



This update provides an overview of the key legal and policy developments in UK & EU Competition law in August 2011. For further information, please contact a member of the Burges Salmon competition team.

## OFT fines supermarkets and dairy processors almost £50 million

On 10 August 2011, the Office of Fair Trading (OFT) issued a decision following its long running investigation into the retail pricing of dairy products, imposing fines totalling £49.51 million on four supermarkets and five dairy processors.

### Key points

- The decision constitutes another example of the OFT intervening in relationships between suppliers and their retailer customers.
- It also serves to emphasise that even arrangements which have apparently well-meaning intentions can still fall foul of competition law.

### Background

The OFT's investigation arose from an application for leniency by Arla in July 2003. Over four years later, in September 2007, the OFT sent a statement of objections to five large supermarkets and five dairy producers, alleging that they had breached the Chapter I prohibition of the Competition Act 1998 by colluding, through exchange of confidential information, to fix the prices of dairy products in 2002 and 2003.

In December 2007, the OFT announced that it had reached early resolution agreements with certain of the supermarkets and dairy producers. Under these agreements, the companies admitted involvement in certain of the anti-competitive practices identified by the OFT in the statement of objections, undertook to co-operate fully with the OFT in its investigation going forward and

accepted a liability in principle. In return, each party received a significant reduction in the financial penalty that would otherwise have been imposed on it.

In April 2010, the OFT announced that the evidence on its file was insufficient to support an infringement finding with regard to liquid milk in 2002 and value butter in 2003. In addition, the OFT stated that the evidence on its file was insufficient to support an infringement decision against Tesco with regard to liquid milk in 2003. Accordingly, these allegations were dropped. As a result, the individual penalties that a number of early resolution parties had agreed to pay were reduced substantially.

### The Decision

The OFT found that four supermarkets (Asda, Safeway, Sainsbury and Tesco) and five dairy processors (Arla, Dairy Crest, McLelland, The Cheese Company and Wiseman) infringed the Competition Act 1998 by co-ordinating price increases for certain dairy products in 2002 and/or 2003.

#### *Indirect information exchange between suppliers and retailers*

The OFT concluded that this co-ordination was achieved by supermarkets indirectly exchanging retail pricing intentions with each other via the dairy processors – so-called A-B-C or “hub and spoke” information exchanges. This is, therefore, the latest in a series of infringement decisions by the OFT in relation to indirect information exchanges between retailers via their suppliers, following previous decisions in respect of replica football kits<sup>1</sup> and toys.<sup>2</sup>

Unusually in this case, the exchange of confidential information was pursued quite openly, with a view to ensuring that UK dairy farmers were able to remain as commercially viable operations. It therefore serves to emphasise that even arrangements which have apparently well-meaning intentions can still fall foul of competition law.

There have also been reports that other potentially beneficial collaborations between competitors (including those with environmental or public health objectives, such as reductions in plastic bag use or concerns over minimum pricing for alcohol), have been deterred over concerns that such collaborations might infringe competition law.

Accordingly, the EU's High Level Group on Milk and other bodies currently seeking to secure a better deal for farmers will need to operate within the confines of what is acceptable from the perspective of UK and EU competition law, or else seek an express carve out.

<sup>1</sup> OFT Decision of 1 August 2003 - Price-fixing of Replica Football Kits.

<sup>2</sup> OFT Decision of 21 November 2003 - Agreements between Hasbro UK Ltd, Argos Ltd and Littlewoods Ltd fixing the price of Hasbro toys and games.

Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX  
Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400

Chancery Exchange, 10 Furnival Street, London EC4A 1AB  
Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7685 1266

www.burges-salmon.com

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### *Reductions on penalties*

The largest individual fine of over £10 million was imposed on Tesco, which did not benefit from any early resolution or leniency discount. The smallest individual fine was £1.26 million for The Cheese Company, benefitting from a 35% reduction as a result of its early resolution agreement. Arla benefitted from complete immunity from fines as it applied for and was granted immunity under the OFT's leniency programme.

