

# OFT fines supermarkets and dairy processors almost £50 million

August 2011

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. The decision constitutes another example of the OFT intervening in relationships between suppliers and their retailer customers.

## 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<sup>1</sup> and five dairy producers<sup>2</sup>, 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, Sainsbury, 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>3</sup> and toys<sup>4</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 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.

## 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, benefiting from a 35% reduction as a result of its early resolution agreement. Arla benefited from complete immunity from fines as it applied for and was granted immunity under the OFT's leniency programme.

<sup>1</sup> Asda, Morrisons, Sainsbury, Sainsbury and Tesco.

<sup>2</sup> Arla, Dairy Crest, Lactalis McLelland, Glanbia (The Cheese Company) and Wiseman.

<sup>3</sup> OFT Decision of 1 August 2003 - Price-fixing of Replica Football Kits.

<sup>4</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.

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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>5</sup>

### Our role

Burges Salmon advised The Cheese Company throughout this investigation by the OFT, using our considerable experience of OFT investigations and of the dairy industry. In particular, we worked closely with The Cheese Company in reaching an early resolution agreement with the OFT.

For more information about our expertise in advising on all aspects of competition law, including OFT investigations, please refer to the following webpage: <http://www.burges-salmon.com/Practices/commercial/competition/default.aspx>

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<sup>5</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, please see the March 2011 issue of our UK & EU Competition Update -

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