

Competition & Antitrust - United Kingdom

First GCA investigation may trigger shift in supermarkets' dealings with suppliers

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Introduction

On February 5 2015 the Groceries Code Adjudicator (GCA) announced plans to investigate Tesco plc over concerns that it had breached the Groceries Code through some of the practices associated with its profit over-statement announced in September 2014. The role of the GCA – conferred on it by the Groceries Code Adjudicator Act 2013 – is to enforce the Groceries Supply Code of Practice and to encourage and monitor compliance with it. The code applies to Aldi Stores Limited, Asda Stores Limited, Co-operative Group Limited, Iceland Foods Limited, Lidl UK GmbH, Marks & Spencer plc, Wm Morrison Supermarkets plc, J Sainsbury plc, Tesco plc and Waitrose Limited.

Competitive marketplace

The GCA's decision to investigate Tesco over its dealings with suppliers could signal a marked shift in supplier-supermarket relations. Only Tesco has been identified by the GCA as having potentially breached the Groceries Supply Code of Practice; however, the GCA has made clear that it will consider whether it is appropriate to extend the scope of its investigation to other retailers if the practices appear more widespread. In particular, the GCA's concerns relate to whether Tesco:

- deals fairly and lawfully with suppliers;
- pays suppliers within a reasonable time; and
- does not charge for better positioning of goods, unless in relation to promotions.

While this sector is considered highly competitive – with retailers competing fiercely to offer low prices to consumers – and notwithstanding the consumer benefits of low retail prices, retailers are increasingly scrutinised in the media for the effect that this is having on suppliers, which claim that they are being squeezed to the point of becoming unviable. Earlier this year, the Environment, Food and Rural Affairs (EFRA) Select Committee publicly called into question retailers' practices in the context of milk prices, arguing that they have been using their market power to squeeze retailers unduly.

Application of competition law

However, this issue is not easily catered to by competition law. Seeking to address this by treating it as an abuse of dominance case – that is, for the Competition and Markets Authority to find Tesco dominant and to characterise the practices as an abuse of dominance driving down prices to suppliers – would be difficult, given the degree of competition which Tesco faces from other large retailers. Therefore, the launch of the GCA's first investigation, described as "a historic day [showing that the GCA] has real teeth" by UK Business Secretary Vince Cable, will allow the adjudicator to consider issues that do not specifically fall within the UK competition law framework, but which should be investigated to address any adverse effects on the supply chain. Further, the GCA's ability to focus on fair treatment of suppliers makes it potentially more effective in securing the policy objective of ensuring the long-term viability of the supply chain.

Penalties

By way of penalties, the GCA can issue legally binding recommendations on Tesco's processes and on how it should behave in future, as well as 'name and shame' the retailer by taking out advertisements disclosing what it has done. However, the GCA has not yet been empowered to levy financial penalties. This is expected to change: a final agreement in government was recently reached to proceed with legislation to enable the GCA to impose hefty fines (up to 1% of turnover) on

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retailers that are found guilty of mistreating suppliers. Various parties have urged for this to take place before the general election in May – including members of Parliament following the EFRA Select Committee report on dairy prices, which called on the government to do so to enable the GCA to enforce the code more effectively and put it on equal footing with other regulators, as well as to consider revisions to the code to extend its protection to farmers.

Comment

The launch of the GCA probe of Tesco comes at a heated time for large retailers in the grocery industry and signals increasing scrutiny. The risk of an adverse finding and accompanying media attention – coupled with the threat of the regulator exercising its promised fining powers on Tesco – will likely lead to changes in large retailers' practices and begin to alter the nature of supplier-supermarket relations going forward.

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