In calculating the fines, the OFT will have taken into account the Competition Appeal Tribunal's (CAT) recent judgments in the Construction appeals, in particular the CAT's clarification that the OFT should calculate fines according to the relevant turnover in the last financial year *preceding the infringement* rather than the year prior to the OFT's final decision.<sup>3</sup>

### **Our role**

Burges Salmon advised The Cheese Company throughout this investigation by the OFT. In particular, we worked closely with The Cheese Company in reaching an early resolution agreement with the OFT.

### **Competition Commission's provisional findings on tacit co-ordination in local bus services market**

On 4 August, the Competition Commission published for consultation its provisional findings on tacit co-ordination as part of its market investigation into the supply of local bus services. It has not found evidence that would clearly establish the existence of tacit co-ordination in the provision of local bus services, nor any clear examples of tacit co-ordination being established or maintained successfully by the large bus operators (i.e. Go-Ahead, Stagecoach, Arriva, FirstGroup and National Express) in local markets.

However, the Competition Commission has found that the conditions of co-ordination are met and it has observed that some operators have occasionally tried to co-ordinate. It has not been able to dismiss the possibility that operators in some local areas may have achieved, or may in the future achieve, a tacit understanding to refrain from head-to-head competition. Accordingly, the Competition Commission considers that there seems every reason to be concerned about the *potential* for tacit co-ordination.

The Competition Commission invited comments on these provisional findings by 25 August, with a view to publishing its final report on the market for the supply of bus services in Great Britain (excluding London) on or before 6 January 2012.

### **European Commission opens in-depth investigation into proposed merger between leading stock exchange groups**

On 4 August, the European Commission announced that it has decided to open an in-depth Phase II investigation into the proposed merger between Deutsche Börse AG and NYSE Euronext Inc.

The parties are the two leading stock exchange groups active

worldwide. Deutsche Börse operates a number of stock exchanges including the Frankfurt Stock Exchange and the Eurex derivatives exchange. NYSE Euronext operates stock exchanges in New York, Amsterdam, Brussels, Lisbon and Paris as well as the Liffe derivatives exchange based in London.

As the transaction would bring together the two largest derivatives exchanges in Europe, the European Commission will focus its investigation on the effect on competition in derivatives trading. The Commission is concerned that due to the removal of an important competitor, the merger would have a negative impact on innovation in derivatives products and technology solutions. Coupled with this, the merger may make it more difficult for a competitor to enter the market, a particular problem given that it is already characterised by high barriers to entry.

This is the sixth Phase II investigation initiated by the European Commission so far in 2011. By comparison, in 2010 only four investigations were initiated in the whole year.

### **Parties challenge European Commission's information gathering decisions**

On 13 August, the Official Journal of the European Union published appeals against the European Commission's exercising of its information gathering powers in relation to Deutsche Bahn (DB) and, in a separate investigation, several cement companies implicated in alleged cartel activity.

DB is arguing that the Commission's decision to raid the premises of a number of its subsidiaries on 30 and 31 March 2011 was unlawful as amongst other grounds, there was no opportunity to judicially review the decision prior to the inspections and the rebate schemes under investigation have previously been found compatible with competition law.

The cement companies claim, in particular, that the information request decision exceeded the Commission's powers as it requested information which the Commission knew the companies did not hold and the search and submission requirements had the effect of delegating the Commission's investigative role to the companies being investigated.

These appeals raise interesting legal questions regarding a competition authority's ability to acquire information in investigations and so the judgments of the EU General Court will be eagerly awaited.

### **OFT publishes market study into aggregates**

On 16 August, the OFT published the conclusions of its market study into the aggregates, cement and ready-mix concrete markets.<sup>4</sup> The OFT conducted the study following concerns regarding the effect of significant consolidation on competition within the markets.

The report identifies a number of features within the selected markets, which may adversely affect competition in the short, medium and long term. These include: high barriers to entry due to physical capital requirements and the difficulties of obtaining planning permission for

<sup>3</sup> [2011] CAT 3. On 27 May, the OFT confirmed that it will not be appealing the CAT's judgments in the Construction appeals. For more information on the implications of the Construction appeals, see our March 2011 briefing (issue 8).

