

CLIENT ALERT

UK Competition Authority in Retreat on Dairy Products "Hub and Spoke" Information Exchange Case -- Partially abandons case and hands back GB£ 50 million in agreed penalties

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Today, 30 April, the UK antitrust regulator, the Office of Fair Trading ('OFT'), announced that it was partially abandoning its case against various supermarkets and dairy firms in relation to the exchange of pricing information. As a result, the OFT will return GB£ 50 million in agreed penalties paid by parties that had reached "early resolution" settlements. The OFT has altogether abandoned its case against Morrisons, one of two supermarkets that did not settle.

The OFT will retain approximately GB£ 70 million in agreed penalties in relation to the remaining aspects of the case, and is likely to impose significant further penalties on Tesco, the other supermarket that contested the OFT's case.

In September 2007, the OFT issued a statement of objections alleging that in 2002 and 2003, 5 supermarkets and 5 dairy processors had colluded in relation to the retail prices of milk, cheese and butter by exchanging commercially sensitive information. Between December 2007 and February 2008, the OFT announced that it had entered into settlements with 7 of the 10 parties under which they had collectively agreed to pay GB£ 120 million in return for a reported 35% reduction in penalties. An eighth party was granted immunity as a leniency applicant.

Two supermarkets, Morrisons and Tesco, contested the case. As a result of their efforts, the OFT has abandoned its allegations of collusion in relation to milk in 2002 and butter in 2003. The OFT said its decision was "in light of detailed representations and new evidence received".

The OFT has been a pioneer in bringing cases such as this one based on indirect 'hub and spoke' information exchanges. These latest developments illustrate the difficulties posed by these cases, and in particular the evidential difficulties in distinguishing between information that supermarkets (and other buyers) can and cannot lawfully exchange with their suppliers. It will be interesting to see what impact this will have on the OFT's ongoing investigation into supermarkets and branded goods suppliers, which also involves allegations of information exchange.

The announcement also represents a potential blow to the OFT's settlement program. Parties are likely to question whether there may be more to gain from contesting OFT allegations than from early resolution.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.