

## GROCERIES MARKET INVESTIGATION

### Summary of the remedies hearing with Marks and Spencer held on 7 December 2007

#### Introduction

1. Marks and Spencer (M&S) generally agreed with most of the provisional findings. In particular, it agreed that competition had been restricted by the planning regime, the control of land and stores located in areas of high local market concentration.
2. In commenting on appropriate remedial action for planning, there was a danger of introducing new time-consuming processes into an already complex system. Individual remedies in isolation would not be sufficient and a package of measures was needed to address issues around planning and land holdings. M&S would support a competition test within the planning process. It believed the sequential approach to planning should be relaxed, facilitating edge-of-centre and out-of-centre development where there was a qualitative need. It would also support an amended need test in Planning Policy Statement 6 (PPS6) that balanced qualitative and quantitative need.
3. With regard to controlled land, all existing and future restrictive covenants and exclusivity arrangements, which have the effect of reducing the likelihood of the land being used for a competing grocery store, should be prohibited. The removal of the Land Exclusion Order could support this as an additional mechanism although M&S said that changes to the controlled land policy should be implemented via an industry-wide order. This could also be framed to cover existing subleases of closed stores above a given size which would reduce the likelihood of the store being used for a competing grocery retail store. In areas of very high concentration due to multiple ownership of stores, M&S, in principle, favoured a requirement for existing stores to be divested, but considered that this should only be required exceptionally and should be done on a site-by-site basis to recognize individual situations. However, M&S had concerns regarding the workability of any remedy that dealt with future, as opposed to existing, land holdings.
4. M&S recognized that there might be a need to tighten the Supermarkets Code of Practice (SCOP) and extend it to more grocery retailers based on the provisional findings.

#### Planning

5. M&S had not spoken specifically to Communities and Local Government (CLG) regarding retail planning changes and the need test, although it had attended various meetings.
6. M&S considered that the key problem with the need test was the over-emphasis on quantitative need, which could be addressed by giving equal weight to qualitative issues. This approach would allow additional stores to be developed where consumer demand was evident. It was suggested that the sequential (town centre focused) test could be made more flexible so that where a qualitative need had been established, this should take precedence over the strict form of whether it was an out-of-centre or edge-of-centre development. M&S suggested that new stores on the edge-of-centre could have a more adverse effect on the town centre than out-of-

centre stores, because they competed more directly with the primary area and might shift the focus of the town centre in a negative way for some retailers more distant from the new development. M&S said that an example of an edge-of-centre development that had a negative impact on a primary shopping area was the Two Rivers Retail Park in Staines. Based on the edge of Staines town centre, the retail park comprised food and retail outlets and was now the primary location for people to visit, at the expense of the town centre.

7. M&S disagreed with the proposition that a move to a two-tier structure of out-of-town and a single edge-of-centre/town centre classification could be beneficial, on the basis that it would have wider ramifications than just groceries. It considered that such an approach could be interpreted as a watering down of the town centre first approach and negatively impact on the town centre. On a case-by-case basis, it was possible that that an out-of-centre location was better than an edge-of-centre location and the reverse could also be true.

### **Competition test**

8. M&S preferred a competition test based around a local share of net grocery floor space. It considered that a test based on sales was more likely to reflect how successful a store was. A fascia count was considered too simplistic to reflect relative market share.
9. It was suggested that local planning authorities (LPAs) had the technical ability to apply the competition test, although they were already rather overburdened. Given that it had only received the Draft Planning Remedies paper shortly before the hearing, M&S had not had an opportunity to review the Competition Commission's (CC) proposals. However, as an initial reaction, M&S expressed reservations about a licence-to-operate system administered by the Office of Fair Trading (OFT), because it would add to what was already a lengthy process, but indicated that it wished to give this further thought and provide more considered comments in due course. However, it did see a role for the OFT acting as a statutory consultee to assist LPAs. If LPAs went against OFT advice then they might go through a prior notification procedure, similar to other areas of planning, where there would be an opportunity for CLG to order an inquiry.

### **Controlled land**

10. M&S said that if the ability to impose restrictive covenants were lost, there was a risk that grocery retailers would be more likely to retain land rather than develop or divest it within a specified period of time. This might cause retailer behaviour to be distorted. Therefore, there was need to consider the package of remedies relating to controlled land as a whole.
11. M&S hoped that an industry-wide order would capture the large number of existing restrictive covenants and deter others from imposing similar arrangements. One concern it had was that existing covenants were framed and worded in a variety of ways and it had no firm conclusions as to how an order would capture all of these variations. For that reason, M&S favoured a presumption of illegality (not notification) which required the party with the benefit of the covenant/agreement to establish legality and there would also need to be a mechanism for resolving disputes about legality.
12. M&S was strongly of the view that specific decisions resulting from an order must operate quickly and effectively. It saw a possible role for the Lands Tribunal in

providing these decisions, given its familiarity with restrictive covenants and their application. However, the Tribunal would need to operate a fast-track procedure for this process to operate effectively. The process needed to be quick otherwise sites identified for acquisition would simply be passed over for development.

