Competition Act 1998

Decision of the Office of Fair Trading

CA98/03/2011

Dairy retail price initiatives

26 July 2011

(Case CE/3094-03)

Confidential information in the original version of this Decision has been redacted from the published version on the public register. Redacted confidential information in the text of the published version of the Decision is denoted by '[C]'.
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1. **INTRODUCTION**

A. **EXECUTIVE SUMMARY**

1.1. By this decision, of which Annexes A to C form an integral part (this 'Decision'), the Office of Fair Trading (the 'OFT') has concluded that the parties listed at paragraph 1.2 below (each referred to as a 'Party', together referred to as the 'Parties') have infringed the Chapter I Prohibition imposed by section 2(1) of the Competition Act 1998 (the 'Chapter I prohibition') (the 'Act') by participating in one or more single overall concerted practices which had as their object the prevention, restriction or distortion of competition in the supply of cheddar and British territorial cheeses in the UK in 2002 and 2003 and fresh liquid milk ('FLM') in the UK in 2003 (each referred to as an 'Infringement', together referred to as the 'Infringements'). Not all Parties participated in all of the Infringements. A summary of each Infringement and the Parties that the OFT has found to have participated in that Infringement is set out at paragraphs 1.2 to 1.6 below.

I. **The Parties**

1.2. This Decision is hereby addressed to each party to which the OFT has attributed liability in respect of the concerted practices which the OFT has concluded constitute an infringement of the Chapter I prohibition and for the resulting penalty in each case:

- Arla Foods Limited and Arla Foods UK Holding Limited (together referred to as 'Arla');
- Asda Stores Limited, Asda Group Limited, Wal-Mart Stores (UK) Limited and Broadstreet Great Wilson Europe Limited (together referred to as 'Asda');
- Dairy Crest Limited and Dairy Crest Group plc (together referred to as 'Dairy Crest');
- The Cheese Company Limited, Waterford Foods International Limited, Glanbia Investments (UK) Limited and Glanbia (UK) Limited (together referred to as 'Glanbia');
- Lactalis McLelland Limited ('McLelland');
- Safeway Stores Limited, Stores Group Limited and Safeway Limited (together referred to as 'Safeway');
- Sainsbury's Supermarkets Limited and J Sainsbury plc (together referred to as 'Sainsbury’s');
- Tesco Stores Limited, Tesco Holdings Limited and Tesco plc (together referred to as 'Tesco'); and
- Robert Wiseman & Sons Limited and Robert Wiseman Dairies plc (together referred to as 'Wiseman').
1.3. A description of each of the Parties and the legal entities to which liability is attributed for the Infringements and the resulting penalty in each case is set out at section 2.A of this Decision.

II. Summary of the Infringements

1.4. Each of the Infringements comprise a number of concerted practices whereby retail price increases for cheddar and British territorial cheeses or FLM were co-ordinated through the indirect exchange of retail pricing intentions between retailers via one or more suppliers.

1.5. The Infringements that are the subject of this Decision are:

i. The 2002 Cheese Initiative: A single overall concerted practice in which Asda, Safeway, Sainsbury’s and Tesco indirectly exchanged cheese retail pricing intentions via Dairy Crest, Glanbia and McLelland acting as intermediaries.

ii. The 2003 Cheese Initiative: A single overall concerted practice in which Asda, Sainsbury’s and Tesco indirectly exchanged cheese retail pricing intentions via McLelland acting as an intermediary.

iii. The 2003 Fresh Liquid Milk Initiative: A single overall concerted practice in which Asda, Safeway and Sainsbury’s disclosed FLM retail pricing intentions via Arla, Dairy Crest and Wiseman acting as intermediaries.

1.6. Each of these concerted practices had as its object the prevention, restriction or distortion of competition in the supply by national multiple retailers of cheddar and British territorial cheeses or FLM in the UK in breach of the Chapter I prohibition.

B. THE OFT’S ACTION

1.7. The OFT considers that it is not necessary to give directions under section 32 of the Act to any of the Parties to bring the Infringements to an end given that the OFT has no evidence on its file to suggest that any of the Infringements are continuing and that the OFT considers that the Infringements have already come to an end.

1.8. Section 36(1) of the Act provides that the OFT may impose a financial penalty on an undertaking which has intentionally or negligently committed an infringement of the Chapter I prohibition. The OFT considers that agreements or concerted practices between undertakings that directly or indirectly fix prices are among the most serious infringements of the Act. In this case, the Infringements co-ordinated retail price increases for cheddar and British territorial cheeses or FLM and, therefore, indirectly fixed prices. Accordingly, with the exception of Arla, the OFT is imposing a financial penalty on each of the Parties under section 36 of the Act in relation to the Infringements to which it was party. The penalties will become owed to the OFT in their entirety on 11

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1 OFT423 OFT's guidance as to the appropriate amount of a penalty (Edition12/04), at paragraph 2.4.
October 2011 and must be paid to the OFT by the close of banking business on that date.²

1.9. Pursuant to the OFT’s leniency programme, Arla has been granted total immunity from financial penalty.

1.10. Asda has been granted a partial reduction in financial penalty on the basis that it obtained total immunity from financial penalties in respect of a completely separate suspected infringement of the Chapter I prohibition in relation to its activities in other, separate markets.

1.11. In addition, each of Asda, Dairy Crest, Glanbia, McLelland, Safeway, Sainsbury’s and Wiseman has been granted a reduction in financial penalty by virtue of an early resolution agreement it concluded with the OFT in December 2007 (and in February 2008 in respect of McLelland), pursuant to which, among other matters, each admitted its involvement in the Infringement(s) to which it was a party in breach of the Chapter I prohibition and agreed to pay a financial penalty.

² Details of how to pay are notified in the letter accompanying the Decision.
2. FACTUAL BACKGROUND

A. THE PARTIES

2.1. The Parties to whom this Decision is addressed are as set out at paragraph 1.2 above and at paragraphs 2.11 to 2.68 below. They are the legal entities that the OFT finds to have been directly involved in the Infringements, as well as, where applicable, the legal entities that had decisive influence on the policy of the entities that were directly involved. Where more than one legal entity is named in respect of a particular Party, the OFT considers that all named entities are jointly responsible for the conduct of the legal entity that was directly involved, and should all be held jointly and severally liable for any financial penalty in respect of that conduct. This is consistent with the legal framework set out at paragraphs 2.2 to 2.9 below.

I. Attribution of liability – legal background

2.2. Where a legal entity was directly involved in the conduct that is the subject of this Decision, liability for the resulting relevant Infringement(s) and any consequential financial penalty imposed by the OFT has been attributed to it.3

2.3. Where a parent company exerts decisive influence on the policy of a subsidiary such that the latter does not enjoy real autonomy in determining its own course of action on the market, liability may be attributed to the parent company for the actions of the subsidiary.4 As confirmed by the Court of Justice of the European Union (the ‘ECJ’) in Akzo Nobel, the exercise of decisive influence can be presumed where a subsidiary is wholly-owned by its parent, either directly or indirectly.5 A 100 per cent shareholding in a subsidiary therefore gives rise to a rebuttable presumption that a parent company exercises decisive influence over the conduct of its subsidiary. Where the presumption of decisive influence arises, the OFT is entitled to attribute liability for an infringement by the subsidiary to the parent company, unless the parent company has proved that the subsidiary acted autonomously on the relevant market.

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2.4. Additional indicia of decisive influence, other than the parent’s shareholding in the subsidiary, may also be relied on. Such indicia have been found to include a parent being active on the same or adjacent markets to its subsidiary, direct instructions being given by a parent to a subsidiary or the two entities having shared directors.

2.5. A change in the legal form or name of an undertaking does not create a new undertaking free of liability for the anti-competitive behaviour of its predecessor when, from an economic point of view, the two are identical. The determining factor is whether there is functional and economic continuity despite the change in legal form or name.

2.6. Where the original legal entity responsible for an infringement still exists, liability remains with it and a new parent company will usually not be liable for infringements which pre-date its acquisition.

2.7. Financial penalties that are imposed both on a parent and a subsidiary may be imposed jointly and severally.

II. Attribution of liability – general approach

2.8. When attributing liability for an infringement of the Chapter I prohibition by an undertaking, including the imposition of a financial penalty, it is necessary to identify the legal or natural person or persons who may be held responsible for the infringement by the undertaking.

2.9. As set out below, for each Party, the OFT has first identified the legal entity that was directly involved in the relevant Infringement(s). This is the legal entity to which the OFT has decided to attribute liability for these Infringement(s). Where a liable legal entity was controlled by a parent entity in the UK, in the sense that the parent entity may be said to

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11 In certain circumstances, a parent company may be held responsible for the unlawful conduct of an undertaking which it has acquired, even where the legal person responsible for the operation of that undertaking at the time of the infringement continues to exist. See, for example, Case T-354/94 Stora Kopparbergs Bergslags v Commission [1998] ECR II-2111, at paragraph 82.

exert a decisive influence on the commercial policy of the liable legal entity, the OFT has found this parent entity jointly and severally liable.\textsuperscript{13}

2.10. For some Parties, the legal entity that exercised control over the legal entity that was directly involved in the relevant Infringement(s) changed during the period of the relevant Infringement(s). In that case, the OFT has found both the old and the new parent entities liable for these Infringement(s). Further, for some Parties, the legal entity that exercised control over the legal entity that was directly involved changed after the end of the period of the relevant Infringement(s). In that case, the OFT has found only the entity that was the parent entity at the time of the relevant Infringement(s) liable for these Infringement(s).\textsuperscript{14}

III. Attribution of liability – the retailers

Asda

Summary

2.11. The OFT is addressing this Decision to the following entities:

i. Asda Stores Limited;

ii. Asda Group Limited;

iii. Wal-Mart Stores (UK) Limited; and


These entities are collectively referred to in this Decision as 'Asda'. The OFT finds these entities jointly and severally liable for the Infringements that it has attributed to them in this Decision (that is, the 2002 Cheese Initiative, the 2003 FLM Initiative and the 2003 Cheese Initiative) and for the resulting penalty that the OFT is imposing.

Reasoning

2.12. Asda Stores Limited is active in the retail of food, clothing, home and leisure products.

2.13. In responses to section 26 Notices from the OFT, Asda Group Limited identified Asda Stores Limited as the entity with sole responsibility for the retail sale of cheese and FLM in the period 2000 to 2003, including setting policy leading to the negotiation, setting and implementation of increases in the wholesale and retail prices of these products. Asda Group Limited also confirmed that the personnel involved in this activity were employed by Asda Stores Limited.\textsuperscript{15} The legal entity directly engaged in the relevant Infringements (that is, the 2002 Cheese Initiative, the 2003 FLM Initiative and the 2003 Cheese Initiative) was, therefore, Asda

\textsuperscript{13} See paragraphs 2.3, 2.4 and 2.7 above.

\textsuperscript{14} See paragraph 2.6 above.

\textsuperscript{15} See documents 4 and 5 to the SO.
Stores Limited. Accordingly, the OFT has attributed liability to Asda Stores Limited for these Infringements and for the resulting penalty that the OFT is imposing.

2.14. When the relevant Infringements took place, Asda Stores Limited was a wholly-owned subsidiary of Asda Group Limited, which was in turn a wholly-owned subsidiary of Wal-Mart Stores (UK) Limited. Wal-Mart Stores (UK) Limited was the ultimate UK parent of Asda Group Limited during 2002 and until 24 January 2003. On this date, Broadstreet Great Wilson Europe Limited acquired by way of a share exchange, as part of a group restructure, the whole of the issued share capital of Wal-Mart Stores (UK) Limited and became its immediate UK parent.

2.15. The registered address of Asda Stores Limited, Asda Group Limited, Wal-Mart Stores (UK) Limited and Broadstreet Great Wilson Europe Limited is Asda House, Great Wilson Street, Leeds, West Yorkshire, LS11 5AD.

2.16. Where a parent company exerts decisive influence over a subsidiary, liability for an infringement by the subsidiary may be attributed to the parent company.\(^{16}\) Decisive influence may be presumed where a subsidiary is wholly-owned by its parent. Accordingly, the OFT has attributed liability to Asda Group Limited and in turn Wal-Mart Stores (UK) Limited and Broadstreet Great Wilson Europe Limited (for the period from 24 January 2003), on a joint and several basis, for the Infringements that the OFT has attributed to Asda Stores Limited and for the resulting penalty that the OFT is imposing, given the 100 per cent ownership chain through these companies of Asda Stores Limited.

Safeway

Summary

2.17. The OFT is addressing this Decision to the following entities:

i. Safeway Stores Limited;

ii. Stores Group Limited; and

iii. Safeway Limited.

These entities are collectively referred to in this Decision as 'Safeway'. The OFT finds these entities jointly and severally liable for the Infringements that it has attributed to them in this Decision (that is, the 2002 Cheese Initiative and the 2003 FLM Initiative) and for the resulting penalty that the OFT is imposing.

Reasoning

2.18. The principal activity of Safeway Stores Limited is grocery retailing in the UK.

\(^{16}\) See paragraph 2.3 above.
2.19. In responses to section 26 Notices from the OFT, Wm Morrison Supermarkets plc ('Morrisons') (then Safeway’s ultimate parent company) identified Safeway Stores Limited (then Safeway Stores plc) as the entity responsible for the retail sale of cheese and FLM under the name 'Safeway' in the period 2000 to 2003, including setting policy leading to the negotiation, setting and implementation of increases in the wholesale and retail prices of these products. Morrisons also confirmed that the personnel involved in this activity were employed by Safeway Stores Limited (then Safeway Stores plc).\(^{17}\) The legal entity directly engaged in the relevant Infringements (that is, the 2002 Cheese Initiative and the 2003 FLM Initiative) was, therefore, Safeway Stores Limited. Accordingly, the OFT has attributed liability to Safeway Stores Limited for these infringements and for the resulting penalty that the OFT is imposing.

2.20. When the relevant Infringements took place,\(^ {18}\) Safeway Stores Limited (then Safeway Stores plc) was a wholly-owned subsidiary of Stores Group Limited (with the exception of one ordinary share), which was in turn a wholly-owned subsidiary of Safeway Limited (then Safeway plc).

2.21. On 8 March 2004, Safeway Stores Limited (then Safeway Stores plc), Stores Group Limited and Safeway Limited (then Safeway plc) were acquired by Morrisons and became its wholly-owned subsidiaries. Morrisons therefore became the ultimate parent of Safeway Stores Limited, Stores Group Limited and Safeway Limited after the period in which the relevant Infringements took place and accordingly the OFT has not attributed liability to Morrisons.

2.22. Safeway Stores Limited and Safeway Limited were registered as public limited companies when the relevant Infringements took place (as Safeway Stores plc and Safeway plc respectively). On 18 May 2004, they were re-registered as private limited companies. This change in the legal form and name of these entities did not create new undertakings free of liability for the anti-competitive behaviour of their predecessors. As there was functional and legal continuity between Safeway Stores Limited and Safeway Stores plc and between Safeway Limited and Safeway plc, they are identical from an economic point of view.\(^ {19}\) Hence, the liability of Safeway Stores plc is attributed to Safeway Stores Limited and the liability of Safeway plc is attributed to Safeway Limited.

2.23. The registered address of Safeway Stores Limited, Stores Group Limited and Safeway Limited is Hilmore House, Gain Lane, Bradford, West Yorkshire, BD3 7DL.

2.24. Where a parent company exerts decisive influence over a subsidiary, liability for an infringement by the subsidiary may be attributed to the parent company.\(^ {20}\) Decisive influence may be presumed where a subsidiary is wholly-owned by its parent. Accordingly, the OFT has

\(^{17}\) See documents 6 and 12 to the SO.
\(^{18}\) See section 6.6 below.
\(^{19}\) See paragraph 2.5 above.
\(^{20}\) See paragraph 2.3 above.
attributed liability to Stores Group Limited and in turn Safeway Limited, on a joint and several basis, for the Infringements that the OFT has attributed to Safeway Stores Limited and for the resulting penalty that the OFT is imposing, given the 100 per cent ownership chain through these companies of Safeway Stores Limited.

**Sainsbury's**

**Summary**

2.25. The OFT is addressing this Decision to the following entities:

i. Sainsbury's Supermarkets Limited; and


These entities are collectively referred to in this Decision as 'Sainsbury's'. The OFT finds these entities jointly and severally liable for the Infringements that it has attributed to them in this Decision (that is, the 2002 Cheese Initiative, the 2003 FLM Initiative and the 2003 Cheese Initiative) and for the resulting penalty that the OFT is imposing.

**Reasoning**

2.26. Sainsbury's Supermarkets Limited, whose principal activity is the retail distribution of food, is a wholly-owned subsidiary of J Sainsbury plc.

2.27. In responses to section 26 Notices from the OFT, J Sainsbury plc identified Sainsbury's Supermarkets Limited as the entity responsible for the retail sale of cheese and FLM in the period 2000 to 2003, including setting policy leading to the negotiation, setting and implementation of increases in the wholesale and retail prices of these products. J Sainsbury plc also confirmed that the personnel involved in this activity were employed by Sainsbury's Supermarkets Limited.21 The legal entity directly engaged in the relevant Infringements (that is, the 2002 Cheese Initiative, the 2003 FLM Initiative and the 2003 Cheese Initiative) was, therefore, Sainsbury’s Supermarkets Limited. Accordingly, the OFT has attributed liability to Sainsbury's Supermarkets Limited for these Infringements and for the resulting penalty that the OFT is imposing.

2.28. The registered address of Sainsbury’s Supermarkets Limited and J Sainsbury plc is 33 Holborn, London, EC1N 2HT.

2.29. Where a parent company exerts decisive influence over a subsidiary, liability for an infringement by the subsidiary may be attributed to the parent company.22 Decisive influence may be presumed where a subsidiary is wholly-owned by its parent. Accordingly, the OFT has attributed liability to J Sainsbury plc, on a joint and several basis, for the Infringements that the OFT has attributed to Sainsbury’s Supermarkets Limited and for the resulting penalty that the OFT is imposing, given its 100 per cent ownership of Sainsbury’s Supermarkets Limited.

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21 See documents 15 and 16 to the SO.

22 See paragraph 2.3 above.
Tesco

Summary

2.30. The OFT is addressing this Decision to the following entities:
   i. Tesco Stores Limited;
   ii. Tesco Holdings Limited; and
   iii. Tesco plc.

These entities are collectively referred to in this Decision as 'Tesco'. The OFT finds these entities jointly and severally liable for the Infringements that it has attributed to them in this Decision (that is, the 2002 Cheese Initiative and the 2003 Cheese Initiative) and for the resulting penalty that the OFT is imposing.

Reasoning

2.31. The principal activity of Tesco Stores Limited is the operation of food stores and associated activities.

2.32. In responses to section 26 Notices from the OFT, Tesco plc identified Tesco Stores Limited as the entity responsible for the retail sale of cheese in the period 2000 to 2003, including setting policy leading to the negotiation, setting and implementation of increases in the wholesale and retail prices of these products. Tesco plc also confirmed that the personnel involved in this activity were employed by Tesco Stores Limited. The legal entity directly engaged in the relevant Infringements (that is, the 2002 Cheese Initiative and the 2003 Cheese Initiative) was, therefore, Tesco Stores Limited. Accordingly, the OFT has attributed liability to Tesco Stores Limited for these Infringements and for the resulting penalty that the OFT is imposing.

2.33. When the 2002 Cheese Initiative took place, Tesco Stores Limited was a wholly-owned subsidiary of Fieldcastle Investments Limited, which was in turn a wholly-owned subsidiary of Tesco Holdings Limited. On 5 February 2003, Fieldcastle Investments Limited transferred its shareholding in Tesco Stores Limited to Tesco Holdings Limited. As a result, from this date, including in the period that the 2003 Cheese Initiative took place, Tesco Stores Limited was a wholly-owned subsidiary of Tesco Holdings Limited. Fieldcastle Investments Limited was dissolved on 29 November 2004. Throughout the period that the relevant Infringements took place, Tesco plc was the ultimate parent company of Tesco Stores Limited.

2.34. The registered address of Tesco Stores Limited, Tesco Holdings Limited and Tesco plc is Tesco House, Delamare Road, Cheshunt, Hertfordshire, EN8 9SL.

2.35. Where a parent company exerts decisive influence over a subsidiary, liability for an infringement by the subsidiary may be attributed to the

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23 See documents 22 and 23 to the SO.
parent company.\textsuperscript{24} Decisive influence may be presumed where a subsidiary is wholly-owned by its parent. Accordingly, the OFT has attributed liability to Tesco Holdings Limited and in turn Tesco plc, on a joint and several basis, for the Infringements that the OFT has attributed to Tesco Stores Limited and for the resulting penalty that the OFT is imposing, given the 100 per cent ownership chain through these companies of Tesco Stores Limited.

IV. Attribution of liability – the processors

Arla

Summary

2.36. The OFT is addressing this Decision to the following entities:

i. Arla Foods Limited; and

ii. Arla Foods UK Holding Limited.

These entities are collectively referred to in this Decision as 'Arla'. The OFT finds these entities jointly and severally liable for the Infringement that it has attributed to them in this Decision (that is, the 2003 FLM Initiative) and for the resulting penalty that the OFT is imposing.\textsuperscript{25}

Reasoning

2.37. The principal activity of Arla Foods Limited is the manufacture, wholesale and distribution of dairy and food products.

2.38. In response to an information request from the OFT, Arla Foods UK plc (then the parent company of Arla Foods Limited) identified Arla Foods Limited (then Arla Foods plc) as the entity responsible for the wholesale supply of FLM in the period 2000 to 2003.\textsuperscript{26} The legal entity directly engaged in the relevant Infringement (that is, the 2003 FLM Initiative) was, therefore, Arla Foods Limited. Accordingly, the OFT has attributed liability to Arla Foods Limited for this Infringement and for the resulting penalty that the OFT is imposing.\textsuperscript{27}

2.39. When the 2003 FLM Initiative took place, Arla Foods Limited (then Arla Foods plc) was a wholly-owned subsidiary of Arla Foods UK Holding Limited. On 22 October 2003, as part of the merger between the Arla group and Express Dairies: (a) Arla Foods Holding UK Limited acquired 51 per cent of Express Dairies plc; (b) Express Dairies plc acquired Arla Foods Limited (then Arla Foods plc) and (c) Express Dairies plc changed its name to Arla Foods UK plc. As a result, on 22 October 2003, Arla Foods

\textsuperscript{24} See paragraph 2.3 above.
\textsuperscript{25} This penalty has been reduced to zero because Arla was granted total immunity (see section 7.G.1 below).
\textsuperscript{26} See document 29 to the SO. For the period from October 2003, Arla Foods UK plc informed the OFT that it was also itself responsible for this activity, together with its subsidiaries, including Arla Foods Limited.
\textsuperscript{27} See footnote 25 above.
Limited (then Arla Foods plc) became the wholly-owned subsidiary of Arla Foods UK plc and Arla Foods UK plc in turn became the 51 per cent subsidiary of Arla Foods UK Holding Limited. On 5 April 2007, Arla Foods UK Holding Limited acquired the remaining 49 per cent of the shares in Arla Foods UK plc.\(^{28}\)

2.40. Arla Foods Limited was registered as a public limited company until 17 March 2004 (as Arla Foods plc). On that date, it was re-registered as a private limited company. This change in the legal form and name did not create a new undertaking free of liability for the anti-competitive conduct of its predecessor. As there was functional and economic continuity between these two entities, they are identical from an economic point of view and hence the liability of Arla Foods plc is attributed to Arla Foods Limited.\(^{29}\)

2.41. The registered address of Arla Foods Limited and Arla Foods UK Holding Limited is Arla House, 4 Savannah Way, Leeds Valley Park, Leeds, Yorkshire, LS10 1AB.

2.42. Where a parent company exerts decisive influence over a subsidiary, liability for an infringement by the subsidiary may be attributed to the parent company.\(^{30}\) Decisive influence may be presumed where a subsidiary is wholly-owned by its parent. Decisive influence may also be shown by other factors. In this case, as set out above, while Arla Foods UK Holding Limited owned all shares in Arla Foods Limited (then Arla Foods plc) until 22 October 2003, on that date, Arla Foods Limited became a wholly-owned subsidiary of Arla Foods UK plc and Arla Foods UK Holding Limited in turn became the 51 per cent shareholder of Arla Foods UK plc. This ownership of the majority (51 per cent) of the shares in Arla Foods UK plc, combined with the power to appoint and dismiss the majority of the directors of Arla Foods UK plc, conferred on Arla Foods UK Holding Limited the possibility of exercising decisive influence over the commercial policy of Arla Foods UK plc\(^{31}\) and, indirectly, over the commercial policy of Arla Foods Limited.

2.43. Accordingly, the OFT has attributed liability to Arla Foods UK Holding Limited, on a joint and several basis, for the Infringement that the OFT has attributed to Arla Foods Limited and for the resulting penalty that the OFT is imposing.\(^{32}\)

**Dairy Crest**

**Summary**

2.44. The OFT is addressing this Decision to the following entities:

\(^{28}\) See document 30 to the SO.

\(^{29}\) See paragraph 2.5 above.

\(^{30}\) See paragraphs 2.3 and 2.4 above.

\(^{31}\) See also the description of Arla Foods UK Holding Limited’s control over Arla Foods UK plc in *Arla Foods amba and Express Dairies plc: A report on the proposed merger*, Competition Commission, October 2003, at paragraph 4.110.

\(^{32}\) See footnote 25 above.
i. Dairy Crest Limited; and

ii. Dairy Crest Group plc.

These entities are collectively referred to in this Decision as 'Dairy Crest'. The OFT finds these entities jointly and severally liable for the Infringements that it has attributed to them in this Decision (that is, the 2002 Cheese Initiative and the 2003 FLM Initiative) and for the resulting penalty that the OFT is imposing.

**Reasoning**

2.45. Dairy Crest Limited, whose principal activity is the manufacture and trading of milk, cheese and other dairy products, is a wholly-owned subsidiary of Dairy Crest Group plc.

2.46. In response to a section 26 Notice from the OFT, Dairy Crest Group plc stated that for the period 2000 to 2003 Dairy Crest Limited was the entity responsible for the wholesale supply of cheese and FLM in Great Britain. The legal entity directly engaged in the relevant Infringements (that is, the 2002 Cheese Initiative and the 2003 FLM Initiative) was, therefore, Dairy Crest Limited. Accordingly, the OFT has attributed liability to Dairy Crest Limited for these Infringements and for the resulting penalty that the OFT is imposing.

2.47. The registered address of Dairy Crest Limited and Dairy Crest Group plc is Claygate House, Littleworth Road, Esher, Surrey, KT10 9PN.

2.48. Where a parent company exerts decisive influence over a subsidiary, liability for an infringement by the subsidiary may be attributed to the parent company. Decisive influence may be presumed where a subsidiary is wholly-owned by its parent. Accordingly, the OFT has attributed liability to Dairy Crest Group plc, on a joint and several basis, for the Infringements that the OFT has attributed to Dairy Crest Limited and for the resulting penalty that the OFT is imposing, given its 100 per cent ownership of Dairy Crest Limited.

**Glanbia**

**Summary**

2.49. The OFT is addressing this Decision to the following entities:

i. The Cheese Company Limited;

ii. Waterford Foods International Limited;

iii. Glanbia Investments (UK) Limited; and

iv. Glanbia (UK) Limited.

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33 See document 37 to the SO.
34 See paragraph 2.3 above.
These entities are collectively referred to in this Decision as 'Glanbia'. The OFT finds these entities jointly and severally liable for the Infringement that it has attributed to them in this Decision (that is, the 2002 Cheese Initiative) and for the resulting penalty that the OFT is imposing.

**Reasoning**

2.50. The principal activity of The Cheese Company Limited is the manufacture and supply of cheese, butter and related dairy products for the retail, foodservice and food ingredients markets.

2.51. In response to a section 26 Notice from the OFT, The Cheese Company Limited stated that for the period 2000 to 2003 it was the entity (then named Glanbia Foods Limited) responsible for the wholesale supply of cheese and butter in Great Britain under the 'Glanbia' name. The legal entity directly engaged in the relevant Infringement (that is, the 2002 Cheese Initiative) was, therefore, The Cheese Company Limited. Accordingly, the OFT has attributed liability to The Cheese Company Limited for this Infringement and for the resulting penalty that the OFT is imposing.

2.52. When the 2002 Cheese Initiative took place, The Cheese Company Limited (then Glanbia Foods Limited) was a wholly-owned subsidiary of Waterford Foods International Limited. This was in turn a wholly-owned subsidiary of Glanbia Investments (UK) Limited, which was in turn a wholly-owned subsidiary of Glanbia (UK) Limited.

2.53. The Cheese Company Limited was named Glanbia Foods Limited until 13 April 2004, when it changed its name into its present name. This change in the legal name did not create a new undertaking free of liability for the anti-competitive conduct of its predecessor. As there was functional and economic continuity between these two entities, they are identical from an economic point of view and hence the liability of Glanbia Foods Limited is attributed to The Cheese Company Limited.

2.54. On 7 April 2004, Waterford Foods International Limited sold its 100 per cent shareholding in The Cheese Company Limited (then Glanbia Foods Limited) to The Cheese Company Holdings Limited. The Cheese Company Holdings Limited is held (indirectly) by Milk Link Limited, which is a co-operative owned by dairy farmers. Therefore, The Cheese Company Holdings Limited and Milk Link Limited became the (ultimate) parent of The Cheese Company Limited after the period in which the relevant Infringement took place and accordingly the OFT has not attributed liability to The Cheese Company Holdings Limited or Milk Link Limited.

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35 See document 32 to the SO.
36 The ultimate parent company was an Irish entity, Glanbia Co-operative Society Limited.
37 See paragraph 2.5 above.
38 From 7 April 2004, Milk Link Limited (indirectly) held 75 per cent of the shares in The Cheese Company Holdings Limited, with Waterford Foods International Limited holding the remaining 25 per cent of the shares. From 29 December 2006, Milk Link Limited (indirectly) held all shares in The Cheese Company Holdings Limited.
2.55. The registered address of The Cheese Company Limited is 3120 Great Western Court, Hunts Ground Road, Stoke Gifford, Bristol, BS34 8HP. The registered address of Waterford Foods International Limited, Glanbia Investments (UK) Limited and Glanbia (UK) Limited is One Victoria Square, Birmingham, West Midlands, B1 1BD.

2.56. Where a parent company exerts decisive influence over a subsidiary, liability for an infringement by the subsidiary may be attributed to the parent company. Decisive influence may be presumed where a subsidiary is wholly-owned by its parent. Accordingly, the OFT has attributed liability to Waterford Foods International Limited and in turn Glanbia Investments (UK) Limited and Glanbia (UK) Limited, on a joint and several basis, for the Infringement that the OFT has attributed to The Cheese Company Limited and for the resulting penalty that the OFT is imposing, given the 100 per cent ownership chain through these companies of The Cheese Company Limited during the period in which this Infringement took place.

**McLelland**

**Summary**

2.57. The OFT is addressing this Decision to Lactalis McLelland Limited. This entity is referred to in this Decision as 'McLelland'. The OFT finds this entity liable for the Infringements that the OFT has attributed to it in this Decision (that is, the 2002 Cheese Initiative and the 2003 Cheese Initiative) and for the resulting penalty that the OFT is imposing.

**Reasoning**

2.58. The principal activity of McLelland is to trade as manufacturer and supplier of cheese and related products.

2.59. In response to a section 26 Notice from the OFT, McLelland (then A McLelland & Son Limited) identified itself as the entity responsible for the wholesale supply of cheese in Great Britain for the period 2000 to 2003. The legal entity directly engaged in the relevant Infringements (that is, the 2002 Cheese Initiative and the 2003 Cheese Initiative) was, therefore, McLelland.

2.60. The registered address of McLelland is The Creamery, Commerce Road, Stranraer, DG9 7DA.

2.61. On 29 September 2004, McLelland (then A McLelland & Son Limited) became a wholly-owned subsidiary of BSA International (a non-UK company), which is part of Groupe Lactalis, and in January 2005 Groupe Lactalis assumed organisational and managerial control over McLelland. Therefore, this was after the period in which the relevant Infringements took place and accordingly the OFT has not attributed liability to BSA International or Groupe Lactalis.

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39 See paragraph 2.3 above.
40 See document 43 to the SO.
41 See documents 43 to the SO and 44 to the SSO.
2.62. McLelland was named A McLelland & Son Limited until 1 November 2006, when it changed its name into its present name. This change in the legal name did not create a new undertaking free of liability for the anti-competitive conduct of its predecessor. As there was functional and economic continuity between these two entities, they are identical from an economic point of view and hence the liability of A McLelland & Son Limited is attributed to McLelland.\(^{42}\)

2.63. Accordingly, the OFT has attributed liability to McLelland for the relevant Infringements (that is, the 2002 Cheese Initiative and the 2003 Cheese Initiative) and for the resulting penalty that the OFT is imposing.

**Wiseman**

**Summary**

2.64. The OFT is addressing this Decision to the following entities:

i. Robert Wiseman & Sons Limited; and

ii. Robert Wiseman Dairies plc.

These entities are collectively referred to in this Decision as 'Wiseman'. The OFT finds these entities jointly and severally liable for the Infringement that it has attributed to them in this Decision (that is, the 2003 FLM Initiative) and for the resulting penalty that the OFT is imposing.

**Reasoning**

2.65. Robert Wiseman & Sons Limited, whose principal activity is the processing and distribution of milk and associated products, is a wholly-owned subsidiary of Robert Wiseman Dairies plc.

2.66. In response to a section 26 Notice from the OFT, Robert Wiseman Dairies plc identified Robert Wiseman & Sons Limited as the only entity responsible for the wholesale supply of fresh liquid milk in Great Britain for the period 2000 to 2003.\(^ {43}\) The legal entity directly engaged in the relevant Infringement (that is, the 2003 FLM Initiative) was, therefore, Robert Wiseman & Sons Limited. Accordingly, the OFT has attributed liability to Robert Wiseman & Sons Limited for this Infringement and for the resulting penalty that the OFT is imposing.

2.67. The registered address of Robert Wiseman & Sons Limited and Robert Wiseman Dairies plc is 159 Glasgow Road, East Kilbride, Glasgow, Strathclyde, G74 4PA.

2.68. Where a parent company exerts decisive influence over a subsidiary, liability for an infringement by the subsidiary may be attributed to the parent company.\(^ {44}\) Decisive influence may be presumed where a

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\(^{42}\) See paragraph 2.5 above.

\(^{43}\) See document 46 to the SO.

\(^{44}\) See paragraph 2.3 above.
subsidiary is wholly-owned by its parent. Accordingly, the OFT has attributed liability to Robert Wiseman Dairies plc, on a joint and several basis, for the Infringement that the OFT has attributed to Robert Wiseman & Sons Limited and for the resulting penalty that the OFT is imposing, given its 100 per cent ownership of Robert Wiseman & Sons Limited.

B. THE OFT’S INVESTIGATION

I. The origins of the OFT’s investigation

2.69. The OFT’s investigation that resulted in the findings set out in this Decision arose from an application for leniency by Arla in July 2003.

2.70. Prior to Arla’s leniency application, Tesco wrote to the OFT on 10 April 2000 about two letters that it had been forwarded by a farmer group, Farmers for Action (‘FFA’).45 These letters were sent to [an official at FFA] by Safeway and [a retailer’s] representatives, following an approach by FFA. In the letters, these retailers expressed support for an increase in retail prices for FLM in order to pass back monies up the supply chain to farmers (to achieve an increase in the farmgate price for raw milk), provided that competing retailers would also increase their retail prices.46 FFA was circulating these letters between retailers, with Safeway having received a copy of [a retailer’s] letter. Tesco sought advice from the OFT on whether this type of letter might breach the Act. The OFT wrote to Tesco, as well as Safeway and [a retailer], on 25 April 2000, advising that concerted action as envisaged by the letters would be likely to constitute a breach of the Chapter I prohibition.47

2.71. Further, on 6 July 2003, a retired dairy farmer wrote to the OFT, enclosing an article published in Farmers Weekly of 4 July 2003, reporting that ‘leading retailers’ had increased the retail price of milk by 2 pence per litre (‘ppl’) on 1 or 2 July. The complainant suggested this conduct amounted to price fixing.48

II. Leniency

2.72. Arla applied for leniency in July 200349 and was subsequently granted conditional total immunity from financial penalty in September 2003.50 Arla was granted total immunity in respect of any cartel activities in the United Kingdom relating to agreements and/or concerted practices that Arla had entered into in respect of the supply of standard dairy products, particularly fresh processed milk, in respect of which Arla had come forward to seek immunity and which may infringe the Chapter I prohibition of the Competition Act 1998.

2.73. Following an application made in October 2007, Asda was granted conditional total immunity from financial penalty in respect of a

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45 See document 79 to the SO, at paragraphs 5.2 to 5.49 below.
46 See document 80 and 81 to the SO, at paragraphs 5.2 to 5.49 below.
47 See document 82 to 84 to the SO at paragraphs 5.2 to 5.49 below.
48 See document 58 to the SO.
49 See document 24 of Annex 2 to the SO.
50 See document 31 of Annex 2 to the SO.
completely separate suspected infringement of the Chapter I prohibition in relation to its activities in other, separate markets. Consequently, Asda has been granted a partial reduction in penalty in respect of the Infringements to which the OFT has found it to be a party in this case.

III. Opening of the investigation

2.74. The information provided by Arla in support of its leniency application gave the OFT reasonable grounds for suspecting that Arla, Asda, Dairy Crest, Tesco and Wiseman were or had been involved in an agreement and/or concerted practice to fix prices in the supply of FLM in the UK over the period 2002 to 2003. On this basis, on 6 January 2004, the OFT commenced a formal investigation under section 25 of the Act into whether there had been an infringement of section 2(1) of the Act (the 'Investigation').

2.75. [C]

2.76. On 11 January 2005, the OFT extended the scope of the Investigation to include Safeway and Sainsbury's, as well as a number of additional dairy products, including butter, cheese and UHT milk. The OFT further extended the scope of the Investigation on 26 April 2005 to include Glanbia and McLelland, in October 2005 to include [a processor], and in April 2007 the OFT wrote to Morrisons informing it that the OFT had reasonable grounds for suspecting it of infringing the Chapter I prohibition. Ultimately, the OFT does not have sufficient evidence to demonstrate [a processor’s] or Morrisons' participation in an infringement to the requisite standard of proof required under the Act.

IV. Section 26 notices

2.77. During the course of the Investigation the OFT sent the following section 26 notices, requiring the production of relevant documents and information:

i. in June 2004, the OFT sent initial section 26 notices to Asda, Dairy Crest, Tesco and Wiseman;

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51 See OFT423 OFT’s guidance as to the appropriate amount of a penalty (Edition 12/04), at paragraphs 3.16 and 3.17. See also the OFT’s draft guidance OFT803 Leniency and no-action (November 2006), at paragraphs 6.8 to 6.10 which was applicable at the time Asda was conditionally granted total immunity from financial penalty in relation to its activities in a separate market. OFT803 Leniency and no-action (December 2008) was subsequently revised and published in December 2008.
52 See paragraph 7.121 below.
53 [C].
54 [C]
55 See paragraphs 2.98 to 2.104 below.
56 Section 26 of the Act empowers the OFT, for the purposes of an investigation under section 25 of the Act, to require any person to produce to it a specified document, or to provide it with specified information, which it considers relates to any matter relevant to the investigation.
ii. in January 2005 and April 2005, the OFT sent initial section 26 notices to Sainsbury’s and Morrisons (in relation to Safeway only)\(^57\) respectively;

iii. between February and April 2005, the OFT sent further section 26 notices to Asda, Dairy Crest, Sainsbury’s, Tesco and Wiseman;

iv. in May 2005, the OFT sent initial section 26 notices to Glanbia and McLelland;

v. in October and November 2005, the OFT sent further section 26 notices to Asda, Dairy Crest, Glanbia, McLelland, Morrisons (in relation to Safeway only), Sainsbury’s, Tesco and Wiseman; \(^58\)

vi. finally, further section 26 notices were sent in October 2006 to Asda, Morrisons (in relation to Safeway only), Sainsbury’s and Tesco in relation to the Investigation.

2.78. Various informal information requests were made of Arla during the course of the Investigation. The OFT also made a number of informal requests for information and had a number of ad hoc exchanges with the Parties on various matters throughout the Investigation.

V. Initial witness evidence

2.79. Between February and July 2005 the OFT conducted taped interviews with four current or former employees of Arla in the presence of Arla’s legal advisers. These were given voluntarily by the individuals concerned and were arranged by Arla as part of its commitment to maintain continuous and complete co-operation with the Investigation under its leniency agreement.

VI. Issue of the Statement of Objections

2.80. On 20 September 2007, the OFT issued a Statement of Objections (the ‘SO’), setting out its provisional findings, to Arla, Asda, Dairy Crest, Glanbia, McLelland,\(^59\) Morrisons, Safeway,\(^60\) Sainsbury’s, Tesco and Wiseman. In the SO, the OFT set out the facts (including the evidence) on which it relied, the objections it raised in terms of the alleged infringements of the Chapter I prohibition, the action it proposed to take and its reasons for the proposed action. The SO set out five separate infringement allegations:

- a single overall concerted practice which had as its object the prevention, restriction or distortion of competition in the supply of

\(^{57}\) All section 26 Notices in relation to Safeway were sent to Morrisons on behalf of Safeway (see paragraphs 2.17 to 2.24 above).

\(^{58}\) See footnote 54 above.

\(^{59}\) In relation to conduct by A McLelland & Son Limited prior to its acquisition by Groupe Lactalis (see at paragraphs 2.57 to 2.63 above).

\(^{60}\) In relation to conduct prior to its acquisition by Morrisons (see at paragraphs 2.17 to 2.24 above).
certain milk products in the UK in 2002 (defined in the SO as 'the 
2002 Liquid Milk Initiative');

- a single overall concerted practice which had as its object the 
  prevention, restriction or distortion of competition in the supply of 
certain cheese products in the UK in 2002 (defined in the SO as 'the 
2002 Cheese Initiative');

- a single overall concerted practice which had as its object the 
  prevention, restriction or distortion of competition in the supply of 
fresh liquid milk in the UK in 2003 (defined in the SO as 'the 2003 
FLM Initiative');

- a single overall concerted practice which had as its object the 
  prevention, restriction or distortion of competition in the supply of 
certain cheese products in the UK in 2003 (defined in the SO as 'the 
2003 Cheese Initiative'); and

- a single overall concerted practice which had as its object the 
  prevention, restriction or distortion of competition in the supply of 
certain butter products in the UK in 2003 (defined in the SO as 'the 
2003 Butter Initiative').

2.81. Ultimately, the OFT decided not to pursue the Investigation in respect of 
the 2002 Liquid Milk Initiative allegation or the 2003 Butter Initiative 
allegation.61 This Decision, therefore, does not deal with either of these 
allegations except in referring to the history of the Investigation.

2.82. The SO made the following infringement allegations in respect of each 
Party:

- Arla was alleged to have participated in the 2002 Liquid Milk 
  Initiative and the 2003 FLM Initiative allegations;

- Asda was alleged to have participated in the 2002 Liquid Milk 
  Initiative, the 2002 Cheese Initiative, the 2003 FLM Initiative and 
  the 2003 Cheese Initiative allegations;

- Dairy Crest was alleged to have participated in the 2002 Cheese 
  Initiative, the 2003 FLM Initiative and the 2003 Butter Initiative 
  allegations;

- Glanbia was alleged to have participated in the 2002 Cheese 
  Initiative allegation only;

- McLelland was alleged to have participated in the 2002 Cheese 
  Initiative and the 2003 Cheese Initiative allegations;

- Morrisons was alleged to have participated in the 2002 Liquid Milk 
  Initiative allegation only;

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61 See paragraphs 2.98 to 2.104 below.
• Safeway was alleged to have participated in the 2002 Liquid Milk Initiative, the 2002 Cheese Initiative, the 2003 FLM Initiative and the 2003 Butter Initiative allegations;

• Sainsbury's was alleged to have participated in the 2002 Liquid Milk Initiative, the 2002 Cheese Initiative, the 2003 FLM Initiative, and the 2003 Cheese Initiative allegations;

• Tesco was alleged to have participated in the 2002 Liquid Milk Initiative, the 2002 Cheese Initiative, the 2003 FLM Initiative, the 2003 Cheese Initiative and the 2003 Butter Initiative allegations; and

• Wiseman was alleged to have participated in the 2003 FLM Initiative allegation only.

VII. Early Resolution

2.83. The covering letter to the SO noted that the addressees of the SO might obtain a reduction in the level of any financial penalty that might be imposed through co-operation with the Investigation (by, for example, an admission of culpability and procedural co-operation with the Investigation), enabling the enforcement process to be concluded more effectively and/or speedily. The covering letter explained:

'a party may obtain a reduction in the level of any financial penalty imposed upon it through mitigation (at Step 4, see paragraph 2.16 of the [OFT’s] Guidance [as to the appropriate amount of a penalty]). One possible mitigating factor is co-operation with the OFT’s investigation, for example an admission of culpability and certain ancillary undertakings, which enables the enforcement process to be concluded more effectively and/or speedily. Even at this stage of the investigation, a significant co-operation by a party could result in a significant discount in the level of any financial penalty that we might impose.'

2.84. The covering letter stated that any addressee of the SO interested in providing such co-operation should contact the OFT to open a discussion (on a without prejudice basis).

2.85. A number of addressees of the SO expressed an interest in providing such co-operation and, from October to December 2007, the OFT held discussions with those addressees on a without prejudice basis. As a result, on 7 December 2007, the OFT announced that it had concluded early resolution agreements ('ERAs') with six of the addressees of the SO (each referred to as an 'ER Party', collectively referred to as 'ER Parties') as follows:

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62 See the cover letter to the SO.
63 At a later stage in the Investigation, the covering letter to the supplementary Statement of Objections (see paragraph 2.94 below) that was sent to those addressees of the supplementary Statement of Objections that had not concluded early resolution agreements with the OFT at that stage (that is, Morrisons and Tesco) contained a similar invitation for discussion.
• Asda, in respect of the 2002 Liquid Milk Initiative, the 2002 Cheese Initiative, the 2003 FLM Initiative and the 2003 Cheese Initiative allegations;

• Dairy Crest, in respect of the 2002 Cheese Initiative, the 2003 Initiative and the 2003 Butter Initiative allegations;

• Glanbia, in respect of the 2002 Cheese Initiative allegation;

• Safeway, in respect of the 2002 Liquid Milk Initiative, the 2002 Cheese Initiative, the 2003 FLM Initiative and the 2003 Butter Initiative allegations;

• Sainsbury’s, in respect of the 2002 Liquid Milk Initiative, the 2002 Cheese Initiative, the 2003 FLM Initiative and the 2003 Cheese Initiative allegations; and

• Wiseman, in respect of the 2003 FLM Initiative allegation.

2.86. On 15 February 2008, the OFT announced that it had also concluded an ERA with McLelland in respect of the 2002 and 2003 Cheese Initiative allegations.

2.87. The ERAs, reproduced at Annex B to this Decision, are in substantially identical form, save in relation to the infringements in respect of which liability was admitted (reflecting the fact that different allegations were made against different ER Parties) and the individual penalty figures.

2.88. The terms of the ERAs included that the ER Party:

• admitted liability in respect of all of the infringements alleged against it in the SO;

• maintained continuous and complete co-operation throughout the Investigation, including but not limited to using reasonable endeavours to secure the complete and truthful co-operation of current and former employees;

• limited representations on the SO to a concise memorandum identifying any material factual inaccuracies in the SO;\footnote{In relation to conduct prior to its acquisition by Morrisons (see paragraphs 2.17 to 2.24 above).}

\footnote{In relation to conduct by A McLelland and Son Limited prior to its acquisition by Groupe Lactalis (see paragraphs 2.57 to 2.63 above).}

\footnote{As explained at paragraphs 2.98 to 2.104 below, this Decision is narrower in scope than the SO and the SSO. Those parts of the ERAs that pertain to aspects of the SO and SSO that do not form part of this Decision have been removed from the ERAs through variation agreements that are also reproduced at Annex C (see paragraph 2.107 below) or have been redacted from the ERAs reproduced at Annex B (specifically, the allegations of bi-lateral concerted practices, see paragraphs 2.120 to 2.121 below).}

\footnote{Although not specifically identified in the text of the ERAs, the OFT considered that this term applied equally to the SSO. Accordingly, the ER Parties agreed to limit any representations on the SSO to identifying material factual inaccuracies.}
• agreed not to request access to documents on the OFT’s file beyond those documents relied on in the SO; and

• agreed to pay an individual financial penalty which reflected a significant reduction in the financial penalty that might otherwise have been imposed, in recognition of the procedural co-operation provided by that Party, provided that the ER Party had met the terms of its ERA.68

VIII. Representations and factual inaccuracies’ submissions relating to the SO

2.89. Morrisons submitted written representations on the OFT’s proposed finding that Morrisons had infringed the Act by participating in the 2002 Liquid Milk Initiative allegation (as set out in the SO) on 30 January 2008.69 Morrisons’ written representations were supported by witness evidence. Morrisons made oral representations on 3 June 2008.70

2.90. Tesco submitted written representations on the OFT’s proposed finding that Tesco had infringed the Act by participating in the 2002 Liquid Milk Initiative, the 2002 Cheese Initiative, the 2003 Butter Initiative, the 2003 Cheese Initiative and the 2003 FLM Initiative allegations (as set out in the SO) on 6 December 2007.71 Tesco decided not to make oral representations.

2.91. Of the seven ER Parties, six provided the OFT with memoranda on material factual inaccuracies in the SO.72 [C]73

IX. Further witness evidence

2.92. After issuing the SO, between April and August 2008, the OFT conducted further taped interviews with 12 individuals who were employed by certain Parties at the time of the Infringements.74 Specifically, the OFT interviewed four current or former Arla staff,75 three current or former Asda staff,76 two Sainsbury’s staff77 and three Wiseman staff.78 These interviews were given voluntarily by the individuals concerned and with the co-operation of the relevant Parties, pursuant to Arla’s leniency agreement and Asda’s, Sainsbury’s and Wiseman’s ERAs

68 See section 7.G of this Decision for the resulting financial penalties for each relevant Party.
69 See document 48 to the SSO.
70 See document 49 to the SSO.
71 See document 62 to the SSO.
72 Dairy Crest (see document 34 to the SSO), Glanbia (see document 39 to the SSO), McLelland (see document 44 to the SSO), Safeway (see document 56 to the SSO), Sainsbury’s (see document 58 to the SSO) and Wiseman, (see documents 68 and 70 to the SSO).
73 [C].
74 See documents 3 to 6, 15 to 17, 60 to 61 and 71 to 73 to the SSO.
75 See documents 3 to 6 to the SSO.
76 See documents 15 to 17 to the SSO.
77 See documents 60 and 61 to the SSO.
78 See documents 71 to 73 to the SSO.
respectively. The OFT also conducted one further voluntary interview with a former employee of [a processor] in October 2008.\textsuperscript{79}

2.93. In addition, Asda,\textsuperscript{80} Dairy Crest,\textsuperscript{81} Glanbia\textsuperscript{82} and Wiseman,\textsuperscript{83} under their respective ERAs, provided the OFT with notes of interviews with individuals who were employed by them at the time of the Infringements. These interviews had been conducted before and/or after the issue of the SO by these Parties’ solicitors without input from the OFT.

X. Issue of the supplementary Statement of Objections

2.94. On 23 July 2009, the OFT issued a supplementary Statement of Objections (‘the SSO’) to all the addressees of the SO in order to supplement and revise the SO by adducing the additional evidence that the OFT had obtained since the SO was issued. This additional evidence consisted in particular of the witness evidence that the OFT obtained after the issue of the SO.\textsuperscript{84}

XI. Representations and factual inaccuracies’ submissions relating to the SSO

2.95. Morrisons submitted written representations on the additional evidence set out in the SSO on 30 October 2009, supported by further witness evidence. As a result of the OFT’s decision not to pursue the 2002 Liquid Milk Initiative allegation (and therefore no longer pursuing the Investigation in respect of Morrisons),\textsuperscript{85} Morrisons did not make any oral representations on the SSO.

2.96. Tesco submitted written representations on the SSO on 8 February 2010, supported by witness evidence.\textsuperscript{86} Tesco limited its written representations to its alleged participation in the 2002 Liquid Milk Initiative, the 2003 FLM Initiative and the 2003 Butter Initiative allegations. At the time, Tesco was considering whether it might not contest the infringement allegations the OFT made in respect of Tesco’s alleged participation in the 2002 and 2003 Cheese Initiative allegations (the ‘Cheese Allegations’),\textsuperscript{87} and, accordingly, did not submit any representations on those allegations. Tesco decided not to make any oral representations on the SSO. Tesco later confirmed that it would not contest its alleged participation in the Cheese Allegations\textsuperscript{88} but subsequently decided that it would, in fact, be submitting written representations and did so in November 2010.\textsuperscript{89}

\textsuperscript{79} See document 74 to the SSO.
\textsuperscript{80} See documents 13 and 14 to the SSO.
\textsuperscript{81} See documents 21 to 33 to the SSO.
\textsuperscript{82} See documents 40 to 42 to the SSO.
\textsuperscript{83} See document 68 to the SSO.
\textsuperscript{84} See paragraphs 2.92 and 2.93 above.
\textsuperscript{85} See paragraphs 2.98 to 2.104 below.
\textsuperscript{86} Tesco’s representations on the SSO in respect of the 2002 Liquid Milk the 2003 Butter and the 2003 FLM Initiatives are referred to in this Decision as ‘Tesco’s first representations on the SSO’.
\textsuperscript{87} See paragraph 2.108 below.
\textsuperscript{88} See paragraphs 2.108 to 2.111 below.
\textsuperscript{89} See paragraphs 2.112 to 2.115 below.
2.97. Of the seven ER Parties, two provided the OFT with memoranda on material factual inaccuracies in the SSO.\textsuperscript{90} [C]\textsuperscript{81}

XII. Decision not to pursue certain allegations set out in the SO and the SSO

2.98. The OFT carefully reviewed Morrisons' and Tesco's written representations on the SSO, including the additional evidence submitted by them in support of their written representations on the SSO. This evidence consisted principally of witness evidence in relation to the 2002 Liquid Milk Initiative (from both Morrisons and Tesco), Tesco's alleged participation in the 2003 FLM Initiative and the 2003 Butter Initiative (from Tesco only) allegations. This additional evidence cast doubt over these allegations as set out in the SO and SSO. In relation to the 2002 Liquid Milk Initiative allegation, the additional evidence from a key witness also contradicted evidence that he had previously provided in a number of respects.

2.99. Following its review, the OFT reached the provisional conclusion that, while it continued to have reasonable grounds for suspecting an infringement of the Chapter I prohibition, the evidence in its possession was no longer sufficient to make a decision that the Act has been infringed in the terms originally set out in the SO and supplemented by the SSO with regard to the following allegations (the 'Closure Allegations'):

- the 2002 Liquid Milk Initiative allegation;
- the 2003 Butter Initiative allegation; and
- Tesco's alleged participation in the 2003 FLM Initiative allegation.\textsuperscript{92}

2.100. As a result of this, the OFT considered whether it should further investigate Tesco's alleged participation in the 2003 FLM Initiative allegation. In accordance with its prioritisation principles,\textsuperscript{93} the OFT considered that such further investigation was not an administrative priority. In reaching this decision, the OFT had particular regard to the significant resources over a period of time that would have been necessary to gather any further evidence and to put that evidence to Tesco in a further supplementary statement of objections, and the relatively low likelihood that committing those resources would have resulted in an infringement decision in respect of that allegation. The OFT also considered that only an incremental effect on impact (in particular, any deterrent effect) and strategic significance (for example, in clarifying the law) could be gained from further investigating Tesco's alleged participation in the 2003 FLM Initiative allegation given the impact and

\textsuperscript{90} McLelland and Sainsbury's.
\textsuperscript{91} [C]
\textsuperscript{92} In relation to the decision not to pursue Tesco's alleged involvement in the 2003 FLM Initiative, see paragraphs Error! Reference source not found. to Error! Reference source not found. below.
\textsuperscript{93} OFT953 \textit{OFT Prioritisation Principles}, October 2008.
strategic significance that could be achieved through pursuing the other allegations in this case.\textsuperscript{94}

2.101. Accordingly, on 11 March 2010, the OFT wrote to all addressees of the SO and SSO (the 'Recipients') to inform them of the OFT’s proposed decision not to pursue the Investigation in respect of the Closure Allegations (the 'Proposed Closure Decision'). The OFT invited all these Recipients to make any comments on the Proposed Closure Decision prior to the OFT deciding whether to close the Investigation in respect of the Closure Allegations.

2.102. In order for these Recipients to better understand the OFT’s reasons for its Proposed Closure Decision and as a result of requests from a number of Recipients of the OFT’s 11 March 2010 letter, on 1 April 2010, the OFT disclosed to all Recipients the additional evidence that it had received after the issue of the SSO and had relied on in reaching the Proposed Closure Decision.

2.103. Following comments from various Recipients, on 29 April 2010, the OFT wrote to all addressees of the SO and SSO affirming its Proposed Closure Decision. As the only allegation against Morrisons was in relation to the 2002 Liquid Milk Initiative, the OFT’s decision not to pursue the Investigation in respect of that allegation resulted in Morrisons ceasing to be a party to the Investigation.

2.104. The OFT announced its decision not to pursue the Closure Allegations on 30 April 2010.\textsuperscript{95}

XIII. Amendment to the early resolution agreements

2.105. As a result of the OFT affirming the Proposed Closure Decision, the admissions that ER Parties had made (as set out in the appendix to each early resolution agreement) needed to be amended.\textsuperscript{96} The agreed penalties for certain ER Parties also needed to be amended. Specifically, agreed penalties needed to be reduced as a result of the OFT’s decision not to pursue the Investigation in respect of the 2002 Liquid Milk Initiative allegation\textsuperscript{97} and the 2003 Butter Initiative allegation.\textsuperscript{98} The OFT also decided that penalties agreed with ER Parties in respect of the 2003 FLM

\textsuperscript{94} That is, the 2002 and 2003 Cheese Initiatives (both of which alleged Tesco’s participation) and the 2003 FLM Initiative. Notwithstanding that absent Tesco’s alleged participation, the OFT considered that continuing the Investigation in respect of the 2003 FLM Initiative allegation would still have a significant effect on impact and strategic significance.


\textsuperscript{96} Specifically, where relevant, references to the 2002 Liquid Milk Initiative, the 2003 Butter Initiative and/or Tesco’s alleged participation in the 2003 FLM Initiative needed to be removed.

\textsuperscript{97} This change affected the penalty agreed for each of Asda, Safeway and Sainsbury’s.

\textsuperscript{98} This change affected the penalty agreed for each of Dairy Crest and Safeway.
Initiative should be reduced as a result of the OFT not pursuing Tesco’s alleged participation in that allegation.\footnote{99}

2.106. Additionally, independently of its Proposed Closure Decision, the OFT reconsidered the adjustments that would be applied at Step 4 of the penalty calculations for each ER Party under the terms of its ERA. Given the circumstances at the time of the Infringements,\footnote{100} the OFT concluded that penalties should not be increased for any aggravating factors in this case and decided that the penalty for each ER Party should to be reduced accordingly. The OFT took the opportunity to make those reductions when certain ER Parties’ penalties had to be changed as a result of the OFT’s affirmation of its Proposed Closure Decision.\footnote{101}

2.107. In order to amend admissions resulting from the affirmation of the Proposed Closure Decision, the OFT requested that each ER Party sign a variation agreement to its ERA to reflect these amendments (collectively referred to as the 'ER Variation Agreements'). All ER Variation Agreements were signed by the ER Parties and returned to the OFT by 27 April 2010. The OFT counter-signed all ER Variation Agreements when it had affirmed the Proposed Closure Decision.\footnote{102} The ER Variation Agreements, reproduced at Annex C to this Decision, are in substantially identical form, save in relation to the Infringements in respect of which liability was admitted (in line with the ERAs) and the revised individual penalty figures.

XIV. Tesco’s decision not to contest the OFT’s proposed findings

2.108. Following the issue of the SSO, [C]\footnote{103} the OFT and Tesco discussed the possibility of [C] Tesco [not contesting the allegations against it]. [C] Tesco considered that the OFT should discontinue the Investigation in respect of Tesco’s alleged participation in the 2002 Liquid Milk Initiative, the 2003 FLM Initiative and the 2003 Butter Initiative allegations and, accordingly, submitted written representations on those allegations. After considering those representations (and Morrisons' written representations in respect of the 2002 Liquid Milk Initiative allegation), the OFT decided to close the Investigation into certain allegations.\footnote{104}

2.109. Prior to Tesco deciding not to contest its alleged participation in the Cheese Allegations, it requested the OFT provide an indication of the level of penalty that the OFT would be minded to impose and the factors the OFT would take into account in reaching that penalty should it issue an infringement decision. As a result of early resolution discussions with ER

\footnote{99}{This change affected the penalty agreed for each of Asda, Dairy Crest, Safeway, Sainsbury’s and Wiseman. See section 7C, in particular, paragraph 7.49 below.}
\footnote{100}{See paragraphs 5.2 to 5.49 below.}
\footnote{101}{The factors the OFT applied to determine each Party’s penalty are set out at section 7G of this Decision.}
\footnote{102}{Except for the ER Variation Agreement relating to Glanbia, which the OFT counter-signed before affirming its Proposed Decision because it was affected only by the reduction at Step 4 of the penalty calculations.}
\footnote{103}{[C]}
\footnote{104}{See paragraphs 2.98 to 2.104 above.}
Parties, the OFT had already reached a view on a number of the factors that it was minded to apply when determining penalties (such as the relevant starting points for each alleged infringement). Given this, the OFT considered it was in a position to respond to Tesco’s request and, therefore, indicated the factors it might be minded to take into account in determining any penalty imposed on Tesco and the overall penalty that the OFT was minded to impose on Tesco based on the turnover data Tesco had previously submitted to the OFT.106

2.110. Tesco also requested that the OFT indicate what reduction it would be minded to apply to any penalty if Tesco decided not to contest the Cheese Allegations. Consistent with previous OFT cases, the OFT informed Tesco that a party not contesting the allegations against it would constitute co-operation with the OFT’s investigation and accordingly that it would be appropriate to reduce the level of any penalty imposed on Tesco by 10 per cent for such co-operation at Step 4 of the penalty calculation as a mitigating factor.106

2.111. On 29 April 2010, Tesco submitted a letter informing the OFT that in light of the OFT’s Proposed Closure Decision it had decided that it would not contest the OFT’s proposed findings relating to Tesco’s alleged participation in the Cheese Allegations if the OFT affirmed its Proposed Closure Decision. The OFT wrote to the Recipients affirming its Proposed Closure Decision on 29 April 2010107 and announced Tesco’s decision not to contest the OFT’s allegations against it in respect of the Cheese Allegations on 30 April 2010,108 the day on which the OFT announced its decision not to pursue the Closure Allegations.109

XV. Tesco’s decision to contest the OFT’s proposed findings in respect of the 2002 and 2003 Cheese Initiative allegations

2.112. After Tesco’s decision not to contest the Cheese Allegations, the OFT gave further consideration to the factors it had previously indicated to Tesco that it was minded to take into account in determining any penalty that it may require Tesco to pay. Following this process, the OFT believed it was no longer minded to apply one of these factors – determining Tesco’s penalty by reference to its 2006/07 relevant turnover, consistent with the year of relevant turnover that the OFT had used to calculate the ER parties’ penalties.110

2.113. The OFT wrote to Tesco to inform it of the fact that it was reconsidering this element of Tesco’s penalty. Tesco wrote back to the OFT on 10

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106 See OFT423 OFT’s guidance as to the appropriate amount of a penalty (Edition 12/04), at paragraph 2.16.
107 See paragraph 2.103 above.
109 See paragraph 2.104 above.
110 See paragraph 7.37 below.
August 2010 suggesting that the OFT should not change the approach it was minded to apply on this issue but that, if the OFT did alter its approach, it should allow Tesco to consider whether it now wished to submit its representations on the Cheese Allegations. The OFT wrote to Tesco on 6 October 2010, informing it that the OFT had decided that it was no longer minded to determine Tesco’s penalty by reference to its 2006/07 relevant turnover and provided Tesco with the opportunity to reconsider its decision not to contest the Cheese Allegations. November 2010, Tesco decided to further contest its alleged involvement in the Cheese Allegations and, accordingly, submitted written representations on the SSO in respect of those allegations.111

2.114. The OFT subsequently wrote to all Parties, providing an update on timing and explaining that Tesco had submitted representations on the Cheese Allegations and that the OFT was carefully considering those representations.

2.115. Subsequently, a number of Parties wrote to the OFT suggesting that the OFT should not consider or take into account Tesco’s representations on the Cheese Allegations given that they were submitted out of time. However, given the circumstances that led to Tesco submitting its representations, the OFT considered it appropriate and fair to give due consideration to those representations.

XVI. Further evidence from Tesco

2.116. On 6 January 2011, Tesco informed the OFT that it was considering contacting a number individuals, including current and former employees of some of the ER Parties, with a view to obtaining further witness evidence. Tesco wrote to the OFT on 7 January 2011 requesting confirmation that the OFT did not have any objections to Tesco interviewing those individuals and that making such individuals available would not adversely affect the position of any of the ER Parties.

2.117. The OFT responded to Tesco on 13 January 2011 explaining that this was a matter for those involved (that is, Tesco, the specific individual(s) involved and, where relevant, the company involved) and that it should ultimately be for the individual to decide whether to provide evidence to Tesco, any other party, or the OFT. However, the OFT also explained that the deadline for Tesco submitting representations on the SSO had passed and that it would, accordingly, be inappropriate for Tesco to seek to submit any further evidence at this stage of the Investigation. [C]

2.118. In March and April 2011, Dairy Crest and McLelland contacted the OFT seeking confirmation that making their employees available to Tesco for interview would not adversely affect their position as ER Parties. The OFT

111 By this date, the OFT had decided, as a matter of its administrative priorities, not to continue the Investigation in respect of the 2002 Liquid Milk Initiative, the 2003 Butter Initiative and Tesco’s alleged involvement in the 2003 FLM Initiative allegations (see paragraphs 2.98 to 2.104 above). Tesco’s representations on the SSO in respect of the 2002 and 2003 Cheese Initiatives are referred to in this Decision as ‘Tesco’s second representations on the SSO’.
responded, explaining that it was ultimately a matter for the company and the individual to decide whether to provide evidence to Tesco but noted that an ER Party may be required to explain how evidence provided by an individual was consistent with the ER Party’s admission.

2.119. On 27 July 2011, Tesco submitted two witness statements (from [a senior manager at Dairy Crest] and [McLelland’s National Account Controller]) and an addendum to the witness statement that [a senior manager at McLelland] previously provided to Tesco (submitted by Tesco in its representations on the SSO). The OFT wrote to Tesco on 29 July 2011, explaining that this submission was significantly out of time\(^\text{112}\) and that the OFT was accordingly returning the additional witness evidence to Tesco unread. No copies of the additional witness evidence were made or retained and they were not placed on the OFT’s file. Tesco submitted this additional witness evidence again on 4 August 2011, requesting that the OFT consider it and explaining that it would be unreasonable for the OFT not to exercise its discretion to consider it. The OFT again returned this additional evidence unread on 5 August 2011 for the reasons it had previously given. Again, no copies of the additional witness evidence were made or retained and they were not placed on the OFT’s file.

XVII. Decision not to pursue allegations of bi-lateral concerted practices

2.120. As set out at paragraph 2.80 above, in the SO, the OFT proposed to make a decision in respect of five separate alleged infringements (the 2002 Liquid Milk Initiative, the 2002 Cheese Initiative, the 2003 FLM Initiative, the 2003 Butter Initiative and the 2003 Cheese Initiative allegations). The OFT proposed to find that each of these alleged infringements consisted not only of a single overall concerted practice between all of the relevant retailers and processors, but also, or in the alternative, of a series of vertical bi-lateral concerted practices between each of these retailers on the one hand and each of these processors on the other hand.

2.121. In its representations on both the SO and the SSO, Tesco submitted that it is inappropriate for the OFT to allege such bilateral concerted practices given that the OFT did not set out any framework within which to analyse such an allegation, did not conduct any analysis of the legal principles underlying such an allegation and made no attempt to analyse the evidence under such a legal framework.\(^\text{113}\)

2.122. It is necessarily the case that arrangements of the type found in this Decision\(^\text{114}\) also contain bi-lateral elements. However, as the OFT has found in this Decision that each Infringement (that is, the 2002 Cheese

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\(^\text{112}\) The deadline for representations on the SSO was initially 25 September 2009. This deadline was extended several times for Tesco for various reasons until 12 November 2010. Tesco duly submitted its representations on the SSO in respect of the 2002 and 2003 Cheese Initiative allegations on 15 November 2010 (see paragraph 2.96 above).


\(^\text{114}\) So called ‘hub and spoke’ or ‘A-B-C’ allegations, see paragraphs 3.37 to 3.56 below.
Initiative, the 2003 FLM Initiative and the 2003 Cheese Initiative) constituted a single overall concerted practice, it is not necessary for it also to find separate bi-lateral concerted practices in order to find that the Parties infringed the Chapter I prohibition of the Act. Accordingly, the OFT has not found in this Decision that the vertical bi-lateral concerted practices were also infringements of the Chapter I prohibition.
3. LEGAL BACKGROUND

A. INTRODUCTION - THE CHAPTER I PROHIBITION

3.1. This section of the Decision sets out the legal framework within which the OFT has considered the evidence in this case.

3.2. Section 2(1) of the Act prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the UK and which have as their object or effect the prevention, restriction or distortion of competition within the UK, unless they are excluded or exempt in accordance with the provisions of Part I of the Act. The prohibition applies in particular to agreements, decisions or practices which directly or indirectly fix selling prices. The prohibition imposed by section 2(1) of the Act is defined as the Chapter I prohibition.

3.3. In order to find an infringement of the Chapter I prohibition, the OFT must establish that the Parties entered into an agreement and/or engaged in a concerted practice that may affect trade within the UK and which had as its object or effect the appreciable prevention, restriction or distortion of competition.

B. APPLICATION OF SECTION 60 OF THE ACT – CONSISTENCY WITH EUROPEAN COMMUNITY LAW

3.4. Section 60(1) of the Act sets out the principle that, so far as it is possible (having regard to any relevant differences between the provisions concerned), questions arising in relation to competition within the UK are dealt with in a manner which is consistent with the treatment of corresponding questions arising in European Union ('EU') law in relation to competition within the EU. In particular, under section 60(2) of the Act, the OFT must act (so far as it is compatible with the provisions of Part I of the Act) with a view to securing that there is no inconsistency with the principles laid down by the Treaty on the Functioning of the European Union ('TFEU') and the European Court and any relevant decision of the European Court in determining any corresponding questions arising in EU law. In addition, under section 60(3) of the Act, the OFT must have regard to any relevant decision or statement of the European Commission (the 'Commission').

115 Under section 2(3) of the Act, subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom and under section 2(7), 'United Kingdom' means, in relation to an agreement which operates or is intended to operate only in a part of the United Kingdom, that part.

116 Section 2(2) of the Act.

117 As to the requirement for appreciability, see OFT401 Agreements and Concerted Practices (Edition 12/04), at paragraphs 2.15 to 2.21.

118 The European Court is defined in section 59 of the Act as meaning the Court of Justice of the European Communities (now the Court of Justice of the European Union) and including the Court of First Instance (now the General Court).
3.5. The provision in EU competition law equivalent to the Chapter I prohibition is Article 101 of the TFEU (formerly Article 81 of the EC Treaty), on which the Chapter I prohibition is modelled.

C. APPLICATION OF ARTICLE 101 OF THE TFEU – EFFECT ON INTERSTATE TRADE

3.6. Following the entry into force of Council Regulation (EC) No 1/2003 on 1 May 2004, the OFT is required, when applying national competition law to agreements and concerted practices between undertakings which may affect trade between EU Member States, also to apply Article 101 TFEU ('Article 101').

3.7. In view of the OFT’s conclusion that the infringements found in this Decision took place before 1 May 2004, the OFT does not consider that it is under a duty to apply Article 101 in the particular circumstances of this case. Accordingly, the OFT has not considered whether trade between EU Member States may have been appreciably affected, and this Decision relates solely to whether the Chapter I prohibition has been infringed.

D. UNDERTAKINGS

3.8. The Chapter I prohibition applies to agreements or concerted practices between undertakings. In order to demonstrate that there has been an infringement, it is therefore necessary to establish that the Parties are undertakings.

3.9. The word undertaking is not defined in the Act or the TFEU Treaty. However, it has been given a broad interpretation by the ECJ in which it has been held to cover ‘every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed’.

3.10. Accordingly, the key consideration in establishing whether an entity is an undertaking is whether it is engaged in ‘economic activity’. The ECJ has defined economic activity broadly as any activity ‘of an industrial or commercial nature’ consisting in ‘offering goods and services on the market’.

3.11. The term undertaking includes any natural or legal person that is capable of carrying on commercial or economic activities. This has resulted in a variety of legal forms of organisation being captured by this definition, including companies, partnerships, individuals operating as sole traders, trade associations and (in some circumstances) public

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119 OJ L 1, 4 January 2003, pages 1 to 25.
120 Article 3, Regulation 1/2003.
123 In all their corporate forms, including a limited partnership (Case 258/78 Nungesser v Commission [1982] ECR 2015; or a trust company, see Commission decision Fides, OJ 1979 L 57/33.
124 See, for example, Commission decision Breeders’ rights: Roses, OJ 1985 L 369/9.
entities that offer goods or services on a given market. The fact that an organisation does not make a profit, lacks profit motive or does not have an economic purpose does not disqualify it as an undertaking provided that it is carrying out some form of commercial or economic activity.

E. RELEVANT CASE LAW IN RELATION TO AGREEMENTS AND/OR CONCERTED PRACTICES

I. Agreement and/or concerted practice

3.12. The Chapter I prohibition applies to 'agreements' and 'concerted practices'.

3.13. For the purposes of finding an infringement of the Chapter I prohibition, it is not necessary for the OFT to characterise an arrangement specifically as either an agreement or a concerted practice.

3.14. This has been confirmed by the ECJ, which has held that the concepts of agreement and concerted practice are not mutually exclusive and that there is no rigid dividing line between the two. They are both intended: to catch forms of collusion having the same nature and are only distinguishable from each other by their intensity and the forms in which they manifest themselves.

3.15. Similarly, the Competition Appeal Tribunal (CAT) confirmed in its judgments in both the Replica Kit and Toys cases:

'It is trite law that it is not necessary for the OFT to characterise an infringement as either an agreement or a concerted practice: it is sufficient that the conduct in question amounts to one or the other'.

II. Agreement

3.16. An agreement within the meaning of the Chapter I prohibition involves a concurrence of wills between at least two parties, the form in which it is

126 See, for example, Case 71/74 FRUBO v Commission [1975] ECR 563.
130 Section 2(1) of the Act.
manifested being unimportant so long as it constitutes the faithful expression of the parties’ intention.\textsuperscript{135}

3.17. As has been held by the General Court, for an agreement to exist:

‘...it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way’.\textsuperscript{136}

3.18. Although it is essential to show the existence of a joint intention to act on the market in a specific way in accordance with the terms of the agreement, it is not necessary to establish a joint intention to pursue an anti-competitive aim as such.\textsuperscript{137} The form in which the parties’ intention to behave on the market is expressed is irrelevant.\textsuperscript{138}

3.19. There is no requirement for an agreement to be legally binding, nor to contain any enforcement mechanisms.\textsuperscript{139} An agreement does not have to be in writing\textsuperscript{140} and may be express or implied from the conduct of the parties.\textsuperscript{141}

3.20. The prohibition is intended to catch a wide range of agreements including simple understandings and ‘gentlemen’s agreements’ since, by their nature, anti-competitive agreements are rarely written down.\textsuperscript{142}

3.21. Thus, for example, the CAT found in the Toys case that there was an informal ‘gentleman’s agreement’ between a retailer, Argos, and its supplier, Hasbro, to the effect that Argos would sell certain of Hasbro’s products at the retail price recommended by Hasbro. The agreement was


\textsuperscript{138} Joined cases T-305/94 etc Limburgse Vinyl Maatschappij and Others v Commission [1999] ECR II-931, at paragraph 715.


\textsuperscript{140} Case C-41/69 ACF Chemiefarma NV v Commission [1970] ECR 661, at paragraphs 106 to 114; and Commission Decision Citric Acid OJ 2002 L 239/18, at paragraph 137.


\textsuperscript{142} OFT401 Agreements and Concerted Practices (Edition 12/04), at paragraphs 2.7. See also the judgment of the ECJ regarding gentlemen’s agreements in Case C41/69 ACF Chemiefarma NV v Commission [1970] ECR 661 (in particular, paragraphs 106 to 114). Also, Commission Decision Citric Acid OJ 2002 L 239/18, at paragraph 137.
verbal and had not been reduced to writing. Neither was it legally binding, nor did it result in any guarantee that Argos would actually follow Hasbro’s recommended prices.\textsuperscript{143}

III. Concerted practice

3.22. The Chapter I prohibition also applies to concerted practices. A concerted practice has been defined by the ECJ as:

‘...a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition’.\textsuperscript{144}

3.23. The ECJ has defined the scope of the term on several occasions. In Dyestuffs, it held that:

‘Although every producer is free to change his prices, taking into account in so doing the present or foreseeable conduct of his competitors, nevertheless it is contrary to the rules on competition contained within the Treaty for a producer to co-operate with his competitors, in any way whatsoever, in order to determine a co-ordinated course of action relating to a change of prices and to ensure its success by prior elimination of all uncertainty as to each other’s conduct regarding the essential elements of that action, such as amount, subject-matter, date and place of the changes’.\textsuperscript{145}

3.24. The ECJ provided further clarification of the term in its judgment in Anic:

‘The list in Article [81(1)] of the Treaty\textsuperscript{146} is intended to apply to all collusion between undertakings, whatever form it takes... The only essential thing is the distinction between independent conduct, which is allowed, and collusion, which is not, regardless of any distinction between types of collusion’.\textsuperscript{147}

3.25. The fact that concerted practices do not arise only as between competitors has been confirmed by the CAT, which held in Toys that:\textsuperscript{148}

\textsuperscript{143} Argos Limited and Littlewoods Limited v Office of Fair Trading [2004] CAT 24, at [672].
\textsuperscript{146} Now Article 101(1) TFEU.
\textsuperscript{148} Argos Limited and Littlewoods Limited v Office of Fair Trading [2004] CAT 24, at [703].
‘...the underlying idea of 'concerted practice' is equally applicable to the vertical relationship between a supplier and a retailer.’

3.26. The Court of Appeal expressed the same view, stating that: 149

‘The Chapter I prohibition catches agreements and concerted practices whether between undertakings at different levels or between those at the same level of commercial operation.’

3.27. The Court of Appeal’s judgment in Toys and Replica Kit is consistent with existing EU jurisprudence concerning the relationship between distributors and suppliers. In Pioneer, a supplier was found to have participated in a concerted practice with its distributors and the ECJ concluded that a supplier has an almost special responsibility in its dealings with its distributors to prevent potentially anti-competitive agreements and/or concerted practices:

‘on account of its central position, it was obliged to display particular vigilance in order to prevent concerted efforts of that kind from giving rise to practices contrary to the competition rules’. 150

3.28. In addition to the requirement of concertation between the parties, the concept of a concerted practice has also been held to imply conduct on the market pursuant to such collusion, and a relationship of cause and effect between the two. Thus, in Anic the ECJ held:

‘As is clear from the very terms of Article [101(1)] of the [TFEU], a concerted practice implies, besides undertakingsconcerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two’. 151

3.29. The concepts of concertation and subsequent conduct in the market place are considered in further detail in paragraphs 3.30 to 3.56 below.

Concertation

3.30. The concept of a concerted practice must be understood in light of the principle that each economic operator must determine independently the policy it intends to adopt on the market. 152 The ECJ has held that whilst undertakings may adapt themselves intelligently to existing or anticipated conduct of their competitors, the requirement of independence strictly precludes:

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Any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market'.

3.31. A concerted practice may, in particular, occur where there are reciprocal contacts between undertakings, which have as their object or effect removing or reducing uncertainty as to their future conduct on the market, including by way of the disclosure to a competitor of the course of conduct which an undertaking has itself decided to adopt or contemplates adopting on the market.

3.32. In Cimenteries, the General Court held that reciprocal contacts are established:

'Where one competitor discloses its future intentions or conduct on the market to another when the latter requests it, or at the very least, accepts it...'

and that:

'It is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct on the market to be expected on his part'.

3.33. Accordingly, in order to demonstrate concertation, it is not necessary to show that the competitor in question has formally undertaken, in respect of one or several others, to adopt a particular course of conduct or that the competitors have expressly requested information on their future conduct on the market. It is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to his conduct on the market. The CAT applied this principle in Replica Kit and concluded that:

'Applying the principles of Suiker Unie and Cimenteries, ... the facts as we find them to be disclose direct contact between competitors, taking


place in a private home, at which retail prices were discussed. In the course of that contact both JJB and Sports Soccer respectively disclosed the course of conduct which they had decided to adopt or contemplated adopting in the market, namely to price at £39.99. By stating their respective pricing intentions, both JJB and Sports Soccer in our view substantially reduced uncertainty as to their future conduct in the market'.

3.34. Concertation may occur as a result of the unilateral disclosure of information by one party to another (where that information is at the very least accepted by the recipient). In Tate & Lyle, the General Court held that:

'Moreover, the fact that only one of the participants at the meetings in question reveals its intentions is not sufficient to exclude the possibility of an agreement or concerted practice'.

3.35. Citing this in Replica Kit, the CAT concluded that:

'Even if the evidence had established only that JJB had unilaterally revealed its future pricing intentions to Allsports and Sports Soccer a concerted practice falling within the Chapter I prohibition would thereby have been established. The fact of having attended a private meeting at which prices were discussed and pricing intentions disclosed, even unilaterally, is in itself a breach of the Chapter I prohibition, which strictly precludes any direct or indirect contact between competitors having, as its object or effect, either to influence future conduct in the market or to disclose future intentions'.

3.36. In Aalborg Portland, the ECJ stated that an undertaking which receives information by participating in meetings, without manifestly opposing the anti-competitive agreements concluded, will be taken to have participated in a concerted practice unless that undertaking puts forward evidence to establish that it had publicly distanced itself from what was discussed:

'81. According to settled case-law, it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs (see Case C-199/92 P Hüls v Commission [1999] ECR I-4287, paragraph 155, and Case C-49/92 P Commission v Anic [1999] ECR I-4125, paragraph 96).

82. The reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to

\[159\] Cases T-202/98 etc Tate & Lyle plc and Others v Commission [2001] ECR II-2035, at paragraph 54.
believe that it subscribed to what was decided there and would comply with it.

83. The principles established in the case-law cited at paragraph 81 of [the judgment in the Aalborg Portland case] also apply to participation in the implementation of a single agreement. In order to establish that an undertaking has participated in such an agreement, the Commission must show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk (Commission v Anic, paragraph 87).

84. In that regard, a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable in the context of a single agreement.

85. Nor is the fact that an undertaking does not act on the outcome of a meeting having an anti-competitive purpose such as to relieve it of responsibility for the fact of its participation in a cartel, unless it has publicly distanced itself from what was agreed in the meeting (see Case C-291/98 P Sarrió v Commission [2000] ECR I-9991, paragraph 50).

Direct or indirect contact

3.37. It is well established that the prohibition on concertation prohibits any direct or indirect contact between operators, the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.162

3.38. In Replica Kit, the CAT considered a situation where competitors disclosed their future pricing intentions indirectly through a common supplier and stated:

'... Suiker Unie and subsequent cases state that what is strictly precluded is "any direct or indirect contact" between economic operators the object or effect of which is either to influence future market conduct or to disclose future intentions...

Thus, for example, if one retailer A privately discloses to supplier B its future pricing intentions in circumstances where it is reasonably foreseeable that B might make use of that information to influence

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161 Cases C-204/00 P etc Aalborg Portland and Others v Commission [2004] ECR I-123, at paragraphs 81 to 85.
market conditions, and B passes that pricing information on to a competing retailer C, then in our view A, B and C are all to be regarded on those facts as parties to a concerted practice having as its object or effect the prevention, restriction or distortion of competition. The prohibition on direct or indirect contact between competitors on prices has been infringed'.

[Italics in original]

3.39. The CAT subsequently applied the same formula in its assessment of evidence of indirect disclosures of future pricing intentions by competing toys and games retailers in Toys.\textsuperscript{164}

3.40. Accordingly, the CAT considered that a concerted practice could exist in circumstances where:

i. retailer A disclosed its future retail pricing intentions to supplier B;

ii. it was reasonably foreseeable that supplier B might make use of that information to influence market conditions; and

iii. supplier B passed that pricing information on to a competing retailer C.

3.41. The Court of Appeal confirmed the CAT’s conclusions in both Replica Kit and Toys on appeal, concurring with the view that concerted practices existed in both cases. However, the Court of Appeal suggested that the CAT’s conclusions on appeal, ’may have gone too far’ in the framework outlined in paragraph 3.40 above. The Court of Appeal did not, however, expressly over-rule the CAT. In paragraph 91 of its judgment, when addressing the Replica Kit appeal, the Court of Appeal stated that:

‘... it does seem to us that the Tribunal may have gone too far, in that paragraph, insofar as it suggests that if one retailer (A) privately disclosed to a supplier (B) its future pricing intentions “in circumstances where it is reasonably foreseeable that B might make use of that information to influence market conditions” and B then passes that information on to a competing retailer (C) then A, B and C are all regarded as parties to a concerted practice having as its object or effect the prevention, restriction or distortion of competition. The Tribunal may have gone too far if it intended that suggestion to extend to cases in which A did not, in fact, foresee that B would make use of the pricing information to influence market conditions or in which C did not, in fact, appreciate that the information was being passed to him with A’s concurrence. This is not such a case on the facts’.\textsuperscript{165}

[Emphasis added]

\textsuperscript{163} JJB Sports plc and Allsports Limited v Office of Fair Trading [2004] CAT 17, at [657] and [659].

\textsuperscript{164} Argos Limited and Littlewoods Limited v Office of Fair Trading [2004] CAT 24, at [779].

3.42. At paragraph 140 of its judgment, when addressing the Toys appeal, the Court of Appeal again observed that the CAT ‘may have gone too far’ when considering an appropriate framework for establishing indirect concerted practices. The Court of Appeal went on to say, at paragraph 141, that the following proposition fell squarely within the General Court’s judgment in *Bayer*\(^{166}\) and was sufficient to dispose of the point in the Toys appeal:

‘...if (i) retailer A discloses to supplier B its future pricing intentions in circumstances where A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is or may be one), (ii) B does, in fact, pass that information to C in circumstances where C may be taken to know the circumstances in which the information was disclosed by A to B and (iii) C does, in fact, use the information in determining its own future pricing intentions, then A, B and C are all to be regarded as parties to a concerted practice having as its object the restriction or distortion of competition.’\(^{167}\)

[Emphasis added]

3.43. The Court of Appeal then said that reciprocity is not required to find a concerted practice, but does strengthen the case against the parties:

‘The case is all the stronger where there is reciprocity: in the sense that C discloses to supplier B its future pricing intentions in circumstances where C may be taken to intend that B will make use of that information to influence market conditions by passing that information to (amongst others) A, and B does so.’\(^{168}\)

IV. Decision framework: the A-B-C test

3.44. In light of the above, the OFT has applied the following framework in this Decision in analysing the evidence set out in section 5 below (for convenience referred to as the ‘A-B-C test’) pursuant to which the OFT considers that retailer A, supplier B and retailer C are parties to a concerted practice where:

i. retailer A disclosed its future retail pricing intentions to supplier B in circumstances where retailer A may be taken to have intended or did, in fact, foresee that supplier B would make use of that information to influence market conditions by passing that information to other retailer competitors of retailer A (of whom retailer C is or may be one); and

ii. supplier B did, in fact, pass that pricing information on to retailer C in circumstances where retailer C may be taken to have known the circumstances in which the information was disclosed by retailer A to supplier B or retailer C did, in fact, appreciate that the


\(^{168}\) Ibid.
information was being passed to it with retailer A’s concurrence; and

iii. retailer C did, in fact, use that information in determining its own future pricing intentions.

3.45. Although the Court of Appeal suggested that the CAT ‘may have gone too far’ when the CAT’s found that, for the A-B-C test to be satisfied, it is sufficient that it was ‘reasonably foreseeable’ for retailer A that supplier B would make use of retailer A’s future retail pricing intentions to influence market conditions by passing that information on to other retailers, the Court of Appeal stated explicitly in its judgment that on the facts of the case it did not need to decide whether the CAT’s suggestion was correct.

3.46. The OFT considers that, where an undertaking discloses its future retail pricing intentions to a supplier in circumstances in which it is ‘reasonably foreseeable’ that that information will be passed on to other retailers in order to influence market conditions, this might well be sufficient to establish a concerted practice in a particular case. However, it is not necessary for the OFT to conclude on this point for the purposes of this Decision given that the evidence set out at section 5 below satisfies the legal framework set out by the Court of Appeal. Specifically, the evidence set out in this Decision shows that retailer A disclosed its future retail pricing intentions in circumstances in which it may be taken to have intended that supplier B would make use of that information to influence market conditions by passing that information to other retailers. In addition, the evidence demonstrates that, in this case, retailer A did, in fact, foresee that supplier B would pass on retailer A’s future retail pricing intentions to other retailers.

3.47. Additionally, the evidence shows that supplier B passed retailer A’s future retail pricing intentions to retailer C in circumstances in which retailer C may be taken to know the circumstances in which the information was disclosed by retailer A to supplier B. In addition, the evidence demonstrates that, in this case, retailer C did, in fact, appreciate that retailer A’s future retail pricing intentions were passed to it with retailer A’s concurrence.

3.48. In its representations on the SO, Tesco submitted that the OFT must prove both elements of the first and second limbs of the A-B-C test, namely that:

i. retailer A may be taken to have intended and did, in fact, foresee that supplier B would make use of that information to influence market conditions by passing that information to other retailer competitors of retailer A; and

169 See paragraph 3.41 above.
171 See paragraph 3.44 above.
172 See document number 62 to the SSO, at paragraph 2.21.
ii. retailer C may be taken to know the circumstances in which the information was disclosed by retailer A to supplier B and retailer C did, in fact, appreciate that the information was being passed to it with retailer A’s concurrence.

3.49. In the OFT’s view, this is incorrect. The OFT considers that these elements of the A-B-C test are alternative, and not cumulative, as suggested by Tesco. This means that the first limb of the test is satisfied by proving that:

i. retailer A may be taken to have intended that supplier B would make use of that information to influence market conditions by passing that information to other retailer competitors or, in the alternative,

ii. retailer A did, in fact, foresee that supplier B would make use of that information to influence market conditions by passing that information to other retailer competitors.

3.50. Similarly, the OFT considers that the second limb of the test is satisfied by proving that:

i. retailer C may be taken to know the circumstances in which the information was disclosed by retailer A to supplier B or, in the alternative,

ii. retailer C did, in fact, appreciate that the information was being passed to it with retailer A’s concurrence.

3.51. For each of the first and the second limb, where the facts prove both elements (as they do in this Decision), the test would clearly also be met. The OFT has concluded that the evidence set out in this Decision is sufficient to meet both of the alternative elements of the first and second limbs of the A-B-C test. Accordingly, when assessing the evidence in section 5 below, the OFT has referred to both of the alternative elements of the first and second limbs of the A-B-C test.

3.52. In its representations on the SO, Tesco also submitted that, alternatively, these two elements ‘are to be treated as equivalent on the facts’. It is not necessary for the OFT to determine whether Tesco’s representation is correct given that the OFT has concluded that the evidence set out in this Decision is sufficient to meet both of these alternative elements. However, the OFT considers that Tesco’s representation is not correct – the wording used by the Court of Appeal, itself, shows that these alternative elements are not equivalent.

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173 See document number 62 to the SSO, at paragraph 2.20.
Anic presumption

3.53. The OFT considers that the third limb of the framework set out in the Court of Appeal's judgment\(^{174}\) is consistent with existing jurisprudence on concerted practices. The concept of a concerted practice implies, besides undertakingsconcerting with each other, subsequentconduct on the market and a relationship ofcause and effect between the two.\(^{175}\)

3.54. Where an undertaking participating in concerting arrangements remains active on the market, there is a presumption that it will take account of the information exchanged with its competitors. This was formulated in Anic, where the ECJ held:

‘...subject to proof to the contrary, which it is for the economic operators concerned to adduce, there is a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on the market, particularly when they concert together on a regular basis over a long period, as was the case here.’\(^{176}\)

3.55. The EU Courts and the CAT have re-stated this principle in a number of subsequent judgments.\(^{177}\) In its judgment in Replica Kit, the CAT, relying on EU jurisprudence, stated that:

‘Even where participation in a meeting is limited to the mere receipt of information about the future conduct of a competitor, the law presumes that the recipient of the information cannot fail to take that information into account when determining its own future policy on the market.’\(^{178}\)

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\(^{174}\) That retailer C does, in fact, use information relating to retailer A’s future retail pricing intentions in determining its own future retail pricing intentions (see paragraph 3.44 above).


\(^{177}\) JJB Sports plc and Allsports Limited v Office of Fair Trading [2004] CAT 17, at [873]. In reaching this conclusion the CAT referred to existing EU jurisprudence citing Cases T-202/98 etc Tate & Lyle plc and Others v Commission [2001] ECR II-2035, at paragraphs
3.56. As far as the A-B-C test is concerned, this means that, having received retailer A’s future retail pricing intentions through supplier B, if retailer C remains active on the market it can be presumed when determining its own conduct on the market to have taken into account the information it received from supplier B, unless retailer C can prove the contrary.

V. Single overall infringement

3.57. Where a group of undertakings pursues a common objective or objectives involving at one and the same time agreements and concerted practices, it is not necessary to divide the conduct by treating it as consisting of a number of separate infringements where there is sufficient consensus to adhere to a plan limiting the commercial freedom of the parties.\textsuperscript{179}

3.58. For example, the ECJ held in \textit{Anic} that:

‘When... the infringement involves anti-competitive agreements and concerted practices, the Commission must, in particular, show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk.’\textsuperscript{180}

3.59. Agreements and/or concerted practices may also constitute a single continuous infringement notwithstanding that they vary in intensity and effectiveness, or even if the arrangement in question is suspended during a short period.\textsuperscript{181}

3.60. Further, the ECJ has stated that an undertaking that has taken part in an agreement and/or concerted practice through conduct of its own:

‘...which was intended to bring about the infringement as a whole [\textit{will}] also [\textit{be}] responsible, throughout the entire period of its participation in that infringement, for conduct put into effect by other undertakings in the context of the same infringement.’\textsuperscript{182}

3.61. Moreover, a finding of an agreement and/or concerted practice does not require a finding that all the parties have given their express or implied consent to each and every aspect of the agreement.\textsuperscript{183} Rather, the parties may show varying degrees of commitment to the common plan and there may well be internal conflict. The mere fact that a party does not abide fully by an agreement or concerted practice which is manifestly anti-

competitive does not relieve that party of responsibility for it.\footnote{Cases T-305/94 etc Limburgse Vinyl Maatschappij NV v Commission [1999] ECR II-931, at paragraph 773; and Case T-141/89 Tréfileurope v Commission [1995] ECR II-791, at paragraphs 60 and 85.} Equally, the fact that a party may come to recognise that, in practice, it can cheat on the agreement or concerted practice at certain times does not preclude a finding that there was a continuing single overall infringement.\footnote{Case C-246/86 Belasco v Commission [1989] ECR 2117, at paragraphs 10 to 16.}

**F. PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION**

3.62. As noted at paragraph 3.2 above, the Chapter I prohibition prohibits

> 'agreements between undertakings...or concerted practices which...have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom.'

I. The law on anti-competitive object


3.64. Agreements or concerted practices that have been held by the ECJ to prevent, restrict or distort competition by object are those that, by their very nature, have the potential to do so.\footnote{See for example, Case 123/83 BNIC v Clair [1985] ECR 391, at paragraph 22. See also Communication from the Commission – Notice – Guidelines on the application of Article 101(3) of the Treaty (OJ 2004 C 101/97), at paragraphs 21 and 22.}

3.65. Further, the ECJ stated in its recent \textit{T-Mobile Netherlands} judgment that agreements or concerted practices which have as their object the prevention, restriction or distortion of competition are those which can be regarded, 'by their very nature', as being injurious to the proper functioning of normal competition.\footnote{Case C-8/08 T-Mobile Netherlands BV and Others v NMa [2009] ECR I-4529, at paragraph 29. At paragraph 24 of its judgment, the ECJ stated that 'the criteria laid down in the Court’s case law for the purposes of determining whether conduct has as its object or effect the prevention, restriction or distortion of competition are applicable irrespective of whether the case entails an agreement, a decision or a concerted practice'.}

3.66. The ECJ went on to state that in order for an agreement or concerted practice to be regarded as having an anti-competitive object:

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\footnote{Case C-246/86 Belasco v Commission [1989] ECR 2117, at paragraphs 10 to 16.}


\footnote{See for example, Case 123/83 BNIC v Clair [1985] ECR 391, at paragraph 22. See also Communication from the Commission – Notice – Guidelines on the application of Article 101(3) of the Treaty (OJ 2004 C 101/97), at paragraphs 21 and 22.}

\footnote{Case C-8/08 T-Mobile Netherlands BV and Others v NMa [2009] ECR I-4529, at paragraph 29. At paragraph 24 of its judgment, the ECJ stated that 'the criteria laid down in the Court’s case law for the purposes of determining whether conduct has as its object or effect the prevention, restriction or distortion of competition are applicable irrespective of whether the case entails an agreement, a decision or a concerted practice'.}
‘... it is sufficient that it has the potential to have a negative impact on competition. In other words, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition’. ¹⁸⁹

[Emphasis added]

3.67. The assessment of whether or not an agreement or concerted practice has as its object the prevention, restriction or distortion of competition should take into account a number of factors, including the content of the agreement and the objective aims pursued by it.¹⁹⁰ In this connection, the object is not assessed by reference to the parties’ subjective intentions when they enter into it, but is determined by an analysis of its objective aims.¹⁹¹ Nonetheless, although proof of subjective intention is not a necessary condition in finding that an agreement or concerted practice has an anti-competitive object, there is nothing to prevent the OFT from taking the intention of the relevant parties into account in reaching such a finding.¹⁹²

3.68. The assessment must also take account of the actual framework and, therefore, the legal and economic context in which the arrangement (to which the restriction is imputed) is deployed.¹⁹³

3.69. Where the obvious consequence of an agreement or concerted practice is to prevent, restrict or distort competition, that will be its object for the purpose of the Chapter I prohibition. This will be the case even if the agreement or concerted practice also had other objectives.¹⁹⁴ Further, an agreement or concerted practice can have an anti-competitive object independently of whether or not the parties to the agreement or concerted practice have considered the anti-competitive nature of their conduct and appreciated that it might be anti-competitive and independently of whether the agreement or concerted practice has the sole aim of preventing, restricting or distorting competition or simultaneously pursues other legitimate objectives.¹⁹⁵

3.70. The OFT considers that an agreement or concerted practice which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, fixes the prices at which goods or

services are sold will amount to an object infringement of the Chapter I prohibition, since such price-fixing, by its very nature, prevents, restricts or distorts competition to an appreciable extent.  

3.71. Additionally, an agreement may constitute a price-fixing agreement or concerted practice where it restricts price competition even if it does not entirely eliminate it.  

3.72. More particularly, the mere disclosure of pricing intentions by one economic operator to a competitor will be considered to have an anti-competitive object, whether the disclosure is direct or indirect, as demonstrated in the following cases.  

3.73. In Rhône Poulenc, the General Court held that the direct exchange of information between competitors about, among other matters, the prices they wished to see charged on the market and the prices they intended to charge amounted to a concerted practice and that it had been established that the meetings at which the exchanges took place had an anti-competitive object. In Tate & Lyle, the General Court held that such a conclusion applied also where the participation of one or more undertakings in meetings with an anti-competitive purpose was limited to the mere receipt of information about the future conduct, in relation to pricing, of their market competitors.  

3.74. In Replica Kit, the CAT held that the indirect disclosure and exchange of future retail pricing intentions between competing retailers through a common supplier had an anti-competitive object. In respect of the indirect exchange of future retail pricing intentions between competitors (in this instance, JJB and Sports Soccer) via an intermediary (in this instance, Umbro), the CAT held that:  

‘In those circumstances, we find that there was an agreement, or concerted practice, within the meaning of the Chapter I prohibition involving at least JJB, Umbro and Sports Soccer, in which each of JJB and Sports Soccer either agreed with Umbro, or confirmed to Umbro their respective intention, not to discount from £39.99 during Euro 2000, on the understanding that no other major retailer would do so. At the very least, each company knowingly gave Mr. Ronnie an intimation or assurance to that effect. Mr. Ronnie then confirmed to each company what the others’ intentions were. That in our judgment is properly characterised either as an agreement to fix the prices of the England shirts at £39.99 during Euro 2000, or as a concerted practice the object or effect of which was to influence the conduct on the market of a competitor, or to disclose to one competitor the future pricing intentions  

196 See OFT401 Agreements and Concerted Practices (Edition 12/04), at paragraph 3.4.  
197 Ibid, at paragraph 3.6.  
199 Ibid, at paragraph 157.  

3.75. The Court of Appeal upheld the CAT’s finding that a concerted practice of this nature had as its ‘object or effect’ the prevention, restriction or distortion of competition.\footnote{JJB Sports plc v Office of Fair Trading [2006] EWCA Civ 1318, at paragraphs 102 to 103.} Moreover, in relation to Toys, the Court of Appeal held that the indirect disclosures of future retail pricing intentions by competing toy retailers amounted to a concerted practice having an anti-competitive object.\footnote{Argos Limited and Littlewoods Limited v Office of Fair Trading [2006] EWCA Civ 1318, at paragraph 141.}

II. No need to prove anti-competitive effect where anti-competitive object is established

3.76. In the context of Article 101 TFEU, the ECJ has held that:

‘there is no need to take account of the concrete effects of an agreement once it has as its object the prevention, restriction or distortion of competition’.\footnote{Consten and Grundig v Commission [1966] ECR 299, at page 342; and more recently, see Case C-8/08 T-Mobile Netherlands BV and Others v NMa [2009] ECR I-4529, at paragraph 29.}

3.77. Equally, where the conduct in question is a concerted practice, the ECJ has held that, although the concept of an ‘object infringement’ presupposes conduct of the participating undertakings on the market, it does not necessarily imply that the conduct should produce the concrete effects of preventing, restricting or distorting competition.\footnote{Case C-49/92 P Commission v Anic Partecipazioni SpA [1999] ECR I-4125, at paragraphs 122 to 123. See also Apex Asphalt and Paving Co Limited v Office of Fair Trading [2005] CAT 4, at [206(xii)]; followed in Makers UK Limited v Office of Fair Trading [2007] CAT 11, at [103(xii)].} Concerted practices are therefore prohibited regardless of their effect, when they have an anti-competitive object.\footnote{Case C-49/92 P Commission v Anic Partecipazioni SpA [1999] ECR I-4125, at paragraphs 124; Case C-199/92 P Hüls AG v Commission [1999] ECR I-4287, at paragraphs 163 to 165 and Commission decision British Sugar, OJ 1999 L 76/1, at paragraph 95, substantially upheld on appeal in Cases T-202/98 etc Tate & Lyle and Others v Commission [2001] ECR II-2035. See also Apex Asphalt and Paving Co Limited v Office of Fair Trading [2005] CAT 4, at [206(xi)]; followed in Makers UK Limited v Office of Fair Trading [2007] CAT 11, at [103(xi)].}

3.78. The CAT confirmed in Toys that the OFT is not, as a matter of law, obliged to establish that an agreement or concerted practice has an anti-competitive effect where it is found to have as its object the prevention, restriction or distortion of competition:
'It is trite law that once it is shown that such agreements or practices had the object of preventing, restricting, or distorting competition, there is no need for the OFT to show what the actual effect was: see Cases 56 and 58/64 Consten and Grundig v Commission [1966] ECR 299, 342 and many subsequent cases.'\textsuperscript{207}

3.79. The ECJ has made clear that, in order to find an object infringement, an agreement or concerted practice need only be capable, in an individual case, of preventing, restricting or distorting competition.\textsuperscript{208} The OFT is not therefore required to conduct a competitive analysis to demonstrate an actual prevention, restriction or distortion of competition where it is established that the agreement or concerted practice had the object of preventing, restricting or distorting competition.

3.80. A finding that an agreement or concerted practice has an anti-competitive object does not amount to a presumption which is rebuttable by an analysis of the actual effects of the agreement or concerted practice.\textsuperscript{209}

G. APPRECIABILITY

3.81. An agreement or concerted practice will infringe the Chapter I prohibition if it has as its object or effect the appreciable prevention, restriction or distortion of competition in the UK. The OFT takes the view that an agreement or concerted practice will generally have no appreciable effect on competition if the aggregate market share of the parties to the agreement or concerted practice does not exceed 10 per cent of the relevant market affected by the agreement where the agreement is made between competing undertakings (that is, undertakings which are actual or potential competitors on any of the market(s) concerned).\textsuperscript{210}

3.82. However, the OFT will generally regard any agreement or concerted practice which directly or indirectly fixes prices as being capable of having an appreciable effect even where the parties’ combined market share falls below the 10 per cent threshold, provided that such agreements or concerted practices do not have only insignificant effects.\textsuperscript{211}

\textsuperscript{207} Argos Limited and Littlewoods Limited v Office of Fair Trading [2004] CAT 24, at [357] and [708].
\textsuperscript{208} Case C-8/08 T-Mobile Netherlands BV and Others v NMa [2009] ECR I-4529, at paragraph 29.
\textsuperscript{209} Ibid.
\textsuperscript{210} From 1 May 2004, the OFT has had regard to the Commission thresholds on appreciability in determining whether there is an appreciable effect on competition. See Commission Notice on Agreements of Minor Importance (OJ 2001 C 368/ 13) and OFT401 Agreements and Concerted Practices (Edition 12/04), at paragraphs 2.16 to 2.19.
\textsuperscript{211} See OFT401 Agreements and Concerted Practices (Edition 12/04), at paragraphs 2.16 and 2.17 and Case 5/69 Völk v Vervaeke [1969] ECR 295. The de minimis doctrine formulated in that case (the interpretation of which is now set out in the Commission Notice on ‘Agreements of Minor Importance’) states that ‘an agreement will fall outside the prohibition where it has only an insignificant effect on the market, taking into account the weak position which the persons concerned have on the market of the product in question’ (the market shares in that case were 0.2 per cent and 0.5 per cent respectively).
H. EFFECT ON TRADE WITHIN THE UK

3.83. By virtue of Section 2(1)(a) of the Act, the Chapter I prohibition applies only to agreements or concerted practices which 'may affect trade within the United Kingdom'. For the purposes of the Chapter I prohibition, 'the United Kingdom' includes any part of the UK where an agreement or concerted practice operates or is intended to operate.\(^\text{212}\) By their very nature, agreements or concerted practices that restrict price competition are likely to affect trade. It should be noted that, to infringe the Chapter I prohibition, an agreement or concerted practice does not actually have to affect trade as long as it is capable of affecting trade. Moreover, effect on trade within the UK is a purely jurisdictional test to demarcate the boundary line between the application of EU competition law and national competition law. The test is not read as importing a requirement that the effect on trade should be appreciable.\(^\text{213}\)

I. BURDEN AND STANDARD OF PROOF

3.84. The burden of proving an infringement of the Chapter I prohibition lies upon the OFT. The CAT held in \textit{Napp}\(^\text{214}\) that:

‘95. ...As regards the burden of proof, the Director\(^\text{215}\) accepts that it is incumbent upon him to establish the infringement, and that the persuasive burden of proof remains on him throughout. However, that does not necessarily prevent the operation of certain evidential presumptions...

100. In our view it follows from Article 6(2) [of the European Convention on Human Rights] that the burden of proof rests throughout on the Director to prove the infringements alleged.’

3.85. However, this burden does not preclude the OFT from relying, where appropriate, on evidential presumptions. In \textit{Napp}, the CAT went on to say:

‘That approach does not in our view preclude the Director, in discharging the burden of proof, from relying in certain circumstances, on inferences or presumption that would, in the absence of any countervailing indications, normally follow from a given set of facts, for example ... that an undertaking’s presence at a meeting with manifestly anti-competitive purpose implies, in the absence of explanation, participation in the cartel alleged.’\(^\text{216}\)

\(^\text{212}\) Section 2(7) of the Act.
\(^\text{213}\) See the final judgment of the CAT in \textit{Aberdeen Journals Limited v Office of Fair Trading} [2003] CAT 11, at [459] and [460].
\(^\text{214}\) \textit{Napp Pharmaceutical Holdings Limited v Director General of Fair Trading} [2002] CAT 1, at [95] and [100]. The CAT confirmed this approach in \textit{JJB Sports plc and Allsports Limited v Office of Fair Trading} [2004] CAT 17, at [164] (see also at [928] and [931]).
\(^\text{215}\) References to the ‘Director’ are to the Director General of Fair Trading. As from 1 April 2003, the Enterprise Act 2002 transferred the functions of the Director General of Fair Trading to the OFT.
\(^\text{216}\) \textit{Napp Pharmaceutical Holdings Limited v Director General of Fair Trading} [2002] CAT 1, at [100].
3.86. As regards the standard of proof, the CAT held, also in *Napp*, that:

‘formally speaking, the standard of proof in proceedings under the Act involving penalties is the civil standard of proof, but that standard is to be applied bearing in mind that infringements of the Act are serious matters attracting severe financial penalties. It is for the Director to satisfy us in each case, on the basis of strong and compelling evidence, taking account of the seriousness of what is alleged, that the infringement is duly proved, the undertaking being entitled to the presumption of innocence, and to any reasonable doubt there may be.’

3.87. This statement has been further clarified by the CAT in its ruling in the *Replica Kit* appeals, where the CAT stated that:

‘It also follows that the reference by the Tribunal to ‘strong and compelling’ evidence at [109] of *Napp* should not be interpreted as meaning that something akin to the criminal standard is applicable to these proceedings. The standard remains the civil standard. The evidence must however be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which the undertaking concerned is entitled.’

3.88. In other words, the standard of proof is the civil standard (that is, the preponderance or balance of probabilities). In using the term ‘strong and compelling’ to describe the evidence in relation to the Parties, the OFT has followed the same principle. That is consistent with recent decisions of the Supreme Court, in other contexts but of general application, confirming that there is only one civil standard of proof, that being on the preponderance or balance of probabilities. Most recently in *Re S-B*, Baroness Hale said:

‘... there is no necessary connection between the seriousness of an allegation and the improbability that it has taken place. The test is the balance of probabilities, nothing more and nothing less.’

J. NATURE OF EVIDENCE

3.89. The CAT has acknowledged that in cases involving a possible infringement of the Chapter I prohibition the nature of the evidence may

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217 Ibid. at paragraph 109.
218 *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17, at [204]. See also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, at [164] and [165]. See also *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17, at [188]: ‘facts are required to be proved on the balance of probability, that is to say that the court must be satisfied on the evidence, that the occurrence of the events is more likely than not. However, the principle is that the more serious the allegation, the stronger the evidence should be before the court concludes that the allegation is established on the balance of probabilities. Hence the civil standard provides for flexibility as to the cogency of the evidence required to satisfy the court of the facts’.
220 See *Re S-B* [2010] 2 WLR, at paragraph 34. See also *Re B* [2009] 1 AC 11, at paragraph 69.
be fragmentary and sparse or circumstantial\textsuperscript{221} and that evidence of an infringement in cases such as \textit{Toys} ‘...is likely to be sparse, incomplete and elliptically expressed’\textsuperscript{222}

3.90. The CAT has expanded on this in its \textit{Replica Kit} and \textit{Toys} judgments:

‘As regards price fixing cases under the Chapter I prohibition, the Tribunal pointed out in \textit{Claymore Dairies} that cartels are by their nature hidden and secret; little or nothing may be committed to writing. \textit{In our view even a single item of evidence, or wholly circumstantial evidence, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard}\textsuperscript{223}

\[\text{[Emphasis added]}\]

3.91. When considering the types of evidence presented in the \textit{Toys} case, the CAT considered that:

‘...it is essential to look at evidence as a whole. Even if for example, particular documents or particular pricing patterns may appear inconclusive standing alone, nonetheless in our judgment the overall picture convincingly establishes the OFT's case'.\textsuperscript{224}

I. \textbf{Inferences and presumptions}

3.92. The CAT has also held that the OFT may, where appropriate, draw inferences or presumptions from a given set of circumstances\textsuperscript{225} and that indirect and circumstantial evidence can ‘have a powerful role to play in the factual matrix of a case'.\textsuperscript{226}

3.93. In addition, the General Court has recently confirmed that the evidence demonstrating an infringement:

\textsuperscript{221} \textit{Claymore Dairies Limited and Express Dairies plc v Office of Fair Trading} [2003] CAT 18, at [3]. See also \textit{Joined Cases C-204/00 P etc Aalborg Portland and Others v Commission} [2004] ECR I-123, at paragraphs 55 to 57.
\textsuperscript{222} \textit{Argos Limited and Littlewoods Limited v Office of Fair Trading} [2004] CAT 24, at [312].
\textsuperscript{224} \textit{Argos Limited and Littlewoods Limited v Office of Fair Trading} [2004] CAT 24, at [311].
\textsuperscript{225} \textit{Napp Pharmaceutical Holdings Limited v Director General of Fair Trading} [2002] CAT 1, at [110]. See also \textit{Claymore Dairies Limited and Express Dairies plc v Office of Fair Trading} [2003] CAT 18, at [10].
\textsuperscript{226} \textit{Claymore Dairies Limited and Express Dairies plc v Office of Fair Trading} [2003] CAT 18, at [9].
may consist of direct evidence, taking the form, for example, of a written document [...], or, failing that, indirect evidence, for example in the form of conduct [...]."  

II. Documentary evidence

3.94. The CAT has also indicated the weight that it has attached to different types of evidence in making its judgments. In Replica Kit, the CAT examined a number of contemporaneous documents and attached significance to their contents:

‘As regards the contemporaneous documents, it seems to us that a document prepared at the time, which the author never anticipated would see the light of day, is likely to be more credible than explanations given later. We have therefore given weight to contemporary documents, unless there is good reason not to do so.’

3.95. In the same judgment, the CAT also considered the significance that it attached to two forms of contemporaneous documentary evidence – external communications and monthly management reports.

3.96. First, it considered the significance of an external communication from a supplier to a downstream retailer which referred to conversations with other retailers stating that they (the retailers) had agreed to price at a certain level with effect from a certain date. The CAT concluded that this document was at least indirect evidence that other retailers and the supplier had agreed to fix prices.

3.97. Second, it considered monthly management reports prepared for senior personnel within an organisation. One of the management reports named a number of retailers that had agreed to fix prices at a certain level; the CAT concluded that this amounted to ‘prima facie evidence of the facts stated’. The CAT went on to say:

‘At the very least Umbro’s May MMR [Monthly Management Report] is cogent evidence that each of the named companies had communicated their intended retail selling price to Umbro.’

III. Witness evidence

3.98. The CAT has made it clear that the OFT is not limited to relying only on documentary or written evidence to establish an infringement of the Chapter I prohibition. The CAT has also stated that the oral evidence of a credible witness, if believed, may in itself constitute sufficient evidence

230 Ibid. at paragraph 545.
to demonstrate an infringement and that the OFT may accept witness evidence at face value if it thinks it is right to do so.\textsuperscript{232}

3.99. In \textit{Replica Kit}, the CAT’s general approach to witness evidence was ‘to be cautious, and to look for corroboration, whether from context, documents or other witnesses, wherever possible’.\textsuperscript{233} In relying on witness evidence, the CAT also observed that ‘[h]owever conscientious a witness may be,... memory is apt to play tricks, and recollections may be mistaken or incomplete’.\textsuperscript{234} When relying on witness evidence, the CAT also observed in \textit{Claymore} that ‘[t]he OFT] will no doubt ask itself whether there is any reason to believe that the witness may be untruthful or mistaken’.\textsuperscript{235}

IV. Economic and market context

3.100. In both \textit{Replica Kit} and \textit{Toys} the CAT considered evidence of the economic and market context in its analysis. It stated:

‘We regard background evidence as to the economic and market context, both before and after the alleged agreements, as relevant to our assessment as to whether the alleged agreements or concerted practices are likely to have occurred.’\textsuperscript{236}

3.101. In \textit{Replica Kit}, the CAT noted that similar fact evidence might be relevant evidence for proving further infringements of the Act:

‘Similar fact evidence of involvement in previous agreements concerning the same or equivalent products in the recent past is capable, in our judgement, of being relevant evidence for the purpose of proving an infringement of the Chapter I prohibition.’\textsuperscript{237}

3.102. However, the CAT did sound a note of caution as to how much weight could be placed upon this type of circumstantial evidence, indicating that it would need to be corroborated by further evidence:

‘On the other hand, the fact that an undertaking has been involved in earlier infringing agreements does not of itself necessarily establish its involvement in subsequent infringing agreements. Much care should be exercised, in our judgement, before drawing inferences from past conduct, having regard, in particular to the presumption of innocence.’\textsuperscript{238}

\begin{flushleft}
\textsuperscript{232} \textit{Ibid}.
\textsuperscript{233} \textit{JJB Sports plc and Allsports Limited v Office of Fair Trading} [2004] CAT 17, at [294].
\textsuperscript{234} \textit{Ibid}, at [292].
\textsuperscript{235} \textit{Claymore Dairies Limited and Express Dairies plc v Office of Fair Trading} [2003] CAT 18, at [8].
\textsuperscript{237} \textit{JJB Sports plc and Allsports Limited v Office of Fair Trading} [2004] CAT 17, at [913].
\textsuperscript{238} \textit{Ibid}, at [914].
\end{flushleft}
4. ECONOMIC ASSESSMENT

A. INDUSTRY STRUCTURE AND CONDITIONS OF COMPETITION IN 2000-2003

I. Introduction

4.1. This section of the Decision describes the structure of and the conditions of competition within the dairy industry with a particular focus on the period 2000 to 2003 inclusive (the 'Relevant Period'), as this period is particularly relevant when considering the Infringements described in section 5.

