

GROCERIES MARKET INVESTIGATION

Provisional decision on remedies: background and overall assessment

1. Introduction

1. On 9 May 2006 the Office of Fair Trading (OFT) referred to the Competition Commission (CC) the supply of groceries by retailers in the UK. On 31 October 2007 we published our provisional findings, which stated that we had found features of the market that were resulting in an adverse effect on competition (AEC). At the same time, we published our notice of possible remedies (remedies notice) that set out a number of measures we would be considering with a view to addressing the AECs we had provisionally found. We received a number of responses to our remedies notice and held a number of hearings and meetings with main and third parties at which remedies were discussed. Having given careful consideration to all the evidence we have gathered to date on remedies, this document—together with three other supplementary documents—sets out our provisional decision on remedies. These papers together serve as the basis for the consultation on our provisional decision on remedies.

2. It is important to note that this provisional decision relates to remedies to the features of the market and adverse effects on competition that were set out in our provisional findings. We received a number of submissions in response to those provisional findings and have held discussions with various parties on our provisional findings. It is possible that our final findings will differ from our provisional findings. However, it is currently our view that, to the extent we consider our final findings likely to differ from our provisional findings, the remedies set out in our provisional decision will still apply.

3. Our provisional decision on remedies is contained in four separate papers, which should be read together. This paper sets out the basis on which we have considered remedies, summarizes the remedies package as a whole and discusses the proportionality of that package to the scale of the AECs. Two further papers set out the remedies we intend to pursue in relation to local market concentration; one paper discusses remedies to controlled land issues (including remedies to deal with existing areas of high concentration, and restrictive covenants, exclusivity agreements, land holdings and subleases going forward) and multiple stores and a second paper discusses measures to prevent new store growth giving rise to new areas of high concentration). A third paper sets out the remedies we intend to pursue in relation to supply chain issues.
4. This paper begins by setting out the framework we have used for our consideration of remedies in this investigation. It then moves on to summarize the package of remedies we intend to pursue. Finally, it sets out our consideration of the effectiveness and proportionality of the package as a whole.

2. Framework for the assessment of remedies

5. Having identified in our provisional findings a number of features of the market for the supply of groceries by retailers in the UK that result in an AEC we are required to decide the following additional questions under section 134(4) of the Act:
 - (a) whether action should be taken by us for the purpose of remedying, mitigating or preventing the AEC concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from the AEC;
 - (b) whether we should recommend the taking of action by others for the purpose outlined in (a) above; and
 - (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.

6. In choosing appropriate remedial action, the CC has a statutory obligation to achieve as comprehensive a solution as is reasonable and practicable to the AEC and any detrimental effect on customers so far as resulting from the AEC.¹

7. As noted in its Guidance (CC3, paragraph 4.9), the CC will consider the effectiveness of different remedies and their associated costs and will have regard to the principle of proportionality when deciding on appropriate remedies. The CC has made several general observations about factors relevant to its consideration of effectiveness (CC3 paragraph 4.13 and following). First, an effective remedy will make clear the persons to whom it is directed and any other persons who might be interested in it. Second, in considering its effectiveness, the CC will consider the prospects of a particular remedy being implemented and complied with. A third relevant consideration is the time period within which the remedy will be effective. Other factors may also be relevant to the CC's consideration of effectiveness, depending on the facts of the case.

8. In considering whether a remedy is reasonable and practicable, the CC will consider the cost associated with implementing the remedy (CC3, paragraph 4.10). The CC will endeavour to minimize any ongoing compliance costs to the parties, provided the effectiveness of the remedy is not reduced (CC3, paragraph 4.12). However, the CC will balance those costs against the benefit to the UK economy and to customers in particular.

9. The CC will also seek to implement remedies or a package of remedies which are not disproportionate in relation to the AEC and any resulting detrimental effect on customers. If it is choosing between two remedies or packages of remedies which it

¹Section 134(6) of the Act.

considers would be equally effective, it will choose that which imposes the least cost or that is the least restrictive (CC3, paragraph 4.10).

