

# Pricing Practices in the Groceries Market

Response to a super-complaint made by  
Which? on 21 April 2015

16 July 2015

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# 1. Summary

## The super-complaint

- 1.1 On 21 April 2015, Which? submitted a super-complaint to the CMA entitled 'Misleading and Opaque Pricing Practices in the Grocery Market'. Which? raised concerns relating to:
- confusing and misleading special offers that make extensive use of price framing, including reference pricing, volume offers and free offers;
  - a lack of easily comparable prices because of the limitations of unit pricing;
  - reductions in pack sizes without any corresponding price change; and
  - price-matching schemes operated by particular retailers which may falsely lead consumers to believe they have the best deal or do not need to shop around.
- 1.2 The super-complaint also identified the following areas that Which? considers the CMA should address:
- the extent to which the cumulative effect of any potentially confusing and opaque pricing practices in the grocery market affects consumers' ability to obtain best value and make informed purchasing decisions;
  - the drivers of any such practices and their pervasiveness within the market; and
  - any changes that are needed to enable consumers to make truly informed choices and obtain best value.
- 1.3 On receipt of a super-complaint, the CMA is required, within 90 days, to publish a response saying whether or not it has decided to take any action in respect of the super-complaint and, if it has decided to take action, what action it proposes to take. The response must state the CMA's reasons for its proposals.

## The CMA's investigation

### *Approach*

- 1.4 The CMA has undertaken its investigation with a view, firstly, to considering the nature and extent of the practices identified by Which? in the super-complaint. To do so, we have gathered evidence directly from traders (including both retailers and manufacturers), commissioned data to establish the prevalence of particular pricing and promotional practices, and spoken with others in the consumer landscape, including Trading Standards Services and traders' primary authorities.
- 1.5 We have then considered the extent to which particular practices have the potential to lead to consumer detriment. We have drawn on academic research and studies, evidence of consumers raising these issues with traders or directly to bodies such as Citizens Advice, Trading Standards Services and the Advertising Standards Authority, and commissioned external research and focus group work in relation to particular issues identified in the super-complaint. We have also drawn on the material provided to us by Which? in support of the super-complaint.
- 1.6 We have considered whether particular practices identified during our investigation are likely to comply with relevant consumer protection legislation. Where we identified divergent practice, particularly in connection with traders' interpretation of the applicable legislation and guidance, we sought to understand the underlying reasons, and gathered views directly from traders and others in the consumer landscape in relation to the effectiveness and clarity of the existing regime. We were then able to draw together particular recommendations to address the issues that were highlighted.
- 1.7 Although limited to a 90 calendar day statutory timetable, the CMA has been able to engage extensively with a wide range of stakeholders, including retailers, trading standards bodies, trade bodies, consumer bodies, suppliers and manufacturers, regulators, government departments, academic bodies, research bodies and members of the public. The full list of stakeholders who have contributed to our investigation is set out at Annex A. The CMA is grateful to all contributors for their willingness to assist in its work, which has allowed the CMA to consider the issues by Which? and determine whether, and if so what, action is appropriate in relation to these issues.

## ***Overall conclusions***

- 1.8 We set out below our high level conclusions in relation to each of the four main practices identified by Which? in the super-complaint. Our investigation into these practices highlighted the following overall themes:
- (a) Retailers have a good awareness of the key consumer protection legislation and guidance that applies to the sale of grocery products. Most retailers had put systems in place designed to prevent the potential for pricing and promotional practices to mislead.
  - (b) We have nevertheless encountered examples of particular pricing and promotional practices which, in our view, have the potential to mislead or confuse consumers and could lead to a breach of consumer law. Where we have encountered such practices, the CMA will take further action with the businesses concerned to address these issues and secure any changes necessary. If this further work reveals clear evidence of breaches of consumer law, this could lead to enforcement action.
  - (c) The evidence and data that we have gathered shows that the prevalence of potentially misleading special offers is relatively limited, and in some respects concern only a limited number of businesses and/or promotional practices.
  - (d) However, there is more that can be done to further increase levels of compliance and reduce the incidence of the problems that we have seen. Therefore, in addition to our direct follow-up work with the relevant businesses, we are recommending further action to clarify the guidance that applies to pricing practices. The CMA will also build on our findings and compliance work to support Trading Standards Services in focusing their future monitoring, compliance and enforcement work. Together, these further actions should help to improve compliance levels, reduce the problems that consumers are encountering, bring greater clarity to consumers in making shopping decisions, and simplify the regulatory landscape for traders.
  - (e) The incidence of formal complaints is low, but behavioural studies and surveys (including those conducted by Which?) along with reviews of social media and information from retailers, suggest that consumers notice that promotions do not always present the best value. Given that enforcement levels within Trading Standards Services are largely driven by complaints, it is important for enforcers to have access to an accurate picture of the prevalence of potentially detrimental promotions by considering consumer complaints from a range of different sources. In

particular, consumers appear to be turning to different channels to express dissatisfaction about particular pricing practices, for example social media or online forums.

- (f) In relation to unit pricing, we agree with Which? that issues of legibility and consistency are causing unnecessary confusion for consumers. We have also found that a clear and consistent approach to unit pricing would bring about benefits across nearly all of the issues raised by Which?, in particular by equipping consumers with the information to make simple and meaningful comparisons between different products, irrespective of brand, size, and any ongoing promotional activity. We are recommending that the law and guidance in this area be changed. This will need to be accompanied by consumer education to help more consumers make better use of this information and we call on Which? and other consumer representative organisations to work with us to inform and educate consumers about the effective use of unit prices.

- 1.9 The CMA's focus is on enhancing consumer decision making and choice to drive competition. Our work highlights that, even in markets typified by intense price competition and high levels of price transparency, pricing and promotional practices have the potential to mislead and confuse consumers. In our view, consumer confidence in the integrity of pricing and promotional activity is a key driver of competition. Thus, implementing our recommendations in relation to the consumer landscape has the potential to further stimulate and intensify levels of competition. Although we have not, as part of our investigation, considered pricing or promotional activity in other sectors, our findings are also likely to be of broader application to other sectors and, where acted upon, are likely to bring similar benefits to consumers and competition.

### ***Issue 1: special offers***

- 1.10 The super-complaint raised concerns about potentially confusing and misleading special offers. Which? submits that its research repeatedly highlights a number of persistent problems with the way in which grocery prices are displayed, suggesting a better deal for consumers than is really the case. This includes concerns expressed by consumers on online fora, including the Which? Conversation web-pages.<sup>1</sup>

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<sup>1</sup> We note that a [petition](#) launched by Which? in parallel with its super-complaint, calling for an end to misleading pricing, has garnered more than 100,000 signatures

- 1.11 Which? highlights in particular the use of reference ('was/now') pricing to suggest an offer that is not genuine (including in respect of seasonal products), increasing the price of individual products before they are included in multi-buy offers, and claims that larger packs represent better value where this is not the case (in that the unit price of a smaller pack is lower).
- 1.12 The CMA has sought evidence from retailers and manufacturers to understand the prevalence of different types of promotions and the factors that influence which type of promotion is used and when. We also commissioned data from mySupermarket to assess the extent to which retailers are using certain promotions in a manner that potentially raises concerns, with a particular focus on the practices highlighted by Which?.
- 1.13 The evidence and data gathered by the CMA have highlighted examples of particular pricing and promotional practices which, in our view, have the potential to mislead consumers and thus lead to a breach of the Consumer Protection from Unfair Trading Regulations 2008 (CPRs).
- 1.14 Where we have encountered such practices, the CMA will take further action with the businesses concerned to address these issues and secure any changes necessary. If this further work reveals clear evidence of breaches of consumer law, this could lead to enforcement action.
- 1.15 In particular, we were concerned that, in some cases, certain retailers appeared to use reference pricing for inappropriately long periods of time, in particular by using 'now' prices for periods that significantly outlasted the period during which the 'was' price applied. Further, we have seen examples of certain retailers increasing the price of products prior to the launch of a volume promotion.
- 1.16 The evidence and data that we have gathered shows that the prevalence of these issues is relatively limited, and in some respects concern only a limited number of businesses and/or promotional practices. The majority of promotions reflect internal policies and systems that generally demonstrate a sound approach to compliance.
- 1.17 However, there is more that can be done to further increase levels of compliance and reduce the incidence of the problems that we have seen. Therefore, in addition to our direct follow-up work with the relevant businesses, our response to the super-complaint highlights particular areas where greater clarity should be provided through guidance to improve the state of compliance with the key legislation in this area. We therefore recommend that the Chartered Trading Standards Institute (CTSI) clarifies, through guidance, how the CPRs apply to certain promotional practices. This



includes bringing together the requirements of the existing Pricing Practices Guide (PPG) and the OFT's 2012 principles on food pricing display and promotional practices into a revised set of guidance as to the likely application of the CPRs. In doing so, we recommend they give particular consideration to:

(a) clarifying the features of a genuine retail price and set out whether, and in what circumstances:

- (i) promotional practices can be run sequentially and use a reference price 'established' in a previous volume promotion
- (ii) an earlier reference price frame ('was' price) can be used after the price of the product has already been lowered for a period (so the reference price does not refer to the last applicable price)
- (iii) a reference price promotion that involves two consecutive stages of promotional pricing can be used, where the second stage affords a less generous discount than the first stage. For example, a product is involved in a 'half price, now £4.50' and then a '1/3 off, now £6' promotion
- (iv) out of season prices can be used as reference prices for seasonal products, and
- (v) businesses can use a reference price when they have not sold a product at that price in the store where the discount is applied.

(b) setting out good practice in relation to whether, and in what circumstances, it is appropriate and not misleading for the prices of individual products to change before and during a volume promotion.

(c) clarifying the circumstances in which stating an end date for promotions would be appropriate and the specific application of this to online purchases where consumers may not pay the price they expect when the promotion ends between the consumer ordering the goods and them being delivered.

1.18 Which? also raised the issue of larger pack sizes that do not represent better value for money than smaller pack sizes. The data that we commissioned has highlighted that larger pack sizes will not always represent the best value for money (even when promotional activity on smaller pack sizes is excluded from consideration). We were not, within the constraints of the timeframe of this investigation, able to consider the separate question of whether manufacturers or retailers are promoting larger pack sizes in a manner that suggests that they represent best value. The limited evidence gathered on

this issue during our investigation indicated that on-pack advertising using 'value' and 'free' statements is decreasing, in response to consumers' dislike for this practice. However, were such claims of value to be made in relation to larger packs with a higher unit price than a smaller pack, we would be concerned that this practice would have the potential to breach the CPRs. This is an area where our recommendations below in relation to unit pricing have the potential to make clearer information available to consumers to help them identify when a larger pack size represents good value for money.

- 1.19 We have found that retailers generally have appropriate *ex ante* systems in place to prevent promotional practices that breach their interpretation of the requirements of the CPRs. However, our investigation has identified there is the potential for errors to occur. As well as addressing specific issues, as discussed above, we recommend that retailers do more to identify why compliance issues are arising, in particular considering whether the balance of *ex ante* and *ex post* controls is optimal to identify all potential problems and further improve their approach to compliance.
- 1.20 The CMA will also build on its findings and compliance work to support Trading Standards in focussing their future monitoring, compliance and enforcement work and help these bodies to effectively target their work at areas where there is the greatest potential for consumer detriment.

## ***Issue 2: unit pricing***

- 1.21 Unit pricing is a potentially important tool for consumers to ensure they get the best deal when comparing products. This is particularly the case where it is available for promotions as it can enable consumers to make best value comparisons between products on promotion and those that are not.
- 1.22 The super-complaint raised concerns that there are problems with unit pricing, which means that prices are not easily comparable. Three specific concerns were highlighted: legibility of unit prices, inconsistency of units for similar products and missing unit prices when there is a promotion. In particular, Which? suggested that complexity and potential ambiguities in the regulatory requirements can cause difficulties for retailers.
- 1.23 The CMA sought information from retailers about their approach to unit pricing and conducted a small-scale review of unit price examples both *in situ* and online and in conjunction with Trading Standards Officers. In addition, the CMA commissioned research into how consumers use unit prices in the context of grocery shopping.

- 1.24 Over the course of our investigation we have observed many of the same complexities and inconsistencies in unit pricing arrangements as expressed by Which? that may adversely affect consumers' ability to make meaningful comparisons between products. In particular, whilst we found that retailers are attempting to comply with the unit pricing legislation, in the absence of clear guidance and/or relevant case law, there are differing interpretations and inconsistencies across the grocery market as to how unit prices should be presented. This is particularly evident for products on promotion where unit prices that reflect the promotional price are not given consistently.
- 1.25 In our qualitative research, unit pricing was only used by a minority of participants, and generally for particular products rather than systematically. Given how useful unit pricing can be in helping consumers to take informed decisions, the CMA has identified various respects in which the existing regime can be improved, which in turn have the potential to increase the number of consumers who use unit pricing and to make unit pricing a more effective price comparison tool. In particular:
- In relation to the legibility of unit pricing information, the CMA recommends the Department for Business, Innovation and Skills (BIS), produces best practice guidelines on the legibility of unit pricing information, to provide greater clarity about the requirements of the Price Marking Order 2004 (PMO) in this regard. This would help TSS and primary authorities assess compliance. We also recommend that retailers introduce any resulting changes to labelling as soon as practicable.
  - In relation to the consistency of unit pricing information, the CMA recommends that BIS' review of the PMO and accompanying guidance, with the Expert Working Group, changes its focus to consider how Schedule 1 to the PMO could be clarified and simplified. We also recommend that BIS notes the findings from our qualitative research and considers what further research, building on the findings from our qualitative research, is needed into how consumers use unit prices to ensure the requirements help as many people as possible to use them in their decision making.
  - In terms of the application of unit pricing to promotions, the CMA found a number of inconsistent approaches that are potentially confusing consumers. The CMA recommends that BIS review the legislation and guidance that stipulates how unit pricing applies to products on promotion, particularly with reference to the requirements of the CPRs and the ongoing review of the PPG.

- 1.26 As discussed above in relation to special offers, we have found that retailers generally have good appropriate *ex ante* systems in place to deliver compliance with the regulatory requirements. However, our investigation has identified there is the potential for errors to occur and for incorrect units of measurement to be used for unit pricing in store, as well as problems with legibility. As before, we recommend that retailers do more to identify why compliance issues are arising and consider whether the balance of *ex ante* and *ex post* controls is optimal to identify all potential problems and further improve their consistency of compliance.
- 1.27 In addition, to help increase consumers' understanding and use of unit pricing we are publishing, alongside this response, high level consumer advice about the use of unit pricing. We consider that consumer education has the potential to assist consumers with using unit prices more effectively in their purchasing decisions. We call on Which? and other consumer representative organisations to work with us to inform and educate consumers about the effective use of unit prices (both now, and in light of any changes brought about to the regime in light of our recommendations above).

### ***Issue 3: pack sizes***

- 1.28 Which? expressed concern about reductions in the size of grocery products that were not accompanied by price reductions, and submitted that this practice could mask price rises and make it difficult for consumers to identify the best value product. Which? suggested that consumers should be informed when the size of a product reduced and there was not a corresponding price decrease.
- 1.29 The CMA sought evidence on this issue from retailers and manufacturers to understand the key drivers of pack size changes and any observable trends. It then considered the information that is currently being provided to consumers when pack sizes change to assess whether consumer detriment and/or a potentially misleading commercial practice arises from current practice. We considered this issue in relation to both branded and own-brand products.
- 1.30 Our investigation revealed a number of complex considerations that will underpin a manufacturer's decision to reduce the size of a particular product. In particular, pack size reductions do not stem exclusively from a desire to increase the effective price of a product, but frequently reflect a number of other considerations, including environmental and health factors alongside product innovation.
- 1.31 Although consumers are likely to be less sensitive to pack size changes than price changes, we found that this practice was likely to be constrained both by

the costs involved in re-sizing a product and by the risk of lost sales if consumers perceive poor value for money and switch away to another product. Further, the factors above highlight that pack resizing can also occur for a number of reasons that bring benefits to consumers.

- 1.32 Most significantly, we have concluded that the information that is currently being presented to consumers (ie the size of the product and its price) is sufficient when a pack size changes, taking account of the relevant legislative requirements. There are certain possible exceptions to this, notably when the pack size change is 'masked' in some way, for example by making the revised quantity and price difficult to identify or by failing to notify a consumer where an item in an online basket of routinely purchased goods has decreased in size. We have not encountered evidence of such practices during our investigation, but manufacturers and retailers should continue to be alert to particular circumstances in which pack size changes could potentially lead to a breach of the CPRs.
- 1.33 We also agree with Which? that a clear unit price potentially affords consumers with a helpful tool when making comparative decisions both before, and following, a pack size change. Our recommendations above in connection with unit pricing thus have the potential to improve consumers' ability to take account of pack size changes in their decision making.

#### ***Issue 4: price-matching***

- 1.34 The super-complaint raised concerns that price match schemes run by retailers in the groceries market are set up and operated in different ways, are potentially complex and may mislead consumers, negatively impacting their appetite to shop around to seek the best deal.
- 1.35 We have sought evidence from retailers about how the price match schemes are set up and operated and reviewed information provided to consumers by retailers and the available explanatory information and terms and conditions. We have also commissioned research into the impact of price match schemes on consumer decision making through a survey.
- 1.36 We have not found evidence that the current approach to price match schemes causes significant consumer harm. Evidence from the survey commissioned by the CMA suggests that price match schemes may not have a significant impact on consumers' choice of retailer. There are several other more important factors which seem to drive this choice. In a similar way, price match schemes do not appear to generate large numbers of consumer complaints, although we note there is some engagement by consumers on social media on the operation of the schemes.

- 1.37 The evidence gathered from retailers confirms that there are important differences in how price match schemes operate, in particular in relation to their coverage of competitors, products and whether and how they offer reimbursement for consumers. While there is the scope for these differences to represent a complex picture for consumers, there are many valid ways of running such a scheme that are likely to be possible under the relevant regulatory provisions and there is no requirement for them all to be the same. The CMA does not consider that a one-size-fits-all approach would necessarily lead to the best outcome for consumers.
- 1.38 However, in order to ensure that retailers comply with relevant legislation and do not mislead consumers in their decision making, it is important that information is presented clearly and accessibly to consumers about the nature of the price match schemes and how they operate (for example in terms of the basis for comparison between products and the limitations or restrictions that may apply). The CMA's initial assessment of the information provided to consumers is that it is generally relatively clear, although it notes that the consumer survey evidence indicates a low level of understanding of the schemes. There are some approaches that are clearer than others and the CMA will engage with the retailers and primary authorities of relevant supermarkets where it has identified there are areas that could be improved. The CMA recommends that retailers and their primary authorities give consideration to the consumer information presented and ensure it is sufficiently transparent and accessible.<sup>2</sup>
- 1.39 We note that self-regulation, through the role of the Advertising Standards Authority in enforcing compliance with relevant advertising codes, plays an important role in this area. A number of issues have been raised, including many by retailers challenging the comparative advertising claims of their competitors, and the ASA has made a number of formal rulings. This willingness of retailers to bring challenges for resolution through this route suggests it is an important check on potentially misleading advertising to mitigate the risk of price match schemes giving inaccurate or misleading information to consumers.

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<sup>2</sup> See paragraph 3.13 and Annex B.

## **2. Introduction**

- 2.1 This Chapter provides an overview of the super-complaint process, the issues raised by Which? in the super-complaint and the CMA's approach to its investigation. Further detail on its engagement with stakeholders during the investigation is set out in Annex A.

### **The super-complaint process**

- 2.2 A super-complaint is defined under section 11(1) of the Enterprise Act 2002 (EA02) as a complaint submitted by a 'designated consumer body' that 'any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers'. The Consumers' Association (Which?) is a designated consumer body<sup>3</sup> for the purposes of the EA02.
- 2.3 Section 11(2) of the EA02 requires the CMA, within 90 days after the day on which it receives the super-complaint, to publish a response saying whether or not it has decided to take any action in respect of the complaint and, if it has decided to take action, what action it proposes to take. The response must state the reasons for the CMA's proposals (section 11(3) EA02).
- 2.4 This document sets out the CMA's reasoned response to the super-complaint entitled 'Misleading and Opaque Pricing Practices in the Grocery Market', submitted by Which? on 21 April 2015.

### **Issues raised in the super-complaint**

- 2.5 The super-complaint focuses on grocery retailing in the UK, defined by Which? to cover food, non-alcoholic and alcoholic drink, cleaning products and household goods, purchased both in store and online for home consumption. It raises concerns about practices relating to:
- confusing and misleading special offers that make extensive use of price framing, including reference pricing, volume offers and free offers;
  - a lack of easily comparable prices because of the limitations of unit pricing;

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<sup>3</sup> The Secretary of State can make any organisation a designated consumer body, provided they represent the interests of consumers of any description and also meet any other criteria published by the Secretary of State which are applied when determining whether to make or revoke a designation. It is expected that those designated will be informed bodies who are in a strong position to represent the interests of groups of consumers and able to provide solid analysis and evidence in support of any super-complaint they may make.

- reductions in pack sizes without any corresponding price change; and
- price-matching schemes operated by particular retailers that may falsely lead consumers to believe they have the best deal or do not need to shop around.

2.6 The super-complaint also identifies the following areas that Which? considers the CMA should address:

- The extent to which the cumulative effect of any potentially confusing and opaque pricing practices in the grocery market affects consumers' ability to obtain best value and make informed purchasing decisions.
- The drivers of any such practices and their pervasiveness within the market.
- Any changes that are needed to enable consumers to make truly informed choices and obtain best value.

## **Framework for assessment**

2.7 The CMA's mission is to make markets work well in the interests of consumers, businesses and the economy. The CMA focuses its efforts and resources on deterring and influencing behaviour that poses the greatest threat to consumer welfare. It intervenes in order to protect consumer welfare and, in the process, drive higher productivity growth. It also recognises the need to avoid imposing unnecessary burdens on business.

2.8 The issues raised by Which? in the super-complaint fundamentally concern consumer protection issues. In considering our response to the issues raised, the CMA has been guided by section 11 of the EA02, and its powers in relation to the relevant consumer protection regulation. The CMA has also had regard to its powers to initiate market studies and market investigations when considering its response to super-complaint.

