

# CPI Antitrust Chronicle

## June 2014 (2)

### Competition Law Enforcement in the U.K. Grocery and Food Sectors and at the EU Level

Mark Jones  
Hogan Lovells LLP

## Competition Law Enforcement in the U.K. Grocery and Food Sectors and at the EU Level

Mark Jones<sup>1</sup>

### I. INTRODUCTION: SUPERMARKETS UNDER THE SPOTLIGHT

In recent years the U.K. grocery and food industries have been among the most scrutinized sectors by the U.K. competition authorities. This article reports on competition law enforcement activity in the United Kingdom under the antitrust rules and also the so-called market investigation regime (merger control is outside its scope). It ends with a brief review of initiatives in these sectors at the EU level.

Enforcement activity in the United Kingdom has focused mainly on grocery markets rather than upstream food markets, although the U.K. competition authorities have issued guidance on the application of competition law to farming co-operatives as well as informal views on two dairy industry codes of practice. They have also promoted the competition agenda in the development and reform of EU farming regulation under the EU Common Agricultural Policy and the EU Dairy Package Regulation.

The U.K. antitrust rules prohibit cartels and other anticompetitive arrangements, and also the abuse of a dominant market position. There have been several significant investigations under the cartel rules, but the prohibition on abuse of dominance has not been applied in these sectors since even the largest of the four major U.K. supermarket chains has a national market share below the level at which a dominant position is normally established. There have been two major sector-wide investigations under the market investigation regime, which allows for review of whole markets where competition is perceived not to be working well in order to assess whether there are market features—in terms of structure or conduct—which adversely affect competition, with the possibility of a wide range of remedies aimed at market participants generally rather than sanctions on individual firms.

This enforcement activity has been shared between the U.K.'s two principal competition agencies, the Office of Fair Trading ("OFT")—responsible for cartel enforcement and initial or phase I merger and market reviews—and the Competition Commission ("CC")—responsible for in-depth or phase II market investigations reviews following reference from the OFT. (As of April 1, 2014, the two authorities merged into a single agency, the Competition and Markets Authority, although the separation of phase I and II activities has been retained within this new organization.)

It is worth noting that a number of the issues addressed in the United Kingdom, including the effects of perceived buyer power on the part of the larger supermarket chains and

---

<sup>1</sup> Mark Jones is a partner based in Hogan Lovell's London office, specializing in competition (antitrust), regulatory, and public procurement law.

the indirect exchange of competitively sensitive information between retailers via their suppliers, have subsequently been picked up by agencies in other jurisdictions and so the U.K. experience is instructive in that respect.

## II. MARKET INVESTIGATIONS

The U.K. groceries sector has been the subject of two market investigations by the CC—in 2000 and then again in 2006. The outcome of the first one was a Supermarkets Code of Practice (“SCOP”), applicable as of 2002, which sought to regulate supermarkets’ conduct in their relations with suppliers, with oversight by the OFT. However, continued complaints about supermarkets’ behavior led to an audit of retailers’ compliance with the SCOP in 2005. Although the OFT initially found insufficient grounds for a further market investigation, this decision was successfully challenged by an association of convenience stores and a further market investigation ensued, lasting two years and subject to considerable political and consumer interest.

The CC found that, generally speaking, the U.K. groceries market was working well for consumers: there were no concerns relating to oligopoly (tacit collusion), there were no significant distortions of competition as a result of price promotions or below-cost selling, and supermarket buyer power was not having an alleged “waterbed effect” whereby lower supplier prices to large retailers pushed up their prices to smaller competitors. However, other competition problems were identified.

First, the CC found that excessive risk and costs were being passed to suppliers as a result of the deployment of buyer power by the supermarkets, with the adverse effect of reducing investment and innovation in the supply chain. To address this, the CC strengthened the regulation system of retailer-supplier dealings with an enhanced Groceries Supply Code of Practice (“GSCOP”), which came into force in 2010. This includes fair dealing requirements (e.g. as regards retrospective changes to supply terms and controls on de-listing), dispute resolution procedures, and in-house compliance obligations for the major retailers. At the CC’s recommendation, the government also established a Groceries Code Adjudicator last year, to act as an independent regulator to oversee compliance with GSCOP through powers of investigation and enforcement and an arbitration role as regards disputes between suppliers and retailers.

