

Provisional decision on planning remedies

Introduction

1. This paper is one of three papers setting out provisional decisions of the Competition Commission (CC) in relation to remedies to the adverse effects on competition (AECs) identified in the provisional findings of the groceries market investigation. We have provisionally found AECs in relation to local market concentration and in relation to supply chain issues. This paper is one of two papers that assess the remedy options in relation to local market concentration. This paper concentrates on measures to prevent the emergence of local market concentration in future, which includes our consideration of possible changes to the planning system. A further paper discussed remedies to address controlled land as a barrier to entry in areas of high concentration and also multiple stores. A third paper discussed remedies to address the AEC we have provisionally found in relation to the supply chain. A fourth paper also summarizes our package of remedies and provides an overall assessment of effectiveness and proportionality.
2. This paper begins by recapping on our provisional findings in relation to local concentration and also by summarizing the main questions on this topic that we included in our Notice of Possible Remedies. The paper then sets out our assessment of the different remedy options, noting key points raised by main and third parties and our views on them. The paper concludes by summarizing our provisional decision on remedies in relation to planning.
3. In considering the planning remedies contained in this paper we have been aware, as we set out in our provisional findings, that the planning system has a variety of objectives. It aims to control and shape retail development to promote the orderly growth and development of existing town centres and the provision of a wide range of services in a pleasant and widely accessible environment. These specific

objectives are set in the context of wider objectives regarding economic growth, regeneration, social inclusion, sustainability and good design. An inevitable consequence of the planning system, that seeks to meet these overarching objectives, is that it will restrict entry and will, quite deliberately for the purposes of meeting its objectives, act to some extent as a barrier to entry and/or expansion for larger grocery stores. We recognize the need to avoid proposing changes that could result in unintended consequences in other areas governed by the planning system that outweigh the benefits to competition achieved by the changes proposed in relation to grocery retailing.

Provisional findings in relation to local market concentration and planning

4. We have provisionally found that a significant number of local markets have high levels of concentration and these high levels of concentration have persisted over a number of years.

5. Weak competition in local markets for the supply of groceries in each of the three major product markets that we identified (larger grocery stores, mid-sized and larger grocery stores, and all grocery stores) influences the retail offer of grocery retailers operating in those markets in two ways:
 - First, it provides national or regional grocery retailers that face limited competition in a number of local markets with the incentive and ability to weaken those components of the retail offer, such as prices, that they choose to apply uniformly, or nearly uniformly, across all the local markets in which they are present.
 - Second, in those local markets where competition is weak, a grocery retailer can degrade components of the retail offer, such as product range and quality on a store-specific basis. We consider that this second effect is the lesser of the two effects we have identified. However, in relation to this effect, which is more amenable to measurement, we estimate that for an average larger grocery store

the effect of an additional competitor within 10 minutes would translate into a profit increase of £240,000 to £300,000 per year at that store.¹

6. In relation to the balance between these two effects, we note that pricing is currently set uniformly across larger stores as a matter of choice by most of the UK's national grocery retailers. This means that any weaknesses in local competition will currently, in large part, be reflected in higher national prices rather than higher prices in localities where competition is weak. However, we note that this could change in the future were grocery retailers to change their national pricing policies and return to one of the various forms of local pricing that were more widely practised prior to 2000.

7. We provisionally found that the planning regime (in particular, PPS6 in England, SPP8 in Scotland, PPS5 in Northern Ireland and MIPPS 02/2005 in Wales), and the manner in which the planning regime is applied by Local Planning Authorities, acts as a barrier to entry or expansion in a significant number of local markets:
 - (a) by limiting construction of new larger grocery stores on out-of-centre or edge-of-centre sites; and
 - (b) by imposing costs and risks on smaller retailers and entrants without pre-existing grocery retail operations in the UK that are not borne to the same extent by existing national-level grocery retailers.

Remedy in relation to the planning system

8. On 31 October 2007, we issued our Notice of Possible Remedies ('Remedies Notice'), which invited comments on the actions that might be taken by the CC, or recommended for implementation by others, to remedy, mitigate or prevent the AEC

¹*The Supply of Groceries in the UK, Provisional Findings*, paragraph 5.44.

or resulting detrimental effect on customers, identified in our provisional findings in relation to the market for the supply of groceries by retailers in the UK.

9. Our Remedies Notice outlined various measures that, alone or in combination, we were considering as possible remedies to the AEC and customer detriments that were identified in the provisional findings and invited comments. The measures included in our Remedies Notice relating to the planning system are set out below.
10. We identified two broad types of remedies that could be used to prevent the emergence of local concentration. The first type of remedy that could be used to address local concentration consists of preventative measures, which would inhibit the emergence of concentrated local markets by applying a ‘competition assessment’² to the opening of new stores, together with extensions and mezzanines. Such a competition assessment would consider the effect of the opening of the proposed store by the identified proposed retailer on the relevant local market. Depending upon when such an assessment was performed and how it related to the overall planning process, the output might either be a simple pass or fail or a more graduated assessment.
11. The second type comprises measures that have the effect of opening up local markets by reducing barriers to entry. In the remedies notice we identified two principal means by which this may be achieved:
 - (a) measures to address barriers to entry from the planning system; and
 - (b) measures to address barriers to entry from controlled land, including land holdings, in highly concentrated local markets.

²In the Remedies Notice we referred to a competition test. However, we consider that a competition assessment better describes its purpose and function.

12. The views expressed by main and third parties and our views in relation to each of these remedy options as they relate to the planning system are set out in turn below (remedies relating to controlled land as a barrier to entry are discussed in a separate paper). We have grouped these views around a series of key themes:

(a) Competition assessment:

- Is a competition assessment required?
- Should the competition assessment apply to developers as well as grocery retailers?
- Should the competition assessment be inside or outside the planning system?
- How should a competition assessment be framed?

(b) Other modifications to the planning system:

- Distinguishing edge-of-centre sites from out-of-centre sites.
- The extent to which a possible amended planning test should recognize quantitative and qualitative aspects of need.
- Potential for streamlining the planning system.

13. It should be noted that in considering the views of parties we have given particular weight to those parties such as Communities and Local Government (CLG), the Scottish Government Planning Directorate, the Welsh Assembly Government Planning Division and the Northern Ireland Department of the Environment, who, given their statutory functions and responsibilities, have an intimate knowledge of the planning system and the legislation and guidance underpinning it. We then set out our consideration of the implementation issues raised by these types of remedies and, in particular, the differences between the devolved administrations. The final section in our assessment of remedy options concerns the interaction between our remedies and the wider public policy objectives of the planning system, and relevant customer benefits.

Is a competition assessment required?

Views of the parties

14. Most retailers were in favour of the introduction of a competition assessment at some point in the process of new store opening, although views differed on the point at which it should be applied. Asda, Sainsbury's, Morrisons, Waitrose, Somerfield, Co-operative Group Limited (CGL) and Marks and Spencer (M&S) were all in favour of the introduction of a competition assessment. Asda considered that a competition assessment would help to mitigate the effect of the planning regime on competition and choice and noted that the Planning White Paper referred to the promotion of competition and choice and the Barker Review saw no reason in principle against the inclusion of a competition assessment into the planning system. The Association of Convenience Stores (ACS) welcomed a competition assessment as an additional factor (but not the overriding factor) that should be considered in planning decisions.

15. Tesco was strongly opposed to a competition assessment. Tesco said that it had overwhelming in principle objections to such an assessment. Tesco did not think the provisional findings had identified an AEC that justified a competition assessment (which it referred to as a growth cap). Tesco said that it could not conceive of any way in which the assessment could be framed without stifling competition. Tesco said that the assessment would be anti-competitive and lead to less investment and fewer stores because it might be prevented from developing stores that no other retailer would take on. Tesco said that the assessment would mean an additional layer of regulation and uncertainty. Tesco also said that the assessment could result in customers paying higher prices and getting a fascia they preferred less. Tesco considered that the competition assessment would be arbitrary and argued that the assessment would encourage strategic behaviour, distort retailers' incentives and the opening of sub-optimal stores to keep within thresholds. Tesco argued that any form of competition assessment was unnecessary, disproportionate and would give rise to

perverse effects, and retailers' strategies would be severely affected by threats to the confidentiality of site assembly. Tesco also considered that a competition assessment did not address the feature of the market that the CC had identified and would instead create new barriers.

16. Tesco thought that it was wrong in principle for a mechanistic competition assessment to be applied as part of the planning process. Tesco said such an assessment would limit Local Planning Authorities' (LPAs) ability to approve developments even where there were significant public policy benefits in the creation of a new store, and there would be cases where other retailers might be unlikely to take them forward. Tesco said a mechanistic assessment would encourage strategic behaviour—such as by encouraging a rival not to open new floor space where doing so would allow a competitor to also expand and a retailer could have an incentive to build a smaller store in order not to exceed an arbitrary threshold. Tesco said that a competition assessment would need to be reviewable, and that this would lead to many appeals and 'regulatory gridlock'.
17. Tesco told us that a competition assessment would have significant implications for sectors of the economy not the subject of our investigation such as landlords, developers and vendors of property. It said that, faced with a competition assessment in relation to grocery use, developers could find there was reduced demand from competing retailers to acquire sites and might find other, non-grocery uses, more attractive.
18. Tesco also said the competition assessment might result in a problem for local authorities looking to sell council-owned land. Tesco noted that local authorities were obliged to get the best value for land and might find it difficult to reconcile this with a

need to take into account the effect on competition of a sale to a particular purchaser on competition.

19. Two LPAs, Weymouth and Portland Borough Council and Alnwick District Council, responded to our Remedies Notice. Weymouth and Portland Borough Council said that LPAs did not consider which supermarket retailer would occupy a store, as permission was granted for a 'supermarket' of a specific size and once granted consent, supermarkets could change hands. Alnwick District Council said that competition itself was not a planning matter because it was the appropriateness of the use of land that was being assessed.

20. CLG told us that, separately from our investigation, it was increasing the emphasis of competition within the planning system in England.³ It pointed to a consultation document on PPS4⁴ recently released by CLG, which made specific references to considering competition in planning applications. CLG noted that, in its view, the 'town centre first' policy helped to encourage competition among retailers since it ensured that retailers were situated in close proximity to each other, thereby making them more likely to compete. If we wished to go further, CLG suggested that we should consider whether there is scope for competition considerations to be taken into account by LPAs considering the impact of a proposal, without requiring a formal competition assessment, by considering the extent to which a proposal promotes

³The planning authorities in the devolved administrations did not mention that they were considering anything similar.

