

Undertakings to establish a Groceries Supply Code of Practice Ombudsman Scheme

Response to consultation

Introduction

1. The CC received 25 responses to our formal consultation on the draft Undertakings, published on 28 April 2009. This paper summarizes the main points arising from those submissions and gives the CC's response to them.

Responses from retailers

2. We obtained responses from nine grocery retailers and the British Retail Consortium. We specifically sought an indication from retailers as to whether they would enter into undertakings materially similar to those published on 28 April 2008.

Willingness to accept undertakings

3. The response we received varied by retailer. Some retailers were opposed to any attempt to establish an Ombudsman. Others were prepared to sign up to undertakings, but subject to changes that the CC felt would not be consistent with the Groceries Report, or could not easily be incorporated into an undertaking (as opposed to an Order). Finally, some retailers were prepared to sign up to undertakings materially similar to those published on 28 April, or with relatively minor changes, provided that other retailers also signed up to them.

Costs and scope

4. It was submitted by a number of retailers that the Ombudsman would be likely to represent supplier, rather than consumer, interests and that this would lead to increased prices for customers. However, the Groceries Report expressly considered both the scope of the Ombudsman's role, and its costs. We found that measures should be put in place to ensure that the role of the Ombudsman was set out with sufficient clarity, and its objectives limited to address concerns regarding regulatory creep. We would encourage BIS to consider similar measures in the creation of the office of the Ombudsman.¹
5. In the Groceries Report the CC also considered the costs of the Ombudsman. We found that costs would be driven largely by the number of disputes and complaints brought against grocery retailers by their suppliers. We incorporated into the draft undertakings a mechanism by which costs of the Ombudsman could be covered by grocery retailers in proportion to the number of disputes and complaints linked to them. Our views on the costs and benefits of the Ombudsman are set out further in the body of the letter.
6. A number of retailers suggested that, in the absence of an Ombudsman, suppliers would be sufficiently protected by the Grocery Supply Code of Practice (GSCOP), or that the OFT was the appropriate authority to undertake the role envisaged for the Ombudsman. As we have set out in our recommendation to BIS, this issue was also considered in the Groceries Report. It was found that there would be advantages to having a dedicated body with industry expertise, which could build working

¹ See paragraph 11.339 of the Report.

relationships with suppliers, their trade associations and also with retailers. We continue to be of the view that the role of the Ombudsman is best achieved through the creation of an independent body.

Ombudsman's role and powers

7. Some retailers had concerns regarding the powers of the Ombudsman in respect of confidential and privileged information. While the undertakings contained limitations on the ability of the Ombudsman to disclose information, it was submitted that issues such as data protection, the power to obtain and disclose information, budget and legal status were all issues that should be the subject of legislation. In addition, some retailers were concerned that there was no right of appeal in respect of the matters discussed above, or in relation to the Ombudsman's findings in relation to investigations. We agree that all of these issues would be important for BIS to consider in creating the office of the Ombudsman.
8. Some retailers had concerns regarding the dual role of the Ombudsman in both resolving disputes and initiating investigations. One retailer expressed concern that the Ombudsman could, in certain circumstances, act as an adviser to suppliers and then as a possible arbitrator in any dispute between the retailer and the supplier. We recognise that there is a danger of a conflict of interest in having the Ombudsman performing this dual role. However, we provided for such a possibility in the draft undertakings, and sought to ensure that the appointed Ombudsman is independent of both suppliers and retailers. In addition, we see substantial benefits from having the Ombudsman arbitrate disputes wherever possible to ensure consistency between disputes and to utilise the Ombudsman's experience in interpreting the GSCOP. We did not accept that these concerns were valid in the context of the undertakings we had drafted.

Fetter on commercial negotiations

9. Some retailers had concerns that the combination of the GSCOP Order and the establishment of the Ombudsman would unnecessarily restrict commercial negotiations between suppliers and retailers. However, we do not agree that this will be the case. The GSCOP sets minimum standards for supply agreements between retailers and suppliers to ensure that excessive risk and unexpected cost are not transferred to suppliers. The GSCOP has been carefully drafted to ensure that there remains ample scope for commercial negotiations between suppliers and retailers, and expressly contains a number of provisions that allow for the default obligations in the GSCOP to be set aside where suppliers and retailers genuinely agree otherwise. There are very few obligations in the GSCOP that do not allow for flexibility between suppliers and retailers. Those provisions where flexibility has not been provided were drafted on the basis of very strong direction from the Groceries report.

