

Competition & Antitrust - United Kingdom

CMA responds to Which? super-complaint on grocery sector pricing practices

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July 30 2015

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Introduction

The Competition and Markets Authority (CMA) has published its response to a super-complaint submitted by consumer body Which? on April 21 2015 concerning UK grocery pricing practices.⁽¹⁾

The CMA has found that supermarkets generally understand the rules on pricing and promotions and are working to apply them in practice. However, the CMA has identified specific examples of confusing or misleading promotions and will be investigating them further, as well as making recommendations to help the sector to avoid promotional practices that could be confusing for consumers.

What is a super-complaint?

As defined in the UK Enterprise Act 2002, 'super-complaints' may be brought by designated consumer bodies and concern any feature or combination of features of a UK market that may be harmful to the interests of consumers.

The Which? super-complaint alleged that the following grocery pricing practices are harming consumers:

- using confusing promotional offers (including discounts, multi-buy and value pack offers that offer no better value than the previous prices or the prices of non-value versions of the products);
- using inconsistent and confusing comparable unit pricing (comparable unit pricing is required by EU Directive 98/6/EC); and
- maintaining prices where product sizes decrease.

In addition, Which? asked the CMA to consider the effects of supermarket price-matching schemes. Its concern was that the wide range of products on offer may make accurate price matching impossible, which may result in consumers mistakenly relying on price-matching schemes rather than shopping around for the best deal.

This is the first super-complaint that the CMA has received. In recent years the CMA's predecessor regulatory body – the Office of Fair Trading (OFT) – handled super-complaints across a number of industries, often concerning clarity of pricing. For example, in relation to a complaint in the travel money market relating to charges for purchasing foreign currency and using credit and debit cards abroad, the OFT agreed voluntary improvements to industry practices, including in relation to standardisation of key terms and provision of clearer information on charges to consumers in card and current account monthly statements.⁽²⁾

The issues raised by Which? cover a mixture of competition and consumer issues which are outlined below.

Promotional and pricing practices

Which? is concerned that the cumulative effect of the practices that it has identified makes it difficult for consumers to identify the best value – for example, because unclear unit pricing and/or changes in pack sizes make it difficult for consumers to evaluate promotional offers.

Where a promotional offer is misleading, this potentially raises concerns over compliance with the Consumer Protection from Unfair Trading Practices Regulations 2008. These regulations prohibit traders from (among other things) presenting a product in a way that deceives or is likely to deceive

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the average consumer in relation to the existence of a specific price advantage and cause the consumer to make a poor transactional decision as a result. The regulations can be enforced by the CMA and by local trading standards authorities.

OFT guidance⁽³⁾ adopted by the CMA suggests that confusing promotional offers may breach the consumer protection regulations. Which? believes that this is the case, as the super-complaint stated that:

"some of the practices we have uncovered are issues of lack of compliance and effective enforcement. Our research has repeatedly uncovered practices that are, in our view, in breach of the [Consumer Protection from Unfair Trading Practices Regulations]."

Price matching

Which? has also raised a concern that the use of price-matching policies by supermarkets could be reducing consumer pressure on supermarket prices by discouraging consumers from shopping around, which appears to be having a potentially dampening effect on competition in the groceries market.

The suggestion that there may be competition concerns is perhaps surprising, given that the UK grocery market is regularly cited as one of the most competitive markets in the United Kingdom. There are multiple credible competitors, including disruptive discounters. In its 2008 market investigation of this sector, the Competition Commission found competition issues in the grocery sector at a local level (where one supermarket chain may have a degree of local market power), but not at the national level, where competition was found to be "effective and delivers good outcomes for consumers".⁽⁴⁾

Price-matching policies seem on their face to be highly pro-competitive, as they provide retailers with an incentive to cut prices in order to meet the price-matching commitment. However, Which? is concerned that, given the scope of the policies and the wide range of products carried by supermarkets – 30,000 in a typical store – consumers may mistakenly rely on them in deciding not to shop around, without realising that not all products are caught by the price-matching guarantee. Which? identifies in particular exclusions that consumers may be unaware of for own-brand products and different pack sizes.

As a result, Which? believes that these policies are not necessarily as pro-competitive in practice as they may at first appear. The super-complaint invited the CMA to consider their effects in more detail, in combination with the more specific concerns described above.

CMA response

The CMA has found that supermarkets are trying to comply with the rules on pricing, and that consumers have a wide range of choices when shopping for groceries – with an estimated 40% of grocery spending being on items on promotion. However, the CMA has identified specific examples of confusing or misleading promotions and will be investigating those further. It has not ruled out the possibility of enforcement action in specific cases.

The CMA's main response to the Which? super-complaint is to make recommendations to help the sector to avoid promotional practices that could be confusing for consumers in future. The CMA has asked the Chartered Trading Standards Institute and the Department for Business, Innovation and Skills to work on guidance for the industry on how legislation applies to promotional practices and in particular the use of unit pricing. The CMA has also published its own guidance to help consumers to make better use of unit pricing when comparing products.⁽⁵⁾

Finally, while not identifying any significant consumer harm arising from the way that price-matching schemes operate at the moment, the CMA has indicated that it will work with retailers to improve the clarity of price-matching schemes and recommends that retailers ensure that the terms of their schemes are set out in plain English.

Overall, after a short and intensive investigation, the CMA has given the grocery sector a relatively clean bill of health. It noted that the grocery industry is highly competitive and makes a significant contribution to the UK economy, accounting for an estimated £148 billion to £178 billion in 2014.

For further information on this topic please contact [Caroline Thomas](#) or [Jamie Cooke](#) at Norton Rose Fulbright by telephone (+44 20 7283 6000) or email (caroline.thomas@nortonrosefulbright.com or jamie.cooke@nortonrosefulbright.com). The Norton Rose Fulbright website can be accessed at www.nortonrosefulbright.com.

Endnotes

(1) See www.gov.uk/government/news/cma-recommends-changes-to-help-shoppers-in-supermarkets.

(2) OFT, *Travel Money and Card Use Abroad: Response to the Consumer Focus super-complaint*, December 2011.

(3) [Principles on food pricing display and promotional practices](#).

(4) Competition Commission Groceries Market Investigation, Final Report, April 30 2008 (Paragraph

10.1).

(5) See www.gov.uk/government/publications/unit-pricing-information-for-consumers.

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