

To: Inquiry Manager
Groceries Market Investigation
(Remedies)
Competition Commission
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Date: 27th May 2009

Ref:

Circulation:

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NFU Consultation Response to the recently issued undertakings to establish a Groceries Supply Code of Practice Ombudsman Scheme

Introduction

The NFU is grateful for the opportunity to comment on the undertakings to establish a Groceries Supply Code of Practice Ombudsman Scheme. The NFU represents some 55 000 agricultural and horticultural businesses across England and Wales.

The NFU understands that it is unusual for the CC to consult formally on Undertakings prior to an indication from all parties that they will be accepted but is pleased that the CC has decided to do so in this case.

As far as possible the NFU has attempted to group its comments on the undertakings under the numbering and headings contained in the CC document issued on 27th April 2009.

Response

2. Appointment and conflict of interest

The NFU agrees that the choice of person appointed to be Ombudsman is critical to the success of the office and that the person must be someone who enjoys the respect of both retailers and suppliers if the office is to be established and run successfully. That the recommendation of the appointment will be made by the CC is welcomed by the NFU given the knowledge of the Grocery market that now exists within the CC following the investigation. The provisions relating to any conflict of interest look sufficiently robust at this stage to deal with such issues.

3. Functions of the Ombudsman

The objectives as laid out in 3.1 should also include an objective of stopping the transfer of excessive risk and unexpected costs onto suppliers.

In 3.2, the Ombudsman should not just be able to conduct investigations following on from complaints received. This also removes the danger of Retailers assuming that a supplier complaint has led to an investigation and taking punitive action against suppliers in a particular category.

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The NFU feels that the ombudsman should be able to 'direct' as well as 'recommend' that retailers make improvements to their code compliance.

4. Disputes

The NFU believes that the Ombudsman's capabilities as an arbitrator will need to be assessed and approved by the OFT early in the life of the post.

5. Investigations

The NFU is pleased to see that the Ombudsman will retain his broad discretion to determine when he should initiate an investigation. 5.2 (c) suggests that trade associations such as the NFU will be able to raise issues with the Ombudsman. The Ombudsman should be able to initiate investigations based on a wide variety of sources including complaints, information in the public domain and information given to him by trade associations. Therefore 5.2 should not be worded in such a way as to limit the sources he can draw on.

When informing the parties of the general nature of the practices which the Ombudsman intends to investigate (5.3), he/she should not wait until receiving a response before commencing the investigation.

In 5.4 to make the ombudsman more effective in discharging his responsibilities, Retailers should be 'directed' to release information on a regular basis and as requested which will help the ombudsman make an assessment of the implementation of the GSCOP.

The NFU understands the rationale behind the Ombudsman publishing a report at the conclusion of an investigation. However the summary of the information that prompted the Ombudsman to commence the Investigation outlined in 5.5(a) must not directly reveal the identities of Suppliers or allow Suppliers to be identified indirectly through the details of Supply Agreements and the circumstances of the issue arising between Retailer and Supplier. The NFU therefore argues that such summaries must be general in their nature removing not only company names but also dates, financial amounts and other specifics of trading relationships which could result in individual suppliers being identified.

6. Guidance

The NFU envisages that the Ombudsman will spend a large proportion of his time advising Parties and the preparation of guidance will assist greatly in discharging these duties. The NFU is pleased to see in 6.3 that the ombudsman will publish proposed guidance for consultation but would emphasise that the list of consultees must include trade bodies and not just the covered Retailers.

7. Recommendations

The NFU agrees that the ombudsman needs to have a follow-up procedure to an investigation, but that follow-up must be in the form of a direction rather than a recommendation and that direction should be framed in time. Such directions should also be accompanied by a list of consequences of non-implementation. This will be particularly important early in the life of the new GSCOP and the Ombudsman as the majority of Parties will have had little knowledge of the old Code and its operation and the consequences of non-compliance

8. Reports to the OFT

Reporting to the OFT is vital to the success of the Ombudsman as any such scheme will need careful monitoring. The five categories proposed seem to encapsulate the operation of the Code and the

Undertakings although the NFU believes reporting should also capture unresolved disputes so that the OFT can assess the effectiveness of the Ombudsman and highlight persistent offenders

11. Resignation or removal from office

This is an important provision should the Ombudsman behave inappropriately or not discharge his duties properly. The NFU is particularly pleased to see the article relating to confidential information which the Ombudsman may receive.

Annex 1 - Formula to calculate each Party's share of the Ombudsman costs

The hybrid funding model is a much fairer way to apportion cost between the Covered Retailers than a straight market share model. The NFU has been aware that some retailers' primary objection to signing the Undertakings was that a pure market share apportionment would be unfair on them as 'fair dealers'. We therefore welcome the formula but ask that it is periodically reviewed as all aspects of Ombudsman operation should be.

Conclusion

Experience has shown that a code of practice cannot be made to work as envisaged without a proactive enforcement mechanism. As an Ombudsman is currently the only such proposed mechanism we see it as vital to the successful implementation of the Competition Commission's remedies. The NFU would go so far as to say that the alternative, policing by the OFT would be unlikely to be effective given that the OFT has neither the manpower, the budget or is constituted in such a way that it could behave along the lines envisaged for the Ombudsman.

Although it is some time since the final report was published, the NFU recognises the work required in developing proposals for an office which needs to be efficient, effective and fair on those who will fund it. It is hoped that the work to establish an Ombudsman can now be progressed and the job of remedying the Adverse Effects on Competition can begin. The NFU therefore looks forward to the CC publishing the next steps for creating an Ombudsman soon after this consultation period has concluded.