2.9 In seeking to target both its resources and enforcement strategy, the CMA uses its Prioritisation Principles<sup>4</sup> to prioritise according to the impact of work on consumers and the strategic significance of the work, balanced against the risks and resources involved. It also takes account of the activity, capacity and interests of its partners.

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<sup>4</sup> [CMA Prioritisation Principles \(CMA16\)](#).



- 2.10 Which? defines the scope of its super-complaint as covering ‘groceries retailing’ which it considers includes food, non-alcoholic and alcoholic drink, cleaning products and household goods. In establishing the scope of its investigation, the CMA has additionally been guided by the Competition Commission’s (CC) 2008 Groceries market investigation report which defines groceries as including ‘food (other than that sold for consumption in the store), pet food, drinks (alcoholic and non-alcoholic), cleaning products, toiletries and household goods’.<sup>5</sup>
- 2.11 As identified in the super-complaint, there is likely to be an interaction between the four issues identified which, in combination, have the potential to increase confusion for consumers. To the extent that each of the practices may contribute to, or ameliorate, this risk, this is discussed under each of the issues.

## Information gathering

- 2.12 In preparing its response to the super-complaint, the CMA has gathered evidence from a wide range of sources. In addition to a general invitation to comment publicised on its website, the CMA pro-actively sought the views of a wide range of stakeholders including those representing consumers, industry and regulators through face-to-face meetings, telephone calls and targeted written information requests.<sup>6</sup>
- 2.13 The CMA has also assessed the practices raised by Which? against the existing relevant legislative framework and the applicable guidance.
- 2.14 In addition, the CMA has conducted its own research into pricing practices in the grocery market, including analysing of social media<sup>7</sup> and complaints registered on the databases held by Citizens Advice, Trading Standards Services and the Advertising Standards Authority. The CMA has also procured third party data showing the prevalence of particular types of promotions and commissioned external research into the way in which consumers understand and use unit pricing information and the role price match schemes play in consumers’ decision making. We have also evaluated

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<sup>5</sup> [Groceries market investigation \(CC\)](#). The CC’s report further clarifies this definition by stating that it excludes petrol, clothing, DIY products, financial services, pharmaceuticals, newspapers, magazines, greeting cards, CDs, DVDs, video and audio tapes, toys, plants, flowers, perfumes, cosmetics, electrical appliances, kitchen hardware, gardening equipment, books, tobacco and tobacco products.

<sup>6</sup> Annex A provides further detail on the CMA’s engagement with stakeholders.

<sup>7</sup> The CMA uses software at a broad level to assist in identifying the potential for consumer detriment, and informing and evaluating our work. The CMA has used digital engagement tools to search for relevant comments, discussions and complaints made via social media.

a range of published literature on relevant themes to assess the evidence available in relation to these issues.

## **The structure of the response**

2.15 The remainder of this response is structured as follows:

- Chapter 3 provides a high-level summary of the structure of the industry and recent developments in pricing practices, the key features of the regulatory framework applicable to groceries pricing, the consumer protection enforcement landscape and recent and ongoing work of relevance to the issues under consideration.
- Chapters 4 to 7 set out the CMA's analysis of the evidence in relation to Which?'s concerns about special offers, unit pricing, pack sizes and price-matching respectively.
- Chapter 8 summarises the CMA's recommendations and proposed next steps.
- Annex A provides an overview of the stakeholder engagement carried out by the CMA during the course of its investigation and a list of contributors.
- Annex B provides further detail on the regulatory context, including primary and secondary legislation, and self-regulation. It also includes an overview of the consumer protection enforcement landscape and an outline of recent and ongoing work of relevance to the issues under consideration.
- Annex C discusses the economic efficiencies and theories of harm relating to the issues raised by Which?
- Annex D outlines the findings from the data that we commissioned from mySupermarket, together with the methodology that we used to scrutinise that data.
- Annex E outlines the findings of the consumer survey commissioned by the CMA.
- Annex F is a qualitative consumer research report prepared by BDRC Continental and commissioned by the CMA for this investigation.
- Annex G contains the data gathered by the consumer survey commissioned by the CMA.

### 3. Market and regulatory context

- 3.1 This chapter provides a high-level summary of the groceries industry and its recent developments; the key features of the regulatory framework applicable to groceries pricing; and the consumer protection enforcement landscape. Annex B provides further detail on these areas.

#### The industry

##### *Industry structure and recent developments*

- 3.2 The groceries industry is large and estimates suggest that the UK retail grocery industry was worth between £148 billion<sup>8</sup> and £178 billion in 2014.<sup>9</sup> Tesco, Asda, Sainsbury's and Morrisons have been the largest retailers in the industry for a number of years. However, as Figure 1 shows, the evidence suggests that the industry has become less concentrated in recent years.

**Figure 1: Share of grocery retailers, 2009-2014**

		2009 %	2010 %	2011 %	2012 %	2013 %	2014 (est)* %
1	Tesco UK	27.4	27.5	27.5	27.0	26.1	25.2
2	Asda Group Ltd	14.8	14.8	15.2	15.4	15.2	15.2
3	J. Sainsbury	14.3	14.3	14.3	14.5	14.5	14.2
4	Wm Morrison Group	10.0	10.3	10.6	10.6	10.1	9.6
5	The Co-operative Food	6.3	6.2	5.9	5.8	5.4	5.3
6	Waitrose Ltd	3.6	3.9	4.1	4.2	4.3	4.4
7	Aldi Stores Ltd UK & Ireland	1.7	1.8	2.2	3.0	4.0	5.0
8	Marks & Spencer UK Food	3.7	3.7	3.7	3.8	3.8	3.9
9	Lidl UK	1.8	2.0	2.2	2.3	2.6	3.0
10	Iceland Foods Ltd	1.9	1.9	2.0	2.0	2.0	na
11	Spar UK Ltd	2.2	2.0	2.1	1.9	1.7	na
12	Musgrave UK	1.9	1.8	1.7	1.7	1.6	na
13	Costcutter Supermarkets Group	1.3	1.3	0.9	1.3	1.6	na
14	Premier	1.1	1.2	1.3	1.4	1.5	na
15	Nisa Retail	0.7	0.8	0.8	0.9	1.0	na
16	Lifestyle Express	na	0.8	1.0	1.0	0.9	na
17	McColl's Retail Group	0.6	0.6	0.6	0.7	0.7	na
18	Ocado Ltd	0.3	0.4	0.5	0.5	0.6	na
19	BP Oil UK Retail	0.6	0.6	0.6	0.6	0.6	na
20	Best-One	na	0.5	0.5	0.5	0.5	na
21	Farmfoods Ltd	0.4	0.5	0.5	0.4	0.5	na
22	Shell UK Retail	0.4	0.4	0.4	0.4	0.4	na

\* estimated only for the top tier of retailers

Source: Page 170, Mintel, November 2014, 'Supermarkets: More Than Just Food Retailing – UK'

<sup>8</sup> Mintel (November 2014), *Supermarkets: More Than Just Food Retailing – UK*, page 170.

<sup>9</sup> IGD (4 June 2015), [UK Grocery Retailing](#).

- 3.3 Since 2011 these four largest retailers have seen a decline in their sales shares, moving from a combined sales share of 67.6% in 2011 to an estimated 64.2% in 2014. In contrast, Aldi and Lidl have seen significant growth in their sales shares over the 2011 to 2014 period, moving from a combined sales share of 4.4% in 2011 to an estimated 8% in 2014. Waitrose has also seen more moderate growth in its sales share over the same period.
- 3.4 The structure of the Northern Ireland groceries industry differs in certain respects from that in Great Britain. In particular, some of the larger retailers with a presence in Great Britain do not have a presence in Northern Ireland (Morrisons and Waitrose), certain retailers established in the Republic of Ireland have a presence in Northern Ireland, and 'symbol' stores<sup>10</sup> (such as Spar and Mace) account for a larger share of grocery sales than in Great Britain.
- 3.5 Over the past year a variety of sources provide evidence of grocery price deflation. For example, Kantar Worldpanel's analysis suggests that a typical basket of everyday items is now 2.1% cheaper than it was in 2014.<sup>11</sup> Similarly, the Grocer Price Index (GPI)<sup>12</sup> first recorded year-on-year deflation in June 2014 and has done so every month since, with a record low for year-on-year grocery price inflation of -2.5% in April 2015.
- 3.6 Finally, promotions are a prominent feature of the UK grocery industry. Estimates suggest that around 40% of Great Britain's grocery expenditure<sup>13</sup> is on items on promotion.<sup>14</sup> The proportion of spend on promotions also varies by retailer and by product category (reaching levels as high as around 60 to 70% for certain categories of impulse purchases, eg carbonated soft drinks and confectionery).<sup>15</sup>

## Regulatory framework

- 3.7 The regulatory framework relevant to groceries pricing comprises several pieces of primary and secondary legislation, codes of practice and guidance.

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<sup>10</sup> Symbol stores generally describe independent retailers that are members of a larger organisation, known as a symbol group.

<sup>11</sup> Kantar Worldpanel (6 May 2015), *British consumers win with lower Grocery prices*.

<sup>12</sup> [The Grocer Price Index](#) is compiled by BrandView from over 70,000 grocery products across Asda, Morrisons, Tesco and Sainsbury's.

<sup>13</sup> We have not been able to identify similar data for Northern Ireland or the whole of the UK.

<sup>14</sup> Kantar Worldpanel data for the year ending 1 March 2015 as cited in Which?'s super-complaint of 21 April 2015, *Misleading and opaque pricing practices in the grocery market*, p9.

<sup>15</sup> Based on data provided by Kantar Worldpanel for the year ending 29 March 2015

Each is briefly summarised below and more detailed information is provided in Annex B:

- **The Consumer Protection from Unfair Trading Regulations 2008 (CPRs)**<sup>16</sup> contain a general prohibition of unfair commercial practices; prohibitions of misleading commercial practices, whether by action or omission; a prohibition of aggressive commercial practices, and outright prohibitions of 31 specific practices which are considered unfair and prohibited in all circumstances.
- **The Business Protection from Misleading Marketing Regulations 2008 (BPRs)**<sup>17</sup> prohibit businesses from advertising products in a way that misleads/deceives traders and set out conditions under which comparative advertising to consumers and business is permitted.
- **The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CCRs)**<sup>18</sup> require, among other things, that certain relevant pre-contractual information must be provided before the consumer becomes bound by a contract. They also provide consumers with cancellation rights in certain circumstances for contracts made at a distance or away from business premises (sometimes called 'doorstep contracts').
- **The Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs)**<sup>19</sup> protect consumers from standard terms which could be used to give the business an unfair advantage. Among other things, the UTCCRs highlight that standard consumer contract terms should be fair and use clear language that consumers can understand.
- **The Price Marking Order 2004 (PMO)**<sup>20</sup> requires traders to display certain pricing information including, in some circumstances, the unit price of a product in a way which is unambiguous, easily identifiable and clearly legible. The unit price needs to be shown on a per kilogram or per litre basis. In relation to specific categories of products, alternative units are required and these are listed in Schedule 1 to the PMO. An Expert Working Group convened by BIS is currently considering new draft

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<sup>16</sup> [The Consumer Protection from Unfair Trading Regulations 2008](#). Also see [the OFT's guidance](#) on the CPRs.

<sup>17</sup> [The Business Protection from Misleading Marketing Regulations 2008](#).

<sup>18</sup> [The Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#).

<sup>19</sup> [The Unfair Terms in Consumer Contracts Regulations 1999](#). Note: The Consumer Rights Act received Royal Assent on 26 March 2015 and its main provisions are likely to come into force in October 2015. In summary, the Act brings together into one piece of legislation, the unfair terms legislation which applies to consumers when dealing with businesses, repealing the UTCCRs.

<sup>20</sup> [The Price Marking Order 2004](#).

guidance on Schedule 1. Its objective is to explore the barriers to achieving greater consistency in unit pricing in the legislation and its guidance, and to identify a simple and pragmatic solution that would help retailers to implement the legislation more effectively.

- **The EU Food Information for Consumers Regulation (FICR)**<sup>21</sup> affirms the need not to mislead consumers. Article 7(1) of the FICR provides that food information shall not be misleading as to the characteristics of the food and, in particular, as to its quantity. Article 7(4)(b) provides that Article 7(1) also applies to the presentation of goods, in particular their shape, appearance or packaging, the packaging materials used, the way in which they are arranged and the setting in which they are displayed.
- **The Groceries (Supply Chain Practices) Market Investigation Order, 2009**<sup>22</sup> contains the **Groceries Supply Code of Practice**<sup>23</sup> which requires retailers to deal with their suppliers fairly and lawfully.
- **The Pricing Practices Guide (PPG)**<sup>24</sup> was republished by BIS in November 2010. It has of itself no mandatory force and traders are not under any legal obligation to follow the practices recommended. However, it recommends to traders a set of good practices in giving the consumer information about prices in various situations. The PPG is currently under review by the Chartered Trading Standards Institute (CTSI).
- **The Office of Fair Trading principles on food pricing display and promotional practices (OFT Principles)**<sup>25</sup> are a set of principles to establish a more consistent approach across the market. The Principles were developed by the OFT with a number of major UK supermarkets following an investigation into groceries pricing in 2012 (in which the OFT made no finding that the supermarkets investigated had breached the law or were engaging in misleading promotional practices). The Principles were designed to help ensure promotional claims are meaningful and accurate. They cover two promotional practices: internal reference pricing (for example, 'Was £3, Now £2' or 'Half Price' labels); and pre-printed value claims on packs (for example, 'Bigger Pack, Better Value'). Eight food and drink retailers agreed to use the principles within their businesses. These are Aldi, The Co-operative, Lidl, Marks and Spencer,

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<sup>21</sup> Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers.

<sup>22</sup> [Groceries market investigation \(CC\)](#).

<sup>23</sup> BIS and Groceries Code Adjudicator (4 August 2009), [Groceries Supply Code of Practice](#).

<sup>24</sup> BIS (30 November 2010), [Pricing practices: a guide for traders](#).

<sup>25</sup> OFT (29 November 2012), [Principles on food pricing display and promotional practices](#)

Morrisons, Sainsbury's, Tesco and Waitrose. The principles were originally published by the OFT, but have been adopted and endorsed by the CMA.

- **The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (CAP Code)<sup>26</sup> and the UK Code of Broadcast Advertising (BCAP Code)<sup>27</sup>** are codes of practice for all advertisers, agencies and media which are designed to address misleading, harmful or offensive advertising. The Codes are self-regulatory and are enforced by the Advertising Standards Authority (ASA).

## Consumer protection enforcement landscape

- 3.8 The following paragraphs provide a brief overview of the role of the key organisations in the consumer protection enforcement landscape relevant to the issues covered by the super-complaint. More detail on this is provided in Annex B and further information on the CMA's role and interaction with the wider enforcement community can be found in the CMA publication *Consumer Protection: Guidance on the CMA's approach to use of its consumer powers*.<sup>28</sup>
- 3.9 The CMA shares its consumer protection powers with a number of partner organisations. The CMA prioritises projects where there are systemic market problems, where consumers are unable to exercise choice, or where we can expect to achieve wider impact, for example, by developing the law or by having a deterrent effect. This role complements and reinforces the effects of our other work to improve markets and to support economic growth by addressing problems where competition enforcement alone does not, or cannot, make a market work well for consumers.
- 3.10 Trading Standards Services in England, Wales and Scotland are funded by and accountable to local authorities. In Northern Ireland, the Trading Standards Service is funded by and accountable to the Department of Enterprise, Trade and Investment (DETI). Trading Standards Services in England, Wales, Scotland and Northern Ireland are collectively referred to as TSS in this response. For the purposes of this response, we refer to those who carry out the work of TSS as Trading Standards Officers (TSOs).

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<sup>26</sup> CAP, [UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing \(CAP Code\)](#).

<sup>27</sup> CAP, [UK Code of Broadcast Advertising \(BCAP Code\)](#).

<sup>28</sup> [Consumer protection – guidance on the CMA's approach to use of its consumer powers \(CMA7\)](#).



- 3.11 Both the CMA and TSS have enforcement powers under the CPRs. The majority of local, regional and national enforcement action is carried out by TSS, whilst the CMA focuses on systemic problems in markets.
- 3.12 Reforms to the consumer landscape in 2013 created the National Trading Standards Board (NTSB), which is responsible for prioritising national and cross-boundary local authority enforcement in England and Wales against unlawful practices. The Convention of Scottish Local Authorities (CoSLA) has created Trading Standards Scotland to perform the same role in Scotland.

### ***Primary authorities***

- 3.13 The Regulatory Enforcement and Sanctions Act 2008 established a statutory scheme in which a business can choose to form a partnership with a local authority in England and Wales, known as a 'primary authority'.<sup>29</sup> A primary authority acts as a key point of contact for a business that it partners with, in relation to the business' interactions with local authorities that regulate it. The Trading Standards Service within a local authority will manage the primary authority relationship with a business where it relates to fair trading, which will include pricing practices. All primary authority officers are therefore also TSOs. The primary authority is able to provide Primary Authority Advice to the partner business, which that business can rely on. The primary authority is also able to provide advice and guidance to other local authorities in relation to how they exercise their regulatory functions in respect of the business.
- 3.14 A primary authority also leads regulation of the business on behalf of other local authority regulators, including through the coordination of intelligence and of responses to specific issues that arise.
- 3.15 In May 2015 BIS announced that it intends to extend and simplify the primary authority scheme in the context of the proposed Enterprise Bill.

### ***Primary Authority Supermarkets Group***

- 3.16 The Primary Authority Supermarkets Group (PASG) enables the primary authority officers for all of the supermarkets to meet and discuss issues which are common across the market. The meeting is also attended by a representative of the ASA, which is officially an observer and, in part, by representatives of the supermarkets. The PASG holds four meetings a year but discussions are also held by email between these meetings.

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<sup>29</sup> BIS (September 2013), [Primary Authority Statutory Guidance](#).



## Summary of relevant recent and ongoing work

3.17 Below is a summary to illustrate, in addition to the reviews noted above, the kind of enforcement and regulatory activity, and the level of scrutiny, which has already been applied to the issues which are the subject of the super-complaint as well as to highlight certain ongoing work in this market. Key examples are summarised below and more detail is provided in Annex B.

### *Office of Fair Trading*

3.18 In addition to the principles on food pricing display and promotional practices, and the investigation which led to their publication, the OFT carried out other key pieces of work of relevance to the issues under consideration, including:

- **Advertising of Prices Market Study.**<sup>30</sup> In 2010 the OFT published a market study report into advertising of prices. The report developed a framework to help analyse which types of price advertisements were more likely to cause the OFT concern. The report also set out specific considerations on the basis of which the OFT would prioritise enforcement action.
- **Investigations into the use of misleading reference pricing by certain furniture and carpet businesses.**<sup>31</sup> In 2012, the OFT opened a number of formal investigations under Part 8 of the EA02 to consider whether six retailers within the furniture/carpet market were engaging in the use of misleading reference pricing. The OFT closed its investigations after receiving commitments from the retailers. More detail about the investigations and the factors which led OFT to question whether genuine reference prices were being used is provided in Annex B.

### *2008 Competition Commission UK Groceries Market Investigation*

3.19 In 2008, the CC published its final report on its market investigation into the UK groceries market.<sup>32</sup> One of the main outcomes of the work was the Groceries (Supply Chain) Market Investigation Order 2009 and the establishment of the Groceries Supply Code of Practice, monitored and enforced by the Groceries Code Adjudicator. However, this investigation, although covering a large number of issues related to the state of competition

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<sup>30</sup> OFT (15 October 2009), [Advertising of prices](#).

<sup>31</sup> OFT (1 November 2012), [Furniture and carpet businesses: misleading reference pricing](#).

<sup>32</sup> [Groceries market investigation \(CC\)](#).

in the UK grocery retailing, did not specifically address any of the four main issues identified by Which? in its super-complaint.

### ***CPRs enforcement by TSS***

3.20 The CMA is aware of two prosecutions under the CPRs relating to the issues under consideration:

- In 2013 Birmingham City Council Trading Standards Service prosecuted Tesco for 12 offences of engaging in an unfair commercial practice under the CPRs relating to the establishment of a reference price for strawberries sold on promotion. The investigation was initiated following a consumer complaint. Tesco was fined £300,000 after pleading guilty to four misleading actions.
- In 2014 Torfaen County Borough Council Trading Standards Service investigated Tesco after a consumer complained that peanuts were incorrectly labelled in store. The peanuts were reduced from £1.99 to £1.00. However, the shelf edge label incorrectly displayed the pack size as 165g (rather than 150g) and the promotional unit price as 60.6p per 100g (rather than 66.7p per 100g). Tesco pleaded guilty to five misleading actions under the CPRs for providing false information on the shelf edge label and was fined £21,000.

## 4. Super-complaint issue 1: special offers

- 4.1 This chapter responds to the concerns raised by Which? in its super-complaint in relation to potentially confusing and misleading special offers. It sets out the issues raised, our assessment of them, summarises the conclusions reached, and makes recommendations for future work.

### The issue

#### *The super-complaint*

- 4.2 The first pricing practice identified by Which? in the super-complaint is ‘confusing and misleading special offers that make extensive use of price framing,<sup>33</sup> including reference pricing, volume offers and free offers’. Which? states in particular that ‘widespread misleading reference pricing’ lies at the heart of its concerns.
- 4.3 Which? submits that its research has ‘repeatedly found a number of persistent problems with the way in which prices are displayed to suggest a better deal than is really the case’. Which? highlights the following types of promotions that, in its view, are problematic:
- Using reference price promotions (‘was/now’ pricing) to suggest an offer that is not genuine. According to Which?, this may arise where the product is priced at the lower ‘now’ price for a longer period of time than at the higher ‘was’ price. Which? gives the example of a handwash product priced at £1.80 for seven days and then labelled as ‘was £1.80, now 90p’ for 84 days.
  - Increasing the price of individual products before they are included in a volume promotion (eg a ‘3 for 2’ promotion). Which? states that this may result in the promotional saving being less than claimed or non-existent, or products being more expensive when they are included in a volume promotion than when they are sold individually before or after the promotion. Which? gives the example of a rice product being increased from £1 to £1.58 at the same time that it was included in a ‘2 for £3’ multi-buy promotion. After the multi-buy promotion, the price returned to £1. According to Which?, a further issue may arise where the increased price

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<sup>33</sup> Price frames refer to the ways in which prices and promotions are communicated to consumers. For example, a product reduced from £2 to £1.50 can be communicated in a number of ways such as ‘was £2, now £1.50’ or ‘25% off, now £1.50’ or simply ‘£1.50’.

of the individual product is used as the higher 'was' price in a 'was/now' promotion that immediately follows the multi-buy promotion.