⁴Consultation Paper on a new *Planning Policy Statement 4: Planning for Sustainable Economic Development*. The aims of the document are to build on the objectives for the planning system set out in *Planning Policy Statement 1: Delivering Sustainable Development*, and provide the tools for regional planning bodies and local planning authorities to plan effectively and proactively for the economic growth they need to help create and maintain sustainable communities. As a result of this new policy, regional and local planning bodies will support economic development by ensuring that they understand and take into account what their economies need to remain competitive, and responsive to the needs of business, and factor in the benefits of economic development alongside environmental and social factors. The document refers to competition under planning outcomes: 'There is a limit to the extent local planning authorities can predict the future of their local economies and so a flexible approach to the supply and use of land will be important. In this way the planning system will help to ensure increased competition and enterprise, enhanced skills and innovation, increased job opportunities and greater investment in the UK economy'. Under Other Impact Tests the document refers to a competition assessment: 'There will be limited impact regarding competition in the general context of economic development'.

competition and consumer choice. However, this would not consider the specific identity of the fascia..

Our views

21. The current planning system, with its focus on the character and use of land rather than the identity of the specific occupier, means there is currently no real ability to consider whether, even if there is overall 'need' for a new development, the consequences of allowing that need to be fulfilled by an operator of a particular identity would create or strengthen an adverse effect on competition as defined in this inquiry.

22. It is not always possible for the pressures of competitive entry to constrain a grocery retailer that enjoys a strong market position in a local area. A competition assessment that prevented a retailer expanding further in an area where the retailer already had a presence above a certain threshold, however that assessment was undertaken and whatever weight might ultimately be attached to its finding, would allow focus on that specific consideration.

23. CLG has pointed out to us that its consultation paper on PPS4 makes some reference to competition. However, while this is welcome, we do not consider that it fully or adequately addresses our specific concern that the development of local areas of concentration should be inhibited. Encouraging competition between retailers in a general sense will not of itself reduce or prevent the adverse effects on competition identified in this inquiry. That can only be achieved by a focus not just upon competition between retailers in the generic sense, but through a specific focus upon the identity of the operator at any particular retail facility. While PPS4, if adopted in broadly the form upon which consultation has been undertaken, may enable local planning authorities to have more regard to general issues of

competition than at present, it does not seem an appropriate vehicle to introduce an assessment of the identity of specific retailers and thus remedy the adverse effects on competition that we have observed.

24. We also note the comments of Tesco that a competition assessment could have significant implications for developers, including local authorities. Tesco's proposition appears to be that the developer might consider that the competition assessment might reduce competition between grocery retailers bidding for the developer's grocery retail scheme, knowing that the eventual operator of a grocery retail scheme would need to undergo a competition assessment. The developer might therefore consider alternative, non-grocery uses of the scheme, to be more attractive. However, this suggests first that the grocery retailer with a high local market share would be the highest bidder for a site compared with other grocery retailers, and second that if that grocery retailer decided not to bid because of the competition assessment, other grocery retailers would then bid less than bidders for non-grocery uses. The first point would only necessarily be true if a grocery retailer with a high market share felt able to bid more to maintain that market position, which is precisely what we would be seeking to prevent with the competition assessment. The second point would also not be true. If a competing grocery retailer wanted to operate from a developer's site the retailer would be aware of the competition provided for a site by non-grocery uses and would seek to bid higher. Therefore, we do not agree that the exclusion of a particular grocery retailer would necessarily result in sufficiently lower bids from other grocery retailers that the site would be used for other, non-grocery uses.
25. We note that the merger control regime does provide a means of preventing the emergence of areas of high concentration that would be created if a grocery retailer acquired a trading store from a competitor. However, we also note that the merger

control regime does not apply in situations where a grocery retailer acquires a store that has been closed for some time, or moves into a newly developed store. We therefore do not consider it sufficient to rely on the merger control regime to prevent the emergence of areas of high concentration in the future. Indeed, we note that it has not been sufficient to prevent their emergence to date.

26. For these reasons, we consider that a competition assessment is necessary to prevent the emergence or strengthening of a concentrated position held by a grocery retailer in local markets. We have therefore provisionally decided to put in place a set of measures designed to prevent the emergence of areas of high concentration. We see our 'competition assessment' remedy as an important complement both to the remedies we have provisionally decided to put in place to deal with existing areas of high concentration (discussed in another paper) and to the merger control regime as it applies to grocery retailing.

Should the competition assessment apply to developers as well as grocery retailers?

Views of the parties

27. Asda, Sainsbury's and Somerfield considered that some form of control over the ultimate beneficiary of a permission granted to a developer was necessary.

Our views

28. We note the views of a number of retailers who considered that some form of control over the ultimate beneficiary of a permission granted to a developer would be necessary. However, we also recognize that developers may want to know which retailers they can negotiate with to take a site (ie those that would pass a competition assessment). In practice we aim to achieve sufficient clarity in the mechanism of the competition assessment to allow retailers and developers to have a good under-

standing of which retailers would be suitable to occupy a store on a development at a relatively early stage in the development process.

29. The manner in which a competition assessment could be applied to developers would clearly depend upon how the assessment related to the overall planning process. If the competition assessment were applied following the submission of a planning application, then it would make little practical difference whether the applicant were a prospective retail operator or a developer. If a retailer were the applicant, the assessment would tell the retailer (possibly subject to the size of the store proposed⁵) whether it could operate the proposed grocery retail store. If a developer were the applicant, the competition assessment would tell the developer which grocery retailers could operate from the proposed store (possibly also specifying what size the store could be for each grocery retailer depending on the nature of the competition assessment). Depending upon the stage that negotiations (if any) had reached between a developer and prospective operators of a proposed retail development, it seems to us that the assessment might either seek positive endorsement of a retailer of a particular identity, or seek negative confirmation of the retailers of a specific identity that would be unacceptable. Given that the planning system enables applications to be made at various points in the process of land assembly and design development (in particular, by not requiring the applicant necessarily to be the owner or prospective occupier of the land that is the subject of the application) there would clearly need to be a sufficient degree of flexibility in the assessment to enable such positive and negative clearances to be given.
30. The same logic would apply if the competition assessment were applied before submission of the planning application, so that anyone wishing to apply for planning

⁵The proposed mechanism for the competition assessment is outlined later in this paper (paragraph 93).

permission would need to have passed the competition assessment before doing so. Again, it would be open to a developer to submit to the pre-planning application assessment in exactly the same manner as the retailer. That submission (as with one made during the planning process) might seek either a clearance in respect of an identified operator (or operators), or an indication of which operators would be unacceptable.

31. Alternatively, a competition assessment that lay outside the normal planning process could be applied in such a way that any grocery retailer wishing to trade from a particular store would be required to pass the competition assessment before doing so. In this case, the competition assessment need only apply to grocery retailers.
32. If a competition assessment is included within the planning system or as a pre-planning application assessment, it should apply to whomever seeks planning permission for grocery retail use. This would include developers (with a view to identifying which retailers would be suitable for operating from a development) as well as retailers.
33. A key concern is to ensure that while the force of the competition assessment in inhibiting the development of local areas of concentration is not diminished, neither should it unduly restrict the ability of developers to bring forward sites for retail development, in particular those which may in fact stimulate fair competition between grocery retailers and thus provide benefits to consumers.
34. If a competition assessment were applied only before a grocery retailer began to trade from a store, we consider it would be appropriate only to apply the assessment to grocery retailers. Indeed, it is difficult to see how an assessment devised in this case could ever apply to developers. We therefore return to this question when we

consider whether the competition assessment should sit within the planning decision-making process or as an entirely separate assessment in paragraphs 62 to 79 below. However, as a general proposition, the later in the overall process between land assembly and commencement of retail operations that a competition assessment is performed, the greater the potential negative effect on a developer. Essentially, the developer will carry for longer the risk that the field of retailers to whom it may eventually dispose of the development will be restricted⁶.

Should the competition assessment be inside or outside the planning system?

Two broad models

35. In our Remedies Notice we consulted on various aspects of the competition assessment. These related to two broad models:

(a) The competition assessment would operate within the planning system. Within this model there are two further options:

- (i) the assessment would be undertaken by the LPA, or
- (ii) the assessment would be undertaken by an external authority on behalf of the LPA such as the Office of Fair Trading (OFT) as a statutory consultee.

(b) The competition assessment would be undertaken outside the planning system by an appropriate body such as the OFT. This might be as an assessment that would need to be passed before a planning application may be submitted, or as an entirely separate assessment applied before a grocery retailer is permitted to trade from a store.

36. We discuss the parties' comments that relate to each model and outline our view. We then discuss the parties' comments on which of the models we should implement for the competition assessment and outline our provisional decision.

⁶The proposed mechanism for the competition assessment (explained in paragraph 93) means that at most one retailer would be unable to operate from a development.

Competition assessment operating within the planning system

37. If the competition assessment were to operate within the planning system the key questions to be answered would be:
- (a) which body would apply the assessment?; and
 - (b) what aspects of the planning system would the assessment be applied to?

Which body would apply the assessment?

38. As discussed above there are two options—either the LPA would apply the assessment or the assessment would be applied by an external authority on behalf of the LPA.

Views of the parties

39. Views were divided over whether, if the competition assessment were part of the planning system, it should be applied by the LPA or the OFT as statutory consultee. Asda, M&S, Aldi and the ACS all said the competition assessment should be applied by the LPA. Tesco said that the primary decision maker in development control matters was the democratically elected local authority, which has local knowledge and experience and is able to balance competing local considerations. Tesco and the ACS considered that making the OFT a statutory consultee would have a similar effect to making the OFT the decision maker, which Tesco said could lead to a development of value to the local community not taking place, which would be less likely to happen under an approach that involved the balancing of criteria by LPAs.
40. Sainsbury's, Morrisons and Somerfield said the assessment should be applied by the OFT as statutory consultee, which would make firm recommendations to the LPA given the results of the competition assessment. Morrisons said that if the LPA sought to approve planning permission against the advice of the OFT, the OFT should have the power to have the application called in, which it said was a power

the Highways Agency currently had. (CLG, however, told us that the Highways Agency is a statutory consultee in the planning system and can, through the Secretary of State, direct a local planning authority to restrict the grant of planning permission, either indefinitely or for a specified period. However, the Highways Agency does not itself call-in applications, but it can ask the Secretary of State to do so.) Waitrose believed that the LPA should refuse permission (except in exceptional circumstances) to a development that the OFT advised had failed the competition assessment. The two LPAs which responded believed the OFT should administer the competition assessment.

