

*A.1. Irish Competition & Regulation (continued)***EU edges toward banning Unfair Trading Practices in food chain***Views sought by 30 April 2013 on codes of practice, civil fines, etc***By Patrick O'Brien**

31 January 2013— The European Commission published today a Communication setting up a European Retail Action Plan, and an accompanying Green Paper to consult on unfair trading practices (UTPs) along the business-to-business (B2B) food and non-food supply chain in Europe.

The Green Paper describes UTPs as “...typically imposed in a situation of imbalance by a stronger party on a weaker one which is often not in a position to abandon the unfair relationship and switch to another business partner due to the costs implied by such change or to the lack of alternatives to the contractant.”

It says that “Such situations may arise, for instance, for agricultural producers, which often have a limited choice of business partners for the take-up of their production and which, due to intrinsic characteristics of many goods, could be unable to store production for a longer period of time in order to obtain better buying terms.”

Following from work in relation to the food sector in 2009, the Commission is now seeking views by 30 April 2013 on possible issues stemming from UTPs. It is also considering the issue of effective enforcement of national and EU rules targeting UTPs.

COMPETITION AUTHORITY SHOULD ADVISE EU TO INTRODUCE REGULATION AGAINST UTPs

In Ireland there has been a distinct lack of effective enforcement against UTPs. The current consultation is an opportunity for the Competition Authority, which has an independent mandate, to make a submission to the European Commission calling for it to introduce an EU-wide Regulation requiring Member States to introduce laws allowing for competition authorities and other relevant enforcement authorities to impose effective sanctions, including civil fines, to deter UTPs.

The food sector has been attracting particular attention by competition authorities in Member States

throughout the EU and from the European Commission in recent times. At the EU level, in 2009, the Commission adopted a communication on a better functioning food supply chain, which was accompanied by a staff working document that reviewed competition in the food supply chain.

According to the Commission in the Green Paper, “At the EU level, UTPs were first discussed in the EU sector in 2009 when consumer prices rose against the background of the agricultural price spikes. The lack of market transparency, inequalities in bargaining power and anti-competitive practice were reported to lead to market distortions with potentially negative effects on the competitiveness of the food supply chain as a whole... The Commission considers that consumers were not offered sufficiently fair deals in terms of product range and prices and that intermediaries/food processing industrials/retailers squeezed the margins of agricultural producers”.

In May 2012 the European Competition Network (which comprises all the competition authorities of the Member States plus the Commission) published a report on competition law enforcement and market monitoring activities by European competition authorities in the food sector. Joaquín Almunia, Commission Vice-President in charge of competition policy, said: “Competition authorities across Europe are working hard to ensure that food markets work for suppliers and consumers alike. Where there has been anticompetitive behaviour at any level of the food supply chain, competition authorities have swiftly addressed them. There are more things that could be done. Some producers could restructure and pool activities in order to become more efficient while some countries still have unnecessary regulatory barriers at the retail level. Competition authorities are ready to help to address these issues at EU and national levels”.

In addition, in December 2012, the Commission announced that it was launching a study to examine choice and innovation in the food sector, the results of which will contribute to the debate around the impact of UTPs in the food supply chain and whether Commission intervention in this area is needed.

The author is a partner in Arthur Cox, solicitors, specialising in EU and Competition Law

LAW DIFFERENT FROM COMPETITION LAW NEEDED IN FOOD CHAIN

It should be noted at this stage that competition may at times be an appropriate tool to address UTPs, but is often too broad and blunt an instrument. The Commission in the Green Paper states: "...one needs to distinguish competition law and laws aimed at preventing unfair practices... EU competition law aims at contributing to the construction of and preservation of the Single Market and enhancing consumer welfare. It seeks to establish conditions under which the market can function properly and is not *per se* concerned with fairness in individual business relations, unless those entail malfunctioning of the market due to the existence of market power. As a result, EU competition law could deal with some but not all UTPs."

