# SUMMARIES

## Opportunities and pitfalls of litigating cartel damages claims in different fora in the UK: the cases of *Emerson IV*, *Toshiba Carrier* and *Bord Na Mona*

*Jon Turner QC, Derek Spitz, Rob Murray*

The authors consider the principles, policy underpinnings and practical implications that emerge from three recent judgments, two from the Court of Appeal, in *Emerson Electric v Mersen UK Portslade Ltd* and *Toshiba Carrier UK Ltd v KME Yorkshire Ltd*, and a third from the Commercial Court in *Bord Na Mona Horticulture Ltd and Bord No Mona plc v British Polythene Industries plc, Combipac BV, Bischof, Klein GmbH & Co KG and FLS Plast A/S (Industrial Bags)*.

## The effects of disclosure rules on leniency incentives: *Pfleiderer* balancing versus the BIS 'but for' test

*Michelle Chowdhury*

This article considers the effect on leniency incentives and deterrence of allowing disclosure of leniency documents to claimants in private damages actions. A review of some of the recent cases concerning disclosure at the EU and Member State level suggests that the BIS proposal to bar disclosure of documents that would not have been created 'but for' the leniency application strikes the right balance between preserving leniency incentives and facilitating private claims.

## An assessment of the OFT's proposed measures to counteract the negative impact of private actions on its leniency programme

*Baskaran Balasingham*

This article attempts to shed light on the interplay between private actions for damages and the OFT's leniency programme. It assesses the proposed measures by the OFT to allay the adverse effect of private actions on its leniency programme. The article compares the proposed OFT measures with the measure adopted under US antitrust law.

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## Patent settlements in the pharmaceutical sector: EU and USA

*Alexandra Sansen*

In the current economic climate and the need for innovation every day, patent settlements have become an increasingly controversial issue. Patent settlements in the pharmaceutical sector provide originator companies the possibility to conclude settlements with generic companies, thereby delaying the entry of generic products to the market. Consumers can be deprived access to lower-cost substitutes of the original product that would otherwise have entered the market. In the EU, the European Commission has been monitoring the pharmaceutical sector since 2008 and has issued statements of objections in relation to such practices in 2012. In the USA, patent settlements have been a topic of discussion for many years, and the US Supreme Court may have an opportunity to resolve the debate in the near future. This article considers the law and policy towards patent settlements and how they should be dealt with.

## The enforcement of competition law in the UK healthcare sector

*Stuart Pibworth*

Competition oversight of the UK healthcare sector is increasing, and seems unlikely to cease as a result of the Health and Social Care Act 2012. The key question at this uncertain juncture for the UK healthcare sector is how robustly UK competition law should be enforced, if at all? This is a question that will be answered over time once the regulatory bodies, the courts and the UK Government consider the policy arguments that may be raised in favour, and against, both the public and private enforcement of UK competition law in the sector. However, at this point, although there is much that may be said in favour of the public enforcement of competition law in the UK healthcare sector by the UK competition authorities, it is questionable whether increased private enforcement is desirable on both a policy and purely practical level.

## The reform of the UK's markets regime

*Martin McElwee*

The UK's 'markets regime' is undergoing its most significant revision since its introduction in its present form in the Enterprise Act 2002. Market participants will welcome the fact that the government and the Competition Commission (CC) have taken the opportunity to review the effectiveness of the regime after this length of time. However, they may also be surprised by some of the conclusions that have been drawn in the context of these reviews and how these are

reflected in the Enterprise and Regulatory Reform Bill and the CC's new (draft) guidance on market investigations. The revisions contain significant changes to the market study and market investigation processes, and also shed light on the CC's views on some important substantive elements of the markets regime.

## Everything you always wanted to know about SfOs … … But were afraid to ask

*Louise Bailey*

This article is designed to examine some commonly raised queries regarding certain forms of horizontal co-operation. It considers the purpose of the Office of Fair Trading's (OFT) short-form opinion (SfO) trial and examines how the OFT has used the tool in the two SfOs issued to date. By providing an insight into the process followed by the OFT, it aims to encourage legal advisers to recommend SfOs to their clients with confidence.

## Quantifying lost profits in the *2 Travel v Cardiff Bus* damages action before the Competition Appeal Tribunal

*Michele Granatstein, Lola Makhkamova, Gunnar Niels*

In July 2012, the Competition Appeal Tribunal issued a judgment in a follow-on competition law damages action between 2 Travel and Cardiff Bus. The latter company had previously been found to have abused its dominant position, leading 2 Travel to claim £50 million in damages. The judgment, which awarded £33,818.79 in lost profits and £60,000 in exemplary damages, provides important precedent on how courts use facts and economic evidence in determining the amount of lost profits.