41. CLG said that if the LPAs were to assess competition issues the criteria would have to be very clearly defined and set out. CLG's view was that the LPAs were capable of applying a competition assessment, although they would need some guidance and assistance as to how to do this and, if we decided to do this, the OFT should be an advisory body. CLG said that it would be possible for the OFT to be made a statutory consultee by amending the Town and Country Planning (General Development Procedure) Order (GDPO), which provides for statutory consultees to be consulted. CLG said that the GDPO could set thresholds at which an application would be referred to the OFT for consideration. CLG suggested that whilst the LPA would need to take account of representations from the OFT, the LPA would need to weigh up the particular competition concerns alongside other issues when deciding a planning application. CLG suggested that over time the OFT would develop a nomenclature that signalled the extent of its concerns.
42. The Scottish Government Planning Directorate raised similar concerns about a competition assessment being applied by LPAs. It did not consider that there was scope to indicate in guidance what weight should be ascribed to the views of a particular statutory consultee. It said that the weight attached to particular statutory

consultees' views was a matter on which the LPA would have to decide in relation to individual applications.

43. The parties that considered it was appropriate for the OFT to act as statutory consultee also said that the OFT should take part, if necessary, in planning appeals. Sainsbury's believed that the appeal process would generally rely upon original written consultation response from the OFT and any further submission that the OFT cared to make.

Our views

44. If the competition assessment were to operate within the planning system we consider the OFT, given its expertise in administering competition regulation in the UK, would be the most appropriate body to undertake the competition assessment.⁷ We consider that, although LPAs could conduct a competition assessment (if necessary, by engaging outside expertise), the matters explored by such an assessment, in particular the identity of the user of land, would run contrary to the sort of planning considerations with which the LPAs are familiar. We do not doubt that this would involve potentially significant cultural change within LPAs. We also note the desire expressed by several of the retailers for consistency in decision making. We therefore consider that a competition assessment, even one applied within the planning system, should be applied by the OFT.
45. The GDPO and similar legislation in the devolved administrations requires an LPA to consult with a range of statutory authorities and other regulatory bodies prior to granting planning permission for specified descriptions of development. The LPA is required, in determining the application, to take into account any representations

⁷This would be the case whether the competition assessment was within or outside the planning system.

received from such a consultee. In the context of a competition assessment, the OFT could be specified as such a statutory consultee for the purpose of providing such an assessment in relation to specified descriptions of grocery retail development. On this model, the advice of the OFT would fall to be taken into account and evaluated by the LPA as part of its determination of the planning application. It would not necessarily override other considerations for the LPA but would be a significant, relevant factor to be balanced against other material considerations in reaching an overall balanced and proper decision.

46. It would of course be possible, if the necessary legislation were brought forward, to provide the OFT, as a statutory consultee, with a power of direction over the LPA in relation to specified descriptions of retail development. A precedent for such an approach already exists, for example, in relation to powers given to the London Mayor in relation to development in London, where the London Mayor can direct the local planning authority to refuse permission. By analogy, the OFT could be given a power to direct the local planning authority to refuse planning permission because the identity of the prospective retail operator would create or increase local market concentration to an unacceptable extent. Such a provision would, however, require a change to primary legislation: that is, section 74 of the Town and Country Planning Act would require amendment⁸ to enable such a power of direction to be conferred on the OFT.
47. Under this model the OFT would need, where appropriate, to support the LPA in planning appeals. Where the main (or an important) reason for refusing planning permission was the output of the competition assessment, only the OFT could

⁸This would be analogous to the amendment made to section 74 of the Town and Country Planning Act 1990 by section 344(9) of the Greater London Authority Act 1999 and implemented by means of the Town and Country Planning (Mayor of London) Order 2000 which gives the Mayor certain powers to direct an LPA to refuse planning applications for specified categories of development in Greater London.

reasonably be expected to provide an effective and sustainable justification for the refusal of planning permission, by reference to the conduct of the competition assessment and the detailed reasoning behind that assessment.

What aspects of the planning system would the assessment be applied to?

48. If the competition assessment were included within the planning system, it is clear that it would need to apply at the development control stage, that is, to individual applications, in order to prevent areas of high concentration emerging. However, planning applications are determined in the context of the local development plan, so we also need to consider whether and how competition issues should be taken into account in the local development plan-making process.

Views of the parties

49. Asda considered that there should be two forms of the competition assessment. In the first, which Asda said should be applied by local planning authorities as part of the local development plan process, LPAs would identify areas where competition was inadequate and take steps to promote new entry. Asda considered that this assessment would work in conjunction with a second competition assessment that would be applied to the determination of particular planning applications and which would prevent store openings that would give rise to a high degree of concentration in a local market.⁹ Other retailers¹⁰ envisaged only the second competition assessment, which would operate only at the development control stage in respect of submitted planning applications, its purpose being effectively to prevent the approval of grocery retail developments that would lead to areas of high concentration, but without any obligation on the LPAs proactively to identify sites in their development plans that could be used to promote entry.

⁹Tesco disagreed with both aspects of the Asda proposal, repeating its contention that the competition assessment amounted to a growth cap.

¹⁰Sainsbury's, Morrisons, Waitrose, M&S.

50. CLG pointed out that the planning system required, in law, that decisions were made in accordance with the development plan unless material considerations indicate otherwise. Therefore, if a site promoted by a retailer was allocated in the development plan for retail use, it would then be difficult not to grant consent to an application for a retail development even if it was problematic on competition grounds because of the identify of the proposed retail operator. CLG considered that introducing a competition assessment as part of the process of granting consent for individual applications would leave an LPA open to significant risk of appeal unless competition were also introduced as a consideration in the development plan itself.
51. The Scottish Government Planning Directorate similarly noted the existence of a plan-led system in Scotland and the risk that, if LPAs did not determine applications in line with the local plan, they would be open to appeal.

Our views

52. If the competition assessment were to sit within the existing planning system, we can see there is a potential tension between what can be undertaken at the different stages of development plan making and development control decision making.
53. While a general competition assessment might be included as part of the development plan process, it is difficult to see how this could include consideration of the specific identity of a prospective operator for the relevant identified sites. Given the timescale over which plans are developed and the period for which they are in force, it is possible that a finding that an operator of a particular identity was unsuitable for a site identified for grocery retail development might become outdated. We therefore find it difficult to see how, at the development plan stage, a competition assessment could ever do more than form a view of competition for grocery retailing generally in the future in the area covered by the development plan. We understand that this is

precisely the kind of evaluation that is envisaged will take place if the current draft of PPS4 is adopted.

54. It therefore seems more practicable to determine the suitability of sites at a generic level (that is, broadly as at present, as varied by the application of PPS4 when adopted), with consideration of the identity of an operator being left to the development control stage. This approach would also avoid another potential problem: namely that in assessing the need to promote proposals to control or determine the identity of suitable operators of proposed grocery store sites to be allocated in a draft development plan, it would often be necessary also to consider the content of neighbouring development plans. In particular, where two or more neighbouring authorities were putting together their development plans at the same time, it is difficult to see how such an identity-focused assessment could be carried out effectively.
55. Whilst it may be difficult to anticipate specific controls on named occupiers at the plan-making stage, the plan could include a policy which made clear that, in determining planning applications for development of sites allocated in the plan for convenience stores (and other sites coming forward during the lifetime of the plan), the LPA would take account of competition issues and the advice and assessment of the OFT. It is commonplace for plans to include criteria-based policies, which identify specific factors which the LPA will pay particular regard to in determining a retail application (eg traffic impact, residential amenity). In order for a policy approach of this kind to carry weight, it would be necessary for CLG and the planning authorities of the devolved administrations to promote the inclusion of such policies in development plans. This would require new national policy guidance such as by amending PPS6 and/or PPS12 and its equivalent guidance in the devolved administrations.

56. The identity-focused competition assessment would therefore be undertaken only at the development control stage, that is after an individual planning application had been submitted. If that assessment led to the conclusion that a retailer of a particular identity was not appropriate, on competition grounds, for a site that had otherwise been identified for grocery retailing in the local development plan, we can see there may be some question as to whether this factor constituted a 'material consideration' within the terms of the planning regime and therefore provided a legitimate basis for refusal, or alternatively for imposing a condition on a grant of planning permission for development of that site for a grocery store which prohibited its operation by that named retailer. This matter would require clarification as part of the necessary legislative changes to be undertaken in order to introduce a competition assessment.

Competition assessment applied outside the planning system

57. We now consider how the competition assessment would operate if it were applied outside the planning system. The competition assessment would then be applied outside the planning system by the OFT, with approval under the assessment being required before a retailer could operate a new grocery store or a new extension or mezzanine to an existing store.

Views of the parties

58. As will be discussed further below (paragraphs 63 and 64), retailers were against a competition assessment outside the planning system and therefore had no proposals around how such an assessment would work. However, the two LPAs that responded considered that a competition assessment should take place outside the planning system.
59. CLG and the planning authorities of the devolved administrations pointed out that there would be a number of key issues with having the competition assessment

within the planning system that would be problematic (see paragraphs 65 to 70 below).

Our views

60. It would be possible for a competition assessment applied outside the planning system to be applied in different ways. In particular we can see two obvious possibilities:
- It could apply to *planning applications*, with passing the competition assessment a pre-condition of submitting an application for planning permission.
 - Alternatively, it could apply to the *operation of a grocery store* (of a certain size) on a certain site, with passing the competition assessment a pre-condition of operating the store.
61. If the competition assessment were to be undertaken outside the planning system entirely, we consider that making a successful outcome of that assessment a pre-condition for operating a grocery store has the greater merit. However, that raises potentially serious practical concerns. If the competition assessment was outside the planning system, then in order to ensure that the cost of its operation remains reasonable, we would need to avoid speculative applications. We consider that a link between applying for the competition assessment and submitting a planning application provides a useful means of achieving this. To avoid speculative applications for competition approvals, if the competition assessment was outside the planning system we would specify that applications for competition assessment approval should be notified to the OFT where the undertakings concerned could demonstrate to the OFT a good faith intention to submit a planning application no more than a certain period (of the order of 28 days) later than the request for the OFT

to perform the competition assessment.^{11,12} The OFT would be expected to decide the application within a fixed time period in the order of 21 days. Once the retailer had passed the competition assessment, the grocery retailer would have competition approval to operate the grocery store as normal.¹³

Views on whether the competition assessment should be inside or outside the planning system

62. Having outlined the two models for the competition assessment we now consider which we intend to pursue.

Views of the parties

63. Retailers were generally against the concept of a competition assessment being applied outside the planning system, as a separate stand-alone assessment. Asda considered that the competition assessment should be administered by the LPA within the plan development process. Morrisons and Sainsbury's did not believe that a competition assessment should be operated outside the planning system. Waitrose said that it would be preferable to include a competition assessment that was applied at the same time as, and as part of, the planning regime. The ACS was concerned that competition did not become an overriding factor in the consideration of a planning application, but should be included as part of a balance of considerations made by planning authorities when determining development applications.
64. Tesco considered that the issue of when to require retailers to apply for a competition 'consent' gave rise to substantial difficulties, whether before or after planning. It stressed that such an assessment applied at any stage would be a significant deterrent to site assembly. If retailers had to apply for a licence to operate for the first

¹¹A similar clause can be found in clause 4.1 of the European Commission Merger Regulation.

