

GSCOP: the UK experience of managing unfair commercial practices and retailer buyer power

Rona Bar-Isaac

Why a GSCOP?

- ▶ A little history
 - ▶ Concern about practices employed by retailers with buyer power
 - ▶ Identified series of practices that adversely affected competition
 - ▶ “a climate of fear”
 - ▶ Addressed by way of 2001 Code, applied to big 4

- ▶ Why revisit?
 - ▶ Code flawed in a number of ways
 - ▶ too few retailers covered
 - ▶ hard to interpret
 - ▶ lacking in binding mechanism to resolve disputes
 - ▶ Widely regarded a failure
 - ▶ very few complaints
 - ▶ dispute resolution procedure not used
 - ▶ no successful enforcement

Why a GSCOP?

- ▶ CC findings in 2008
 - ▶ Large grocery retailers have buyer power in relation to at least some suppliers
 - ▶ Exercise of buyer power can benefit consumers through lower prices but can also cause harm where:
 - ▶ excessive risks or unexpected costs are transferred by retailers onto suppliers
 - ▶ leading to reduced incentives for investment by suppliers
 - ▶ unchecked, consumers would ultimately be harmed by reduced investment in quality and innovation
 - ▶ Other concerns, e.g. category management, own-label, discounted

Why a GSCOP?

- ▶ The 2008 answer
 - ▶ New GSCOP to remedy flaws of old Code
 - ▶ Binding dispute resolution procedure
 - ▶ Supported by a dedicated Ombudsman to oversee enforcement

Key features of the Code

- ▶ Scope
 - ▶ 10 retailers covered
 - ▶ Only covers interaction between retailers and direct suppliers
- ▶ Improve transparency and certainty
 - ▶ Written agreements
 - ▶ Prohibit retrospective changes to those agreements
- ▶ Evidential burden on the retailer
 - ▶ Fair dealing provision
 - ▶ Definition of “require”
- ▶ Dispute resolution procedure
- ▶ Retailer accountability
- ▶ Ability to fine up to 1% of UK turnover – expected only in severe or repeated breaches

What does an Adjudicator add?

- ▶ Permanent body with responsibility for enforcement of GSCOP
- ▶ Funded by a levy paid by the designated retailers
- ▶ The Adjudicator can:
 - ▶ Arbitrate disputes between retailers and suppliers
 - ▶ Investigate confidential complaints from direct and indirect suppliers, whether in the UK or overseas, and from third parties
 - ▶ Issue recommendations to resolve differences in interpretation
 - ▶ Hold to account retailers who break the rules by-
 - ▶ 'naming and shaming'
 - ▶ imposing a fine – up to 1% of turnover
- ▶ Appeals to the High Court

Adjudicator appointment

- ▶ Christine Tacon appointed Adjudicator
 - ▶ GCA has statutory basis and became operational in June 2013
 - ▶ Four year appointment
 - ▶ Industry roles in food and farming (including fast moving consumer goods and farm supply businesses) and regulated sector experience
 - ▶ £800k budget, levy funded
 - ▶ Staff of 5 (but some, including Christine Tacon, part time)
- ▶ Rolling five key areas of focus: forensics: third party audits; drop and drive: delivery performance; Forecasting/service levels; Requests for lump sum payments; Packaging and design charges

Adjudicator approach

- ▶ Extensive engagement
 - ▶ With retailers – monthly meetings with CCOs, meetings with audit committees
 - ▶ Suppliers
 - ▶ Trade Associations
 - ▶ Annual Conference
- ▶ Awareness among suppliers still relatively low but rising
- ▶ Given resources, preference to resolve issues informally rather than formally

Key Adjudicator actions to date (1)

- ▶ Tesco investigation: launched in February 2015 into possible breaches of the Code:
 - ▶ relating to delay in paying suppliers and
 - ▶ the prohibition against payments for better positioning of goods which are not the subject of a sales promotion
 - ▶ Related to ongoing SFO investigation
- ▶ Official case studies (summaries of issues considered by the Adjudicator, which have been reviewed and concluded):
 - ▶ Charging for shelf positioning - Tesco (Jan 2014)
 - ▶ Payments for target service levels - Co-op (Mar 2014)
 - ▶ Payments for multi-channel participation - Morrison's (May 2014)

Key Adjudicator actions to date (2)

- ▶ Highlights the following priority areas:
 - ▶ Payments demanded by retailers
 - ▶ Multiple suppliers affected
 - ▶ The case studies reflect early clarifications on the code and can be viewed as an education piece for retailers
- ▶ Role as arbitrator: believed to be 2 arbitrations ongoing, both relating to delisting
- ▶ The adjudicator has reported success in relation to forensic audits as 8 of the ten large retailers have voluntarily committed to time limit conducting these. Previously audits could go back as far as six years, retailers have now agreed to limit this to two years
- ▶ CMA reviewing the extent to which suppliers receive written trading terms

What have we learnt?

- ▶ Consistent findings of the existence and exercise of buyer power by large retailers in dealings with (small) suppliers
- ▶ The evidence seems to point to that power leading to reduced quality, choice and innovation in the medium term (but contrast with EU findings)
- ▶ In terms of remedy, the enforcement framework to back a Code is as important as the content of the Code
- ▶ UK regime appears to be working with increased compliance from retailers and anecdotally, increased willingness to raise the Code informally
- ▶ Granting of fining powers was needed in order to give the Adjudicator sufficient credibility – query whether powers will grow on review in 2016?