

ASDA Response to Consultation on the Ombudsman

1. Summary

1.1 ASDA opposes the appointment of an Ombudsman:

- It is likely to represent supplier interests and not consumer interest.
- It is likely to work against ASDA in its mission to continue delivering low prices for customers and to keep fighting inflation on their behalf. This at a time of economic uncertainty and rising unemployment.
- It is expensive and unnecessary – suppliers will be protected by the Grocery Supply Code of Practice (“GSCOP”) in any event. And the OFT is best placed to oversee GSCOP.

1.2 This note sets out some macro comments, focussing particularly on the Ombudsman’s scope and on the risk of unintended consequences.

2. ASDA’s concerns

2.1 Subject to ASDA’s concerns about GSCOP, it does not object to some form of body being responsible for monitoring and enforcing GSCOP. However, such body must:

- (i) have as an overriding objective the promotion of the welfare of end consumers, and be otherwise impartial as between the interests of retailers and suppliers. It should be able to resist acting as a pressure group for suppliers (including large suppliers);
- (ii) be constructed so that it sticks strictly to its appointed role. The body must be able (and required) to resist the inevitable pressure to get involved in wider matters, such as the role of supermarkets in society. Issues such as rural policy and sustainability are important, but are not part of the GSCOP;
- (iii) be cost effective;
- (iv) be qualified to perform that role. The body must have a good understanding of the nature of the economic relationship as between retailers and their suppliers and of the operation of markets in general, both to be effective and to avoid unintended consequences of its actions. This will be a challenging task, better suited to a body with expertise in market analysis; and
- (v) not create legal gridlock and process costs in fast moving commercial relations.

2.2 ASDA acknowledges that the Commission has tried to address some of these concerns in the draft undertakings, in particular relating to “regulatory creep” and the cost of the Ombudsman. An industry-funded Ombudsman would not however satisfy the above criteria in any form.

2.3 As set out below, ASDA considers that the OFT is best placed to monitor and enforce GSCOP. And ASDA sees no sensible role (for an Ombudsman or OFT) going beyond that. In particular looking at the following roles envisaged by the Commission:

- Arbitration – In its comments on the draft GSCOP order, ASDA expressed strong concerns about the dispute resolution procedure as currently proposed. But if there is to be arbitration, the arbitrator must be agreed as between the parties (which an Ombudsman would not necessarily be).
- Investigations – ASDA notes the Commission's proposal that an Ombudsman would establish and consult on guidelines for investigations. However given the Ombudsman's powers and very wide discretion to initiate investigations (which may be triggered by a third party complaint), there remains substantial risk that an Ombudsman will conduct unnecessary investigations. Indeed, it is not at all clear to ASDA why it should be necessary to conduct any investigations over and beyond those the OFT could conduct in monitoring and enforcing GSCOP. The cost of such investigations (both direct costs of the investigation and indirect costs (e.g. dampening fast moving commercial relations)) will ultimately be borne by the consumer.

3. The OFT

3.1 The Commission envisages monitoring and enforcement of GSCOP by the OFT as a fallback to the appointment of an industry Ombudsman.

3.2 The OFT is best placed to monitor and enforce GSCOP. It is an impartial body with expertise in competition issues and with a remit to make markets work better for consumers.

3.3 It is not clear from the Report why the Commission decided for an Ombudsman and against the OFT. The Report simply states that the Commission considered "*that a dedicated body with industry expertise, which could build working relationships with suppliers, their trade associations and also with retailers, would be advantageous.*" There is no good reason why the OFT could not perform that role – building on its existing expertise. On the contrary.

3.4 The Commission also appears to suggest that an Ombudsman would be better placed (than OFT) to establish "*confidence among suppliers in the GSCOP*" – but it is not at all clear why that should be the case (other than the risk that the Ombudsman would be prone to a partial view in favour of suppliers). The OFT is an existing body with considerable status and credibility.

3.5 There is therefore no need to set up a parallel body – and for the reasons outlined above it is likely to be counterproductive. The OFT has a statutory duty to monitor and enforce GSCOP – it will protect suppliers.

4. Cost

- 4.1 ASDA notes the Commission's attempt to try to impose some control over the cost/budget of the Ombudsman. But that is missing the point. Irrespective of any such controls, the appointment of an Ombudsman would introduce substantial and unnecessary cost.
- 4.2 The Commission proposals also envisage duplication – with the OFT retaining *“an overall supervisory role in relation to retailers' compliance with the GSCOP, in accordance with its duty to monitor market investigation remedies under section 162 of the Act. In this regard, grocery retailers will also be required to provide information to the OFT (and to allow the Ombudsman to pass such information directly to the OFT).”*
- 4.3 In its Report, the Commission flagged the risk that the introduction of GSCOP would lead to short term price increases. ASDA considers that the Commission has not properly evaluated the additional costs of an Ombudsman over and above the costs of monitoring GSCOP.
- 4.4 Ultimately those costs will be borne by consumers

5. Support for ASDA's position

- 5.1 ASDA's position is consistent with that of Professor Bruce Lyons. The Report states that Professor Lyons:
- (i) *“believed that the Ombudsman would be counterproductive”;*
 - (ii) *“was concerned that the Ombudsman may find a role ‘proactively’ representing the interests of suppliers, including global manufacturers and large intermediaries, which he considered would reduce the benefits of competition”;*
 - (iii) *“believed that an ‘independent’ Ombudsman... would be susceptible to external pressures and regulatory creep”.*
- 5.2 Professor Lyons also considered that the role would be better performed by OFT, which he saw as *“well placed to refrain from undesirable intervention because it has an embedded mission to make markets work well for consumers.”*
- 5.3 In addition, Professor Lyons *“was concerned that set-up and operating costs would be substantially higher for an independent Ombudsman than for the OFT”.*

6. Conclusion

- 6.1 ASDA is not prepared to agree undertakings for the appointment of an Ombudsman. Suppliers will be protected by GSCOP and the OFT.
- 6.2 Setting up an Ombudsman would impose an unnecessary and counterproductive burden on the industry – with consumers bearing the ultimate cost in terms of higher

prices, unwelcome at any time and in particular during the current difficult economic climate. For the same reasons ASDA believes that Government should resist imposing an Ombudsman.

- 6.3 Monitoring and enforcement of GSCOP should be undertaken by the OFT - an impartial body with expertise in competition issues and with a remit to make markets work better for consumers.