

COMPETITION COMMISSION INQUIRY INTO GROCERY MARKET – CLIENT BRIEFING NOTE

The Competition Commission issued its 'Provisional Remedies' following its investigation of the Groceries Market on 15 February. As well as making a number of recommendations to regulate the relationship between the retailers and their suppliers, the Commission has made a number of recommendations regarding planning and also how retailers should be able to hold land ostensibly acquired for development and dispose of vacated premises in the future.

Planning

The Commission's previous reports have already expressed concerns that the planning process as it currently operates throughout the UK is a potential 'barrier to entry' in many local markets, and that greater attention should be had to competition considerations and the benefits that this might offer through increased choice, price competition, etc. The report now confirms that some form of competition assessment should be introduced into the groceries market.

The Commission has then gone on to consider whether such an assessment should either form part of the planning process with the Office of Fair Trading being a statutory consultee or be the subject of some form of new, separate licensing regime administered by the OFT. The first option would require changes to existing planning policy guidance and GDPO (as well as the equivalents in the devolved

administrations in Wales and Scotland). The second option would require the Department of Business, Enterprise and Regulatory Reform to facilitate the creation or amendment of primary legislation to give the OFT the power and resources to perform the competition assessment outside the planning system. The first option may not require primary legislation, however, the second option definitely would.

Despite the reservations expressed by retailers (including Tesco) as well as the Department of Communities and Local Government, the Commission has concluded that the issue of competition should form part of the statutory planning process and the OFT should become a statutory consultee. Its findings on individual proposals should become a 'material consideration' in the determination of any planning application for a foodstore.

Whilst the Commission also considered matters such as the operation and appropriateness of the existing 'need' test and the 'sequential approach' towards site assessment it has made no further recommendations on these matters.

Controlled Land

The Commission had previously expressed concerns regarding the way in which some retailers hold land acquired for development purposes and have often imposed restrictions on land

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and/or premises disposals. In the light of extensive investigations the Commission has proposed a package of measures covering the future use of restrictive covenants and exclusivity agreements.

In order to address what are described as "the adverse effects of competition" (AEC) arising from the past use of restrictive covenants, the Commission recommends that:

- retailers will be required to release existing restrictive covenants in areas of high concentration as soon as possible;
- existing restrictive covenants that has the effect of restricting grocery retail use should be released;
- retailers will be prevented in the future from imposing restrictive covenants on grocery use and will not be able to enter into contracts which effectively amount to restrictive covenants limiting use for grocery retailing;
- where an existing restriction requires the agreement of a local planning authority in order to be lifted, the local planning authority should have regard to local competition issues in deciding whether the restriction can be released; and
- local planning authorities do not enter into agreements restricting grocery use on sites in future.

The Commission has, however, decided against any measures in relation to land bank sites, leasing, or store divestitures.

Chase & Partners' Commentary

We believe that the Commission's analysis of the development and planning aspects of the Groceries Market has been reasonably incisive. However, its recommendations in many respects are both ill-conceived and, in places, quite naïve – reflecting what we believe to be a relatively poor understanding of how the planning and development process operates in the real world.

It is important to stress that the Commission's recommendations cannot be implemented immediately and are unlikely, in the short term, to have a material effect on the determination of existing applications. However, they will, cast something of a shadow over current foodstore proposals and could affect the attitude some authorities will take towards approaches by certain retailers, and might even make some developers cautious about dealing with operators in locations where their existing representation might be considered more than adequate.

For more information on the Competition Commission's investigations and its possible implications please contact either **Graham Chase** or **Huw Williams** at Chase & Partners.

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