

The Regulatory Perception of the Marketing Function: an Interpretation of UK Competition Authority Investigations 1950-2005

January 2007

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INTRODUCTION

- This study provides a detailed examination of the links between marketing practice and competition policy by assessing 161 reports issued by UK Competition Commissions, with regards to the competition concerns within UK markets over the period 1950-2005.
- The examination consists firstly of the frequency with which marketing activity has been judged to be uncompetitive, and secondly, the forms of marketing practice which have been deemed to be most uncompetitive.
- Competition or antitrust law concerns both how products are sold and distributed to customers, and how companies collaborate with and serve customers.
- Marketers may not realise the growing likelihood of violating competition laws; many business crimes are caused by employees who often unknowingly break the law. As the frequency and severity of punishment for competition law violations have increased in recent times, it is important that the implications of firms' marketing actions are grasped.

ASSESSING COMPETITION JUDGEMENTS

- Definitions of uncompetitive behaviour are drawn from Competition Commission (2003) and Office of Fair Trading (2004) documentation. These include:
 - Excessive prices
 - Price discrimination
 - Predation
 - Discounts
 - Vertical restraints
 - Refusal to supply and essential facilities
- In many cases multiple forms of uncompetitive behaviour are identified in reports.
- Vertical restraints or commercial relationships are the most common and persistent form of anticompetitive abuse.
- Cases which involve uncompetitive marketing practices are on average more complex cases involving multiple forms of uncompetitive behaviours.

KEY FINDINGS

Excessive Prices

- 'Excessive prices' are identified as when prices are higher than might be expected in a competitive market. This issue concerns competition commissions when undertaken by a dominant firm and is considered symptomatic of uncompetitive markets.
- Marketing arises as an issue in 67% of cases (46 cases) involving excessive prices.
- A schism exists between the marketing perspective, that effective branding recognises that some brands will attract premium prices, and the commission view that branding is used to provide firms with more defensible products that potentially damage competition.
- The Competition Commissions have repeatedly viewed marketing as a cost, which should be limited to the role of informing customers. Expenditure beyond this end is viewed to be unnecessary and potentially uncompetitive.

Price Discrimination

- 'Price discrimination' emerges when a firm applies different conditions to similar transactions for different customers, or charges different customers the same for goods or services of differing quality or cost.
- 8 out of 10 investigations into price discrimination feature marketing as an issue.
- Competitive concerns include offering 'special' price terms to different types of customer, excessive levels of marketing spending and discounting, discriminatory price structures for complimentary products, and the use of these to recover marketing costs.

Predation

- When a firm acts in a predatory manner it deliberately incurs losses on the sale of a good or service to eliminate a competitor.
- In 15 out of 16 predation investigations marketing has been an issue.
- This form of behaviour is identified in a number of ways, including pricing at below cost and displaying intentions to eliminate competitors; and practices such as loss leading, short run

promotions and establishing sufficient market share are considered uncompetitive when undertaken by a dominant firm.

Discounts

- While offering discounts is a central element of price competition in many markets, under certain circumstances it can be considered uncompetitive both for the market and the perpetrator.
- Of the 32 cases of uncompetitive discounts undertaken, marketing is mentioned in 27.
- Uncompetitive discounting practices include quantity discounts, loyalty discounts, discounts for prompt payment, compliance discounts (specified arrangements for stocking, promoting or displaying goods), and discounts for meeting pre-determined sales targets.
- Main concerns for this practice are the exclusion of competitors from a market and the associated reduction in consumer choice.

Vertical Restraints

- Out of 106 investigations of vertical restraints, marketing featured as an issue in 65.
- 'Vertical restraints' include the set of business to business and business to customer relationships which impose certain restrictions on the sale or supply of goods and services.
- Key processes through which vertical restraints develop include the use of trade associations, vertically integrated firms, material and financial incentives, after-sales environment, and threat of withdrawn supply.
- Uncompetitive behaviours that have developed from the presence of vertical restraints have included discounting, the bundling of goods and the common funding of marketing initiatives.
- This form of uncompetitive behaviour is considered to be particularly persistent in that many industries have undergone repeated competition assessment.

Refusal to Supply and Essential Facilities

- Marketing featured in 10 of the 18 cases of refusal to supply.
- Refusal to supply, which becomes uncompetitive when exercised by a dominant firm, arises for many reasons including after-sales service provision or selective distribution.
- The Commission reports which assess after-sales service provision or selective distribution have made conflicting and inconsistent judgements.

CONCLUSION

- A lack of consistency in the judgements studied raises concerns as to how recent and stronger competition law in the UK is employed by UK competition authorities.
- Marketing managers need to be cognisant with competition law, and marketing objectives should be created that are cognisant of the rules for competitive behaviour.
- Competition authorities need a stronger comprehension of marketing concerns to reduce future inconsistent judgements and potentially limit the persistence of some competition and marketing concerns.
- Competition authorities should consider developing greater dialogue with marketing academics and managers with the aim of disseminating good practice and reducing competition violations.

THE CCP

The ESRC Centre for Competition Policy (CCP), at the University of East Anglia, undertakes competition policy research, incorporating economic, legal, management and political science perspectives, that has real-world policy relevance without compromising academic rigour.

FOR MORE INFORMATION

The full working paper (CCP Working Paper 07-1) and more information about CCP and its research is available from our website: www.ccp.uea.ac.uk

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