¹²This means the application for the competition assessment could be made after the planning application was made.

¹³This approval may specify the size of store allowed under the assessment (see the discussion of the mechanism of the test below).

parcel acquired in a site assembly and the permission was refused retailers would not continue with the process. If the licence were awarded and became public knowledge the rest of the site assembly would become more difficult and expensive. Tesco was also concerned that investments that were authorized under a competition assessment could be jeopardized by changing competitive circumstances.

65. CLG told us that the introduction of competition considerations aimed at addressing market share and complex competition matters within the planning system would represent a fundamental change to planning policy. It was their view that such considerations do not normally extend to the identity of the occupant. CLG clarified that the planning system has, to date, not easily enabled decision makers to take into account the occupier of a building and that planning conditions on permissions restricting a building's occupancy are generally only possible in special circumstances. CLG said that to implement such an approach it would need to have decided that the planning system should routinely acknowledge the identity of an occupier of a development to be a factor affecting the outcome of a particular planning application.
66. CLG also suggested that it would be necessary for legislative change (possibly primary legislative change) in order to bring the competition assessment within the ambit of the normal planning system but The Scottish Government Planning Directorate and the Welsh Assembly Government Planning Division felt the change could be accomplished through changes to guidance.
67. CLG said that the planning regime might in time be adapted to enable the identity of the occupant of a retail site to be taken into account as part of the normal process of development control. However, even if such a change were justified in relation to

retail development, it was not feasible for it to be introduced without a full consideration of all possible impacts. It represented such a fundamental change that there were likely to be much wider ramifications, which would need to be properly assessed. At this stage it was not even clear what those ramifications might be. For that reason, it was unlikely CLG would be able quickly to agree to an amendment of the planning regime along the lines proposed.

68. In addition, CLG expressed reservations on the principle of including a competition assessment as part of the planning process. It suggested that it would be preferable for issues that did not directly relate to planning considerations to be dealt with outside the planning process. It pointed out that there were a number of precedents for separate consent regimes that run outside and in parallel with the planning process, including casino premises licences, premises licences for premises selling alcohol, and other regulatory regimes such as pollution control.

69. The Scottish Government Planning Directorate raised some similar concerns to those expressed by CLG in relation to England. It noted that the planning system was concerned with land use and that any requirement to consider the identity of the user would run contrary to conventional planning considerations. It said that there was no reason, in principle, why a local authority should not be able to acquire the skills to implement a competition assessment. However, it would not sit comfortably with the other duties of the planner. It acknowledged that if a competition assessment was applied outside the planning system this might lead to situations in which an LPA would like to encourage a new grocery retail store, for example to regenerate an area, but was unable to do so because the store failed the competition assessment, but it noted that this situation already exists in relation to other licences (there are licensing regimes already in place, for example for building control and pollution

prevention control, which the developer has to obtain in a process separate to the planning permission).

70. The Welsh Assembly Government Planning Division also raised the same concern that the system considered land use only and not the identity of the user. It noted that planning authorities had no competition expertise. It also said that planning authorities were accustomed to development proposals being subject to separate licensing requirements. It was possible that a competition assessment could be dealt with outside the planning system. The Northern Ireland Department of the Environment, responsible for planning in Northern Ireland, expressed similar concerns over planning being concerned with the use of the land instead of the identity of the operator and the lack of competition expertise within the planning authority.

Our views

71. We can see many attractions in having a competition assessment that sits entirely outside the planning system. It would be easier to implement an assessment that applied only to grocery stores and it would be easier to introduce it across the devolved administrations in a consistent manner since it would not require changes to each devolved administration's individual planning system. It would also avoid the risk of inconsistent application across different local planning authorities.
72. However, there are also many countervailing advantages in having a competition assessment as part of the planning system. The inclusion of competition as part of an existing regulatory process, rather than establishing a new regulatory process, has merit. We also acknowledge that it may be desirable in some cases to allow LPAs to trade off competition issues and other planning issues at the margin in the interests of other concerns of specific local importance, such as, for example, regeneration, local employment or general amenity. Such an approach would allow LPAs, for

example, to decide to allow new grocery stores that would regenerate derelict areas even though the only retailer prepared to take on the store already had an otherwise unacceptable degree of concentration in that area. We also note that if the OFT became a statutory consultee on competition issues this would help to ensure that the competition assessment was applied uniformly and would also help to address the LPAs' lack of competition expertise.

73. As noted in paragraph 13 above, in reaching a view on whether a competition assessment should be introduced as part of the planning system or as a separate assessment we give considerable weight to the views of CLG and the planning functions of the devolved administrations. Aside from their statutory responsibilities, this also reflects their status as experts in the practical operation of their respective planning systems. It also reflects the fact that, if we were to choose a remedy based on the inclusion of a competition assessment as part of the planning system, the effectiveness of that remedy would depend critically on the willingness of these bodies to implement our recommendations.
74. CLG and the planning bodies of the devolved administrations have each expressed concern at the prospect of introducing identity-specific considerations into a planning system that has traditionally focused on land use and been blind to the identity of the user. It has also been suggested that some legislative change may be needed to put in place a competition assessment as part of the planning system.
75. In choosing between the two alternatives, we are restricted to some degree by the CC's current order-making powers under the relevant provisions of the Enterprise Act 2002. Essentially, there are two options, neither of which could be introduced without some legislative change, although the precise scope of that change remains to be clarified.

76. These options are:
- (a) CLG and the devolved planning administrations should introduce the competition assessment into the planning system; or
 - (b) the OFT should operate the competition assessment outside the planning system.
77. Our preliminary view is that the first option would require changes to planning policy guidance and changes to the Town and Country Planning (General Development Procedure) Order (GDPO) and equivalents in the devolved administrations for the purpose of providing for the inclusion of OFT as a statutory consultee in relation to specified descriptions of the proposed development. The second option would require the Department of Business, Enterprise and Regulatory Reform (BERR) 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. We note that the first option may not require primary legislation, however, the second option definitely would.
78. Given that there are advantages and disadvantages with the competition assessment either within or outside the planning system we consider that the assessment could operate effectively in either circumstance. However, we recognize that, as discussed in paragraph 72 above, the inclusion of competition into the planning regime, as part of an existing regulatory process, has merit. It would also be desirable in some cases to allow LPAs to trade off competition issues and other planning issues at the margin in the interests of other concerns of specific local importance. We therefore express a strong preference for option (a), with option (b) as a fallback should option (a) not be pursued.

79. In this regard, we reiterate our view that a competition assessment should be introduced into the grocery retail market.¹⁴

How should a competition assessment be framed?

80. In this section we discuss how the assessment should operate.

Views of the parties

81. Asda and Morrisons both suggested that the competition assessment should be based on the number of fascias, and if there were fewer than four fascias a retailer already present in an area should not be able to open a further grocery store in that area. Asda said a fascia assessment would address areas of restricted choice (ie too few competitors) directly and would be easier to apply than a market share assessment based on floor area. Asda and Morrisons both suggested that the assessment should include planned and existing stores over 1,400 sq metres net sales area.¹⁵ Asda suggested that the isochrones should be 10 minutes for urban areas and 15 minutes for rural areas.¹⁶ Asda argued that a market share assessment based on groceries net sales area would be problematic because grocery sales area would have to be identified. Morrisons also said that it would not be desirable for a rigid application of mapping software and methodology to outweigh local factors.

¹⁴We note that we made a similar recommendation in the 2000 report: *Supermarkets: a report on the supply of groceries from multiple stores in the United Kingdom*, 10 October 2000. The report recommended (paragraph 1.15):

We recommend that in certain clearly defined circumstances, the DGFT's approval should be required for particular parties to be allowed to acquire or develop large new stores. These are that if Asda, Morrison, Safeway, Sainsbury or Tesco wish to acquire an existing store, or build a new store, having over 1,000 sq metres (about 11,000 sq feet) of grocery retail sales area within a 15-minute drive time of one of its existing stores, or significantly to extend the grocery retailing area of an existing store, it should be required to apply to the DGFT for consent. We think that a small, dedicated unit should be established to deal with such cases within the OFT. We recognize that this proposal would represent an additional burden and some business risk for the parties and would entail a staffing and resource cost for the OFT. Despite these considerations, however, we believe the benefit to consumers would clearly outweigh these costs.

¹⁵Asda also suggested the cut-off could be 1,000 sq metres with discretion being exercised to determine whether stores in this size range operated as large grocery stores or mid-range stores.

¹⁶Asda did not define how rural and urban areas should be identified. It also suggested that some discretion by the body applying the assessment could be exercised.

82. Sainsbury's, M&S, Somerfield and Aldi suggested that the competition assessment should be based on local market shares. M&S favoured a measurement based on net grocery sales area. Sainsbury's said that the assessment should be based on a 15-minute drive time isochrone centred on the development site for all proposals where the additional floor space was over 1,000 sq metres, but the assessment should not apply to extensions or on-site replacements (Sainsbury's believed these did not act as a barrier to entry). Sainsbury's suggested that MapInfo¹⁷ isochrones should be used as the basis for assessing market shares.
83. Sainsbury's also proposed that the threshold should be more stringent for a retailer with national market power. Sainsbury's suggested, as an example, that the threshold could be, say, a 50 per cent market share within the isochrone, but this should be reduced to, say, 40 per cent for a retailer with national market power. Sainsbury's also proposed that the market share assessment should assess total grocery turnover for each relevant store in the isochrone by reference to the net grocery selling area of the store (or proposed store) multiplied by the company average turnover for the named operator. Sainsbury's suggested that Tesco's share of national sales, and its purchasing cost advantage, combined with its high frequency of high local market share allowed it to have an asymmetric impact on local competition in two ways. First, it can afford to bid more for new space than its competitors, and second, it has a greater incentive and ability than its competitors to deter entry by creating a reputation for aggressive response.
84. All the retailers that commented on this point proposed that the competition assessment should apply to all grocery retailers in the large grocery store market.¹⁸ However, it should be noted that if, as some retailers suggested, the assessment

¹⁷A commercially available mapping package that can be used to derive drive time isochrones

¹⁸Asda pointed out that the stores operated by the LADs, Iceland and Farmfoods, should be excluded as these fascias are not defined as being in the same market.

should only apply to developments in excess of a certain floor space, this would affect which retailers were most likely to be affected by the assessment.

