Competition and collaboration

The law, food businesses and the public interest

A report of the Business Forum
meeting on 22nd March 2011

Contents

About the Business Forum

Ethical questions around climate change, obesity and new technologies are becoming core concerns for food businesses. We have launched the Business Forum to help senior executives gain expert insights into the big issues of the day. Membership is by invitation only and numbers are strictly limited.

The Business Forum meets six times a year for in-depth discussion over an early dinner at a London restaurant. The forum members shape the meeting agenda.

To read reports of previous meetings, visit foodethicscouncil.org/businessforum.

For further information contact:

Dr Tom MacMillan
Executive Director
Food Ethics Council
39-41 Surrey Street
Brighton BN1 3PB

Direct line: +44 1273 766651

tom@foodethicscouncil.org

www.foodethicscouncil.org

Introduction

Government looks increasingly to businesses to take the initiative in promoting sustainable and healthy diets. This works well where efficiency savings can be had, benefitting businesses and consumers. However, further progress requires the sector also to account for environmental and social externalities, thus raising prices, and to remove the least sustainable products from sale. Businesses face the dilemma of doing this alone, and losing customers, or collaborating with their competitors in potential breach of competition law for conspiring to raise prices or limit consumer choice.

The twenty-third meeting of the Food Ethics Council's Business Forum discussed how to address this dilemma. Should government regulate instead of putting such responsibilities onto businesses? What mechanisms exist to ensure that companies can collaborate on publicly accountable sustainability and public health initiatives without fear of prosecution by the Office of Fair Trading?

We are very grateful to our speaker, Michael Hutchings OBE, a solicitor specialising in competition law. Helen Browning OBE, chair of the Food Ethics Council, chaired the event. A discussion paper circulated in advance of the meeting is available on the FEC website.[1]

This report outlines points raised during the meeting. Contributions are not attributed. The report was prepared by Tom MacMillan. It does not represent the views of the Food Ethics Council, the Business Forum or their members.

[1] www.foodethicscouncil.org/node/614

Key points

- The introduction of judicial review, which means government can be challenged in court over legislation, has contributed to the rise of **'soft law'**, where the state sets objectives but expects the businesses to pursue them through voluntary initiatives.
- To comply with competition law, voluntary agreements need to be able to demonstrate either that they have no effect on competition or, if they do, that they provide an **overriding consumer benefit**. A fear of prosecution inhibits the scope and effectiveness of voluntary agreements.
- How the consumer interest should be interpreted is hotly debated and, by the broader definitions, includes **sustainability and health** in addition to choice, price and innovation.
- Interventions by the Office of Fair Trading (OFT) have **stopped a number of voluntary agreements** in the food sector, including in dairy, and over public health and portion size.
- Successful voluntary initiatives, such as the Courtauld Commitments, have so far tended to focus on measures that make **savings for businesses and consumers** while providing environmental or social benefits, rather than on 'choice editing'.
- Since 2010, the OFT will provide parties considering a voluntary agreement with a **Short Form Opinion** on its legality. While this would not necessarily stand up in court, it would provide significant comfort to participants in an agreement and represents an important development.

The rise of soft law

Over the past 40 years, it has become more difficult for the UK government to regulate. This is partly because globalisation, multi-level governance, social change and new technology have increased the complexity of the challenges facing regulators, but also because the government has become subject to judicial review, meaning that it can be taken to court over legislation. Legislation that used to cover tens of pages now stretches to hundreds or even thousands.

This has seen the rise of 'soft law'. In complex areas such as public health, sustainability and the protection of international suppliers, binding acts of parliament have given way to consultation papers, guidance notes and position statements from government. These are persuasive in a court of law but not decisive.

The burden of translating the ambitions set out in such 'soft law' into practice, and the liabilities that go with that, have fallen largely on industry and NGOs. Government sets regulatory objectives and calls for voluntary initiatives to implement them, sometimes backed by the threat of legislation. It was not long ago that the advertising industry was almost alone in having a voluntary regulatory structure, but now such initiatives are common, including on health and environmental issues in the food sector.

This approach has many problems, including that:

- The government's objectives are often vague, requiring people working within an industry to translate national targets into sector-specific commitments.
- Industry initiatives tend to be led by the large players and may exclude smaller businesses.
- Businesses operating in international markets are under competitive pressures to keep any burden associated with national voluntary initiatives to a minimum, to avoid disparity of trading conditions in different countries.
- Businesses are expected to achieve buy-in not only across their industry but also from consumers and the public at large, who may be sceptical about the effectiveness of self-regulation or concerned whether voluntary approaches to regulation are sufficiently accountable to the public.
- Even if government endorses or supports a voluntary initiative, that does not provide immunity from challenge in the courts.

The competition catch

The most likely challenge to voluntary initiatives is under competition law. Competition law is designed to ensure choice and lower prices for consumers, and to encourage enterprise. It has three main strands:

- Merger law. In the UK, the Office of Fair Trading (OFT) can investigate any mergers that would result in market share over 25%.

