

Groceries Investigation
Competition Commission
Victoria House
Southampton Row
London WC1B 4AD

28th May 2009

Re: CC/RM/Groceries (Remedies)/317-09

Dear Mr Oyler,

Thank you for this opportunity to contribute to the Groceries Ombudsman public consultation. ActionAid welcomes the draft Undertakings published on 27th April, and we would like to thank the Competition Commission (CC) for the progress it has made towards establishing effective remedies for the groceries supply chain.

It is encouraging that to date the CC has stood firm by its proposal for a proactive Ombudsman in the face of substantial opposition from retailers. We are conscious however, that following the 2000 market inquiry into the grocery sector, retailers' negotiations with the Office of Fair Trading (OFT) were successful in weakening the draft Supermarkets Code of Practice, to the point of rendering it largely ineffective.

It is crucial that a similar fate does not befall the Ombudsman Scheme, and as such, we urge the CC to continue standing firm by its proposal.

In particular, it is vital that the Ombudsman:

- initiates surveys, fact-finding initiatives and Investigations of its own will, without needing to rely on external sources of information to do so;
- operates a strict policy of not revealing complainants' identities if they wish to remain anonymous;
- allows indirect suppliers such as primary producers to submit complaints;
- is able to issue directions to Designated Retailers, and;
- ensures all Suppliers in developing countries, including indirect suppliers, are informed of their rights under the GSCOP and Ombudsman scheme.

In order to remedy the Adverse Effect on Competition (AEC) as effectively possible, we encourage the CC to make the following amendments to the draft Undertakings:

General

3 Operative provisions

- 3.3 Each Party whom the OFT reasonably believes to have information which may be relevant to the monitoring or review of the operation of the Scheme and/or any provisions of these Undertakings may be required by the OFT to attend and provide such information in person.

We suggest that each party should be required to provide the OFT with information in writing, as well as in person.

Schedule

2. Appointment and conflict of interest

A new sub-section should be added that ensures the Ombudsman scheme is subjected to a regular review process, for example every three years.

3 Functions of the Ombudsman

- 3.1 The overriding objective of the Ombudsman will be to undertake Investigations and arbitrate Disputes arising from the Code to promote the interests of consumers.

For clarity, the overriding objective of the Ombudsman should also be to prevent the transfer of unexpected costs and excessive risks by Designated Retailers to Suppliers, as per the Final Report finding, as well as undertake Investigations and arbitrate Disputes.

- 3.2 (d) to make recommendations to Designated Retailers on how to improve compliance with the Code and to monitor progress on the implementation of such recommendations;

It is vital that the Ombudsman should be able to issue directions to Designated Retailers, as Designated Retailers may not feel obliged to comply with recommendations.

It is also not clear what sanctions will be available to the Ombudsman, or any other enforcement body such as the OFT and CC, should a Designated Retailer fail to comply with a direction or recommendation issued by the Ombudsman.

- 3.2. (e) to advise and report to the OFT on the operation of the Scheme and the Code.

Reports produced in accordance with section 3.2 (e) should indicate whether or not a Designated Retailer implemented a direction or recommendation. These reports should also be made public, as this would increase the remedy's deterrent effect.

5. Investigations

- 5.2 The Ombudsman shall use his discretion when deciding whether to investigate **complaints regarding** a Party's (or Parties') obligations under the Code (an Investigation). Before exercising this discretion, the Ombudsman will consider the following information in relation to the obligations under the Code that it proposes to investigate:

The words "complaints regarding" should be deleted. This is because the Ombudsman should not rely solely on external sources of information to initiate Investigations.

A new sub-section 5.2 (e) should be added requiring the Ombudsman to carry out fact-finding initiatives – such as regular surveys of supply chain practices and visits to Parties' business premises – of its own volition, without having to rely on external sources of information such as supplier complaints or information in the public domain.

If the Ombudsman acts independently to root out breaches of the Groceries Supply Code of Practice (GSCOP), Designated Retailers would not be in a position to justifiably apportion blame to Suppliers for 'whistle-blowing'. This would encourage Suppliers to come forward with information to the Ombudsman, and will make the Scheme more effective in remedying the AEC.

- 5.3 Subject to its obligations in paragraph 13 below, the Ombudsman will, before commencing an Investigation, inform the Party (or Parties) concerned of the general nature of the practices which the Ombudsman intends to investigate, and allow the Party (or Parties) a reasonable time in which to respond to the proposed Investigation.

The Ombudsman must not be obliged to wait to receive Designated Retailers' responses before starting an Investigation. Otherwise retailers will be able to frustrate an Investigation by delaying their formal response and using the period of 'reasonable time' to conceal evidence.