4.2. The Infringements that are the subject of this Decision concern the indirect exchange of retail pricing intentions between retailers via certain dairy processors for fresh milk ('FLM') in 2003 and cheddar and British territorial cheeses in 2002 and 2003. This Decision demonstrates that the purpose of these exchanges was to co-ordinate retail price increases in respect of those products. Although the OFT does not need to demonstrate or reach a conclusion as to what the purpose of these initiatives was in order to demonstrate infringements of the Chapter I prohibition, it is clear from the evidence in its possession that each of the initiatives were driven by financial issues in the dairy supply chain. The 2002 Cheese and 2003 FLM Initiatives aimed to increase the price that UK dairy farmers received for raw cows' milk used to produce dairy products (the 'farmgate price'). The purpose of the 2003 Cheese Initiative was to financially support McLelland's margin. Accordingly, this section will describe the market conditions in the Relevant Period at each level of the dairy industry, that is, dairy farming, processing and retailing.

4.3. The OFT has relied upon a number of sources in preparing this section, including the report by the Competition Commission ('CC') on the proposed merger between Arla Foods amba and Express Dairies plc ('the Arla/Express Report'). This report assessed the impact of the merger in the context of three customer groups. One of these customer groups was defined as 'national multiples', consisting of Asda, Marks and Spencer, Morrisons, Safeway, Sainsbury's, Somerfield, Tesco and Waitrose. The OFT notes that this group includes all of the retailers that are addressees of this Decision (that is, Asda, Safeway, Sainsbury's and Tesco) and therefore many of the CC’s findings in respect of this group are relevant to the OFT’s own investigation. Where in this section the OFT has relied on or considered findings made by the CC in respect of this group of retailers it has also used the term 'national multiple retailer' or 'national multiple'.

II. Dairy farming level

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239 Arla Foods amba and Express Dairies plc: A report on the proposed merger’ Competition Commission, October 2003
240 See the Arla/Express Report, at paragraph 5.13.
4.4. Raw milk production is limited by quotas set under the European Union’s ('EU') Common Agricultural Policy ('CAP'). The production quotas limit how much raw milk can be produced in each EU Member State.

4.5. A secular decline in the size of UK dairy herd and a long term decline in the number of dairy farmers in the UK, (which accelerated rapidly in the period since 2000 especially with the impact of culling associated with the outbreak of Foot and Mouth disease in 2001), have been offset by increasing milk yields so that throughout the period 1995 to 2005 a consistent annual volume of around 14bn litres of milk was produced in the UK.

4.6. This volume of output being approximately double the volume of liquid milk consumption implies that the ability of the dairy processing industry to absorb the excess supply is a key determinant of returns to dairy farmers. Conditions in the international commodity markets for butter, cheese and SMP are important as, while very little liquid milk is traded, a significant volume of UK butter, cheese and SMP is exported while imports of cheese and butter are also a key feature of the UK market.

4.7. In the short term there is a seasonal variation in the supply of milk with supply rising in the spring. An additional factor that complicated the market during the period relevant to the Price Initiatives is the impact that culling in response to Foot and Mouth disease may have had on the domestic supply of raw milk.

4.8. One of the key market mechanisms of market management under the CAP dairy regime is intervention purchases of butter and SMP by the EU when prices fall below pre-determined floor levels. The intervention stocks can then be released onto EU or non-EU markets when prices rise in response to tightening markets.

4.9. The key point for UK dairy farmers is that these intervention prices often do form the floor of the market and that they are set in euros. This means that if sterling strengthens against the euro the intervention support price will fall in sterling terms.

4.10. The ability of the EU to export surplus intervention products (skimmed milk and butter) is a key factor in determining the extent to which raw milk prices can escape from intervention levels. This in turn depends on world market conditions (both supply and demand) and the value of the euro against the dollar.

4.11. The chart below illustrates the close relationship between the sterling value of intervention prices (known as the Intervention Milk Price Equivalent or IMPE) and the farmgate price between 1995 and the end of 2003. The Milk Development Council (MDC) concluded that since the deregulation of raw milk supply in 1994, the farmgate price had been predominantly driven by commodity wholesale markets which in turn had been driven by intervention prices for much of the time.

Chart: Farmgate and Intervention Prices 1995 to 2003 (ppl)
III. Processor level

a. Introduction

4.12. This section describes the conditions of competition and industry structure at the processor level of the UK dairy industry in the Relevant Period. Processors purchase raw milk from individual producers, milk selling groups and farmer co-operatives and process this into liquid milk and other dairy products for supply to wholesalers and retailers. Owing to the focus of the OFT’s infringement findings within this Decision this section focuses on issues surrounding the production and supply of FLM and cheese to national multiple retailers including those that are addressees of this Decision. During the Relevant Period approximately 50 per cent of UK raw milk production was processed into liquid milk, approximately 25 per cent was processed into cheese, 12.5 per cent into milk powder (including SMP), 2 per cent into butter and 1.8 per cent into cream, with the remainder going into other products such as condensed milk and yoghurt.241

b. Liquid Milk

4.13. This section considers the industry structure and the conditions of competition in respect of liquid milk processing and its supply to major national multiple retailers.

Market trends and features

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241 See the Arla/Express Report, at paragraph 3.13 and Milk and Dairy Products, Key Note Reports 2004 and 2005.
Decline in consumption

4.14. Consumption of liquid milk has been in slow but continual decline with the UK’s milk consumption per person demonstrating a downward trend of 1 to 2 per cent a year since the late 1960s.\textsuperscript{242}

Decline in doorstep sales

4.15. A key trend affecting the liquid milk supply chain is the dramatic change in the nature of household milk sales, particularly since 1980, with national multiples gaining a significant market share at the expense of doorstep sales. In 1980 doorstep sales accounted for almost 90 per cent of household milk sales, by 2002 this share had fallen to just over 20 per cent.\textsuperscript{243}

4.16. The majority of this doorstep volume has moved to grocery retailers and by 2003 65 per cent of liquid milk was sold through grocery retailers, in particular national multiples.\textsuperscript{244} This has meant that the supply of liquid milk to national multiples has become a significant source of revenue to FLM processors.

Concentration of supply

4.17. During the Relevant Period, the supply of liquid milk to national multiples was concentrated to the FLM processors.

4.18. Table 1 below, taken from the Arla/Express Report, shows the shares of supply of liquid milk to national multiples in Great Britain for the period 1999 to April 2003 inclusive. It demonstrates that the FLM processors that are addressees of this Decision, along with Express Dairies, collectively supplied nearly all liquid milk that was purchased by national multiples in this period.

<table>
<thead>
<tr>
<th>Shares of supply of liquid milk to national multiples in Great Britain</th>
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*Volume (mlpa)(Figures omitted)

\textsuperscript{242} See the Arla/Express Report, at paragraph 3.44.
\textsuperscript{243} Ibid, at paragraph 3.48.
\textsuperscript{244} Ibid, at paragraph 5.97.
In the Arla/Express Report, the CC found that the prospects for other processors to supply liquid milk to national multiples were limited. Smaller and medium size processors were not routinely asked to tender for national multiples’ business and there had been only one instance of a small or medium sized processor supplying a national multiple with what was considered a significant portion of its FLM supplies – and that was for a limited period in 2001.  

Moreover, the CC established that the national multiples themselves did not generally consider the fifth largest FLM processor in the UK at the time (Associated Co-operative Creameries Limited ['ACC']) to be a viable alternative supplier to any of the FLM processors.

Reasons for concentration of supply to national multiples

The CC found that the concentration of supply was the result of the specific requirements of national multiples in respect of quality and service, assurance of supply (the majority of national multiples expect daily deliveries of liquid milk to their stores), volume purchased and distribution requirements. Morrisons informed the CC that it considered ACC would also have needed to invest in its facilities to be able to match the production quality of the FLM processors.

These various requirements were confirmed by the OFT in this Investigation. The quality and safety of liquid milk was of particular importance to national multiples because they sell liquid milk under their own label and therefore take more responsibility for product quality as it directly impacts on their own brand. The CC found that this potential exposure meant that national multiples put in place rigorous monitoring of their supply and have schemes to trace milk supply from farmer to consumer.

Reduction in number of suppliers

The CC also noted that there had also been a trend for national multiples to reduce the number of the processors from whom they purchased liquid milk. In 1998, the national multiples had an average of 3.75 supplying processors, by late 2003 it was 2.25.

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245 Ibid, at paragraphs 5.17 to 5.22.
247 Ibid, at paragraphs 5.17 to 5.22.
248 Ibid, at paragraph 5.22.
249 See, for example, documents 4, 15, 22, 29, 46 and 54 to the SO.
250 See the Arla/Express Report, at paragraph 5.18.
251 Ibid, at paragraph 5.16.
Main competitors

4.24. Given the concentration of supply of liquid milk it is not surprising that each of the FLM processors that are addressees of this Decision identified the other two and Express Dairies\textsuperscript{252} as its principal competitors during the Relevant Period in respect of the supply of liquid milk to national multiples.\textsuperscript{253}

Processor over-capacity

4.25. In the Arla/Express Report, the CC additionally identified the existence of over-capacity among the FLM processors in respect of the supply of FLM to national multiples. The CC concluded that following the merger between the two parties an over-capacity level of 29 per cent would exist among the FLM processors to supply FLM to national multiples.\textsuperscript{254}

4.26. The presence of over-capacity has been confirmed by the OFT in its investigation. [Two processors] both commented that over-capacity was 'endemic' and that this feature of the market was likely to remain because it was not relatively expensive for processors to add additional capacity.

Relationship between processors and retailers

Countervailing buyer power of national multiples

4.27. In the Arla/Express Report, the CC found that national multiples had a 'significant degree of buyer power' in respect of purchases of FLM.\textsuperscript{255} Each of the FLM processors that are addressees of this Decision also identified this as a feature of the market place in response to enquiries made by the OFT pursuant to this Investigation and also provided examples of how this buyer power manifested itself.\textsuperscript{256}

4.28. The concept of the national multiples having countervailing buyer power is based upon a number of factors, including:

a. The transparency of the farmgate price, which enables national multiples to identify decreases in the costs of processing and therefore seek that any such decreases are passed on through reduced wholesale prices.

b. Over-capacity in the processing industry, which enables national multiples to switch large volumes of milk purchases between processors. This ability to switch suppliers is greatly facilitated by the fact liquid milk is sold under the national multiple’s own brand because consumers would be unaware of the change of supplier.

\textsuperscript{252} In October 2003, Arla Foods Plc merged with Express Dairies plc, resulting in the formation of Arla Foods UK plc.
\textsuperscript{253} See documents 29, 46 and 54 to the SO.
\textsuperscript{254} See the Arla/Express Report, at paragraph 5.69.
\textsuperscript{255} \textit{Ibid}, at paragraph 5.96.
\textsuperscript{256} See documents 29, 46 and 54 to the SO.
c. The increased significance of national multiples as the source of household milk sales provides them with additional strength in the supply chain, because the share of each FLM processor’s sales to national multiples as a proportion of its overall sales has increased.

**Tendering/contractual arrangements with national multiples**

4.29. The CC found that all 'national multiples' procured liquid milk on a national basis in that contracts are centrally negotiated and prices did not vary between regions.257

4.30. The FLM processors that are the addressees of this Decision indicated that arrangements for the supply of liquid milk to retailer customers tended to be informal and rarely involved written contracts.268 They also noted that supply contracts were re-tendered on an intermittent rather than a regular basis.259

**Factors influencing liquid milk wholesale prices**

4.31. Wholesale prices for liquid milk tended to be set by negotiation between processors and their individual customers. The FLM processors that are addressees of this Decision cited a number of factors which influenced this price.260 These included costs (such as raw milk prices, distribution, packaging and processing) and the quality and volume of the product demanded.

4.32. [A processor] submitted that an important factor in the setting of its wholesale prices was how strongly the retailers negotiated on price.261 Dairy Crest submitted that the power to set prices essentially rested with the retailers, adding that wholesale prices tended to be renegotiated when raw milk prices fluctuated.262

**Wholesale price levels and processor margins**

4.33. Datum MDC studies have established that the wholesale price for the supply of FLM to retailers fell by approximately 15 per cent between 1994 and 2004.263

4.34. Despite the fall in wholesale prices processor margins remained relatively stable owing to the fall in the farmgate price.

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257 See the Arla/Express Report, at paragraph 5.15.
258 However, Sainsbury’s, in its submission of 31 January 2008 on material factual inaccuracies in the SO, noted that the arrangements for the supply of FLM between it and its supplying processors were never informal and that the key details of these arrangements were always set out in writing (see document 58 to the SSO, at paragraph 1).
259 See documents 29, 46 and 54 to the SO.
260 See documents 29, 46 and 54 to the SO.
261 See document 29 to the SO.
262 See document 54 to the SO.
4.35. In 2003 Datum MDC reported that processor gross margins (the difference between wholesale and farmgate prices) had fallen slightly in the period since 1995, but had remained relatively stable – varying by around 1.5 ppla. Margins did come under particular pressure in 2002 owing to poor commodity market returns, but recovered in 2003 to stand at approximately 15ppl with profits estimated at around 1.5 to 2.5ppl.

c. Cheese

4.36. This section considers the industry structure and conditions of competition in respect of the production and supply of UK sourced cheddar and territorials to national multiple retailers, including the retailers that are parties to the 2002 and/or 2003 Cheese Initiatives, during the Relevant Period. The processors that are parties to the 2002 and/or 2003 Cheese Initiatives (they are, Dairy Crest, Glanbia and McLelland) are in this section collectively referred to as the 'Cheese Processors'.

i. Types of cheese

4.37. In this Decision, the OFT has found that retail price increases were co-ordinated in respect of Cheddar and British territorial cheese. Parties' responses at the time indicated that Cheddar cheese sales constituted approximately 50 per cent of total cheese sales in the UK in respect of value and volume and generally can be broken down into three categories: mild, medium and mature. Cheddar is also characterised by having supplier branded products (such as McLelland's Seriously Strong or Dairy Crest's Cathedral City) and retailer own label. A Mintel Report, dated July 2005, stated that territorial cheese sales constituted 10 per cent of retail sales by value in 2004.

ii. Market trends and features

Concentration of supply

4.38. Total cheese production in the UK in 2004 amounted to 359 kilo tonnes. Dairy Crest was the largest domestic producer of all cheese in the UK in 2004 (producing 75 kilo tonnes). Glanbia was the joint second largest producer in the UK (producing 50 kilo tonnes) and McLelland the fourth largest producer in the UK (producing 25 kilo tonnes). In terms of market shares, Dairy Crest, Glanbia and McLelland were approximately 21 per cent, 14 per cent and 7 per cent respectively.

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264 Ibid.
265 See document 32 to the SO.
267 Source: DairyCo Datum.
268 See document 43 to the SO. The other second largest producer of cheese in the UK in 2004 (50 kilo tonnes) was Milk Link, which is now the indirect owner of Glanbia.
Main competitors

4.39. Dairy Crest, Glanbia and McLelland all identified each other as their principal competitors in respect of the supply of cheddar to the retailers which are addressees of this Decision during the Relevant Period.269

Excess capacity and over production

4.40. As with FLM, over-capacity existed in cheese processing in the Relevant Period. A KPMG study commented that Glanbia and Dairy Crest both reported underused capacity at this time.270

Import competition

4.41. Cheddar is storable, meaning domestic producers face import competition. McLelland estimated that around 230 kilo tonnes of cheddar was produced in the UK in 2003 with approximately 90 kilo tonnes (around 30 per cent of consumption) being imported. The majority of imports were sourced from Ireland (60 kilo tonnes) and New Zealand (11 kilo tonnes).271

iii. Relationship between processors and retailers

Brand presence

4.42. During the Relevant Period, retailer own label cheese took a higher share of the market than supplier brands. However, the share of the market accounted for by supplier brands increased, with a Key Note market report concluding that total brand sales for all cheese had doubled in the five years to November 2002.272 Dairy Crest estimated that branded cheese accounted for around 20 per cent of the market and believed that the greater presence of brands in cheese when compared to FLM reduced the pressure retailers could assert as a result of their buyer power, although other evidence suggested that suppliers were vulnerable to the delisting of their brands.273

Tendering/contractual arrangements with national multiples

4.43. During the Relevant Period, supply contracts for low value, own-label cheese were generally tendered for a specific period of up to a year.274 Contracts to supply branded products were agreed after bilateral negotiation. Contracts tended to be national and varied in duration depending on the type of cheese involved.275

269 See documents 32, 43 and 54 to the SO.
270 ‘Prices and Profitability in the British Dairy Chain’ KPMG Report to the Milk Development Council, February 2003 page 61, section 1.16.
271 See document 43 to the SO.
272 See Milk and Dairy Products, Key Note, March 2003, at page 58.
273 See document 54 to the SO.
274 See documents 43 and 54 to the SO.
275 See documents 32 and 43 to the SO.
IV. Retail level

4.44. This section considers the industry structure and conditions of competition that existed at the retail level of the dairy supply chain in the Relevant Period. In the Arla/Express Report the CC broke down the retail market for the sale of FLM to consumers as follows:

i. National into national multiples.

ii. Smaller retail chains (such as Iceland).

iii. Discount retailers (such as Aldi and Netto).

iv. Associations of small shops grouped together in symbol groups (such as Spar and Nisa).

v. Co-operative retail store.

vi. Non-affiliated independents.

vii. Convenience multiples.

viii. Petrol forecourt stores.\(^\text{276}\)

4.45. All of the retailers which are addressees of this Decision (Asda, Safeway, Sainsbury’s and Tesco) fell within the CC’s definition of ‘national multiple’.\(^\text{277}\) The evidence in the OFT’s possession suggests that there is no reason to conclude that this categorisation of retail outlets should not be equally applicable to cheese as it was for FLM.

1. Market trends and features

4.46. During the Relevant Period, Asda, Safeway, Sainsbury’s and Tesco were the four largest grocery retailers in the UK, with a market share of approximately 60 per cent in 2002/03.\(^\text{278}\) This market was considered by the CC in 2000\(^\text{279}\) and in 2003.\(^\text{280}\) In these studies, the CC identified and defined one-stop grocery shopping as a form of shopping whereby consumers purchase all or a substantial part of a household’s weekly grocery items together in one place. The CC found that stores of over 1,400 sq metres were necessary in order to have the product range and

\(^{276}\) See the Arla/Express Report, at paragraph 5.15.

\(^{277}\) Ibid, at paragraph 1.5.

\(^{278}\) See Safeway plc and Asda Group Limited (owned by Wal-Mart Stores Inc); Wm Morrison Supermarkets PLC; J Sainsbury plc; and Tesco plc: A report on the mergers in contemplation, Competition Commission, September 2003, at paragraph 5.191. The individual retailers’ shares were 23 per cent (Tesco), 16 per cent (Sainsbury’s), 13 per cent (Asda) and 9 per cent (Safeway).

\(^{279}\) Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom, Competition Commission, October 2000.

\(^{280}\) Safeway plc and Asda Group Limited (owned by Wal-Mart Stores Inc); Wm Morrison Supermarkets PLC, Sainsbury plc and Tesco plc, Competition Commission, September 2003.
depth to support one-stop shopping. Asda, Safeway, Sainsbury’s and Tesco accounted for around 87 per cent of grocery sales in stores of over 1,400 sq metres in the UK in 2002/03.

4.47. National multiple retailers have a considerable share of the retail sales of dairy products in the UK. Data compiled by Fearne and Bates in 2000 demonstrated that grocery retailers, in particular national multiples, held a 65 per cent share of total liquid milk retail sales and 80 per cent of total cheddar sales.

4.48. The OFT asked each of Asda, Safeway, Sainsbury’s and Tesco who their top three competitors were for the sale of FLM and cheese during the Relevant Period. Each of Asda, Safeway and Sainsbury’s identified the other three retailers as their top three competitors. Tesco differed by identifying its main competitor as liquid milk doorstep sales. Based upon the evidence in its possession, the OFT considers that Tesco’s estimate is more likely to have been based on comparative shares of the milk retail market share rather than a genuine reflection of whom Tesco might gain or lose customers from. In drawing this conclusion, the OFT has noted that no other retailer cited doorstep sales as one of its main competitors. Tesco did identify the other three retailers as its next strongest competitors after doorstep sales.

2. Price competition between national multiples

4.49. This section considers the factors influencing price competition between, and price setting decisions by, the retailers which are addressed in this Decision in respect of the Products. It also considers how this impacted on the FLM processors and cheese processors which addressed this Decision.

i. Pricing of competitors and Known Value Items

4.50. In its 2000 report on supermarkets (the ‘2000 Supermarkets Report’), the CC identified that the price levels of competing retailers were a key determinant in a supermarket’s own retail pricing decisions:

‘Although the parties all stressed that the pricing of their competitors was the key determinant of their own pricing, other influences were acknowledged by some companies. These influences included supplier

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281 Ibid, at paragraph 5.4 referring to the CC’s conclusions in Supermarkets, October 2000.
282 Ibid, at paragraph 5.168. The individual retailers’ shares were 32 per cent (Tesco), 23 per cent (Sainsbury’s), 20 per cent (Asda) and 12 per cent (Safeway).
283 See Prices and Profitability in the British Dairy Chain, KPMG Report to the Milk Development Council, February 2003, at page 25.
284 The identity of Safeway’s main competitors was provided by Morrisons. As Morrisons acquired Safeway in 2004 (see paragraphs 2.21 above), it could not be certain as to who Safeway regarded as its main competitors during the relevant period and provided an estimate based upon market share.
285 See documents 4, 6 and 15 to the SO.
286 See document 22 to the SO.
costs, retailing and distribution costs, sales rates, seasonal availability of products and currency fluctuations.  

4.51. This was confirmed by the OFT in the Investigation. The retailers that are addressees of this Decision indicated a number of factors that they took into account in setting the retail prices of cheese and FLM, including cost prices, promotions, quality of product and target margins. However, the most commonly cited factor was their competitors' prices.

4.52. The CC found that supermarkets rigorously monitored their competitors' retail prices in order to support this price setting model. In the 2000 Supermarkets Report the CC noted that:

'It seems clear that for most of the parties [the 24 supermarkets in the CC market investigation] there is a core group of products that are particularly important for comparative purposes and on which they tend to concentrate their price monitoring activity.'

4.53. Price monitoring of KVIs and own label products is especially rigorous. In the 2000 Supermarkets Report the CC noted:

'As well as core lines or KVIs, budget own-label products are also intensively monitored by all the parties that stock them. Although representing a small proportion of the total number of products stocked, these categories of product account for a very much higher proportion of the parties' total revenue.'

4.54. These core products include so-called key or known-value items ('KVIs'). KVIs are products which retail customers are considered likely to remember the prices of and might compare prices for between retailers. Retailers work on the basis that consumers use KVIs to make price comparisons between them and consider that the price levels of KVIs materially influence a consumer’s perception of the pricing of all goods within a store and therefore how expensive a retailer is compared to its competitors.

ii. Dairy products have low price elasticity

4.55. A further relevant factor when assessing how the retailers that are addressees of this Decision set prices for the Products is that they have low price elasticity.

4.56. Price elasticity measures the change in demand for a product following a change in the product’s price. If a product has a price elasticity that is between 0 and -1, this means that a price increase for that product would result in an overall increase in revenue, because the additional revenue obtained as a result of the price increase will exceed the revenue lost from the decrease in sales. Studies have shown that dairy products have a relatively low price elasticity when compared to other grocery products,

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287 See the Supermarkets Report, at paragraph 2.232.
288 See documents 4, 6, 15 and 22 to the SO.
289 See the Supermarkets Report, at paragraph 2.235.
290 Ibid.
meaning an increase in retail prices would be likely to result in an increase in revenues. A London Economics study,\textsuperscript{291} based upon data in the 1999 National Foods Survey, estimated that the elasticity for liquid milk was -0.4 and for cheese was -0.6.

4.57. In respect of FLM, this conclusion has been confirmed by evidence the OFT has received during the course of the Investigation, which demonstrates that major dairy industry players considered that FLM is an inelastic product, and took this into account when considering the potential impact of the 2003 FLM retail price initiative on their business.

4.58. For example, in an internal Asda e-mail dated 9 April 2003, [Asda’s Category Manager for Dairy] commented when assessing the pros and cons of a FLM retail price increase that ‘milk is not price elastic’.\textsuperscript{292}

4.59. The fact that dairy products are price inelastic is significant, because it means that the gains made from the price increase would outweigh any decreased consumption.\textsuperscript{293}

4.60. The OFT notes that the elasticity study referred to in paragraph 4.56 above only examined general dairy product groupings (such as cheese) and not the impact on sales of an increase in the retail price of British sourced dairy products, which are subject to import competition where price increases are not implemented in respect of those imported products (that is, the effect on demand of an increase in the price of UK produced cheese where the price of imported products did not increase). In fact, numerous contemporaneous documents show that there were very strong concerns about the impact of cheaper imports on the demand for UK produced cheese during the discussions that took place prior to the implementation of the 2002 Cheese Initiative. For example, a meeting note prepared by an employee [at a processor] following his attendance at the Tesco dairy supply group meeting on 13 September 2002 records that ‘[c]oncern is cheese side. If the base price of cheese raised then imports drawn in and price collapse’.\textsuperscript{294} This means that the OFT has relied only upon the evidence of inelasticity in respect of FLM, because it is not subject to any meaningful level of import competition.

Pro-active/reactive pricing strategies

\textsuperscript{291} London Economics study quoted in Prices and Profitability in the British Dairy Chain, KPMG Report to the Milk Development Council, February 2003. The OFT notes that this study only examined general dairy product groupings. It did not consider the impact on sales of an increase in the retail price of only British sourced dairy products where these products are subject to import competition, such as British produced cheese. The OFT therefore only relies upon the evidence of inelasticity in respect of FLM, because unlike cheese it is not subject to serious import competition.

\textsuperscript{292} See document 57 to the SO.

\textsuperscript{293} However, the OFT accepts that in the specific circumstances of the time the Parties may have gained little (if at all) financially from the Infringements.

\textsuperscript{294} See paragraph iv.5.82 below. In addition, a letter from Dairy Crest to Sainsbury’s, dated 25 September 2002, refers to ‘concern about the differentials that could occur post retail price increases, between UK sourced cheese and imports’. See paragraph 5.161 below.
4.61. In the 2000 Supermarkets Report, the CC considered the overall pricing strategies of Asda, Safeway, Sainsbury’s and Tesco.\textsuperscript{295} Asda and Tesco represented to the CC that they had proactive and aggressive pricing strategies.\textsuperscript{296} On the other hand, Safeway and Sainsbury’s viewed their own pricing strategies as reactive.\textsuperscript{297}

4.62. In respect of their pricing strategies for FLM, the CC found that both Asda and Tesco were significant price leaders, with Safeway and Sainsbury’s following with a lag of one week during the relevant period (2000).\textsuperscript{298}

Retailer margins

4.63. Research conducted by Datum MDC has also shown that, in contrast with margins in other parts of the market for milk, retailer margins in respect of FLM (the difference between wholesale and retail prices) improved by around 8 to 10 ppl in the period between 1994 and 2004.\textsuperscript{299}

4.64. The table below compares average FLM margins throughout the supply chain in 2003 with those in 1995. It demonstrates that the farmgate price fell dramatically, that processor margins increased modestly while retailer margins increased considerably from 3.1 per cent in 1995 to 27.7 per cent in 2003.

<table>
<thead>
<tr>
<th>Table 1: Liquid Milk Supply Chain Margins\textsuperscript{300}</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>2003</strong></td>
</tr>
<tr>
<td><strong>ppl</strong></td>
</tr>
<tr>
<td>Farmgate Milk Price</td>
</tr>
<tr>
<td>Operating Costs and Processor Margin</td>
</tr>
<tr>
<td>Processor Selling Price</td>
</tr>
<tr>
<td>Operating Costs and Margin</td>
</tr>
<tr>
<td>Retail Price</td>
</tr>
</tbody>
</table>

Source: Milk Development Council

\textsuperscript{295} See the Supermarkets Report, at paragraphs 7.36 and 7.42.
\textsuperscript{296} Ibid, at paragraphs 7.36 and 7.39.
\textsuperscript{297} Ibid, at paragraphs 7.40 and 7.42.
\textsuperscript{298} Ibid, at paragraph 7.194.
\textsuperscript{299} ‘Dairy Supply Chain Margins 2003-04 – Who made what in the dairy industry and how it has changed’ Datum MDC, August 2004 at paragraph 1.
\textsuperscript{300} All data in this table is based on annual averages and is approximate. Exact figures will vary between different processors, retailers and different contracts, including different sources of milk supply. In particular, liquid milk processors are likely to pay more to retailers and different contracts, which may reduce their actual margin below what is stated in the table. Changes over the time period should be accurate, but care must be taken with the precise figures at any point in time. The reason for not trying to more accurately estimate the farmgate price is that, although it is possible to estimate a standard litre direct milk price, it is not possible to know the actual average direct milk price and price paid for milk from co-operatives.
4.65. The MDC has also noted a dramatic increase in retailer margins in respect of cheddar compared to other parts of the supply chain. Tables 2 and 3 below compare margins throughout the supply chain for 2003 with those of 1995 in respect of Mild and Mature Cheddar and demonstrate these increases:

**Table 2: Mild Cheddar Supply Chain Margins**

<table>
<thead>
<tr>
<th></th>
<th>2003</th>
<th></th>
<th>1995</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>ppl</td>
<td>Margin</td>
<td>ppl</td>
<td>Margin</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(%)</td>
<td></td>
<td>(%)</td>
</tr>
<tr>
<td>Milk Price</td>
<td>18.03</td>
<td>24.49</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Processor Margin</td>
<td>3.09</td>
<td>14.3</td>
<td>3.44</td>
<td>12.3</td>
</tr>
<tr>
<td>Processor Selling Price</td>
<td>21.12</td>
<td>27.93</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Retail Margin§</td>
<td>12.28</td>
<td>36.8</td>
<td>7.57</td>
<td>21.3</td>
</tr>
<tr>
<td>Retail Price</td>
<td>33.40</td>
<td>35.50</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

§ Based on TNS annual average retail price for mild cheddar
† These margins do not include income from whey. This will increase the gross margin and profits of the processor.

Source: Milk Development Council

**Table 3: Mature Cheddar Supply Chain Margins**

<table>
<thead>
<tr>
<th></th>
<th>2003</th>
<th></th>
<th>1994</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>ppl</td>
<td>Margin</td>
<td>ppl</td>
<td>Margin</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(%)</td>
<td></td>
<td>(%)</td>
</tr>
<tr>
<td>Milk Price including transport</td>
<td>18.03</td>
<td>22.13</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Processor Margin</td>
<td>4.53</td>
<td>20</td>
<td>7.13</td>
<td>24</td>
</tr>
<tr>
<td>Processor Selling Price</td>
<td>22.56</td>
<td>29.26</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Retail Margin§</td>
<td>34.34</td>
<td>60</td>
<td>18.94</td>
<td>39</td>
</tr>
<tr>
<td>Retail Price‡</td>
<td>56.90</td>
<td>48.20</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

§ Based on TNS annual average retail price for mature cheddar
‡ These margins do not include income from whey. This will increase the gross margin and profits of the processor.

Source: Milk Development Council

**B. ASSESSMENT OF THE RELEVANT MARKET**

**I. Introduction**

4.66. This section considers the relevant markets for the products affected by the Infringements. In a decision under the Chapter I prohibition of the Act, it is necessary to define the relevant market only where it would be impossible, without such a definition, to determine whether the agreement or concerted practice may affect trade in the UK and whether it has as its object or effect the prevention, restriction or distortion of

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301 Ibid.
302 Ibid.
competition. No such obligation arises in this case because it involves concerted practices that had as their object the prevention, restriction or distortion of competition. However, market definition is relevant to assessing penalties, and for this purpose the OFT must identify the market affected by the Infringements on a reasonable and properly reasoned basis.

II. The relevant product markets

4.67. Due to the limited use made of market definition in this Decision, namely as the starting point for the assessment of penalties, the OFT is primarily concerned to define the narrowest set of relevant markets which could be reasonably expected to have been affected by the Infringements. The Infringements concern the supply of fresh liquid milk (FLM) and British cheese to national multiple retailers and consumers. The market definition will therefore involve consideration of both the products themselves and their means of supply to consumers.

Product market

FLM

4.68. The 2003 FLM Initiative sought to co-ordinate (and did involve the co-ordination of) retail price increases for fresh liquid milk ('FLM'), The starting point for product market definition for the purpose of this Decision is therefore FLM.

4.69. The OFT has considered whether any other products are such close substitutes for FLM that they should be included in the same product market for the purposes of this Decision. Its view is that other products are not necessarily directly substitutable from a consumer’s perspective (either because of price or the characteristics of the product). For the purposes of this Decision, the OFT has therefore decided to take a conservative approach and exclude them from the product market definition.

Cheese


305 This conclusion is for the purposes of this Decision only and the OFT may define the market differently in other circumstances where it conducts a more thorough analysis of substitutability and relevant demand and supply side factors.
4.70. Given that the 2002 Cheese Initiative sought to co-ordinate (and did involve the co-ordination of) retail price increases for British produced cheddar and territorials, the starting point for product market definition for the purpose of this Decision is British produced cheddar and territorials.

4.71. The OFT has considered whether any other products are such close substitutes for these products that they should be included in the same product market for the purpose of this Decision. Its view is that that imported cheddar is a direct substitute for British produced cheddar from a consumer’s perspective so should be included in the same relevant market. The evidence on the OFT’s file supports this view since concerns were expressed about the impact of the 2002 Cheese Initiative on sales of British cheddar given that consumers could switch to imported cheddar. For the purpose of this Decision, the relevant product market is therefore defined as including all cheddar, regardless of origin, and British territorials306.

Means of supply

4.72. The initiatives described in this Decision involved co-ordination by FLM and cheese processors of retail prices charged by national multiples (including their convenience retail outlets). The starting point for upstream market definition for the purpose of this Decision is therefore the supply of the relevant products to national multiples.

4.73. The OFT has considered whether the supply relevant products to other supply channels should also be included in the same relevant market but its view is that national multiples are distinct group from processors’ other customers (such middleground retailers, caterers and doorstep sales). The OFT has therefore decided to take a conservative approach for the purposes of this Decision and define the market narrowly to include only sales by processors to national multiples.307

Retail market

4.74. Given that the 2003 FLM Initiative involved co-ordination of retail prices charged by national multiples, the starting point for the definition of the retail market is sales of the relevant products through national multiples. Other sales channels (such as doorstep or the middle ground) have different characteristics from national multiples and not therefore necessarily seen as direct substitutes by consumers. The OFT has

306 This conclusion is for the purposes of this Decision only and the OFT may define the market differently in other circumstances where it conducts a more thorough analysis of the substitutability of alternatives.

307 This conclusion is for the purposes of this Decision only and the OFT may define the market differently in other circumstances where it conducts a more thorough analysis of the substitutability of alternatives.
therefore decided to take a conservative approach and define the retail market to include only sales through national multiples.\footnote{This conclusion is for the purposes of this Decision only and the OFT may define the market differently in other circumstances where it conducts a more thorough analysis of the substitutability of alternatives.}

\textbf{Geographic market}

4.75. The Initiatives described in this Decision involved co-ordination of retail prices across Great Britain. For the purpose of this Decision, the OFT has therefore decided to treat the relevant geographic market as being Great Britain.\footnote{This conclusion is for the purposes of this Decision only and the OFT may define the market differently in other circumstances where it conducts a more thorough analysis of the substitutability of alternatives.}

\textbf{III. Conclusions on the relevant market}

4.76. For the purposes of this Decision, and in particular for the purpose of assessing the level of penalties, the OFT has defined the relevant markets as:

i. the supply of FLM by processors to national multiple retailers in Great Britain;

ii. the supply of FLM by national multiple retailers to consumers in Great Britain;

iii. the supply of all cheddar and British territorial cheeses by processors to national multiple retailers in Great Britain;

iv. the supply of all cheddar and British territorial cheeses by national multiple retailers to consumers in Great Britain.
5. ANALYSIS OF THE CONCERTED PRACTICES

5.1. This section analyses the evidence and states the inferences and conclusions that the OFT has drawn from that evidence in respect of each of the Infringements. It is structured as follows:

i. First, it provides background to the concerted practices both in respect of their origins and in respect of the legal framework that the OFT has applied in analysing them.

ii. Second, it presents and analyses the evidence and states the inferences and conclusions that the OFT has drawn from the evidence in respect of the 2002 Cheese Initiative.

iii. Third, it presents and analyses the evidence and states the inferences and conclusions that the OFT has drawn from the evidence in respect of the 2003 Cheese Initiative.

iv. Fourth, it presents and analyses the evidence and states the inferences and conclusions that the OFT has drawn from the evidence in respect of the 2003 FLM Initiative.

A. BACKGROUND TO THE CONCERTED PRACTICES

5.2. Section 4 above described the steep decline in the farmgate price since 1997 and the very low levels it reached during the period 2000 to 2003 inclusive. The decline in the farmgate price caused hardship for dairy farmers and a significant number chose to leave the industry.

5.3. Section 4 above also identified that national multiple retailers had become the principal means by which consumers purchased milk at the expense of doorstep sales and that these retailers were considered to have buyer power within the milk supply chain. It also demonstrated that retailer margins had increased significantly in respect of milk and cheese products since de-regulation occurred in 1994.

5.4. As a result of these increased margins, farmers believed that processors and retailers might be able to subsidise an increase in farmgate prices and began lobbying to achieve this.

5.5. During March 2000 farmers blockaded processors' and supermarkets' depots and lobbied Parliament. One farmer pressure group, Farmers For Action ('FFA'), actively attempted to co-ordinate a FLM retail price increase to subsidise a farmgate price increase. As part of this plan FFA sought written statements from retailers confirming their willingness to increase FLM retail prices. These written commitments were usually provided on the basis that other retailers would take similar action. FFA then disclosed these letters to other retailers to facilitate further commitments to increase prices.

5.6. Tesco brought this plan to the OFT's attention by a letter, dated 10 April 2000, from [a senior manager at Tesco] to [C] (who was at this time the OFT's Director of Policy). [A senior manager at Tesco] wrote:
5.7. In its letter, Tesco enclosed letters from two of its competitors to FFA, one from [a retailer] (dated 7 March 2000) and one from Safeway (dated 10 March 2000). In these letters both [a retailer] and Safeway expressed a willingness to increase FLM prices in order to subsidise an increase in the farmgate price.

5.8. On 7 March 2000, [a senior manager at a retailer] wrote to [an official at FFA] as follows:

‘With reference to the meeting at our Cirencester branch last Monday I wish to confirm the deep concerns we have about the current viability of milk production at current produced returns. This view was endorsed fully in our communication with the Monopolies and Mergers Commission in January of last year when we forecast that the break up of “Milk Marque” could force prices down to below cost of production.

Although we acknowledged that in the short term this [low prices for raw milk] might create a more competitive situation for consumers, retailers and processors, we also felt that it could lead to farmers taking short cuts and lowering standards which potentially could lead to poorer welfare practices. This scenario appears to have already developed and our concern for a viable and sustainable supply chain of fresh milk is such that I would have no problem in agreeing to a price increase which would return producer prices to a more viable level perhaps in the low 20s per litre, IF this could a) be passed back through the supply chain to producers and b) ensured that we would not be uncompetitive in the market place as a whole.

I hope this letter reinforces the support and understanding that we have for milk producers at this moment and I wish you good luck in pursuing your goal.’

5.9. On 10 March 2000 [a senior manager at Safeway] wrote to [an official at FFA]. It is clear from this letter that FFA had provided a copy of [a retailer’s] letter of 7 March 2000 to Safeway. In his response to FFA, [a senior manager at Safeway] expressed agreement with the position outlined in [a retailer’s] letter of 7 March 2000. The Safeway letter reads as follows:

‘Following up my recent conversation with [an official at FFA], I have discussed the issue of milk prices with my colleagues in our Trading Division.

We substantially agree with [a retailer’s] position, as outlined in [a senior manager at a retailer] letter to you of 7 March. We would support a significant increase in the retail price of milk provided that the dairy farmers were the sole beneficiaries and that we did not thereby disadvantage ourselves in what is a very price sensitive product market. Unilateral action by any major retailer to increase prices would be of no use to anyone.

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310 See document 79 to the SO.
311 See document 80 to the SO.
A price increase will no doubt bring temporary relief to the producers, especially the smaller farmers. But as an industry we have to tackle the root causes of the problem, which in my view are over-supply and excessive competition. I would very much welcome a constructive dialogue with representatives of the dairy farmers to see if we can come up with some practical ideas which might commend themselves to the Government.

I look forward to hearing from you in due course.\textsuperscript{312}

[Emphasis in original]

5.10. The OFT sent a letter to Tesco on 25 April 2000, responding to Tesco’s letter of 10 April 2000. The letter made clear the OFT’s view that the plan that FFA envisaged and which Safeway and [a retailer] had written to FFA on would be likely to suggest a breach of the Chapter I prohibition. The OFT’s letter reads:

‘I think that in approaching the issues you raise we need look no further than the guideline that OFT has issued (which I am assuming you have seen but I enclose a copy for ease of reference) on the Chapter I prohibition under the Competition Act 1998.

It seems to me that the sort of letter that you have in mind, along the lines of those you enclosed, would be an indication of the sort of action you would be willing to take on the basis that others (ie your competitors) followed suit. This sort of concerted arrangement whereby the parties indicate their willingness to follow a particular course of action would appear to fall within what we would regard as an agreement or concerted practice within the meaning of the Chapter I prohibition (see paragraphs 2.7 and 2.8 of the guideline).

The next question is whether such an arrangement would have an appreciable effect on competition and/or might be capable of benefiting from an exemption. I have little doubt that we would regard the type of agreement or concerted practice in contemplation as having an appreciable effect. What we are talking about is essentially an agreement to raise consumer prices in order to pass on the increase to farmers. Whatever one might think about the desirability of helping a hard-pressed sector of the economy, the guideline makes it clear that we are likely to regard such agreements as significant where they involve a combined market share in excess of 25% (paragraph 2.19 of the guideline) or where they fix prices (paragraphs 2.20 and 3.5). Both would appear to apply in this case and it is difficult to see how such an agreement could qualify for exemption.

In summary, the sort of letter you contemplate would in our view be likely to suggest a breach of the Chapter I prohibition. I am making this view clear to both Safeway and [a retailer] (but without referring to Tesco in any way).\textsuperscript{313}

5.11. The OFT also made its views clear to both Safeway and [a retailer] in letters to Safeway (to [a senior manager at Safeway]) and [a retailer] (to

\textsuperscript{312} See document 81 to the SO.
\textsuperscript{313} See document 82 to the SO.
[a senior manager at a retailer]) dated 25 April 2000. The OFT’s letters were identical and read:

'It has come to our attention through the trade press and other sources, that your company has put forward and/or offered support for a proposal that the retail price of milk should be increased on the basis that the benefit of this increase be passed to dairy farmers.

We can accept that the dairy farming industry is undergoing an exceptionally hard time (caused in large part by the continuing strength of the pound against other European currencies). However, I think that I must make the point to you that the action you seem to contemplate in the letter I have seen (copy enclosed) might well be a breach of the prohibition on anti-competitive agreements under Chapter I of the Competition Act 1998. Indeed it seems to me that in itself the issuing of this type of letter may amount to such a breach.

I enclose a copy of the guideline the OFT has issued on the Chapter I prohibition. Your letter seems to me to amount to an indication of the sort of action you would be willing to take on the basis that others (ie your competitors) followed suit. This sort of concerted arrangement whereby the parties indicate their willingness to follow a particular course of action would appear to fall within what we would regard as an agreement or concerted practice within the meaning of the Chapter I prohibition (see paragraphs 2.7 and 2.8 of the guidelines).

I have little doubt that we would regard such an arrangement as having an appreciable effect on competition. What we are talking about is essentially an agreement to raise consumer prices in order to pass on the increase to farmers, Whatever one might think about the desirability of helping a hard-pressed sector of the economy, the guideline [sic] make it clear that we are likely to regard such agreements as significant where they involve a combined market share in excess of 25% (paragraph 2.19 of the guideline) or where they fix prices (paragraphs 2.20 and 3.5). Both would appear to apply in this case and it is difficult to see how such an agreement or concerted practice could qualify for exemption. Any agreement which has the effect of fixing (and indeed in this case raising) consumer prices is effectively not exemptable and is likely to breach the prohibition. Considerable fines are capable of being imposed for such a breach.

I hope that you will be able to give me an assurance that this initiative on milk prices will go no further.\(^\text{314}\)

5.12. Subsequent to the OFT’s letters, this initiative was abandoned. However, notwithstanding the OFT’s advice a series of price initiatives were subsequently implemented involving increases in the retail and wholesale prices of cheddar and British territorial cheeses in 2002 and 2003 and FLM in 2003.

B. CONCERTED PRACTICES IMPLEMENTED IN 2002 AND 2003

I. Introduction

\(^{314}\) See documents 83 and 84 to the SO.
5.13. In order to find an infringement of the Chapter I prohibition, the OFT must establish that the Parties entered into an agreement and/or engaged in a concerted practice that may affect trade within the UK and had as its object or effect the appreciable prevention, restriction or distortion of competition. In this Decision the OFT has found that each of the Infringements had as its object the prevention, restriction or distortion of competition. Consequently, it is not necessary for the OFT to determine whether the Infringements also (or alternatively) had the effect of preventing, restricting or distorting competition and the OFT, accordingly, makes no such finding in this Decision.

a. Market conditions at the time of the concerted practices

5.14. The evidence in the OFT’s possession demonstrates that the aim of both the 2002 Cheese and 2003 FLM Initiatives was to financially assist UK dairy farmers by subsidising an increase in the farmgate price through co-ordinated wholesale and retail price increases. The evidence in the OFT’s possession demonstrates that the aim of the 2003 Cheese Initiative was to financially assist McLelland by subsidising an increase in the wholesale price of cheese it supplied to retailers through a co-ordinated retail price increase in order to ‘stabilise’ McLelland’s margins.\(^{315}\)

5.15. Accordingly, regardless of their aim(s), a key component of each of the Infringements was co-ordinated retail price increases. Moreover, the evidence demonstrates that retail prices did rise as a result of each Infringement meaning consumers paid more for cheddar and British territorial cheeses and FLM products than they had previously done.

5.16. In their responses to the SO, the SSO, and in the context of early resolution discussions, the Parties submitted representations to the OFT regarding the nature of the Initiatives which they requested be reflected in the OFT’s analysis of the Infringements. These representations can be broadly summarised as follows:\(^{316}\)

- The Initiatives were motivated by a desire to financially assist UK dairy farmers rather than to increase profits and the Parties did not gain financially.
- The Parties were under significant pressure to take action given the pressure from farmer groups.
- The Government positively encouraged the Initiatives.

5.17. Each of these issues is considered in detail below.

i. Parties’ motivation was to financially assist UK dairy farmers

5.18. The majority of the Parties claimed that:

\(^{315}\) See paragraph 5.22 below.

\(^{316}\) In the following section, the OFT has made reference to submissions of Parties as examples only, since similar submissions were made by the same and other Parties during the early resolution discussions that were conducted on a ‘without prejudice’ basis (see section 2 above). These submissions cannot therefore be referred to in this Decision.
i. the aim of the Infringements was to financially assist UK dairy farmers;

ii. they did not gain any commercial benefit from their participation in the Infringements; and

iii. they took all appropriate steps to pass the increases in retail prices for both FLM and cheese arising from the Infringements back to farmers. 317

5.19. It is important to note that the OFT recognised in the SO that the apparent purpose of both the 2002 Cheese and 2003 FLM Initiatives was to financially assist UK dairy farmers – and this conclusion is supported by a number of contemporaneous documents.

5.20. In relation to the 2002 Cheese Initiative, for example, a briefing document that was sent by Dairy Crest to each of Asda, Safeway, Sainsbury's and Tesco in late September 2002, states that 'our objective is to pass the revenue gained [from retail and wholesale price increases on cheese] straight on to farmers'. 318

5.21. An example in relation to the 2003 FLM Initiative is provided in e-mails from Wiseman to each of Safeway and Sainsbury’s in June 2003, which refer to 'the retail initiative to increase retails on Fresh Milk … and pass this to the farmer via the processor'. 319

5.22. The evidence demonstrates that the purpose of the 2003 Cheese Initiative was to increase ('stabilise') McLelland’s margins, rather than pay a higher farmgate price to farmers. 320 This motivation is demonstrated by presentations and written proposals made by McLelland to Sainsbury’s and Tesco – and was confirmed in a submission made by McLelland to the OFT following the issue of the SO in which it stated that the aim of the initiative was:

'to stabilise its [McLelland’s] profit margin in the wake of cost increases which it was finding increasingly difficult to absorb given that it had not benefited from an increase in wholesale prices for the previous five years'. 321

5.23. Although some contemporaneous documents show that certain retailers asked McLelland to pass the increased wholesale prices on to farmers there is no evidence to suggest that they believed or received any assurance that McLelland would act in this way, nor that they required McLelland to do so. This is demonstrated by an email from [Tesco’s Senior Cheese Buyer] to [McLelland’s National Account Manager for its

317 See, for example, documents 34 (at section 3.6); 39 (at paragraph 3.3 and 3.4); 58 (at section 3); 62 (at paragraphs 3.51 and 3.57); and 68 to the SSO.
318 See documents 70, 71, 72, 73 and 170 to the SO. See also, for example, documents 178 and 180 to the SO.
319 See documents 227 and 228 to the SO. See also, for example, documents 214, 230, 237 and 244 to the SO.
320 See, for example, documents 261 and 273 to the SO.
321 See document 44 to the SSO, at paragraph 14.
Tesco account following Tesco’s agreement to increase its cheese prices:

‘it is our wish that this [increase in wholesale price] is passed back to the farmers but as they are your costs you must do as you see fit’.322

Parties did not gain financially from the Infringements

5.24. In the SO, the OFT included a comparison of retail and farmgate price data between October 2000 and December 2003, which suggested that the alleged co-ordinated retail price increases did not appreciably increase farmgate prices for raw milk.323 As shown in this Decision, the retail price of FLM increased in July 2003, along with two retail price increases for certain categories of cheese in autumn 2002 and autumn 2003. However, it is not clear whether these retail price increases resulted in an increase in farmgate prices and the evidence suggests that the retail price increases may not have resulted in a corresponding increase in farmgate prices, which fluctuated only slightly in the same period. On the other hand, the House of Commons Environment, Food and Rural Affairs Committee examined whether retail price increases that were implemented in July and September 2003 were passed back to farmers and concluded that they were transmitted to farmers.324 However, the report also noted concerns about the way in which the price increases were transmitted, in particular, that they were uneven; some farmers benefited more than others; they were delayed; it took some time for increases in retail prices to reach farmers; and it remained to be seen how long the price increases would remain sustainable.325

5.25. It is extremely difficult to attempt to accurately establish what impact the various price initiatives did in fact have on the farmgate price – not in the least because of the need to identify a benchmark price against which to consider the impact of the Infringements (in other words whilst the farmgate price may have fluctuated only moderately following the price initiatives, it is plausible that the price would have fallen to lower levels without an initiative).326

5.26. However, it is not necessary for the OFT to establish whether any of the Infringements achieved their apparent aim of increasing farmgate prices in order to find that there has been an infringement of the Chapter I

322 See document 277 to the SO.
323 See paragraphs 422 to 429 of the SO.
325 Ibid.
326 See, for example, documents 34 (at section 3.2); 58 (at section 3); 62-7 (at paragraph 2.14); and 68 (at page 3) to the SSO. Tesco submitted that its analysis of farmgate prices suggested that, controlled for seasonality, average farmgate prices in fact rose as a result of the retail price increases for liquid milk in 2002 (by around 0.6ppl) and 2003 (by around 1.4ppl) (see document 62 to the SSO, at paragraph 3.53; and document 62-7 to the SSO, at paragraphs 2.1 to 2.15). Witnesses from Dairy Crest and Glanbia also stated that their employers had not gained from the Infringements – see documents 24 (at paragraphs 37 to 38 and 58); 41 (at page 4); and 42 (at page 5) to the SSO.
prohibition. Accordingly, the OFT has not reached a conclusion on this point in this Decision. Indeed, it is important to note that the co-ordination of retail prices is anti-competitive regardless of whether the motivation is to pass the proceeds up the supply chain rather than retain them. The Infringements restricted competition between grocery retailers in respect of cheddar and British territorial cheese and/or FLM and consumers paid higher prices.

5.27. That said, the OFT does not dispute (and has never disputed) that the Parties entered into the 2002 Cheese and 2003 FLM Initiatives with the intention of passing the proceeds of increased retail and wholesale prices to UK dairy farmers and that they made limited (if any) financial gain from their participation. It also appears that at least two retailers requested that the proceeds of the 2003 Cheese Initiative be passed back to farmers – although there is no evidence to suggest that they received any assurance that this would happen or indeed that they made this a requirement.

5.28. While this does not affect the infringement findings in this Decision, the OFT has taken the motivation of the Parties in participating in the Initiatives and the fact the Parties are unlikely to have gained financially from them into account when determining the appropriate amount of a financial penalty for each Party.

ii. **Severe farmer pressure**

5.29. The SO recognised that both retailers and processors faced considerable pressure from dairy farmers and farmer organisations to take steps to increase the farmgate price. For example, an FFA press release of 12 July 2002 states that:

> 'we successfully blockaded ... sites belonging to Dairy Crest and Robert Wiseman. ... These protests will start to escalate over the coming weeks until the said companies act in a responsible manner [by returning the money they stole from British dairy farmers].'

5.30. Further, a briefing document that was sent by Dairy Crest to each of Asda, Safeway, Sainsbury’s and Tesco in late September 2002, states:

> 'There is enormous pressure from the British Farming Community to address the very low level of milk prices of present. Retailers and processors alike face a prolonged and increasingly bitter period of protest and disruption if this issue is not addressed.'

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327 The OFT has also considered whether the criteria for exemption under section 9 of the Act were met, but has concluded that they were not.
328 See, for example, case C-551/03 General Motors v Commission [2006] ECR I-3137, at paragraph 64. See also case C-209/07 Competition Authority v Beef Industry Development Society and Barry Brothers (Carrigmore) Meats [2008] ECR I-8637, at paragraph 21.
329 See document 164 to the SO.
330 See documents 70, 71, 72, 73 and 170 to the SO. See also, for example, documents 163 and 167 to the SO.
5.31. In relation to the 2003 FLM Initiative, an internal Arla document states that:

'As a result of an aggressive move by the farmers in a number of our customers, there will be a price increase on fresh milk from 1/7/03. ... The farmers are looking for universal support, with retailers running the high risk of being picketed if they do not increase their prices.'

5.32. Many of the Parties provided further detail on the level of pressure they were being put under at this time. They submitted that they had protracted dealings with farmer organisations such as FFA and the NFU and were put under pressure by farmers through protests and blockades of facilities.

5.33. Much of this farmer action was targeted at the processors. For example, Dairy Crest submitted that its operations were subject to blockades and its staff ‘were subjected to aggression and abusive behaviour by farmers, even on occasion involving threats of violence against them and their families, along with extremely distressing accusations of responsibility for farmer suicides’. Documents on the OFT’s file support that processors faced such actions around the time of the Initiatives.

5.34. Retailers also submitted that they were targeted by lobbying and direct action from farmer groups and documents on the OFT’s file support that retailers faced such actions around the time of the Initiatives.

5.35. Witness evidence obtained by the OFT after the issue of the SO also supports that processors and retailers faced lobbying and direct action from farmer groups at the time. For example:

- [Asda’s Category Manager for Dairy] stated that ‘the scenario was that, back in 2002, that the farmers ... were doing a lot of lobbying, including taking action against retailers, particularly Farmers For Action, picketing depots, stopping goods getting out from depots ...’.  

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331 See document 220 to the SO (undated but likely produced around 24 June 2003).
332 See, for example, documents 34 (at paragraph 3.1.5); and 62 (at section 3) to the SSO.
333 See, for example, documents 34 (at section 3.1) and 68 (at page 1) to the SSO.
334 See document 34 to the SSO, at paragraph 3.1.5.
335 Examples in addition to those in paragraph 5.35 are in OFT interviews with: [Asda’s Business Unit Director] (document 15 to the SSO, at pages 3 and 5 to 7); [Sainsbury’s Senior Cheese Buyer] and [Sainsbury’s Dairy Trading Manager] (documents 60 (at pages 7 to 8) and 61 (at pages 3 and 30) to the SSO respectively); and [Wiseman’s National Accounts Manager for its Safeway and Sainsbury’s accounts, a senior manager at Wiseman] and [Wiseman’s National Accounts Director] (documents 71 (at page 3), 72 (at page 9) and 73 (at pages 3 to 4) to the SSO respectively); and in notes of the respective Parties’ own interviews with a number of Asda employees (document 14 to the SSO, at section 2), with [a senior manager at Dairy Crest], [a senior manager at Dairy Crest] and [a senior manager at Dairy Crest] (documents 24 (at paragraphs 8 to 27), 28 (at paragraphs 15 to 19) and 33 (at paragraph 5) to the SSO respectively) and with [a senior manager at Glanbia] and [a senior manager at Glanbia] (documents 40 (at pages 1 to 2) and 42 (at page 2) to the SSO respectively).
336 See document 17 to the SSO, at page 4.
• [A senior manager at Dairy Crest] explained: 'Blockades started to increase as did the levels of anger. Blockades now began against retail distribution centres...'. \(^{337}\)

• [A senior manager at Dairy Crest] stated: 'Dairy Crest was at that time the biggest processor and was first in line as the obvious target to be picketed. … Dairy Crest viewed this picketing as inconvenient and a nuisance. It looked bad but did not in fact lead to a drop in our business. FFA realised that they would have more impact if they picketed retailers. … FFA therefore decided to target the retailers themselves'. \(^{338}\)

• [A senior manager at Wiseman] stated: 'They [FFA] had picketed us … at several of our sites. … [I]n instances of that, we’d worked our way through that … . But when they turned up at the supermarket sites and they shut down an RDC [regional distribution centre], I think they were much more sensitive to being closed down than we were, because it encompassed all their business and certain stores could be extremely vulnerable to being out of goods …'. \(^{339}\)

5.36. The OFT acknowledges that at the time of the Infringements, the Parties were under severe pressure to take action to financially assist UK dairy farmers. However, it does not accept that this pressure made it necessary or justified to co-ordinate retail price increases. In particular, the OFT considers that Parties could have taken unilateral action to support UK dairy farmers, as some retailers have indeed subsequently done,\(^{340}\) without infringing the Chapter I prohibition. Although the severe pressure the Parties faced does not undermine the OFT’s infringement findings or legitimise the Parties’ actions, the OFT does consider that it is appropriate to take it into account when determining the appropriate amount of a financial penalty for each Party – and has done so.

iii. Political pressure

5.37. Several Parties also referred to political pressure to increase the farmgate price to farmers and submitted that there was support from within the Government and Parliament for the industry to work together in order to increase the farmgate price for raw milk.\(^{341}\)

5.38. For example, in its representations on the SO, Tesco quoted [an official] at the Department for Environment, Food and Rural Affairs (‘Defra’), who stated:

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\(^{337}\) See document 30 to the SSO, at paragraphs 18 to 19.

\(^{338}\) See document 28 to the SSO, at paragraphs 16 to 17. See also, for example, document 32 to the SSO (note of interview with [a senior manager at Dairy Crest], at paragraph 7.

\(^{339}\) See document 72 to the SSO, at page 9.

\(^{340}\) For example, in the report The supply of groceries in the UK market investigation (30 April 2008) the CC noted how in recent years there has been a trend for grocery retailers to develop dedicated supply chains for which premiums are paid over and above farmgate prices (Appendix 9.3, at paragraph 17).

\(^{341}\) See, for example, documents 34 (at section 3.4) and 62 (at paragraphs 3.23 to 3.30) to the SSO.
'We [Defra] shall take every opportunity to encourage all parts of the dairy industry to take up the recommendations of the Milk Task Force to improve communications between one another – for example between supermarkets and their suppliers – and to increase co-operative and collaborative activity'.

5.39. Additionally, Dairy Crest referred to the conclusions of a report on milk pricing by the House of Commons Environment, Food and Rural Affairs Committee of 8 June 2004 (the 'Select Committee Report').\footnote{\textit{Milk Pricing in the United Kingdom}, Ninth Report of Session 2003-2004 (HC335), 8 June 2004.} The Select Committee Report stated:

'We welcome the decisions of the supermarkets to increase the retail prices of liquid milk and cheese last year (2003) while specifying that the price increases must be passed along to farmers.'

5.40. The OFT does not consider that this evidence undermines its infringement findings in this Decision. Although the Select Committee Report demonstrates that it was aware that cheese and milk retail prices were increased in 2003 in order to financially assist UK dairy farmers and also shows support for action being taken by those lower down the supply chain to financially assist UK dairy farmers,\footnote{Select Committee Report, paragraphs 28 and 83.} there is nothing within the report that suggests the Select Committee was aware that these retail price increases may have been co-ordinated nor that such an illegal course of action was (or would have been) endorsed.

5.41. The only suggestion that the Government may not have raised any concerns about a potential infringement of competition law in relation to the price increases for milk in 2003 and cheese in 2002 and 2003 was that, according to witnesses of Glanbia and another processor, [an official] at Defra ‘brushed … off’ their comments about such a potential infringement at an industry dinner in 2002 or 2003.\footnote{See document 40 to the SSO, at page 3. Another processor also submitted this argument but requested confidentiality on that submission since it considered that the dinner in question was held under the ‘Chatham House rule’. It is not clear whether [a senior manager at Glanbia] and the other processor’s witnesses attended the same dinner, but it appears likely. [A senior manager at Glanbia] could not remember the exact date.} However, none of the Parties has submitted evidence demonstrating that any part of the Government or Parliament was, in fact, aware of, or approved of, the co-ordinated nature of the retail price increases achieved by the Infringements.

5.42. Accordingly, the OFT does not accept that there was Governmental or Parliamentary knowledge of or support for the Infringements that are the subject of this Decision.

\begin{itemize}
\item \textbf{b. How the price increases were implemented}
\end{itemize}

\footnote{See document 62 to the SSO, at paragraph 3.25, from a written answer in the House of Commons of 14 May 2002.}
5.43. Regardless of their motivation, the Infringements that are the subject of this Decision all resulted in, or aimed for, 2ppl price increases (or £200pmt as the equivalent measure in the case of cheese) in the retail prices of cheddar and British territorial cheeses in 2002 and 2003 and FLM in 2003. These retail price increases were accompanied by corresponding wholesale price increases which were either implemented before or after the retail price increase had taken place.

5.44. Taking into account that market forces did not support or justify an increase in the wholesale and retail price of FLM during the period 2002 to 2003, these closely timed retail price increases raised a suspicion of co-ordination. The evidence presented below demonstrates that the retail price increases that are the subject of this Decision were co-ordinated. This co-ordination occurred through a number of practices by which the retailers that are addressees of this Decision knowingly substituted practical co-operation for the risks of competition by eliminating or, at the very least, substantially reducing uncertainty as to their future market behaviour through the indirect disclosure of commercially sensitive information between themselves.

5.45. The type of information disclosed by retailers chiefly consisted of expressions of willingness to increase retail prices on condition that their competitors either led or followed the retail price increase and information concerning future retail price increases (such as the levels of the retail price increases and the dates on which those increases would be implemented).

5.46. This commercially sensitive information was disclosed indirectly between the retailers that are addressees of this Decision with their supplying processors acting as the intermediaries through which information was disclosed. For each of the Infringements, these disclosures formed part of a common plan to co-ordinate retail prices.

5.47. In disclosing this information, the retailers that are addressees of this Decision, at the very least, substantially reduced uncertainty as to the conduct on the market to be expected on their part as they indirectly revealed to their competitors the course of conduct they had decided to adopt or contemplate adopting on the market in respect of retail prices.

347 See section 4 above.
This meant what should otherwise have been an independent decision to set retail prices, was instead a decision taken in the context of awareness of (often precise) details of their competitors’ retail pricing intentions.\footnote{361}

c. **Overview of the legal framework applied**

5.48. The OFT has assessed the evidence presented in sections 5 below within the framework used by the Court of Appeal in its judgement in the *Hasbro*\footnote{352} and *Replica Kit*\footnote{353} appeals. As set out at section 3 above, the framework requires the OFT to establish that:

i. retailer A disclosed its future pricing intentions to supplier B in circumstances where retailer A may be taken to have intended or did, in fact, foresee that supplier B would make use of that information to influence market conditions by passing that information to other retailer competitors of retailer A (of whom retailer C is or may be one); and

ii. supplier B did, in fact, pass that pricing information on to retailer C in circumstances where retailer C may be taken to have known the circumstances in which the information was disclosed by retailer A to supplier B or retailer C did, in fact, appreciate that the information was being passed to it with retailer A’s concurrence; and

iii. retailer C did, in fact, use that information in determining its own future pricing intentions.

5.49. Although reciprocity is not a necessary condition in demonstrating an infringement, the case is all the stronger where it is proven.\footnote{354}

II. **2002 concerted practice in respect of cheese retail prices (‘The 2002 Cheese Initiative’)**

5.50. The OFT has found that Asda, Dairy Crest, Glanbia, McLelland, Safeway, Sainsbury’s and Tesco (each referred to as a ‘2002 Cheese Party’, collectively referred to as the ‘2002 Cheese Parties’) infringed the Chapter I prohibition by participating in a single overall concerted practice

\footnote{CAT 17 at [872]. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [206(viii)].}

\footnote{\textit{Joined Cases 40/73 etc Suiker Unie and Others v Commission} [1975] ERC 1663, at paragraph 173. See also, for example, *Cases C-199/92P etc Hüls AG v Commission* [1999] ECR I-4287 and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [206(iv)].}

\footnote{*Argos Limited and Littlewoods Limited v Office of Fair Trading* [2006] EWCA CIV 1318.}

\footnote{*JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318.}

\footnote{Reciprocity in this sense is where, having received retailer A’s future pricing intentions, retailer C then discloses its future pricing intentions to supplier B in circumstances where it may be taken to have intended or did, in fact, foresee that supplier B would make use of that information to influence market conditions by passing it on to (amongst others) retailer A, and supplier B does pass that information to retailer A (\textit{Argos Limited and Littlewoods Limited v Office of Fair Trading} and \textit{JJB Sports plc v Office of Fair Trading} [2006] EWCA CIV 1318, at paragraph 141).}
which had as its object the prevention, restriction or distortion of competition in respect of retail prices of UK produced cheese in the autumn of 2002. This single overall concerted practice is referred to as the '2002 Cheese Initiative'.

5.51. Each of Asda, Dairy Crest, Glanbia, McLelland, Safeway and Sainsbury’s has admitted its involvement in the 2002 Cheese Initiative as part of the early resolution agreements that each entered into with the OFT.

5.52. Tesco made written representations on the SO, which the OFT considered before issuing the SSO but did not find persuasive. Following its decision to further contest its alleged participation in the 2002 Cheese Initiative, Tesco also made written representations on the SSO. In this section, the OFT has addressed Tesco’s written representations on both the SO and the SSO when appropriate.

5.53. In this section of the Decision, the OFT presents, analyses and draws conclusions from the evidence on which it relies in reaching its infringement finding. It is structured as follows:

i. First, it provides relevant background to the cheese market.

ii. Second, it presents and analyses the evidence on which the OFT relies in respect of the 2002 Cheese Initiative by reference to the relevant law and incorporates, where appropriate, any comments received from the 2002 Cheese Parties as to the factual inaccuracy of the OFT’s proposed findings in the SO and SSO as well as Tesco’s representations on the SO and the SSO.

iii. Third, it sets out the OFT’s conclusions in respect of each of the 2002 Cheese Party’s involvement in the 2002 Cheese Initiative.

5.54. The Parties should note that the conclusion section is not exhaustive and nor is it intended to be so. For the avoidance of doubt, the OFT relies on the contents of paragraphs 5.55 to 5.486 below to support its infringement finding in respect of the 2002 Cheese Initiative.

a. Relevant background of the cheese market

5.55. The cheese product market is extremely diverse with numerous different varieties of branded products (for example, and of particular relevance to the 2002 Cheese Initiative, Dairy Crest’s Cathedral City brand and McLelland’s Seriously Strong brand) and own label products, and significant amounts of produce imported from countries outside of the United Kingdom. Additionally, cheese is sold at the retail level in a number of ways. It can be pre-packed in either fixed or random weight forms or sold over deli-counters. The significant number of product lines meant that a high level of contact between cheese processors and retailers was required in order to achieve and sustain co-ordinated retail price increases.
5.56. The majority of pre-packed cheese is random weight\(^{355}\) and so is priced on its packaging by the packing company (which is often also the supplying processor) and then supplied to retailers. This process makes attempts to time the implementation of a retail price increase precisely difficult compared with fixed weight products which are priced on a shelf edge or through price labels applied by a retailer. This is because retailers need to sell their existing priced marked cheese stock before they are able to place stock with a revised price on the shelf.

5.57. This time lag complicates attempts to co-ordinate retail price increases. This is because the major grocery retailers are extremely sensitive about their cheese retail prices when compared with those of their competitors and (as the evidence in relation to the 2002 Cheese Initiative will demonstrate) were only prepared to increase their retail prices if their competitors also increased their retail prices. Accordingly, if a retailer had increased its retail prices and was waiting for a competitor to match its increase or if a retailer wished to see that a competitor had increased its retail prices before increasing its own retail prices, there could be a gap between the implementation of a retail price increase by the first retailer and the increase implemented by the retailer following, while it used up price marked cheese. This would result in the first retailer being left in an uncompetitive position for what might be an undesirable period of time.

5.58. In circumstances where cheese is pre-packed and priced marked by a supplying processor (specifically, where that product is random weight), there is a legitimate commercial reason for a retailer to inform that supplier of its retail pricing intentions. This is because a supplier will require information as to the amount and timing of any retail price increase before it is able to print the retail price on the packaging.

5.59. However, notwithstanding this process, the OFT considers that the weight of evidence in the 2002 Cheese Initiative clearly demonstrates that retailers disclosed information regarding their cheese retail pricing intentions to their supplying processors in circumstances where they clearly understood that the retail price increases were part of a co-ordinated plan to increase cheese prices across the grocery retail sector, which would also have involved the implementation of retail price increases by their competitors. Additionally, the evidence will show that disclosures of retail pricing intentions were frequently reciprocal in that they were made by retailers after they had received information regarding one or more of their competitors’ retail pricing intentions and that certain retailers disclosed that their willingness to increase cheese retail prices was conditional upon their competitors also increasing their prices.

5.60. Taking into account this context, the OFT has concluded that, notwithstanding the legitimate commercial reason for a retailer to disclose information concerning its cheese retail pricing intentions in respect of pre-packed, random weight cheese to its supplying processors, in the

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\(^{355}\) Random weight cheese means that each item is not of a uniform weight and so a standard uniform retail price cannot be applied. Instead, each item needs to be weighed and priced individually on the packaging. In contrast, fixed weight products have a uniform weight so will have the same retail price.
context of the 2002 Cheese Initiative these disclosures were made in circumstances where the disclosing retailer may be taken to have intended and did, in fact, foresee that the supplying processor would make use of the information to influence behaviour on the cheese retail market by passing it on to other retailers.\textsuperscript{356}

5.61. It should be noted that the 2002 Cheese Initiative covered various types of cheese (including fixed weight packs and deli counter cheese) which are not priced on its packaging (and so the retail price is not printed on the product by the supplying processor) and for which there is no obvious legitimate commercial reason for a retailer to inform its supplying processor of information regarding its intention to increase its retail prices aside from promotional activity.

b. Analysis of evidence

5.62. In this section, the OFT sets out the evidence relied upon to establish that the 2002 Cheese Parties infringed the Chapter I prohibition by participating in the 2002 Cheese Initiative.

i. Supply relationships

5.63. The following cheese supply relationships existed at the time of the 2002 Cheese Initiative.

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<tr>
<th>Dairy Crest</th>
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<td>Tesco</td>
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Source: Information supplied by the Parties.

ii. Contacts between cheese processors, retailers and farmer representative groups regarding the need for a farmgate price increase

Introduction

5.64. Farmer representative groups exerted pressure on processors and retailers during the summer of 2002 with the aim of securing an increase in the farmgate price of raw milk used for cheese production. The paragraphs below set out details of some of these contacts.

Farmers For Action (FFA) statement 8 July 2002

5.65. On 8 July 2002, FFA issued a statement explaining that it planned direct action against dairy processors with the implication that supplies of milk and other dairy products (which the OFT has inferred would have included cheese) might be disrupted:

‘Following negotiations that have taken place with dairy processors over the last few days, to no avail, Farmers For Action have been left with no alternative other than to take direct action against certain milk processors. All major supermarkets have been notified that they are about to see disruption to their supply of milk and dairy products as they have all been honest enough to denounce any price reduction that has been made by the milk processors.’

5.66. This statement was followed by blockades of some dairy processing facilities by farmers, which was reported in a further FFA statement issued on 12 July 2002:

‘FFA were delighted at the turnout of farmers from Cornwall to Manchester last night, Thursday 11 July. We successfully blockaded the following sites belonging to Dairy Crest and [a processor]: Chard, Droitwich, Davidstow, Manchester & Hamworth in London. Last night’s demonstration was to send a message to both these processors to return the money they stole from British dairy farmers on July 1st. These protests will start to escalate over the coming weeks until the said companies act in a responsible manner.’

Letter from National Farmers’ Union Scotland (NFUS) to Sainsbury’s, 28 August 2002

5.67. NFUS representatives lobbied contacts at Sainsbury’s with the aim of achieving some sort of action to increase the farmgate price of raw milk used to make cheddar cheese.

5.68. On 28 August 2002, [an official at NFUS] sent a letter to [a senior manager at Sainsbury’s]. This letter read as follows:

‘You are aware of increasing pressure amongst milk producers for action to support their call for an increase in the farm-gate price of milk... I know that you fully understand the range of issues behind the current price situation, but you will also appreciate that most farmers see the supermarkets as the most powerful players in the chain, and therefore those with the best ability to change the situation. Their concerns are about both the milk and Cheddar cheese markets, and they are looking for real upward price movement as the autumn milk round approaches.’

[Emphasis added]

Sainsbury’s meeting with the National Farmers’ Union (NFU), 11 September 2002

5.69. Sainsbury’s representatives then met with the NFU on 11 September 2002. In preparation for this meeting [Sainsbury’s General Manager for
Dairy and Cheese requested a briefing from [Sainsbury’s Senior Cheese Buyer]. The briefing request (entitled ’CHEESE RETAILS - URGENT’) is set out below and clearly indicates that, following the implementation of a liquid milk price increase, [Sainsbury’s General Manager for Dairy and Cheese] anticipated that the NFU would want to discuss the farmgate price that dairy farmers were receiving for raw milk used for cheese processing:

'I am with the NFU tomorrow and although milk pricing has increased, they will still be pursuing the little return that Cheese Dairy farmers get. In preparation and [sic] by lunchtime tomorrow, can you please prepare a rough summary of the retail price movements on standard JS Cheese lines in the last 12 months due to competitive pressures from Tesco.'

[Emphasis added]

Asda communication with NFUS, 12 September 2002

5.70. On 12 September 2002, [Asda’s Agricultural Development Manager] sent an internal e-mail to [Asda’s Business Unit Director for Dairy] and [Asda's Category Manager for Dairy] reporting on conversations with [an official at NFUS]. The e-mail referred to a media statement made by the NFUS which identified that the farmgate price increases achieved for FLM needed to be supplemented by price increases for other dairy products in order to provide a greater return for dairy farmers. This was because 'liquid milk only account[ed] for half of the [processed milk] market':

'Responding to the milk price rise this week: [an official at NFUS] "Liquid milk only accounts for half the market, so we will continue to look for a similar commitment to be made on cheese and other dairy products."'

[Emphasis added]

5.71. The OFT has inferred that the reference to the NFUS looking 'for a similar commitment to be made on cheese' to that which had been implemented in respect of FLM meant that the NFUS was looking to retailers to engage in some form of price initiative to subsidise a further increase in the farmgate price.

iii. Tesco dairy supply group meeting, 13 September 2002

Introduction

5.72. A Tesco dairy supply group meeting occurred on 13 September 2002. The meeting was attended by several dairy processors that supplied Tesco with FLM and cheese. Staff attending the meeting on behalf of [a processor], [a processor] and Dairy Crest each made notes of the meeting. Additionally, an account of discussions was also included in [a

360 See document 166 to the SO.
361 See number 167 to the SO.
362 See document 167 to the SO.
363 The OFT notes that Glanbia did not attend this meeting, as it did not supply Tesco at the time.
There is a high degree of consistency between each of the meeting notes and [a processor’s] National Account Board report and therefore each account corroborates the others.

Analysis of meeting notes

[A processor’s] note of the Tesco Supply Group meeting

5.73. [A processor’s] meeting note was prepared by [an employee at a processor] [one of two [of that processor’s] employees who attended the Tesco dairy supply group meeting] and records that the meeting was additionally attended by:

- [Tesco’s Category Manager for Dairy];
- [Tesco’s Category Director for Dairy];
- [Farm Liaison Manager at a processor];
- [Farmer Representative at a processor];
- [Dairy Crest’s Commercial Director for its Tesco account];
- [a Dairy Crest Technical Director for Milk];
- [a senior manager at a processor];
- [an employee at a milk partnership];
- [an employee at a processor];
- [McLelland’s National Account Controller];
- [a senior manager at a processor];
- [National Accounts Director at a processor];
- [Farmer Representative at a processor]
- [an employee at a processor];
- [Producer Representative at a processor];
- [Producer Representative at a processor];
- [an employee at a processor];
- [an employee at a processor]; and

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364 See document 153 to the SO.
365 'McLelland' is written as 'McHolland' in [a processor’s] meeting note. The OFT has established that [McLelland’s National Account Controller] was employed by McLelland as Farther National Account Controller at a processor and was employed by McLelland as at 13 September 2002.
366 [A National Accounts Director at a processor] authored the [processor’s National Account Board] report, set out at paragraph 5.95 below.
• [an employee at a producer].

5.74. The meeting notes prepared by [a processor] and Dairy Crest do not identify individual attendees, however, [a processor’s] meeting note recorded that the companies represented were [a processor], [a processor], McLelland, [a processor], [a processor], [a processor], [a processor], Dairy Crest, [a processor], [a producer] and [a processor].

5.75. [A processor’s] meeting note was circulated within [that processor] by [an employee at that processor] by e-mail on 16 September 2002. The e-mail reads as follows:

'[A Buying Manager for Milk at a processor] asked me to circulate notes on the Producer Forum which are attached – for the last hour we were just going nowhere and at times throughout [Tesco’s Category Director for Dairy] and [Tesco’s Category Manager for Dairy] appear to have had different views.’

5.76. The note listed the following under the heading ‘Expectations of the meeting (points raised around the table by various)’:

'Realistic next steps
Clarification on Tesco initiative and background
How do we keep this initiative going and other retailers’ response
How sustainable?

Price move from fresh milk into cheese
Clear agenda for way forward
Expectations from milk producers
Consumer – managing their expectations
Long term stability
How is money passed back through the likes of [a producer]/[a processor]

Expectations on Tesco’s farm standards impact
Plans for any further retail price changes'

[Emphasis added]

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367 The recipients were [a senior manager at a processor], [a senior manager at a processor], [an employee at a processor, position unknown], [a senior manager at a processor] (who attended the Tesco dairy supply group meeting) and [an employee at a processor, position unknown]. This e-mail was also forwarded to [a processor’s Category Sales Manager for its Tesco and another retailer account] on the same day.
368 See document 68 to the SO.
369 Ibid.
5.77. The note then records that [Tesco’s Category Manager for Dairy] stated that Tesco wished to see an increase in farmgate prices and referred to the action that had already been taken to achieve this through the 2 pence per litre (‘2ppl’) increases that had been implemented in respect of milk earlier that week. However, it is evident that [Tesco’s Category Manager for Dairy] believed that the milk price increase would not be sufficient to achieve a significant increase in farmgate prices because milk sales by grocery retailers accounted for only a quarter of raw milk consumption in the UK. [Tesco’s Category Manager for Dairy] then established as Tesco’s target an aggregate 2ppl farmgate price increase and expected its processors to play a key role in achieving this:

'[Tesco’s Category Manager for Dairy] - Go back 4/5 weeks view coming back to Tesco was that come October current farmer milk prices would perhaps be difficult to hold at even the current low levels. A poor summer for farming and winter prospects therefore very difficult.

Challenge to processors was that Tesco wanted to see a better return to farmers and the decision therefore taken to facilitate a price increase back to the farmer (this kind of action probably won’t be repeated). All retailers have moved except for Safeway (internal price problem but down to Safeway to solve). The challenge to processors was to put 2ppl on all milk but recognising that supermarket milk is only 25% of total. Want processors to settle this quickly with farmers so that they are confident going into the winter.

The price since March has dropped 3.25 ppl and processors are therefore expected to help in achieving the price increases.'

[Emphasis added]

5.78. Discussions then focused on how the 2ppl farmgate price increase could be achieved through extending the scope of the recent cost and retail price increases that had been achieved for milk to include other dairy products, in particular cheese.\(^{370}\) In drawing this conclusion, the OFT notes not only the record of subsequent discussions presented below, but also that the 'expectations of the meeting' outlined above refer to 'keep[ing] this initiative going' through a ''price move from fresh milk into cheese'.\(^{371}\)

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\(^{370}\) In its representations on the SO, Tesco acknowledged that ‘it would have been apparent to all those at the meeting that an increase of 2ppl on liquid milk alone – which accounted for around 50% of raw milk production – would not address the concerns of all farmers’ and that it was therefore ‘unsurprising’ that ‘this obvious point was raised by a number of those at the meeting.’ Tesco also acknowledged that it did ‘challenge those present to come up with proposals for meeting the milk producers’ political demands for 2ppl at the farmgate’. Given that the OFT has only presented this information to provide relevant context and to describe what was discussed at the supply group meeting itself, it is not necessary to consider these statements further, other than to note that they demonstrate that Tesco concurs with the information presented in [a processor’s] meeting note on these points and therefore that these passages of evidence are not controversial as presented.

\(^{371}\) See paragraph 5.76 above.
5.79. [Tesco’s Category Manager for Dairy] was then reported to have acknowledged that any form of price initiative for other dairy products would be relatively more difficult than milk:

‘Fresh milk was the easiest to start moving forward and Tesco looking to processors for a response in the next two weeks. **Accept that it is a complex situation but liquid simplest to kick start and Tesco now looking at other areas**’.

[Emphasis added]

5.80. It is also evident that [Tesco’s Category Manager for Dairy] gave a clear and direct indication that Tesco was contemplating increasing its cheese **retail** prices as part of any price initiative with the note recording him as stating that:

‘Cheese and spread values have crashed over the last 3 years and Tesco has been selling them at a loss. **Cautiously optimistic that Tesco can now start to move retail prices forward in this area** but Tesco still needs to sell ‘value products’ (21% of sales). Price problem in dairy victim of shopping basket values and **very difficult to move out of line with other competitors** but [Tesco’s Category Manager for Dairy] senses there is a mood to move some of these prices forward.’

[Emphasis added]

5.81. The OFT notes that there are several direct and indirect references to retail prices being increased in this passage of [a processor’s] file note. First, [Tesco’s Category Manager for Dairy] is unambiguously recorded as being ‘[ca]utiously optimistic that Tesco can now start to move [cheese and spread] retail prices forward’. Second, there is a reference to the ‘price problem in dairy’ being the result of ‘shopping basket values’, with [Tesco’s Category Manager for Dairy] again indicating that Tesco was contemplating increasing these prices because he sensed there was ‘a mood to move some of these prices forward’ – this is again a clear reference to the retail side of the dairy market. The conclusion that this second statement was a reference to cheese retail prices is further confirmed by the fact that [Tesco’s Category Manager for Dairy] also stated it would be ‘very difficult’ for Tesco ‘to move out of line with other competitors’. Tesco would only have moved out of line if it increased its retail prices to a level above its competitors. In addition, [Tesco’s Category Manager for Dairy] statement demonstrates that Tesco would have been reluctant to increase its retail prices unilaterally, even if the proceeds of the resultant increase were passed on to farmers in the form of increased farmgate prices.

5.82. The meeting note then describes that discussions turned specifically to the complexities of implementing a cheese price initiative with a particular concern being that it would affect the competitive position of UK produced cheese against imported cheeses with a [processor’s] sales person’ being recorded as having stated that the:

‘Concern is cheese side. If the base price of cheese raised then imports drawn in and price collapses. Could we perhaps relate premiums on
commodities to UK farm assurance schemes? How can UK differentiate and would the consumer recognise and pay.'

5.83. This part of the note demonstrates that the retail price increases contemplated at this meeting were in respect of British produced cheese because there were concerns that a consequence of this price initiative would have been that UK produced cheese would have been more expensive and therefore less competitive than imported products. Consequentially, this would have a negative impact on demand, possibly resulting in a further fall in the farmgate price (the note refers to a potential collapse in the cheese price in such circumstances).

5.84. The fact that a retail price increase in respect of British produced cheese was contemplated at this meeting is further confirmed by the discussion that occurred as to whether UK cheese could be differentiated from overseas produce through a farm assurance scheme in a way that would justify a retail price premium for UK produced cheese and therefore manage the risk that cheaper imports would negatively affect demand (the note refers to discussions on ‘[h]ow can UK differentiate’ and whether 'the consumer [would] recognise [the farm assurance programme] and pay’.)

5.85. Moreover, the OFT’s conclusion is further supported by a subsequent proposal made by Dairy Crest to Sainsbury’s on 25 September in which Dairy Crest expressed ‘concern’ at the ‘differentials that could occur post retail price increases, between UK sourced cheese and imports’.

5.86. In addition, the contents of certain interview notes submitted to the OFT by Dairy Crest pursuant to the early resolution agreement it entered into with the OFT following the issue of the SO further confirms the OFT’s conclusion. Although he did not attend the Tesco dairy supply group meeting on 13 September 2002, [a senior manager at Dairy Crest] provided the following insight on the issue that would arise in relation to imported cheese in the event the retail price of UK produced cheese was increased pursuant to an initiative:

'We also knew that doing this [implementing a cheese price initiative] would put up the price of British cheese but not imported cheese. This was a difficult problem because we knew consumers would switch... Therefore, it helped if the retail price of all cheese increased’

5.87. Further, the OFT has noted that [Tesco’s Category Director for Dairy] was recorded as expressing that Tesco would need to remain competitive in the retail market place if cheese retail prices were increased (with a particular concern being Asda’s price position) therefore indicating that Tesco’s willingness to increase its cheese retail prices was conditional on its competitors also doing so:

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372 See document 75 to the SO.
373 See document 28 to the SSO, at paragraph 66. See also Dairy Crest’s letter dated 25 September 2002 to Sainsbury’s where Dairy Crest raised a ‘concern about the differentials that could occur post retail price increases, between UK sourced cheese and imports’ (at paragraphs 5.161 to 5.164 below).
'Tesco's Category Director for Dairy] – at the end of the day we [Tesco] must be competitive. Highlighting that they [Tesco] are up against Walmart’s view of 'lowering the cost of living for the world, so how to tackle other sectors. How is it more sustainable over the next 12 months?'

[A processor’s] note of the Tesco supply group meeting

5.88. [A processor’s] note of the meeting is set out below:

'Tesco
• Concern expressed at last meeting that the farmer price was to [sic] low.
• Prospects going into the winter not looking good.
• March 02 price perceived as being OK
• 'Can’t have an industry that continues to do this' [price fluctuation]
• **Challenge to processors to return a better price to farmers.**
• Decided to facilitate a price increase by increasing retail by 1pp pint.
• Safeway not yet increased (price point problem).
• **Expectation that price increase to farmers should be at least 2ppl.**
• Tesco expects processors to report how they are going to achieve this.

Discussion

...  
• Tesco/processors cautiously optimistic that there is a mood to address the problem with cheese.
• Ask the customers to pay for it.
...  
• If farm assurance can be used as a point of difference then a premium can be attached to it..."375

[Emphasis added]

5.89. This account corroborates several of the areas of discussion referred to in [a processor’s] meeting note [as set out in paragraphs 5.75 to 5.87 above], in particular, that:

i. an initiative to achieve an aggregate farmgate price increase of 'at least 2ppl’ to extend the recently achieved wholesale and retail price increases in respect of milk to other dairy products was discussed and contemplated at the Tesco dairy supply group meeting;376

ii. cheese would be among the products that would be included in this initiative ('there is a mood to address the problem with cheese');377

iii. retail price increases were contemplated ('Ask customers [consumers378] to pay for it'),379 and

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374 The OFT has inferred that the reference to 'Walmart' is a reference to Asda given that Wal-Mart Stores (UK) Limited was the ultimate UK parent of Asda.
375 See paragraphs 5.77 to 5.78 above.
376 See paragraphs 5.76 to 5.85 above.
iv. Consideration was given as to whether a farm assurance scheme could be used to justify the 'premium' which - when read in conjunction with [a processor’s] meeting note [as set out in paragraphs 5.75 to 5.87 above] – further demonstrates that retail price increases were contemplated because concern was raised over how the price difference of UK produced cheese relative to imported cheese could be justified.

Dairy Crest’s note of the Tesco supply group meeting

5.90. Dairy Crest’s meeting note is handwritten and unclear in parts. However, where legible, it also corroborates much of the content of the [processors’] notes [as set out above].

5.91. The note again refers to a discussion of the need to increase farmgate prices by implementing price initiatives in respect of a number of dairy products.

5.92. The note also demonstrates that cheese would be among the products for which increases were contemplated with a discussion of a ‘...mood to see ↑ in other products ...butter/cheese...' and significantly that ‘...ultimately consumers pay...' for the increased prices that were contemplated. The reference to ‘consumers’ ultimately paying further demonstrates that it was envisaged that cheese retail prices would be increased in order to subsidise a farmgate price increase.

5.93. The note also records that the attendees at the meeting believed that achieving a price increase across other dairy products was likely to be more complex than it had been with FLM (the note states that 'other sectors [that is, other dairy products] more complex...' – this was because the milk retail market was more ‘...transparent...').

5.94. The note concludes with a record of further discussions of the practicalities of achieving these price moves. It notes that the market is deregulated and prices are volatile and mentions the need for ‘...some form of market management...' which was followed immediately by a reference to mention or discussion of ‘anti competitive [means] [text illegible: possibly ‘moves’]...’ suggesting a link between these two statements.

[A processor’s] National Accounts Board Report

5.95. A [processor] document entitled ‘National Accounts Board Report’, prepared by [the National Accounts Director of a processor] on 4 October 2002, gives an account of the Tesco dairy supply group meeting which he had attended. The relevant extract from the report again confirms that discussions focused upon extending the price increase that had been achieved in respect of milk to cheese:

378 In drawing the conclusion that the term ‘customer’ means ‘consumer’, the OFT notes the term ‘consumer’ was used by [a processor] in its record of the meeting (see document 68 to the SO set out at paragraphs 5.75 to 5.87 above).
379 See paragraphs 5.80 to 5.87 above.
380 See document 169 to the SO.
The big news this month has been Tesco's initiative to raise retail prices by circa 2 pence per litre with the idea that this money is paid back to the farmers. At the time of writing the major retailers have all followed suit and have increased their reitals [on FLM] to enable payment back to the farmers – we are presently working hard on the remaining smaller retailers to try and achieve this throughout the sector.

TESCO

...

The Tesco Suppliers Conference for the top 50 suppliers in the Dairy and Deli category was held on the 12th September 2002...

This was followed the next day with the Tesco farmers’ forum at Heathrow Airport which was attended by both milk and cheese suppliers and was totally dominated by the 2 pence per litre initiative mentioned above. Initially the meeting started on liquid prices but by the middle of the session the meeting had moved on to discuss what was felt as the crux of the matter – namely the prices currently being achieved on products with most of the discussion centred on cheese. There was no real conclusion to this discussion perhaps other than the realisation that this is a very difficult task and there seemed to be hope that this could be tackled in some way.

[Emphasis added]

Tesco’s representations on the supply group meeting

No specific future retail pricing information disclosed

5.96. In its representations on the SO, Tesco submitted that ‘there is no evidence that either specific future retail prices or dates for any future increases were discussed at the meeting and Tesco denies this occurred’. 382

5.97. However, the OFT made no allegation or finding that Tesco disclosed specific information during the course of the meeting. The OFT has found that the records of discussions at the Tesco dairy supply group meeting demonstrate that cheese retail price increases were at least contemplated in order to achieve a farmgate price increase and that Tesco would have only been prepared to take this course of action if it remained competitive in the market. This is most clearly demonstrated by [a processor’s] file note [as set out in paragraphs 5.75 to 5.87 above] which quotes [Tesco’s Category Manager for Dairy] as stating that he was 'cautiously optimistic that Tesco can now start to move retail prices forward in this area [that is, cheese and spreads]' and that it was 'very difficult [for Tesco] to move out of line with other competitors but [Tesco’s Category Manager for Dairy] senses there is a mood to move some of these prices forward' [emphasis added].

5.98. In its representations on the SO, Tesco also submitted that the 'very general nature of the discussion at the meeting would have been of no

381 See document 153 to the SO.
382 See document 62 to the SSO, at paragraph 5.10.
commercial or co-ordinating benefit to anyone’. The OFT does not agree. The evidence it will present below will demonstrate that very shortly after the Tesco dairy supply group meeting, a number of processors sought to achieve retail and wholesale price increases with the aim of achieving an increase in the farmgate price of raw milk. This chain of events strongly suggests that the discussions that took place at the Tesco dairy supply group were, at least, relevant to the wider implementation of the 2002 Cheese Initiative. Further, knowledge of Tesco’s willingness to increase its cheese retail prices and its concern for its pricing position relative to its competitors (in particular, Asda) was also of value in any plan to co-ordinate retail price increases even if this was only expressed in general terms.

No discussion of future retail prices

5.99. In its representations on the SSO, Tesco adjusted its argument in respect of the nature of the discussions that occurred at the Tesco dairy supply group meeting and submitted that, rather than no specific disclosures of pricing intentions occurring – as it previously claimed – no discussion of future retail pricing intentions (specific or otherwise) occurred whatsoever and that Tesco did not discuss its own cheese retail pricing intentions.

5.100. In support of this representation, Tesco stated that the meeting notes were very unclear as to what the term ‘ultimately consumers pay’ referred to.

5.101. In relation to [a processor’s] note, Tesco submitted that the reference to ‘ultimately consumers pay’ appeared in the context of a discussion about improving customer support for UK produced cheese through a farm assurance scheme and that this is consistent with the reference in the Dairy Crest note to the ‘Red Tractor’ scheme and ‘relates to a discussion about how to convince customers of the value of paying more for British produce over cheaper imports’.

5.102. However, the OFT considers that Tesco’s representation on this passage of [a processor’s] meeting note is entirely consistent with its conclusion that the subject of cheese retail prices was discussed and contemplated during the meeting with the clear implication of ‘customers […] paying more for British produce’ in the context of a farm assurance scheme being that retail prices would be increased pursuant to a price initiative in British cheese and that consumers would therefore pay more if they wanted to buy British cheese. The OFT considers that consumers would only pay more if retail prices increased.

5.103. The OFT considers it is also important to note that it has never alleged or suggested that the statement ‘ultimately consumers pay’ was made in anything other than a discussion on the viability of a farm assurance scheme, but rather that the reason that the farm assurance scheme was discussed in the first place was to consider means by which a retail price increase in respect of UK produced cheese (implemented pursuant to a

383 See document 62 to the SSO, at paragraph 5.10.
384 See document 68 to the SO, set out at paragraphs 5.75 to 5.87 above.
price initiative) could be ‘sold’ to consumers so that demand for UK produced cheese would not be adversely affected in circumstances where imported cheese would be cheaper. Accordingly, Tesco’s representations did not address the OFT’s actual proposed findings on this point.

5.104. In any event, the OFT notes that this is by no means the only nor the strongest statement it has relied upon to demonstrate that cheese retail price increases were discussed and contemplated at the Tesco dairy supply group meeting. In particular, [Tesco’s Category Manager for Dairy] was quoted to have directly referred to this possibility in [a processor’s] note of this meeting [as set out in paragraphs 5.75 to 5.87 above]: ‘[c]autiously optimistic that Tesco can now start to move \textit{retail prices} forward in this area [that is, cheese and spreads]’ [emphasis added].

5.105. The OFT notes its conclusion on the relevance of farm assurance schemes is supported by [a senior manager at Dairy Crest] observations on this point in his interview with Dairy Crest’s solicitors which has been cited at paragraph 5.86 above.

5.106. In relation to [a processor’s] note [as set out in paragraphs 5.88 to 5.89 above], Tesco submitted that the reference to ‘[a]sk the customers to pay for it’ is ambiguous and therefore ‘cannot be taken to reflect a consensus amongst those present to proceed in a particular way’.\footnote{385} However, the OFT has neither found nor previously alleged that there was agreement or consensus amongst the attendees about increasing retail prices, but instead that the subject of cheese retail price increases was contemplated at the Tesco dairy supply group meeting. Further, the OFT does not consider that there is anything ambiguous about the statement at issue, especially when this note is considered alongside the other notes of the Tesco dairy supply group meeting. It is clear that the term ‘consumers’ refers to members of the public (that is, retailers’ customers) and the term ‘pay’, when considered in the context, refers to consumers paying more for dairy products pursuant to a price initiative to support farmers.

5.107. In relation to the Dairy Crest note,\footnote{386} Tesco noted that the reference to ‘ultimately consumers pay’ appeared under the comment ‘…mood to see ↑ in other products …butter/cheese…’. However, Tesco made no further representations on this point and the OFT does not consider that this observation undermines its findings on this note.

5.108. Tesco additionally supported its argument that retail price increases were not discussed at the meeting by reference to witness evidence provided by [Dairy Crest’s Commercial Director for its Tesco account] in an interview with Dairy Crest’s solicitors after the issue of the SO. In this interview, [Dairy Crest’s Commercial Director for its Tesco account] is recorded as stating that he was sure there was no open dialogue on pricing:

‘I do not recall a discussion regarding the need to increase the price of cheese and butter as well as milk, despite such comments being referred

\footnote{385} See document 62 to the SSO, at paragraph 5.16.
\footnote{386} See document 169 to the SO, set out at paragraphs 5.90 to 5.94 above.
to in the minutes. I am sure that no reference was made to, and there was no open dialogue about, pricing.\textsuperscript{387}

5.109. The OFT has carefully considered [Dairy Crest’s Commercial Director for its Tesco account] comment in its wider context and concluded that his account of events is not reliable. In drawing this conclusion, the OFT again notes that there are three contemporaneous meeting notes prepared by attendees of the Tesco supply group meeting which demonstrate that the subject of cheese retail price increases was discussed and contemplated during the meeting.\textsuperscript{388}

5.110. The OFT has concluded that the contents of these contemporaneous documents, which corroborate the contents of each other on this point, are clearly a more credible basis for determining what was discussed at the Tesco dairy supply group meeting than [Dairy Crest’s Commercial Director for its Tesco account] witness evidence. In particular, [Dairy Crest’s Commercial Director for its Tesco account] provided his evidence some years after the event in question and in such circumstances it is reasonable to conclude that there is a clear risk that his recollection may be mistaken or incomplete.\textsuperscript{389} Indeed, the risk of mistaken or incomplete recollection is reflected in [Dairy Crest’s Commercial Director for its Tesco account] own statement that he did ‘not remember what was discussed at the meeting in detail’ (which Tesco omitted from its representation). Accordingly, the OFT has concluded that it is appropriate for it to attach greater weight to the contemporaneous records.

5.111. Tesco additionally relied upon witness evidence provided by [a senior manager at Dairy Crest] in an interview with Dairy Crest’s solicitors after the issue of the SO. In this statement, [a senior manager at Dairy Crest] stated that the Tesco dairy supply group meeting was neither ‘unusual or some sort of conspiracy’ but that ‘Tesco was simply trying to understand what was going on’.\textsuperscript{390} [A senior manager at Dairy Crest] did not attend this meeting, which means he is unable to authoritatively comment on specific discussions that occurred during the meeting and, in any event, his statements do not undermine the conclusions the OFT has drawn from the contemporaneous meeting notes.

Witness evidence from [Tesco’s Category Director for Dairy] and [Tesco’s Category Manager for Dairy]

5.112. Finally, in its representations on the SSO, Tesco stated that both [Tesco’s Category Manager for Dairy] and [Tesco’s Category Director for Dairy] ‘confirmed that neither of them discussed or even intimated that Tesco would accept a cost price increase on cheese at any point during the Tesco dairy supply

\textsuperscript{387} See document 22 to the SSO, at paragraph 10.
\textsuperscript{388} See paragraph 5.80 above.
\textsuperscript{390} See document 28 to the SSO, at paragraph 28.
group meeting’ and that ‘there were no discussions about cheese retail prices’. 391

5.113. The OFT has carefully considered this representation and concluded that it is clearly inconsistent with the wider, contemporaneous documentary evidence, which records very specific comments being made by [Tesco’s Category Director for Dairy] and [Tesco’s Category Manager for Dairy] on the subject of cheese retail prices. The OFT considers that the contents of these contemporaneous notes, which corroborate each other, represent more compelling evidence than Tesco’s representation on this point.

The supply group meeting as a ‘catalyst’ for the 2002 Cheese Initiative

5.114. In the SO, the OFT stated that the Tesco supply group meeting acted as the ‘catalyst’ for the implementation of the 2002 Cheese Initiative. 392

5.115. In response to this statement in its representations of the SSO, Tesco submitted that the dairy supply group meeting at issue ‘served a normal and legitimate commercial purpose, and was not the catalyst for the coordination of cheese retail prices in 2002’393 and that this meeting ‘had been planned some time in advance of the milk price increase earlier that week and was one of a series of meetings with processors and farmer representatives to discuss a range of issues affecting the industry at the time’. 394

5.116. The OFT acknowledges that the Tesco dairy supply group meeting may well have been planned some time in advance of the various retail price increases that were implemented around this time; indeed, no allegation was ever made to the contrary. It is the subject matter of the discussions that occurred at the meeting (as evidenced by the meeting notes analysed in paragraphs 5.74 to 5.95 above) which is relevant in terms of determining its significance to the 2002 Cheese Initiative rather than the date on which the meeting was planned. Accordingly, the OFT considers that this representation did not address, and therefore did not undermine, its proposed finding that the discussions at the Tesco dairy supply group meeting contemplated the implementation of market-wide cheese retail price increases.

5.117. The OFT has also concluded that it is not necessary for it to determine whether the Tesco dairy supply group meeting did act as the ‘catalyst’ for the 2002 Cheese Initiative because this fact is not necessary in order to demonstrate Tesco’s participation in the 2002 Cheese Initiative and nor has it been considered as a potential aggravating factor in calculating Tesco’s financial penalty. However, the OFT does accept that the evidence in its possession demonstrates that there was a significant amount of dialogue taking place in the dairy industry at this time regarding the need to take some form of action to increase the farmgate price of raw milk and that all of these discussions are likely to have been influential in the formation of the 2002 Cheese Initiative.

391 See Tesco’s second representations on the SSO, at paragraph 4.8.
392 See paragraphs 1232 and 1301 of the SO.
393 See Tesco’s second representations on the SSO, at paragraph 4.7.
394 See document 62 to the SSO, at paragraphs 5.4(a), 5.5(b).
Inconsistent accounts and notes of the Tesco dairy supply group meeting on 13 September 2002

5.118. In its representations on the SSO, Tesco stated that the OFT had relied upon 'inconsistent accounts and notes of the Dairy Supply Group Meeting on 13 September 2002'. Tesco did not identify examples of these inconsistencies. The OFT does not accept Tesco's proposition. As highlighted above, there is a high degree of consistency between the contemporaneous written accounts of the Tesco dairy supply group meeting. The OFT notes that there are some differences between these written notes and certain statements that were made by Dairy Crest staff in their interviews with Dairy Crest's solicitors – for example, [Dairy Crest's Commercial Director for its Tesco account] failure to recollect that a discussion had taken place on needing to increase cheese and butter prices – and has addressed these inconsistencies above.

Overall conclusions and inferences drawn from Tesco supply group meeting notes

5.119. The OFT has concluded that the three contemporaneous meeting notes prepared by employees from [a processor], [a processor] and Dairy Crest (all of whom attended the Tesco dairy supply group meeting) together with [a processor’s] National Accounts Board Report (prepared by an employee at a processor who attended the Tesco dairy supply group meeting) demonstrate that:

i. Attendees at the Tesco dairy supply group meeting of 13 September 2002 discussed a plan to increase the farmgate price of raw milk by an aggregate of 2ppl.

ii. These discussions focused upon means by which a price initiative could be implemented in respect of cheese.

iii. It is clear that the implementation of cheese retail price increases was discussed and contemplated as part of this initiative with much discussion occurring as to the consequences of such an increase, particularly in relation to imported produce.

iv. Although Tesco was contemplating increasing its cheese retail prices as part of this initiative, it also emphasised the need for it to stay competitive in the market place and would therefore have looked to its competitors to also increase their retail prices. This conditional commitment by Tesco is clearly inconsistent with the principle that competitors should determine their prices independently.

v. In disclosing that it was prepared to increase its cheese retail prices, Tesco substantially reduced uncertainty as to its future behaviour on the cheese retail market by disclosing the course of conduct it had decided to adopt or was contemplating adopting on the market.

Moreover, in disclosing this information to its supplying processors in the context of discussions which had as their purpose the co-ordination of a market wide cheese retail price increase, Tesco may be taken to have intended and did, in fact, foresee that its supplying processors would make use of that information to influence conditions on the cheese retail market by passing it to other retailers in order to facilitate further and wider retail price increases.396

vi. Tesco expected its processors to play an important role in the extension of the FLM initiative to other products.

iv. Dairy Crest contacts with retailer customers between 17 and 23 September 2002

Introduction

5.120. The documentary evidence presented in paragraphs 5.121 to 5.192 below demonstrates that, following the Tesco dairy supply group meeting, Dairy Crest (one of the attendees of the Tesco dairy supply group meeting) engaged in dialogue with several of its major retailer customers (including Asda, Safeway, Sainsbury’s and Tesco itself) concerning the implementation of a price initiative that involved increasing retail and wholesale prices in respect of cheese and other processed dairy products.

Dairy Crest meeting with Asda, 17 September 2002

5.121. On 17 September 2002, [a senior manager at Dairy Crest] and [Dairy Crest’s Senior Account Manager for its Asda account] met with [Asda’s Business Unit Director for Dairy] and [Asda’s Category Manager for Dairy].

5.122. A slide presentation entitled ‘Asda Briefing Document Raw Milk Pricing’397 was prepared for this meeting. Its contents demonstrate that Dairy Crest proposed to Asda that it should participate in an initiative to subsidise a farmgate price increase through retail price increases on dairy products in addition to milk.

5.123. The second slide of the presentation was entitled ‘Elements Leading to Current Situation’ and appears to refer to issues facing the dairy industry, including over-supply of raw milk and low farmgate prices. The third slide, which is set out below, presented proposals for addressing these issues. Among the proposals was a recommendation that the price initiative that had been implemented in respect of milk be extended to include all dairy products:

<table>
<thead>
<tr>
<th>Options</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do nothing – maintain free market stance</td>
<td></td>
</tr>
</tbody>
</table>

397 See document 69 to the SO.
Result
Unrest Disruption

Action
Leave market increase on liquid as stand alone solution

Result
Only half the market is moved

Action
Move the whole market forward

Result
An increase between 1.5 and 2ppl
Does not address longer term issues’

[Bold emphasis added, underline in original]

5.124. The OFT has inferred that the reference to ‘moving the whole market forward’ is a reference to increasing prices on all dairy products, including cheese.

5.125. The purpose of the twelfth slide appears to have been to convey to Asda that the retail price increases that had been recently implemented in respect of milk were unlikely to result in a satisfactory level of farmgate price increase and to explain the reasons why this was the case. It concluded that the net benefit to dairy farmers of the milk price increase was as low as 0.77ppl with the chief issue appearing to be that only 51 per cent of raw milk was used for milk production by Dairy Crest:

‘WHAT DOES 2PPL ON RETAILS MEAN

<table>
<thead>
<tr>
<th>Income</th>
<th>PPL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Retail milk sales are only 51% of total liquid intake net of wastage, etc</td>
<td>1.02</td>
</tr>
<tr>
<td>75% of direct supplies go to liquid (0.765ppl)</td>
<td></td>
</tr>
<tr>
<td>Therefore, Increase</td>
<td>0.77</td>
</tr>
<tr>
<td>NB. Any cash received up to 1st October will be paid as a lump sum</td>
<td></td>
</tr>
</tbody>
</table>

[Bold and underline in original]

5.126. The final slide of Dairy Crest’s presentation proposed that the retail price of cheese, together with certain other processed dairy products, would be increased as part of Dairy Crest’s proposal:

‘1  Move Cheese Prices at retail up by £200 per tonne
2  Move butter prices up by £200\(^{398}\) per tonne
3  Move Yoghurt and Dessert prices up
4  Ensure that competitive set versus imports does not change
...

\(^{398}\) The presentation records £100. However, a handwritten amendment was made crossing out the ‘1’ and, instead, recording a ‘2’.

113
7  Ask NFU/FFA in return for agreed cessation of hostilities and commitment to dialogue before action.

8  Ask FFA/NFU to convene.'

Dairy Crest presentation to [a retailer]

5.127. Dairy Crest made a virtually identical presentation to the one it made to Asda (as described in paragraphs 5.121 to 5.126 above) to [a retailer] also on 17 September 2002. 399

Dairy Crest e-mail and letters to Asda, 20 September 2002

5.128. On 20 September 2002, [Dairy Crest’s Senior Account Manager for its Asda account] e-mailed [Asda’s Business Unit Director for Dairy], [Asda’s Category Manager for Dairy], [Asda’s Deli Cheese Buyer], [Asda’s Butter Buyer], [Asda’s Milk, Cream and Cheese Buyer] and [an employee at Asda, position unknown] 400. This e-mail was sent as a follow up to the meeting that had taken place between the two parties on 17 September 2002 and reads as follows:

’Please find attached further to the meeting on Tuesday [17 September 2002] with [Asda’s Business Unit Director for Dairy], [Asda’s Category Manager for Dairy] and [a senior manager at Dairy Crest] details of the industry initiative that Dairy Crest is proposing to lead.’ 401

5.129. Five letters were attached to the e-mail 402 they were addressed to [Asda’s Milk, Cream and Cheese Buyer], [Asda’s Deli Cheese Buyer], [an employee at Asda, position unknown] and [Asda’s Butter Buyer]. The letters are all identical and read as follows:

’As I’m sure you will now be aware [Asda’s Business Unit Director for Dairy], [Asda’s Category Manager for Dairy] and [a senior manager at Dairy Crest] had a meeting on Tuesday [17 September 2002] to discuss the proposed industry action that Dairy Crest are intending to lead as a result of the intensive action from the farmers and the industry. The current raw milk market is unsustainable as it stands, as discussed at the meeting we are proposing an increase of £200 pmt on cheese and a 10% increase on cream in cost prices and an equivalent increase in retails based on cash margin maintenance. As a result of these proposed increases Dairy Crest will guarantee that any cost benefits will be passed back to the Farmers supplying Dairy Crest in full; this value will be shown as a market price supplement to our monthly milk price.

399 The only differences between the presentations appear to have been the graphical representation of certain price data. See document 50 to the SO.

400 This email was copied to [Dairy Crest’s Commercial Director for its Tesco account], [a senior manager at Dairy Crest], [Dairy Crest’s National Account Manager for its Asda account] and [Dairy Crest’s National Account Manager for its Asda account]

401 See document 70 to the SO.

402 The attachments were entitled: ’Briefing document – price increases’; ’Increase letter 190902 [Asda’s Milk, Cream and Cheese Buyer]’; ’Increase letter 190902 [Asda’s Deli Cheese Buyer]’; ’Increase letter 190902 [an employee at Asda, position unknown]’; and ’Increase letter 190902 [Asda’s Butter Buyer]’.
We would ideally like the change in cost prices to be effective for all deliveries from [C] October, but various O/L [retailer 'own-label'] cheese lines still have pre price printed labels and the time lines would need to be reviewed to reflect what's involved in having the prices removed. The rationale [is] to move swiftly on all lines to have an immediate positive effect on the farming industry and we would in conjunction with this initiative like to jointly agree on a PR campaign to effectively communicate the benefits that this action will have on British farming.

I attach a briefing document to this letter giving more information on our proposals.'

[Emphasis added]

5.130. The OFT notes that:

i. Dairy Crest proposed an increase in the wholesale prices of the cheese it supplied to Asda in the amount of £200 pmt with the aim of passing this increase on to farmers in the form of a supplement to its farmgate price.

ii. Dairy Crest proposed that retailers recover these wholesale price increases through increased retail prices – demonstrated by the reference to 'an equivalent increase in retail prices based upon cash margin maintenance' following the proposal to increase wholesale prices by £200 pmt.

iii. The language used in both the letter and covering e-mail supports the OFT's conclusion that Dairy Crest's proposals were based upon a co-ordinated retail price increase being implemented across the grocery retail sector. In particular, the language used in both pieces of correspondence was not tailored to Asda but was instead generic and clearly suggestive of broader, collective industry action in respect of both wholesale and retail price increases. For example, the letter introduces the 'proposed industry action' that Dairy Crest planned to lead (the detail of which involved Dairy Crest proposing a wholesale price increase and 'an equivalent increase in retail prices based upon cash margin maintenance') while the covering e-mail refers to the 'details of the industry initiative' that had been discussed at the meeting between Dairy Crest and Asda on 17 September.

5.131. The 'briefing document' attached to the e-mail and referred to in each of the letters is entitled 'Dairy Product Price Increase'. It further supports the OFT's conclusion that Dairy Crest's proposals were based upon co-ordinated retail price increases. The briefing document reads as follows:

'Background

There is enormous pressure from the British Farming Community to address the very low level of milk prices of present. Retailers and processors alike face a prolonged and increasingly bitter period of protest and disruption if this issue is not addressed.

Objective
Dairy Crest aims to build on the recent retailer initiative on liquid milk pricing, by requesting significant increases in pricing for packet butter, fresh cream and cheese. All prices recovered as a result of this initiative will be passed back to farmers effective from date given.

**Butter pricing**

We propose to increase all Dairy Crest supplied butters, by £200 per Tonne.

**Cream**

We propose to move fresh cream prices up by 10%. Again, our comments on margin would be the same as above.

**Cheese**

We propose to increase all Dairy Crest supplied cheeses, by £200 per tonne. The reason for an immediate move on all grades is that our objective is to pass the revenue gained straight on to farmers immediately.

**UK Sourced Dairy Products versus imports**

We are seeking to address an immediate problem in farming today. If however we jointly change the competitive set of British dairy products versus imports, damage would be done to this initiative. We ask that you bear this in mind when considering your retail pricing decisions.

**Raw Milk Pricing**

If we are successful in persuading the market to move the resultant revenue gained will enable us to increase raw milk prices in total between 1.0 and 1.5ppl. It should be noted that we cannot affect commodity butter and powder prices since these are internationally traded commodities. We have already announced an increase of 0.77ppl. The total number quoted above is inclusive of 0.77ppl.

**Transparency**

It should be noted that in the current climate cash margin maintenance should, in our view, be the rule. Percentage margin maintenance will only create accusations of profiteering.

It is clearly vital that neither retailer or processor is seen to benefit from this process in margin terms. We will create a market pricing supplement to our milk prices shown separately for milk, cheese, and cream and butter. Should our margins or volumes be affected going forward, these supplements will alter.

**Timing**

We have promised to pay our farmers all revenue recovered from the market from the date RSPs and costs have moved. Raw milk prices will alter from the 1st October and the supplements will come into effect from [then]. All increases gained on milk before the [C] October will be paid in
lump sum to our farmers in October. We propose butter, cream and cheese price increases will move up on the [C] October.'

**Media policy**

We have already made public statements about our intentions to review butter, cheese and cream pricing. Please note that we will never comment on any aspect of individual retailer business decisions, intentions or discussions.

[Emphasis added]

5.132. The briefing document provides further clarification on the purpose of Dairy Crest’s proposed cheese price initiative. It confirms that the farmgate (cost) price increase that Dairy Crest wished to achieve would be subsidised in part by cheese wholesale and retail price increases with Dairy Crest committing to pay its supplying dairy 'farmers all revenue recovered from the market from the date RSPs and costs have moved'. The conclusion that retail prices would also be increased pursuant to Dairy Crest’s proposals is further demonstrated by its proposal that 'cash margin maintenance' should be the rule, because it is only possible for a retailer to maintain its cash margin following the implementation of a wholesale price increase if it also increased its retail prices. 403

5.133. The OFT considers that the language used in Dairy Crest’s briefing document together with the targeted level of increase demonstrates that the retail and wholesale price increases proposed were intended to be implemented across the retail marketplace.