10. The CC will also have regard to the effects of any remedial action on any relevant customer benefits within the meaning of section 134(8) of the Act arising from the adverse feature or features of the market concerned. Such benefits comprise lower prices, higher quality or greater choice of goods or services or greater innovation in relation to such goods and services. To qualify within the meaning of section 134(8), the CC must believe that the benefit would be unlikely to accrue without the relevant feature or features.
11. In general, the CC will seek to implement (or recommend) remedies that address the AEC, though it may also choose to address the detrimental effect on customers in addition or as an alternative (CC3, paragraph 4.6).² The CC has said that it is unlikely that, having decided that there is an AEC, it will decide that there is no case for remedial action, at least before it has given attention to any relevant customer benefits that may accrue from the market features.

3. Provisional decision on remedies: summary

12. Our assessment of the remedy options contained in our remedies notice, as well as other proposals put forward by parties is contained in the three other papers published as part of this provisional decision. This section of this paper summarizes our provisional decision. The remedies we have provisionally decided to pursue cover local market concentration and practices by retailers in the supply chain.

²The CC has said (CC3, paragraph 4.22) that it 'will first look for a remedy that would be effective in dealing with the adverse effects on competition of the market features rather than seeking to deal with any detrimental effect on customers'. However, the CC is prevented from taking action to address future (rather than existing) detrimental effect on customers if it is not also remedying the AEC (section 138(6) of the Act).

Local market concentration remedies

13. Those remedies that will address local market concentration may be divided into those relating to existing areas of high concentration and those relating to measures to prevent new store growth giving rise to new areas of high concentration. Each is set out in turn below.

Existing areas of high concentration

14. Those remedies that will address local market concentration may be divided into those relating to existing areas of high concentration and those relating to measures to prevent new store growth giving rise to new areas of high concentration. Each is set out in turn below.

Existing areas of high concentration

15. We have provisionally decided to pursue a package of measures covering the use of restrictive covenants and exclusivity agreements affecting grocery retailing. We are not proposing measures in relation to land bank sites, leasing, or store divestitures.

Restrictive covenants

16. We have provisionally decided that the following measures would constitute a comprehensive, reasonable and practicable solution to the AEC that we have found results from the use of restrictive covenants by grocery retailers:
 - grocery retailers will be required as soon as possible to release existing restrictive covenants in areas of high concentration;
 - grocery retailers will be required to release any existing restrictive covenant that has the object or effect of restricting grocery retail use, and which the burdened party has notified to the OFT and which the OFT has said exists in an area of high concentration;

- grocery retailers will be required in the future not to impose restrictive covenants that have as their object or effect the restriction of grocery retail use;
- as an anti-avoidance measure, grocery retailers will be required not to enter into contracts which are similar in effect to restrictive covenants limiting grocery retailing;
- where a restriction requires the agreement of a local planning authority in order to be lifted we recommend that the local planning authority has regard to the AEC resulting from the restriction in reaching its decision; and
- we recommend that local planning authorities do not enter into agreements restricting grocery retail use in future.

Exclusivity arrangements

17. We have provisionally decided that the following measures would constitute a comprehensive, reasonable and practicable solution to the AEC that we have found results from the use of exclusivity arrangements that restrict grocery retail use:
- grocery retailers will be required not to enforce any existing exclusivity arrangement in an area of high concentration and that has been in place for more than five years from the store opening;
 - grocery retailers will be required not to enter into or seek to enforce any exclusivity arrangement in the future that covers a period of more than five years from the store opening; and
 - local authorities will be recommended not to enter into any exclusivity arrangement in the future that has the object or effect of restricting grocery retail use for a period of more than five years from the store opening.

Other issues

18. We have provisionally decided not to take or recommend the taking of action in relation to a number of other issues.

- *Land banks*

19. We have provisionally identified only nine land bank sites that may be acting as barriers to entry in areas of high concentration. We do not consider it appropriate to put in place a remedy specifically designed to deal with land bank sites. In general we do not consider the scale of the AEC we have found from land bank sites acting as barriers to entry to be large and note that we have found little evidence that they are primarily being used as such. We note that in many cases in the past commercial agreements have been reached between retailers that have allowed store developments to take place. We are also concerned that placing restrictions on land bank sites in the future would inhibit legitimate site assembly.