- Pricing seasonal products at the higher price only out of season. For example, Which? refers to Easter eggs priced at £7.49 for ten days in January and then at £5 for 51 days.
- Advertising larger packs as better value where the unit price of the larger pack is more expensive than smaller packs. Which? highlights a pack of 12 toilet rolls marked as 'great value', despite being more expensive per roll than a four pack of toilet roll produced by the same manufacturer.

4.4 Which? says it has also found that 'products can rotate on and off offer, which makes it difficult for consumers to identify the true value of the product'.

4.5 According to Which? the types of promotions and price frames that it has focused on have the potential to be misleading and cause consumer detriment. In particular, Which? considers consumers may suffer 'financial detriment and wasted time through shopping errors, over-buying, buying a product that is not of the value that is assumed and emotional detriment through frustration and annoyance'.

4.6 Which? asserts that the problems they have identified are widespread and persistent, despite regulatory guidelines (such as the PPG and the OFT Principles<sup>34</sup>) that have attempted to improve pricing practices.

### ***Evidence provided by Which?***

4.7 Which? states that it has regularly found examples of the problems identified at paragraph 4.3 above 'across a wide range of supermarkets over a number of years'. The super-complaint is supported by material drawn from previous investigations and campaigns it undertook between December 2008 and April 2015, identifying particular examples of pricing and promotional practices that, in Which?'s view, illustrate the concerns voiced in the super-complaint. Certain of the earlier Which? investigations are also supported by survey material, in particular seeking views from consumers in relation to their attitudes towards, and confidence in, promotions run by grocery retailers. We have also had regard to various 'Which? Conversation' webpages and its online petition relating to 'misleading pricing'. Consumers have posted various

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<sup>34</sup> See Annex B.

comments on these webpages highlighting examples of promotions that, in their view, may be misleading.<sup>35</sup>

- 4.8 The CMA has also considered further material provided by Which? following its submission of the super-complaint. This includes a June 2015 Which? magazine feature<sup>36</sup> highlighting certain promotional practices by grocery retailers in relation to branded goods. On 12 June 2015, Which? also provided the CMA with a further study that it had undertaken in order to understand the potential impact on consumers of misleading promotions. It was based on a review of the pricing of 50 branded food and toiletry products across six supermarkets using data from mySupermarket (between January and June 2015). It assessed promotions as potentially misleading by reference to guidelines in the PPG and the OFT Principles.<sup>37</sup> Which? considered instances of reference pricing, as well as the long term use of volume promotions and the frequency of volume promotions and price reductions over the period under review. Where relevant, we refer further to the material provided by Which? in support of the super-complaint in our assessment below.

### ***Other evidence considered by the CMA***

#### *Evidence from retailers and manufacturers*

- 4.9 The CMA explored the issue of special offers with the retailers identified at Annex A. In particular the CMA:
- (a) asked retailers to explain the nature and extent of their promotional activity and how this had changed over time, and sought views on the factors that influence which types of promotions and price frames are used and when;
  - (b) requested copies of key internal compliance and training materials, to observe how retailers had interpreted the relevant legislation and guidance in this area;
  - (c) conducted a number of visits to retailers' stores to observe their approaches to in store pricing and promotional activity and to ask questions of front-line staff; and

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<sup>35</sup> For example, [Which? Conversation](#).

<sup>36</sup> Which? (June 2015), *Special offer... Save Nothing*.

<sup>37</sup> In relation to a higher reference price being a retailer's most recent price available for at least 28 days and the application of a 1:1 ratio between the period that the higher and lower prices apply.

(d) sought views from retailers in relation to the existing regulatory landscape, in particular as regards the clarity and usability of the existing guidance and the role of TSS and primary authorities.

- 4.10 The CMA also invited views from the manufacturers identified at Annex A in relation to many of the same issues as those explored with retailers, in particular to the extent that manufacturers support or fund particular promotional activity by retailers and adopt similar mechanisms to ensure compliance with the CPRs.

#### *Evidence from TSS and primary authorities*

- 4.11 The CMA asked TSOs and primary authority officers about their experiences of enforcing compliance with the CPRs in relation to the promotional practices identified by Which?. We also sought views more generally on the existing legislation, guidance and the overall approach to compliance, monitoring and enforcement activity in relation to grocery pricing and promotions.

#### *Data*

- 4.12 To provide us with a broader view of the prevalence of particular types of promotions and price frames, validate our findings from our discussions with retailers about their promotional practices and allow us to look in more detail at the specific issues identified by Which?, we commissioned data from mySupermarket.<sup>38</sup>
- 4.13 We asked mySupermarket to provide data on all reference price promotions, volume promotions and products with multiple pack sizes across five retailers (Asda, Tesco, Sainsbury's, Waitrose and Ocado<sup>39</sup>) on a single day (7 November 2014<sup>40</sup>) in 2014.<sup>41</sup> The CMA also asked mySupermarket to provide information on prices and promotions for the products identified in this initial

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<sup>38</sup> MySupermarket is a price comparison website which allows consumers to compare prices of grocery products across grocery and non-grocery retailers. MySupermarket collects information about the products, prices and promotions available from the retailers' websites (not in store) on a regular basis (usually daily).

<sup>39</sup> The CMA understands that these five retailers have mature online shopping operations and stock a consistent set of their products online. In contrast the CMA did not analyse the data obtained in relation to Aldi because it does not offer online shopping and data are collected less frequently (twice a week). The CMA also did not analyse the data obtained in relation to Morrisons because it has only recently launched online shopping and appears to list a smaller set of its product range online. It was therefore considered that the data for Aldi and Morrisons were not reflective of their full range of in store prices and promotions.

<sup>40</sup> This particular date was chosen on the basis that it was unlikely to be disproportionately affected by seasonal promotions and could be viewed as a representative day at each of the retailers.

<sup>41</sup> The analysis included the full online product ranges available at these retailers with the exception of reference price promotions and volume promotions in mySupermarket's Adult Drinks and Mixers product category. This is because the Alcohol etc. Act (2010) prohibits the use of volume promotions on alcohol in Scotland. As a result, a retailer will often use different prices and promotions in different stores for products in the Adult Drinks and Mixers category. This complicates the task of identifying a pricing history for these products and any subsequent analysis.

sample for periods before and after the promotions in place on 7 November 2014.

4.14 Within the statutory timeframe of the super-complaint the CMA has conducted an initial analysis of this data to assess the prevalence of:

- reference price promotions where the higher 'was' price was established for less than 28 days (the '28 day indicator' set out in the PPG);
- reference price promotions where the higher 'was' price was available for less time than the lower 'now' price during the promotional period (the '1:1 ratio' set out in the OFT Principles);
- volume promotions where the price per item under the volume promotion is higher than the price per item before the volume promotion (for example, where a product is priced at £1 before a volume promotion and then 'one for £1.50 or two for £2' during the volume promotion); and
- larger pack sizes of a product having a higher unit price than smaller pack sizes of the same product.

4.15 We are mindful of the limitations of data alone in demonstrating whether particular practices are misleading under the law and that it is not appropriate solely to use indicators in guidance (such as the '28 day indicator' for price establishment under the PPG or the '1:1 ratio' under the OFT Principles) to establish compliance or non-compliance with the CPRs. Rather, any assessment of the compliance by traders with the CPRs can only be undertaken with reference to the requirements of the legislation, the established precedent and guidance and the specific circumstances of any promotion. Nevertheless, these indicators are helpful in highlighting potential issues and they are used by retailers as part of their processes to ensure compliance.

4.16 Further, the fact that pricing data was more readily available for five retailers in particular should not be taken to support any conclusion that these five retailers are more or less compliant with the CPRs than any other retailer, or that the CMA's recommendations are limited in scope to these retailers in particular. In certain tables the CMA has anonymised the retailers' names so it is not possible to identify them in relation to the data provided by mySupermarket. The CMA has done this because the analysis of this data is only intended to provide a snapshot of the pricing practices of the specified retailers on 7 November 2014. Given the limited nature of this data, the CMA would not consider it appropriate to specify the parties to whom the

information relates as this risks creating an inaccurate implication that any particular supermarket is not complying with the legislation.

### *Complaints data*

- 4.17 The CMA additionally gathered information from retailers, enforcers and consumer organisations to identify which types of promotions generate consumer complaints. Retailers informed the CMA that they occasionally receive complaints from consumers, both in store and via social media or email, about the issues raised by Which?. Primary authority officers, TSOs and the ASA informed the CMA that they rarely receive complaints about the promotions highlighted by Which?.
- 4.18 The CMA reviewed the databases held by Citizens Advice, TSS and the ASA, and found several relevant records of consumers reporting concerns about promotions to Citizens Advice and TSS. The issues covered included instances of discounted products that consumers did not recall being labelled at a higher price, multi-buy promotions and meal deals that were more expensive than purchasing the individual products separately, and packs marked as 'bigger size', 'big saver' or 'extra free' that were more expensive than smaller packs of the same product. The CMA also used digital engagement tools to search for relevant comments made via social media, and similarly saw several remarks regarding multi-buy promotions, meal deals and 'big family packs'.
- 4.19 We note that the level of consumer complaints is unlikely to be a reliable indicator of whether promotions are more likely to mislead consumers and cause them detriment. The sentencing remarks from the Tesco strawberries case<sup>42</sup> highlight that consumers may not be aware of misleading practices and, even if they are, may not complain about them. For example, we recognise that it would be rare for consumers to track price changes over time and notice how long higher prices have applied for.

### *Consumer surveys*

- 4.20 Which? submitted to the CMA the results of the following surveys on pricing to illustrate how promotions may influence consumers' purchasing behaviour:
- In June 2013, Populus surveyed 2,028 British adults and found that 55% of people thought that multi-buy promotions often lead them to buy more food than they needed, and 40% said that they consequently wasted food.

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<sup>42</sup> Discussed in paragraph 3.20



- In March 2015, Populus surveyed 2,075 UK adults and found that of the 68% of people who purchased products on promotion, 69% said it is difficult to work out whether they were actually a good deal, 38% said they trusted that promotions represented good value and 17% responded that they had purchased a product they did not need.
- 4.21 The Consumer Council for Northern Ireland (CCNI) provided details of a survey it had conducted in 2012. It commissioned Ipsos MORI to conduct face to face surveys of 1,016 households in Northern Ireland (19 March 2012 to 6 April 2012).<sup>43</sup> It reported that 43% of consumers seek 'buy-one-get-one-free' (BOGOF) promotions, but 35% want more promotions on individual products and 45% want essential items reduced more frequently. Further, 22% of respondents said that promotions encourage them to buy more than they need.
- 4.22 Both Which? and CCNI have highlighted the potential for consumer detriment in circumstances where consumers perceive that promotions help them make the most of their budget, but where the promotions in question do not afford consumers a real saving. They emphasise that consumers will only benefit when promotions are fair and transparent.

### ***Economic framework***

- 4.23 As part of our economic assessment of the promotional practices raised by Which? in the super-complaint, we have sought to understand the role of price frames and promotions in driving price competition between retailers and the circumstances in which particular price frames and promotions have the potential to lead to consumer detriment.
- 4.24 When promotions and price frames are genuine, they can provide significant benefits to consumers. In particular, promotions and price frames can efficiently signal a genuine discount to consumers, helping to drive price competition. Promotions and price frames may be a particularly simple and efficient way of doing this, especially in complex shopping environments in which consumers are more reliant on decision making short-cuts.
- 4.25 However, when promotions and price frames are misleading they can lead to consumer detriment. The CMA has considered the following broad theories of harm that explain how, in general, consumer detriment may arise due to the use of promotions and price frames:

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<sup>43</sup> The Consumer Council for Northern Ireland (January 2013), [\*Hard to Stomach: The impact of rising food costs for Northern Ireland consumers\*](#), pp28-29.

- Inflating consumer willingness to pay for a product by suggesting that a promotion is better than it really is.
  - Decreasing the perceived benefits of further consumer search by suggesting that a promotion is better than it really is.
  - Increasing the costs consumers face when comparing products and searching for the best deal.
- 4.26 Under the first theory of harm, consumers may focus on a reference price and assume that it reflects the value of the product. If that reference price is misleading, perhaps because it does not reflect a genuine previous selling price, then consumers may be willing to pay more for the product than they otherwise would. This may lead consumers to purchase the product at a higher price than they would have done otherwise or to purchase the product when they would not have done so at all.
- 4.27 Under the second theory of harm, consumers may interpret a reference price as an indication of the prevailing price for that product elsewhere in the market, leading them to overestimate the prices available at other retailers and underestimate the value of searching further. If consumers are more reluctant to shop around and to compare prices across retailers, then there is less incentive for retailers to reduce prices to attract customers. This may lead consumers to face higher prices than they would otherwise.
- 4.28 The third theory of harm relates to the effects that promotions and price frames have on the search costs consumers face when shopping and comparing products. These costs include the time required to compare and evaluate the relative value of alternative products within a store using the information on the products and the shelf edge labels. Promotions and price frames may increase the complexity of a consumer's decision, either posing an additional burden on consumers to work out the best value for them or making it more likely that they will make mistakes or not consider which product provides best value. As with the second theory of harm, this may soften price competition between retailers by reducing the willingness of consumers to shop around and to compare prices across retailers, resulting in consumers paying higher prices than they otherwise would.
- 4.29 These issues may be particularly significant if multiple price frames are used in combination or there is a wide product range to choose from. A large number of promotions and price frames used simultaneously will increase the complexity of the consumer's decision, imposing an additional burden on consumers and making it more likely that they will rely on simple rules and

short cuts (such as interpreting the reference price as the value of the product or the price charged by other retailers) when making choices.

- 4.30 When promotions and price frames are genuine consumers will benefit. When they are misleading, and consumers cannot easily distinguish between genuine and misleading promotions, they can lead to consumer detriment. Consumers cannot easily distinguish between genuine and misleading promotions and this creates the potential for consumer detriment. It is therefore necessary to consider the specific characteristics of a promotion or price frame in order to assess whether it is genuine or misleading.
- 4.31 Economic research suggests that each type of promotion and price frame can have significant effects on consumer behaviour (see Annex C for further details on this literature), although there is no evidence that any general type of promotion is systematically misleading or detrimental for consumers. In addition, in the focus groups<sup>44</sup> commissioned by the CMA, many of the participants said they select products quickly without calculating whether they actually provide best value and that they were likely to buy products on promotion that they had not planned to purchase. Participants also said that they recognised that promotions did not necessarily offer the best value, and that they preferred promotions that were easier to understand.

### ***Legal framework***

- 4.32 The CPRs prohibit traders from engaging in commercial practices that, through action or omission, mislead (or are likely to mislead) the average consumer into taking a transactional decision they would not have taken otherwise. Further details of the key provisions of the CPRs are set out in Annex B. We have considered in particular in this context whether certain types of promotions or price frames could amount to a misleading action for the purposes of regulation 5 of the CPRs or a misleading omission for the purposes of regulation 6 of the CPRs.
- 4.33 The PPG and the OFT Principles provide guidance to retailers on the pricing practices that are more likely to be compatible with the CPRs. Again, further detail is provided in relation to this guidance, and particularly its status against the background of the relevant EU and national legislation, in Annex B.

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<sup>44</sup> Details of this work are set out at Annex F.

## Evidence and analysis

- 4.34 The CMA has first considered the types of promotions and price frames used by retailers in the grocery market, as well as the key drivers of particular promotions and pricing practices.
- 4.35 The CMA has then sought to ascertain the broad prevalence of the concerns raised by Which?. We have drawn on the analysis of the data obtained from mySupermarket, but have also considered the information provided by Which? and the evidence gathered directly from retailers and manufacturers. We have considered whether the practices highlighted are compatible with the applicable legislation and/or have the potential to lead to consumer detriment.
- 4.36 The CMA has also assessed the views expressed by retailers, consumer bodies and enforcers in relation to the existing regulatory landscape, including the applicable legislation and guidance, and regimes for compliance, monitoring and enforcement.
- 4.37 Finally, the CMA has considered whether any change is needed to address specific issues that we have encountered through our investigation, and, if so, what actions may be appropriate.

### ***Prevalence and drivers of different types of promotions and price frames***

#### *Broad prevalence of promotions and price frames*

- 4.38 The CMA considered market reports assessing the extent of promotional activity in the grocery market and other observable trends. According to Kantar Worldpanel, promotions account for around 40% of retail grocery market expenditure in the UK.<sup>45</sup> In 2013/2014, the most common type of promotion was a temporary price reduction,<sup>46</sup> which includes reference pricing, followed by volume promotions such as multi-buy promotions. Kantar Worldpanel estimates that temporary price reductions account for between 28% and 35% of turnover and that volume promotions account for between 15% and 17% of turnover at the four largest retailers.<sup>47</sup>
- 4.39 Retailers' use of price frames and particular promotions varied considerably, depending on the size of the retailer, its position in the market, its split of branded and own-brand products, and the profile of its customer base.

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<sup>45</sup> Kantar Worldpanel data for the year ending 1 March 2015.

<sup>46</sup> A temporary price reduction is identified from the sales value and sales volume data of a product and occurs when the average price of the product drops from a higher price for a short period of time before increasing again.

<sup>47</sup> Kantar Worldpanel data for the year ending 29 March 2015.

Promotions are less prevalent at Aldi and Lidl than at the four largest retailers (Tesco, Asda, Sainsbury's and Morrisons). Across the range of retailers we engaged with, we were informed that approximately 10% to 40% of their products are involved in promotions at any one time. Some of the larger retailers use a wide range of different types of promotions while others use a much more limited range.

- 4.40 Several retailers and manufacturers referred to avoiding complex promotions and simplifying their product ranges. One manufacturer mentioned a growth in price reductions instead of multi-buy promotions due to changed shopping approaches following the recession. Almost all retailers referred to a trend towards 'round pound' pricing<sup>48</sup> and everyday low pricing (EDLP).<sup>49</sup> The extent of promotional activity also varies considerably depending on the product category. For example, product categories characterised by impulse purchases, such as canned cola and chocolate biscuits, are frequently sold on promotion (approximately 73% and 60% of the time respectively), whereas other categories of product, such as long-life pizza bases and powdered instant milk, are rarely sold on promotion (approximately 4% and 6% of the time respectively).<sup>50</sup>

#### *The drivers of different types of promotions and price frames*

- 4.41 The CMA sought views from retailers and manufacturers as to the factors that influence which types of promotions and price frames are used and when.
- 4.42 All of the larger retailers determine prices and promotions centrally, and (as noted above) these are then generally rolled out across all stores and online (although there may be exceptions for smaller stores such as convenience stores and petrol stations). Therefore individual stores have no discretion to independently engage in promotional activity (other than to reduce perishable products to clear).
- 4.43 We also spoke with some of the larger chains of independent stores, and to wholesalers that plan and negotiate promotions on behalf of independent stores across the country or in a particular region. Those stores are free to decide whether or not to opt in to particular promotions and generally have discretion to run additional local promotions over and above any centrally planned promotions. We observed greater use of manufacturer price marked

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<sup>48</sup> Brand View, [Round Pound Promotions](#).

<sup>49</sup> Mintel (November 2014) *Supermarkets: More Than Just Food Retailing – UK, November 2014*, pp187, 188, 207, 212, and 220.

<sup>50</sup> Kantar Worldpanel data for the year ending 29 March 2015.

packs in convenience stores, some of which also included a price frame (including reference prices and volume promotions).

- 4.44 Many of the retailers we spoke with plan their promotional activity up to a year in advance, dividing the calendar year into three to four week promotional periods, frequently based on seasonal themes. The retailers' buying teams then negotiate with manufacturers and suppliers to offer customers particular promotions within those periods.
- 4.45 The CMA was informed by retailers and manufacturers that manufacturers similarly prepare annual promotional plans, in particular across major branded products, and propose funding and other support for promotions. They then engage in negotiations with retailers' buyers to reach agreement on an appropriate type of promotion to give prominence to their brand and drive sales volume.
- 4.46 Some retailers informed the CMA that promotions on branded products are driven to a great extent by manufacturers due to the funding support that they provide and the bargaining power held by the manufacturers of the top brands. Both retailers and manufacturers emphasised to the CMA that retailers make the final decision about the retail price of products, the type of promotion ultimately run and how it is communicated to consumers.
- 4.47 As far as the choice of a particular type of promotion is concerned, retailers again emphasised the trend towards 'round pound' pricing and EDLP. However, the particular type of promotion chosen is informed by a wide range of factors, including: sale and pricing history, customer feedback, offering value, promoting specific brands, the product category, the availability of stock, the season, and their specific approach to branding and theming promotions and to customer service.
- 4.48 The CMA's discussions with retailers and manufacturers highlighted the extent to which promotional activity frequently strikes a balance between a retailer's desire to deliver a compelling range of promotions to highlight good value to consumers, and manufacturers' more specific aims to drive sales of particular branded products at key periods.

### ***Analysis of different types of promotions and price frames***

- 4.49 In this section, we set out our more detailed analysis of the particular promotions and price frames highlighted by Which?. We have drawn on our discussions with retailers and manufacturers and the evidence that they provided to us in relation to the operation of different promotions and price frames. We have also used the mySupermarket data described at paragraphs

4.12 to 4.16 above, where appropriate, to draw findings about the way in which these promotions and price frames appear to be operated in practice by the five retailers considered within that data. We have also taken into account, so far as is relevant, the incidence of consumer complaints in relation to these issues, relevant survey evidence, and views of TSOs and primary authority officers.

- 4.50 In analysing the different types of promotions and price frames and whether they give rise to concern, we have been guided by the requirements of the CPRs, in relation to whether they have the potential to be misleading.