5.134. In respect of the language used, Dairy Crest’s briefing document proposes a series of price increases in respect of cheese, butter and cream, the purpose of which was to pay farmers more money. Having made this proposal, Dairy Crest’s briefing document then states '[i]f we [Dairy Crest] are successful in persuading the market to move the resultant revenue gained will enable us to increase raw milk prices in total between 1.0 and 1.5ppl'. The OFT considers that the obvious interpretation of the reference to 'persuading the market to move' [emphasis added] is clearly a generic reference to the retail market, given that Dairy Crest circulated this briefing to a number of major retailers (including Safeway, Sainsbury’s and Tesco) 404 and it contained a clear proposal to increase retail prices. Therefore, the OFT concludes that this was a reference not only to Asda increasing its retail prices but also to its competitors doing so.

5.135. In respect of the price increases that were targeted by this initiative and referred to in this document, Dairy Crest proposed price increases to Asda of £200 pmt in respect of cheese and butter and 10 per cent in respect of cream. However, the aggregate level of farmgate price increase that Dairy Crest was hoping to achieve was between 1 and 1.5 ppl. In order to achieve this figure, Dairy Crest would have needed to implement price

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403 The fact that Dairy Crest’s proposals were based on cash margin maintenance is also consistent with the cover letters sent to Asda, set out at paragraph 5.129 above.

404 See paragraphs 5.137 to 5.140 below.
increases over a significantly higher portion of its customer base than just Asda. In drawing this conclusion, the OFT notes that Dairy Crest’s cheese, butter and cream sales would have been spread over a number of major retailers and therefore it would not have been possible for the levels of price increase proposed to Asda to have yielded the level of farmgate price increase that Dairy Crest had targeted if other retailers had not also been involved.

5.136. This conclusion will be further supported by the evidence presented below, which demonstrates that Dairy Crest sent the same briefing document as it sent to Asda, containing the same price increase proposals and target levels of increase, to each of Safeway, Sainsbury’s and Tesco, thus confirming that the farmgate (cost) price figure referred to was an aggregate figure based upon the implementation of a market-wide price increase.

*Dairy Crest letter to Safeway, 20 September 2002*

5.137. On 20 September 2002, [Dairy Crest’s Category Manager for Cheese and Spreads] sent a letter to [Safeway’s Commercial Manager]. The briefing document that Dairy Crest sent to Asda (as well as Sainsbury’s and Tesco) was attached to this letter. The letter refers to earlier telephone conversations that had taken place between [Safeway’s Commercial Manager] and [a senior manager at Dairy Crest] during which this proposal was discussed and also demonstrates that further contact would occur on this matter the following Monday (23 September 2002). The letter reads as follows:

> ‘Following your telephone conversations with [a senior manager at Dairy Crest], please find attached a copy of the Dairy Product Price Increase Rationale.

> I will contact you on Monday to discuss content and further details.’

*Dairy Crest letter to Sainsbury’s, 23 September 2002*

5.138. On 23 September 2002, [Dairy Crest’s Commercial Director for its Sainsbury’s account] sent a letter to [Sainsbury’s Dairy Trading Manager]. The briefing document that Dairy Crest sent to Asda (as well as Safeway and Tesco) was attached to this letter. The letter refers to earlier discussions on the proposal between Dairy Crest representatives and Sainsbury’s. The letter reads as follows:

> ‘As discussed last week, Dairy Crest intend to lead a manufactured dairy product price increase which will enable the liquid milk premium to be increased for farmers.’

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405 See paragraphs 5.137 to 5.140 below.
406 This letter was copied to [Dairy Crest’s Commercial Director for its Tesco account], [Safeway’s Cheese Buyer] and [a Category Manager at Safeway].
407 See document 71 to the SO. This letter was copied to [Dairy Crest’s Commercial Director for its Tesco account], [Safeway’s Cheese Buyer] and [a Category Manager at Safeway].
The current raw milk market is unsustainable thus Dairy Crest are proposing an increase of £200 per metric tonne on cheese and butter and 10% increase on cream. As a result of these proposed increases Dairy Crest will guarantee that all benefits will be passed back to the supplying farmers as per liquid milk payments; this value will be shown as a market price supplement for our monthly milk price.

In terms of timings we would like to have all prices effective from [C] October, however we are aware of stock holdings and the time required to change systems/price files. The rationale to move swiftly on all lines is to have an immediate positive effect on the farming industry.

I attached a briefing document which we handed to [Sainsbury’s General Manager for Dairy and Cheese] on Thursday, which provides more information on our proposals.

As I am away from Tuesday 24th September, please contact [Dairy Crest’s Senior Account Manager] or [a senior manager at Dairy Crest] to discuss any queries and the timing/method of implementation.  

Dairy Crest letter and e-mail to Tesco, 23 September 2002

5.139. On 23 September 2002, [Dairy Crest’s Commercial Director for its Tesco account] sent an e-mail to [Tesco’s Category Manager for Dairy]. The same briefing document that Dairy Crest sent to Asda (as well as Safeway and Sainsbury’s) was attached to this e-mail. As with the Dairy Crest letters to Safeway and Sainsbury’s, the e-mail demonstrates that an earlier conversation had taken place between [Dairy Crest’s Commercial Director for its Tesco account] and [Tesco’s Category Manager for Dairy] on 20 September 2002 and also demonstrates that further contact would happen on this matter the following day (24 September 2002). It reads:

'Following our conversation on Friday [20 September 2002], I can confirm that Dairy Crest are to increase prices on Cheese, Packet Butter, and Cream with effect from [C] October.

We are fully committed to passing all revenue gained from this increase to our supplying farmers. The attached briefing document clarifies all of the issues associated with the increase.

I will contact you tomorrow (Tuesday) to discuss any questions which you may have.'

5.140. Separately, also on 23 September 2002, [Dairy Crest’s Category Manager for Cheese and Spreads for its Tesco account] sent a letter to [Tesco’s Buying Manager for Cheese]. As with [Dairy Crest’s Commercial Director for its Tesco account] e-mail to [Tesco’s Category Manager for Dairy], the briefing document was again attached to this. The letter demonstrates that an earlier conversation had taken place between [Dairy Crest’s Category Manager for Cheese and Spreads for its Tesco account] and [Tesco’s Buying Manager for Cheese].
Category Manager for Cheese and Spreads for its Tesco account] and [Tesco’s Buying Manager for Cheese]. It reads:

"Following our earlier conversation about the recent moves in liquid milk pricing I can confirm that we are committed to passing the increases received back to the farmers. However, recognising that supermarket milk represents only 25% of Dairy Crest's sales it is our intention to raise the prices of milk related commodities to enable us to pass further money back to the farmers over and above the 0.77ppl we have already committed to paying.

I have attached a supporting document, which I believe outlines the background to the current situation and should answer any questions that you may have. If you do have any questions however please do not hesitate to give me a call.

The increase that is required on butter is £200 per tonne and I have outlined what this means per case below. It is our intention to implement these cost price increases on October [C] across the range of products supplied to Tesco."\(^{410}\)

Tesco’s representations on the Dairy Crest correspondence

5.141. Tesco did not make any submissions on the OFT’s proposed findings in respect of the Dairy Crest briefing document in its representations on the SO.

5.142. However, in its representations on the SSO, Tesco submitted that the briefing document was a proposal for a wholesale price increase and therefore could not ‘be construed as a proposal for a co-ordinated retail price increase’.\(^{411}\) In making this representation, Tesco cited evidence provided by [Dairy Crest’s Commercial Director for its Sainsbury’s account], [a senior manager at Dairy Crest] and [Dairy Crest’s Commercial Director for its Tesco account] in interviews with Dairy Crest’s solicitors after the issue of the SO.

5.143. Before considering Tesco’s representation by reference to the witness evidence it has relied upon, the OFT reiterates that a face value interpretation of the various documents (including the briefing) clearly demonstrates that Dairy Crest proposed a market-wide cheese retail price increase to a number of retailers (with references made to RSPs and cash margin maintenance as the basis for recovery of the increased wholesale price).

Dairy Crest’s Commercial Director for its Sainsbury’s account witness evidence

5.144. In respect of [Dairy Crest’s Commercial Director for its Sainsbury’s account], Tesco cited the following excerpt from his interview in support of its representation:

‘I am aware that the OFT suggests that this briefing note indicates that Dairy Crest was trying to lead the market increase in retail prices for

\(^{410}\) See document 170 to the SO.

\(^{411}\) See Tesco’s second representations on the SSO, at paragraph 4.9.
cheese. I disagree with this proposition. Everyone was on board at that time and the aim was not to tell the retailers that they must increase their RSPs to a certain figure. As it says in the briefing document, the RSPs were the retailers’ domain. This briefing document makes it clear that Dairy Crest did not want to benefit from this price increase. [...] These price increases were in the public domain, and I believe the OFT is completely barking up the wrong tree.\footnote{412}{See document 27 to the SSO, at paragraph 6.}

5.145. The OFT has carefully considered both Tesco’s submission and [Dairy Crest’s Commercial Director for its Sainsbury’s account] evidence and remains of the view that the documents sent by Dairy Crest to various retailer accounts between 20 September and 23 September 2002 set out a framework to co-ordinate cheese retail price increases (in addition to the wholesale price increase that Tesco has accepted was proposed).

5.146. First, the observations made by [Dairy Crest’s Commercial Director for its Sainsbury’s account], which are cited by Tesco, are based on assertions, misunderstandings and factual inaccuracies that do not challenge or address the basis for the OFT’s conclusion that Dairy Crest’s proposals clearly envisaged cheese retail price increases. For example, [Dairy Crest’s Commercial Director for its Sainsbury’s account] does not seek to explain why the reference to ‘cash margin maintenance’ would not relate to a retail price increase nor why the briefing referred to RSP increases as part of this initiative, and notably nor do Tesco’s representations seek to challenge this conclusion, despite this point being significant in the OFT’s infringement findings.

5.147. Second, [Dairy Crest’s Commercial Director for its Sainsbury’s account] observations are not inconsistent with the OFT’s findings. For example, his statement that ‘RSPs were the retailers’ domain’ is a statement of fact which the OFT does not disagree with. However, that does not mean that Dairy Crest’s proposal did not seek to propose and facilitate a market-wide cheese retail price increase, nor that Dairy Crest did not seek to influence retail pricing behaviour, even if the ultimate decision on whether each retailer would increase its retail prices clearly was that retailer’s. The fact that retailers ultimately remained free to determine their retail prices is irrelevant – there is no need for the supplier to need to guarantee that a retailer would increase its retail prices\footnote{413}{Argos Limited and Littlewoods Limited v Office of Fair Trading [2004] CAT 24, at [516] and [531].} – rather, this evidence shows that Dairy Crest was seeking to facilitate market-wide cheese retail price increases.

5.148. The OFT reiterates that it is evident that Dairy Crest’s proposals at this time clearly targeted cheese retail price increases. This is unambiguously demonstrated by the reference to ‘cash margin maintenance’ being ‘the rule’ and that farmers would be paid increased revenue ‘recovered from the market from the date RSPs and costs have moved’\footnote{413}{Argos Limited and Littlewoods Limited v Office of Fair Trading [2004] CAT 24, at [516] and [531].}. Further, Dairy Crest’s presentations to both Asda and [a retailer] on 17 September 2002, stated that the objective of Dairy Crest’s proposal was to ‘move cheese prices at retail up by £200 per tonne’ and in an email to Asda, dated 20 September
2002, [Dairy Crest’s Senior Account Manager for its Asda account] proposed a £200 pmt increase on cheese and an equivalent increase in retails based on cash margin.\textsuperscript{414} Further, a Dairy Crest internal note of 24 September 2002 stated that farmers ‘could expect to see retail prices for cheese increasing from mid October onwards’. Tesco made no attempt in its representations to address or explain these clear references to retail price increases in Dairy Crest’s proposals.

5.149. Third, [Dairy Crest’s Commercial Director for its Sainsbury’s account] evidence is inconsistent with the facts. In particular, he stated (without substantiation) that ‘these price increases were in the public domain’ – this is simply not the case. Cheese price increases had not been implemented at this stage and, indeed, it is obvious that the purpose of this document was to achieve increases. It may have been the case that the pressure for action to be taken to increase the farmgate price of raw milk was in the public domain, as were the price increases that had recently been implemented in respect of milk. However, the OFT has not received any evidence to support the conclusion that cheese retail price increases were in the public domain at this time nor how such increases would be implemented.

[Dairy Crest’s Commercial Director for its Tesco account] witness evidence

5.150. Tesco also relied on the following witness evidence provided by [Dairy Crest’s Commercial Director for its Tesco account] to Dairy Crest’s solicitors in support of its representation:

‘At Dairy Crest we wanted to be whiter than white and so we suggested to the retailers that the principle of cash margin maintenance rather than percentage margin maintenance should be adopted so as to reduce the risk of the accusation of profiteering. These suggestions were simply that, suggestions, as retailers have the power to decide what they want, but we thought it was important to set out Dairy Crest’s position clearly.’\textsuperscript{415}

5.151. After considering this representation, the OFT has concluded that the evidence [of Dairy Crest’s Commercial Director for its Tesco account] does not undermine its conclusion that the Dairy Crest correspondence and briefing documents had as their purpose the co-ordination of a cheese retail price increase. As with [Dairy Crest’s Commercial Director for its Sainsbury’s account] statement, the OFT notes that [Dairy Crest’s Commercial Director for its Tesco account] observations do not address the specific subject matter of the OFT’s case. The OFT has not found nor alleged that Dairy Crest was in a position to dictate retail price increases (or their level) to grocery retailers. The key conclusion that the OFT drew from these documents was that Dairy Crest had proposed cheese retail and wholesale price increases as part of an industry wide move to subsidise a farmgate price increase and nothing in [Dairy Crest’s Commercial Director for its Tesco account] statement undermines that conclusion. The fact that [Dairy Crest’s Commercial Director for its Tesco account] acknowledged the reference to cash margin maintenance and did

\textsuperscript{414} See document 50 to the SO.
\textsuperscript{415} See document 22 to the SSO, at paragraph 14.
not question that reference (instead, only seeking to explain why Dairy Crest was proposed cash margin maintenance) supports the OFT’s conclusion that Dairy Crest’s proposals sought retail price increases.

[A senior manager at Dairy Crest] witness evidence

5.152. Tesco also cited the following witness evidence provided by [a senior manager at Dairy Crest] in support of its argument that the various Dairy Crest documents circulated to retailers during September 2002 targeted cheese wholesale and not retail price increases:

‘Tesco was quite proud to be seen to be doing something. None of the retailers wanted to be picketed at Christmas. Militant farmers were running around like wild animals at this time and there was a real desire to solve the crisis. We could not simply increase the price to one retailer because a single retailer just would not accept it.’

5.153. The OFT notes that, in this paragraph of his witness interview notes, [a senior manager at Dairy Crest] only appears to refer to increasing each retailer’s wholesale prices (because it is only the wholesale price that Dairy Crest could increase). However, examining this paragraph in isolation is misleading. When read as a whole, it is evident that [a senior manager at Dairy Crest] confirmed that both retail and wholesale price increases would be implemented pursuant to Dairy Crest’s proposals:

‘We knew that the retailers would have to put up their retail prices for us to get the [wholesale price] increase we needed. For us this amounted to the same thing. We talked to them in shorthand. Putting their retails up means putting our [wholesale] price up. Before and since the retailers only ever pay us an increase if they can put their retail price up.’

Evidence submitted by Dairy Crest which supports the OFT’s conclusions on retail prices

5.154. The OFT additionally notes that other witness interview notes submitted by Dairy Crest specifically support its conclusions that the various documents Dairy Crest sent to retailers in September 2002 were targeting cheese retail price increases. For example, [Dairy Crest’s Category Manager for Cheese and Spreads for its Tesco account] informed Dairy Crest’s solicitors that the statement ‘the date RSPs and costs have moved’ in the Dairy Crest briefing meant ‘the date on which the prices on the shelf changed’.

Briefing document did not contain future pricing information

5.155. In its representations on the SSO, Tesco also submitted that Dairy Crest’s briefing document ‘did not contain future retail pricing information’. However, the OFT has neither alleged nor found that Dairy Crest’s briefing document contained future retail pricing information. Instead, the

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416 See document 28 to the SSO, at paragraph 41.
417 See document 28 to the SSO, at paragraph 38.
418 See document 21 to the SSO, at paragraph 9.
419 See Tesco’s second representations on the SSO, at paragraph 4.9.
OFT has concluded that Dairy Crest’s briefing document demonstrates that Dairy Crest was planning to co-ordinate a market-wide cheese retail price increase.\(^{420}\) Further, the OFT notes that by this point Tesco had already disclosed the course of conduct it had decided to adopt or was contemplating adopting on the market (increasing cheese retail prices).\(^{421}\)

**Summary of conclusions drawn from Dairy Crest correspondence**

5.156. On the basis of these communications between Dairy Crest and its retailer customers, the OFT draws the following conclusions:

i. Between 17 and 23 September 2002, Dairy Crest corresponded with Asda, Safeway, Sainsbury’s and Tesco to propose a cheese price initiative. The purpose of this initiative was to subsidise a farmgate price increase.

ii. It is clear from the language used in Dairy Crest’s ‘briefing document’, the pieces of covering correspondence and the evidence submitted by Dairy Crest following the issue of the SO that the price initiative Dairy Crest proposed involved industry wide action on cheese retail prices. As a result of this, each of the retailers that Dairy Crest approached (that is, for the purpose of this Decision, Asda, Safeway, Sainsbury’s and Tesco) would have understood that it was not being asked to act unilaterally in increasing its cheese retail and wholesale prices, but as part of a wider market move in which it was intended that its competitors would also implement retail and wholesale price increases. Therefore, as a result of this, each retailer would have understood that Dairy Crest was in contact with its competitors concerning a co-ordinated retail price increase and each of Asda’s, Safeway’s, Sainsbury’s and Tesco’s subsequent actions should be considered in this context. This is clearly inconsistent with the principle that competitors should determine their prices independently.

iii. It is clear from references in the correspondence to further verbal discussions that the documentary evidence presented represents only part of the contacts and discussions that actually occurred between Dairy Crest and its retailer customers.

v. **Commencement of co-ordination of retail prices on cheese lines supplied by Dairy Crest**

*Record of Dairy Crest internal meeting, 24 September 2002*

5.157. Following its initial contacts with its retailer customers, an internal Dairy Crest meeting took place on 24 September 2002, during which the subject of cheese price increases was discussed. An internal Dairy Crest note entitled ‘Action points from Cheese Price Increase Meeting’ provides a

\(^{420}\) See paragraphs 5.131 to 5.136 above.

contemporaneous record of the conclusions of that meeting. The note sets out a detailed framework and timetable within which cheese price increases should be implemented in the marketplace and further emphasises that a co-ordinated retail price increase would be implemented. It reads:

1 It was agreed that we should set a **cheese price implementation date for retailers of 20th October 2002**.

2 Each account team to persuade their respective retailers to **move a section of their cheese category on the 20th October followed by a three week programme during which the remainder of the cheese category moves**.

3 Commercial Directors to clear with their senior contacts, **by no later than Friday 4th October, Dairy Crests [sic] intention of making a public statement to the effect that farmers could expect to see retail prices for cheese increasing from mid October onwards**.

NB It would be helpful if some key individual accounts such as Tesco, Sainsbury, Asda, [a retailer], or [a retailer] could endorse such a statement.

4 **Each Account Manager to present a matrix showing cheese price implementation plans effective 20th October.** These matrices to be presented to cheese price increase meeting No.3 held on Tuesday 4th October at 4pm.

5 It was agreed that we would communicate to retailers that **we would not move individual cost prices for cheese lines. Instead we would provide a total tonnage summary of all British Cheese shipped on a [C] basis and apply a £200pt Invoice charge.** Our recommendation here is in major support of our proposals for price transparency ... 

Next meeting 4th October 4pm”

[Emphasis added]

5.158. The OFT notes that this meeting note sets out in detail a plan to co-ordinate cheese price increases across the grocery retail sector through staggered increases over three weeks starting on 20 October 2002, with the reference to ‘retailers’ further demonstrating that prices would be increased across the grocery retail sector as a result of this initiative.

5.159. The meeting note refers to Dairy Crest’s ‘intention of making a public statement to the effect farmers could expect to see retail prices for cheese increasing from mid-October onwards’ [emphasis added] further confirming the OFT’s conclusion that cheese retail price increases were an integral part of Dairy Crest’s proposals to its retailer customers. The note then proceeds to provide examples of five retailers that it was hoped would publicly endorse Dairy Crest’s belief that cheese retail prices would increase, including Asda, Sainsbury’s and Tesco.

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422 See document 172 to the SO.
5.160. This note shows that Dairy Crest carefully planned the implementation of a cheese price initiative including its timing and the amount of retail price increases (‘we should set a cheese price implementation date for retailers’) and apparently expected to control the timing of retail price increases on specific cheese lines (‘Each account team to persuade their respective retailers to move a section of their cheese category on the 20th October followed by a three week programme during which the remainder of the cheese category moves’).

*Dairy Crest letter to Sainsbury’s, 25 September 2002*

5.161. Following the internal Dairy Crest meeting on 24 September 2002, the following day, [Dairy Crest’s Senior Account Manager for its Sainsbury’s account] sent a letter to [Sainsbury’s General Manager for Dairy and Cheese]. This letter, which refers to previous discussions between the companies, reads as follows:

>'As previously discussed Dairy Crest is seeking dairy product price increases which will enable raw milk prices to be increased for farmers.

> The current raw milk market pressure are well understood by both of us. *Dairy Crest are proposing an increase of £200 per metric tonne on cheese* and butter and a 10% increase on cream. As a result of these proposed increases *Dairy Crest will guarantee that all benefits will be passed back to the supplying farmers* as per liquid milk payments.

> With regard to the UK sourced cheese category we are proposing to move some prices, effective from 20th October 2002. Clearly we aim to move as swiftly as possible in order to have an immediate positive effect on the farming industry but importantly this date gives us the opportunity to manage current stock holdings and to maintain a consistent supply of correctly priced products to Sainsburys.

> Therefore the proposed lines to move from the 20th October 2002 are as follows:

> Cathedral City all lines
> Own Label Medium all lines.

> It is Dairy Crests intention to make a public statement on the proposed increases and we would welcome Sainsburys endorsement of such a statement.

> Following the Medium and Cathedral City there will be a three week programme during which the remainder of the cheese category will move.

> The proposal for Sainsburys is as follows:

> **27th October 2002**
> Own Label Mature all lines
> Davidstow all lines

423 See paragraphs 5.157 to 5.160 above.
424 Previous discussions between Dairy Crest and Sainsbury’s are also shown by evidence presented at paragraph 5.138 above.
With regard to the financial management of these increases our recommendation is that Dairy Crest will not move individual cost prices on cheese lines but instead provide Sainburys [sic] on a [C] basis a summary of all British cheese shipped, applying the £200t increase against this number. This will be issued to Sainsbury’s as a separate invoice for transparency and audit purposes.

I would like to raise concern about the differentials that could occur post retail price increases, between UK sourced cheese and imports. I have no doubt that you will give this issue careful consideration.

I trust the above clarify’s [sic] the situation regarding the cheese price implementation and how Dairy crest will account for the payment.

On a separate note I can confirm that we believe that applying Red Tractor Logo to cheese would be a positive step to take by us jointly. Perhaps you could confirm your very positive response.'

[Emphasis added]

5.162. The OFT notes that [Dairy Crest’s Senior Account Manager for its Sainsbury’s account] letter proposed a series of sequenced cheese retail and wholesale price increases to Sainsbury’s, which corresponded with the strategy outlined in the internal Dairy Crest meeting note of 24 September 2002. The action points from that meeting required each Dairy Crest retail account team to move a section of their retailer’s cheese category by 20 October 2002, followed by a three week programme during which the remainder of the cheese category would move. In line with this strategy, Dairy Crest proposed to Sainsbury’s a series of cheese price increases: all lines of Cathedral City and ‘Own Label Medium’ would move from 20 October 2002, with a series of further moves planned over the following three weeks (27 October 2002 – ‘Own Label Mature’ and ‘Davidstow’; 3 November 2002 – ‘Own Label Mild’ and ‘all lines [of] Stilton’; and 10 November ‘Traditional’, ‘all lines [of] Farmhouse’ and ‘All remaining lines’).

425 ‘Wexford’ has been scored out in the copy of this letter obtained by the OFT from Sainsbury’s.
426 A handwritten annotation after ‘Own Label Mild all lines’ reading ‘check Asda’ appears on the copy of this letter obtained by the OFT from Sainsbury’s.
427 See document 75 to the SO.
428 See paragraph 5.157 to 5.160 above.
5.163. It is evident that the cheese price increases proposed in this letter included retail prices with Dairy Crest raising ‘concern about the differentials that could occur post retail price increases, between UK sourced cheese and imports’. This concern also supports the OFT’s interpretation that the references to the impact of imported cheese on sales of British produced cheese in the Tesco dairy supply group meeting meant that cheese retail price increases were discussed and contemplated.\(^\text{429}\)

5.164. Taking into account the evidence that has been presented above demonstrating dialogue between Dairy Crest and Sainsbury’s regarding a cheese price initiative,\(^\text{430}\) the OFT has concluded that Sainsbury’s would have made its decision whether or not it would implement these price increases understanding that it was being asked to act as part of a wider market move that also involved its competitors being asked to implement similar retail price increases.

*Dairy Crest meeting with Asda, 27 September 2002*

5.165. On 27 September 2002, [Dairy Crest’s Commercial Director for its Tesco account] and [a senior manager at Dairy Crest] met with [Asda’s Business Unit Director for dairy] and Asda’s Category Manager for Dairy. [Dairy Crest’s Commercial Director for its Tesco account] took a note of this meeting, entitled ‘Industry Pricing Proposed Action Plan’. It reads as follows:

**Outline**

- Recent retail price moves across milk of 2ppl
- Multiple milk represents 25% of Dairy Crest sales
- This translates into a blanket increase of 0.77ppl (as announced)

**Action Proposed**

- Move manufactured product prices forward during October
- **Cheese/Butters – circa £200 pmt proposed by 20th October**
  - Tesco value butter now at 54p (from 45p)
- **Cream – 10% increase proposed by 14th October**
  - JS happy to lead on cream

**Mechanics – Cheese**

It is proposed that the cheese sector moves on the 20th October.

Catch will be needed in the "middle ground" accounts and the management of labels / stocks will need closely monitoring.

Proposed that by early November all accounts would have followed the market moves.

- Asda -
- Tesco -
- Sainsbury -
- Safeway
- [A retailer] / [a retailer]

\(^\text{429}\) See paragraphs 5.82 to 5.84 above.

\(^\text{430}\) See paragraphs 5.131 to 5.135; 5.138; and 5.161 above.
Latest position is that JS / Tesco have agreed to move all sectors

Payments Mechanics/ Thoughts:

It is proposed that these increases would be retrospective, by period, this cash is then paid directly to the farming industry. This reduces the workload/admin although retails still require some work.\

[Emphasis added]

5.166. [Dairy Crest’s Commercial Director for its Tesco account] meeting note demonstrates that senior Dairy Crest personnel proposed cheese price increases to Asda.

5.167. It is evident that many of the points discussed during the meeting reiterated earlier dialogue between Dairy Crest and Asda (as well as other retailers) on the subject of cheese price increases.\[See paragraphs 5.121 to 5.140 above.\] In addition, the products that were to be subject to the proposed increases (cheese, butter and fresh cream) together with the levels of increase (£200 pmt in the case of cheese and butter, and 10 per cent on cream) are consistent with the earlier briefing given to Asda and other retailers.\[See paragraphs 5.131 to 5.135 above.\]

5.168. [Dairy Crest’s Commercial Director for its Tesco account] note then indicates that discussions turned to concrete steps for the implementation of cheese price increases with a proposal that the ’cheese sector moves on 20th October’. This implementation date is consistent with the strategy outlined within the internal Dairy Crest meeting note of 24 September 2002\[See paragraph 5.157 above.\] and the subsequent proposal to Sainsbury’s on 25 September 2002.\[See paragraph 5.161 above.\]

5.169. [Dairy Crest’s Commercial Director for its Tesco account] note also provides further evidence demonstrating that Dairy Crest’s proposals involved the implementation of co-ordinated retail price increases and therefore corroborates earlier inferences the OFT has made in this respect.\[See paragraphs 5.120 to 5.156 above, in particular, paragraphs 5.126; 5.128 to 5.130 and 5.131 to 5.135.\]

5.170. In drawing this conclusion, the OFT notes that the section of the note entitled 'Mechanics – Cheese' clearly refers to the need to closely monitor 'the management of labels / stock', which would only need to be done if cheese retail prices were being increased. In addition, the OFT also notes that this meeting followed on from a number of meetings and correspondence between Asda and Dairy Crest in relation to a cheese price initiative and that it is evident from this dialogue that cheese retail price increases were envisaged.
5.171. In respect of demonstrating co-ordination, the OFT notes that Dairy Crest informed Asda that it was not being expected to increase its cheese retail prices unilaterally, but as part of a wider market move which also involved the implementation of retail price increases by its competitors. For example, [Dairy Crest’s Commercial Director for its Tesco account] note records that Dairy Crest ‘[p]roposed’ to Asda ‘that by early November all accounts would have followed the market moves… Asda - Tesco - Sainsbury’s - Safeway [a retailer] / [a retailer]… Latest position that JS / Tesco have agreed to move all sectors’. This is clearly inconsistent with the principle that competitors should determine their prices independently.

5.172. The meeting note also demonstrates that Dairy Crest disclosed information concerning Sainsbury’s and Tesco’s cheese retail pricing intentions to Asda by stating that the ‘[l]atest position’ was that both retailers had ‘agreed to move all sectors’. Based upon the context within which Dairy Crest disclosed this information, the OFT has inferred that it had originated from Sainsbury’s and Tesco given that Dairy Crest had engaged in extensive dialogue with both Sainsbury’s and Tesco by this date with the aim of securing their participation in a co-ordinated cheese price increase. Indeed, in respect of Tesco, the evidence has demonstrated that Dairy Crest would have understood that Tesco was contemplating increasing its cheese retail prices in order to subsidise a farmgate price increase as a result of statements made by Tesco staff at the Tesco dairy supply group meeting on 13 September 2002.

5.173. In disclosing their willingness to increase their cheese retail prices to Dairy Crest, Sainsbury’s and Tesco at the very least, substantially reduced uncertainty as to the conduct on the cheese retail market to be expected on their part by disclosing the course of conduct they themselves had decided to adopt or contemplate adopting on that market.439

5.174. Furthermore, in disclosing this information to Dairy Crest in the context of discussions which had as their purpose the co-ordination of a market wide cheese retail price increase, both Sainsbury’s and Tesco may be taken to have intended and did, in fact, foresee that Dairy Crest would make use of that information to influence conditions on the cheese retail market by passing it to other retailers in order to facilitate further and wider retail price increases.440 Both Sainsbury’s and Tesco were aware of Dairy Crest’s proposal and that its proposal involved a market-wide cheese retail price increase. This conclusion will be further supported by evidence that will be presented later in this section which demonstrates that each

437 See paragraphs 5.138 and 5.161 to 5.163 above.
438 See paragraphs 5.90 to 5.94 and 5.139 to 5.140 above.
441 See paragraphs 5.131 to 5.136; 5.138; and 5.161 to 5.163 above.
442 See paragraphs 5.131 to 5.136 and 5.139 to 5.140 above.
of Sainsbury’s and Tesco’s willingness to increase its retail price was conditional upon its competitors also increasing their prices.\textsuperscript{443}

5.175. This meeting note demonstrates that Dairy Crest did make use of its knowledge of Sainsbury’s and Tesco’s retail pricing intentions to influence conditions on the cheese retail market by passing it to Asda in the context of a meeting in which Dairy Crest was proposing that Asda increase its cheese retail prices.\textsuperscript{444}

5.176. Having received this information, Asda could not have failed to take it into account when determining its own future behaviour on the cheese retail market.\textsuperscript{445} Asda’s awareness of its competitors’ retail pricing intentions is clearly inconsistent with the principle that competitors should determine their prices independently. Moreover, taking into account that Asda received this information pursuant to discussions which it would have understood had as their purpose achieving a market wide cheese retail price increase,\textsuperscript{446} the OFT has concluded that Asda may be taken to have known the circumstances under which Sainsbury’s and Tesco disclosed their retail pricing intentions to Dairy Crest and did, in fact, appreciate that the information was passed to it with Sainsbury’s and Tesco’s concurrence.\textsuperscript{447}

\textbf{Tesco representations on [Dairy Crest’s Commercial Director for its Tesco account] meeting note}

5.177. Tesco challenged the OFT’s interpretation of [Dairy Crest’s Commercial Director for its Tesco account] note in its written representations on the SO and the SSO.

5.178. First, Tesco argued that [Dairy Crest’s Commercial Director for its Tesco account] was discussing wholesale rather than retail prices and relied upon evidence provided by [a senior manager at Dairy Crest] in an interview with Dairy Crest’s solicitors after the issue of the SO to support this representation. In his interview, [a senior manager at Dairy Crest] is recorded as stating that he believed the section of the Dairy Crest note under the heading ‘Mechanics – Cheese’ referred specifically to wholesale, not retail price increases:\textsuperscript{448}

\begin{quote}
'I believe that the section on "mechanics of cheese" refers to our cost prices, not the retail price increasing. This is a retrospective proposal. Raw milk price increases were going through on 1 October so we needed to have from 1 October to 20 October covered. The NFUS had used a
\end{quote}

\textsuperscript{443} In respect of Sainsbury’s, see paragraphs 5.231 to 5.242 5.274 to 5.280; and 5.323 to 5.329 below. In respect of Tesco, see paragraphs 5.80 to 5.87 above and paragraphs 5.195 to 5.197; 5.213 to 5.214; and 5.399 to 5.402 below.

\textsuperscript{444} See paragraphs 5.128 to 5.136 and 5.165 to 5.171 above.


\textsuperscript{446} See paragraphs 5.128 to 5.136 and 5.165 to 5.171 above.


\textsuperscript{448} JJB Sports plc v Office of Fair Trading and Argos Limited and Littlewoods Limited v Office of Fair Trading [2006] EWCA Civ 1318, at paragraphs 91 and 141.
previous press releases [sic], mentioning pressure from processors. That was also the date of the first meeting with ASDA, on 17 September.  

5.179. Second, on the basis of its proposition that [Dairy Crest’s Commercial Director for its Tesco account] was referring to wholesale prices, Tesco represented that the information contained within the meeting note in respect of itself was fictitious. In support of this representation, Tesco stated that it had not accepted Dairy Crest’s wholesale price increase by the 27 September 2002 and therefore would not have been in a position to disclose such information to Dairy Crest by the time of its meeting with Asda on that date.  

Further, Tesco submitted that it was resisting wholesale price increases and that [Tesco’s Senior Cheese Buyer’s] ‘natural inclination was to resist all cost [wholesale] price increases aggressively’. Accordingly, Tesco claimed that it could not have agreed a wholesale price increase with Dairy Crest by 27 September 2002 and ‘far less could Tesco have communicated its future retail prices to Dairy Crest’ and believed that Dairy Crest had “spun” a story to Asda that Tesco “had agreed to move all sectors” at the time when it was expecting to fund a downward price promotion by Tesco. Tesco further supported this position by evidence provided by [Tesco’s Category Director for Dairy] and [Tesco’s Senior Cheese Buyer] who each confirmed that ‘the Tesco dairy team resisted cost price increases on cheese for as long as possible in autumn 2002’.

5.180. The OFT has carefully considered Tesco’s representation on this point and concluded that the balance of the evidence in its possession supports its conclusion that Tesco decided to increase or was contemplating increasing its cheese retail prices before 27 September 2002 and had also communicated this to Dairy Crest.

5.181. In drawing this conclusion, the OFT first notes that there is clear evidence to support the conclusion that [Dairy Crest’s Commercial Director for its Tesco account] was referring to cheese retail prices when describing the timings of price increases in that he stated that the ‘management of labels/stocks will need closely monitoring’. Labels and stocks would only need to be monitored if retail prices were being changed - price labels would need to be changed to reflect the revised prices and stocks would need to be monitored in order to manage the timing of the price change because existing priced stock would need to be sold off in advance of newly priced stock being put on the shelf.

5.182. The OFT additionally notes that the meeting between Dairy Crest and Asda staff took place following a significant amount of dialogue between Dairy Crest and various retailers (including Asda) with the aim of

449 See document 24 to the SSO, at paragraph 70.
450 See document 62 to the SSO, at paragraphs 5.47 and 5.49 and Tesco’s second representations on the SSO, at paragraph 4.12.
451 Tesco submitted this point at a number of places in its representations (see, for example, Tesco’s second representations on the SSO, at paragraph 4.13).
452 See Tesco’s second representations on the SSO, at paragraph 4.12(b).
453 See document 62 to the SSO, at paragraph 5.4(e).
454 See document Tesco’s second representations on the SSO, at paragraph 4.13.
implementing a cheese retail price increase in order to subsidise an increase in the farmgate price through increased cheese wholesale and retail prices and considers that this surrounding context strongly supports its conclusion that [Dairy Crest’s Commercial Director for its Tesco account] was referring to cheese retail (and wholesale) price increases in this meeting note.

5.183. The OFT’s conclusion is further supported by evidence provided by [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] in an interview with Dairy Crest’s solicitors following the issue of the SO. In this interview, [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] stated that “Tesco was responsive to our campaign and conversations happened at all levels within Tesco. I think when my conversation happened with [Tesco’s Buying Manager for Cheese], the decision within Tesco to raise the prices [that is, cheese retail and cost prices] had already been made at a higher level” [emphasis added].

5.184. Significantly, the conversation between [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] and [Tesco’s Buying Manager for Cheese] is referred to in [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] letter to [Tesco’s Buying Manager for Cheese] on 23 September 2002. It is evident from the date of [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] letter that the conversation occurred at some point on or shortly before 23 September 2002 (given that the letter refers to ‘our earlier conversation’) and therefore in advance of the meeting between Dairy Crest and Asda on 27 September 2002.

5.185. Moreover, Tesco’s representation that it always initially rejected a wholesale price increase and so could not have accepted a wholesale price increase by this date also fails to reflect the wider context. The cheese wholesale and retail price increases that Dairy Crest was proposing at this time were motivated to assist UK dairy farmers financially and therefore differed from standard wholesale price increases which would ordinarily have been driven by an increase in input prices. This different motive may well have resulted in a different approach from Tesco in respect of its negotiations and therefore the OFT considers that Tesco’s representation may not be an accurate reflection of its position.

5.186. In drawing this conclusion, the OFT relies upon evidence from the notes of interviews that Dairy Crest’s solicitors conducted with the following Dairy Crest employees: [Dairy Crest’s Commercial Director for its Tesco account]; [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] and [a senior manager at Dairy Crest].

5.187. In his interview with Dairy Crest’s solicitors, [Dairy Crest’s Commercial Director for its Tesco account] stated the following in respect of Tesco’s willingness to increase its prices in order to support farmers:

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455 See document 21 to the SSO, at paragraph 6.
456 See document 170 to the SO, at paragraph 5.140 above.
'Usually it was not easy to get an agreed cost increase from any retailer, as they would strongly resist any attempt to do so. In 2002, however, the different circumstances meant that Tesco understood the issues the farmers were facing and therefore were more open minded to an increase in cost prices as the benefit would be passed back to farmers. Besides, ultimately the cost increase would be passed through to an increase in the retail price and so it would be the consumer who eventually would pay for the increase rather than the retailer taking out their margin.'

5.188. The OFT notes that [Dairy Crest’s Commercial Director for its Tesco account] states that far from rejecting the proposed price initiative, Tesco appeared to be sympathetic to the issues farmers were facing and therefore 'were more open minded to an increase in cost prices’ which would 'be passed through to [consumers through] an increase in the retail price’. Significantly, [Dairy Crest’s Commercial Director for its Tesco account] differentiated the positive approach that Tesco adopted in respect of this price initiative relative to other wholesale price increases, consistent with the OFT’s view at paragraph 5.185 above.

5.189. [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] also recorded that Tesco was positive about Dairy Crest’s proposals ('Tesco was responsive to our campaign and conversations happened at all levels within Tesco'), whilst [a senior manager at Dairy Crest] additionally stated that 'Tesco was quite proud to be seen to be doing something [on cheese prices]'.

5.190. The OFT considers that the notes of the interviews with each of these Dairy Crest employees strongly supports the conclusion that, far from challenging the implementation of a cheese wholesale price increase, Tesco was keen to increase its prices in order to subsidise an increase in the farmgate price. The OFT additionally notes that these witness interview notes are also consistent with the contemporaneous records of the Tesco dairy supply group meeting that have been analysed above at which it was clear that Tesco was prepared to increase its cheese retail and wholesale prices to assist farmers, provided that it was not left in an uncompetitive position on the retail market.

Tesco promotional activity

5.191. In its representations on the SO, Tesco also submitted that it ran promotions on a number of cheese lines between 16 October and 12 November 2002 and that Dairy Crest was both aware of and supported Tesco’s promotional activity. Tesco argued that this demonstrates that Dairy Crest was ‘clearly misleading Asda’ and that Tesco’s price reductions through these promotions are ‘inconsistent' with the OFT’s proposed finding of a market wide initiative to increase cheese retail prices.

5.192. The OFT does not consider that this representation undermines its infringement findings. The fact products are temporarily discounted

457 See document 22 to the SSO, at paragraph 4.
458 See document 21 to the SSO, at paragraph 6.
459 See document 28 to the SSO, at paragraph 41.
460 See document 62 to the SSO, at paragraph 5.48(d).
through promotions does not mean that those products could not also be part of the 2002 Cheese Initiative or that Dairy Crest was 'misleading' Asda as to Tesco's intentions. The fact that a product was temporarily on promotion only meant that any retail price increase to reflect the initiative would be delayed until after the promotion had finished, after which the retail price would be increased to above pre-promotional levels to reflect the £200 pmt increase. Indeed, there is evidence of exactly this behaviour later in the Initiative.

vi. Glanbia and McLelland plan co-ordination of cheese retail price increases

Introduction

5.193. In addition to Dairy Crest, other processors were also considering implementing price initiatives on the products they supplied to grocery retailers at this time. Paragraphs 5.195 to 5.220 below demonstrate the preparatory steps that Glanbia and McLelland took to co-ordinate cheese retail price increases with the aim of passing the money achieved by the increases on to farmers during the latter part of September 2002.

5.194. The structure of these proposed price increases were virtually identical to those proposed by Dairy Crest and the evidence demonstrates a degree of direct co-ordination and contact between the processors themselves with the aim of implementing a market wide cheese retail price increase.

Glanbia internal memorandum, 25 September 2002

5.195. An internal Glanbia memorandum dated 25 September 2002 and prepared by [a senior manager at Glanbia] demonstrates that Glanbia was contacted by a number of its retailer customers concerning a cheese price initiative to pay farmers increased farmgate prices. The memorandum reads:

‘Issue

Farmers are seeking milk price increases from a move in retail cheese prices.
Can this be achieved
Can we support it and manage it?

Developments

[A retailer] asked us to consider 20/9.
JS asked for "our views" 19/9.
Asda ([Asda’s Category Manager for Dairy]) seeking our views 22/9.
[A retailer] informal enquiry recently.
[C] called to say Tesco would move if Asda moved.¹⁴⁶¹

5.196. [A senior manager at Glanbia] memorandum records that a number of retailers had contacted Glanbia concerning the possibility of a price initiative in respect of cheese. Sainsbury ('JS') had made contact on 19 September 2002, [a retailer] on 20 September 2002, Asda (specifically

¹⁴⁶¹ See document 135 to the SO.
[Asda’s Category Manager for Dairy]) on 22 September 2002, and [a retailer] on or before 25 September 2002 ('recently').

5.197. [A senior manager at Glanbia] memorandum also records that ‘[C]’ (which the OFT has inferred to be [a producer], at the time a farmer co-operative) had contacted Glanbia to inform it that Tesco would increase its cheese retail prices provided that Asda also did so ('Tesco would move if Asda moved').

5.198. It is not clear from the face of [a senior manager at Glanbia] memorandum whether Tesco had disclosed this information to [a producer]; whether [a producer] had acquired it from another source; or whether [a producer] was merely anticipating (or predicting) what it expected Tesco would do.

5.199. In its representations on the SO, Tesco submitted that the statement was 'no more than a statement of [a producer’s] understanding of how Tesco was likely to behave, given its observations of Tesco’s previous behaviour in the marketplace' and supported this proposition with the following facts:

- Neither Glanbia nor [a producer] supplied cheese to Tesco at this time making it unlikely that either Glanbia or [a producer] would have had information regarding Tesco’s pricing intentions; and

- [Tesco’s Senior Cheese Buyer] had not heard of [a producer] at the time so it is unlikely that she would have been the source of this information.

5.200. The OFT has carefully considered Tesco’s representation in the context of all the evidence in its possession and notes that, although [a producer] did not supply Tesco with cheese at this time, [a producer’s] representative was present at the Tesco supply group meeting on 13 September 2002 when the question of a cheese price initiative was discussed, therefore demonstrating that a channel of communication existed between [a producer] and Tesco with respect to this initiative. Although, the OFT notes that the statement attributed to [a producer] is at best hearsay evidence in that if Tesco had disclosed this information to [a producer] it had not disclosed it directly to Glanbia, the content of this statement is consistent with other conditional statements attributed to Tesco during the course of the 2002 Cheese Initiative. Accordingly, the OFT considers that it is likely that this statement originated from Tesco and, in drawing this conclusion, also notes that the information is consistent with the statements attributed to [Tesco's Category Director for Dairy] at the Tesco dairy supply group meeting where he was recorded in [a processor’s] meeting note as referring to Asda when stating the need for Tesco to remain competitive in respect of its cheese retail prices.

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462 See document 62 to the SSO, at paragraph 5.21.
463 See document 62 to the SSO, at paragraphs 5.20 to 5.21
464 See document 62 to the SSO, at paragraph 5.20.
465 See paragraph 5.73 above.
466 See, paragraphs 5.80 to 5.87 and 5.195 to 5.197 above and paragraphs 5.213 to 5.214 and 5.399 to 5.402 below.
467 See paragraph 5.87 above.
5.201. The OFT additionally notes that Tesco did not provide any information in support of its representation that the information [a producer] disclosed to Glanbia was a prediction based on Tesco’s ‘previous behaviour in the marketplace’ (for example previous instances of such behaviour). However, it is noteworthy that the most recent retail price increases that had been implemented on dairy products at this time would have been those implemented in respect of milk in early September 2002, where Tesco increased its retail prices before Asda (and all other major grocery retailers) did and accordingly, this is not consistent with Tesco’s argument that the comment attributed to [a producer] would have been founded on previously observable behaviour.

5.202. The dates recorded in [a senior manager at Glanbia] note of the contacts that occurred between Glanbia and each of Asda and Sainsbury’s are significant as they followed on from previous contacts these retailers had with Dairy Crest concerning its proposal for a cheese price initiative. For example, Dairy Crest had made a presentation to Asda on 17 September 2002468 and a further proposal to Asda on 20 September 2002,469 while a Dairy Crest letter to Sainsbury on 23 September referred to discussions between the two companies in the previous week (the week commencing 16 September 2002).470

5.203. The timing of these contacts between these retailers and Glanbia indicates that following an initial approach by Dairy Crest, each subsequently contacted Glanbia for its views on a cheese price initiative. This conclusion is supported by the language used in [a senior manager at Glanbia] memorandum which indicates that the discussions regarding a cheese price initiative were not instigated by Glanbia, but by the retailers themselves. For example, Asda and Sainsbury’s both contacted Glanbia to ask for its views.

5.204. It is clear from the language used in [a senior manager at Glanbia] memorandum that the structure of the price initiative under discussion within Glanbia was similar to the one Dairy Crest had proposed to retailers, with the opening sentence stating that a farmgate price increase would be subsidised by a cheese retail price increase (‘Farmers are seeking milk price increases from a move in retail cheese prices’).

5.205. It is evident that Glanbia had not, by this stage, decided whether it would implement a cheese price initiative. [A senior manager at Glanbia] memorandum includes a table entitled ‘[c]onsiderations’ which is set out below and outlines the ‘[p]ositive’ and ‘[n]egative’ reasons for implementing an initiative:

<table>
<thead>
<tr>
<th>Positive</th>
<th>Negative</th>
</tr>
</thead>
<tbody>
<tr>
<td>Farmers receive higher milk price:</td>
<td>Our margins are depressed due to excessive</td>
</tr>
<tr>
<td>likely to continue in business</td>
<td>industry stock position:</td>
</tr>
<tr>
<td></td>
<td>agreeing to a 100% ‘pass through’</td>
</tr>
</tbody>
</table>

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468 See paragraphs 5.95 to 5.126 above.
469 See paragraphs 5.128 to 5.136 above.
470 See paragraph 5.138 above.
of a retail price increase locks this margin in

Enables us to move towards DC milk price already increased to reflect liquid movements now being orchestrated

Reduces cheese-makers ability to increase their % margin as milk prices increase ‘naturally’ over the next few months

Positive PR potential

Orchestrating a retail increase could be seen as collaboration. Potential ‘competition’ law infringement?

Could drive up PTF?

How do we pass back the increase to farmers / co-ops to farmers: recognise 20 kmt cheese goes via FS/Ing so increase will be well below 2ppl on a weighted basis

How do we handle Irish and imported cheese?

If only certain retailers increase there is the issue appropriating the revenue back to the relevant milk suppliers on each location (or do we must [sic] average across the whole piece?)

Retailers have locked in the low milk prices during 2002 (check RSP trajectories) and have secured these through contracts offer into 2003. Surely retailers should cut their cash margins to give back to farmers?

If only certain retailers increase there is the issue of appropriating the revenue back to the relevant milk suppliers on each location (or do we must [sic] average across the whole piece?)

How do we handle Irish and imported cheese?

[Emphasis added]

5.206. The table further demonstrates a close degree of commonality between the price initiative that Glanbia was considering implementing and the proposals Dairy Crest had made to its retailer customers. For example, it is evident that the amount of farmgate price increase Glanbia was considering was the same as that Dairy Crest had proposed to its customers (‘2ppl on a weighted basis’) and that the initiative would involve the ‘100% pass through of a [cheese] retail price increase’ to farmers, in other words the proposed farmgate price increase would be subsidised through cheese wholesale and retail price increases.

5.207. It is also evident that the cheese price initiative that Glanbia was considering implementing involved the co-ordination of cheese retail price increases across a number of retailers with concerns being raised as to whether ‘orchestrating a retail price increase could be seen as collaboration’, and therefore risked being a ‘[p]otential ‘competition’ law infringement.’ The OFT believes the obvious interpretation of the word ‘orchestrating’ is some
form of co-ordinated action. This conclusion is supported by evidence presented later in this analysis, which demonstrates that Glanbia did co-ordinate retail price increases across its retailer customers.\(^\text{471}\)

5.208. In addition, [a senior manager at Glanbia] memorandum listed various options for action by Glanbia in a table under the heading 'so what are we going to do?' as follows:

<table>
<thead>
<tr>
<th></th>
<th>Positive</th>
<th>Negative</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Refuse to co-operate</td>
<td>Future flexibility to move margins</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Retailer reaction</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Farmer reaction</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Glanbia reputation</td>
</tr>
<tr>
<td>2</td>
<td>&quot;Inactivity&quot; (passive refusal)</td>
<td>As above</td>
</tr>
<tr>
<td></td>
<td></td>
<td>As above</td>
</tr>
<tr>
<td>3</td>
<td>&quot;Passive acceptance&quot;, i.e. agree on a retailer by retailer basis (conditional on other cheese makers doing the same?)</td>
<td>Retailer/farmer reaction</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Weighted increase payable to farmers likely to be well &lt; 2ppl</td>
</tr>
<tr>
<td>4</td>
<td>Active role in forcing increase</td>
<td>As above</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Locks in low margin. Probably won’t cover food service/ingredient elements</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Competition law precludes price fixing</td>
</tr>
<tr>
<td>5</td>
<td>[C/]</td>
<td>[C/]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Retailer reaction</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Farmers unlikely to gain much</td>
</tr>
<tr>
<td>6</td>
<td>Steal the high ground – ensure retailers name those suppliers who are participating and enable retailer to highlight &quot;cheese for farmer support&quot;</td>
<td>Retailer/farmer reaction</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Could ‘steal the march’ on our competitors?</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Do-ability</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Our cheese could be competitively disadvantaged?</td>
</tr>
</tbody>
</table>

[Emphasis added]

5.209. The above table sets out Glanbia’s assessment of the options available to it as regards whether it implemented a cheese price initiative. Notably, it further demonstrates Glanbia’s concerns regarding the possible application of competition law to the actions it was contemplating on the grounds that should it play an ‘active role in forcing’ the price increases, it

\(^{471}\) See paragraphs 5.322 to 5.331 below.
might involve anti-competitive conduct on the basis that 'competition law precludes price fixing'.

**Glanbia internal communication, 27 September 2002**

5.210. Two days after his memorandum, [a senior manager at Glanbia] prepared an internal communication, dated 27 September 2002. This internal communication further demonstrates that Glanbia was in dialogue with its retailer customers as well as other cheese processors concerning the implementation of a cheese price initiative.

5.211. [A senior manager at Glanbia] started by reporting on discussions he had held that day with [Sainsbury’s Senior Cheese Buyer] concerning a cheese price initiative:

> 'Cheese Pricing Movement – Notes for Consideration

1. I have spoken to [Sainsbury’s Senior Cheese Buyer] today (27 September) and sought her views regarding **how long this initiative on raised cheese prices with full remittal back to farmers is likely to last**. She gave a clear impression that JS had not given this any thought whatsoever. I said this was a major issue for the industry and at some stage we would need to move back to normal market setting cheese prices in relation to the usual influence of milk price and butter/skim markets. I suggested that she might try and canvas a few on the JS management team today and feed back to me at the British Cheese Awards tonight. **Any response we get from her will come back into the system from [an employee at Glanbia].**

[Emphasis added]

5.212. The OFT notes that this passage of text demonstrates that Glanbia had engaged in discussions with Sainsbury’s concerning the proposed cheese price initiative that day (27 September 2002). It clearly suggests that Sainsbury’s was favourable to engaging in the initiative with the main subject of discussion not apparently being whether Sainsbury’s would participate in the initiative, but how long this action could last.

5.213. [A senior manager at Glanbia] then referred to a lengthy discussion he had held on the subject of the cheese price initiative with [a senior manager at McLelland]. It is evident from the summary of this discussion that this was not the first time that [a senior manager at McLelland] and [a senior manager at Glanbia] had discussed the price initiative and that information was being passed between processors concerning retailers’ cheese retail pricing intentions:

> '2. I had a further lengthy discussion with [a senior manager at McLelland] on the same subject. He tells me that Tesco will go if one other major player moves. He also told me that DC [Dairy Crest] are seeing Asda this afternoon. I have asked [an employee at Glanbia] to call [Asda’s Category Manager for Dairy] later this afternoon to elicit information on what Asda may now do on cheese

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472 See also paragraph 5.205 to 5.207 above and 5.219 below.

473 See document 175 to the SO.
5.214. The statement 'Tesco will go if one other major player moves' provides further evidence that Tesco was willing to increase its cheese retail prices on condition that one of its major competitors increased its retail prices first.\footnote{See document 175 to the SO.}

5.215. The source of [a senior manager at McLelland] information is not clear and, as with the earlier communication regarding the conditional nature of Tesco’s retail pricing behaviour which was made by [a producer] to Glanbia, Tesco submitted in its representations on the SO that this statement was 'no more than McLelland’s assessment of how Tesco was likely to behave, based on its observations of Tesco’s previous behaviour'. As with the earlier disclosure, the OFT considers that McLelland’s disclosure regarding the conditional nature of Tesco’s retail pricing behaviour is consistent with records made of statements by Tesco staff at the Tesco dairy supply group meeting and additionally notes that McLelland staff attended this meeting. In making this conditional commitment Tesco clearly acted inconsistently with the principle that competitors should determine their prices independently.

5.216. The note also demonstrates that [a senior manager at Glanbia] discussed the methodology for implementing the cheese price increases with [a senior manager from McLelland], stating that McLelland would be sending a letter to each of its customers in all sectors (that is, retail, food service and ingredients) to request their support for the proposed increases and that these letters would be followed up by meetings with each customer:

'A senior manager from McLelland] believes that this will set the milk price now until next April and therefore we should not be expected to pay farmers any more than the current prices plus 2ppl. We discussed whether this increase would be applicable in the Foodservice and Ingredients sectors. His approach was to issue a letter to all customers in all sectors, indicating that there would be an increase in order to resolve the farmers’ current problems and in his letter would hope that our customers would support this initiative. His letter is to go out next week and will be followed up by detailed one-to-one sessions with each customer in turn. His view was that it was right to publish a letter to non-retail sectors on the basis that the cheese maker can be seen to have asked for an increase and gives the customers concerned a chance to say "No".' \footnote{See document 175 to the SO.}

[Emphasis added]

5.217. It is evident from this note that McLelland planned to approach all of its customers in all sectors to propose a price increase at some point in the week commencing 30 September 2002. This would obviously have
included Asda, Safeway, Sainsbury’s and Tesco who were all supplied with cheese by McLelland.

5.218. Later in his note [a senior manager at Glanbia] recommended that Glanbia should also write to its customer base to propose a cheese price increase of £200 pmt with the extra money being passed directly to farmers in the form of a farmgate price increase of 2ppl. The proposed increases were intended to be implemented in October 2002, the same month Dairy Crest was proposing its increases:477

'4. In summary, I believe we should press ahead with a letter to our customer base outlining the fact that we are intending to increase cheese prices by £200 per tonne with the sole objective of passing all of the benefit of that back to the farming community at 2ppl. We should indicate in the letter that this is a move which we hope will help farmers out of their current problems, and we would hope to impose these increases in [C] October.

We should also then allude to the fact that we will then follow this letter up with the individual customer concerned on a one-to-one basis, armed with their specific detail by SKU, etc.478

[Emphasis added]

5.219. [A senior manager at Glanbia] then recommended that the draft letter should be checked by Glanbia’s solicitors for an assessment of its competition law implications, thereby further demonstrating Glanbia’s concern that its actions might infringe competition law and its understanding of its possible application to their actions:479

'This letter should be checked legally as discussed already ([an employee at Glanbia] to deal with his competition law contact at [a law firm]) and the letter should be shared with all members of the sales force for all sectors before issue. This session with the sales force should be used to explain very clearly the implications of this movement satisfactorily, and answer any issues arising from our customer base on their individual circumstances .... .

I would suggest the letter goes out towards the end of next week once individual major retailer positions become clearer, but if necessary could be delayed until my return to the business on Monday 7 October.

[An employee at Glanbia] to keep [an employee at Glanbia] in the loop on developments in this issue in respect of milk pricing policy.480

[Emphasis added]

Conclusions drawn from Glanbia internal notes of 25 and 27 September 2002

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477 See paragraphs 5.157 to 5.161 and 5.165 above.
478 See document 175 to the SO.
479 See also paragraphs 5.205 to 5.209 above.
480 See document 175 to the SO.
5.220. The OFT has drawn the following conclusions from the Glanbia internal notes presented and analysed above:481

i. Glanbia and McLelland, in addition to Dairy Crest, were considering whether to participate in a scheme to subsidise a farmgate price increase through increased cheese retail and wholesale prices.

ii. Glanbia discussed the possibility of a cheese price initiative with various retailers by the end of September 2002 while McLelland had planned to approach its retailer customers to propose cheese price increases. It is also evident from [a senior manager at Glanbia] internal communication of 27 September 2002 that McLelland had resolved to take steps to implement such a cheese price initiative and that Glanbia was also seriously considering taking such steps.

iii. These initiatives aimed to subsidise a farmgate price increase through a cheese retail price increase of £200 pmt.

iv. Tesco made its willingness to increase its cheese retail prices conditional upon its competitors also increasing their retail prices.482

v. A number of direct and indirect contacts occurred between processors concerning both the plan to implement a cheese price initiative and the form such an initiative should take.483

vii. Co-ordination of cheese retail price increases in October and November 2002

Introduction

5.221. Paragraphs 5.64 to 5.220 above have presented and evaluated a significant volume of contextual evidence relating to the planning and formation of the 2002 Cheese Initiative. The OFT has concluded that these plans involved the subsidisation of a farmgate price increase through a co-ordinated cheese retail price increase. Analysis below demonstrates the co-ordination of cheese retail price increases.

5.222. The evidence demonstrates that each of Dairy Crest, Glanbia and McLelland co-ordinated retail price increases in respect of the cheese they supplied to their retailer customers by acting as intermediaries for the indirect disclosure and/or exchange of retail pricing intentions between Asda, Safeway, Sainsbury’s and Tesco.

Asda internal communication, 1 October 2002

5.223. On 1 October 2002, a series of e-mails were sent within Asda between [Asda’s Category Manager for Dairy] and [Asda’s PR Manager].484

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481 See paragraphs 5.195 to 5.219 above.
482 See paragraphs 5.195 to 5.197 and 5.213 to 5.214 above.
483 See, for example, paragraphs 5.197 to 5.213 above.
484 See document 176 to the SO.
5.224. In the first e-mail of the series, [Asda’s PR Manager] attached a press article which claimed that Asda, Safeway, Sainsbury’s and Tesco had ‘agreed’ to facilitate an increase of the farmgate price by 2ppl in respect of raw milk used for the production of cheese and other dairy products. The article read:

‘ASDA, Safeway, Sainsbury and Tesco have agreed to a 2p per litter [sic] price increase for dairy farmers selling milk for the production of cheese and other dairy products. NFU Scotland is claiming the move as a victory.’

5.225. In her e-mail, [Asda’s PR Manager] explained to [Asda’s Category Manager for Dairy] that Asda had not made any announcement and that the publications did not ‘call us [Asda] to check the facts’. [Asda’s PR Manager] then asked [Asda’s Category Manager for Dairy]:

‘I assume you don’t want to be proactive on this and issue press releases, certainly until the deal isn’t confirmed. Can you please let me know?’

5.226. [Asda’s Category Manager for Dairy] responded by clarifying what had been agreed, by stating that Asda had agreed to a wholesale price increase in order to subsidise a farmgate price increase and that this would necessitate retail price increases. [Asda’s Category Manager for Dairy] also stated that Asda would be increasing its cheese retail prices in order to subsidise these price increases:

‘...we’ve asked them [processors] to pay more now for the milk and made a commitment that we will pay more for the cheese when it gets to us. There will inevitably be some retail price increases – short term or not depends upon you’re [sic] view of this. However, the first retails would come through within the next few months.’

5.227. The fact that Asda’s cheese retail price increases ‘would come through within the next few months’ demonstrates that Asda may have been planning to diverge from Dairy Crest’s previous proposal that wholesale and retail price increases would increase simultaneously.485 This is also evident from a later e-mail in the exchange in which [Asda’s Category Manager for Dairy] said that other retailers may put their retail prices up shortly after a wholesale price increase and that may require Asda to do the same:

‘What we haven’t got yet is agreement from Dairycrest [sic] to this proposal. Other retailers are proposing to put prices straight up. We may end up having to do this as well if we can’t get agreement from them and get boxed into a corner.’

[Emphasis added]

5.228. These internal Asda e-mails demonstrate that Asda understood that both it and its competitors would be increasing their cheese retail prices as a result of these wholesale price increases. Not only this, but Asda was also in possession of information concerning the likely timing of its

485 See paragraphs 5.157 to 5.160 above.
competitors’ cheese retail price increases (with [Asda’s Category Manager for Dairy] expecting Asda’s competitors (‘[o]ther retailers’) to go ‘straight up’) and understood that Asda may have to increase its retail prices straight away (‘[w]e [Asda] may end up having to do this [putting its cheese retail prices ‘straight up’] as well’). Asda’s awareness of its competitors’ retail pricing intentions and its understanding that it was acting as part of a market wide initiative is clearly inconsistent with the principle that competitors should determine their prices independently.

5.229. Taking into account the context within which this e-mail exchange occurred and the references to seeking Dairy Crest’s ‘agreement’ to delaying the implementation of retail price increases, the OFT has inferred that Asda received the information concerning its competitors’ cheese retail pricing intentions (‘[o]ther retailers are proposing to put prices straight up’) from its supplying cheese processors, including Dairy Crest. In drawing this conclusion, the OFT notes that Dairy Crest was explicitly referred to by name in [Asda’s Category Manager for Dairy] e-mail and that the note of the meeting on 27 September 2002 between Dairy Crest and Asda (which [Asda’s Category Manager for Dairy] attended) showed that Dairy Crest informed Asda that Sainsbury’s and Tesco had already committed to move their retail prices.

5.230. Additionally, [Asda’s Category Manager for Dairy] generic reference to Asda’s processors in the letter – he said Asda had asked ‘them’ to pay more for their milk – indicates that Glanbia and McLellan had also had discussions with Asda given that both of those processors supplied Asda with cheese at this time.

Sainsbury’s letter to FFA regarding cheese price increases, 4 October 2002 and additional evidence showing that Sainsbury’s willingness to increase its cheese retail prices was conditional upon its competitors also increasing their prices

5.231. On 4 October 2002, [Sainsbury’s General Manager for Dairy and Cheese] wrote to [an official at FFA] and informed him of the status of discussions between Sainsbury’s and its processors regarding a cheese price increase. The letter reads as follows:

’In the spirit of the Sainsbury’s Dairy Forum, which stresses our commitment to communicating as much as possible, I have attached a copy of the letter, which I sent to our milk producers confirming our position on liquid milk prices.

A similar letter is due to be despatched on UHT milk (increased buying prices from [C] and cream (increased buying prices from [C]. I can let you have a copy of these letters in due course, if you so wish.

With regards to cheese we are still discussing the implementation of cost price increases with all our processors. It is intended that we will pass on an increase in our buying prices by £200/tonne in approx 3 weeks, for all our standard cheese range, provided other retailers also accept this.’

486 See paragraphs 5.165 to 5.181 above.
487 A handwritten annotation made by [a senior manager at Sainsbury’s] appears next to the words ’provided other retailers also accept this’ on the copy of this letter obtained by
must stress that if others do not generally support this initiative, I will have to withdraw my support for cheese, if I find I am uncompetitive in the wider market place.\textsuperscript{488}

[Emphasis added]

5.232. The OFT notes that [Sainsbury’s General Manager for Dairy and Cheese] informed [an official at FFA] that Sainsbury’s was discussing cheese wholesale (‘cost’) price increases with ‘all’ of its supplying cheese processors with the intention of increasing its wholesale prices by £200pmt on all its ‘standard cheese range’.

5.233. Sainsbury’s was supplied with cheese by Dairy Crest, Glanbia and McLelland in 2002 and the OFT has, therefore, inferred from [Sainsbury’s General Manager for Dairy and Cheese] reference to ‘all our processors’ that Sainsbury’s would have been in discussions with each of them concerning price increases at this time.

5.234. The OFT’s conclusion on this is consistent with the surrounding contextual evidence given that Dairy Crest\textsuperscript{489} and Glanbia\textsuperscript{490} had both by this time been in contact with Sainsbury’s concerning cheese price increases and that McLelland had planned to approach its retailer customers to propose cheese price increases.\textsuperscript{491}

5.235. It is evident from this document that Sainsbury’s willingness to increase its cheese prices was conditional upon its competitors also increasing their prices. Having informed [an official at FFA] of the level of cheese price increase that Sainsbury’s was considering, [Sainsbury’s General Manager for Dairy and Cheese] proceeded to state that these increases would be implemented ‘provided other retailers also accept this’ and then emphasised the conditional nature of Sainsbury’s retail pricing intention in the following sentence: ‘I must stress that if others do not generally support this initiative, I will have to withdraw my support for cheese, if I find I am uncompetitive in the wider market place’.

5.236. The OFT has concluded that the clear implication of the term ‘uncompetitive in the wider market place’ is that Sainsbury’s was concerned about its retail pricing levels relative to its competitors. A wholesale price increase alone would not make Sainsbury’s uncompetitive ‘in the wider market place’ but would instead impact on Sainsbury’s margin. In contrast, an accompanying retail price increase by Sainsbury’s would make it ‘uncompetitive in the wider market place’ if its competitors did not also implement similar retail price increases.

5.237. The OFT’s conclusion is again consistent with, and supported by, the surrounding contextual and witness evidence provided by Sainsbury’s employees following the issue of the SO.

\textsuperscript{488} See document 177 to the SO.
\textsuperscript{489} See paragraphs 5.157 to 5.163 above.
\textsuperscript{490} See paragraphs 5.195 and 5.211 to 5.212 above.
\textsuperscript{491} See paragraphs 5.216 to 5.217 above.
5.238. In respect of contextual evidence, the OFT notes that the evidence it has analysed showing discussions between processors and retailers (including Sainsbury’s) regarding the implementation of the initiative were clearly based upon the implementation of cheese retail price increases.492

5.239. In respect of witness evidence, the OFT interviewed [Sainsbury’s Senior Cheese Buyer] and [Sainsbury’s Dairy Trading Manager] following the issue of the SO. In their interviews, both [Sainsbury’s Senior Cheese Buyer] and [Sainsbury’s Dairy Trading Manager] confirmed that Sainsbury’s willingness to increase its cheese retail prices was conditional upon its competitors also increasing their prices. [Sainsbury’s Senior Cheese Buyer] stated that ‘we did […] increase some of our [cheese] retails but we were looking for assurances that […] the other retailers would have been in the same situation, under the same pressure from the farming community. We were looking for assurances that they [other retailers] would be moving [their retail prices] as well’.493

5.240. [Sainsbury’s Senior Cheese Buyer] observations were corroborated by [Sainsbury’s Dairy Trading Manager] who explained that ‘[i]t [a retail price initiative] could only happen on cheese as long as we remained competitive in the market place’.494 He also explained that he understood this attitude to be the same for Sainsbury’s competitors.495

5.241. The OFT notes that these statements of conditionality by Sainsbury’s staff are also consistent with the evidence submitted by Dairy Crest following the issue of the SO.

5.242. Accordingly, the OFT has concluded that Sainsbury’s conducted its discussions with its supplying processors concerning the implementation of a cheese price initiative on the basis that any retail price increase it implemented was conditional upon its competitors also increasing their retail prices and sought reassurance that its competitors would be increasing their retail prices. This behaviour is clearly inconsistent with the principle that competitors should determine their prices independently. The OFT’s conclusion that Sainsbury’s cheese retail price increases were conditional on other retailers also increasing their retail prices is further supported by a number of pieces of evidence that will be presented later in this analysis.496

McLelland internal e-mail confirming Sainsbury’s cheese price increase, 16 October 2002

5.243. On 16 October 2002, [McLelland’s National Account Controller] sent an internal e-mail to [a senior manager at McLelland] entitled ‘Sainsbury cost movement’. The e-mail reads as follows:

‘[Sainsbury’s Senior Cheese Buyer] has now confirmed that the position moving forward will be as follows.

492 See paragraphs 5.120 to 5.220 above.
493 See document 60 to the SSO, at page 9.
494 See document 61 to the SSO, at page 44.
495 See document 61 to the SSO, at page 44.
496 See paragraphs 5.274 to 5.280 and 5.323 to 5.328 below.
1. Seriously Strong Pre-pack will move on costs and Retails from the 21st of October.

2. Sainsbury own label and pre-pack Brands will move on the 4th of November, allowing for the proper market conditions etc.

3. Deli and TASTE THE Difference will move on the 11th of November.

Sainsbury would also like from us an official statement of our intentions or actions to ensure that this recovery on costs will be passed directly back through the Milk price to the Farmer, Can you advise on the content of such a statement.  

[Emphasis added]

5.244. This internal McLelland e-mail demonstrates that ([Sainsbury’s Senior Cheese Buyer]), had informed McLelland that it would increase the retail and wholesale prices on various lines of cheese supplied to it by McLelland.

5.245. These price increases were to be staggered in three stages. Seriously Strong Pre-Pack prices would be increased on 21 October 2002; Sainsbury’s own label and pre-pack brands would move on 4 November 2002; and its Deli and Taste the Difference ranges would be increased on 11 November 2002.

5.246. The OFT notes that these retail price increases were to be staggered in a similar way to the price increase proposal Dairy Crest had made to Sainsbury’s on 25 September 2002 in that they would be staggered in three stages with closely proximate dates of implementation (the dates Dairy Crest had proposed to Sainsbury’s were 27 October, 3 November and 10 November 2002).

5.247. In disclosing its intention to increase its cheese retail prices to McLelland together with the dates on which those increases would be implemented, Sainsbury’s, at the very least, substantially reduced uncertainty as to the conduct on the cheese retail market to be expected on its part by disclosing the course of conduct that it had decided to adopt or was contemplating adopting on that market.

5.248. Taking into account the context within which this disclosure was made, the OFT has concluded that Sainsbury’s may be taken to have intended and did, in fact, foresee that McLelland would use its cheese retail pricing intentions to influence conditions on the cheese retail market by passing it

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497 See document 178 to the SO.
498 See paragraphs 5.161 to 5.162 above.
on to other retailers in order to facilitate the implementation of further cheese retail price increases by other retailers.\textsuperscript{500}

5.249. In drawing this conclusion, the OFT notes that the evidence has demonstrated that Sainsbury’s willingness to increase its cheese retail prices was conditional on its competitors also increasing their cheese retail prices\textsuperscript{501} and also that through discussions with its cheese processors it would have understood it was acting as part of a wider market move that involved its competitors also implementing retail price increases.\textsuperscript{502}

5.250. Evidence presented below demonstrates that McLelland made use of Sainsbury’s cheese retail pricing intentions to influence conditions on the cheese retail market by passing that information on to Tesco.\textsuperscript{503}

\textit{McLelland passes Sainsbury’s cheese retail pricing intentions on to Tesco on 21 October 2002}

5.251. On 21 October 2002, [McLelland’s National Account Controller] sent an e-mail to [Tesco’s Senior Cheese Buyer]. [McLelland’s National Account Controller] attached a spreadsheet to his e-mail which contained a comprehensive list of retail price increases for what appears to be all cheese products supplied by McLelland to Tesco. [McLelland’s National Account Controller] also used his e-mail to pass information concerning Sainsbury’s and other retailers’ cheese retail pricing intentions on to Tesco demonstrating that McLelland made use of retailers’ pricing intentions to influence conditions on the cheese retail market:\textsuperscript{504}

\begin{quote}
'Spreadsheet attached which will cover off the Current supply prices and the new position with the proposed £200 per Tonne recovery. I have provided the recommended Retail going forward plus the position to protect your own margin. As we discussed last week other parties are confirming that they will protect Cash Margin on this occasion but not % MARGIN. We will need to discuss this as time develops this week and reach a conclusion.

The timescales are as we proposed.

I.e. 4\textsuperscript{th} of November for Pre-pack and the 11\textsuperscript{th} of November for Deli. Sainsbury are confirming that the new retails on Branded pre-pack will be in place Tuesday this week.'\textsuperscript{505}

[Emphasis added]
\end{quote}

\textsuperscript{500} \textit{JJB Sports plc v Office of Fair Trading and Argos Limited and Littlewoods Limited v Office of Fair Trading} [2006] EWCA Civ 1318, at paragraphs 91 and 141.
\textsuperscript{501} See paragraphs 5.231 to 5.242 above.
\textsuperscript{502} See paragraphs 5.131; 5.138iv; 5.138; 5.161 to 5.163; 5.195 to 5.204; and 5.210 to 5.212 above.
\textsuperscript{503} See paragraphs 5.251 to 5.261 below.
\textsuperscript{504} \textit{JJB Sports plc v Office of Fair Trading and Argos Limited and Littlewoods Limited v Office of Fair Trading} [2006] EWCA Civ 1318, at paragraphs 91 and 141.
\textsuperscript{505} See document 179 to the SO.
5.252. It is evident from the e-mail that McLelland passed information concerning Sainsbury’s cheese retail pricing intentions on to Tesco. [McLelland’s National Account Controller] informed [Tesco’s Senior Cheese Buyer] that ‘Sainsbury are confirming that the new retails on Branded pre-pack will be in place Tuesday this week’.

5.253. The information disclosed by McLelland to Tesco is identical to the information contained within the internal McLelland e-mail of 16 October 2002 in which [McLelland’s National Account Controller] informed [a senior manager at McLelland] that Sainsbury’s had confirmed that it would increase retail prices on Seriously Strong pre-pack cheese from 21 October 2002.\(^\text{506}\) Having received Sainsbury’s retail pricing intentions, McLelland was, therefore, in a position to pass this information on to Tesco and [McLelland’s National Account Controller] e-mail to [Tesco’s Senior Cheese Buyer] shows that McLelland did do so. The fact that [McLelland’s National Account Controller] also informed [Tesco’s Senior Cheese Buyer] that Sainsbury’s retail price increase ‘will be in place Tuesday this week’ [emphasis added] shows that Sainsbury’s retail price increase was expected rather than having already been implemented in-store and that this was, therefore, information about Sainsbury’s future retail price.

5.254. Accordingly, [McLelland’s National Account Controller] e-mail of 21 October 2002 demonstrates that McLelland made use of the information it had received regarding Sainsbury’s cheese retail pricing intentions to influence conditions on the cheese retail market by passing it on to Tesco\(^\text{507}\) in an e-mail in which McLelland was also seeking Tesco’s commitment to increase its cheese retail prices. Additionally, the OFT notes that earlier documentary evidence recorded that McLelland believed that Tesco would increase its cheese retail prices ‘if one other major player moves’.\(^\text{508}\) Sainsbury’s would have been considered a ‘major player’ on the grocery retail market at this time and therefore McLelland would have understood that Sainsbury’s decision to increase its cheese retail prices would have been of significance to Tesco in deciding whether or not it would increase its own cheese retail prices.

5.255. There is no evidence to suggest that Tesco rejected the information it received, nor that it did not wish to receive the information it had regarding Sainsbury’s retail pricing intentions. Having received this information, Tesco could not have failed to take it into account when determining its own future pricing behaviour on the cheese retail market.\(^\text{509}\) Indeed, the evidence has demonstrated that Tesco had previously disclosed to McLelland that its cheese retail pricing intentions

\(^{506}\) See paragraph 5.243 above. Seriously Strong is a brand of pre-pack cheese manufactured by McLelland and would therefore have been included within the reference to ‘Branded pre-pack’ in [the] e-mail of 16 October 2002 from [McLelland’s National Account Controller] to [a senior manager at McLelland].


\(^{508}\) See paragraph 5.213 above.

were conditional on other retailers’ increasing their cheese retail prices.\textsuperscript{510} Having received information that informed it that this condition was to be met (that ‘one other major player [will] move’), the OFT has concluded that Tesco took this information into account in determining its own future pricing behaviour (that is, in determining its cheese retail pricing decisions). This behaviour is clearly inconsistent with the principle that competitors should determine their prices independently.

5.256. Taking into account the circumstances in which it received this information, the OFT has concluded that Tesco may be taken to have known the circumstances in which Sainsbury’s had disclosed its cheese retail pricing intentions to McLelland and did, in fact, appreciate that the information was passed to it with Sainsbury’s concurrence.\textsuperscript{511}

5.257. In drawing this conclusion, the OFT notes that Tesco received Sainsbury’s Seriously Strong retail pricing intentions pursuant to a plan to co-ordinate cheese retail price increases in order to subsidise a farmgate price increase.

5.258. Tesco was aware of this plan and also that its implementation involved both itself and its competitors implementing cheese retail price increases. The evidence has demonstrated that following its dairy supply group meeting on 13 September 2002\textsuperscript{512}, Tesco engaged in discussions with Dairy Crest\textsuperscript{513} and McLelland\textsuperscript{514} concerning a cheese price initiative and disclosed its conditional willingness to increase its cheese retail prices to McLelland at some point prior to or on 27 September 2002.\textsuperscript{515}

5.259. Moreover, the content of [McLelland’s National Account Controller] 21 October 2002 e-mail demonstrates that further discussions had occurred in the previous week (‘[a]s we discussed last week’) between Tesco and McLelland concerning this initiative, and that those discussions included the fact that other retailers were ‘confirming’ that they were intending to increase their cheese retail prices as well.\textsuperscript{516}

5.260. The OFT additionally notes that the information relating to Sainsbury’s was not the only disclosure regarding Tesco’s competitors’ cheese retail pricing intentions that was disclosed to Tesco by McLelland. The e-mail also referred to details of an earlier conversation [McLelland’s National Account Controller] had held with [Tesco’s Senior Cheese Buyer] during which he passed general information concerning the cheese retail pricing intentions of other retailers on to Tesco (‘As we discussed last week other parties are confirming that they will protect Cash Margin on this occasion but not

\textsuperscript{510} See paragraph 5.213 to 5.215 above. The fact that Tesco’s cheese retail price increases were conditional on other retailers also increasing their cheese retail prices is consistent with other evidence (see paragraphs 5.80 to 5.87 and 5.195 to 5.197 above and paragraphs 5.399 to 5.402 below).

\textsuperscript{511} JJB Sports plc v Office of Fair Trading and Argos Limited and Littlewoods Limited v Office of Fair Trading [2006] EWCA Civ 1318 at paragraphs 91 and 141.

\textsuperscript{512} See paragraph 5.72 above.

\textsuperscript{513} See paragraphs 5.131 to 5.136 and 5.139 to 5.140 above.

\textsuperscript{514} See paragraphs 5.213 to 5.214 above.

\textsuperscript{515} See paragraph 5.213 above.

\textsuperscript{516} See paragraph 5.251 above.
This statement informed Tesco that 'other parties' (that is, retailers) would be increasing their retail prices as a result of the wholesale price increase because, in the face of a wholesale price increase, it would only have been possible to 'protect... margin[s]' through retail price increases. Moreover, [McLelland’s National Account Controller] also disclosed that this margin would be protected on a cash rather than percentage basis.

5.261. This disclosure would have additionally reduced uncertainty for Tesco as to the conduct on the cheese retail market to be expected from its competitors. In particular, Tesco would not only have understood that its competitors were planning cheese retail price increases pursuant to the initiative, but that these increases would be based on the premise of cash margin recovery.

5.262. As a result of the discussions between McLelland and Tesco outlined above, Tesco would have understood that it was being asked to implement cheese retail price increases as part of a wider market move that also involved its competitors increasing their cheese retail prices.

Tesco’s representations on the McLelland disclosure

5.263. In its representations on the SO, Tesco submitted that [Tesco's Senior Cheese Buyer] said 'that she did not take into account the statement that "other parties are confirming that they will protect cash margin on this occasion but not % margin"' and that she 'believed this to be another example of McLelland "talking up" the future behaviour of other retailers in an attempt to influence Tesco'.

5.264. Tesco also stated that the OFT’s conclusion that it took the information it received regarding Sainsbury’s pricing intentions into account was 'wholly at odds with how Tesco actually behaved', specifically:

i. Tesco’s pre-packed cheese lines supplied by McLelland did not increase in line with McLelland’s proposed timescale of 4 November 2002;

ii. for McLelland’s branded products, Tesco and Sainsbury’s increased their retail prices at different times and by different amounts; and

iii. none of Tesco’s branded lines of cheese increased on 22 October 2002.

5.265. The OFT has carefully considered Tesco’s representation and concluded that it does not undermine its finding that Tesco did take account of the information it received from McLelland regarding Sainsbury’s cheese retail pricing intentions. In reaching this conclusion, the OFT notes that it did not rely on any of the points Tesco submitted in its representations when

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518 See document 62 to the SSO, at paragraph 5.70.

519 Ibid, at paragraph 5.77.
it drew the provisional conclusion that Tesco took the information into account. For example, it is not, and never has been, the OFT’s view that Tesco and Sainsbury’s did, or needed to, increase their cheese retail prices by the same amount at the same time in order for Tesco to have taken account of Sainsbury’s retail pricing intentions when taking its own pricing decisions. Nor has the OFT ever alleged that Tesco increased its retail prices on branded lines of cheese on 22 October 2002.

5.266. Indeed, the OFT does not consider that the information that has been presented by Tesco is relevant when determining whether Tesco took account of the information concerning Sainsbury’s retail pricing intentions. What is relevant is that Tesco was aware of a plan to co-ordinate cheese retail price increases in order to subsidise an increase in the farmgate price of raw milk; had expressed that it was keen to participate in the initiative and received information concerning one of its competitor’s retail pricing intentions pursuant to that plan. Further, Tesco presented no evidence to suggest that [Tesco’s Senior Cheese Buyer] rejected the information she received regarding Sainsbury’s retail pricing intentions, nor that she was uncomfortable in receiving this information (and notably this is not the only occasion on which [Tesco’s Senior Cheese Buyer] received information concerning Tesco’s competitors’ cheese pricing intentions during the 2002 Cheese Initiative). Moreover, there are a number of instances in the evidence presented in this section which demonstrate that Tesco’s supplying processors were of the understanding that Tesco would not have been prepared to increase its cheese retail prices unilaterally (with this being clearly communicated by Tesco staff at the dairy supply group meeting of 13 September 2002). Accordingly, [Tesco’s Senior Cheese Buyer] would have found the information she received regarding one of Tesco’s major competitors helpful when determining Tesco’s future behaviour on the cheese retail market.

*E-mail from Glanbia to Sainsbury’s, 16 October 2002*

5.267. On 16 October 2002, [Glanbia’s Account Development Manager] e-mailed [Sainsbury’s Senior Cheese Buyer] to confirm details of wholesale and retail price increases to be implemented by Sainsbury’s in respect of Stilton. The increases were to be effective from 4 November 2002 and the level of retail price increase would be 20 pence per kilogram (‘ppkg’):

‘[An employee at Glanbia, position unknown] has asked me to confirm the details of your agreement to increase the retail selling prices & buying cost prices for the Stilton range. The increases will be effective from 4 November 2002. Please find attached a letter of confirmation that the RSP’s will increase by 20p per kg and the buying price by £200 per tonne. This benefit will then be passed back to our milk supplying farmers. The details of this mechanism will be confirmed by [sic] shortly.’

5.268. The OFT notes that both the amount of this retail price increase (20ppkg, the equivalent of £200pmt) and its timing (4 November 2002) are

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520 See document 180 to the SO.
consistent with the various proposals to implement an initiative to subsidise a farmgate price increase through co-ordinated retail and wholesale cheese price increases. Accordingly, the OFT has concluded that Sainsbury’s retail and wholesale price increases were being implemented pursuant to that initiative.

5.269. In disclosing its Stilton retail pricing intentions to Glanbia together with the dates on which those increases would be implemented, Sainsbury’s, at the very least, substantially reduced uncertainty as to the conduct on the cheese retail market to be expected on its part by disclosing the course of conduct that it had decided to adopt or contemplate adopting on that market.\(^5\) Moreover, based on the surrounding contextual evidence, the OFT has concluded that Sainsbury’s disclosed this information regarding its Stilton retail pricing intentions to Glanbia in circumstances in which it may be taken to have intended and, did in fact foresee, that Glanbia would use that information to influence conditions on the cheese retail market by passing it on to other retailers in order to facilitate the implementation of further cheese retail price increases by other retailers.\(^5\)

5.270. In drawing this conclusion, the OFT notes that the evidence has demonstrated that Sainsbury’s willingness to increase its cheese retail prices was conditional on its competitors also increasing their cheese retail prices\(^5\) and that through its discussions with its supplying processors it would have understood it was acting as part of a wider market move that involved its competitors also implementing retail price increases.\(^5\)

5.271. This is further supported by a Glanbia internal document, dated 1 November 2002, which describes the status of discussions between itself and its retailer customers concerning cheese retail price increases and which shows that Glanbia understood that Sainsbury’s cheese retail price increases were conditional upon its competitors also increasing their retail prices (‘[s]ubject to other retailers following suit’).\(^5\)

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\(^5\) See paragraphs 5.231 to 5.242 above. Evidence presented at paragraphs 5.274 to 5.280 and 5.323 to 5.328 below further supports the OFT’s conclusion that Sainsbury’s willingness to increase its cheese retail prices was conditional on other retailers also increasing their retail prices.

\(^5\) See paragraphs 5.131; 5.138; 5.156; 5.161 to 5.163; 5.195 to 5.204; and 5.210 to 5.212 above.

\(^5\) See document 186 to the SO, at paragraphs 5.322 to 5.331 below.
5.272. The OFT also notes that the date of Sainsbury’s cheese retail price increases recorded in this internal Glanbia document (‘[r]olling change from 4/11’) is also consistent with the date that Sainsbury’s Stilton retail price increases were expected to take effect as set out in [Glanbia’s Account Development Manager] e-mail of 16 October 2002 to [Sainsbury’s Senior Cheese Buyer].  

5.273. The OFT has concluded that Glanbia used Sainsbury’s cheese retail pricing intentions to influence conditions on the cheese retail market by passing it to other retailers with the aim of facilitating further retail price increases and supports this conclusion with evidence that will be presented later in this section.  

*Dairy Crest internal e-mail, 24 October 2002*  

5.274. On 24 October 2002, [an employee at Dairy Crest] e-mailed a number of his colleagues at Dairy Crest to inform them that Sainsbury’s had increased its retail prices for Dairy Crest’s Cathedral City brand of cheese, but would not implement increases on Sainsbury’s own label cheese lines until it had evidence that Asda and Tesco were increasing their retail prices:  

‘After raising RSPs on Cathedral City, SSL [Sainsbury Stores Limited] have now stated that they want to wait to raise prices on own label products until they have evidence that Asda and Tesco are moving. [A senior manager at Dairy Crest] is in SSL tomorrow and will push for them [Sainsbury’s] to continue on track rather than wait based on intelligence that he has on Tesco and Asda. 

We are now packing blank labels for Asda and packing the new priced packs for [a retailer] so the movements are in the pipeline. This needs to be communicated so that the lag created by everyone waiting for each other to move in store can be reduced.’  

5.275. Although the precise date on which Sainsbury’s increased its Cathedral City retail prices is not apparent from this email, the date of [an employee at Dairy Crest] e-mail (24 October 2002) suggests that the increase was implemented more or less in line with the timing proposed in the letter sent by [Dairy Crest’s Senior National Account Manager for its Sainsbury’s account] to [Sainsbury’s General Manager for Dairy and Cheese] on 25 September 2002, which proposed that Sainsbury’s implement a retail price increase on this product line from 20 October 2002.  

5.276. It is evident that, having increased its Cathedral City retail prices, Sainsbury’s was not prepared to increase its own label cheese retail prices without first having received evidence that Asda and Tesco were increasing their retail prices as well.

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526 See paragraph 5.267 above.  
527 See paragraphs 5.387 to 5.392 below.  
528 See document 181 to the SO.  
529 See paragraphs 5.161 to 5.162 above.
5.277. In disclosing this information to Dairy Crest, Sainsbury’s effectively made its willingness to increase its own label cheese retail prices conditional upon two of its competitors (Asda and Tesco) also increasing their retail prices and, therefore, this document provides further evidence of the conditional nature of Sainsbury’s retail pricing behaviour in respect of cheese during the 2002 Cheese Initiative.\(^{530}\) This conditional commitment by Sainsbury’s is clearly inconsistent with the principle that competitors should determine their prices independently.

5.278. Additionally, in making this disclosure of its conditional willingness to increase its own label retail prices to Dairy Crest, Sainsbury’s, at the very least, substantially reduced uncertainty as to the conduct on the cheese retail market to be expected on its part by disclosing the course of conduct it had decided to adopt or contemplate adopting on that market.\(^{531}\) As a result of this information, Dairy Crest would have understood that if Sainsbury’s was provided with evidence that Tesco and Asda ‘were moving’ their retail prices in respect of this range of products, Sainsbury’s would have increased its own retail prices. The OFT notes that the email indicates that Sainsbury’s did not necessarily require evidence that retail prices had actually increased on the shelf (and therefore in the public domain), but evidence that the increase would be forthcoming (in other words this could have been information in Dairy Crest’s possession prior to the increases being observable on the shelf, such as revised price labels). This disclosure additionally demonstrates that Sainsbury’s did not consider that it was implementing cheese retail price increases unilaterally but as part of a market-wide move that also involved retail price increases being implemented by its major competitors too.

5.279. In making this conditional commitment, Sainsbury’s may be taken to have intended and did, in fact, foresee that Dairy Crest would use its cheese retail pricing intentions to influence conditions on the cheese retail market by passing it on to other retailers in order to facilitate the implementation of further cheese retail price increases by other retailers.\(^{532}\) This conclusion is all the stronger when the email is considered in its wider context. Sainsbury’s made this disclosure pursuant to a plan to co-ordinate a market-wide increase in the retail price of UK produced cheese in order to subsidise an increase in the farmgate price of raw milk. The evidence has demonstrated that Sainsbury’s was both aware of this plan and its objectives.

5.280. It is evident that Dairy Crest planned to influence Sainsbury’s behaviour on the cheese retail market by using ‘intelligence’ it possessed in respect

\(^{530}\) Evidence showing that Sainsbury’s retail price increases were conditional on other retailers also increasing their retail prices has been presented at paragraphs 5.231 to 5.242 above. Further evidence will also be presented at paragraphs 5.323 to 5.328 below.


of both Asda’s and Tesco’s anticipated behaviour. It is not clear what this ‘intelligence’ consisted of (although, in the case of Asda, there seems to have been a belief that a ‘movement’ was ‘in the pipeline’ because it had been supplied with blank labelled stock533 or whether it was indeed passed to Sainsbury’s).

5.281. In its representations on the SO, Tesco submitted that Dairy Crest had not received any ‘intelligence’ from Tesco regarding its retail pricing intentions because the first evidence showing that Dairy Crest had any information regarding Tesco’s intentions is dated 30 October 2002 (six days after [an employee at Dairy Crest] e-mail).534 Accordingly, Tesco submitted that this passage of evidence demonstrated that Dairy Crest was ‘speculating with a view to influencing Sainsbury’s intentions’535 or that, to the extent that Dairy Crest passed any information regarding Tesco’s cheese retail pricing intentions to Sainsbury’s, it did so inappropriately without intention or foresight by Tesco.536 The OFT does not accept this representation on the grounds that the surrounding evidence demonstrates that Dairy Crest was in possession of information concerning Tesco’s retail pricing intentions prior to 30 October 2002 and that Dairy Crest made use of that information by passing it on to Asda.

5.282. However, the OFT does not consider it is necessary to reach a conclusion or speculate as to whether information relating to Tesco’s (or for that matter Asda’s) retail pricing intentions was passed on to Sainsbury’s during the meeting between [a senior manager at Dairy Crest] and Sainsbury’s on 25 October 2002 for the purposes of making an infringement finding (although it is clear that Dairy Crest planned to influence Sainsbury’s retail pricing decision in respect of own label cheese). This is because evidence that will be presented later in this section will demonstrate that Dairy Crest did subsequently provide Sainsbury’s with information regarding Tesco’s own label retail pricing intentions.537 However, it is clear from this (and other pieces of evidence) that a significant amount of contact took place orally between processors and retailers during the 2002 Cheese Initiative, meaning that those contacts that are reduced to writing do not represent a complete record of the discussions and disclosures that occurred.

*Dairy Crest internal e-mail confirming Tesco cheese retail price increases, 30 October 2002*

5.283. On 30 October 2002, [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] sent an internal e-mail to a number of

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533 See, for example, document 28 to the SSO, at paragraph 57, where [a senior manager at Dairy Crest] explained that the reference to blank labels was ‘because they [Asda] know that they are going to put the price up but do not know what price yet so they ask us [Dairy Crest] to put on blank labels’. See also document 24 to the SSO, at paragraph 83, where [a senior manager at Dairy Crest] explained that ‘It is possible for a retailer to signal his intention [to increase retail prices] to a retailer in a different way...’.

534 See document 62 to the SSO, at paragraph 5.52.

535 Ibid, at paragraph 5.53.

536 Ibid, at paragraph 5.54.

537 See paragraphs 5.315 to 5.320 below.
Dairy Crest staff advising them that Tesco had 'confirmed' that it would be implementing cheese price increases:

'Following a conversation late this afternoon Tesco have confirmed that all branded Pre Pack cheese will go up as of Monday 4th November. The only exception is Cathedral City 400g due to promotional activity - this line will move on 15.12.02. Their regional cheeses and Stilton are also due to increase at this time.

They have confirmed the price for Weight Watchers Mature at £8.19 per kilo targeted to move 11.11.02

Finest, speciality lines and cottage cheese will move on the 11.11.02

They have now informed me that they intend to move all the other own label lines on the 18.11.02 ie Mild, Medium, Mature, Extra Mature and Farmhouse, sliced and grated and healthy eating.

this is a 1 week delay on Mild and Medium

Deli lines are also due to move on 18.11.02' 538

5.284. The OFT notes that [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] circulated information regarding the dates on which Tesco would be increasing its prices on a number of lines of cheese to colleagues within Dairy Crest. The information had clearly been disclosed to [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] by Tesco (‘Tesco have confirmed’) in a conversation that had taken place earlier that afternoon. However, the email does not clearly specify whether these were Tesco’s wholesale or retail prices. Accordingly, the only product for which a clear conclusion can be drawn from the information included in the email is in respect of Weight Watchers Mature – where a retail price point of £8.19 per kilo was provided – and which Tesco has conceded is a retail price. 539

5.285. The OFT has concluded that the information within this email was Tesco’s cheese retail pricing intentions and reflected increases to be implemented pursuant to the 2002 Cheese Initiative and sets out the reasons for this conclusion below.

5.286. First, the OFT considers that the context within which the email was sent is significant. In this respect, the OFT notes that the information was disclosed by Tesco to Dairy Crest in response to Dairy Crest’s earlier proposals for a cheese price initiative. 540 This proposal involved a wholesale price ‘increase in all Dairy Crest supplied cheeses, by £200 per tonne’ 541 with retailers recovering this price increase through an increase in retail prices on the basis of cash margin maintenance. The evidence has demonstrated both that Dairy Crest had proposed the price initiative to

538 See document 182 to the SO.
539 See document 62 to the SO, at paragraph 5.26(f).
540 See paragraphs 5.120 to 5.181 above, in particular, paragraphs 5.131 to 5.136 and 5.139 to 5.140.
541 See document 73 to the SO, set out at paragraphs 5.131 and 5.139 above.
Tesco (and a number of other grocery retailers) and that Tesco was supportive of such an initiative. Tesco’s support for the initiative is clearly demonstrated by the statements attributed to Tesco employees at the Tesco supply group meeting of 13 September 2002,\footnote{This has been additionally demonstrated by the observations of certain Dairy Crest employees who were involved in the implementation of the 2002 Cheese Initiative. For instance, [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] (in an interview with Dairy Crest’s solicitors after the SO was issued) described Tesco as being ‘...responsive to our campaign [to implement a market wide cheese retail and wholesale price increase]’ and that Tesco had made a decision to increase its prices to support this campaign as early as 23 September 2002 (see document 21 to the SSO, at paragraph 6). Similarly, [a senior manager at Dairy Crest] (in an interview with Dairy Crest’s solicitors after the SO was issued) stated that ‘Tesco was quite proud to be seen to be doing something [to help farmers]’ (see document 28 to the SSO, at paragraph 41).} confirmed by the various accounts of Tesco’s intentions which have been provided by various Dairy Crest staff.

5.287. Second, Tesco has confirmed that the price information referred to in the email in respect of Weight Watchers Mature did relate to its retail price (that it would be priced at £8.19 a kilo and was ‘targeted to move on 11.11.02’). This strongly supports the OFT’s conclusion that the dates of increase referred to in the email were the dates on which retail price increases would be implemented given that the Weight Watchers line was not in any way distinguished from the other cheese lines referred to in this email (and there is no attempt to categorise the dates of increase as referring to wholesale or retail prices) despite (price level aside) the same information being included for all the other cheese lines as was the case for Weight Watchers (namely the dates on which the increases would be implemented). Adopting Tesco’s logic, the date provided for Weight Watchers was the date that its retail price would be increased, while for the other products it would be the date on which the wholesale price would increase. The OFT considers that proposition to be unlikely, not least given that there is no surrounding evidence to support Tesco’s proposition.

5.288. In drawing this conclusion, the OFT additionally notes that, although retail price levels were not provided in the email for the other lines of cheese the surrounding context would have meant that the level of increase would have been widely understood to have been £200 per metric tonne. For example, contemporaneous documentary evidence demonstrates that Dairy Crest approached several of its retailer customers (including Tesco) in September 2002 to propose this level of increase on its cheese lines and other evidence has shown that this figure was understood to be the target level of increase across the dairy industry.\footnote{That the level of price increase would have been widely understood to have been £200 per metric tonne is also supported by the notes of the witness interview conducted by Dairy Crest’s solicitors with the author of this email, [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account], when asked about this email: ‘Everyone knew that the number we were aiming for was £200 per tonne as the farmers had pushed for this price [...] People would have known that £200 per tonne was the increase we had achieved’ (see document 21 to the SO, at paragraphs 16).}
5.289. In fact, taking into account the general awareness of the target level of increase and the fact that retailers were not prepared to increase their cheese retail prices unilaterally (because they were concerned they would be left in an uncompetitive position), information as to whether any retailer would be increasing its retail prices and, if so, when that increase would be implemented would have been of considerable significance in co-ordinating the price increase (and was arguably at least as significant as knowledge of the revised retail price level).

5.290. Third, the OFT considers it is very significant that the information contained within this email was sent verbatim by Dairy Crest to Sainsbury’s the following day and that nothing within that email identified that the pricing information disclosed was Tesco’s wholesale (rather than retail) prices.\(^{544}\) This is relevant because the evidence presented above has demonstrated that Sainsbury’s would only have been prepared to increase its cheese retail prices pursuant to this price initiative if its competitors also increased their retails. Indeed an internal Dairy Crest e-mail of 24 October 2002\(^{545}\) recorded that Sainsbury’s had requested to see evidence that its competitors were increasing their retail prices before it was prepared to implement its own retail price increase.

5.291. Accordingly, given this context, the disclosure by Dairy Crest of the dates on which Tesco would be increasing its wholesale prices would, on its own, have been of very little value to Sainsbury’s given its primary concern of being uncompetitive on retails price. Indeed, the evidence in the OFT’s possession would suggest that any such disclosure of only wholesale price increase timings would have been wholly exceptional within the context of the various dairy price initiatives it has investigated.\(^{546}\) Further Dairy Crest was sufficiently confident of this information to pass it to other retailers.\(^{547}\)

5.292. Fourth, although there are a number of product lines on which the dates included in the email did not correspond to the date on which Tesco implemented a retail price increase,\(^{548}\) it is notable that the dates listed for

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\(^{544}\) See paragraphs 5.315 to 5.321 below.

\(^{545}\) See document 181 to the SO, at paragraphs 5.274 to 5.282 above.

\(^{546}\) Out of the significant volume of evidence on the OFT’s file there is only one instance of a processors passing only a retailer’s wholesale pricing intentions to a competing retailer. This one instance is outside of the context of the 2002 Cheese Initiative and relates to an instance in 2000 where Asda agreed to increase its wholesale price for milk without any corresponding retail price increase. Critically, this disclosure was made pursuant to an initiative which did not include retail price increases. There is no evidence of wholesale price increase timings being passed on in any initiative which involved the implementation of retail price increases from the outset. Accordingly, the evidence on the OFT’s file supports that a processor only passing on a retailer’s wholesale pricing intentions to a competing retailer is wholly exceptional where retail price increases were envisaged or contemplated.

\(^{547}\) Argos Limited and Littlewoods Limited v Office of Fair Trading [2004] CAT 24, at, for example, [595].

\(^{548}\) Those lines relate chiefly to own label lines of cheese. The difference between the dates recorded in [the] email [from Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] and the dates on which Tesco actually implemented retail price increases for those lines of cheese is considered below.
some of the product lines do closely correspond with the date on which Tesco did increase its retail prices. For example, the email states that Stilton and branded pre-pack prices would go up on 4 November 2002 and the data Tesco submitted shows that it increased its retail prices on both product lines a day earlier on 3 November 2002. Although the dates on which Tesco implemented these retail price increases do differ slightly from the dates listed in the email, the OFT considers that the close proximity between the two dates supports its conclusion that the pricing intentions referred to in [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] email were Tesco’s retail prices. In drawing this conclusion, the OFT notes that the date on which the retail price of the Weight Watchers Mature line increased (10 November 2002) was also a day earlier than the date referred to in the email (11 November 2002) – despite the fact Tesco has acknowledged that it disclosed this information to Dairy Crest.

5.293. Further, the OFT also notes that the dynamics of the cheese market make it difficult to co-ordinate a precise date of increase on random weight lines because these products are generally priced on their packaging by either suppliers or packers – meaning that existing stock needs to be sold off before stock with a higher price can be placed on the shelf. Such a process could be responsible for the difference in dates of increase.

5.294. Additionally, it is not clear whether the price data Tesco submitted provides the precise date of increase or whether the date referred to was, in fact, the week in which the price was increased. To the extent Tesco’s pricing data referred to the week rather than the precise day, this also could explain the slight difference in date.

5.295. Finally, any discrepancies might exist because Tesco changed its mind as to the date on which it would implement a price increase.

Consideration of Tesco’s representations

5.296. Tesco provided representations on this email on both the SO and SSO which the OFT has carefully considered in reaching its conclusion that this email demonstrates that Tesco disclosed its retail pricing intentions to Dairy Crest. These representations are considered below. It should be noted that a number of Tesco’s representations on the SO were founded on its view that some of the information within this email may have been information regarding its retail pricing intentions which [Tesco’s Senior Cheese Buyer] had disclosed to Dairy Crest whereas in its representations

549 The general references to 'Stilton' and 'branded Pre-Pack' would have covered a number of lines and pack sizes.
550 See document 64 to the SSO.
551 See document 62 to the SO, at paragraph 5.26(f).
552 For example, in an interview with Dairy Crest’s solicitors after the issue of the SO, [a senior manager at Dairy Crest] explained that 'Tesco [sic] sometimes say they will agree a price increase and then pull out of it’ (see document 28 to the SSO, at paragraph 88). Further, the OFT also notes that Dairy Crest felt sufficiently confident in this expectation to make use of Tesco’s retail pricing intentions to influence conditions on the cheese retail market by passing that information on to Sainsbury’s.
on the SSO, Tesco submitted that the information disclosed (with the exception of Weight Watchers) related only to its wholesale prices. As a result of this change of argument, the OFT has focused upon Tesco’s claim that this was its wholesale rather than retail prices first, but has dealt with Tesco’s original representations as well.

5.297. In its representations on the SSO, Tesco claimed that [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] email referred to the timing of its wholesale price increases and supported this representation by saying that [Tesco’s Senior Cheese Buyer] had confirmed that the email recorded a telephone conversation she had held with [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] in which she informed him of Tesco’s wholesale pricing intentions ‘to enable him to put through cost price changes’ and that all of the dates (except for the Weight Watchers product) ‘indicate when the cost price was to be changed on the system so that Dairy Crest’s invoices to Tesco took effect from the correct date’.  

5.298. In paragraphs 5.286 to 5.294 above, the OFT has set out the reasons for its conclusion that the information in this email referred to Tesco’s retail pricing intentions.

5.299. The OFT has carefully considered Tesco’s representation and does not accept that the dates set out in [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] email refers only to Tesco’s wholesale prices. In drawing this conclusion the OFT notes that Tesco did not substantiate its representation by reference to the dates on which it actually implemented wholesale price increases on these product lines. The OFT additionally notes that Tesco has supported this representation by reference to information given to it by [Tesco’s Senior Cheese Buyer] following the issue of the SSO. This is noteworthy because [Tesco’s Senior Cheese Buyer] had no recollection of the conversation she had with [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] in 2007 when Tesco submitted its representations on the SO, but was then able to recall the conversation some time later following the issue of the SSO in 2009. In these circumstances, the OFT has concluded that considering this email in the context of the contemporaneous documentary evidence is a more credible basis for determining what was discussed in the conversation [between Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] and [Tesco’s Senior Cheese Buyer] than [Tesco’s Senior Cheese Buyer] inconsistent witness evidence.

Promotional information

553 See Tesco’s second representations on the SSO, at paragraph 4.9(b).
554 In its representations on the SO Tesco submitted that [Tesco’s Senior Cheese Buyer] ‘has no recollection of the conversation with [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] which allegedly preceded this e-mail’ (see document 62 to the SSO, at paragraph 5.26(d)).
5.300. In its representations on the SO, Tesco made a series of observations on the fact that a number of the products referred to in [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] email were on promotion and that, as a result of this, Dairy Crest would have been aware of when Tesco’s wholesale prices would be increasing (subsequent to the promotion ending) because it had funded the promotions. 555

5.301. The OFT acknowledges that knowledge of Tesco’s promotion end dates would have given Dairy Crest some insight as to when Tesco would be implementing retail price increases. However, the OFT has concluded that this email conveyed information as to when Tesco would be implementing retail price increases pursuant to the cheese price initiative – in addition to the promotion ending. This is strongly implied by the statement in the email that ‘Tesco have confirmed that all branded Pre Pack cheese will go up as of Monday 4th November. The only exception is Cathedral City 400g due to promotional activity - this line will move on 15.12.02’. The reference to Cathedral City in this email and the wider context suggests not only that Cathedral City was coming off promotion on 4 November 2002 but also that its retail price would be increased to reflect the £200 per metric tonne level targeted by the 2002 Cheese Initiative (that is, the retail price was not merely reverting to pre-promotional levels). Moreover, this email contained comprehensive information regarding Tesco’s retail pricing intentions on its cheese range – accordingly, the information within it cannot be explained away by the knowledge of when Tesco would be coming off promotion on a number of product lines.

Weight Watchers brand

5.302. In its representations on the SO, Tesco justified its disclosure of its retail pricing intentions on the Weight Watchers Mature line on the basis that this was a Dairy Crest joint venture with Yoplait and that Dairy Crest would have wanted the information so that it could ‘understand the relative price position of the product’ because of the ‘investment’ it had committed in ‘developing the brand’. 556 Further, Tesco submitted that because Weight Watchers was a random weight line it was necessary to disclose this information so that Dairy Crest could prepare price labels. 557

5.303. The OFT is aware that retailers do need to disclose information regarding their cheese retail pricing intentions to suppliers where the supplier prepares price marked packaging (as appears to be the case with the Weight Watchers line). 558 The OFT is not convinced that just because a supplier develops and has invested in a brand that it should have access to such information in advance of its implementation and Tesco has failed to provide any explanation as to why this might be necessary. However,

555 See document 62 to the SSO, at paragraphs 5.26(b) and 5.26(c).
556 Ibid, at paragraph 5.26(f). See also document 62 to the SSO, at paragraph 2.85, where Tesco submitted that brand owners ‘will be interested in the positioning of the brand, including its pricing, across the different distribution channels’ and that discussions between the brand owner and the retailer may include ‘how to position the product in terms of pricing’.
557 Ibid.
558 See, for example, paragraphs 5.55 to 5.61 above.
the OFT does not consider the fact that a retailer needs to inform a processor of information concerning its retail pricing intentions should it wish to change its prices undermines its infringement findings in this Decision. It is the process by which Tesco took its decision to increase its cheese retail prices which is critical rather than the mere communication of that information and the evidence has clearly demonstrated that Tesco took its decision to increase its cheese retail prices as a result of co-ordination.

The information in [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] e-mail was incorrect

5.304. In its representations on the SO, Tesco’s submitted that even if [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] e-mail related to future retail price increases, ‘virtually all’ of the information proved to be wrong.\(^559\) For the information that Tesco submitted was wrong, it submitted that this is ‘inconsistent with the quality of information which retailers would be expected to seek to pass on if they were trying to co-ordinate’.\(^560\)

5.305. As explained at paragraph 5.292 above, the information in [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] email relating to a number of cheese lines (branded pre-pack and Stilton) was broadly accurate. While the OFT has not considered and does not consider it necessary to exhaustively consider the accuracy of every date and cheese line recorded in [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] email, the OFT notes that some information in that email (relating to, for example, Tesco’s own label price increases) ultimately proved to be incorrect. However, the OFT does not consider that this undermines its conclusion – the evidence set out at paragraph 5.283 to 5.293 above clearly demonstrates that the information in [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] email related to Tesco’s retail prices and was disclosed by Tesco to Dairy Crest. It is not necessary for there to have been a guarantee that Tesco would increase its retail prices on these dates; rather, it is sufficient that Dairy Crest had an expectation that Tesco would do so.\(^561\)

Circumstances in which Tesco disclosed its retail pricing intentions

5.306. In disclosing its willingness to increase its cheese retail prices to Dairy Crest, Tesco, at the very least, substantially reduced uncertainty as to the

\(^{559}\) document 62 to the SSO, at paragraph 5.29(b)

\(^{560}\) See document 62 to the SSO, at paragraph 5.28(i).

\(^{561}\) In this regard, see, for example, Argos Limited and Littlewoods Limited v Office of Fair Trading [2004] CAT 24, at [516] where the CAT found that ‘It is true that there was no certainty, and no guarantee that Argos would price at RRP, and certainly no legally enforceable agreement. There may also from time to time have been some exceptions where Argos did not price at the price level it had indicated. However, it seems to us implicit in the arrangements as described, unchallenged, by Mr. Wilson, that Hasbro had aroused in Argos an expectation that it would not be undercut if it sold at RRP, and that Argos had indicated to Hasbro that it would go out at Hasbro’s RRP on the products in question in the next relevant catalogue.’. See also, for example, at [531]
conduct on the cheese retail market to be expected on its part by disclosing the course of conduct it had decided to adopt or contemplate adopting on that market.  

5.307. In its representations on the SO, Tesco submitted that [Tesco’s Senior Cheese Buyer] may have inadvertently disclosed information concerning Tesco’s pricing intentions to Dairy Crest in relation to cheese lines that Dairy Crest did not supply to Tesco and that, although any such disclosure was ‘not best practice’, it was ‘not done with the intention or foresight that it [the information] would be passed on’.  

5.308. The OFT notes that this line of argument is clearly inconsistent with Tesco’s position following the issue of the SSO that the information included in the email related to Tesco’s wholesale and not retail prices (given that this representation could not refer to the Weight Watchers brand – given that Dairy Crest supplied it).  

5.309. The OFT has also concluded that this representation is not consistent with the evidence it has set out above which clearly demonstrates that [Tesco’s Senior Cheese Buyer] disclosed information concerning Tesco’s retail pricing intentions to Dairy Crest in circumstances in which she may be taken to have intended and, did in fact foresee, that Dairy Crest would make use of the information to influence conditions on the cheese retail market by passing it on to other retailers in order to facilitate the implementation of further cheese retail price increases by other retailers.  

5.310. In drawing this conclusion, the OFT notes that Tesco disclosed this information in the context of discussions with Dairy Crest which had the aim of implementing a cheese retail price increase in order to subsidise a farmgate price increase. Tesco and Dairy Crest had discussed this initiative on several prior occasions and, as a result of these various discussions, Tesco would have understood it was not increasing its retail prices unilaterally but as part of a co-ordinated market move that also involved its competitors increasing their retail prices. Tesco’s disclosure of its pricing intentions in these circumstances is clearly inconsistent with the principle that competitors should determine their prices independently.  

5.311. Furthermore, there is strong evidence demonstrating that Tesco’s willingness to increase its cheese retail price increases was conditional upon its competitors also implementing retail price increases with one of these statements being made at the Tesco dairy supply group meeting – which Dairy Crest attended.  

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563 See document 62 to the SSO, at paragraphs 5.26(g) and 5.26(h).  


565 See paragraphs 5.131 to 5.136 and 5.139 to 5.140 above.  

566 See paragraphs 5.80 to 5.87; 5.195 to 5.197 and 5.213 to 5.214 and paragraphs 5.399 to 5.402 below.
5.312. The OFT’s conclusion is very strongly supported by the surrounding context and, in particular, the product lines that were the subject of the price increase. Besides branded products (such as Dairy Crest’s Cathedral City brand) Dairy Crest also supplied own label cheese to Tesco. [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] e-mail of 30 October 2002 states that Tesco was due to implement a price increase on its own label cheeses on 18 November 2002. Evidence presented later in this analysis demonstrates that Tesco was also supplied with some own label brands by McLelland and that it made its willingness to increase its retail prices on these lines conditional upon Asda increasing its retail prices first. Given the body of evidence, the OFT finds it is reasonable to infer that Tesco would have treated all own label cheeses in the same way when considering its retail pricing strategy and that its willingness to increase retail prices on all of its own label cheeses (regardless of the supplying processor) would have been conditional upon its competitors also increasing their retail prices.

5.313. The OFT additionally considers it is significant that many of the recipients of this e-mail were individuals with responsibility for other retailer accounts within Dairy Crest, including [Dairy Crest’s Senior Account Manager for its Asda account], [Dairy Crest’s National Account Manager for its Asda account] and [Dairy Crest’s Senior National Account Manager for its Sainsbury’s account]. The circulation of Tesco’s cheese retail pricing intentions to these individuals is significant because it meant that significant information concerning Tesco’s future conduct on the cheese retail market was available to individuals within Dairy Crest whose job involved direct contact and management of Dairy Crest’s relationship with competing retailers. Furthermore, in an interview with Dairy Crest’s solicitors following the issue of the SO, [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] explained that he had included [Dairy Crest’s Senior Account Manager for its Asda account] and [Dairy Crest’s Senior National Account Manager for its Sainsbury’s account] on the distribution list for the e-mail so that they ‘could use that information to encourage Asda and Sainsbury’s to move their prices too’ and that he ‘would perhaps expect them to communicate the fact that the price is going up, but not to specify that price’.

