



29th June 2009

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Competition Commission
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London
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Ref: CC/RM/Groceries (Remedies)/330-09

Dear Tim

Consultation: introduction of an ombudsman (Phase 2)

Thank you for inviting us to comment on the latest iteration of the GSCOP Order.

At this point, we feel it best to focus on two crucial aspects of the Order where we continue to have significant concerns and where we believe there to be fundamental flaws: (1) enforcement in the absence of the Ombudsman and (2) the Supply Agreement and whose Terms and Conditions apply, the retailer's or the supplier's. We have raised both matters with the Competition Commission (CC) before.

Enforcement

We urge the CC to reconsider and adopt our suggestion to incorporate the GSCOP into the text of the Order. This would impose a statutory duty on retailers to both include the GSCOP within their Supply Agreements **and to comply with its provisions**. Simply requiring the GSCOP to be included in retailers' Supply Agreements does not provide an effective remedy to the adverse effect on competition identified in its findings, as the CC is required to do under the Enterprise Act.

This change is essential in light of the uncertain prospects for an Ombudsman in the short or medium term. It is now clear that the major retailers will not give voluntary undertakings and that introducing the measure via legislation may well not get off the ground. Even were it to do so,

the legislative process is likely to take many years and may itself not be successful. An effective remedy must be in place **from the start** and not be dependent on forlorn hopes for a hypothetical Ombudsman.

We find the reasons for not including the GSCOP within the Order far from compelling. The complaint regime would really not be unduly complicated. In any event, if history is anything to go by, suppliers will not use the dispute resolution procedure as the commercial risks of bringing a complaint will be unduly high, even with the safeguards in place. Furthermore, it looks unlikely there will be an Ombudsman anyway. We understand there to be no automatic right for anonymous complaints to be investigated and we do not seek this.

The approach currently proposed is a significant step backwards from our current position under the SCOP. Currently suppliers and trade associations such as ourselves can raise concerns over compliance with the SCOP with the OFT. Under the GSCOP without the Ombudsman, the only available option is for suppliers alone to seek to enforce their private contractual rights. This proposition, as we have discussed on numerous occasions with Peter Freeman and his colleagues, is simply unrealistic.

We would not want the CC to underestimate the strength of our concerns on this matter. We see the effective monitoring and enforcement of the GSCOP as fundamental to remedying the AEC **from day one**, whether or not the Ombudsman is in place.

Supply Agreements

We are encouraged that the Explanatory Note clarifies explicitly that there should be no assumption that retailers' rather than suppliers' terms and conditions apply in any Supply Agreement. However this does not go far enough. We have a real concern that the CC does not fully appreciate, and is underestimating, the commercial pressures that will now focus on the Supply Agreement.

The CC is introducing a new requirement into the commercial relationship between retailers and suppliers (the requirement to record a Supply Agreement in writing). Retailers are likely to see this as a heaven-sent opportunity to insist on their own terms and conditions applying, as a condition of being a supplier (currently, a supplier has flexibility, being free not to accept retailers' terms while not inhibiting the supplier's ability to supply products).

The GSCOP therefore introduces a new and powerful means for retailers to exert their buyer power, distorting the commercial relationship further in favour of the retailer. This is wholly inappropriate for a remedy to an AEC. When the GSCOP is introduced, existing suppliers will not have the safeguard of the Code's provision preventing retailers exerting economic duress as the Supply Agreement will not have been concluded. This will also be the case for all new suppliers thereafter.

The Explanatory Note needs to go further, emphasising that the GSCOP applies to any agreement to supply, even if the specific terms and conditions of that agreement have not been agreed.

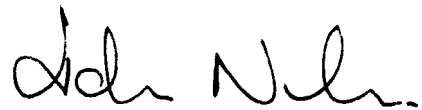
In overview, while some of the proposed amendments to the GSCOP are weaker than the earlier draft (and others are stronger, which we welcome), the two matters of utmost priority are the need to ensure retailers comply with the GSCOP and the potential adverse effects of suppliers being effectively forced to accept disadvantageous terms and conditions laid down by

retailers. We therefore focus our input on these two points alone to stress their importance and urge the CC to heed our concerns.

We would also make the point that the process of developing the GSCOP and Ombudsman proposals, and seeking the voluntary support of retailers, has now been going on for many months. While this has been necessary, we feel strongly that it must now be brought to a head, with the CC, OFT and BIS now working constructively with retailers and suppliers to introduce the CC's preferred solution into the market. This is clearly in the long-term interests of consumers as well as the groceries industry, ie. in the overall public interest.

These matters are crucial to our members and we would be grateful for an opportunity to express our concerns in person, direct to the CC.

Yours sincerely

A handwritten signature in black ink, appearing to read "John Noble". The signature is written in a cursive, slightly slanted style.

John Noble