### *Reference price promotions*

#### *Summary of evidence*

- 4.51 Our discussions with retailers and manufacturers and our review of retailers' internal guidance and compliance material generally revealed a good understanding of the principles underpinning the CPRs in relation to reference pricing. Retailers were generally alive to the need to ensure that the higher prices used in reference price promotions are genuine and referred, as appropriate, to the PPG and/or the OFT Principles in their internal procedures. Among the retailers there are a number of automatic or manual systems in place to check reference price promotions before they are loaded into their systems. These typically validate proposed promotions against the retailer's internal guidance and procedures and flag, for further management attention, any which would fall outside their requirements. However, there was a divergence in approach in relation to the length of time a higher price would need to be charged in order for it to be referred to in a promotion (for ease we refer to this as the 'price establishment period'). This was also evident from our review of the data below.
- 4.52 As we noted at paragraphs 4.12 to 4.16 above, the CMA has used data supplied by mySupermarket to analyse a sample of reference price promotions at five retailers (further details of our analysis of the data are set out at Annex D). The CMA has analysed data on all of the reference price promotions available at these retailers on 7 November 2014. Table 4.1 below sets out the percentage of all products at each of these retailers that were included in a reference price promotion on that day.

**Table 4.1: Percentage of products at each retailer that were included in a reference price promotion (excluding alcoholic products) on 7 November 2014**

	%				
<i>Retailer</i>	<i>Asda</i>	<i>Ocado</i>	<i>Sainsbury's</i>	<i>Tesco</i>	<i>Waitrose</i>
Percentage of all products in reference price promotions (excluding alcoholic products)	8	8	9	8	8

Source: CMA analysis of data supplied by mySupermarket.

- 4.53 The CMA has then considered the data in relation to these particular reference price promotions to assess whether the higher reference price was charged for at least 28 days before the promotion (the '28 day indicator') and whether the product was available at the higher reference price for at least as long as it was available at the lower price during the reference price promotion (the '1:1 ratio').
- 4.54 The '28 day indicator' and the '1:1 ratio' are set out in the PPG and the OFT Principles respectively. As we note at paragraph 4.15 above, the indicators set out in the PPG and the OFT Principles are just that. They can only provide an initial indication of practices that are more or less likely to comply with the CPRs. Promotions that fail the 28 day and 1:1 ratio indicators can still comply with the CPRs, and promotions that satisfy those indicators can equally, in some circumstances, fail to comply with the CPRs. A broader view is required, in the round, to determine whether a practice has the potential to mislead, including consideration of the information given to consumers and the extent to which they are able (or not) to discern the genuine reference price. The underlying principle in both the PPG and the OFT Principles is that a reference price used to make a comparison with a promotional price should represent a genuine retail price and that the reference price should not be used where the promotional price has applied for so long that it becomes the true price of the product.
- 4.55 In its initial analysis the CMA has used the data to assess the extent to which the reference price promotions in the sample satisfied the '1:1 ratio'.<sup>51</sup> This is consistent with the approach taken in the OFT's Principles which stated that 'where this 1:1 ratio is not exceeded, the OFT is unlikely to be concerned with the length of time which the higher price was initially charged'. The CMA has then used the '28 day indicator' when further analysing those reference price promotions which did not satisfy the '1:1 ratio'.

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<sup>51</sup> Throughout its analysis the CMA incorporated a margin of error and allowed for 3 days leeway from both the '1:1 ratio' and the '28 day indicator'. This is explained in more detail in Annex D.



4.56 The limitations of the data set meant that some reference price promotions could not be analysed at all or further information would be required before it would be clear whether the reference price promotion satisfied the '1:1 ratio'. The reasons for these limitations and their implications are discussed in detail in Annex D and the CMA has accounted for these limitations when analysing the data and interpreting the results. These limitations meant that the CMA could not clearly analyse whether a reference price promotion satisfied the '1:1 ratio' in between 6% and 45% of the promotions for each retailer.

4.57 Table 4.2 summarises the results of the CMA's initial analysis.

**Table 4.2: Characteristics of reference price offers analysed by the CMA (% of all reference price promotions available at each retailer on 7 November 2014)**

Retailer	% Not analysed			
	Satisfies the '1:1 ratio'	Does not satisfy the '1:1 ratio'	Further data required	
A	70	5	16	9
B	81	1	18	0
C	34	21	13	32
D	90	4	5	1
E	91	1	6	2

Source: CMA analysis of data supplied by mySupermarket.

4.58 Where the data did provide a clear indication of whether the '1:1 ratio' had been satisfied, there was generally a low incidence with which reference price promotions in the sample did not satisfy the '1:1 ratio'. However, there was one retailer for which this proportion was much larger. For this retailer 21% of the reference price promotions in the sample did not satisfy the '1:1 ratio'. This equated to 37% of the reference price promotions where the CMA could clearly analyse whether the reference price promotion satisfied the '1:1 ratio'. For the other four retailers 5% or less of the reference price promotions in the sample did not satisfy the '1:1 ratio'. For each of these retailers this equated to 6% or less of the reference price promotions where the CMA could clearly analyse whether the reference price promotion satisfied the '1:1 ratio'. Overall, across the five retailers 8% of the reference price promotions we analysed did not satisfy the '1:1 ratio'. This represents 0.5% of the products available at the retailers analysed.

4.59 The CMA has analysed the data in more detail to understand the circumstances in which the data might suggest that a reference price promotion did not satisfy the '1:1 ratio'. The CMA has focussed on the following circumstances which account for a significant fraction of the reference price promotions where the '1:1 ratio' is not satisfied:

- (a) **Neither the '1:1 ratio' or the '28 day indicator' are satisfied** – The previous, higher reference price was not charged for 28 days prior to the commencement of the promotion and the subsequent, lower price was

available for longer during the promotion than the previous higher reference price.

- (b) **The '28 day indicator' is satisfied but the '1:1 ratio' is not** – The previous higher reference price was charged for 28 days prior to the commencement of the promotion but the subsequent, lower price was available for longer during the promotion than the previous, higher reference price.
- (c) **A price frame added at least two weeks later** – The reference price frame was added to the product two or more weeks after the product's price had been reduced. For example, the product was priced at £11 before the price was cut to £9 with no price frame being applied and then 2 or more weeks later a 'Was £11, Now £9' price frame was added.

4.60 Table 4.3 summarises the results of this analysis.

**Table 4.3: Circumstances in which reference price promotions did not meet the '1:1 ratio' (as a percentage of all reference price promotions available on 7 November 2014)**

Retailer	%			
	<i>Neither '28 day indicator' nor '1:1 ratio' are satisfied</i>	<i>The '28 day indicator' is met but the '1:1 ratio' is not</i>	<i>Price frame added at least 2 weeks later</i>	<i>Other*</i>
A	2.5	0.8	0.1	1.3
B	0.1	0.6	0.0	0.5
C	0.0	12.4	6.7	1.5
D	1.3	0.7	0.0	2.1
E	0.2	0.2	0.0	0.3

Source: CMA analysis of data supplied by mySupermarket.

\*The 'Other' category covers a range of circumstances including some cases where one would expect little consumer detriment to arise. For example, this category includes cases where the data suggests that a retailer could have referenced a higher price than that used in the reference price promotion. This and the other circumstances covered in this category are discussed in more detail in Annex D.

- 4.61 Table 4.3 shows that in only a minority of the promotions analysed by the CMA was neither the '28 day indicator' or the '1:1 ratio' satisfied (at most 2.5% of reference price promotions and less than 1% of reference price promotions at three retailers).
- 4.62 However, the analysis highlights instances in which the '28 day indicator' is met but the '1:1 ratio' is not. At one retailer this related to 12.4% of the reference price promotions in the sample (22.6% of the reference price promotions where the CMA could clearly analyse whether the reference price promotion satisfied the '1:1 ratio').
- 4.63 Further, when a promotion ran for longer than the higher reference price had been charged (ie the '1:1 ratio' was not satisfied), this difference was often significant. For the retailer concerned the length of the reference price promotion exceeded the length of time for which the higher price was charged

by an average of 37 days<sup>52</sup> and the largest difference was 73 days. This is in contrast to the average length of a reference price promotion in the sample of 31 days (50 days for the retailer concerned). The analysis also highlights that there are occasions where a price frame is added after the price of the product has already been lowered for a period (at least two weeks). This amounted to 6.7% of the reference price promotions in the CMA's sample at one retailer.

### *Findings*

- 4.64 From the information we have gathered and the analysis of the data set out above, we have identified certain practices which, in the CMA's view, have the potential to be misleading and, if so, may breach the requirements of the CPRs. These relate to the particular issue of ensuring a reference price is a genuine selling price and a fair basis for comparison for any promotions that refer to it.
- 4.65 The primary area of concern relates to **promotional periods that significantly outlast the period of price establishment**. From our discussions with retailers and our review of their internal guidance and procedures, we identified promotional periods lasting for significantly longer than the product was on sale at the reference price. This is also apparent in the data analysed by the CMA, as shown in Table 4.3.
- 4.66 We bear in mind in this context the sentencing remarks from the Tesco strawberries case (see paragraph 3.20 above and Annex B) and we consider that it is questionable whether the higher price could be properly characterised as the 'normal' selling price of the product where the promotional period so significantly outlasts the price establishment period. In these circumstances, there is a question about whether the higher price is a genuine one, and it might also be argued that, after a certain point, the promotional price itself becomes the 'normal' price of the product. While low prices for sustained periods are generally to be welcomed, it could be misleading to continue to reference the higher price throughout such sustained periods.<sup>53</sup>
- 4.67 The CMA will therefore take further action with the businesses concerned to address these issues and secure any changes necessary to ensure consumers are not misled.

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<sup>52</sup> The average across all retailers was 30 days.

<sup>53</sup> There is a connected issue in relation to manufacturer price marked packs which include a reference price frame. We observed the use of such packs in convenience stores. Manufacturers and retailers alike should ensure that their use does not lead to a breach of the CPRs.

- 4.68 In addition, there are certain other practices relating to reference price promotions which have the potential to be misleading. The CMA wants to understand the issues further to assess their significance and potential to mislead. Again, the CMA will follow up with retailers to explore these issues in more detail. They are also areas where clearer guidance as to the application of the legislation would help ensure compliance.
- 4.69 The first such practice relates to the **use of reference price frames after the price of the product has already been lowered for a period** – Table 4.3 highlights occasions where a higher reference price frame is used after the product has already been presented at the lower price for a significant period of time. In these circumstances it could be argued that the reference price is no longer genuine and no longer provides a relevant or meaningful basis for comparison. This was an issue already addressed to some extent by retailers in their internal systems, guidance and compliance materials, but we will raise the issue directly with the retailers concerned.
- 4.70 In addition, the data highlighted isolated instances<sup>54</sup> where a reference price was used as the basis of two promotions, but where the second promotion afforded a less generous discount than the first (for example, a ‘was £9, now half price’ promotion was followed immediately by a ‘was £9, now 1/3 off’ promotion). Such a practice can lead to a lengthy overall promotional period, and appears to give no consideration to whether the price in the first promotional period has become the established price of the product.
- 4.71 Our investigation highlighted a further issue, relating to **reference prices that are established during a volume promotion**. Our review of evidence from retailers, and our initial analysis of the mySupermarket data, highlight that certain retailers take different views about whether the reference price of an individual product can or should be established while that product is involved in a volume promotion. Table 4.4 below sets out the frequency with which this occurs for the retailers analysed.

**Table 4.4: Percentage of reference price offers where the higher reference price was charged during a volume promotion**

<i>Retailer</i>	<i>% Percentage of reference price promotions*</i>
A	6
B	9
C	14
D	16
E	0

<sup>54</sup> At this retailer this amounted to 0.4% of the reference price promotions in the sample. See Annex D for details.

- 4.72 We are aware from this data and from other evidence that, certain retailers take the view that reference prices should not be established by reference to the price of a product during the lifetime of a volume promotion, whilst others take the view that this is permitted. Indeed the data above shows that it is a relatively frequent occurrence for certain retailers.
- 4.73 Finally, we have also been told about a number of other aspects of reference price promotions in relation to which the application of the CPRs could usefully be clarified. These include:
- the use of frequent promotions where certain products are promoted on near constant sequences of high/low pricing;
  - the use of an out-of-season reference price for seasonal products;<sup>55</sup> and
  - the approach to how widespread any reference price needs to be established across a retailer's stores and across geographical areas to be considered genuine.
- 4.74 In relation to the issues set out in paragraphs 4.69 to 4.73, our discussions with retailers about their approach and the data analysis above shows that there are a range of issues relevant to whether or not a reference price is likely to be a fair and genuine basis for comparison. Where they have the potential to mislead consumers, these could be issues that could breach the CPRs. As noted, we will engage with retailers further on these points to understand their prevalence and impact.
- 4.75 In addition, the CMA considers there is more that can be done through clearer guidance. The current version of the PPG is silent on certain aspects of these types of promotional practices. We therefore consider that it would be beneficial for the revised PPG to address these issues and recommend that CTSI considers this further in the context of the review of the PPG.

### *Volume promotions*

- 4.76 In its super-complaint, Which? refers to certain retailers **increasing the price per item of a product when the product is included in a volume**

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<sup>55</sup> Reference price promotions can apply in relation to seasonal goods. We have not analysed particular reference price promotions to assess whether the higher reference price was 'established' out of season. The principles that apply to reference price promotions equally apply to seasonal promotions. Where the higher price is established out of season the relevant question is whether the price is genuine, taking account of all of the relevant circumstances, including the time of year that the product is supplied and purchased.

**promotion.** The CMA has assessed how frequently this occurs by reference to the sample of volume promotions provided by mySupermarket.

4.77 As with reference price promotions, we used mySupermarket data to ascertain how many volume promotions were in place at each of the five retailers on 7 November 2014, between 13% and 18% of all products at each of the retailers analysed.

**Table 4.5: Percentage of products at each retailer that were included in a volume promotions on 7 November 2014**

	%				
Retailer	Asda	Ocado	Sainsbury's	Tesco	Waitrose
Percentage of all products in volume promotions	18	13	16	17	15

Source: CMA analysis of data supplied by mySupermarket.

4.78 Table 4.6 summarises the results of the CMA's initial analysis of the volume promotions in the sample on 7 November 2014.

**Table 4.6: Summary of the characteristics of volume promotions as a percentage of all volume promotions available on 7 November 2014**

Retailer	Change in the structure of a volume promotion <sup>1</sup>	Price per item under the volume promotion:			Not analysed
		not higher than the previous selling price	higher than previous selling price	between the higher reference and the lower selling price in a previous reference price promotion <sup>2</sup>	
A	9.1	33.4	0.4	5.9	51.3
B	25.5	48.9	0.5	10.7	14.4
C	10.0	17.0	5.3	4.5	63.1
D	11.0	35.8	0.2	12.1	41.0
E	28.0	38.9	1.2	6.5	25.2

Source: CMA analysis of data supplied by mySupermarket.

**Notes**

1. So the volume promotion occurring on 7 November 2014 followed another volume promotion. For example, a '3 for 2' promotion was followed by a '5 for £3' promotion. In these cases a retailer has changed the pricing structure within a volume promotion, rather than moving from a single selling price to a volume promotion.

2. Immediately prior to the volume promotion the product was involved in a reference price promotion. Additionally, the price per item under the volume promotion was higher than the price under the reference price promotion but lower than the reference price. For example, the product was involved in a reference price promotion of 'Was £2.75, Now £1.50' prior to a volume promotion of '1 for £2.50 or 2 for £4'.

4.79 As is discussed in detail in Annex D, limitations in the data available to the CMA meant that between 14% and 63% of the volume promotions at each retailer could not be analysed because the data did not provide clarity as to the previous selling price. The CMA will continue to analyse the data and seek to establish whether there are any issues or practices that merit further investigation. The CMA is mindful that, as for reference price promotions, data alone can only tell us so much about whether retailers are complying with the CPRs. In particular, the broader circumstances of the volume promotions in

question (notably the information communicated to the consumer) would need to be considered.

- 4.80 Where the CMA was able to analyse the volume promotions, for four of the five retailers less than 1.2% of the volume promotions in the sample had a higher price per item under the volume promotion than the previous selling price. For these retailers this equated to less than 2% of the volume promotions the CMA was able to analyse. For the final retailer the figure was somewhat higher at 5.3% of the volume promotions in the sample (16% of the volume promotions the CMA was able to analyse at this retailer). Overall across the five retailers 3% of the volume promotions we analysed had a higher price per item under the volume promotion than the previous selling price. This represents 0.3% of the products available at the retailers analysed.
- 4.81 The CMA considers that many of the same issues that arise in relation to reference price promotions can also arise in relation to volume promotions. In particular, where a volume promotion presents a particular saving to a consumer based on the purchase of multiple items, the consumer will take the price of an individual item as the benchmark for any saving. If the price of the individual item is artificially inflated, this could mislead the consumer as to the genuine price of the product in question. As with the concerns described above relating to reference price promotions, we will take further action with the businesses concerned to address these issues.
- 4.82 Which? highlights a concern in relation to long-term volume promotions and the extent to which these are misleading.<sup>56</sup> We would not necessarily agree with Which? that a long-term volume promotion (which appears to be common in a number of retailers for a number of household ‘staples’ such as milk, juice and cheese and for ‘meal deals’)<sup>57</sup> in and of itself has the potential to mislead consumers. However, as we explore further from paragraph 4.95 onwards below, there can be circumstances in which it may be misleading to suggest, through a short promotional end date, that a promotion is due to end when that promotion will in fact continue indefinitely.

#### *Larger pack sizes with a higher unit price*

- 4.83 To understand how often larger packs represented worse value for consumers than purchasing several individual smaller packs, we again

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<sup>56</sup> Which?’s analysis provided to the CMA on 12 June 2015 highlighted that 59 of the 235 products considered by Which? (25% of the total) were included in a multi-buy promotion for more than three of the six months analysed.

<sup>57</sup> In the data analysed by the CMA 48% of the volume promotions lasted for at least 60 days and 34% lasted for at least 90 days.

gathered data from mySupermarket. Here, we considered all the products (SKUs<sup>58</sup>) on sale on 7 November 2014 that had a smaller pack size variant, with a view to comparing the unit prices of each variant and establishing how frequently larger pack sizes had higher or lower unit prices than the smaller pack size.

- 4.84 Table 4.7 below summarises the data provided to the CMA. This table shows, for each retailer, the number of SKUs where there was at least one other SKU that was a smaller pack size of the same product and occasions where an SKU had more than one smaller pack size.

**Table 4.7: Summary statistics for different pack size analysis**

<i>Retailer</i>	<i>Number of SKUs</i>	<i>Number unused</i>	<i>Number analysed</i>	<i>Number of SKUs analysed with:</i>			
				<i>1 smaller</i>	<i>2 smaller</i>	<i>3 smaller</i>	<i>4+ smaller</i>
Asda	2,281	2	2,279	1,883	331	53	12
Ocado	1,923	2	1,921	1,604	273	36	8
Sainsbury's	2,106	9	2,097	1,753	283	50	11
Tesco	3,208	6	3,202	2,556	503	107	36
Waitrose	1,192	0	1,192	1,005	164	19	4

Source: CMA analysis of data supplied by mySupermarket.

Notes:

1. The figures in this table relate to individual SKUs rather than individual product lines. For example, suppose that a single product comes in pack sizes of 2 units, 4 units, 9 units and 16 units (ie four different SKUs). This product would have three SKUs listed in the data: the 16 unit pack (which has three smaller SKUs), the 9 unit pack (which has two smaller SKUs) and the 4 unit pack (which has one smaller SKU).

- 4.85 As this table shows, the majority of SKUs had only one other SKU which was a smaller size of the same product (82% of all SKUs) and most of the others only had two smaller SKUs. A small number of SKUs (19 in total) were excluded from the analysis because the pricing and promotional data provided by mySupermarket for those SKUs was inconsistent.<sup>59</sup>
- 4.86 First, the CMA analysed the frequency with which a smaller sized SKU (the smaller pack size) had a lower per unit price than a larger SKU (the larger pack size). To identify instances where the unit price differences were significant, the CMA also identified the frequency with which the unit price difference was greater than 10%. Table 4.8 summarises the results of this analysis.

<sup>58</sup> SKU refers to a stock-keeping unit and each SKU denotes a uniquely identifiable product stocked by a retailer. Therefore, different sizes of the same product will be identified as separate SKUs.

<sup>59</sup> For example, the description of the promotion may say 'Was £2.50, Now £2' but all of the prices were recorded as £2.50.



**Table 4.8: Percentage of SKUs with at least one smaller sized SKU which is cheaper**

Retailer	%	
	<i>Percentage (of SKUs with multiple sizes) with at least one smaller pack which is cheaper</i>	
	<i>Any lower price</i>	<i>Price lower by 10% or more</i>
A	18	12
B	16	12
C	17	12
D	16	11
E	21	16

Source: CMA analysis of data supplied by mySupermarket.

4.87 As can be seen in Table 4.8 a significant proportion of the larger SKUs had at least one smaller SKU which had a lower per unit price. For each of the retailers the proportion of larger SKUs where at least one smaller SKU had a lower per unit price was between 16% and 21%. In addition, the difference between the unit prices for the smaller and larger SKUs was often significant. For four of the retailers the proportion of the larger SKUs whose unit price was at least 10% larger than the unit price of the smaller SKUs was between 11% and 12% and for the other this proportion was nearly 16%.

4.88 The CMA then considered the extent to which the lower price on the smaller pack size was due to a promotion that only applied to the smaller pack. This analysis is shown in Table 4.9.

**Table 4.9: Frequency with which a smaller SKU has a lower unit price due to a promotion**

	%					
	SKUs with at least one smaller SKU which is cheaper		Due to a promotion on the smaller pack only		Not due to a promotion only on the smaller pack size	
	Any lower price	Price lower by 10% or more	Any lower price	Price lower by 10% or more	Any lower price	Price lower by 10% or more
A	18	12	12	9	7	3
B	16	12	12	9	4	2
C	17	12	7	6	10	6
D	16	11	13	10	3	2
E	21	16	15	12	6	3

Source: CMA analysis of data supplied by mySupermarket.

Note: The percentages in this table may not equate due to rounding errors.

4.89 This analysis shows that, for four of the five retailers, in the majority of instances where the unit price is lower for a smaller sized SKU this is due to a promotion which only applies to the smaller sized SKU. However, for one retailer the majority of instances where the unit price is lower for a smaller pack size were not due to a promotion of the smaller pack size and, in over half of these cases, the price difference was greater than 10%.

4.90 These figures should necessarily be treated with some caution as we do not know from the data what information was presented to consumers in

connection with the different pack sizes and whether manufacturers or retailers are steering consumers towards larger pack sizes, for example by making claims on the product packaging or surrounding material implying that the larger pack size represents the best value.