- 5.6 As a result of an Investigation, the Ombudsman may undertake one or more of the following actions:

(a) pursuant to paragraph 5.7 below, recommend to a Party (or Parties) that it change its practice(s) when interacting with Suppliers in order to comply with the Code;

As per our comments to section 3.2(d), Section 5.6 should provide for the Ombudsman to direct a Designated Retailer to change its practices.

6. Guidance

- 6.3 Before publishing any guidance in accordance with this paragraph 6, the Ombudsman will publish his proposed guidance for consultation, and will consider any representations made on the proposed guidance.

Section 6.3 should make it clear that the Ombudsman is required to consult with Suppliers, their representative organisations and relevant third parties, in addition to Designated Retailers, before changing either the GSCOP or guidance on how to interpret the Code.

7. Recommendations

- 7.1 Following an Investigation, the Ombudsman may make recommendations to a Party (or Parties) on how to improve their compliance with the Code.

As per our comments in sections 3.2(d) and 5.6, the Ombudsman should be able to issue directions to Designated Retailers, not only recommendations.

8. Reports to the OFT

- 8.1 The Ombudsman shall keep the Code and the Undertakings under review and report to the OFT on them annually. Such reports shall include, for the period since the previous report to the OFT:

(a) a summary of each Dispute between Designated Retailers and Suppliers which have been resolved using the dispute procedure set out in Part 5 of the Order;

Reports to the OFT should include summaries of all Disputes and their status, not only those Disputes which have been resolved as is currently required by section 8.1(a), as the publication of outstanding Disputes would highlight cause for concern in relation to compliance with the GSCOP and act as a deterrent to further breaches.

- 8.2 The Ombudsman may also include in the report to the OFT any suggestion to vary the Undertakings and/or the Code (pursuant to and as limited by section 162 of the Act).

As per our comments on section 3.2 (e), the Ombudsman's reports to the OFT should be placed in the public domain so that Suppliers and interested third parties gain confidence that the Ombudsman is being effective in stimulating changes in Designated Retailers' supply chain practices if they needed to raise a complaint. This will also strengthen the Ombudsman's deterrent effect.

11. Resignation or removal from office

Retailers affected by the scheme will be interested in hiring a former Ombudsman to understand their scope of manoeuvre under the Order and Ombudsman scheme. It is therefore important that a new Ombudsman will have had a full annual cycle to establish themselves before having to contend with a previous incumbent being employed by a Designated Retailer.

We would propose that for 11.3 (a), six months is changed to 15 months to enable a new Ombudsman to be in place for one year after allowing for a three month recruitment period.

13. Disclosure of information

13.7 Before disclosing any specified information pursuant to paragraph 13.4, the Ombudsman is required to have regard to the following considerations:

(a) the need to exclude from disclosure the identity of any individual or undertaking making a complaint to the Ombudsman regarding the Code and/or the Undertakings;

Given the CC recognizes that a 'climate of fear' exists amongst suppliers (Final Report, 11.359), it is critical that the Ombudsman does not reveal the identity to Designated Retailers of any Supplier that makes a complaint, unless that Supplier has given permission to the Ombudsman to do so, if the Scheme is to be effective in remedying the AEC.

We are concerned therefore that the wording "to have regard to" in 13.7 is not sufficiently robust to encourage Suppliers to bring forward complaints. As such, we suggest the CC should change the wording so that the Ombudsman is strictly not permitted to reveal the identity of any Supplier making a complaint, unless that Supplier has given permission to the Ombudsman to do so.

Informing overseas suppliers of their rights under the GSCOP and Ombudsman Scheme

While we understand this may be more a procedural matter for the Ombudsman to consider once it has been appointed, we wish to stress the importance of ensuring that Suppliers based overseas, including indirect suppliers, are informed of their rights under the GSCOP and Ombudsman Scheme. This will improve the remedies' effectiveness in preventing the AEC.

The Ombudsman should therefore find ways of informing overseas suppliers about the Scheme, for example through a combination of disseminating information itself, and by directing Designated Retailers to require their Suppliers to apply the terms of the GSCOP

in Suppliers' dealings with second tier suppliers, and so on up the chain so that the GSCOP is applied to the primary producer.

This would also have the effect of affording indirect suppliers greater protection under the GSCOP, as it would place the onus on Designated Retailers to 'enforce' the GSCOP as a contractual obligation, where appropriate, or face the scrutiny of the Ombudsman.

We thank you for considering the points raised above, and hope this note will help towards the creation of an effective Ombudsman Scheme.

If you would like further clarification on these or any other points relating to the supply chain remedies, please do not hesitate to contact me.

Yours sincerely,

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