5.314. Evidence set out below demonstrates that [Dairy Crest’s Senior National Account Manager for its Sainsbury’s account] did use this information regarding Tesco’s cheese retail pricing intentions to influence conditions on the cheese retail market by passing it to Sainsbury’s. Taking into account the wider context, the OFT considers it is likely that other recipients of [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] 30 October 2002 e-mail (and therefore recipients of this information) would have passed it to their contacts at other retailers as well. In this regard, it is notable that Dairy Crest felt sufficiently confident

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567 See paragraphs 5.399 to 5.402 below.
568 See document 21 to the SSO, at paragraphs 14 and 15.
569 See paragraphs 5.315 to 5.321 below.
of this information to make use of it by passing it on to other retailers (specifically, Sainsbury’s).\textsuperscript{570}

\textit{Dairy Crest passes Tesco's cheese retail pricing intentions to Sainsbury’s, 31 October 2002}

5.315. On 31 October 2002, [Dairy Crest’s Senior National Account Manager for its Sainsbury’s account] e-mailed information concerning Tesco’s cheese retail pricing intentions to [Sainsbury’s Senior Cheese Buyer]. The e-mail reads as follows:

'Please find below the latest information from Tesco on their price increases:

1. Pre Pack cheese will go up as of Monday 4\textsuperscript{th} November.
   The only exception is Cath[edral] City 400g due to promotional activity - this line will move on 15.12.02
   Their regional cheeses and Stilton are also due to increase at this time.

2. They have confirmed the price for Weight Watchers Mat[ure] at £8.19 per kilo targeted to move 11.11.02.

3. Finest, speciality lines and cottage cheese will move on the 11.11.02

4. They have now informed me that they intend to move all the other own label lines on the 18.11.02
   ie Mild, Medium, Mature, Extra Mat[ure] and Farmhouse, sliced and grated and healthy eating -

5. Deli lines are also due to move on 18.11.02

I’ll call you tomorrow when you’re back in the office to discuss further.'\textsuperscript{571}

5.316. The OFT notes that the information contained within [Dairy Crest’s Senior National Account Manager for its Sainsbury’s account] e-mail is the same as the contents of the Dairy Crest internal e-mail sent by [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] the previous day of which [Dairy Crest’s Senior National Account Manager for its Sainsbury’s account] had been an addressee.\textsuperscript{572}

5.317. The fact Dairy Crest passed this information to Sainsbury’s supports the OFT’s conclusion that it related to Tesco’s cheese \underline{retail} pricing intentions rather than its wholesale pricing intentions. This is because Sainsbury’s had previously requested to see evidence that its competitors were increasing their retail prices before it was prepared to implement its own increases.\textsuperscript{573}

\textsuperscript{570} Argos Limited and Littlewoods Limited v Office of Fair Trading [2004] CAT 24, at, for example, [595].
\textsuperscript{571} See document 183 to the SO.
\textsuperscript{572} See paragraph 5.283 above.
\textsuperscript{573} See paragraphs 5.274 to 5.282 above.
5.318. [Dairy Crest’s Senior National Account Manager for its Sainsbury’s account] e-mail demonstrates that Dairy Crest made use of Tesco’s cheese retail pricing intentions to influence conditions on the cheese retail market by passing it to Sainsbury’s in order to facilitate a retail price increase.\(^\text{574}\) In drawing this conclusion, the OFT notes the contents of an internal Dairy Crest e-mail of 24 October 2002 from [an employee at Dairy Crest] which reported that although Sainsbury’s had implemented retail price increases on the Cathedral City brand of cheese, it did not wish to implement increases on its own label cheese lines without evidence that Asda and Tesco were also increasing their retail prices.\(^\text{575}\) This e-mail also demonstrated that Dairy Crest planned to persuade Sainsbury’s to continue with its retail price increases based on ‘intelligence’ it had in respect of Asda’s and Tesco’s plans. Accordingly, Dairy Crest understood that the information that Tesco would be increasing its cheese retail prices (especially on own label lines) would have been of significance to Sainsbury’s when deciding whether it would implement further retail price increases of its own.

5.319. There is no evidence to suggest that [Sainsbury’s Senior Cheese Buyer] rejected this information regarding Tesco’s retail pricing intentions, nor that she had any reservations about receiving such information. Accordingly, having received information regarding Tesco’s cheese retail pricing intentions, Sainsbury’s could not have failed to take it into account when determining its own future pricing behaviour on the cheese retail market.\(^\text{576}\) In fact, taking into account its earlier conditional commitment to increase its retail prices as expressed in the Dairy Crest internal e-mail of 24 October (where Sainsbury’s had ‘stated that they want to wait to raise prices on own label products until they have evidence that Asda and Tesco are moving’),\(^\text{577}\) Therefore it is clear that Sainsbury’s would have willingly received this information and taken it into account and this is clearly inconsistent with the principle that competitors should determine their prices independently.

5.320. Moreover, taking into account the circumstances in which it received this information, the OFT has concluded that Sainsbury’s may be taken to have known the circumstances under which Tesco had disclosed information concerning its cheese retail pricing intentions to Dairy Crest and did, in fact, appreciate that the information was passed to it with Tesco’s concurrence.\(^\text{578}\)

5.321. In drawing this conclusion, the OFT notes that Tesco disclosed its cheese retail pricing intentions to Dairy Crest pursuant to an industry wide initiative to subsidise a farmgate price increase through a co-ordinated


\(^{575}\) See document 181 to the SO, at paragraph 5.274 above.


\(^{577}\) See paragraphs 5.274 to 5.280 above.

cheese retail price increase. Sainsbury’s was aware of this initiative, its scope, structure and objectives. Sainsbury’s had itself increased its retail prices pursuant to the initiative and had made any increases it was prepared to implement on own label cheese lines supplied to it by Dairy Crest conditional on receiving evidence that Asda and Tesco were also increasing their retail prices.

**Glanbia internal document dated 1 November 2002 demonstrating progress of discussions with various retailers**

5.322. Evidence presented above demonstrated that Glanbia was contemplating engaging in a plan to co-ordinate (‘orchestrate’) cheese retail price increases in order to subsidise a farmgate price increase during late September 2002.

5.323. A Glanbia internal document dated 1 November 2002 demonstrates that Glanbia subsequently took steps to co-ordinate cheese retail price increases and the progress that it had made. The document consists of a table outlining the status of discussions between Glanbia and its retailer customers, and shows that several retailers had by this time made commitments to increase their retail prices. The table reads as follows:

<table>
<thead>
<tr>
<th>Account</th>
<th>Timing of Change</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asda</td>
<td>First Dep on Smartprice 2/11/02, see separate sheet</td>
<td>SP to move by 20p per kg. All FW being produced with no RSP’s on label currently</td>
</tr>
<tr>
<td>JS</td>
<td>Rolling change from 4/11, see separate sheet</td>
<td>Subject to other retailers following suit</td>
</tr>
<tr>
<td>[A retailer]</td>
<td>Core Range on 28/10/2002. Territorials on 4/11/02, see separate sheet</td>
<td></td>
</tr>
<tr>
<td>[A retailer]</td>
<td>Will move as competition do</td>
<td>Asda for [a retailer], JS for [a retailer]</td>
</tr>
<tr>
<td>[A retailer]</td>
<td>Move within 2 weeks following JS, Tesco moves</td>
<td>Awaiting other retailer moves, after having been stung on cream shift</td>
</tr>
<tr>
<td>Safeway</td>
<td>All products 18/11/2002</td>
<td></td>
</tr>
<tr>
<td>[A retailer]</td>
<td>2nd December</td>
<td>Making sure trade has gone.</td>
</tr>
<tr>
<td>[A retailer]</td>
<td>Liable to follow Tesco</td>
<td>Awaiting Buyer confirmation</td>
</tr>
<tr>
<td>[A retailer]</td>
<td>Will go on 11th if Tesco goes on 4th</td>
<td>No Pressure to move.</td>
</tr>
</tbody>
</table>

579 See paragraphs 5.283 to 5.295 above. See also paragraphs 5.131 to 5.136 and 5.139 to 5.140 above.
580 See paragraphs iv.5.131; iv.5.138; 5.156; 5.161 to 5.163; 5.195 to 5.204; and 5.210 to 5.212 above.
581 See paragraphs 5.274 to 5.275 above.
582 See paragraphs 5.274 to 5.280 above. See also paragraphs 5.231 to 5.242 above.
583 See paragraphs 5.195 to 5.219 above.
584 The authorship of this document is unknown.
585 See document 186 to the SO.
[A retailer] Will go on 11th, if Asda goes on 4th

[A retailer] Potentially follow across all products

[A retailer] Making decision w/c 28/10

[A retailer] No Move

| Tesco  | 04/11/2002 for brands, 11/11 farmhouse & mainstream cheddar + territorials, 18/11 Organic, sub brand cheddar, deli, sliced & grated |

[Emphasis added]

5.324. This table records the status of discussions between Glanbia and several of its major retailer customers concerning Glanbia's plans to implement cheese retail and wholesale price increases.

5.325. The comment column shows that several retailers had informed Glanbia that they would implement cheese retail price increases and disclosed information concerning the timing of those increases, including that:

i. Asda would change its ‘Smartprice’ range on 2 November 2002;

ii. Sainsbury's ('JS') would implement '[r]olling change[s]' on its cheese range from 4 November 2002; and

iii. Safeway would change all of its cheese range on 18 November 2002.

5.326. The table also appears to include information regarding Tesco's cheese retail pricing intentions. However, Glanbia did not supply cheese to Tesco at this time so the information in question is unlikely to have been disclosed by Tesco and, notably, no observations are recorded in respect of Tesco in the 'Comment' column, which suggests less information was available to Glanbia in respect of this retailer.

5.327. In disclosing their willingness to increase their cheese retail prices to Glanbia, each of Asda, Safeway and Sainsbury's, at the very least, substantially reduced uncertainty as to the conduct on the cheese retail market to be expected on its part by disclosing the course of conduct it had decided to adopt or contemplate adopting on that market.586

5.328. Moreover, taking into account the context within which these disclosures were made, the OFT has concluded that each of Asda, Safeway and Sainsbury’s may be taken to have intended and did, in fact, foresee that Glanbia would use its cheese retail pricing intentions to influence

conditions on the cheese retail market by passing it on to other retailers in order to facilitate the implementation of further cheese retail price increases by other retailers.\(^{587}\) In drawing this conclusion, the OFT notes that this Glanbia internal document presents considerable evidence that the retail price increases were being co-ordinated and that Asda, Safeway and Sainsbury’s would have understood that they were acting as part of a wider market move when confirming their willingness to increase their cheese retail prices and in disclosing the timing of those increases.

5.329. In respect of Sainsbury’s, it is noteworthy that the document provides further evidence that its willingness to increase its cheese retail prices was conditional upon other retailers either increasing their prices first or subsequently with it reported to have informed Glanbia that its price increases were ‘[s]ubject to other retailers following suit’.\(^{588}\) In making this conditional commitment Sainsbury’s clearly acted inconsistently with the principle that competitors should determine their prices independently.

5.330. In respect of Safeway, subsequent evidence in the form of a Safeway internal e-mail, dated 5 November 2002, will show that Safeway understood it was acting as part of a co-ordinated market move when it implemented its retail price increases.\(^{589}\) Additionally, evidence presented above has demonstrated that Safeway, through discussions with one of its supplying processors (Dairy Crest), was aware of a plan to subsidise a farmgate price increase through a co-ordinated cheese retail price increase.\(^{590}\)

5.331. In drawing these conclusions, the OFT also considers that the various discussions between Glanbia and its retailer customers (that is, for the purpose of this Decision, Asda, Safeway and Sainsbury’s) should be considered in light of earlier internal Glanbia documents, which demonstrate that it was preparing to co-ordinate retail price increases in respect of the cheese it supplied to retailers.\(^{591}\)

*Dairy Crest e-mail to Tesco, 4 November 2002*

5.332. On 4 November 2002, [Dairy Crest’s Category Manager (Cheese and Spreads) for its Tesco account] sent an e-mail and attached spreadsheet entitled ‘Suggested RSP’ to [Tesco’s Senior Cheese Buyer]. The e-mail reads as follows:

’I have attached a spreadsheet which shows the suggested rsp’s [retail selling prices] of cheese lines that we supply Asda following the price increase.


\(^{588}\) Evidence presented above has already demonstrated that Sainsbury’s cheese retail price increases were conditional on other retailers also increasing their retail prices and had disclosed this fact to Dairy Crest (see paragraphs 5.231 to 5.242 and 5.274 to 5.280 above).

\(^{589}\) See paragraphs 5.387 to 5.395 below.

\(^{590}\) See paragraphs iv.5.137 and iv.5.131 to 5.136 above.

\(^{591}\) See paragraphs 5.195 to 5.220 above.
My understanding is that Asda will be applying £200 per tonne ie 20p per Kilo to rsps of Smart Price Mild & Mature.

Please could you confirm the rsp’s that you wish me to pack Tesco lines with for deliveries targeted wc 10.11.02 following the cost price increase in Tesco. (not actually implemented until 17.11.02) asap or to [an employee at Dairy Crest] if later in the week.

[Emphasis added]

5.333. The OFT has concluded that this email demonstrates that Asda had disclosed information concerning its retail pricing intentions on a number of cheese lines including Asda own label lines and Smart Price mild and mature lines to Dairy Crest which [Dairy Crest’s Category Manager (Cheese and Spreads) for its Tesco account] then disclosed to Tesco with the aim of influencing Tesco’s own cheese retail pricing decisions.

5.334. It is evident from this email that [Dairy Crest’s Category Manager (Cheese and Spreads) for its Tesco account] provided [Tesco’s Senior Cheese Buyer] with intelligence regarding Asda’s cheese retail pricing intentions. It is clear [Dairy Crest’s Category Manager (Cheese and Spreads) for its Tesco account] was not guaranteeing that Asda would price at the levels disclosed – only that he understood that Asda would implement increases. In drawing this conclusion the OFT notes that Asda had not, by this time, increased its retail prices on many of the cheese lines referred to in the spreadsheet (in particular own label lines such as ‘Asda English Cheddar Extra Mature White’) meaning that information related to Asda’s future retail pricing intentions.

5.335. Additionally, the OFT notes that, in an interview with Dairy Crest’s solicitors following the issue of the SO, [Dairy Crest’s Category Manager (Cheese and Spreads) for its Tesco account] confirmed that the information within the spreadsheet was his understanding of Asda’s retail pricing behaviour:

‘By sending this email, I was showing [Tesco’s Senior Cheese Buyer] that the suggested price of cheese was the same across the board and not specific to Tesco. The prices mentioned were only suggested prices and not guaranteed prices. In my view it was not a definitive statement that Asda’s prices would go up by the amount listed; I stated that it was "My understanding" that they would do so rather than stating that they definitely would.’

5.336. In addition to the product lines referred to in the spreadsheet, [Dairy Crest’s Category Manager (Cheese and Spreads) for its Tesco account] also disclosed information in respect of Asda’s Smart Price Mild and

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592 See document 187 to the SO.
594 See paragraph 5.413 below. See also document number 28 to the SSO, at paragraph 88 in which [a senior manager at Dairy Crest] explained that ‘the prices are probably not in store yet’.
595 See document 21 to the SSO, at paragraph 18.
Mature lines – again this information was [his] understanding of Asda’s retail pricing behaviour rather than a definitive statement:

“My understanding is that Asda will be applying £200 per tonne ie 20p per kilo to rsps of Smart Price Mild and Mature”

5.337. The OFT considers that [Dairy Crest’s Category Manager (Cheese and Spreads) for its Tesco account] use of the words ‘understanding’ and ‘will be applying’ demonstrate that the information conveyed was not speculative but had been informed by Asda.

5.338. The OFT has concluded that this e-mail demonstrates that Dairy Crest understood that Asda had decided to increase or was contemplating increasing its own label and Smart Price cheese retail prices and was sufficiently confident in this information to pass it on to Tesco. In this respect, it is irrelevant that Dairy Crest was unable to guarantee to Tesco that Asda would increase its prices as disclosed.596

5.339. The OFT has concluded that the information contained within the email had been disclosed by Asda to Dairy Crest. In drawing this conclusion, the OFT notes that by 4 November 2002 (the date of [Dairy Crest’s Category Manager (Cheese and Spreads) for its Tesco account] e-mail), there had been various discussions between retailers and processors regarding a plan to subsidise a farmgate price increase through co-ordinated cheese retail price increase. Asda had been involved in such discussions with Dairy Crest, and would have been aware of this plan, its scope, structure and objectives.597 Further, the OFT also notes that evidence presented above has demonstrated that Asda also disclosed its cheese retail pricing intentions to Glanbia598 and that Asda had received information regarding its competitors’ cheese retail pricing intentions from its supplying processors.599

5.340. Additionally, the OFT has also taken account of the interview [Dairy Crest’s Category Manager (Cheese and Spreads) for its Tesco account] conducted with Dairy Crest’s solicitors following the issue of the SO, in which he stated that although he could ‘not remember exactly how’ he had Asda’s cheese retail pricing intentions he believed that he could either ‘have known that they were accepting our proposals and worked out the prices’ or that it was possible [Dairy Crest’s Senior Account Manager for its Asda account] gave the list to me’.600 In either scenario [Dairy Crest’s Category Manager (Cheese and Spreads) for its Tesco account] would have been informed by knowledge of Asda’s retail pricing intentions.

5.341. Additionally, the OFT has noted that in his interview with Dairy Crest’s solicitors, [a senior manager at Dairy Crest] stated he believed that the

596 Argos Limited and Littlewoods Limited v Office of Fair Trading [2004] CAT 24, at [516] and [531].
597 See paragraphs 5.121 to 5.126; 5.128 to 5.136; 5.165 to 5.172; 5.195 to 5.204; and 5.223 to 5.229 above regarding discussions that Asda had with several of its supplying cheese processors.
598 See paragraphs 5.323 to 5.331 above.
599 See paragraphs 5.223 to 5.229 above.
600 See document 21 to the SSO, at paragraph 21.
information would have probably been provided to [Dairy Crest’s Category Manager (Cheese and Spreads) for its Tesco account] by [Dairy Crest’s Senior Account Manager for its Asda Account] and that it related to Asda’s retail pricing intentions (as opposed to information that would have been in the public domain):

'The Asda spreadsheet would probably have been prepared by [Dairy Crest’s Senior Account Manager for its Asda Account] who was the Asda account manager but the prices are probably not in store yet'.

5.342. In its representations on both the SO and the SSO, Tesco submitted that the information that Dairy Crest provided to Tesco was ‘no more than Dairy Crest’s own speculative suggestions as to how Asda should price its products’ rather than information that Asda disclosed to Dairy Crest. In support of its submission, Tesco relied on evidence provided by [Dairy Crest’s Category Manager (Cheese and Spreads) for its Tesco account] in an interview with Dairy Crest’s solicitors after the issue of the SO, in which he explained:

18. By sending this email, I was showing [Tesco’s Senior Cheese Buyer] that the suggested price of cheese was the same across the board and not specific to Tesco. The prices mentioned were only suggested prices and not guaranteed prices. In my view it was not a definitive statement that Asda’s prices would go up by the amount listed; I stated that it was "My understanding" that they would do so rather than stating that they definitely would.

19. I would not consider the lists of prices attached to be commercially sensitive between Dairy Crest and Asda since the figure of £200 per tonne was the same across the industry. It was a widely known industry-wide target and the prices were just setting out what this target would mean in terms of a block of cheese of a certain size.

20. Asda was not singled out for any particular reason as it could just have easily been [a retailer] or Sainsbury’s. Tesco would have been sensitive to Asda’s price as all the retailers watch each other like hawks. If they were not interested I would not have sent them the information. However, the prices listed were suggested prices only and what we had suggested across the board.'

5.343. In its representations on the SSO, Tesco also submitted that [Tesco’s Senior Cheese Buyer] ‘confirmed that she understood that this was just a theoretical exercise by Dairy Crest to give Tesco an indication as to what Asda’s retail prices would be if Dairy Crest’s request for a cost price increase was accepted’.

5.344. The OFT has carefully considered Tesco’s representation and has concluded, based on the reasoning it has set out above, that the

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601 See document number 28 to the SSO, at paragraph 88.
602 See document 62 to the SSO, at paragraph 5.73 and Tesco’s second representations on the SSO, at paragraph 4.9(c).
603 See document 21 to the SSO, at paragraphs 18 to 20.
604 See Tesco’s second representations on the SSO, at paragraph 4.9(c).
information [Dairy Crest’s Category Manager (Cheese and Spreads) for its Tesco account] disclosed to Tesco was Asda’s retail pricing intentions which had been disclosed by Asda to Dairy Crest.

5.345. The OFT does not accept that just because [Dairy Crest’s Category Manager (Cheese and Spreads) for its Tesco account] could not ‘guarantee’ that Asda would increase its retail prices to the levels suggested in this email, the information he conveyed was necessarily speculative – and does not consider that conclusion to be consistent with [his] own witness evidence. Indeed, the argument that Dairy Crest was unable to dictate the level and timing of retail price increases by retailers (or guarantee that prices would increase) is a recurrent theme of the witness evidence that was submitted by Dairy Crest following interviews its solicitors conducted with its employees. However, there is a significant difference between a supplier being unable to dictate retail prices to a retailer and a supplier being informed by a retailer of information regarding that retailer’s retail pricing intentions and having the confidence to pass it on to other retailers. The OFT also notes that it is not necessary for there to have been any guarantee that Asda would increase its retail prices on these dates.605 Further, the OFT notes that Dairy Crest was sufficiently confident of the information regarding Asda’s cheese retail pricing intentions to make use of it by passing it on to Tesco.606

5.346. Moreover, the OFT does not accept [Dairy Crest’s Category Manager (Cheese and Spreads) for its Tesco account] view that the information within the email he sent to Tesco was not commercially sensitive because the level of the increase (£200 pmt) was widely understood. What this proposition ignores is that Asda might have chosen not to participate in this initiative and therefore would not have increased its retail prices on these product lines. The evidence presented to date has demonstrated that retailers (including Tesco) were extremely reluctant to increase their cheese retail prices unless their competitors also increased their retail prices. Additionally, various notes of the Tesco dairy supply group meeting demonstrate that Tesco was particularly concerned about its retail pricing position against Asda.607 Given this surrounding context, the mere fact that Asda had committed to increase its retail prices on a number of cheese lines pursuant to this price initiative would have been of value to Tesco in taking its retail pricing decisions because Tesco would have been reassured that one of its major competitors was increasing its retail prices on commercially significant lines in terms of sales volumes.

5.347. In disclosing its willingness to increase its cheese retail prices to Dairy Crest, Asda, at the very least, substantially reduced uncertainty as to the conduct on the cheese retail market to be expected on its part by

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605 In this regard, see, for example, Argos Limited and Littlewoods Limited v Office of Fair Trading [2004] CAT 24, at [516] and [531].
607 See documents 68, 168 and 169 to the SO.
disclosing the course of conduct it had decided to adopt or contemplate adopting on that market. 608

5.348. Moreover, taking into account the circumstances within which this disclosure was made, the OFT has concluded that Asda may be taken to have intended and did, in fact, foresee that Dairy Crest would make use of that information to influence conditions on the cheese retail market by passing it to other retailers in order to facilitate further cheese retail price increases by other retailers. 609 In drawing this conclusion, the OFT notes that Asda disclosed this information pursuant to a plan to co-ordinate cheese retail price increases in order to subsidise a farmgate price increase. Asda was aware of this plan and also that its implementation involved both itself and its competitors implementing cheese retail price increases. Moreover, the evidence has also demonstrated that Asda received information regarding other retailers’ retail pricing intentions from Dairy Crest and therefore must have been aware that Dairy Crest was acting as an intermediary for the disclosure of cheese retail pricing intentions between retailers.

5.349. There is no evidence to suggest that Tesco rejected, nor that it did not wish to receive, the information regarding Asda’s retail pricing intentions. In fact, the surrounding evidence demonstrates that [Tesco’s Senior Cheese Buyer] would have been keen to receive this information - in particular Tesco was keen to participate in the initiative but was concerned about its retail pricing position on cheese compared to its competitors (this was especially the case with Asda). [Tesco’s Senior Cheese Buyer] would therefore have been reassured to know that Asda was increasing its retail prices.

5.350. In its representations on the SSO, Tesco submitted that a full review of this paragraph of [Dairy Crest’s Category Manager (Cheese and Spreads) for its Tesco account] witness evidence in respect of this email showed that Tesco was not actually interested in receiving retail pricing information on Asda. 610 The OFT disagrees and notes that [Dairy Crest’s Category Manager (Cheese and Spreads) for its Tesco account] made the following comment in his witness evidence: ‘[i]f they [Tesco] were not interested I would not have sent them the information.

5.351. Accordingly, having received Asda’s cheese retail pricing intentions, Tesco could not have failed to take that information into account when determining its future behaviour on the cheese retail market. 611 In fact, both the content of [Dairy Crest’s Category Manager (Cheese and Spreads) for its Tesco account] e-mail and the surrounding evidence strongly suggest that the purpose of Dairy Crest’s disclosure was for

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610 See Tesco’s second representations on the SSO, at paragraph 4.11.
Tesco to take account of the information concerning Asda’s decision to increase its cheese retail prices and then commit to its own cheese retail price increases. An Asda internal e-mail of 13 November 2002 confirms that Tesco certainly did increase its retail price in respect of the value line of cheese.\(^{612}\) This is clearly inconsistent with the principle that competitors should determine their prices independently.

5.352. Taking into account the circumstances within which it received this information, the OFT has concluded that Tesco may be taken to have known the circumstances in which Asda had disclosed its cheese retail pricing intentions to Dairy Crest and did, in fact, appreciate that the information was passed to it with Asda’s concurrence.\(^{613}\) In drawing this conclusion, the OFT notes that Tesco received Asda’s cheese retail pricing intentions pursuant to a plan to co-ordinate cheese retail price increases in order to subsidise a farmgate price increase. As a result of discussions with its supplying processors (in particular, following its supply group meeting on 13 September 2002,\(^{614}\) Tesco engaged in discussions with Dairy Crest\(^{615}\) concerning a cheese price initiative), Tesco was aware of this plan, its scope, structure and objectives, and also that its implementation involved both itself and its competitors implementing cheese retail price increases.

**McLelland e-mail to [a retailer], 4 November 2002**

5.353. On 4 November 2002, [a McLelland National Account Manager] sent an e-mail to [an employee at a retailer]\(^{616}\) entitled ‘FW: Price movement’. In his e-mail, [a McLelland National Account Manager] outlined the cheese retail price movements which he considered would be made by major retailers. The e-mail reads as follows:

> 'As per our conversation I have detailed below what I believe is happening with retail prices over the next 2 weeks. **Seriously Strong retails have already moved in some cases. We will be checking stores all this week and I will keep you updated** on anything that filters through over the next few days. **I would like to raise your costs from /C/ and have attached a file detailing the new costs by line.** We will be raising the retail prices on the McLelland random weight brands by 20p per kilo to allow for cash margin to be maintained. Detail on these new retails are also attached. Can you confirm that you are OK with these retails or let me know if you want to use different retails?

**Seriously Strong prices checked today (I can fax you receipts if required).**

\(^{612}\) See document 195 to the SO, at paragraphs 5.413 below. In this document, [Asda’s Cheese Buyer] states in relation to the ‘Smart Price’ line (that is, value cheese) that ‘Tesco have moved RSP in line with Asda on all packs – till receipts available’, thus confirming that Tesco had indeed followed Asda’s retail price increases on this line. See also paragraph 1666 of the SO.

\(^{613}\) *JJB Sports plc v Office of Fair Trading and Argos Limited and Littlewoods Limited v Office of Fair Trading* [2006] EWCA Civ 1318 at paragraphs 91 and 141.

\(^{614}\) See paragraphs 5.72 to 5.95 above.

\(^{615}\) See paragraphs 5.131 to 5.136; and 5.139 to 5.140 above.

\(^{616}\) This email was copied to [an employee at a retailer].
Asda, Tesco and JS have all moved their retails on Seriously Strong as of today:
Asda 250g was £1.58, now £1.63 400g was £2.48, now £2.56
Tesco 250g was £1.58, now 1.66 500g was £3.29, now £3.45
JS 250g was £1.79, now £1.85 500g was £3.49, now £3.59

What I believe will happen elsewhere is –
Asda
4/11/02 – moved on Seriously Strong, McLelland random weight brands (20p per kilo)
11/11/02 – will move all deli and pre-pack own label.

Tesco
11/11/02 – random weight McLelland retails
18/11/02 – all own label lines

JS
11/11/02 – random weight McLelland products
18/11/02 – own label

[A retailer]
11/11/02 – all brands

Safeway
11/11/02 – All McLelland brands, deli, generic mild contract
18/11/02 – Own label

[A retailer]
11/11/02 – all McLelland brands

Summary is that we expect all retails to move over the next two weeks, provided all the information that we are currently picking up is correct. All parties have accepted the £200 cost increase in order to support the farmers and I can confirm that we will pay this amount back to our milk suppliers.
I will keep you updated throughout the week [C]. Please give me a call if you have any questions.

[Emphasis added]

5.354. The OFT notes that [a McLelland National Account Manager] provided [a retailer] with information concerning retail price increases that had been implemented by Asda, Sainsbury’s and Tesco in respect of McLelland’s Seriously Strong brand that day.

5.355. [A McLelland National Account Manager] then disclosed detailed information concerning the cheese pricing intentions of Asda, Safeway, Sainsbury’s and Tesco, as well as two other retailers. It is clear from the content of the email that the pricing information disclosed was each retailer’s retail pricing intentions. In drawing this conclusion, the OFT notes that, having reported on cheese retail prices that had been implemented, [a McLelland National Account Manager] immediately introduced the future price information by stating 'What I believe will

617 See document 188 to the SO.
happen elsewhere is...'. The use of the word 'believe' indicates that the information [a McLelland National Account Manager] was disclosing to [a retailer] had been informed and was not purely speculative. The fact [a McLelland National Account Manager] did not distinguish the future price information he listed from the retail price increases he had described makes it reasonable to conclude that the future price information also involved retail prices.

5.356. In terms of the information disclosed, [a McLelland National Account Manager] informed [a retailer] that:

i. Sainsbury's would be increasing its retail prices on McLelland random weight lines on 11 November 2002 and own label lines on 18 November 2002;

ii. Tesco would be increasing its retail prices on McLelland random weight lines on 11 November 2002 and own label lines on 18 November 2002;

iii. Asda would be increasing the retail prices on its deli and pre-pack own label on 11 November 2002; and

iv. Safeway would increase its retail prices on all McLelland brands, deli and generic mild contract on 11 November 2002, followed by own-label increases on 18 November 2002.

5.357. In its representations on the SO, Tesco submitted that 'it is explicit in the document [[McLelland National Account Manager] e-mail of 4 November 2002] that this is [a McLelland National Account Manager's] own opinion ("what I believe"), not actual information'.\(^{618}\) However, the OFT has concluded that the evidence on its file supports the conclusion that this information would have been disclosed by each of the retailers concerned to McLelland. In drawing this conclusion, the OFT has taken account of the considerable body of evidence which demonstrates the existence of a plan to co-ordinate cheese retail price increases across the grocery retail sector and the considerable evidence demonstrating discussions regarding the timing of these price increases between retailers and their supplying processors (including McLelland) and between the processors themselves.

5.358. The OFT's conclusion is supported by other documentary evidence which demonstrates that Safeway, Sainsbury's and Tesco had disclosed to McLelland that they would increase their cheese retail prices, thereby supporting the OFT's conclusion that the increases referred to were in respect of retail prices.

5.359. In disclosing this information regarding their cheese retail pricing intentions each of Safeway, Sainsbury and Tesco at the very least, substantially reduced uncertainty as to the conduct on the cheese retail market to be expected on their part by disclosing the course of conduct

\(^{618}\) See document 62 to the SSO, at 5.35.
they themselves had decided to adopt or contemplate adopting on that market.\(^{619}\)

5.360. Furthermore, the OFT has concluded that based on the surrounding evidence each of Asda, Safeway, Sainsbury’s and Tesco may be taken to have intended and did, in fact, foresee that McLelland would make use of that information to influence conditions on the cheese retail market by passing it to other retailers in order to facilitate further and wider retail price increases.\(^{620}\)

5.361. In drawing this conclusion, the OFT notes that each of Asda, Safeway, Sainsbury’s and Tesco disclosed its cheese retail pricing intentions pursuant to plans to subsidise a farmgate price increase through increased cheese retail and wholesale prices. Furthermore, the evidence has demonstrated or will demonstrate that each of these parties would have understood that it was increasing its retail prices as part of a wider market move that would also have involved its competitors increasing their prices, and would have known that McLelland was in discussions with its competitors on this issue.

5.362. The conclusion that Sainsbury’s and Tesco may be taken to have intended that McLelland would use the information to influence conditions on the cheese retail market is further demonstrated by the conditional commitments to increase retail prices that they made. Documentary evidence will demonstrate or has demonstrated that they made conditional commitments to increase their cheese retail prices to one or more of their supplying processors based upon other retailers also implementing retail price increases during the implementation of the co-ordinated retail price increases.\(^{621}\) From the evidence in the OFT’s possession, there is no reason to believe that retailers would have treated their retail pricing strategy in respect of cheese supplied by one processor differently to cheese supplied by other processors pursuant to the price initiative that was being implemented.

5.363. In drawing this conclusion, the OFT notes that the pattern of evidence presented thus far demonstrates a high degree of co-ordination of price increases at both the wholesale and retail level with direct and indirect contacts occurring between processors as to the form of the initiative. These contacts tend to indicate the existence of a market-wide move in respect of cheese wholesale and retail price increases in order to subsidise a farmgate price increase, with identical amounts (£200pmt), dates and methods (that is, staggered in stages) of increase being agreed.


\(^{621}\) In respect of Tesco, see paragraphs 5.80 to 5.87; 5.195 to 5.197; 5.213 to 5.215; and paragraphs 5.404 to 5.407 below. In respect of Sainsbury’s, see paragraphs 5.231 to 5.242; 5.247 to 5.280; and 5.323 to 5.328 above.
5.364. In such circumstances, the OFT has inferred that sensitivities expressed by a retailer to a specific processor in respect of its retail price levels relative to a competitor would have been applicable to its cheese sales generally and not just to the cheese supplied by that processor.

5.365. In its representations on the SO, Tesco submitted that it 'expected the receiving processor to recognise that the information was commercially sensitive, and to treat it accordingly' and that '[c]learly, McLelland acted in breach of this'.\footnote{See document 62 to the SSO, at paragraph 5.37.} The OFT has concluded that Tesco’s proposition is not sustainable when this email is considered in its context. The surrounding evidence demonstrates that Tesco had been involved in discussions which had as their object the implementation of a co-ordinated cheese retail price increase. Moreover, the evidence has demonstrated that Tesco had received information concerning Sainsbury’s cheese retail pricing intentions from McLelland pursuant to this initiative.\footnote{See paragraphs 5.251 to 5.262 above.} Accordingly, when disclosing its cheese retail pricing intentions to McLelland, Tesco not only would have understood that its competitors would also be increasing their retail prices, but must have been aware that McLelland was acting as an intermediary for the disclosure of cheese retail pricing intentions between retailers and did not reject, nor show any reservations about receiving, this information and therefore could not reasonably expect that McLelland would not pass its information on to other retailers.

5.366. [A McLelland National Account Manger] e-mail of 4 November 2002 to [a retailer] demonstrates that McLelland did make use of the information it received to influence market conditions by passing it to a competing retailer in an e-mail which had as its purpose persuading retailer to implement retail price increases (the e-mail provides the retailer with revised retail and wholesale price increases and then requests that it 'confirm that you are OK with these retails' or to inform McLelland if it wanted 'to use different retails?'). However, in respect of [a retailer], the OFT has not found that it infringed the Chapter I prohibition.

*Glanbia internal e-mail concerning [a retailer’s] conditional commitment to increase its retail prices, 4 November 2002*

5.367. On 4 November 2002, [Glanbia's Account Development Manager] sent an internal e-mail to his colleague ([Glanbia’s Sales Operation Manager]), which reads as follows:

'I spoke to [a retailer]/[a retailer] ref. 2ppl. She says they will react to Tesco and Asda movements and increase £200p/t. So if Asda and Tesco move today, [a retailer] will be up on the 11th.'\footnote{See document 190 to the SO.}

5.368. This e-mail demonstrates Glanbia took steps to co-ordinate the implementation of cheese retail price increases across its retailer
customers and supports the OFT’s earlier conclusions in respect of the Glanbia internal memorandum of 1 November 2002.  

5.369. The OFT notes that the earlier Glanbia internal memorandum of 1 November 2002 demonstrates that Glanbia was in possession of information concerning Asda’s and Tesco’s cheese retail pricing intentions and was therefore in a position to disclose this information. This included an understanding that Tesco would be increasing some of its cheese retail prices on 4 November 2002 (the date on which [Glanbia’s Account Development Manager] e-mail of 4 November 2002 stated a Tesco move was likely). As noted above, Glanbia did not supply cheese to Tesco at the relevant time, therefore the OFT considers that Glanbia received the information about Tesco’s retail pricing intentions from a third party.

5.370. The OFT has inferred from the language of [Glanbia’s Account Development Manager] e-mail and Glanbia’s awareness of Asda’s and Tesco’s cheese retail pricing intentions that [Glanbia’s Account Development Manager] passed the information concerning Asda’s and Tesco’s cheese retail pricing intentions to [a retailer] during his conversation with his contact at [a retailer]. The e-mail records that [Glanbia’s Account Development Manager] informed [Glanbia’s Sales Operation Manager] that if Asda and Tesco increased their retail prices on 4 November 2002, then [a retailer] would increase its retail prices on 11 November 2002. This detail on the date [a retailer] would respond to a cheese retail price increase by Asda and Tesco is very specific and indicates that Glanbia had sounded out its contact at [a retailer] on likely retail price increase dates for [a retailer] based upon dates of increase for Asda and Tesco.

5.371. In disclosing its willingness to increase its cheese retail prices to Glanbia, Asda, at the very least, substantially reduced uncertainty as to the conduct on the cheese retail market to be expected on its part by disclosing the course of conduct it had decided to adopt or contemplate adopting on that market. Moreover, for the reasons set out in this section, the OFT has concluded that Asda disclosed its retail pricing intentions to Glanbia in circumstances in which it may be taken to have intended and did, in fact, foresee that Glanbia would make use of that information to influence conditions on the cheese retail market by passing it to other retailers either to facilitate further and wider price increases or to ensure that the retail price increases that had been implemented were maintained.

5.372. In drawing this conclusion, the OFT has noted that contemporaneous documentary evidence demonstrates that Asda understood it was acting

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625 See paragraphs 5.322 to 5.331 above.
626 See paragraph 5.326 above.
as part of a wider market move that involved its competitors also implementing retail price increases.\(^{629}\)

5.373. [Glanbia’s Account Development Manager] e-mail of 4 November 2002 demonstrates that Glanbia made use of the information about Asda’s cheese retail pricing intentions to influence conditions on the cheese retail market by passing it on to [a retailer] in order to facilitate a cheese retail price increase by [that retailer]. This conclusion is strongly supported by the contents of the Glanbia internal memorandum of 1 November 2002. That document demonstrated that Glanbia had been uncertain whether [a retailer] would increase its cheese retail prices in response to Asda increasing its retail prices but that Asda’s pricing behaviour was likely to be significant to [a retailer] (‘May not move even if Asda do’).\(^{630}\) This is a further example of efforts Glanbia made to coordinate a retail price increase. For the avoidance of doubt the OFT has not found that [a retailer] infringed the Chapter I prohibition.

**McLelland e-mail to Sainsbury’s, 5 November 2002**

5.374. On 5 November 2002, [McLelland’s National Account Controller] sent an e-mail to [Sainsbury’s Senior Cheese Buyer] in which he updated her on retail price changes that had been implemented by Asda in respect of its value cheddar range and disclosed information concerning Tesco’s cheese retail pricing intentions.

‘A quick update on the Generic Cheddar area, ASDA have moved all sizes of Smart price mild cheddar to £2.69 per Kilo and Smart Price mature cheddar to 3.69 per Kilo. This will be matched by Tesco.’\(^{631}\)

5.375. The OFT notes that [McLelland’s National Account Controller] informed Sainsbury’s of retail price changes that had been implemented by Asda in respect of its mild and mature value (‘Smart Price’) range and that Tesco would match these price changes.

5.376. In the SO, the OFT analysed this email on the basis that the retail price changes in question were price increases. However, in its representations on the SO, Tesco submitted that the price moves in question were decreases and that this was inconsistent with the OFT’s allegation that there was a co-ordinated, market-wide retail price increase.\(^{632}\)

5.377. The OFT has carefully considered Tesco’s representation in the context of the other evidence in its possession. Following this analysis, the OFT has concluded that at least some of the retail prices of smart price/value cheese were **increased** as part of the 2002 Cheese Initiative. This conclusion is supported by the following evidence.

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\(^{629}\) See paragraphs 5.121 to 5.126; 5.128 to 5.136; iv.5.165 to 5.172; 5.195 to 5.204; and 5.223 to 5.229 above regarding discussions that Asda had with several of its supplying cheese processors.

\(^{630}\) See document 186 to the SO, at paragraph 5.323 above.

\(^{631}\) See document 191 to the SO.

\(^{632}\) See document 62 to the SSO, at paragraph 5.61.
5.378. First, [Asda’s Milk, Cream and Cheese Buyer] confirmed that Asda’s Smart Price cheese would have been one of the first lines to have been increased because it was Asda’s highest volume cheese line:

‘that [Smart Price] was our biggest volume line in mild and mature. So, yes, that was the first one that we moved on. […] Upwards… - which was easier because we don’t carry much stock on the system on that one, or it sells through much faster’. 633

5.379. Moreover, given that Asda’s Smart Price cheese was such a high volume line, the OFT considers it is unlikely it could have been omitted from the 2002 Cheese Initiative as it would have made its objective (of subsidising an increase in the farmgate price through increased cheese retail prices) significantly harder to achieve.

5.380. Second, the OFT notes that the e-mail Dairy Crest sent to Tesco on 4 November 2002 stated that it was understood that Asda would be increasing the retail prices on its ‘Smart Price Mild and Mature’ ranges by 20 pence per kilo, again demonstrating that smart price/value cheeses were included within the 2002 Cheese Initiative. 634

5.381. However, the OFT has not been able to establish whether all of the retail price changes referred to in this e-mail of 5 November were increases. To the extent that they were price decreases, the OFT considers that this is likely to have been because Asda had decided to re-align the retail prices on some of the pack sizes following an initial price increase (perhaps to reflect revised price points). This conclusion is supported by Tesco’s own response to follow up enquiries that were made by the OFT in respect of its representations on this document in which it stated that ‘[f]ollowing the price decreases of the small and medium packs, the price per kilo for the larger packs was aligned; which in fact resulted in a price increase for this pack size’. 635

5.382. The OFT also notes that the spreadsheets attached to an internal Asda e-mail on 13 November 2002 from [Asda’s Milk, Cream and Cheese Buyer] support the proposition that this was a price alignment, with some retail prices increasing and other retail prices decreasing. 636 The relevant entries read:

<table>
<thead>
<tr>
<th>Cheese</th>
<th>Sainsbury</th>
<th>Tesco</th>
<th>[A retailer]</th>
<th>Asda</th>
</tr>
</thead>
<tbody>
<tr>
<td>Generic Mild</td>
<td>£2.87</td>
<td>£2.89</td>
<td>£2.99</td>
<td>£2.69</td>
</tr>
</tbody>
</table>

633 See document 16 to the SSO, at page 38. See also document 62 to the SSO, at paragraph 5.4(m), where Tesco explains that value cheddar is ‘by far the largest cheese category by volume, accounting for around 20% of Tesco’s sales of British cheese’.

634 See paragraph 5.332 above.

635 See document 64 to the SSO. The OFT also notes that the fact of Tesco increasing its retail price for large size packs of its value cheddar came to light only after the OFT requested clarification on Tesco’s underlying pricing data. In its representations on the SO, Tesco made reference only to retail price decreases by Asda, with Tesco following those decreases (see document 62 to the SSO, at paragraph 5.61).

636 See document 195 to the SO, at paragraph 5.413 below.
5.383. These spreadsheets show that Asda had increased its retail price for ‘Generic Mild’ by 11 November 2002.

First Safeway internal e-mail, 5 November 2002

5.384. The evidence presented in paragraphs 5.131 to 5.137 above has demonstrated that Dairy Crest approached Safeway in September 2002 to propose that it implement cheese retail price increases as part of an initiative to subsidise a farmgate price increase and that as a result of that approach Safeway would have understood that it was being asked to act as part of a wider market move, which would also involve its competitors increasing their retail prices.

5.385. The evidence has also demonstrated that McLelland co-ordinated retail price increases in respect of the cheese it supplied to retailers in order to subsidise a farmgate price increase. In respect of McLelland’s dealings with Safeway, a McLelland e-mail to [a retailer], dated 4 November 2002, demonstrates that Safeway informed McLelland that it would implement retail price increases in respect of all branded, deli, generic, mild and own label cheeses supplied by McLelland pursuant to this initiative in two stages on 11 and 18 November 2002.\(^ {637} \)

5.386. A Glanbia internal note of 1 November 2002 has also demonstrated that Safeway had disclosed to Glanbia that it would increase its retail prices on cheese supplied to it by Glanbia on 18 November 2002.\(^ {638} \)

\(^ {637} \) See document 188 to the SO, at paragraph 5.353 above.

\(^ {638} \) See document 186 to the SO, at paragraph 5.323 above.
5.387. An internal Safeway e-mail, dated 5 November 2002, from [a Category Manager at Safeway] to [Safeway’s Commercial Manager for Pricing] and [a Buyer at Safeway] confirms the accuracy of the information in Glanbia’s and McLelland’s possession by demonstrating that Safeway had decided to implement retail price increases on its cheese range which were to be implemented on 11 and 18 November 2002. This e-mail clearly demonstrates that Safeway understood that its retail price increases formed part of a wider market move that also involved retail price increases by its competitors. The e-mail reads as follows:

‘Need your advice – we are about to execute a market wide RSP increase on the full range of UK cheeses. This is linked to supporting Farmers to the tune of 2p per litre of Milk or £200 per tonne.

We will be having to make changes to the range on the 11th and 18th of November of an average of 10p per 500g piece and 5p per 250g, to show our support.

...

Our indices will remain the same, as all players will be moving by the same amount on the same day.’

[Emphasis added]

5.388. The OFT notes that Safeway was about to implement (‘execute’) ‘a market wide RSP [retail selling price] increase on the full range of UK cheeses.’ The reference to the ‘full range of UK cheeses’ suggests that these retail price increases were to be applied to all UK cheeses retailed by Safeway.

Safeway was supplied with ‘UK cheeses’ by Dairy Crest, Glanbia and McLelland and the OFT has concluded that the reference to ‘full range’ and the surrounding contextual evidence in relation to the activities of each of these processors means that Safeway was intending to implement retail price increases in respect of cheese supplied by each of these processors.

5.389. In drawing this conclusion, the OFT notes that each of these processors had approached retailers with proposals to increase cheese wholesale and retail prices by £200pmt with the aim of subsidising an increase in the farmgate price. The amount and purpose of these Safeway increases were consistent with Dairy Crest’s, Glanbia’s and McLelland’s proposals.

5.390. In his e-mail, [a Category Manager at Safeway] states that Safeway was to stagger the implementation of these retail price increases with some on 11 November 2002 and the remainder being increased on 18 November 2002. The reference to these dates is significant because they are the dates on which McLelland informed [a retailer] that Safeway would be increasing its retail prices on various lines of cheese it supplied to Safeway. Additionally, the OFT notes that 18 November 2002 was the date on which Glanbia understood that Safeway would implement retail

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639 See document 189 to the SO.
640 In respect of Dairy Crest, see paragraphs 5.120 to 5.181 above. In respect of Glanbia and McLelland, see paragraphs 5.193 to 5.220 above.
641 See paragraph 5.353 above.
price increases on the cheese it supplied to Safeway.⁶⁴² Accordingly, this supports the OFT’s earlier conclusion that the source of Glanbia’s and McLelland’s information on Safeway’s cheese retail pricing intentions was Safeway itself.⁶⁴³

5.391. [A Category Manager at Safeway] e-mail demonstrates that Safeway understood that it was not acting unilaterally in increasing its cheese retail prices and was aware that all of its competitors would be increasing their retail prices by the same amount on the same dates. This is evident from the reference to ’[o]ur [Safeway’s] indices will remain the same as all players will be moving by the same amount on the same day…’. The OFT has inferred from the context of the e-mail that the reference to 'all players' is a reference to other grocery retailers. The fact that the amounts and timing of these increases would be identical strongly supports the OFT’s conclusion of the existence of a co-ordinated plan to increase cheese retail prices. This also meant that [a Category Manager at Safeway] was in possession of quite significant information regarding Safeway’s competitors’ retail pricing intentions – in that he understood that they would be increasing their retail prices on the same day as Safeway. Safeway’s clear understanding that it was increasing its cheese retail prices pursuant to a market wide move and its awareness of its competitors’ retail pricing intentions is clearly inconsistent with the principle that competitors should determine their prices independently.

5.392. [A Category Manager at Safeway] e-mail does not identify the source(s) of Safeway’s information that its competitors would all be increasing their cheese retail prices on the same day, however the OFT has inferred that the information would have been obtained from Safeway’s supplying processors. In drawing this conclusion, the OFT has relied on the surrounding contextual evidence which has demonstrated that each of Dairy Crest, Glanbia and McLelland had acted as the intermediary for the disclosure of information concerning cheese retail pricing intentions between retailers in order to co-ordinate cheese retail price increases.

5.393. Having received this information concerning its competitors’ cheese retail pricing intentions, Safeway could not have failed to take it into account when determining its own future behaviour on the cheese retail market.⁶⁴⁴ In fact, the content of [a Category Manager at Safeway] e-mail of 5 November 2002 suggests that this information was significant to Safeway when deciding whether to increase its cheese retail prices and so it is likely that Safeway did take that information into account in determining its own future pricing behaviour.

5.394. Moreover, the OFT has concluded that Safeway may be taken to have known the circumstances under which the information it received had been disclosed to Dairy Crest, Glanbia and McLelland and did, in fact appreciate that the information was passed to it with its competitors’

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⁶⁴² See paragraph 5.323 above.
⁶⁴³ The OFT’s earlier conclusions are set out at paragraphs 5.325 (in relation to Glanbia) and 5.357 to 5.358 (in relation to McLelland) above.
In drawing this conclusion, the OFT has taken into account that [a Category Manager at Safeway] e-mail demonstrates Safeway understood that it was increasing its cheese retail prices pursuant to a market-wide move to subsidise a farmgate price increase. Safeway was both aware of this plan and also that its implementation involved both itself and its competitors implementing retail price increases.\(^\text{646}\)

5.395. The contents of [a Category Manager at Safeway] e-mail, and in particular, the fact it demonstrates that Safeway had decided to increase its cheese retail prices on the understanding that it was acting as part of a market-wide move that also involved its competitors increasing their retail prices by the same amounts on the same dates, strongly support the OFT's earlier conclusion\(^\text{647}\) that Safeway disclosed its cheese retail pricing intentions to McLelland in circumstances in which it may be taken to have intended and did, in fact, foresee that McLelland would make use of that information to influence conditions on the cheese retail market by passing that information to other retailers.\(^\text{648}\)

**Second Safeway internal e-mail, 5 November 2002**

5.396. On 5 November 2002, [Safeway’s Cheese Buyer] sent an internal e-mail to [Safeway’s Price Strategy Analyst] asking her to ‘…change the retails of the Savers Mild Cheddar lines listed below wef 10/11/02’.\(^\text{649}\)

5.397. The OFT has concluded that this e-mail demonstrates that Safeway took steps to implement cheese retail price increases pursuant to the plans to co-ordinate retail price increases that were being implemented in the market place.

5.398. Taking into account the contents of the earlier Safeway internal e-mail of 5 November 2002,\(^\text{650}\) the OFT has concluded that this decision was taken with the understanding that its competitors would also be increasing their retail prices.

**McLelland internal e-mail demonstrating Tesco conditional commitment to increase retail prices, 8 November 2002**

5.399. On 8 November 2002, [a senior manager at McLelland] sent an internal e-mail to [a senior manager at McLelland] and [McLelland’s National Account Controller]. The e-mail described a conversation [a senior manager at McLelland] had held with [Tesco’s Senior Cheese Buyer] concerning 'Own Brand' retail price increases. It is evident that [Tesco’s Senior Cheese Buyer] had made any retail price increases on these lines conditional upon Asda having increased its retail prices. The e-mail reads:

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\(^{646}\) See paragraphs 5.137 and 5.131 to 5.136 above.

\(^{647}\) See paragraphs 5.357 to 5.361 above.


\(^{649}\) See document 192 to the SO.

\(^{650}\) See document 189 to the SO, at paragraph 5.387 above.
'Tesco’s Senior Cheese Buyer] called to state Tesco will not commit to moving Own Brand until they see that Asda have moved and therefore will not give us their rsps. While they are relatively confident that everything is in place with Asda, they are taking a “We won’t believe it until we see it” stance.'

5.400. The OFT notes that Tesco disclosed information concerning its own label cheese pricing intentions to McLelland by stating that it would not increase those prices without having seen that Asda had increased its own label cheese retail prices. This is consistent with the contents of the e-mail from McLelland to [a retailer] on 4 November 2002, which demonstrated that Asda was not scheduled to implement pre-pack own label retail price increases until 11 November 2002.

5.401. It is evident that the prices being referred to in [a senior manager at McLelland] e-mail would have included Tesco’s retail prices. In drawing this conclusion, the OFT notes that the e-mail expressly refers to Tesco ‘not giv[ing]’ its ‘rsps’ (that is, retail selling prices) to McLelland. Additionally, the OFT notes that [a senior manager at McLelland] e-mail states that Tesco wanted to ‘see that Asda have moved’ before committing to increase its own retail prices. Taking into account that wholesale price levels are not in the public domain and therefore not observable, the OFT has concluded that this reference is to Asda’s retail prices.

5.402. The OFT additionally notes that this is the fourth occasion on which a contemporaneous piece of documentary evidence records that Tesco made its willingness to increase its cheese retail prices conditional upon one or more of its competitors also increasing their retail prices. The OFT considers that this statement of conditionality, directly attributed to a member of staff at Tesco ([Tesco’s Senior Cheese Buyer]), strongly supports its conclusion that the earlier statements of conditionality were a genuine reflection of Tesco’s commercial position and had been communicated to its supplying processors. Furthermore, the OFT notes that this conditional commitment further demonstrates that Tesco was particularly concerned about Asda’s retail pricing behaviour (which is consistent with the OFT’s interpretation of earlier evidence, especially at the Tesco dairy supply group meeting) and therefore corroborates and supports the conclusions the OFT has drawn from those earlier pieces of evidence. In making this conditional commitment Tesco clearly acted inconsistently with the principle that competitors should determine their prices independently.

5.403. [A senior manager at McLelland] e-mail also demonstrates that McLelland made use of information concerning Asda’s own label cheese retail pricing intentions to influence conditions on the cheese retail market by passing

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651 See document 136 to the SO.
652 See document 188 to the SO, at paragraph 5.353 above.
653 The other evidence showing that Tesco made its willingness to increase its cheese retail prices conditional upon one or more of its competitors also increasing their retail prices is presented at paragraphs 5.80 to 5.87; 5.195 to 5.197 and 5.213 to 5.214 above.
654 See, in particular, document 135 to the SO, at paragraphs 5.195 to 5.197 above.
that information on to Tesco in order to facilitate further retail price increases. In drawing this conclusion, the OFT notes [a senior manager at McLelland] statement when referring to Tesco’s conditional commitment to increase its own label cheese retail prices, that ‘[w]hile they [Tesco] are relatively confident that everything is in place with Asda, they are taking a "We won’t believe it until we see it" stance’. This statement strongly suggests that Tesco had itself been informed that Asda was preparing to increase its retail prices.

5.404. Taking into account the wider context, the OFT has inferred that McLelland received the information concerning Asda’s cheese retail pricing intentions from Asda itself. In drawing this conclusion, the OFT notes that not only did McLelland supply Asda with certain lines of own label cheese at this time but also that an e-mail sent by McLelland to [a retailer] on 4 November 2002 demonstrates that McLelland understood Asda would be increasing its retail prices on own label lines on 11 November 2002, thereby showing that McLelland was in possession of intelligence regarding the likely timing of an Asda retail price increase which it would have been in a position to impart to Tesco.

5.405. In disclosing this information to McLelland, Asda, at the very least, substantially reduced uncertainty as to the conduct on the cheese retail market to be expected on its part by disclosing the course of conduct it had decided to adopt or contemplate adopting on that market. Moreover, for the reasons it provides in this section, the OFT has concluded that Asda disclosed this information concerning its cheese retail pricing intentions to McLelland in circumstances in which it may be taken to have intended and did, in fact, foresee that McLelland would use that information to influence conditions on the cheese retail market by passing it to other retailers in order to facilitate further and wider retail price increases.

5.406. There is no evidence to suggest that Tesco rejected, nor that it did not wish to receive, the information regarding Asda’s retail pricing intentions. In fact, Tesco’s earlier clear statement that it was concerned about its retail pricing position against Asda supports the conclusion that it would have willingly received this information and taken it into account when determining its own future behaviour on the cheese retail market. Having received this information, Tesco could not have failed to take it into account when determining its own future behaviour on the cheese retail market. Tesco’s awareness of its competitors’ retail pricing intentions

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656 See document 188 to the SO, at paragraph 5.353 above.
658 See paragraph 5.223 to 5.230 and 5.353 to 5.361 above and 5.413 to 5.414 below.
is clearly inconsistent with the principle that competitors should determine their prices independently.

5.407. Moreover, taking into account the circumstances in which McLelland passed this information to Tesco, the OFT has concluded that Tesco may be taken to have known the circumstances in which Asda disclosed its cheese retail pricing intentions to McLelland and did, in fact, appreciate that the information was passed to it with Asda’s concurrence.\(^{661}\) In drawing this conclusion, the OFT notes that Tesco received this information pursuant to a plan to co-ordinate cheese retail prices in order to subsidise a farmgate price increase. Tesco was aware of this plan, its scope, structure and objectives, and would have understood Asda disclosed its information to McLelland for that purpose (as is evidenced by Tesco’s conditional commitment).\(^{662}\)

**McLelland passes information concerning [a retailer’s] retail pricing intentions to Asda, 8 November 2002**

5.408. On 8 November 2002, [a McLelland National Account Manager] sent an e-mail to [Asda’s Milk, Cream and Cheese Buyer] in which he disclosed information concerning [a retailer’s] retail pricing intentions in respect of Seriously Strong cheddar. The e-mail reads as follows:

>'Reference our earlier conversation I can confirm that [a retailer] will not move their retail price on Seriously Strong 250g until they finish a 3 week promotion that is scheduled to run from 13/11 to 3/12. Thereafter they will implement a rise versus their current retail of £1.59. This activity has been scheduled since prior to recent market price moves and is not a response to these moves.

I will keep you up to date on the movement of Scottish brands as they occur next week.'\(^{663}\)

5.409. The OFT notes that [a McLelland National Account Manager] passed to [Asda’s Milk, Cream and Cheese Buyer] detailed and precise information concerning [a retailer’s] retail pricing intentions in respect of 250g packs of Seriously Strong cheddar.

5.410. [A McLelland National Account Manager] disclosed that [a retailer] would be having a three week promotion in respect of 250g packs of Seriously Strong cheddar, which would start on 13 November 2002 (five days after the date of [a McLelland National Account Manager] e-mail) and finish on 3 December 2002 and that, once that promotion had finished, [a retailer] would increase its retail price to reflect the price initiative (that is, by applying a price increase to its pre-promotion price of £1.59).

5.411. Taking into account the wider context and, in particular, the date of [a McLelland National Account Manager] e-mail (8 November 2002), the product involved ( Seriously Strong) and earlier evidence demonstrating

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\(^{661}\) *See paragraphs 5.72 to 5.95; 5.131 to 5.136; 5.139 to 5.140; and 5.213 to 5.215 above.*

\(^{662}\) *See document 193 to the SO.*
McLelland’s efforts to co-ordinate cheese retail price increases, the OFT considers that McLelland disclosed this information to Asda pursuant to a plan to subsidise a farmgate price increase through a market-wide cheese retail price increase.

5.412. Having received this information Asda could not have failed to have taken it into account when determining its own future behaviour on the cheese retail market. In fact, subsequent evidence in the form of an Asda internal e-mail sent by [Asda’s Milk, Cream and Cheese Buyer] (the recipient of a McLelland National Account Manager e-mail of 8 November 2002) will demonstrate that Asda attached considerable significance to [a retailer’s] cheese retail pricing intentions when considering its own pricing strategy, suggesting that Asda would have taken this information into account. This conclusion is further supported by the OFT’s earlier inference that the information was passed by McLelland to Asda at Asda’s request.

*Asda internal e-mail, 13 November 2002*

5.413. On 13 November 2002, [Asda’s Milk, Cream and Cheese Buyer] sent an internal e-mail to [Asda’s Business Unit Director], [Asda’s Category Manager for Dairy], [Asda’s Agricultural Manager] and other colleagues within Asda. The purpose of [Asda’s Milk, Cream and Cheese Buyer] e-mail was to inform his colleagues of the cheese retail price increases that had either been implemented by Asda’s competitors or that he understood would be implemented based on intelligence he had received. The e-mail reads:

‘Attached audit for English stores,

*Smart price - Tesco have moved RSP in line with Asda on all packs- till receipts available

[A retailer] - Mature value cheddar packs with higher RSP than Asda noted, however no evidence of movement yet on Mild Buyer on holiday, however we are assured that this has been planned in for increased RSP this weekend still chasing

*On own label packs – Tesco- Safeway and J/S [Sainsbury’s] have commenced phasing in higher priced packs, no evidence yet in [a retailer] and [a retailer], we will propose increase for Dec 2nd subject to others moving earlier

*Stilton cheese - Asda not yet applied any increase - All have moved up except - [a retailer], will submit proposal to move up 25 Nov subject to [a retailer] .nb all Christmas line pricing will not change,

665 See document 195 to the SO, at paragraph 5.413 below.
666 See paragraph 5.411 above.
667 The other recipients of [this] e-mail were [an Asda Buyer], [an Asda employee], [an Asda employee] and [an Asda Buyer].
nb - others have indicated will move back down unless we [Asda] follow
due to moving 2 weeks ago

*Branded packs - no issues this week except [a retailer] on Cathedral City
200g on promotion at 98p until Dec 2nd, they have assured Dairy Crest
will then increase in line with others.668

5.414. [Asda's Milk, Cream and Cheese Buyer] e-mail demonstrates that Asda
staff understood they were increasing Asda's cheese retail prices as part
of a market-wide move which also included the implementation of retail
price increases by its competitors. Additionally, this email clearly
demonstrates that Asda's willingness to increase its cheese retail prices
was conditional upon its competitors also increasing their cheese retail
prices and that Asda was in possession of detailed information concerning
its competitors' cheese retail pricing intentions which it clearly took into
account when reaching its own retail pricing decisions. These conclusions
are developed more fully below.

5.415. [Asda's Milk, Cream and Cheese Buyer] started his e-mail by describing
retail price changes that had been implemented in respect of value
cheeses and reported that Tesco had changed its 'Smart price' cheddar
retail prices and was now 'in line with Asda on all packs'. It appears that the
retail price changes referred to are some form of re-alignment or re-
balancing of retail prices across a product range by reference to pack size
following an earlier retail price increase pursuant to the initiative.669

5.416. [Asda's Milk, Cream and Cheese Buyer] then reported on [a retailer’s]
retail pricing activities on its 'value' cheddar lines. He observed that [a
retailer’s] mature value cheddar was at a higher retail price than Asda's,
but that there was 'no evidence of movement yet on Mild' although Asda
had been 'assured' that a retail price increase on this product line would
be implemented in the forthcoming 'weekend' (this would have been 16
and 17 November 2002) but that Asda staff were still 'chasing' this
matter up. The reference to value lines reinforces that the price of this
product line was increased as a result of the price initiative.

5.417. [Asda's Milk, Cream and Cheese Buyer] commentary on [a retailer’s] likely
future retail pricing behaviour in respect of mild value cheddar is
significant, as it further demonstrates the disclosure of cheese retail
pricing intentions between retailers with Asda being in possession of
apparently precise information concerning [a retailer’s] retail pricing
intentions. It is also evident that [Asda's Milk, Cream and Cheese Buyer]
had sought and willingly received the information regarding [a retailer’s]
pricing intentions (as demonstrated by its circulation within Asda).

5.418. Although [Asda's Milk, Cream and Cheese Buyer] e-mail does not identify
the source of the information in Asda's possession, the OFT has
concluded from the pattern of evidence presented above that the
information would have been provided to Asda by at least one of its

668 See document 195 to the SO.
669 See paragraphs 5.381 to 5.382 above.
supplying cheese processors. Asda’s supplying cheese processors at this time were Dairy Crest, Glanbia and McLelland.

5.419. Moreover, the evidence has also demonstrated that one of Asda’s supplying processors (McLelland) previously passed information regarding [a retailer’s] cheese retail prices to other retailers, including Asda. Indeed, the person at Asda to whom McLelland had previously passed information regarding [a retailer’s] cheese retail prices to was [Asda’s Milk, Cream and Cheese Buyer] – the author of this e-mail.

5.420. Having summarised the market position in respect of ‘smart price’ and ‘value’ lines, [Asda’s Milk, Cream and Cheese Buyer] then outlined the position in respect of own label pre-packed cheeses. The information he possessed again demonstrates the implementation of a co-ordinated market move on these products. [Asda’s Milk, Cream and Cheese Buyer] reported that Safeway, Sainsbury’s (‘J/S’) and Tesco had all started to implement retail price increases on these lines, but noted that [a retailer] and [a retailer] had yet to do so.

5.421. Taking into account the pattern of evidence that has been presented above, the OFT has concluded that these retail price moves demonstrate the implementation of the initiative that has been outlined in this analysis to co-ordinate cheese retail price increases in order to subsidise a farmgate price increase (that is, the 2002 Cheese Initiative).

5.422. The OFT’s conclusion regarding the co-ordinated nature of these retail price increases is supported by [Asda’s Milk, Cream and Cheese Buyer] comment concerning Asda’s own retail pricing intentions on this product line. [Asda’s Milk, Cream and Cheese Buyer] stated that Asda would propose an increase on its own label retail prices on 2 December 2002 ‘subject to others moving earlier’. In other words, [Asda’s Milk, Cream and Cheese Buyer] was proposing that Asda increase its retail prices on condition that its competitors increased their retail prices first and further

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670 See document 193 to the SO, at paragraphs 5.408 to 5.412 above.

671 See paragraph 5.413 above. Documentary evidence has demonstrated that [a retailer’s] cheese retail pricing intentions were twice passed on to other retailers in order to influence market conditions. The first occasion was on 4 November 2002 when [a McLelland National Account Manager] e-mailed details concerning [a retailer’s] and several other retailers’ pricing intentions to [an employee at a retailer] (see document 188 to the SO, set out at paragraphs 5.353 to 5.366 above). The second occasion was on 8 November 2002 when [a McLelland National Account Manager] passed on information concerning [a retailer’s] retail pricing intentions on 250g packs of Seriously Strong cheddar to [Asda’s Milk, Cream and Cheese Buyer].

672 In particular, see paragraphs 5.161 and 5.162 above which demonstrate that Dairy Crest had proposed to Sainsbury’s that it increase its own label retail price increases between 20 October 2002 and 3 November 2002, while an internal McLelland e-mail to [a retailer] of 4 November 2002 (document 188 to the SO, at paragraphs 5.353 to 5.366 above) anticipated retail price increases on own label cheese for Safeway, Sainsbury’s and Tesco from 18 November 2002. Further, an internal Safeway e-mail, dated 5 November 2002 (documents 189 and 192 to the SO, at paragraphs 5.384 to 5.398 above), demonstrates that Safeway had decided to implement a retail price increase on its ‘full range of UK cheese’ and that this would have included retail price increases on own label cheddars.
demonstrates that Asda was not taking its retail pricing decisions unilaterally, but on the understanding it was acting as part of a market-wide move which also involved its competitors increasing their retail prices too. This behaviour is clearly inconsistent with the principle that competitors should determine their prices independently.

5.423. Taking into account the references within [Asda's Milk, Cream and Cheese Buyer] e-mail to [a retailer] and [a retailer] not having implemented own label retail price increases, the OFT has inferred that Asda wished to see that both of these retailers had implemented own label retail price increases before it was prepared to implement its own increase. This further demonstrates that Asda understood it was acting as part of a co-ordinated market move in increasing its own label cheese retail price increases.

5.424. [Asda’s Milk, Cream and Cheese Buyer] then referred to retail price increases implemented in respect of Stilton cheeses. He stated that although Asda had not yet increased its retail prices on this line, all of Asda’s competitors, with the exception of [a retailer], had increased their retail prices.

5.425. Taking into account the pattern of evidence demonstrated above, the OFT has concluded that the increases referred to reflected the implementation of a co-ordinated retail price increase on Stilton.

5.426. The OFT has also inferred that Safeway, Sainsbury’s and Tesco would have been among the retailers who had already implemented retail price increases on Stilton, otherwise it would have been an issue of significance that [Asda's Milk, Cream and Cheese Buyer] would have been expected to have commented on. In drawing this conclusion the OFT notes that [Asda's Milk, Cream and Cheese Buyer] highlighted that [a retailer] (a far smaller multiple retailer than Safeway, Sainsbury’s or Tesco and therefore a less significant competitor to Asda) had not yet implemented a retail price increase.

5.427. The conclusion that Safeway, Sainsbury’s and Tesco would have implemented Stilton retail price increases is further supported by surrounding documentary evidence.

5.428. In respect of Tesco, a Dairy Crest internal e-mail, dated 30 October 2002, stated that Tesco had confirmed it would increase its Stilton retail prices on 4 November 2002. See document 182 to the SO, at paragraphs 5.283 to 5.314 above.

5.429. In respect of Sainsbury’s, there is a significant body of evidence to suggest it would have implemented Stilton retail price increases pursuant to the co-ordinated market moves that were being implemented prior to the date of [Asda's Milk, Cream and Cheese Buyer] e-mail of 13 November 2002. A Glanbia internal e-mail, dated 16 October 2002, confirmed that Sainsbury’s would implement a Stilton retail price increase to be effective from 4 November 2002. A McLelland internal e-mail,
also dated 16 October 2002, stated that Sainsbury’s had confirmed that it would increase the retail price of all of its own label and pre-pack brands on 4 November 2002 (the OFT has inferred that Stilton would have been among these cheese lines).675 Finally, the OFT notes that by a letter dated 25 September 2002, Dairy Crest proposed to Sainsbury’s that it increase its Stilton retail prices on 3 November 2002.676

5.430. In respect of Safeway, the OFT notes that an internal Safeway e-mail of 5 November 2002 stated that it would be increasing the retail prices on its 'full range of UK cheeses' on 11 and 18 November 2002, indicating that Safeway, by this stage, is likely to have implemented a retail price increase on its Stilton lines.677

5.431. It is again evident that Asda was considering implementing a retail price increase on Stilton on condition that one of its competitors increase its retail prices first (‘will submit proposal to move up 25 November subject to [a retailer]’).

5.432. For the reasons provided above, the OFT has concluded that Asda was preparing to disclose information regarding its retail pricing intentions to one or more of its supplying processors.

5.433. It is also evident that [Asda’s Milk, Cream and Cheese Buyer] had been informed that Asda’s competitors might reverse their retail price increases if Asda did not implement Stilton retail price increases shortly ('Nb - others have indicated will move back down unless we [Asda] follow due to moving 2 weeks ago').

5.434. For the reasons provided above,678 the OFT has inferred that both Sainsbury’s and Tesco would have been among those retailers (the reference in [Asda’s Milk, Cream and Cheese Buyer] e-mail to ‘others’) who would have implemented retail price increases on Stilton, but who ‘will move back down’ if Asda did not increase its retail price.

5.435. This conclusion is supported by the fact that both Sainsbury’s and Tesco had each, on more than one occasion, made their willingness to implement cheese retail price increases pursuant to an initiative to increase farmgate prices conditional upon their competitors also increasing their retail prices.675 Moreover, both Sainsbury’s and Tesco had specifically made their willingness to implement retail price increases on certain cheese products conditional upon Asda also moving.680

5.436. Asda’s awareness that its competitors were considering reversing their retail price increases further demonstrates the co-ordinated nature of

675 See document 178 to the SO, set out at paragraphs 5.243 to 5.250 above.
676 See document 75 to the SO, set out at paragraphs 5.161 to 5.163 above.
677 See documents 189 and 192 to the SO, set out at paragraphs 5.387 to 5.398 above.
678 See paragraphs 5.426 to 5.430 above.
679 In respect of Sainsbury’s, see paragraphs 5.231 to 5.242; 5.274 to 5.280; and 5.323 to 5.328 above. In respect of Tesco, see paragraphs 5.80 to 5.87; 5.195 to 5.197; 5.213 to 5.214; and 5.399 to 5.402 above.
680 In respect of Sainsbury’s, see paragraphs 5.274 to 5.280 above. In respect of Tesco, see paragraphs 5.195 to 5.197 and 5.399 to 5.402 above.
cheese retail prices at this time and the fact that Asda was not acting independently in increasing its prices. [Asda’s Milk, Cream and Cheese Buyer] e-mail does not identify how Asda came into possession of this information regarding its competitors’ retail pricing intentions, but taking into account the pattern of evidence presented above, the OFT has concluded that the information had been disclosed by its competitors to one or more of Asda’s supplying processors,\(^{681}\) who then passed it on to Asda.

5.437. The indications given by Sainsbury’s and Tesco that they would reverse the retail price increases they had implemented in respect of Stilton would have substantially reduced uncertainty as to their future behaviour on the cheese retail market – the processors to whom they made this disclosure would have understood that if Asda did not increase its Stilton retail prices both retailers would have decreased their prices. Moreover, by making this disclosure both Tesco and Sainsbury’s may be taken to have intended and did, in fact, foresee that the information disclosed would have been used by their supplying processors to influence conditions on the cheese retail market by passing it on to Asda with a view to facilitating a retail price increase by Asda. The fact Asda was in possession of this information shows that this information was used in that way. It is evident from this email that [Asda’s Milk, Cream and Cheese Buyer] took account of this information when determining Asda’s own future pricing behaviour in respect of Stilton. Further, in passing this information on to Asda, Asda’s supplying processors accepted and acted on Sainsbury’s and Tesco’s complaints.\(^{682}\)

5.438. In respect of branded packs of cheese, [Asda’s Milk, Cream and Cheese Buyer] description of retail price increases on these packs supports the OFT’s earlier conclusions that Asda had been provided with information concerning its competitors’ cheese retail pricing intentions by one or more of its supplying processors.

5.439. [Asda’s Milk, Cream and Cheese Buyer] stated that [a retailer] was conducting a price promotion on Cathedral City 200g packs until 2 December 2002 but that it had ‘assured Dairy Crest [that it] will then increase in line with others’. It is again clear from this statement that [Asda’s Milk, Cream and Cheese Buyer] was in possession of precise and detailed information concerning one of its competitors’ retail pricing intentions in that he understood that [a retailer] would increase its retail prices in respect of Cathedral City 200g packs from 2 December 2002 and that the level of retail price increase that would be implemented would be ‘in line’ with retail price increases that had been implemented by other retailers (that is, by applying an increase to the pre-promotional retail price). Taking into account the contents of [Asda’s Milk, Cream and Cheese Buyer] e-mail as a whole and the context within which it was

\(^{681}\) Dairy Crest, Glanbia and McLelland all supplied Asda with cheese (see paragraph 5.63 above).

sent, the OFT has inferred that the reference to 'others' is a reference to other retailers. The OFT’s conclusion in this regard is also consistent with its conclusion that [Asda’s Milk, Cream and Cheese Buyer] reference to 'others' in relation to Stilton also referred to other retailers.  

5.440. [Asda’s Milk, Cream and Cheese Buyer] specific reference to [a retailer] having 'assured' Dairy Crest as to its future retail pricing behaviour suggests that Dairy Crest had received information regarding [a retailer’s] retail pricing intentions from [a retailer] and passed it on to Asda. In drawing this conclusion, the OFT notes that Dairy Crest manufactured the Cathedral City brand and, therefore, was the processor most likely to have been in possession of this information. Moreover, the OFT notes that this conclusion is consistent with the wider pattern of evidence that has been presented above which has demonstrated that Dairy Crest actively set out to co-ordinate cheese retail price increases across its retailer customers, previously disclosed information concerning other retailers’ cheese retail pricing intentions to Asda pursuant to this initiative, and acted more widely as an intermediary for the disclosure of retail pricing intentions between competing retailers.

5.441. As explained at paragraph 5.422 above, [Asda’s Milk, Cream and Cheese Buyer] e-mail demonstrates that there was a clear conditionality in Asda’s willingness to increase its cheese retail prices. In particular the proposals advanced by [Asda’s Milk, Cream and Cheese Buyer] in respect of implementing increases in respect of Asda’s own label and Stilton retail prices demonstrate a strong reluctance to implement an increase without having first seen that its competitors had increased, or at the very least would be increasing, their retail prices. Additionally, [Asda’s Milk, Cream and Cheese Buyer] concern regarding [a retailer’s] failure to increase its retail price on ‘value’ line cheeses also strongly supports the conclusion that the retail price increases Asda had implemented on this line were conditional upon its competitors following suit. This behaviour is clearly inconsistent with the principle that competitors should determine their prices independently.

Evaluation of Tesco’s general representations on the 2002 Cheese Initiative

5.442. As well as the specific representations on the evidence and the OFT’s analysis of that evidence that have been considered above, in its representations on the SO and SSO, Tesco submitted a number of arguments that were more general to the OFT’s case or common across the infringements that Tesco was alleged to have participated in. This section presents and analyses those general representations.

Legitimate commercial reason for disclosing cheese retail pricing intentions

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683 See paragraph 5.434 above.
684 It should be noted that the price increase disclosed by Dairy Crest to Asda went beyond information Dairy Crest might have been able to infer from [a retailer’s] promotion end date as Dairy Crest was aware that [a retailer] would be increasing its retail price above pre-promotional levels.
5.443. In its representations on the SSO, Tesco submitted that the OFT inappropriately alleged that where a retailer disclosed its cheese retail pricing intentions in respect of fixed-weight products, this supported its proposed finding that that retail may be taken to have intended and did, in fact, foresee that the supplier would make use of that information to influence conditions on the cheese retail market by passing it on to other retailers. In particular, Tesco represented that this approach is ‘simplistic and far too broad’ and that the OFT ‘cannot make a blanket assertion of an infringement without further investigation of the specific circumstances in which each piece of information was disclosed’.

5.444. It is not the OFT’s case, nor has the OFT ever alleged, that the mere fact a retailer disclosed information concerning its retail pricing intentions for fixed-weight cheese products was, on its own, sufficient to demonstrate an infringement and certainly no such ‘blanket assertion’ has been made. Rather, it is the context within which those disclosures occurred that is relevant. The OFT considers that the evidence it has presented and analysed in this section clearly demonstrates that these disclosures occurred in circumstances where Tesco (and the other disclosing retailers) may be taken to have intended and did, in fact, foresee, that the information would be used to influence conditions on the cheese retail market and the evidence has been carefully evaluated in its context before this conclusion was reached.

5.445. In its representations on both the SO and the SSO, Tesco also submitted that there are ‘good commercial reasons’ for a retailer to disclose its future retail price information to its suppliers. Tesco identified the following examples where it considered that such commercial reasons arise:

i. where the product was on promotion in order to most effectively plan the volumes necessary for price promotions (for the anticipated increased demand for the product during the promotion) and particularly where the supplying processor was funding the promotion (the supplying processor, therefore, needing to know when its promotional funding needed to start and end);

ii. where the supplying processor printed the pricing labels on products for the retailer; and

iii. where the brand belonged to the supplying processor (such as, for example, Dairy Crest’s Cathedral City brand and McLelland’s Seriously Strong brand) the supplying processor had a legitimate interest in knowing the retail pricing strategy.

5.446. The OFT acknowledges that there are a number of circumstances in which a retailer may legitimately disclose information regarding its retail pricing intentions to its suppliers and considers Tesco’s representations on this point below. However, it is not, and never has been, the OFT’s

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685 See Tesco’s second representations on the SSO, at paragraph 4.22. See also paragraph 338 of the SSO.

686 See Tesco’s second representations on the SSO, at, for example, paragraph 1.15. See also, document 62 to the SSO, at, for example, paragraphs 2.83 to 2.85.
case that all such disclosures are illegitimate, instead it is the OFT’s conclusion that it is the context within which these disclosures occurred that is significant. The OFT has concluded based on the evidence it has presented in paragraphs 5.62 to 5.441 above that these disclosures that took place during the 2002 Cheese Initiative (including those made by Tesco) took place in the context of a co-ordinated market-wide retail price increase.

5.447. In respect of products that were on promotion, as explained above, the OFT is aware that it may be necessary for a supplier to know the start and end dates of price promotions and the OFT has not found that such disclosures are illegitimate in this decision and did not propose to make this finding in either the SO or SSO.

5.448. The OFT notes that there are certain instances in which some of the cheese product lines it has found to have been the subject of a co-ordinated retail price increase were on promotion for at least part of the time in which prices were co-ordinated. However, the OFT has not alleged that the fact retail prices increased at the end of a promotional period, nor that a supplier being aware that retail prices would be increased at the end of a promotion, is an infringement. What the OFT has found to be an infringement are those occasions that the relevant retailer has disclosed that its retail prices would increase above the pre-promotional price after the promotion ended. In respect of the 2002 Cheese Initiative, the contextual evidence has demonstrated that, where Tesco and other retailers made disclosures regarding their retail price levels at the end of a promotion, they did so with the awareness that they were increasing their retail prices pursuant to a co-ordinated market-wide price increase which involved price increases being implemented by both itself and its competitors.

5.449. Similarly, the OFT has not alleged that the disclosure by a retailer of its retail pricing intentions to a supplier where that supplier is responsible for preparing price marked packaging is illegitimate conduct. Again it is the circumstances and context surrounding the decision to increase retail prices that is relevant. In respect of the 2002 Cheese Initiative, the contextual evidence has demonstrated that, where retailers (including Tesco) communicated retail price increases to suppliers, those increases were the product of co-ordination.

5.450. Finally, the OFT is not persuaded by Tesco’s representation that it might be necessary for a retailer to inform a supplier of its retail pricing intentions on a product just because the supplier ‘owned’ the brand. However, even if such disclosures were justifiable, the OFT considers that the context clearly demonstrates that where such information was disclosed during the 2002 Cheese Initiative by retailers (including Tesco) it was done pursuant to a co-ordinated retail price increase.

_Tesco expected its information to be treated as confidential_
5.451. In its representations on both the SO and the SSO, Tesco also submitted that it intended its communications with its supplying processors to be confidential.\textsuperscript{687} For example, Tesco submitted that it:

‘regards its communications with its suppliers as confidential. So did they [Tesco’s suppliers]. Tesco was shocked to learn from the SO of the degree of transparency that was given to its information within the processors and then externally. This occurred both without Tesco’s knowledge and contrary to its intent.’\textsuperscript{688}

5.452. In support of this proposition, Tesco explained that all Tesco e-mails contained statements to the effect that Tesco expected any information it discussed with suppliers to remain confidential.\textsuperscript{689} Tesco did not indicate what actual wording was used in Tesco’s e-mails at the time. However, there are a number of Tesco e-mails on the OFT’s file from the relevant time period. These ‘statements’ that Tesco refers to are general ‘disclaimers’ and, for example, state:

‘This is an email from the Tesco Plc Group of companies and is confidential. If you are not the intended recipient you must not disclose or use the information but please delete the email as soon as possible. Any views in the email are those of the sender only and not those of the Tesco Group. Unless otherwise stated this email is not intended to be contractually binding’.\textsuperscript{690}

5.453. The OFT considers that such general disclaimers automatically added to the end of an e-mail are not sufficient, in the context of the 2002 Cheese Initiative, to demonstrate that Tesco did not intend or foresee that its supplying processors would make use of Tesco’s retail pricing intentions to influence conditions on the cheese retail market by passing it on to other retailers.

5.454. In its representations on the SO, Tesco further submitted that its terms and conditions of business with suppliers meant that its retail pricing intentions were understood to be confidential.\textsuperscript{691} Tesco’s terms and conditions of business state:

‘The Supplier shall not announce or disclose the existence of any contractual arrangement or any dispute between the Supplier and the Buyer (including a dispute referred to under Clause 24) or its terms unless specifically agreed by the Buyer or as required by law or any regulatory authority or where a disclosure is to the Supplier’s professional advisers. Any such announcement or disclosure by the Supplier shall in any event be made only after prior consultation with the Buyer.’\textsuperscript{692}

\textsuperscript{687} See Tesco’s second representations on the SSO, at, for example, paragraphs 2.80 to 2.93. See also, document 62 to the SSO, at, for example, paragraphs 2.86 to 2.89.

\textsuperscript{688} See document 62 to the SSO, at paragraph 1.15.

\textsuperscript{689} See Tesco’s second representations on the SSO, at paragraph 2.15.

\textsuperscript{690} See document 62-6 to the SSO.

\textsuperscript{691} See document 62 to the SSO, at paragraph 2.81(b).

\textsuperscript{692} See document 62 to the SSO, at paragraphs 2.86 and 2.87.
5.455. Tesco submitted that it considered ‘the dates and amounts of future cost and retail price changes’ to be information about its ‘contractual arrangement[s]’ and so was confidential.693

5.456. In its representations on the SSO, Tesco also submitted witness statements from Tesco personnel694 and from its suppliers (specifically, [a senior manager at McLelland]695 in support of this proposition.

5.457. The OFT considers that the question of confidentiality needs to be considered in the specific context. The evidence presented and analysed above demonstrates that Tesco disclosed its cheese retail pricing intentions in the context of a plan to co-ordinate cheese retail price increases in order to subsidise a farmgate price increase and that Tesco was aware of this plan, its scope structure and objectives. Tesco’s retail pricing intentions were conditional on other retailers increasing their retail prices and Tesco also received information concerning its competitors’ retail pricing intentions from its supplying processors. In these circumstances, the OFT considers that, regardless of the very general statements of confidentiality that were included on its email footers or its trading agreements, that Tesco disclosed its retail pricing intentions to its supplying processors in circumstances where it may be taken to have intended and did, in fact, foresee that the supplying processor would make use of the information to influence competing retailers’ behaviour on the cheese retail market.

5.458. In drawing this conclusion, the OFT notes that it has no evidence on its file to suggest that Tesco drew attention to such claimed confidentiality when it disclosed its retail pricing intentions to its supplying processors. While Tesco submitted that ‘it would be commercially impracticable to expect Tesco’s buyers to mention at the start of each conversation that it was to be considered as confidential’,696 the OFT considers that it is reasonable to expect to see evidence that it asked its suppliers to treat its pricing intentions as confidential given the surrounding context.

5.459. In particular, Tesco received confidential information regarding its competitors’ retail pricing intentions which, in itself, would have demonstrated to Tesco that its supplying processors were not respecting any claimed confidentiality at the time.697 Even in this context, there is no evidence on the OFT’s file, nor any submission from Tesco, that the relevant Tesco personnel at the time in any way questioned receiving such information in the context of the 2002 Cheese Initiative or

693 Ibid, at paragraph 2.87.
694 See Annexes B, E and F of Tesco’s second representations on the SSO.
695 See Annexe C of Tesco’s second representations on the SSO.
696 See document 62 to the SSO, at paragraph 2.87.
697 See, for example, Argos Limited and Littlewoods Limited v Office of Fair Trading [2004] CAT 24, at [514] where the CAT held: ‘Although Mr Needham [Argos] expressed his ‘disappointment that information about Argos’ pricing intentions was passed on to Littlewoods, in our view, it must have been apparent to Argos that, if Hasbro was feeding back to Argos Hasbro’s views as to other retailers’ pricing intentions, by the same token Hasbro would be feeding such views to other retailers, based on Hasbro’s conversations with Argos’. Upheld on appeal in Argos Limited and Littlewoods Limited v Office of Fair Trading [2006] EWCA Civ 1318.
expressed any concern to its supplying processors about whether they may be treating Tesco’s retail pricing intentions in a similar way, by passing that information on to Tesco’s competitors.

5.460. Similarly, there is no evidence on the OFT’s file to suggest, within the context of the 2002 Cheese Initiative, that Tesco in any way sought to reject information that it received from its supplying processors regarding its competitors’ cheese retail pricing intentions or in any way sought to remind or reaffirm its supplying processors of the claimed confidential nature of their discussions with Tesco. This is particularly notable given that Tesco received confidential information regarding its competitors’ future retail prices from its supplying processors – information that would not be expected to be received in the normal course of business and exactly the type of information that Tesco expressed shock at having been passed around to its competitors. Tesco has not provided any evidence or represented that any such rejection occurred in the context of the 2002 Cheese Initiative. This is in stark contrast to Tesco’s representation on the 2003 Cheese Initiative in which it submitted that Tesco explicitly rejected such information.

5.461. In respect of the specific witness evidence that Tesco submitted in support of its representations on the SSO, the OFT has considered this above when it analysed the evidence. However, the OFT notes that, in contrast to the witness statements that Tesco submitted from [a senior manager at McLelland],698 and [a senior manager at a processor],699 the witness statements from Tesco personnel700 are standardised statements which confirm the accuracy of particular paragraphs within Tesco’s written representations and all provide the following confirmation:

’In light of the issues that arise in the SO and the SSO, I wish to confirm the following, for the avoidance of any doubt:

(a) Tesco at all times regarded its conversations with its suppliers as confidential, and intended for them to be so. I can think of no circumstances in which any supplier could have thought that it was entitled to disclose Tesco’s information to any other retailer, nor that Tesco intended it to do so.

(b) I never gave any future retail pricing information to a supplier intending it to be passed on to a competitor retailer in order to coordinate dairy retail prices, nor did I in fact foresee this would happen at the time. As far as I am aware, no other member of the Tesco dairy team passed on information with such intention nor foresaw this at the time.

(c) I did not, directly or indirectly, agree my retail pricing strategy for dairy products with other retailers or processors (and as far as I am aware, no-one else did at Tesco). In particular, no decisions that I took (or, so far as I am aware, any other Tesco employee took) in relation to Tesco’s retail prices for liquid milk or cheese in 2002 or fresh liquid milk, butter or cheese in 2003 were based on (i) any prior

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698 See Annexe C of Tesco’s second representations on the SSO.
699 See Annexe D of Tesco’s second representations on the SSO.
700 See Annexes B, E and F of Tesco’s second representations on the SSO.
communication, or coordination, with any other retailer (either directly or via a processor) or (ii) any agreement with a processor. They were unilateral decisions based on Tesco’s own assessment as to what was in Tesco’s own commercial best interests.’

5.462. The OFT notes that these are general statements which do not address any of the specific facts or documents which are relevant to the 2002 Cheese Initiative and are therefore of little evidential value.

Processors predicted retailers’ retail pricing intentions

5.463. In its representations on both the SO and the SSO, Tesco submitted that rather than passing on information that had been disclosed by retailers, processors predicted and speculated on retailers’ retail pricing intentions, based on their analyses, market knowledge and intuition from their discussions with retailers.\(^\text{701}\) In particular, Tesco submitted that the evidence shows that:

- processors ‘were frequently talking up the market to achieve this [an increase in cost prices], including by misrepresenting their own assessment of Tesco’s position to others’ and ‘habitually provided false information, bluffing in order to try to generate upward movements in cost and retail prices, to the processors’ advantage’; and

- the information that processors held in relation to Tesco’s retail pricing intentions was ‘overwhelmingly inaccurate’, and so does not support the OFT’s allegation that this information was informed by disclosures from retailers.

5.464. This representation is not consistent with the evidence in respect of the 2002 Cheese Initiative and is therefore not sustainable. The evidence set out and analysed above has demonstrated that, rather than a processor speculating or predicting pricing behaviour, Tesco disclosed its retail pricing intentions to its supplying processors and that the information that processors passed to Tesco was information regarding their retail pricing intentions that competing retailers’ had disclosed to their supplying processors.

Tesco only asked for reassurance in the form of publicly available information

5.465. In its representations on the SO, Tesco submitted that ‘far from there being any coordinated movement in respect of future retail prices, retailers would not act until they saw evidence in the public domain in the form of till receipts’ and that the only ‘reassurance’ that retailers (including Tesco) sought from processors before they accepted a cost price increase was publicly available information in the form of till receipts.\(^\text{702}\) In particular, Tesco explained that ‘[Tesco’s Senior Cheese Buyer] has specifically confirmed that

\(^\text{701}\) See Tesco’s second representations on the SSO, at, for example, paragraph 1.12(b). See also, document 62 to the SSO, at, for example, paragraph 5.4(e).

\(^\text{702}\) See Tesco’s second representations on the SSO, at paragraphs 2.15 and 4.20.
the 'reassurance' she expected from processors was evidence of in store prices in the form of till receipts or photocopies of purchased products'.

5.466. This representation is not consistent with the evidence in respect of the 2002 Cheese Initiative and is therefore not sustainable. There is no evidence to support the proposition that [Tesco’s Senior Cheese Buyer] requested that she be provided with till receipts or photocopies of purchased products as evidence that Tesco’s competitors’ prices had increased.

5.467. Further, the evidence has demonstrated that [Tesco’s Senior Cheese Buyer] not only received information regarding Tesco’s competitors’ cheese retail pricing intentions but that she took no steps to reject the information. Moreover, witness evidence supports the conclusion that at least one of the individual’s who disclosed information to Tesco ([Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account]) believed that Tesco wanted to receive information regarding its competitors retail pricing intentions:

‘If they [Tesco] were not interested [in receiving the information disclosed in this email] I would not have sent them the information.’

Reliance on other allegations


5.469. The OFT accepts that it cannot rely on such supporting evidence where it has not found those allegations to have infringed the Chapter I prohibition. In finding that the 2002 Cheese Initiative Parties infringed the Chapter I prohibition by participating in the 2002 Cheese Initiative, the OFT does not rely on those allegations that it has not found in this Decision. However, the OFT does not consider that this undermines its infringement finding in respect of the 2002 Cheese Initiative.

5.470. In its representations on the SSO, Tesco also submitted that ‘the OFT was correct to consider that its original allegations against Tesco – and the other parties – in relation to Milk and Butter were unsustainable, and that Tesco’s introduction of a cost and retail price increase in relation to Milk 2002 was unilateral’.

5.471. For the avoidance of doubt, the OFT did not find that Tesco unilaterally introduced a cost and retail price increase in relation to milk in 2002. Such a finding would amount to a finding that Tesco did not infringe the Chapter I prohibition. Instead, as explained above, the OFT considered that the evidence on its file was not sufficient to make a decision that the

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703 Ibid, at paragraph 4.20.
704 See document 21 to the SSO, at paragraph 20.
705 See Tesco’s second representations on the SSO, at, for example, paragraph 1.18.
706 See Tesco’s second representations on the SSO, at paragraph 2.20.
Chapter I prohibition had been infringed. The OFT considered that it continued to have reasonable grounds for suspecting an infringement but that further investigating the 2002 Liquid Milk Initiative allegation (as well as the 2003 Butter Initiative allegation and Tesco’s alleged participation in the 2003 FLM Initiative) was no longer an administrative priority.

**Conclusions drawn from early resolution parties’ admissions**

5.472. In the SSO, the OFT sought to rely upon the fact other parties had admitted to their role in the 2002 Cheese Initiative as evidence to support its proposed finding that Tesco had also participated in the Initiative.\(^{707}\) Tesco submitted that the reliance on these admissions as proof of its participation in an infringement was inappropriate.

5.473. The OFT has carefully considered whether it is appropriate to place such reliance on admissions in light of Tesco’s representation and has decided that these admissions do not, on their own, amount to evidence demonstrating Tesco’s involvement in the 2002 Cheese Initiative. Accordingly, the OFT does not place any reliance on these third party admissions in making its infringement finding in respect of Tesco.

5.474. However, the OFT does consider that the evidence presented above demonstrates that Tesco was a participant in the 2002 Cheese Initiative and infringed the Chapter I prohibition through its participation.

**Inferences drawn from Tesco’s position in the market place**

5.475. In the SSO, the OFT proposed to find that it was highly unlikely that the 2002 Cheese Initiative could have taken place without Tesco’s participation.\(^{708}\) Tesco submitted that this ‘does not amount to evidence of any sort’.\(^{709}\)

5.476. The OFT has reconsidered this provisional conclusion together with all the evidence in its possession, and has concluded that this is not a justifiable inference and has not made reference to it in reaching its infringement decision in respect of Tesco’s participation in the 2002 Cheese Initiative.

5.477. In drawing this conclusion, the OFT believes that although Tesco may well have needed to increase its cheese retail prices in order for the price initiative to be sustainable (on the basis that other retailers would not have wished to have been out of line with Tesco on retail prices), clearly this does not necessarily mean that Tesco’s decision to increase its cheese retail prices was the result of co-ordination.

5.478. However, the OFT considers that the evidence presented in paragraphs 5.62 to 5.441 above clearly demonstrates that Tesco did not take a decision to increase its retail prices unilaterally but as part of a co-ordinated market move of which it was aware and actively participated in. In particular, Tesco received information regarding its competitors’ cheese retail pricing intentions on several occasions and also made its willingness

\(^{707}\) See paragraphs 473, 491 and 501 of the SSO.

\(^{708}\) See paragraphs 309 to 320 of the SSO.

\(^{709}\) See Tesco’s second representations on the SSO, at paragraphs 3.16 to 3.19.
to increase its cheese retail prices conditional on its competitors increasing their retail prices. Accordingly, the OFT considers that Tesco participated in the 2002 Cheese Initiative.

_Tesco’s pricing decisions were unilateral and part of a co-ordinated retail price increase_

5.479. In its representations on both the SO and the SSO, Tesco represented that it at all times followed a unilateral and independent pricing policy.\(^\text{710}\) Tesco relied on evidence provided by [a senior manager at Dairy Crest] and [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] in interviews that were conducted with Dairy Crest’s solicitors following the issue of the SO in support of this representation. [A senior manager at Dairy Crest] explained:

‘On supermarket margins we would never say to the retailer that this is the retail price you need to charge. What we say is that we want a price increase. There are three things they could do. They could put the retail price up by the amount we have put our cost price up; or they could maintain their percentage margin by putting a bigger increase through; or they could choose not to move their retail price at all. This latter option just does not happen anymore. 2000 was the last time that happened. We just tell the retailers we want a £200 increase. We were not advising the retailers on their retail prices. Sometimes we talked about percentage or cash margins but we would not talk about specific retail prices.’\(^\text{711}\)

5.480. [Dairy Crest’s Category Manager (cheese and spreads) for its Tesco account] explained:

‘Retailers do tend to consider what other retailers are doing before deciding on their own course of action but in this case I do not know whether Tesco was influenced by what the other retailers were doing.’\(^\text{712}\)

5.481. The OFT has carefully considered this representation and does not consider it to be supported by the evidence cited above which has demonstrated that Tesco did take part in a co-ordinated retail price increase. In particular, the evidence has demonstrated that Tesco was aware it was increasing its cheese retail prices pursuant to a market wide move to subsidise an increase in the farmgate price of raw milk through increased cheese retail and wholesale prices. Moreover, the evidence has also demonstrated that Tesco willingly received and took account of information regarding its competitors’ retail pricing intentions pursuant to this initiative and clearly made its willingness to increase its cheese retail conditional upon its competitors also implementing a retail price increase.

5.482.

_Failure to retrieve evidence from third parties_

5.483. In its representations on the SSO, Tesco submitted that the OFT has failed to obtain evidence directly from Dairy Crest and McLelland

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\(^{710}\) See Tesco’s second representations on the SSO, at, for example paragraph 1.12(a).

\(^{711}\) See document 28 to the SSO, at paragraph 64.

\(^{712}\) See document 21 to the SSO, at paragraph 7.
witnesses and instead relied on notes of witness statements without testing their accuracy and makes assumptions as to what a witness might have said.\textsuperscript{713} Tesco further submitted that the OFT cannot substitute assumptions, which favour its case, for a failure to ask a witness the facts about the key issues.\textsuperscript{714}

5.484. Given the volume and nature of the contemporaneous documents relating to the 2002 Cheese Initiative, the OFT decided not to prioritise interviewing witnesses relevant to that allegation. In respect of McLelland employees, given the passage of time since the 2002 Cheese Initiative and the volume and nature of the contemporaneous documents, the OFT considers that such individuals would not be in a position to provide valuable evidence that materially affected the evidence on the OFT’s file. In respect of Dairy Crest employees, the OFT has notes of interviews carried out by Dairy Crest’s solicitors in 2007 and some of this evidence has been considered within this decision However, as with McLelland employees, given the passage of time and the volume and nature of the contemporaneous documents, the OFT considers that such individuals would not be in a position to provide valuable evidence that materially affected the evidence on the OFT’s file.

\textit{No direct evidence on intent}

5.485. In its representations on the SSO, Tesco submitted that the OFT has no direct evidence of Tesco's intent and instead “has sought to cast a “cloud of illegality” over lawful, bilateral discussions between a retailer and a supplier”.\textsuperscript{715}

5.486. There is no requirement that evidence demonstrating intent needs to be direct in form. Moreover, the CAT has been satisfied that that indirect evidence can be relied on in this respect as reflected in its judgements in both \textit{Replica Kit} and \textit{Toys}.

c. \textbf{Conclusion}

5.487. Based on the evidence set out and analysed at paragraphs 5.62 to 5.486 above the OFT finds that Asda, Dairy Crest, Glanbia, McLelland, Safeway Sainsbury’s and Tesco participated in a number of concerted practices. The evidence set out at paragraphs 5.62 to 5.486 above has demonstrated that:

\begin{itemize}
\item On or before 27 September 2002, Sainsbury’s disclosed its cheese retail pricing intentions to Dairy Crest.
\item That disclosure was made in circumstances in which Sainsbury’s may be taken to have intended and did, in fact, foresee that Dairy Crest would make use of that information to influence conditions on the cheese retail market by passing it on to other retailers.
\end{itemize}

\textsuperscript{713} See Tesco’s second representations on the SSO, at, for example, paragraphs 3.4 to 3.6.
\textsuperscript{714} \textit{Ibid}, at, for example, paragraph 1.19(h).
\textsuperscript{715} \textit{Ibid}, at paragraph 1.16.
On or before 27 September 2002, Tesco disclosed its cheese retail pricing intentions to Dairy Crest.

That disclosure was made in circumstances in which Tesco may be taken to have intended and did, in fact, foresee that Dairy Crest would make use of that information to influence conditions on the cheese retail market by passing it on to other retailers.

On 27 September 2002 Dairy Crest made use of Sainsbury’s and Tesco’s cheese retail pricing intentions to influence market conditions on the cheese retail market by passing that information on to Asda.

Dairy Crest passed that information on to Asda in circumstances in which Asda may be taken to have known the circumstances in which the information was disclosed by Sainsbury’s and Tesco to Dairy Crest and did, in fact, appreciate that the information was passed on with each retailer’s concurrence.

On or before 27 September 2002 Tesco’s disclosed its cheese retail pricing intentions to McLelland.

That disclosure was made in circumstances in which Tesco may be taken to have intended and did, in fact, foresee that McLelland would make use of that information to influence conditions on the cheese retail market by passing it on to other retailers.

On or before 16 October 2002 Sainsbury’s disclosed its cheese retail pricing intentions to McLelland.

That disclosure was made in circumstances in which Sainsbury’s may be taken to have intended and did, in fact, foresee that McLelland would make use of that information to influence conditions on the cheese retail market by passing it on to other retailers.

On 21 October 2002 McLelland made use of Sainsbury’s cheese retail pricing intentions to influence market conditions on the cheese retail market by passing that information on to Tesco.

McLelland passed that information on to Tesco in circumstances in which Tesco may be taken to have known the circumstances in which the information was disclosed by Sainsbury’s to McLelland and did, in fact, appreciate that the information was passed on with Sainsbury’s concurrence.

On or before 16 October 2002 and on or before 1 November 2002 Sainsbury’s disclosed its cheese retail pricing intentions to Glanbia.

Those disclosures were made in circumstances in which Sainsbury’s may be taken to have intended and did, in fact, foresee that Glanbia would make use of that information to influence conditions on the cheese retail market by passing it on to other retailers.
• On or before 5 November 2002 Glanbia made use of Sainsbury’s cheese retail pricing intentions to influence conditions on the cheese retail market by passing that information on to Safeway.

• Glanbia passed that information on to Safeway in circumstances in which Safeway may be taken to have known the circumstances in which the information was disclosed by Sainsbury’s to Glanbia and did, in fact, appreciate that the information was passed on with Sainsbury’s concurrence.

• On or before 24 October 2002 Sainsbury’s disclosed its cheese retail pricing intentions to Dairy Crest.

• That disclosure was made in circumstances in which Sainsbury’s may be taken to have intended and did, in fact, foresee that Dairy Crest would make use of that information to influence conditions on the cheese retail market by passing it on to other retailers.

• On or before 5 November 2002 Dairy Crest made use of Sainsbury’s cheese retail pricing intentions to influence conditions on the cheese retail market by passing that information on to Safeway.

• Dairy Crest passed that information on to Safeway in circumstances in which Safeway may be taken to have known the circumstances in which the information was disclosed by Sainsbury’s to Dairy Crest and did, in fact, appreciate that the information was passed on with Sainsbury’s concurrence.

• On or before 30 October 2002 Tesco disclosed its cheese retail pricing intentions to Dairy Crest.

• That disclosure was made in circumstances in which Tesco may be taken to have intended and did, in fact, foresee that Dairy Crest would make use of that information to influence conditions on the cheese retail market by passing it on to other retailers.

• On 31 October 2002 Dairy Crest made use of Tesco’s cheese retail pricing intentions to influence conditions on the cheese retail market by passing that information on to Sainsbury’s.

• Dairy Crest passed that information on to Sainsbury’s in circumstances in which Sainsbury’s may be taken to have known the circumstances in which the information was disclosed by Tesco’s to Dairy Crest and did, in fact, appreciate that the information was passed on with Tesco’s concurrence.

• On or before 5 November 2002 Dairy Crest made use of Tesco’s cheese retail pricing intentions to influence conditions on the cheese retail market by passing that information on to Safeway.

• Dairy Crest passed that information on to Safeway in circumstances in which Safeway may be taken to have known the circumstances in which the information was disclosed by Tesco’s to Dairy Crest.
and did, in fact, appreciate that the information was passed on with Tesco’s concurrence.

- On or before 1 November 2002 Asda disclosed its cheese retail pricing intentions to Glanbia.

- That disclosure was made in circumstances in which Asda may be taken to have intended and did, in fact, foresee that Glanbia would make use of that information to influence conditions on the cheese retail market by passing it on to other retailers.

- On or before 5 November 2002 Glanbia made use of Asda’s cheese retail pricing intentions to influence conditions on the cheese retail market by passing that information on to Safeway.

- Glanbia passed that information on to Safeway in circumstances in which Safeway may be taken to have known the circumstances in which the information was disclosed by Asda to Glanbia and did, in fact, appreciate that the information was passed on with Asda’s concurrence.

- On or before 1 November 2002 Sainsbury’s disclosed its cheese retail pricing intentions to Glanbia.

- That disclosure was made in circumstances in which Sainsbury’s may be taken to have intended and did, in fact, foresee that Glanbia would make use of that information to influence conditions on the cheese retail market by passing it on to other retailers.

- On or before 1 November 2002 Safeway disclosed its cheese retail pricing intentions to Glanbia.

- That disclosure was made in circumstances in which Safeway may be taken to have intended and did, in fact, foresee that Glanbia would make use of that information to influence conditions on the cheese retail market by passing it on to other retailers.

- On or before 4 November 2002 Asda disclosed its cheese retail pricing intentions to Dairy Crest.

- That disclosure was made in circumstances in which Asda may be taken to have intended and did, in fact, foresee that Dairy Crest would make use of that information to influence conditions on the cheese retail market by passing it on to other retailers.

- On 4 November 2002 Dairy Crest made use of Asda’s cheese retail pricing intentions to influence market conditions on the cheese retail market by passing that information on to Tesco.

- Dairy Crest passed that information on to Tesco in circumstances in which Tesco may be taken to have known the circumstances in which the information was disclosed by Asda to Dairy Crest and did, in fact, appreciate that the information was passed on with Asda’s concurrence.
On or before 5 November 2002 Dairy Crest made use of Asda’s, cheese retail pricing intentions to influence conditions on the cheese retail market by passing that information on to Safeway.

Dairy Crest passed that information on to Safeway in circumstances in which Safeway may be taken to have known the circumstances in which the information was disclosed by Asda to Dairy Crest and did, in fact, appreciate that the information was passed on with Asda’s concurrence.

On or before 4 November 2002 Asda disclosed its cheese retail pricing intentions to McLelland.

That disclosure was made in circumstances in which Asda may be taken to have intended and did, in fact, foresee that McLelland would make use of that information to influence conditions on the cheese retail market by passing it on to other retailers.

On or before 5 November 2002 McLelland made use of Asda’s cheese retail pricing intentions to influence conditions on the cheese retail market by passing that information on to Safeway.

McLelland passed that information on to Safeway in circumstances in which Safeway may be taken to have known the circumstances in which the information was disclosed by Asda to McLelland and did, in fact, appreciate that the information was passed on with Asda’s concurrence.

On or before 8 November 2002 McLelland made use of Asda’s cheese retail pricing intentions to influence conditions on the cheese retail market by passing that information on to Tesco.

McLelland passed that information on to Tesco in circumstances in which Tesco may be taken to have known the circumstances in which the information was disclosed by Asda to McLelland and did, in fact, appreciate that the information was passed on with Asda’s concurrence.

On or before 4 November 2002 Safeway disclosed its cheese retail pricing intentions to McLelland.

That disclosure was made in circumstances in which Safeway may be taken to have intended and did, in fact, foresee that McLelland would make use of that information to influence conditions on the cheese retail market by passing it on to other retailers.

On or before 4 November 2002 Sainsbury’s disclosed its cheese retail pricing intentions to McLelland.

That disclosure was made in circumstances in which Sainsbury’s may be taken to have intended and did, in fact, foresee that McLelland would make use of that information to influence conditions on the cheese retail market by passing it on to other retailers.
conditions on the cheese retail market by passing it on to other retailers.

• On or before 5 November 2002 McLelland made use of Sainsbury’s cheese retail pricing intentions to influence conditions on the cheese retail market by passing that information on to Safeway.

• McLelland passed that information on to Safeway in circumstances in which Safeway may be taken to have known the circumstances in which the information was disclosed by Sainsbury’s to McLelland and did, in fact, appreciate that the information was passed on with Sainsbury’s concurrence.

• On or before 4 November 2002 and on or before 5 November 2002 Tesco disclosed its cheese retail pricing intentions to McLelland.

• That disclosure was made in circumstances in which Tesco may be taken to have intended and did, in fact, foresee that McLelland would make use of that information to influence conditions on the cheese retail market by passing it on to other retailers.

• On 5 November 2002 McLelland made use of Tesco’s cheese retail pricing intentions to influence conditions on the cheese retail market by passing that information on to Sainsbury’s.

• McLelland passed that information on to Sainsbury’s in circumstances in which Sainsbury’s may be taken to have known the circumstances in which the information was disclosed by Tesco to McLelland and did, in fact, appreciate that the information was passed on with Tesco’s concurrence.

• On or before 5 November 2002 McLelland made use of Tesco’s cheese retail pricing intentions to influence conditions on the cheese retail market by passing that information on to Safeway.

• McLelland passed that information on to Safeway in circumstances in which Safeway may be taken to have known the circumstances in which the information was disclosed by Tesco to McLelland and did, in fact, appreciate that the information was passed on with Tesco’s concurrence.

• On or before 8 November 2002 Tesco disclosed its cheese retail pricing intentions to McLelland.

• That disclosure was made in circumstances in which Tesco may be taken to have intended and did, in fact, foresee that McLelland would make use of that information to influence conditions on the cheese retail market by passing it on to other retailers.

• On or before 13 November 2002 Sainsbury’s and Tesco disclosed its cheese retail pricing intentions to McLelland.

• Those disclosures were made in circumstances in which Sainsbury’s and Tesco may be taken to have intended and did, in fact, foresee
that one or more of Asda’s supplying processors would make use of that information to influence conditions on the cheese retail market by passing it on to other retailers.

- On or before 13 November 2002 one or more of Asda’s supplying processors passed Sainsbury’s and Tesco’s cheese retail pricing intentions on to Asda.

- One or more of Asda’s supplying processors passed that information on to Asda in circumstances in which Asda may be taken to have known the circumstances in which the information was disclosed by Sainsbury’s and Tesco to one or more of Asda’s supplying processors and did, in fact, appreciate that the information was passed on with Sainsbury’s and Tesco’s concurrence.

**Single overall concerted practice**

5.488. Whilst each of the elements set out at paragraph 5.487 above could be regarded as comprising a number of separate concerted practices in breach of the Chapter I prohibition, the OFT considers that they can be regarded as forming part of a single overall concerted practice given that they reinforce one another and share a common objective.

5.489. The OFT considers that it would be contrary to the commercial reality of the situation to seek to split the behaviour into a series of bilateral concerted practices where the evidence demonstrates that information has been exchanged not merely bilaterally but multilaterally through intermediaries, in this case Dairy Crest, Glanbia and McLelland, who are also Parties. The OFT has therefore concluded that all of the elements of the 2002 Cheese Initiative described in the section above formed part of a single overall concerted practice.
III. 2003 concerted practice in respect of cheese retail prices (‘The 2003 Cheese Initiative’)

5.490. The OFT has found that Asda, McLelland, Sainsbury’s and Tesco (each a '2003 Cheese Party,' collectively, the '2003 Cheese Parties') infringed the Chapter I prohibition by participating in a concerted practice which had as its object the co-ordination of retail price increases in respect of UK produced cheese supplied by McLelland in 2003. This infringement is in this Decision referred to as 'the 2003 Cheese Initiative'.

5.491. As noted above, each of Asda, Sainsbury’s and McLelland has admitted its involvement in the 2003 Cheese Initiative as part of the early resolution agreement that each entered into with the OFT.

5.492. Tesco made written representations on the SO, which the OFT considered before issuing the SSO but did not find persuasive. Following its decision to further contest its alleged participation in the 2003 Cheese Initiative, Tesco also made written representations on the SSO. In this section, the OFT has addressed Tesco’s written representations on both the SO and the SSO when appropriate.

5.493. In this section of the Decision the OFT presents, analyses and draws conclusions from the evidence on which it relies in reaching its infringement finding in respect of the 2003 Cheese Initiative. It is structured as follows:

i. First, it presents and analyses the evidence on which the OFT relies in respect of the 2003 Cheese Initiative by reference to the relevant law and incorporates, where appropriate, any comments received from the Parties as to the factual accuracy of the OFT’s proposed findings in the SO and SSO as well as Tesco’s representations on the SO and SSO.

ii. Second, it sets out the OFT’s conclusions in respect of the 2003 Cheese Initiative.

5.494. The Parties should note that the conclusion section is not exhaustive and nor is it intended to be so. For the avoidance of doubt, the OFT relies on the contents of paragraphs 5.495 to 5.637 below to support its infringement finding in respect of the 2003 Cheese Initiative.

a. Analysis of Evidence

i. Relevant background of the cheese market

5.495. The nature of the cheese market and the implications of this for the OFT’s infringement findings in this Decision are set out at paragraphs 5.55 to 5.61 above.

ii. Supply Relationships

5.496. McLelland supplied UK produced cheese to each of Asda, Sainsbury’s and Tesco at the time of the 2003 Cheese Initiative.
iii. **Formation of the 2003 Cheese Initiative**

5.497. The evidence set out below demonstrates that the motivation for the 2003 Cheese Initiative was McLelland’s wish to ‘stabilise’ its profit margin on the cheese it supplied to retailers through increased wholesale and retail prices.\(^{716}\) It is also apparent from the evidence that both Sainsbury’s and Tesco asked McLelland to pass the wholesale price increase back to farmers.\(^{717}\) However, neither retailer received any assurance that this would take place and accepted that it was at McLelland’s discretion how it used the money. The evidence in the OFT’s possession suggests that no money would have been passed back to farmers as a result of this Initiative.

**Meeting between McLelland and Tesco on 4 September 2003**

5.498. An internal McLelland document entitled ‘TESCO BRIEFING’ authored by [McLelland’s National Account Manager for its Tesco account] records that he met with [Tesco’s Senior Cheese Buyer] on 4 September 2003 to propose a £200 pmt wholesale price in respect of cheese it supplied to Tesco:

> I had a meeting with [Tesco’s Senior Cheese Buyer] on 4\(^{th}\) September at which we discussed the £200 increase. We ran through all the arguments as to why we were looking for an increase at that time. [Tesco’s Senior Cheese Buyer] requested a further explanation as to why we arrived at the figure of £200 and I subsequently e-mailed this to her detailing the fact that butter, curd and powder are currently being sold at £200 per Tonne above Mild and that £200 was required to re-dress the balance and make sure that we continued to manufacture cheese rather than other products. At the close of the meeting my understanding was that [Tesco’s Senior Cheese Buyer] had accepted the cost increase on the basis that we would work to increase retail prices across the market to maintain retailer margin. [Tesco’s Senior Cheese Buyer] also stated that she might even move her retail price prior to 1\(^{st}\) October.\(^{718}\)

[Emphasis added]

5.499. This document demonstrates that [Tesco’s Senior Cheese Buyer] accepted McLelland’s proposed cheese price increase on behalf of Tesco on condition that both Tesco and its competitors increased their cheese retail prices in order to ‘maintain’ their margins (‘my understanding was that [Tesco’s Senior Cheese Buyer] had accepted the cost increase on the basis that we would work to increase retail prices across the market to maintain retailer margin’).\(^{719}\)

5.500. In making this conditional commitment, Tesco effectively expressed its willingness to participate in a co-ordinated cheese retail price increase - it had informed McLelland it would be prepared to increase its cheese wholesale and retail prices if McLelland also managed to achieve retail

\(^{716}\) See document 44 to the SSO, at page 5.