85. On the question of resourcing, Morrisons told us that in applying a competition assessment the OFT should continue to be resourced from general taxation. In contrast, Sainsbury's suggested that the costs of dealing with the initial competition analysis should be funded by a fee in addition to the normal planning application fee.

Our views

86. We consider that the competition assessment for new site development should reflect the same principles we have applied in the controlled land analysis. The remedial action required may be different because the controlled land analysis has identified specific areas where concentration is already high and remedies that will reflect the specifics of those areas. However, where a competition assessment showed a problem with a particular retailer we would not expect it to be allowed to operate from a new store (or a new extension or mezzanine to an existing store that has increased the size of the store).¹⁹
87. However, we do not consider that the competition assessment for site development should be the same as a competition assessment that applies to mergers. A merger may reduce competition and choice, while a new store expands capacity in that market. A new store may strengthen an incumbent's position, but it also expands the provision of grocery retailing in the local area, which does not occur with a merger. We consider that competition and choice are of critical importance to a successfully functioning grocery market but, because a new store expands the provision of

¹⁹Unless the competition assessment was considered within the planning system and the LPA considered there were other considerations that outweighed the results of the assessment.

grocery retailing, we consider the thresholds for intervention should be higher than in a merger investigation. This is discussed further in paragraph 93 below.

88. We also note the arguments made by Sainsbury's about how the assessment should be made asymmetric, with tougher thresholds for Tesco compared with the other grocery retailers. The fact that Tesco has many stores in concentrated areas might give them an incentive to be more aggressive when it faces local entry. By developing a reputation for being a 'tough' competitor, it raises barriers to entry wherever it is present. There is some support for this form of predatory strategy in the economic literature.²⁰
89. However, Tesco would not be the only multiple to have such an incentive. Tesco has 136 monopoly and duopoly stores, whereas Morrisons, Sainsbury's and Asda have respectively 104, 60 and 40 monopoly and duopoly stores (as defined by the CC). Furthermore, the success of a predatory strategy based on reputation depends on the belief of the potential entrant. When that potential entrant is another multiple it is difficult to see how they would be deterred by Tesco's aggressive behaviour. We have evidence of entry of large stores from other multiples near a Tesco store. We consider it unlikely that Tesco would engage in this systematic strategy as described by Sainsbury's.
90. We note that there is mixed evidence as to whether the buying advantage of Tesco can be attributed simply to the size of Tesco. Our econometric evidence shows no statistically significant relationship between the purchasing price and volume for primary brands, while it shows a relationship for non-primary brands. However, given the non-linearity of the relationship between prices and size for non-primary brand,

²⁰Milgrom and Roberts (1982), Kreps and Wilson (1982).

the size advantage of Tesco relative to Sainsbury's and other multiples may explain part of the price difference, but is unlikely to generate a significant cost advantage.

91. We consider that, for a new development, the assessment could take account of a combination of fascia, based on the number of fascia over a given size within the isochrone, and an assessment based on market shares (probably of grocery floor space) within the isochrone. We note the view of Sainsbury's that market shares used in the assessment should be based on a calculated revenue figure that uses each operator's average revenue per sq metre. We have decided not to use that measure because we are concerned that average sales per sq metre varies between stores of the same fascia for a number of reasons, including the number of nearby stores. An average revenue across all stores of the same fascia would not pick up local effects.
92. While the fascia assessment would be simpler it would not take account of the differences between large and small stores, even though a large store could be several times the size of the small store with a significantly higher market share. Neither would it take account of extension or mezzanine applications. Nevertheless the number of fascias remains an important measure of choice. Each of the major retailers invests significantly in brand enhancement and differentiation of product offering. A fascia assessment would explicitly recognize these activities which, for the final consumer, translate into a wider variety of products and pricing than would otherwise be available.
93. As noted above we consider it important to implement a competition assessment that prevented a grocery retailer expanding in an area where its existing presence was too great. We consider it could operate either inside the planning system with the OFT as statutory consultee or as a separate competition assessment outside the

planning system administered by the OFT. In either case we consider that the OFT should itself administer the actual process of competition assessment.²¹ The basic features of the assessment would be the same in either circumstance. We consider that it should incorporate the following features:

- (a) The assessment should apply to all stores above 1,000 sq metres in the CC's market definition. The assessment should apply to all new store applications and all applications for extensions/mezzanines which would take the resulting size of the store above 1,000 sq metres. It would also apply to re-sites of stores (where a grocery retailer vacates a store to move to a new store in the same area²²). We consider that setting the threshold at 1,000 sq metres will reduce the impact of grocery retailers attempting to strategically 'game' the system by building stores just below the size threshold.
- (b) The fascia to be included would be consistent with the CC's market definition.²³
- (c) Different fascia within the CC's market definition but owned by the same ultimate parent company would be included as the same fascia.
- (d) The fascia (both for the applicant and competing fascia) to be included in the analysis would include those sites within the isochrone that had received planning permission (though account would not be taken of sites that had merely been identified for retail development in the development plan (or that of an adjacent LPA)) or that had been purchased for grocery retail use but had not yet received planning permission.²⁴

²¹The OFT would administer all aspects of the assessment including the initial new entry assessment in (f).

²²The grocery retailer may find it necessary to ensure the existing store is retained for grocery retail use and operated by another fascia in order to meet the requirements of the competition assessment.

²³In the provisional findings we considered that a store operated by any of the full-range national or regional grocery retailers and symbol groups (ie with the exception of stores operated by the LADs, Iceland and Farmfoods which sell a limited range) will be in the same product market as stores operated by any of the other national or regional grocery retailers and symbol groups—provided that the store in question meets the local store-size threshold for inclusion in the product market. In individual local markets, particularly the all grocery stores product market, there will be independently-owned grocery stores in addition to those operated by national or regional grocery retailers that should be included in the relevant product market for the purposes of undertaking a competition analysis.

²⁴This approach mirrors that taken in planning generally, where an application for permission in respect of any individual site is assessed against not just existing infrastructure, but also against prospective development that has already received planning permission.

- (e) Drive time isochrones centred on the site to be developed and consistent with those used in the CC's market definition (10 minutes in urban areas and 15 minutes in rural areas²⁵). Drive times isochrones would be based on the same commercially available package (eg the most recent version of Microsoft MapPoint) to ensure clarity and consistency.
- (f) An initial 'new entry assessment' that would always allow any entry of a fascia not already present in an isochrone, even into an isochrone with no other fascia, because it would see a new competitor entering and would always reduce concentration in the market.
- (g) Where the fascia was already present in the isochrone the OFT would perform a more sophisticated assessment based on fascia and shares of grocery net sales area:
 - (i) We are minded to recommend that where the total number of fascia was three or less and the applicant's share of grocery net sales area including the proposed development would be greater than 60 per cent, within the isochrone, the retailer would fail the competition assessment and not be allowed to operate the proposed development.²⁶
 - (ii) We would require all grocery retailers to provide the OFT with up-to-date information as required on net sales area and grocery net sales area for all stores within the isochrone. We would ask for the information to be provided on a consistent basis (this should reduce the risk of the calculations being affected by different grocers definitions of net sales area), in line with question 104 of the main party questionnaire sent to the main parties in July 2006 (see Annex 1).

²⁵An appropriate mechanism would have to be used to identify urban and rural areas such as the methodology shown on the DEFRA website for classifying urban and rural areas (see www.defra.gov.uk/rural/ruralstats/rural-definition.htm).

²⁶A maximum of one fascia would be excluded because of the competition assessment.

(iii) We would anticipate the results of the competition assessment being valid for five years, in line with the usual period of validity of a planning application. Applicants would be able to resubmit an application in the event of a material change (usually the entry of another fascia within the isochrone).

94. The competition assessment would be subject to appeal. However, the mechanism would be different depending on whether the assessment was within the planning system or outside. If the assessment was within the planning system, an appeal might be made to the refusal to grant planning permission on the grounds that the LPA had ascribed inappropriate weight to the OFT's views as statutory consultee. This would not be an appeal against the competition assessment as such, but against the use of that assessment by the LPA and the weight attached to it. It would not therefore differ from a normal planning appeal, though the OFT may need to be available to support the LPA in the appeal, possibly appearing as or providing an expert witness. If the assessment was outside the planning system, the decision made by the OFT in relation to the freestanding competition assessment would be subject to challenge by way of judicial review. In either instance we consider, in particular given the clear, bright lights approach proposed, that the OFT decision on the merits of the competition assessment should be conclusive, subject only to legal challenge on judicial review grounds.

95. We note the concern expressed by a retailer (Tesco) that the application of any competition assessment would mean that retailers would be unable to assemble sites confidentially. Tesco suggested that revealing its site assembly plans to its competitors earlier on than it would wish could give those competitors an unfair advantage in reacting to the proposals, and once the site assembly became public knowledge the process would become more difficult, protracted and expensive. However, we consider that the application of the competition assessment would not

lead to any greater confidentiality concerns than is the case under the current planning system. If the competition assessment was within the planning system it would be directly linked to a planning application. If the assessment was outside the planning system we would also require it to be linked to the planning application so the process would be little different to the situation now. We also note that, as part of our analysis of controlled land in areas of high concentration we have held detailed discussions with retailers about particular areas and, from these discussions, it is apparent to us that retailers already have extensive knowledge of their competitors' store opening plans.

Resource requirements

96. With regard to the resource requirements of such a scheme, Table 1 shows the number of planning applications for stores above 1,000 sq metres for the big four grocery retailers. This implies that across all retailers there are, on average, likely to be three to four applications a week for the OFT to consider. However, there may be an initial period of more intense activity, when the assessment was introduced, and demand is also likely to fluctuate in accordance with the economic cycle. Given this, and noting the likelihood at least initially of a number of challenges to the OFT's decision under the assessment, we recognize that additional resources would be required within the OFT. We have received some preliminary costings from the OFT that suggest the cost of a department to administer the competition assessment would be £2–£3 million a year. The OFT's initial estimate, in response to a summary outline of the proposed remedy, covered a number of factors, such as the potential for a high volume of written submissions, disputes involving interested parties and any legal challenges. The OFT's preliminary view was that the costs could not be absorbed within its current operational budget so would need to be met either by an

agreed increase in its budget or by industry funding.²⁷ We recognize that the OFT will need to reallocate its resources to fulfil these new functions and we acknowledge also that consideration will need to be given as to whether the OFT's budget will need to be increased in respect of these functions.