- *Leases and sub-leases*

20. We have provisionally decided to take no action in relation to existing leases or sub-leases we have identified as barriers to entry in areas of high concentration. We have also provisionally decided to take no action in relation to future leases and sub-leases.

- *Replacement stores*

21. We have provisionally decided not to take action in relation to 13 multiple stores in the context of store replacements. This is because we expect the retailer to dispose of the former store on relocation and we note that our remedies in relation to controlled land will ensure that no restrictive covenant or exclusivity arrangement covering more than five years will be placed on the former store.

- *Multiple stores*

22. In relation to the other 24 areas of high concentration where there are multiple stores, we have provisionally decided that it would not be proportionate to require compulsory divestitures in this case. Whilst store divestitures would be a direct and

effective remedy to high concentration we consider that divestitures would in this case represent a significant intervention in property rights, as well as being disruptive to consumers. We do not consider such an intervention to be supported by the strength, robustness and scale of the AEC we have found at the local level in the relevant areas. We also consider that the effect of local concentration on nationally-set aspects of the retail offer will be dealt with effectively by our other remedies and we do not consider that our AEC findings in respect of the local effects of concentration in these areas is sufficient to support such a high degree of intervention.

Future areas of high concentration

23. We have provisionally decided to put into place the following remedies to address the AEC that relates to measures to prevent the emergence of local market concentration in future, including our consideration of possible changes to the planning system.

The competition assessment

24. We consider that a competition assessment is necessary to prevent the emergence or strengthening of a concentrated position held by a grocery retailer in local markets. We have provisionally decided to recommend the following set of measures:
- Our provisional decision is to recommend to the Government and the Governments of the devolved administrations that the competition assessment should be implemented within the planning system, with the OFT acting as statutory consultee. We consider that the competition assessment could operate effectively either inside or outside the planning system. However, the inclusion of competition into the planning regime, as part of an existing regulatory process, has merit and would allow local planning authorities (LPAs) to trade off

competition issues and other planning issues when this meets local needs. This assessment should work as follows:

- The competition assessment should be undertaken at the development control stage, that is after an individual planning application has been submitted. In addition the development plan should include a policy which made clear that, in determining planning applications for development of sites allocated in the plan for grocery retail use, the LPA would take account of competition issues and the advice and assessment of the OFT.
- Any necessary changes to legislation and guidance should be made to introduce the competition assessment into the planning system:
 - The competition assessment should apply to all grocery store developments (new stores, extensions/mezzanines, store relocations) above 1,000 sq metres in the CC's market definition.
 - The local market should be defined by drive-time isochrones centred on the site. The drive-times should be consistent with those used in the CC's market definition and should be based on a standard commercially available computer package.
 - For a new development, the competition assessment should take account of a combination of fascia and an assessment based on market shares (probably of grocery floor space) within the isochrone.
 - We are currently minded to propose the following as the basis for the assessment that would be applied by the OFT:
 - Entry by a fascia not already present in the isochrone would always be acceptable.
 - If there are four or more different fascias in the isochrone (including the proposed development) the development would be considered acceptable under the competition assessment.

- If the grocery retailer proposed for the development has a share of net grocery sales floorspace (including the proposed development) of less than 60 per cent, this would be considered acceptable under the competition assessment.
 - If the proposed development did not satisfy the three criteria above, the OFT would advise the LPA that the development was not acceptable on competition grounds.
25. The fascias to be included in the assessment would be consistent with the CC's market definition. Different fascias within the CC's market definition which are owned by the same ultimate parent company would be included as the same fascia. The assessment would include in the analysis sites within the isochrone that had received planning permission.
26. The results of the competition assessment would be valid for five years, in line with the usual period of validity of a planning application. Applicants should be able to resubmit an application in the event of a material change.
27. We would require all grocery retailers to provide the OFT with up-to-date information as required on net sales area and grocery net sales area for all stores within the isochrone.

