



The nature of unfair commercial practices – a UK perspective

Rona Bar-Isaac

5 April 2011



Introduction

- (Brief) review of the framework and themes from which existing analysis of B2B restrictive practices has been drawn
- Particular reference to CC 2000 and 2008 reports and the overall concerns they expressed
- The particular types of practices that have been identified as harmful



A recap – the candidate frameworks for understanding unfair commercial practices

- UCPD 2005 – “requirements of professional diligence”; “misleading”; “aggressive” (but essentially a B2C framework)
- Art 102 and local variants – “abusive” behaviour
- CC 2000 – “public interest” (but with a focus on competition)
- CC 2008 – “feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition”



UCPD 2005

- A B2C framework, but note Recital 8, which raises the possibility that there are other practices “*which may hurt competitors and business customers*”
- Has been taken into account in the application of other frameworks – see CC report 2008, paras 11.313 – 11.315 “*principle of fair dealing*”



CC 2000 – the overview

“Where the retail market is competitive, buyer power can be used to counterbalance the market power of large suppliers, and this may result in lower wholesale prices and hence lower retail prices than would otherwise be the case. Where the retail market is not competitive, buyer power may lower wholesale prices, but these may not be passed on to consumers. Even in a competitive market, buyer power, if exercised inappropriately, may damage the competitiveness of smaller suppliers in the long run and this may have adverse effects on consumers.” (para 2.441)



CC 2000 – categories of practices covered

- Payments/concessions for access to shelf space
- [Imposing conditions relating to suppliers’ trade with other retailers (exclusivity)]
- Applying different standards to different suppliers’ offers (misleading origin indications)
- Imposing unfair balance of risk (through price terms/charges)
- Imposing retrospective changes to contractual terms with suppliers
- [Restricting suppliers’ access to the market (i.e. favouring own-label)]
- Imposing charges and transferring costs to suppliers
- Requiring suppliers of groceries to use third party suppliers by a retailer



ADDLESHAW GODDARD

CC 2000 – factors that influenced findings on particular practices

- Effects on product selection and consumer choice:
 - *“does not necessarily select the best or most efficiently produced product or that preferred by consumers”* (para 2.476(c))
- Distortion of competition in supplier markets (especially for small suppliers) and distortion of consumer choice (e.g. para 2.491(c))
- Distortion of competition in retail markets as some retailers obtain the benefit of discounts/terms not available to others (e.g. para 2.494(c))



ADDLESHAW GODDARD

CC 2000 outcome

- Supermarkets Code of Practice
- Generally perceived to be less successful than it might have been



CC 2008 – the overview

“...the transfer of excessive risk and unexpected costs by grocery retailers to their suppliers through various supply chain practices if unchecked will have an adverse effect on investment and innovation in the supply chain, and ultimately on consumers” (Summary para 3)



CC 2008 – the link between supply chain practices and investment/innovation

- Retailers’ actions have bearing on level of risk that suppliers face in undertaking investment
- May lessen suppliers’ incentives to invest in new capacity, products and production processes
- Particular concern with *“retrospective adjustments to terms of supply”*
- Recognised as side-effect of aggressive retail competition – requires balancing of short term consumer benefits against longer term losses



CC 2008 – categories of practices identified

- Starting point was CC 2000 list of 52 practices
- Category management practices, potential coordination between retailers and own label were assessed separately and were not addressed through remedies
- Other categories identified to be addressed:
 - Actions aimed at targeting costs/availability for competing retailers
 - [Product mislabelling or other practices to mislead consumers (but essentially B2C issue)]
 - Lump sum payments by suppliers (e.g. listing fees, payments for promo slots)
 - Practices with potential to create uncertainty for suppliers as to revenues or costs
 - Others (mostly relating to price negotiation), where no concerns



CC 2008 – analysis of individual practices

- Change of view on a small number of practices of 2000 but ultimately little change to core practices that are a concern
- Analysis has evolved somewhat:
 - Creation of “barriers to entry” for small suppliers
 - Effect of retrospective changes on suppliers’ incentives to innovate



CC 2008 – further observations

- Recognition of need for commercial flexibility – only one practice prohibited outright (shrinkage charges)
- Safeguards in placing burden of proof on retailer and in “fair dealing” provision
- In those circumstances, creating incentives for compliance and the right mechanisms for enforcement is particularly important



CC 2008 - outcome

- Code of Practice – GSCOP
- Starts with an overarching “fair dealing” principle
- Greatly strengthened provisions to achieve contractual certainty and address retrospective changes
- Otherwise substantively similar to 2000 SCOP
- Backed by strengthened reporting and compliance measures
- Strengthened enforcement mechanisms
- Ombudsman/Adjudicator still on legislative agenda



Conclusions from the UK experience

- Broad consistency about which kinds of practices are a cause for concern
- CC 2008 has clearly articulated why – and made the link between “unfair” practices, that “*transfer excessive risk or unexpected costs*” and the harm to competition
- Markets regime generally perceived to be successful and in particular a good route to addressing the concerns of SMEs – see BIS consultation
- But UK markets regime is almost unique in that it allows market failures to be analysed and addressed outside the Art 101/102 framework (and the penalties attached)