Second, the CC found that there was significant concentration and barriers to entry, leading to higher prices in many local grocery markets. To address this, the CC made an order requiring supermarkets to remove certain restrictive covenants and exclusivity agreements affecting the use of land. It also proposed the introduction of a competition test as part of the planning process, but this recommendation was not accepted by the government.

## III. ANTITRUST

The UK Competition Act 1998 contains a prohibition on anticompetitive agreements and concerted practices modeled on the equivalent EU prohibition in Article 101 of the EU treaty. Not long after this regime came into force the OFT initiated what became two high profile and long-running investigations in the groceries sector, which had a significant influence on the development of the law and procedure more generally for the U.K. antitrust regime.

In the first of these investigations, the OFT took action against co-ordination between supermarkets via suppliers on retail price increases for dairy products (milk and cheese) in 2002 and 2003—so-called "A-B-C" or "hub and spoke" indirect anticompetitive information exchanges. Ironically, these activities had started in the context of an industry initiative to improve the prices paid to farmers for raw milk, in response to concerns expressed about the threat to the U.K.'s domestic milk supply base and ultimately farmers' livelihoods in part as a result of supermarket buyer power. In 2011, the OFT imposed fines of nearly £50 million on the major supermarkets and milk processors that supplied them. The investigation saw the use of the leniency procedure to initiate it and the first widespread use of the OFT's settlement procedure, with the result that most parties received significant discounts on their fines (of up to 35 percent) and only one of the parties appealed the decision.

The potential concerns revealed about anticompetitive information exchange in the OFT dairy investigation apparently spilled over into other product sectors. The OFT undertook a Competition Act investigation into suspected price co-ordination involving a number of retailers and suppliers across a wider range of products in the U.K. grocery sector, although in late 2010 it announced that it had closed this investigation on the grounds of administrative priority.

The OFT also ran a second full antitrust investigation into the retail pricing of tobacco products where it alleged a novel theory of harm based on the two major tobacco manufacturers and the supermarkets entering into a series of bilateral agreements in 2000 to 2003 under which the retailers agreed to position the retail price of each manufacturers' product at the same level as, or a given differential to, their retail price for the equivalent brand of the other manufacturer. (There was also another allegation of A-B-C information exchange, although this was subsequently dropped.) Again, this case was a long running one, involving leniency and settlement procedures; but, unlike in the dairy investigation, the eventual decision and record fines (totaling £225 million in 2010) were the subject of multiple appeals.

During the course of these appeals, before the Competition Appeal Tribunal in 2012, cross-examination of multiple witnesses did not support the OFT's findings on the facts and the OFT accepted that the theory of harm it had articulated in its decision could not be sustained. The Tribunal did not allow the OFT to redefine its case and instead quashed the OFT decision and fines. (This led the OFT to come under some criticism for the quality of its investigation, and the lessons drawn from the experience contributed to a number of changes in its procedures.)

As a footnote, one of the two tobacco manufacturers and a retailer, both of which had opted to settle and had not appealed the decision within the normal two-month time window for doing so, then made an application for an exceptional extension of that limitation period in order to bring a similar appeal in view of the circumstances in which the OFT's case had been completely overturned (i.e. they had admitted liability and paid substantial fines in respect of an infringement which had then been found not to have happened). This was finally rejected by the Court of Appeal in April this year

#### **IV. THE BROADER EU PERSPECTIVE—AND THE ACTIVITIES OF THE EUROPEAN COMMISSION**

One area of relevance in connection with retailing where the European Commission has issued guidelines is in relation to the practice of category management, whereby a retailer obtains

the advice and support of a supplier—the category leader or captain—for the marketing of the product category concerned (e.g. the layout of the shelf space allocated for the category in its stores), including all of its competitors' products as well as its own products. The European Commission's guidance identifies the potential competition problems that can arise with this practice, principally the category captain exploiting this position to foreclose rivals' products and the facilitation of anticompetitive information exchange and collusion as a result of the category captain's access to its competitors in managing the category. However, it balances this against the potential consumer benefit in allowing more efficient management of the category and more effective response to consumer needs based on the category captain's greater marketing expertise and customer understanding.