TABLE 1 **Planning applications in the UK by year for big four stores over 1,000 sq metres**

	<i>New stores</i>	<i>Extensions</i>	<i>Total</i>
2000	35	80	115
2001	34	70	104
2002	35	76	111
2003	44	85	129
2004	48	90	138
2005	42	35	77
Average	40	73	112

Source: CC analysis of main party questionnaire responses.

Need test

97. We do not envisage the competition assessment being a replacement for the need test. We consider that the competition assessment would be necessary to address the AEC that we have found whether or not the current need test were retained because (as noted in paragraph 21 above) the need test is applied on an 'identity-blind' basis whereas a key point of the competition assessment would be to control the identity of the occupant. In assessing need LPAs have no ability to consider whether, even if there is need for a new development, the consequences of allowing that need to be fulfilled by a particular retailer would have anti-competitive effects.

Other modifications to the planning system

98. In the remedies notice we also consulted on a number of possible changes that we could recommend to the planning system:

- (a) The facilitation of greater availability of land for development outside the town centre by:

²⁷Legislation may be required to allow the assessment to be funded by industry.

- (i) modifying the sequential test to distinguish to a greater extent edge-of-centre sites from out of centre; and
 - (ii) the extent to which a possible amended planning test should recognize quantitative and qualitative aspects of need.
- (b) Potential for streamlining the planning system.

Distinguishing edge-of-centre sites from out-of-centre

99. In our remedies notice we asked whether the CC should recommend that the edge-of-centre site definition should be abandoned so that the edge-of-centre sites that were of benefit to the centre because of their functional relationship to the centre should be included in the centre, while the edge-of-centre sites that did not benefit the centre should become out-of-centre sites. This would effectively change the sequential test to a two-stage test rather than a three-stage test. In asking this question we were considering whether we should recognize that some edge-of-centre sites could benefit the town centre because of the functional relationship that exists between the two, while other edge-of-centre sites were not of benefit to the centre.

Views of the parties

100. The response of the retailers was mixed on this proposal. Many told us this was being dealt with already by CLG's proposals on the planning white paper.
101. Asda and Sainsbury's were in favour of making more land available for development in edge-of-centre locations (but Sainsbury's did not believe that achieving consent in out-of-town locations should be made easier). M&S considered that the sequential approach should be retained, but it should be relaxed for both out-of-centre and edge-of-centre locations in exceptional cases where the need for a wider range of offers and better consumer choice was a key consideration.

102. Morrisons and Tesco considered that planning policy already distinguished between edge-of-centre and out-of-centre sites. Tesco believed, however, there would be merit in abolishing the distinction between edge-of-centre and town centre for the purpose of the sequential test. This would be pro-development and consistent with Government policy and the Barker Report. It could be expected to lead to more stores being built, and would still support the town centre first policy because edge-of-centre development could often benefit town centres.²⁸
103. Waitrose (through its parent company the John Lewis partnership plc) recognized the strengths of the sequential test and the need test. Waitrose considered that any changes to those tests or to the planning system should retain a strong emphasis on the priority given to the viability and vitality of town centres. Somerfield and the ACS were also strongly opposed to any changes to the sequential test. The ACS was wholly opposed to any proposal to take edge-of-town-centre developments outside the scope of the sequential and other impact tests that apply to non-town-centre development in PPS6 and considered that edge-of-town-centre developments were not necessarily of economic benefit to town centres. ACS said that current policy strikes the right balance on the issue of store location. CGL agreed that some edge-of-centre development could support the town centre but this link was not guaranteed in all cases. CGL was not in favour of changing the current geographic definitions.
104. Friends of the Earth was opposed to a change to the sequential test since PPS6 already allowed edge-of-centre developments where there were no sites in the centre. Friends of the Earth considered that existing policy was already favourable to large format stores on the edge of town and PPS6 proactively encouraged local authorities to provide such sites if a suitable site could not be found in the centre.

²⁸Tesco emphasized that removing barriers to entry in the planning system would be a more appropriate and proportionate step to address areas of concentration than a competition assessment.

Friends of the Earth believed that edge-of-centre sites should be subject to a robust set of tests to ensure that they did not have a negative impact on the town centre, and put forward proposals for a new integrated test that would, for example, measure diversity of retail provision. Friends of the Earth suggested that this would test whether a new development would improve the choice available to shoppers and enhance the attractiveness of centres and pointed out that diversity of retail representation is recognized in PPS6 as an indicator of a healthy town centre.²⁹

105. The British Council of Shopping Centres (BCSC) considered that any move to promote large-format, out-of-centre retail developments would have wide-ranging consequences for town centres and would be in direct conflict with the Government's town centre first policy. BCSC provided some figures from a 2006 survey it had done that showed only 23 per cent of new supermarket floor space in Great Britain was in town centres.
106. The two LPAs that responded to our remedies notice believed that the distinction between edge-of-centre and out-of-centre sites was an important factor.
107. CLG emphasized that the sequential approach was fundamental to the Government's town centre first policy, and said that the town centre first policy was crucial to the Government's wider objectives and was 'non-negotiable'. CLG acknowledged that local authorities should be looking at expanding their town centres to take account of some edge-of-centre locations and making sites available for larger stores in edge-of-centre locations where appropriate. CLG told us that, because edge-of-centre was a grey area, there were a series of judgements to be made. Planning is a devolved

²⁹Friends of the Earth considered that the options in the Remedies Notice concerning changes to the planning system would fundamentally work against wider planning policy objectives and pointed out that PPS1 states that 'sustainable development is the core principle underpinning planning'.

activity and the planning body of the Welsh Assembly Government also expressed a strong commitment to the town centre first policy.

108. The Scottish Government Planning Directorate told us that it also uses a sequential approach (town centre, edge-of-centre and out-of-town) but with an additional category for ‘commercial centre’.³⁰ There was no rigid definition for where an edge-of-centre location lies. The definition was based on a number of criteria, including functionality, physical barriers, adjacent to boundaries, local context, and easy walking distance, which took into account local factors and allowed edge-of-centre developments to be tied closely to the town centre.³¹ The Northern Ireland Department of the Environment told us that it is currently taking forward a review of planning policy on retailing and town centres (revised PPS 5) in Northern Ireland and that the review afforded an opportunity to consider how best to facilitate the location of the full range of convenience stores to meet the objectives of choice and competition.

The extent to which a possible amended planning test should recognize quantitative and qualitative aspects of need

109. In paragraph 6.41 of the provisional findings we noted that in practice, a number of retailers see the need test, rather than any of the other tests, as the key barrier to the development of new larger grocery stores in many local areas and consulted on whether we should recommend the need test should be abolished.

³⁰A ‘commercial centre’ generally has a more specific focus on retailing and/or leisure uses and, in the sequential approach, follows on from town-centre and edge-of-centre sites. Using the category ‘commercial centre’ reflects practicality—it is preferable to have further development at an existing commercial centre site than on a site where there is no other development. It can also allow further development, even if there is no space for large stores in the town centre.

³¹Distance from the town centre is not the only factor. Other criteria include functionality, physical barriers, adjacent to boundaries, local context, and easy and comfortable walking distance which take into account local factors.

Views of the parties

110. Asda believed strongly that the quantitative needs test should be removed. It argued that the need test led to less choice and poorer competition to the detriment of consumers. Asda said that the need test was the most important barrier to entry to areas of insufficient competition and choice. Tesco was also in favour of its abolition and, together with Asda, said that it was unnecessary because of the retail impact and sequential assessments. Tesco saw the need test as an unnecessary hurdle (although not one which has ever been the only reason for an application failing). M&S said that it would not oppose the abolition of the need test provided this was accompanied by the introduction of a competition assessment. Aldi said that the current need test was anti-competitive and should be abolished.
111. Sainsbury's proposed that the need test should be replaced with a broader holistic test and suggested that quantitative need would be one of the factors within the retail impact assessment. CGL also favoured replacing the current need test with a broader review comprising a comprehensive, integrated test of impact.
112. A number of retailers were in favour of retaining a form of need test. Morrisons believed the quantitative need test should still be an important factor to be considered with a planning application. Somerfield said that the current aspects of the need test should be retained as part of a comprehensive impact test. The ACS said that the measurement of quantitative and qualitative aspects of need was an important part of retail planning policy. The ACS considered that a diversity test (where LPAs should only approve developments that improved the choice available to shoppers) should be part of the new impact assessment proposed in the Planning White Paper.

113. BCSC said that the need test was a robust indicator of the degree of room in the market and, if there was little or no spare capacity, could provide a clear indication that there could be an adverse impact on other centres.
114. Friends of the Earth said that the CC should not recommend abolition of any of the existing tests in PPS6 and that removal of the need test would make it harder for the Government to maintain and nurture the vitality and viability of town centres.
115. Both the LPAs that responded to our remedies notice were in favour of retaining the current tests. Weymouth and Portland Borough Council considered that having to demonstrate need and impact was of crucial importance in ensuring that small centres did not decline, and Alnwick DC said that the current need test was reasonable and relevant to assessing retail proposals.
116. CLG pointed out that the White Paper showed that the Government is particularly concerned about the need test and is not convinced that it is really doing what was intended. CLG was in the process of doing something about it. The draft revision of PPS6 was in preparation and will include a new impact test which will supersede the need and retail impact tests. The Scottish Government Planning Directorate told us that need is not a specific aspect of Scottish planning policy. Qualitative and quantitative deficiencies have to be considered along with other criteria in reaching a decision about the application. The balance between need and other factors appeared to be similar to where England was heading with the proposed introduction of a 'holistic' test. The Planning Authority of the Welsh Assembly Government expressed a stronger commitment to retention of the need test.

Potential for streamlining the planning system

Views of the parties

117. Sainsbury's would welcome remedies to streamline the planning system which it felt was complex, time-consuming and costly. Tesco suggested a series of measures to streamline the planning system (including increased resourcing, having separate processes for large and small applications, LPAs sharing resources, simplifying planning policy, improving policy over compulsory purchase orders, streamlining targets and encouraging a more positive attitude to development) and also suggested the thresholds for referral of applications for call ins could be raised.
118. Asda considered that abolishing the need test might have benefits in streamlining the planning system: its major benefit would be better economic outcomes. Asda considered also that there would be streamlining benefits in imposing deadlines on statutory consultees.
119. The ACS did not believe that the CC had the authority to intervene in recommending the retention or removal of tests that were in place because of policy considerations outside the remit of competition policy.

