

Plus ça change, plus c'est la même chose?

On April 30 2008 the Competition Commission published its final report and thirty-six appendices, some 900 pages all told, on its two-year investigation into the UK grocery market. The final report reveals almost no changes from *Provisional Findings* last October nor from *Provisional Remedies* in February 2008 (see *Competition Law Insight*, April 8 2008), so, perhaps for that reason, this magnum opus attracted only muted media coverage.

The report confirms that all is well in grocery, save for adverse effects on competition in three areas, all relating to concentrations of “large stores” in local markets. Two concern planning and land use, the third deals with relationships between supermarkets’ and suppliers. The CC’s remedies are as follows:

“We are recommending to Government and the devolved administrations that a competition test be applied, as part of the planning process, to proposed new stores (and proposed extensions to existing stores). The competition test will favour new entrants...” (Main report, paragraph 4)

“We will...require grocery retailers to relinquish control over landsites in highly-concentrated markets... Further, we will be limiting the ability of grocery retailers to prevent land being used by their competitors in the future.” (*ibid*, paragraph 4)

“We will be tightening the provisions of the Supermarkets Code of Practice [covering dealings with suppliers] and broadening its application... We will also be seeking legally binding commitments from grocery retailers to establish an Ombudsman to oversee the revised Code.” (*ibid*, paragraph 5)

Those who favour the CC’s remedies include the National Farmers’ Union and ActionAid, who see a tighter Code of Practice and an Ombudsman as together strengthening the positions of primary producers at home and abroad.

The supermarkets are lukewarm: they applaud the CC’s finding that supermarkets have done a good job for consumers, but they do not much like the remedies. Asda thinks that the new Code and Ombudsman will cost the industry “hundreds of millions” but that it is consumers who will suffer – which suggests that it will cost the industry nothing. Sainsbury’s is in favour of the competition test, presumably because it thinks it will put the brake on Tesco. No comments appear on the websites of Morrisons, Waitrose, Marks & Spencer, the Co-op Group, Aldi, Lidl or Netto.

Still bristling with rage, however, are parties who back the interests of small shops. The Association of Convenience Stores says, “The overriding failing of this Inquiry is that the Commission views competition in the grocery market [only] as competition between the big four ...[it] neglects the needs of many groups of consumers...” Friends of the Earth too point to “The Commission’s failure to understand the importance of independent shops...” The Federation of Small Businesses says that, “...the Competition Commission has consistently failed to understand the value to consumers of small independent shops. This latest inquiry has again missed the point.”

It has often been said that when the CC manages to irritate almost everybody in sight it has probably got things right. A less charitable view is that this time it has behaved like the

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elderly driver on a busy motorway, sticking doggedly to the middle lane, oblivious of what is happening on either side.

In the summer of 2007, a year after it began, the CC unleashed a small blizzard of papers which foreshadowed that competition in grocery might all be about competition between the largest players. And so it has turned out. *Provisional Findings* and now the final report confirm the CC's somewhat Panglossian view that, apart from the three flaws noted above, everything is pretty much for the best in this best of all possible grocery worlds.

If what really matters is competition *between* larger stores, the CC sees no harm in the inability of smaller stores to compete *against* them:

“The competitive position of convenience stores relative to large grocery retailers was a key concern for many in our investigation....[But] having examined thoroughly the full range of concerns that have been raised with us regarding possible distortions in competition between large grocery retailers and convenience store operators, we did not find that these concerns were substantiated.” (Main report, paragraph 6)

The core of the small shops' case is that the buying price and other disadvantages they face are based not merely on the supermarkets' economies of scale, which are not objectionable, but on their market power, which is. No, says the CC, if there is a problem with buying prices, the solution lies in the operators' hands:

“In our view, convenience store operators that purchase from small wholesalers could, in many cases, address at least some of their purchasing cost disadvantage by shifting to a larger wholesaler. Further, small wholesalers have the potential to address at least some of their cost disadvantage relative to other wholesalers and grocery retailers by joining a larger buying group. As a result, we concluded that convenience stores do not face a barrier to entry arising from any cost disadvantage relative to other grocery retailers.” (*ibid*, paragraph 27)

The words above have some weasel about them. In lines 1 and 2, how many cases? In line 2, how much of the disadvantage? In line 4, does the CC imagine that owners of smaller stores and wholesaling businesses never think of seeking better buying terms elsewhere? How many did it visit to find out? It does not say. The small stores' associations say the CC neither understands nor addresses the magnitude of the buying price problem: it merely sidesteps it.