More generally at the EU level, there has been a greater focus on food and drinks markets, where the European Commission has completed a number of antitrust investigations. Since 2004, there have been six cartel cases, which have focused on the markets for beer, carbonated soft drinks, bananas, and shrimps. The most recent fines by the European Commission were in November 2013, when it imposed fines totaling EUR 28.7 million on participants in the North Sea shrimp cartel case.

It is worth noting that, across the European Union, cartel enforcement in the food sector has often been more rigorous at the national level within EU Member States, no doubt in a large part because of the local scope of food and retail markets, where national competition authorities may be better positioned to act. Indeed, between 2004 and 2011 EU national competition authorities conducted 182 antitrust cases in the food sector.

There has, nevertheless, been considerable political pressure for closer antitrust scrutiny of the food supply chain at the EU level. Over the past five years, the European Parliament has passed a number of resolutions calling for stronger antitrust enforcement in these markets. The European Commission has reacted to this pressure by implementing a number of initiatives. First, in January 2012, its Directorate for Competition created its own dedicated "Task Force Food" within its enforcement team.

Second, in May 2012, the European Commission actively participated in and promoted a report by the European Commission Network: *Competition Law Enforcement and Market Monitoring Activities by European Competition Authorities in the Food Sector*. This report summarized the key enforcement and monitoring actions undertaken by national competition authorities across the European Union and the European Commission from 2004 to 2011. It concluded that they would continue to act to ensure that food markets remain competitive to the benefit of European consumers.

Third, in late 2013, the European Commission commissioned a study into competition in food retail markets. This is being prepared by a consortium, which includes Ernst & Young, Arcadia International, and Cambridge Econometrics, and will examine whether increased concentration of retailers and food manufacturers, as well as other factors such as the role of private labels, have hampered choice and innovation in the European food supply chain. It will cover the eight-year period starting in 2004, and will focus on a sample of EU Member States. The results of the study have been expected for some time, and current indications are that the report will be published in the summer of this year (2014).

There has also been speculation that the European Commission could launch a sector inquiry into the food sector, e.g. if it concluded that rigidity of prices or other circumstances suggest that competition may be restricted in these markets. Unlike market investigations in the United Kingdom, the European Commission's sector inquiries are essentially fact-finding exercises, but they can lead to antitrust investigations where problems are found. However, more recent reported statements from European Commission officials, while not conclusive, appear to indicate that there will not be a specific sector inquiry.

Nevertheless, it remains clear that the European Commission retains an appetite to pursue individual antitrust infringement cases at the EU level where appropriate. At a conference in Rome in February this year, the director for cartels in the European Commission's Directorate for Competition is reported to have stated that the food sector would see increased cartel enforcement activity in 2014. Currently, there is at least one active cartel investigation being led by the European Commission in the food sector, which is in the market for canned mushrooms.

## V. CONCLUSIONS

It will be clear from the above that in recent years grocery and food markets have been the subjects of extensive competition law scrutiny in the United Kingdom and more generally across Europe. A number of the issues arising have been new or specific to these sectors.

A relevant factor in much of the competition analysis relating to this enforcement activity has been the strong position of the major supermarkets at the retail end of the grocery supply chain. Buyer power on the part of these supermarkets can be characterized as pro-competitive in driving value for consumers, with pass-throughs of buying efficiencies in an intensively competitive retail market. Indeed, although merger control is outside the scope of this review, it is worth noting that buyer power has been routinely cited as a competitive constraint to rebut any horizontal concerns about merger cases involving concentration between food producers.

On the other hand, the strength of the large retailers has led to concerns about pressure on suppliers and complaints from small retailers unable to compete with them. These issues contributed to the reference of the grocery market for investigation by the CC in 2006 (although they were not fully substantiated in the findings of that inquiry). Likewise, concerns about primary producers not receiving a sufficient share of the value in the supply chain lay behind the origins of the practices which led to the OFT's dairy price-fixing investigation.