



28th May 2009

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

Dear Tim

### **Consultation on the introduction of an ombudsman**

We are grateful for the opportunity to comment on the draft undertakings to establish a GSCOP Ombudsman Scheme. We see this as an important part of the remedy to the adverse effect on competition found in relation to retailers passing excessive risks and unexpected costs to suppliers in the groceries market. The principle of an Ombudsman therefore has our wholehearted support.

As you will be aware, our input is based on the perspective of brand manufacturers, whose interests we represent in the UK.

While we have some detailed points of comment which are provided in the following pages, our most substantive input relates to the ombudsman's potential discretion to launch an investigation. Your covering email is encouraging when you state "we consider that an effective Ombudsman would require broad discretion to determine when he should initiate an investigation". We agree but his discretion is severely limited by the wording of the Schedule. Section 3(b) and Section 5 are clear in stating that the ombudsman can only launch an investigation in relation to a complaint.

We have long maintained that suppliers will not complain. This is the experience of the last seven years. The ombudsman must be able to launch an investigation on the basis of any information he receives that may indicate the passing of excessive risks and unexpected costs

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from designated retailers to suppliers. This is not just our view. It reflects the Competition Commission's Final Report:

"...the effective monitoring and enforcing of the GSCOP requires... proactive investigation of retailers' behaviour... We therefore believe that proactive investigation of practices by the body responsible for monitoring and enforcement will be critical to the success of the GSCOP. Such investigations will provide a basis for breaches of the GSCOP to be identified without revealing the identity of particular suppliers, and without the implication that any particular supplier has complained" (paragraph 11.350).

The recognition that the Ombudsman must be proactive in carrying out investigations even in the absence of a complaint from a named supplier has been fundamentally watered down in the current proposals where investigations may only be carried out on the basis of actual complaints. The Ombudsman's ability to launch investigations beyond areas of specific complaint will be crucial to him achieving the overriding objective of monitoring and enforcing compliance with the GSCOP and we therefore urge the Competition Commission (CC) to reconsider its approach in this area.

We would be delighted to expand on this and any point in our detailed comments, should this be helpful. We would also like to confirm that we are happy for this letter and the attached points to be published on the Commission's website.

Yours sincerely

John Noble

## Consultation on undertakings to establish a GSCOP ombudsman scheme

### Comments from the British Brands Group

#### 1 **Notice**

Paragraph 5: On a small point, we believe the Remedies Notice was published on 31 October 2008, not 2007.

#### 2 **Undertakings**

Section 1: Commencement – we note an inconsistency in that “Group of Interconnected Bodies Corporate” are referred to 1.2 and only subsidiaries in 1.3.

3 Section 2: Interpretation – we believe this section should include the definition of “Scheme” and “Party”. These definitions currently feature in the Schedule.

4 Section 3: Obligation to comply with the scheme – we suggest that 3.3 is clarified further to ensure that such information is provided both in person and in writing.

#### 5 **Schedule**

Section 1: Interpretation – the definition of “Ombudsman” should be expanded to include any person temporarily acting in the capacity of Ombudsman under paragraph 2.5 of the Scheme.

6 We note the separate definitions for a “Party” and “Designated Retailer” which seems to anticipate that not all Designated Retailers will be Parties to the Undertakings. This will be a most unsatisfactory outcome.

7 Section 2: Appointment and conflict of interest – paragraph 2.1 requires the CC to specify the person to be appointed by the OFT. It would be helpful were it clarified whether this applies equally to any substitute Ombudsman to be appointed under paragraph 2.2.

8 We suggest, in 2.2, that provision is made for the OFT to appoint an interim or acting Ombudsman in the event of death, retirement, incapacity, etc. The definition of the Ombudsman in Section 1 would need to be extended accordingly. Were this suggestion to be pursued, 2.6 would need a reference not only to a new Ombudsman but also to a temporary or interim Ombudsman.

9 In 2.4, it is not clear to whom or how the Ombudsman is required to declare a conflict. Presumably it is to the OFT. It would be helpful to have clarified whether a temporary replacement is conditional on approval from the OFT, which seems prudent.

10 Section 3: Functions of the Ombudsman – Paragraph 3.1 requires strengthening to link more strongly to the AEC eg.

The overriding objective of the Ombudsman will be **to monitor and enforce**

compliance with the GSCOP, undertaking investigations and arbitrating Disputes arising from the Code to promote the interests of shoppers.

This reflects the wording in paragraph 4.7 of the CC's Final Report.

- 11 In section 3.2 (b) we believe this should be expanded to read:

To receive complaints **and any other information** in relation to a breach of the Code, and where appropriate to conduct investigations.
- 12 In section 3.2 (e), any report to the OFT on the operation of the Scheme and the Code should be made public, in the interests of transparency.
- 13 Section 4: Disputes – it would be helpful to have more guidance on where conflicts of interest may arise. If the provision of advice to a Supplier on an issue prior to the dispute is grounds for conflict, conflict could occur in a number of cases. It would also be helpful to cross-reference paragraph 2.5 in this section, concerning the designation of an appropriate replacement.
- 14 Section 5 : Investigations – there is a small misprint in 5.2:

Before exercising this discretion, the Ombudsman will consider the following information in relation to the obligation under the Code that **he** proposes to investigate:
- 15 The information that the Ombudsman may consider when deciding whether or not to investigate should be expanded in 5.2 (d):

Any other information obtained by the Ombudsman or the OFT, whether in the public domain or as result of a Designated Retailer's reporting obligations under the Order or these Undertakings **or from any other source**.
- 16 The Ombudsman's practices and procedures for Investigations should include indications of time frames for completing investigations (5.4). These timelines will be an important factor influencing whether suppliers bring issues to the Ombudsman.
- 17 For clarity, we suggest 5.5 (and 8.1) should be subject to the considerations set out in paragraph 13 concerning the disclosure of information, particularly in light of the crucial need to safeguard the anonymity of suppliers.
- 18 We question whether "pursuant" in 5.6 (a) should read "subject".
- 19 It would be helpful were, in paragraph 5.7, the Ombudsman to give interested parties written notice of any intention to cancel or suspend an investigation and the reasons for such action.
- 20 Section 6: Guidance – on a small point, we believe "compliment" in 6.1 (b) should be "complement".

- 21 In paragraph 6.3, as in previous instances, we assume that 'publish for consultation' means **public** consultation. This will be important to ensure the efficacy of his proposed guidance.
- 22 Section 8: Reports to the OFT – we suggest that summaries of each Dispute should also include disputes that have not been resolved (paragraph 8.1 (a)).