Resources

28. We recognize that the OFT will need to re-allocate its resources to fulfil these new functions and we acknowledge also that consideration will need to be given as to whether the OFT's budget will need to be increases in respect of these functions, and recommend that these be made available either by an agreed increase in its budget or by industry funding.

Merger control

29. We note that the competition assessment proposed could be more pervasive than merger control legislation. In particular, we note that a grocery retailer that had an unacceptable degree of concentration in a local market may be able to avoid the competition assessment that would result from the retailer developing a store by buying a store in the area and the transaction may not come under the scrutiny of the OFT. We therefore consider it appropriate, in order to achieve consistency, to require that all grocery store acquisitions with grocery net sales area above 1,000 sq metres should be notified to the OFT by the acquiring party.

Other modifications to the planning system

30. We have consulted on making changes to the planning system in three areas (changing the sequential test to free up some edge-of-centre locations for new store development, modifying the need test and streamlining the planning system). Whilst these changes could benefit competition by reducing the barriers to entry that the planning system presents to grocery store development, we are aware that (other than in an indirect way) the planning system does not seek to promote competition in grocery retailing. We are recommending that in future more account of competition should be taken in the development plans of local planning authorities but have provisionally decided not to recommend any further specific changes to the planning system (other than the competition assessment described above). We are concerned that there is a risk of unintended consequences that could arise from interfering than is necessary with an area of policy that has specific and well-defined social objectives and which is itself subject to a process of public consultation and reform.

Supply chain remedies

31. In summary, we have provisionally decided to put in place the following remedies to address the AEC in respect of supply chain practices:

- a new code of practice will be created, the terms of which certain grocery retailers will be required to adhere to in their dealings with suppliers of groceries, and which those retailers will be obliged to incorporate into all contracts with suppliers of groceries;
- the coverage of the code of practice will be extended to all UK grocery retailers that are part of corporate groups with a turnover greater than £1 billion in the supply of groceries at a retail level in the UK, and the code of practice will be referred to as the Groceries Supply Code of Practice (GSCOP), to reflect the fact that its coverage is broader than the SCOP;
- the substantive provisions of the GSCOP will essentially mirror those of the SCOP, with certain amendments:
 - to prohibit outright retrospective changes to agreed terms of supply; and
 - to require retailers to make certain improvements to their internal processes in relation to dealing with suppliers;
- those grocery retailers that are subject to the GSCOP will be obliged to:
 - appoint an in-house code compliance officer;
 - improve their arrangements for keeping records of contracts with suppliers; and
 - automatically provide to their suppliers information on contractual terms (including the GSCOP), rights to complain and details of the dispute resolution procedure; and
- our preference is for the establishment of a groceries supply code ombudsman, which, in particular, would:
 - arbitrate disputes between retailers and suppliers arising under the GSCOP;
 - publish guidance regarding specific provisions of the GSCOP;
 - have the power to gather information (for example, by receiving confidential complaints from suppliers and primary producers regarding breaches of the GSCOP) and proactively investigate retailers' records in areas subject to

complaint, in order to identify whether breaches of the GSCOP had occurred;
and

- report to the public and the OFT on retailers' compliance with the GSCOP;
- in the absence of such an ombudsman being established:
 - disputes between retailers and suppliers under the GSCOP will be heard by an independent arbitrator, nominated by an external body with expertise in alternative dispute resolution, such as the Centre for Effective Dispute Resolution (CEDR);
 - those grocery retailers that are subject to the GSCOP will be obliged to provide to the OFT details of all disputes arising under the GSCOP (regardless of whether those disputes have involved independent arbitration), and will be required to have their compliance with the GSCOP certified by an independent audit, conducted periodically;
 - we will recommend to the OFT that as part of monitoring retailers' compliance with this remedy, it should:
 - gather information (for example, by receiving confidential complaints from suppliers and primary producers regarding breaches of the GSCOP) and proactively investigate retailers' records in areas subject to complaint, in order to identify whether breaches of the GSCOP have occurred;
 - publish guidance on specific provisions of the GSCOP where it considers that differences in interpretation exist; and
 - report annually to the public on operation of the GSCOP, using the information provided to it by retailers.

