



**Friends of
the Earth**

T J Oyler
Inquiry Manager
Groceries Market Investigation Remedies
Competition Commission
London
WC1B 4AD

28 May 2009

Dear Mr Oyler

Groceries Supply Code of Practice Ombudsman Scheme – Undertakings for consultation

Friends of the Earth welcomes the opportunity to comment on the draft Undertakings for the Groceries Supply Code of Practice Ombudsman Scheme, as published by the Competition Commission on 28 April 2009.

While we support many of the provisions in the draft Undertakings, our main concern rests with the lack of emphasis on the duty of the Ombudsman to initiate investigations pro-actively, and on the lack of detail on penalties and corrective measures should a retailer be found to be in breach of the Code and to be exercising buyer power through the use of supply chain practices that transfer excessive costs and risks to suppliers.

Considering the retailer responses that have been made public during the consultation period, we are also extremely concerned that voluntary agreement will not be reached and therefore ask, should that happen, that the Competition Commission petitions Government in the strongest possible terms to establish the Ombudsman through legislative means. The Competition Commission (CC) conducted a thorough two-year investigation of the grocery market and concluded that an adverse effect on competition arises from retailers' supply chain practices, and it is essential that the CC stands by its original findings and the entirely proportionate remedies it has proposed in the best interests of consumers.

Friends of the Earth Trust
England, Wales and Northern Ireland
National Office 26-28 Underwood Street London N1 7JQ
Tel 020 7490 1555 Fax 020 7490 0881 Website www.foe.co.uk

Friends of the Earth Trust Limited is recognised as an independent research institute by the Economic and Social Research Council
Friends of the Earth Trust Limited Registered in London No 1533942 Charity Registered Number 281681

Printed on paper made from 100% post-consumer waste

We set out comments in response to specific sections of the draft Undertakings below.

3. Functions of the Ombudsman

It is essential that the Ombudsman is able to pro-actively conduct investigations and not be solely complaints-driven if it is to effectively remedy the adverse effect on competition identified by the Competition Commission. The Ombudsman must be able to conduct investigations pro-actively in order to improve the likelihood of identifying any breaches of the Code and practices that transfer excessive costs and risks, and to safeguard suppliers from any potential retributive action from retailers should they assume a supplier has made a complaint against them.

In detailing the overriding objective of the Ombudsman in 3.1, the undertakings should refer specifically to the need to remedy the negative effects of the exercise of buyer power, for example 'The overriding objective of the Ombudsman will be to undertake Investigations and arbitrate Disputes arising from the Code, and to eradicate practices that transfer excessive risk and unexpected costs onto suppliers, to promote the interests of consumers'.

We would like section 3.1b on the duties and powers of the Ombudsman to be clearer on the ability to receive and act upon complaints, and solicit information, from primary producers. If only intermediaries are able to make complaints, this will damage the effectiveness of the Ombudsman in stopping any retailer practices that transfer excessive costs and risks onto suppliers, as intermediaries are able to pass on any unfair terms of trade that they receive from retailers to their own suppliers.

The language of 3.2 could be strengthened to avoid any ambiguity in the interpretation of the Ombudsman's duties and powers, for example:

3.2 (b) to receive complaints in relation to a breach of the Code, to instigate regular checks of Code compliance, and to conduct full and transparent investigations both in response to complaints and as part of regular monitoring of Code compliance.

3.2 (d) to instruct Designated Retailers on how to ensure compliance with the Code and to assess whether retailer practice is transferring excessive costs and risks, the Ombudsman may need access to a variety of information relating to commercial arrangements and discussion between suppliers and retailers. Therefore the clause 3.3 c 'should not consider other commercial elements of the Supply Agreement' should be removed and replaced with 'should consider commercial elements of the Supply Agreement where such information would aid the investigation' in order to a gain a full picture of dealings between suppliers and retailers where there is reason to suspect transferral of excessive costs and risks.

In addition to monitoring compliance with the Code and the specific practices referenced, the Ombudsman should also have due regard to new practices that may emerge that transfer excessive costs and risks to suppliers.