- 4.91 Within the constraints of the timeframe of this investigation, we were not able to consider this question in detail. Retailers indicated to us that on-pack advertising using 'value' and 'free' statements is decreasing. Some retailers informed the CMA that they have asked their suppliers not to mark 'bigger pack better value' or 'best value' on products, and other retailers avoid making statements about 'extra free', 'value' or 'special' on advertising materials. Certain manufacturers informed the CMA that they no longer include non-promotional value statements on their packaging.
- 4.92 The CMA understands that these changes have arisen in response to consumer feedback that such statements are not transparent as to the true value or price of the product. They may also be driven by a need to ensure that retailers and manufacturers do not unlawfully describe a product as free when it is not.<sup>60</sup>
- 4.93 In the event that claims about the better value of certain packs were made which were likely to be misleading under the CPRs, this would be a cause for concern. Over the course of our investigation, we did not encounter particular examples of such claims being made, over and above the material provided by Which?. Provided misleading claims are not made about value on product packaging, retailers are free to price larger pack sizes how they wish, even if this leads to the counter-intuitive situation where the unit price of a larger pack size is higher than smaller variants.
- 4.94 However, given the frequency with which our data revealed that larger pack sizes do not represent better value than smaller pack sizes, there is clearly scope to enhance consumer awareness of the issue. This is an area where presentation of clear and consistent unit pricing has the potential to help consumers compare pack sizes and decide which size represents better value and we discuss this further below in Chapters 5 and 6.

#### *Time limited promotions*

- 4.95 Which?'s campaign material, provided in support of the super-complaint, reports instances of the end date or order by date of volume promotions being extended, or retailers including a short promotional period on a product

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<sup>60</sup> See Schedule 1 to the CPRs, paragraph 20 (in relation to describing a product as free when that is not true and the consumer is required to pay); [Commission's Guidance on paragraph 20 of Annex 1 to the UPCD](#).

despite the promotion actually lasting for most of the year. This has the potential to give consumers a false impression that the promotion is only available for a short period of time, and thus encourages them to act to take advantage of it.

- 4.96 Our review of the presentation of promotions in store and online revealed different approaches by some retailers in relation to displaying end dates on particular promotions. Our investigation highlighted a potential issue in relation to **displaying an ‘end date’ for continuous promotions**. We found some evidence to support Which?’s concerns on this issue. For example, we observed from our in-store visits that certain retailers operating long term volume promotions update the end date of the promotion on a monthly or annual basis.<sup>61</sup> Some retailers’ compliance materials say promotional end dates must not be extended and some specify when it is appropriate to state an end date for long term volume promotions. Only three (of the seven) retailers offering online grocery shopping provide ‘order by’ or ‘delivery by’ dates in relation to products on promotion.
- 4.97 The ASA recently found<sup>62</sup> that, in circumstances where the retailer intended a promotion to end on a particular date, it was misleading not to state the end date in a newspaper advertisement. The CMA agrees that there will be situations where the end date of a promotion is material information that the consumer needs and that falsely stating the end date, and then extending it, or not stating it could have a detrimental impact on consumers’ purchasing decisions.<sup>63</sup> In addition, there may be circumstances where including an end date is itself misleading (in particular in connection with continuous promotions) to the extent that it gives consumers the false impression that they need to act promptly to take advantage of a promotion that will not be available following the stated end date.<sup>64</sup>
- 4.98 We would therefore recommend that the revised PPG provide clarity on when and how promotional end dates should be communicated to consumers. At the same time, CTSI could usefully give consideration to the specific circumstances of online shopping where customers may not be charged the price they were expecting if a promotion has ended between the date that the products are ordered and the date they are delivered.

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<sup>61</sup> We observed a similar issue in relation to price marked packs in convenience stores, where retailers made continued use of price marked packs with a volume promotion price frame (eg ‘2 for £3) but included an end date on the promotion.

<sup>62</sup> [ASA Ruling on Wm Morrison Supermarkets plc](#).

<sup>63</sup> Also see Schedule 1 to the CPRs, paragraph 5 (in relation to failure to disclose the existence of reasonable grounds the trader may have for believing they will not be able to supply to products at the stated price).

<sup>64</sup> Also see Schedule 1 to the CPRs, paragraph 7 (in relation to falsely stating a product will only be available, or available on particular terms, for a very limited time).

## ***The regulatory and enforcement landscape***

### *The role of legislation and guidance*

- 4.99 As part of our investigation into the issues raised by Which?, the CMA sought views from retailers, manufacturers and enforcers on whether they found the existing legislation and guidance clear and useful and what, if any, changes they would recommend. In general, we heard that the guidance is helpful, but the ongoing review of the PPG provides an opportunity for it to reflect current pricing and promotional practices (particularly given technological developments), give greater emphasis to the requirements of the CPRs, and include examples of good and bad practices similar to those in the OFT Principles.
- 4.100 A couple of more specific views were provided. One retailer urged against legislative change, given their limited range of promotions and good track record, and another suggested that all relevant legislation should be brought together. One manufacturer and several enforcers said they have observed different interpretations of the legislation and guidance by retailers, particularly in relation to reference pricing, and clarity on such issues would be helpful.
- 4.101 The CMA's assessment above has identified a number of areas where, in our view, retailers would benefit from further guidance. We consider that this could be provided by CTSI in the course of the review of the PPG. As we note further at paragraph 5.72 below in relation to unit pricing, there may also be scope for addressing aspects of the interplay between the CPRs and the PMO in the context of such a revision.

### *Approaches to compliance*

- 4.102 The CMA obtained information and documents from retailers to understand their approach to embedding their interpretation of their legal obligations in their policies, training and monitoring. Most retailers have policies and procedures that set out their interpretation of the relevant law and guidance and how it applies to their business. These documents underpin compulsory training, focused on initiating and presenting promotions in a compliant manner. Some retailers have sought input, assured advice and/or training from their primary authority officers. Retailers rarely ask primary authority officers to review specific promotions. Several retailers also obtain advice on their external advertising of promotions from the Committees of Advertising Practice (CAP) and receive updates on rulings and Code rules from their stakeholder manager at the ASA.

- 4.103 Several retailers use automated checks to prevent non-compliant promotions from being set up by buyers and manufacturers. Manufacturers also aim to avoid funding promotions that, in their view, will not comply with the law and guidance (such as the 28 day indicator set out in the PPG). In store checks are conducted by most retailers. They appear to be directed at ensuring that prices, labels and products are accurately displayed, rather than acting as a further check on whether the presentation of the promotion, and the type of promotion itself, is compliant. A few retailers carry out unannounced store audits and mystery shopping exercises, and report mistakes to head office.
- 4.104 Broadly, the CMA found that retailers had put in place appropriate mechanisms to secure compliance with the CPRs. The systems that had been put in place by retailers reflected the principles of the CPRs and the guidance provided by the PPG and, to some extent, the OFT Principles (bearing in mind that only certain retailers subscribed to these Principles which are, in any event, limited to food and drink retailing).
- 4.105 As is clear from our assessment above, we have seen evidence of different interpretations of the guidance and legislation by retailers. This is, to some extent, the inevitable consequence of principles-based legislation. However, where we have identified particular issues of concern, or broad divergences of approach, we have identified particular areas that CTSI might wish to address through revised guidance as part of the review of the PPG.
- 4.106 We would note, however, that most retailers' compliance mechanisms appear to focus on ensuring *ex ante* compliance, through training buyers and operational controls supporting the initiation of promotions only in accordance with internal policies. We agree that this is, in general, the most appropriate approach to securing compliance with the CPRs. However, we have observed that, once promotions are set up in stores (or online), limited further *ex post* checks appeared to be carried out to ensure that the *ex ante* compliance has been successful in eliminating pricing or promotional practices that could potentially lead to a breach of the CPRs. Our work in relation to the issues raised by Which? in the super-complaint has involved several store visits, some of which have highlighted particular issues that had not been identified by the retailer as part of its *ex ante* controls.

#### *Views of enforcers*

- 4.107 The CMA asked primary authority officers and other TSOs about their experience of enforcing compliance with the CPRs in relation to the promotional practices identified by Which?.

4.108 We received details from TSS of relevant investigations in response to consumer complaints that they did not recall higher 'was' prices being charged and that it was cheaper to purchase products individually than as part of a volume promotion. However, in general the CMA was informed that enforcement work (including investigations, inspections and advice to retailers) by TSS in relation to pricing and promotions was rare.<sup>65</sup> This is for a number of reasons, including that they receive insufficient consumer complaints to prioritise this issue over other consumer issues and, even if issues are detected, not all TSS will have the time and resources to carry out a complex investigation and take action against large, well-resourced retailers. One primary authority officer informed the CMA that they may assess whether a price is genuine if a complaint has been reported by another TSO or the retailer has asked for advice.

4.109 Recent research commissioned by BIS and CTSI<sup>66</sup> has found that Local Authority TSS are operating with a diminished resource base. That research notes that:

- (a) Budget cuts and reduced staff levels over the past five years has changed ways of working and priorities. There has been a shift in approach, from proactive and preventative to reactive and responsive. Their work is now more driven by complaints from consumers and other intelligence reports, and involves fewer routine inspections to check compliance levels and fewer enforcement projects.
- (b) While TSS are committed to supporting businesses to facilitate compliance, their resource constraints mean they can no longer keep regular contact through visits. To achieve greater efficiency and effectiveness, TSS have moved to an intelligence led model. They have also prioritised their activities, focusing less on low-profile, regulatory activities such as analysing food samples and more on publicly visible responsibilities, including protecting vulnerable consumers from rogue traders, scams and door-step crime.

4.110 We have observed from our own work that in store monitoring is generally not a priority area for TSS and they are unlikely to undertake proactive inspections. A few primary authority officers carry out in store inspections under their agreements with retailers, for example where new procedures are being rolled out by the retailer, or in response to a report from another TSO. This can involve reviewing pricing and promotions and how they are displayed

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<sup>65</sup> Relevant CPRs prosecutions taken by TSS are set out in Annex B.

<sup>66</sup> Raine, J, Mangan, C and Watt, P, University of Birmingham Institute of Local Government Studies (March 2015), The impact of Local Authority Trading Standards in challenging times, pp4-6.

(both in store and online) for compliance with the CPRs. The consequences of focusing on the lawfulness of promotions before they are implemented in store or online may mean there is no clear overall picture from enforcers about whether retailers are broadly complying with the CPRs. It could, as we note at paragraph 4.106 above, also result in potentially misleading promotions not being identified.

- 4.111 The CMA intends to share its findings, as well as further observations obtained from our analysis of the mySupermarket data, with TSS and primary authority officers as appropriate, in particular to the extent that these assist enforcers in identifying priority areas for further work, including monitoring, compliance and enforcement work.
- 4.112 The CMA is also aware of ongoing work to enhance the intelligence function supporting TSS, in particular through a revision of the way in which particular complaints are categorised by Citizens Advice.<sup>67</sup> This is a positive development, which has the potential to more accurately pinpoint particular pricing practices that may merit further attention. We would also draw attention to our findings that consumers may not necessarily choose to engage with the ‘traditional’ channels when reporting pricing practices of concern, but may instead use other channels, in particular social media, to prompt a particular response from a retailer or manufacturer.

## Conclusions

- 4.113 Over the course of our investigation we have encountered examples of particular pricing and promotional practices which, in our view, have the potential to mislead or confuse consumers and thus lead to a breach of consumer law. Where we have encountered such practices, the CMA will take further action with the businesses concerned to secure the necessary change. The CMA will ensure that relevant factors identified by retailers to explain their use of particular price frames and promotions are taken fully into account as part of this further work.
- 4.114 The evidence and data that we have gathered shows that the prevalence of these issues is relatively limited, and in some respects concern only a limited number of businesses and/or promotional practices. The majority of promotions reflect the relevant legislation and guidance, and are underpinned by internal policies and systems – on the part of both retailers and manufacturers – that generally demonstrate a sound approach to compliance.

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<sup>67</sup> Citizens Advice Bureau (2015), [Consumer Codes: 2015 Review Consultation](#).

4.115 We have seen evidence of different interpretations of the guidance and legislation by certain retailers in relation to their pricing and promotional activity. This is, to some extent, the inevitable consequence of principles-based legislation. However, there is more that can be done to further increase levels of compliance and reduce the incidence of the potential problems that we have seen. Therefore, in addition to our direct follow-up work with the relevant businesses, our response to the super-complaint highlights particular areas where greater clarity should be provided through guidance to improve the state of compliance with the key legislation in this area.

4.116 **Recommendation 1:** We recommend that the CTSI clarifies how the legislation applies to certain promotional practices. This includes bringing together the requirements of the existing PPG and the OFT Principles into a revised set of guidance as to the likely application of the CPRs. In doing so, we recommend they give particular consideration to:

- (a) clarifying the features of a genuine retail price and set out whether, and in what circumstances:
  - (i) promotional practices can be run sequentially and use a reference price 'established' in a previous volume promotion
  - (ii) an earlier reference price frame ('was' price) can be used after the price of the product has already been lowered for a period (so the reference price does not refer to the last applicable price)
  - (iii) a reference price promotion that involves two consecutive stages of promotional pricing can be used, where the second stage affords a less generous discount than the first stage. For example, a product is involved in a 'half price, now £4.50' and then a '1/3 off, now £6' promotion
  - (iv) out of season prices can be used as reference prices for seasonal products, and
  - (v) businesses can use a reference price when they have not sold a product at that price in the store where the discount is applied.
- (b) setting out good practice in relation to whether, and in what circumstances, it is appropriate and not misleading for the prices of individual products to change before and during a volume promotion.
- (c) clarifying the circumstances in which stating an end date for promotions would be appropriate and the specific application of this to online purchases where consumers may not pay the price they expect when the



promotion ends between the consumer ordering the goods and them being delivered.

- 4.117 Which? also raised the issue of larger pack sizes that do not represent better value for money than smaller pack sizes. The data that we commissioned has highlighted that larger pack sizes will not always represent the best value for money (even when promotional activity on smaller pack sizes is excluded from consideration). We were not, within the constraints of the timeframe of this investigation able to consider the separate question of whether manufacturers or retailers are promoting larger pack sizes in a manner that suggests that they represent best value. The limited evidence gathered on this issue during our investigation indicated that on-pack advertising using 'value' and 'free' statements is decreasing. However, were such claims of value to be made in relation to larger packs with a higher unit price than a smaller pack, we would be concerned that this practice would have the potential to breach the CPRs. This is an area where our recommendations below in relation to unit pricing have the potential to make clearer information available to consumers to help them identify when a larger pack size represents good value for money.
- 4.118 Our review of aspects of the existing regulatory and enforcement landscape has revealed a number of interesting features. The incidence of formal complaints is low, but behavioural studies and surveys along with reviews of social media and information from retailers, suggests that consumers notice that promotions do not always present the best value. Given that enforcement levels within TSS are largely driven by complaints, it is important for enforcers to have access to an accurate picture of the prevalence of potentially detrimental promotions by considering consumer complaints from a range of different sources. In particular, consumers appear to be turning to different channels to express dissatisfaction about particular pricing practices, for example social media or online forums.
- 4.119 We have found that retailers generally have appropriate *ex ante* systems in place to prevent promotional practices that breach their interpretation of the requirements of the CPRs. However, our investigation has identified that there is the potential for errors to occur. While it is generally preferable to ensure that issues are prevented through the use of effective *ex ante* controls, further *ex post* checks may help to identify problems and why they are arising in order to further improve compliance. We return to this issue in chapter 5.
- 4.120 The CMA will also build on its findings and compliance work to support Trading Standards in focussing their future monitoring, compliance and enforcement work and help these bodies to effectively target their work at areas where there is the greatest potential for consumer detriment.

## 5. Super-complaint issue 2: unit pricing

- 5.1 This chapter responds to the concerns raised by Which? in its super-complaint that there are problems with unit pricing which mean that prices are not easily comparable. It sets out the issues raised, our assessment of them, summarises the conclusions reached, and makes recommendations for possible future work.

### The issue

#### *The super-complaint*

- 5.2 Which? raised concerns about three issues in relation to unit pricing: legibility, inconsistency of units for similar products and missing unit prices where there is a promotion. Which? highlights the importance of unit pricing as a price comparison tool and states that ‘if unit pricing was more consistent it would be one way to help consumers make decisions based on the true value of the products to them, regardless of size or whether they are on promotion’.<sup>68</sup> In particular, it suggested that complexity and potential ambiguities in the regulatory requirements can cause difficulties for retailers.<sup>69</sup>
- 5.3 Which? describes a commitment by several retailers to improve the legibility of unit pricing<sup>70</sup> and noted that, whilst there has been some improvement, a number of retailers had yet to make changes to their shelf edge labelling.

#### *Information provided by Which?*

- 5.4 The information that Which? has provided to support its concerns includes:
- Examples of shelf edge labelling which it suggested are problematic.<sup>71</sup> These highlight particular examples of products where, in Which?’s assessment, unit prices were not clearly presented, where they show inconsistent units for similar products or where they were not shown for a special offer.
  - Results from its March 2015 consumer research considering reasons why consumers do not use unit pricing.<sup>72</sup> From these survey results, Which? indicated that 87% of respondents were aware of unit prices and 69% had

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<sup>68</sup> Super-complaint, p3.

<sup>69</sup> Super-complaint, p16.

<sup>70</sup> BIS (4 December 2013), [Progress on clearer pricing in supermarkets](#).

<sup>71</sup> Super-complaint, pp15-17, and examples provided by Which? to the CMA on 13 May 2015.

<sup>72</sup> Super-complaint, p18.

used them. Where respondents had not used them, Which? states that the reasons given were that they were inconsistent or not always included. The survey also found that a number of respondents (44%) favoured unit prices being shown for both the promotional price and previous price and some (28%) favoured showing only the promotional unit price.

### ***Economic framework***

- 5.5 Unit pricing information can benefit consumers by allowing them to better choose the product that represents the best value for them. In particular, unit pricing may be used to compare prices across goods of comparable and different qualities, such that the consumer may be better able to assess their relative value.<sup>73</sup>
- 5.6 Therefore, the lack of easily understandable unit pricing information increases the difficulties consumers face when making purchasing decisions. In particular, consumer harm may arise if this leads to them paying more per unit or choosing a less appropriate good than they otherwise would have done.<sup>74</sup> For example, our analysis of the data from mySupermarket discussed in chapter 4 has indicated that larger packs are not necessarily cheaper, and can be materially more expensive, per unit than smaller packs. Without clear unit pricing, this could lead to consumers paying more than they need to.
- 5.7 The existing evidence (discussed in more detail in Annex C) suggests that there are a number of factors that may limit the extent to which consumers use unit pricing. However, there is also evidence that, when used, unit price information leads consumers to select products with lower unit prices.
- 5.8 In order to test this theory of harm we explored:
- the way that consumers use unit pricing information and the impact it has on their decision making
  - whether unit pricing is displayed in a clear and legible way
  - whether unit pricing is shown in an inconsistent manner (eg similar products presented with different units)

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<sup>73</sup> There are of course limitations to the effectiveness of unit pricing in enabling better decision making by consumers, for example where there is a potential overload of information or where the units presented make it hard for many consumers to relate them to something meaningful for them. These are discussed in more detail in this chapter.

<sup>74</sup> For a fuller discussion of the possible benefits of unit pricing and harm that can arise if it is not provided appropriately see Annex C.

- whether unit pricing information is provided in specific circumstances when it could/should be, especially in relation to special offers, and
- how the relevant legislation is enforced.

### **Legal framework**

- 5.9 As discussed in Annex B, the approach to unit pricing is regulated in large part by the PMO. With particular relevance to the issues raised by Which?, the PMO includes requirements relating to (i) the clarity and legibility of selling price and unit price information, (ii) the application of unit pricing to general price reductions and (iii) specific alternative units for particular types of product.<sup>75</sup>
- 5.10 In relation to the **legibility** requirements, Article 7 of the PMO requires the indication of the unit price to be ‘unambiguous, easily identifiable and clearly legible’ but is not prescriptive about the way the requirement is met.<sup>76</sup> Guidance produced by the Department of Trade and Industry (DTI, now BIS)<sup>77</sup> states that legibility of unit pricing means legible to a consumer with normal sight, though indicates that traders should have regard to the needs of consumers with less than perfect eyesight.
- 5.11 In relation to **consistency** of information, the PMO requires unit prices to be shown per kilogram or litre of the product. However, there are specific alternative required units set out in Schedule 1 to the PMO. This lists a range of product categories and the required unit to be given in unit price information in respect of each (for example, per 100g or per 100ml).
- 5.12 With regard to **price reductions and promotions**, Article 9 of the PMO states that traders selling goods as part of a general price reduction below the usual selling price may comply with their obligations under the PMO by indicating by a general notice that the products are or may be for sale at a reduction, provided that the details of the reduction are prominently displayed, unambiguous, easily identifiable and clearly legible. This would seem to imply that traders do not need to give the unit price for the reduced product, as long as they indicate clearly and unambiguously that the product is on sale at a reduced price. The guidance produced by the DTI states that for promotions,

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<sup>75</sup> Article 5(3)(d) of the PMO provides that the requirement for traders to indicate a unit price shall not apply to pre-packaged items sold in a ‘small shop’, that is a shop with a relevant floor area not exceeding 280 square metres.

<sup>76</sup> Article 7(1)(a).

<sup>77</sup> Guidance note on the Price Marking Order 2004, The Department of Trade and Industry, January 2005.

such as volume promotions, unit price information for the single standard product, before the application of the promotion, should be given.

- 5.13 In addition, the CPRs<sup>78</sup> are also relevant as they regulate the provision of information in general to consumers in commercial practices.

## **Evidence and analysis**

### ***Consumers' use of unit pricing to inform decision making***

- 5.14 We have sought evidence about how consumers engage with unit pricing information and how it is used in their decision making.

