

Interests of customers in market investigations

Introduction

1. A number of parties have provided us with submissions which discuss the interests of grocery customers and the manner in which these interests should be defined. This appendix sets out the statutory basis on which the interests of customers are relevant to the market investigation regime.
2. For the purpose of this appendix, all section references are to the Act unless otherwise stated.

The definition of a customer

3. A key issue when considering the interests of customers is identifying who is a 'customer' in the context of a market investigation. Certain parties have made submissions to the CC in relation to this issue during the course of the present market investigation. These parties have noted the fact that section 183 provides an inclusive definition of 'customer'. In this context, the term could include not merely final consumers but also entities that purchase goods at intermediate stages of the production chain.
4. In the present market investigation, the CC has proceeded on the basis that 'customers' refers to final consumers of groceries; that is, individuals who purchase groceries from grocery retailers. The basis for this view is that the market investigation reference made by the OFT under section 131 is for an investigation into the 'supply of groceries *by retailers* in the United Kingdom' (emphasis added). Under section 134(3), this forms the 'relevant market'. As such, we consider that 'customer' must be interpreted in the context of this 'relevant market'. However, the interests of entities purchasing groceries at intermediate levels of the groceries supply chain, such as wholesalers and grocery retailers (including independent retailers), are relevant to the consideration of the competitiveness of the relevant market. In this context, the interests of these entities might be addressed indirectly through remedial action, dependent upon whether an AEC was found and the basis for that finding.

Interests of customers and the Act

5. The interests of customers are expressly referred to in the Act in the context of remedial action for market investigations. Section 134(4) provides that if the CC identifies an AEC in the course of a market investigation, it must then decide whether action should be taken to remedy, mitigate or prevent the AEC 'or any detrimental effect on customers so far as it has resulted from, or may be expected to result from' the AEC. The relevant CC guidelines note that this allows the CC to seek remedial action to 'deal with the source of the problem' (ie the AEC) 'or with its consequences' (ie the detrimental effect on customers).¹
6. While the Act expressly refers to the interests of customers in relation to remedial action, the CC considers that it may also be appropriate to have regard to the

¹Market Investigation References: Competition Commission Guidelines, CC3, paragraph 4.6.

interests of customers when considering the elements of the AEC (that is, whether there are any features of the market which prevent, restrict or distort competition).

7. The CC does not need to identify specific harm to the interests of customers in order to find an AEC. The relevant statutory framework (Part 4 of the Act) proceeds on the premise that competition *of itself* is good; as a corollary, an AEC *of itself* is bad. The assumption underlying this premise is that an AEC will necessarily give rise to customer harm, albeit that such harm may be indirect and not readily identifiable. The CC will therefore be more secure within an AEC finding where the feature, or combination of features, adversely affects the interests of present or future customers.
8. Notwithstanding that we consider that the CC can make an AEC finding without evidence of specific customer harm, it is also appropriate to have regard to the effect of particular features, or combinations of features, on the interests of customers. As noted above, the customer harm resulting from an AEC may be indirect and not readily identifiable, so this consideration will not always involve the quantification of any such customer detriment.

Interests of customers and the current market investigation

9. As noted in paragraph 4, for this investigation we have proceeded on the basis that the 'interests of customers' refers to the interests of final consumers of groceries, who purchase their groceries from grocery retailers.
10. Section 134(5) defines 'detrimental effect on customers'. It states that such an effect will be taken to arise if there is a detrimental effect on current or future customers in the form of:
 - (a) higher prices, lower quality or less choice of goods or services in any market in the UK; or
 - (b) less innovation in relation to such goods and services.

The retail offer

11. In Section 4, we set out the concept of the 'retail offer' which is summarized as the product sold by grocery retailers to their customers. Aspects of the retail offer include, among others, the price, range and quality of products, store cleanliness, parking facilities and opening hours. The most visible portions of the retail offer are sometimes quoted in shorthand as PQRS—price, quality, range and service. Customers have an interest in seeing the retail offer maximized. That is, section 134(5) refers to 'higher prices, lower quality or less choice of goods or services' as being elements of a 'detrimental effect on customers' and each of these elements feature within the retail offer (price, quality and range respectively). However, it is acknowledged that the value attributed to particular aspects of the retail offer, and the extent to which those aspects can be traded off against other aspects of it, will vary considerably between individual customers.
12. It should also be noted that while price is the most easily observable element of the retail offer, it is far from the only element. Further observations regarding trends in other outcomes of the retail offer are provided in Section 3 of the main report.
13. 'Less choice of goods or services' is referred to in section 134(5) as an element of potential customer detriment. In this market investigation, when considering the interests of customers, we have proceeded with the view that 'choice' refers to the ability

of customers to choose between a wide range of products within an individual store (as might be measured by the number of SKUs available at a store), and also to customers' access to a number of different retail offers. As suggested in Section 4 of the main report, we consider that there are two observable variables which capture many aspects of the retail offer of any given store: store size (and perhaps also store format), and the identity of the store operator (ie store fascia).