

ACS Response: A Competition Regime for Growth

Introduction

1. ACS (the Association of Convenience Stores) welcomes the opportunity to respond to the Government's consultation on restructuring the UK's competition authorities. ACS is the voice of local shops representing 33,500 local shops including multiple chains, groups and thousands of independent retailers.
2. In this consultation response ACS will address the following issues;
 - the Competition and Market Authority's (CMA) responsibility to assess the competitiveness of the grocery market and the functionality of the Grocery Code Adjudicator in the new structure,
 - the role of SME representatives in competition investigations, and
 - a mandatory code of practice for mergers.
3. Overall ACS urges Government to seize the opportunity of these reforms to reframe the approach to competition regulation and free the CMA to take a more holistic view of the impact of concentrated markets on consumers. This will only be achieved if the CMA is allowed to act in the public interest.
4. ACS has been closely involved in the competition scrutiny that has taken place in the grocery industry over the past ten years. This has included providing evidence to a significant number of merger investigations (see timeline at Appendix A.) It was ACS in partnership with Friends of the Earth that called for the OFT to refer the Groceries Market for investigation in 2005. ACS took the decision to appeal the initial decision not to refer the market to the Competition Appeals Tribunal, this action led to a reconsideration and eventual market referral. ACS was a main party to the Inquiry that took place between 2006 and 2008. We have therefore had extensive experience of dealing with both the Office of Fair Trading (OFT) and the Competition Commission (CC).
5. ACS has also played a close interest in the OFT scrutiny of the news and magazine supply chain. The delays and procrastination that characterised the OFTs consideration of the need for intervention and/or a market investigation over a number of years leading up to the 2009 decision are a telling example of where procedures can be improved. This is a decision due for review, as per the OFTs commitment in 2009, and lessons can be learned to ensure a more efficient and decisive outcome this time.

Recent Experiences

Grocery Market Inquiries

6. There have been a number of OFT and CC inquiries into the grocery market over the last decade. The Grocery Market is a highly concentrated industry and any new competition structure should be prepared for the need for this market to be continually reviewed. To ensure that this is handled effectively and efficiently provision should be made for the continual monitoring of industries that are highly concentrated and present a risk of harm to consumers.
7. Since the first grocery market inquiry concluded there have been two further large scale investigations, in 2005 (Safeway merger Inquiry) and 2008 (Groceries Market Inquiry). Given that the pace of consolidation in the market has continued, and that effective remedies to combat the identified adverse effects on competition have still to be effectively delivered, there will be cause for more such investigations in the future. This is not desirable for any of the parties involved and is not a smart way to regulate the industry.
8. The Competition and Markets Authority will continue to be presented with grocery market related concerns in three areas:
 - a) *Mergers and Acquisitions*
 - a. The OFT has persisted with an untenable position whereby all acquisitions that affect large grocery stores are subject to stringent restrictions and yet large groups of small stores have been acquired without even being referred for investigation by the Competition Commission. Poor application of market definition has been the major cause of these problems. The opportunity presented by the change in regulatory structure around this merger provides an opportunity to put in place a framework that will lead to more satisfactory approach to market definition and ensure that acquisitions by companies with large national market shares being effectively scrutinised when acquiring much smaller businesses.
 - b) *Abuse of Buyer Power*
 - a. ACS urged the CC to go much further than it did with regard to the remedies necessary for countering the effects of the harmful buying practices. The remedy proposed wholly failed to consider the impact of the identified abuses on the competitiveness of smaller retail businesses, the chosen remedy is therefore of limited benefit to addressing the competitiveness of the grocery retail sector.
 - b. The CMA must have the powers to go much further and act far more radically in how it delivers remedies in this area.
 - c) *Anti-Competitive or Predatory Pricing Campaigns*

The issue of predatory pricing was largely ignored by the grocery inquiry. The 2008 Inquiry failed to grapple the issue of price variation between stores dependent on location. It also discounted concerns about the use of short and targeted deep discounting. Threat to competition through aggressive pricing remains a live issue as supermarket retailers all engage on aggressive expansion programmes throughout 2011 and 2012.

The OFT is not ideally suited to receiving and reacting to individual concerns and complaints in this area. No effort has been made to gather or collate information about harmful practices. The CMA must put in place more effective and accessible means for individual businesses to register concerns and gain advice.

Supply of News and Magazines

9. Working with the Association of News Retailing (ANR), ACS has called on the OFT to allow a full market investigation of the news and magazine market. The decision in 2009 not to refer the issues for a full market investigation by the Competition Commission, was made to give the industry the opportunity to put in place suitable voluntary arrangements that would mitigate the anti-competitive impacts of monopoly supply agreements.
10. ANR criticised this decision at the time, highlighting the long established record of failure in employing self regulation to promote a more competitive, efficient and consumer focused supply chain. In the two years since that decisions the self regulatory structures put in place have been a failure and have no support from the retail sector.
11. The experience of this case is a cautionary note with regard to the consideration being given in this consultation to the use of voluntary agreements in lieu of market investigations. In the case of news and magazines, the lesson is that self regulatory options should only be considered where there is a clearly demonstrated consensus for such an approach.