#### *Evidence from retailers*

- 5.15 A small number of retailers told us they have undertaken some limited research with consumers specific to unit pricing to inform their approach. This has included whether people recognise unit price information, whether it is clear and useable and whether different types of presentation of it are preferred. In addition, we have been told about steps that have been taken to help improve use and understanding, such as one retailer enabling consumers to sort their online shopping results by unit price. However, it does not appear that retailers have undertaken thorough research on consumer behaviours relating to unit pricing. Many articulated to us that their approach to unit pricing is based on the law so they just work to comply directly with the legislation.
- 5.16 We were told by some traders that consumers are more likely to use unit prices where the unit shown reflects how they use the product, for example the number of washes for laundry detergent rather than weight or volume. This appears to be based on anecdotal evidence rather than particular research conducted by retailers about how consumers use unit prices.
- 5.17 Overall, therefore, retailers do not appear to collect clear evidence about how consumers use unit pricing in their decision making.

#### *Literature review*

- 5.18 The CMA conducted a review of relevant research on this issue.<sup>79</sup> The evidence from the literature we have seen suggests:

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<sup>78</sup> See Annex B.

<sup>79</sup> See Annex C for more details.

- When a lot of information is provided, consumers may be overloaded and subsequently do not use all of the information in their decision making. Instead they are likely to anchor on the most prominent or salient pieces of information; for example, this may be the largest or clearest piece of information. There is a risk that unit pricing information may become lost amongst this information overload.
- Many consumers rely on mental shortcuts, such as ‘bigger is cheaper,’ to make purchasing decisions, either in the absence of unit pricing information or as an alternative to using it.<sup>80</sup>
- If clear information is provided, unit pricing information can benefit consumers by allowing them to better choose the product which is the best value through being better able to make price and quality comparisons.

### *Qualitative research findings*

- 5.19 To take a step towards addressing the lack of consumer insight work in this area, the CMA commissioned BDRC Continental to conduct qualitative research<sup>81</sup> looking at the usage of unit pricing in the context of supermarket shopping.
- 5.20 This research was based on four focus groups with 7-8 participants in each group. Therefore, while informative, the results are not necessarily representative and only give us an insight into the range of consumer views and behaviours.<sup>82</sup>
- 5.21 The focus groups covered questions about general shopping habits (including the frequency of shopping trips, the time spent in the store and attitudes towards grocery shopping). They also included exercises in which participants were asked to select from example products from across seven product categories<sup>83</sup> and indicate the reasons why they had chosen particular products. Moderators subsequently elicited the information that respondents used to make these choices, and in particular the use they made of unit pricing information.

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<sup>80</sup> As discussed in chapter 4, our data analysis suggests that bigger packs can be materially more expensive per unit than smaller packs, making this type of shortcut more likely to result in consumers paying more than they need to.

<sup>81</sup> A copy of the report produced by BDRC Continental for the CMA can be found at Annex F.

<sup>82</sup> For more information on the composition of the different focus groups see Annex F.

<sup>83</sup> These were cheese, bananas, orange juice, mayonnaise, tuna, shower gel and toilet tissue.

- 5.22 The research indicated that consumers use a variety of different techniques to simplify their decision making when shopping. For example, at least four shopping behaviours were observed in the focus groups:
- Participants simplifying their choice of product by only considering certain pack sizes and brands.
  - Participants simplifying their choice of product by using promotions to indicate a good deal.
  - Participants attempting to calculate and compare value across products in some way (for example, some participants calculated their own unit prices which they could relate to rather than using the unit pricing information which was provided).
  - Participants using the unit prices provided to inform their choice of product.
- 5.23 Further, the research indicated that the same person can use different shopping strategies for different product categories.
- 5.24 Although the usage of unit pricing was observed in the focus groups, this was only by a minority of participants (usually one, a maximum of two, per group) and they tended to use it for particular products rather than systematically.<sup>84</sup>
- 5.25 The research explored the reasons why the majority of participants did not use unit pricing information. In particular, those in lower social grades ignored unit pricing in favour of information that they found easier to conceptualise and use. For example, where toilet roll was unit priced per 100 sheets, some participants struggled to conceptualise what that meant when comparing across brands/pack sizes, therefore they ignored this information. In addition, for certain participants, speed was an important factor, with a desire to complete the shopping as quickly and efficiently as possible rather than spending time thinking carefully about the best deals available.
- 5.26 Some participants indicated that the savings they felt they could make by using unit pricing were smaller than they were in reality. This is because, when given on a per 100g or 100ml basis, the price differences seemed

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<sup>84</sup> The level of usage of unit pricing found by the Which? survey (as outlined at paragraph 5.4) appears to be higher than that found by the CMA's research. This is likely to be due to the relatively small scale qualitative research commissioned from BDRC, which makes the results illustrative rather than statistically representative. In addition, while Which?'s survey asked respondents whether they were aware of unit pricing and have used it, it did not capture specific details of the extent to which they used unit prices, how they used them and whether that usage was recent to give context to their responses. Therefore the Which? survey may overestimate the number of respondents who routinely use unit pricing in their decision making.

insignificant. Therefore their estimate of how much they could save was skewed by their interpretation of the unit price.

- 5.27 Finally, while participants found some inconsistencies in the presentation and provision of unit pricing confusing, such as different bananas being unit priced on a per kilogram or a per item basis, many were not picked up.
- 5.28 The CMA considers that this research suggests that more consumer education work could be done to help consumers better understand unit pricing.

### *International comparisons*

- 5.29 Generally, there appears to be widespread agreement that unit pricing is a potentially important tool in ensuring consumers can effectively compare prices. A mandatory system is considered more effective than a voluntary system and provides more consistency. However studies suggest that a mandatory system which is not sufficiently prescriptive regarding how pricing is displayed is less likely to be effective.<sup>85</sup>
- 5.30 Several international studies based on consumer perceptions and surveys have made recommendations regarding optimal layout, sizing, colours and positioning in order to achieve clarity and consistency for consumers and aid enforcement. For example, some of the most comprehensive guidance on presentation is contained within the US Department of Commerce 'Unit Pricing Guidance' which outlines a number of best practice recommendations intended to improve the accuracy and usability of unit price information as well as to improve uniformity across retailers and states.<sup>86</sup>
- 5.31 We are aware of innovations in labelling in other countries, primarily those relating to electronic shelf edge labels. UK retailers have generally not yet adopted this approach at scale. Electronic labelling is likely to enable easier and lower cost changes to information presented. However, depending on the technology chosen, the screen size is likely to impose an additional constraint on the quantity and legibility of information that can be provided.

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<sup>85</sup> Australian Competition and Consumer Association Grocery Inquiry 2008 and Queensland Consumer Council, Ian Jarratt, Report for the Winston Churchill Memorial Trust for Australia, November 2007

<sup>86</sup> NIST (2015), [Unit Pricing Guide](#).



## ***Legibility of unit pricing information***

- 5.32 In the super-complaint Which? expresses concern about the legibility of unit prices, in particular that the unit price ‘is not always easy for consumers to spot or to read relative to the selling price.’

### ***Evidence from retailers***

- 5.33 We have discussed with retailers the approach they take to unit pricing. In addition, we have received copies of internal policies and procedures, showing how they have implemented the legibility requirements in practice. All retailers we spoke to believed that their approach was clear and legible to consumers. Many have told us that they have worked with the Royal National Institute of Blind People (RNIB)<sup>87</sup> to improve the legibility of their shelf edge labels.
- 5.34 Most retailers indicated to us that they have changed their approach to presenting unit prices and volumes in response to an initiative undertaken by BIS in 2013.<sup>88</sup> For example, many retailers have told us that they have increased the font size of unit prices on shelf edge labels so that they are roughly one third to one half of the headline selling price. Others have told us that they are working on this as part of a phased process. We have been told that the cost of changing shelf edge labels in a short period of time can be significant which is why some retailers are introducing the changes incrementally. However, we did not receive specific evidence of these costs to be able to substantiate this point.
- 5.35 A number of retailers suggested that some care needed to be exercised in the provision of unit pricing information. In particular, it was considered by some that increasing the size of the unit price beyond a certain point could cause confusion amongst consumers between the selling price and the unit price or result in a complex and cluttered presentation of information to consumers. We understand the reason for these concerns and recognise a balance needs to be struck. As discussed above, our qualitative consumer research on unit pricing highlighted that consumers are presented with a large amount of information which they need to process to make purchase decisions and it is important to make sure the selling price and unit price can be identified easily.

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<sup>87</sup> In 2012 Which? worked with the RNIB and a trading standards expert to produce a set of guidelines for retailers that outlined a suggested layout for shelf-edge labels ‘to ensure that shelf edge labels are accessible to as a wide range of consumers as possible.’ In addition to giving recommendations on label size and colour, and font type and size, the guidelines included a recommendation that the unit price should never be less than 50% the height of the selling price. However these guidelines are not binding on retailers and views have been expressed by the RNIB and Which? that these guidelines have not yet been implemented consistently by retailers.

<sup>88</sup> See Annex B.

However, no specific evidence has been given to us that an increase in the font size is likely to cause confusion. This is likely to depend on the context and the nature of how the information is presented.

- 5.36 Overall, from the information we have received from them, the CMA considers that retailers appear to be attempting to comply with the legibility requirements of the legislation but, as this is not prescriptive and in the absence of guidance and/or relevant case law, this can lead to differing interpretations.

#### *CMA and TSS review of legibility*

- 5.37 The CMA considers that the ‘unambiguous, easily identifiable and clearly legible’ provisions of the PMO mean that the unit price should be capable of being read in the normal course of a shopping trip. We consider it should take into account where the label is placed in proximity to where the consumer stands and should not confuse the consumer. It should be obvious that it is a unit price and not the weight of the product or the selling price.
- 5.38 The CMA has reviewed the example shelf edge labels provided by Which? for compliance with the PMO. In addition, we have considered a number of shelf edge labels provided by retailers and undertaken a number of store visits to view them *in situ*.
- 5.39 We have seen examples of where the font size of the unit price was arguably too small to be easily legible, where the presentation of the shelf edge label made it hard to read (for example where it was behind curved plastic), where the absence of text meant the unit price could be confused with the weight or selling price, and where the unit price was peripherally located on the labelling. These are examples where the CMA considers the requirement on legibility may not have been met. However, it is worth noting that this exercise was conducted on a small sample of shelf edge labels rather than as part of a systematic analysis, although we note that retailers tend to adopt a similar approach to displaying the unit price across a range of products.
- 5.40 To understand the extent to which there are likely to be different interpretations of the requirements, we asked a small group of TSS pricing experts and primary authority officers for their views on the meaning of the legibility requirements of the PMO. Some pointed to the fact that these terms are not defined in the legislation nor guidance but taken directly from the Directive and suggested that the legibility test should be one considering whether the average consumer<sup>89</sup> could read the label without difficulty or

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<sup>89</sup> The European Court of Justice interprets the average consumer as ‘reasonably well informed and reasonably observant and circumspect, taking into account social cultural and linguistic factors’.

wastage of time. However, we found that there was no consensus opinion about appropriate interpretations.

- 5.41 In addition, the CMA asked the group to provide their views on whether a sample of shelf edge labels provided by Which?, said to be used in stores in March 2015, comply with the PMO. Primary authority officers were also asked to comment on the examples for the retailer with whom they partner. Again, overall the group did not reach a unanimous view on whether the shelf edge labels comply with the legibility requirements. In particular, there were differences in view about the legibility of certain font sizes, the volume of information presented on small labels, the terminology used to present the unit price and whether both shelf edge label and larger point of sale information needed to show the unit price to avoid ambiguity. The majority of primary authority officers that reviewed the examples for the retailer they are affiliated with considered the information was sufficiently clear to comply with the PMO.
- 5.42 A caveat to these findings is that some enforcers commented on the difficulty in making an assessment of the example shelf edge labels because they were not displayed *in situ* and hence not a realistic in store experience. Factors such as height and the distance from the consumer to the label are likely to influence the assessment of legibility.
- 5.43 The CMA considers that this highlights the potential for different interpretations and confusion without guidance on the interpretation of the requirements. This may create difficulties for enforcers to assess whether or not there has been a breach of the law, and for retailers to comply.

#### *CMA review of online stores*

- 5.44 The CMA has undertaken a small-scale review of how grocery retailers that offer online shopping present unit prices,<sup>90</sup> focusing (for consistency) on the seven product types chosen for our qualitative focus group work (cheese, bananas, orange juice, mayonnaise, tuna, shower gel and toilet tissue). This review was conducted between 28 May and 5 June 2015. We considered how easy it was to compare the unit prices of similar products, whether retailers were using the correct measures for unit prices and also whether unit prices were being presented in accordance with the legibility requirements. We looked at a sample of products which included certain items on promotion.

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<sup>90</sup> Asda, Iceland, Morrisons, Ocado, Sainsbury's, Tesco, Waitrose.

- 5.45 To a larger extent than with in store presentation, we found that retailers have adopted similar formats for the presentation of their products online. The typical practice adopted by most retailers appears to be to present the selling price in bold, with the unit price either directly underneath or immediately to the side and in a smaller font size. However, we have identified a few variations in the presentation including the unit prices appearing in a lighter colour or, in one case, in the same size font as the selling price.
- 5.46 This assessment was undertaken using a very small sample of products and is by no means an authoritative assessment of online unit pricing. However, it appears the medium of online stores enables greater consistency and clarity for the presentation of unit prices as there is more space to display information than on small shelf edge labels. In a similar way, the specific presentation of products can be much more consistent than in stores, without variables such as shelf height, overlapping labelling and the use of separate shelf edge and other promotional labelling.

### ***Consistency of unit price information***

- 5.47 In the super-complaint, Which? expresses concern that inconsistent units for similar products make it difficult for consumers to compare prices and has suggested that this is partly a compliance issue and partly a legislative issue.<sup>91</sup> Which? has highlighted specific examples of inconsistent approaches to support its concerns including:
- Frozen prawns sold per kg; cooked prawns per 100g.
  - Semi-solid products such as ice-cream and mayonnaise can be sold by weight or volume.
  - Products such as snack bars and biscuits can be sold by weight or by 'per item'.
  - Fruit and vegetables can be sold by kilogram and by number under the relevant weights and measures legislation.

### ***Evidence from retailers***

- 5.48 Some retailers considered the PMO was sufficiently clear and straightforward to comply with. However, a number of other retailers and enforcers highlighted the potential for complexity and inconsistent information, particularly in relation to Schedule 1 to the PMO and determining how certain

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<sup>91</sup> Super-complaint, p15.

products should be defined. We were told that currently some products can fit under several categories. For example we were told about products such as pasta salad and whether it should be unit priced as pasta, per kilogram, or as 'fresh processed salad', per 100 grams, according to Schedule 1 of the PMO.

- 5.49 In addition, as identified by Which?, the treatment of semi-solid products such as mayonnaise was a frequently-cited example of potential confusion as to whether it should be unit priced by weight or by volume. Several retailers have told us that they tend to adopt the measurement used by the manufacturer of the leading brand. However, this is not always consistent as some provide only weight information, others provide volume and some provide both. We understand that there have been some steps taken to bring greater standardisation by manufacturers and moves towards measuring semi-solid products by weight, although this does not appear to have been universally adopted.
- 5.50 We have been told that following the list in Schedule 1 to the letter can be misleading as it is not sufficiently flexible to cater for innovation in products. An example given to us was concentrated washing detergent which may be cheaper per wash than normal detergent but, when unit priced by volume or weight may appear worse value. It was argued that a requirement to give a unit price per wash was more likely to be meaningful for consumers. In addition, some retailers have told us that the list leaves ambiguity as new products are introduced and that there is consequently inconsistency across retailers. No specific evidence of this was provided, although we recognise that the detailed category-specific nature of the regulations may be less likely to be future-proofed for new types of products.
- 5.51 We have heard that the PMO is not the only obstacle facing retailers in creating consistency. They must also comply with the Weights and Measures (Packaged Goods) Regulations 2006 and other food regulations<sup>92</sup> which are said to create inconsistency by specifying when and/or how products should be weight marked. We understand that there are particular difficulties in respect of fruit and vegetable produce. For example, some retailers sell fruit on a per item basis and it has been said that if they were required to give a per kilogram price consumers may not know the actual cost of items and be able to assess affordability until they get to the till. Conversely, we are aware that one retailer trialled a new method of unit pricing loose fruit and vegetables previously sold by weight by including a typical price per fruit. However, we have been told that, due to fluctuations in size and weight, it was

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<sup>92</sup> For example, The Weights and Measures Act 1963 (Cheese, Fish, Fresh Fruits and Vegetables, Meat and Poultry) Order 1984 as amended by the Weights and Measures (Food) (Amendment) Regulations 2014.

not possible to accurately maintain the average price per item and as such this initiative was discontinued in the face of concerns from enforcers about compliance with the CPRs.

- 5.52 We sought views from retailers about potential solutions to the apparent complexity. One stated option was to remove Schedule 1 of the PMO and unit price more consistently on a per kilogram or per litre measure. This would significantly simplify the arrangements and avoid the need to consider the correct interpretation of a large number of product categories. Some reservations have been expressed by retailers about moving uniformly to this approach as it is said this higher unit price would make the product appear to the consumer to be more expensive. Certain, more extreme, examples were given for high value products sold in small quantities where a per kilogram unit price would be thousands of pounds (saffron has been a particular example that has been cited by several retailers during the investigation).
- 5.53 No specific evidence was provided on this point. We note that other Member States have tended to adopt a simpler system based more on the standard kilogram or litre measures without apparent difficulty, a view confirmed by our discussions with grocery retailers that operate in other Member States. One retailer, anecdotally, suggested to us that UK consumers have different shopping habits to those in other Member States and are less accustomed to buying products by weight and that this explains the concern of following certain overseas examples.
- 5.54 To avoid this apparent increase in price, the option preferred by retailers is a move towards a unit price per 100 grams or 100 millilitres across the board. However, the prevailing view is that this is considered to go too far by way of a general derogation from the kilogram and litre measures required by the EU Directive.<sup>93</sup>
- 5.55 Whilst many retailers recognise the limitations of the unit pricing regime, many have pointed to the potential benefits from greater consistency that could be delivered through the work underway by BIS to consider these issues.<sup>94</sup>
- 5.56 In addition, we have been told this is not an issue specific to the UK. WELMEC, a European organisation made up of metrology experts from Member States that advises the European Commission,<sup>95</sup> is also producing

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<sup>93</sup> As per article 2(b) of the Directive deviations from the kilogram/litre standard is supposed to be for 'specific products' only.

<sup>94</sup> See Annex B.

<sup>95</sup> WELMEC is the European cooperation in the field of legal metrology. Its Members are representative national authorities responsible for legal metrology in European Union and European Free Trade Association (EFTA) Member States.

guidance to clarify certain ambiguities which are Europe-wide such as what constitutes a liquid or a semi-solid.

#### *CMA and TSS review of consistency*

- 5.57 As noted above, the CMA conducted a small scale assessment of a sample of shelf edge labels, both those provided by Which? and some examples in stores. The intention was to give an overall sense of whether there were different approaches being taken within and between retailers. Generally we found that retailers were presenting unit prices using the measures outlined in the legislation in a consistent manner. However, along the same lines as the assessment provided by Which?, we identified some examples where different measures were used for comparable products which may make it difficult for consumers to make comparisons. For example, unit prices for mayonnaise were given in grams for some brands and millilitres for others, whilst the unit prices for toilet rolls were presented per 100 sheets by some retailers and per roll by others. We also found it may be challenging for a consumer to compare the per-kilogram unit price of loose bananas versus the per-item unit price of pre-packed bananas. We consider that these difficulties may be exacerbated for consumers shopping online as they will have no way of handling or weighing loose produce as they may be able to in store.
- 5.58 Several of the TSS pricing experts that we engaged with identified that some of the retailers were using incorrect units for certain products in the examples considered. This included, for example, certain labels where the unit price was shown per 100 grams but where the TSS pricing expert considered the requirement under the PMO was to show it per kilogram. In addition, two primary authority officers identified that the incorrect unit had been used in the examples provided and one suggested that they would raise the matter directly with their supermarket partner.
- 5.59 Again, this exercise was conducted using a small number of example shelf edge labels and with a small number of TSS colleagues. However, it may illustrate the potential for complexity and, despite *ex ante* compliance processes within retailers, for errors and therefore the potential for confusion amongst consumers.

#### ***Use of unit pricing information in specific circumstances, in particular special offers***

- 5.60 Which? expressed concern that some retailers do not provide unit pricing information for products when they are part of a special offer, making it difficult for consumers to compare between similar products that are on offer and those that are not. Which? has pointed to the BIS initiative on unit pricing

and the commitment made by some retailers to include the unit price on promotions for volume promotions of the same item.<sup>96</sup> It suggested that, whilst there have been some improvements, some information is still missing on many offers.<sup>97</sup> Which? recognises that the ability of the retailer to provide the reduced unit price may depend on the nature of the special offer.

### *Evidence from retailers*

- 5.61 As part of our investigation we sought information from retailers about how they approach unit pricing for products on promotion and requested sight of internal policies and procedures.
- 5.62 Some retailers told us that during promotions they try to show the unit price based on the promotional price but are constrained by space on the shelf edge label and a concern about information overload for consumers. In particular, where the products on promotion are part of a multi-buy or bundle promotion, the unit price can vary depending on the products purchased and their respective weights. These types of promotions require more explanation than there is space for on the shelf edge label without risking creating confusion. Some retailers additionally have systems that only allow for one unit price to be displayed or printed. For online shopping we have been told that retailers will tend to show the unit price based on the promotion wherever possible but, as with in store display, face challenges with particular types of promotions.
- 5.63 Some internal guidance documents that we have seen suggest that the unit price should be based on the price without the application of any promotion. This would appear to be in accordance with the DTI guidance for the PMO. However, as discussed below, it may not be the most meaningful approach for the consumer.
- 5.64 In relation to 'extra free' products, some retailers suggested that clarification is needed as to whether unit price should be measured based on the original weight of the product or the weight including the 'extra free' amount. In some cases, we have been told that retailers use the chargeable amount of the product so consumers are not misled by short term promotions. This may also be driven by a need to ensure they do not breach the terms of the CPRs which prohibit describing a product as free when it is not<sup>98</sup> and a concern that amending the unit price to reflect the promotional price may do this. However,

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<sup>96</sup> See Annex B.

<sup>97</sup> Super-complaint, p18.

<sup>98</sup> The Consumer Protection from Unfair Trading Regulations 2008, Schedule 1 – Commercial practices which in all circumstances are considered unfair, paragraph 20.



again it may not give the consumer the most effective information on which to compare different products.

