

Recovery and Reorganisation

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Dear Sirs

**GROCERY MARKET : PROPOSED DECISION TO MAKE A
MARKET INVESTIGATION REFERENCE**

I refer to the Office of Fair Trading's ("OFT") decision to refer the market for the supply of groceries by retailers in the UK to the Competition Commission ("CC") for a market investigation.

My comments here for CC's consideration, concern the buyer power of the big supermarkets, and the possibility that this power could harm consumer choice through a distortion of competition, aspects of the market that fall to be dealt with under the auspices of the Supermarket Code of Practice ("the Code").

Notwithstanding the OFT's conclusions on the veracity of the Code, it is my contention that the current basis for applying the Code is such that it is ineffective, as evidenced by:

- (i) The lack of suppliers making representations to the OFT regarding abusive buyer conduct in circumstances where anecdotal evidence, and indeed evidence I have seen first hand, is of suppliers living in a culture of fear, with steadily corrosive and increasingly heavy handed buyer behaviour. Such conduct continues to include: short notice delisting and retrospective demands for supplier contributions whether in the guise of contributions to promotions, volume over-riders and other supply or listing based contributions.
- (ii) The impasse reached on the Ferndale Foods trade dispute with Asda, being the only dispute reported to the OFT that has progressed to mediation but which remains unresolved some 11 months after it was first reported. The OFT professes that in its view it is not clear whether the dispute is a matter that falls under the Code, and is unclear as regards to how it will use its own powers to adjudicate the dispute to a conclusion.

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In its review of the market, we would ask the CC to consider making the Code more effective in the following areas:

- (1) By appointing a market ombudsman or regulator. This body must have the obligation of investigating trade disputes with the responsibility and power to adjudicate on those disputes. If the appointment of an ombudsman or regulator is not possible, we would ask for the appointment of an independent adjudicator to whom the OFT is obliged to refer all trade disputes after inconclusive mediation. The adjudicator here should have the powers and the obligation, for dispute determination, conclusion, restitution and/or compensation.
- (2) By including in the Code an explicit definition of what constitutes reasonable key trade terms under the commonly implied contract term areas between buyer and supplier of:
 - Price
 - Payment terms (credit period)
 - Specification
 - Delisting period
 - Term of supply agreement
 - Volume
 - The contracted period of time between the contracting for goods and their delivery

and, explicitly defining unreasonable terms. These should include any form of retrospectively sought supplier payment to the buyer or variation to the reasonable terms made at short notice, where the basis of such payment or variations had not been specified and agreed between the parties at the outset of the contracted period, in writing and before the supply was made.

- (3) By including in the Code, the stipulation that there must be an agreed written contract between supplier and supermarket for each SKU (Stock Keeping Unit), irrespective of point of delivery. (It is not intended that the requirement for a short form contract will create a lawyers' charter. It is intended to serve the primary function of evidencing the balance in transactions between suppliers and retailers. This would make any subsequent audit of the effectiveness of the code far more meaningful).
 - Each contract to contain the minimum terms of:
 - (i) 30 days notice of contract termination for each year of the supply relationship between Supplier and Buyer, sole exceptions being contamination/public health matters where such incidences have been reported by either party to The Food Standards Agency.
 - (ii) Supermarket notifying supplier one week forward of total SKU order requirement of which 70% is guaranteed for payment by the supermarket if over 70% of that order requirement has been made available by the supplier to the supermarket at the relevant time. Sole exception should apply to promotional supplies.

- (iii) All retrospective financial discounts or contributions related to volume or otherwise to be recorded in the contract prior to relevant supply being made. Failure to record rendering such discount or contribution requirements invalid.
 - (v) Payment for SKU's supplied and accepted, or amount equivalent to guaranteed order requirement, to be made by the Supermarket to the supplier no later than 30 days after supply without deduction.
- (4) Finally, in order to better review the effectiveness of the Code on an ongoing basis, I contend that the OFT should be obliged to review supplier/buyer relationships that have ended or failed, in the intervening period since the Code was brought into effect, whether through buyer termination, supplier complaint or supplier business failure (particularly supplier insolvency).

I shall be happy to discuss the above comments (and to supply evidence, where appropriate) with you and the CC should this assist in the investigation.

Yours faithfully

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