<sup>4</sup> For further information on the background to this market study, please see our briefing from September 2010: [http://www.burges-salmon.com/Practices/real\\_estate/minerals/Publications/OFT\\_Aggregates\\_Study.pdf](http://www.burges-salmon.com/Practices/real_estate/minerals/Publications/OFT_Aggregates_Study.pdf)

extraction and processing; concentration of the markets within five major players with significant vertical integration; the homogenous nature of the products reducing the ability of customers to differentiate between products or providers; and a high degree of transparency reducing unpredictability.

The OFT is now consulting on the exercise of its discretion to make a market investigation reference to the Competition Commission. The Competition Commission would carry out its own assessment of the effectiveness of competition in the markets and if appropriate, implement structural or behavioural remedies. The consultation closes on 30 September 2011.

### **Competition Commission formally approves travel agency joint venture between Thomas Cook and the Co-operative Group**

On 16 August, the Competition Commission published its final report on the anticipated travel agency joint venture between Thomas Cook, the Co-operative Group and the Midlands Co-operative Society.

The Competition Commission has confirmed its provisional findings (which we reported on in last month's briefing - issue 12) that the joint venture will not result in a substantial lessening of competition and nor would the joint venture have the ability and/or incentive to engage in input or customer foreclosure.

### **OFT closes criminal investigation into agricultural bale wraps**

On 17 August, the OFT announced the end of its investigation into the potential criminal liability under the cartel offence for certain individuals involved in the supply of bale wrap for use in the agricultural sector. British Polythene Industries confirmed in May 2010 that they were the subject of an investigation.

The Enterprise Act 2002 created a criminal offence for directors and employees of a company who dishonestly participate in the most serious types of anti-competitive behaviour. In this instance, the Enterprise Act investigation was conducted in parallel to a European Commission investigation into the bale wrap sector, which remains ongoing.

The closure of this investigation may be said to represent a further failure by the OFT to enforce the criminal powers it has under the Enterprise Act. Indeed, the perceived failure of the cartel offence was noted by the government and finding a remedy to this forms a significant part of its ongoing consultation for reform to the UK competition regime.<sup>5</sup>

### **Competition Commission publishes provisional findings in pay TV market investigation**

On 19 August, the Competition Commission published its provisional findings in the Movies on Pay-TV Market Investigation and an

accompanying consultation on proposed remedies.<sup>6</sup>

The Competition Commission has found that BSkyB has significant market power in the pay TV market enabling it to acquire the exclusive rights to show films in the "first pay TV subscription windows" (FSPTW), i.e. premieres, for six major Hollywood Studios including Walt Disney, NBC Universal and Time Warner. This power created barriers to other pay TV providers creating their own competing product based on either, acquiring Sky's movie channels on a wholesale basis, or by acquiring the FSPTW rights themselves. The Competition Commission continued that due to the importance of movie channels to subscribers in the pay TV market as a whole (a customer survey indicated that 22% of Sky Movies subscribers would cancel their current pay TV service if their provider stopped offering Sky Movies), the barriers to entry in the FSPTW market have an adverse effect on competition in the wider pay TV market.

The Competition Commission is consulting on three possible remedies: (i) restricting the number of major studios Sky can license exclusive FSPTW rights from; (ii) restricting the range of exclusive FSPTW right Sky may license; and/or (iii) imposing measures requiring Sky to market to its customers products incorporating FSPTW content created by other parties. The consultation closes on 9 September 2011.

**For further information please contact:**



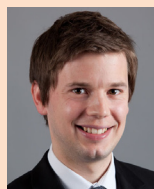
**Laura Claydon**  
Partner

+44(0)117 939 2273  
laura.claydon@burges-salmon.com



**Marc Shrimpling**  
Solicitor

+44(0)117 939 2221  
marc.shrimpling@burges-salmon.com



**Tim Riisager**  
Solicitor

+44(0)117 307 6877  
tim.riisager@burges-salmon.com

<sup>5</sup> For more information on this ongoing consultation, see our June 2011 briefing (issue 11).

<sup>6</sup> We reported on the original reference of this matter to the Competition Commission by Ofcom in our August 2010 briefing (issue 2).