4. Assessment of the package of remedies

32. The three papers published alongside this paper assess the remedy options relating to controlled land issues, measures to prevent new store growth giving rise to new areas of high concentration and supply chain issues respectively. In each of these

papers, the effectiveness of the relevant remedies is considered, as is the question of whether the remedies we have provisionally decided to pursue represent the least cost, least intrusive remedies that we consider would be effective.

33. In this section of this paper, we consider whether our package of remedies as a whole represents the least cost, least intrusive package of remedies that we consider would be effective in addressing the AECs that we have provisionally found. We also consider whether our package of remedies is proportionate to the scale of the AEC.

The least cost, least intrusive package of effective remedies

34. We have noted that in the CC's guidance it is stated that:

The Commission must have regard to the reasonableness of any remedy and will aim to ensure that no remedy is disproportionate in relation to the AEC and any adverse effects on customers. Part of its consideration will include an assessment of the costs of implementing a remedy ...; and the costs of complying with a remedy, for example, providing the OFT with periodic information on prices or margins. However, the Commission must consider the wider picture. Adverse effects on competition are likely to result in a cost or disadvantage to the UK economy in general and customers in particular. Where significant, these costs might usually be expected to outweigh the costs incurred by any person on whom remedies are imposed. If the Commission is choosing between two remedies which it considers would be equally effective, it will choose the remedy that imposes the least cost or that is least restrictive.³

35. As part of our consideration of each of the remedy options, set out in detail in the three other papers, we ensured that each individual remedy was no more intrusive or

³CC3, paragraph 4.10.

costly than required to achieve an effective remedy. It is our view that each element of our package of remedies is needed effectively to address the features of the market that we have identified in our provisional findings as preventing, restricting or distorting competition thus resulting in an AEC.

36. Our provisional AEC finding in respect of local market concentration has two dimensions, the first to the barriers to entry that stem from controlled land and ownership of multiple stores. We consider that it is necessary for us effectively to address these barriers to entry in order to ensure that competing grocery retailers have the opportunity to enter local areas of high concentration where it is commercially rational for them to do so. We have therefore provisionally decided to put in place a set of measures designed to deal with the various means by which grocery retailers control land (eg restrictive covenants, exclusivity arrangements). These remedies in relation to controlled land will address existing areas of high concentration and barriers to entry, and will help to ensure both that existing areas of high concentration enjoy greater competition and that new areas of high concentration do not emerge in the future. The second dimension of the AEC finding in respect of local market concentration concerns the emergence of areas of high concentration over time and we consider that further steps are necessary to address this. We note in particular that although the merger control process provides a means of preventing acquisitions of trading grocery retail stores that would result in a substantial lessening of competition, there is currently no means of preventing a lessening of competition that results from an increase in concentration from acquisition of stores not currently trading as grocery retail stores (including the opening of brand new stores). We have therefore recommended a means of assessing the effect on competition of such acquisitions and new store openings by the introduction of a competition assessment into the planning system. We consider that our remedies in relation to controlled land and multiple stores and our remedies

to prevent new store growth giving rise to new areas of high concentration are complementary, and that both sets of remedies are needed to address the AEC that we have provisionally found in relation to local market concentration.

37. We have provisionally decided to pursue only one set of remedies to address the AEC we have identified in relation to the supply chain, and the need for each individual element of that set of remedies is discussed in detail in the relevant paper.
38. Overall, we consider that the three sets of remedies we have provisionally decided to pursue (in relation to controlled land, measures to prevent new store growth giving rise to new areas of high concentration, and the supply chain) represent the least cost, least intrusive package of remedies that will effectively address the AECs we have found. We have provisionally decided to take no action in relation to some elements of our AEC finding on local market concentration. These comprise: land bank sites, leases and sub-leases, and multiple stores. Neither have we decided to recommend the taking of action to streamline the planning system or reduce the extent to which it acts as a barrier to entry. The reasons behind these elements of our provisional decision vary and the relevant papers set them out in detail. However, we consider that those remedies we have decided to pursue represent a balanced package of measures sufficient effectively to address the AECs we have found.