- 5.65 From the information we have gathered, there are clearly differences in approach between types of promotion and between retailers. The CMA understands the points made about the complexity of giving unit price information for certain types of products or promotions where this would be difficult to communicate succinctly given the number of potential variables. However, we consider there is the potential for greater consistency with certain types of simpler promotions.

#### *Potential complexity in the regulatory requirements*

- 5.66 There is a potentially complex interaction between the requirements of the PMO, its accompanying guidance and the CPRs in relation to the provision of unit price information for products on promotion. This includes both products that are subject to a general price reduction and volume promotions.
- 5.67 As noted above, where there is a general price reduction, Article 9 of the PMO does not expressly require the unit price to be given provided that information about the price reduction is prominently displayed, unambiguous, easily identifiable and clearly legible. The DTI guidance seems to suggest that the retailer may comply with their obligations under the PMO by providing the pre-reduction unit price, together with the details of the price reduction. Under the CPRs, it could be argued that only displaying the old unit price information may constitute a misleading action under regulation 5 (even though that may be envisioned by the PMO). Similarly, failing to display the new, lower price for a reduced item could be considered a misleading omission under regulation 6, as it has the potential to constitute material information which the average consumer needs to take an informed decision.
- 5.68 In general, we consider that displaying the new unit price after the application of any reduction is likely to be the most relevant for consumers for the purposes of price comparison and should be relatively straightforward to provide for simple price reductions. From our small-scale review of unit pricing examples, all but one retailer gave the unit price based on the promotional price for these types of general reductions. In our view, the new, lower unit price is 'material information' that the average consumer needs to make accurate value comparisons between that product and others. What is likely to be relevant to consumers in these circumstances is the final unit price of the product at the time of purchase.
- 5.69 In relation to more complex promotion types, such as volume promotions, the application of the PMO is less clear. Article 9 of the PMO is stated to relate to

‘general reductions’ where a higher price was previously available. The DTI guidance provides guidance on ‘promotions’ more generally, suggesting that, in the case of a volume promotion, it may be considered a breach of the PMO to fail to provide the pre-reduction, single, standard unit price. Under the CPRs, it could be argued that the consumer also needs the promotional unit price to be able to take an informed view on whether to purchase that product on promotion. Failure to provide the single item or the promotional unit price could be considered a misleading practice under the CPRs.

- 5.70 From our small-scale review of unit pricing examples (see paragraph 5.42), very few of the retailers provided a unit price for the volume promotion but gave the unit price for the single standard product (as recommended by the DTI guidance). Where volume promotions relate to products of the same size (eg ‘buy one, get one free’), it may be possible to provide the unit price based on the promotional price relatively simply. However we acknowledge that this is more difficult to do succinctly with certain types of promotions (eg meal deals or ‘buy three get the cheapest free’).
- 5.71 We have seen examples of retailers giving unit price information for both before and after the application of the promotion on their shelf edge labels. Where this is done clearly, this should provide useful information to help consumers compare products on promotion with those that are not or are subject to a different promotion. Where it is not clear which unit price is which, this has the potential to add confusion rather than clarity and could potentially equate to a breach of the legibility requirements under the PMO and breach the prohibitions on misleading omissions in the CPRs (as the information is provided in a manner which is unclear, unintelligible or ambiguous).<sup>99</sup>
- 5.72 Overall, therefore, we consider greater clarity can be given to how the provisions of the PMO and the CPRs, as well as the guidance, apply to products on different types of promotions. This could be achieved through a review of the PMO, particularly Article 9, and the accompanying guidance, to specifically reflect the more recent requirements of the CPRs. This work is necessary to reduce the variation in interpretation of the provisions, by TSS, primary authority officers and retailers.

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<sup>99</sup> CPRs, regulation 6(1)(c).

## ***Regulation and compliance***

### *Consumer complaints*

- 5.73 We have assessed consumer contact information from Citizens Advice and information provided by local authority TSS about unit pricing. In summary, unit pricing does not seem to be an issue which generates many complaints or enquiries to these bodies. TSS have told us that the only real issue that tends to produce complaints is consumers mistaking the selling price for the unit price. This may further suggest that attention should be given to the clarity and legibility requirements of the PMO in relation both to the unit price and the selling price.
- 5.74 The CMA has used digital engagement tools to search for relevant complaints made via social media. We have identified that unit pricing is an issue that does feature to some extent in this activity, with examples of people highlighting discrepancies in the unit of measurement (ie by weight/volume or kilogram/item) or errors in the unit price figures. As the use of social media has expanded, it appears to be an increasingly used mechanism for consumers to complain, rather than going to the more traditional channels of contacting Citizens Advice or their local authority TSS.
- 5.75 We have not received detailed evidence from retailers about the number of complaints they receive about unit pricing. Anecdotally, we understand they are comparatively few.

### *TSS enforcement*

- 5.76 TSS are enforcers of the PMO. Against the background of limited complaints and in operating an intelligence-led model, enforcing compliance with the PMO does not appear to be an area that is particularly prioritised. We have been told that where a retailer has an existing primary authority such issues were likely to be referred to them for consideration. Few of the primary authorities we have spoken with have specifically referred PMO-related issues to their retailer partners in the last five years and none have considered enforcement action for non-compliance with the PMO. Some primary authorities told us that they have assessed compliance with the PMO when reviewing their partner's internal policies and procedures but we understand that this will be dependent on the agreed remit of the primary authority relationship. We have also been told that the PMO, and more specifically Schedule 1, has been discussed several times at the Primary Authority Supermarkets Group so it does appear to be an issue of recurring interest.

- 5.77 Levels of knowledge and understanding of the PMO amongst TSS vary. Some we consulted with appeared to view it as complex and technical whilst others suggested it was straightforward. Given the limited engagement with retailers in this area it seems likely that enforcers are unable to develop and/or consolidate experience.
- 5.78 We have also heard differences in the extent to which primary authority officers routinely visit stores as part of their role. Some have indicated that they tend to conduct some inspection work linked to particular changes being made at the retailer. Others suggested they only rarely carry out site inspections. This may be a function of the prioritisation given to inspection work by the retailers and the extent to which it forms part of their agreements with their primary authorities. While retailers generally have *ex ante* processes in place to create unit price information, there is less focus on *ex post* monitoring that shelf edge labels provide the required information sufficiently clearly and accurately. Some suggested to us that reducing numbers of inspections could lead to a number of issues not being picked up and an overall decline in levels of understanding and compliance.

## Conclusions

- 5.79 In the super-complaint Which? has highlighted a number of issues relating to unit pricing. Over the course of our investigation we have observed many of the same complexities and inconsistencies in the arrangements. We therefore recognise the concerns Which? expressed and agree there is the potential for them to adversely affect consumers' ability to make meaningful comparisons between products.
- 5.80 The CMA considers that unit pricing is a potentially important tool for the consumer to ensure they get the best deal when comparing products. This is particularly the case where it is available for promotions. In addition, as highlighted in chapter 4, the data we commissioned suggested that larger packs do not always represent better value and clear and consistent unit pricing should help consumers assess the best option. Clear unit pricing information should also enable consumers to better recognise the impact of any change in pack size to the relative value of the product (discussed further in chapter 6). Therefore, it has the potential to mitigate, to some extent, the potential risk of consumer detriment arising from other issues raised in the super-complaint.
- 5.81 However, unit pricing should not be seen as a silver bullet solution to the issues raised. Our qualitative consumer research, while limited in scale, suggests there may be a number of consumers for whom unit pricing may never be a significant input to their purchasing decisions. Nevertheless, the

CMA considers that there is the potential to bring some improvements to the regime through greater clarity and guidance about how the regulations apply which should help to make unit pricing more useful for many consumers, and thereby potentially increase the number who use it.

- 5.82 In relation to the **legibility** of unit pricing information, the CMA notes that there is a range of different interpretations about how the requirements of the PMO should be implemented among retailers and enforcers. We recognise that BIS, in earlier initiatives on unit pricing, has to some extent sought to address issues of legibility by seeking commitments from retailers to improve the legibility of their shelf edge labels. However we note that some changes are yet to be implemented and concerns about legibility remain. In addition, innovation in labelling in the future, in particular any widespread roll out of electronic shelf edge labels, is likely to create new opportunities, but also new constraints, for legibility of information, depending on the solutions chosen (for example in relation to screen size).
- 5.83 **Recommendation 2:** The CMA recommends that BIS produces best practice guidelines on the legibility of unit pricing information, to provide greater clarity about the requirements of the PMO in this regard. This would help TSS and Primary Authorities assess compliance. We also recommend that retailers introduce any resulting changes to labelling as soon as practicable.
- 5.84 In relation to the **consistency** of unit pricing information, the CMA notes that the Expert Working Group is currently giving consideration to improving the consistency of information, with a particular focus on bringing greater clarity to the application of Schedule 1 of the PMO. We agree with the prevailing view that a wholesale move to unit price products in grams or millilitres may be problematic under the terms of the underlying European Directive. However, we note that there are difficulties in applying Schedule 1 consistently and that there are much simpler systems, with fewer derogations from the standard units that exist in other countries. We also note that some of the inconsistencies with unit pricing are not UK-specific and that consideration is being given at a European level to certain relevant issues (such as whether specific products should be measured as liquids or solids).
- 5.85 **Recommendation 3:** We recommend that BIS continues its review, with the Expert Working Group, of Schedule 1 to the PMO, but changes the focus to give particular consideration to:
- (a) Ways to clarify and simplify the requirements, considering evidence about the advantages and disadvantages of simpler and more future-proofed approaches, with fewer exceptions, used in other countries, and

- (b) What further research, building on the findings from our qualitative research, is needed into how consumers use unit prices to ensure the requirements help as many people as possible to use them in their decision-making.
- 5.86 In terms of the application of unit pricing to **promotions**, the CMA notes there is the potential for confusion and complexity in relation to the application of the PMO, its accompanying guidance and the CPRs. We also note that retailers take a range of approaches to the display of promotional unit prices. Consumers are often presented with a variety of products, often in conjunction with different applications of promotions and this makes decision making more complex. While delivering relevant and meaningful unit price information may be difficult for certain types of volume promotions, the CMA considers that further focus should be given to whether the requirements for simpler promotions can be clarified and whether the use of promotional unit prices could be more widespread.
- 5.87 **Recommendation 4:** To encourage a more consistent use of unit pricing for products on promotion, the CMA recommends that BIS considers reviewing and clarifying the legal requirements set out in Article 9 of the PMO, and the associated guidance. This should be done with particular reference to the requirements of the CPRs and the ongoing review of the PPG.
- 5.88 As discussed in chapter 4, we have found that retailers generally have appropriate *ex ante* systems in place to deliver compliance with the regulatory requirements. However, our investigation has identified there is the potential for errors to occur and for incorrect units of measurement to be used for unit pricing in store. Simplifying the requirements, as discussed above, should reduce the potential for error. In addition, retailers should consider whether the balance of *ex ante* and *ex post* controls is optimal to identify all potential problems and further improve their approaches to compliance. Confusion on the part of the consumer (and/or concerns about legibility) may not become apparent until the presentation of the product is considered in its in store context alongside other products.
- 5.89 We consider a review of the PMO and associated guidance is necessary before assessing whether enforcement action is required.
- 5.90 Finally, the qualitative research we commissioned suggests that improving the consistency and clarity of unit pricing may help a number of consumers. However, it will not help all consumers due to the apparently low current use of unit pricing. The CMA considers that this may indicate that consumer education is also needed to increase consumers' understanding and use of unit pricing. We are therefore publishing, alongside this response, high-level

consumer advice about the use of unit pricing. In combination with the points above about more consistent and meaningful presentation of unit price information, further work in the area of consumer advice has the potential to help a wider range of people to use unit pricing as an effective tool in their purchasing decisions.

- 5.91 **Recommendation 5:** The CMA recommends that Which? and other consumer representative organisations consider whether there is a further role they can play in consumer education on the effective use of unit prices. Further, following any further work by BIS on our above recommendations, there will be a further need to educate consumers on any changes to unit pricing.

## 6. Super-complaint issue 3: pack sizes

- 6.1 The third pricing practice identified by Which? in the super-complaint relates to ‘reductions in pack sizes without any corresponding price change’. Which? states that its research has repeatedly identified this as an issue ‘across the sector’. This chapter responds to these concerns and sets out the issues raised, our assessment of them and summarises the conclusions reached.

### The issue

#### *The super-complaint*

- 6.2 Which? states that pack size changes can mask price rises and make it difficult for consumers to assess the best value product, given that consumers are not generally informed of the size reduction and may assume the product they are buying is the same size as it was the last time they bought it.
- 6.3 Which? states that problems with unit pricing, such as inconsistent units or missing information on products on special offer, can make it difficult to spot pack size changes and identify the cheapest option.
- 6.4 When describing how, in its view, this issue should be addressed, Which? states as follows: ‘While it is legitimate for manufacturers to change the size of their products, we do not consider it fair that they do this without informing consumers when the price is not consequently reduced. This is a way of passing on price increases without consumers necessarily knowing. This practice adds to the argument for clear, consistent unit pricing.’<sup>100</sup>
- 6.5 Which? referred us to three of its recent campaigns in relation to pack size changes:
- In April 2013, Which? ran a campaign entitled ‘Products shrink, prices don’t’. Which? gathered examples from its members before conducting a review of data from mySupermarket (for the period November 2011 to October 2012) to find details and to identify its own examples. The campaign featured 12 branded products that were said to have reduced size (by between 6 and 25%) whilst the price stayed the same or increased.
  - In March 2014, Which? ran a campaign entitled ‘10 pricing tactics to watch out for in supermarkets’ which identified three further examples of

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<sup>100</sup> Super-complaint, p21.



branded products that had shrunk in size whilst the price stayed the same or increased. It also provided two examples of supermarket own-brand soft fruit products that had shrunk in size (rather than increased in price) as the fruit moved out of season.

- In April 2015, Which? ran a further campaign in relation to shrinking pack sizes, again using mySupermarket data to investigate products that had been highlighted by Which? members and to explore examples of its own (from both 2013 and 2014). This identified a further 13 examples of products that had shrunk in size between 6% and 20%. Five of these 13 examples are highlighted in the Which? super-complaint.<sup>101</sup>

6.6 We have also had regard to particular supporting survey work referred to by Which? in its campaign material (which is considered further at paragraphs 6.36 and 6.37 below) as well as various 'Which? Conversation' webpages<sup>102</sup> relating to the issue of pack size changes. Consumers have posted various comments on these webpages highlighting examples of pack size changes in supermarkets.

### ***Economic framework***

6.7 Which? highlights in the super-complaint that consumers are likely to be less sensitive to changes in package size than changes in price. This is supported to some extent by our own economic research, which suggests that pack size is a less prominent attribute than price, and that consumers may not respond as promptly to effective price increases resulting from pack size changes as to those resulting from nominal price increases. As a result, consumers may pay higher effective prices in circumstances where a pack size changes than if the nominal selling price was increased.

6.8 However, the incentives firms have to adjust pack sizes, rather than prices, may be reduced because the costs of adjusting pack size may be significant. For example, this may be because a change in pack size requires a change in the production process. Additionally, any negative effects of pack size may be partially offset if product size is a salient product characteristic, such that consumers are more likely to notice when the effective price of the product increases as a result of a change in product size. This is more likely to be the case where clear, consistent and usable information is presented to the consumer in relation to the product size and the unit price of the product.

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<sup>101</sup> Which? gave a further example of a pack size change in a press release issued on 20 May 2015.

<sup>102</sup> For example, see ['When pack sizes shrink why don't their prices?'](#) and ['Products are shrinking – so why aren't prices?'](#).

- 6.9 Finally, there may be features associated with changes in the size of a product that may provide benefits to consumers. For example, a product size change may be a necessary part of introducing a new feature to a product, such as the introduction of resealable packaging or a reformulation or an increase in the concentration level of the product, or adapting to the demands of society (for example, where there is demand for smaller products to avoid waste, or to reflect more frequent, smaller, convenience purchases in certain households).
- 6.10 We have set out in more detail our review of the relevant economic literature and research relating to product re-sizing at Annex C.

### ***Legal framework***

- 6.11 The relevant framework for our legal assessment of this issue is essentially the same as for the broader issue of potentially misleading pricing and promotions set out at paragraphs 4.32 to 4.33 above. Thus, we have considered in particular whether a pack size reduction that is not accompanied by a corresponding price decrease could amount to a misleading action for the purposes of regulation 5 of the CPRs or a misleading omission for the purposes of regulation 6 of the CPRs. We have considered, in particular, the requirements of regulation 6(3)(a) of the CPRs as far as the communication of material information which the average consumer needs, according to the context, to take an informed decision. We have also taken account of the provisions of the FICR (see paragraph 3.7).
- 6.12 The PPG does not make any specific recommendations to traders in relation to the practice of reducing pack sizes without making a corresponding price decrease.

### **Evidence and analysis**

- 6.13 The CMA has explored this issue with retailers and manufacturers to understand the key drivers of pack size changes and any observable trends.
- 6.14 In light of the economic and legal framework set out above, the CMA has considered the information that is communicated to consumers in circumstances where a pack size change leads to an effective price increase, and in particular whether:
- There is potential for consumer detriment where material information is not communicated, and

- A misleading commercial practice exists for the purposes of the CPRs and/or there may be a breach of the FICR in connection with the information presented to consumers concerning a change in pack size.

### ***Key drivers and observable trends***

6.15 In our discussions with retailers and manufacturers, there were some distinctions highlighted between branded and own-brand goods, and we have drawn these out below.

#### ***Branded goods***

6.16 Retailers told us that the incidence of pack size changes varies considerably depending on the product category and supplier. Those that gave examples of areas that had seen pack size reductions referred to the following categories of products: biscuits, confectionery, cheese, crisps and snacks, soft drinks and breakfast cereals.

6.17 Several retailers told us that it was unusual to see a change in pack size more frequently than once a year, in particular because manufacturers typically adjust prices on an annual basis. Another told us that the recent trend was actually towards increasing the size of products, to give consumers better value for money. That was supported by the views expressed by another retailer, citing the recent reduction in commodity prices and improved strength of sterling against the euro.

6.18 Most retailers claimed to have no or little influence over reductions in size of branded products, and directed us to manufacturers. Some said that they would try to negotiate with manufacturers to prevent an effective price increase, but highlighted that ultimately the wholesale price was a matter for the manufacturer, and a commercial decision would then need to be taken whether to maintain the same selling price following the pack size change. Another told us that they would treat a pack size reduction as they would the introduction of a new product, and would try to negotiate the best value for the new product.

6.19 Manufacturers cited a wide array of reasons for reductions in pack sizes, highlighting in particular constant cycles of product innovation and reformulation which, whilst it might bring about a change in product size, would lead to a superior product for consumers. We were told that the frequency and extent of pack size changes varies considerably between product categories and that it was not safe to assume that there was a general downwards trend in pack sizing. The costs of re-sizing a product could potentially offset any saving from decreasing the contents. Further,

manufacturers highlighted changing concentration levels (and ‘compaction’ initiatives, such as in relation to deodorant cans), sustainability, reduced wastage, anti-obesity measures, legislative requirements, permitted ingredients, and changes in price to reflect revised brand stratification (ie where the manufacturer seeks to differentiate variants of a particular product according to the consumer perceptions that they hope to foster).

- 6.20 Maintaining a certain price point was highlighted as particularly important, and manufacturers accepted that sensitivity to price meant that a pack size could reduce in order to allow the manufacturer to meet a particular wholesale price point. However, manufacturers said they are conscious of the risks of losing consumers’ trust, and would revisit decisions if data revealed that the pack resizing was negatively impacting consumer purchases. The manufacturers that we spoke to also had sophisticated systems for monitoring consumer complaints, whether communicated via retailers or directly through observations of social media.
- 6.21 One manufacturer that we spoke to accepted that, in the majority of cases, the retailer would not resist a pack size change. However, that manufacturer did point to examples of products that had been delisted by a retailer following a reduction in pack size.

#### *Retailers’ own-brand goods*

- 6.22 The extent of particular retailers’ range of own-brand goods varies considerably, with some offering an extensive range across most categories of grocery products and others offering a much more limited range. Most retailers told us that pack size changes for own-brand goods were less prevalent than for branded goods. Some said that they would follow trends in the sizes of branded products, others suggested that the costs of changing product sizes (including procuring new packaging, adjusting filling processes and machinery etc) were likely to be significant and would therefore outweigh any savings from making the product smaller.
- 6.23 Reasons presented by retailers for reducing the size of own-brand goods included increased production costs, seasonal scarcity of a particular crop, a change of supplier who uses a different pack size, new product development, health and nutritional concerns and environmental considerations. More than one retailer told us that they would adjust the pack sizes of seasonal goods as the product in question moved through the season, to ensure that the product remained affordable, or so that it could continue to be included in a volume promotion.

- 6.24 One retailer told us that they conducted market research before they reduced a pack size, and that occasionally that research would highlight that consumers actually prefer a smaller pack size (for example due to the perishability of contents). Another told us that they would seek feedback and insight from suppliers to determine whether size was a relevant factor in consumers' decisions about whether or not to buy the product in question. Two retailers told us that they would reduce the price proportionately if they reduced the pack size of an own-brand product.
- 6.25 It was also highlighted to us that the same manufacturer may supply a number (or all) of the major retailers with a particular line of own-brand products. Accordingly, to the extent that the manufacturer supplies different retailers with identically sized packs, the manufacturer can make efficiency and therefore cost savings (for example, by using the same machinery, packaging and processes across the supply chain and thus lowering manufacturing costs). This could therefore additionally act as a driver towards standard product sizes for similar own-brand goods across different retailers.

### *Data*

- 6.26 We considered whether it was appropriate or necessary to gather more granular data in relation to the prevalence of pack size changes (and corresponding price movements) either from retailers or directly from other data sources. Although we explored this issue with retailers and with third party data providers,<sup>103</sup> our examination of the drivers of pack size changes highlighted a number of factors that, in our view, are likely to constrain the frequency and magnitude of pack size reductions. Further, our legal assessment below allowed us to reach a view on the key question of the appropriate level of information that should be communicated to consumers in connection with pack size changes, such that it was not necessary for us to gather further data on this issue.