- Abuse of dominant position. This concerns monopolies.
- Cartels and horizontal competition. This concerns agreements between businesses, and is the aspect most relevant to collaborative health and sustainability initiatives.

The law on cartels and horizontal competition is enshrined in Article 101 of the new EU Treaty and Chapter 1 of the UK Competition Act: the Competition Act applies to agreements that only have effects in the UK; Article 101 applies any with cross-border effects. It prohibits agreements between companies that restrict, prevent or distort competition, unless there are consumer benefits.

To be legal, voluntary agreements therefore need to be able to demonstrate either that they have no effect on competition or, if they do, that they provide an overriding consumer benefit. Failing to do so could see companies fined a maximum of 10% of global turnover by the OFT or, in the unlikely event that price fixing had taken place, result in a prison sentence. Corporate lawyers in the food sector tend to be cautious about this, and some companies even have a policy not to take part in any meetings at which any of their competitors are present. While most large businesses are prepared to take part in such meetings (for example through trade associations) as long as lawyers are available to check the papers and conversation, a fear of prosecution inhibits the scope and effectiveness of voluntary agreements.

The OFT has sought to reassure businesses that competition law is not a barrier to collaborative sustainability initiatives, publishing a report called 'Green Product Standards Should Work with Competition'.[2] However, that is soft law – the OFT cannot guarantee that following its guidance will offer protection in court.

Consumer benefits

Where the nature of an agreement and the parties involved means that there is a competition issue, its legality hinges on whether a strong case can be made that it provides an overriding consumer benefit. If the initiative increases choice or lowers prices, for example through encouraging the more efficient use of energy or natural resources, then this is likely to be straightforward. Where it has other consequences for consumers – for example an agreement to introduce minimum environmental or nutritional standards that would raise consumer prices or restrict choice – then it may still be possible to demonstrate an overriding benefit but that task would be more challenging.

Compared with the more familiar notion of the 'public interest', the 'consumer interest' that is protected through competition law may appear a rather narrow concept. However, how the consumer interest should be interpreted is hotly debated and, by the broader definitions, includes concerns such as sustainability and health in addition to the traditional considerations of choice, price and

[2] http://bit.ly/gQarID

innovation. Legal debates are divided between economists, who tend to focus on price, and other social scientists and lawyers who espouse a broader interpretation.

Problem cases

In exploring the real and perceived limits that competition law places on voluntary sustainability and health initiatives, it is helpful to consider some examples.

One of the best known in the food sector concerns milk. Dairy farmers had long been arguing that farm gate prices were unsustainable. After government endorsed this concern, a number of dairies and supermarkets agreed to pay higher prices for milk, but were challenged by the OFT. Although it is questionable whether the agreement was unlawful, several of the companies agreed to pay fines exceeding £100 million. Some of those involved in the agreement are contesting the case in court.

A second example concerns portion size. Patricia Hewitt, when health minister, challenged the industry to improve the healthiness of their products, including by reducing portion sizes. The Food and Drink Federation took up the challenge and wrote to the OFT to outline their proposals, only to be told they would be illegal. Even if such nutritional agreements are voluntary and involve only a small number of companies they can be considered to affect the whole market, particularly if retailers get involved. By contrast, initiatives that are specifically for consumer protection and food safety, for example to reduce the incidence of listeria, are generally considered to demonstrate an overriding consumer benefit.

Third is the case of the £2 chicken, an outcome of supermarket price war that caused outrage in the press in 2007. One multistakeholder forum on animal health and welfare concluded that chickens were undervalued in the marketplace, and sought to start a conversation about improving standards in production, which would likely have the effect of raising prices. Participants recall that broaching the subject cleared the room, as businesses were concerned about the competition implications. If the discussion had concerned only quality and improved standards then it might have been unproblematic under competition law, but if it also concerned prices then it would have raised genuine competition concerns.

Success stories

While widespread problems have been reported and many businesses are cautious, there are also some success stories. Several of the businesses taking part in our meeting were active in collaborative initiatives and considered their approach to competition issues to be proportionate, rather than overly cautious.

WRAP, the government's Waste and Resources Action Programme, is widely heralded as a success in brokering collaborative sustainability initiatives, particularly through the Courtauld Commitments. WRAP's

approach is to start collaborative research fora, which lead on to voluntary agreements involving sometimes 30-40 leading companies. Having focused initially on waste reduction and resource efficiency, they are now reaching into broader issues such as climate change. They calculate that they are saving consumers billions of pounds, and providing benefits for the environment and businesses.

However, consumer, environmental and corporate benefits do not always align. For example, meeting targets for greenhouse gas reductions beyond 2020 is likely to require changes in consumption towards a less resource-intensive diet. The more that making progress on sustainability or health is seen to require choice editing or measures to account for the full environmental and social costs of production, the more elusive win-wins will be and the more difficult it will become to demonstrate consumer benefits to competition regulators.