4. Disputes

In addition to acting as an arbitrator over disputes, the Ombudsman must have the powers to seek corrective action and exact penalties on retailers who are found to be in breach of the Code and transferring excessive costs and risks to suppliers.

5. Investigations

In addition to 'receive and may investigate complaints', the Ombudsman must be able to act pro-actively and instigate investigations. We would like clause 5.1 to either omit the specific reference to complaints, or add 'and shall instigate investigations where a breach of the Code is suspected'.

We are pleased to see the inclusion of 'complaints from any other person' and 'any other information obtained by the Ombudsman' in 5.2 which would ensure information can be solicited and used from primary producers and other sources with market intelligence, and from what is available in the public domain. However, as raised earlier, there must be more emphasis on pro-active investigation throughout the supply chain, for example through spot-checks, fact-finding missions, surveys and other research.

The Ombudsman must be specific and prescriptive when setting timescales for investigations and pre-investigation enquiries in order to avoid a situation where a retailer is able to delay proceedings. For example, when a retailer is asked to respond to a proposed investigation, they must do so within a specified time and should that deadline not be met the investigation must commence (section 5.3).

In remedying breaches of the Code uncovered in an investigation, the Ombudsman must be able to take tough action and not be confined to simply 'recommend' (5.6 a) that a retailer changes practice in order to comply with the Code. If a retailer is found guilty of breaching the Code, it must be made to make immediate changes to its relevant policies and practices, and take remedial action towards the supplier it has acted against. Should a retailer not alter its policies and practices, nor take remedial action in favour of a supplier, there must be clear sanctions and penalties.

The draft Schedule proposes that the 'Ombudsman may suspend or cancel an Investigation for any reason' (5.7). Should this occur, the reasons must be made clear and transparent to avoid accusations of bias towards, or undue influence from, any party involved.

7. Recommendations

As raised previously, the Ombudsman must have the powers to instruct and direct retailers to change policies and practices and to compensate suppliers in order to achieve compliance with the Code and rectify any breaches. The wording of 7.1, 'the Ombudsman may make recommendations to a Party on how to improve their compliance with the Code' must therefore be stronger in order to convey powers of direction, for example 'the Ombudsman will instruct a Party on how to ensure compliance with the Code'. It must also include details of how and when penalties will be applied should the retailer not take the specified action.

8. Reports to the OFT

All reports and details of Investigations and Disputes, including those that are yet to be resolved, must be put in the public domain in order to ensure transparency and enable information concerning supply chain practices to be accessible to interested parties.

9. Remuneration and budget

The costs of the Ombudsman incurred in general operations and in relation to an Investigation or Dispute, should fall to the designated retailers. As the Competition Commission's own research has shown, the costs of the Ombudsman are extremely small compared to overall turnover, and it should have no effect on consumer food prices. If retailers comply with the Code, investigations and monitoring should be relatively straight-forward and therefore save time and potential costs.

13. Disclosure of information

We are pleased that section 13.7 recognises the need to protect complainants' identity and request that this is retained and strengthened so that the Ombudsman may only disclose the identity of a complainant if permission has been given. Suppliers must be encouraged to come forward with complaints, and all measures necessary to protect the identity of suppliers and overcome the often referred to 'climate of fear' must be taken. Suppliers must have the confidence to make complaints or give information without fear of retributive action from the retailers.

Should voluntary agreement fail

It is imperative that should agreement not be reached with designated retailers, as is widely expected and indicated by many of the major supermarkets themselves, that the Competition Commission makes recommendation, in the strongest form possible, to the Secretary of State for Business, Enterprise and the Regulatory Reform to establish the Ombudsman through legislative means.

An independent Ombudsman and strong Code are not only in the best interests of suppliers and farmers, but as concluded by the Competition Commission in its original findings, are in the best interests of consumers. Only by implementing a proactive, independent Ombudsman to police a strong and robust Code, will a further costly and time-consuming market investigation be avoided in the future.

Yours sincerely

Helen Rimmer

Food Campaigner, Friends of the Earth