Proportionality to the scale of the AEC

39. In addition to considering whether the package represents the least cost, least intrusive package of remedies that would be effective in addressing the AECs, we have also considered whether this package of remedies is proportionate to the scale of the AECs.

Local market concentration remedies

40. We provisionally found that a significant number of local markets have high levels of concentration and these high levels of concentration result in a weakening of competition.
41. Weak competition in local markets for the supply of groceries in each of the three major product markets that we identified (larger grocery stores, mid-sized and larger grocery stores, and all grocery stores) affects the retail offer of grocery retailers operating in those markets in two ways:
- First, it provides national or regional grocery retailers that face limited competition in a number of local markets with the incentive and ability to weaken those components of the retail offer, such as prices, that they choose to apply uniformly, or nearly uniformly, across all the local markets in which they are present.
 - Second, in those local markets where competition is weak, a grocery retailer can degrade components of the retail offer, such as product range and quality, on a store-specific basis. We consider that this second effect is the lesser of the two effects we have identified. However, in relation to this effect, which is more amenable to measurement, we estimate that for an average larger grocery store the effect of an additional competitor within 10 minutes would translate into a profit increase of £240,000 to £300,000 per year at that store.⁴

Moreover, in our provisional findings we noted that a reduction in the choice of fascias available to consumers is a significant element of the detriment to consumers that arises from high levels of concentration in local areas.

42. It is clearly not possible for us to assess the scale of the detriment that would result from the emergence of local market concentration in the future. However, since our

⁴The Supply of Groceries in the UK, Provisional Findings, paragraph 5.44.

view is that local market concentration adversely affect competition, we consider it likely that local market concentration that would emerge in the future absent our remedies would generate a significant consumer detriment.

43. Morrisons submitted that we should have regard to the cost of any proposed remedies in relation to local market concentration, bearing in mind that we provisionally found generally intense competition in the UK grocery industry and that this had benefited consumers generally. Morrisons reminded us that the AEC that we identified in relation to local market concentration was limited, based on our provisional finding of a 3.4 per cent differential in margins.
44. Tesco told us that we had not properly evidenced any consumer detriment. Tesco also noted that the CC had provisionally found a 3.4 per cent reduction in margin from the introduction of an additional competing fascia into a local market.⁵ Given that the average margin in Tesco stores is [X] per cent, Tesco has calculated that on the basis of 3.4 per cent figure there would be a reduction of [X] percentage points in the margin of a Tesco store from the introduction of an additional competing fascia into a local market. Tesco has calculated that this would translate into a gain for consumers of [X]p on a £30 basket of groceries.
45. Tesco suggested that its calculation implied a small consumer detriment from areas of local market concentration. However, we do not accept this. We note that even on the basis of a gain of [X]p on a £30 basket of groceries, aggregating this over the annual grocery spend of a customer, and aggregating this over all the customers in areas of high concentration, produces a significant detriment in total. Moreover this is the case even before making any allowance for the effect of local market

⁵Tesco disputes our margin-concentration analysis and noted that it had only used the CC's calculated margin differential in order to argue that the customer detriment that resulted from our analysis was very small. Tesco's view is that there is no detriment to consumers from local concentration.

concentration in allowing retailers to weaken those components of the retail offer that are set nationally.

46. Tesco also said that if our remedies resulted in stores that had been operated by Tesco no longer being operated by Tesco this would generate a detriment to consumers that (in terms of its effect on a £30 basket of groceries) would be between 66 and 1,500 per cent higher than the detriment to consumers from the local market concentration.