Recommended Changes in Approach to Market Investigations

12. The conduct of these recent Inquiries highlights certain specific procedural shortcomings that can be addressed in the creation of the CMA. These are:

- a) *Remedies*

The experience of the Grocery Market Inquiry shows that the outcomes and recommendations of a market investigation can be subject to significant delay and identified remedies can be watered down substantially post Inquiry. The consultation suggests that the CC delivered remedies with 10 months of the conclusion of the Inquiry. This is only accurate because the CC considers the end of its responsibility to hand over a recommendation; certain remedies identified in the Inquiry were implemented in that time scale but the most substantial remedies (a planning competition test and a Grocery Ombudsman) remain outstanding.

In the case of these two remedies the planning competition test appears to be no longer actively pursued and the grocery ombudsman is making slow progress and has already been substantially altered from the original recommendation.

The effectiveness of the CMA is likely to be severely undermined if its recommendations to Ministers are treated in the same way following future inquiries. A clear working protocol must be in place that ensures a Ministerial response within weeks and a commitment to deliver the proposed remedy within 12 months.

The CMA should also set itself a new standard which is assessing its success in delivering remedies that they lead to material change in anti-competitive practices. The GMI experience demonstrates that the CC saw its responsibilities ended at the point that it handed out recommendations to Ministers.

b) Structural Deficiencies in Competition

The Grocery Market Inquiry of 2008 was ultimately flawed because its analysis of local competition failed to challenge the established orthodoxy that consumer interests in the grocery market are served if they have more than one national supermarket chain within a 5 or 10 minute drive of their home. This orthodoxy led to the substantive part of the 2008 Inquiry being a rerun of the Inquiries that took place in 2000 and 2005.

The desire to limit the scope of its assessment of competitiveness to a narrow definition of consumer choice ultimately obscured the opportunity to address

the wider structural questions about the ongoing consolidation of the market and its implications for the consumer.

ACS accepts that when faced with a broad ranging industry an investigation team will follow a process that will reduce the scope of the investigation to more tangible specific areas of concern. However in the case of the grocery market this led to a focus that was too narrow.

c) Protecting Public Interest

The failings of recent investigations in grocery arise primarily from the constraints imposed by the existing legal framework. The CMA must be empowered to develop its work and make decisions that take into consideration the public interest.

In markets like the grocery market there are considerations that go beyond the narrow confines of existing competition law parameters. In such cases the competition authority must be able to consider whether the wider social impact of market concentration should take precedence over more narrow considerations of consumer interest.

Grocery Code Adjudicator

12. The *Grocery Market Inquiry* recommended the creation of a Grocery Ombudsman to oversee the proposed Grocery Supply Code of Practice. This is a remedy that ACS supported and remains a necessary addition to the regulation of the market.
13. The pace towards delivering an effective regulator has been far too slow. Four years later, a draft Grocery Code Adjudicator Bill has been published. However legislative priorities and the complications arising from the reform of the competition regulators are likely to suggest longer delays in implementation.
14. The CMA must have significantly enhanced powers to impose its recommended remedies and agreed remedies should be subject to legislative fast track so as to ensure that where harms are identified remedy is in place swiftly.
15. The Bill provides for the Adjudicator to perform the following functions:
 - i. arbitrate disputes between suppliers and retailers
 - ii. investigate complaints about breaches of the code
 - iii. report annually on compliance with the GSCOP

16. The Bill also provides the means by which complaints can be registered anonymously. The proposed mechanism is flawed in that it does not allow formal complaints by third parties. We know from the experience of both the OFT and the CC that suppliers suffering from abusive practices are unlikely to raise issues themselves. There is a 'climate of fear' that is presented when considering highlighting a harmful practice by a very large customer. The CMA should in all its functions be open to receive and deal with information about breaches of competition law or regulations, the source should be immaterial.

17. The Bill provides the GCA with 'naming and shaming' sanctions only. This is insufficient given the scale of the problems identified in the CC Inquiry, this review presents an opportunity to revisit the limits imposed on the ability of the adjudicator to use financial sanctions.

Extensions to the Role of the GCA

18. The Grocery Code Adjudicator as proposed in the draft Bill, is far more limited than proposed by the Competition Commission. The reason for limiting the scope and powers of the Ombudsman are unconvincing. Instead there is opportunity for the GCA to provide a crucial role in protecting consumer interests and promoting competition. This can be achieved by decoupling the GCA from just having a role overseeing the GSCOP and provide it with a wider monitoring role.

19. For example in a recent report published by the Think Tank ResPublica they recommended that the GCA should report annually on the competitiveness of the grocery market.