Our views

120. At the outset of this paper we noted the varying aims and objectives of the planning system and have expressed concern at the possibility of unintended consequences from making changes that benefit competition but may have a knock-on effect elsewhere. We are also aware that the Government already proposes to change the planning system in England, recognizing that the need test may not be functioning as was intended. It has proposed changes to the test that are presently being consulted

on. Following the recommendations of the Barker Report³² the Planning White Paper proposed replacing the need test and the retail impact assessment with a new test³³ which has a strong focus on the town centre first policy, promotes competition and improves consumer choice avoiding the unintended effects of the current need test. We also note that a draft revision of PPS6 is in preparation by CLG.

121. We also note that a number of retailers, CLG and the two LPAs that responded were also strongly in favour of retaining the sequential test in support of the government's town centre first policy.
122. We have consulted on making changes to the planning system in three areas (changing the sequential test to free up some edge-of-centre locations for new store development, modifying the need test and streamlining the planning system). Whilst these changes could benefit competition by reducing the barriers to entry that the planning system presents to grocery store development, we are aware that (other than in an indirect way) the planning system does not seek to promote competition in grocery retailing. We are recommending that in future more account of competition should be taken in the development plans of local planning authorities but have

³²The Barker Report stated that:

The current system of needs tests in town centre first policy also can have perverse effects: it protects incumbents and gives preference to operators that have lower sales densities. These incumbents may be operating in out-of-town shopping centres, leading to the effect that if need is demonstrated and there is no impact on the town centre, an existing out-of-town shopping centre could expand while there is no application for a sequentially preferable site in the town centre. Furthermore, incumbents may find it easier to expand incrementally while prospective local entrants fail at any one time to demonstrate sufficient need for a one-off increase of space. The needs test should therefore be removed.

Barker Report Barker Review of Land Use Planning, Final Report—Recommendations, December 2006 paragraph 1.33.

³³The White Paper stated that:

We recognize that there are issues around the practical effect of the current policy requirement on applicants to demonstrate the need for proposals outside town centres, where these are not supported by an up-to-date development plan. This 'need test' has proved in some respects a blunt instrument, and can have the unintended effect of restricting competition and limiting consumer choice. For example, it is possible under current policy for a new retail development on the edge of the town centre to be refused because there is an existing or proposed out-of-town development which meets the identified 'need' even though the new retail development would bring wider benefits and help support the town centre. In addressing this issue, we have two clear objectives. First, we must support current and prospective town centre investment, which contributes to economic prosperity, and to our social and environmental goals. Simply to remove the 'needs test' could put this at risk. Second, we must ensure that planning promotes competition and consumer choice and does not unduly or disproportionately constrain the market. We therefore intend to review the current approach in PPS6 to assessing the impact of proposals outside town centres. We will replace the need and impact tests with a new test which has a strong focus on our town centre first policy, and which promotes competition and improves consumer choice avoiding the unintended effects of the current need test.

Planning for a Sustainable Future, White Paper, 21 May 2007, paragraphs 7.53 to 7.55.

provisionally decided not to recommend any further specific changes to the planning system (other than the competition assessment described above). We are concerned that there is a risk of unintended consequences that could arise from interfering more than is necessary with an area of policy that has specific and well-defined social objectives and which is itself subject to a process of public consultation and reform.

123. The remainder of this paper is therefore solely concerned with the competition assessment as this is the sole planning remedy that we propose to take forward.

Differences between the different administrations

124. We noted earlier that if legislation was passed that allowed the competition assessment to be considered as part of the planning system, since planning is the responsibility of each devolved nation the competition assessment within the planning system would need to be implemented by each of the different administrations separately. In response to our remedies notice we received a number of responses to how this could be achieved. If the competition assessment was outside the planning system it would be implemented uniformly across the different administrations.

125. Asda and Morrisons believed that the competition assessment could be applied in each administration. Morrisons considered that only relatively modest changes would need to be made to PPS6 to achieve the changes referred to above³⁴ and anticipated that the same would be true for the other planning policy guidance in other parts of the UK.

³⁴Morrisons did not specify what the required changes would be.

126. Sainsbury's said that, although a similar approach should be adopted in England, Wales and Scotland, in Northern Ireland, the approach may need to be bespoke.
127. M&S said the planning remedies could be implemented by amendments to national planning policies in each devolved administration and that such an approach would not require significant legislative time and could be delivered quickly. Waitrose believed the changes proposed would not require primary legislation.
128. We noted in paragraph 66 above the views of CLG concerning the changes required to introduce the competition assessment into the planning system. CLG considered that some legislative change might be required (which might include amending primary legislation). The Scottish Government Planning Directorate and the Welsh Assembly Government Planning Division felt the change could be accomplished through changes to policy guidance.

Our views

129. We noted in paragraph 77 above that our view is that establishing the competition assessment within the planning system would require changes to guidance and changes to the GDPO and its equivalents in the devolved administrations to provide for the inclusion of the OFT as a statutory consultee in respect of specified descriptions of development.

Interaction with wider public policy objectives

Parties' views

130. Asda said the proposed competition assessment would not represent a departure from current policy direction as it would be consistent with the Government's town centre first policy and consistent with the consideration of qualitative factors as part of the current planning regime. Morrisons considered that a competition assessment

within the planning system would allow competition issues to be a more significant factor without adversely affecting wider public policy objectives. Sainsbury's said a competition assessment would have no detrimental effect on the planning system. We note that each of these retailers has proposed that the competition assessment should be applied within the planning system.

131. CLG, however, told us the planning system had developed over a protracted period and it would need to understand fully what the implications of any legislative changes required to introduce a competition assessment into the planning system would be. CLG and the other devolved planning administrations expressed concerns about the planning system not being focused on the identity of the operator. Both LPAs that responded to the remedies notice felt the competition assessment should take place outside the planning system.

Our views

132. We have noted earlier (paragraphs 71 and 72) that there are advantages and disadvantages with the competition assessment being situated either within or outside the planning system. However, we consider that it would be desirable to allow LPAs to trade off competition issues and other planning issues at the margin in the interests of local people by situating the assessment within the planning system. This would ensure that wider public policy objectives were not adversely affected by the competition assessment. However, we also note that we strongly believe that the competition assessment should be introduced into the grocery retail market to remedy the AEC we have found.

Scope of remedies

133. We note that the competition assessment proposed could be more pervasive than merger control legislation. In particular, we note that a grocery retailer that had an

unacceptable degree of concentration in a local market may be able to avoid the competition assessment that would result from the retailer developing a store by buying a store in the area and the transaction may not come under the scrutiny of the OFT. We therefore consider it appropriate, in order to achieve consistency, to require that all grocery store acquisitions with grocery net sales area above 1,000 sq metres should be notified to the OFT by the acquiring party.

Implementation of remedies

134. In paragraph 76 above we considered that there were two options for implementing the competition assessment:
- (a) CLG and the devolved planning administrations should introduce the competition assessment into the planning system; or
 - (b) the OFT should operate the competition assessment outside the planning system.
135. In both cases there was some requirement for legislative change. The first option would require changes to guidance and changes to the GDPO and its equivalents in the devolved administrations to provide for the inclusion of the OFT as a statutory consultee in respect of specified descriptions of development. The second option would require BERR 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. We expressed a strong preference for the first option. Our provisional decision is therefore to recommend to the Government and the governments of the devolved administrations that the assessment should be implemented within the planning system, with the OFT acting as statutory consultee to perform the competition assessment and to report its conclusions and recommendation in the light of that assessment to the LPA, for

consideration as a material consideration in its determination of a given planning application for a specified description(s) of retail development.

Monitoring and enforcement

136. We consider that once the competition assessment is implemented there would be little need for additional monitoring and enforcement arrangements. The OFT would be consulted as statutory consultee by the LPA as part of the normal consideration of the planning application. In addition, we consider that the OFT's publication of its decisions under the assessment will over time engender an understanding among retailers of the way in which the assessment is applied and will lead to self-enforcement.

Assessment of remedy options

137. The CC is concerned to achieve as comprehensive a remedy as is reasonable practicable. With this in mind, we have considered whether our preferred recommendations in relation to the planning system represent the least cost, least intrusive set of measures that would effectively remedy the AEC we have found in this regard. The question of proportionality to the scale of the AEC is discussed in the Background and Overall Assessment paper.

138. We note that our preference to establish the competition assessment within the planning system avoids the need to create a new, additional regulatory process. We further note that our preference for the OFT's acting as a statutory consultee should also avoid the need for LPAs to develop a new set of skills in assessing competition, making use instead of a body with existing expertise in this area.

139. We also note that we have proposed that a clear methodology would be used by the OFT in applying the competition assessment (including specifying the package to be

used for calculating drive-time isochrones). We consider that this, together with OFT guidance and its published decisions on the application of the assessment, will allow the retailer to satisfy itself of whether it was likely that a competition issue may arise. This will provide the retailer with greater certainty and will help the retailer to focus on sites which have a high chance of passing a competition assessment, thereby minimizing both its costs and the costs to the OFT in monitoring and enforcing the system.

140. We further note that our preference for the incorporation of a competition assessment in the planning process will have the advantage of allowing LPAs to decide how much weight they wish to attribute to the competition in their decision on a planning application. Clearly, it is our view that significant weight should be ascribed to the competition assessment. However, we recognize that there may be cases where the balance public policy objectives is in favour of a development that would lead to grocery retail concentration. Our proposal for the incorporation of a competition assessment within the planning system would allow the LPA to exercise judgement in such cases and will reduce the likelihood of a scheme that is socially beneficial overall being rejected purely on competition grounds.

141. Overall, we consider that our competition assessment remedy represents the least cost, least intrusive remedy that would effectively prevent the emergence of areas of high concentration in the future.

Relevant customer benefits

Framework for assessment of relevant customer benefits

142. In deciding the question of remedies, the CC is concerned with the effect of any remedy on relevant customer benefits and will consider whether to modify the remedy that it might otherwise have imposed or recommended; however, it will not

seek to weigh the adverse effect of the feature or features of the market concerned against any resulting relevant customer benefits in deciding whether remedies are appropriate.³⁵

143. If the CC is satisfied that there are relevant customer benefits deriving from a market feature that also has adverse effects on competition, when deciding whether to modify a remedy, the CC will consider a number of factors, including the size and nature of the expected benefit, how long the benefit is to be sustained, and the impact of the benefit on different customers.
144. Tesco claimed that there would be a detriment to consumers of another operator operating a store that would otherwise have been operated by Tesco and suggested that, depending which of Asda, Morrisons, Sainsbury or Waitrose operated the store, the increase in prices at that store would range between £1 and £10 on a basket that would cost £100 in Tesco. However, even if this is a relevant customer benefit, whether or not it is the case that a particular basket of goods costs less in Tesco than in other grocery retailers, the CC considers that a choice of fascia is a prerequisite of effective competition in a local market and that effective competition is the best means of ensuring that customers receive the price, quality, range and service that they want in the longer term. Although we accept that the competition assessment may result in sites that could otherwise have been Tesco stores—or any particular grocery retailer’s stores—becoming stores of other grocery retailers, we do not accept that this will have an adverse effect on relevant customer benefits.
145. There were no concerns expressed by other grocery retailers with respect to relevant customer benefits.