On the same theme, the ECN report concluded that "certain trading practices which are considered unfair by many stakeholders do not fall within the scope of competition rules at the EU level or in most of the Member States." That is why there is a specific focus now in the Green Paper on possible harmonized laws at the EU level outlawing UTPs, and possible uniform standards of enforcement.

We should also remember that the Commission's initiative on UTPs concerns B2B or business to business relationships for which (according to the Commission) "there is no specific EU regulatory framework;" unlike the many EU-wide laws on consumer protection, such as Directive 93/13/EEC on unfair terms in consumer contracts.

2006 REFORM OF COMPETITION ACT UNUSED, DUE TO SUPPLIERS' FEAR OF RETALIATION

In Ireland, with the abolition of the Groceries Order in 2006 (which principally contained a ban on retailers selling below net invoice price) concerns were raised by suppliers about UTPs in the B2B food and non-food sectors. This resulted in an amendment to the Competition Act in 2006 to attempt to address these concerns, but the new laws enacted have never been tested, applied or enforced.

The new laws essentially outlawed certain restrictive agreements between suppliers and retailers but suppliers' fears of retaliation such as "de-listing" was and continues to be a significant barrier to enforcement through evidence given in public in the courts at the private B2B level, or at the public level through a complaint to the Competition Authority, which was designated as the enforcement authority.

PROPOSED GROCERY 'CODE' LACKS DIRECT IMPOSITION OF FINES FOR UTPs

The Irish Minister for Jobs, Richard Bruton (Fine Gael) in 2011 published a draft Code of Conduct for Grocery Goods Undertakings (the "Code"), which is styled on a similar UK code. The Code is to be adopted following the introduction of omnibus legislation to combine the functions of the Competition Authority and the National Consumer Agency in new competition legislation to be introduced this year.

When announcing the Code, Mr Bruton made the following statement: "Regulation of the grocery goods sector is a highly contentious area. There is an inevitable strain in the relationships between suppliers and

retailers. These relationships, I believe, must be built on solid principles of mutual opportunity and fair competition. This does not always happen."

The main difference between the Code and the existing UK code in the context of enforcement is that the UK code has a dedicated Ombudsman who can enforce the code, including the imposition of fines, whereas under the Irish Code the Competition Authority (which is likely to be the equivalent of the Ombudsman in the UK) will likely not have the power to impose fines. This would lead to a significant impediment to effective enforcement in Ireland.

The Commission's Green Paper identifies the levels of protection of the weaker contracting party in a B2B relationship as varying widely across Member States of the EU. These include *inter alia* judicial redress, possible actions by competition authorities under national rules on abuse of a dominant position, administrative redress, and ombudsmen such as in the UK.

UNIFORM EU-WIDE REGULATION NEEDED?

The Commission considers that in order to address the different types of UTPs, it may be necessary to ensure the existence in all Member States of a common set of enforcement principles. According to the Commission: "The level of protection of the weaker contracting party in B2B relationships varies across Member States... The variety of approaches adopted in Member States to address the issue of UTPs may result in a significant Single Market fragmentation. Companies, in particular SMEs [small & medium enterprises], find it difficult to identify remedies available in different Member States."

Such a set of possible enforcement principles could foresee that the competent authorities in the Member States should have the right to impose appropriate sanctions. These could include, for example, the possibility to order compliance with fair practices, recover damages, impose fines with deterring effect, and report publicly on their findings.

COMPULSORY CIVIL FINES POSSIBLE

The possibility of an EU measure requiring Member States to allow for a competent authority (such as the Competition Authority in Ireland overseeing compliance with the Code) to impose a civil fine is an interesting development. Currently under Irish competition law, only criminal (and not civil) fines can be imposed by a Court, following a criminal prosecution where the standard of proof is proof beyond a reasonable doubt. This makes enforcement of non-cartel infringements (abuse of a dominant position or certain restrictions in agreements between parties at different levels of a supply chain) more difficult.