20. ACS supports the use of the GCA to provide an ongoing monitoring function and early warning system of concerns in the grocery market. The continued concern about the risk presented by high levels of concentration make ongoing monitoring necessary to ensure the absence of consumer harm. A proportionate approach to reporting and monitoring will prove cost effective by averting the inquiries in the scale experienced in the past few years. This presents a viable model for a new approach to be adopted by the GCA and a significant departure from the confusion and frustration of the current system.

SME Bodies

21. ACS supports the proposals to extend the super-complaints power from just consumer groups to SME bodies. However careful consideration must be given to how a small business representative body is identified. There is no one membership form for trade associations or business representative groups. The system must

therefore be set up to be inclusive and outcome focused. The aim is to identify harm and to drive probity in the right areas. This could be quickly frustrated if the scope of who can raise issues is limited from the outset to a very limited number of bodies.

22. ACS is not untypical of the diverse membership types often found in trade bodies. ACS is a representative body with more than 33,500 shops in membership, the majority of our members are small businesses and we see ourselves as a champion of independent retailing. However ACS is a broad church and large national and international companies can also take up membership. This structure could preclude us from being a super complainant and therefore important concerns may not get the opportunity to be aired in the future.
23. The right approach is for the CMA to have scope to decide whether a representative body is bona fide at the same time as considering the content of the complaint brought forward. So long as the complainant is demonstrably about small business harm and the representative body is demonstrably speaking for small businesses then it should be included in the process.
24. The parameters for making these judgements should be a matter for the CMA. There may be scope for a policy to be put in place by the CMA and regularly reviewed to ensure that it remains as current and flexible as possible.

Stronger Mergers Regime

25. ACS supports the proposals to overview the mergers regime. The mergers regime requires greater scope to ensure that it can pick up all anti competitive activities. ACS recommends that a mandatory notification regime is introduced to deliver complete coverage of all mergers within the jurisdictional threshold.
26. ACS would also like to highlight the poor scrutiny of mergers by the competition authorities currently. In each instance of convenience store acquisition ACS has provided evidence outlining the need for action by the OFT. However, limited investigation has occurred or action taken to prevent impact on the grocery market.

Conclusion

27. ACS supports the Government's commitment to restructuring the UK's competition authorities. We believe that it presents an opportunity for a new approach and a shift away from outdated thinking about what constitutes the best interest of consumers. Above all the CMA must be able to make decisions informed by a mandate to act in the public interest.

28. In responding to this consultation the Government must consider carefully how the Grocery Code Adjudicator will fit into a new national competition framework and manage the continual scrutiny of the grocery market. The adjudicator must also have the ability to be proactive to discover anti competitive behaviour and be operationally independent.

29. For further information on this submission please contact Edward Woodall:
Edward.woodall@acs.org.uk or 01252 533014.

APPENDIX A

Competition in the grocery sector 1997 – 2010

- Apr 1999** The supply of groceries in Great Britain from “multiple” retailers is referred to the Competition Commission (CC) for investigation and report under the monopoly provisions of the Fair Trading Act 1973 (FTA) on account of:
1. A public perception that the price of groceries in the UK tended to be higher than in other comparable European countries and the USA
 2. An apparent disparity between farm-gate and retail prices, which was seen as evidence by some that grocery multiples were profiting from the crisis in the farming industry
 3. Continuing concern that large out-of-town supermarkets were contributing to the decay of the high street in many towns.
- Oct 2000** The Competition Commission’s report found the supermarket industry was broadly competitive but identified a number of practices that it considered operated against the public interest.
- Oct 2001** The Supermarkets Code of Practice (SCOP) is introduced following the 2000 Competition Commission report as a voluntary agreement regarding the treatment of suppliers
- Aug 2005** In response to a marked expansion of supermarkets into the convenience market, the Office of Fair Trading (OFT) releases a review of the Supermarket Code of Practice concluding it “should remain unchanged but be used more effectively” given
- May 2006** OFT formally refers the entire UK grocery market to the CC specifically raising four concerns: land banks, the planning regime, buying power and supermarket impact in the convenience store sector
- Feb 2008** CC informally releases its ‘proposed remedies,’ which includes a new ‘Groceries Supply Code of Practice’ (GSCOP) and an Adjudicator, but fails to come to a resolution concerning planning and land banks
- Apr. 2008** CC final report does not find “proof of anti-competitive activities” and defends supermarkets as delivering “a good deal for consumers,” despite stating that action is needed to improve competition in local markets.

- Feb 2009** CC publishes a draft code in an attempt to reach a voluntary agreement
- Mar 2009** Tesco successfully challenges the CC's proposal to introduce a competition test into the planning system.
- Aug 2009** CC achieves a voluntary agreement on GSCOP, but not concerning a market Adjudicator.
- Aug 2010** Coalition Govt. establishes a 'Groceries Code Adjudicator' within the OFT to proactively enforce the Grocery Supply Code of Practice and curb abuses of power