\(^{717}\) See documents 277 to the SO and 60 to the SSO, at pages 8 and 14.

\(^{718}\) See document 272 to the SO.

\(^{719}\) It is noteworthy that Tesco made its conditional commitment in respect of its competitors’ retail (rather than wholesale) prices.
prices across the market place. This proposition is not consistent with the principle that competitors should determine their prices independently and is significant when considering Tesco’s subsequent behaviour during the 2003 Cheese Initiative in the evidence set out below.

5.501. The OFT considers its conclusion regarding the conditional nature of Tesco's pricing behaviour is consistent with, and therefore supported by, Tesco's behaviour during the 2002 Cheese Initiative where contemporaneous documents provide evidence of Tesco (and [Tesco’s Senior Cheese Buyer]) making similar conditional commitments in respect of its cheese retail pricing behaviour.

5.502. Indeed the evidence in the 2002 Cheese Initiative has demonstrated that Tesco was extremely concerned about being more expensive on cheese than its competitors and would not have been prepared to increase its retail prices unilaterally and risk being more expensive than its competitors. Based on the evidence in its possession, the OFT considers that there is no reason why it would have behaved differently in 2003. In fact, evidence that will be presented below will demonstrate that (as with the 2002 Cheese Initiative) Tesco was extremely concerned of its retail pricing position when compared to Asda.

McLelland proposes ‘total market move’ to Sainsbury’s on 5 September 2003

5.503. On 5 September 2003, [McLelland’s National Account Manager for its Sainsbury’s account] e-mailed [Sainsbury’s Senior Cheese Buyer] with a ‘rationale for moving [cheese] prices in October’. It is evident from McLelland’s proposal that this wholesale price increase would be subsidised through a co-ordinated retail price increase:

‘Price Increase
• £200 tonne increase on all business from October 2003
• This is to bring margin back into cheese for the manufacturer
• Not related to milk prices
• This will be a total market move
  • All major suppliers
  • All major retailers
  • All RSP’s will move
    - Contract and Brand’

[Emphasis added]

5.504. The OFT notes that McLelland proposed a wholesale price increase of '£200 tonne increase on all [cheese] business from October 2003’ to Sainsbury’s. The purpose of this proposed price increase was to 'bring margin back into cheese for the manufacturer’ and was '[n]ot related to milk prices', therefore meaning McLelland was clearly not intending to pass any of the increase on to farmers.

5.505. It is evident from the content of McLelland’s proposal that it intended to co-ordinate a cheese wholesale and retail price increase. In drawing this conclusion, the OFT notes that McLelland stated that the proposed price

\[720\] See document 261 to the SO.
increase was a 'total market move' involving 'all major suppliers' and 'all major retailers' in which 'all RSP's will move'. As a result of being provided with this information, [Sainsbury's Senior Cheese Buyer] would have understood that Sainsbury's was being asked to increase its cheese wholesale and retail prices as part of a co-ordinated market-wide move which would also involve the implementation of wholesale and retail price increases by its competitors. This proposal is clearly inconsistent with the principle that competitors should determine their prices independently and is effectively identical in mechanics to the plan that McLelland's National Account Manager for its Tesco account agreed with [Tesco’s Senior Cheese Buyer] a day earlier (where it was agreed that Tesco would accept McLelland’s proposals for a cheese cost price increase ‘on the basis that’ McLelland worked to ‘maintain retailer margin’ across the market place.) Sainsbury’s subsequent actions during the 2003 Cheese Initiative, as will be presented below, need to be considered in this context.

McLelland e-mail of 12 September 2003 to Tesco

5.506. On 12 September 2003, [McLelland’s National Account Manager for its Tesco account] sent an e-mail to [Tesco’s Senior Cheese Buyer], setting out McLelland’s rationale for its proposed wholesale price increase. This e-mail is referred to in the ‘TESCO BRIEFING’. It is evident from the e-mail that, as with the presentation to Sainsbury’s on 5 September 2003, the purpose of McLelland’s proposed price initiative was to restore McLelland’s margin, with no reference being made to any of the revenue generated being passed on to farmers:

‘As per our conversations, our rationale can be set out as follows:

The £200 increase has come about mainly because of current market pressures. Recently, butter, curd and dried milk have all been sold as a better return than mild cheddar, and in order to ensure that we continue to support cheddar and it’s [sic] manufacture rather than move into other milk products, we need to have the increase. The reason for £200 is that £200 is the level that butter, curd and milk powder is currently being sold above mild cheddar. As a business, we do not want to manufacture more non cheese products than we do at present, but currently, we could achieve better returns with other milk products and achieve these returns more quickly than laying down milk for cheese.

Currently, cheese manufacturers generally are suffering as we have not had a price increase for 5 years – all the price increases in the last 5 years have been related to milk. This has led to some businesses loosing [sic] money ([a processor], [a processor]) and [a processor] have blamed cheddar for their lower than expected annual results. Even at McLelland, we have experienced our first ever year of our margin going backwards (Turnover was up, but profit stayed the same).

721 See document 272 to the SO, at paragraph 5.529 below. In that briefing, McLelland’s National Account Manager for its Tesco account] set out that ‘[Tesco’s Senior Cheese Buyer] requested a further explanation as to why we [McLelland] arrived at the figure of £200 and I subsequently e-mailed this to her detailing the fact that butter, curd and powder are currently being sold at £200 per Tonne above Mild and that £200 was required to re-dress the balance and make sure that we continued to manufacture cheese rather than other products’ [emphasis added].
The extra £200 will be used to invest back into the business, both to address our margin for the city and banks, and to drive our brands through capital expenditure and marketing. This will secure cheese for your business for the future, and ensure our business continues to focus on cheese.\(^{722}\)

*Internal McLelland e-mail on 16 September 2003*

5.507. On 16 September 2003, [McLelland’s National Account Manager for its Tesco account] sent an internal e-mail to [McLelland’s National Account Controller]\(^{723}\) and [a senior manager at McLelland].\(^{724}\) The purpose of the e-mail was to summarise discussions between McLelland and Tesco regarding Tesco’s disappointment with the margins it was achieving on McLelland’s Seriously Strong cheddar brand. The e-mail reads as follows:

> ‘I have summarised the current Seriously Strong situation in Tesco following our recent discussions and [Tesco’s Senior Cheese Buyer] e-mail to me highlighting that our distribution is about to be reduced. Can you please read through this and let me know your thoughts as to how we best resolve this?

> […] Current margins are –

> SSW 250g – Cost […] / Retail £1.52 / Margin […]
> SSW 500g – Cost […] / Retail £3.45 / Margin […]
> SSC 250g – Cost […] / Retail £1.63 / Margin […]
> SSC 500g – Cost […] / Retail £3.45 / Margin / […]

The current margin level is compromised by the Tesco policy of matching Asda’s retail price on SS 250g. Therefore the two issues that need resolved are –

1. Increase the Asda retail price to allow Tesco to match this and this will restore some margin.
2. Achieve our objective of the £200 per Tonne increase and still meet [Tesco’s Senior Cheese Buyer] margin expectation.

What will happen to retail prices?

> […]

So, what will Asda do?

If they apply a £200 increase to the retail price this will move the 250g pack to £1.68. […] Ideal scenario is that Asda can be persuaded to increase the retail price to maintain their margin, giving a new retail price of £1.71. […] was complaining about prior to Asda rolling back the retail to £1.52.

\(^{722}\) See document 273 to the SO.

\(^{723}\) This meant that McLelland’s National Account Controller was line manager to McLelland’s National Account Managers including [McLelland’s National Account Manager for its Tesco account] and [McLelland’s National Account Manager for its Sainsbury’s account].

\(^{724}\) This is a senior position within McLelland’s Sales organisational structure. A senior manager at McLelland would have reported to [a senior manager at McLelland]. See McLelland’s response of 9 November 2005 (document 43 to the SO) to question 4.4 of the OFT’s section 26 Notice of 21 October 2005.
Will Asda listen to the retail price argument and move to £1.71? We don’t know. This is the equivalent of £760 per Tonne vs. the current retail price.

So, even if Asda can move their retail price to £1.71 we need to hold our cost price at [...] to ensure [...]. If we compromise on the £200 increase on SSW how can we recover towards the £200 per tonne?

We have already suggested paying [...] retro on Seriously Strong at the end of this year provided we meet the target of [...] Tonnes. This is worth [...] per Tonne which we can invest in the [...] At current level of business we are already tracking to hit [...] Tonnes. We can look to push distribution to the maximum possible level. There are around a [...] although they have the option to do so. If [Tesco’s Senior Cheese Buyer] can provide the information to identify these stores then we can look to target them to stock the product. The other option [...] We need to make a proposal to [Tesco’s Senior Cheese Buyer] on this by next week at the latest so your earliest thoughts or suggestions will be appreciated."

5.508. This email clearly demonstrates that Tesco was disappointed with the margin it was achieving on Seriously Strong and was applying pressure to McLelland to take action to increase it. The email also shows that McLelland attributed the source of this problem to Tesco’s policy of price matching Asda (who was operating a ‘roll-back’ [discount] on the product line) and believed that the best way of resolving this problem was to persuade Asda to increase its cheese retail prices so Tesco could follow and therefore increase its margin.

5.509. Accordingly, although this email does not in and of itself demonstrate the co-ordination of Seriously Strong retail price increases by McLelland, it clearly shows that McLelland was considering ways in which it could increase Tesco’s margin, including by retail prices being increased by two major retailers. It also shows that McLelland was contemplating acting on Tesco’s complaint regarding the level of margin it was achieving on Seriously Strong and that such action contemplated achieving retail price increases. This document also demonstrates that McLelland clearly planned to include Seriously Strong White in the co-ordinated cheese retail price initiative it has been demonstrated was proposed to both Sainsbury and Tesco (‘If we compromise on the £200 increase on SSW how can we recover towards the £200 per tonne?’) and the retail price that would be implemented if Asda was to both reverse its roll-back and additionally accept the £200 per tonne increase (£1.71). This is significant because

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725 See document 264 to the SO.
727 This is consistent with the proposal McLelland made to Sainsbury’s on 5 September 2003 where it was stated the targeted ‘£200 tonne increase’ would be placed on ‘all business from October 2003’.

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the retail price of Seriously Strong 250g packs did increase to £1.71 as a result of this Initiative.

McLelland e-mail Dairy Industry Newsletter to Sainsbury's, 24 September 2003

5.510. On 24 September 2003, [McLelland’s National Account Manager for its Sainsbury’s account] e-mailed a copy of an article taken from the Dairy Industry Newsletter website of the same date to [Sainsbury's Senior Cheese Buyer]. The article stated that a number of major retailers would shortly be implementing cheese retail price increases. [McLelland’s National Account Manager for its Sainsbury’s account] covering e-mail suggests that McLelland may have played a role in providing information for the article. The article and covering email are set out below:

'Please read the below feature on the retail move. As you can see, we have positioned you favourably in terms of moving the price forward, and as the Dairy Industry News is the 'Bible' of the dairy farming community, this has been viewed as a very favourable move by Sainsbury's.

...'

SUPERMARKETS AGREE £200/tonne PRICE INCREASE
Apparently, as of this week, all the major UK supermarkets are to implement an across-the-board £200/tonne increase in cheese prices as from next month. Asda were the last of the major chains to 'come on board'. Sainsbury led the initiative, followed by [a retailer], [a retailer] and [a retailer]. Tesco, initially reluctant, have agreed to a price increase. It is understood that Sainsbury are putting retail prices up this week, the others will follow.'728

5.511. The OFT notes that [McLelland’s National Account Manager for its Sainsbury’s account] cover e-mail strongly suggests that McLelland provided the Dairy Industry Newsletter with some of the information contained within the article (he states that 'we [that is, McLelland] have positioned you [that is, Sainsbury's] favourably in terms of moving the price forward').

5.512. An argument could be made that the existence of this article meant that McLelland’s efforts to co-ordinate a cheese retail price increase were in the public domain. However, regardless of this article and whether some or all of the information contained within it was provided to the Dairy Industry Newsletter by McLelland, the OFT does not consider it would have been likely to have been treated as credible by retailers and would certainly have been significantly less credible than private disclosures (especially where supported by evidence in the form of price labels showing that the retail price increases were going to be implemented) made by McLelland to its retailer accounts would have been in terms of substantially reducing uncertainty as to the future conduct of a retailer on the cheese retail market.

Internal McLelland e-mail on 24 September 2003 indicating that Asda had decided to implement cheese retail price increases

728 See document 265 to the SO.
5.513. On 24 September 2003, [McLelland’s Logistics Manager] sent an e-mail to [a senior manager at McLelland] and [McLelland’s National Account Controller].\(^{729}\) The e-mail demonstrates that Asda had decided to implement a retail price increase on certain cheese lines and that these retail price increases formed part of a wider move that was taking place across the market place and also involved other retailers:

‘Further to my telephone conversation with [McLelland’s National Account Controller] who confirmed that Asda will be moving to new retails effective from Monday the 29\(^{729}\).

I urgently require the following information before I can proceed with the price change.

1. Which customers are moving and from what dates.
2. What products are changing and from what dates.
3. Are the standard retails changing and if so what products and when do they change.
4. I also need a full list of all the new retails by customer and product.
5. The retails have to be supplied to Mauchline first thing Thursday morning in order for them to set-up their [sic] machine prior to packing.
6. I need confirmation on whether we will running [sic] the existing stock through with our customers.

I have started collating a list of our current retail stocks and will pass this to you once complete.

It is highly unlikely that we will be in a position to supply the new retails from Monday given that we only have one and half days of production left and they already have this time booked for our other lines.

Please bear in mind that we have to continue supplying the existing retails until the change-over can be confirmed.

We will therefore have to pack some of the lines to maintain supply.

I require this information before 10am on Thursday as Mauchline are due to start packing some of the existing retails from this time.\(^{730}\)

[Emphasis added]

\(^{729}\) McLelland informed the OFT that [the] role [of McLelland’s Logistics Manager] was to ensure that any price increases to McLelland’s customers were placed on McLelland’s invoicing system in accordance with written internal communication received from account managers. Also, as regards cheese pre-packed with affixed prices, he would ensure that the ‘new’ and correctly priced stock on random weight lines were despatched to the appropriate retailer. He would not have been involved in implementing price increases by McLelland’s customers (except in a mechanical or operational sense). See document 267 to the SO.

\(^{730}\) See document 268 to the SO.
5.514. This e-mail shows that [McLelland’s National Account Controller] had been informed that Asda would be increasing its cheese retail prices 'effective from Monday the 29th' September 2003. The OFT has concluded, based on the certainty of the language used, the seniority of the source of the information ([McLelland’s National Account Controller]), and the fact that McLelland was clearly acting on this information, that this information originated from Asda and was not speculative. Further, given that McLelland would be responsible for packing and pricing random weight cheese for Asda (indeed the purpose of this email was to manage the logistics of exactly such an increase across multiple retailers), McLelland would have needed to be informed by Asda that it had decided to implement a price increase. The OFT’s conclusion on the source of this information will be additionally supported by evidence presented later in this section which will demonstrate that Asda was in dialogue with McLelland regarding retail price increases. In disclosing its willingness to increase its cheese retail prices to McLelland, Asda, at the very least, substantially reduced uncertainty as to the conduct on the cheese retail market to be expected on its part by disclosing the course of conduct it had decided to adopt or contemplate adopting on that market.731

5.515. The evidence in paragraphs 5.589 to 5.613 below, will demonstrate that Asda’s decision to increase its retail prices was taken in the knowledge that it was acting as part of a co-ordinated, market-wide move which also involved the implementation of retail price increases by its competitors. Accordingly, regardless of whether there was a commercial reason for Asda to inform McLelland of its decision to increase cheese retail prices, it is evident that Asda did not take this decision to increase its retail prices independently but as a result of co-ordination.

5.516. The OFT has therefore concluded that Asda disclosed its retail pricing intentions to McLelland in circumstances in which it may be taken to have intended and, did in fact foresee, that McLelland would make use of that information to influence conditions on the cheese retail market by passing it on to other retailers in order to facilitate further cheese retail price increases by other retailers.733

5.517. Further contemporaneous documentary evidence, which will be presented below734, will demonstrate that McLelland made use of the information it had received regarding Asda’s cheese retail pricing intentions to influence conditions on the cheese retail market by passing it on to Tesco in order to persuade it to increase its cheese retail prices.735

Internal McLelland e-mail on 29 September 2003

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731 See paragraphs 5.531 to 5.532; 5.560 to 5.563; and 5.589 to 5.618.
734 See paragraphs 5.529 to 5.538 below.
5.518. An internal McLelland e-mail, dated 29 September 2003, from [McLelland’s Sales Support Manager] to [McLelland’s Mauchline Packing Station Manager] entitled ’Retail Price Increase Stocks’, provides further evidence of the steps that McLelland took to co-ordinate cheese retail price increases:

‘To confirm earlier telephone call in which I asked for your assistance to provide photocopy examples of all pre-pack labels that have been packed with the new retail prices as advised by [McLelland’s Quality Control Manager] and [McLelland’s Logistics Manager] late last week.

This information is to send to the buyers this afternoon so that they can be encouraged with proof that retails have moved and expedite price increases across the board.

Please send to [McLelland’s Quality Control Manager] on his fax [C] and if there are any concerns give him a phone call.’

[Emphasis added]

5.519. The OFT notes that McLelland staff were planning to photocopy price labels demonstrating retail price increases were in the process of being implemented by certain of its retailer customers. McLelland informed the OFT that the labels in question are likely to have belonged to [a retailer] and/or Sainsbury’s. Based upon further documentary evidence presented at paragraphs 5.541 to 5.542 below, the OFT has concluded that the price labels would have belonged to both [a retailer] and Sainsbury’s.

5.520. The OFT has also concluded that the retail prices recorded on the labels were future pricing information reflecting the implementation of increases that would not, at this stage, have been in the public domain. In drawing this conclusion, the OFT has carefully considered the possibility that the statement ’retails have moved’ [emphasis added] could suggest that the information was already in the public domain. However, the OFT considers that the use of the word ’have’ in this context actually relates to the fact that retail prices would be increasing in the near future based upon the fact cheese was being packed by McLelland with revised prices.

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736 McLelland informed the OFT that [the] responsibilities [of McLelland’s Sales Support Manager] included packing. When arranging the packing of pre-packed cheese to which price labels were to be affixed [McLelland’s Sales Support Manager] would liaise with the account managers to ascertain what pricing had been stipulated by the relevant retailer, which he would collate and communicate to [McLelland’s Quality Control Manager]. See document 267 to the SO.

737 McLelland informed the OFT that [McLelland’s Mauchline Packing Station Manager] would have been responsible to ensure the cheese left Mauchline correctly packaged. See document 267 to the SO.

738 Copied to [McLelland’s Quality Control Manager] – McLelland informed the OFT that [McLelland’s Quality Control Manager] was responsible for communicating and confirming all packing and transportation information to McLelland’s Mauchline packing station [see document 267 to the SO], [McLelland’s National Account Manager for its Sainsbury’s account] and [McLelland’s National Account Manager for its Tesco account].

739 See document 269 to the SO.

740 See document 267 to the SO.
In drawing this conclusion, the OFT also notes that for random weight cheese lines (which were price-marked on the pack), it was necessary for a retailer to sell its existing stock of price-marked cheese before it could introduce stock priced at the higher retail price. As such, there would almost certainly have been a time lag between Sainsbury’s deciding to increase its retail prices and newly priced stock appearing in store, therefore supporting the conclusion that the retail prices referred to in this email were not yet in the public domain. This conclusion will be further supported by evidence presented below.

5.521. In disclosing their retail pricing intentions to McLelland, both [a retailer] and Sainsbury’s, at the very least, substantially reduced uncertainty as to the conduct on the cheese retail market to be expected on their part by disclosing the course of conduct that they had decided to adopt or contemplate adopting on that market.

5.522. However, taking into account that both [a retailer] and Sainsbury’s would have needed to disclose their cheese retail pricing intentions to McLelland in respect of these product lines in order for McLelland to have prepared the price labels in question, there is a potentially legitimate reason for these disclosures to have occurred.

5.523. In respect of [a retailer], the OFT is not in possession of any evidence in relation to the 2003 Cheese Initiative demonstrating the circumstances in which [a retailer] disclosed its cheese retail pricing intentions to McLelland. Accordingly, this disclosure may have been made in entirely legitimate circumstances and therefore the OFT has not made a finding that [a retailer] infringed the Chapter I prohibition in respect of the 2003 Cheese Initiative.

5.524. In respect of Sainsbury’s position, taking into account the context within which the disclosure was made, the OFT has concluded that Sainsbury’s may be taken to have intended and did, in fact, foresee that McLelland would make use of its cheese retail pricing intentions to influence market conditions by passing it on to other retailers in order to facilitate the implementation of further cheese retail price increases by other retailers.

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741 See, for example, document 275 to the SO (in which McLelland recorded that, in respect of Sainsbury’s) ‘Some product held back to work through the stocks’), presented at paragraph 5.558 below.
742 See paragraphs 5.541 to 5.542 below.
744 Specifically, that [a retailer] may be taken to have intended or did, in fact, foresee that McLelland would make use of that information to influence conditions on the cheese retail market by passing it on to other retailers (JJB Sports plc v Office of Fair Trading and Argos Limited and Littlewoods Limited v Office of Fair Trading [2006] EWCA Civ 1318, at paragraphs 91 and 141).
5.525. In drawing this conclusion, the OFT has relied upon evidence presented above\(^{746}\) demonstrating that, as a result of the proposal that McLelland sent to Sainsbury’s on 5 September 2003, Sainsbury’s would have understood that it was being asked to increase its cheese retail prices as part of a ‘a total market move’ involving the implementation of cheese retail price increases by ‘all major retailers’. \(^{747}\)

5.526. Additionally, the OFT notes that it has no evidence on its file to suggest that Sainsbury’s took any steps to distance itself from McLelland’s proposal (such as requesting that McLelland treat its information as confidential) and that Sainsbury’s itself has admitted to its participation in the 2003 Cheese Initiative and has not identified the OFT’s conclusions in respect of this e-mail as a material factual inaccuracy. \(^{748}\)

5.527. The OFT has also taken account of Sainsbury’s conduct during the 2002 Cheese Initiative, during which it demonstrated a strong level of conditionality in respect of its willingness to increase its cheese retail prices and has concluded that this supports its conclusion that, when informing McLelland of its decision to increase its cheese retail prices, Sainsbury’s may be taken to have intended and did, in fact, foresee that McLelland would make use of its cheese retail pricing intentions to influence market conditions by passing it on to other retailers in order to facilitate the implementation of further cheese retail price increases by other retailers.

5.528. It is evident that McLelland was preparing to use the information it possessed concerning [a retailer’s] and Sainsbury’s cheese retail pricing intentions in order to influence conditions on the cheese retail market by passing it on to other retailers in order to facilitate further retail price increases. The photocopies of the labels were to be used ‘to send to the buyers this afternoon so that they can be encouraged with proof that retails have moved and expedite price increases across the board.’ The OFT considers that the reference to ‘buyers’ is clearly to buyers at other retailers who were supplied with cheese by McLelland and therefore would have included Asda and Tesco. It is also clear that the information to be circulated was future retail pricing information. \(^{749}\) The evidence presented below demonstrates that McLelland did make use of [a retailer’s] and Sainsbury’s cheese retail pricing intentions (by faxing Sainsbury’s retail price labels to Tesco) \(^{750}\) and that this was done with the aim of influencing Tesco’s retail pricing behaviour. \(^{751}\)

*Internal McLelland note entitled ‘Tesco Briefing’, October 2003*

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\(^{746}\) See paragraphs 5.503 to 5.505 above.

\(^{747}\) See document 261 to the SO, paragraph 5.503 above.

\(^{748}\) In contrast, Sainsbury’s identified specific factual inaccuracies in respect of McLelland’s 2 October 2003 e-mail to Tesco (see paragraphs 5.546 to 5.548 below).

\(^{749}\) See paragraph 5.520.

\(^{750}\) See paragraphs 5.541 to 5.542 below.

\(^{751}\) See ‘TESCO BRIEFING’ at paragraphs 5.529 to 5.537 below and McLelland e-mails to Tesco on 30 September 2003 (at paragraphs 5.541 to 5.545 below) and 2 October 2003 (at paragraphs 5.546 to 5.553 Below).
5.529. A contemporaneous account of McLelland’s discussions with Tesco regarding McLelland’s proposed cheese retail price increase is provided by the ‘TESCO BRIEFING’. This document was drafted by [McLelland’s National Accounts Manager for its Tesco Account]. Although only dated ‘October 2003’ the OFT believes that the ‘TESCO BRIEFING’ was authored at some point between 1 and 5 October 2003. The document demonstrates that McLelland disclosed information concerning Asda’s, [a retailer’s] and Sainsbury’s cheese retail pricing intentions to [Tesco’s Senior Cheese Buyer] with a view to facilitating a cheese retail price increase by Tesco.

5.530. There is no suggestion in this document that [Tesco’s Senior Cheese Buyer] rejected the information she received regarding Tesco’s competitors retail pricing intentions. In fact, the document clearly supports the conclusion that she took no such steps because it shows her receiving future retail pricing information in relation to Tesco’s competitors on more than one occasion and also that she took account of information she had been provided regarding one of those competitors’ (Asda) intentions when determining Tesco’s own future conduct on the cheese retail market. This behaviour is not consistent with the principle that Tesco should determine its cheese retail prices independently. The briefing is set out below.

‘TESCO BRIEFING

Present situation is that Tesco are not accepting the £200 cost increase. I had a meeting with [Tesco’s Senior Cheese Buyer] on 4th September at which we discussed the £200 increase. We ran through all the arguments as to why we were looking for an increase at that time. [Tesco’s Senior Cheese Buyer] requested a further explanation as to why we arrived at the figure of £200 and I subsequently e-mailed this to her detailing the fact that butter, curd and powder are currently being sold at £200 per Tonne above Mild and that £200 was required to re-dress the balance and make sure that we continued to manufacture cheese rather than other products. At the close of the meeting my understanding was that [Tesco’s Senior Cheese Buyer] had accepted the cost increase on the basis that we would work to increase retail prices across the market to maintain retailer margin. [Tesco’s Senior Cheese Buyer] also stated that she might even move her retail price prior to 1st October. All conversations subsequent to this meeting focused on what was happening to retail prices with my understanding that the £200 increase was agreed. [Tesco’s Senior Cheese Buyer] rang me last Friday [26 September 2003] and I told her that it was our understanding that Asda would move retail prices from Monday 29th September. That being the case she said she would enter her new case

752 The OFT also considered the ‘TESCO BRIEFING’ at paragraphs 5.498 to 5.501 above, regarding McLelland’s proposal.

753 The fact that [McLelland’s National Accounts Manager for its Tesco account] referred to discussions with [Tesco’s Senior Cheese Buyer] on Tuesday 30 September 2003 shows that the ‘TESCO BRIEFING’ was authored at some point after 30 September 2003. The meeting with [Tesco’s Senior Cheese Buyer] and [Tesco’s Category Director for dairy] that [McLelland’s National Accounts Manager for its Tesco account] referred to having been scheduled (for ‘next Monday’) is the 6 October 2003 meeting (see paragraph 5.618 below and documents 62 to the SSO, at paragraph 8.29, and [Tesco’s SSO reps on cheese], at paragraphs 5.13 to 5.19).
costs on Monday /Tuesday to be effective form [sic] [C] October. At no time during the last few weeks has [Tesco’s Senior Cheese Buyer] told me that Tesco would not accept the increase or asked for further justification of our need for an increase. On Tuesday [30 September 2003] morning I had a discussion with [Tesco’s Senior Cheese Buyer] and told her that Asda had not moved retail prices as expected but that [a retailer] and JS [Sainsbury’s] had started to move and that I still believed Asda would move. At this time [Tesco’s Senior Cheese Buyer] told me that she would not enter her new case costs without evidence of Asda moving on retail prices. On Tuesday [30 September 2003] afternoon I spoke to [Tesco’s Senior Cheese Buyer] to ask her to increase her costs and to help start the ball rolling on retail prices. It was at this time that [Tesco’s Senior Cheese Buyer] said she had not agreed to the £200 cost increase and that further justification was needed before Tesco would consider accepting the increase.

This morning [Tesco’s Senior Cheese Buyer] has scheduled a meeting with her & [Tesco’s Category Director for dairy] for next Monday [6 October 2003] to discuss the cost increase and the rationale behind £200.

She has said that in view of our high growth with Tesco she does not believe that we can justify £200 per Tonne, that we engineered an increase on the introduction of the Caledonian range and that she already has a margin issue on Seriously Strong which will become even greater as a result of this increase.

[...]

However, we are still under threat of losing [...] based upon the current [...] and we need to come up with a solution within the next week. An increase retail price in Asda will help this and I have sent [Tesco’s Senior Cheese Buyer] a proposal based on the £1.72 retail for a 250g pack that we believe Asda may move to. 

[Emphasis added]

5.531. This document clearly records that further discussions occurred between [McLelland’s National Accounts Manager for its Tesco account] and [Tesco’s Senior Cheese Buyer] regarding McLelland’s proposed cheese price increase following their meeting on 4 September 2003 (a conclusion additionally supported by [McLelland’s National Accounts Manager for its Tesco account] email to [Tesco’s Senior Cheese Buyer] on 12 September 2003). The document also clearly records that [McLelland’s National Accounts Manager for its Tesco account] disclosed precise information to [Tesco’s Senior Cheese Buyer] concerning when McLelland understood that Asda would be increasing its cheese retail prices during these further discussions:

‘[Tesco’s Senior Cheese Buyer] rang me last Friday and I told her that it was our understanding that Asda would move retail prices from Monday 29th September.’

[Emphasis added]

754 See document 272 to the SO.
5.532. The date [McLelland’s National Accounts Manager for its Tesco account] disclosed to [Tesco’s Senior Cheese Buyer] as to when Asda would increase its cheese retail prices (29 September 2003) is very significant because it is consistent with the date that [McLelland’s National Account Controller] had reported within McLelland that Asda would move, which the OFT concluded has been disclosed to McLelland by Asda. Accordingly, [McLelland’s National Account Manager for its Tesco account] note demonstrates that McLelland made use of Asda’s cheese retail pricing intentions to influence conditions on the cheese retail market by passing that information to Tesco with a view to persuading Tesco to increase its cheese prices.

5.533. There is no evidence within this document which supports the conclusion that [Tesco’s Senior Cheese Buyer] rejected the information she received regarding Asda’s retail pricing intentions. Accordingly, having received this information, Tesco could not have failed to take it into account when determining its own future pricing behaviour on the cheese retail market. Indeed, the contents of this document demonstrate that [Tesco’s Senior Cheese Buyer] did take the information into account, as she informed [McLelland’s National Accounts Manager for its Tesco account] that Tesco would accept a wholesale price increase based on the information she had been provided by McLelland regarding Asda and thereby did not take an independent pricing decision:

'That being the case [Asda moving its retail prices on 29th September] she [Tesco’s Senior Cheese Buyer] said she would enter her new case costs on Monday / Tuesday to be effective form [sic] [C] October.'

5.534. This clear reliance on the information she had been provided regarding Asda’s retail pricing intentions also supports the conclusion that [Tesco’s Senior Cheese Buyer] did not reject it.

5.535. The OFT notes that it is obviously rational commercial behaviour for a business to wish to be competitive on price with its competitors. Accordingly, it is both reasonable and rational for Tesco not to have wanted to be more expensive than Asda in respect of cheese retail prices. However, it is not acceptable for Tesco to have been reassured by McLelland that Asda would be increasing its retail prices in advance of their implementation (based on disclosures made to McLelland by Asda) and then make its own pricing decisions based, at least in part, on that information (as is demonstrated to have occurred in this piece of evidence – ‘That being the case she said she would enter her new case costs on Monday / Tuesday to be effective form [sic] […] October’). This behaviour is clearly inconsistent with the principle that competitors should determine their prices independently.

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755 See paragraphs 5.513 to 5.515 above.
5.536. The ‘TESCO BRIEFING’ also records that Asda did not move its retail prices in line with McLelland’s disclosure and that this resulted in [Tesco’s Senior Cheese Buyer] informing McLelland that Tesco would not be increasing its cheese retail prices, thereby further supporting the conclusion that Tesco’s willingness to increase its cheese retail prices was conditional upon Asda increasing its retail prices too (and its decision whether it would increase its retail prices was informed by disclosures regarding Asda’s retail pricing intentions):

‘On Tuesday morning I had a discussion with [Tesco’s Senior Cheese Buyer] and told her that Asda had not moved retail prices as expected but that [a retailer] and JS [Sainsbury’s] had started to move and that I still believed Asda would move. At this time [Tesco’s Senior Cheese Buyer] told me that she would not enter her new case costs without evidence of Asda moving on retail prices.’

5.537. The above passage of the ‘TESCO BRIEFING’ further demonstrates the significance of Asda’s retail pricing behaviour to Tesco with [McLelland’s National Accounts Manager for its Tesco account] informing [Tesco’s Senior Cheese Buyer] that he ‘still believed that Asda would move’.

5.538. It is not clear from the evidence whether [his] belief that Asda would still be increasing its cheese retail prices which he communicated to [Tesco’s Senior Cheese Buyer] on Tuesday 30 September 2003 was speculative or based on further information McLelland had received from Asda. Taking into account the wider context (such as the fact that the OFT has concluded that Asda had previously disclosed its retail pricing intentions to McLelland and that McLelland was in discussion with Asda regarding the implementation of wholesale and retail price increases in respect of cheese) the OFT believes it is likely that McLelland had received some form of signal from Asda. However, the OFT does not consider that it needs to draw a conclusion on this point as the surrounding evidence provides strong examples that McLelland did disclose information concerning Asda’s (together with other retailers’) retail pricing intentions to Tesco.

5.539. The OFT has also considered whether the information communicated by [McLelland’s National Accounts Manager for its Tesco account] to [Tesco’s Senior Cheese Buyer] that Asda would increase its cheese retail prices on 29 September 2003 was speculative given that Asda did not, in fact, increase its prices on that date. The OFT has concluded that the information was both credible and originated from Asda and that the reason why the dates may have proved inaccurate was because Asda subsequently changed its mind as to when it would increase its retail prices. This conclusion is based on the fact that 29 September 2003 was the date Asda was reported to be increasing its retail prices in [McLelland’s Logistics Manager] e-mail of 24 September 2003. The OFT also notes that it is not necessary for there to have been a guarantee that Asda would increase its retail prices on these dates; rather, it is sufficient that McLelland had an expectation that Asda would do so – and this was
clearly the case in [McLelland’s Logistics Manager] email.\textsuperscript{758} The OFT also notes that McLelland was clearly sufficiently confident of this information to pass it to Tesco.\textsuperscript{759}

\textit{Correspondence between McLelland and Tesco}

5.540. Further contemporaneous documentary evidence corroborates significant parts of the ‘TESCO BRIEFING’ and shows that [McLelland’s National Account Manager for its Tesco account] provided Tesco with updates on the cheese retail price changes being implemented by competing retailers.

\textit{E-mail from McLelland to Tesco on 30 September 2003}

5.541. On Tuesday 30 September 2003, [McLelland’s National Accounts Manager for its Tesco account] faxed [Tesco’s Senior Cheese Buyer] copies of price labels showing retail price increases to be implemented by [a retailer] and Sainsbury’s.\textsuperscript{760} [McLelland’s National Accounts Manager for its Tesco account] confirmed the extent of the price changes in a separate e-mail on the same day. That e-mail reads:\textsuperscript{761}

\begin{quote}
‘Copy of e-mail as requested.\textsuperscript{762}
I have faxed copies of the [retailer’s] & JS [Sainsbury’s] labels to you (fax no. [C]).
[A retailer] has increased in price by 26p / kilo and JS “Isle of Bute” has increased by 20p / kilo.’
\end{quote}

5.542. The OFT notes that [McLelland’s National Accounts Manager for its Tesco Account] faxed copies of [a retailer’s] and Sainsbury’s price labels showing retail price increases to [Tesco’s Senior Cheese Buyer]. These labels were sent only a day after [the McLelland’s Sales Support Manager] e-mailed colleagues within McLelland to request photocopies of labels demonstrating future retail price increases to be implemented by retailer customers.\textsuperscript{763} McLelland informed the OFT that those labels were likely to have belonged to either [a retailer] and/or Sainsbury’s.\textsuperscript{764} The fact that price labels belonging to both of these retailers were faxed to Tesco the following day supports the OFT’s conclusion that the labels photocopied on 29 September 2003 belonged to both [a retailer] and Sainsbury’s. The evidence has also demonstrated that these labels were photocopied within McLelland on 29 September 2003 in order to be circulated to other retailers to facilitate further cheese retail price increases (‘so that they

\textsuperscript{758} \textit{Argos Limited and Littlewoods Limited v Office of Fair Trading} [2004] CAT 24, at [516] and [531].
\textsuperscript{759} \textit{Argos Limited and Littlewoods Limited v Office of Fair Trading} [2004] CAT 24, at, for example, [595].
\textsuperscript{760} See paragraph 5.518 above.
\textsuperscript{761} See document 273 to the SO.
\textsuperscript{762} The e-mail that has been ‘requested’ was an e-mail from [McLelland’s National Accounts Manager for its Tesco Account] to [Tesco’s Senior Cheese Buyer] dated 12 September 2003 setting out McLelland’s rationale for its proposed wholesale price increase. [McLelland’s National Account Manager for its Tesco account] forwarded his e-mail of 12 September to [Tesco’s Senior Cheese Buyer] (see paragraph 5.506 above).
\textsuperscript{763} See paragraphs 5.518 to 5.527 above.
\textsuperscript{764} See paragraph 5.519 above.
[buyers at retailers] can be encouraged with proof that retailers have moved and expedite price increases across the board'). This e-mail demonstrates that McLelland did use the information in this way by passing it on to Tesco.

5.543. For the reasons stated above, the OFT has concluded that Sainsbury’s disclosed its cheese retail pricing intentions to McLelland in circumstances where it may be taken to have intended, and did in fact foresee, that McLelland would make use of that information to influence conditions on the cheese retail market by passing them on to competing retailers in order to facilitate further retail price increases. The OFT has made no such conclusion in respect of [a retailer] and has not found that [a retailer] infringed the Chapter I prohibition in respect of the 2003 Cheese Initiative.

5.544. There is again no contemporaneous evidence to support the proposition that [Tesco’s Senior Cheese Buyer] either rejected the information received or was in any way uncomfortable in receiving it. Accordingly, having received this information, Tesco could not have failed to take it into account when determining its own future pricing behaviour on the cheese retail market. In fact, the ‘TESCO BRIEFING’ demonstrates that Tesco would have found this information useful because [Tesco’s Senior Cheese Buyer] was recorded as accepting McLelland’s proposal for a cheese cost price increase on the basis that McLelland ‘work to increase retail prices across the market’ – this information would have clearly reassured [Tesco’s Senior Cheese Buyer] that some of its major competitors would be increasing their cheese retail prices. Indeed, given the clear evidence demonstrating the conditional nature of Tesco’s willingness to increase its cheese retail prices, the OFT has concluded that [Tesco’s Senior Cheese Buyer] would have willingly received this information and taken it into account when determining Tesco’s behaviour on the cheese retail market. This behaviour is clearly inconsistent with the principle that competitors should determine their prices independently.

5.545. Further, as a result of her discussions with [McLelland’s National Account Manager for its Tesco account] (as demonstrated by the ‘TESCO BRIEFING’) [Tesco’s Senior Cheese Buyer] would have understood that Sainsbury’s had disclosed its retail pricing intentions pursuant to a McLelland plan to subsidise an increase in its wholesale prices through a co-ordinated cheese retail price increase and therefore may be taken to have known the circumstances under which Sainsbury’s disclosed its retail pricing intentions to McLelland and did, in fact, appreciate that the information was disclosed to it with Sainsbury’s concurrence.

**McLelland e-mail to Tesco on 2 October 2003**

5.546. On 2 October 2003, [McLelland’s National Account Manager for its Tesco account] e-mailed [Tesco’s Senior Cheese Buyer] regarding Sainsbury’s

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765 See paragraphs 5.518 to 5.528 above.
766 See paragraphs 5.518 to 5.528 above.
768 See paragraph 5.548 above. See also paragraphs 5.618 to 5.621 below.
(as well as [a retailer’s] and [a retailer’s]) retail prices in respect of several lines of cheese supplied by McLellan. The information disclosed concerning Sainsbury’s contained a mixture of public domain and private information.

'The attached is a matrix of our pre-pack and deli brands showing the prices across the multiples. I have included the old/current retail and the new retail price where relevant. I will keep this updated as changes become visible and also let you know on any own label moves that we identify.
Give me a call if you want any more information.'

5.547. The attachment provided the following price information.

'PRE-PACK

<table>
<thead>
<tr>
<th>Product</th>
<th>Sainsbury’s</th>
<th>[A retailer]</th>
<th>[A retailer]</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Old Retail</td>
<td>New Retail</td>
<td>Old Retail</td>
</tr>
<tr>
<td>Seriously Strong 250g</td>
<td>£1.79</td>
<td>£1.85</td>
<td>£1.85</td>
</tr>
<tr>
<td>Seriously Strong 500g</td>
<td>£3.49</td>
<td>£3.69</td>
<td>£3.79</td>
</tr>
<tr>
<td>Galloway Coloured 227g (RW)</td>
<td>£6.79</td>
<td>£7.09</td>
<td>£6.79</td>
</tr>
<tr>
<td>Galloway Coloured 454g (RW)</td>
<td>£6.69</td>
<td>£6.99</td>
<td>£6.69</td>
</tr>
<tr>
<td>McLellan Mature Coloured 227g (RW)</td>
<td>£7.29</td>
<td>£7.59</td>
<td>£7.19</td>
</tr>
<tr>
<td>McLellan Mature Coloured 454g (RW)</td>
<td>£7.19</td>
<td>£7.49</td>
<td>£7.09</td>
</tr>
<tr>
<td>Orkney White Mature 227g (RW)</td>
<td>£7.29</td>
<td>£7.59</td>
<td>£7.29</td>
</tr>
<tr>
<td>Arran Coloured 227g (RW)</td>
<td>n/a</td>
<td>n/a</td>
<td>£6.79</td>
</tr>
<tr>
<td>Arran White 227g (RW)</td>
<td>n/a</td>
<td>n/a</td>
<td>£6.79</td>
</tr>
<tr>
<td>Isle of Bute Coloured 227g (RW)</td>
<td>£6.79</td>
<td>£7.09</td>
<td>n/a</td>
</tr>
<tr>
<td>Mull of Kintyre 227g (RW)</td>
<td>n/a</td>
<td>n/a</td>
<td>n/a</td>
</tr>
</tbody>
</table>

RW = Random Weight
All Random Weight packs are price per kilo.'

5.548. In the SO, the OFT provisionally concluded that the information relating to Sainsbury’s was its future retail pricing intentions. However, in its memorandum of material factual inaccuracies on the SO, Sainsbury’s informed the OFT that its retail pricing data suggested that it increased the price of Seriously Strong 250g and 500g on 30 September 2003 and, therefore, that the information relating to Seriously Strong 250g and Seriously Strong 500g may have already been in store by the date of

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769 See document 274 to the SO.
[McLelland’s National Account Manager for its Tesco account] e-mail. However, even if Sainsbury’s Seriously Strong retail price increases were in store by this date, [McLelland’s National Account Manager for its Tesco account] e-mail also disclosed Sainsbury’s retail price increases for a number of other cheese lines (Galloway coloured 227g and 454g, McLelland mature coloured 227g and 454g, Orkney white mature 227g and Isle of Bute coloured 227g). Sainsbury’s did not identify that retail price increases for any of these cheese lines were already in store. Accordingly, the OFT has concluded that McLelland passed information regarding Sainsbury’s future retail pricing intentions to Tesco. In drawing this conclusion, the OFT also notes that an internal McLelland e-mail on 3 October 2003 (that is, the day after this information was disclosed to Tesco), which is presented later in this section, recorded that some Sainsbury’s cheese lines were being ‘held back to work through the stocks’, supporting the conclusion that at least some of the information in [McLelland’s National Account Manager for its Tesco account] e-mail of 2 October 2003 related to Sainsbury’s retail price increases that were not yet in store.

5.549. Further, given that these disclosures were for random weight lines it would have been necessary to sell through stock with existing retail price on the pack before packs with increased prices appeared on the shelf. The fact that new retail prices were only recently being packed (see document 269 to the SO) makes it unlikely that existing stock had already been cleared such that new stock was already on the shelf. In contrast, Seriously Strong was fixed weight, so priced on the shelf, meaning its retail price could be changed more quickly.

5.550. For the reasons stated above, the OFT considers that Sainsbury’s disclosed this information to McLelland in respect of these other cheese lines in circumstances in which it may be taken to have intended and did, in fact, foresee that McLelland would use that information to influence conditions on the cheese retail market by passing it on to competing retailers in order to facilitate further cheese retail price increases.

5.551. In respect of [a retailer] and [a retailer], the OFT is not in possession of any evidence in relation to the circumstances under which either retailer disclosed its cheese retail pricing intentions to McLelland. Accordingly, their disclosures may have been legitimate and therefore the OFT has not made a finding that [a retailer] or [a retailer] infringed the Chapter I prohibition in respect of the 2003 Cheese Initiative.

770 See document 58 to the SSO, at section 5.
771 See document 275 to the SO, at paragraph 5.558 below.
772 See paragraphs 5.503 to 5.505 and 5.524 to 5.527 above.
774 Specifically, that [a retailer] or [a retailer] may be taken to have intended or did, in fact, foresee that McLelland would make use of that information to influence conditions on the cheese retail market by passing it on to other retailers (JJB Sports plc v Office of Fair Trading and Argos Limited and Littlewoods Limited v Office of Fair Trading [2006] EWCA Civ 1318, at paragraphs 91 and 141).
5.552. [McLelland’s National Account Manager for its Tesco account] e-mail of 2 October 2003 demonstrates that McLelland did use Sainsbury’s retail pricing intentions to influence conditions on the cheese retail market by passing it on to Tesco. Having received this information Tesco could not have failed to take it into account when determining its own future pricing behaviour on the cheese retail market.\(^{775}\) Indeed, the content of the ‘TESCO BRIEFING’ shows that the purpose of this disclosure was for Tesco to use the information in this way as it reassured Tesco that its major competitors were increasing their cheese retail prices in order to facilitate a price increase by Tesco.\(^{776}\) In receiving such information, Tesco clearly acted inconsistently with the principle that competitors should determine their prices independently. The OFT has additionally noted that there is no contemporaneous evidence to suggest [Tesco’s Senior Cheese Buyer] rejected this information despite this being at least the third occasion on which she received information regarding a competitor’s cheese retail pricing intentions.

5.553. For the reasons set out above,\(^{777}\) the OFT has also concluded that Tesco may be taken to have known the circumstances under which Sainsbury’s disclosed its cheese retail pricing intentions to McLelland and did, in fact, appreciate that the information was disclosed to it with Sainsbury’s concurrence.\(^{778}\)

Tesco’s representations on the information contained within [McLelland’s National Account Manager for its Tesco account] email of 2 October 2003

5.554. Tesco submitted a witness statement provided by [a senior manager at McLelland] as part of its representations on the SSO. In this statement, [a senior manager at McLelland] stated that he believed that the information contained within the table was the result of in-store price checks – noting that it was the ‘only way we [that is, McLelland] would know what the products are priced at on the deli counter’.\(^{779}\) In other words, [a senior manager at McLelland] effectively stated that McLelland would only have been aware of the cheese retail pricing intentions of its retailer customers in circumstances where there was an operational need (such as for preparing price-marked packs) and that because there was no operational need, McLelland would not have known Sainsbury’s retail pricing intentions in respect of deli counter cheese. However, [a senior manager at McLelland] statement is clearly inconsistent with the surrounding contemporaneous documentary evidence which demonstrates that McLelland staff possessed information regarding the retail pricing intentions of their retailer customers despite the fact there was no operational need for them to possess this information.


\(^{776}\) See paragraphs 5.529 to 5.537 above.

\(^{777}\) See paragraphs 5.544 to 5.545 above.


\(^{779}\) See Annexe C of Tesco’s second representations on the SSO.
5.555. First, documentary evidence presented below demonstrates that McLelland was aware of Asda’s retail pricing intentions in respect of the Seriously Strong brand of cheese. Seriously Strong is sold by fixed weight and is priced on the shelf rather than on its packaging – meaning that there was no operational need for McLelland to have been in possession of this information.

5.556. Second, documentary evidence presented above in relation to the 2002 Cheese Initiative has shown that some retailers disclosed their retail pricing intentions to processors (including to McLelland) for cheese lines where there was no operational need for them to do so. In particular, an internal McLelland e-mail dated 16 October 2002 demonstrates that McLelland had received information concerning Sainsbury’s cheese retail pricing intentions in respect of a number of different cheese lines including deli lines of cheese\(^{780}\) – the same lines that [a senior manager at McLelland] said McLelland would only know from information in the public domain. A subsequent e-mail from McLelland to Tesco dated 21 October 2002 demonstrated that McLelland passed this information (including information relating to Sainsbury’s deli cheese retail pricing intentions) to Tesco prior to implementation.\(^{781}\)

5.557. The OFT has therefore concluded that the contemporaneous documents are a more credible account of events than [a senior manager at McLelland] statement given the clear record of events that were contained within the documents and the discrepancy between them and [a senior manager at McLelland] later witness statement.

*Internal McLelland e-mail on 3 October 2003*

5.558. An internal McLelland e-mail exchange dated 3 October 2003 provides a summary of the status of retail price increases across a number of retailers. The e-mail shows that, although Sainsbury’s cheese retail price increases were effective on 1 October 2003, some lines were held back in order to sell through existing stock which was priced at the lower level, thereby supporting the OFT’s conclusion that the information passed to Tesco regarding Sainsbury’s cheese retail prices on 29 September 2003 and some of the information passed to Tesco on 2 October 2003 was Sainsbury’s future pricing information.\(^{782}\) The e-mail exchange also demonstrates that Tesco had yet to decide whether to increase its retail prices. The first e-mail in the exchange was sent by [McLelland’s Logistics Manager] to a number of colleagues. [McLelland’s Logistics Manager] wrote:

> I have attached a control sheet detailing the customer details on the October price increase.  
> Sales  
> Can you as a matter of urgency advise on the dates for the remaining [sic] customers?  
> [C]

\(^{780}\) See document 178 to the SO.  
\(^{781}\) See document 179 to the SO.  
\(^{782}\) See paragraphs 5.546 to 5.548 above.
Customer | Customer | Salesman | Date of Increase | Date of Increase | Efacs | Comments | Code | Branded | Own Label | Updated | 
<table>
<thead>
<tr>
<th></th>
<th></th>
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<td>[an employee at McLelland]</td>
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<tr>
<td>M114</td>
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<td>[an employee at McLelland]</td>
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<tr>
<td>F101</td>
<td>[a retailer]</td>
<td>[an employee at McLelland]</td>
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<tr>
<td>U100</td>
<td>[a retailer]</td>
<td>[an employee at McLelland]</td>
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<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S105</td>
<td>[a retailer]/[a retailer]</td>
<td>[an employee at McLelland]</td>
<td>20 October 2003</td>
<td>13 October 2003</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>N108</td>
<td>[a retailer]</td>
<td>[an employee at McLelland]</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S107</td>
<td>Sainsbury [McLelland’s National Account Manager for its Sainsbury’s account]</td>
<td>01 October 2003</td>
<td>01 October 2003</td>
<td>30/09/03</td>
<td>Some product held back to work through the stocks</td>
<td>R101</td>
<td>[a retailer]/[a retailer]</td>
<td>[an employee at McLelland]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>S106</td>
<td>[a retailer]</td>
<td>[an employee at McLelland]</td>
<td>28 September 2003</td>
<td>28 September 2003</td>
<td>26/09/03</td>
<td>[an employee at McLelland] advised that we could continue supplying the old retail stocks. There were some product [sic] held back to later dates.</td>
<td>I107/B115</td>
<td>[a retailer]/[a retailer]</td>
<td>[an employee at McLelland]</td>
<td></td>
</tr>
<tr>
<td>A123</td>
<td>Asda [an employee at McLelland]</td>
<td></td>
<td></td>
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<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>A109</td>
<td>M118/N111</td>
<td>[a retailer]</td>
<td>[an employee at McLelland]</td>
<td>13 October 2003</td>
<td>20 October 2003</td>
<td>Price rise excludes deli at the moment</td>
<td>L103</td>
<td>[a retailer]</td>
<td>[an employee at McLelland]</td>
<td>19 October 2003</td>
</tr>
<tr>
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<td>[an employee at McLelland]</td>
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<td></td>
<td></td>
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</tr>
<tr>
<td>F107</td>
<td>[a retailer]</td>
<td>[an employee at McLelland]</td>
<td></td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>T102</td>
<td>Tesco [McLelland’s National Account Manager for its Tesco account]</td>
<td>Small Customers 13 October 2003</td>
<td></td>
<td></td>
<td></td>
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<td></td>
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<td></td>
<td></td>
</tr>
</tbody>
</table>

[Emphasis added]

5.559. [McLelland’s National Account Manager for its Tesco account] responded to [McLelland’s Logistics Manager] e-mail on the same day (3 October 2003) explaining that 'Tesco will be confirmed next week, hopefully'.

McLelland e-mail to Tesco on 7 October 2003

5.560. On 7 October 2003, [McLelland’s National Account Manager for its Tesco account] e-mailed [Tesco’s Senior Cheese Buyer] an updated version of the spreadsheet he had sent to her on 2 October 2003. This spreadsheet included information concerning Asda’s retail pricing intentions on a number of lines of cheese supplied to it by McLelland in addition to the information that had been previously disclosed to Tesco by McLelland in respect of [a retailer], [a retailer] and Sainsbury’s. The covering e-mail is set out below:

'Please find attached an updated spreadsheet including the new retail prices that Asda will run on McLelland Random Weight branded lines. The only Asda label line we do is Extra Special Mull of Kintyre 250g where the retail price has moved from £1.48 to £1.68."

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783 See document 275 to the SO.
784 Ibid.
785 See document 274 to the SO, at paragraphs 5.546 to 5.547 above.
Please give me a call when you are back at your desk to discuss your own label position and our new cost price schedule.\textsuperscript{786}

[Emphasis added]

5.561. The following table provides an excerpt of the spreadsheet attached to [McLelland’s National Account Manager for its Tesco account] e-mail with entries for old and new retail prices for both Tesco and Asda. With the exception of McLelland’s Seriously Strong line, the column designated to Tesco’s ‘New Retail’ prices was left blank. By contrast Asda’s ‘New Retail’ price column had been completed with details of new price levels not only for Seriously Strong, but also for various other ‘pre-pack’ (Galloway Coloured, McLelland Mature Coloured, Orkney White Mature and Arran Coloured) and ‘deli’ (McLelland Mature and Arran Mature) cheese lines.

\textsuperscript{786} See document 276 to the SO.

\begin{center}
\begin{tabular}{|c|c|c|c|c|}
\hline
\textbf{Product} & \textbf{Tesco} & \textbf{Asda} & \textbf{Tesco} & \textbf{Asda} \\
\hline
 & Old Retail & New Retail & Old Retail & New Retail \\
\hline
Seriously Strong 250g & £1.52 & £1.71 & £1.52 & £1.71 \\
Seriously Strong 500g & £3.45 & £3.60 & n/a & n/a \\
Galloway Coloured 227g (RW) & £6.79 & £6.79 & £6.98 & \textbf{\ldots} \\
Galloway Coloured 454g (RW) & £6.69 & £6.69 & £6.90 & \textbf{\ldots} \\
McLelland Mature Coloured 227g (RW) & £7.29 & £6.89 & £7.08 & \textbf{\ldots} \\
McLelland Mature Coloured 454g (RW) & £7.19 & £6.79 & £7.00 & \textbf{\ldots} \\
Orkney White Mature 227g (RW) & £7.29 & £6.89 & £7.08 & \textbf{\ldots} \\
Arran Coloured 227g (RW) & £6.79 & £6.79 & £6.98 & \textbf{\ldots} \\
Arran White 227g (RW) & £6.79 & n/a & n/a & \textbf{\ldots} \\
isle of Bute Coloured 227g (RW) & £6.89 & n/a & n/a & \textbf{\ldots} \\
Mull of Kintyre 227g (RW) & £7.29 & n/a & n/a & \textbf{\ldots} \\
\hline
\end{tabular}
\end{center}

\textit{RW} = Random Weight
All Random Weight packs are price per kilo.

DELI

\begin{center}
\begin{tabular}{|c|c|c|}
\hline
\textbf{Product} & \textbf{Tesco} & \textbf{Asda} \\
\hline
\end{tabular}
\end{center}

\textsuperscript{786} See document 276 to the SO.
5.562. It is evident from the language used in the covering e-mail that the information relating to Asda’s ‘New Retail’ were its future retail prices in respect of at least the random-weight lines of cheese that are referred to. In particular, the OFT notes that [McLelland’s National Account Manager for its Tesco account] stated that this information was the ‘new retail prices that Asda will run on McLelland Random Weight branded lines’ [emphasis added]. The use of the words ‘will run’ clearly indicates that the retail prices were those Asda would implement at some point in the future rather than being retail prices that were already visible in-store. The OFT notes that Asda has not submitted any factual inaccuracies on the OFT’s proposed conclusion in this regard. Additionally, as with Sainsbury’s random weight lines, it is likely that Asda's random weight retail price increases would not have appeared in store until the lower priced stock had been sold through.

5.563. In disclosing its cheese retail pricing intentions to McLelland, Asda, at the very least, substantially reduced uncertainty as to the conduct on the cheese retail market to be expected on its part by disclosing the course of conduct that it had decided to adopt or was contemplating adopting on that market.\(^\text{787}\)

5.564. The OFT has concluded that Asda disclosed its cheese retail pricing intentions to McLelland in circumstances where it may be taken to have intended and did, in fact, foresee that McLelland would make use of that information to influence prices on the cheese retail market by passing that information on to other retailers in order to facilitate a wider price increase.\(^\text{788}\) This conclusion is based on by evidence presented below which will demonstrate that Asda staff were aware that they were acting as part of a co-ordinated market move when they decided to increase Asda’s cheese retail prices.\(^\text{789}\)


\(^{789}\) See paragraphs 5.589 to 5.613 below.
5.565. [McLelland’s National Account Manager for its Tesco account] e-mail of 7 October 2003 demonstrates that McLelland did use Asda’s cheese retail pricing intentions to influence conditions on the cheese retail market in order to facilitate further cheese retail price increases by passing it to Tesco.\(^{790}\) In its representations on the SO, Tesco also recognised that the information in [McLelland’s National Account Manager for its Tesco account] e-mail on 7 October 2003 was a ‘further inappropriate communication’.\(^{791}\)

5.566. Having received this information, Tesco could not have failed to take it into account when determining its own future pricing behaviour on the cheese retail market.\(^{792}\) Indeed, the surrounding evidence demonstrates that Tesco would not increase its cheese retail prices without reassurance that Asda was also increasing its retail prices.\(^{793}\) Further, subsequent evidence (in the form of an e-mail from Tesco to McLelland on 9 October 2003) will demonstrate that Tesco did take this information into account when determining its pricing behaviour on all lines of the cheese that were common to it and Asda.\(^{794}\) This behaviour is clearly inconsistent with the principle that competitors should determine their prices independently. Additionally, the OFT notes that this was at least the fourth occasion on which [Tesco’s Senior Cheese Buyer] was recorded as receiving information concerning Tesco’s competitors retail pricing intentions and there is no contemporaneous evidence that she rejected this information or was uncomfortable receiving it.

5.567. Moreover, taking into account the context in which it received this information,\(^{795}\) the OFT has concluded that Tesco may be taken to have known the circumstances in which Asda disclosed its cheese retail pricing intentions to McLelland and did, in fact, appreciate that the information was disclosed to it with Asda’s concurrence.\(^{796}\)

**Tesco’s representations on McLelland’s e-mail of 7 October 2003**

5.568. In its representations on the SSO, Tesco submitted that the OFT had failed to put forward evidence to substantiate its allegation that the retail prices provided in the table sent by McLelland to Tesco had been disclosed to McLelland by Asda.\(^{797}\)

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\(^{790}\) *JJB Sports plc v Office of Fair Trading* and *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2006] EWCA Civ 1318, at paragraphs 91 and 141.

\(^{791}\) See document 62 to the SSO, at paragraph 8.29(d). The OFT considers Tesco’s submission that it rejected this information below.

\(^{792}\) Case C-49/92P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, at paragraph 121.

\(^{793}\) See ‘TESCO BRIEFING’ above, which shows [Tesco’s Senior Cheese Buyer] initially agreed that Tesco would increase its cheese retail prices when she understood that Asda would be increasing its retail prices on 29 September and then refused to do so when informed that Asda would not, in fact, be doing so.

\(^{794}\) See paragraphs 5.571 to 5.578 below.

\(^{795}\) See paragraphs 5.498 to 5.501 and 5.529 to 5.537 above.

\(^{796}\) *JJB Sports plc v Office of Fair Trading* and *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2006] EWCA Civ 1318, at paragraphs 91 and 141.

\(^{797}\) See Tesco’s second representations on the SSO, at paragraph 5.23.
5.569. The OFT has carefully considered this representation and concluded that it is not consistent with the evidence in its possession. In particular, the OFT notes that the language [McLelland’s National Account Manager for its Tesco account] uses in his cover email is certain in form (he states that these are prices Asda ‘will run’). The OFT also notes that to the extent these were random weight lines, Asda would have needed to disclose this information to McLelland in order for McLelland to print the labels.

5.570. Additionally, in its representations on the SO, Tesco submitted that it did not take account of Asda’s information (or other future pricing information it received during the course of the 2003 Cheese Initiative)798 and that it rejected that information.799 Because of the generic nature of these representations they are considered below at the end of the evaluation of the evidence.

Tesco e-mail to McLelland on 9 October 2003

5.571. On 9 October [Tesco’s Senior Cheese Buyer] e-mailed a list of retail price changes to [McLelland’s National Account Manager for its Tesco account] with the request that they were to be packed ‘ASAP’. The e-mail reads as follows:

'I have amended some of the suggested RSP’s [retail selling prices] – for ease I have highlighted them in RED, please pack to these RSP’s ASAP. – thanks

As for Costs, as clearly pointed out at our meeting on Monday [6 October 2003] we will increase your cost price by £200T, it is our wish that this is passed back to the farmers but as they are your costs you must do as you see fit. I do not foresee any further cost increases being needed by your business until potentially at the next round of milk price negotiations in Spring 2004

Costs on Seriously Strong PRE PACKS will move on [C] October Costs on all other McLelland lines (with the EXCEPTION of SS Deli as I need to discuss) will move on [C] October.800

[Emphasis added]

5.572. An excerpt of the table attached to [Tesco’s Senior Cheese Buyer] e-mail is set out below:

<table>
<thead>
<tr>
<th>Product description</th>
<th>Current Retail Price</th>
<th>New Retail Price</th>
<th>New Cost Effective From</th>
</tr>
</thead>
<tbody>
<tr>
<td>SERIOUSLY STRONG COL P/PACKS 20X250G</td>
<td>£1.63</td>
<td>£1.71</td>
<td>12/10/2003</td>
</tr>
<tr>
<td>SERIOUSLY STRONG COLOURED P/P 500G/5KG</td>
<td>£3.45</td>
<td>£3.60</td>
<td>12/10/2003</td>
</tr>
<tr>
<td>SERIOUSLY STRONG WHITE P/PACKS 20X250G</td>
<td>£1.52</td>
<td>£1.71</td>
<td>12/10/2003</td>
</tr>
<tr>
<td>SERIOUSLY STRONG WHITE P/P 500G/5KG</td>
<td>£3.45</td>
<td>£3.60</td>
<td>12/10/2003</td>
</tr>
<tr>
<td>CABOC DOUBLE CREAM CHEESE 12X110G</td>
<td>£1.69</td>
<td></td>
<td>19/10/2003</td>
</tr>
</tbody>
</table>

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798 See document 62 to the SSO, at paragraphs 8.29 to 8.30.
800 See document 277 to the SO.
<table>
<thead>
<tr>
<th>Product Description</th>
<th>Price 1</th>
<th>Price 2</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>GALLOWAY COL P/P 227G/9.07KG</td>
<td>£6.79</td>
<td>£6.98</td>
<td>19/10/2003</td>
</tr>
<tr>
<td>GALLOWAY COL P/P 454G/9.07KG</td>
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<td>19/10/2003</td>
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<tr>
<td>GALLOWAY COL CHEDDAR 6X2.5KG</td>
<td>£5.44</td>
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<tr>
<td>MCELLELLAND MATURE COLOURED 8X2.5KG</td>
<td>£6.19</td>
<td>...</td>
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<tr>
<td>MCELLELLAND COLOURED MATURE 454G/9.07KG</td>
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</tr>
<tr>
<td>MCELLELLAND COLOURED MATURE 227G/9.07KG</td>
<td>£7.29</td>
<td>£7.08</td>
<td>19/10/2003</td>
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<tr>
<td>TESCO CALEDONIAN EX MAT WHITE</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TESCO CALEDONIAN EX MAT WHITE 300G/12KG</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TESCO SCOTS COL MED 300G/12KG</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SMP MULL OF KINTYRE TRUCKLE 12X380GM</td>
<td>£2.99</td>
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<tr>
<td>ORKNEY COLOURED MATURE 8X2.5KG CHEDDAR</td>
<td>£7.04</td>
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<td>ORKNEY COLOURED MATURE 227G/9.07KG PREPACK</td>
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<td>...</td>
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<tr>
<td>ORKNEY WHITE MATURE 227G/9.07KG PREPACK</td>
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<td>GALIC SOFT CHEESE 12X110GM</td>
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<tr>
<td>HOWGATE SCOTTISH BRIE 1X1.4KG</td>
<td>£7.45</td>
<td>...</td>
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<tr>
<td>SMP ISLE OF BUTE 20X227G PREPKACS</td>
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<td>£7.09</td>
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</tr>
<tr>
<td>SMP MULL OF KINTYRE COL P/P 10X500G</td>
<td>£3.65</td>
<td>...</td>
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<tr>
<td>SMP MULL OF KINTYRE 8X2.5KG</td>
<td>£6.29</td>
<td>...</td>
<td>19/10/2003</td>
</tr>
<tr>
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<td>£6.29</td>
<td>...</td>
<td>19/10/2003</td>
</tr>
<tr>
<td>SMP MULL OF KINTYRE 20X227G PREPKACS</td>
<td>£7.29</td>
<td>£7.69</td>
<td>19/10/2003</td>
</tr>
<tr>
<td>HOWGATE ST ANDREWS CHEESE 2.4KG</td>
<td>£8.19</td>
<td>...</td>
<td>19/10/2003</td>
</tr>
<tr>
<td>SERIOUSLY STRONG COLOURED 8X2.5KG</td>
<td>£6.49</td>
<td>...</td>
<td>19/10/2003</td>
</tr>
<tr>
<td>SERIOUSLY STRONG WHITE 8X2.5KG</td>
<td>£6.49</td>
<td>£6.83</td>
<td>19/10/2003</td>
</tr>
<tr>
<td>TESCO CALEDONIAN EX MAT COL 300G/12KG</td>
<td>£7.86</td>
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<td>TESCO CALEDONIAN EX MAT COL 600G/12KG</td>
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<tr>
<td>TESCO SCOTS COL MILD 300G/12KG</td>
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<td>19/10/2003</td>
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<td>TESCO CALEDONIAN MAT COL 300G/12KG</td>
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<td>19/10/2003</td>
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<tr>
<td>TESCO SCOTS COL MED 300G/12KG</td>
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<td>£4.82</td>
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<td>TESCO SCOTS COL MED 600G/12KG</td>
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<td>TESCO CALEDONIAN MAT WHITE 300G/12KG</td>
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<tr>
<td>TESCO CALEDONIAN MAT WHITE 600G/12KG</td>
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<td>TESCO CALEDONIAN EX MAT WHITE 300G/12KG</td>
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<td>£8.02</td>
<td>19/10/2003</td>
</tr>
<tr>
<td>TESCO GENERIC COL MATURE 1KG/12KG</td>
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</tr>
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<td>£4.58</td>
<td>£4.80</td>
<td>19/10/2003</td>
</tr>
</tbody>
</table>

5.573. This e-mail demonstrates that Tesco had decided to implement retail price increases in respect of various cheese lines supplied to it by McLelland and that Tesco disclosed this information to McLelland. This information was disclosed by Tesco only two days after [McLelland’s National Account Manager for its Tesco account] had passed specific information concerning Asda’s retail pricing intentions to Tesco. The OFT has concluded, taking into account the fact that the surrounding contextual evidence has demonstrated that Tesco made its willingness to increase its cheese wholesale and retail prices conditional upon Asda increasing its retail prices, that Tesco took the information it received from McLelland.

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801 See paragraphs 5.560 to 5.567 above.
802 See paragraphs 5.498 to 5.501 and 5.532 to 5.534 above.
regarding Asda’s retail pricing intentions into account when determining its own future behaviour on the cheese retail market.

5.574. This conclusion is strongly supported by a comparison of the cheese product lines that Tesco committed to increase in this e-mail to the product lines for which [McLelland’s National Account Manager for its Tesco account] disclosed Asda’s retail pricing intentions to Tesco on 7 October 2003. Tesco had decided to increase its retail prices for Galloway Coloured 227g and 454g; McLelland Mature Coloured 227g and 454g; Orkney White Mature 227g; and Arran Coloured 227g exactly in line with Asda’s future retail prices on those cheese lines.

5.575. [Tesco’s Senior Cheese Buyer] e-mail of 9 October 2003 also demonstrates that Tesco disclosed its cheese retail pricing intentions to McLelland.

5.576. In disclosing its cheese retail pricing intentions to McLelland Tesco, at the very least, substantially reduced uncertainty as to the conduct on the cheese retail market to be expected on its part by disclosing the course of conduct that it had decided to adopt or contemplate adopting on that market.\(^{803}\)

5.577. Moreover, taking into account the context within which Tesco disclosed its cheese retail pricing intentions,\(^ {804}\) the OFT has concluded that Tesco may be taken to have intended and did, in fact, foresee that McLelland would use its cheese retail pricing intentions to influence conditions on the cheese retail market by passing it on to other retailers in order to facilitate the implementation of further cheese retail price increases by other retailers.\(^ {805}\) In this respect, it would have been clear to [Tesco’s Senior Cheese Buyer] that McLelland was acting as an intermediary for the disclosure of cheese retail pricing intentions between competing retailers as she had received information on Tesco’s competitors’ future behaviour on at least four occasions. Moreover, during the course of this initiative, [Tesco’s Senior Cheese Buyer] had disclosed to McLelland that Tesco’s willingness to increase its cheese retail prices was conditional on Asda also increasing its retail prices.

5.578. Evidence presented below will demonstrate that McLelland did use Tesco’s cheese retail pricing intentions to influence conditions on the cheese retail market in order to facilitate further cheese retail price increases by passing it to Asda.\(^ {806}\)

5.579. The OFT has also noted that there is no suggestion that [Tesco’s Senior Cheese Buyer] (who from her own experience during both the 2002 and, pertinently, the 2003 Cheese Initiatives would have been aware of the

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\(^{804}\) See paragraphs 5.544 to 5.545 above.


\(^{806}\) See paragraphs 5.589 to 5.613 below.
fact that McLelland was prepared to disclose the retail pricing intentions of one retailer to another in order to co-ordinate a cheese retail price increase) requested that [McLelland’s National Account Manager for its Tesco account] treat Tesco’s retail pricing intentions as confidential. These points are particularly relevant when considering Tesco’s representations on the infringement allegations the OFT put forward in both the SO and SSO which are evaluated below.

Tesco’s representations on its email to McLelland of 9 October 2003

Decision to increase Seriously Strong prices was a unilateral commercial decision

5.580. In its representations on the SO, Tesco submitted that its retail pricing data demonstrated that it implemented retail price increases for Seriously Strong 250g White and Coloured lines in advance of receiving Asda’s Seriously Strong retail pricing intentions and that Tesco, therefore, did not take Asda’s Seriously Strong retail pricing intentions into account. 807

5.581. However, this initial retail price increase is only part of the story. Tesco also acknowledged that it further increased its Seriously Strong 250g retail price on 8 October 2003 from £1.60 to £1.71 – this was the day after McLelland passed it Asda’s Seriously Strong retail pricing intentions. Although Tesco accepted that this further retail price increase in respect of Seriously Strong White 250g took place after [McLelland’s National Account Manager for its Tesco account] 7 October 2003 e-mail, it submitted that increase was a unilateral decision to align prices of the white and coloured products based on a commercial assessment of how best to position the products rather than the information about Asda’s retail pricing intentions. 808

5.582. The OFT has carefully considered this representation and does not consider it to be supported by the evidence cited above, which demonstrates that Tesco decided to increase its retail price on Seriously Strong White 250g having received information regarding Asda’s retail pricing intentions prior to Asda implementing them in-store.

5.583. Further, earlier contemporaneous documentary evidence has demonstrated that Tesco was concerned about the margin it was achieving on the Seriously Strong product line generally and that this was itself a result of its decision to match an Asda price discount on this line. This clearly demonstrates that Tesco was concerned about its pricing position relative to Asda on this line. 809 Accordingly, whilst Tesco may well have chosen to align its prices on its Seriously Strong lines, the

807 Tesco’s pricing data suggests that it had increased the retail price of Seriously Strong Coloured 250g (from £1.63 to £1.71) and of Seriously Strong White 250g (from £1.52 to £1.60) on 6 October 2003 – the day before passed Asda’s Seriously Strong retail pricing intentions to Tesco (see document 62 to the SSO, at paragraph 8.31).

808 See document 62 to the SSO, at paragraph 8.31.

809 This is particularly the case when considered in conjunction with the ‘TESCO BRIEFING’, which demonstrates that Tesco was concerned about Asda’s retail price position on cheese and changed its own retail pricing decision twice having been informed of Asda’s intentions.
evidence supports the conclusion that knowledge that Asda would also be increasing its prices to this level would have informed this decision.

5.584. The OFT additionally notes that this sequence of events, with both Asda and Tesco increasing their Seriously Strong retail prices to £1.71, is also consistent with McLelland’s proposal in [McLelland’s National Account Manager for its Tesco account] internal e-mail of 16 September 2003.\footnote{See document 264 to the SO, at paragraph 5.507 above.} In that e-mail, [McLelland’s National Account Manager for its Tesco account] set out that the ‘ideal scenario is that Asda can be persuaded to increase the retail price to maintain their margin, giving a new retail price of £1.71’.

5.585. Further, the claim that Tesco took a unilateral decision in respect of its cheese retail prices is clearly inconsistent with a significant body of contemporaneous documentary evidence which demonstrates that Tesco was only prepared to increase its cheese retail prices if its competitors also increased their retail prices and that Tesco had received information concerning its competitors’ cheese retail pricing intentions on a number of occasions. This behaviour is clearly inconsistent with the principle that competitors should determine their prices independently.

Disclosure of its random weight retail pricing intentions was legitimate commercial behaviour

5.586. In its representations on the SO and SSO, Tesco stated that [Tesco’s Senior Cheese Buyer] disclosure to McLelland of the retail price increases that Tesco wished to implement on random weight products was legitimate because McLelland required the information in order to pack and label the cheese.\footnote{See document 62 to the SSO, at paragraphs 8.5(c) and 8.5(d). See also Tesco’s second representations on the SSO, at paragraphs 5.10 to 5.11.}

5.587. The OFT has carefully considered this representation and has concluded it is not supported by the contextual evidence surrounding the disclosure which demonstrates that Tesco understood it was increasing its cheese retail prices as part of a co-ordinated market move which also involved increases being implemented by its competitors. Accordingly, whether or not there was a commercial need for Tesco to inform McLelland of its decision to increase its random weight cheese retail prices, the decision to increase these prices in the first place was the result of co-ordination rather than independent action.

5.588. The OFT additionally considers it is significant that despite being aware that McLelland was acting in this way (and with supposedly having raised reservations about those actions with senior McLelland staff) [Tesco’s Senior Cheese Buyer] did not refer to, let alone highlight, the need for McLelland to keep the information she had disclosed as confidential and nor did she refer to any conversation at which any reservations were raised. More generally, in its representations on both the SO and the SSO, Tesco represented that contractual terms\footnote{See document 62 to the SSO, at paragraph 2.81(b).} and e-mail footers\footnote{See document 62 to the SSO, at paragraph 2.81(b).}
clearly requested that McLelland kept its pricing information confidential. The OFT considers this representation below. However, in the context (where Tesco had received significant information regarding its competitors retail pricing intentions), Tesco and [Tesco’s Senior Cheese Buyer] would clearly have known McLelland was acting as an intermediary for the disclosure of this information in order to co-ordinate and facilitate price increases and, in these circumstances, it is not sufficient to rely on this type of clause, especially when Tesco apparently willingly received this information.

Internal Asda e-mails on 10, 22 and 23 October 2003

5.589. A series of internal Asda e-mails, dated 10, 22 and 23 October 2003, demonstrate that Asda clearly understood that it was acting as part of a wider market move when increasing its own cheese retail prices and therefore its own disclosures of retail pricing information to McLelland (which was then passed on to Tesco) need to be considered in light of this understanding.

5.590. On 10 October 2003 [Asda’s Cheese Buyer] sent an e-mail to [Asda’s Dairy Business Unit Director], providing him with information [Asda’s Cheese Buyer] had concerning Tesco’s retail prices for a number of cheese lines:

‘Further update below.

Retails
Tesco have now moved to increase retails on OL [own label]. Value and Territorials have moved between 23p and 29p per kg and I have line detail. Cheddar has moved on average 35p per kg though I have no visibility on exact prices. These packs should be instore in c. 10 days time. On balance the extent of their price changes suggests they have maintained margin % across the cheese category.

We have moved on brands by an average of 20p per kg and I have sent instructions to packers to move on Smartprice and Territorials in line with this change. I’ll advise suppliers when I return on Thursday the revised retails on Cheddar – in the meantime we will continue to keep the price block on pack blank. Prices on the system will change in c.4weeks time when we are clear all old-priced stock is through the chain. As discussed we’ll review prices in 4wks time and assess our competitive position then.\(^\text{815}\)

5.591. On 22 October 2003, [Asda’s Cheese Buyer] sent a further e-mail to [Asda’s Business Unit Director], updating him and confirming that some of Tesco’s own label cheese retail price increases were becoming visible in its stores. [Asda’s Cheese Buyer] reported:

‘Further update and re-cap below.

\(^{813}\) See Tesco’s second representations on the SSO, at paragraph 2.15.  
\(^{814}\) Copied to a number of Asda staff including [Asda’s Business Unit Director], [Asda’s Category Manager for Dairy] and [Asda’s Milk and Cream Buyer].  
\(^{815}\) See document 278 to the SO.
Retail moves as before …

**Retails**

Tesco have now moved with increased retails through their entire range of British cheeses. Price increases vary from 23p per kg on Value to 39p per kg on OL. These packs are now filtering through to stores. As before, they have generally sought to maintain % across the cheese category. This is now being reviewed now they have had sight of our price increases in-store, eg. all branded prices – where they had moved c.30p per kg – have now been re-aligned back to match our 20p increase. So, at least for a few weeks we’ve managed a small gap!

**JS** have now moved up 20p per kg on OL.

[A retailer] have moved up another 20p per kg as well, even after the gross increases they put through early September.

[A retailer] have moved up 20p per kg.

[A group of retailers] have indicated they will re-align to the revised ASDA Smartprice levels.

I’ve seen no evidence in stores yet that [a retailer] have moved to align prices though understand they will do so – certainly in the background they have been moving prices up on lines where they were cheaper than ASDA so it is fair to assume they’ll move in line.

**For us** – we have moved on brands by an average of 20p per kg.

Smartprice moved by similar amounts and is now in-store. Territorials and core Cheddar lines are now being re-priced similarly and this stock will hit stores in the next few days.

System scanning prices are being kept at the current non-increased levels until 10 November. This gives us time to ensure all the old lower priced stock is out of stores, buys time until we are clear on [a retailer’s] move and gives a strong enough signal that we have no intention of holding the market back.

Before buttons are finally pushed on the system to effect the 10 November change I’ll run through a WAS/NOW pricing matrix so we are all clear our pricing position is not undermined.

**Costs**

As before we are currently paying an additional £200 per tonne on branded lines and now on the vast majority of OL business.

[Emphasis in underlining added, emphasis in bold in original]

5.592. Finally, on 23 October 2003 [Asda’s Cheese Buyer for Deli] sent an e-mail to [Asda’s Dairy Business Unit Director], copying in a number of Asda staff including [Asda’s Cheese Buyer], in which she provided an update on deli cheese price increases:

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816 See document 279 to the SO.
‘The position on deli is fairly similar [to the position outlined in [Asda’s Cheese Buyer’s] e-mails], with only [a retailer] left to move retails, although, as on prepack, the view is that they will move imminently. Therefore, where it has been feasible, we have moved retails up by 20p/kg either where [a retailer] do not stock the line, or we were significantly cheaper already.

Cost increases have been agreed in principle with all British Cheese suppliers. The cheddar [sic] have received the £200pmt increases over the last [...] weeks.

Territorials, Stiltons & blended cheeses will start to move from this weekend over the next [...] weeks.817

5.593. Paragraphs 5.513 to 5.514 and 5.560 to 5.562 above demonstrate that Asda disclosed its cheese retail pricing intentions to McLelland and that McLelland made use of that information by passing it to Tesco with the aim of influencing Tesco’s pricing behaviour on the cheese retail market. This series of internal Asda emails provide evidence regarding the circumstances in which Asda would have disclosed this information to McLelland and demonstrate that Asda may be taken to have intended or did in fact foresee that McLelland would make use of this information to influence conditions on the cheese retail market by passing it on to other retailers.

5.594. These emails clearly demonstrate that Asda understood that it was increasing its cheese retail prices as part of a co-ordinated market-wide cheese retail price increase which also involved its competitors increasing their retail prices. For example, in his e-mail on 22 October 2003, [Asda’s Cheese Buyer] set out the steps that Asda had taken to implement retail price increases and explained that those steps would ‘buy [...] time’ until [a retailer] had increased its retail prices and give a ‘strong enough signal that we [Asda] have no intention of holding the market back’. The fact that Asda was keen (and believed it was necessary) to send such a signal to the market demonstrates that it considered that it was increasing its retail prices as part of a wider market move and is clearly inconsistent with the principle that competitors should determine their prices independently.818

5.595. The emails additionally demonstrate that Asda’s willingness to increase its cheese retail prices was conditional on its competitors also increasing their prices. This is demonstrated by the fact that Asda put in place contingency steps to ‘buy... time’ until [a retailer] increased its cheese retail prices. Although there is no direct evidence that this conditionality was communicated by Asda to McLelland, the OFT has concluded that in the circumstances of this pricing initiative that such communication probably occurred.

5.596. Further, these emails also demonstrate that Asda received information regarding Tesco’s cheddar retail pricing intentions – further demonstrating

817 Ibid.
818 This is further supported by the fact that [Asda’s Cheese Buyer] recorded that he had ‘sent instructions to packers to move on Smartprice and Territorials in line with this change’.
Asda’s awareness that it was acting as part of a co-ordinated market move:

‘Cheddar has moved on average 35p per kg though I have no visibility on exact prices. These packs should be instore in c. 10 days time.’

[Emphasis added]

5.597. Tesco was not the only one of Asda’s competitors from which [Asda’s Cheese Buyer] received information in respect of future retail pricing intentions. He also understood [a retailer] would be moving to align prices and that [a group of retailers] had ‘indicated they will re-align to the revised ASDA Smartprice levels’, while [Asda’s Cheese Buyer for Deli] also had received information regarding [a retailer’s] deli cheese retail pricing intentions.

5.598. The OFT has concluded that Asda received at least some of the information it possessed regarding Tesco’s cheddar retail pricing intentions from McLelland, therefore meaning it would have understood that McLelland was acting as an intermediary for the disclosure of retail pricing intentions between competing retailers, and set out its reasons for this conclusion below.

5.599. First, [Asda’s Cheese Buyer] clearly reported Tesco’s cheddar retail price increase had not yet been implemented (but were expected to be within 10 days) and that McLelland supplied various lines of cheddar to both Tesco and Asda and also was in possession of information regarding Tesco’s retail pricing intentions on a number of cheddar lines (for example Tesco Caledonian Mature, Galloway Coloured, Tesco Mature, Seriously Strong and McLelland Mature) as a result of the table [Tesco’s Senior Cheese Buyer] sent to [McLelland’s National Account Manager for its Tesco account] on 9 October 2003 (the day before [Asda’s Cheese Buyer] email). Accordingly, McLelland was in a position to pass information regarding Tesco’s cheddar retail pricing intentions to Asda and had an interest in doing so (in order to achieve McLelland’s aim of a market-wide wholesale and retail price increase).

In reaching this conclusion, the OFT considers that it is additionally significant that there is evidence demonstrating that McLelland did pass information regarding the cheese retail pricing intentions of certain retailers to other retailers during the course of both the 2003 and 2002 Cheese Initiatives.

Tesco’s representations on the Asda e-mails on 10, 22 and 23 October 2003

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819 The e-mail also demonstrates that [Asda’s Cheese Buyer] was aware that Tesco was reconsidering its retail price increase levels on branded products on the basis that Asda had increased its prices by a lower than anticipated level: ‘This is now being reviewed now they have had sight of our price increases in-store, eg, all branded prices – where they had moved c.30p per kg – have now been re-aligned back to match our 20p increase’.

820 See document 277 to the SO, set out at paragraph 5.571 above.

821 McLelland’s aim is set out in both its presentation to Sainsbury’s (see paragraphs 5.503 to 5.505 above) and in the ‘TESCO BRIEFING’ (see paragraph 5.498 above).
5.600. In reaching the conclusion that McLelland passed information concerning Tesco's cheddar pricing intentions to Asda, the OFT has also carefully considered Tesco's representations on this issue in both the SO and SSO and the additional evidence presented by other parties to the Investigation.

5.601. In the SO, the OFT proposed to find that [Asda’s Cheese Buyer] email of 10 October demonstrated that Tesco’s cheese retail pricing intentions had been passed to Asda in respect of each of the lines referred to in the email (that is, own label, value, territorial and cheddar cheeses). Following the issue of the SO, McLelland informed the OFT that it did not supply or pack own label, territorial or value cheese lines to Tesco at this time – and therefore could not have been the source of this information.

5.602. The OFT has carefully considered this representation and has concluded that the e-mail demonstrates that McLelland passed information concerning Tesco’s cheddar retail pricing intentions to Asda. In drawing this conclusion, the OFT notes that the text of the e-mail distinguishes the information disclosed in respect of cheddar from own label, value and territorial lines.

5.603. In respect of own label, value and territorial lines, the language [Asda’s Cheese Buyer] used in his email suggests that the information might have been in the public domain. In drawing this conclusion, the OFT notes that [Asda’s Cheese Buyer] stated that Tesco’s retail prices ‘have moved’ and that he had ‘line detail’. However, if it is indeed the case that McLelland did not supply or pack own label cheese for Tesco at this time, it is interesting to note that [McLelland’s National Account Manager for its Tesco account] was to contact [Tesco’s Senior Cheese Buyer] for information on Tesco’s ‘own label position’ on 7 October.

5.604. Notwithstanding this, it is clear that the information in respect of cheddar was Tesco’s future pricing intentions (‘Cheddar has moved on average 35p per kg though I have no visibility on exact prices. These packs should be instore in c. 10 days time’).

5.605. In its representations on the SO, Tesco conceded that it ‘may well be the case’ that information concerning its cheese retail pricing intentions was disclosed by McLelland to Asda. However, Tesco did challenge whether Asda would have ‘believe[d] that Tesco had sanctioned transmission of this information’ given the ‘fiercely competitive nature of the grocery retailing sector’. The OFT considers that the series of Asda internal emails clearly demonstrate that Asda may be taken to have known the circumstances in which Tesco disclosed its cheese retail pricing intentions to McLelland and did, in fact, appreciate that the information was disclosed to it with Tesco’s concurrence. In particular, it is evident that Asda believed it was increasing its retail prices as part of a market-wide move that also would have included Tesco increasing its retail prices.

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822 See paragraphs 2520 to 2533 of the SO.
823 See paragraph 5.560 above.
824 See document 62 to the SO, at paragraphs 8.37 to 8.39.
825 Ibid, at paragraph 8.33.
This is particularly strongly demonstrated by the fact that Asda believed it needed to send ‘a strong enough signal’ that it had ‘no intention of holding the market back’ and also by the various pieces of information regarding its competitors’ retail pricing intentions that it was in possession of (namely regarding Tesco, [a retailer] and [a group of retailers]). Further, nothing within these emails suggests that [Asda’s Cheese Buyer] considered the information he was provided in respect of Tesco to be speculative – in fact, it is clear he considered the information to be credible and reported it without any reservation.

5.606. In its representations on the SO, Tesco also submitted that, to the extent that the information was disclosed by Tesco to McLelland, Tesco expected McLelland ‘to recognise that the information was commercially sensitive, and to treat it accordingly’ and that the following description of their retail pricing behaviour in the email of 22 October 2003 [from Asda’s Cheese Buyer] supported the conclusion that each party set its prices independently:

‘As before, they have generally sought to maintain % across the cheese category. This is now being reviewed now they have had sight of our price increases in-store, eg. all branded prices – where they had moved c.30p per kg – have now been re-aligned back to match our 20p increase. So, at least for a few weeks we’ve managed a small gap!’

5.607. The OFT considers that the evidence it has presented above clearly demonstrates that Tesco may be taken to have intended and did, in fact, foresee that McLelland would have made use of the information to influence conditions on the cheese retail market by passing that information on to other retailers with the aim of influencing their pricing decisions and that Tesco (and some of its competitors) did not take independent retail pricing decisions. In respect of Tesco, the evidence set out above demonstrates that it made its willingness to increase its cheese retail prices conditional upon Asda also increasing its cheese retail prices; received, and did not reject, information regarding Asda’s cheese retail pricing intentions from McLelland and adapted its behaviour based upon this information. Accordingly, the OFT has concluded that Tesco disclosed information regarding its cheese retail pricing intentions to McLelland in circumstances in which it clearly knew and understood that McLelland was acting as an intermediary for the disclosure of such information without making it clear that the information in question must not be passed on. In any event, such a request would have been of questionable worth given Tesco’s other actions (such as willingly receiving and not rejecting competitor pricing information).

5.608. In its representations on the SSO, Tesco submitted that evidence provided by [Asda’s Cheese Buyer] to Asda’s solicitors after the issue of the SO undermined the OFT’s proposed finding that McLelland passed Tesco’s cheese retail pricing intentions to Asda.

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826 See paragraph 5.594 above.
827 See document 62 to the SO, at paragraph 8.34.
828 See Tesco’s second representations on the SSO, at paragraphs 5.32 to 5.33.
5.609. In particular, Tesco relied on [Asda’s Cheese Buyer] response that he ‘had a tough rule about what is seen in store and a processor may have been ahead on packaging’ when asked what he meant when he stated that he had ‘no visibility’ of Tesco’s prices in his e-mail of 10 October 2002.\textsuperscript{829} Whilst this does not emphatically support the OFT’s infringement finding (and the OFT has not made further enquiries of [Asda’s Cheese Buyer] or Asda on this matter), it does not undermine it either. In fact, [Asda’s Cheese Buyer] comments suggest he is merely providing an explanation as to what he meant by saying he had ‘no visibility’ – namely that he had no evidence that price increases were already visible in-store and that he may have received the information from a processor because the processor may have prepared the relevant packaging.

5.610. When asked how he would have known the information in advance he made a number of observations, that:

- ‘the market takes four weeks to re-settle and it would have been a mix of physically seen in store (Tesco had fixed prices on territorial cheeses so these would have been in store)’;
- ‘you move prices and then watch the market’;
- ‘[t]here would have been modelling before deciding to move costs and retails’;
- he could ‘predict how the market would move’; and
- ‘people watch prices very closely’.\textsuperscript{830}

5.611. These various observations seem neither to answer nor address the question asked and therefore certainly do not undermine the OFT’s conclusions from the significant body of contemporaneous documentary evidence on which it has relied.

5.612. For the reasons set out above, the OFT has concluded that the information regarding Tesco’s cheddar pricing intentions was disclosed by Tesco to McLelland in circumstances in which it may be taken to have intended and did, in fact, foresee that McLelland would make use of that information to influence conditions on the cheese retail market by passing it onto other retailers including (as demonstrated by this e-mail) Asda.

5.613. Moreover, taking into account the context in which it received this information,\textsuperscript{831} the OFT has concluded that Asda may be taken to have known the circumstances in which Tesco disclosed its cheese retail pricing intentions to McLelland and did, in fact, appreciate that the information was disclosed to it with Tesco’s concurrence.\textsuperscript{832}

\textbf{Evaluation of Tesco’s representations}

\textsuperscript{829} See document 14 to the SSO, at paragraph 3.1.
\textsuperscript{830} Ibid, at paragraph 3.2.
\textsuperscript{831} See paragraphs 5.498 to 5.501 and 5.529 to 5.538 above.
\textsuperscript{832} JJB Sports plc v Office of Fair Trading and Argos Limited and Littlewoods Limited v Office of Fair Trading [2006] EWCA Civ 1318, at paragraphs 91 and 141.
5.614. Tesco submitted a number of representations in response to the infringement allegations made by the OFT in the SO and SSO. These representations are evaluated in paragraphs 5.615 to 5.637 below.

Tesco’s price moves were unilateral and not part of a co-ordinated retail price increase

5.615. In its representations on both the SO and SSO, Tesco stated that its price moves were unilateral and not part of a co-ordinated retail price increase.

5.616. The OFT has carefully considered this representation and does not consider it to be supported by the evidence cited above which has demonstrated that Tesco did take part in a co-ordinated cheese retail price increase. In particular, the evidence has demonstrated that [Tesco’s Senior Cheese Buyer] made Tesco’s willingness to increase its cheese retail and wholesale prices conditional upon its competitors (particularly Asda) also implementing a retail price increase.833

5.617. Further, it is also evident that [Tesco’s Senior Cheese Buyer] received information concerning Asda’s and Sainsbury’s cheese retail pricing intentions and took this information into account when determining Tesco’s behaviour on the cheese retail market. This is demonstrated by the narrative set out in the ‘TESCO BRIEFING’ which shows that [Tesco’s Senior Cheese Buyer] committed to increase Tesco’s cheese wholesale and retail prices when informed that Asda would be increasing its cheese retail prices and then chose not to do so when informed Asda had changed its mind. Additionally, the correspondence between [McLelland’s National Account Manager for its Tesco Account] and [Tesco’s Senior Cheese Buyer] of the 7 October 2003 demonstrates that McLelland passed further information regarding Asda’s cheese retail pricing intentions to Tesco834 and 9 October 2003, showing that Tesco took information regarding Asda’s cheese retail pricing intentions into account.835 There is no contemporaneous evidence to suggest that any of the information Tesco received regarding Asda’s pricing intentions was rejected or even that Tesco was uncomfortable with receiving this information. This behaviour is clearly inconsistent with the principle that competitors should determine their prices independently.

Tesco did reject the retail pricing information it received from McLelland

5.618. In its representations on both the SO and the SSO, Tesco submitted that it did reject the retail pricing information it received from McLelland on 30 September 2003 and 2 October 2003.836 In particular, Tesco represented that:

- During the cost price increase negotiations, [Tesco’s Senior Cheese Buyer] informed McLelland that she was not interested in hearing

833 See paragraphs 5.498 to 5.501 and 5.534 to 5.537 above.
834 See document 276 to the SO.
835 See document 277 to the SO.
836 See document 62 to the SSO, at paragraph 8.29 and Tesco’s second representations on the SSO, at paragraphs 5.13 to 5.19.
from them how others (presumably competing retailers) would behave.

- When [Tesco’s Senior Cheese Buyer] did receive the [retailer’s] and Sainsbury’s price labels on 30 September 2003 she escalated her concerns to [Tesco’s Category Director for dairy].

- [Tesco’s Senior Cheese Buyer] contacted [McLelland’s National Account Manager for its Tesco account] (by an unspecified means of communication) to complain about him sending inappropriate information.

- [Tesco’s Senior Cheese Buyer] and [Tesco’s Category Director for dairy] then complained about [McLelland’s National Account Manager for its Tesco account] e-mails to [a senior manager at McLelland], [McLelland’s National Account Controller] and [a senior manager at McLelland] during a meeting between McLelland and Tesco at Tesco’s premises that occurred on 6 October 2003.

- A signed witness statement provided by Tesco based on an interview it conducted with [a senior manager at McLelland] (who attended the meeting on 6 October 2003) supports Tesco’s representation that Tesco made this complaint.

- Tesco explained that the fact that [McLelland’s National Account Manager for its Tesco account] passed information concerning Asda’s cheese retail pricing intentions to Tesco subsequent to Tesco’s complaint is explained by [his] absence at the meeting on 6 October 2003.

5.619. The OFT has carefully considered Tesco’s representation, and has concluded that it is not consistent with the contemporaneous documentary evidence in its possession.

5.620. First, there is no contemporaneous documentary evidence that substantiates or even supports Tesco’s representation. Tesco itself has confirmed that it does not have a contemporaneous written record of any complaints it purports to have made to McLelland. Moreover, having received Tesco’s representations, the OFT asked McLelland if they had any record of any such complaint and was informed no record of such a complaint could be found. As part of this process, McLelland asked [a senior manager at McLelland] and [McLelland’s National Account Controller] whether they could recall any such complaint and they could not. Significantly, both accompanied [a senior manager at McLelland] to the meeting with Tesco on 6 October where the complaint was claimed to have been made.

5.621. Second, it is also notable that [McLelland’s National Account Manager for its Tesco account] makes no reference to the complaints he is meant to have received from [Tesco’s Senior Cheese Buyer] in the ‘TESCO BRIEFING’

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837 See document 276 to the SO, considered at paragraphs 5.560 to 5.567 above.
838 See document 47 to the SSO.
which provides a detailed account of his discussions with [Tesco’s Senior Cheese Buyer] at this time. In particular, the complaint that Tesco suggests [Tesco’s Senior Cheese Buyer] made to [McLelland’s National Account Manager for its Tesco account] is very likely to have been prior to the ‘TESCO BRIEFING’ having been finalised (given that the briefing refers to contacts between [McLelland’s National Account Manager for its Tesco account] and [Tesco’s Senior Cheese Buyer] at least up to Wednesday 1 October 2003 and makes reference to the upcoming meeting between McLelland and Tesco on Monday 6 October 2003). The ‘TESCO BRIEFING’ notably makes reference to two separate conversations between [McLelland’s National Account Manager for its Tesco account] and [Tesco’s Senior Cheese Buyer] on 30 September 2003 and neither of these records makes any reference to [Tesco’s Senior Cheese Buyer] alleged complaint to [McLelland’s National Account Manager for its Tesco account] regarding Tesco’s competitor’s retail pricing intentions, [Tesco’s Senior Cheese Buyer] found the information useful when determining Tesco’s own future conduct on the cheese retail market. This behaviour is not consistent with Tesco’s representation that [Tesco’s Senior Cheese Buyer] and [Tesco’s Category Director for dairy] raised concerns regarding receiving this information.

5.622. Third, the OFT notes that Tesco has not suggested that McLelland’s disclosure of Asda’s cheese retail pricing intentions to Tesco on 7 October 2003\(^{840}\) triggered another complaint or even a reminder of the complaint that Tesco purports to have been made at the meeting on 6 October 2003. In fact, Tesco’s own representations merely suggest that the reason why [McLelland’s National Account Manager for its Tesco account] forwarded Asda’s pricing intentions to [Tesco’s Senior Cheese Buyer] was because he had not attended the meeting of 6 October 2003 and was therefore unlikely to have been briefed on the meeting by the time of his e-mail on 7 October 2003.\(^{841}\) However, this ignores the fact that Tesco also claims that [Tesco’s Senior Cheese Buyer] separately complained to [McLelland’s National Account Manager for its Tesco account] about his conduct following his e-mail of 30 September 2003 to [Tesco’s Senior Cheese Buyer]. If such a complaint had been made it would be reasonable to conclude it would have been reiterated if necessary (especially if the matter had been escalated in both organisations). Further, it is also unusual, taking account of Tesco’s purported conduct and how strongly concerned [Tesco’s Senior Cheese Buyer] was supposed to have been regarding receiving Tesco’s competitors’ retail pricing intentions, that she did not make reference to her concerns in her e-mail of 9 October 2003 in which she confirmed Tesco’s retail price increases. This is all the more so given that [Tesco’s Senior Cheese Buyer] made a clear reference to that meeting (‘As for

\(^{839}\) See paragraphs 5.529 to 5.538 above.

\(^{840}\) See document 276 to the SO, considered at paragraphs 5.560 to 5.567 above.

\(^{841}\) See documents 62 to the SO, at paragraph 8.29(d), and Tesco’s second representations on the SSO, at paragraph 5.21.
costs, as clearly pointed out at our meeting on Monday [6 October 2003] we will increase your cost price by £200T, it is our wish that this is passed back to the farmers but as they are your costs you must do as you see fit’ [emphasis added]).

_Tesco expected its pricing information to be treated as confidential_

5.623. As stated above, in its representations on the SO, Tesco acknowledged that it ‘may well be the case’ that McLelland passed information concerning its cheese retail pricing intentions to Asda, but that if McLelland did so its ‘misuse’ of Tesco’s information ‘cannot be laid at Tesco’s door’ because any disclosure by McLelland to Asda would have been ‘in breach of the confidential relationship between Tesco and its suppliers’.

5.624. The OFT has carefully considered this representation and has concluded that it is not supported by, or consistent with, the evidence presented above. In particular, it is clear from this evidence that Tesco received information regarding the cheese retail pricing intentions of its competitors on a number of occasions. Moreover, the evidence presented above has demonstrated that [Tesco’s Senior Cheese Buyer] also received such information from McLelland during the 2002 Cheese Initiative. There is no contemporaneous documentary evidence to support the proposition that [Tesco’s Senior Cheese Buyer] rejected this information. Accordingly, based on these experiences, [Tesco’s Senior Cheese Buyer] would have known that McLelland was acting as an intermediary for the disclosure of retail pricing intentions between competing retailers for the purpose of facilitating a cheese retail price increase and had performed this role in the past. Given this context, it is unusual that [Tesco’s Senior Cheese Buyer] did not make it clear to [McLelland’s National Account Manager for its Tesco account] when she e-mailed him Tesco’s retail pricing intentions on 9 October 2003 that the information was not to be transmitted to any competitor or, at least, reminded him of the confidential manner in which Tesco expected such information to be treated.

_Witness statement [of a senior manager at McLelland]_

5.625. Tesco submitted a witness statement which was provided to it by [a senior manager at McLelland] in support of certain of its representations regarding the 2003 Cheese Initiative. In particular, [a senior manager at McLelland] confirmed that:

- [Tesco’s Category Director for dairy] stated that Tesco did not wish to discuss the future retail price intentions of other retailers during the meeting of 6 October 2003.
- McLelland did receive future retail price information from Tesco for the purpose of printing price labels for random weight packs of

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842 See document 277 to the SO, at paragraph 5.571 to 5.578 above.
843 See document 62 to the SSO, at paragraphs 8.37 to 8.39.
844 See Annexe C of Tesco’s second representations on the SSO.
845 Ibid, at paragraph 14.
cheese. This information was provided by Tesco in confidence and treated on this basis.\textsuperscript{846}

- It was not McLelland’s practice to pass on retailers’ future pricing intentions to competing retailers and that he did not form the impression that retailers generally, or Tesco specifically, were transmitting future price information between themselves through McLelland.\textsuperscript{847}

- It was unlikely that retailers would transmit information in this way because of how competitive they were.\textsuperscript{848}

5.626. The OFT has considered the evidence surrounding Tesco’s claim that it complained about the information it received regarding its competitors cheese retail pricing intentions above.\textsuperscript{849}

5.627. The OFT has concluded that [a senior manager at McLelland] claim that Tesco disclosed its retail pricing intentions to McLelland on a confidential basis and they were treated as such is not sustainable. Contemporaneous documentary evidence demonstrates that McLelland disclosed information concerning Tesco’s cheese retail pricing intentions to other retailers during the 2002 Cheese Initiative. Indeed, Tesco itself in its representations on the SO conceded that McLelland ‘may well’ have passed its future retail pricing information on to Asda.\textsuperscript{850}

5.628. Further, as explained above, [Tesco’s Senior Cheese Buyer] disclosed information concerning Tesco’s retail pricing intentions to McLelland in circumstances where she had already received information concerning her competitors’ cheese retail pricing intentions during both the 2002 and 2003 Cheese Initiatives and as such would have understood that McLelland did not treat such information as confidential. Indeed it is clear from the contemporaneous documentary evidence in respect of both of these initiatives that [a senior manager at McLelland] claim that McLelland did not act as an intermediary for the transmission of retail pricing intentions between competing retailers is not sustainable.

5.629. Finally, [a senior manager at McLelland] statement that retailers would be unlikely to indirectly transmit future retail pricing information to each other because of how competitive they are is at odds with the considerable volume of evidence that the OFT has presented in connection with the 2003 FLM Initiative and the 2002 and 2003 Cheese Initiatives which has demonstrated that certain grocery retailers did transmit information to each other through their supplying processors. Indeed, one of the drivers for these disclosures was the price competitiveness of the retailers concerned because they did not wish to increase their retail prices for fear of being more expensive than their competitors – which resulted in information being disclosed between

\textsuperscript{846} Ibid, at paragraph 19.

\textsuperscript{847} Ibid.

\textsuperscript{848} Ibid, at paragraph 23.

\textsuperscript{849} See paragraphs 5.618 to 5.622 above.

\textsuperscript{850} See document 62 to the SSO, at paragraphs 8.37 to 8.39.
retailers in order to provide reassurance that their competitors would be increasing their retail prices as well.

Asda and Sainsbury witness interviews

5.630. In the SSO, the OFT relied upon witness evidence provided by [Asda’s Business Unit Director], [Asda’s Cheese Buyer] and [an employee at Asda] and [Sainsbury’s Senior Cheese Buyer] in support of its infringement allegations.

5.631. The OFT has decided that it will not place any reliance on this witness statement evidence which, as has been acknowledged by Tesco in its representations, is very general in nature. In respect of [Sainsbury’s Senior Cheese Buyer], her evidence primarily related to the 2002 rather than the 2003 Cheese Initiative and therefore was not of significant value to demonstrating the infringement that the OFT has found to have occurred in 2003.

Conclusions drawn from McLelland’s admission

5.632. In the SSO, the OFT sought to rely upon the fact McLelland had admitted to its role in the 2003 Cheese Initiative as evidence to support its proposed finding that Tesco had also participated in the Initiative.

5.633. The OFT has carefully considered whether it is appropriate to place such reliance on McLelland’s admission in light of representations made by Tesco and has decided that McLelland’s admission does not, on its own, amount to evidence demonstrating Tesco’s involvement in the 2003 Cheese Initiative. Accordingly, the OFT does not place any reliance on McLelland’s admission in making its infringement finding in respect of Tesco.

5.634. However, the OFT does consider that the contemporaneous documentary evidence presented in paragraphs 5.497 to 5.613 above demonstrates that Tesco was a participant in the 2003 Cheese Initiative.

Inferences drawn from Tesco’s position in the market place

5.635. In the SSO, the OFT proposed to find that it was highly unlikely that the 2003 Cheese Initiative could have taken place without Tesco’s participation. Tesco submitted that this is an ‘inappropriate assumption’. Having carefully considered this provisional conclusion together with all the evidence in its possession, the OFT has concluded that this is not a justifiable inference. Regardless of this inference, the
OFT considers that the evidence set out at paragraphs 5.497 to 5.613 above demonstrates that Tesco was a participant in the 2003 Cheese Initiative.

5.636. In drawing this conclusion, the OFT believes that although Tesco may well have needed to increase its cheese retail prices in order for the price initiative to be sustainable (on the basis that other retailers would not have wished to have been out of line with Tesco on retail prices), this does not necessarily mean that Tesco’s decision to increase its cheese retail prices was the result of co-ordination.

5.637. However, the OFT considers that the contemporaneous documentary evidence presented in paragraphs 5.497 to 5.613 above demonstrates that Tesco did not take a decision to increase its retail prices unilaterally but as part of a co-ordinated market move of which it was aware and actively participated in. In particular, Tesco received information regarding its competitors’ cheese retail pricing intentions on several occasions and also made its willingness to increase its cheese retail prices conditional on McLelland achieving retail prices across the market place. Accordingly, regardless of the merits of the inference it made based upon Tesco’s market position, the OFT considers that Tesco participated in the 2003 Cheese Initiative.

b. Conclusion

5.638. Based on the evidence set out and analysed at paragraphs 5.497 to 5.637 above the OFT finds that Asda, McLelland, Sainsbury’s and Tesco participated in a number of concerted practice. The evidence set out at paragraphs 5.497 to 5.637 above has demonstrated that:

- Each of Asda and Sainsbury’s disclosed its retail pricing intentions for UK produced cheese to McLelland.
- These disclosures were made in circumstances where each of Asda and Sainsbury’s may be taken to have intended that McLelland would make use of that information to influence market conditions by passing it on to competing retailers.
- McLelland made use of the information on each of Asda’s and Sainsbury’s retail pricing intentions to influence conditions on the cheese retail market by passing that information on to Tesco.
- McLelland passed that information on to Tesco in circumstances in which Tesco who may be taken to have known the circumstances in which the information was disclosed by each of Asda and Sainsbury’s to McLelland.
- Tesco did, in fact, use the information regarding Asda’s and Sainsbury’s retail pricing intentions in determining its own conduct on the cheese retail market.
- Furthermore, Tesco disclosed its future retail pricing intentions for UK produced cheese to McLelland.
• That disclosure was made in circumstances where Tesco may be taken to have intended that McLelland would make use of that information to influence market conditions by passing it on to competing retailers.

• McLelland made use of the information on Tesco’s retail pricing intentions to influence conditions on the cheese retail market by passing that information on to Asda.

**Single overall concerted practice**

5.639. Whilst each of the elements set out at paragraph 5.638 above could be regarded as comprising a number of separate concerted practices in breach of the Chapter I prohibition, the OFT considers that they can be regarded as forming part of a single overall concerted practice given that they reinforce one another and share a common objective.

5.640. The OFT considers that it would be contrary to the commercial reality of the situation to seek to split the behaviour into a series of bilateral concerted practices where the evidence demonstrates that information has been exchanged not merely bilaterally but multilaterally through intermediaries, in this case McLelland, who is also a Party. The OFT has therefore concluded that all of the elements of the 2003 Cheese Initiative described in the section above formed part of a single overall concerted practice.
IV. 2003 concerted practice in respect of fresh liquid milk retail prices ('The 2003 FLM Initiative')

5.641. The OFT has found that Arla, Asda, Dairy Crest, Safeway, Sainsbury’s and Wiseman (each referred to as a '2003 FLM Party’, collectively referred to as the '2003 FLM Parties’) infringed the Chapter I prohibition by participating in a single overall concerted practice which had as its object the co-ordination of retail price increases for FLM in July 2003. This single overall concerted practice is referred to in the Decision as 'the 2003 FLM Initiative'.

5.642. Each of Asda, Dairy Crest, Safeway, Sainsbury’s and Wiseman has admitted its involvement in the 2003 FLM Initiative as part of the early resolution agreement that each entered into with the OFT.860 Further, Arla was granted 100 per cent leniency in respect of any breaches arising from agreements and/or concerted practices in the supply of standard dairy products, particularly FLM.861

5.643. In this section of the Decision, the OFT presents, analyses and draws conclusions from the evidence on which it has relied in reaching its infringement finding for the 2003 FLM Initiative. It is structured as follows:

I. First, it presents and analyses the evidence on which the OFT relies in respect of the 2003 FLM Initiative by reference to the relevant law and incorporates representations received from the 2003 FLM Parties on the OFT’s provisional findings in the SO and SSO.862

II. Second, it sets out the OFT’s conclusion in respect of each 2003 FLM Party’s involvement in the 2003 FLM Initiative.863

5.644. The Parties should note that the conclusion section is not exhaustive and nor is it intended to be so. For the avoidance of doubt, the OFT relies on the contents of paragraphs 5.650 to 5.862 below to support its infringement finding in respect of the 2003 FLM Initiative.

5.645. [C]

5.646. [C]

5.647. [C]

5.648. [C]

5.649. [C]

a. Analysis of Evidence

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860 See paragraphs 2.83 to 2.88 above.
861 See paragraph 2.72 above.
862 See paragraphs 5.650 to 5.862 below.
863 See paragraph 5.863 below.
In this section, the OFT sets out the evidence relied upon to establish that Arla, Asda, Dairy Crest, Safeway, Sainsbury’s and Wiseman infringed the Chapter I prohibition by participating in the 2003 FLM Initiative.

i. Supply relationships

The table below shows the relevant FLM supply relationships at the time of the 2003 FLM Initiative.

Table 4: Relevant supply relationships during the 2003 FLM Initiative.

<table>
<thead>
<tr>
<th>Arla</th>
<th>Dairy Crest</th>
<th>Wiseman</th>
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<tbody>
<tr>
<td>Asda</td>
<td>Asda</td>
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<tr>
<td>Safeway</td>
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<td>Sainsbury’s</td>
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<tr>
<td>[C]</td>
<td>[C]</td>
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Source: Information supplied by the Parties.

ii. Preliminary discussions concerning the implementation of an FLM price increase between February and April 2003

FFA press release of 12 February 2003

On 12 February 2003, FFA issued a press release in which it stated its intention ‘to achieve a further 2p a litre for all dairy producers’. FFA anticipated that part of this payment would be funded by ‘the generosity of the processors and the supermarkets’. FFA also appeared to suggest that there might have been repercussions for parties who did not support the plan:

‘Those who chose [sic] not to help the farming industry know exactly what to expect in the coming weeks from the FFA’.

Asda’s response to FFA’s press release of 12 February 2003

Initial discussions concerning an FLM retail price initiative appear to have started as early as February 2003.

On 13 February 2003, [Wiseman’s National Accounts Director] e-mailed the FFA press release of 12 February 2003 to [Asda’s Category Manager for Dairy], who then forwarded it to [a senior manager at Asda].

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864 See document 200 to the SO.
865 Ibid.
866 Ibid.
867 Asda informed the OFT that this position was head of Asda’s dairy buying team.
868 See document 200 to the SO.
his covering e-mail to [a senior manager at Asda], [Asda's Category Manager for Dairy] indicated that:

'My view is that we should be maintaining the status quo in our pricing. We have no intention to revert the 2ppl increase put through last year, however, I do not think we should be putting prices up again.'  

5.655. Subsequent evidence will demonstrate that [Asda's Category Manager for Dairy] later changed his mind on whether Asda should participate in a milk price initiative.  

5.656. It is also clear from [Asda’s Category Manager for Dairy] e-mail that Asda wished to be proactive in discussions with FFA in respect of this issue and considered that Asda had been surprised by [a retailer’s] announcement in 2002:

'Need to think through what the FFA / NFU etc […] strategy is going to be. Last year they got to [a retailer] and [that retailer’s] announcement put us in the position where we had to follow'.  

5.657. [Asda’s Category Manager for Dairy] recommended that Asda should take the lead in discussions with FFA: '[n]ot sure how we take the driving seat at the minute, but I think we need to get into the chair'.  

5.658. [A senior manager at Asda] responded by saying that he had anticipated that the issue of subsidising a farmgate price increase would arise and had already unsuccessfully attempted to make contact with [an official at FFA] concerning milk prices on 10 February 2003 (that is, even before the FFA press release) and that he would try again that day. When interviewed by the OFT, [a senior manager at Asda] confirmed that he would 'undoubtedly' have had very regular contact with [an official at FFA] in the early months of 2003.

Meeting between Asda and FFA in April 2003

5.659. On 9 April 2003, [Asda’s Category Manager for Dairy] sent an e-mail internally within Asda to [a senior manager at Asda] and [Asda’s Trading Director] to brief them on issues in the dairy sector in preparation for a meeting between Asda and [an official at FFA]. The e-mail summarised areas where Asda had supported dairy farmers in the period prior to Christmas 2002, referring to increases in the cost (wholesale) and retail prices of milk (both FLM and long life), cream, core cheeses, and own label butter. [Asda’s Category Manager for Dairy] considered that [an official at FFA] had not been satisfied with the amount of the farmgate price increases that had been implemented in 2002, stating:

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869 Ibid.
870 See paragraph 5.660 below.
871 See document 200 to the SO.
872 Ibid.
873 Ibid.
874 See document 15 to the SSO, at pages 14 and 15.
875 See document 202 to the SO.
'He [an official at FFA] did not get as much money as hoped in October 2002, he will argue some farmers are being paid less than they need to survive.'