Whatever the legitimacy of small stores' complaints, the CC places its (and thus our) trust in vigorous competition between supermarkets. Yet just as it does so the OFT launches investigations into the possibility that, with their suppliers, they have engaged in price-fixing.

The OFT had already investigated price-fixing in dairy products over the period 2002-2003. In September 2007 it published a provisional Statement of Objections, and in December Asda, Sainsbury's and a number of milk processors admitted guilt (the case against Morrisons has been dropped, but against Tesco it continues). Then on April 25 2008 the OFT published a Statement of Objections to possible price-fixing involving supermarkets and the main tobacco products suppliers. And a few days after that the *Financial Times* (April 27 and 29) and the BBC (April 28) reported statements from supermarkets and some suppliers that the OFT had visited them and/or had sought information in connection with possible price-fixing in beverages and in health, beauty and grocery products.

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We are thus confronted with a bizarre unfolding of events: in August 2005, after consultation, the OFT saw no need for a grocery market reference; following an appeal to the CAT it changed its mind and in May 2006 handed over to the CC; by November 2007 the CC was satisfied that had unearthed only the three problems mentioned above; and now the OFT not only suspects, but in dairy products has actually found, price-fixing. To the man on the Clapham omnibus this must all seem pretty rum, neither authority emerging with much credit.

To justify its own position, the CC draws a distinction between collusion and coordination, saying (at paragraph 32 of the report) that investigating collusion is for the OFT, whereas the CC can explore only tacit coordination. One may perhaps hear a clatter of ladders being pulled up at the CC but distinctions between collusion and coordination are unlikely to impress consumers at the checkout. The CC goes on to say that, while it has not actually found any coordination, it *could* exist in grocery: "...we are concerned that, given the structure of the grocery retailing market, such behaviour could occur in the future." (*ibid*, paragraph 34)

Much, surely, turns on the evidence and the way in which it was analysed? The CC and the OFT are likely to have received price data from substantially the same suppliers and retailers over substantially the same period of time. Unless the data sets were different, how odd it is that the two bodies arrived at such differing interpretations.

In fact, for an inquiry into retailing, the CC provides remarkably scant analysis of retail prices. Yet it had evidence of price proximity among the supermarkets. GfK/NOP's survey for the CC itself (*Groceries Inquiry – Local Case Studies*, June 2007) noted that "...prices matched almost exactly, reflecting the fact that the Major supermarkets price these items very similarly to each other." (p.19). The Association of Convenience Stores too had already drawn the CC's attention to a lack of retail price dispersion among the Big Four. In an analysis of wholesale and retail prices across 317 items as at February 2007 it said:

"...111 line items (35 per cent) show zero dispersion and a further 98 items (31 per cent) show dispersion of less than 5p. All in all, some two thirds of items show either no price dispersion or dispersion which we suggest is negligible from a consumer's point of view."

Despite the OFT's subsequent alarm over dairy products the CC appears not to have revisited these two prompts. Perhaps it had already presumed firmly against the likelihood of price coordination and thus would not have spotted it. As Sherlock Holmes famously remarked, "I saw, Watson, but I did not *observe*." Too late now, Holmes. The inquiry is closed and the panel disbanded.

Now we are at the end, what difference will the CC's report make to retailers, suppliers and consumers?

A safe bet is that the collective market share of the Big Four will go on rising: it rose from 57% in 2000 to an estimated 65% in 2007. The new competition test and the new rules on land use may jostle individual Big Four market shares, but probably not by very much, and their collective share will remain undamaged. Even the largest middle-ranking player (Somersfield with 4%) is a long way behind the smallest Big Four player (Morrisons with 10%). The market share of small and specialist stores has fallen from 25% to 15%, leaving

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convenience store owners still astonished that the CC thinks store numbers have actually risen.

The CC's conclusions can only dismay that percentage of shoppers – over 26 per cent according to the British Brands Group – whose needs are not met by supermarkets. There will foreseeably be adverse effects on rural and poorer communities too, but because these are not competition matters the CC says it cannot touch them. Nevertheless, one might ask whether, without exceeding its brief, the CC could have considered more sympathetically the likely distributional effects of leaving the market effectively in the hands of the Big Four.

Producers, processors and suppliers should benefit – if they find new courage to complain to the Ombudsman, and if he/she is appointed. Here the CC contemplates possible defeat. Should retailers not agree to an Ombudsman, the CC says it will pass the matter to the Department for Business, Enterprise and Regulatory Reform. If DBERR fails the CC will propose independent dispute resolution under the aegis of the OFT – whose role in allowing the old Code to be diluted helped to spark this latest inquiry. What neat symmetry and what corrosive irony!