

The UK OFT drops allegations in dairy cartel investigation (Tesco, Morrisons)

United Kingdom, Anticompetitive practices, Fine mitigating, Investigations/Inquiries, Cartel, Sanctions/Fines/Penalties, Exchange of information, Food products, Distribution/Retail

UK Office of Fair Trading, 30 April 2010, Tesco

[http://oft.gov.uk/news-and-updates/...](http://oft.gov.uk/news-and-updates/)

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On 30 April 2010, the Office of Fair Trading (« OFT ») announced it was dropping a number of allegations in its dairy cartel investigation. The OFT conceded there was insufficient evidence of antitrust infringement in the information exchanges it had been investigating since 2003. The OFT announcement vindicates the decision by Morrisons to defend against the OFT's investigation rather than enter into an early settlement. This was despite the fact that seven other companies being investigated had entered into early settlement agreements with the OFT between 2007 and 2008. Tesco is the only party still under investigation by the OFT.

In conjunction with dropping certain aspects of its case, the OFT also agreed to (1) discount by 10% any fine imposed on Tesco, in recognition of Tesco notifying that it does not intend to contest the remaining aspects of the investigation, and (2) reduce the individual penalties agreed with parties that already settled, to the extent that the allegations the OFT has dropped applied to them.

This development highlights the OFT's flexibility in settling antitrust cases, but may also lead some companies to think twice before agreeing to settle cases with the OFT.

I. Background

In September 2007, the OFT issued a Statement of Objections (« SO ») to several supermarkets in the UK (Asda, Morrisons, Sainsbury, Safeway, and Tesco) and dairy processors (Arla, Dairy Crest, Lactalis McLelland, The Cheese Company, and Wiseman), alleging that: the retailers had indirectly disclosed or exchanged with other retailers commercially sensitive retail price information for fresh liquid milk and liquid milk products, UK produced cheese, and value butter in 2002 and 2003; and the dairy processors had facilitated exchanges of retail price information among retailers.

Each retailer and dairy processor was accused of varying degrees of involvement in « hub and spoke » information exchanges, with some operators accused of exchanging price information in all the markets under investigation, and

others of doing so in just one, such as cheese or liquid milk. The OFT estimated that the information exchanges artificially increased the price of dairy products by £270 million.

Shortly after the SO was issued, the OFT reached early resolution agreements with several parties: Asda, Safeway, Sainsburys, Dairy Crest, The Cheese Company, and Wiseman all admitted involvement in anticompetitive practices and agreed to pay individual penalties exceeding £116 million in total [1]. Early in 2008, Lactalis McLelland also settled [2]. The remaining two parties, Tesco and Morrisons, continued to defend themselves.

During this process, Morrisons sued the OFT for defamation, after an OFT press release incorrectly suggested that Morrisons was subject to a provisional finding of infringement and that it previously had been warned for anticompetitive behaviour by the OFT. The OFT apologised for its comments and settled out of court for £100,000.

II. Early settlement agreements

From the enforcer's perspective, a settlement process allows for swift resolution of a case, reducing costs and time spent on investigations and removing the legal uncertainty of an appeal. From the perspective of the subject of an investigation, settlement can enable swift resolution and mitigate the level of fines. A settlement also may make it more difficult for third parties to bring follow on actions for damages, as there is no detailed infringement decision to form the liability basis for a private action.

At the EU level, the European Commission adopted a formal Settlement Notice in 2008 (Notice 2008/C 167/01) [3], outlining its principles and procedure for the early settlement of antitrust investigations. To date this EU settlement process has not been used successfully. This may in part be due to the fact that the Commission requires all parties to an investigation to admit liability and to agree to settlement and because the potential reduction in fines as a reward for settlement is capped at 10% (on top of any leniency).

There is no such formal settlement system in the UK. The OFT adopts a flexible, case-by-case approach. A significant difference between the UK and EU settlement procedures is that the OFT may settle a case with some but not all of the companies under investigation. The OFT's more flexible approach has led to « early resolution » agreements in several cases, in addition to this most recent case: the school fees cartel (2006) [4]; the BA/Virgin long-haul fuel-surcharges cartel (2007) [5]; and the tobacco retail cartel (2008).

III. Practical implications

The OFT's decision in the dairy investigation is significant for all parties to OFT investigations.

Resisting the pressure to settle, as the majority of the other companies under investigation had settled, and vigorously defending its interests, Morrisons persuaded the OFT to drop elements of its investigation for which there was insufficient evidence. As a result, Morrisons has avoided liability that other parties had conceded at an early stage. And thanks to Morrisons' persistence, some of the parties that entered into early settlement agreements will have the fines they agreed with the OFT reduced.

This development highlights the importance for companies subject to an OFT investigation to (a) properly assess the strength of the OFT's case against them, before submitting to an early settlement agreement, and (b) resist the temptation to be settle only because others have settled. These decisions are complicated by the fact that, where some party to an investigation fights on, despite others having settled, those other companies ultimately may enjoy a reduction in their fines thanks to the efforts of the non-settling defendant.

[1] Regarding this case, see also David Shahrudin, The UK OFT having issued a statement of objections alleging that supermarkets and dairy processors colluded to fix the prices of milk, cheese and butter, some of the concerned undertakings agree to pay individual penalties collectively reaching nearly € 150 M (« Supermarkets and dairies price fixing »), 7 December 2007, e-Competitions, n° 16063 and Andreas Stephan, The UK OFT employs a form of direct settlement and agrees over € 155 M penalties in dairies cartel case (Asda, Dairy Crest, Safeway, Sainsbury's etc.), 7 December 2007, e-Competitions, n° 15533.

[2] See Marie-Charlotte Rouzier, A UK Court grants a plaintiff judicial review against the NCA's "sensational publicity" and "public relations" policy regarding the disclosure of investigations' results (Lactalis Mclelland - « Dairy price fixers' case »), 15 February 2008, e-Competitions, n° 16069.

[3] See Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases ; (OJ C 167, 2.7.2008, p. 1-6).

[4] See Matthew Goss, The OFT finds that an exchange of information on independent school fees violates national competition provisions but accepts a € structured settlement » (Independent Schools), 20 November 2006, e-Competitions, n° 17743.

[5] See Suzanne Innes-Stuart, Ian Reynolds, The UK Office of Fair Trading imposes its highest ever fine and a 6 month penalty in the course of civil and criminal law proceedings (British Airways), 1 August 2007, e-Competitions, n° 14181 and Marie-Charlotte Rouzier, The UK Office of Fair Trading inflicts a record penalty of € 1,75 M - highest penalty ever imposed - for price fixing over long-haul surcharges following criminal and civil investigations (British Airways), 1 August 2007, e-Competitions, n° 14161.

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