5.660. [Asda's Category Manager for Dairy] felt that [an official at FFA] 'key concern' was that the farmgate price might decrease as the year progressed and that this would mean Asda was exposed to the risk of direct action by farmers in the autumn.876

5.661. [Asda's Category Manager for Dairy] concluded by recommending that [Asda’s Trading Director] and [Asda’s Fresh Foods Director] consider a further increase in FLM retail prices of between 0.5 pence per litre to 2 pence per litre. [Asda’s Category Manager for Dairy] felt that such a move would bring 'some positive PR' for Asda 'in terms of supporting farmers' and that such a move would make direct action by farmers, in the form of blockades, 'far less likely'. The OFT has concluded from this that, despite his earlier reservations as to whether Asda should implement a further FLM retail price increase,877 [Asda’s Category Manager for Dairy] was intending any price increase to be subsidised through increased FLM retail prices. For instance, in his e-mail, [Asda’s Category Manager for Dairy] referred explicitly to the benefits of 'increasing the retail now'. Additionally, when assessing the benefits and costs of an FLM retail price increase he commented that 'milk is not price elastic'. This is a reference to the price inelasticity of milk at retail level which means that milk purchases do not increase significantly if the retail price falls, or decrease significantly if the retail price increases. Accordingly, [Asda’s Category Manager for Dairy] considered that if FLM retail prices were increased it would not adversely affect FLM sales because consumers would not switch to other products.

5.662. [Asda’s Trading Director] met with [an official at FFA] shortly after [Asda’s Category Manager for Dairy] e-mail of 9 April 2003 and reported back on the conclusions of this meeting in an e-mail to [a senior manager at Asda] and [Asda’s Category Manager for Dairy] on 11 April.878 This e-mail confirms that Asda and FFA discussed the issue of FLM retail price increases to subsidise a farmgate price increase and therefore is consistent with the OFT’s earlier conclusion in paragraph 5.660 above that Asda intended to increase its FLM retail prices to cover any wholesale price increase. [Asda’s Trading Director] informed his colleagues that 'Having spoken with [an official at FFA], the farmers are clearly fed up with the status of no [FLM] retail moves this year' [emphasis added]. Accordingly, he recommended it 'might be smart to encourage some MODEST further upward movement in pricing that gives him say [0].3 p /litre'. The use of the words 'encourage some MODEST further upward movement' show that it was envisaged that industry players other than Asda and FFA would be involved as there was no need for Asda to encourage FFA in this respect.

876 Specifically, [the] e-mail recorded: 'His [an official at FFA] key concern is probably that as the year goes on the milk price paid to farmers will fall once more and the risk then would be action in the autumn'.
877 See paragraph 5.653 above.
878 See document 202 to the SO.
5.663. However, despite [Asda’s Trading Director] apparent enthusiasm for a small FLM retail price increase, his colleagues were not convinced by the substance of his proposals. [A senior manager at Asda] responded to [Asda’s Trading Director] recommendation by e-mailing [Asda’s Category Manager for Dairy] and [Asda’s Business Unit Director] and requesting that they 'hold fire' because '[Asda’s Trading Director] is assuming too much'.\(^{879}\) It is not clear from his e-mail what [a senior manager at Asda] was referring to when he considered that [Asda’s Trading Director] was 'assuming too much'. However, it is not necessary for the OFT to draw a conclusion on this because the significant point for the purposes of its infringement finding is that Asda discussed with FFA the prospect of an FLM retail price increase to subsidise a farmgate price increase. The OFT has not received any representations that challenged this conclusion.

*Meeting between Dairy Crest and FFA in April 2003*

5.664. [Asda’s Category Manager for Dairy] also informed [Asda’s Trading Director] and [a senior manager at Asda] that he understood that Dairy Crest had met with [an official at FFA] in the previous week (in the week commencing 31 March 2003) and was told that Dairy Crest had informed FFA that 'there was no chance of a further cost increase on manufactured products [that is, cheese and butter], although they may have left the door slightly ajar on liquid milk'.\(^{880}\)

### iii. The events of June 2003

*Dairy Crest internal meeting of 4 June 2003*

5.665. The minutes of an internal Dairy Crest meeting 'to Discuss Price Increases' attended by senior Dairy Crest personnel\(^{881}\) and dated 4 June 2003 referred to intervention prices having reached 20 pence per litre and the fact that Dairy Crest's supplying farmers had begun to 'request [farmgate] price increases of 1-1.5ppl'.\(^{882}\) [A senior manager at Dairy Crest] was reported to have stated that he believed '8p/gallon (1.746 pence per litre) may be an appropriate retail price increase' [emphasis added] and that this increase would be implemented in mid-July 2003.\(^{883}\)

5.666. The minutes of the meeting recorded that both [a senior manager at Dairy Crest] and [a senior manager at Dairy Crest] were due to meet with Asda and [a retailer] that week to discuss Dairy Crest’s proposal for milk price increases, and a reference was also made to 'F.F.A' indicating that contact was also intended to be made with representatives of that body. The OFT has no record of the content of any such discussions with [a retailer] or whether they did indeed occur. However, the evidence

\(^{879}\) Ibid.

\(^{880}\) Ibid.

\(^{881}\) The attendees of the meeting were listed as follows: [a senior manager at Dairy Crest]; [a senior manager at Dairy Crest]; [a senior manager at Dairy Crest]; [a senior manager at Dairy Crest]; and [a senior manager at Dairy Crest].

\(^{882}\) See document 204 to the S0.

\(^{883}\) Ibid.
presented below demonstrates discussions certainly did occur between Dairy Crest and Asda. \[884\]

5.667. [A senior manager at Dairy Crest] then sent an e-mail to [a senior manager at Dairy Crest]\[885\] providing further details of his understanding of the discussions concerning a proposed retail price initiative that had taken place in the meeting on 4 June 2003. \[886\] In this e-mail [a senior manager at Dairy Crest] referred to a discussion that had taken place 'at our session last week' regarding:

> 'the possibility of sharing the margin generated from a retail price increase between the farmers (achieving the increased return viewed as being required by [probably [a senior manager at Dairy Crest]\[887\] and [probably [a senior manager at Dairy Crest]\[888\]]) whilst at the same time improving our own returns and the retailers.'

[Emphasis added]

5.668. [A senior manager at Dairy Crest] then outlined what he understood to be the basis for this plan:

> 'My understanding of this debate was that 8ppg = 1.74ppl of which at least 1ppl was required for producer prices leaving the remainder available for division between us and retailers.'

5.669. Accordingly, the evidence strongly suggests that Dairy Crest was aiming to achieve an increase in the farmgate price through an increase in the wholesale and retail price of FLM with the benefit being shared between farmers, processors and retailers.

5.670. [A senior manager at Dairy Crest] then stated that he believed he had two objectives arising from the internal meeting of 4 June 2003. The first objective was to contact retailers to establish if they were prepared to engage in an initiative to subsidise a farmgate price increase through increased wholesale and retail prices in respect of FLM; the second was to establish whether retailers were prepared to share possible surplus benefits of any retail price increase with the processors:

> 'Whilst our first objective was to test if the retailers would consider an increase I was also asked to see if the principle of sharing benefit was acceptable.'

[Emphasis added]

Dairy Crest discussion with Asda

5.671. On 5 June 2003, [a senior manager at Dairy Crest] confirmed (by e-mail) that he had approached [Asda’s Category Manager for Dairy] and that

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\[884\] See paragraphs 5.671 to 5.679 below.
\[885\] See document 205 to the SO.
\[886\] See paragraph 5.665 above.
\[887\] [C]
\[888\] [C]

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[Asda’s Category Manager for Dairy] had provided a guarded and non-committal response to Dairy Crest’s proposal:

‘Asda [sic] Response. ([Asda’s Category Manager for Dairy])

Guarded but receptive to opening up a debate.

Interested in other ‘industry views’ and he will seek other opinions.

[Asda’s Category Manager for Dairy] wants to discuss in more detail next week. At the time of the discussion he would not confirm a view one way or the other.”

5.672. [A senior manager at Dairy Crest] view of his discussions with Asda was that Asda did not rule out his proposal for a price increase and was open to discussing the matter (both being ‘receptive’ to opening a discussion and wanting to discuss ‘in more detail’ subsequently). However, [Asda’s Category Manager for Dairy] wanted information on ‘other ‘industry views’.

5.673. [A senior manager at Dairy Crest] e-mail did not specifically identify who [Asda’s Category Manager for Dairy] meant when he referred to ‘other ‘industry views’’ and in particular whether this included other retailers. In the SO, the OFT provisionally found that ‘other ‘industry views’’ was a reference to the views of Asda’s competitors and its processors. Dairy Crest submitted that this was, instead, a reference to ‘views from the industry as a whole, for example from the NFU and other processors’. The author of this e-mail ([a senior manager at Dairy Crest]) explained that:

‘Perhaps the phrase ‘industry’ meant other retailers to [Asda’s Category Manager for Dairy] but that was not what I meant’ and that:

‘this did not mean from other retailers […] [w]hen I wrote the words ‘industry views’ I am certain I did not have other retailers in mind’.

5.674. The OFT considers that [a senior manager at Dairy Crest] statement and Dairy Crest’s submission that it would be [Asda’s Category Manager for Dairy] himself (rather than Dairy Crest) who would seek the ‘other ‘industry views’’ and that this term covered market players other than competing retailers is credible and that the contents of [a senior manager at Dairy Crest] e-mail of 5 June 2003 are clearly ambiguous. It is, however, not necessary for the OFT to conclude whether this was a reference to other retailers, given that subsequent contemporaneous documentary evidence demonstrates that Asda was, indeed, interested in other retailers’ views.

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889 See document 206 to the SO.
890 See document 34 to the SSO, at paragraph 2.4.3.
891 See document 32 to the SSO, at paragraph 19.
892 See document 33 to the SSO, at paragraph 21.
893 See paragraph 5.706 below.
5.675. Consistent with his e-mail to [a senior manager at Dairy Crest], [a senior manager at Dairy Crest] provided [Asda’s Category Manager for Dairy] with a very specific proposal in respect of sharing surplus benefits arising from a retail price increase and explained that the products included in Dairy Crest’s proposal were all dairy products and not just FLM:

'I was specific on 8ppg (1.74ppl)

I floated the idea that we would anticipate the larger share of this being returned to producers.

I confirmed we were proposing the increase be applied to all products not just liquid.'

5.676. However, it appears from subsequent discussions that Dairy Crest was not successful in persuading retailers of its proposal to share the benefit of FLM retail price increases.

5.677. On 18 June 2003, [Asda’s Category Manager for Dairy] also reported on his discussions with [a senior manager at Dairy Crest] to his Asda colleagues [Asda’s Agricultural Manager], [a senior manager at Asda] and [Asda’s Milk and Cream Buyer]. [Asda's Category Manager for Dairy] report formed part of a wider internal discussion as to whether Asda would implement an FLM retail price increase. These reports further confirm that [a senior manager at Dairy Crest] had:

i. approached Asda with a view to an FLM retail price increase; and

ii. proposed that some of the proceeds of an FLM retail price increase be shared by processors and retailers;

and therefore corroborates [a senior manager at Dairy Crest] version of events set out in his e-mail of 5 June 2003.

5.678. In his e-mail, [Asda's Category Manager for Dairy] stated:

'Dairycrest have been trying to broker an increase in milk price – but I think this is as much if not more for their gain than the farmers! [A senior manager at Dairy Crest] even suggested to me that there "might be an opportunity for margin gain across the board" through this! DC have been peddling this [proposal for an increase in the milk price with the sharing of any surplus] around the retailers – when I last spoke to them all retailers "were considering" – there was no prime mover.'

[Emphasis added]
5.679. This also demonstrates that Dairy Crest provided Asda with the preliminary views of other retailers on its proposition for an FLM retail price increase with the benefits being shared between dairy farmers, processors and retailers.

5.680. The OFT considers that the language used by [Asda's Category Manager for Dairy] demonstrates that he was comfortable with receiving such information and that there was no suggestion that he rejected or complained about receiving such information.

5.681. In the SO, the OFT considered that it was reasonable to infer from the statement in [Asda’s Category Manager for Dairy] e-mail ‘when I last spoke to them all retailers "were considering" that Dairy Crest would have approached Safeway, Sainsbury’s and [a retailer] in addition to Asda in connection with [a senior manager at Dairy Crest] proposal. 900 In an interview with OFT officials following the issue of the SO, [Asda’s Category Manager for Dairy] confirmed that Dairy Crest representatives would have informed him that they were ‘talking to other retailers’, 901 however he did not identify which retailers would have been involved. The OFT still considers it plausible that Safeway, Sainsbury’s and [a retailer] would have been contacted by Dairy Crest at this time given the fact that Dairy Crest supplied them with FLM and that these retailers were all commercially significant.

Dairy Crest’s submission that it only proposed an FLM cost price increase

5.682. In its response to the SO, Dairy Crest submitted that the OFT had mischaracterised the evidence in early June 2003902 by provisionally finding that: (i) Dairy Crest was targeting FLM retail price increases to cover any increase in farmgate prices; and (ii) Dairy Crest approached retailers to see if they were prepared to engage in an initiative and increase FLM retail prices. Dairy Crest submitted that the evidence (and, in particular, witness evidence) submitted by Dairy Crest demonstrated that its focus in early June 2003 was in achieving an FLM wholesale price increase and that its contacts with retailers were an ‘entirely legitimate attempt’ to achieve a wholesale price increase.903

5.683. Further evidence (which will be presented and considered below)904 demonstrates that Dairy Crest made use of information relating to Asda’s FLM retail pricing intentions to influence conditions on the FLM retail market by passing that information on to Sainsbury’s and therefore infringed the Chapter I prohibition. As a result of this further evidence, it is not necessary for the OFT to determine whether Dairy Crest attempted to co-ordinate an FLM retail price increase in early June 2003.

5.684. However, while the OFT notes the witness evidence submitted by Dairy Crest, it does consider that the surrounding evidence supports the

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900 See paragraph 1998 to 1999 of the SO.
901 See document 17 to the SSO, at page 43. See also paragraph 5.683 below.
902 Specifically, documents 204, 205, 206 and 207 to the SO.
903 See document 34 to the SSO, at paragraphs 2.3.1 to 2.4.3.
904 See paragraphs 5.800 to 5.808 below.
conclusion that Dairy Crest was at least proposing an FLM retail price increase. It is evident from contemporaneous documents that senior Dairy Crest staff did discuss FLM retail price increases with retailer customers in June 2003. In drawing this conclusion, the OFT notes that [a senior manager at Dairy Crest] e-mails of 5 and 9 June 2003 made various references to the opportunity for retailers to increase their margins which would only be relevant if retail price increases were also involved, while [Asda’s Category Manager for Dairy] e-mail of 18 June 2003 refers to [a senior manager at Dairy Crest] as having stated that Dairy Crest’s proposal ‘might be an opportunity for margin gain’. Given that the proposal Dairy Crest was putting to its retailer customers clearly involved an FLM wholesale price increase it would only have been possible for retailers to increase their margins if they also increased their FLM retail prices. The OFT’s conclusion is further supported by witness evidence provided by [Asda’s Category Manager for Dairy] in an interview with OFT officials:

‘Well, they [Dairy Crest] would have come in and made a presentation to me and told me that they are talking to other retailers as well... And trying to, and they were trying to move their cost price to farmers up via us moving the retail price up’. [Emphasis added]

5.685. The OFT also notes that both Asda and Dairy Crest have admitted their involvement in the 2003 FLM Initiative and that Asda has not submitted any representations challenging this conclusion.

5.686. What is less clear from the evidence is whether Dairy Crest’s proposal to its retailer customers in early 2003 anticipated FLM retail price increases being co-ordinated or whether retailers would have understood at the time that they were being asked to increase their FLM retail prices as part of a wider plan to increase FLM retail prices across the industry. However, it is evident that in their discussions with retailers Dairy Crest representatives did provide indications to Asda that Dairy Crest was talking to other retailers regarding its proposal. For example, in his e-mail dated 18 June 2003, [Asda’s Category Manager for Dairy] was of the view that ‘when I [Asda’s Category Manager for Dairy] last spoke to them [Dairy Crest] all retailers ‘were considering’ [Dairy Crest’s proposal for an increase in the milk price with the sharing of any surplus]’. Additionally, in his witness evidence, [Asda’s Category Manager for Dairy] confirmed that Dairy Crest ‘told [him] that they are talking to other retailers as well’.

Article in Western Daily press dated 10 June 2003

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905 See paragraphs 5.667 (‘whilst at the same time improving our own returns and the retailers’), 5.668 (‘leaving the remainder available for division between us and retailers’) and 5.670 (‘the principle of sharing benefit’) above.

906 See paragraph 5.678 above (‘[Dairy Crest] suggested to me that there ‘might be an opportunity for margin gain across the board’ through this’).

907 See document 17 to the SSO, at page 43.

908 See document 10 to the SSO.

909 See document 18 to the SSO.

910 See paragraph 5.678 above.

911 See document 17 to the SSO, at page 43.
5.687. At around the same time that Dairy Crest held discussions with Asda, it is also clear that FFA was seeking to promote an initiative to secure a farmgate price increase through increased FLM retail prices during June 2003 and held discussions with several major retailers concerning this.

5.688. In an article in the Western Daily Press, dated 10 June 2003, [an official at FFA] was quoted as claiming he had secured Asda’s support for an FLM price increase and that his aim was to secure ‘another across-the-board price rise’ in order to subsidise a farmgate price increase:

‘[An official at] Farmers For Action says he has secured the backing of the first major supermarket chain for an increase in the milk price.

Now there are hopes that another across-the-board price rise can be introduced this summer, with the margin passed back to producers.

[An official at FFA] emerged from weekend talks with Asda in buoyant mood after setting out the farmers’ case to directors.

"I think they now fully understand the predicament of the British dairy farmer and the likely outcome if nothing is done to get the price up," her [sic] said.912

[Emphasis added]

5.689. It is clear from the content of the article and the surrounding context that [an official at FFA] was aiming to secure FLM price increases from several retailers (‘[n]ow there are hopes that another across-the-board price rise can be introduced this summer, with the margin passed back to producers’).

*Sainsbury’s internal e-mail, dated 10 June 2003, demonstrating discussions with FFA

5.690. An internal Sainsbury’s e-mail, dated 10 June 2003, shows communication may have taken place between FFA and a number of retailers. In the e-mail, [Sainsbury’s Dairy Trading Manager] briefed [a senior manager at Sainsbury’s] about discussions he had held with FFA representatives.913

5.691. [Sainsbury’s Dairy Trading Manager] reported as follows:

‘[C]

The following is a brief update on the current situation on milk pricing within the market:

Following discussions with FFA across all the majors, including JS [Sainsbury’s], there is a general feeling that a further liquid milk retail increase, to reflect the potential rise in raw milk pricing in the autumn, can be instigated as early as July. I have highlighted to [an official at FFA] that we would support this in principle, but would not necessarily be the ones to lead it, and would need to remain competitive at all times. I also

912 See document 208 to the SO.
913 See document 209 to the SO.
pointed out the importance of OFT guidelines on this matter, and that if he was acting as the mediator with all these discussions, he has to be discreet.

I also stated that this would only be across liquid fresh & UHT [that is, FLM and ultra heat treated milk], as the added value categories were too confusing to contemplate going through a change again.

At this point in time we are taking no further action than awaiting [a] phone call [from an official at FFA] to update us on the situation, and offer solution on a way forward. I would however, be interested on the company’s view of taking the lead on this, on the assumption that the rest of the market would follow. For info, a penny a pint (2ppl) would generate an additional £8-9M pa in turnover.'

[Emphasis added]

5.692. In his response, [a senior manager at Sainsbury’s] confirmed that he did not want Sainsbury’s to take the leading role in any FLM retail price increase:

'Would not want to take the lead here'.

5.693. Accordingly, [Sainsbury’s Dairy Trading Manager], a senior member of staff within Sainsbury’s Fresh Foods division, had been in dialogue with [an official at FFA] concerning an increase in the retail price of FLM of 2ppl. The apparent purpose of this retail price increase was to support an increase in the farmgate price of raw milk.

5.694. As a result of these discussions, [Sainsbury’s Dairy Trading Manager] believed that FFA had also discussed an FLM retail price increase with Sainsbury’s competitors (’[f]ollowing discussions with FFA across all the majors’). When the OFT interviewed [Sainsbury’s Dairy Trading Manager] on 22 April 2008, he confirmed that his reference to ‘majors’ would have included Asda, Safeway and [a retailer].

5.695. [Sainsbury’s Dairy Trading Manager] also understood as a result of these discussions that there was ‘a general feeling that a further liquid milk retail increase’ could be ‘instigated as early as July’.

5.696. Although [Sainsbury’s Dairy Trading Manager] e-mail suggests that he treated the information received from FFA as credible, other evidence demonstrates information provided by FFA was treated with scepticism by the retailers who received it.

914 Ibid.
915 Ibid.
916 [This] e-mail [of 10 June 2003 from Sainsbury’s Dairy Trading Manager] reported that the purpose of this price increase was to ‘reflect the potential rise in raw milk pricing in the autumn’ and therefore clearly shows a link between this proposed price increase and an increase in the farmgate price.
917 See document 61 to the SSO, at page 28.
918 [C] [A retailer] submitted ‘He [an official at FFA] was regarded as a colourful activist, capable of causing damage, and was not someone in whose statements [a retailer’s]
5.697. Taking this into account, the OFT has not relied on evidence suggesting that FFA passed retailers’ FLM retail pricing intentions on to other retailers. However, the OFT does consider the fact that [Sainsbury’s Dairy Trading Manager] was prepared to receive and accept information regarding what he understood to be Sainsbury’s competitors’ retail pricing intentions is indicative of the circumstances in which Sainsbury’s subsequently received information regarding Asda’s FLM retail pricing intentions.

5.698. During his discussions with [an official at FFA], [Sainsbury’s Dairy Trading Manager] disclosed that Sainsbury’s would ‘in principle’ be prepared to support a ‘further liquid milk retail increase’ in July 2003, but that it would need ‘to remain competitive at all times’. The OFT has concluded that the need ‘to remain competitive at all times’ shows that Sainsbury’s would only be prepared to increase its FLM retail (and wholesale) prices if its competitors also increased their retail prices because in such circumstances Sainsbury’s competitive position in respect of price would be unaffected and therefore amounted to a statement of conditionality. This conditional commitment is consistent with FLM’s status as a known value item to Sainsbury’s, meaning it is very sensitive to its retail price relative to its competitors. [Sainsbury’s Dairy Trading Manager] confirmed this conclusion when interviewed by the OFT subsequent to the issue of the SO:

‘this goes back to the KVI argument that clearly if we did it [increase FLM retail prices] and we were out there alone, not only is it not going to get the returns for the business but equally we are going to be in a position which is not tenable for us as a retail business’. 919

5.699. In making this conditional commitment, Sainsbury’s demonstrated a willingness to disclose its own FLM retail pricing intentions.

5.700. The OFT additionally notes that [Sainsbury’s Dairy Trading Manager] was concerned as to whether [an official at FFA] discussions with other retailers concerning an FLM retail price increase might be subject to scrutiny by the OFT. [Sainsbury’s Dairy Trading Manager] reported that he had ‘pointed out the importance of OFT guidelines on this matter, and that if he [an official at FFA] was acting as mediator with all these discussions, he had to be discreet’. It is not clear what ‘OFT guidelines’ [Sainsbury’s Dairy Trading Manager] was referring to, but his reference indicates that [Sainsbury’s Dairy Trading Manager] was both aware, to some extent, of the OFT’s role and conscious that the behaviour under discussion between him and [an official at FFA] might be of interest to the OFT. This demonstrates that [Sainsbury’s Dairy Trading Manager] was concerned that such discussions may potentially lead to a breach of competition law.

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919 See document 61 to the SSO, at page 29.
Witness evidence provided by [Sainsbury’s Dairy Trading Manager] subsequent to the SO being issued further supports this finding.\[920\]

Asda contemplates increasing its FLM retail price

5.701. The reality of the situation appears to have been more complex than FFA had suggested in its press releases and its discussions with [Sainsbury’s Dairy Trading Manager], supporting the OFT’s conclusion above that the information passed on by FFA to Sainsbury’s might not have been accurate.\[921\] An Asda internal e-mail exchange on 18 June 2003 suggests that Asda had not committed to increase its FLM retail prices and that certain responsible individuals within Asda’s dairy department were sceptical of the need for such an increase. However, the e-mail exchange does reveal that Asda was seriously contemplating implementing an FLM retail price increase of 2 pence per litre in July 2003.

5.702. In the opening e-mail of the exchange, dated 18 June 2003, [a senior manager at Asda] asked his colleagues:

‘If we were to move on milk in July, is 2p a litre realistic?
Do processors think prices should move in July also?’\[922\]

5.703. This e-mail indicates [a senior manager at Asda] was at least considering Asda implementing an FLM price increase of 2 pence per litre in July 2003.

5.704. [Asda’s Category Manager for Dairy] responded to [a senior manager at Asda] e-mail. He began by referring to his discussions with Dairy Crest\[923\] and then stated that it was his view that attention should be directed at processors because Asda was still honouring the price increases that it implemented in 2002:

‘This year [a processor], [a processor] and DC [Dairy Crest] have reduced the price to farmers – I would be trying to bat the responsibility back to the processors.’\[924\]

5.705. [Asda’s Category Manager for Dairy] continued that he did not think an FLM price increase of 2 pence per litre could be justified on economic grounds (although he did not rule out an increase of this amount):

‘The current strength of the Euro / weakness of the pound plays into the hands of the processors and farmers anyway – they can get 20p from intervention and it should be easier to sell dairy products abroad. This in itself should drive the price of milk up through market forces.

\[920\] [Sainsbury’s Dairy Trading Manager] explained that [an official at FFA] had ‘no regard for the context in which we [Sainsbury’s] as supermarkets were governed in terms of our operation [...] the fact that he had to be discreet – I’m not sure he had a general knowledge of what competition law was, how it applied in the context of what was going on’ (document 61 to the SSO, at page 31).

\[921\] See paragraphs 5.695 to 5.696 above.

\[922\] See document 207 to the SO.

\[923\] See paragraphs 5.677 to 5.679 above.

\[924\] See document 207 to the SO.
In short therefore from an economic point of view I don’t think we should move 2p. There is of course always the political angle and if we want to move for PR / risk aversion reasons then I believe we should move on liquid milk alone. If we do so, then we should also however somehow get the onus back on the processors to justify the position on milk pricing they have taken this year."

5.706. It is clear from this exchange that, at the very least, the amount of any FLM price increase Asda was prepared to implement and its timing was yet to be determined.

5.707. The e-mail exchange between [a senior manager at Asda], [Asda’s Category Manager for Dairy], [Asda’s, Agricultural Manager] and [Asda’s Milk and Cream Buyer] also revealed that Asda understood that processors and farmer groups had held discussions with [a retailer] concerning its possible participation in the 2003 FLM Initiative and that the results of these discussions were disclosed to Asda. [Asda’s, Agricultural Manager] responded to [Asda’s Category Manager for Dairy] e-mail on the same day (18 June 2003), explaining that:

'I’ve spoken with the NFU and Arla (who are close to FFA and supply [a retailer]) Neither supports [an official at FFA] belief that [a retailer] have committed to an increase in milk prices. He is attempting his usual divide and conquer tactic’.

5.708. This disclosure is significant because it demonstrates Asda was willingly receiving and seeking information concerning whether one of its competitors’ would be increasing its FLM prices from both its processors and farmer representative groups, albeit that the view was that [a retailer] had not committed to increasing FLM prices. However, it is not clear to the OFT what information was passed on (given that [Asda’s Category Manager for Dairy] e-mail referred only to 'milk prices’) nor whether the information regarding [a retailer] was provided by [that retailer].

5.709. [A senior manager at Asda] responded on the same day (18 June 2003) to [Asda’s Category Manager for Dairy] e-mail querying:

'If we [Asda] were to move on milk in July, is 2p a litre realistic?

Do processors think prices should move in July also?

Urgent response pls.'

5.710. [Asda’s Agricultural Manager] then responded on the same day (18 June 2003) to [a senior manager at Asda] request for views as to whether a 2 pence per litre price increase in July 2003 was realistic:

'[C] – is this an increase on liquid milk only or an across the dairy sector rise? The experience from last year would indicate that the latter is very difficult to achieve as not all purchasers are willing to increase prices. Further the cheese market is firming and will be rising anyway. If we are to increase liquid prices solely this would be easier to monitor across

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925 See document 207 to the SO.
... retailers but wouldn’t provide [FFA] members with the rise he is looking for’.

[Emphasis added]

5.711. It is unclear from some of the evidence set out above whether Asda was contemplating a retail or wholesale cost price increase.926 However, [Asda’s Agricultural Manager] e-mail demonstrates that Asda was contemplating an FLM retail price increase. The fact that [Asda’s Agricultural Manager] envisaged that Asda would 'monitor [the increase] across retailers’ shows that the increase in 'liquid prices’ that Asda was contemplating was an FLM retail price increase given that it was retail price increases and not cost price increases that could be monitored 'across retailers’. The fact that Asda was contemplating an FLM retail price increase is also consistent with the evidence above demonstrating that Dairy Crest discussed with Asda the possibility of an FLM retail price increase.927

Asda decides to increase FLM retail prices

5.712. Very shortly after the internal Asda e-mail exchange on 18 June 2003, Asda began the process to implement an FLM retail price increase. On Friday 20 June, [Asda’s Business Unit Director] sent an internal e-mail to [Asda’s Category Manager for Dairy], [Asda’s Milk and Cream Buyer] and [Asda’s General Category Manager for Dairy] informing them that [a senior manager at Asda] wanted them ‘to start the ball rolling on cost price increases on Milk’. [Asda’s Business Unit Director] concluded the e-mail by requesting that his colleagues 'start making the relevant noises around getting 2p back to the farmers to our suppliers',928 indicating that the amount of the price increase was to be 2 pence per litre and the purpose of the increase was to subsidise an increase in the farmgate price.

5.713. Although [Asda’s Business Unit Director] e-mail referred only to a cost price increase, the OFT believes, based on the preceding evidence set out above,929 that Asda intended to implement an FLM retail price increase in conjunction with any cost price increase. The OFT’s conclusion will also be further supported by evidence subsequent to [Asda’s Business Unit Director] e-mail as set out below.930

iv. Asda discloses its FLM retail pricing intentions to Arla, Dairy Crest and Wiseman

5.714. The evidence presented below demonstrates that on or by 20 June 2003 Asda had taken a decision to increase its FLM retail prices to subsidise an increase in farmgate prices and passed this information on to one of its supplying processors (Wiseman).931

926 See paragraphs 5.701 to 5.708 above.
927 See paragraphs 5.671 to 5.674 and 5.676 to 5.679 above.
928 See document 210 to the SO.
929 See paragraphs 5.710 to 5.711 above.
930 See paragraphs 5.714 to 5.747 below.
931 See paragraphs 5.715 to 5.725 below.
Asda discloses its FLM retail pricing intentions to Wiseman

5.715. The Royal Highland Show in Scotland (which was attended by employees from a number of companies and organisations in the dairy industry) took place on the same day that [Asda's Business Unit Director] instructed [Asda's Category Manager for Dairy] and others to 'start the ball rolling on cost price increases' (20 June 2003).\textsuperscript{932}

5.716. [A senior manager at Asda] had a meeting with [Wiseman's National Accounts Director] during the course of the Royal Highland Show. The OFT has concluded that [a senior manager at Asda] disclosed information concerning Asda's FLM retail pricing intentions to Wiseman during the course of this meeting. The evidence demonstrating this disclosure is set out below.\textsuperscript{933}

5.717. During his interview with the OFT, [Wiseman's National Accounts Director] stated that he was informed of Asda’s intention to increase its FLM cost prices during this meeting:

'we had a meeting with Asda at the Royal Highland Show, along with [a senior manager at Asda], who I've mentioned there. And, at the time, when we went to see them, our intention was to talk to them about the farmers price going down – just because of the value of the product at the time, where the cream levels were, etc. And they, or he in particular, stopped us and said, 'that’s all very well and good, but actually what we’re going to do is we’re going to pay you 2 pence a litre, and we’d like you to give it back to the farmers'.\textsuperscript{934}

5.718. [Wiseman's National Accounts Director] was unable to recollect whether Asda also disclosed its FLM retail pricing intentions during that meeting:

'No, not at that meeting, I don’t think, my recollection of it, anyway. And obviously it’s a wee while ago, but I don’t recall us talking about specific numbers on retail prices at all'.\textsuperscript{935}

5.719. [Wiseman's National Accounts Director] also suggested that, to the extent that he was aware of Asda's FLM retail pricing intentions, this might have been a prediction based on knowledge that Asda would be implementing an FLM wholesale price increase. When interviewed by the OFT, [Wiseman's National Accounts Director] explained:

'I don’t know if they [Asda] actually said those words that they were putting the retail prices up, but I would imagine that would have been the inference, certainly'.\textsuperscript{936}

5.720. [Wiseman's National Accounts Director] also explained that:

'Well, if you look back over the years, you know, there’s [...] – you could kind of draw a graph of what the costs are and what the retails are.'

\textsuperscript{932} See paragraph 5.712 above.
\textsuperscript{933} See paragraphs 5.717 to 5.729 below.
\textsuperscript{934} See document 73 to the SSO, at page 3.
\textsuperscript{935} \textit{ibid}, at page 9.
\textsuperscript{936} \textit{ibid}, at page 4.
They’re not exactly the same, but they’re not a hundred miles away. And again, typically it had happened previously, so I guess they would anticipate that the same thing would have happened again. 937

5.721. In the SSO, 938 the OFT provisionally considered that it was reasonable and understandable for [Wiseman’s National Accounts Director] to make that ‘inference’ from Asda’s statement, 939 particularly in light of the retailers’ practice of generally not accepting a cost price increase unless it could be passed on to consumers by virtue of a retail price increase that would allow them to preserve their margin.

5.722. However, having reconsidered this evidence, the OFT has concluded that it is not clear from [Wiseman’s National Accounts Director] witness evidence whether Asda disclosed its FLM retail pricing intentions to Wiseman on 20 June 2003. Notwithstanding this, the OFT is satisfied that other evidence in its possession demonstrates that Asda did disclose specific information concerning its FLM retail pricing intentions to Wiseman during the meeting on 20 June 2003.

5.723. A contemporaneous document in the form of a Wiseman National Accounts Board Report, which was authored by [Wiseman’s National Accounts Director], supports the OFT’s conclusion that Asda (specifically, [a senior manager at Asda]) disclosed to Wiseman (specifically, [Wiseman’s National Accounts Director]) at the Royal Highland Show that Asda would increase its FLM retail prices on 1 July 2003. 940 [Wiseman’s National Accounts Director] report states:

‘At the time of writing this report ASDA have just announced that they will increase their retail prices by 2ppl from the 1st July 2003 on fresh milk only – the work with all the other customers will now begin’. 941

[Emphasis added]

5.724. The report contained what is clearly unambiguous information regarding Asda’s FLM retail prices (not only that Asda would be increasing its FLM retail prices, and by how much, but also that this increase would take place on 1 July 2003) and does not refer to cost prices. The information in this report relating to the date on which Asda would be increasing its FLM retail prices (1 July 2003) also proved to be accurate. The OFT considers that the accuracy of this information further supports that the information in this report was disclosed by Asda to Wiseman. In addition, the OFT considers that the certainty of [Wiseman’s National Accounts Director] language regarding Asda’s retail price increase further supports the OFT’s conclusion that Asda disclosed its FLM retail pricing intentions to Wiseman.

5.725. Although the report did not include the exact retail price for each container size that Asda would increase to, the OFT considers that the

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937 See document 73 to the SSO, at page 5.
938 See paragraph 389 of the SSO.
939 See paragraph 5.717 above.
940 See document 225 to the SO.
941 Ibid.
key information was the date on which Asda would increase its FLM retail prices, particularly given that the level of possible price increase (2 pence per litre) was widely known within the industry at the time and was recorded in the report itself.\textsuperscript{942} However, evidence considered below also demonstrates that Asda did subsequently disclose the exact level of its FLM retail price increases to Wiseman.\textsuperscript{943}

5.726. The reference in this report to Asda having 'just announced' might suggest that Asda had made a public announcement in relation to its decision to increase its FLM retail prices. However, the OFT has not been provided with any evidence which would support the conclusion that Asda had made a public announcement at or around the time in relation to its planned FLM retail price increase.

5.727. The OFT notes that [Wiseman's National Accounts Director] report was dated 2 July 2003. However, critically [Wiseman's National Accounts Director] believes that he drafted this report on the evening of 20 June 2003 and therefore on the same day as he met with [a senior manager at Asda] at the Royal Highland Show:

'Yes, I think, and I don’t know for 100 per cent sure, but my recollection of doing this is that I wrote that the night before I went away, and logged on with my computer and sent it in on the Friday night, before I went away on holiday.' \textsuperscript{944}

5.728. The OFT notes that [Wiseman's National Accounts Director] recollection as to the likely timing of his report is supported by the contents of the report itself in which he states that he prepared it earlier than usual on account of his annual leave:

'I am writing this report fairly early in comparison to normal as I shall be going on holiday shortly.' \textsuperscript{945}

5.729. Accordingly, the timing of the writing of this report supports the OFT’s conclusion that Asda did disclose its FLM retail pricing intentions to Wiseman during the Royal Highland Show on 20 June 2003. As such, the OFT has concluded that the information within it would have therefore been based on conversations between [Wiseman’s National Accounts Director] and [a senior manager at Asda] that day.

5.730. The OFT’s conclusion is strengthened by the fact that [Wiseman’s National Accounts Director] himself confirmed that this statement in his report 'would most likely have referred to the discussion between Wiseman and [a senior manager at Asda] on 20 June 2003'. \textsuperscript{946}

5.731. Accordingly, the OFT has concluded that Asda on 20 June 2003 did disclose to Wiseman that it would be increasing its FLM retail prices and

\textsuperscript{942} See, for example, paragraphs 5.652 and 5.690 above.
\textsuperscript{943} See paragraphs 5.732 to 5.737 below.
\textsuperscript{944} See document 73 to the SSO, at page 14. See also document 68 to the SSO, Appendix 2, at paragraph 5.1.
\textsuperscript{945} See document 225 to the SO.
\textsuperscript{946} See document 68 to the SSO, Appendix 2, at paragraph 5.2.
that this increase would be implemented on 1 July 2003, notwithstanding
that the 'specific numbers' were not disclosed. The OFT additionally
notes that both Asda and Wiseman have admitted their involvement
in the 2003 FLM Initiative and that Asda has not submitted any
representations challenging this conclusion.

Asda further discussions with Wiseman

5.732. A series of e-mails between Asda and Wiseman between 24 and 26 June
2003 further support the OFT’s conclusion that Asda disclosed its FLM
retail pricing intentions to Wiseman including the level of its FLM retail
price increase. In these e-mails, Wiseman demonstrated a clear
understanding that Asda would be increasing its FLM retail prices on 1
July 2003 and provided recommendations to Asda regarding its revised
retail price levels.

5.733. On 24 June 2003, [Wiseman’s National Accounts Manager for its Asda
account] e-mailed proposed new FLM retail prices to [Asda’s Category
Manager for Dairy] and [Asda’s Milk and Cream Buyer]. These new retail
prices had apparently been requested by Asda during conversations that
afternoon. The e-mail confirmed that the date of the retail price increase
would be 1 July 2003 and the amount of the price increase by container
size. The average amount of the increase spread across all container sizes
would be 2 pence per litre.

‘Afternoon [C],

Further to our conversation this afternoon, please find below details as
requested. As you are aware, the retail initiative you propose is 2p per
litre, which equates to 9.092p per gallon. Given the milk is sold in imperial
it’s impossible to price exactly pro rata.
I would therefore suggest the following retail price position , which
effectively passes on the 2p in Average weighted terms given the relative
split in size per product ( ie 6 pint and 4 pint approx [C] in volume terms
recovering [C] per litre and [C] per litre respectively )
Conversely 2 pints and 1 pints return [C] per litre.
I’m sure you will agree increasing the 2 smaller sizes any further would
distort the current price hierarchy
The retail price movements mirror those made in September 2002.

<table>
<thead>
<tr>
<th></th>
<th>Pre Sept 2002</th>
<th>Current</th>
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<tr>
<td>6 pint</td>
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<td>4 pint</td>
<td>93p</td>
<td>98p</td>
<td>£1.03</td>
</tr>
<tr>
<td>2 pint</td>
<td>54p</td>
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<tr>
<td>1 pint</td>
<td>28p</td>
<td>29p</td>
<td>30p</td>
</tr>
</tbody>
</table>

947 See paragraph 5.718 above.
948 Nonetheless, evidence set out at paragraphs 5.732 to 5.737 below demonstrates that
Wiseman did subsequently discuss the 'specific numbers' of Asda's FLM retail price
increases with Asda prior to Asda increasing its FLM retail prices.
949 See document 10 to the SSO.
950 See document 67 to the SSO.
Hope this is OK [C], please give me a ring to confirm, I can then progress as discussed.  

5.734. This e-mail is additionally noteworthy because it demonstrates that oral discussions also took place between Asda and Wiseman regarding Asda’s prospective FLM retail price increases, therefore further supporting the OFT’s conclusion that Asda disclosed its FLM retail pricing intentions (specifically the fact that Asda would be increasing its FLM retail prices and the date on which it would implement those retail price increases) to Wiseman.

5.735. [Wiseman’s National Accounts Manager for its Asda account] sent further e-mails to [Asda’s Milk and Cream Buyer] on 26 and 27 June 2003. The purpose of the second e-mail (on 27 June 2003) was to confirm FLM wholesale price increases to reflect Asda’s prospective FLM retail price increases.

5.736. On 26 June 2003, [Wiseman’s National Accounts Manager for its Asda account] e-mailed the following message:

‘Morning [C],
Left a message on your phone.
When you’ve a minute, could you please give me a ring.’

5.737. In his e-mail of 27 June 2003, [Wiseman’s National Accounts Manager for its Asda account] attached new wholesale price proposals to reflect Asda’s prospective retail price increases showing a clear connection between the wholesale and retail price increases:

‘Hi [C]
Tried ringing, hence the e-mail
Please find attached new cost price proposals for [C] July reflecting the increase in retails.
Movements are as the previous retail initiative led by yourselves in September 2002.
Please give me a ring to discuss and confirm.
I am in ASDA House this afternoon at 1.30pm maybe we could have a chat then?
Speak to you soon.’

Asda discloses its FLM retail pricing intentions to Arla

5.738. On 24 June 2003, [Arla’s Business Manager Milk & Cream for its Asda account] e-mailed a spreadsheet to [Asda’s Category Manager for Dairy] detailing new FLM retail prices to be implemented on 1 July 2003. This demonstrates that Asda had disclosed to Arla its intention to increase its FLM retail prices and the date on which Asda would implement its FLM retail price increases.

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951 See document 211 to the SO.
952 See paragraph 5.729 above.
953 See document 211 to the SO.
954 Ibid.
955 See document 212 to the SO.
5.739. [Asda’s Category Manager for Dairy] forwarded this spreadsheet to [Asda’s Milk and Cream Buyer] and [Asda’s General Category Manager for Dairy] commenting:

'These are the retails we are proposing to move to on 1 July. Could you look at the costs [Asda’s Milk and Cream Buyer] to check whether they make sense?'

5.740. The proposed retail price increases within the attached spread sheet were as follows:

<table>
<thead>
<tr>
<th>SIZE</th>
<th>TYPE</th>
<th>OLD RSP</th>
<th>NEW RSP</th>
<th>CHANGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 PINT</td>
<td>WHOLE</td>
<td>£0.29</td>
<td>£0.30</td>
<td>£0.01</td>
</tr>
<tr>
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<td>SEMI</td>
<td>£0.29</td>
<td>£0.30</td>
<td>£0.01</td>
</tr>
<tr>
<td>1 PINT</td>
<td>SKIMMED</td>
<td>£0.29</td>
<td>£0.30</td>
<td>£0.01</td>
</tr>
<tr>
<td>2 PINT</td>
<td>WHOLE</td>
<td>£0.56</td>
<td>£0.58</td>
<td>£0.02</td>
</tr>
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<td>2 PINT</td>
<td>SEMI</td>
<td>£0.56</td>
<td>£0.58</td>
<td>£0.02</td>
</tr>
<tr>
<td>2 PINT</td>
<td>SKIMMED</td>
<td>£0.56</td>
<td>£0.58</td>
<td>£0.02</td>
</tr>
<tr>
<td>4 PINT</td>
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<td>£0.98</td>
<td>£1.03</td>
<td>£0.05</td>
</tr>
<tr>
<td>4 PINT</td>
<td>SEMI</td>
<td>£0.98</td>
<td>£1.03</td>
<td>£0.05</td>
</tr>
<tr>
<td>4 PINT</td>
<td>SKIMMED</td>
<td>£0.98</td>
<td>£1.03</td>
<td>£0.05</td>
</tr>
<tr>
<td>6 PINT</td>
<td>WHOLE</td>
<td>£1.44</td>
<td>£1.51</td>
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</tr>
<tr>
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<td>SEMI</td>
<td>£1.44</td>
<td>£1.51</td>
<td>£0.07</td>
</tr>
</tbody>
</table>

5.741. A subsequent internal Arla e-mail, dated 25 June 2003, further demonstrates that Asda did subsequently confirm to Arla that it would increase its FLM retail prices.

5.742. Accordingly, the OFT has concluded that Asda disclosed its FLM retail pricing intention to Arla. The OFT additionally notes that Asda has admitted its involvement in the 2003 FLM Initiative and that neither Arla nor Asda have submitted any representations challenging this conclusion.

**Asda discloses its FLM retail pricing intentions to Dairy Crest**

5.743. In an e-mail at 12:31 on 27 June 2003, [Dairy Crest's National Account Manager for its Asda account] sent a table to [Asda's Milk and Cream Buyer] and [Asda's Trading Assistant Dairy] 'show[ing] current costs and RSP and new costs / RSP's from [...]'. The new retail prices listed were identical to those proposed or confirmed with Arla and Wiseman and, significantly, demonstrates that Dairy Crest was aware of both the fact that Asda would be increasing its FLM retail prices and the date on which Asda would implement its FLM retail price increases.

5.744. News of Asda’s decision to increase its FLM retail prices was then widely distributed within Dairy Crest. At 12:44pm on 27 June 2003 (13 minutes...
after [Dairy Crest’s National Account Manager for its Asda account] e-mailed Asda, [Dairy Crest’s National Account Manager for its Asda account] e-mailed details of Asda’s new retail prices to a number of colleagues, further supporting the OFT’s conclusion that Asda disclosed its FLM retail pricing intentions to Dairy Crest. Among those who received the e-mail were [Dairy Crest’s Sales Controller for its Liquid Business Unit] and [a senior manager at Dairy Crest]:

'Asda will be increasing their RSP’s from Tuesday 1st July [2003], to allow further monies to be paid to farmers'.  

[Emphasis added]

5.745. An e-mail from [a senior manager at Dairy Crest] secretary) to a number of Dairy Crest employees at 16:40 on 27 June 2003 also further supports the OFT’s conclusion that Asda disclosed its FLM retail pricing intentions to Dairy Crest:

'Please be advised that following extensive discussions with Asda, they [Asda] have confirmed that they will be increasing RSP’s for standard milk by the equivalent of 2ppl from Tuesday 1st July.'

<table>
<thead>
<tr>
<th>Product</th>
<th>Current</th>
<th>New</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>29p</td>
<td>30p</td>
</tr>
<tr>
<td>2</td>
<td>56p</td>
<td>58p</td>
</tr>
<tr>
<td>4</td>
<td>98p</td>
<td>1.03p</td>
</tr>
<tr>
<td>6</td>
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</tbody>
</table>

Asda will be issuing formal confirmation on Monday [1 July 2003] with their objective to ensure that "Milk price increases will be passed back to farmers with immediate effect".

I will ensure everyone is updated accordingly on Monday.'

5.746. Accordingly, the OFT has concluded that Asda disclosed its FLM retail pricing intention to Dairy Crest. The OFT additionally notes that both Asda and Dairy Crest have admitted their involvement in the 2003 FLM Initiative and have not submitted any representations challenging this conclusion.

Conclusion regarding Asda’s disclosure of its FLM retail pricing intentions to Arla, Dairy Crest and Wiseman

5.747. Accordingly, documentary evidence demonstrates that between 20 and 27 June 2003, Asda was in discussions with its supplying processors (Arla, Dairy Crest and Wiseman) concerning its FLM retail pricing intentions and that by 27 June 2003 at the latest, Asda had confirmed new retail price levels (per carton size) together with the date on which it

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962 The other recipients were [an employee at Dairy Crest]; [an employee at Dairy Crest]; [a Customer Service Manager within Dairy Crest’s Liquids Business Unit] and [an employee at Dairy Crest]. See document 214 to the SO.

963 See document 215 to the SO.

964 See document 10 to the SSO.

965 See document 18 to the SSO.
would increase its prices – 1 July 2003 – with each of Arla, Dairy Crest and Wiseman.

5.748. In disclosing its intention to increase its FLM retail prices to Arla, Dairy Crest and Wiseman, Asda, at the very least, substantially reduced uncertainty as to the conduct on the FLM retail market to be expected on its part by disclosing the course of conduct that it had decided to adopt or was contemplating adopting on that market.966

v. Conditional nature of Asda’s FLM retail price increase

5.749. In order to demonstrate an infringement of the Chapter I prohibition it is necessary for the OFT to not only demonstrate that Asda disclosed its FLM retail pricing intentions to Arla, Dairy Crest and Wiseman, but that it also disclosed that information in circumstances in which Asda may be taken to have intended or did, in fact, foresee that Arla, Dairy Crest and Wiseman would make use of that information to influence conditions on the FLM retail market by passing it to other retailers in order to facilitate further retail price increases.967 The OFT considers that the evidence demonstrates this.

5.750. This conclusion is further supported by evidence set out and analysed below showing that Asda made its FLM retail price increase conditional on its competitors also increasing their FLM retail prices.968 The OFT considers that evidence demonstrating the conditional nature of a retailer’s retail pricing intentions is sufficient to satisfy this requirement. The OFT additionally notes that Asda has admitted its involvement in the 2003 FLM Initiative969 and has not submitted any representations challenging this conclusion. This conditional commitment Asda is clearly inconsistent with the principle that competitors should determine their prices independently.

Arla internal e-mail, dated 25 June 2003

5.751. The first piece of evidence showing that Asda’s intention to increase its FLM retail prices was conditional upon its competitors also increasing their FLM retail prices is provided by an Arla internal e-mail, dated 25 June 2003, in which [Arla’s Retailer Brand Milk and Cream Controller] updated [Arla’s Milk and Cream Marketing Controller] on ‘Fresh milk price increases’:

’[C],

Having trouble getting hold of you to keep to updated [sic] ref the fresh milk price increase, hence the e-mail.

968 See paragraphs 5.752 to 5.763 below.
969 See document 10 to the SSO.
To confirm the current status:

Farmers have pushed retailers for 2ppl price increase

**Asda have agreed to move up fresh milk and Cravendale on the understanding that they will only do this if their competitors follow.**

Price points will move up by the same amount as last time i.e. 1p/2p/5p/7p on fresh milk (1/2/4/6 pint) and by 2p/4p on Cravendale.

[An employee at Arla] will speak to Asda to try and maintain current fresh 4pt/ Cravendale 2l differential i.e. 10p.

Processors are currently discussing the 2ppl with the trade. Given that this is a wider milk initiative, the opportunity to raise Cravendale by more than 2 ppl looks very limited.\(^{970}\)

[Emphasis added]

5.752. It is clear from this e-mail that responsible individuals within Arla understood that Asda's FLM retail price increase was conditional upon its competitors following suit ('Asda have agreed to move up fresh milk and Cravendale on the understanding that they will only do this if their competitors follow' [emphasis added]). Taking into account the context within which Arla was in possession of this information (in particular the fact that discussions had taken place between Arla and Asda shortly before the date of this e-mail concerning the implementation of an FLM retail price increase by Asda)\(^ {971}\) the OFT has inferred that Asda was the source of the information in [Arla’s Retailer Brand Milk and Cream Controller] e-mail.

*Sainsbury’s internal e-mails dated 25 and 27 June*

5.753. Two contemporaneous internal Sainsbury’s e-mails further demonstrate the conditional nature of Asda’s FLM retail pricing intentions. These e-mails also demonstrate that Sainsbury’s was aware of the conditional nature of Asda’s FLM retail price increase and that Sainsbury’s adapted its FLM retail pricing behaviour based upon this information.

**Internal Sainsbury’s e-mail from [a senior manager at Sainsbury’s], dated 25 June 2003**

5.754. On 25 June 2003, [a senior manager at Sainsbury’s] e-mailed [a senior manager at Sainsbury’s], together with other Sainsbury’s employees\(^ {972}\), to inform them of the discussions he had had with [an official at NFU] in relation to ‘the next milk round’:

> ‘He [an official at NFU] said that **ASDA were prepared to move if others were**. He also said that he was very upset about the amount of margin

\(^{970}\) See document 217 to the SO.

\(^{971}\) See paragraphs 5.738 to 5.740 above

\(^{972}\) [An employee at Sainsbury’s], [an employee at Sainsbury’s] and [an employee at Sainsbury’s].
being absorbed by the processors and he felt that they were taking too much of the margin...

[Emphasis added]

5.755. The OFT notes that [a senior manager at Sainsbury’s] was informed that Asda was willing to increase its FLM prices if its competitors also increased their prices, and notes that he relayed this information to a number of individuals within Sainsbury’s (including [a senior manager at Sainsbury’s] and therefore an individual connected with Sainsbury’s FLM pricing). However, it is not necessary for the OFT to reach any firm conclusions on this document given that other evidence within this section demonstrates that Sainsbury’s did engage in the co-ordination of FLM retail prices.

Internal Sainsbury’s e-mail from [Sainsbury’s Dairy Trading Manager] to [a senior manager at Sainsbury’s], dated 27 June 2003

5.756. A second Sainsbury’s internal e-mail, dated 27 June 2003, from [Sainsbury’s Dairy Trading Manager] to [a senior manager at Sainsbury’s] further demonstrates that key Sainsbury’s staff were aware that Asda was about to implement an FLM retail price increase and that this increase was conditional upon its competitors also increasing their FLM retail prices. In this e-mail, [Sainsbury’s Dairy Trading Manager] informed [a senior manager at Sainsbury’s] that Asda had ’made it clear through their processors, the NFU and FFA that they expect the competition to follow [their FLM retail price increase] within 48hrs or they will revert back’ [emphasis added].

Farmers Weekly article dated 24 June 2003

5.757. In the SO, the OFT considered that a Farmers Weekly article, dated 24 June 2003, also supported the fact that Asda’s FLM retail pricing intentions were conditional on its competitors also increasing their FLM retail prices\(^\text{975}\) and that a further Farmers Weekly article, dated 27 June 2003, supported the fact that Asda’s FLM retail pricing intentions were widely known and were conditional on its competitors also increasing their FLM retail prices.\(^\text{976}\)

5.758. In its representations on the SO and SSO, [a retailer] submitted that the content of these articles meant that information concerning Asda’s FLM retail pricing intentions was in the public domain.\(^\text{977}\) However, since issuing the SO, the OFT has obtained conflicting evidence as to the reliability of information relating to the dairy price initiatives contained within industry publications. Further, regardless of the content of these articles, the private disclosure of information concerning Asda’s retail pricing intentions by its supplying processors would have been of benefit

\(^{973}\) See document 218 to the SO.

\(^{974}\) See document 219 to the SO, presented and analysed in full at paragraphs 5.766 to 5.783 below.

\(^{975}\) See paragraphs 2053 to 2058 of the SO.

\(^{976}\) See paragraphs 2112 to 2116 of the SO.

\(^{977}\) [C]
to other retailers when determining their future pricing behaviour on the FLM retail market.

5.759. Accordingly, the OFT has concluded that, taking into account doubts regarding the credibility of information within industry journals, a private disclosure of information regarding a retailer’s (retailer A) retail pricing intentions by a processor (supplier B) (that was itself a supplier to retailer A) to another retailer (retailer C), would have served to, at the very least, substantially reduce uncertainty as to retailer A’s future conduct on the FLM retail market.

*Further evidence supporting the conditional nature of Asda’s FLM retail price increase*

5.760. In addition to the contemporaneous documentary evidence presented above, the OFT considers that Asda’s FLM retail pricing intentions are confidential and a business secret. Based on the evidence in the OFT’s possession, there is also nothing to suggest that Asda’s disclosure of its FLM retail pricing intentions was legitimate commercial behaviour. Additionally, there is no evidence in the OFT’s possession to suggest that, when Asda disclosed its FLM retail pricing intentions to each of Arla, Dairy Crest and Wiseman, it in any way drew attention to the fact that that information was confidential or requested that it be considered as such and not be disclosed to third parties.

5.761. Moreover, the OFT’s conclusion that Asda’s FLM retail price increase was conditional upon its competitors also increasing their FLM retail prices is also consistent with the commercial reality of FLM as a known value item. As a known value item, Asda was very sensitive to its FLM retail price relative to its competitors and did not wish to be seen as more expensive.

5.762. The OFT also notes that the evidence presented above shows that Asda’s decision to increase its FLM retail prices was taken following extensive discussions within the dairy industry concerning the implementation of wider FLM retail price increases. The evidence shows that Asda was interested in other retailers’ views on the proposition of FLM retail price increases and that it received such information from at least one of its supplying processors. Accordingly, when disclosing its FLM retail pricing intentions, Asda would have been aware that discussions were being held within the dairy industry. Despite this awareness, there is no evidence that Asda instructed its processors not to disclose its FLM retail pricing intentions to its competitors.

*Witness evidence [of Asda’s Category Manager for Dairy]*

5.763. The OFT’s conclusion that Asda’s FLM retail pricing intentions were conditional on its competitors also increasing their FLM retail prices has also been corroborated by [Asda’s Category Manager for Dairy]. During his interview with OFT staff following the issue of the SO, [Asda’s

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978 See paragraphs 5.653 to 5.685 above.
979 See paragraphs 5.676 to 5.680 above.
Category Manager for Dairy] was shown [Sainsbury’s Dairy Trading Manager] e-mail of 27 June 2003\(^{980}\) and explained:

‘it’s [the wording [Sainsbury’s Dairy Trading Manager] used in his e-mail of 27 June 2003] consistent with our [Asda’s] approach on the whole of the milk initiative as we talked at the […] beginning in terms of we didn’t want to be out of line, so we wouldn’t have expected to be holding a price for a couple of weeks and being the only people out there’.\(^{981}\)

vi. Arla, Dairy Crest and Wiseman pass Asda’s FLM retail pricing intentions on to other retailers

5.764. As demonstrated above,\(^{982}\) by disclosing its FLM retail pricing intentions to Arla, Dairy Crest and Wiseman, Asda, at the very least, substantially reduced uncertainty as to the conduct on the FLM retail market to be expected on its part by disclosing the course of conduct that it had decided to adopt or was contemplating adopting on that market (in particular, the date on which its FLM retail price increase would be implemented and the fact that its FLM retail price increase was conditional upon its competitors also increasing their FLM retail prices).\(^{983}\)

The evidence set out above\(^{984}\) has demonstrated that Asda also disclosed its FLM retail pricing intentions to Arla, Dairy Crest and Wiseman in circumstances in which it may be taken to have intended and did, in fact, foresee that Arla, Dairy Crest and Wiseman would make use of that information to influence conditions on the FLM retail market by passing it on to other retailers in order to facilitate further FLM retail price increases.\(^{985}\)

5.765. The evidence presented and analysed below demonstrates that Arla, Dairy Crest and Wiseman made use of Asda’s FLM retail pricing intentions to influence conditions on the FLM retail market by passing that information on to other retailers in order to facilitate further FLM retail price increases.\(^{986}\)

*Internal Sainsbury’s e-mail, dated 27 June 2003*

5.766. The OFT has concluded that Arla, Dairy Crest and Wiseman used the information in their possession concerning Asda’s FLM retail pricing intentions to influence conditions on the FLM retail market by passing that information to Sainsbury’s. This is demonstrated by an internal

\(^{980}\) See document 219 to the SO and paragraph 5.757 above.

\(^{981}\) See document 17 to the SSO, at pages 45 to 46.

\(^{982}\) See paragraphs 5.715 to 5.747 above.


\(^{984}\) See paragraphs 5.749 to 5.763 above.


\(^{986}\) *JJB Sports v OFT and Argos and Littlewoods v OFT* [2006] EWCA Civ 1318 at paragraphs 91 and 141.
Sainsbury’s e-mail, dated 27 June, from [Sainsbury’s Dairy Trading Manager] to [a senior manager at Sainsbury’s].

5.767. The purpose of [Sainsbury’s Dairy Trading Manager] e-mail was to inform [a senior manager at Sainsbury’s] ‘on the latest situation on milk retails’ and it reads as follows:

‘Thought I’d drop you a quick update on the latest situation on milk retails. The industry believes that Asda will be increasing milk retails by the equivalent [sic] of 2 pence per litre from 01/07 (tuesday). The [sic] have made it clear through their processors, the NFU and FFA that they expect the competition to follow within 48 hrs or they will revert back. Their biggest worry is that [a retailer] will not follow. From JS’s perspective, I have given assurance to the industry that we will be watching prices from monday of next week, and that we will ‘remain competitive in the market place’ if we see a change. Realistically we will implement the increase from weds 2nd [July] if Asda move.

The expected price points are as follows, although this is yet to be confirmed:

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<tr>
<th>Size</th>
<th>Current Retail</th>
<th>Expected Retail</th>
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<tr>
<td>1 pint</td>
<td>29p</td>
<td>30p</td>
</tr>
<tr>
<td>2 pint</td>
<td>54p</td>
<td>56p</td>
</tr>
<tr>
<td>4 pint</td>
<td>98p</td>
<td>£1.02</td>
</tr>
<tr>
<td>6 pint</td>
<td>£1.44</td>
<td>£1.50</td>
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The biggest unknown is whether Asda will put the 4 pint through the £ barrier. This may cause issue with customers on price perception.

On a positive note, this will add £8-9 million to the T/O annually, although it will dilute the %GM by approx 1% on the milk category as the costs are passed back to farmers.

I will update you on the situation as it changes next week.’

[Emphasis added]

5.768. This was followed half an hour later by the following update:

‘Slight mistake on the retails below, we’re 56p on 2 pint NOT 54p as stated. New retail would be 58p. Sorry for the confusion.’

5.769. This e-mail demonstrates that:

i. Sainsbury’s was informed of the date on which Asda would increase its FLM retail price (1 July 2003);

987 The e-mail was also copied to [Sainsbury’s Senior Manager Trading].
988 See document 219 to the SO.
989 Ibid.
ii. Asda's FLM retail price increase was conditional on its competitors also increasing their FLM retail prices ('[Asda] have made it clear through their processors, the NFU and FFA that they expect the competition to follow within 48hrs or they will revert back'); and

iii. information relating to Asda's FLM retail pricing intentions had been communicated to Sainsbury's by Asda's supplying processors ('their [Asda's] processors') with a precise timeframe provided for Asda's competitors to also increase their FLM retail prices ('they [Asda] expect the competition to follow within 48 hrs or they will revert back').

5.770. [C]

5.771. The OFT has concluded that the reference to 'their [Asda's] processors' was a reference to Arla, Dairy Crest and Wiseman. In drawing this conclusion, the OFT notes that Asda and Sainsbury's were both supplied with FLM by Arla, Dairy Crest and Wiseman in 2003. Moreover, earlier evidence has demonstrated that Arla, Dairy Crest and Wiseman were all in possession of information concerning Asda's FLM retail pricing intentions prior to the date of this e-mail and therefore would have been appropriately briefed to make such a disclosure.

5.772. The OFT's conclusion is further supported by witness evidence provided by [Sainsbury's Dairy Trading Manager] subsequent to the SO being issued. When the OFT interviewed [Sainsbury's Dairy Trading Manager] on 22 April 2008, he explained that the 'processors' referred to in his e-mail of 27 June 2003 were 'likely to be Wiseman and Arla'. Accordingly, [Sainsbury's Dairy Trading Manager] evidence supports the OFT's conclusion that Arla and Wiseman passed Asda's FLM retail pricing intentions on to Sainsbury's. Subsequent evidence will further demonstrate that Wiseman passed Asda's FLM retail pricing intentions on to Sainsbury's.

5.773. In an interview with Dairy Crest's solicitors subsequent to the SO being issued, [a senior manager at Dairy Crest] explained that he did not consider that the reference to 'their [Asda's] processors' included Dairy Crest given that 'even if Dairy Crest had said that the prices were moving, it is very unlikely that they would threaten Sainsbury's by telling it that it had to follow' and that he did not think that anyone at Dairy Crest 'would have spoken to Sainsbury's about the increase using this sort of conditional language'. However, the OFT considers that Dairy Crest was included in the reference to 'their [Asda's] processors' in [Sainsbury's Dairy Trading Manager] e-mail of 27 June 2003.

5.774. While [Sainsbury's Dairy Trading Manager] did not specifically identify Dairy Crest by reference to 'their [Asda's] processors', he stated a number of times within his interview with the OFT that Sainsbury's would also

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990 [C]
991 [C]
992 See paragraphs 5.715 to 5.747 above.
993 See document 61 to the SSO, at page 33.
994 See paragraphs 5.816 to 5.830 below.
995 See document 27 to the SSO, at paragraph 25.
have received Asda's FLM retail pricing intentions from Dairy Crest.\footnote{996}{See document 61 to the SSO, at pages 11 and 27 to 28.}

Accordingly, [Sainsbury’s Dairy Trading Manager] evidence supports the OFT’s conclusion that Dairy Crest passed Asda's FLM retail pricing intentions on to Sainsbury’s.

5.775. The OFT’s conclusion is also supported by evidence in the form of further documentary evidence which shows that Arla,\footnote{997}{See paragraphs 5.785 to 5.798 below.} Dairy Crest\footnote{998}{See paragraphs 5.800 to 5.808 below.} and Wiseman\footnote{999}{See paragraphs 5.809 to 5.830 below.} took steps to pass on Asda's retail pricing intentions.

5.776. It is clear that [Sainsbury’s Dairy Trading Manager] willingly received Asda’s FLM retail pricing intentions. This is demonstrated by the ‘assurance’ he gave to ‘the industry’ that Sainsbury’s ‘will be watching prices from Monday of next week [30 June 2003], and that we will 'remain competitive in the market place' if we see a change’.\footnote{1000}{See document 219 to the SO.} The willing receipt by Sainsbury’s of Asda’s FLM retail pricing intentions and the resulting ‘assurance’ by Sainsbury’s is clearly inconsistent with the principle that competitors should determine their prices independently.\footnote{1001}{Joined Cases 40/73 etc Suiker Unie and others v Commission [1975] ECR 1663, at paragraph 173; and Case C-199/92 P etc Hüls AG v Commission [1999] ECR I-4287. See also Apex Asphalt and Paving Co Limited v Office of Fair Trading [2005] CAT 4, at [206(iv)].}

5.777. The OFT considers that [Sainsbury's Dairy Trading Manager] reference to Sainsbury’s need to ‘remain competitive in the market place’ amounted to a commitment to increase its FLM retail prices, conditional on its competitors also increasing their FLM retail prices. [Sainsbury’s Dairy Trading Manager] statement clearly indicates that if Sainsbury’s competitors did increase their FLM retail prices, Sainsbury’s would also do so as its competitive position would not be adversely affected. This was a reciprocal disclosure.\footnote{1002}{JJB Sports plc v Office of Fair Trading and Argos Limited and Littlewoods Limited v Office of Fair Trading [2006] EWCA Civ 1318, at paragraphs 91 and 141.} This conclusion was confirmed by [Sainsbury’s Dairy Trading Manager] in his interview with the OFT on 22 April 2008:

‘The context of what I meant it [‘remain competitive in the market place’] to be internally is explained in the next sentence, which was ‘we would implement a price increase if our competitors move’.\footnote{1003}{See document 61 to the SSO, at page 36.}

5.778. [Sainsbury's Dairy Trading Manager] also explained that although he did not clarify the statement ‘remain competitive in the market place’, this was because he was never requested to clarify the meaning of that statement:

‘Well, interestingly enough, I was never queried directly, I was never asked to clarify that particular statement [‘remain competitive in the market place’]. There was a context of everyone understood what it meant but I
never expressly stated that it means that we would follow the retail market moves up'.

5.779. Given that Sainsbury’s was aware of the conditional nature of Asda’s FLM retail pricing intentions and, rather than rejecting that information, instead made a reciprocal disclosure of its FLM retail pricing intentions, the OFT has concluded that Sainsbury’s may be taken to have known the circumstances in which Asda disclosed its FLM retail pricing intentions to Arla, Dairy Crest and Wiseman and did, in fact, appreciate that Asda’s information was disclosed to Sainsbury’s with Asda’s concurrence. In drawing this conclusion, the OFT also notes that Sainsbury’s received this information pursuant to a plan to co-ordinate FLM retail price increases in order to subsidise a farmgate price increase. Sainsbury’s was aware of this plan and also that its implementation involved both itself and its competitors implementing FLM retail price increases. Evidence presented above has also shown that Sainsbury’s willingness to increase its FLM retail prices was conditional on other retailers also increasing their FLM retail prices.

5.780. Having received this information regarding Asda’s FLM retail pricing intentions, Sainsbury’s could not have failed to take it into account when determining its own future behaviour on the FLM retail market. Indeed, the OFT considers that by communicating this ‘assurance’ to ‘the industry’ it is clear that [Sainsbury’s Dairy Trading Manager] took the information he received concerning Asda’s FLM retail pricing intentions into account when determining Sainsbury’s future conduct on the FLM retail market.

5.781. In making a conditional commitment regarding its future retail pricing behaviour Sainsbury’s, at the very least, substantially reduced uncertainty as to the conduct on the FLM retail market to be expected on its part by disclosing the course of conduct that it had decided to adopt or was contemplating adopting on that market. This conditional commitment by Sainsbury’s is also clearly inconsistent with the principle that competitors should determine their prices independently.

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1004 See document 61 to the SSO, at page 37.
1005 See paragraphs 5.754 to 5.766 and 5.769 above.
1006 See paragraphs 5.697 to 5.699; 5.766 to 5.769; and 5.775 to 5.778 above.
1008 See paragraphs 5.690 to 5.699 above. Evidence presented at paragraphs 5.813 to 5.817; 5.819 to 5.821; and 5.824 below further supports the OFT’s conclusion that Sainsbury’s was aware of this plan.
1009 See paragraphs 5.754 to 5.766 and 5.769 above.
1010 See paragraphs 5.690 to 5.699 above.

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Moreover, in making such a conditional commitment regarding Sainsbury’s future retail pricing behaviour, particularly having received Asda’s FLM retail pricing intentions, Sainsbury’s may be taken to have intended and did, in fact, foresee that its FLM retail pricing intentions would be used by the intermediaries to influence conditions on the FLM retail market by passing that information on to other retailers.\footnote{JJB Sports plc v Office of Fair Trading and Argos Limited and Littlewoods Limited v Office of Fair Trading [2006] EWCA Civ 1318, at paragraphs 91 and 141.} In drawing this conclusion, the OFT notes that Sainsbury’s disclosed this information pursuant to a plan to co-ordinate FLM retail price increases in order to subsidise a farmgate price increase.\footnote{See paragraphs 5.690 to 5.699 above. Evidence presented at paragraphs 5.813 to 5.817; 5.819 to 5.821; and 5.830 to 5.833 below further supports the OFT’s conclusion that Sainsbury’s was aware of this plan.} Sainsbury’s was aware of this plan and also that its implementation involved both itself and its competitors implementing FLM retail price increases.\footnote{See paragraphs 5.754 to 5.756 and 5.766 to 5.769 above}

The OFT also notes that Sainsbury’s has admitted its involvement in the 2003 FLM Initiative\footnote{See document 57 to the SSO.} and has not submitted any representations challenging this conclusion.

However, the OFT has no evidence in its possession that Arla, Dairy Crest or Wiseman made use of Sainsbury’s FLM retail pricing intentions by passing that information on to other retailers. The OFT, therefore, does not find that Sainsbury’s FLM retail pricing intentions were passed on to other retailers. However, given that the evidence demonstrates that Arla, Dairy Crest and Wiseman passed Asda’s FLM retail pricing on to Sainsbury’s, it is not necessary to demonstrate a reciprocal disclosure of Sainsbury’s FLM retail pricing intentions.\footnote{JJB Sports plc v Office of Fair Trading and Argos Limited and Littlewoods Limited v Office of Fair Trading [2006] EWCA Civ 1318, at paragraphs 91 and 141.}

Arla makes use of Asda’s FLM retail pricing intentions to influence conditions on the FLM retail market by passing that information on to other retailers

\textit{Arla internal document demonstrating preparation to co-ordinate FLM retail price increases based upon Asda’s FLM retail pricing intentions}

An internal, undated, Arla document entitled ‘FRESH MILK PRICE INCREASE’ demonstrates that Arla specifically instructed its employees to co-ordinate FLM retail price increases by other retailers to follow Asda. It started by confirming that there would be an increase in the ‘price’ of FLM on 1 July 2003 as a result of concerns over direct action by farmers:

‘As a result of an aggressive move by the farmers in a number of our customers, there will be a price increase on fresh milk from 1/7/03. This will see prices rise by 2ppl.’\footnote{See document 220 to the SO.}
5.786. The document listed the likely new retail prices by container size and indicated that Cravendale, Arla’s brand of filtered milk, would also be included. The price points listed were identical to those in an internal Asda e-mail on 24 June:\textsuperscript{1020}

'\textquote{The new prices are likely to be:}

\begin{tabular}{|c|c|}
\hline
1pt & 30p (29p currently) \\
2pt & 58p (56p currently) \\
4pt & £1.03 (98p currently) \\
6pt & £1.51 (1.44 currently) \\
\hline
\end{tabular}

Cravendale 2l TBC tomorrow

The farmers are looking for universal support, with retailers running the high risk of being picketed if they do not increase their prices.

At this stage it is just fresh milk that will be affected. UHT milk, sterilised/flavoured milk and cream are excluded at this stage.'

5.787. The note concluded by listing two urgent action points. The first was the need to discuss with ‘customers’ (that is, other retailers) the need to increase FLM retail prices by 1 July 2003:

'We need to discuss the following points with customers asap:

1. The need to move retails up by 1/7/03
2. Our cost prices should look to move upwards in order to offer the retailers cash margin maintenance.'

5.788. In the interview conducted by the OFT with [Arla’s Retailer Brand Milk and Cream Controller] on 16 June 2008, [Arla’s Retailer Brand Milk and Cream Controller] confirmed that he was the author of the above note, and further stated that:

'[T]his [document] I think came in as a request to me to do something specific. It’s an, if you like, advance briefing that we would be going for a price increase, what we thought, based on the 2 pence a litre that was being talked about at that point in time, what the new price points would be. And some just very outline detail at that point in time in terms of timings and scope'.\textsuperscript{1021}

5.789. Although [Arla’s Retailer Brand Milk and Cream Controller] did not confirm exactly when he created the document, he most likely did so at some stage in the week commencing 23 June 2003, and probably on or shortly after 24 June 2003, because it was only during this week that Asda disclosed to Arla that it was increasing its FLM retail prices by the amounts and on the dates set out in this document.\textsuperscript{1022}

5.790. [Arla’s Retailer Brand Milk and Cream Controller] was unable to remember whether he originally produced the document as a briefing to Arla

\textsuperscript{1020} See paragraphs 5.738 to 5.741 above.
\textsuperscript{1021} See document 3 to the SSO, at page 13.
\textsuperscript{1022} See paragraphs 5.738 to 5.741 above.
Business Unit Directors\footnote{1023} or whether it was meant for an individual team within Arla. In any event, the circulation of this document to either of these groups would have been significant because it demonstrates that Arla planned to co-ordinate FLM retail price increases by its retailer customers based upon its knowledge of Asda’s FLM retail pricing intentions.

5.791. The OFT notes that there is limited documentary evidence of correspondence between Arla and its retailer customers concerning the co-ordination of further FLM retail price increases. However, this does not mean that such contacts did not occur.

5.792. In addition to Asda, Arla supplied FLM to a number of other retailers including Safeway, Sainsbury’s and [a retailer] in 2003. In the SO, the OFT considered it reasonable to infer that all of these retailers would have been approached by Arla to increase their FLM retail prices on the back of Asda’s decision to increase its FLM retail prices and that Arla would have disclosed Asda’s FLM retail pricing intentions and the conditional nature of Asda’s intentions to these retailers in order to facilitate wider FLM retail price increases.\footnote{1024}

5.793. In respect of Sainsbury’s, evidence set out above has demonstrated that Arla made use of Asda’s FLM retail pricing intentions to influence conditions in the FLM retail market by passing this information on to Sainsbury’s.\footnote{1025}

5.794. In respect of Safeway and [a retailer], the OFT has reconsidered the evidence in its possession and considers it is not sufficient to demonstrate to the required standard of proof that Arla passed Asda’s FLM retail pricing intentions on to either of these retailers. However, in respect of Safeway, evidence set out below demonstrates that it did receive Asda’s FLM retail pricing intentions from Wiseman.\footnote{1026}

\textit{Arla correspondence with [a retailer], dated 2 July 2003, demonstrating implementation of a co-ordinated FLM retail price increase}\footnote{1023} Business Unit Directors were the individuals within Arla who were responsible for the day to day management of retailer accounts.\footnote{1024} See paragraph 2089 of the SO.\footnote{1025} See paragraphs 5.766 to 5.783 above.\footnote{1026} See paragraphs 5.809 to 5.830 below.\footnote{1027} See paragraphs 5.785 to 5.791 above.
5.796. The purpose of [a Business Unit Manager within Arla] letter was to confirm details of a wholesale price increase on FLM supplied to the retailer by Arla. It is clear from the letter that the price increases formed part of the 2003 FLM Initiative. It begins:

‘Further to our telephone conversation on Tuesday 24th June, I am writing to confirm that with effect from 1st July 2003 all liquid milk prices will be increased by 2ppl.

This initiative has been led by the NFU/FFA and several of the Major Multiples. I am enclosing till receipts to show that the Multiples retail prices have increased accordingly.'\textsuperscript{1028}

[Emphasis added]

5.797. [A Business Unit Manager within Arla] referred to a telephone conversation between himself and [a retailer] on 24 June 2003 – the same day that Asda discussed its FLM retail pricing intentions with Arla.\textsuperscript{1029} It is clear from the overall context of this letter that during the telephone conversation Arla disclosed to [a retailer] that an FLM retail price initiative would be implemented with FLM retail price increases being implemented on or around 1 July 2003.

5.798. It is also clear that the prices [a Business Unit Manager within Arla] referred to in the first paragraph of the letter were neither [the recipient retailer’s] wholesale nor retail prices. The language used is clearly inconsistent with the prices being [the recipient retailer’s] retail prices, while its revised wholesale prices are confirmed later in the letter and they were to become effective in July 2003.

5.799. The OFT has concluded that this correspondence demonstrates the steps Arla took to co-ordinate further FLM retail price increases following Asda disclosing its FLM retail pricing intentions with Arla. Evidence set out above has also demonstrated the steps that Arla took to co-ordinate further FLM retail price increases – by passing Asda’s FLM retail pricing intentions on to Sainsbury’s.\textsuperscript{1030}

viii. Dairy crest makes use of Asda’s FLM retail pricing intentions to influence conditions on the FLM retail market by passing that information on to other retailers

5.800. An internal Dairy Crest e-mail dated 27 June 2003 demonstrates that [a senior manager at Dairy Crest] took steps to circulate details of Asda’s decision to increase its retail prices widely to other Dairy Crest employees. At 16:40 on 27 June 2003 [the secretary of a senior manager at Dairy Crest] sent an e-mail detailing Asda’s prospective FLM retail prices to a number of other Dairy Crest employees. The text of the e-mail (‘following extensive discussions with Asda’) indicates that Dairy Crest had played a role in influencing Asda’s decision. In an interview with Dairy Crest’s solicitors following the issue of the SO, [a senior manager at Dairy

\textsuperscript{1028}See document 224 to the SO.
\textsuperscript{1029}See paragraphs 5.738 to 5.741 above.
\textsuperscript{1030}See paragraphs 5.766 to 5.783 above.
Crest] explained that he ‘would have circulated this information internally as many people within Dairy Crest would need/want to know of Asda’s proposed price increase’.\footnote{See document 27 to the SSO, at paragraph 18.} The secretary of a senior manager at Dairy Crest\footnote{See document 215 to the SO.} e-mail (sent on behalf of [a senior manager at Dairy Crest]) reads as follows:

‘Please be advised that following extensive discussions with Asda, they have confirmed that they will be increasing RSP’s for standard milk by the equivalent of 2ppl from Tuesday 1\textsuperscript{st} July.

<table>
<thead>
<tr>
<th>Product</th>
<th>Current</th>
<th>New</th>
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<tr>
<td>1</td>
<td>29p</td>
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<tr>
<td>2</td>
<td>56p</td>
<td>58p</td>
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<tr>
<td>4</td>
<td>98p</td>
<td>1.03p</td>
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<tr>
<td>6</td>
<td>1.44p</td>
<td>1.51p</td>
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Asda will be issuing formal confirmation on Monday [30 June 2003] with their objective to ensure that “Milk price increases will be passed back to farmers with immediate effect.”

I will ensure everyone is updated accordingly on Monday.’\footnote{See paragraphs 5.671 to 5.679 above.}

5.801. Many of the recipients of the e-mail held senior positions within Dairy Crest, including [a senior manager at Dairy Crest],\footnote{See document 215 to the SO.} [a senior manager at Dairy Crest] and [a senior manager at Dairy Crest]. Significantly some of those who received the e-mail were individuals with responsibility for other retailer accounts within Dairy Crest, including [two Dairy Crest Commercial Directors for its retailer accounts], [Dairy Crest’s National Account Manager for its Safeway account] and the supervisor of [Dairy Crest’s National Account Manager for its Safeway account], [Dairy Crest’s Sales Controller]. The distribution of this information to these individuals is significant because it meant that information regarding Asda’s FLM retail pricing intentions was available to individuals within Dairy Crest whose job involved direct contact with other retailers (that is, Asda’s competitors).

5.802. In the SO, the OFT considered it reasonable to infer that these individuals would have passed Asda’s FLM retail pricing intentions to their contacts at each of the retailers mentioned above and therefore attempt to influence conditions on the FLM retail market. The OFT’s inference in respect of Dairy Crest passing Asda’s FLM retail pricing intentions on to Sainsbury’s is heavily supported by evidence provided by Dairy Crest employees after the issue of the SO. In an interview with Dairy Crest’s solicitors subsequent to the SO being issued, [a senior manager at Dairy Crest] explained that Asda’s FLM retail pricing intentions would have been passed on to Sainsbury’s:

‘I do not doubt that account managers would have informed retailers that prices would be increasing on the relevant date. Bearing in mind that Dairy Crest’s National Account Manager for its Asda account circulated Asda’s increased RSPs at around 12.30 p.m., I believe that it is likely that this
information would have been passed on to Sainsbury’s by 5.00 p.m. that
day. I believe there is around a 50% chance that this information would
have been passed to Sainsbury’s within three to four hours, with a 60-
70% chance that it would have been communicated by close of business.
This information would definitely have been communicated within twenty-
four hours’. 1034

5.803. While he could not remember a specific conversation with Sainsbury’s, [a
senior manager at Dairy Crest] explained that ‘I would probably have had a
conversation with Sainsbury’s about the information we had about Asda and I
expect that I would have indicated in general terms that the expected increase
was being passed on in full’. 1035 He also explained that ‘there were around ten
people who could have contacted Sainsbury’s’ and that he had ‘no doubt that
one of them would have spoken to Sainsbury’s’.

5.804. Earlier evidence also supports the OFT’s conclusion that Dairy Crest made
use of Asda’s FLM retail pricing intentions to influence conditions on the
FLM retail market by passing that information on to Sainsbury’s. 1036

5.805. Having received this information regarding Asda’s FLM retail pricing
intentions, Sainsbury’s could not have failed to take it into account when
determining its own future behaviour on the FLM retail market. 1037 This
behaviour is clearly inconsistent with the principle that competitors should
determine their prices independently.

5.806. Moreover, for the reasons set out above, 1038 the OFT has concluded that
Sainsbury’s may be taken to have known the circumstances in which
Asda disclosed its FLM retail pricing intentions to Dairy Crest and did, in
fact, appreciate that Asda’s information was disclosed to Sainsbury’s
with Asda’s concurrence. 1039

5.807. [A senior manager at Dairy Crest] also explained that Asda’s FLM retail
pricing intentions would have been passed on to other retailers:

‘Similarly for other retailers. Account managers would have spoken to
their opposite numbers’. 1040

5.808. In respect of Safeway and [a retailer], the OFT has reconsidered the
evidence in its possession and considers it is not sufficient to
demonstrate to the required standard of proof that Dairy Crest passed
Asda’s FLM retail pricing intentions on to either of these retailers.
However, in respect of Safeway, evidence set out below demonstrates
that it did receive Asda’s FLM retail pricing intentions from Wiseman. 1041

1034 See document 27 to the SSO, at paragraph 19.
1035 Ibid, at paragraph 24.
1036 See paragraphs 5.766 to 5.783 above.
paragraph 121.
1038 See paragraph 5.779 above.
1039 JJB Sports plc v Office of Fair Trading and Argos Limited and Littlewoods Limited v
Office of Fair Trading [2006] EWCA Civ 1318, at paragraphs 91 and 141.
1040 See document 27 to the SSO, at paragraph 19.
1041 See paragraphs 5.809 to 5.830 below.
ix. Wiseman makes use of Asda’s FLM retail pricing intentions to influence conditions on the FLM retail market by passing that information on to other retailers

5.809. Wiseman also made use of Asda’s FLM retail pricing intentions to influence conditions on the FLM retail market by passing that information on to other retailers. In his interview with the OFT subsequent to the SO being issued, [Wiseman’s National Accounts Director] explained that he did not know how he informed his colleagues of Asda’s FLM retail pricing intentions. He recalled that he and [a senior manager at Wiseman] attended a meeting with [a senior manager at Asda] at the Royal Highland Show on 20 June 2003 (when Asda disclosed its FLM retail pricing intentions).1042 He could not recall whether [Wiseman’s National Accounts Manager for its Safeway and Sainsbury’s accounts] or [Wiseman’s National Accounts Manager for its Asda account] also attended the Royal Highland Show on 20 June 2003. Instead, [Wiseman’s National Accounts Director] considered that he ‘probably’ informed his colleagues of Asda’s FLM retail pricing intentions by telephone.1043 The fact that [Wiseman’s National Accounts Director] shared Asda’s FLM retail pricing intentions with his colleagues is important given that he was on holiday from 21 June 2003.1044

Wiseman National Accounts Board Report, dated 2 July 2003

5.810. At paragraph 5.722 above, the OFT set out a Wiseman National Accounts Board Report drafted by [Wiseman’s National Accounts Director] on 20 June 2003 for a Wiseman Board of Directors meeting on 2 July 2003 that demonstrated that Asda had disclosed its FLM retail pricing intentions to Wiseman. The OFT considers that this Wiseman Board report also demonstrates that Wiseman (one of Asda’s processors) played a pro-active role in the facilitation of FLM retail price increases by retailers:

‘At the time of writing this report ASDA have just announced that they will increase their retail prices by 2ppl from the 1st July 2003 on fresh milk only – the work with all the other customers will now begin.’1045

[Emphasis added]

Wiseman internal e-mail, dated 4 July 2003, describing discussions with [a retailer]

5.811. An internal Wiseman e-mail from [Wiseman’s National Accounts Manager for its Asda account] to [a senior manager at Wiseman] and [Wiseman’s National Accounts Director], dated 4 July 2003, supports the OFT’s conclusion that Wiseman anticipated playing a pro-active role in the facilitation of FLM retail price increases by retailers.1046 It provided a detailed retrospective account of discussions between Wiseman and [a retailer] concerning the latter’s participation in a co-ordinated FLM retail

1042 See paragraphs 5.715 to 5.731 above.
1043 See document 73 to the SSO, at page 13.
1044 Ibid, at page 3.
1045 See document 225 to the SO.
1046 See document 226 to the SO.
price increase. In his e-mail, [Wiseman’s National Accounts Manager for its Asda account] stated that [Wiseman’s National Accounts Director] ‘first spoke to [an employee at a retailer] on Fri 20th June regarding ASDA’s intention’.

5.812. 20 June 2003 was the date on which [a senior manager at Asda] instructed his colleagues at Asda to prepare to increase milk prices and to contact Asda’s processors with this news. This contemporaneous document therefore further supports the OFT’s conclusion that Asda did inform Wiseman of its intention to increase its FLM retail prices on 20 June 2003 and indicates that Wiseman passed this information on to one of its retailer customers.

E-mails sent by Wiseman to Safeway and Sainsbury’s on 30 June 2003

5.813. The OFT’s conclusion that Wiseman planned to use Asda’s FLM retail pricing intentions to influence conditions on the FLM retail market by co-ordinating FLM retail price increases by other retailers is further supported by e-mails sent by Wiseman to Safeway and Sainsbury’s on 30 June 2003. Both e-mails were sent by [Wiseman’s National Accounts Manager for its Safeway and Sainsbury’s accounts].

Wiseman e-mail to Safeway, dated 30 June 2003

5.814. [Wiseman’s National Accounts Manager for its Safeway and Sainsbury’s accounts] e-mail sent to Safeway was addressed to [Safeway’s Buyer of Milk and Cream] and [Safeway’s Category Manager Dairy/Deli]:

‘Further to our conversations, you are aware of the retail initiative to increase retails on Fresh Milk by 2p per litre tomorrow (1st July 2003) and pass this to the farmer via the processor.

As discussed, I trust Safeway will also be supporting this initiative and we therefore suggest that your retails would increase by the following which effectively passes on the 2p in average weighted terms given the relative split in size per product. These were also the numbers we discussed on the phone.

6 Pint = increase in retail of 7p
4 Pint = increase in retail of 5p
2 Pint = increase in retail of 2p
1 Pint = increase in retail of 1p

The retail price movements mirror those made in September 2002. As in September 2002 our cost price increased to incorporate the increases in retail and I have done the work on the numbers and have attached a file showing the new cost prices effective [C] July 2003.’

[Emphasis added]

1047 See paragraphs 5.712 to 5.713 above.
1048 The e-mail was also copied to [a senior manager at Wiseman].
1049 See document 228 to the SO.
5.815. [Safeway’s Category Manager Dairy/Deli] responded nine minutes later on the same day (at 13:35 on 30 June 2003) and confirmed that Safeway would increase its FLM retail prices once it had seen its competitors had moved:

'[C] we will not be moving tomorrow but will follow quickly when we have seen a move, happy to discuss a cost move following our retail move but this will not be the 2nd of July.'\textsuperscript{1050}

[Emphasis added]

Wiseman e-mail to Sainsbury’s, dated 30 June 2003

5.816. [Wiseman’s National Accounts Manager for its Safeway and Sainsbury’s accounts] e-mail sent to Sainsbury’s was addressed to [Sainsbury’s Milk Buyer]:

'I trust you are aware of the retail initiative to increase retails on Fresh Milk by 2p per litre from tomorrow (1st July 2003) and pass this to the farmer via the processor.

I trust Sainsbury’s will also support this initiative and we therefore suggest that your retails would increase by the following which effectively passes on the 2p in average weighted terms given the relative split in size per product.

6 Pint = increase in retail of 7p (£1.51)
4 Pint = increase in retail of 5p (£1.03)
2 Pint = increase in retail of 2p (£0.58)
1 Pint = increase in retail of 1p (£0.30)

The retail price movements mirror those made in September 2002.

As in September 2002 our gallonage price increased to replicate the increases in retail and I have replicated this to create the attached file containing our new cost prices effective [C] July 2003.

If you have any questions on the above, please do not hesitate to contact me.'\textsuperscript{1051}

5.817. It is clear that both e-mails were sent in advance of the implementation of any FLM retail price increases – which were to (and did) start the following day\textsuperscript{1052} – and that the proposed FLM retail price increases formed part of a wider, co-ordinated move that would also have included the implementation of FLM retail price increases by several retailers. When interviewed by the OFT, [Wiseman’s National Accounts Manager for its Safeway and Sainsbury’s accounts] explained that what he meant by the ‘retail initiative’ was ‘the understanding at that time, was where the retails increased to allow costs to be increased, to allow, at that time, money to be passed back to the farmers’\textsuperscript{1053}

\textsuperscript{1050} See document 229 to the SO.
\textsuperscript{1051} See document 227 to the SO.
\textsuperscript{1052} See paragraph 5.835 below.
\textsuperscript{1053} See document 71 to the SSO, at page 29.
5.818. Both e-mails assumed awareness on the part of the recipient 'of the retail initiative to increase retail prices on Fresh Milk by 2p per litre' from 1 July 2003 and requested Safeway’s and Sainsbury’s support for this ‘retail initiative’ ('I trust [Safeway / Sainsbury’s] will also be supporting this initiative') These statements demonstrate that the ‘retail initiative’ being put forward by these e-mails did not consist of unilateral FLM retail price increases, particularly given that future FLM retail price increases were anticipated and given that Wiseman was requesting Safeway’s and Sainsbury’s support for that ‘retail initiative’. This conclusion is further supported by a submission by Wiseman subsequent to the SO being issued:

‘Members of the Wiseman sales team were, therefore, playing their part in facilitating an increase in the retail price of fresh liquid milk. The emails identified in the Statement of Objections from [Wiseman’s National Accounts Manager for its Safeway and Sainsbury’s accounts] and from [Wiseman’s National Accounts Manager for its Safeway and Sainsbury’s accounts] to [Sainsbury’s Milk Buyer] and from [Wiseman’s National Accounts Manager for its Safeway and Sainsbury’s accounts] to [Safeway’s Buyer of Milk and Cream] [document numbers 228 and 229 to the SO] are examples of Wiseman’s attempts to facilitate an increase in the retail price of fresh liquid milk’. The precise price proposals for the different sized containers included in each of the emails from [Wiseman’s National Accounts Manager for its Safeway and Sainsbury’s accounts] would have been in response to specific requests from the retailers concerned for Wiseman to calculate how the 2ppl increase could be applied to the standard imperial sizes.  

5.819. Although Asda is not specifically named in the e-mails as leading the 2003 FLM Initiative, the OFT considers that this would again have been known by both recipients. When interviewed by the OFT, [Wiseman’s National Accounts Manager for its Safeway and Sainsbury’s accounts], supported this conclusion, explaining that he would have ‘been talking about Asda’ when referring to FLM retail prices increasing on 1 July 2003.  

5.820. In respect of Sainsbury’s, a number of internal Sainsbury’s documents demonstrate that there was clear awareness on the part of Sainsbury’s that Asda was leading the co-ordinated FLM retail price increase and would be implementing an FLM retail price increase on 1 July 2003. The OFT’s conclusion that Wiseman discussed the 2003 FLM Initiative with Sainsbury’s is further supported by a record of an oral presentation that [a senior manager at Wiseman] gave to the Wiseman board on 2 July 2003:

‘Major Multiple Milk Price Increase: [a senior manager at Wiseman] described what had been taking place since ASDA announced their initiative of increasing the price of milk by 2ppl to go back to Farmers. It appeared that there had been some breakdown in communication within the ASDA organisation and not all prices in all their stores had moved at the same time. [A senior manager at Wiseman] also advised that both [a

1054 See document 70 to the SSO, at paragraph 3.1.
1055 See document 71 to the SSO, at page 29.
1056 See, for example, paragraphs 5.755 to 5.756 and 5.766 to 5.783 above.
retailer] and Sainsbury should move prices that day and that [a retailer]/[a retailer] had actually put up their prices on the previous day.\textsuperscript{1057}

[Underline in original]

5.821. [A senior manager at Wiseman] referred to the fact Asda had increased its FLM retail prices by an average of 2 pence per litre on 1 July and advised the Wiseman Board that 'Sainsbury should move prices that day [2 July 2003]'. It is clear from the context presented by the board document that this price increase was linked to the same initiative as Asda's and that Wiseman had not yet monitored Sainsbury's FLM retail price increases, indicating that [a senior manager at Wiseman] was reporting upon what he expected to happen based upon information he had been provided.

5.822. The veracity of the information presented by [a senior manager at Wiseman] in respect of Sainsbury's FLM retail price increase is demonstrated by conduct that subsequently occurred on the retail market. Sainsbury's did increase its prices on 2 July 2003.\textsuperscript{1058} Taking into account the wider context and, in particular, the fact that Wiseman did, in fact, pass Asda's FLM retail pricing intentions on to Sainsbury's, the OFT has inferred that the origin of this FLM retail price information was Sainsbury's. The OFT's conclusion is further supported by evidence set out and analysed above demonstrating that Sainsbury's had disclosed its FLM retail pricing intentions to its processors (including Wiseman) as part of the formation of the 2003 FLM Initiative.\textsuperscript{1059}

5.823. However, as explained above,\textsuperscript{1060} the OFT has no evidence in its possession that Wiseman made use of Sainsbury's FLM retail pricing intentions by passing that information on to other retailers. The OFT, therefore, does not find that Sainsbury's FLM retail pricing intentions were passed on to other retailers. Given that the evidence demonstrates that Arla, Dairy Crest and Wiseman passed Asda's FLM retail pricing on to Sainsbury's it is, however, not necessary to demonstrate a reciprocal disclosure of Sainsbury's FLM retail pricing intentions.\textsuperscript{1061}

5.824. In the SO, the OFT considered that, taking into account the wider context (in particular, the disclosure of Asda's FLM retail pricing intentions to other retailers), it was reasonable to infer that the information relating to [a retailer] (‘[A senior manager at Wiseman] also advised that both [a retailer] and Sainsbury should move prices that day’) would have originated from [that retailer].\textsuperscript{1062} [A senior manager at Wiseman] supported this inference in a witness interview conducted with OFT staff following the issue of the SO in which he stated that while he could not remember why he would have written this statement, his 'best conclusion' was that Sainsbury's and [a retailer] had informed him of their decisions to increase their FLM retail

\textsuperscript{1057} See document 237 to the SO.
\textsuperscript{1058} See paragraph 5.836 below.
\textsuperscript{1059} See paragraphs 5.766 to 5.783 above.
\textsuperscript{1060} See paragraph 5.783 above.
\textsuperscript{1061} JJB Sports plc v Office of Fair Trading and Argos Limited and Littlewoods Limited v Office of Fair Trading [2006] EWCA Civ 1318, at paragraphs 91 and 141.
\textsuperscript{1062} See paragraph 2162 of the SO.
prices in advance. However, notwithstanding [a senior manager at Wiseman] witness evidence, the OFT considers that the surrounding evidence is not sufficient to meet the requisite standard of proof that [a retailer] participated in the 2003 FLM Initiative. In particular, even if the conclusion could be drawn that Sainsbury’s and [a retailer] disclosed their retail pricing intentions to Wiseman in advance of their implementation, there is no evidence which would support the conclusion that Wiseman passed this information to any third party retailer.

5.825. In respect of Safeway, [Wiseman’s National Accounts Manager for its Safeway and Sainsbury’s accounts] e-mail of 30 June 2003 refers to earlier discussions that had taken place between him and [Safeway’s Buyer of Milk and Cream] concerning Safeway’s participation in the 2003 FLM Initiative (specifically, the e-mail opens with the words ‘[f]urther to our conversations’ and later states ‘[a]s discussed’). This further supports the OFT’s earlier conclusion that Wiseman would have engaged in oral discussions with retailers, including Safeway, concerning co-ordinated FLM retail price increases. \(^{1063}\) When interviewed by the OFT, [Wiseman’s National Accounts Manager for its Safeway and Sainsbury’s accounts] confirmed that he ‘had a conversation with [Safeway’s Buyer of Milk and Cream]’ and that ‘[Safeway’s Buyer of Milk and Cream] clearly confirmed that she was aware of the retail initiative to increase the retail price and pass it to the farmer via the processor’. \(^{1064}\) Further, [Wiseman’s National Accounts Manager for its Safeway and Sainsbury’s accounts] confirmed that either on 30 June 2003 or slightly before that date, he informed [Safeway’s Buyer of Milk and Cream] that Asda would be increasing its FLM retail prices on 1 July 2003:

\begin{verbatim}
[Q.]  Okay, so what you’re saying is that on 30th June you, either on that day or slightly before, you may have informed [Safeway’s Buyer of Milk and Cream] that Asda would be increasing their prices on 1st July? That’s what you’re saying?

[A.]  Yes.

[Q.]  Yes.

[A.]  Quite possibly that was... \(^{1065}\)
\end{verbatim}

5.826. The OFT’s conclusion that Safeway would have understood it was being asked to participate in a wider market move also involving its competitors is further supported by [Safeway’s Category Manager Dairy/Deli] response to [Wiseman’s National Accounts Manager for its Safeway and Sainsbury’s accounts] e-mail in which [Safeway’s Category Manager Dairy/Deli] stated ‘we [Safeway] will not be moving tomorrow but will follow quickly when we have seen a move’. The OFT considers that this demonstrates that Safeway disclosed its FLM retail pricing intentions to Wiseman (‘will follow quickly when we have seen a move’). However, the OFT has no evidence in its possession that Wiseman made use of Safeway’s FLM retail pricing intentions by passing that information on to

\(^{1063}\) See paragraphs 5.734 and 5.809 to 5.811 above.

\(^{1064}\) See document 71 to the SSO, at page 29.

\(^{1065}\) See document 71 to the SSO, at pages 29 to 30.
other retailers. The OFT, therefore, does not find that Safeway’s FLM retail pricing intentions were passed on to other retailers. Given that the evidence demonstrates that Wiseman passed Asda’s FLM retail pricing on to Safeway it is, however, not necessary to demonstrate a reciprocal disclosure of Safeway’s FLM retail pricing intentions.  

5.827. The OFT notes that the retail price increase levels per FLM carton size that were proposed by Wiseman to both Safeway and Sainsbury’s are identical and match those levels of increase that Asda had decided to implement.  

1066 This is consistent with the OFT’s conclusion that Wiseman (as well as Arla and Dairy Crest) was co-ordinating FLM retail price increases based upon its understanding of Asda’s FLM retail price increase levels and is also consistent with the OFT’s interpretation of the Wiseman National Accounts Board report, dated 2 July (prepared on 20 June 2003 by [Wiseman’s National Accounts Director]).  

1067 From the evidence in the OFT’s possession there is no legitimate commercial explanation as to why Wiseman should have attempted to influence its retailer customers’ FLM retail pricing decisions in this way.

5.828. [These] e-mails of 30 June 2003 to Safeway and Sainsbury’s further demonstrate that Wiseman used Asda’s FLM retail pricing intentions to influence conditions on the FLM retail market by passing that information on to Safeway and Sainsbury’s. They demonstrate that Wiseman had disclosed to Safeway and Sainsbury’s that Asda would increase its FLM retail prices on 1 July 2003.

5.829. Having received this information regarding Asda’s FLM retail pricing intentions both Safeway and Sainsbury’s could not have failed to take it into account when determining their own future behaviour on the FLM retail market.  

1068 Indeed, it is clear that Safeway willingly received Asda’s FLM retail pricing intentions and took that information into account when determining its future conduct on the FLM retail market.  

1069 This is demonstrated by [Safeway’s Category Manager Dairy/Deli] reciprocally disclosing Safeway’s conditional FLM retail pricing intentions (‘we will not be moving tomorrow but will follow quickly when we have seen a move’). In relation to Sainsbury’s, evidence considered above has demonstrated that Wiseman passed Asda’s FLM retail pricing intentions on to Sainsbury’s and that Sainsbury’s both willingly accepted that information and made a reciprocal and conditional disclosure of its FLM retail pricing intentions.  

1070 In receiving information regarding Asda’s retail pricing intentions, Safeway and Sainsbury’s clearly acted inconsistently with the principle that competitors should determine their prices independently.


1067 See paragraphs 5.732 to 5.745 above.

1068 See paragraph 5.810 above.


1071 See paragraphs 5.766 to 5.783 above.
5.830. The OFT has also concluded that both Safeway and Sainsbury’s would have been aware of the 'initiative' that Wiseman was requesting their support for and that the 'initiative' did not consist of unilateral FLM retail price increases.  

5.831. Safeway and Sainsbury’s would both, by this stage, have been aware of the objective that existed within the industry to co-ordinate an FLM retail price increase with the apparent aim of subsidising a farmgate price increase. Given that both Safeway and Sainsbury’s had been involved in discussions regarding the 2003 FLM Initiative, they would both have been aware of its objectives, scope and structure. Additionally, the evidence has demonstrated a willingness on the part of both Safeway and Sainsbury’s to increase their FLM retail prices pursuant to this plan, on condition that their competitors’ also implemented FLM retail price increases.

5.832. Accordingly, the OFT has concluded that both Safeway and Sainsbury’s may be taken to have known the circumstances in which Asda disclosed its FLM retail pricing intentions to Wiseman and did, in fact, appreciate that Asda’s information was disclosed to them by Wiseman with Asda’s consent. In drawing this conclusion, the OFT notes that Asda’s FLM retail pricing intentions were passed by Wiseman to Safeway and Sainsbury’s pursuant to a plan to subsidise a farmgate price increase through a co-ordinated FLM retail price increase. The scope, structure and objective of the plan would have been known by Safeway and Sainsbury’s as would Asda’s proposed leadership of the initiative and the fact its FLM retail price increase was conditional upon its competitors following suit.

5.833. In relation to Sainsbury’s, the evidence has also demonstrated that Sainsbury’s was aware of the conditional nature of Asda’s FLM retail pricing intentions and that it made a reciprocal disclosure of its FLM retail pricing intentions (albeit that the OFT has no evidence in its possession to demonstrate that Sainsbury’s FLM retail pricing intentions were passed on to other retailers). Evidence presented above has also shown that Sainsbury’s willingness to increase its FLM retail prices was conditional on other retailers also increasing their FLM retail prices.

1072 See, in particular, paragraph 5.817 above.
1073 See paragraphs 5.814 and 5.815 above.
1074 See paragraphs 5.690 to 5.699 and 5.766 to 5.783 above.
1075 See paragraph 5.815 above.
1076 See paragraphs 5.766 to 5.783 above.
1078 See paragraphs 5.813 to 5.834 above. In relation to Sainsbury’s, see also paragraphs 5.779 and 5.805 above.
1079 See paragraphs 5.754 to 5.756 and 5.766 to 5.769 above.
1080 See paragraphs 5.697 to 5.699; 5.766 to 5.769; and 5.775 to 5.778 above.
1081 See paragraphs 5.690 to 5.699 above.
In relation to Safeway, the evidence has also demonstrated that it made a reciprocal disclosure of its FLM retail pricing intentions.  

x. Implementation of FLM retail price increases

Overview of dates of FLM retail price increases

Table 5 below sets out the dates upon which Asda, Safeway, Sainsbury’s and [a retailer] implemented FLM retail price increases in July 2003. Contemporaneous price monitoring evidence demonstrates that Asda increased its FLM retail prices on 1 July 2003 by an average of 2 pence per litre. Asda’s FLM retail price increases were also confirmed by an Asda media log of 1 July 2003, which set out Asda’s ‘position’:

‘From today (Tuesday 1 July) ASDA has increased fresh milk retail prices by an average of 2p per litre as a measure of its support for dairy farmers.

Our cost prices have also gone up by 2p per litre and therefore we expect these price increases to be passed back down the chain to farmers. Our suppliers have indicated that this will happen with immediate effect.

This means that from today retail prices will increase as follows:
- From 29p – 30p for one pint
- From 56p – 58p for two pints
- From 98[p] – £1.03 for four pints
- From £1.44 - £1.51 for six pints

We have also committed to continue our policy of not exerting any downward pressure on farmgate milk prices for dairy products.

N.B We made similar price moves over the last 3 years – in September 2002, April 2001 and September 2002 we added another 2p per litre to milk prices which were then passed down the chain to farmers.’

The date and amount of Asda’s retail price increase by FLM container size was consistent with the documentary evidence that the OFT has presented above. Asda’s FLM retail price increases were monitored and quickly followed by Safeway, Sainsbury’s and [a retailer], who all increased their FLM retail prices by identical amounts on 2 July 2003. The process by which these retail price increases were implemented is described below.

Table 5: Dates of retail price increases in 2003 FLM Initiative

<table>
<thead>
<tr>
<th>Retailer</th>
<th>Date of FLM retail price increase*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asda</td>
<td>1 July 2003</td>
</tr>
</tbody>
</table>

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1082 See paragraph 5.826 above
1083 See paragraphs 5.837 to 5.853 below which demonstrate that Wiseman reported Asda’s FLM retail price increases on 1 July 2003. Although Asda implemented an FLM retail price increase on 1 July 2003 it appears that not all of its stores increased FLM retail prices on this date.
1084 See document 230 to the SO.
1085 See, for example, paragraphs 5.714 to 5.747 above.
xi. Monitoring of FLM retail price increases by Wiseman, [a processor] and Dairy Crest

*Price monitoring by Wiseman*

5.837. Following Asda's FLM retail price increase on 1 July 2003, representatives of Wiseman took immediate steps to provide evidence of the increase to various retailer customers.

5.838. Between 09:00 and 09:30 on 1 July 2003, [Wiseman’s National Accounts Manager for its Safeway and Sainsbury’s accounts] sent e-mails to relevant contacts within [a retailer], Safeway, Sainsbury’s and [a retailer], attaching a till receipt from an Asda store in Hamilton for purchases of various container sizes of FLM at 08:24 on 1 July 2003, thus confirming Asda’s new FLM retail price levels. Wiseman sent similar e-mails to a number of other retailers.

5.839. [Wiseman’s National Accounts Manager for its Safeway and Sainsbury’s accounts] e-mails sent to [a retailer], Safeway, and [a retailer] read as follows:

>'Please find attached file containing receipt obtained this morning from a [sic] ASDA store for the purchase of milk.

As suggested the retail have increased by 7p on a 6 Pint, 5p on a 4 Pint, 2p on a 2 Pint, & 1p on a 1 Pint.

If you have any questions on the above, please do not hesitate to contact me.' ¹⁰⁸⁶

5.840. The text of the e-mail to [Sainsbury’s Dairy Trading Manager] at 09:08 on 1 July 2003 differed very slightly from the e-mail sent to the other retailers in that it started '[a]s discussed, please find attached'. ¹⁰⁸⁷

5.841. Other personnel within Wiseman also took steps to provide evidence of Asda’s FLM retail price increase to [a retailer] and [a retailer].

5.842. At 09.37 on 1 July 2003, [Wiseman’s National Accounts Manager for its Asda account] e-mailed the same Asda till receipt to [an employee at a retailer]. The covering e-mail on this occasion was blank. ¹⁰⁸⁸

5.843. At 09.22 on 1 July 2003, [a senior manager at Wiseman] e-mailed the same Asda till receipt to [an employee at a retailer]. ¹⁰⁸⁹ The text of the

¹⁰⁸⁶ See documents 231 to 233 to the SO.
¹⁰⁸⁷ See document 235 to the SO.
¹⁰⁸⁸ See document 236 to the SO.
¹⁰⁸⁹ See document 234 to the SO.
covering e-mail was identical to the e-mail that [Wiseman’s National Accounts Manager for its Safeway and Sainsbury’s accounts] had earlier sent to [a retailer], Safeway and [a retailer] and read:

‘Please find attached file containing receipt obtained this morning from an ASDA store for the purchase of milk.

As suggested the retails have increased by 7p on a 6 Pint, 5p on a 4 Pint, 2p on a 2 Pint & 1p on a 1 Pint.

If you have any questions on the above, please do not hesitate to contact me.’

5.844. In the SO, the OFT provisionally found that the words ‘[a]s suggested’ supported the conclusion that Wiseman had passed Asda’s FLM retail pricing intentions on to [a retailer] prior to their implementation. Following the issue of the SO, the OFT conducted witness interviews with [Wiseman’s National Accounts Manager for its Safeway and Sainsbury’s accounts] and [a senior manager at Wiseman]. During his interview with the OFT, [Wiseman’s National Accounts Manager for its Safeway and Sainsbury’s accounts] speculated that [a senior manager at Wiseman] had copied and pasted [his] earlier e-mail to Safeway and Sainsbury’s and sent it to [a retailer] without considering whether he needed to amend it. [A senior manager at Wiseman] confirmed that he would have had ‘quite a lot of contact’ with [an employee at a retailer] at this time and presumed that his use of the term ‘[a]s suggested’ referred ‘to an earlier conversation about prices moving’, however [a senior manager at Wiseman] was unable to confirm whether this was the case. The OFT carefully considered this new evidence and, on balance, concluded in the SSO that it was still sufficient to draw the provisional conclusion that Wiseman had passed Asda’s FLM retail pricing intentions to [a retailer] in advance of their implementation on 1 July 2003. However, the OFT has reconsidered the evidence surrounding this e-mail in its wider context and has concluded that it is not sufficiently strong to draw the conclusion that Wiseman passed Asda’s FLM retail pricing intentions to [a retailer] in advance of 1 July 2003.

Price monitoring by [a processor]

5.845. [A processor] also monitored Asda’s FLM retail price increase and provided evidence of the increases to other retailers.

5.846. At 09.35 on 1 July 2003, [a National Account Controller at a processor] e-mailed [a Trading Director for Supermarket Accounts at a processor] to inform him that:

‘[C],

[The Dairy Trading Manager] from J.S. has spoke [sic] to [an employee at a processor] this morning regarding RSP changes in Asda, we have visited 2 stores this morning and there was no change in RSPs.

1090 See paragraphs 2151 to 2160 of the SO.
[Sainsbury’s Dairy Trading Manager] has been in a [sic] Asda in Scotland and they have changed RSPs:

1 Pint – 0.29 > 0.30
2 Pint – 0.56 > 0.58
4 Pint – 0.98 > 1.03
6 Pint – 1.44 > 1.51

We will send more bods out during this morning to visit Asda. As we are a proactive supplier, what’s [sic] your view on informing [a retailer] of these changes.\(^1\)

5.847. It is clear from this e-mail that staff at [a processor] had discussed Asda’s FLM retail price increases with [Sainsbury’s Dairy Trading Manager]. Although [a processor] had not been able to identify any FLM retail price increases at this time, [Sainsbury’s Dairy Trading Manager] had informed [a processor] that he had identified FLM retail price increases in Scotland – the clear implication being that Asda had increased its FLM retail prices in Scotland but it had yet to do so in England and possibly Wales. This discrepancy can be explained by the Wiseman board minute of 2 July 2003\(^2\) which explained 'it appeared that there had been some breakdown in communication within the ASDA organisation and not all prices in all their stores had moved at the same time'.

5.848. [A National Account Controller at a processor] e-mail demonstrates that [a processor] committed resources to monitoring Asda’s FLM retail prices and that [a processor] was going to commit further resources to monitor Asda’s prices ('We will send more bods out during this morning to visit Asda').

5.849. At 09:50, [a National Account Controller at a processor] e-mailed [a Trading Director for Supermarket Accounts at a processor] again to inform him that Asda 'have moved RSPs on fresh milk' 'south of Scotland' 'as of 10.00 am'.\(^3\)

5.850. At 10.15, [a National Account Controller at a processor] e-mailed [an employee at a retailer] to inform him of Asda’s FLM retail price increases.

'Following our conversation this morning, here is the list of RSP changes we found in Asda on fresh milk whilst doing our weekly check.

1 pint - 0.29 > 0.30
2 pint - 0.56 > 0.58
4 pint - 0.98 > 1.03
6 pint - 1.44 > 1.51

Average increase would be in the region of 2p per litre. If you require any further information please do not hesitate to give me a call.'\(^4\)

\(^1\) See document 239 to the SO.
\(^2\) See document 237 to the SO, at paragraph 5.819 above.
\(^3\) See document 240 to the SO.
\(^4\) See document 241 to the SO.
5.851. The OFT considers that the purpose of this e-mail was to provide [a retailer] with evidence of Asda’s FLM retail price increases.

5.852. At 10.48, [a National Account Controller at a processor] sent a further e-mail to [a Trading Director for Supermarket Accounts at a processor] informing him that:

'[Sainsbury’s Dairy Trading Manager] has requested a receipt for the RSP increases, we have faxed a copy to him.'

5.853. Again the clear purpose of this e-mail, given its context, is that it was sent to Sainsbury’s to confirm that Asda had increased FLM retail prices in England (as [Sainsbury’s Dairy Trading Manager] had already monitored Asda’s FLM retail price increases in Scotland).

*Price monitoring by Dairy Crest*

5.854. Dairy Crest was also alert to monitor FLM retail price increases in the market.

5.855. On 2 July 2003, [a senior manager at Dairy Crest] e-mailed colleagues within Dairy Crest to advise them of FLM retail price increases that had been implemented by retailers. [A senior manager at Dairy Crest] started by informing his colleagues that Sainsbury’s, [a retailer] and [a retailer] had all followed Asda’s FLM retail price increases:

'I can confirm that following Asda’s RSP move yesterday, Sainsbury’s [a retailer] and [a retailer] have moved as follows:-

<table>
<thead>
<tr>
<th>Product</th>
<th>Current</th>
<th>New</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>29p</td>
<td>30p</td>
</tr>
<tr>
<td>2</td>
<td>56p</td>
<td>58p</td>
</tr>
<tr>
<td>4</td>
<td>98p</td>
<td>1.03p</td>
</tr>
<tr>
<td>6</td>
<td>1.44p</td>
<td>1.51</td>
</tr>
</tbody>
</table>

5.856. [A senior manager at Dairy Crest] then stated that Safeway had also increased its FLM retail price increases:

'Safeway have moved their RSP’s as follows:-

<table>
<thead>
<tr>
<th>Product</th>
<th>Current</th>
<th>New</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>30p</td>
<td>32p</td>
</tr>
<tr>
<td>2</td>
<td>58p</td>
<td>61p</td>
</tr>
<tr>
<td>4</td>
<td>1.03p</td>
<td>1.09p</td>
</tr>
<tr>
<td>6</td>
<td>1.51p</td>
<td>1.61p</td>
</tr>
</tbody>
</table>

[A retailer] will be moving on Monday'*

xii. Implementation of FLM retail price increases by Safeway and Sainsbury’s

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1095 See document 242 to the SO.
1096 See document 215 to the SO.
5.857. Following Asda's FLM retail price increases, several other retailers moved swiftly to increase their FLM retail prices. Safeway and Sainsbury’s price increases are described below.