In civil cases, where there is currently no possibility of a fine as a remedy, the standard of proof is significantly less, being proof on the balance of probabilities.

The reason put forward for not introducing laws allowing the Competition Authority to impose civil fines is an apparent Constitutional impediment; but it is curious that in the financial sector, regulators are empowered to levy substantial fines for infringements.

However, there is also a provision in the Irish Constitution (following a Constitutional amendment on Ireland's entry to the then EEC) to the effect that where a law or measure is necessitated by virtue of membership

of the EU, such laws are not inconsistent with the Constitution.

Normally European laws (Directives) set out the basic rights and obligations applying to persons and businesses in each of the Member States of the EU but leave it to the Member States to decide how these are transposed into each Member State law and how enforcement is to be implemented, again in accordance with national procedures, which can vary in effectiveness between Member States.

In policing UTPs, however, it is the varying degrees of effectiveness of enforcement regimes in Member States which is the problem (Ireland being a specific example). So it would be open to the Commission, as alluded to in the Green Paper, to specify a minimum standard, such as the possibility of an EU Regulation requiring Member States to empower their enforcement authorities to impose civil fines at an appropriate level to ensure effective and uniform enforcement across all Member States of the EU.

To achieve this uniform outcome, a directly applicable and directly effective EU Regulation would appear to be the appropriate measure. Different from an EU Directive, which has to be transposed into Member State law in order to become effective, an EU Regulation is directly applicable, without the need for transposition country by country.

Normally, the Commission uses a Directive to harmonize laws: but where one of the main problems is the lack of a uniform and effective level of enforcement, as distinct from a lack of uniform laws defining and outlawing UTPs, an EU Regulation might be the best legal instrument.

CIVIL FINES ARE EU NORM

Will the Commission mandate the possibility for the imposition of civil fines to police UTPs following its consultation? If it does, it is possible that, for the purposes of enforcement of the Code, the Competition Authority might (through an EU Regulation, bypassing an apparent Constitutional impediment) have the power to impose civil fines in circumstances where this is not open to the Competition Authority for broader enforcement of EU or Irish competition law.

That would be a curious anomaly and might prompt

the Minister to re-consider whether Irish competition law should be changed to allow for the imposition of civil fines in competition cases—which is the norm for enforcement regimes across the EU.

It is worth noting that the Competition Authority has for years advocated for a change in the law to allow for civil fines for infringement of competition law, albeit to be imposed by the Courts and not by the Competition Authority itself. Last year there was an amendment to the Competition Acts to introduce new provisions to facilitate more effective enforcement of Irish and EU competition law in Ireland, but the possibility of the imposition of civil fines either by the Competition Authority or the Courts was considered a ‘bridge too far’.

A clever alternative aid to enforcement in civil cases was, however, introduced in the 2012 amendments to the Irish competition law, whereby commitments given to the Competition Authority by parties under investigation for alleged infringement of competition law in order to settle the case can now be made a Court Order, with the result that if the commitment is broken this will amount to breach of a Court Order, which is contempt of Court and a criminal offence.

This new procedure has been used for the first time very recently by the Competition Authority in an investigation into Double Bay Enterprises Ltd, which trades as Brazil Body Sports (BBS), who are the exclusive distributors of the FitFlop brand of footwear in the island of Ireland. [*See report on next page.*]

Some might argue that this new tool is an even more effective deterrent than a civil fine, but others, myself included, would argue that, not only is it important to have the possibility of civil fines to police UTPs (and competition law generally if the apparent Constitutional impediment could be overcome), it is also important that the Competition Authority itself has the power to levy the fine just like the competition authorities in most other Member State of the EU and the Commission. In the absence of civil fines, enforcement of UTPs lacks a necessary element of punishment (as distinct from deterrence) for the wrongdoing involved.

The Competition Authority has a fine record in responding to consultation processes at the EU and Irish level. It will be interesting to see what, if any, submission it makes to the European Commission following-on from the ‘prompt’ in the Green Paper. ♦