

Summary of the remedies hearing with Waitrose held on 28 November 2007

Introduction

1. Competition had become much tougher during the course of 2007, in terms of renewing existing leases and obtaining new sites. There was no evidence that planning, under current conditions, was getting any easier for Waitrose to be able to maintain or grow its market share. Waitrose hoped that the rules decided by the Competition Commission (CC) would be clear and workable.

Planning

2. Waitrose thought that it was essential that the 'town centre first' policy was retained and believed that the need test should be a broader test in terms of social, economic and sustainability issues. Grocery retailers had an obligation to ensure that developments were sustainable. The thrust of its development programme and that of the John Lewis Partnership were aimed at the regeneration of town centres, although there was a need to be flexible where appropriate: edge-of-town centre sites should be considered in the context of the wider planning scenario of any particular town. The town centre first policy had a number of benefits, including the social aspect of providing store access to people who would not otherwise have access to stores located in out-of-town developments. In addition, town centre developments did not have the environmental impact of out-of-town developments.

Competition test

3. Waitrose proposed a fascia-based competition test in which local authorities would be required to consult the Office of Fair Trading (OFT) for any planning applications for grocery stores above 1,400 sq metres. The OFT would indicate which operators would not pass the test. Where a planning application was for a named operator which would not pass the test, planning permission would be refused unless there were exceptional circumstances which justified permission being granted. A condition would need to be imposed on all relevant permissions to ensure that the competition test was not breached in the future. The test would be clear, transparent and would not add extra cost or delay to the planning application system. If the CC considered that store extensions should be included the test would need to incorporate a floor space test. This would add a level of complexity and would affect the workability of the test Waitrose was proposing. In this event extensions to large stores (ie stores above 1,400 sq metres) which already stocked a significant proportion of non-grocery items should be exempt from the process for the sake of workability. Relying on market shares would not solve the issue of duopolies and would make the test hugely complex to operate
4. The current fascia test for the analysis of mergers had proved to be very straightforward and robust and dealt with the key issue of choice. During the last seven to eight years supermarkets had, in the vast majority of cases, been able to determine whether applications for acquisitions were likely to succeed without the need to consult other bodies. Waitrose believed that its proposed test would act in a similar manner.

Controlled land sites

5. Waitrose supported the idea of identifying sites for divestment in areas where a retailer had a high concentration of stores. Divestment of a site could be managed under the proposed competition test. It would be clear which supermarkets were not trading in a particular area and could bid for the site.
6. It was difficult to say how long a piece of land should be held by a retailer before it had to be developed. It generally took three to four years to develop a site. There needed to be a time limit, but this should be linked to the competition test to ensure that any land divested went to a retailer that would bring added competition to the market in question. The length of time taken to develop a site was less of a consideration (sometimes it had taken Waitrose eight or nine years to develop a site) than the fascia of the operator concerned. The competition test would determine whether a grocery retailer should open a store and whether it would give the consumer choice.
7. Restrictive covenants were often applied to land sold by grocery retailers. In most cases they did not serve any valid commercial purpose apart from protecting market share. The exception to the rule was shopping centres where a grocery retailer would, in return for developing a shopping centre, expect to generate a certain return on the basis of it being the sole supermarket in the development. Generally, shopping centres were developed by developers and the landlords would decide the right mix of retailers. It was unusual to find two major grocery retailers (other than one of the supermarkets and a Marks and Spencer) in the same shopping centre because there were too few customers to make it economically worthwhile for more than one operator. Waitrose used restrictive covenants because they were standard industry practice. If the CC found that particular restrictive covenants should be removed Waitrose would accept that—assuming that such a policy was applied to all supermarket operators.
8. With regard to subleases Waitrose would support a remedy which addressed the practice by grocery retailers of preventing stores from being sublet to other food retailers again, assuming that this was applied to all supermarket operators.
9. The removal of the Land Agreements Exclusion and Revocation Order 2004 was not necessary and would create uncertainty for those parties with restrictive covenants. The proposed remedies should not go beyond what was necessary.

Supermarket Code of Practice

10. Waitrose believed that it would be disproportionate to extend the scope of the Supermarket Code of Practice (SCOP) to smaller retailers but would accept being included if the CC's findings justified widening it to a broader group. Waitrose dealt fairly with its suppliers and its own supplier code went beyond what was set out in the SCOP. For example, its payment terms and arrangements for fresh food suppliers took account of local quality and the weather. In addition, all of Waitrose's suppliers had access to its Managing Director.
11. Waitrose did not believe that flexibility of the SCOP could be retained without a reasonableness test. The only real solution would be to encourage suppliers to come forward if they felt they were being treated unreasonably. A lot depended on the confidence of suppliers to challenge a retailer without the fear that at some point in the future the retailer would take punitive action against them. There was a benefit in keeping and improving the SCOP, but the main issue was how to enforce it in the absence of a supply base prepared to come forward when there was a problem. The

only solution to getting suppliers to come forward was changing buyers' behaviour. The culture in which buyers operated needed to be changed so that it was easier for vulnerable suppliers to come forward with evidence. Waitrose could not see the value of having a separate ombudsman to enforce the SCOP; there was no reason to think that this would work better than the current system administered by the OFT. Waitrose believed that the rules of the SCOP and the penalties for non-compliance should be well defined to give suppliers the confidence to come forward, but should not be framed in such a way that it became advantageous to complain without merit in the first place.

12. Waitrose suggested that a regular audit of the trading records between suppliers and retailers could pick up misdemeanours by retailers without increasing the perceived vulnerability of suppliers, but this would be hugely intrusive, enormously time-consuming and complicated.
13. Commenting on waste, Waitrose said that it was very unusual for suppliers to cover the cost of its waste products. This would only occur if stock that had been delivered (to a warehouse or to a store) was considered to be sub-standard. In those circumstances the Waitrose buyer would notify the supplier. This did not happen very often and was a very small proportion of Waitrose wastage. Waitrose generally absorbed the costs of items returned by customers, replacing the product and refunding them at the same time. Returned items were a fraction of Waitrose's waste bill. If Waitrose made a mistake and ordered too much product it would bear the cost: it would never retrospectively charge a supplier. Waitrose was much stricter with regard to best before dates than its competitors. For all these reasons its waste bill was considerably higher than other grocery retailers.
14. Waitrose limited the promotions in its stores to between [X] and [X] per calendar month. At any one time there were probably about [X] to [X] lines that Waitrose's suppliers would like to promote in its stores. The difficulty for Waitrose was deciding which lines to promote. Promotions were planned a long time in advance (typically four to five months ahead) and worked in the same way in all the Waitrose stores. It was rare for Waitrose to initiate the promotion of a particular line; rather it was prompted by the suppliers seeking promotion of their products.
15. Waitrose did not see any reason why the SCOP should not be tightened but noted that there were instances when certain practices (for example, retrospective charges) benefited suppliers. Waitrose considered that grocery retailers with an 8 per cent market share should be covered by the SCOP and saw possible value in extending it back to primary producers in the UK. It would probably prove too difficult to extend it to overseas suppliers.

Merger control

16. Waitrose supported the existing merger control rules which had been effective and had worked well but suggested an 'enhanced rule' for divestments in merger cases which would operate in line with the competition test. This rule would apply where a retailer with two stores in an isochrone would be required to sell one of its stores to a retailer other than an incumbent, thereby creating the opportunity for an increase in fascia count from two to three or three to four. In these very specific circumstances, the merger rules should support an increase in fascia count. In contrast with this counterfactual, the sale of a store to an existing incumbent represented a lessening of competition.

Conclusion

17. Waitrose considered that the CC's provisional findings were fair and appropriate.