Responses from other parties

10. The vast majority of the other parties who responded to the formal consultation supported the creation of an Ombudsman; stating that an Ombudsman would be in the best interests of suppliers and consumers. A number of parties emphasised the importance of having a well-resourced Ombudsman to monitor and enforce the GSCOP. Many agreed with the submission of retailers that the Ombudsman should be created through primary legislation rather than through the undertakings process (although in contrast to the retailer submissions this was because of the possibility of greater sanctions against retailers). We consider below some of the main concerns raised by parties other than the retailers.

Pro-activeness of the Ombudsman and scope

11. In contrast to the views of retailers, a number of other respondents emphasised the need of the Ombudsman to be proactive, and have broad powers of investigation. Some respondents submitted that the Ombudsman should have the power to initiate investigations without requiring external sources of information, or beyond areas of specific complaint. Others requested that the Ombudsman consider relationships in other parts of the supply chain. Finally, some respondents suggested that the Ombudsman be given greater powers to penalise retailers for breaches of the GSCOP, including penalties and corrective measures (this final issue is discussed in the body of the letter).
12. The CC considers that the ability of the Ombudsman to be proactive should be weighed against the burden to retailers of Ombudsman investigations. We consider that it is important that the Ombudsman have some evidence on which to base an investigation (although the draft undertakings which are drafted to require first a 'complaint' may be too narrow). BIS may wish to develop further a threshold that must be met before an investigation is commenced by the Ombudsman (similar, for example, to that in section 25 of the Competition Act 1998).
13. In relation to the scope of investigations, the Groceries Report was limited to a consideration of the relationship between retailers and their immediate suppliers. The CC did not investigate, nor make any conclusions regarding, relationships in the supply chain apart from those between retailers and their immediate suppliers. Nor did parties have the opportunity to comment on other parts of the supply chain. Therefore, the CC cannot recommend that the Ombudsman's investigation be extended beyond this relationship.
14. A number of parties submitted that the overriding objective of the Ombudsman should be extended to include an obligation to 'eradicate practices that transfer excessive risk and unexpected costs onto suppliers'. This would be in addition to the current objective to undertake investigations and arbitrate disputes. While goal of the Ombudsman to reduce the transfer of excessive risk and unexpected costs for suppliers, we remain cautious about making such broad statements regarding the Ombudsman's remit.

Anonymity

15. A number of suppliers emphasised the need for the Ombudsman to maintain the anonymity of individuals who made complaints regarding retailer behaviour. It was submitted that suppliers would be unlikely to come forward with information on GSCOP practices unless they could be assured of anonymity. In contrast, a number of retailers were concerned with the anonymity provisions, stating that anonymity will limit the ability of retailers to respond to the proposed investigation and defend its supply chain procedures. Our view is that complainant anonymity should be considered against the role of the Ombudsman in investigating complaints.
16. As set out in the Groceries Report, there is an important distinction between the investigative function of the Ombudsman and the dispute resolution function in the GSCOP. A dispute involves a single complaint by a supplier against a retailer, whereas an investigation would follow a period of information-gathering, through which the Ombudsman may identify, for example, a pattern of behaviour or area of concern from a particular retailer or set of retailers. We have reflected this in the undertakings. Given that an investigation will likely cover a broad area of concern, rather than focussing on individual complaints, we do not think that the anonymity of

complainants should be a problem for retailers in responding to investigations. We therefore recommend that the anonymity of persons who provide information to the Ombudsman be maintained.

Structure of the Ombudsman's office

17. Some submissions were made regarding the structure of the Ombudsman's office. A number of respondents submitted that the period within which the Ombudsman could not act for retailers or suppliers following termination of his appointment should be one year, rather than the six months currently proposed. It was also suggested that there be regular reviews of the effectiveness of the Ombudsman in conducting its office. We think that both of these submissions would be worth considering further in establishing the Ombudsman.