**Safeway**

5.858. Having been provided with evidence of Asda's FLM retail price increases, Safeway swiftly implemented its own FLM retail price increase. The amount of Safeway’s average FLM retail price increases matched the level of increase implemented by Asda and Sainsbury’s (2 pence per litre per container size). Safeway’s FLM retail price increase was confirmed in an internal e-mail from [Safeway’s Buyer of Milk and Cream] to [Safeway’s Category Manager Dairy/Deli] and [a Safeway employee]. The e-mail demonstrates that Safeway considered it was acting as part of a wider market move in concert with its competitors and that the aim of the FLM retail price increases was to subsidise an increase in the farmgate price via increased wholesale prices:

> 'On Wednesday 2nd July you will have received a new price batch of Milk Retail changes.

These retail changes have affected 1, 2, 4 and 6 Pint Milk Lines.

The reason for this move is that we and all other retailers are supporting the British Farmers that supply Fresh Milk by moving our retail prices up. Dairy Crest and Wisemans can then pay the farmers an extra 2 pence per litre.

This move has affected everyone and the price of milk has moved up by 2 pence per litre by all Retailers.

Please ensure your team are aware of these reasons for the retail increase so this message can be passed on to our customers.

Please also ensure that all Shelf Edge Tickets now states [sic] the correct new retail prices on all core milk lines.

Any further issues please contact [Safeway's Price Strategy Analyst] or [Safeway’s Buyer of Milk and Cream].

[Emphasis added]

**Sainsbury’s**

5.859. Following Asda’s FLM retail price increase, Sainsbury’s also implemented an FLM retail price increase. The level of Sainsbury’s increases by FLM container sizes matched those implemented by Asda. [Sainsbury’s Dairy Trading Manager] confirmed that these FLM retail price increases had been implemented in an internal e-mail to [a senior manager at Sainsbury’s], dated 2 July 2003. The language used by [Sainsbury’s Dairy Trading Manager] indicated that Sainsbury’s considered that it had implemented its FLM retail price increase as part of a wider market move which Asda had led:

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1097 See paragraph 5.838 above.
1098 See document 244 to the SO.
'Just a quick note to let you know that Asda led the retails up on milk yesterday, with the rest of the market expected to be there today. We put our increases through for today as well, and will continue to monitor the competition. The new pricing looks like this:

1pt – 29p – 30p
2pt – 56p – 58p
4t – 98p – £1.03p
6pt – £1.44 – £1.51

The media team have been briefed.’

[Emphasis added]

5.860. It is noteworthy that [Sainsbury’s Dairy Trading Manager] had implemented Sainsbury’s FLM retail price increases not only with awareness of Asda’s FLM retail price increases, but also with the expectation that Sainsbury’s other competitors (‘the rest of the market’) would increase their prices too. This further indicates that Sainsbury’s possessed information concerning its competitors’ FLM retail pricing intentions. The OFT has inferred that ‘the rest of the market’ was a reference to Sainsbury’s competitors.

5.861. In respect of Safeway, earlier evidence demonstrates that Safeway disclosed its FLM retail pricing intentions to Wiseman and the OFT notes that Safeway did increase its FLM retail prices on 2 July 2003 (which is consistent with [Sainsbury’s Dairy Trading Manager] statement 'the rest of the market [are] expected to be there today’). Although the OFT considers it possible that 'the rest of the market' referred to retailers other than Safeway, it has not uncovered any evidence to demonstrate that any other retailers disclosed their FLM retail pricing intentions.

5.862. The OFT considers that the clear implication from [Sainsbury’s Dairy Trading Manager] statement that he would 'continue to monitor the competition' is that if other retailers failed to increase their prices, [Sainsbury’s Dairy Trading Manager] may have reconsidered Sainsbury’s FLM retail price increase. This is also consistent with [Sainsbury’s Dairy Trading Manager] earlier disclosure to, among others, Arla, Dairy Crest and Wiseman that Sainsbury’s was prepared to increase its FLM retail prices but would need 'to remain competitive at all times', and with FLM being considered a known value item by Sainsbury’s.

b. Conclusion

5.863. Based on the evidence set out and analysed at paragraphs 5.651 to 5.862 above, the OFT finds that Arla, Asda, Dairy Crest, Safeway, Sainsbury’s and Wiseman participated in a number of concerted practices. The evidence set out at paragraphs 5.651 to 5.862 above has demonstrated that:

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1099 See document 243 to the SO.
1100 See paragraphs 5.815 and 5.828 above.
1101 See paragraph 6 above.
Asda disclosed its FLM retail pricing intentions to Arla, Dairy Crest and Wiseman. These disclosures were made in circumstances in which Asda may be taken to have intended and did, in fact, foresee that Arla, Dairy Crest and Wiseman would make use of that information to influence conditions on the FLM retail market by passing it on to other retailers.

Arla, Dairy Crest and Wiseman made use of Asda's FLM retail pricing intentions to influence conditions on the FLM retail market by passing that information on to Sainsbury's.

Arla, Dairy Crest and Wiseman passed that information on to Sainsbury's in circumstances in which Sainsbury's may be taken to have known the circumstances in which the information was disclosed by Asda to Arla, Dairy Crest and Wiseman and did, in fact, appreciate that the information was passed on with Asda's concurrence.

Sainsbury's did, in fact, use information regarding Asda's FLM retail pricing intentions in determining its own conduct on the FLM retail market.

Sainsbury's reciprocally disclosed its FLM retail pricing intentions to Arla, Dairy Crest and Wiseman.

Wiseman made use of Asda's FLM retail pricing intentions to influence conditions on the FLM retail market by passing that information on to Safeway.

Wiseman passed information regarding Asda's FLM retail pricing intentions on to Safeway in circumstances in which Safeway may be taken to have known the circumstances in which the information was disclosed by Asda to Wiseman and did, in fact, appreciate that the information was passed on with Asda's concurrence.

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1102 See paragraphs 5.738 to 5.741 above.
1103 See paragraphs 5.743 to 5.746 above.
1104 See paragraphs 5.715 to 5.737 above.
1105 See generally paragraphs 5.701 to 5.747 above.
1106 See paragraphs 5.653 to 5.685 and 5.749 to 5.763 above.
1107 See paragraphs 5.766 to 5.783 and 5.785 to 5.795 above.
1108 See paragraphs 5.766 to 5.783 and 5.800 to 5.808 above.
1109 See paragraphs 5.766 to 5.783; 5.809 to 5.830 and 5.814 to 5.819 above.
1110 See paragraphs 5.779, 5.805 and 5.830 to 5.832 above and the references in those paragraphs.
1111 See paragraphs 5.766 to 5.768; 5.775 to 5.780; and 5.859 to 5.861 above.
1112 See paragraphs 5.766 to 5.768 and 5.775 to 5.778 above.
1113 See paragraphs 5.814 to 5.819 above.
1114 See paragraphs 5.830 and 5.833 above and the references in those paragraphs.
Safeway did, in fact, use information regarding Asda’s FLM retail pricing intentions in determining its own conduct on the FLM retail market.  \(^{1115}\)

Safeway reciprocally disclosed its FLM retail pricing intentions to Wiseman.  \(^{1116}\)

**Single overall concerted practice**

5.864. Whilst each of the elements set out at paragraph 5.863 above could be regarded as comprising a number of separate concerted practices in breach of the Chapter I prohibition, the OFT considers that they can be regarded as forming part of a single overall concerted practice given that they reinforce one another and share a common objective.

5.865. The OFT considers that it would be contrary to the commercial reality of the situation to seek to split the behaviour into a series of bilateral concerted practices where the evidence demonstrates that information has been exchanged not merely bilaterally but multilaterally through intermediaries, in this case Arla, Dairy Crest and Wiseman, who are also Parties. The OFT has therefore concluded that all of the elements of the 2003 FLM Initiative described in the section above formed part of a single overall concerted practice.

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\(^{1115}\) See paragraph 5.829 above.

\(^{1116}\) See paragraphs 5.815 and 5.826 above.
6. LEGAL ASSESSMENT

A. INTRODUCTION

6.1. This section sets out the OFT's conclusions concerning the legal assessment of the Infringements by reference to the applicable constituent elements of the Chapter I prohibition.

B. UNDERTAKINGS

6.2. The meaning of the word undertaking is set out at section 3.D above. As noted, the key consideration in establishing whether an entity is an undertaking is whether it is engaged in an 'economic activity'. The ECJ has defined economic activities as any activity 'of an industrial or commercial nature' consisting in 'offering goods and services on the market'.

6.3. Accordingly, in view of the evidence in this case, the OFT considers that each of Arla, Asda, Dairy Crest, Glanbia, McLelland, Safeway, Sainsbury's, Tesco and Wiseman constituted an undertaking for the purposes of the Act at the time of the Infringements. The legal entities to which this Decision is addressed, as described in more detail in section 2.A above, comprise the entities within the relevant undertaking to which liability for the relevant Infringements has been attributed.

C. CONCERTED PRACTICES

6.4. The applicable aspects of the law on concerted practices in relation to the present case are set out above at sections 3.E.III and 3.E.IV.

6.5. On the basis of the evidence set out and analysed in section 5 above, the OFT considers that each of the 2002 Cheese Initiative, the 2003 Cheese Initiative and the 2003 FLM Initiative amounted to a concerted practice within the meaning of the Act.

D. OBJECT: PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION

6.6. The evidence set out and analysed in section 5 above demonstrates that each of the concerted practices comprised the co-ordination of increases in retail prices for cheddar and British territorial cheeses or FLM. Therefore, the aim of each of the concerted practices was to maintain retail prices for the relevant products at higher levels than they might have been, absent the concerted practices.

6.7. As set out above at section 3.F.I, it is established in EU law that an agreement or concerted practice which directly or indirectly fixes prices is clearly restrictive of competition. The OFT therefore considers that each of the concerted practices, in the context in which it operated, had as its object the prevention, restriction or distortion of competition within the meaning of the Act.

6.8. Given that each of the concerted practices had the object of preventing, restricting or distorting competition, it is not necessary for the OFT to find that they also had the effect of preventing, restricting or distorting competition, nor is it necessary for the OFT to demonstrate that the concerted practices produced anti-competitive effects on the relevant markets.  

E. APPRECIABILITY

6.9. As set out above at section 3.G, the OFT will generally regard any agreement or concerted practice which directly or indirectly fixes prices as being capable of appreciably preventing, restricting or distorting competition even where the parties’ combined market share is less than 10 per cent, provided that such agreements or concerted practices do not have only insignificant effects. The evidence set out and analysed in section 5 above demonstrates that the concerted practices comprised the co-ordination of increases in retail prices for cheddar and British territorial cheeses or FLM. The OFT does not consider that the concerted practices produced only an insignificant effect on the market, in particular in light of the significant market shares of the Parties. Therefore, the OFT considers that each of the concerted practices appreciably prevented, restricted or distorted competition, whether or not the Parties’ combined market share in the relevant market fell below 10 per cent.

F. EFFECT ON TRADE WITHIN UK

6.10. As set out at section 3.H above, the OFT considers that by its very nature an agreement or concerted practice that restricts price competition is likely to affect trade. The evidence set out and analysed in section 5 above demonstrates that the concerted practices comprised the co-ordination of increases in retail prices for cheddar and British territorial cheeses or FLM and were implemented in a part of the UK – Great Britain. This co-ordination of retail price increases was clearly, at the very least, capable of altering the pattern of trade within the UK by reducing competition between the retailers, which are addressees of this Decision. The OFT therefore considers that each of the concerted practices affected, or was at least capable of affecting, trade within the UK within the meaning of the Act.

G. DURATION

6.11. Duration is important insofar as it is a relevant factor for determining the financial penalty that the OFT imposes following a finding of infringement.

6.12. On the basis of the evidence set out and analysed in section 5 above, the OFT has considered the relevant duration of each of the concerted practices. Given the nature of the concerted practices, it is very difficult to determine precisely when each began and ended. The OFT considers that each of the concerted practices started at the latest when the first full disclosures of retail pricing intentions between competing retailers

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1118 See section 3.A.V.F.II above.
occurred. The OFT therefore considers that the concerted practices started on the following dates:

- the 2002 Cheese Initiative started, at the very least, in September 2002 when the first indirect exchanges of retail pricing intentions between competing retailers via processors occurred;

- the 2003 FLM Initiative started, at the very least, in June 2003 when the first indirect exchanges of retail pricing intentions between competing retailers via processors occurred; and

- the 2003 Cheese Initiative started, at the very least, in September 2003 when the first indirect exchanges of retail pricing intentions between competing retailers via a processor occurred.

6.13. In respect of the end date of the concerted practices, the OFT has no evidence to suggest that the concerted practices ceased. The OFT has, therefore, decided to treat each concerted practice as having lasted for the full year in which the first co-ordinated retail price increase in respect of that concerted practice occurred and has, accordingly, not made any increase to any of the Parties' penalties for duration.1119

H. EXCLUSION

6.14. None of the exclusions from the Chapter I prohibition provided for by section 3 or under section 50 of the Act applies in respect of the concerted practices. In particular, the exclusion for agreements relating to trade in agricultural products provided for at paragraph 9 of Schedule 3 to the Act does not apply, as none of the elements required to benefit from this exclusion, as set out at (a) to (c) of sub-paragraph 9(1), are present in the concerted practices. Therefore, none of the concerted practices benefited from an exclusion from the Chapter I prohibition.

I. EXEMPTION

6.15. There is no block exemption order under section 6 of the Act or any order pursuant to section 11 of the Act pursuant to which the concerted practices would have been exempt from the Chapter I prohibition. Nor is there any applicable EU Council or Commission Regulation by virtue of which the concerted practices would have been exempt from Article 81(1) EC at the time (now Article 101(1) TFEU) and would have benefited from a parallel exemption from the Chapter I prohibition under section 10 of the Act.

6.16. At the time of the concerted practices, in order to benefit from an individual exemption from the Chapter I prohibition, a party needed to request an individual exemption under section 4 of the Act. No Party made an application under section 4 of the Act for individual exemption in respect of any of the concerted practices.

1119 OFT423 OFT's guidance as to the appropriate amount of a penalty (Edition 12/04), at paragraph 2.10. See paragraph 7.59 below.
6.17. The OFT does not in any case consider that any of the concerted practices would have met the requirements for individual exemption of section 9 of the Act. In particular, the OFT considers that the coordination of retail price increases between competing retailers (whether achieved directly or, as in this case, indirectly via supplying processors) does not contribute to improving production or distribution of goods or promoting technical or economic progress\textsuperscript{1120} and that there are no resulting benefits of which consumers receive a fair share.\textsuperscript{1121} Indeed consumers had to pay more for cheddar and British territorial cheeses and FLM as retail prices did increase.

\textsuperscript{1120} Section 9(a) of the Act.
\textsuperscript{1121} Section 9(b)(i) of the Act.
7. THE OFT’S ACTION

7.1. This part of the Decision sets out the enforcement action that the OFT is taking and its reasons for taking that action.

A. DECISION

7.2. On the basis of the evidence and the reasons set out at section 5 above, the OFT finds that each of the Parties listed at paragraph 1.2 above have infringed the Chapter I prohibition. The OFT finds that, in respect of:

- **The 2002 Cheese Initiative**: each of Asda, Dairy Crest, Glanbia, McLelland, Safeway, Sainsbury’s and Tesco infringed the Chapter I prohibition of the Act by participating in a single overall concerted practice which had as its object the prevention, restriction or distortion of competition in respect of cheddar and British territorial cheese retail prices in 2002.

- **The 2003 FLM Initiative**: each of Arla, Asda, Dairy Crest, Safeway, Sainsbury’s and Wiseman infringed the Chapter I prohibition of the Act by participating in a single overall concerted practice which had as its object the prevention, restriction or distortion of competition in respect of FLM retail prices in 2003.

- **The 2003 Cheese Initiative**: each of Asda, McLelland, Sainsbury’s and Tesco infringed the Chapter I prohibition of the Act by participating in a single overall concerted practice which had as its object the prevention, restriction or distortion of competition in respect of cheddar and British territorial cheese retail prices in 2003.

7.3. These infringements are each referred to as an 'Infringement' and collectively referred to as the 'Infringements'.

B. DIRECTIONS

7.4. Section 32(1) of the Act provides that if the OFT has made a decision that an agreement or concerted practice infringes the Chapter I prohibition, it may give to such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end.

7.5. The OFT has no evidence on its file to suggest that the Infringements are continuing and considers that the Infringements have already come to an end. It is therefore not necessary to issue any directions in this case.

C. FINANCIAL PENALTIES

I. General points

7.6. Section 36(1) of the Act provides that on making a decision that an agreement and/or concerted practice has infringed the Chapter I prohibition, the OFT may require the undertaking concerned to pay it a financial penalty in respect of the infringement. In accordance with
section 38(8) of the Act, the OFT must have regard to the guidance on penalties issued under section 38(1) of the Act, for the time being in force, when setting the amount of the penalty. The guidance on penalties in force at the time of this Decision is the OFT’s guidance as to the appropriate amount of a penalty (the ‘Penalty Guidance’). Pursuant to section 36(8) of the Act, no penalty which has been fixed by the OFT may exceed 10 per cent of the turnover of the undertaking, calculated in accordance with the provisions of the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2000 (SI 2000/309) (the 2000 Order), as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259) (the 2004 Order).

7.7. In imposing financial penalties in respect of the Infringements under section 36(1) of the Act, the OFT has identified the legal person or persons whom it considers to have been party to each Infringement and therefore liable for the ensuing financial penalty. The addressees of the Decision are as set out in section 2.A above.

a. Section 60 of the Act

7.8. The OFT does not consider that it is required by section 60 of the Act to calculate the penalties it imposes under the Act in the same manner as penalties imposed by the Commission under Regulation 1/2003 for infringements of Articles 101 or 102 of the TFEU. Questions of procedure, investigation and enforcement, including the calculation of financial penalties, are not covered by section 60 of the Act (save as regards fundamental procedural safeguards). Rather, specific provision is made for these under the Act. The OFT’s primary obligation when calculating penalties under the Act is, therefore, to have regard to its Penalty Guidance. Moreover, to the extent that that produces a different result from that which would arise from the approach adopted by the Commission, the OFT considers that such an outcome would be

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1122 OFT423 OFT’s guidance as to the appropriate amount of a penalty (Edition 12/04).
1123 To the extent that infringements are not a single continuous infringement, the cap on the level of financial penalties that the OFT may impose applies for each separate infringement rather than on the cumulative financial penalties that are imposed within an infringement decision (see Barrett Estate Services Limited and Others v Office of Fair Trading [2011] CAT 9, at [36]).
1124 See comments in Hansard at the time the Competition Bill was being debated, such as the comment on behalf of the Government that section 60 was intended to import ‘high level principles, such as proportionality, legal certainty and administrative fairness’ into domestic law (see Lord Simon of Highbury, Hansard, House of Lords’ debates, 25 November 1997: Column 961).
1125 See, in particular, sections 25 to 44, section 51 and Schedule 9 of the Act, together with the guidance and secondary legislation made under those provisions.
1126 This is consistent with Regulation 1/2003, which does not require national competition authorities to apply the same approach to sanctions as the Commission in respect of infringements of Article 101 or 102 TFEU.
the consequence of a 'relevant difference' between the provisions concerned under section 60(1) of the Act.\textsuperscript{1127}

7.9. Furthermore, although the OFT’s approach will be broadly consistent with the general principles applied by the Commission – such as the need to sanction the undertakings concerned and deter other undertakings as per the preamble to the Commission’s guidelines\textsuperscript{1128} – the OFT is not bound to adopt, in relation to the detail, the same methodology as the Commission, particularly where the Commission has itself a wide margin of discretion under its own guidelines.\textsuperscript{1129} That would be tantamount to arguing that the OFT should apply the Commission’s guidelines. Moreover, the OFT’s duty under section 60(3) is at most only to have regard to any relevant decision or statement of the Commission.

b. The OFT’s margin of appreciation in determining the appropriate amount of a penalty

7.10. Provided the penalties it imposes in a particular case are within the range of penalties permitted by section 36(8) of the Act and the 2000 Order (as amended by the 2004 Order) and the OFT has had regard to the Penalty Guidance under section 38 of the Act, the OFT has a margin of appreciation when determining the appropriate amount of a penalty under the Act.\textsuperscript{1130} The OFT is not in any event bound by its decisions in relation to the calculation of financial penalties in previous cases.\textsuperscript{1131} Rather, as set out in the Penalty Guidance,\textsuperscript{1132} the OFT makes its assessment on a case by case basis having regard to all relevant circumstances and the objectives of its policy on financial penalties, as set out in the Penalty Guidance.\textsuperscript{1133}

c. Separate penalty for each infringement

\textsuperscript{1127} See, for example, GF Tomlinson Group Limited and Others v Office of Fair Trading [2011] CAT 7, at [102].

\textsuperscript{1128} Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210/2.

\textsuperscript{1129} Ibid.

\textsuperscript{1130} Argos Limited and Littlewoods Limited v Office of Fair Trading [2005] CAT 13, at [168]. See also Umbro Holdings Limited and Others v Office of Fair Trading [2005] CAT 22, at [101] and [102]. In this regard, the Court of Appeal has also held that section 38(8) of the Act 'does not bind the OFT to follow the [Penalty] Guidance in all respects in every case' but that 'in accordance with general principle, the OFT must give reasons for any significant departure from the [Penalty] Guidance' (see JJB Sports plc v Office of Fair Trading and Argos Limited and Littlewoods Limited v Office of Fair Trading, [2006] EWCA Civ 1318, at [161]). More recently, see, for example, Kier Group plc and Others v Office of Fair Trading [2011] CAT 3, at [76].

\textsuperscript{1131} See, for example, Eden Brown Limited and Others v Office of Fair Trading [2011] CAT 8, at [78] where the CAT held that '[t]he OFT is not bound by its previous decisions'.

\textsuperscript{1132} See Penalty Guidance, at paragraph 2.5

\textsuperscript{1133} See, for example, Kier Group plc and Others v Office of Fair Trading [2011] CAT 3, at [116] where the CAT noted that 'other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent'. See also Eden Brown Limited and Others v Office of Fair Trading [2011] CAT 8, at [97] where the CAT observed that '[d]ecisions by this Tribunal on penalty appeals are very closely related to the particular facts of the case'.
7.11. The OFT considers that it is appropriate in this Decision to treat each Infringement separately with respect to determining the appropriate amount of a financial penalty. In particular, each Infringement covers different time periods and/or different products and/or involves a different set of Parties. Further, where a Party has been found to have participated in more than one Infringement, the OFT considers it appropriate that it should face more than one financial penalty.\textsuperscript{1134} The OFT is therefore imposing a separate financial penalty on each Party in respect of each Infringement it is found to have committed.

7.12. Some Parties submitted that the fact they were alleged to have been involved in fewer infringements than other Parties meant they were less culpable and should therefore benefit from a proportionately lower financial penalty. The OFT’s approach – imposing separate financial penalties for each Infringement – takes account of this point, with Parties found to have been involved in more infringements having a greater number of financial penalties imposed on them and, cumulatively, a proportionately greater financial penalty overall. Additionally, in determining each Party’s financial penalty the OFT has had regard to the overall level of penalty imposed, both for individual Infringements and in total, and considered whether that is sufficient to achieve the objectives of the OFT’s policy on financial penalties\textsuperscript{1135} and whether the penalty arrived at is proportionate.\textsuperscript{1136}

d. No penalty / nominal penalty

7.13. Some Parties also submitted that the OFT should impose either no or only a nominal financial penalty given the exceptional circumstances surrounding the Infringements at the time. Parties submitted that the Infringements took place in circumstances and context similar to those found by the OFT in its \textit{Northern Ireland Livestock} decision.\textsuperscript{1137} However, the OFT considers that the ‘wholly exceptional circumstances’ present in relation to \textit{Northern Ireland Livestock}\textsuperscript{1138} are different from the circumstances at the time of the Infringements in this case. Specifically, the OFT’s decision not to impose a financial penalty in \textit{Northern Ireland Livestock} took into account the extreme difficulties for the industry at the time (resulting from the effects of diseases),\textsuperscript{1139} and the resulting increased health regulation, restrictions on trade and a period of time where all trade was prohibited. In this Decision, although the OFT considers that there were exceptional circumstances within the UK dairy

\textsuperscript{1134} In this regard, see, for example, \textit{GF Tomlinson Group Limited and Others v Office of Fair Trading} [2011] CAT 7, at [122].

\textsuperscript{1135} To impose penalties on infringing undertakings which reflect the seriousness of the infringement; and to ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices (see paragraph 1.4 of the Penalty Guidance).

\textsuperscript{1136} See paragraphs 7.60 to 7.76 (particularly paragraphs 7.71 to 7.76) below.

\textsuperscript{1137} OFT decision CA98/1/2003 \textit{Decision of the Northern Ireland Livestock and Auctioneers’ Association of undertakings to recommend that its members introduce a buyer’s commission in Northern Ireland cattle markets} (3 February 2003), in which the OFT decided not to impose a penalty (see paragraphs 68 to 73 of that decision).

\textsuperscript{1138} \textit{Ibid}, at paragraph 72.

\textsuperscript{1139} Specifically, Bovine Spongiform Encephalopathy (BSE) and Foot and Mouth Disease.
industry at the time of the Infringements, these circumstances were different in their severity and impact to the circumstances the OFT found in *Northern Ireland Livestock* such as to justify either no or only a nominal financial penalty being imposed. Instead, to the extent that there are exceptional circumstances in this case which are relevant to determining the level of an appropriate penalty, the OFT has considered and taken these into account at Steps 1 and/or 4 of the penalty calculations, as set out below.

e. **Statutory cap on penalties**

7.14. Under section 36(8) of the Act, no penalty which has been fixed by the OFT may exceed 10 per cent of the turnover of the undertaking calculated in accordance with the provisions of the 2000 Order, as amended by the 2004 Order. This is considered further at paragraphs 7.91 to 7.93 below.

f. **Small agreements**

7.15. Section 39(3) of the Act provides that, subject to the OFT withdrawing immunity, a party to a small agreement is immune from the effect of section 36(1) of the Act. A small agreement is defined, pursuant to section 39(1) and the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262), as the category of all agreements between undertakings, the combined applicable turnover of which, for the business year ending in the calendar year preceding the one during which the infringement occurred, does not exceed £20 million.

7.16. The OFT considers that none of the Infringements qualify as small agreements as the combined applicable turnover of the Parties for each of the Infringements exceeded £20 million in the relevant business year. They are therefore not immune from the effect of section 36(1) of the Act.

g. **Intention/negligence**

7.17. The OFT may impose a penalty on an undertaking which has infringed the Chapter I prohibition only if it is satisfied that the infringement has been committed intentionally or negligently, although the OFT is not obliged to specify whether it considers the infringement to be intentional or merely negligent.

i. **Intention**

7.18. The CAT has stated in *Napp* that:

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1140 Calculated in accordance with the Schedule to the Regulations.
1141 SI 2000/262, paragraph 3.
1142 Section 36(3) of the Act.
an infringement is committed intentionally for the purposes of the Act if the undertaking must have been aware that its conduct was of such a nature as to encourage a restriction or distortion of competition [...] It is sufficient that the undertaking could not have been unaware that its conduct had the object or would have the effect of restricting competition, without it being necessary to show that the undertaking also knew that it was infringing the Chapter I or Chapter II prohibition. 1144

7.19. The OFT considers that serious infringements of the Chapter I prohibition, which have the object of preventing, restricting or distorting competition, such as the Infringements, are likely to have been, by their very nature, committed intentionally. In this context, the OFT considers that ignorance or a mistake of law is no bar to a finding of intentional infringement under the Act. 1145

7.20. Although not obliged to specify whether the Infringements were committed intentionally or negligently, the OFT considers that each of the Infringements were committed intentionally. The OFT considers that the restrictive nature of the Infringements was obvious and, therefore, their anti-competitive consequences were plainly foreseeable. In these circumstances, the OFT considers that each of the Parties could not have been unaware that the Infringements had the object of preventing, restricting or distorting competition.

ii. Negligence

7.21. The CAT has further stated in Napp that:

'[a]n infringement is committed negligently for the purposes of section 36(3) [of the Act] if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition.' 1146

7.22. The OFT considers that each Party at least ought to have known that its conduct in respect of the Infringements would result in a prevention, restriction or distortion of competition, since each Party participated in one or more Infringements that sought to co-ordinate retail price increases. As such, the OFT considers that, to the extent that any of the Parties were genuinely unaware of the anti-competitive nature of their conduct, each Party at the very least ought to have known that the Infringements would result in a prevention, restriction or distortion of competition and that each Party, therefore, at least negligently infringed the Chapter I prohibition.

7.23. In any event, as stated above, 1147 ignorance of the law is irrelevant to the assessment of intent or negligence, and the OFT is not obliged to show that an undertaking knew that its conduct infringed the Act. 1148

1144 Napp Pharmaceutical Holdings Limited v Director General of Fair Trading [2002] CAT 1, at [456].
1145 See OFT407 Enforcement (Edition 12/04), at paragraphs 5.9 to 5.11.
1147 See paragraph 7.19 above.
h. Turnover of the undertakings

7.24. For the purpose of the penalty calculation, the OFT considers that the relevant turnover or total turnover, as applicable, is the turnover of the undertaking that comprises the relevant single economic entity, as described in more detail in section 2.A above.

7.25. An undertaking may comprise several legal entities within the same corporate group. In such cases, the OFT has based its penalty calculations on the consolidated turnover of the legal entities to which the OFT has attributed liability for the relevant Infringement(s).1148

II. Calculation of penalties

7.26. In accordance with section 38(8) of the Act, the OFT must have regard to the Penalty Guidance issued under section 38(1) of the Act, for the time being in force, when setting the amount of the penalty. The Penalty Guidance sets out five steps for determining a financial penalty.

7.27. In determining the appropriate amount of a financial penalty for each Party, the OFT has considered the Parties’ submissions. Many of these submissions were made during early resolution (ER) discussions between the OFT and ER Parties.1150

7.28. The OFT entered into ERAs with a number of Parties in 2007 and 2008 (the ER Parties).1151 As part of that process, the OFT determined the level of financial penalty that it would impose on each ER Party should the OFT subsequently decide to issue an infringement decision and each ER Party agreed to pay that level of financial penalty. At that time, it was the OFT’s policy to calculate a party’s relevant turnover at Step 1 as its relevant turnover in its last business year preceding the date on which the infringement decision was issued (‘Decision Year turnover’). In order to determine penalties for ER Parties in advance of the OFT deciding to issue an infringement decision, the OFT used each ER Party’s relevant turnover in its last business year preceding the date on which it concluded an ERA with the OFT (‘ER Year turnover’). Within the context of discussing and agreeing ERAs the ER Parties submitted various representations on the level of penalty, some which were accepted by the OFT.

7.29. The CAT’s judgments in the Construction and CRF appeals clarified the position on ‘last business year’ for the purposes of Step 1 of the penalty calculation – this is to be interpreted as the undertaking’s last business year preceding the date on which the infringement ended (‘Infringement Year turnover’).1152 The OFT therefore decided to reassess each ER Party’s penalty in light of the judgments, albeit in the context of having

1148 Napp Pharmaceutical Holdings Limited v Director General of Fair Trading [2002] CAT 1, at [456].
1149 See section 2.A for the OFT’s assessment of those legal entities that the OFT has attributed liability for the relevant Infringement(s) to.
1150 See paragraphs 2.83 to 2.88 above.
1151 See section 2.B above.
1152 See, for example, Kier Group plc and Others v Office of Fair Trading [2011] CAT 3, at [137].
previously agreed the financial penalty that the OFT would impose and each ER Party having agreed to pay that level of financial penalty.

a. **Step 1 – starting point**

7.30. The starting point for determining the level of penalty is calculated having regard to the seriousness of the infringement and the relevant turnover of the undertakings.\(^{1153}\) The starting point may be any amount up to a maximum of 10 per cent of an undertaking’s relevant turnover.\(^{1154}\)

i. **Relevant turnover – turnover in the relevant product and geographic markets covered by the Infringements**

7.31. The relevant turnover is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in its last business year.\(^{1155}\) As the Infringements covered different relevant product markets, the OFT sets out below the relevant product and geographic markets with respect to each of the Infringements.

- **The 2002 and 2003 Cheese Initiatives:** The OFT considers that the relevant product and geographic markets affected by this infringement are those set out in section 4.B, namely, the supply by processors to national multiple retailers, and by those retailers to consumers, of all cheddar (regardless of origin) and British territorial cheeses in Great Britain.

- **The 2003 FLM Initiative:** The OFT considers that the relevant product and geographic markets affected by this infringement are those set out in section 4.B, namely, the supply by processors to national multiple retailers, and by those retailers to consumers, of fresh liquid milk in Great Britain.

7.32. For the 2002 Cheese Initiative and the 2003 FLM Initiative, in determining each Party’s penalty, the OFT has used each Party’s entire turnover in the relevant product and geographic market.

7.33. In contrast, for the 2003 Cheese Initiative, in determining each retailer’s penalty, the OFT has used only the turnover attributable to the sales by these retailers of British cheese supplied by McLelland. This is because the 2003 Cheese Initiative applied to the cheese products supplied by one processor only, McLelland, which at the time of this Infringement held a relatively small market share (below 10 per cent).\(^{1156}\) The 2003 Cheese Initiative differs from the other Infringements in this respect, as the processors that participated in the 2002 Cheese Initiative and the 2003 FLM Initiative had combined market shares that were significantly larger.

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\(^{1153}\) See Penalty Guidance, at paragraph 2.3.

\(^{1154}\) Ibid, at paragraph 2.8.

\(^{1155}\) Ibid, at paragraph 2.7.

\(^{1156}\) See paragraph 7.45 below.
than McLelland's market share (more than 40 per cent and around 75 per cent respectively).\textsuperscript{1157}

7.34. Given the relatively small share of the cheese retail market that was covered by the 2003 Cheese Initiative (by virtue of the fact that McLelland is the only processor found to have participated in the 2003 Cheese Initiative), in determining relevant turnover in respect of the 2003 Cheese Initiative for each of the relevant retailers (that is, Asda, Sainsbury’s and Tesco), the OFT has used only the turnover attributable to the sales by these retailers of British cheese supplied by McLelland. This logically applies only to the relevant retailers. For McLelland, the OFT has used its entire relevant turnover at Step 1 to determine its penalty in respect of the 2003 Cheese Initiative.

7.35. This approach is supported by the CAT's observations in Toys\textsuperscript{1158} where the CAT, in considering the link between an infringement and turnover for determining relevant turnover, held that the OFT was correct to use all turnover in the relevant market where the infringement concerned products for which the supplier had a market share greater than 25 per cent, as this meant that:

\begin{quote}
'the infringing agreements would have had the effect of enabling the prices of competing brands to be maintained at prices that were higher than those that would have prevailed had there been no agreements'.\textsuperscript{1159}
\end{quote}

7.36. However, the CAT considered that the OFT could not use all turnover in the relevant market where the infringement concerned products for which the supplier had a market share between two and five per cent.\textsuperscript{1160} Although McLelland's market share was greater than five per cent, it was also significantly lower than 25 per cent. The OFT does not consider that market shares between five and twenty five per cent necessarily mean that the full relevant turnover should not be used but, in the particular circumstances of this case, it has used only the turnover attributable to the sales of British cheese supplied by McLelland in determining each retailer's penalty.

\textbf{ii. Relevant turnover - last business year}

7.37. As noted at paragraph 7.31 above, the relevant turnover that is used to determine the starting point is the undertaking's turnover in the relevant product market and the relevant geographic market affected by the infringement in its last business year.\textsuperscript{1161}

7.38. Following the CAT's judgments in the Construction and CRF appeals, last business year is to be interpreted as an undertaking's relevant turnover in its last business year preceding the date on which the infringement ended.

\textsuperscript{1157} See paragraph 7.45 below.
\textsuperscript{1159} Ibid, at [198]. See also [199] to [201] and [242] to [247].
\textsuperscript{1160} Ibid, at [202] to [211].
\textsuperscript{1161} See Penalty Guidance, at paragraph 2.7.
7.39. However, for some ER Parties using Infringement Year turnover rather than ER Year turnover resulted in a higher relevant turnover figure at Step 1 than had been determined by the OFT at the time of the ERAs. Assuming all other steps in the penalty calculation were unchanged, this would have resulted in a higher penalty for these parties than that set out and agreed in their ERAs. In order to maintain the integrity of the OFT’s ER policy, for those ER Parties whose penalty would increase when Infringement Year turnover is used, the OFT considers that, in the circumstances of this case, it is appropriate and just to treat the penalty set out and agreed in its ERA as the maximum penalty that the OFT will impose on that party (the ‘ER Cap’). This is irrespective of whether the penalty amount that the OFT agreed in each ERA can still be regarded as contractually binding, in light of the CAT’s judgments in Construction.

7.40. The OFT considers it appropriate to ensure that ER Parties benefit from the certainty as to the maximum penalty they will pay. Imposing a penalty higher than that set out in an ER Party’s ERA would remove this certainty and risk reducing parties’ incentives to engage in ER in the future. The OFT’s approach of applying the ER Cap is applicable to the level of financial penalty to be imposed on a Party for each individual Infringement it has been found to have participated in. In order to give effect to the ER Cap, for those ER Parties for which the ER Cap applies, the OFT has determined their penalties by reference to their ER Year turnover rather than their Infringement Year turnover. The OFT notes that this is a departure from the Penalty Guidance but considers that the existence of the ERAs and the need to ensure the integrity of its ER policy justifies such a departure. The OFT also notes that it could have given effect to the ER Cap by making an adjustment after Step 5 of the penalty calculation in order to impose the ER penalty to give the same result.

7.41. The relevant turnover used to determine each Party’s penalty is set out below.

iii. The seriousness of the Infringements

7.42. The starting point percentage which the OFT applies to an undertaking’s relevant turnover at Step 1 of the penalty calculation depends upon the

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1162 See, for example, *Kier Group plc and Others v Office of Fair Trading* [2011] CAT 13, at [137].

1163 See paragraph 7.29 above.

1164 Dairy Crest, Glanbia and Safeway (for both penalties in respect of individual Infringements and total penalties) and Asda (for its penalty in respect of the 2003 FLM Initiative).

1165 In this regard, the Court of Appeal has previously held that: ‘The language of section 38(8) [of the Act] is general in nature. It does not bind the OFT to follow the [Penalty] Guidance in all respects in every case. However, in accordance with general principle, the OFT must give reasons for any significant departure from the [Penalty] Guidance’ (see *JJB Sports plc v Office of Fair Trading* and *Argos Limited and Littlewoods Limited v Office of Fair Trading*, [2006] EWCA Civ 1318, at [161]).
nature of the infringement. The more serious and widespread the infringement, the higher the percentage rate likely to be applied.\footnote{See Penalty Guidance, at paragraph 2.4.}

7.43. When considering the seriousness of the infringement, the OFT will consider a number of factors, including the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved in the infringement, entry conditions and the effect on competitors and third parties.\footnote{Ibid, at paragraph 2.5.} The damage caused to consumers (whether directly or indirectly) is also an important consideration.\footnote{Ibid. See also Kier Group plc and Others v Office of Fair Trading [2011] CAT 3, at [133], in which the CAT held that ‘[i]t is clearly necessary to take into account the effects (actual or potential) of an infringement when considering its seriousness’. See paragraph 7.10 above.}

\textit{General considerations relating to the seriousness of the Infringements}

7.44. Although the OFT does not consider that it is bound by the calculation of financial penalties in previous cases,\footnote{See, for example, Eden Brown Limited and Others v Office of Fair Trading [2011] CAT 8, at [78], in which the CAT accepted that ‘there should be broad consistency in the OFT’s approach’ but that ‘when it comes to assessment of seriousness in this context, each case is very dependent on its facts’.} it is nevertheless informative to consider the appropriate starting point in previous cases with some similar features.\footnote{OFT decision CA98/6/2003 Price-fixing of Replica Football Kit (1 August 2003). See also replica kit\footnote{OFT decision CA98/8/2003 Agreements between Hasbro U.K. Ltd, Argos Ltd and Littlewoods Ltd fixing the price of Hasbro toys and games (21 November 2003). OFT decision CA98/6/2003 Price-fixing of Replica Football Kit (1 August 2003), upheld by the CAT on appeal (Umbro Holdings Limited and Others v Office of Fair Trading [2005] CAT 22).} and toys\footnote{OFT decision CA98/8/2003 Agreements between Hasbro U.K. Ltd, Argos Ltd and Littlewoods Ltd fixing the price of Hasbro toys and games (21 November 2003), upheld by the CAT on appeal (Argos Limited and Littlewoods Limited v Office of Fair Trading [2005] CAT 13).} involved infringements that are similar to the Infringements found in this Decision, that is, ‘A-B-C’ or ‘hub and spoke’ infringements that had the object of co-ordinating retail prices. In determining the appropriate starting point in this case, the OFT had regard to the fact that, in \textit{Replica Kit}, a starting point of nine per cent was applied in respect of retailers’ penalties and a starting point of eight per cent of relevant turnover was applied in respect of the supplier’s (Umbro’s) penalty,\footnote{OFT decision CA98/8/2003 Agreements between Hasbro U.K. Ltd, Argos Ltd and Littlewoods Ltd fixing the price of Hasbro toys and games (21 November 2003), upheld by the CAT on appeal (Umbro Holdings Limited and Others v Office of Fair Trading [2005] CAT 22).} while in \textit{Toys}, a starting point of ten per cent was applied when determining all parties’ penalties.\footnote{OFT decision CA98/8/2003 Agreements between Hasbro U.K. Ltd, Argos Ltd and Littlewoods Ltd fixing the price of Hasbro toys and games (21 November 2003), upheld by the CAT on appeal (Argos Limited and Littlewoods Limited v Office of Fair Trading [2005] CAT 13).} In light of the similar nature of the infringements found in \textit{Replica Kit} and \textit{Toys} and the Infringements in this Decision, the OFT considers that the Infringements would have warranted a starting point close to or at the maximum of ten per cent but for the exceptional circumstances in which the Infringements took place. However, the OFT concluded that a lower starting point was appropriate as a result of a number of factors (relating to the Infringements and the industry at the time) that made the Infringements less serious.
The factors that the OFT considers make the Infringements more serious are:

- The Infringements had as their object the co-ordination of retail price increases – a form of price-fixing (in that the Parties did not determine their retail prices independently). The OFT considers that price-fixing agreements are among the most serious infringements of the Chapter I prohibition. While the Infringements are not ‘classic’ hardcore cartels (in that the restriction of competition was not achieved through direct horizontal contacts between competitors), the indirect disclosure of retail pricing intentions between retailers via processors is akin to, and has the same object as, direct horizontal co-ordination.

- As the OFT has found that each Infringement had the object of preventing, restricting or distorting competition, the OFT is not required to prove in addition that each Infringement had the effect of preventing, restricting or distorting competition. The OFT has nonetheless considered the potential effects of the Infringements in assessing the seriousness of the Infringements. The Infringements had as their aim to achieve an increase in the retail prices for staple consumer goods through indirect co-ordination. As such, the potential effects arising from the Infringements were retail price increases for end consumers. The potential harm arising from the Infringements is obvious (increasing prices for consumers). Given the nature of the Infringements, the OFT considers, consistent with Replica Kit and Toys, that they constituted very serious infringements of the Chapter I prohibition.

- The Infringements involved most or all of the largest multiple retailers and processors at the time:
  - **The 2002 Cheese Initiative:** In 2002, the retailers that participated in this Infringement (Asda, Safeway, Sainsbury’s and Tesco) accounted for around 60 per cent of grocery sales to consumers in the UK, while the processors (Dairy Crest, Glanbia and McLelland) accounted for around 40 per cent of UK cheese production.
  - **The 2003 Cheese Initiative:** In 2003, the retailers that participated in this Infringement (Asda, Sainsbury’s and Tesco) accounted for around 50 per cent of grocery sales to consumers in the UK, while the processor (McLelland)

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1175 See Penalty Guidance, at paragraph 2.4.
1176 In *Kier*, the CAT acknowledged that establishing that an infringement had the object of preventing, restricting or distorting competition means that effects need not be proved. However, the CAT considered that it is necessary to take into account actual or potential effects when considering the seriousness of an infringement. (*Kier Group plc and Others v Office of Fair Trading* [2011] CAT 3, at [133]. See also, for example, *Barrett Estate Services Limited and Others v Office of Fair Trading* [2011] CAT 9, at [23].)
1177 The relevant retailers’ combined share of one-stop grocery shopping was still higher at around 87 per cent.
accounted for just under 10 per cent of UK cheese production.¹¹⁷⁸

- **The 2003 FLM Initiative:** In 2003, the retailers that participated in this Infringement (Asda, Safeway and Sainsbury’s) accounted for nearly 40 per cent of grocery sales to consumers in the UK, while the processors (Arla, Dairy Crest and Wiseman) accounted for around 75 per cent of the supply of liquid milk to national multiple retailers in Great Britain.¹¹⁷⁹

  • The nature of the products affected by the Infringements also contributed to their seriousness. The Infringements concerned the retail sale of cheese and fresh liquid milk to consumers – both staple household goods that are widely bought by consumers.

7.46. The OFT considers that there are, however, a number of factors that reduce the overall seriousness of the Infringements. These factors all relate to the background to, and the context of, the Infringements: that farmgate prices for raw milk were not, on average, high enough to cover dairy farmers’ costs between 2000 and (at least) 2003; the significant numbers of dairy farmers leaving the industry; and the resulting pressure to take action to help farmers. These factors are considered above. The factors that the OFT considers make the Infringements less serious are:

  • As submitted by the Parties and supported by the evidence, an apparent aim of the 2002 Cheese and 2003 FLM Initiatives was to support UK dairy farmers by subsidising an increase in the farmgate price of raw milk through increased cheese and fresh liquid milk retail prices. This involved a chain of price increases, with consumers being charged higher retail prices, retailers paying higher wholesale prices to processors and processors paying higher farmgate prices to UK dairy farmers.¹¹⁸⁰ The evidence in relation to the 2003 Cheese Initiative suggests that this Infringement was intended, at least by the processor involved (McLelland), to ‘stabilise’ its profit margins. However, the evidence also shows that at least two of the retailers involved expressed a wish (albeit without pursuing the point further) that the wholesale price increase in this Infringement be passed back to farmers.

  • As submitted by the Parties and supported by the evidence, the Parties were put under strong pressure to take action to help UK dairy farmers.

¹¹⁷⁸ The relevant retailers’ combined share of one-stop grocery shopping was around 75 per cent. The fact that the 2003 Cheese Initiative related to the products of only one processor is taken into account in relation to relevant turnover (see paragraphs 7.32 to 7.36 above).

¹¹⁷⁹ The relevant retailers’ combined share of one-stop grocery shopping was around 55 per cent. The OFT considers that the absence of Tesco’s participation in the 2003 FLM Initiative means that that Infringement is less widespread than the other Infringements (see paragraph 7.48 below).

¹¹⁸⁰ The OFT has not sought to establish whether the Infringements were successful in their aim of passing money back to UK dairy farmers.
dairy farmers by farmer action (including protests at and blockades of several Parties’ facilities). These protests and blockades were very disruptive to the Parties’ business and might have resulted in significant damage, in particular to the retailers in the run-up to Christmas. While in French Beef the Commission reduced parties’ penalties by 60 per cent (increased to 70 per cent by the General Court) as a result of the specific economic context (which was marked by the serious crisis in the beef sector), the OFT considers that the situation in this case is not comparable given that the circumstances in this case are different in their severity and impact compared to the circumstances the Commission found in French Beef. The OFT also considers that pressure faced by the industry generally (and so faced by all Parties) is most appropriately taken into account in determining the seriousness of the infringements (at Step 1 of the penalty calculation) rather than under specific individual mitigation (at Step 4 of the penalty calculation).

7.47. The OFT considers that none of these factors in themselves justified the Infringements but does nevertheless consider that the exceptional circumstances set out at paragraph 7.46 above reduce the seriousness of the Infringements and, therefore, make it appropriate to use a lower starting point than would ordinarily have been the case.

7.48. Taking into account the factors set out above, for the 2002 Cheese Initiative, the OFT considers that a starting point of six per cent of relevant turnover is appropriate.

7.49. The OFT considered that the same factors regarding seriousness of the infringement apply in respect of the 2003 FLM Initiative and therefore considered that a starting point of six per cent was appropriate. However, while the OFT has found that Asda, Safeway and Sainsbury’s were Parties to this Infringement, the OFT does not have evidence to satisfy the required standard of proof that Tesco was a Party to this Infringement. The OFT considers that the fact it has not found that the market leading national multiple participated in this Infringement means that it has not established that the Infringement was as widespread as the 2002 Cheese Initiative. Accordingly, for the 2003

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1182 See also the OFT’s consideration of its decision in Northern Ireland Livestock, set out at paragraph 7.13 above.
1183 The OFT does consider that the pressure that some Parties faced (in particular, the processors) was greater than other Parties. In order to differentiate this, the OFT has taken this difference in position into account at Step 4 – see paragraphs 7.85 to 7.88 below.
1184 In that regard, see also, for example, Kier Group plc and Others v Office of Fair Trading [2011] CAT 3, at [107] where the CAT held that ‘the industry’s general perceptions and motivations… do not affect the unlawfulness of [the infringements]’.
1185 At the time, Tesco had a market share of approximately 23 per cent of grocery sales to consumers in the UK and a share of approximately 32 per cent of one-stop grocery shopping.
1186 See Penalty Guidance, at paragraph 2.4. See also paragraph 7.42 above.
FLM Initiative, the OFT considers that a lower starting point of five per cent of relevant turnover is appropriate.\textsuperscript{1187}

7.50. The 2003 Cheese Initiative was aimed at ‘stabilising’ McLelland’s margin rather than increasing the price of raw milk for UK dairy farmers. However, the OFT considers that, consistent with the 2002 Cheese Initiative, a starting point of six per cent is appropriate given that the general context within the industry at the time (marked by pressure on processors’ margins in order to financially support UK dairy farmers) was similar to that in respect of the 2002 Cheese Initiative and the 2003 FLM Initiative.

7.51. These starting points were determined at the time of ER and are set out in each ER Party’s ERA. However, as a result of the Construction judgments the OFT has reconsidered the starting points it had determined for the Infringements. In particular, the OFT has considered whether the starting points for the Infringements are appropriate given the CAT’s findings in relation to the various mitigation relevant to starting point in the Construction appeals, that:

- cover pricing was a long-standing, widespread and endemic practice in the construction industry;
- the construction industry perceived cover pricing as a normal and acceptable practice which was not regarded within the industry as illegitimate; and
- rather than being aimed at determining or assisting in determining prices, cover pricing was aimed at saving the otherwise wasted costs of preparing tenders for work which was not wanted by the companies.\textsuperscript{1188}

7.52. The OFT has considered the potential application of analogous arguments to the present case, although as already noted, the circumstances of these Infringements are different to those considered in Construction. The OFT took into account the motivations of, and context relevant to, the Infringements when determining starting points for the Infringements. Overall, the OFT has concluded that the three particular aspects identified in the CAT’s judgments in Construction do not apply in the present case and do not justify any adjustment to the starting points as determined at the time of the ERAs. In drawing this conclusion, the OFT also notes that the CAT upheld the OFT’s decision to apply a nine per cent starting point in the CRF case.\textsuperscript{1189}

Different starting points for retailers and processors

\textsuperscript{1187} See, for example, Eden Brown Limited and Others v Office of Fair Trading [2011] CAT 8, at [75], where the CAT took into account the fact that the infringements in that case ‘comprised the largest players in the market’ in determining that the infringements are among the most serious kinds of infringement.

\textsuperscript{1188} Kier Group plc and Others v Office of Fair Trading [2011] CAT 3, at [100] to [115].

\textsuperscript{1189} Eden Brown Limited and Others v Office of Fair Trading [2011] CAT 8, at [79].
7.53. The OFT assesses the seriousness of the infringement on a case by case basis, taking account of all the circumstances of the case.\footnote{See Penalty Guidance, at paragraph 2.5} Given that for each Infringement all of the Parties found to have participated were seeking to achieve the same aim (to co-ordinate retail price increases in order to increase the farmgate price for raw milk), the OFT considers that the same starting point should be applied in determining all Parties' penalties regardless of whether a Party was a processor or a retailer.\footnote{In that regard, see, for example, \textit{Eden Brown Limited and Others v Office of Fair Trading} [2011] CAT 8, at [80], in which the CAT accepted the OFT’s submission that ‘the seriousness percentage is not designed to reflect all the particular circumstances of each undertaking’s unlawful conduct but rather “to assign the infringement a categorisation which reflects it seriousness and the scale of the undertaking in the relevant market”’.} To the extent that distinguishing factors relevant to the appropriate amount of a financial penalty existed for a particular Party, the OFT has taken those factors into account at Step 4 of the penalty calculation.

Further representations on starting point

7.54. Most of the Parties submitted that the Infringements were public knowledge and that the Government was both aware of them and even appeared to support them and that the Infringements were, accordingly, less serious. However, the OFT does not consider that these submissions are supported by the facts and has not, therefore, taken these factors into account in determining the seriousness of the Infringements. It is necessary to distinguish between the price initiatives themselves and the mechanism by which the Parties chose to implement those initiatives (namely indirect co-ordination of retail price increases).

7.55. While certain facts surrounding the Infringements may have been publicly known at the time,\footnote{Such as farmer protests (reported in the media, see for example an FFA press release of 12 July 2002 about blockades (document 164 to the SO)), calls for increasing the farmgate price for raw milk (see for example a Tesco press release of 4 September 2002 that called on the processors to increase the farmgate price (document 128 to the SO), and the fact that retailers were increasing their retail prices for FLM and cheese to help dairy farmers (reported in the media, see for example the Dairy Industry Newsletters of 5 November 2002 (document 64 to the SO), 27 June 2003 (document 203 to the SO) and 24 September 2002 (documents 265 and 266 to the SO)).} there is no evidence on the OFT’s file to suggest that the mechanism of co-ordination through which the initiatives were implemented\footnote{That is, the indirect disclosure and/or exchange of retail pricing intentions by retailers through processor(s) acting as intermediaries.} was publicly known.

7.56. Additionally, while some evidence suggests that certain parts of Government may have been aware of elements of the initiatives and may have expressed support and/or approval for processors and retailers seeking to increase monies paid to UK dairy farmers, there is no evidence on the OFT’s file to suggest that any part of Government was in any way
aware of or approved the mechanism by which the initiatives were implemented.\textsuperscript{194}

7.57. Further, in \textit{Austrian Banks}, the General Court considered that neither the public nature of meetings, nor the participation of national authorities in those meetings, affected the intention to restrict competition or the seriousness of the infringement.\textsuperscript{195}

7.58. Some Parties also submitted that the public nature of the Infringements meant that they could not be considered as, or compared to, secret cartel activity between direct competitors and that the Infringements were less serious as a result of this. However, the OFT does not consider that this is supported by the facts.\textsuperscript{196}

b. \textbf{Step 2 – adjustment for duration}

7.59. The penalty at the end of Step 1 may be increased or, in exceptional circumstances, decreased to take into account the duration of the infringement. Penalties for infringements which last more than one year may be multiplied by not more than the number of years of the infringement. Part years may be treated as full years for the purpose of calculating the number of years of the infringement.\textsuperscript{197} In this Decision, the OFT has decided to make no increase or decrease for duration at Step 2 of the penalty calculation.

c. \textbf{Step 3 – adjustment for other factors}

7.60. The penalty may be adjusted as appropriate, after Step 2 of the penalty calculation, to achieve the objectives of the OFT’s policy on financial penalties: to impose penalties on infringing undertakings which reflect the seriousness of the infringement; and to ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices.\textsuperscript{198} Relevant considerations at Step 3 may include: the OFT’s objective estimate of any economic or financial benefit made or likely to be made by the infringing undertaking from the infringement; and the special characteristics, including the size and financial position, of the undertakings in question.\textsuperscript{199} This assessment is carried out on a case by case basis for each undertaking.\textsuperscript{200} Adjustments to the financial penalty

\begin{thebibliography}{9}
\bibitem{194} That is, the indirect disclosure and/or exchange of retail pricing intentions by retailers through processor(s) acting as intermediaries.
\bibitem{195} Case T-259/02 Raiffeisen Zentralbank Österreich AG and Others v Commission \citeyear{2006} ECR II-5169, at paragraphs 209, 260 and 506.
\bibitem{196} See paragraph 7.55 above.
\bibitem{197} See Penalty Guidance, at paragraph 2.10. See also, for example, Case T-259/02 Raiffeisen Zentralbank Österreich AG and Others v Commission \citeyear{2006} ECR II-5169, at paragraph 506.
\bibitem{198} \textit{Ibid}, at paragraph 1.4.
\bibitem{199} \textit{Ibid}, at paragraph 2.11.
\bibitem{200} \textit{Ibid}, at paragraph 2.12. See also, for example, \textit{Kier Group plc and Others v Office of Fair Trading} \citeyear{2011} CAT 3, at \([164]\) to \([169]\).
\end{thebibliography}
at Step 3 may result in either an increase or a decrease in the financial penalty.\(^{1201}\)

### 7.61. In Kier, the CAT considered that it is appropriate to take a step back to consider whether a penalty is sufficient to deter and is proportionate. This is, in fact, a 'step' that the OFT had already taken when determining original ER penalties in this case. When determining penalties for ER Parties, the OFT considered whether the penalty arrived at for each Party at the end of Step 2 was sufficient to meet the twin objectives of the OFT's policy on financial penalties\(^{1202}\) and to ensure that each penalty was proportionate.\(^{1203}\)

### 7.62. In considering whether each ER Party's penalty was appropriate in comparison to its size and financial position, the OFT compared its penalty after Step 2 to its total turnover and operating profits.\(^{1204}\)

### 7.63. The OFT also had regard to the proportion of each ER Party's total turnover and profit that its penalty accounted for as compared to other ER Parties' penalties in order to ensure that it was not disproportionate or excessive. Whilst such comparisons cannot be used to displace the proper application of the Penalty Guidance,\(^{1205}\) in this case, the OFT considered that such a cross-check was informative when considering proportionality. For example, some processors' penalties as a proportion of total turnover, as compared to retailers', highlighted a significant difference. Although this was principally as a result of those processors' economic activities being particularly concentrated in the relevant market(s), the OFT nonetheless considered that the overall penalties for certain processors were disproportionate as compared to other parties' penalties.

### 7.64. The OFT did not seek to determine exact percentages or ranges that penalties should fall within but rather to consider whether each penalty arrived at was broadly proportionate and achieved the objectives of the OFT's policy on financial penalties. Similarly, in comparing penalties as between ER Parties, the OFT did not seek to determine an ER Party's

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\(^{1201}\) Ibid, at paragraph 2.12.

\(^{1202}\) See Penalty Guidance, at paragraph 1.4.

\(^{1203}\) See, for example, Kier Group plc and Others v Office of Fair Trading [2011] CAT 3, at [166] where the CAT explained that 'it is particularly important that at some stage the OFT should take a step back and ask itself whether in all the circumstances a penalty at the proposed level is necessary and proportionate in order both to punish the particular undertaking for the specific infringement and to deter it and other companies from further breaches of that kind'. See also, for example, Crest Nicholson plc and ISG Pearce Limited v Office of Fair Trading [2011] CAT 10, at [54]; and Eden Brown Limited and Others v Office of Fair Trading [2011] CAT 8, at [100].

\(^{1204}\) The OFT notes that in Kier, the CAT considered that a number of factors, including turnover, profit, cash flow and margin, may be appropriate in considering the size and financial position of a company and, therefore, the extent to which a deterrence increase is necessary at Step 3. However, rather than prescribe which factor(s) should be considered, the CAT considered that the OFT should not limit itself to only one factor (Kier Group plc and Others v Office of Fair Trading [2011] CAT 3, at [170] to [172]).

\(^{1205}\) See, for example, GF Tomlinson Group Limited and Others v Office of Fair Trading [2011] CAT 7, at [149] to [158].
penalty precisely in accordance with other ER Parties’ penalties but rather sought to determine whether there were any ‘outliers’.\textsuperscript{1206}

7.65. The OFT carried out this comparison using each Party’s most recent total UK turnover and profits, as those figures provide the most relevant measures of that Party’s size and significance.\textsuperscript{1207} For ER Parties, the OFT initially carried out this comparison by reference to their turnover and profit figures in 2007, as this was the year in which the OFT concluded those ERAs.\textsuperscript{1208}

7.66. Following the CAT’s Construction judgments, in reconsidering penalties the OFT considered whether any adjustment was necessary at Step 3 for each ER Party’s penalty when their Infringement Year turnover was used. The OFT carried out this assessment by reference to both financial information at the time of ER (in 2007 and 2008) and most recently available financial information.\textsuperscript{1209} As Tesco did not conclude an ERA, the OFT carried out this assessment by reference to its most recently available financial information only.

7.67. The OFT also notes that in Kier, the CAT considered that ‘[a]ccount should also be taken of the typical margin on turnover earned in the industry in question, in order to ensure that the ultimate penalty represents a proportionate and sufficient punishment and deterrent’.\textsuperscript{1210} In all the circumstances of this case, the OFT does not consider it necessary to adjust any Party’s penalty on the basis of typical margin. Additionally, Parties’ specific margins have been considered by virtue of the fact that the OFT considered each Party’s penalty by reference to its total turnover and operating profit (operating profit being a function of those two factors).

i. Increase in penalties

7.68. Although the Infringements are serious infringements of the Act (having the object of co-ordinating retail price increases),\textsuperscript{1211} the OFT considered at the time of ER that each Party’s penalty at the end of Step 2 was

\begin{itemize}
\item \textsuperscript{1206} A similar approach was taken by the OFT in its Construction decision. This particular approach of identifying ‘outliers’ was broadly upheld by the CAT in GF Tomlinson Group Limited and Others v Office of Fair Trading [2011] CAT 7, at [269].
\item \textsuperscript{1207} This is also the approach the CAT took in Eden Brown Limited and Others v Office of Fair Trading [2011] CAT 8, at [107], where the CAT held that ‘when it comes to the issue of deterrence we consider that the more pertinent financial information is that for the year before the decision […] the focus of deterrence is on the future conduct of the undertaking itself, and the message sent to other undertakings, and it is therefore prospective’.
\item \textsuperscript{1209} See, for example, Eden Brown and others v Office of Fair Trading [2011] CAT 8, at [107], where the CAT held that ‘when it comes to the issue of deterrence we consider that the more pertinent financial information is that for the year before the decision […] the focus of deterrence is on the future conduct of the undertaking itself, and the message sent to other undertakings, and it is therefore prospective’.
\item \textsuperscript{1210} Kier Group plc and Others v Office of Fair Trading [2011] CAT 3, at [172].
\item \textsuperscript{1211} See paragraphs 7.42 to 7.49 above.
\end{itemize}
sufficient both to reflect the seriousness of the Infringements and to ensure that both the Parties and other companies are deterred from engaging in anti-competitive actions in future. The OFT did not, therefore, increase any ER Party’s penalty at Step 3 at the time of ER.\textsuperscript{1212}

7.69. For some Parties (specifically, the retailers), their penalties at the end of Step 2 both at the time of ER and following the OFT’s reassessment of penalties are a low proportion of their total turnover and operating profit (particularly as compared to other Parties’ penalties). However, this is principally a consequence of the fact that those Parties are significantly more diverse than other Parties and achieve the majority of their turnover from a very broad range of economic activities. In the particular circumstances of this case, the OFT did not consider it necessary to increase any Party’s penalty for deterrence. In drawing this conclusion, the OFT was also mindful of the fact that the absolute penalty imposed on each Party is not insignificant and that the majority of retailers’ penalties are, in absolute terms, greater than processors’ penalties.

7.70. As part of its reassessment of ER penalties (following the CAT’s \textit{Construction} and \textit{CRF} judgments), the OFT considered whether it was necessary to increase any ER Party’s penalty at Step 3. While some ER Parties’ penalties decreased as a result of using Infringement Year turnover, the OFT considered that those decreases were not so great such that any penalty was now too low to either reflect the seriousness of the Infringements or to achieve deterrence. Accordingly, the OFT has decided not to increase any Party’s penalty at Step 3.

\textit{ii. Decrease in penalties}

7.71. In some cases, the financial penalty calculated at the end of Step 2 may be higher than is necessary to reflect the seriousness of the infringement and to achieve deterrence\textsuperscript{1213} or may not be proportionate in comparison to the seriousness of the infringement and the penalties imposed on other Parties.\textsuperscript{1214} That may be the case, for instance, for undertakings whose economic activities are relatively concentrated in the relevant market(s).\textsuperscript{1215} It may also be the case due to an undertaking’s special characteristics, including its size or financial position (including, for example, its business model). In determining the appropriate amount of a penalty for each Party, the OFT has also had regard to the fact that undertakings must be treated ‘like for like’\textsuperscript{1216} and the CAT’s observations

\textsuperscript{1212} The OFT’s assessment of each Party’s penalty at Step 3 is set out below.

\textsuperscript{1213} See, for example, \textit{Kier Group plc and Others v Office of Fair Trading} [2011] CAT 3, at [140].

\textsuperscript{1214} This approach is consistent with the CAT’s judgment in \textit{Sepia Logistics Limited and Precision Concepts Limited v Office of Fair Trading} [2007] CAT 13, at [111]. See also, for example, \textit{Kier Group plc and Others v Office of Fair Trading} [2011] CAT 3, at [140].

\textsuperscript{1215} See, for example, the CAT’s observations regarding the need to guard against the risk of unfairness that may result from different parties’ relevant turnover to total turnover ratios (\textit{Umbro Holdings Limited and Others v Office of Fair Trading} [2005] CAT 22, at [176]).

\textsuperscript{1216} \textit{Richard W Price (Roofing Contractors) Limited v Office of Fair Trading} [2005] CAT 5, at [62]. See also the CAT’s observations on proportionality of penalties in \textit{Umbro Holdings
Where the OFT considered that an adjustment was necessary in order to ensure that a Party’s penalty was proportionate, the OFT has made this adjustment at Step 3.

As regards the retailers that concluded an ERA with the OFT (that is, Asda, Safeway and Sainsbury’s), their penalties as calculated at the time of their ERAs did not account for a significant proportion of their total turnover or of their profits. Accordingly, the OFT concluded that those penalties were not disproportionate or excessive. When Asda’s, Safeway’s and Sainsbury’s penalties are determined by reference to their Infringement Year turnover, their penalties either decrease or remain the same (where the OFT has applied the ER Cap). Accordingly, the OFT considers that the appropriateness of those penalties remains unchanged in this regard.

As regards the processors who concluded ERAs with the OFT, Glanbia’s, McLelland’s and Wiseman’s penalties prior to any changes at Step 3 accounted for a significant proportion of their total turnover and their profits, and a much greater proportion as compared to the penalties for each retailer and for Dairy Crest. In these circumstances, the OFT considered a decrease in their penalties was appropriate. The details of these decreases are set out in section 7.7 below.

These proportionality reductions were determined at the time of concluding the ERAs. Accordingly, they were determined by reference to each ER Party’s ER Year turnover. As part of its reassessment of ER penalties (following the CAT’s Construction and CRF judgments), the OFT considered whether the proportionality reductions it had made to Glanbia’s, McLelland’s and Wiseman’s penalties remained appropriate. For Glanbia, as the ER Cap applies, the OFT considers that its penalty remains appropriate. Without any reduction for proportionality, the OFT considered and, following its reassessment, continues to consider, that McLelland’s and Wiseman’s penalties remain disproportionate as compared to other Parties’ penalties. A reduction for proportionality is

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in both Price and Replica Kit. The OFT has also had regard to the CAT’s recent judgments in Construction and CRF.

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Where the OFT considered that an adjustment was necessary in order to ensure that a Party’s penalty was proportionate, the OFT has made this adjustment at Step 3.

As regards the retailers that concluded an ERA with the OFT (that is, Asda, Safeway and Sainsbury’s), their penalties as calculated at the time of their ERAs did not account for a significant proportion of their total turnover or of their profits. Accordingly, the OFT concluded that those penalties were not disproportionate or excessive. When Asda’s, Safeway’s and Sainsbury’s penalties are determined by reference to their Infringement Year turnover, their penalties either decrease or remain the same (where the OFT has applied the ER Cap). Accordingly, the OFT considers that the appropriateness of those penalties remains unchanged in this regard.

As regards the processors who concluded ERAs with the OFT, Glanbia’s, McLelland’s and Wiseman’s penalties prior to any changes at Step 3 accounted for a significant proportion of their total turnover and their profits, and a much greater proportion as compared to the penalties for each retailer and for Dairy Crest. In these circumstances, the OFT considered a decrease in their penalties was appropriate. The details of these decreases are set out in section 7.7 below.

These proportionality reductions were determined at the time of concluding the ERAs. Accordingly, they were determined by reference to each ER Party’s ER Year turnover. As part of its reassessment of ER penalties (following the CAT’s Construction and CRF judgments), the OFT considered whether the proportionality reductions it had made to Glanbia’s, McLelland’s and Wiseman’s penalties remained appropriate. For Glanbia, as the ER Cap applies, the OFT considers that its penalty remains appropriate. Without any reduction for proportionality, the OFT considered and, following its reassessment, continues to consider, that McLelland’s and Wiseman’s penalties remain disproportionate as compared to other Parties’ penalties. A reduction for proportionality is

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Limited and Others v Office of Fair Trading [2005] CAT 22, at [163], [176] and [349] to [351].


Umbro Holdings Limited and Others v Office of Fair Trading [2005] CAT 22, for example, at [163]; [174] to [177]; and [349] to [351]. See also at [163] to [165].

In this regard, see GF Tomlinson Group Limited and Others v Office of Fair Trading [2011] CAT 7, at [269], where the CAT held that: ‘The scheme for imposing fines created these “outliers” in the sense that the fines expressed as a proportion of turnover for these undertakings were much higher than the fines for the other companies being fined in the same Decision’ and that the OFT was, accordingly, right to seek to reduce those fines.

See also Eden Brown Limited and Others v Office of Fair Trading [2011] CAT 8, at [116] where the CAT observed that ‘[i]f we were to consider the UK business alone, it might be arguable that the penalty calculated after Steps 1 and 2 should be reduced as it represents such a high proportion of the net fees of CDI AndersElite Limited’.

See paragraph 7.39 above.
therefore necessary. The OFT considers that it remains appropriate to reduce their penalties by [C] per cent.

7.76. In contrast to Glanbia, McLelland and Wiseman, at the time of ER, the OFT considered that the proportion of total turnover and profits that Dairy Crest’s penalty accounted for was appropriate both in the circumstances of this case and as compared to other Parties’ penalties. As Dairy Crest’s penalty is subject to the ER Cap\textsuperscript{1221} the OFT’s considers that the appropriateness of its penalty remains unchanged in this regard.

iii. Economic benefit

7.77. Some Parties submitted that any financial penalty should reflect the fact that any financial benefits from the Infringements (resulting from increased retail and wholesale prices) were passed back to farmers (consistent with the apparent aim of the Infringements) so Parties derived no economic or financial benefit from the Infringements.

7.78. The OFT considers that whereas the existence of any economic or financial benefit from an infringement may warrant an increase in the penalty at Step 3, its absence does not warrant a decrease in the penalty. The OFT has considered this matter in paragraphs 5.18 to 5.28 above and considers that it is not necessary to reach any specific conclusion on whether increased retail and wholesale prices resulted in an increase in the farmgate price of raw milk. To the extent that these submissions go to the aim of the Infringements, the OFT has taken this factor into account in determining the overall seriousness of the Infringements in this case.\textsuperscript{1222}

d. Step 4 – adjustment for aggravating and mitigating factors

7.79. The OFT may increase the penalty at Step 4 where there are aggravating factors, or decrease it where there are mitigating factors.\textsuperscript{1223}
i. Aggravating factors

7.80. In this case, the OFT has decided to make no increase in penalty for aggravating factors.

ii. Mitigating factors

7.81. The OFT considers that there are a number of mitigating factors that warrant a decrease in particular Parties’ penalties at Step 4. The applicable decreases at Step 4 specific to each Party’s penalty is set out in section 7.G below.

Compliance

7.82. In this case, where a Party has demonstrated following the start of this Investigation that it has taken adequate steps with a view to ensuring

\textsuperscript{1221} See paragraph 7.39 above.
\textsuperscript{1222} See paragraph 7.42 to 7.49 above.
\textsuperscript{1223} See Penalty Guidance, at paragraph 2.14.
compliance with the Chapter I and/or II prohibitions and Articles 101 and/or 102 TFEU, the OFT considers this a mitigating factor and has decreased its penalty accordingly.  

**Co-operation**  

7.83. The OFT considers that co-operation which enables the enforcement process to be concluded more effectively and/or speedily is a mitigating factor which may result in a decrease in the penalty. However, the mere compliance with statutory requirements (such as formal notices requesting documents and/or information) will not of itself merit any reduction in penalty as a mitigating factor. In addition, undertakings benefiting from leniency (a condition of which is their continuous and complete co-operation) will not receive an additional decrease in penalties at Step 4 to reflect general co-operation. Similarly, a Party that has concluded an ERA with the OFT and as a result receives a reduction in its penalty will not receive an additional decrease at Step 4 to reflect co-operation after the date of its ERA.

7.84. To the extent that the OFT has decided to decrease any Party’s penalty as a result of co-operation, this is explained in section 7.8 below.

**Role of the undertaking – severe duress or pressure**  

7.85. As explained above, the Infringements occurred at a time of particular exceptional circumstances. Although the OFT principally took this into account in determining the starting point for penalties at Step 1 (when assessing the seriousness of the Infringements), the OFT considers that the processors that were parties to one or more of the Infringements faced more severe pressure at the time that justifies a decrease in their penalties at Step 4 of the penalty calculation.

7.86. Specifically, the OFT considers that processors were under greater commercial pressure than retailers at the time to support UK dairy farmers given that they derived most of their turnover from the relevant products and they faced both pressure from farmer groups (such as FFA) and commercial pressures from retailers to support UK dairy farmers and relieve the farmers’ pressure on the retailers. The OFT notes that farmer protests and blockades were initially targeted at processors, for example, an FFA press release of 12 July 2002 states that ‘we successfully blockaded … sites belonging to Dairy Crest and Wiseman. … These protests will start to escalate over the coming weeks until the said companies act in a responsible manner [by returning the money they stole from British dairy farmers].’ Also, Dairy Crest explained that ‘it was a major focus of

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1224 Ibid, at paragraphs 2.14 and 2.16.  
1225 Ibid, at paragraphs 2.14 and 2.16.  
1226 Ibid, at paragraph 2.16, footnote 19.  
1227 See at paragraphs 2.83 to 2.88 above.  
1228 In this regard, the OFT notes that when considering Umbro’s penalty in Replica Kit the CAT observed that its general view was that ‘to a considerable extent Umbro was placed under commercial pressure’ (Umbro Holdings Limited and Others v Office of Fair Trading [2005] CAT 22, at [343], see also at [162]).  
1229 See document 164 to the SO.
pressure from farmers (and retailers) to increase farmgate prices in order to meet
the crisis, and that it 'was specifically targeted by farmers at the beginning
of their actions because a number of factors meant they [farmers] saw Dairy
Crest as the key to realising their demands'. It was also submitted that the
limited ability for processors to build up stocks of processed milk or divert
raw milk supplies meant that a blockade could have had a potentially
significant impact on operations.

7.87. The OFT considers that the processors were vulnerable to pressure from
the retailers, because – in view of their large share of grocery sales to
consumers – they represented a significant part of the processors’
business. Dairy Crest also submitted that 'the power in the industry sits
with the retailers and not the processors' and that '[t]he pressure for
coordinated retail prices derived from the stance of all the major retail buyers that
(i) they were not prepared to accept any increase in their supply prices that could
not be passed through to customers; (ii) they were not prepared to increase their
retail prices unless such increases were matched by their major competitors; and
(iii) they insisted that the demands of farmers were addressed by the processors
in order to bring the disruption to their business and the political pressure for
action to an end'. Processors were also likely to face a significant
impact from farmer actions because the circumstances in the UK dairy
industry affected their entire business, compared with the retailers for
whom milk and cheese were only two of many product lines.

7.88. The OFT considers that in general, pressure is not a mitigating factor. However, given the exceptional circumstances that processors, in
particular, faced at the time, the OFT considers it appropriate to decrease
the penalty for each processor by [10-20] per cent for each Infringement.

Role of the undertaking – reactive role

7.89. Some processors submitted that their penalty should be reduced due to
the fact that they played only a reactive or subsidiary and minor role or
had limited involvement in the Infringement(s). The OFT considers that
this is not a mitigating factor in this case that justifies any decrease in the
penalty, particularly given the nature of the Infringements and the role

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1230 See document 34 to the SSO, at paragraph 3.1.4.
1231 Ibid, at paragraph 3.1.4.1.
1232 See paragraph 4.46 above.
1233 For example, in the Arla/Express report, the Competition Commission found that
national multiple retailers were able to exert a substantial degree of buying power in
relation to the supply of FLM (Arla Foods amba and Express Dairies plc: A report on the
proposed merger, Competition Commission, October 2003, at paragraph 2.81).
1234 See document 34 to the SSO, section 3.3.
1235 See document 34 to the SSO, at paragraph 3.3.6.2. See also for example, document
25 to the SSO in which [a senior manager at Dairy Crest] explained, in relation to the
2003 FLM Initiative, that 'retailers still looked to Dairy Crest to sort out the issues' and
that 'r[etailers effectively told us [Dairy Crest] to sort it out' (at paragraph 12).
1236 As is recognised by the fact that OFT423 OFT’s guidance as to the appropriate
amount of a penalty (Edition 12/04) describes this as 'severe duress or pressure'
[emphasis added] (at paragraph 2.16).
1237 The indirect disclosure and/or exchange of retail pricing intentions between retailers.
that processors played in those Infringements.\textsuperscript{1238} The OFT has, however, taken into account the additional pressure on processors, as set out at paragraphs 7.85 to 7.88 above.

\textit{Genuine uncertainty}

7.90. Some Parties submitted that they had genuine uncertainty as to whether their actions would constitute an infringement of the Chapter I prohibition or that the law on this area was unclear at the time. However, the OFT does not consider it is appropriate in this case for any decrease to be made in relation to arguments of genuine uncertainty. The OFT considers that the restriction of competition resulting from the Infringements in this case (indirectly co-ordinating retail price increases) was obvious, such that each Party must have been aware or, at least, ought to have known\textsuperscript{1239} that the Infringements entailed a restriction of competition. As such, the OFT considers that there could not have been any genuine uncertainty that the Parties' actions were capable of infringing the Chapter I prohibition.\textsuperscript{1240}

e. \textbf{Step 5 – adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy}

i. \textbf{Statutory cap}

7.91. The OFT may not fix a penalty that exceeds 10 per cent of the worldwide turnover of the undertaking\textsuperscript{1241} in its last business year before the date of the OFT's decision, calculated in accordance with the provisions in the 2000 Order, as amended by the 2004 Order.\textsuperscript{1242} This turnover is not restricted to a party's turnover in the relevant product market and relevant geographic market.\textsuperscript{1243}

7.92. In addition, where an infringement of the Chapter I prohibition ended prior to 1 May 2004, any penalty must, if necessary, be further adjusted to ensure that it does not exceed the maximum penalty applicable prior to 1 May 2004, that is 10 per cent of the turnover in the UK of the undertaking in the financial year preceding the date when the infringement ended (multiplied pro rata by the length of the infringement where the length of the infringement was in excess of one year, up to a maximum of three years).\textsuperscript{1244}

\textsuperscript{1238} Acting as the intermediaries for disclosing and/or exchanging retail pricing intentions between retailers.
\textsuperscript{1239} See paragraphs 7.17 to 7.23 above.
\textsuperscript{1240} See also 	extit{Argos Limited and Littlewoods Limited v Office of Fair Trading} [2005] CAT 13, at [218] and [220] to [225], in which the CAT found that infringements that were similar to the Infringements (see paragraph 7.44 above) 'were plainly contrary to the Chapter I prohibition in accordance with well known legal principles'.
\textsuperscript{1241} The statutory cap applies to the turnover of the undertaking, not separately to the turnover of each legal entity within the undertaking.
\textsuperscript{1242} Section 36(8) of the Act and the 2000 Order, as amended by the 2004 Order.
\textsuperscript{1243} See \textit{Penalty Guidance}, at paragraph 2.17.
\textsuperscript{1244} \textit{Ibid}, at paragraph 2.18.
7.93. The OFT has assessed each of the Parties’ penalties against both of the tests set out above (as applicable) and is satisfied that no reductions to penalties at Step 5 of the penalty calculations are necessary in this case.

ii. Double jeopardy

7.94. The OFT must also, when setting the amount of a penalty for a particular agreement or concerted practice, take into account any penalty or fine that has been imposed by the Commission or by a court or other body in another Member State in respect of the same agreement or concerted practice. As there is no such applicable penalty or fine in respect of the Infringements, no adjustments are necessary in this case.

D. APPLICATION OF THE OFT’S LENIENCY POLICY

7.95. Both Arla’s and Asda’s penalties have been reduced as a result of the OFT’s leniency policy. The details of these decreases are set out for each Party in section 7.G below.

E. EARLY RESOLUTION

7.96. While parties to investigations under the Act do not have a general right to ER (the use of ER being at the OFT’s discretion), the OFT considered that in the circumstances of the Investigation, it was appropriate to explore the Parties’ interests in ER and, ultimately, to proceed with ER in this case.

7.97. As explained in section 2.B above, each of Asda, Dairy Crest, Glanbia, McLelland, Safeway, Sainsbury’s and Wiseman concluded an ERA with the OFT. All of these Parties agreed to variations to their respective ERAs in April 2010 when the scope of the Investigation was changed.

7.98. The ERA for each of Asda, Dairy Crest, Glanbia, Safeway, Sainsbury’s and Wiseman anticipated a decrease in the penalty of up to 35 per cent if the relevant Party co-operated fully as set out in the agreements. In determining the appropriate decrease, the OFT took into account the value of the co-operation that the Parties could provide to the Investigation. As well as an admission and other procedural co-operation, ER Parties agreed to use their reasonable endeavours to secure further evidence. This was co-operation that the OFT considered would add value to the Investigation and which the OFT utilised.

7.99. In respect of McLelland, the decrease that its ERA anticipated was up to 30 per cent, because McLelland did not conclude an ERA with the OFT in

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1245 Section 38(9) of the Act and OFT423 ‘OFT’s guidance as to the appropriate amount of a penalty’ (Edition 12/04), at paragraph 2.20.
1246 Paragraph 6(iv) of the early resolution agreements.
1247 For example, limiting representations to identifying material factual inaccuracies.
1248 By, for example, securing the complete and truthful co-operation of current and former employees.
1249 By carrying out a number of witness interviews pursuant to early resolution agreements (see section 2.B above).
the original timetable stipulated. The OFT considers it important that the reduction for ER should both take account of the procedural co-operation that a party will provide and be set in such a way that it does not undermine incentives for parties to engage in ER or apply for leniency at the earliest opportunity in future cases.

7.100. In order both to ensure equal treatment and to ensure that parties are not disincentivised in future cases from engaging in ER when it is first offered by the OFT, the OFT decided that the full 35 per cent decrease should not be available to McLelland. As a result of this, the OFT decided that a decrease of up to 30 per cent for McLelland’s procedural co-operation was appropriate.1250

F. REDUCTION FOR THE LENGTH OF THE OFT’S INVESTIGATION

7.101. A number of parties submitted that the OFT should reduce the penalty for the length of the Investigation, relying on the OFT’s Tobacco decision in support of their submissions. The OFT considers that such a reduction is not appropriate in this Decision.

7.102. First, each case is specific to its own facts and circumstances, and it cannot be assumed that the level of penalty appropriate for a particular party in one case (or the manner in which the Penalty Guidance has been applied) will necessarily be the same in respect of another party in another case.1251

7.103. Secondly, the OFT considers that the exceptional circumstances in Tobacco are different from those in this Investigation. In Tobacco, it was not the length of the investigation as such which attracted the further penalty reduction, but rather that the OFT acknowledged that a key lesson it learnt from the Tobacco investigation was the need to ‘prioritise more effectively’, in that the decision to reduce the number of parties subject to the investigation was taken around three years into the investigation.1252 This had the effect, in particular, of creating a longer span of time between the start of the Tobacco investigation and the issue of the statement of objections than might otherwise have occurred had the OFT prioritised more effectively.

7.104. In this Investigation, as well as the fact that the SO was issued approximately a year earlier than in Tobacco, the OFT does not consider that it could have applied its prioritisation principles more effectively. In contrast to the Tobacco decision, there has been no significant reduction in the number of parties subject to the Investigation as a result of the application of the OFT’s prioritisation principles, still less one which the OFT considers was made later than should have been the case. While the OFT reduced the scope of the Investigation (in terms of the numbers of

1250 The OFT considered that the relevant circumstances had made it difficult rather than impossible for McLelland to meet the OFT’s original timetable. Therefore, the OFT did not consider it justified to grant it the full 35 per cent decrease that was available for the Parties that concluded early resolution within this timetable.

1251 See paragraph 7.10 above.

1252 OFT decision CA98/01/2010 Tobacco, at paragraphs 8.122 to 8.124.
infringements), that was as a result of a detailed consideration of the evidence which came to the OFT’s attention following the issue of the SSO rather than as the result of the OFT not prioritising as effectively as it could have. More generally, the OFT does not consider that any action by it has significantly added to the length of this Investigation such to justify a reduction in penalties.

G. INDIVIDUAL FINANCIAL PENALTIES

7.105. In this section the OFT sets out the various steps and calculations applicable in determining each Party’s financial penalty. The calculation applicable for each Party is also set out at Annexe A to this Decision.

I. Penalty for Arla

7.106. The OFT has found that Arla was a party to one Infringement, the 2003 FLM Initiative. However, as explained at section 2.B above, Arla applied to the OFT for leniency under the OFT’s leniency policy and was the first to do so in circumstances where there was no prior OFT investigation. As the relevant conditions as set out in the leniency agreement between Arla and the OFT have been met, Arla benefits from total immunity from financial penalties.

7.107. The OFT does not consider that it needs to determine Arla’s financial penalty since it will not, as a successful immunity applicant, be required to pay a financial penalty to the OFT under section 36 of the Act. Accordingly, the OFT has not calculated the financial penalty that would otherwise be imposed on Arla had it not benefitted from such immunity.

II. Penalty for Asda

7.108. The OFT has found that Asda was a party to three Infringements, the 2002 and 2003 Cheese Initiatives and the 2003 FLM Initiative. Therefore, in calculating Asda’s penalty, the OFT has determined three penalties and is imposing the aggregate sum of those penalties on Asda. Asda’s penalties and a summary of the calculations at each step of the penalty calculations are set out at Annexe A.

Step 1 – starting point

7.109. Asda concluded an ERA with the OFT. Therefore, the OFT used Asda’s ER turnover in determining its penalty as set out in its ERA. In light of the change in interpretation of last business year, the OFT reconsidered Asda’s penalties by reference to its Infringement Year turnover.

7.110. As Asda’s Infringement Year turnover for both the 2002 and 2003 Cheese Initiatives was less than its ER Year turnover, the OFT has used Asda’s Infringement Year turnover when determining its penalties in respect of the 2002 and 2003 Cheese Initiatives. For the 2003 FLM Initiative, Asda’s Infringement Year turnover was greater than its ER Year turnover. Accordingly, the ER Cap is applicable for Asda’s penalty in

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1253 See paragraphs 7.11 to 7.12 above.
respect of the 2003 FLM Initiative. The OFT has therefore used Asda’s ER Year turnover when determining its penalty in respect of the 2003 FLM Initiative.

7.111. For the 2002 Cheese Initiative, Asda’s Infringement Year turnover was £[C]. For the 2003 Cheese Initiative, Asda’s Infringement Year turnover was £[C]. For the 2003 FLM Initiative, Asda’s ER Year turnover was £[C]. Applying a starting point of 6 per cent for the 2002 and 2003 Cheese Initiatives and a starting point of 5 per cent for the 2003 FLM Initiative, Asda’s penalties after Step 1 are:

<table>
<thead>
<tr>
<th>The 2002 Cheese Initiative</th>
<th>The 2003 Cheese Initiative</th>
<th>The 2003 FLM Initiative</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>£[C]</td>
<td>£[C]</td>
<td>£[C]</td>
<td>£[C]</td>
</tr>
</tbody>
</table>

**Step 2 – duration**

7.112. As explained above,\(^{1254}\) the OFT has decided to make no adjustment for duration. Accordingly, Asda’s penalties after Step 2 remain as set out at paragraph 7.111 above.

**Step 3 – adjustment for other factors**

7.113. The OFT considered whether Asda’s penalties after Step 2 should be adjusted in order to achieve the objectives of the OFT’s policy on financial penalties or to ensure that its penalties are not disproportionate or excessive. Asda’s penalties after Step 2 represent the following proportions of its total turnover and operating profit:

- **The 2002 Cheese Initiative**: [C] per cent of its total turnover in 2007 and [C] per cent of its total turnover in its most recent business year; and [C] per cent of its operating profit in 2007 and [C] per cent of its operating profit in its most recent business year.

- **The 2003 Cheese Initiative**: [C] per cent of its total turnover in 2007 and [C] per cent of its total turnover in its most recent business year; and [C] per cent of its operating profit in 2007 and [C] per cent of its operating profit in its most recent business year.

- **The 2003 FLM Initiative**: [C] per cent of its total turnover in 2007 and [C] per cent of its total turnover in its most recent business year; and [C] per cent of its operating profit in 2007 and [C] per cent of its operating profit in its most recent business year.

7.114. While Asda’s penalties after Step 2 are a relatively low proportion of its total turnover and operating profit, this is a consequence of the fact that Asda achieves a significant proportion of its turnover from a wide range of sales outside of the relevant product market(s). The OFT considers that Asda’s absolute penalties after Step 2 are sufficient to achieve deterrence in this case. The OFT has therefore decided to make no adjustment to

\(^{1254}\) See paragraph 7.59 above.
Asda’s penalties at Step 3. Accordingly, Asda’s penalties after Step 3 remain as set out at paragraph 7.111 above.

7.115. As explained above, the OFT does not consider it necessary to adjust any Party’s penalty on the basis of typical margin and has therefore not adjusted Asda’s penalties on this basis.

**Step 4 – aggravating and mitigating factors**

*Aggravating factors*

7.116. As explained above, the OFT has decided to make no adjustments for aggravating factors. The OFT therefore made no increases to Asda’s penalties for any aggravating factors.

*Mitigating factors*

7.117. The OFT is satisfied that Asda has demonstrated that it has taken adequate steps to ensure compliance. Accordingly, the OFT has decreased Asda’s penalties by [5-10] per cent at Step 4 for each Infringement.

7.118. The OFT considers that Asda provided additional co-operation early in the Investigation. In particular, when it became aware of the Investigation, Asda provided information on the background to the initiatives that the OFT was investigating, which assisted the OFT with its understanding and progression of the Investigation. Accordingly, the OFT has decided to decrease Asda’s penalties by [5-10] per cent at Step 4 for each Infringement.

**Conclusion**

7.119. Asda’s penalties are decreased by [10-20] per cent at Step 4 for each Infringement. Accordingly, Asda’s penalties after Step 4 are:

<table>
<thead>
<tr>
<th>The 2002 Cheese Initiative</th>
<th>The 2003 Cheese Initiative</th>
<th>The 2003 FLM Initiative</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>£[C]</td>
<td>£[C]</td>
<td>£[C]</td>
<td>£[C]</td>
</tr>
</tbody>
</table>

**Step 5 – adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy**

7.120. No adjustments to Asda’s penalties are necessary as each of its penalties after Step 4 is below the maximum penalty that the OFT may impose.

**Leniency**

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1255 See paragraph 7.67 above.
1256 See paragraph 7.80 above.
1257 This co-operation is not covered by the reduction under Asda’s early resolution agreement, since it was provided at an early stage of the Investigation, before this agreement was concluded.
7.121. Asda is granted a 10 per cent decrease in its penalties on the basis that it has been granted total immunity from financial penalties in respect of a completely separate suspected infringement of the Chapter I prohibition in relation to its activities in other, separate markets.\textsuperscript{1258} Asda penalties after reductions for leniency are:

<table>
<thead>
<tr>
<th>The 2002 Cheese Initiative</th>
<th>The 2003 Cheese Initiative</th>
<th>The 2003 FLM Initiative</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>£(C)</td>
<td>£(C)</td>
<td>£(C)</td>
<td>£(C)</td>
</tr>
</tbody>
</table>

### Early resolution

7.122. The OFT is satisfied that Asda has fully complied with the terms of its early resolution agreement and has therefore decreased its penalties by 35 per cent after Step 5. Accordingly, the final penalties that the OFT is imposing on Asda are:

<table>
<thead>
<tr>
<th>The 2002 Cheese Initiative</th>
<th>The 2003 Cheese Initiative</th>
<th>The 2003 FLM Initiative</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>£(C)</td>
<td>£(C)</td>
<td>£(C)</td>
<td>£(C)</td>
</tr>
</tbody>
</table>

### III. Penalty for Dairy Crest

7.123. The OFT has found that Dairy Crest was a party to two Infringements, the 2002 Cheese Initiative and the 2003 FLM Initiative. Therefore, in calculating Dairy Crest’s penalty, the OFT has determined two penalties and is imposing the aggregate sum of those penalties on Dairy Crest.\textsuperscript{1259} Dairy Crest’s penalties and a summary of the calculations at each step of the penalty calculations are set out in Annexe A.

#### Step 1 – starting point

7.124. Dairy Crest concluded an early resolution agreement with the OFT. Therefore, the OFT used Dairy Crest’s ER Year turnover in determining its penalty as set out in its ERA. In light of the change in interpretation of last business year, the OFT reconsidered Dairy Crest’s penalties by reference to its Infringement Year turnover.

7.125. Dairy Crest’s Infringement Year turnover for both the 2002 Cheese Initiative and the 2003 FLM Initiative was greater than its ER Year turnover. Accordingly, the ER Cap is applicable for Dairy Crest’s penalties. The OFT has therefore used Dairy Crest’s ER Year turnover when determining its penalty in respect of both the 2002 Cheese Initiative and the 2003 FLM Initiative.

\textsuperscript{1258} See Penalty Guidance, at paragraphs 3.16 and 3.17. See also OFT803 \textit{Leniency and no-action} (November 2006), at paragraphs 6.8 to 6.10, which was applicable at the time Asda was granted total immunity in relation to its activities in a separate market. OFT803 \textit{Leniency and no-action} was subsequently updated in December 2008.

\textsuperscript{1259} See paragraphs 7.11 to 7.12 above.
7.126. For the 2002 Cheese Initiative, Dairy Crest’s ER Year turnover was £[^C]. For the 2003 FLM Initiative, Dairy Crest’s ER Year turnover was £[^C]. Applying a starting point of 6 per cent for the 2002 Cheese Initiative and a starting point of 5 per cent for the 2003 FLM Initiative, Dairy Crest’s penalties after Step 1 are:

<table>
<thead>
<tr>
<th>The 2002 Cheese Initiative</th>
<th>The 2003 FLM Initiative</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>£[^C]</td>
<td>£[^C]</td>
<td>£[^C]</td>
</tr>
</tbody>
</table>

Step 2 – duration

7.127. As explained above, the OFT has decided to make no adjustment for duration. Accordingly, Dairy Crest’s penalties after Step 2 remain as set out at paragraph 7.126 above.

Step 3 – adjustment for other factors

7.128. The OFT considered whether Dairy Crest’s penalties after Step 2 should be adjusted in order to achieve the objectives of the OFT’s policy on financial penalties or to ensure that its penalties are not disproportionate or excessive. Dairy Crest's penalties after Step 2 represent the following proportions of its total turnover and operating profit:

- **The 2002 Cheese Initiative**: [C] per cent of its total turnover in 2007 and [C] per cent of its total turnover in its most recent business year; and [C] per cent of its operating profit in 2007 and [C] per cent of its operating profit in its most recent business year.

- **The 2003 FLM Initiative**: [C] per cent of its total turnover in 2007 and [C] per cent of its total turnover in its most recent business year; and [C] per cent of its operating profit in 2007 and [C] per cent of its operating profit in its most recent business year.

7.129. The OFT considers that these proportions of total turnover and operating profit are sufficient to achieve deterrence in this case. While Dairy Crest’s penalties as a proportion of total turnover and operating profit are greater than retailers’ penalties, the OFT considers that they are not significantly greater such to suggest that Dairy Crest’s penalties are disproportionate. The OFT has therefore decided to make no adjustment to Dairy Crest’s penalties at Step 3. Accordingly, Dairy Crest’s penalties after Step 3 remain as set out at paragraph 7.126 above.

7.130. As explained above, the OFT does not consider it necessary to adjust any Party’s penalty on the basis of typical margin and has therefore not adjusted Dairy Crest's penalties on this basis.

Step 4 – aggravating and mitigating factors

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1260 See paragraph 7.59 above.
1261 See paragraph 7.67 above.
Aggravating factors

7.131. As explained above,\textsuperscript{1262} the OFT has decided to make no adjustments for aggravating factors. The OFT therefore made no increases to Dairy Crest’s penalties for any aggravating factors.

Mitigating factors

7.132. The OFT is satisfied that Dairy Crest has demonstrated that it has taken adequate steps to ensure compliance. Accordingly, the OFT has decreased Dairy Crest’s penalties by [5-10] per cent at Step 4 for each Infringement.

7.133. As explained above,\textsuperscript{1263} the OFT considers that processors faced greater commercial pressure at the time. The OFT has therefore decided to decrease Dairy Crest’s penalties by [10-20] per cent at Step 4 for each Infringement.

7.134. In addition, Dairy Crest submitted that it ‘faced extraordinary pressures and found itself at the heart of the farmers’ action’ at the time of the Infringements.\textsuperscript{1264} In particular, Dairy Crest was ‘the only major processor active across all the major dairy sectors, representing a "one stop shop" for supplies of fresh liquid milk, cheese and butter\textsuperscript{1265} and that '[r]eflecting its central position in the UK dairy industry, Dairy Crest had a well publicised and long standing commitment to support its suppliers by maintaining its farmgate prices'.\textsuperscript{1266}

7.135. Dairy Crest also submitted that ‘[a]s one of the largest single purchasers of raw milk at this time, Dairy Crest was not only particularly vulnerable to such a threat [of ‘collective action by farmers’], but also recognised a responsibility towards its supply base to take such steps as were available to it to ensure that efficient farmers were able to survive’.\textsuperscript{1267} The OFT accepts Dairy Crest’s submissions and considers that, in these exceptional circumstances, it is appropriate to decrease Dairy Crest’s penalties further given that it was likely to have faced greater commercial pressure to support UK dairy farmers than other processors or retailers. At the time, Dairy Crest was the only processor in the Investigation to supply all of the relevant

\textsuperscript{1262} See paragraph 7.80 above.
\textsuperscript{1263} See paragraphs 7.85 to 7.88 above.
\textsuperscript{1264} See, for example, document 34 to the SSO, at section 3.1. See also document 25 to the SSO, at paragraph 11, where [a senior manager at Dairy Crest] explained that: ‘Dairy Crest were regarded as the fulcrum of the disputes by farmers and retailers and in that respect Dairy Crest differed from Wiseman and Arla... It was widely thought by farmers that if you cracked Dairy Crest you could crack the market place. Dairy Crest was held accountable by everyone because they were the focus of the dispute and therefore all the pressure was on Dairy Crest at this time’.
\textsuperscript{1265} See document 34 to the SSO, at paragraph 3.1.3.2. See also document 25 to the SSO, at paragraph 11.
\textsuperscript{1266} See document 34 to the SSO, at paragraph 3.1.3.3.
\textsuperscript{1267} See document 34 to the SSO, at paragraph 3.2.5.3.
products and it was likely to have been under additional commercial pressure.

7.136. This is supported by witness evidence from Dairy Crest employees. For example, [a senior manager at Dairy Crest] stated that "... probably because Dairy Crest were involved in cheese, butter, liquid milk and doorstep sales ... Dairy Crest were perceived as a "one stop shop" by [an official at FFA]. Dairy Crest were uniquely put into the situation where we were at the fulcrum of the industry dispute. We were the centre of all the FFA pressure because the FFA seemed to think that if they cracked Dairy Crest, they would crack everyone." Retailer employees also referred to the pressure Dairy Crest was under. For example, [a senior manager at Asda] stated that '[an official at FFA] would target Dairy Crest because they were the biggest and he particularly didn’t like them'.

7.137. Accordingly, the OFT has decided to decrease Dairy Crest’s penalties by a further 5-10 per cent at Step 4, for each Infringement, to reflect the particular pressure to which it was additionally exposed.

Conclusion

7.138. Dairy Crest’s penalties are decreased by 20-40 per cent at Step 4 for each Infringement. Accordingly, Dairy Crest’s penalties after Step 4 are:

<table>
<thead>
<tr>
<th>The 2002 Cheese Initiative</th>
<th>The 2003 FLM Initiative</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>£[C]</td>
<td>£[C]</td>
<td>£[C]</td>
</tr>
</tbody>
</table>

Step 5 – adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy

7.139. No adjustments to Dairy Crest’s penalties are necessary as each of its penalties after Step 4 is below the maximum penalty that the OFT may impose.

Early resolution

7.140. The OFT is satisfied that Dairy Crest has fully complied with the terms of its early resolution agreement and has therefore decreased its penalties by 35 per cent after Step 5. Accordingly, the final penalties that the OFT is imposing on Dairy Crest are:

<table>
<thead>
<tr>
<th>The 2002 Cheese Initiative</th>
<th>The 2003 FLM Initiative</th>
<th>Total</th>
</tr>
</thead>
</table>

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1268 Dairy Crest supplied fresh liquid milk, Cheddar and UK territorial cheeses and butter (the OFT subsequently closed the Investigation in respect of butter, see paragraphs 2.98 to 2.104 above) while none of Arla, Glanbia, McLelland and Wiseman supplied the full range of relevant products. See document 34 to the SSO, at paragraph 3.1.3.2
1269 See document 24 to the SSO, at paragraphs 10 to 11. Similarly, see document 28 to the SSO, at paragraph 16.
1270 See document 15 to the SSO, at page 6. See also document 60 to the SSO, at page 9.
IV. Penalty for Glanbia

7.141. The OFT has found that Glanbia was a party to one Infringement, the 2002 Cheese Initiative. Therefore, in calculating Glanbia’s penalty, the OFT has determined only one penalty.\(^{1271}\) Glanbia’s penalty and a summary of the calculations at each step of the penalty calculations are set out at Annexe A.

Step 1 – starting point

7.142. Glanbia concluded an early resolution agreement with the OFT. Therefore, the OFT used Glanbia’s ER Year turnover in determining its penalty as set out in its ERA. In light of the change in interpretation of last business year, the OFT reconsidered Glanbia’s penalty by reference to its Infringement Year turnover.

7.143. Glanbia’s Infringement Year turnover for the 2002 Cheese Initiative was greater than its ER Year turnover. Accordingly, the ER Cap is applicable for Glanbia’s penalty. The OFT has therefore used Glanbia’s ER Year turnover when determining its penalty in respect of the 2002 Cheese Initiative.

7.144. For the 2002 Cheese Initiative, Glanbia’s ER Year turnover was £[C]. Applying a starting point of 6 per cent for the 2002 Cheese Initiative, Glanbia’s penalty after Step 1 is £[C].

Step 2 – duration

7.145. As explained above,\(^{1272}\) the OFT has decided to make no adjustment for duration. Accordingly, Glanbia’s penalty after Step 2 remains as set out at paragraph 7.144 above.

Step 3 – adjustment for other factors

7.146. The OFT considered whether Glanbia’s penalty after Step 2 should be adjusted in order to achieve the objectives of the OFT’s policy on financial penalties or to ensure that its penalty is not disproportionate or excessive. Glanbia’s penalty after Step 2 represents: [C] per cent of its total turnover in 2007 and [C] per cent of its total turnover in its most recent business year; and [C] per cent of its operating profit in 2007 and [C] per cent of its operating profit in its most recent business year.

7.147. The OFT considers that these proportions of total turnover and operating profit are sufficient to achieve deterrence in this case. In contrast, Glanbia’s penalty as a proportion of total turnover and operating profit is significant as compared to retailers’ penalties. Given this, the OFT

\(^{1271}\) See paragraphs 7.11 to 7.12 above.

\(^{1272}\) See paragraph 7.59 above.
considered it appropriate to reduce Glanbia’s penalty by \$C\ per cent at Step 3 in order to ensure that it is proportionate. Accordingly, Glanbia’s penalty after Step 3 is \$C\.

7.148. As explained above,\textsuperscript{1273} the OFT does not consider it necessary to adjust any Party’s penalty on the basis of typical margin and has therefore not adjusted Glanbia’s penalty on this basis.

**Step 4 – aggravating and mitigating factors**

*Aggravating factors*

7.149. As explained above,\textsuperscript{1274} the OFT has decided to make no adjustments for aggravating factors. The OFT therefore made no increases to Glanbia’s penalty for any aggravating factors.

*Mitigating factors*

7.150. The OFT is satisfied that Glanbia has demonstrated that it has taken adequate steps to ensure compliance. Accordingly, the OFT has decreased Glanbia’s penalty by \([5-10]\) per cent at Step 4.

7.151. As explained above,\textsuperscript{1275} the OFT considers that processors faced greater commercial pressure at the time. The OFT has therefore decided to decrease Glanbia’s penalty by \([10-20]\) per cent at Step 4.

**Conclusion**

7.152. Glanbia’s penalty is decreased by \([15-30]\) per cent at Step 4. Accordingly, Glanbia’s penalty after step 4 is \$C\.

**Step 5 – adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy**

7.153. No adjustment to Glanbia’s penalty is necessary as its penalty after Step 4 is below the maximum penalty that the OFT may impose.

**Early resolution**

7.154. The OFT is satisfied that Glanbia has fully complied with the terms of its early resolution agreement and has therefore decreased its penalty by 35 per cent after Step 5. Accordingly, Glanbia’s penalty after Step 5 is \$C\.

**V. Penalty for McLelland**

7.155. The OFT has found that McLelland was a party to two Infringements, the 2002 and 2003 Cheese Initiatives. Therefore, in calculating McLelland’s penalty, the OFT has determined two penalties and is imposing the aggregate sum of those penalties on McLelland.\textsuperscript{1276} McLelland’s penalties

\textsuperscript{1273} See paragraph 7.67 above.
\textsuperscript{1274} See paragraph 7.80 above.
\textsuperscript{1275} See paragraph 7.85 to 7.88 above.
\textsuperscript{1276} See paragraphs 7.11 to 7.12 above.
and a summary of the calculations at each step of the penalty calculations are set out at Annexe A.

Step 1 – starting point

7.156. McLelland concluded an early resolution agreement with the OFT. Therefore, the OFT used McLelland’s ER Year turnover in determining its penalty as set out in its ERA. In light of the change in interpretation of last business year, the OFT reconsidered McLelland’s penalties by reference to its Infringement Year turnover.

7.157. As McLelland’s Infringement Year turnover for both the 2002 and 2003 Cheese Initiatives was less than its ER Year turnover, the OFT has used McLelland’s Infringement Year turnover when determining its penalties in respect of the 2002 and 2003 Cheese Initiatives.

7.158. For the 2002 Cheese Initiative, McLelland’s relevant turnover in the last business year preceding its early resolution agreement was £[C]. For the 2003 Cheese Initiative, McLelland’s relevant turnover in the last business year preceding its early resolution agreement was £[C]. Applying a starting point of 6 per cent for the 2002 and 2003 Cheese Initiatives, McLelland’s penalties after Step 1 are:

<table>
<thead>
<tr>
<th>The 2002 Cheese Initiative</th>
<th>The 2003 Cheese Initiative</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>£[C]</td>
<td>£[C]</td>
<td>£[C]</td>
</tr>
</tbody>
</table>

Step 2 – duration

7.159. As explained above, the OFT has decided to make no adjustment for duration. Accordingly, McLelland’s penalties after Step 2 remain as set out at paragraph 7.157 above.

Step 3 – adjustment for other factors

7.160. The OFT considered whether McLelland’s penalties after Step 2 should be adjusted in order to achieve the objectives of the OFT’s policy on financial penalties or to ensure that its penalties are not disproportionate or excessive. McLelland’s penalties after Step 2 represent the following proportions of its total turnover and operating profit:

- **The 2002 Cheese Initiative**: [C] per cent of its total turnover in 2007 and [C] per cent of its total turnover in its most recent business year; and [C] per cent of its operating profit in 2007 and [C] per cent of its operating profit in its most recent business year.

- **The 2003 Cheese Initiative**: [C] per cent of its total turnover in 2007 and [C] per cent of its total turnover in its most recent business year; and [C] per cent of its operating profit in 2007 and [C] per cent of its operating profit in its most recent business year.

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1277 See paragraph 7.59 above.
7.161. The OFT considers that these proportions of total turnover and operating profit are sufficient to achieve deterrence in this case. In contrast, McLelland’s penalties as a proportion of total turnover and operating profit are significant as compared to retailers’ penalties. Given this, the OFT considered it appropriate to reduce McLelland’s penalties by [C] per cent at Step 3 in order to ensure that they are proportionate. While McLelland’s penalties reduce as a result of using its Infringement Year turnover, its penalties remain significant as a proportion of its total turnover and operating profit as compared to retailers’ penalties. The OFT therefore considers it remains appropriate to reduce McLelland’s penalties by [C] per cent at Step 3. Accordingly, McLelland’s penalties after Step 3 are:

<table>
<thead>
<tr>
<th>The 2002 Cheese Initiative</th>
<th>The 2003 Cheese Initiative</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>£[C]</td>
<td>£[C]</td>
<td>£[C]</td>
</tr>
</tbody>
</table>

7.162. As explained above,\(^{1278}\) the OFT does not consider it necessary to adjust any Party’s penalty on the basis of typical margin and has therefore not adjusted McLelland’s penalties on this basis.

**Step 4 – aggravating and mitigating factors**

*Aggravating factors*

7.163. As explained above,\(^{1279}\) the OFT has decided to make no adjustments for aggravating factors. The OFT therefore made no increases to McLelland’s penalties for any aggravating factors.

*Mitigating factors*

7.164. The OFT is satisfied that McLelland has demonstrated that it has taken adequate steps to ensure compliance. Accordingly, the OFT has decreased McLelland’s penalties by [5-10] per cent at Step 4 for each Infringement.

7.165. As explained above,\(^{1280}\) the OFT considers that processors faced greater commercial pressure at the time. The OFT has therefore decided to decrease McLelland’s penalties by [10-20] per cent at Step 4 for each Infringement.

7.166. The OFT also considers it appropriate to decrease McLelland’s penalties given that it sourced most of its raw milk from only one supplier (First Milk) at the time, when Scottish farmers, supported by the NFUS, were particularly active in their attempts to increase the farmgate price for raw milk. McLelland’s product portfolio, with its almost exclusive reliance on raw milk from Scottish dairy farmers coupled with its inability to source

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\(^{1278}\) See paragraph 7.67 above.

\(^{1279}\) See paragraph 7.80 above.

\(^{1280}\) See paragraphs 7.85 to 7.88 above.
raw milk from other locations,\textsuperscript{1281} meant that it faced particularly intense pressure to support dairy farmers. Accordingly, the OFT has decided to decrease McLelland’s penalties by [5-10] per cent at Step 4 for each Infringement.

**Conclusion**

7.167. McLelland’s penalties are decreased by [20-40] per cent at Step 4 for each Infringement. Accordingly, McLelland’s penalties after Step 4 are:

<table>
<thead>
<tr>
<th>The 2002 Cheese Initiative</th>
<th>The 2003 Cheese Initiative</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>£[C]</td>
<td>£[C]</td>
<td>£[C]</td>
</tr>
</tbody>
</table>

**Step 5 – adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy**

7.168. No adjustments to McLelland’s penalties are necessary as each of its penalties after Step 4 is below the maximum penalty that the OFT may impose.

**Early resolution**

7.169. The OFT is satisfied that McLelland has fully complied with the terms of its early resolution agreement and has therefore decreased its penalties by 30 per cent after Step 5. Accordingly, the final penalties that the OFT is imposing on McLelland are:

<table>
<thead>
<tr>
<th>The 2002 Cheese Initiative</th>
<th>The 2003 Cheese Initiative</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>£[C]</td>
<td>£[C]</td>
<td>£[C]</td>
</tr>
</tbody>
</table>

**VI. Penalty for Safeway**

7.170. The OFT has found that Safeway was a party to two Infringements, the 2002 Cheese Initiative and the 2003 FLM Initiative. Therefore, in calculating Safeway’s penalty, the OFT has determined two penalties and is imposing the aggregate sum of those penalties on Safeway.\textsuperscript{1282} Safeway’s penalties and a summary of the calculations at each step of the penalty calculations are set out at Annexe A.

**Step 1 – starting point**

7.171. Safeway concluded an early resolution agreement with the OFT. Therefore, the OFT used Safeway’s ER Year turnover in determining its

\textsuperscript{1281} In particular, McLelland needed to purchase Scottish raw milk and produce its products in Scotland given that many of its products were perceived to be Scottish brands.

\textsuperscript{1282} See paragraph 7.11 to 7.12 above.
penalty as set out in its ERA. In light of the change in interpretation of last business year, the OFT reconsidered Safeway’s penalties by reference to its Infringement Year turnover.

7.172. Safeway’s Infringement Year turnover for both the 2002 Cheese Initiative and the 2003 FLM Initiative was greater than its ER Year turnover. Accordingly, the ER Cap is applicable for Safeway’s penalties. The OFT has therefore used Safeway’s ER Year turnover when determining its penalties in respect of both the 2002 Cheese Initiative and the 2003 FLM Initiative.

7.173. For the 2002 Cheese Initiative, Safeway’s relevant turnover in the last business year preceding its early resolution agreement was £[C]. For the 2003 FLM Initiative, Safeway’s relevant turnover in the last business year preceding its early resolution agreement was £[C]. Applying a starting point of 6 per cent for the 2002 Cheese Initiative and a starting point of 5 per cent for the 2003 FLM Initiative, Safeway’s penalties after Step 1 are:

<table>
<thead>
<tr>
<th>The 2002 Cheese Initiative</th>
<th>The 2003 FLM Initiative</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>£[C]</td>
<td>£[C]</td>
<td>£[C]</td>
</tr>
</tbody>
</table>

Step 2 – duration

7.174. As explained above, the OFT has decided to make no adjustment for duration. Accordingly, Safeway’s penalties after Step 2 remain as set out at paragraph 7.173 above.

Step 3 – adjustment for other factors

7.175. The OFT considered whether Safeway’s penalties after Step 2 should be adjusted in order to achieve the objectives of the OFT’s policy on financial penalties or to ensure that its penalties are not disproportionate or excessive. Safeway’s penalties after Step 2 represent the following proportions of its total turnover and operating profit:

- **The 2002 Cheese Initiative**: [C] per cent of its total turnover in 2007 and [C] per cent of its total turnover in its most recent business year; and [C] per cent of its operating profit in 2007 and [C] per cent of its operating profit in its most recent business year.

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1283 At the time of the Infringements, Safeway was a separate entity (with Morrisons acquiring Safeway in March 2004. Subsequent to its acquisition, Morrisons divested a number of Safeway stores. Safeway’s relevant turnover in 2007 was determined by reference to those Safeway stores that Morrisons had retained.

1284 See paragraph 7.59 above.

1285 As Safeway does not exist as a separate legal entity, the OFT has compared Safeway’s penalties with Morrisons’ financial information – although the OFT has not attributed liability to Morrisons (see section 2.A above), the OFT considers it appropriate to compare against Morrisons financial information.
• **The 2003 FLM Initiative:** [C] per cent of its total turnover in 2007 and [C] per cent of its total turnover in its most recent business year; and [C] per cent of its operating profit in 2007 and [C] per cent of its operating profit in its most recent business year.

7.176. While Safeway’s penalties after Step 2 are a relatively low proportion of its total turnover and operating profit, this is a consequence of the fact that Safeway achieves a significant proportion of its turnover from a wide range of sales outside of the relevant product market(s). The OFT considers that Safeway’s absolute penalties after Step 2 are sufficient to achieve deterrence in this case. The OFT has decided to make no adjustment to Safeway’s penalties at Step 3. Accordingly, Safeway’s penalties after Step 3 remain as set out at paragraph 7.173 above.

7.177. As explained above,\(^{1286}\) the OFT does not consider it necessary to adjust any Party’s penalty on the basis of typical margin and has therefore not adjusted Safeway’s penalties on this basis.

**Step 4 – aggravating and mitigating factors**

*Aggravating factors*

7.178. As explained above,\(^{1287}\) the OFT has decided to make no adjustments for aggravating factors. The OFT therefore made no increases to Safeway’s penalties for any aggravating factors.

*Mitigating factors*

7.179. The OFT is satisfied that Safeway has demonstrated that it has taken adequate steps to ensure compliance. Accordingly, the OFT has decreased Safeway’s penalties by [5-10] per cent at Step 4 for each Infringement.

**Conclusion**

7.180. Safeway’s penalties are decreased by [5-10] per cent at Step 4 for each Infringement. Accordingly, Safeway’s penalties after Step 4 are:

<table>
<thead>
<tr>
<th>The 2002 Cheese Initiative</th>
<th>The 2003 FLM Initiative</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>£[C]</td>
<td>£[C]</td>
<td>£[C]</td>
</tr>
</tbody>
</table>

**Step 5 – adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy**

7.181. No adjustments to Safeway’s penalties are necessary as each of its penalties after Step 4 is below the maximum penalty that the OFT may impose.