47. Again we do not accept this. First, although it may be the case that certain groceries are available at lower prices in Tesco stores than in stores of other grocery retailers, this does not necessarily mean that the price of an average consumer's shopping basket, consisting of a range of groceries, will be lower in Tesco than in other retailers. Second, we consider that there are other dimensions to the retail offer than price and it is quite possible for a grocery retailer with higher prices, but a better offer in other respects, to compete with a retailer with lower prices. Indeed, our concern is not with absolute price levels (or indeed the absolute levels of other components of the retail offer) but with the effectiveness of the competitive process, which, if operating properly, will ensure that consumers receive what they value at any point in time. Third, if the effect of our remedies was that a store that would otherwise have been a Tesco is operated by a competing grocery retailer, this will only be because Tesco is already present in the local area. Local consumers will therefore not be denied the opportunity to shop at Tesco altogether by any of our remedies. Our remedies will mean that consumers in local areas will have a choice of retailer—some will prefer the offer of the other retailer (even if that offer is more highly priced) and those who wish to shop at Tesco will continue to be able to do so, even though they may have to travel a little further.

48. We are confident that, as discussed in the relevant papers, our controlled land remedies do not go further than is necessary to address existing local market concentration and the measures we intend to recommend to prevent new store growth giving rise to new areas of high concentration do not go further than is necessary to address future local market concentration. We accept that the implementation of these two sets of remedies taken together will generate some costs. We do not consider that a requirement not to enforce restrictive covenants or exclusivity agreements is likely to be costly. To the extent that these remedies result in a transfer of monopoly rents to consumers, this is precisely the result we wish to achieve. We have taken care to design our controlled land remedies so that compliance costs are kept to a minimum. Indeed, the remedies in relation to restrictive covenants and exclusivity agreements are likely to be very largely self-policing. In relation to restrictive covenants, the only involvement of the OFT comes when a grocery retailer wishes to enforce an existing restrictive covenant (the enforcement of which we have not prohibited) and wishes to seek guidance from the OFT as to whether this is in an area of high concentration, or similarly where a burden party notifies the OFT of a restrictive covenant and the OFT assesses whether it is in an area of high concentration. In relation to exclusivity arrangements the OFT's involvement is similar although likely to be less because of our prohibition on the enforcement of exclusivity arrangements that have been in place for more than five years. However, we would expect the retailer in question to be able to predict whether it was likely to secure consent or not, so that the number of such applications is likely to be low.

49. In relation to areas of high concentration where a retailer or retailers had multiple stores, we gave particularly careful consideration to a small number of areas where store divestiture was a possible remedy. However, we noted that such remedies would represent a significant intervention in property rights and would cause

significant disruption. We weighed this against the scale, strength and robustness of the AEC we had found both at the local level and in terms of its effect on nationally-set components of the retail offer. We also noted the remedies that we had put in place to address barriers to entry and prevent the emergence of areas of high concentration in the future. On balance we provisionally decided that store divestitures would be disproportionate to this aspect of our AEC finding.

50. As discussed in the relevant paper on our remedies to prevent new store growth giving rise to new areas of high concentration take the form of recommendations. As we do not have control over the precise mechanism by which new store growth is prevented from giving rise to new areas of high concentration, it is difficult for us to assess the cost associated with it. To the extent that the costs to retailers are as a result of the transfer of monopoly rents to consumers, this is precisely what we wish to achieve. To the extent that any retailer may argue that a competition assessment that denied consumers one of its stores in favour of one of its rivals would generate a consumer detriment, we consider that the same arguments set out in paragraph 41 above apply. We accept that there will be an administrative cost associated with the remedy but we consider that our preferred option—with the OFT as a statutory consultee applying a competition assessment in the planning system—both avoids the creation of an additional regulatory process and avoids the need for LPAs to develop a new set of skills in assessing competition by making use instead of a body with existing expertise in this area.

51. We also note that most of our remedies in relation to local market concentration will apply only in concentrated local markets and will not extend beyond the areas affected by this AEC. This is true of our remedies in relation to existing restrictive covenants and exclusivity arrangements that we have found to be barriers to entry in concentrated local markets. This is also true of the measures we have provisionally

decided to recommend to prevent new store growth giving rise to new areas of high concentration, which only limit growth of retailers with an already strong position in a highly concentrated area.