³⁵The CC’s approach to the assessment of relevant customer benefits is discussed in more detail in [CC3, Market Investigation References](#), paragraph 4.26 and following.

146. We have taken account of the wider public benefits from the planning system elsewhere in our consideration of planning systems (paragraph 3).

Conclusion on relevant customer benefits

147. We do not consider that any relevant customer benefits are adversely affected by the competition assessment.

Summary of provisional decision on remedies to prevent the emergence of local market concentration in future

148. We have provisionally decided to put into place the following remedies to address the AEC that relates to measures to prevent the emergence of local market concentration in future, including our consideration of possible changes to the planning system.

The competition assessment

149. We consider that a competition assessment is necessary to prevent the emergence or strengthening of a concentrated position held by a grocery retailer in local markets. We have provisionally decided to recommend the following set of measures.

150. Our provisional decision is to recommend to the Government and the Governments of the devolved administrations that the competition assessment should be implemented within the planning system, with the OFT acting as statutory consultee. We consider that the competition assessment could operate effectively either inside or outside the planning system. However, the inclusion of competition into the planning regime, as part of an existing regulatory process has merit and would allow local planning authorities (LPAs) to trade off competition issues and other planning issues when this meets local needs. This assessment should work as follows:

(a) The competition assessment should be undertaken at the development control stage, that is after an individual planning application has been submitted. In

addition the development plan should include a policy which made clear that, in determining planning applications for development of sites allocated in the plan for grocery retail use, the LPA would take account of competition issues and the advice and assessment of the OFT.

- (b) Any necessary changes to legislation and guidance should be made to introduce the competition assessment into the planning system.³⁶
- (c) The competition assessment should apply to all grocery store developments (new stores, extensions/mezzanines, store relocations) above 1,000 sq metres in the CC's market definition.
- (d) The local market should be defined by drive time isochrones centred on the site. The drive-times should be consistent with those used in the CC's market definition³⁷ and should be based on a standard commercially available computer package.
- (e) For a new development, the competition assessment should take account of a combination of fascia and an assessment based on market shares (probably of grocery floor space) within the isochrone. We are currently minded to propose the following as the basis for the assessment that would be applied by the OFT:
- Entry by a fascia not already present in the isochrone would always be acceptable under the competition assessment.³⁸
 - If there are more than three different fascias in the isochrone (including the proposed development), the development would be considered acceptable under the competition assessment.
 - If the grocery retailer proposed for the development has a share of net grocery sales floorspace (including the proposed development) of less than

³⁶This would include requiring the competition assessment to be considered a material consideration, and to provide for the inclusion of the OFT as a statutory consultee in respect of specified descriptions of development amending national policy guidance such as PPS6 and/or PPS12 and amending the Town and Country Planning (General Development Procedure) Order (GDPO), which provides for statutory consultees to be consulted.

³⁷10 minutes' drive-time in urban areas, 15 minutes' drive-time in rural areas.

³⁸The LPA may find the development unacceptable for other reasons irrespective of the competition assessment, however.

60 per cent, the development would be considered acceptable under the competition assessment.

- If the proposed development did not satisfy the three criteria above, the OFT would advise the LPA that the development was not acceptable on competition grounds.

151. The fascias to be included in the assessment would be consistent with the CC's market definition.³⁹ Different fascias within the CC's market definition which are owned by the same ultimate parent company would be included as the same fascia. The assessment would include in the analysis sites within the isochrone that had received planning permission.⁴⁰

152. The results of the competition assessment would be valid for five years, in line with the usual period of validity of a planning application. Applicants should be able to resubmit an application in the event of a material change.

153. We would require all grocery retailers to provide the OFT with up-to-date information as required on net sales area and grocery net sales area for all stores within the isochrone.

³⁹In the provisional findings we considered that a store operated by any of the full-range national or regional grocery retailers and symbol groups (ie with the exception of stores operated by the LADs, Iceland and Farmfoods which sell a limited range) will be in the same product market as stores operated by any of the other national or regional grocery retailers and symbol groups—provided that the store in question meets the local store-size threshold for inclusion in the product market. In individual local markets, particularly the all grocery stores product market, there will be independently-owned grocery stores in addition to those operated by national or regional grocery retailers that should be included in the relevant product market for the purposes of undertaking a competition analysis.

⁴⁰This approach mirrors that taken in planning generally, where an application for permission in respect of any individual site is assessed not just against existing infrastructure, but also against prospective development that has already received planning permission.

Resources

154. We recognize that the OFT will need to reallocate its resources to fulfil these new functions and we acknowledge also that consideration will need to be given as to whether OFT's budget will need to be increased in respect of these functions.

Merger control

155. We note that the competition assessment proposed could be more pervasive than merger control legislation. In particular, we note that a grocery retailer that had an unacceptable degree of concentration in a local market may be able to avoid the competition assessment that would result from the retailer developing a store by buying a store in the area and the transaction may not come under the scrutiny of the OFT. We therefore consider it appropriate, in order to achieve consistency, to require that all grocery store acquisitions with grocery net sales area above 1,000 sq metres should be notified to the OFT by the acquiring party.

Other modifications to the planning system

156. We have consulted on making changes to the planning system in three areas (changing the sequential test to free up some edge-of-centre locations for new store development, modifying the need test and streamlining the planning system). Whilst these changes could benefit competition by reducing the barriers to entry that the planning system presents to grocery store development, we are aware that (other than in an indirect way) the planning system does not seek to promote competition in grocery retailing. We are recommending that in future more account of competition should be taken in the development plans of local planning authorities but have provisionally decided not to recommend any further specific changes to the planning system (other than the competition assessment described above). We are concerned that there is a risk of unintended consequences that could arise from interfering more

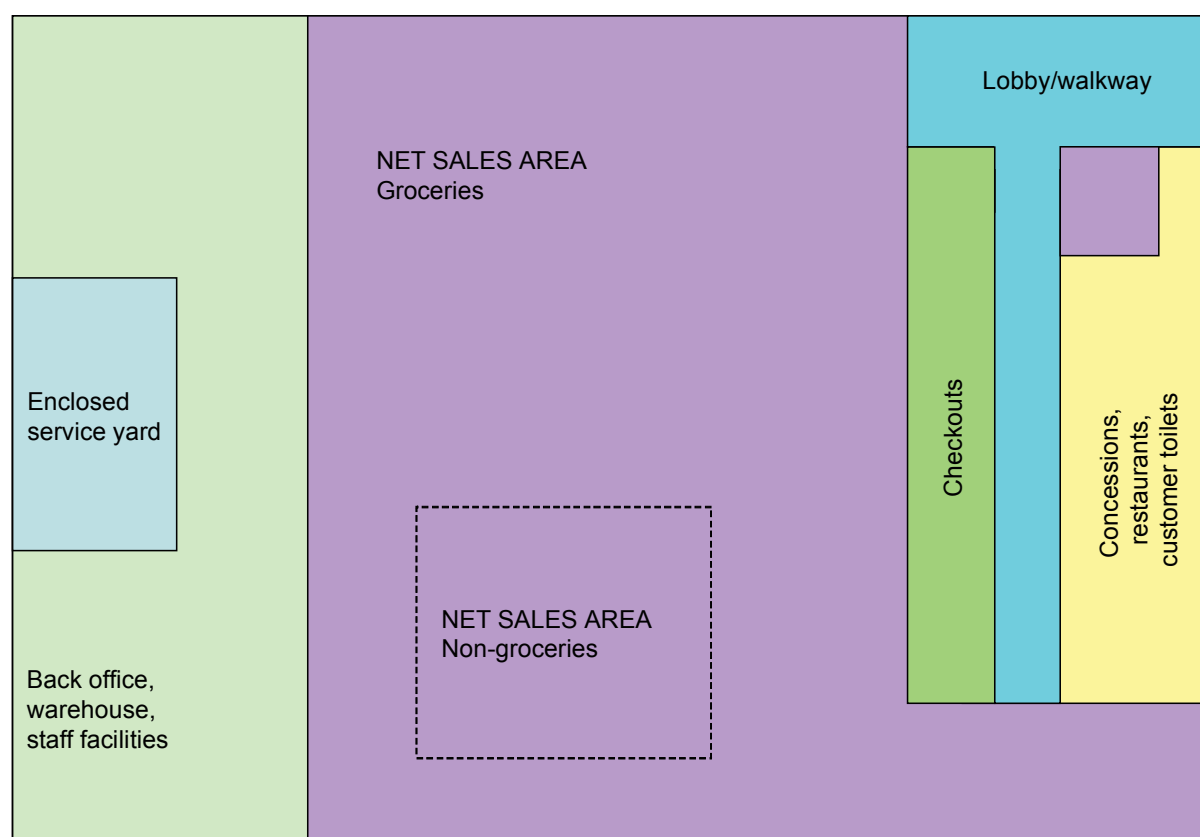
than is necessary with an area of policy that has specific and well-defined social objectives and which is itself subject to a process of public consultation and reform.

Definition of grocery net sales area (from Main Party Questionnaire question 104) to be used in the competition assessment

<i>Groceries</i>	Including food (but not restaurants and coffee shops); drink (alcoholic and non-alcoholic); tobacco products and accessories; toiletries, non-prescription medicine, health care and optical goods; household and fabric cleaning products; small household goods (including pots, pans, cutlery); newspapers and periodicals; pet food and accessories; and stationery.
<i>Net sales area</i>	The sales area within a building (ie all internal areas accessible to the customer) but excluding checkouts, lobbies, concessions, restaurants, customer toilets and walkways behind the checkouts as indicated on the example plan attached to Question 104(a).
<i>Non-groceries</i>	Other retail products and services not included in groceries (defined above) and prescription-only medicine, health care and optical goods.

FIGURE 1

Question 104(c), area definitions



Source: Main Party Questionnaire question 104, July 2006.

Notes:

1. Footprint = all areas shown above (at ground level).
2. Net sales area = areas in purple including those operated by the grocery retailer behind the checkouts.