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\(^{1286}\) See paragraph 7.67 above.

\(^{1287}\) See paragraph 7.80 above.
Early resolution

7.182. The OFT is satisfied that Safeway has fully complied with the terms of its early resolution agreement and has therefore decreased its penalties by 35 per cent after Step 5. Accordingly, the final penalties that the OFT is imposing on Safeway are:

<table>
<thead>
<tr>
<th>The 2002 Cheese Initiative</th>
<th>The 2003 FLM Initiative</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>£[C]</td>
<td>£[C]</td>
<td>£[C]</td>
</tr>
</tbody>
</table>

VII. Penalty for Sainsbury’s

7.183. The OFT has found that Sainsbury’s was a party to three Infringements, the 2002 and 2003 Cheese Initiatives and the 2003 FLM Initiative. Therefore, in calculating Sainsbury’s penalty, the OFT has determined three penalties and is imposing the aggregate sum of those penalties on Sainsbury’s.\(^{1288}\) Sainsbury’s penalties and a summary of the calculations at each step of the penalty calculations are set out at Annexe A.

Step 1 – starting point

7.184. Sainsbury’s concluded an early resolution agreement with the OFT. Therefore, the OFT used Sainsbury’s ER Year turnover in determining its penalty as set out in its ERA. In light of the change in interpretation of last business year, the OFT reconsidered Sainsbury’s penalties by reference to its Infringement Year turnover.

7.185. As Sainsbury’s Infringement Year turnover for the 2002 and 2003 Cheese Initiatives and the 2003 FLM Initiative was less than its ER Year turnover, the OFT has used Sainsbury’s Infringement Year turnover when determining its penalties in respect of the 2002 and 2003 Cheese and 2003 FLM Initiatives.

7.186. For the 2002 Cheese Initiative, Sainsbury’s Infringement Year turnover was £[C]. For the 2003 Cheese Initiative, Sainsbury’s Infringement Year turnover was £[C]. For the 2003 FLM Initiative, Sainsbury’s Infringement Year turnover was £[C]. Applying a starting point of 6 per cent for the 2002 and 2003 Cheese Initiatives and a starting point of 5 per cent for the 2003 FLM Initiative, Sainsbury’s penalties after Step 1 are:

<table>
<thead>
<tr>
<th>The 2002 Cheese Initiative</th>
<th>The 2003 Cheese Initiative</th>
<th>The 2003 FLM Initiative</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>£[C]</td>
<td>£[C]</td>
<td>£[C]</td>
<td>£[C]</td>
</tr>
</tbody>
</table>

Step 2 – duration

\(^{1288}\) See paragraphs 7.11 to 7.12 above.
7.187. As explained above, the OFT has decided to make no adjustment for duration. Accordingly, Sainsbury’s penalties after Step 2 remain as set out at paragraph 7.185 above.

**Step 3 – adjustment for other factors**

7.188. The OFT considered whether Sainsbury’s penalties after Step 2 should be adjusted in order to achieve the objectives of the OFT’s policy on financial penalties or to ensure that its penalties are not disproportionate or excessive. Sainsbury’s penalties after Step 2 represent the following proportions of its total turnover and operating profit:

- **The 2002 Cheese Initiative:** [C] per cent of its total turnover in 2007 and [C] per cent of its total turnover in its most recent business year; and [C] per cent of its operating profit in 2007 and [C] per cent of its operating profit in its most recent business year.

- **The 2003 Cheese Initiative:** [C] per cent of its total turnover in 2007 and [C] per cent of its total turnover in its most recent business year; and [C] per cent of its operating profit in 2007 and [C] per cent of its operating profit in its most recent business year.

- **The 2003 FLM Initiative:** [C] per cent of its total turnover in 2007 and [C] per cent of its total turnover in its most recent business year; and [C] per cent of its operating profit in 2007 and [C] per cent of its operating profit in its most recent business year.

7.189. While Sainsbury’s penalties after Step 2 are a relatively low proportion of its total turnover and operating profit, this is a consequence of the fact that Sainsbury’s achieves a significant proportion of its turnover from a wide range of sales outside of the relevant product market(s). The OFT considers that Sainsbury’s absolute penalties after Step 2 are sufficient to achieve deterrence in this case. The OFT has therefore decided to make no adjustment to Sainsbury’s penalties at Step 3. Accordingly, Sainsbury’s penalties after Step 3 remain as set out at paragraph 7.185 above.

7.190. As explained above, the OFT does not consider it necessary to adjust any Party’s penalty on the basis of typical margin and has therefore not adjusted Sainsbury’s penalties on this basis.

**Step 4 – aggravating and mitigating factors**

*Aggravating factors*

7.191. As explained above, the OFT has decided to make no adjustments for aggravating factors. The OFT therefore made no increases to Sainsbury’s penalties for any aggravating factors.

*Mitigating factors*

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1289 See paragraph 7.59 above.
1290 See paragraph 7.67 above.
1291 See paragraph 7.80 above.
7.192. The OFT is satisfied that Sainsbury’s has demonstrated that it has taken adequate steps to ensure compliance. Accordingly, the OFT has decreased Sainsbury’s penalties by [5-10] per cent at Step 4 for each Infringement.

7.193. The OFT considers that Sainsbury’s provided additional co-operation early in the Investigation. In particular, when it became aware of the Investigation, Sainsbury’s provided information on the background to the initiatives that the OFT was investigating, which assisted the OFT with its understanding and progression of the Investigation.\textsuperscript{1292} Accordingly, the OFT has decided to decrease Sainsbury’s penalties by [5-10] per cent at Step 4 for each Infringement.

\textit{Conclusion}

7.194. Sainsbury’s penalties are decreased by [10-20] per cent at Step 4 for each Infringement. Accordingly, Sainsbury’s penalties after Step 4 are:

<table>
<thead>
<tr>
<th>The 2002 Cheese Initiative</th>
<th>The 2003 Cheese Initiative</th>
<th>The 2003 FLM Initiative</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>£[C]</td>
<td>£[C]</td>
<td>£[C]</td>
<td>£1[C]</td>
</tr>
</tbody>
</table>

\textbf{Step 5 – adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy}

7.195. No adjustments to Sainsbury’s penalties are necessary as each of its penalties after Step 4 is below the maximum penalty that the OFT may impose.

\textbf{Early resolution}

7.196. The OFT is satisfied that Sainsbury’s has fully complied with the terms of its early resolution agreement and has therefore decreased its penalties by 35 per cent after Step 5. Accordingly, the final penalties that the OFT is imposing on Sainsbury’s are:

<table>
<thead>
<tr>
<th>The 2002 Cheese Initiative</th>
<th>The 2003 Cheese Initiative</th>
<th>The 2003 FLM Initiative</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>£[C]</td>
<td>£[C]</td>
<td>£[C]</td>
<td>£[C]</td>
</tr>
</tbody>
</table>

\textbf{VIII. Penalty for Tesco}

7.197. The OFT has found that Tesco was a party to two Infringements, the 2002 and 2003 Cheese Initiatives. Therefore, in calculating Tesco’s penalty, the OFT has determined two penalties and is imposing the

\textsuperscript{1292} This co-operation is not covered by the reduction under Sainsbury’s early resolution agreement, since it was provided at an early stage of the Investigation, before this agreement was concluded.
aggregate sum of those penalties on Tesco.\textsuperscript{1293} Tesco’s penalties and a summary of the calculations at each step of the penalty calculations are set out at Annexe B.

**Step 1 – starting point**

7.198. Tesco did not conclude an early resolution agreement with the OFT.\textsuperscript{1294} The OFT has, therefore, used Tesco’s Infringement Year turnover when determining its penalties in respect of the 2002 and 2003 Cheese Initiatives.

7.199. For the 2002 Cheese Initiative, Tesco’s Infringement Year turnover was \( \text{£}[C] \). For the 2003 Cheese Initiative, Tesco’s Infringement Year turnover was \( \text{£}[C] \). Applying a starting point of 6 per cent for the 2002 and 2003 Cheese Initiatives, Tesco’s penalties after Step 1 are:

<table>
<thead>
<tr>
<th>The 2002 Cheese Initiative</th>
<th>The 2003 Cheese Initiative</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>( \text{£}[C] )</td>
<td>( \text{£}[C] )</td>
<td>( \text{£}[C] )</td>
</tr>
</tbody>
</table>

**Step 2 – duration**

7.200. As explained above,\textsuperscript{1295} the OFT has decided to make no adjustment for duration. Accordingly, Tesco’s penalties after Step 2 remain as set out at paragraph 7.199 above.

**Step 3 – adjustment for other factors**

7.201. The OFT considered whether Tesco’s penalties after Step 2 should be adjusted in order to achieve the objectives of the OFT’s policy on financial penalties or to ensure that its penalties are not disproportionate or excessive. Tesco’s penalties after Step 2 represent the following proportions of its total turnover and operating profit:

- **The 2002 Cheese Initiative**: \( \text{[C]} \) per cent of its total turnover in its most recent business year and \( \text{[C]} \) per cent of its operating profit in its most recent business year.

- **The 2003 Cheese Initiative**: \( \text{[C]} \) per cent of its total turnover in its most recent business year and \( \text{[C]} \) per cent of its operating profit in its most recent business year.

7.202. While Tesco’s penalties after Step 2 are a relatively low proportion of its total turnover and operating profit, this is a consequence of the fact that Tesco achieves a significant proportion of its turnover from a wide range of sales outside of the relevant product market(s). The OFT considers that Tesco’s absolute penalties after Step 2 are sufficient to achieve

\textsuperscript{1293} See paragraphs 7.11 to 7.12 above.

\textsuperscript{1294} Tesco did, however, for a period of time decide not to contest the Cheese Allegations, see section 2.8 above.

\textsuperscript{1295} See paragraph 7.59 above.
deterrence in this case. The OFT has therefore decided to make no adjustment to Tesco’s penalty at Step 3. Accordingly, Tesco’s penalties after Step 3 remain as set out at paragraph 7.199 above.

7.203. As explained above, the OFT does not consider it necessary to adjust any Party’s penalty on the basis of typical margin and has therefore not adjusted Tesco’s penalties on this basis.

**Step 4 – aggravating and mitigating factors**

**Aggravating factors**

7.204. As explained above, the OFT has decided to make no adjustments for aggravating factors. The OFT therefore made no increases to Tesco’s penalties for any aggravating factors.

**Mitigating factors**

7.205. The OFT is satisfied that Tesco has demonstrated that it has taken adequate steps to ensure compliance. Accordingly, the OFT has decreased Tesco’s penalties by [5-10] per cent at Step 4 for each Infringement.

7.206. The OFT considers that in the particular circumstances of this case, Tesco provided significant additional co-operation early in the Investigation that materially assisted the Investigation. [C] In particular, Tesco [C] focussed the OFT’s attention more speedily on the possibility that the Initiatives may also have covered other dairy products (including cheese products), at a stage when these products were not part of the Investigation. [C]

7.207. [C] The OFT considers that Tesco provided co-operation early in the Investigation that added value to the Investigation [C]. Accordingly, the OFT considers that, exceptionally, in the particular circumstances of this case, it is appropriate to recognise the material value added in the specific circumstances of this case and has decided to decrease Tesco’s penalties by [10-20] per cent at Step 4 for each Infringement.

**Conclusion**

7.208. Tesco’s penalties are decreased by [15-30] per cent at Step 4 for each Infringement. Accordingly, Tesco’s penalties after Step 4 are:

<table>
<thead>
<tr>
<th>The 2002 Cheese Initiative</th>
<th>The 2003 Cheese Initiative</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>£[C]</td>
<td>£[C]</td>
<td>£[C]</td>
</tr>
</tbody>
</table>

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1296 See paragraph 7.67 above.
1297 See paragraph 7.80 above.
1298 [C]
1299 [C]
Step 5 – adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy

7.209. No adjustment to Tesco’s penalties are necessary as each of its penalties after Step 4 is below the maximum penalty that the OFT may impose. Accordingly, the final penalties that the OFT is imposing on Tesco are:

<table>
<thead>
<tr>
<th>The 2002 Cheese Initiative</th>
<th>The 2003 Cheese Initiative</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>£[C]</td>
<td>£[C]</td>
<td>£[C]</td>
</tr>
</tbody>
</table>

IX. Penalty for Wiseman

7.210. The OFT has found that Wiseman was a party to one Infringement, the 2003 FLM Initiative. Therefore, in calculating Wiseman’s penalty, the OFT has determined only one penalty.\textsuperscript{1300} Wiseman penalty and a summary of the calculations at each step of the penalty calculations are set out at Annexe A.

Step 1 – starting point

7.211. Wiseman concluded an ERA with the OFT. Therefore, the OFT used Wiseman’s ER turnover in determining its penalty as set out in its ERA. In light of the change in interpretation of last business year, the OFT reconsidered Wiseman’s penalty by reference to its Infringement Year turnover.

7.212. As Wiseman’s Infringement Year turnover for the 2003 FLM Initiative was less than its ER Year turnover the OFT has used Wiseman’s Infringement Year turnover in determining its penalty in respect of the 2003 FLM Initiative. For the 2003 FLM, Wiseman’s Infringement Year turnover was £[C]. Applying a starting point of 5 per cent for the 2003 FLM Initiative, Wiseman's penalty after Step 1 is £[C].

Step 2 – duration

7.213. As explained above,\textsuperscript{1301} the OFT has decided to make no adjustment for duration. Accordingly, Wiseman’s penalty after Step 2 remains as set out at paragraph 7.212 above.

Step 3 – adjustment for other factors

7.214. The OFT considered whether Wiseman’s penalty after Step 2 should be adjusted in order to achieve the objectives of the OFT’s policy on financial penalties or to ensure that its penalty are not disproportionate or excessive. Wiseman’s penalty after Step 2 represents [C] per cent of its total turnover in 2007 and [C] per cent of its total turnover in its most recent business year; and [C] per cent of its operating profit in 2007 and [C] per cent of its operating profit in its most recent business year.

\textsuperscript{1300} See paragraphs 7.11 to 7.12 above.
\textsuperscript{1301} See paragraph 7.59 above.
7.215. The OFT considers that these proportions of total turnover and operating profit are sufficient to achieve deterrence in this case. In contrast, Wiseman’s penalty as a proportion of total turnover and operating profit is significant as compared to retailers’ penalties. Given this, the OFT considered it appropriate to reduce Wiseman’s penalty by [C] per cent at Step 3 in order to ensure that it is proportionate. While Wiseman’s penalty reduces as a result of using its Infringement Year turnover, its penalties remain significant as a proportion of its total turnover and operating profit as compared to retailers’ penalties. The OFT therefore considers it remains appropriate to reduce Wiseman’s penalty by [C] per cent at Step 3. Accordingly, Wiseman’s penalty after Step 3 is £[C].

7.216. As explained above, the OFT does not consider it necessary to adjust any Party’s penalty on the basis of typical margin and has therefore not adjusted Wiseman’s penalty on this basis.

**Step 4 – aggravating and mitigating factors**

*Aggravating factors*

7.217. As explained above, the OFT has decided to make no adjustments for aggravating factors. The OFT therefore made no increases to Wiseman’s penalty for any aggravating factors.

*Mitigating factors*

7.218. The OFT is satisfied that Wiseman has demonstrated that it has taken adequate steps to ensure compliance. Accordingly, the OFT has decreased Wiseman’s penalties by [5-10] per cent at Step 4.

7.219. As explained above, the OFT considers that processors faced greater commercial pressure at the time. The OFT has therefore decided to decrease Wiseman’s penalty by [10-20] per cent at Step 4.

**Conclusion**

7.220. Wiseman’s penalty is decreased by [15-30] per cent at Step 4. Accordingly, Wiseman’s penalty after Step 4 is £[C].

**Step 5 – adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy**

7.221. No adjustment to Wiseman’s penalty is necessary as its penalty after Step 4 is below the maximum penalty that the OFT may impose.

**Early resolution**

7.222. The OFT is satisfied that Wiseman has fully complied with the terms of its early resolution agreement and has therefore decreased Wiseman’s

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1302 See paragraph 7.67 above.
1303 See paragraph 7.80 above.
1304 See paragraphs 7.85 to 7.88 above.
penalty by 35 per cent after Step 5. Accordingly, the final penalty that the OFT is imposing on Wiseman’s is £[C].

H. PAYMENT OF THE PENALTY

7.223. The OFT requires each of the Parties to pay the penalty applicable to it as set out at section 7. C above and in Annex A to this Decision. The penalty calculation methodology explained in the preceding paragraphs of this section applies in respect of each Party. Both the individual figures and the final penalty figures are rounded to the nearest pound.

7.224. The penalties must be paid to the OFT by the close of banking business on 11 October 2011. If the penalty is not paid, and either an appeal against the imposition or amount of that penalty has not been made or such an appeal has been made and determined in the OFT’s favour, the OFT may commence proceedings to recover the amount as a civil debt.

John Fingleton for and on behalf of the Office of Fair Trading

Chief Executive Officer

26 July 2011

Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London EC4Y 8JX

Contact: Andrew Groves (Project Director) / Ann Pope (Senior Responsible Officer)

Direct line: 020 7211 8927 / 020 7211 8786

E-mail: andrew.groves@oft.gsi.gov.uk / ann.pope@oft.gsi.gov.uk

1306 Details of how to pay are notified in the letter accompanying the Decision.
1306 See section 37 of the Act.
## ANNEXE A: PENALTY CALCULATIONS

### Asda

<table>
<thead>
<tr>
<th>Step 1 - starting point</th>
<th>Starting percentage</th>
<th>The 2003 FLM Initiative</th>
<th>The 2002 Cheese Initiative</th>
<th>The 2003 Cheese Initiative</th>
<th>Total</th>
</tr>
</thead>
<tbody>
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<td>6%</td>
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<td>[C]</td>
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<td>[C]</td>
<td>[C]</td>
<td>[C]</td>
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<td>-[5-10]%</td>
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<td>[C]</td>
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<td>[C]</td>
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Total: £9,096,611
### Dairy Crest

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<table>
<thead>
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</tr>
<tr>
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### The 2002 Cheese Initiative

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<tbody>
<tr>
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<table>
<thead>
<tr>
<th>Step 3 - other factors</th>
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<tbody>
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<td>Mitigation: compliance</td>
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<td>Mitigation: pressure on processors</td>
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<tr>
<td>Step 4 net adjustments</td>
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<tbody>
<tr>
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## McLelland

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<td>[C]</td>
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<td>Step 4 - aggravation and mitigation</td>
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</tr>
<tr>
<td>Mitigation: compliance</td>
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<td>-[5-10]%</td>
<td></td>
</tr>
<tr>
<td>Mitigation: pressure on processors</td>
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<td>-[10-20]%</td>
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<td>-[5-10]%</td>
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<td>[C]</td>
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<td>Step 5 - statutory maximum</td>
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<tr>
<td>Adjustment for statutory maximum</td>
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<tr>
<td>Penalty after step 5</td>
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<td>[C]</td>
<td>[C]</td>
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<tr>
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<td>-30%</td>
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372
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## Sainsbury’s

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<td>Proportionality</td>
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<td>0</td>
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<tr>
<td>Penalty after step 3</td>
<td>[C]</td>
<td>[C]</td>
<td>[C]</td>
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<table>
<thead>
<tr>
<th>Step 4 - aggravation and mitigation</th>
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<tbody>
<tr>
<td>Aggravating factors</td>
<td>0</td>
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<tr>
<td>Mitigation: compliance</td>
<td>-[5-10]%</td>
<td>-[5-10]%</td>
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</tr>
<tr>
<td>Mitigation: early co-operation</td>
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<td>-[5-10]%</td>
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<tr>
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<td>-35%</td>
<td>-35%</td>
<td>-35%</td>
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<tr>
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<td><strong>£4,886,996</strong></td>
<td><strong>£425,444</strong></td>
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### Tesco

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<td>[C]</td>
<td>[C]</td>
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<td>Step 3 - other factors</td>
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<td>Penalty after step 3</td>
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<td>[C]</td>
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<td>Step 4 - aggravation and mitigation</td>
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<td>0</td>
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<tr>
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<td>-[5-10]%</td>
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<tr>
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<td>[C]</td>
<td>[C]</td>
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<tr>
<td>Step 5 - statutory maximum</td>
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<tr>
<td>Penalty after step 5</td>
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### The 2003 FLM Initiative

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<tr>
<td>Step 3 - other factors</td>
<td>Proportionality</td>
<td>-[C]%</td>
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<tr>
<td>Penalty after step 3</td>
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<td>Step 4 - aggravation and mitigation</td>
<td>Aggravating factors</td>
<td>0</td>
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<tr>
<td></td>
<td>Mitigation: compliance</td>
<td>-[5-10]%</td>
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<tr>
<td></td>
<td>Mitigation: pressure on processors</td>
<td>-[10-20]%</td>
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<tr>
<td>Step 4 net adjustments</td>
<td>[C]</td>
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</tr>
<tr>
<td>Penalty after step 4</td>
<td>[C]</td>
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</tr>
<tr>
<td>Step 5 - statutory maximum</td>
<td>Adjustment for statutory maximum</td>
<td>0</td>
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<tr>
<td>Penalty after step 5</td>
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<td></td>
</tr>
<tr>
<td>Early resolution</td>
<td>Early resolution reduction</td>
<td>-35%</td>
</tr>
<tr>
<td>Penalty after early resolution reduction</td>
<td>£3,197,765</td>
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</table>
ANNEXE B: EARLY RESOLUTION AGREEMENTS
Asda Group Limited
Asda House
South Bank
Great Wilson Street
Leeds
West Yorkshire LS11 5AD
(Office of Peter Rowland, Slaughter and May)

Your ref
Our ref
CE/3094-03
Date
5 December 2007
Direct line
(020) 7211 8675
Fax
(020) 7211 8538
Email
Sean.Williams@oft.gsi.gov.uk

Dear Sirs,

Asda Group Limited (‘Asda’) - Competition Act 1998 Case CE/3094-03 (Dairy Retail Price Initiatives Investigation)

As you are aware, the Office of Fair Trading (the ‘OFT’) proposes to make a decision in terms of the Statement of Objections issued on 20 September 2007 (the ‘SO’) that Asda and the other parties set out in paragraph 3 of the SO have infringed the Chapter I prohibition of the Competition Act 1998, through the repeated exchange and/or disclosure of commercially sensitive retail pricing intentions in respect of various dairy products in 2002 to 2003, as listed in the Appendix (the ‘Infringements’).

You have indicated Asda’s willingness to admit its involvement in relation to all of the Infringements. You have also indicated Asda’s willingness to co-operate in the OFT’s desire to expedite the process of concluding its investigation. Further to discussions between the OFT and Asda, this letter (the ‘Agreement’) sets out the terms upon which the OFT would be prepared to resolve its investigation of the Infringements, were Asda to accept these terms.

1) Asda will, by signing the Agreement, admit its involvement in the Infringements.

2) Asda will maintain continuous and complete co-operation throughout the investigation and until the conclusion of any action by the OFT arising as a result of the investigation; and reference to such action includes any action taken by the OFT in any proceedings before the Competition Appeal Tribunal (the ‘CAT’) arising from a decision of the OFT in connection with the Infringements.

3) In relation to the Infringements, save as otherwise agreed with the OFT, this may include but may not be limited to:

   a) Asda using reasonable endeavours to secure the complete and truthful cooperation of its current and former directors, officers, employees and agents and encouraging such persons to voluntarily provide the OFT with specific and valuable information (directly...
or indirectly), by 31 January 2008, which supports Asda’s admission and, if applicable, supports the OFT’s findings in respect of the infringing conduct of the other parties to which the SO is addressed;

b) Asda using reasonable endeavours to ensure that such information is closely referenced to any available contemporaneous evidence, states the identities of individuals involved in the Infringements (their names, job description, the name of their employer), clearly outlines the infringing conduct (i.e. outlining what was said or agreed) and specifies dates and venues relevant to the Infringements;

c) Asda using reasonable endeavours to secure the complete and truthful cooperation of its current and former directors, officers, employees and agents and encouraging such persons to attend interviews in order to provide the OFT with specific and valuable information relevant to the Infringements;

d) Asda facilitating the ability of current and former directors, officers, employees and agents to appear for such interviews as the OFT may reasonably require at the times and places reasonably designated by the OFT;

e) Asda using reasonable endeavours to ensure that current and former directors, officers, employees and agents who provide information to the OFT respond completely and truthfully to all questions asked in interviews;

f) in relation to any CAT proceedings, Asda using reasonable endeavours to facilitate, and secure the complete and truthful co-operation, of its current and former directors, officers, employees and agents, even if Asda is not a party to those CAT proceedings, in:

(i) assisting the OFT or its counsel in the preparation for those CAT proceedings;

(ii) if requested by the OFT or its counsel, attending those CAT proceedings; and

(iii) speaking to their witness statements and being cross-examined on such witness statements in those CAT proceedings.

4) The OFT will accept from Asda a concise memorandum indicating any material factual inaccuracies in the SO, which should be received by the OFT by 31 January 2008. Should the memorandum, in the opinion of the OFT, go so far as to contest Asda’s liability for all or any part of the Infringements or represent that the penalty should be other than as set out in the Agreement, or otherwise exceed the scope identified in the previous sentence, the OFT will notify Asda of its concerns. Should Asda not agree promptly to amend its representations in a manner which satisfies the OFT, the OFT may treat any agreement on the terms set out in the Agreement as ceasing to have effect and shall notify Asda accordingly.

5) In relation to the Infringements, Asda will refrain from seeking access to documents on the OFT’s file, other than those documents directly relied on and referred to in the SO.

6) The OFT will adopt a decision in respect of the Infringements which will:
a) as to substance,

(i) set out the OFT’s findings of the facts which had taken place in materially the same form as set out in the SO, subject to any amendments deemed necessary and appropriate by the OFT as a result of the representations referred to in paragraph 4 or equivalent representations from the other recipients of the SO;

(ii) note Asda’s admission as to involvement in the Infringements and conclude that such Infringements had been committed;

(iii) have a copy of the Agreement annexed to it.

b) as to remedy,

(i) set out the OFT’s approach to calculating the penalty in accordance with its published guidance and note that for the purpose of applying its guidance on penalties in Competition Act 1998 cases the OFT would have adopted a ‘starting point’ of 6% of relevant turnover in the absence of resolution on the terms of the Agreement;

(ii) set out clearly the factors considered in determining this ‘starting point’;

(iii) impose a penalty on Asda of £34,305,056 before any discount for co-operation;

(iv) note that we anticipate that the penalty figure for Asda also includes a reduction in recognition of the procedural co-operation as set out in the Agreement, which will enable the OFT to complete its investigation into the Infringements more speedily and effectively. A reduction of up to 35% is available for procedural co-operation with the OFT’s investigation. If Asda co-operates fully as set out in the Agreement the OFT will therefore impose a penalty on Asda of £22,298,286.

7) In relation to the Infringements, if Asda brings appeal proceedings before the CAT in respect of the OFT’s decision, the OFT reserves the right to make an application to the CAT:

a) to increase the penalty imposed on Asda in relation to the Infringements; and

b) to require Asda to pay the OFT’s full costs of the appeal regardless of the outcome of that appeal.

8) Following Asda’s acceptance of the terms of the Agreement, the OFT will make a press announcement concerning the Agreement. The OFT will make that announcement at 07.00 on the day that the Agreement comes into effect. The OFT will share with Asda its final press announcement 48 hours before that announcement to enable Asda to comment in relation to the final press release and Asda will do the same in respect of any press announcement it intends to make. The OFT will consider any comments that Asda raises but is not obliged to make any changes to its press release. Asda agrees to do the same in respect of any comments raised by the OFT. Any announcements, interviews or briefings made by Asda to the stock exchange, press or other third parties shall not contradict any of the OFT’s proposed findings in relation to the Infringements set out in the SO.
9) The OFT agrees that any announcement by it concerning the Agreement shall not be made until a resolution agreement has either been signed by the last of the parties in resolution discussions or in any event no later than 7 December 2007.

10) In relation to the Infringements, in the event that Asda wishes to withdraw its admission, seek access to documents on the file other than those relied on in the SO, or submit representations that exceed the scope envisaged in paragraph 4 above, Asda will notify the OFT that it is terminating the Agreement. All terms of the Agreement, including but not limited to the agreed final penalty and procedural co-operation reduction referred to at paragraph 6 above, will then cease to have effect and the OFT will pursue its investigation in accordance with its normal procedures.

11) The OFT may, subject to the provisions of paragraph 12 below, terminate the Agreement and impose any penalty in accordance with section 36 of the Competition Act 1998 in relation to the Infringements if, at any time before conclusion of the case including any proceedings before the CAT (whether by adopting a decision or otherwise), it determines that the conditions in paragraphs 1-8 above have not been complied with.

12) Before terminating the agreement, the OFT shall give written notice to Asda of the nature of the alleged non-compliance and that the OFT is considering terminating the Agreement with Asda. Asda will be given a reasonable opportunity to respond to the notice and to remedy any breach within a reasonable period of time from the service of the notice.

13) All information, documents and other evidence provided by Asda to the OFT under the Agreement shall, notwithstanding the termination of the Agreement (whether by revocation, the conclusion of the case, including in any proceedings before the CAT, in relation to the Infringements or otherwise), remain the property of the OFT and may be used by the OFT to facilitate the performance of its functions by or under any enactment.

14) Nothing in the Agreement affects any of the OFT’s separate ongoing or future investigations into possible infringements of the Competition Act 1998 and/or Articles 81 and 82 of the EC Treaty or of the Enterprise Act 2002 outside the scope of the SO.

If Asda accepts the terms set out in the Agreement, a duly authorised representative of Asda should countersign the Agreement as indicated below and return a faxed copy to the OFT. The copy bearing the original signature of the duly authorised representative should then be returned to the OFT as soon as reasonably practicable thereafter. The Agreement will become effective when it has been signed by both the OFT and Asda.

Yours sincerely,

Sean Williams
Executive Director
Markets and Projects
For the Office of Fair Trading
COUNTERSIGNED ON BEHALF OF ASDA

Signature:
Name:
Position:
Date: 6-12-07
APPENDIX: The Infringements

Asda Group Limited (‘Asda’) has infringed the Chapter I prohibition of the Competition Act 1998 through the repeated exchange and/or disclosure of commercially sensitive retail pricing intentions by participating in the following initiatives described in the Statement of Objections, issued on 20 September 2007:

- The 2002 Liquid Milk Initiative
  
  (i) the single overall concerted practice between Asda, Morrisons, Safeway, Sainsbury, Tesco and Arla which had as its object the prevention, restriction or distortion of competition in respect of fresh liquid milk (‘FLM’), Cravendale and Cheapest on Display ultra heat treated extended shelf life milk (‘COD UHT’) retail prices in 2002, as set out in the Statement of Objections; and

  (ii) the bi-partite concerted practices between Asda and Arla which had as their object the prevention, restriction or distortion of competition in respect of FLM, Cravendale and COD UHT retail prices in 2002, as set out in the Statement of Objections.

- The 2002 Cheese Initiative
  
  (i) the single overall concerted practice between Asda, Safeway, Sainsbury, Tesco, Dairy Crest, Glanbia and McLelland which had as its object the prevention, restriction or distortion of competition in respect of retail prices for UK produced cheese in 2002, as set out in the Statement of Objections; and

  (ii) the bi-partite concerted practices between Asda and Dairy Crest, Asda and Glanbia, and Asda and McLelland which had as their object the prevention, restriction or distortion of competition in respect of retail prices for UK produced cheese in 2002, as set out in the Statement of Objections.

- The 2003 FLM Initiative
  
  (i) the single overall concerted practice between Asda, Safeway, Sainsbury, Tesco, Arla, Dairy Crest and Wiseman which had as its object the prevention, restriction or distortion of competition in respect of FLM retail prices in 2003, as set out in the Statement of Objections; and

  (ii) the bi-partite concerted practices between Asda and Arla, Asda and Dairy Crest, and Asda and Wiseman which had as their object the prevention, restriction or distortion of competition in respect of FLM retail prices in 2003, as set out in the Statement of Objections.
The 2003 Cheese Initiative

(i) the single overall concerted practice between Asda, Sainsbury, Tesco and McLelland which had as its object the prevention, restriction or distortion of competition in respect of retail prices for UK produced cheese in 2003, as set out in the Statement of Objections; and

(ii) the bi-partite concerted practices between Asda and McLelland which had as their object the prevention, restriction or distortion of competition in respect of retail prices for UK produced cheese in 2003, as set out in the Statement of Objections.
By Special Delivery

Dairy Crest Group plc
Claygate House
Littleworth Road
Esher
Surrey KT10 9PN

(Care of Andrew Chandler and Ros Kellaway, Eversheds)

Our ref CE/3094-03
Date

Direct line (020) 7211 8675
Fax (020) 7211 8538
Email Sean.Williams@oft.gsi.gov.uk

Dear Sirs,

Dairy Crest Group plc ('Dairy Crest') - Competition Act 1998 Case CE/3094-03 (Dairy Retail Price Initiatives Investigation)

As you are aware, the Office of Fair Trading (the 'OFT') proposes to make a decision in terms of the Statement of Objections issued on 20 September 2007 (the 'SO') that Dairy Crest and the other parties set out in paragraph 3 of the SO have infringed the Chapter I prohibition of the Competition Act 1998, through the repeated exchange and/or disclosure of commercially sensitive retail pricing intentions in respect of various dairy products in 2002 to 2003, as listed in the Appendix (the 'Infringements').

You have indicated Dairy Crest's willingness to admit its involvement in relation to all of the Infringements. You have also indicated Dairy Crest's willingness to co-operate in the OFT's desire to expedite the process of concluding its investigation. Further to discussions between the OFT and Dairy Crest, this letter (the 'Agreement') sets out the terms upon which the OFT would be prepared to resolve its investigation of the Infringements, were Dairy Crest to accept these terms.

1) Dairy Crest will, by signing the Agreement, admit its involvement in the Infringements.

2) Dairy Crest will maintain continuous and complete co-operation throughout the investigation and until the conclusion of any action by the OFT arising as a result of the investigation; and reference to such action includes any action taken by the OFT in any proceedings before the Competition Appeal Tribunal (the 'CAT') arising from a decision of the OFT in connection with the Infringements.

3) In relation to the Infringements, save as otherwise agreed with the OFT, this may include but may not be limited to:

   a) Dairy Crest using reasonable endeavours to secure the complete and truthful cooperation of its current and former directors, officers, employees and agents and
encouraging such persons to voluntarily provide the OFT with specific and valuable information (directly or indirectly), by 31 January 2008, which supports Dairy Crest's admission and, if applicable, supports the OFT's findings in respect of the infringing conduct of the other parties to which the SO is addressed;

b) Dairy Crest using reasonable endeavours to ensure that such information is closely referenced to any available contemporaneous evidence, states the identities of individuals involved in the infringements (their names, job description, the name of their employer), clearly outlines the infringing conduct (i.e. outlining what was said or agreed) and specifies dates and venues relevant to the infringements;

c) Dairy Crest using reasonable endeavours to secure the complete and truthful cooperation of its current and former directors, officers, employees and agents and encouraging such persons to attend interviews in order to provide the OFT with specific and valuable information relevant to the infringements;

d) Dairy Crest facilitating the ability of current and former directors, officers, employees and agents to appear for such interviews as the OFT may reasonably require at the times and places reasonably designated by the OFT;

e) Dairy Crest using reasonable endeavours to ensure that current and former directors, officers, employees and agents who provide information to the OFT respond completely and truthfully to all questions asked in interviews;

f) in relation to any CAT proceedings, Dairy Crest using reasonable endeavours to facilitate, and secure the complete and truthful cooperation, of its current and former directors, officers, employees and agents, even if Dairy Crest is not a party to those CAT proceedings, in:

   (i) assisting the OFT or its counsel in the preparation for those CAT proceedings;

   (ii) if requested by the OFT or its counsel, attending those CAT proceedings; and

   (iii) speaking to their witness statements and being cross-examined on such witness statements in those CAT proceedings.

4) The OFT will accept from Dairy Crest a concise memorandum indicating any material factual inaccuracies in the SO, which should be received by the OFT by 31 January 2008. Should the memorandum, in the opinion of the OFT, go so far as to contest Dairy Crest's liability for all or any part of the infringements or represent that the penalty should be other than as set out in the Agreement, or otherwise exceed the scope identified in the previous sentence, the OFT will notify Dairy Crest of its concerns. Should Dairy Crest not agree promptly to amend its representations in a manner which satisfies the OFT, the OFT may treat any agreement on the terms set out in the Agreement as ceasing to have effect and shall notify Dairy Crest accordingly.

5) In relation to the infringements, Dairy Crest will refrain from seeking access to documents on the OFT’s file, other than those documents directly relied on and referred to in the SO.
6) The OFT will adopt a decision in respect of the infringements which will:

a) as to substance,

(i) set out the OFT’s findings of the facts which had taken place in materially the same form as set out in the SO, subject to any amendments deemed necessary and appropriate by the OFT as a result of the representations referred to in paragraph 4 or equivalent representations from the other recipients of the SO;

(ii) note Dairy Crest’s admission as to involvement in the infringements and conclude that such infringements had been committed;

(iii) have a copy of the Agreement annexed to it.

b) as to remedy,

(i) set out the OFT’s approach to calculating the penalty in accordance with its published guidance and note that for the purpose of applying its guidance on penalties in Competition Act 1998 cases the OFT would have adopted a ‘starting point’ of 6% of relevant turnover in the absence of resolution on the terms of the Agreement;

(ii) set out clearly the factors considered in determining this ‘starting point’;

(iii) impose a penalty on Dairy Crest of £14,481,758 before any discount for co-operation;

(iv) note that we anticipate that the penalty figure for Dairy Crest also includes a reduction in recognition of the procedural co-operation as set out in the Agreement, which will enable the OFT to complete its investigation into the infringements more speedily and effectively. A reduction of up to 35% is available for procedural co-operation with the OFT’s investigation. If Dairy Crest co-operates fully as set out in the Agreement the OFT will therefore impose a penalty on Dairy Crest of £9,400,143.

7) In relation to the infringements, if Dairy Crest brings appeal proceedings before the CAT in respect of the OFT’s decision, the OFT reserves the right to make an application to the CAT:

a) to increase the penalty imposed on Dairy Crest in relation to the infringements; and

b) to require Dairy Crest to pay the OFT’s full costs of the appeal regardless of the outcome of that appeal.

8) Following Dairy Crest’s acceptance of the terms of the Agreement, the OFT will make a press announcement concerning the Agreement. The OFT will make that announcement at 07.00 on the day that the Agreement comes into effect. The OFT will share with Dairy Crest its final press announcement 48 hours before that announcement to enable Dairy Crest to comment in relation to the final press release and Dairy Crest will do the same in
respective of any press announcement it intends to make. The OFT will consider any comments that Dairy Crest raises but is not obliged to make any changes to its press release. Dairy Crest agrees to do the same in respect of any comments raised by the OFT. Any announcements, interviews or briefings made by Dairy Crest to the stock exchange, press or other third parties shall not contradict any of the OFT’s proposed findings in relation to the Infringements set out in the SO.

9) The OFT agrees that any announcement by it concerning the Agreement shall not be made until a resolution agreement has either been signed by the last of the parties in resolution discussions or in any event no later than 7 December 2007.

10) In relation to the Infringements, in the event that Dairy Crest wishes to withdraw its admission, seek access to documents on the file other than those relied on in the SO, or submit representations that exceed the scope envisaged in paragraph 4 above, Dairy Crest will notify the OFT that it is terminating the Agreement. All terms of the Agreement, including but not limited to the agreed final penalty and procedural co-operation reduction referred to at paragraph 6 above, will then cease to have effect and the OFT will pursue its investigation in accordance with its normal procedures.

11) The OFT may, subject to the provisions of paragraph 12 below, terminate the Agreement and impose any penalty in accordance with section 36 of the Competition Act 1998 in relation to the Infringements if, at any time before conclusion of the case including any proceedings before the CAT (whether by adopting a decision or otherwise), it determines that the conditions in paragraphs 1-8 above have not been complied with.

12) Before terminating the agreement, the OFT shall give written notice to Dairy Crest of the nature of the alleged non-compliance and that the OFT is considering terminating the Agreement with Dairy Crest. Dairy Crest will be given a reasonable opportunity to respond to the notice and to remedy any breach within a reasonable period of time from the service of the notice.

13) All information, documents and other evidence provided by Dairy Crest to the OFT under the Agreement shall, notwithstanding the termination of the Agreement (whether by revocation, the conclusion of the case, including in any proceedings before the CAT, in relation to the Infringements or otherwise), remain the property of the OFT and may be used by the OFT to facilitate the performance of its functions by or under any enactment.

14) Nothing in the Agreement affects any of the OFT’s separate ongoing or future investigations into possible infringements of the Competition Act 1998 and/or Articles 81 and 82 of the EC Treaty or of the Enterprise Act 2002 outside the scope of the SO.

If Dairy Crest accepts the terms set out in the Agreement, a duly authorised representative of Dairy Crest should countersign the Agreement as indicated below and return a faxed copy to the OFT. The copy bearing the original signature of the duly authorised representative should then be returned to the OFT as soon as reasonably practicable thereafter. The Agreement will become effective when it has been signed by both the OFT and Dairy Crest.
Yours sincerely,

Sean Williams
Executive Director
Markets and Projects
For the Office of Fair Trading

COUNTERSIGNED ON BEHALF OF DAIRY CREST GROUP PLC AND DAIRY CREST LIMITED

Signature: [Redacted]
Name: [Redacted]
Position: [Redacted]
Date: 6/12/07
APPENDIX: The Infringements

Dairy Crest Group plc ('Dairy Crest') has infringed the Chapter I prohibition of the Competition Act 1998 through the repeated exchange and/or disclosure of commercially sensitive retail pricing intentions by participating in the following initiatives described in the Statement of Objections, issued on 20 September 2007:

- The 2002 Cheese Initiative:
  (i) the single overall concerted practice between Asda, Safeway, Sainsbury, Tesco, Dairy Crest, Glanbia and McLellan which had as its object the prevention, restriction or distortion of competition in respect of retail prices for UK produced cheese in 2002, as set out in the Statement of Objections; and
  (ii) the bi-partite concerted practices between Asda and Dairy Crest, Safeway and Dairy Crest, Sainsbury and Dairy Crest, and Tesco and Dairy Crest which had as their object the prevention, restriction or distortion of competition in respect of retail prices for UK produced cheese in 2002, as set out in the Statement of Objections.

- The 2003 FLM Initiative:
  (i) the single overall concerted practice between Asda, Safeway, Sainsbury, Tesco, Arla, Dairy Crest and Wiseman which had as its object the prevention, restriction or distortion of competition in respect of fresh liquid milk retail prices in 2003, as set out in the Statement of Objections; and
  (ii) the bi-partite concerted practice between Dairy Crest and Sainsbury which had as its object the prevention, restriction or distortion of competition in respect of fresh liquid milk retail prices in 2003, as set out in the Statement of Objections.

- The 2003 Butter Initiative:
  (i) the single overall concerted practice between Safeway, Tesco and Dairy Crest which had as its object the prevention, restriction or distortion of competition in respect of retail prices for UK produced butter in 2003, as set out in the Statement of Objections; and
  (ii) the bi-partite concerted practices between Safeway and Dairy Crest, and Tesco and Dairy Crest which had as their object the prevention, restriction or distortion of competition in respect of retail prices for UK produced butter in 2003, as set out in the Statement of Objections.
By Special Delivery

Glanbia Investments (UK) Limited
Second Floor, 2 Albert Road
Tamworth
Staffordshire B79 7JN
FAO Company Secretary

Glanbia (UK) Limited
Second Floor, 2 Albert Road
Tamworth
Staffordshire B79 7JN
FAO Company Secretary

The Cheese Company Limited
3130 Great Western Court
Hunts Ground Road
Stoke Gifford
Bristol BS34 8HP
FAO Company Secretary

Waterford Foods International Limited
Second Floor, 2 Albert Road
Tamworth
Staffordshire B79 7JN
FAO Company Secretary

(Care of Laura Claydon and Noel Beale,
Burges Salmon and Kathrine Eddon and
Guy Lougher, Pinsent Masons)

Our ref CE/3094-03
Date 30 November 2007

Direct line (020) 7211 8675
Fax (020) 7211 8538
Email Sean.Williams@oft.gsi.gov.uk

Dear Sirs,

Glanbia Investments (UK) Limited, Glanbia (UK) Limited, The Cheese Company Limited and
Waterford Foods International Limited - Competition Act 1998 Case CE/3094-03 (Dairy Retail Price
Incentives Investigation)

As you are aware, the Office of Fair Trading (the 'OFT') proposes to make a decision in terms of
the Statement of Objections issued on 20 September 2007 (the 'SO') that Glanbia Investments
(UK) Limited, Glanbia (UK) Limited, The Cheese Company Limited and Waterford Foods
International Limited (collectively referred to throughout the rest of this letter as 'Glanbia/TCC') and
other parties set out in paragraph 3 of the SO have infringed the Chapter I prohibition of the
Competition Act 1998, through the repeated exchange and/or disclosure of commercially sensitive
retail pricing intentions in respect of UK produced cheese in 2002, as listed in the Appendix (the
'Infringement').
You have indicated Glanbia/TCC's willingness to admit its involvement in relation to the Infringement. You have also indicated Glanbia/TCC's willingness to co-operate in the OFT's desire to expedite the process of concluding its investigation. Further to discussions between the OFT and Glanbia/TCC, this letter (the 'Agreement') sets out the terms upon which the OFT would be prepared to resolve its investigation of the Infringement, were Glanbia/TCC to accept these terms.

1) Glanbia/TCC will, by signing the Agreement, admit its involvement in the Infringement.

2) Glanbia/TCC will maintain continuous and complete co-operation throughout the investigation and until the conclusion of any action by the OFT arising as a result of the investigation; and reference to such action includes any action taken by the OFT in any proceedings before the Competition Appeal Tribunal (the 'CAT') arising from a decision of the OFT in connection with the Infringement.

3) In relation to the Infringement, save as otherwise agreed with the OFT, this may include but may not be limited to:

   a) Glanbia/TCC using reasonable endeavours to secure the complete and truthful cooperation of its current and former directors, officers, employees and agents and encouraging such persons to voluntarily provide the OFT with specific and valuable information (directly or indirectly), by 31 January 2008, which supports Glanbia/TCC's admission and, if applicable, supports the OFT's findings in respect of the infringing conduct of the other parties to which the SO is addressed;

   b) Glanbia/TCC using reasonable endeavours to ensure that such information is closely referenced to any available contemporaneous evidence, states the identities of individuals involved in the Infringement (their names, job description, the name of their employer), clearly outlines the infringing conduct (i.e. outlining what was said or agreed) and specifies dates and venues relevant to the Infringement;

   c) Glanbia/TCC using reasonable endeavours to secure the complete and truthful cooperation of its current and former directors, officers, employees and agents and encouraging such persons to attend interviews in order to provide the OFT with specific and valuable information relevant to the Infringement;

   d) Glanbia/TCC facilitating the ability of current and former directors, officers, employees and agents to appear for such interviews as the OFT may reasonably require at the times and places reasonably designated by the OFT;

   e) Glanbia/TCC using reasonable endeavours to ensure that current and former directors, officers, employees and agents who provide information to the OFT respond completely and truthfully to all questions asked in interviews;

   f) in relation to any CAT proceedings, Glanbia/TCC using reasonable endeavours to facilitate, and secure the complete and truthful co-operation, of its current and former directors, officers, employees and agents, even if Glanbia/TCC is not a party to those CAT proceedings, in:

      (i) assisting the OFT or its counsel in the preparation for those CAT proceedings;
(ii) if requested by the OFT or its counsel, attending those CAT proceedings; and

(iii) speaking to their witness statements and being cross-examined on such witness statements in those CAT proceedings.

4) The OFT will accept from Glanbia/TCC a concise memorandum indicating any material factual inaccuracies in the SO, which should be received by the OFT by 31 January 2008. Should the memorandum, in the opinion of the OFT, go so far as to contest Glanbia/TCC's liability for all or any part of the Infringement or represent that the penalty should be other than as set out in the Agreement, or otherwise exceed the scope identified in the previous sentence, the OFT will notify Glanbia/TCC of its concerns. Should Glanbia/TCC not agree promptly to amend its representations in a manner which satisfies the OFT, the OFT may treat any agreement on the terms set out in the Agreement as ceasing to have effect and shall notify Glanbia/TCC accordingly.

5) In relation to the Infringement, Glanbia/TCC will refrain from seeking access to documents on the OFT's file, other than those documents directly relied on and referred to in the SO.

6) The OFT will adopt a decision in respect of the Infringement which will:

a) as to substance,

   (i) set out the OFT's findings of the facts which had taken place in materially the same form as set out in the SO, subject to any amendments deemed necessary and appropriate by the OFT as a result of the representations referred to in paragraph 4 or equivalent representations from the other recipients of the SO;

   (ii) note Glanbia/TCC's admission as to involvement in the Infringement and conclude that such an Infringement had been committed;

   (iii) have a copy of the Agreement annexed to it.

b) as to remedy,

   (i) set out the OFT's approach to calculating the penalty in accordance with its published guidance and note that for the purpose of applying its guidance on penalties in Competition Act 1998 cases the OFT would have adopted a 'starting point' of 6% of relevant turnover in the absence of resolution on the terms of the Agreement;

   (ii) set out clearly the factors considered in determining this 'starting point';

   (iii) impose a penalty on Glanbia/TCC of £2,018,360 before any discount for co-operation;

   (iv) note that we anticipate that the penalty figure for Glanbia/TCC also includes a reduction in recognition of the procedural co-operation as set out in the Agreement, which will enable the OFT to complete its investigation into the Infringement more speedily and effectively. A reduction of up to 35% is available.
for procedural co-operation with the OFT’s investigation. If Glanbia/TCC co-operates fully as set out in the Agreement the OFT will therefore impose a penalty on Glanbia/TCC of £1,339,884.

7) In relation to the Infringement, if Glanbia/TCC brings appeal proceedings before the CAT in respect of the OFT’s decision, the OFT reserves the right to make an application to the CAT:

a) to increase the penalty imposed on Glanbia/TCC in relation to the Infringement; and

b) to require Glanbia/TCC to pay the OFT’s full costs of the appeal regardless of the outcome of that appeal.

8) Following Glanbia/TCC’s acceptance of the terms of the Agreement, the OFT will make a press announcement concerning the Agreement. The OFT will make that announcement at 07.00 on the day that the Agreement comes into effect. The OFT will share with Glanbia/TCC its final press announcement 48 hours before that announcement to enable Glanbia/TCC to comment in relation to the final press release and Glanbia/TCC will do the same in respect of any press announcement it intends to make. The OFT will consider any comments that Glanbia/TCC raises but is not obliged to make any changes to its press release. Glanbia/TCC agrees to do the same in respect of any comments raised by the OFT. Any announcements, interviews or briefings made by Glanbia/TCC to the stock exchange, press or other third parties shall not contradict any of the OFT’s proposed findings in relation to the Infringement set out in the SO.

9) The OFT agrees that any announcement by it concerning the Agreement shall not be made until a resolution agreement has either been signed by the last of the parties in resolution discussions or in any event no later than 7 December 2007.

10) In relation to the Infringement, in the event that Glanbia/TCC wishes to withdraw its admission, seek access to documents on the file other than those relied on in the SO, or submit representations that exceed the scope envisaged in paragraph 4 above, Glanbia/TCC will notify the OFT that it is terminating the Agreement. All terms of the Agreement, including but not limited to the agreed final penalty and procedural co-operation reduction referred to at paragraph 6 above, will then cease to have effect and the OFT will pursue its investigation in accordance with its normal procedures.

11) The OFT may, subject to the provisions of paragraph 12 below, terminate the Agreement and impose any penalty in accordance with section 36 of the Competition Act 1998 in relation to the Infringement if, at any time before conclusion of the case including any proceedings before the CAT (whether by adopting a decision or otherwise), it determines that the conditions in paragraphs 1-8 above have not been complied with.

12) Before terminating the agreement, the OFT shall give written notice to Glanbia/TCC of the nature of the alleged non-compliance and that the OFT is considering terminating the Agreement with Glanbia/TCC. Glanbia/TCC will be given a reasonable opportunity to respond to the notice and to remedy any breach within a reasonable period of time from the service of the notice.
13) All information, documents and other evidence provided by Glanbia/TCC to the OFT under the Agreement shall, notwithstanding the termination of the Agreement (whether by revocation, the conclusion of the case, including in any proceedings before the CAT, in relation to the infringement or otherwise), remain the property of the OFT and may be used by the OFT to facilitate the performance of its functions by or under any enactment.

14) Nothing in the Agreement affects any of the OFT’s separate ongoing or future investigations into possible infringements of the Competition Act 1998 and/or Articles 81 and 82 of the EC Treaty or of the Enterprise Act 2002 outside the scope of the SO.

If Glanbia/TCC accepts the terms set out in the Agreement, duly authorised representatives of Glanbia (UK) Limited (for itself and on behalf of Waterford Foods International Limited and Glanbia Investments (UK) Limited) and The Cheese Company Limited should countersign the Agreement as indicated below and return a faxed copy to the OFT. The copy bearing the original signature of the duly authorised representatives should then be returned to the OFT as soon as reasonably practicable thereafter. The Agreement will become effective when it has been signed by the OFT, Glanbia (UK) Limited and The Cheese Company Limited.

Yours sincerely,

Sean Williams
Executive Director
Markets and Projects
For the Office of Fair Trading

COUNTERSIGNED ON BEHALF OF GLANBIA (UK) LIMITED, WATERFORD FOODS INTERNATIONAL LIMITED AND GLANBIA INVESTMENTS (UK) LIMITED

Signature:
Name:
Position:
Date: 6 DECEMBER 2007

COUNTERSIGNED ON BEHALF OF THE CHEESE COMPANY LIMITED

Signature:
Name:
APPENDIX: The Infringement

Glanbia Investments (UK) Limited, Glanbia (UK) Limited, The Cheese Company Limited and Waterford Foods International Limited (collectively 'Glanbia/TCC') have infringed the Chapter I prohibition of the Competition Act 1998 through the repeated exchange and/or disclosure of commercially sensitive retail pricing intentions by participating in the following initiative described in the Statement of Objections, issued on 20 September 2007:

- The 2002 Cheese Initiative:

  (i) the single overall concerted practice between Asda, Safeway, Sainsbury, Tesco, Dairy Crest, Glanbia/TCC and McLelland which had as its object the prevention, restriction or distortion of competition in respect of retail prices for UK produced cheese in 2002, as set out in the Statement of Objections; and

  (ii) the bi-partite concerted practices between Asda and Glanbia/TCC, Safeway and Glanbia/TCC, Sainsbury and Glanbia/TCC, and Tesco and Glanbia/TCC which had as their object the prevention, restriction or distortion of competition in respect of retail prices for UK produced cheese in 2002, as set out in the Statement of Objections.
By Special Delivery

Lactalis McLelland Limited
10th Floor, C.I. Tower
High Street, New Malden
Surrey KT3 4TT

FAO

Our ref CE/3094-03
Date

Direct line (020) 7211 8707
Fax (020) 7211 8575
Email Sonya.Branch@oft.gsl.gov.uk

Dear Sirs,

Lactalis McLelland Limited (‘McLelland’)- Competition Act 1998 Case CE/3094-03 (Dairy Retail Price Initiatives Investigation)

As you are aware, the Office of Fair Trading (the ‘OFT’) proposes to make a decision in terms of the Statement of Objections issued on 20 September 2007 (the ‘SO’) that McLelland, as defined in paragraph 22 and paragraphs 106-112 of the SO, and other parties set out in paragraph 3 of the SO have infringed the Chapter I prohibition of the Competition Act 1998, through the repeated exchange and/or disclosure of commercially sensitive retail pricing intentions in respect of UK produced cheese in 2002 and 2003, as listed in the Appendix (the ‘Infringements’).

You have indicated McLelland’s willingness to admit its involvement in relation to all of the Infringements. You have also indicated McLelland’s willingness to co-operate in the OFT’s desire to expedite the process of concluding its investigation. Further to discussions between the OFT and McLelland, this letter (the ‘Agreement’) sets out the terms upon which the OFT would be prepared to resolve its investigation of the Infringements, were McLelland to accept these terms.

1) McLelland will, by signing the Agreement, admit its involvement in the Infringements.

2) McLelland will maintain continuous and complete co-operation throughout the investigation and until the conclusion of any action by the OFT arising as a result of the investigation; and reference to such action includes any action taken by the OFT in any proceedings before the Competition Appeal Tribunal (the ‘CAT’) arising from a decision of the OFT in connection with the Infringements.
In relation to the Infringements, save as otherwise agreed with the OFT, this may include but may not be limited to:

a) McLelland using reasonable endeavours to secure the complete and truthful cooperation of its current and former directors, officers, employees and agents and encouraging such persons to voluntarily provide the OFT with specific and valuable information (directly or indirectly), by 14 March 2008, which supports McLelland’s admission and, if applicable, supports the OFT’s findings in respect of the infringing conduct of the other parties to which the SO is addressed;

b) McLelland using reasonable endeavours to ensure that such information is closely referenced to any available contemporaneous evidence, states the identities of individuals involved in the Infringements (their names, job description, the name of their employer), clearly outlines the infringing conduct (i.e. outlining what was said or agreed) and specifies dates and venues relevant to the Infringements;

c) McLelland using reasonable endeavours to secure the complete and truthful cooperation of its current and former directors, officers, employees and agents and encouraging such persons to attend interviews in order to provide the OFT with specific and valuable information relevant to the Infringements;

d) McLelland facilitating the ability of current and former directors, officers, employees and agents to appear for such interviews as the OFT may reasonably require at the times and places reasonably designated by the OFT;

e) McLelland using reasonable endeavours to ensure that current and former directors, officers, employees and agents who provide information to the OFT respond completely and truthfully to all questions asked in interviews;

f) In relation to any CAT proceedings, McLelland using reasonable endeavours to facilitate, and secure the complete and truthful cooperation of its current and former directors, officers, employees and agents, even if McLelland is not a party to those CAT proceedings, in:
   (i) assisting the OFT or its counsel in the preparation for those CAT proceedings;
   (ii) if requested by the OFT or its counsel, attending those CAT proceedings; and
   (iii) speaking to their witness statements and being cross-examined on such witness statements in those CAT proceedings.

The OFT will accept from McLelland a concise memorandum indicating any material factual inaccuracies in the SO, which should be received by the OFT by 14 March 2008. Should the memorandum, in the opinion of the OFT, go so far as to contest McLelland’s liability for all or any part of the Infringements or represent that the penalty should be other than as set out in the Agreement, or otherwise exceed the scope identified in the previous sentence, the OFT will notify McLelland of its concerns. Should McLelland not agree promptly to amend its representations in a manner which satisfies the OFT, the OFT may treat any
agreement on the terms set out in the Agreement as ceasing to have effect and shall notify McLelland accordingly.

5) In relation to the Infringements, McLelland will refrain from seeking access to documents on the OFT's file, other than those documents directly relied on and referred to in the SO.

6) The OFT will adopt a decision in respect of the Infringements which will:
   a) as to substance,
      (i) set out the OFT's findings of the facts which had taken place in materially the same form as set out in the SO, subject to any amendments deemed necessary and appropriate by the OFT as a result of the representations referred to in paragraph 4 or equivalent representations from the other recipients of the SO;
      (ii) note McLelland's admission as to involvement in the Infringements and conclude that such Infringements had been committed;
      (iii) have a copy of the Agreement annexed to it.
   b) as to remedy,
      (i) set out the OFT's approach to calculating the penalty in accordance with its published guidance and note that for the purpose of applying its guidance on penalties in Competition Act 1998 cases the OFT would have adopted a 'starting point' of 6% of relevant turnover in the absence of resolution on the terms of the Agreement;
      (ii) set out clearly the factors considered in determining this 'starting point';
      (iii) impose a penalty on McLelland of £4,025,575 before any discount for co-operation;
      (iv) note that we anticipate that the penalty figure for McLelland also includes a reduction in recognition of the procedural co-operation as set out in the Agreement, which will enable the OFT to complete its investigation into the Infringements more speedily and effectively. A reduction of up to 30% is available for procedural co-operation with the OFT's investigation. If McLelland co-operates fully as set out in the Agreement the OFT will therefore impose a penalty on McLelland of £2,817,903.

7) In relation to the Infringements, if McLelland brings appeal proceedings before the CAT in respect of the OFT's decision, the OFT reserves the right to make an application to the CAT:
   a) to increase the penalty imposed on McLelland in relation to the Infringements; and
   b) to require McLelland to pay the OFT's full costs of the appeal regardless of the outcome of that appeal.
8) Following McLelland’s acceptance of the terms of the Agreement, the OFT will make a press announcement concerning the Agreement. The OFT will make that announcement at 09.00 on the day that the Agreement comes into effect. The OFT will share with McLelland its final press announcement 48 hours before that announcement to enable McLelland to comment in relation to the final press release and McLelland will do the same in respect of any press announcement it intends to make. The OFT will consider any comments that McLelland raises but is not obliged to make any changes to its press release. McLelland agrees to do the same in respect of any comments raised by the OFT. Any announcements, interviews or briefings made by McLelland to the stock exchange, press or other third parties shall not contradict any of the OFT’s proposed findings in relation to the Infringements set out in the SO.

9) The OFT agrees that any announcement by it concerning the Agreement shall not be made until a resolution agreement has either been signed by the last of the parties in resolution discussions or in any event no later than 19 February 2008.

10) In relation to the Infringements, if the event that McLelland wishes to withdraw its admission, seek access to documents on the file other than those relied on in the SO, or submit representations that exceed the scope envisaged in paragraph 4 above, McLelland will notify the OFT that it is terminating the Agreement. All terms of the Agreement, including but not limited to the agreed final penalty and procedural co-operation reduction referred to at paragraph 6 above, will then cease to have effect and the OFT will pursue its investigation in accordance with its normal procedures.

11) The OFT may, subject to the provisions of paragraph 12 below, terminate the Agreement and impose any penalty in accordance with section 36 of the Competition Act 1998 in relation to the Infringements if, at any time before conclusion of the case including any proceedings before the CAT (whether by adopting a decision or otherwise), it determines that the conditions in paragraphs 1-8 above have not been complied with.

12) Before terminating the Agreement, the OFT shall give written notice to McLelland of the nature of the alleged non-compliance and that the OFT is considering terminating the Agreement with McLelland. McLelland will be given a reasonable opportunity to respond to the notice and to remedy any breach within a reasonable period of time from the service of the notice.

13) All information, documents and other evidence provided by McLelland to the OFT under the Agreement shall, notwithstanding the termination of the Agreement (whether by revocation, the conclusion of the case, including in any proceedings before the CAT, in relation to the Infringements or otherwise), remain the property of the OFT and may be used by the OFT to facilitate the performance of its functions by or under any enactment.

14) Nothing in the Agreement affects any of the OFT’s separate ongoing or future investigations into possible infringements of the Competition Act 1998 and/or Articles 81 and 82 of the EC Treaty or of the Enterprise Act 2002 outside the scope of the SO.

If McLelland accepts the terms set out in the Agreement, a duly authorised representative of McLelland should countersign the Agreement as indicated below and return a faxed copy to the
OFT. The copy bearing the original signature of the duly authorised representative should then be returned to the OFT as soon as reasonably practicable thereafter. The Agreement will become effective when it has been signed by both the OFT and McLelland.

Yours sincerely,

\[signature\]

Sonya Branch  
Senior Director  
Markets and Projects  
For the Office of Fair Trading

COUNTERSIGNED ON BEHALF OF McLELLAND

Signature: 
Name: 
Position: 
Date: 13/12/08
Lactalis McLelland Limited (‘McLelland’) has infringed the Chapter I prohibition of the Competition Act 1998 through the repeated exchange and/or disclosure of commercially sensitive retail pricing intentions by participating in the following initiatives described in the Statement of Objections, issued on 20 September 2007:

- **The 2002 Cheese Initiative**
  
  (i) the single overall concerted practice between Asda, Safeway, Sainsbury, Tesco, Dairy Crest, Glanbia and McLelland which had as its object the prevention, restriction or distortion of competition in respect of retail prices for UK produced cheese in 2002, as set out in the Statement of Objections; and
  
  (ii) the bi-partite concerted practices between Asda and McLelland, Safeway and McLelland, Sainsbury and McLelland, and Tesco and McLelland which had as their object the prevention, restriction or distortion of competition in respect of retail prices for UK produced cheese in 2002, as set out in the Statement of Objections.

- **The 2003 Cheese Initiative**
  
  (i) the single overall concerted practice between Asda, Sainsbury, Tesco and McLelland which had as its object the prevention, restriction or distortion of competition in respect of retail prices for UK produced cheese in 2003, as set out in the Statement of Objections; and
  
  (ii) the bi-partite concerted practices between Asda and McLelland, Sainsbury and McLelland, and Tesco and McLelland which had as their object the prevention, restriction or distortion of competition in respect of retail prices for UK produced cheese in 2003, as set out in the Statement of Objections.
By Special Delivery

Safeway Stores Limited
Hilmore House
Gain Lane
Bradford
West Yorkshire BD3 7DL

Stores Group Limited
Hilmore House
Gain Lane
Bradford
West Yorkshire BD3 7DL

Safeway Limited
Hilmore House
Gain Lane
Bradford
West Yorkshire BD3 7DL

FAQ
(Care of Suyong Kim, Wilmer Hale)

Your ref
Our ref CE/3094-03
Date

Direct line (020) 7211 8675
Fax (020) 7211 8538
Email Sean.Williams@oft.gsi.gov.uk

Dear Sirs,

Statement of Objections, Case CE/3094-03 (Dairy Retail Price Initiatives Investigation)

As you are aware, the Office of Fair Trading (the ‘OFT’) proposes to make a decision in terms of
the Statement of Objections issued on 20 September 2007 (the ‘SO’) that Safeway Stores
Limited, Stores Group Limited, Safeway Limited (collectively referred to throughout the rest of this
letter as ‘Safeway’) and the other parties set out in paragraph 3 of the SO have infringed the
Chapter I prohibition of the Competition Act 1998, through the repeated exchange and/or
disclosure of commercially sensitive retail pricing intentions in respect of various dairy products in
2002 to 2003, as listed in the Appendix (the ‘Infringements’).

You have indicated Safeway’s willingness to admit its involvement in relation to all of the
Infringements. You have also indicated Safeway’s willingness to co-operate in the OFT’s desire to
expedite the process of concluding its investigation. Further to discussions between the OFT and
Safeway, this letter (the ‘Agreement’) sets out the terms upon which the OFT would be prepared
to resolve its investigation of the Infringements, were Safeway to accept these terms.

1) Safeway will, by signing the Agreement, admit its involvement in the Infringements.
2) Safeway will maintain continuous and complete co-operation throughout the investigation and until the conclusion of any action by the OFT arising as a result of the investigation; and reference to such action includes any action taken by the OFT in any proceedings before the Competition Appeal Tribunal (the "CAT") arising from a decision of the OFT in connection with the Infringements.

3) In relation to the Infringements, save as otherwise agreed with the OFT, this may include but may not be limited to:

a) Safeway using reasonable endeavours to secure the complete and truthful cooperation of its current and former directors, officers, employees and agents and encouraging such persons to voluntarily provide the OFT with specific and valuable information (directly or indirectly), by 31 January 2008, which supports Safeway’s admission and, if applicable, supports the OFT’s findings in respect of the infringing conduct of the other parties to which the SO is addressed;

b) Safeway using reasonable endeavours to ensure that such information is closely referenced to any available contemporaneous evidence, states the identities of individuals involved in the Infringements (their names, job description, the name of their employer), clearly outlines the infringing conduct (i.e. outlining what was said or agreed) and specifies dates and venues relevant to the Infringements;

c) Safeway using reasonable endeavours to secure the complete and truthful cooperation of its current and former directors, officers, employees and agents and encouraging such persons to attend interviews in order to provide the OFT with specific and valuable information relevant to the Infringements;

d) Safeway facilitating the ability of current and former directors, officers, employees and agents to appear for such interviews as the OFT may reasonably require at the times and places reasonably designated by the OFT;

e) Safeway using reasonable endeavours to ensure that current and former directors, officers, employees and agents who provide information to the OFT respond completely and truthfully to all questions asked in interviews;

f) in relation to any CAT proceedings, Safeway using reasonable endeavours to facilitate, and secure the complete and truthful co-operation, of its current and former directors, officers, employees and agents, even if Safeway is not a party to those CAT proceedings, in:

(i) assisting the OFT or its counsel in the preparation for those CAT proceedings;

(ii) if requested by the OFT or its counsel, attending those CAT proceedings; and

(iii) speaking to their witness statements and being cross-examined on such witness statements in those CAT proceedings.

4) The OFT will accept from Safeway a concise memorandum indicating any material factual inaccuracies in the SO, which should be received by the OFT by 31 January 2008. Should
the memorandum, in the opinion of the OFT, go so far as to contest Safeway's liability for all or any part of the Infringements or represent that the penalty should be other than as set out in the Agreement, or otherwise exceed the scope identified in the previous sentence, the OFT will notify Safeway of its concerns. Should Safeway not agree promptly to amend its representations in a manner which satisfies the OFT, the OFT may treat any agreement on the terms set out in the Agreement as ceasing to have effect and shall notify Safeway accordingly.

5) In relation to the Infringements, Safeway will refrain from seeking access to documents on the OFT's file, other than those documents directly relied on and referred to in the SO.

6) The OFT will adopt a decision in respect of the Infringements which will:

a) as to substance,

(i) set out the OFT's findings of the facts which had taken place in materially the same form as set out in the SO, subject to any amendments deemed necessary and appropriate by the OFT as a result of the representations referred to in paragraph 4 or equivalent representations from the other recipients of the SO;

(ii) note Safeway's admission as to involvement in the Infringements and conclude that such Infringements had been committed;

(iii) have a copy of the Agreement annexed to it.

b) as to remedy,

(i) set out the OFT's approach to calculating the penalty in accordance with its published guidance and note that for the purpose of applying its guidance on penalties in Competition Act 1998 cases the OFT would have adopted a 'starting point' of 6% of relevant turnover in the absence of resolution on the terms of the Agreement;

(ii) set out clearly the factors considered in determining this 'starting point';

(iii) impose a penalty on Safeway of £16,449,893 before any discount for co-operation;

(iv) note that we anticipate that the penalty figure for Safeway also includes a reduction in recognition of the procedural co-operation as set out in the Agreement, which will enable the OFT to complete its investigation into the Infringements more speedily and effectively. A reduction of up to 30% is available for procedural co-operation with the OFT's investigation. If Safeway co-operates fully as set out in the Agreement the OFT will therefore impose a penalty on Safeway of £10,692,431.

7) In relation to the Infringements, if Safeway brings appeal proceedings before the CAT in respect of the OFT's decision, the OFT reserves the right to make an application to the CAT:
a) to increase the penalty imposed on Safeway in relation to the Infringements; and
b) to require Safeway to pay the OFT's full costs of the appeal regardless of the outcome of that appeal.

8) Following Safeway's acceptance of the terms of the Agreement, the OFT will make a press announcement concerning the Agreement. The OFT will make that announcement at 07.00 on the day that the Agreement comes into effect. The OFT will share with Safeway its final press announcement 48 hours before that announcement to enable Safeway to comment in relation to the final press release and Safeway will do the same in respect of any press announcement it intends to make. The OFT will consider any comments that Safeway raises but is not obliged to make any changes to its press release. Safeway agrees to do the same in respect of any comments raised by the OFT. Any announcements, interviews or briefings made by Safeway to the stock exchange, press or other third parties shall not contradict any of the OFT's proposed findings in relation to the Infringements set out in the SO.

9) The OFT agrees that any announcement by it concerning the Agreement shall not be made until a resolution agreement has either been signed by the last of the parties in resolution discussions or in any event no later than 7 December 2007.

10) In relation to the Infringements, in the event that Safeway wishes to withdraw its admission, seek access to documents on the file other than those relied on in the SO, or submit representations that exceed the scope envisaged in paragraph 4 above, Safeway will notify the OFT that it is terminating the Agreement. All terms of the Agreement, including but not limited to the agreed final penalty and procedural co-operation reduction referred to at paragraph 6 above, will then cease to have effect and the OFT will pursue its investigation in accordance with its normal procedures.

11) The OFT may, subject to the provisions of paragraph 12 below, terminate the Agreement and impose any penalty in accordance with section 38 of the Competition Act 1998 in relation to the Infringements if, at any time before conclusion of the case including any proceedings before the CAT (whether by adopting a decision or otherwise), it determines that the conditions in paragraphs 1-8 above have not been complied with.

12) Before terminating the agreement, the OFT shall give written notice to Safeway of the nature of the alleged non-compliance and that the OFT is considering terminating the Agreement with Safeway. Safeway will be given a reasonable opportunity to respond to the notice and to remedy any breach within a reasonable period of time from the service of the notice.

13) All information, documents and other evidence provided by Safeway to the OFT under the Agreement shall, notwithstanding the termination of the Agreement (whether by revocation, the conclusion of the case, including in any proceedings before the CAT, in relation to the Infringements or otherwise), remain the property of the OFT and may be used by the OFT to facilitate the performance of its functions by or under any enactment.
14) Nothing in the Agreement affects any of the OFT’s separate ongoing or future investigations into possible infringements of the Competition Act 1998 and/or Articles 81 and 82 of the EC Treaty or of the Enterprise Act 2002 outside the scope of the SO.

If Safeway accepts the terms set out in the Agreement, a duly authorised representative of Safeway should countersign the Agreement as indicated below and return a faxed copy to the OFT. The copy bearing the original signature of the duly authorised representative should then be returned to the OFT as soon as reasonably practicable thereafter. The Agreement will become effective when it has been signed by both the OFT and Safeway.

Yours sincerely,

[Signature]

Sean Williams
Executive Director
Markets and Projects
For the Office of Fair Trading

COUNTERSIGNED ON BEHALF OF SAFEWAY

Signature: [Redacted]
Name: [Redacted]
Position: [Redacted]
Date: 6/12/07
APPENDIX: The Infringements

Safeway Stores Limited, Stores Group Limited, Safeway Limited (collectively referred to throughout the rest of this letter as 'Safeway') has infringed the Chapter I prohibition of the Competition Act 1998 through the repeated exchange and/or disclosure of commercially sensitive retail pricing intentions by participating in the following initiatives described in the Statement of Objections, issued on 20 September 2007:

- The 2002 Liquid Milk Initiative
  
  (i) the single overall concerted practice involving Safeway and alleged to be between Asda, Morrisons, Safeway, Sainsbury, Tesco and Arla which had as its object the prevention, restriction or distortion of competition in respect of fresh liquid milk ('FLM'), Cravendale retail prices in 2002, as set out in the Statement of Objections; and
  
  (ii) the bi-partite concerted practices between Safeway and Arla which had as their object the prevention, restriction or distortion of competition in respect of FLM, Cravendale retail prices in 2002, as set out in the Statement of Objections.

- The 2002 Cheese Initiative
  
  (i) the single overall concerted practice involving Safeway and alleged to be between Asda, Safeway, Sainsbury, Tesco, Dairy Crest, Gianbila and McLelland which had as its object the prevention, restriction or distortion of competition in respect of retail prices for UK produced cheese in 2002, as set out in the Statement of Objections; and
  
  (ii) the bi-partite concerted practices between Safeway and Dairy Crest, Safeway and Gianbila, and Safeway and McLelland which had as their object the prevention, restriction or distortion of competition in respect of retail prices for UK produced cheese in 2002, as set out in the Statement of Objections.

- The 2003 FLM Initiative
  
  (i) the single overall concerted practice involving Safeway and alleged to be between Asda, Safeway, Sainsbury, Tesco, Arla, Dairy Crest and Wiseman which had as its object the prevention, restriction or distortion of competition in respect of FLM retail prices in 2003, as set out in the Statement of Objections; and
  
  (iii) the bi-partite concerted practices between Safeway and Wiseman which had as their object the prevention, restriction or distortion of competition in respect of FLM retail prices in 2003, as set out in the Statement of Objections.
The 2003 Butter Initiative

(i) the single overall concerted practice involving Safeway and alleged to be between Safeway, Tesco and Dairy Crest which had as its object the prevention, restriction or distortion of competition in respect of retail prices for UK produced butter in 2003, as set out in the Statement of Objections; and

(ii) the bi-partite concerted practices between Safeway and Dairy Crest which had as their object the prevention, restriction or distortion of competition in respect of retail prices for UK produced butter in 2003, as set out in the Statement of Objections.
By Special Delivery

J Sainsbury plc
33 Holborn
London EC1N 2HT

Sainsbury’s Supermarkets Limited
33 Holborn
London EC1N 2HT

(Care of Nicole Kar, Tony Morris)

Your ref  CE/3094-03
Our ref  Direct line  (020) 7211 8675
Date   Fax       (020) 7211 8538
3 December 2007
Email   Sean.Williams@oft.gsi.gov.uk

Dear Sirs

J Sainsbury plc, Sainsbury’s Supermarkets Limited (collectively ‘Sainsbury’s’)- Competition Act 1998 Case CE/3094-03 (Dairy Retail Price Initiatives Investigation)

As you are aware, the Office of Fair Trading (the ‘OFT’) proposes to make a decision in terms of the Statement of Objections issued on 20 September 2007 (the ‘SO’) that Sainsbury’s and the other parties set out in paragraph 3 of the SO have infringed the Chapter I prohibition of the Competition Act 1998, through the repeated exchange and/or disclosure of commercially sensitive retail pricing intentions in respect of various dairy products in 2002 to 2003, as listed in the Appendix (the ‘Infringements’).

You have indicated Sainsbury’s willingness to admit its involvement in relation to all of the Infringements. You have also indicated Sainsbury’s willingness to co-operate in the OFT’s desire to expedite the process of concluding its investigation. Further to discussions between the OFT and Sainsbury’s, this letter (the ‘Agreement’) sets out the terms upon which the OFT would be prepared to resolve its investigation of the Infringements, were Sainsbury’s to accept these terms.

1) Sainsbury’s will, by signing the Agreement, admit its involvement in the Infringements.

2) Sainsbury’s will maintain continuous and complete co-operation throughout the investigation and until the conclusion of any action by the OFT arising as a result of the investigation; and reference to such action includes any action taken by the OFT in any proceedings before the Competition Appeal Tribunal (the ‘CAT’) arising from a decision of the OFT in connection with the Infringements.

3) In relation to the Infringements, save as otherwise agreed with the OFT, this may include but may not be limited to:

   a) Sainsbury’s using reasonable endeavours to secure the complete and truthful cooperation of its current and former directors, officers, employees and agents and encouraging such persons to voluntarily provide the OFT with specific and valuable...
information (directly or indirectly), by 31 January 2008, which supports Sainsbury’s admission and, if applicable, supports the OFT’s findings in respect of the infringing conduct of the other parties to which the SO is addressed;

b) Sainsbury’s using reasonable endeavours to ensure that such information is closely referenced to any available contemporaneous evidence, states the identities of individuals involved in the Infringements (their names, job description, the name of their employer), clearly outlines the infringing conduct (i.e. outlining what was said or agreed) and specifies dates and venues relevant to the Infringements;

c) Sainsbury’s using reasonable endeavours to secure the complete and truthful cooperation of its current and former directors, officers, employees and agents and encouraging such persons to attend interviews in order to provide the OFT with specific and valuable information relevant to the Infringements;

d) Sainsbury’s facilitating the ability of current and former directors, officers, employees and agents to appear for such interviews as the OFT may reasonably require at the times and places reasonably designated by the OFT;

e) Sainsbury’s using reasonable endeavours to ensure that current and former directors, officers, employees and agents who provide information to the OFT respond completely and truthfully to all questions asked in interviews;

f) in relation to any CAT proceedings, Sainsbury’s using reasonable endeavours to facilitate, and secure the complete and truthful co-operation, of its current and former directors, officers, employees and agents, even if Sainsbury’s is not a party to those CAT proceedings, in:

(i) assisting the OFT or its counsel in the preparation for those CAT proceedings;

(ii) if requested by the OFT or its counsel, attending those CAT proceedings; and

(iii) speaking to their witness statements and being cross-examined on such witness statements in those CAT proceedings.

4) The OFT will accept from Sainsbury’s a concise memorandum indicating any material factual inaccuracies in the SO, which should be received by the OFT by 31 January 2008. Should the memorandum, in the opinion of the OFT, go so far as to contest Sainsbury’s liability for all or any part of the Infringements or represent that the penalty should be other than as set out in the Agreement, or otherwise exceed the scope identified in the previous sentence, the OFT will notify Sainsbury’s of its concerns. Should Sainsbury’s not agree promptly to amend its representations in a manner which satisfies the OFT, the OFT may treat any agreement on the terms set out in the Agreement as ceasing to have effect and shall notify Sainsbury’s accordingly.

5) In relation to the Infringements, Sainsbury’s will refrain from seeking access to documents on the OFT’s file, other than those documents directly relied on and referred to in the SO.

6) The OFT will adopt a decision in respect of the Infringements which will:
a) as to substance,

(i) set out the OFT's findings of the facts which had taken place in materially the same form as set out in the SO, subject to any amendments deemed necessary and appropriate by the OFT as a result of the representations referred to in paragraph 4 or equivalent representations from the other recipients of the SO;

(ii) note Sainsbury's admission as to involvement in the Infringements and conclude that such Infringements had been committed;

(iii) have a copy of the Agreement annexed to it.

b) as to remedy,

(i) set out the OFT's approach to calculating the penalty in accordance with its published guidance and note that for the purpose of applying its guidance on penalties in Competition Act 1998 cases the OFT would have adopted a 'starting point' of 6% of relevant turnover in the absence of resolution on the terms of the Agreement;

(ii) set out clearly the factors considered in determining this 'starting point';

(iii) impose a penalty on Sainsbury's of £40,089,028 before any discount for co-operation;

(iv) note that we anticipate that the penalty figure for Sainsbury's also includes a reduction in recognition of the procedural co-operation as set out in the Agreement, which will enable the OFT to complete its investigation into the Infringements more speedily and effectively. A reduction of up to 35% is available for procedural co-operation with the OFT's investigation. If Sainsbury's co-operates fully as set out in the Agreement the OFT will therefore impose a penalty on Sainsbury's of £26,057,868.

7) In relation to the Infringements, if Sainsbury's brings appeal proceedings before the CAT in respect of the OFT's decision, the OFT reserves the right to make an application to the CAT:

a) to increase the penalty imposed on Sainsbury's in relation to the Infringements; and

b) to require Sainsbury's to pay the OFT's full costs of the appeal regardless of the outcome of that appeal.

8) Following Sainsbury's acceptance of the terms of the Agreement, the OFT will make a press announcement concerning the Agreement. The OFT will make that announcement at 07.00 on the day that the Agreement comes into effect. The OFT will share with Sainsbury's its final press announcement 48 hours before that announcement to enable Sainsbury's to comment in relation to the final press release and Sainsbury's will do the same in respect of any press announcement it intends to make. The OFT will consider any comments that Sainsbury's raises but is not obliged to make any changes to its press
release. Sainsbury’s agrees to do the same in respect of any comments raised by the OFT. Any announcements, interviews or briefings made by Sainsbury’s to the stock exchange, press or other third parties shall not contradict any of the OFT’s proposed findings in relation to the Infringements set out in the SO.

9) The OFT agrees that any announcement by it concerning the Agreement shall not be made until a resolution agreement has either been signed by the last of the parties in resolution discussions or in any event no later than 7 December 2007.

10) In relation to the Infringements, in the event that Sainsbury’s wishes to withdraw its admission, seek access to documents on the file other than those relied on in the SO, or submit representations that exceed the scope envisaged in paragraph 4 above, Sainsbury’s will notify the OFT that it is terminating the Agreement. All terms of the Agreement, including but not limited to the agreed final penalty and procedural co-operation reduction referred to at paragraph 6 above, will then cease to have effect and the OFT will pursue its investigation in accordance with its normal procedures.

11) The OFT may, subject to the provisions of paragraph 12 below, terminate the Agreement and impose any penalty in accordance with section 36 of the Competition Act 1998 in relation to the Infringements if, at any time before conclusion of the case including any proceedings before the CAT (whether by adopting a decision or otherwise), it determines that the conditions in paragraphs 1-8 above have not been complied with.

12) Before terminating the agreement, the OFT shall give written notice to Sainsbury’s of the nature of the alleged non-compliance and that the OFT is considering terminating the agreement with Sainsbury’s. Sainsbury’s will be given a reasonable opportunity to respond to the notice and to remedy any breach within a reasonable period of time from the service of the notice.

13) All information, documents and other evidence provided by Sainsbury’s to the OFT under the Agreement shall, notwithstanding the termination of the Agreement (whether by revocation, the conclusion of the case, including in any proceedings before the CAT, in relation to the Infringements or otherwise), remain the property of the OFT and may be used by the OFT to facilitate the performance of its functions by or under any enactment.

14) Nothing in the Agreement affects any of the OFT’s separate ongoing or future investigations into possible infringements of the Competition Act 1998 and/or Articles 81 and 82 of the EC Treaty or of the Enterprise Act 2002 outside the scope of the SO.

If Sainsbury’s accepts the terms set out in the Agreement, a duly authorised representative of Sainsbury’s should countersign the Agreement as indicated below and return a faxed copy to the OFT. The copy bearing the original signature of the duly authorised representative should then be returned to the OFT as soon as reasonably practicable thereafter. The Agreement will become effective when it has been signed by both the OFT and Sainsbury’s.

Yours sincerely,
Sean Williams
Executive Director
Markets and Projects
For the Office of Fair Trading

COUNTERSIGNED ON BEHALF OF SAINSBURY'S

Signature: 
Name: 
Position: 
Date: 4.12.07
APPENDIX: The Infringements

J Sainsbury plc, Sainsbury's Supermarkets Limited (collectively 'Sainsbury's') has infringed the Chapter I prohibition of the Competition Act 1998 through the repeated exchange and/or disclosure of commercially sensitive retail pricing intentions by participating in the following initiatives described in the Statement of Objections, issued on 20 September 2007:

- The 2002 Liquid Milk Initiative

  (i) the single overall concerted practice between Asda, Morrisons, Safeway, Sainsbury's, Tesco and Arla which had as its object the prevention, restriction or distortion of competition in respect of fresh liquid milk ('FLM'), Cravendale and Cheapest on Display ultra heat treated extended shelf life milk ('COD UHT') retail prices in 2002, as set out in the Statement of Objections; and

  (ii) the bi-partite concerted practices between Sainsbury's and Arla which had as their object the prevention, restriction or distortion of competition in respect of FLM, Cravendale and COD UHT retail prices in 2002, as set out in the Statement of Objections.

- The 2002 Cheese Initiative

  (i) the single overall concerted practice between Asda, Safeway, Sainsbury's, Tesco, Dairy Crest, Glanbia and McLelland which had as its object the prevention, restriction or distortion of competition in respect of retail prices for UK produced cheese in 2002, as set out in the Statement of Objections; and

  (ii) the bi-partite concerted practices between Sainsbury's and Dairy Crest, Sainsbury's and Glanbia, and Sainsbury's and McLelland which had as their object the prevention, restriction or distortion of competition in respect of retail prices for UK produced cheese in 2002, as set out in the Statement of Objections.

- The 2003 FLM Initiative

  (i) the single overall concerted practice between Asda, Safeway, Sainsbury's, Tesco, Arla, Dairy Crest and Wiseman which had as its object the prevention, restriction or distortion of competition in respect of FLM retail prices in 2003, as set out in the Statement of Objections; and

  (ii) the bi-partite concerted practices between Sainsbury's and Arla, Sainsbury's and Dairy Crest, and Sainsbury's and Wiseman which had as their object the prevention, restriction or distortion of competition in respect of FLM retail prices in 2003, as set out in the Statement of Objections.
The 2003 Cheese Initiative

(i) the single overall concerted practice between Asda, Sainsbury's, Tesco and McLelland which had as its object the prevention, restriction or distortion of competition in respect of retail prices for UK produced cheese in 2003, as set out in the Statement of Objections; and

(ii) the bi-partite concerted practices between Sainsbury's and McLelland which had as their object the prevention, restriction or distortion of competition in respect of retail prices for UK produced cheese in 2003, as set out in the Statement of Objections.
By Special Delivery

Robert Wiseman Dairies plc
159 Glasgow Road
East Kilbride
Glasgow G74 4PA
FAO

(Care of Morag Bond and James Quinney,
Herbert Smith)

Our ref CE/3094-03                     Direct line (020) 7211 8675
Date 4 December 2007                  Fax (020) 7211 8538
Email Sean.Williams@oft.gsi.gov.uk

Dear Sirs,

Robert Wiseman Dairies plc ('Wiseman') - Competition Act 1998 Case CE/3094-03 (Dairy Retail Price Initiatives Investigation)

As you are aware, the Office of Fair Trading (the 'OFT') proposes to make a decision in terms of the Statement of Objections issued on 20 September 2007 (the 'SO') that Wiseman and other parties set out in paragraph 3 of the SO have infringed the Chapter I prohibition of the Competition Act 1998, through the repeated exchange and/or disclosure of commercially sensitive retail pricing intentions in respect of fresh liquid milk in 2003, as listed in the Appendix (the 'Infringement').

You have indicated Wiseman's willingness to admit its involvement in relation to the Infringement. You have also indicated Wiseman's willingness to co-operate in the OFT's desire to expedite the process of concluding its investigation. Further to discussions between the OFT and Wiseman, this letter (the 'Agreement') sets out the terms upon which the OFT would be prepared to resolve its investigation of the Infringement, were Wiseman to accept these terms.

1) Wiseman will, by signing the Agreement, admit its involvement in the Infringement.

2) Wiseman will maintain continuous and complete co-operation throughout the investigation and until the conclusion of any action by the OFT arising as a result of the investigation; and reference to such action includes any action taken by the OFT in any proceedings before the Competition Appeal Tribunal (the 'CAT') arising from a decision of the OFT in connection with the Infringement.

3) In relation to the Infringement, save as otherwise agreed with the OFT, this may include but may not be limited to:

   a) Wiseman using reasonable endeavours to secure the complete and truthful cooperation of its current and former directors, officers, employees and agents and encouraging such persons to voluntarily provide the OFT with specific and valuable information (directly or indirectly), by 31 January 2008, which supports Wiseman's admission

Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London EC4V 8JX
Switchboard: (020) 7211 8000
and, if applicable, supports the OFT's findings in respect of the infringing conduct of the other parties to which the SO is addressed;

b) Wiseman using reasonable endeavours to ensure that such information is closely referenced to any available contemporaneous evidence, states the identities of individuals involved in the Infringement (their names, job description, the name of their employer), clearly outlines the infringing conduct (i.e. outlining what was said or agreed) and specifies dates and venues relevant to the Infringement;

c) Wiseman using reasonable endeavours to secure the complete and truthful cooperation of its current and former directors, officers, employees and agents and encouraging such persons to attend interviews in order to provide the OFT with specific and valuable information relevant to the Infringement;

d) Wiseman facilitating the ability of current and former directors, officers, employees and agents to appear for such interviews as the OFT may reasonably require at the times and places reasonably designated by the OFT;

e) Wiseman using reasonable endeavours to ensure that current and former directors, officers, employees and agents who provide information to the OFT respond completely and truthfully to all questions asked in interviews;

f) In relation to any CAT proceedings, Wiseman using reasonable endeavours to facilitate, and secure the complete and truthful co-operation, of its current and former directors, officers, employees and agents, even if Wiseman is not a party to those CAT proceedings, in:

(i) assisting the OFT or its counsel in the preparation for those CAT proceedings;

(ii) if requested by the OFT or its counsel, attending those CAT proceedings; and

(iii) speaking to their witness statements and being cross-examined on such witness statements in those CAT proceedings.

4) The OFT will accept from Wiseman a concise memorandum indicating any material factual inaccuracies in the SO, which should be received by the OFT by 31 January 2008. Should the memorandum, in the opinion of the OFT, go so far as to contest Wiseman's liability for all or any part of the Infringement or represent that the penalty should be other than as set out in the Agreement, or otherwise exceed the scope identified in the previous sentence, the OFT will notify Wiseman of its concerns. Should Wiseman not agree promptly to amend its representations in a manner which satisfies the OFT, the OFT may treat any agreement on the terms set out in the Agreement as ceasing to have effect and shall notify Wiseman accordingly.

5) In relation to the Infringement, Wiseman will refrain from seeking access to documents on the OFT's file, other than those documents directly relied on and referred to in the SO.

6) The OFT will adopt a decision in respect of the Infringement which will:
a) as to substance,

(i) set out the OFT's findings of the facts which had taken place in materially the
same form as set out in the SO, subject to any amendments deemed necessary
and appropriate by the OFT as a result of the representations referred to in
paragraph 4 or equivalent representations from the other recipients of the SO;

(ii) note Wiseman's admission as to involvement in the Infringement and conclude
that such an Infringement had been committed;

(iii) have a copy of the Agreement annexed to it.

b) as to remedy,

(i) set out the OFT's approach to calculating the penalty in accordance with its
published guidance and note that for the purpose of applying its guidance on
penalties in Competition Act 1998 cases the OFT would have adopted a 'starting
point' of 6% of relevant turnover in the absence of resolution on the terms of the
Agreement;

(ii) set out clearly the factors considered in determining this 'starting point';

(iii) impose a penalty on Wiseman of £9,384,417 before any discount for co-
operation;

(iv) note that we anticipate that the penalty figure for Wiseman also includes a
reduction in recognition of the procedural co-operation as set out in the
Agreement, which will enable the OFT to complete its investigation into the
Infringement more speedily and effectively. A reduction of up to 35% is available
for procedural co-operation with the OFT's investigation. If Wiseman co-operates
fully as set out in the Agreement the OFT will therefore impose a penalty on
Wiseman of £6,099,871.

7) In relation to the Infringement, if Wiseman brings appeal proceedings before the CAT in
respect of the OFT's decision, the OFT reserves the right to make an application to the
CAT:

a) to increase the penalty imposed on Wiseman in relation to the Infringement; and

b) to require Wiseman to pay the OFT's full costs of the appeal regardless of the outcome
of that appeal.

8) Following Wiseman's acceptance of the terms of the Agreement, the OFT will make a press
announcement concerning the Agreement. The OFT will make that announcement at 07.00
on the day that the Agreement comes into effect. The OFT will share with Wiseman its final
press announcement 48 hours before that announcement to enable Wiseman to comment in
relation to the final press release and Wiseman will do the same in respect of any press
announcement it intends to make. The OFT will consider any comments that Wiseman
raises but is not obliged to make any changes to its press release. Wiseman agrees to do
the same in respect of any comments raised by the OFT. Any announcements, interviews or
briefings made by Wiseman to the stock exchange, press or other third parties shall not
contradict any of the OFT’s proposed findings in relation to the Infringement set out in the
SO.

9) The OFT agrees that any announcement by it concerning the Agreement shall not be made
until a resolution agreement has either been signed by the last of the parties in resolution
discussions or in any event no later than 7 December 2007.

10) In relation to the Infringement, in the event that Wiseman wishes to withdraw its admission,
seek access to documents on the file other than those relied on in the SO, or submit
representations that exceed the scope envisaged in paragraph 4 above, Wiseman will notify
the OFT that it is terminating the Agreement. All terms of the Agreement, including but not
limited to the agreed final penalty and procedural co-operation reduction referred to at
paragraph 6 above, will then cease to have effect and the OFT will pursue its investigation
in accordance with its normal procedures.

11) The OFT may, subject to the provisions of paragraph 12 below, terminate the Agreement
and impose any penalty in accordance with section 38 of the Competition Act 1998 in
relation to the Infringement if, at any time before conclusion of the case including any
proceedings before the CAT (whether by adopting a decision or otherwise), it determines
that the conditions in paragraphs 1-8 above have not been complied with.

12) Before terminating the agreement, the OFT shall give written notice to Wiseman of the
nature of the alleged non-compliance and that the OFT is considering terminating the
Agreement with Wiseman. Wiseman will be given a reasonable opportunity to respond to
the notice and to remedy any breach within a reasonable period of time from the service of
the notice.

13) All information, documents and other evidence provided by Wiseman to the OFT under the
Agreement shall, notwithstanding the termination of the Agreement (whether by revocation,
the conclusion of the case, including in any proceedings before the CAT, in relation to the
Infringement or otherwise), remain the property of the OFT and may be used by the OFT to
facilitate the performance of its functions by or under any enactment.

14) Nothing in the Agreement affects any of the OFT’s separate ongoing or future investigations
into possible infringements of the Competition Act 1998 and/or Articles 81 and 82 of the
EC Treaty or of the Enterprise Act 2002 outside the scope of the SO.

If Wiseman accepts the terms set out in the Agreement, a duly authorised representative of
Wiseman should countersign the Agreement as indicated below and return a faxed copy to the
OFT. The copy bearing the original signature of the duly authorised representative should then be
returned to the OFT as soon as reasonably practicable thereafter. The Agreement will become
effective when it has been signed by both the OFT and Wiseman.

Yours sincerely,
Sean Williams
Executive Director
Markets and Projects
For the Office of Fair Trading

COUNTERSIGNED ON BEHALF OF ROBERT WISEMAN DAIRIES PLC AND ROBERT WISEMAN & SONS LIMITED

Signature:
Name:
Position:
Date: 4th December 2007
APPENDIX: The Infringement

Robert Wiseman Dairies plc ('Wiseman') has infringed the Chapter I prohibition of the Competition Act 1998 through the repeated exchange and/or disclosure of commercially sensitive retail pricing intentions by participating in the following initiative described in the Statement of Objections, issued on 20 September 2007:

- The 2003 FLM Initiative:
  
  (i) the single overall concerted practice between Asda, Safeway, Sainsbury, Tesco, Arla, Dairy Crest and Wiseman which had as its object the prevention, restriction or distortion of competition in respect of fresh liquid milk retail prices in 2003, as set out in the Statement of Objections; and

(ii) the bi-partite concerted practices between Asda and Wiseman, Safeway and Wiseman, Sainsbury and Wiseman, and Tesco and Wiseman which had as their object the prevention, restriction or distortion of competition in respect of fresh liquid milk retail prices in 2003, as set out in the Statement of Objections.
ANNEXE C: VARIATIONS TO EARLY RESOLUTION AGREEMENTS
VARIATION TO ASDA’S EARLY RESOLUTION AGREEMENT

All terms of the early resolution agreement entered into by the Office of Fair Trading (the 'OFT') and Asda Group Limited ('Asda') on 6 December 2007 (the 'Agreement') will remain unchanged and fully effective, with the exception of the following clauses and the Appendix that are each amended and restated as follows:

Clause 6(b) is amended and restated as follows:

6) The OFT will adopt a decision in respect of the Infringements which will:

a) as to substance,

[...]

b) as to remedy,

(i) set out the OFT's approach to calculating the penalty in accordance with its published guidance and note that for the purpose of applying its guidance on penalties in Competition Act 1998 cases the OFT would have adopted a 'starting point' of 5% of relevant turnover in the absence of resolution on the terms of the Agreement in respect of the 2003 FLM Initiative and a 'starting point' of 6% of relevant turnover in the absence of resolution on the terms of the Agreement in respect of the 2002 Cheese Initiative and the 2003 Cheese Initiative;

(ii) set out clearly the factors considered in determining this 'starting point';

(iii) impose a penalty on Asda of £18,059,657 before any discount for co-operation;

(iv) note that we anticipate that the penalty figure for Asda also includes a reduction in recognition of the procedural co-operation as set out in the Agreement, which will enable the OFT to complete its investigation into the Infringements more speedily and effectively. A reduction of up to 35% is available for procedural co-operation with the OFT’s investigation. If Asda co-operates fully as set out in the Agreement the OFT will therefore impose a penalty on Asda of £11,738,777.

The following text is removed from the Appendix of the Agreement:
"The 2002 Liquid Milk Initiative

(i) the single overall concerted practice between Asda, Morrisons, Safeway, Sainsbury, Tesco and Arla which had as its object the prevention, restriction or distortion of competition in respect of fresh liquid milk ('FLM'), Cravendale and Cheapest on Display ultra heat treated extended shelf life milk ('COD UHT') retail prices in 2002, as set out in the Statement of Objections; and

(ii) the bi-partite concerted practices between Asda and Arla which had as their object the prevention, restriction or distortion of competition in respect of FLM, Cravendale and COD UHT retail prices in 2002, as set out in the Statement of Objections."

Under the heading "The 2003 FLM Initiative", under (i) the word "Tesco" is removed.

If Asda accepts the above variation to the Agreement, a duly authorised representative of Asda should sign this letter as indicated below and return two copies to the OFT no later than Thursday 22 April 2010. Assuming the OFT has taken a decision to close the Investigation into the 2002 Liquid Milk Initiative allegation and Tesco's alleged participation in the 2003 FLM Initiative allegation, the OFT will countersign both copies and return one of these copies to you. The variation to the Agreement will become effective when it has been signed by both the OFT and Asda.

ON BEHALF OF ASDA

Signature

Name:

Position:

Date:

ON BEHALF OF THE OFFICE OF FAIR TRADING

Simon Williams
Senior Director
Markets and Projects, Goods

Date: 5 May 2010
VARIATION TO DAIRY CREST'S EARLY RESOLUTION AGREEMENT

All terms of the early resolution agreement entered into by the Office of Fair Trading (the 'OFT') and Dairy Crest Group plc ('Dairy Crest') on 6 December 2007 (the 'Agreement') will remain unchanged and fully effective, with the exception of the following clauses and the Appendix that are each amended and restated as follows:

Clause 6(b) is amended and restated as follows:

6) The OFT will adopt a decision in respect of the infringements which will:

a) as to substance,

(...)

b) as to remedy,

(i) set out the OFT's approach to calculating the penalty in accordance with its published guidance and note that for the purpose of applying its guidance on penalties in Competition Act 1998 cases the OFT would have adopted a 'starting point' of 5% of relevant turnover in the absence of resolution on the terms of the Agreement in respect of the 2003 FLM Initiative and a 'starting point' of 6% of relevant turnover in the absence of resolution on the terms of the Agreement in respect of the 2002 Cheese Initiative;

(ii) set out clearly the factors considered in determining this 'starting point';

(iii) Impose a penalty on Dairy Crest of £10,985,663 before any discount for cooperation;

(iv) note that we anticipate that the penalty figure for Dairy Crest also includes a reduction in recognition of the procedural co-operation as set out in the Agreement, which will enable the OFT to complete its investigation into the infringements more speedily and effectively. A reduction of up to 35% is available for procedural co-operation with the OFT's investigation. If Dairy Crest cooperates fully as set out in the Agreement the OFT will therefore Impose a penalty on Dairy Crest of £7,140,681.

The following text is removed from the Appendix of the Agreement:

* "The 2003 Butter Initiative"

(i) the single overall concerted practice between Safeway, Tesco and Dairy Crest which had as its object the prevention, restriction or distortion of competition in respect of retail prices for UK produced butter in 2003, as set out in the Statement of Objections; and
(1) the bi-partite concerted practices between Safeway and Dairy Crest, and Tesco and Dairy Crest which had as their object the prevention, restriction or distortion of competition in respect of retail prices for UK produced butter in 2003, as set out in the Statement of Objections.

• Under the heading "The 2003 FLM Initiative", under (1) the word "Tesco" is removed.

If Dairy Crest accepts the above variation to the Agreement, a duly authorised representative of Dairy Crest should sign this letter as indicated below and return two copies to the OFT. Once the OFT has taken a decision to close its investigation into the 2003 Butter Initiative allegation and Tesco's alleged participation in the 2003 FLM Initiative allegation, the OFT will countersign both copies and return one of these copies to you. The variation to the Agreement will become effective when it has been signed by both the OFT and Dairy Crest.

ON BEHALF OF DAIRY CREST

Signature: 

Dairy Crest Group plc

Date: 27th April 2010

ON BEHALF OF THE OFFICE OF FAIR TRADING

Signature: 

Simon Williams
Senior Director
Markets and Projects, Goods

Date: 29 April 2010
VARIATION TO GLANBIA/TCC'S EARLY RESOLUTION AGREEMENT

All terms of the early resolution agreement entered into by the Office of Fair Trading (the 'OFT') and Glanbia (UK) Limited, Waterford Foods International Limited, Glanbia Investments (UK) Limited and The Cheese Company Limited (collectively 'Glanbia/TCC') on 6 December 2007 (the 'Agreement') will remain unchanged and fully effective, with the exception of the following clauses and the Appendix that are each amended and restated as follows:

Clause 6)b) is amended and restated as follows:

6) The OFT will adopt a decision in respect of the Infringements which will:

   a) as to substance,

       [...]

   b) as to remedy,

       (i) set out the OFT’s approach to calculating the penalty in accordance with its published guidance and note that for the purpose of applying its guidance on penalties in Competition Act 1998 cases the OFT would have adopted a 'starting point' of 6% of relevant turnover in the absence of resolution on the terms of the Agreement;

       (ii) set out clearly the factors considered in determining this 'starting point';

       (iii) impose a penalty on Glanbia/TCC of £1,932,525 before any discount for co-operation;

       (iv) note that we anticipate that the penalty figure for Glanbia/TCC also includes a reduction in recognition of the procedural co-operation as set out in the Agreement, which will enable the OFT to complete its investigation into the Infringements more speedily and effectively. A reduction of up to 35% is available for procedural co-operation with the OFT’s investigation. If Glanbia/TCC co-operates fully as set out in the Agreement the OFT will therefore impose a penalty on Glanbia/TCC of £1,256,141.

The following text is removed from the Appendix of the Agreement:
• Under the heading "The 2002 Cheese Initiative", under (ii) the words "Tesco and Glanbia/TCC" are removed.

If Glanbia/TCC accepts the above variation to the Agreement, a duly authorised representative of Glanbia (UK) Limited (for itself and on behalf of Waterford Foods International Limited and Glanbia Investments (UK) Limited) and The Cheese Company Limited should sign this letter as indicated below and return two copies to the OFT no later than Friday 26 March 2010. Once the OFT has taken a decision to close its investigation into the 2002 Liquid Milk Initiative allegation, the 2003 Butter Initiative allegation and Tesco’s alleged participation in the 2003 FLM Initiative allegation (all as defined in the SO), the OFT will countersign both copies and return one of these copies to you. The variation to the Agreement will become effective when it has been signed by the OFT, Glanbia (UK) Limited and The Cheese Company Limited.

ON BEHALF OF GLANBIA (UK) LIMITED, WATERFORD FOODS INTERNATIONAL LIMITED AND GLANBIA INVESTMENTS (UK) LIMITED

Signature:

Name:

Position:

Date: 24th March 2010.

ON BEHALF OF THE CHEESE COMPANY LIMITED

Signature:

Name:

Position:

Date:
ON BEHALF OF THE OFFICE OF FAIR TRADING

Simon Williams
Senior Director
Markets and Projects, Goods

Date: 21 March 2010

RESTRICTED
VARIATION TO MCLELLAND’S EARLY RESOLUTION AGREEMENT

All terms of the early resolution agreement entered into by the Office of Fair Trading (the 'OFT') and Lactalis McLelland Limited ('McLelland') on 13 February 2008 (the 'Agreement') will remain unchanged and fully effective, with the exception of Clause 6(b), which is amended and restated as follows:

6) The OFT will adopt a decision in respect of the infringements which will:

   a) as to substance,

      [...]

   b) as to remedy,

      (i) set out the OFT's approach to calculating the penalty in accordance with its published guidance and note that for the purpose of applying its guidance on penalties in Competition Act 1998 cases the OFT would have adopted a 'starting point' of 6% of relevant turnover in the absence of resolution on the terms of the Agreement;

      (ii) set out clearly the factors considered in determining this 'starting point';

      (iii) impose a penalty on McLelland of £3,609,136 before any discount for co-operation;

      (iv) note that we anticipate that the penalty figure for McLelland also includes a reduction in recognition of the procedural co-operation as set out in the Agreement, which will enable the OFT to complete its investigation into the infringements more speedily and effectively. A reduction of up to 30% is available for procedural co-operation with the OFT’s investigation. If McLelland co-operates fully as set out in the Agreement the OFT will therefore impose a penalty on McLelland of £2,526,396.

If McLelland accepts the above variation to the Agreement, a duly authorised representative of McLelland should sign this letter as indicated below and return two copies to the OFT no later than Friday 26 March 2010. Once the OFT has taken a decision to close its investigation into the 2002 Liquid Milk Initiative allegation, the 2003 Butter Initiative allegation and Tesco's alleged...
participation in the 2003 FLM Initiative allegation (all as defined in the SO), the OFT will countersign both copies and return one of these copies to you. The variation to the Agreement will become effective when it has been signed by both the OFT and McLelland.

ON BEHALF OF MCLELLAND

Signature: 

Name: 

Position: 

Date: 

ON BEHALF OF THE OFFICE OF FAIR TRADING

Simon Williams
Senior Director
Markets and Projects, Goods

Date: 5 May 2010
VARIATION TO SAFEWAY’S EARLY RESOLUTION AGREEMENT

All terms of the early resolution agreement entered into by the Office of Fair Trading (the 'OFT') and Safeway Stores Limited, Stores Group Limited and Safeway Limited (collectively 'Safeway') on 6 December 2007 (the 'Agreement') will remain unchanged and fully effective, with the exception of the following clauses and the Appendix that are each amended and restated as follows:

Clause 6(b) is amended and restated as follows:

6) The OFT will adopt a decision in respect of the Infringements which will:

a) as to substance,

[...]

b) as to remedy,

(i) set out the OFT’s approach to calculating the penalty in accordance with its published guidance and note that for the purpose of applying its guidance on penalties in Competition Act 1998 cases the OFT would have adopted a ‘starting point’ of 5% of relevant turnover in the absence of resolution on the terms of the Agreement in respect of the 2003 FLM Initiative and a ‘starting point’ of 6% of relevant turnover in the absence of resolution on the terms of the Agreement in respect of the 2002 Cheese Initiative and the 2003 Cheese Initiative;

(ii) set out clearly the factors considered in determining this ‘starting point’;

(iii) impose a penalty on Safeway of £8,756,236 before any discount for co-operation;

(iv) note that we anticipate that the penalty figure for Safeway also includes a reduction in recognition of the procedural co-operation as set out in the Agreement, which will enable the OFT to complete its investigation into the Infringements more speedily and effectively. A reduction of up to 35% is available for procedural co-operation with the OFT’s investigation. If Safeway co-operates fully as set out in the Agreement the OFT will therefore impose a penalty on Safeway of £5,691,553.
The following text is removed from the Appendix of the Agreement:

- "The 2002 Liquid Milk Initiative

(i) the single overall concerted practice involving Safeway and alleged to be between Asda, Morrisons, Safeway, Sainsbury, Tesco and Arla which had as its object the prevention, restriction or distortion of competition in respect of fresh liquid milk ('FLM'). Cravendale retail prices in 2002, as set out in the Statement of Objections; and

(ii) the bi-partite concerted practices between Safeway and Arla which had as their object the prevention, restriction or distortion of competition in respect of FLM. Cravendale retail prices in 2002, as set out in the Statement of Objections."

- "The 2003 Butter Initiative

(i) the single overall concerted practice involving Safeway and alleged to be between Safeway, Tesco and Dairy Crest which had as its object the prevention, restriction or distortion of competition in respect of retail prices for UK produced butter in 2003, as set out in the Statement of Objections; and

(ii) the bi-partite concerted practices between Safeway and Dairy Crest which had as their object the prevention, restriction or distortion of competition in respect of retail prices for UK produced butter in 2003, as set out in the Statement of Objections."

- Under the heading "The 2003 FLM Initiative", under (ii) the word "Tesco" is removed.

If Safeway accepts the above variation to the Agreement, a duly authorised representative of Safeway should sign this letter as indicated below and return two copies to the OFT no later than Monday 19 April 2010. Assuming the OFT has taken a decision to close the investigation into the 2002 Liquid Milk Initiative allegation, the 2003 Butter Initiative allegation and Tesco's alleged participation in the 2003 FLM Initiative allegation, the OFT will countersign both copies and return one of these copies to you. The variation to the Agreement will become effective when it has been signed by both the OFT and Safeway.
ON BEHALF OF SAFEWAY

Signature

Name: 

Position:

Date: 19 April 2010

ON BEHALF OF THE OFFICE OF FAIR TRADING

Simon Williams
Senior Director
Markets and Projects, Goods

Date: 29 April 2010
VARIATION TO SAINSBURY’S EARLY RESOLUTION AGREEMENT

All terms of the early resolution agreement entered into by the Office of Fair Trading (the 'OFT') and J Sainsbury plc and Sainsbury's Supermarkets Limited (collectively 'Sainsbury’s') on 4 December 2007 (the 'Agreement') will remain unchanged and fully effective, with the exception of the following clauses and the Appendix that are each amended and restated as follows:

Clause 6)(b) is amended and restated as follows:

6) The OFT will adopt a decision in respect of the infringements which will:

a) as to substance,

[...]

b) as to remedy,

(i) set out the OFT’s approach to calculating the penalty in accordance with its published guidance and note that for the purpose of applying its guidance on penalties in Competition Act 1998 cases the OFT would have adopted a 'starting point' of 5% of relevant turnover in the absence of resolution on the terms of the Agreement in respect of the 2003 FLM Initiative and a 'starting point' of 6% of relevant turnover in the absence of resolution on the terms of the Agreement in respect of the 2002 Cheese Initiative and the 2003 Cheese Initiative;

(ii) set out clearly the factors considered in determining this 'starting point';

(iii) impose a penalty on Sainsbury’s of £20,744,953 before any discount for co-operation;

(iv) note that we anticipate that the penalty figure for Sainsbury’s also includes a reduction in recognition of the procedural co-operation as set out in the Agreement, which will enable the OFT to complete its investigation into the Infringements more speedily and effectively. A reduction of up to 35% is available for procedural co-operation with the OFT’s investigation. If Sainsbury’s co-operates fully as set out in the Agreement the OFT will therefore impose a penalty on Sainsbury’s of £13,484,219.

The following text is removed from the Appendix of the Agreement:
• "The 2002 Liquid Milk Initiative

(i) the single overall concerted practice between Asda, Morrisons, Safeway, Sainsbury, Tesco and Arla which had as its object the prevention, restriction or distortion of competition in respect of fresh liquid milk ("FLM"), Cravendale and Cheapest on Display ultra heat treated extended shelf life milk ("COD UHT") retail prices in 2002, as set out in the Statement of Objections; and

(ii) the bi-partite concerted practices between Sainsbury's and Arla which had as their object the prevention, restriction or distortion of competition in respect of FLM, Cravendale and COD UHT retail prices in 2002, as set out in the Statement of Objections."

• Under the heading "The 2003 FLM Initiative", under (i) the word "Tesco" is removed.

If Sainsbury's accepts the above variation to the Agreement, a duly authorised representative of Sainsbury’s should sign this letter as indicated below and return two copies to the OFT no later than Thursday 22 April 2010. Assuming the OFT has taken a decision to close the investigation into the 2002 Liquid Milk Initiative allegation and Tesco’s alleged participation in the 2003 FLM Initiative allegation, the OFT will countersign both copies and return one of these copies to you. The variation to the Agreement will become effective when it has been signed by both the OFT and Sainsbury’s.

ON BEHALF OF SAINSBURY’S

Signature: 

Name: 
Position: 

Date: 22 April 2010
ON BEHALF OF THE OFFICE OF FAIR TRADING

Simon Williams
Senior Director
Markets and Projects, Goods

Date: 29 April 2010
VARIATION TO WISEMAN’S EARLY RESOLUTION AGREEMENT

All terms of the early resolution agreement entered into by the Office of Fair Trading (the ‘OFT’) and Robert Wiseman Dairies plc (‘Wiseman’) on 4 December 2007 (the ‘Agreement’) will remain unchanged and fully effective, with the exception of the following clauses and the Appendix that are each amended and restated as follows:

Clause 6)b) is amended and restated as follows:

6) The OFT will adopt a decision in respect of the Infringements which will:

a) as to substance,

b) as to remedy,

   (i) set out the OFT’s approach to calculating the penalty in accordance with its published guidance and note that for the purpose of applying its guidance on penalties in Competition Act 1998 cases the OFT would have adopted a ‘starting point’ of 5% of relevant turnover in the absence of resolution on the terms of the Agreement;

   (ii) set out clearly the factors considered in determining this ‘starting point’;

   (iii) impose a penalty on Wiseman of €6,516,956 before any discount for co-operation;

   (iv) note that we anticipate that the penalty figure for Wiseman also includes a reduction in recognition of the procedural co-operation as set out in the Agreement, which will enable the OFT to complete its investigation into the Infringements more speedily and effectively. A reduction of up to 35% is available for procedural co-operation with the OFT’s investigation. If Wiseman co-operates fully as set out in the Agreement the OFT will therefore impose a penalty on Wiseman of €4,236,022.

The following text is removed from the Appendix of the Agreement:
• Under the heading “The 2003 FLM Initiative”, under (i) the word “Tesco” is removed and under (iii) the words “Tesco and Wiseman” are removed.

If Wiseman accepts the above variation to the Agreement, a duly authorised representative of Wiseman should sign this letter as indicated below and return two copies to the OFT no later than Monday 19 April 2010. Assuming the OFT has taken a decision to close the Investigation into Tesco’s alleged participation in the 2003 FLM Initiative allegation, the OFT will countersign both copies and return one of these copies to you. The variation to the Agreement will become effective when it has been signed by both the OFT and Wiseman.

ON BEHALF OF WISEMAN

Signature: 

Name: 

Position: 

Date: 21 April 2010

ON BEHALF OF THE OFFICE OF FAIR TRADING

Simon Williams
Senior Director
Markets and Projects, Goods

Date: 29 April 2010