52. Where our remedies extend beyond areas of high concentration, which is only in relation to future restrictive covenants and future exclusivity arrangements, this has been because we did not consider it practicable, at least at reasonable cost, to target the measures in question only at areas of high concentration while maintaining the effectiveness of the remedy. We also note that where our remedies require grocery retailers to make changes to existing arrangements (ie where our remedies are relatively more intrusive, for example, requiring releasing restrictive covenants and not enforcing existing exclusivity arrangements, they apply only in areas of high concentration. Where our remedies extend beyond areas of high concentration (ie where we are requiring retailers not to enter into restrictive covenants, or exclusivity arrangements) they involve setting rules for future conduct. We consider such remedies to be relatively less intrusive as retailers will be able to take decisions in the future on the basis of these rules.
53. Overall, we consider that each element of the remedies we have provisionally decided to pursue in relation to local market concentration is necessary to address that AEC. Although we have not been able to quantify them, we have taken account of the costs of implementing these remedies and we consider that we have not gone further than is necessary to address the AEC and we are confident that our remedies in relation to local market concentration are proportionate to the scale of this AEC.

Supply chain

54. In our provisional findings we found an AEC resulting from supply chain practices by grocery retailers that resulted in the transfer of risk and unexpected cost to suppliers.

We noted that, if these practices were left unchecked, they would result in lower levels of investment and innovation, ultimately resulting in a detriment to consumers. The nature of this AEC means that it has not been possible to quantify it. However, we note⁶ that the total value of the grocery sales in the UK in 2006 was £101.7 billion and we expect the value of the UK grocery supply chain to be a significant portion of that amount. We therefore consider that this AEC is likely to be of considerable scale.

55. As discussed in the relevant paper, we consider that our remedies in relation to supply chain practices represent the least cost, least intrusive set of measures that would provide an effective remedy to the AEC. We have given considerable thought to the costs of implementing our supply chain remedy. We note that those measures we intend to put in place to prevent the transfer of risk and unexpected cost to suppliers may result in a greater degree of risk and unexpected cost being borne by the retailer. This is not necessarily the case as the measures we have provisionally decided to pursue focus on retrospective changes to terms and conditions of supply, so that risk may still be shared between grocery retailer and supplier provided agreement has been reached in advance. To the extent that our remedies do result in greater risk being borne by retailers, this will only be as a result of a lack of agreement from suppliers to accept greater risk, which addresses precisely the exercise of buyer power that forms the basis of our AEC.
56. The costs from any increased risk borne by the retailer aside, we consider it likely that the principal costs for any given grocery retailer will result from the requirement to appoint an in-house compliance officer and to establish an in-house dispute resolution procedure. Even though we have not been able to quantify these costs, we do not expect them to be high. Beyond these basic compliance costs, we note that the costs for grocery retailers associated with implementing our supply chain remedies

⁶IGD, UK Grocery Retailing September 2006. Total sales excludes non-grocery and tobacco sales by these retailers.

will largely be related to the number and nature of complaints or disputes, which to a large extent will be under the control of the retailer. A retailer who complies with our remedies ought to face fewer complaints and disputes than one who does not comply. Furthermore, there are retailers whose conduct in the supply chain is already compliant with some of the measures we intend to introduce, and the costs of implementation for these retailers will be lower.

57. We consider that our supply chain remedies are closely targeted at the source of the AEC. Although the GSCOP will extend to a greater number of grocery retailers than the existing SCOP, we consider that this is important in securing an effective remedy given our provisional finding that all retailers may enjoy buyer power in certain circumstances. Bearing in mind that there will be some fixed cost associated with the GSCOP, we consider that our introduction of a de minimis threshold which will exclude grocery retailers with a turnover of less than £1 billion a year from the scope of the GSCOP will allow us to achieve an effective remedy while not placing an undue burden on smaller retailers. While we did not introduce the de minimis threshold in order to reduce the costs of the supply chain remedy overall, our provisional decision to exclude retailers whose turnover is less than £1 billion a year reinforces our view that these remedies are proportionate to the scale of the AEC.

5. Next steps

58. These provisional decision documents serve as the basis for the consultation on our provisional decision on remedies. Any responses to this consultation should be submitted to the CC by 5pm on Friday 7 March 2008. Any responses received will be taken into account in our final report.