13. It was suggested that it could be difficult to determine whether a restrictive covenant had the effect of reducing the likelihood of the land being used for a competing grocery store, as a specific covenant might target only an element of a grocery operation, for example, the sale of alcohol or meat products. In such circumstances, it would need to be determined whether the covenant was effectively deterring grocery retail competition. To make any such remedy reasonable and practicable, it could be appropriate to include a test of materiality.
14. M&S said that remedies should also prohibit exclusivity agreements as these had prevented it from opening stores in a number of locations (more commonly than restrictive covenants), particularly in retail parks. For example, a rival retailer could agree with a landlord that no competing retailer could have a 185 sq metres (2,000 sq feet) food section in the same retail park. M&S referred to the 18 examples of exclusivity covenants/restrictions that had prevented it from entering local markets, which had been supplied to the CC in June 2007, and agreed to provide an updated list including further examples it had encountered since then.
15. Exclusivity agreements against M&S had only been relaxed in the past where its store took the form of a full format store selling clothes rather than where it was proposing a food store only.
16. M&S suggested that subleases of closed stores above a given size with restrictions which reduce the likelihood of the store being used for a competing grocery retail store should be prohibited. If they were not then a means to circumvent the other remedies might be possible.
17. It was considered that removing the exclusion in the Land Exclusion Order had the potential to act as an additional mechanism but would not be sufficient alone to prevent the exclusion of other grocery retailers via these sorts of agreements. Instead, M&S favoured a remedy by way of undertakings or an order.
18. Subject to clarifying the criteria that should apply, M&S considered that, in principle, it would be appropriate to require grocery retailers to divest existing land holdings in order to facilitate new entry in areas of very high concentration through multiple store ownership. However, M&S considered that it could be difficult to set a period within which divestment were to be effected, and noted that this could distort behaviour on the market. For example, in a site assembly process, if the deadline by which the site must be developed was imminent, the party owning the final piece of land needed to assemble the site would be in a very strong position. Also, if a retailer had a given period within which to develop or divest, that retailer would be able to divest to a non-competitor just before the deadline, and thereby avoid the remedy.

### **Supermarkets Code of Practice**

19. Although M&S had a set of internal processes which were at least equivalent to the SCOP, it believed that if the SCOP were to be extended, it should capture all multiple retailers including large wholesalers such as Nisa-Today's and Booker. M&S had not considered whether the SCOP should be extended to primary producers or overseas suppliers. Its initial reaction was that the same principles should apply to both its UK and overseas suppliers.

20. M&S did not believe that a complaint could be properly investigated if the specific nature of the complaint, and who had made it, were unknown. There appeared to be a high level of misunderstanding regarding the SCOP and a feeling among suppliers that it might not be in their interest to make a complaint. If the SCOP was relaunched, it would need to be resold to suppliers, communicating to them that retailers recognized it was important and supported its principles.
21. M&S had its own internal settlement process for suppliers and an ongoing dialogue for various issues that commonly arise. M&S could not think of any instances where it had not been able to resolve disputes internally and had ended up in complete disagreement with a supplier.
22. M&S said that it was difficult to comment on the penalties associated with breaches of the SCOP because it was not a signatory to it. However, M&S felt that it would be sensible to allow any enhanced SCOP to take effect before considering whether formal sanctions against retailers (and hence legislative changes) were necessary.

### **Ombudsman**

23. M&S was not convinced that there was a need for an Ombudsman. An Ombudsman was typically appointed for a specific and well-defined purpose, whereas grocery retailing was a multi-faceted and complex industry. Complaints could already be pursued with the OFT and the OFT could also investigate breaches of competition law. The enhanced SCOP should be given time to take effect before introducing another independent body to investigate complaints.

### **Wastage**

24. M&S discussed its trade terms in relation to wastage.
25. M&S was clear that it would not impose retrospective charges on suppliers.
26. When dealing with fresh produce, M&S thought that it would be very difficult for an external adjudicator to rule on whether there was a quality issue with a product, because by the time the product was examined it would be well past its sell-by date in any event. However, there was scope for having a process written into an agreement for establishing an objective level of quality.

### **Good practice**

27. M&S said that it was not in favour of a requirement for best practice to be disseminated among grocery retailers.
28. M&S said that, rather than sharing methods of working, individual firms should be encouraged to develop their own good practice.

### **General**

29. M&S regarded itself as an effective competitor to the big four supermarkets. Though it concentrated on its own goods and did not sell brands, it offered an edited range of the best of all products and the vast majority of groceries that consumers wished to purchase were available.