

Kluwer Competition Law Blog

Don't be too cheerful

Max Findlay (Max Findlay Associates, United Kingdom) · Monday, June 6th, 2011

Managing disappointment is as important for businesses as it is for individuals. But it can be particularly hard to do if you've been encouraged or threatened by possible change which then, suddenly, seems to evaporate into a big wet nothingness.

Take, for instance, the draft groceries code adjudicator bill recently published by the UK's Department for Business, Innovation and Skill. The basic idea is to create a watchdog that can stop Britain's supermarkets bullying their suppliers. The groceries code adjudicator – whose creation was recommended by the Competition Commission (CC) following its 2008 groceries market investigation – will have the job of enforcing the groceries supply code of practice (GSCOP). Among other things, the new regulator will be able to take action against supermarkets if, for instance, they put unjustified financial pressure on suppliers, make onerous retrospective changes to contracts or charge suppliers prohibitive fees for stocking their products in stores.

Not too bad, you might think. True, it's taken a couple of years to get to this point since the CC's final report but now, thanks to the draft legislation, everyone will know where they stand. Except, of course, they won't because the legislative programme means that the new ombudsman probably won't start work until the summer of 2013. This has dismayed many, including the National Farmers Union. Its government affairs adviser Nick von Westenholz pointed out that on this timing – and given that the GSCOP was introduced last year – “we're looking at three years of having this GSCOP regime without having anyone to enforce it”.

Nor are the retailers terribly happy either, albeit for different reasons. The British Retail Consortium's food director Andrew Opie complained that a fair system for suppliers already exists. “This begs the question,” he asks, “what will a grocery adjudicator do all day”? What's more, he goes on, any new system of regulation will be expensive and “the current climate makes it more important than ever” that such costs are avoided.

So, disappointment all round. Not that the supermarkets need feel particularly threatened, whenever the new watchdog starts. The government has already announced that the groceries code adjudicator will not “initially” fine anyone in breach of the code. Instead, ministers will bravely name and shame those stores that breach the rules in the hope that lost sales and a tarnished public reputation will hurt offenders more than any financial penalty. You can just hear Britain's top 10 supermarkets – Tesco, Asda, Sainsbury's, Morrisons, Waitrose, Marks & Spencer, Aldi, Lidl, Iceland and the Co-op – quaking in their shoes, especially as they are the ones who'll be funding the new scheme. Is it likely, many people will wonder, that such a watchdog will take a tough line

with the very people paying its bills? You can hear the dashing of hopes already.

Another source of likely unhappiness lies in the Office of Fair Trading's recent announcement that there are serious competition concerns about the provision of auditing services to major companies. The OFT will be conducting a series of discussions with other regulators, government, business and the audit industry to see if there is anything that the Competition Commission can do about the problem.

Currently, there are only four major players in this field – KPMG, Deloitte, Ernst & Young and Pricewaterhouse Coopers – and the OFT says there are “reasonable grounds for suspecting” that there are serious barriers to switching to other providers or for other accountancy firms breaking into this charmed circle. Some banks, the OFT have discovered, will only lend to companies that had been audited by one of the Big Four.

Cue lots of expectation. People have been grumbling about the quartet's grip on this market for a long time – and with increasing force since the collapse of Arthur Andersen nine years ago. Might something actually change now? It would probably be wise not to be too hopeful. For one thing, the OFT isn't entirely sure what the Competition Commission can actually do, hence all the consultations. For another, the European Commission is thinking about possibly introducing legislation to boost competition in this sector, so the UK regulators may well decide that an EU-wide approach would work better (and cause less aggro) than one country acting alone. So, even if the issue is referred to the Competition Commission later this year, the chances are that nothing will actually change any time soon.

The moral of the story, therefore, seems to be that it's best to adjust one's expectations in inverse proportion to the size of the gain promised by any advertised reform.

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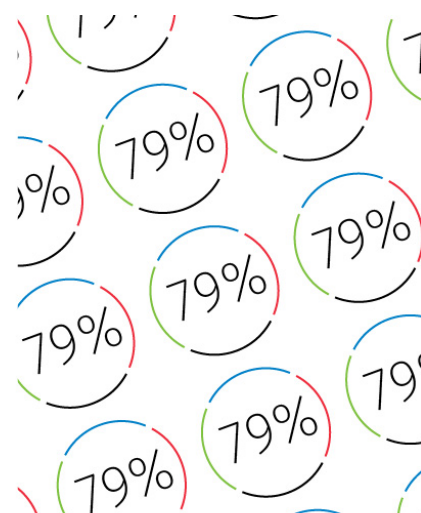
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