Government alignment

One of the challenges that government faces in reducing the barriers that competition law poses to collaborative sustainability and health initiatives is that OFT is an independent body. There is therefore no formal alignment between the government officials and ministers pushing particular environmental or social objectives, and the competition regulator. In France, by contrast, they have a body which works to align policy and competition law enforcement. However, the cultural context is quite different, in that the French approach to commercial life is less economically liberal than in Britain.

Nevertheless, where voluntary agreements can be shown directly to contribute to achieving formal government objectives, for example in public health or greenhouse gas emission reductions, they should be relatively well-placed to be able to demonstrate they are benefitting consumers. Government would be under considerable pressure to ensure that such initiatives could work. Ministers should be encouraged to reduce the risks for businesses and encourage participation by proactively engaging the OFT, for example by making sure senior competition officials are involved in the early stages of significant voluntary agreements.

Short form opinions

Companies used to be able to apply to the OFT to have their agreement exempted from prosecution under competition law. For example, those behind the channel tunnel obtained such an exemption as it was deemed appropriate in view of the scale of investment required. Exemptions remain available in some other countries, particularly those with the strictest laws on competition. However, the UK authorities withdrew that facility in 2003 in favour of self-assessment, which dampened corporate appetites for collaboration. After all, when lawyers have to advise companies on whether or not an agreement is anti-competitive, they

tend to be conservative in order to protect themselves from potentially incurring liabilities.

In a welcome development last year, the OFT introduced a new facility called a Short Form Opinion (SFO). Details are available in on the OFT website.[3] SFOs provide informal guidance on the legality of an agreement, informed by public consultation via the OFT website. A SFO would not stand up in court but it would provide significant comfort to participants in an agreement. Indeed, some lawyers would hold that it would be foolish not to heed a SFO.

SFOs have the potential to be hugely important in enabling agreements on health and sustainability issues, while also increasing their transparency to consumers, the public and stakeholder groups. However, they have not been widely publicised and are little known. No business or trade association present at our meeting had heard of this facility, despite some having been involved in discussions with the OFT over voluntary agreements, and nobody present was aware of it yet being used. Businesses and NGOs seeking to initiate collaborations that may raise competition issues should consider contacting the OFT for a SFO.

Conclusions

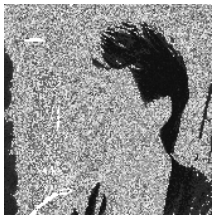
One response to the rise of soft law is to call on government to stop shedding responsibilities for public interest issues such as public health and sustainability. This may be appropriate where deregulation is being driven by ideological commitments, for example in support of a smaller state, a more liberal marketplace or industry self-regulation. However, it is important to recognise that there are also structural pressures driving regulatory power away from the public sector towards the private sector.

In this context, voluntary agreements are likely to remain a prominent regulatory tool in promoting public health and sustainability in the food sector. Their effectiveness depends on setting challenging targets and including clear commitments on monitoring and reporting. The tension between ensuring an effective agreement and complying with competition law can be negotiated by:

- Contributing to formal government targets and seeking endorsement from ministers.
- Seeking a Short Form Opinion from the OFT, rather than adopting an excessively cautious approach to any competition issues.
- Keeping the OFT and European competition authorities informed of developments.

[3] http://bit.ly/hmzipz

Speaker biographies



Helen Browning OBE runs a 1350 acre organic livestock and arable farm in Wiltshire which supplies organic meat to multiple retailers. Helen has worked with many food and farming organisations over the last twenty years. She is currently Director of the Soil Association. Her prior roles include Food and Farming Director and then Policy Advisor of the Soil Association (until March 2010), and External Affairs Director at the National Trust. She was chair of the England Animal Health and Welfare Implementation Group throughout its life (2005-09), a member of the Government's Policy Commission on the Future of Farming and Food ('the Curry Commission'), a member of the Agriculture and Environment Biotechnology Commission (AEBC) until it disbanded in April 2005, and a member of the Meat and Livestock Commission until its end. She was awarded an OBE in 1998 for services to organic farming.

Michael Hutchings OBE is a solicitor specialising in competition law of the EU and UK, and EU law and policy, including internal market legislation and regulatory policy. Having qualified as a lawyer in 1973, he joined Lovell, White & King (now Lovells) in 1974. He set up the firm's EU practice in late 1970s with Philip Collins (now chairman of the Office of Fair Trading), became a partner in firm's Brussels office in 1982-86 and a partner in London office 1986-1996. He has been an independent sole practitioner since 1996. His previous cases include: competition cases before the Office of Fair Trading, the Competition Commission (e.g. the Groceries inquiry), the European Commission and the European Court; advice to a number of trade associations and to companies on compliance with competition rules; anti-dumping cases before the European Commission and Court; advice and lobbying on EU legislation, including food, advertising, VAT, energy and consumer protection directives; and advice on mergers including Noble Foods. He is joint editor of the British Institute of International and Comparative Law (BIICL) Competition Law Yearbook. He was appointed OBE in 2005 for services to international law, based on his work with BIICL.

Food Ethics Council
39-41 Surrey Street
Brighton BN1 3PB
+44 1273 766651
info@foodethicscouncil.org
www.foodethicscouncil.org