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30 October 2020

By email: remediesmonitoringteam@cma.gov.uk

To whom it may concern,

CMA Consultation: Merger and Market Remedies – Guidance on reporting, investigation and enforcement of potential breaches (the "Consultation")

1. We refer to the Consultation published on 30 September 2020, in which the Competition and Markets Authority ("**CMA**") asked for feedback on its draft guidance regarding the investigation and enforcement of final merger and market undertakings and orders (the "**Guidance**").

2. The Groceries Supply Code of Practice ("**GSCOP**") and the Controlled Land Order ("**CLO**") are both final Orders made under section 161 of the Enterprise Act 2002, following the Competition Commission's ("**CC**") 2006 market investigation into the supply of groceries by retailers in the UK (the "**Market Investigation**"). Accordingly, we understand that the Guidance is intended to apply to GSCOP and the CLO.[1]

3. As the CMA will know, GSCOP and the CLO were drafted with care and precision to address the specific concerns identified by the CC during its Market Investigation. In our view, certain aspects of the Guidance introduce (a) additional obligations not contemplated during the Market Investigation, and (b) uncertainty and confusion in what are already effective, well-functioning regimes.

4. The Guidance seems to suggest that firms will be required to self-report actual, potential and future breaches of GSCOP and the CLO to the CMA, as soon as such issues are identified.[2]

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[1] Sainsbury's may also be required to comply with a number of other final merger and market undertakings/orders (for instance, the Sainsbury's/Asda Merger Inquiry Order 2019). Given the importance of the CLO and GSCOP to our business, we focus on how we understand the Guidance will affect our obligations/compliance under those Orders in this letter.

[2] Paragraph 3.3. of the Guidance provides that: "*It is important for the CMA to find out about all breaches of its undertakings and orders,…irrespective of whether such breaches are considered material*". Paragraph 3.4. provides: "*Where firms become aware that they either will or may breach a set of undertakings or and* [sic] *order in the near future, the CMA expects them to contact it as soon as they are aware of this possibility….*" (emphasis added). And later, paragraph 3.14 of the Guidance states: "*As noted above, all breaches and potential breaches should be reported to the CMA… (emphasis added).*

5. In our view, this requirement:

a. **Introduces a new obligation.** This reporting obligation is wider (in terms of both substance and timing) than the existing (very specific and clear) notification obligations contained in Articles 10 and 11 of GSCOP and the CLO, respectively. As above, GSCOP and the CLO were designed to address the specific concerns identified by the CC during the Market Investigation; and were the subject of an exhaustive consultation and market testing process prior to their introduction.[3] There is no clear link between any new obligation and the Market Investigation / remedies package.

b. **Is unnecessary.** GSCOP and the CLO apply to live negotiations with commercial counterparts. Accordingly, we are consistently accountable, and will be exposed to third party complaints to the CMA/GCA if we breach the Orders. As the CMA notes in the Guidance[4], it already has a variety of routes by which it will become aware of actual or legitimate compliance concerns. GSCOP and the CLO are sophisticated, well-functioning and well-known regimes (the former with its own dedicated regulator). Additional reporting obligations for these Orders are duplicative and unnecessary.

c. **Is not sufficiently clear.** There is insufficient clarity as to the types of conduct that would be caught within the reporting obligation, which seems to require the notification of actual, potential and future potential breaches of GSCOP and the CLO. In theory, that interpretation could capture even a "problematic pondering" during the course of live negotiations which is later rejected. Such a broad requirement could result in over-reporting, which is of no value to the firm or the CMA (see below). In any event, there is no clarity on how the Guidance should be reconciled with existing provisions in the Orders (e.g. dispute resolution procedures, existing reporting obligations etc.)

d. **Is overly broad**. We note that the Guidance identifies that breaches could take place inadvertently or by accident[5]; but that even an inadvertent, technical breach with no effect (i) should be notified to the CMA as it is discovered; and (ii) could be viewed by the CMA to comprise a material concern. In our view, this is too broad an approach, and fails to take due account of the fact that compliance measures need to be reasonable, proportionate and achievable.

e. **Places an unreasonable and unwarranted administrative burden on firms (and the CMA).** In our view, the reporting obligation would mean that (i) we report issues that we can resolve commercially (or indeed matters that do not even become a concern as they are potential or future potential breaches); and (b) we are under a continuous obligation to make such notifications to the CMA. This is a time-consuming task requiring considerable internal resource. Moreover, in many instances, the notification would be of little material value to the CMA to measure/confirm compliance or take a view on enforcement, given its potential/future potential nature.

[3] The Guidance notes this explicitly in para 2.3.
[4] Para 3.2 of the Guidance.
[5] Para 2.6 of the Guidance.

6. As above, the Guidance contains a broad approach to the concept of "breach" (including how it could arise) and to appropriate enforcement action that could be taken as a result. We assume that this Guidance does not (and is not intended to) cut across the CMA's Prioritisation Principles. It would be helpful to make this explicit in the Guidance itself.

7. Considering the above, we would argue that the CLO and GSCOP regimes (including the existing reporting obligations contemplated in each) are already effective and proportionate to ensure that the CMA is made aware of issues that are sufficiently material and worthy of investigation and enforcement.

8. As the CMA will know, we place considerable importance on our compliance with both GSCOP and the CLO (as is the case for all rules that apply to us). We have extensive compliance policies, measures and processes in place, and dedicate significant resource to training and compliance functions. We value our reputation as a trusted customer to grocery suppliers, and counterpart in land agreements, and will continue to take steps to uphold it.

9. We trust this is helpful for the CMA's Consultation, and would be happy to discuss in more detail.

10. Kindly acknowledge receipt.

Regards,

Sainsbury's