### *The CMA's analysis*

- 6.27 The various drivers identified above reveal a number of complex considerations that will underpin a decision to reduce the size of a particular product. In particular, although the desire to maintain certain key price points has been highlighted, it will not necessarily be the case that an increase in the

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<sup>103</sup> Retailers told us that gathering data on this issue was a complex task, in particular due to the need to take account of the overlap between the discontinuation of a larger product and the introduction of a smaller product (which could be part of a broader revision of a manufacturer's product line), as both can remain on sale together for a period. Further, pack size changes could (as noted above) be accompanied by other changes of the features of the particular product, and these features would not be adequately reflected by looking at data at a high level.

effective price of a product is driven by the desire to secure a higher cost price, but may reflect a number of other relevant factors. Further, it should be emphasised that, within the boundaries of competition law, manufacturers enjoy total commercial freedom in relation to decisions around the size and wholesale price of their products. We have seen the costs of resizing a product and a fear of lost sales volumes (if customers perceive poor value for money) will often act as a 'brake' on manufacturers when considering whether to reduce the size of a product.

### ***Information communicated to the consumer when pack sizes change***

- 6.28 As far as the information that is communicated to consumers is concerned, none of the retailers that we spoke to specifically highlight pack size decreases to consumers, irrespective of whether they are accompanied by a price change. However, the shelf edge labelling is updated to refer to the new pack size and any adjusted price. None of the retailers that we spoke with considered that the existing legislation and guidance required them to present additional information to consumers in connection with a pack size decrease that did not lead to a corresponding price decrease, and did not support a further obligation to do so.
- 6.29 Retailers noted that more information might be communicated to consumers, usually by manufacturers on the product packaging, if the pack size increased.
- 6.30 Like the retailers that we spoke with, manufacturers did not agree with Which?'s proposal that there should be a duty to highlight to consumers that a pack size had decreased whilst the price maintained the same. The manufacturers felt that consumers were already presented with sufficient information to take this matter into account. Further, given the various possible underlying reasons for a reduction in pack size, including a product reformulation or change in concentration level, it would be difficult to present appropriate wording that would fairly describe the change to the product.
- 6.31 As far as the communication of unit pricing information is concerned, retailers told us that (in those stores in which the PMO requires a unit price to be displayed) shelf edge unit pricing information would automatically be updated to reflect a change in pack size. We also note our broader conclusions and recommendations in Chapter 5 above in relation to this issue. The presentation of clear and consistent unit pricing has the potential to help consumers take account of product re-sizing in their transactional decisions, although we acknowledge that our focus group work suggests that currently only a minority of consumers are actively using unit pricing in their decision making.

### ***Potential for consumer detriment***

- 6.32 We considered whether there was potential for consumer detriment to arise in the context of the economic framework set out at paragraphs 6.7 to 6.9 above (and at Annex C) and in light of the evidence gathered during our investigation.
- 6.33 In this context, we considered the incidence of complaints. Our review of the Citizens Advice database over a five month period highlighted a negligible number of complaints in relation to pack sizes. However, we are conscious that a low number of complaints may reflect the lower sensitivity of consumers to pack size changes than price increases.
- 6.34 We sought views directly from TSOs and from supermarkets' primary authorities in relation to this issue. None of the primary authorities that responded to us highlighted any concerns in relation to pack size reductions, with one describing this as part of 'normal commercial practice'. Of the various TSOs that we contacted, only one considered that the practice of reducing pack sizes had the potential to be misleading, particularly if the packaging remained the same size whilst its contents shrank.
- 6.35 The CMA has used digital engagement tools to search for relevant complaints made via social media. This revealed a number of social media posts related to shrinking pack sizes, and included various messages expressing dissatisfaction about a particular change to the size of a product, frequently accompanied by a photo of the product in question. This echoed some of the themes that were voiced on the 'Which? Conversation' webpages and other online forums.
- 6.36 We also considered the surveys referred to by Which? in its campaign material and the extent to which these highlighted possible consumer detriment:
- Which?'s April 2013 campaign described at paragraph 6.5 above referred to the results of a January 2013 survey of 1,257 Which? members in relation to shrinking products. According to Which? the survey found that 58% of participants said that they would prefer to see a price rise rather than a decrease in pack size; 37% were said to prefer that the pack size decreased, but only if they were told, and 3% were said to be happy for the pack size to shrink and not to be told about it.
  - Which?'s April 2015 campaign, also described at paragraph 6.5 above, cites an online survey of 2,076 adults undertaken by Populus on behalf of Which?. Respondents were asked four questions about pack size changes, in particular whether they had observed pack size changes

(87% expressed strong or slight agreement), whether they would 'be annoyed' if they found that a product had shrunk but the price had remained the same (91% expressed strong or slight agreement), whether manufacturers should tell you if their products shrank but the price stayed the same (88% expressed strong or slight agreement), and whether manufacturers would be expected to reduce the price of a product that had decreased in size (86% expressed strong or slight agreement).

- 6.37 This survey material appears to support the views expressed in social media and other online forums that consumers dislike the practice of increasing effective prices through pack size decreases, and that to some extent a more straightforward approach by manufacturers and retailers towards such price changes would be valued. However, the survey material does not suggest that consumers had been misled by pack size changes in their transactional decisions; indeed the more recent survey highlights a high level of awareness of the issue.
- 6.38 Looking beyond the impact on consumers, some retailers expressed frustration about pack size reductions with no corresponding cost price decrease, and that this placed them in the unenviable position of having to present a higher effective price to consumers, or to consider whether to sacrifice their own margin to maintain the retail price. One retailer told us that the strategy of reducing pack sizes was risky, as the manufacturer was likely to see a fall in volumes sold to the extent that consumers felt that they were obtaining less value for money. It gave the example of a soft drink product that had shrunk by 12.5% and weekly sales had reduced by 64% as a consequence. Another told us they would actively monitor the impact of changes to a pack size, and would provide feedback to the manufacturer, asking them to consider a pack size increase or decreased price.
- 6.39 However, and although there is possibly more that particular manufacturers can do to secure the trust of their customers, the various drivers identified by retailers and manufacturers for pack size changes are understandable and reflect a range of valid commercial considerations, rather than any underlying motive to systematically increase prices. Nor have we encountered evidence to suggest that consumers' lower sensitivity to pack size changes is leading to them suffering harm in the form of significantly higher prices.
- 6.40 Further, we consider that potential for harm is mitigated by a number of factors, in particular: (i) the fact that pack size changes are not exclusively concerned with bringing about an effective price increase, but frequently reflect other factors, including product reformulation, varied concentration levels, or other environmental or dietary factors; (ii) the competition and wide extent of choice available in almost all product categories, which acts as a



further ‘brake’ on pack re-sizing; (iii) the self-policing nature of pack re-sizing, in which respective manufacturers and retailers are acutely aware of the potential for consumers to switch away from a particular product if they perceive less value for money; and (iv) the costs involved in changing pack sizes are likely to limit the frequency with which they occur.

### **Legal assessment**

- 6.41 We have considered whether a reduction in a pack size that is not accompanied by a decrease in price could amount to a breach of the CPRs and/or the FICR and, if so, in which circumstances. We have also considered whether any requirement (whether on retailers or manufacturers) to provide additional information to highlight an effective price increase (through a reduction in pack size that is not accompanied by a price decrease) would itself be compatible with the relevant legislation.
- 6.42 In the particular context of changes to the size of a product, a misleading commercial practice will arise if (i) material information is not provided or (ii) where false information is provided to the consumer in relation to the main characteristics of the product including in relation to its quantity, price or a specific price advantage, or (iii) the product or its overall presentation in any way deceives or is likely to deceive the average consumer in relation to those matters, such that it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.
- 6.43 The ‘average consumer’ for these purposes is taken to be ‘reasonably well informed and reasonably observant and circumspect’.<sup>104</sup> In particular, they are likely to be regarded by the courts to be sceptical about certain claims made on product packaging.<sup>105</sup>
- 6.44 Our understanding from the evidence presented by retailers and manufacturers is that, when a pack size changes, the revised volume/weight and any revised price, is immediately communicated to the consumer both on the product itself (as far as the volume/weight is concerned) and the retailer’s shelf edge label. A revised unit price will also be provided in those stores in which the PMO requires a unit price to be displayed.
- 6.45 In our view, in circumstances where information about the price and volume/weight of the product is communicated clearly and accurately to the

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<sup>104</sup> C-210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657, paragraph 31.

<sup>105</sup> For example, the courts have found that the average consumer will be taken not to believe that the size of a promotional marking on a package actually corresponds to the promotional increase in the size of that product (Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH* [1995] ECR I-01923, para 24). In this case, the wrapper was labelled ‘+10%’.

consumer, a pack size change will not amount to a misleading action or omission under the CPRs, in the sense that the consumer is not provided with false information or otherwise deceived and they have been provided with the information which the average consumer needs, in this context, to take an informed transactional decision. As a result, we do not consider that a reduction in pack size that is not accompanied by a notice to the consumer informing them of the effective price increase would amount to a misleading omission under regulation 6 of the CPRs. This is unlikely, in our view, to be information that the average consumer would need in order to take an informed transactional decision, particularly in light of the other key information which is already being provided to the consumer in these circumstances. The consumer is further equipped (in stores in which the PMO requires a unit price to be displayed) with the unit price of the product in question, which provides a further metric to guide the transactional decision.<sup>106</sup>

- 6.46 There may be particular circumstances in which a pack size change will have a greater potential to mislead consumers, for example where the pack size is 'masked' to some extent. This might occur where a manufacturer or retailer makes the revised volume/weight and price difficult to identify, where the size of the packaging increases despite a decrease in the contents, or where a re-sized product is included in a form of promotional activity in relation to which it is not possible to state a unit price (such that the consumer cannot use unit pricing to identify an effective price increase). It may also be a misleading commercial practice to continue to label a product as giving consumers, for example, 'great value' or 'same low price' following a pack size reduction, as these statements are no longer true. In a less extreme example, an online shopper repeatedly purchasing the same items from a pre-populated basket (based on earlier shopping preferences) might not be made aware if one of the products in the basket has been substituted for a smaller item. Although we have not encountered particular examples of this behaviour during our investigation, we would expect manufacturers and retailers to carefully consider the information made available to consumers in these circumstances. Further, the CPRs also require careful scrutiny to be applied in relation to products that a trader could reasonably expect vulnerable groups, such as children, to purchase.

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<sup>106</sup> This accords with the view expressed by the UK rapporteur to a 2012 study conducted by the European Parliament's Directorate General for Internal Policies in relation to misleading packaging practices: '...it is tentatively submitted that the English courts would first query whether the average British consumer would be misled if the actual quantity sold and price per unit of measurement were correctly indicated. This approach would seem to be consistent with the ECJ's case-law as a reasonably well-informed, observant and circumspect British consumer may be expected to notice an increase in the price per unit of measurement.' See European Parliament (2012), [Misleading packaging practices](#).

- 6.47 More broadly, however, any requirement on retailers or manufacturers to include a specific notification to highlight an effective price increase through pack re-sizing is likely to go beyond the requirements of the CPRs.

## Conclusions

- 6.48 Our work on this issue has highlighted a number of factors that may influence a decision to resize a product. Although the importance of maintaining a particular 'price point' for the consumer has been emphasised, pack size reductions do not stem exclusively from a desire to increase the effective price of a product, but frequently reflect a number of other considerations, including environmental and health factors alongside product innovation.
- 6.49 Although consumers are likely to be less sensitive to pack size changes than price changes, we found that this practice was likely to be constrained both by the costs involved in re-sizing a product and by the risk of lost sales if consumers perceive poor value for money and switch away to another product. Further, the factors above highlight that pack resizing can also occur for a number of reasons that bring benefits to consumers.
- 6.50 Most significantly, we have concluded that the information that is currently being presented to consumers when pack sizes change is likely to be sufficient, taking account of the relevant legislative requirements.
- 6.51 Manufacturers and retailers should continue to be alert to particular circumstances in which pack size changes could potentially lead to consumer harm, notably where the pack size change is 'masked' in some way, for example by:
- Making the revised quantity and price difficult to identify, or making a false claim as to a particular price advantage following a reduction in pack size
  - Failing to notify the consumer where an identical group of products are routinely purchased as part of an online shop, and one or more of those products decreases in size, or
  - Using promotional activity immediately following a pack re-sizing in such a way that prevents the consumer from being able to use unit pricing effectively to identify an effective price increase.
- 6.52 Although not displayed in all cases, in particular in smaller stores where the PMO does not require a unit price to be displayed, a clear unit price potentially affords consumers with a helpful tool when making comparative decisions both before, and following, a pack size change. Our

recommendations above in connection with unit pricing thus have the potential to improve consumers' ability to take account of pack size changes in their decision making.

## 7. Super-complaint issue 4: price-matching

- 7.1 This chapter responds to the concerns raised by Which? in the super-complaint that complex price-matching schemes operated by particular retailers may falsely lead consumers to believe they have the best deal or do not need to shop around. It sets out the issues raised, our assessment of them, summarises the conclusions reached, and makes recommendations for possible future work.

### The issue

#### *The super-complaint*

- 7.2 In the super-complaint Which? expresses concern about the use of brand and price match schemes.<sup>107</sup> A price-matching scheme is when a retailer promises to match or to beat the prices offered by at least one competitor on a significant range of products. The specific areas of concern Which? identified, based on their analysis from November 2013, were the following:
- Retailers set their own rules for what products are and are not compared in price match schemes, making it hard for consumers to tell which is cheapest overall.
  - The rules for comparisons are different for each retailer, for example whether own-brand products are included and which items are comparable with each other. Which? indicates that some retailers only include branded products while others also include own-brand products.
  - Some price match schemes do not enable consumers to check how the price match had been calculated to verify it is correct.
  - Products can be excluded due to different pack sizes and this is not always obvious to the consumer.
  - Products are excluded for other reasons and there are numerous errors.
- 7.3 Which? asked that the CMA investigate whether the price-matching practices operated by retailers benefit consumers overall or whether they result in reduced shopping around based on potentially misleading information.

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<sup>107</sup> Super-complaint, p21.

### ***Information provided by Which?***

- 7.4 The issues raised in the super-complaint are drawn from previous analysis undertaken by Which?. In November 2013 Which? published an article detailing its analysis of price match schemes.<sup>108</sup> In it they referred to analysis of how the schemes operate based on a sample of shopping trips and the views of consumers based on a survey they conducted.
- 7.5 In terms of how the schemes operate, Which? referenced their examination of 59 different shopping trips at Sainsbury's, Tesco and Asda in which they found the supermarket running the price match scheme was often shown as the cheapest (in half the cases for Sainsbury's and Tesco and in 17 of 19 shopping trips at Asda).<sup>109</sup>
- 7.6 In addition, in both the November 2013 article and the super-complaint, Which? highlights specific products that were excluded from price match schemes, for example because the package sizes were different. The super-complaint points to certain other schemes which allow for a 10% difference in package sizes.
- 7.7 Further, the super-complaint lists certain products which were allegedly excluded from specific price match schemes for reasons that Which? were unable to identify.
- 7.8 In terms of the views of consumers, Which? referred to a survey of 1,900 shoppers about price match schemes. It reported that the majority thought they knew how they operated and that they were a good thing. In addition, they found that some consumers rarely or never redeem vouchers and that this tended to be because they expired before they could be used.
- 7.9 While the survey of consumers referred to in the November 2013 article provides high-level information about whether people think they understood price match schemes or redeemed their vouchers, it did not provide particular evidence of the role played by price-matching in consumers' decision making.

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<sup>108</sup> Which? magazine (November 2013), *Who's the cheapest?*

<sup>109</sup> It is worth noting that the sample size of 59 shopping trips is small, different baskets were purchased on each occasion and the purchases were made on different days. Therefore, the findings may not be representative. The fact that Sainsbury's and Tesco shopping trips were cheaper only half the time may not be unexpected, nor that the majority of shopping trips at Asda (generally regarded as the cheaper of the four major supermarkets and whose price match scheme aims to beat competitor prices by 10%) were cheaper.

## ***Economic framework***

### *Theories of harm*

- 7.10 Below the CMA outlines some potential theories of harm and efficiencies that may arise due to price-matching schemes and how they may be used to facilitate price discrimination.<sup>110</sup> In relation to all of these points it is important to note that, for any of them to hold, price-matching schemes must play an important role in consumers' choice of retailer. Therefore, as outlined below, the CMA sought evidence in relation to whether price-matching schemes are a significant factor in consumers' choice of retailer.
- 7.11 Having considered the super-complaint and other relevant literature,<sup>111</sup> we have identified two broad theories of harm relevant to the issues raised:
- **Impact on consumer purchasing:** consumers may have a false impression that the price-matching scheme will ensure that the consumer receives the best price. This softens consumers' incentives to shop around and may result in them paying more than they otherwise would have done.
  - **Impact on competition:** competitors know that any reduction in price will be matched by a seller with a price-matching scheme. Therefore, they have a reduced incentive to lower their prices as this will lead to a loss of revenue on existing customers but attract few, if any, new customers. Consequently, a price-matching scheme can soften competition in the market, again meaning that consumers end up paying higher prices than they otherwise would have done.
- 7.12 There are a number of reasons why price-matching schemes may create a false impression that they will ensure that consumers receive the lowest price. First, consumers may have insufficient information about the coverage of the scheme and think it covers more products and/or compares to more retailers than it does in practice. Second, if the scheme imposes 'hassle costs' to benefit from the scheme (for example, requiring consumers to check their price comparison later or providing vouchers that they must remember to redeem rather than an automatic price adjustment) then consumers expect to benefit from the scheme but then do not do so in practice.

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<sup>110</sup> For more detail see Annex C.

<sup>111</sup> In particular, LEAR, commissioned by the OFT (2012), [Can 'Fair' Prices Be Unfair? A Review of Price Relationship Agreements](#).

- 7.13 The economic literature suggests that there are two important factors that affect the likelihood that price-matching schemes will soften competition. First, the presence of ‘hassle costs’ may encourage consumers to purchase directly from the cheapest company rather than relying on the scheme, thereby giving incentives to cut prices. Conversely, the presence of switching costs provides incentives to rely on the price-matching scheme rather than incurring the costs of moving to a different company.

#### *Potential for efficiencies and price discrimination*

- 7.14 It is also important to note that price-matching schemes can be used as an efficient signalling device for consumers to highlight where retailers have low prices.<sup>112</sup> It may also enable price discrimination, particularly where a price-matching scheme is not automatic, enabling retailers to charge lower prices to consumers for whom price is a significant factor in their decision making and higher prices for those for whom it is less significant. Such price discrimination has the potential to be beneficial or detrimental to consumer welfare, depending on the circumstances. Further detail on these points is set out in Annex C.

#### ***Legal and regulatory framework***

- 7.15 The main regulatory obligations relevant to the operation of price match schemes are set out in the CPRs. In addition, the terms and conditions of the scheme are required to comply with the UTCCRs and comparative advertising between retailers must comply with the BPRs. In addition, self-regulation plays an important role in this area. The ASA oversees and enforces compliance with Advertising Codes for broadcast and non-broadcast advertising, including in relation to comparative advertising.
- 7.16 As noted above, the CPRs prohibit practices that are unfair, in particular in relation to misleading actions or omissions which would impair the ability of the average consumer to make an informed decision and cause them to take a transactional decision that they would not have taken otherwise. In relation to price match schemes, there are a number of potential transactional decisions which consumers take including which retailer they choose to shop

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<sup>112</sup> This could be because the retailer has a low cost base or the retailer is generally of higher quality but wants to signal that this does not come at the expense of higher prices on equivalent products.



at,<sup>113</sup> as well as the choice of specific products to buy, on the basis of whether or not they are included in price-matching arrangements.

- 7.17 In addition, the terms and conditions of the price match schemes are covered by the UTCCRs which require that consumer contract terms are fair, use clear language and do not create a significant imbalance in the parties' rights and obligations under the contract.

## **Evidence and analysis**

- 7.18 We have sought views from retailers about the operation of their price match schemes, including the rationale for providing them, how they operate in practice, how retailers ensure their consumers understand how the schemes work and the effect they have had. We have also sought evidence about the impact that price match schemes may have on consumers' purchasing decisions. To support this, we sought information about consumer complaints, whether to retailers, Citizens Advice or through activity on social media. We commissioned a survey of consumers in relation to their engagement with price match schemes and the role they may play in their decision making. We also undertook a high-level review of the information provided about price match schemes and their terms and conditions against the requirements of the CPRs and UTCCRs.

### ***Context: the rationale for price match schemes***

- 7.19 In recent years a number of retailers have introduced a type of price-matching scheme. These have been used in a number of advertising campaigns to signal to consumers that the retailer in question will price its products in line with certain competitors.
- 7.20 During our investigation, Asda, Morrison's, Ocado, Sainsbury's, Tesco, and Waitrose all told us they operate some form of price match scheme. There are two broad types of scheme highlighted to us. Some operate by simply highlighting to consumers (for example in advertising, on the retailer's website or by signage in stores) that the retailer has committed to match the price of competitors. Others schemes go further and will reimburse the consumer, for example through money-off vouchers, if their shopping trip would have been cheaper elsewhere. In addition, some can be considered a price-matching guarantee, whereby the retailer undertakes simply to match prices, while others can be considered a price-beating guarantee which commits to deliver

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<sup>113</sup> There is relevant case law and guidance relating to the Unfair Commercial Practices Directive that the decision to enter a shop can be a transactional decision. See Court of Justice (19 December 2013), [Case C-281/12](#), paragraph 36.

prices a certain amount cheaper than matched competitors. Some other retailers, while not matching the prices of competitors, offer price comparison information for certain branded and own-brand products, including an online calculator to show the results.

- 7.21 The decision about whether or not to price-match is governed by a number of factors relating to the competitive positioning of the retailers. In our discussions with them, the main driver described was to increase customer loyalty. This is in the context of a market in which customers increasingly shop regularly at more than one retailer. For example, some retailers told us that more than half of their customers had also shopped with a competitor at some point in the same month.<sup>114</sup> As described to us, price-matching provides a mechanism to enable the consumer to have the confidence that they will not get a better deal by shopping around.
- 7.22 Other reasons for operating the schemes were cited. For example, price-matching also helps retailers to identify areas where they should invest in lowering prices by providing the data to highlight products for which they are regularly more expensive. One asserted to us that this has helped drive reductions in price and contribute to an overall 5% reduction over the past 12 months. It also helps provide a richer set of data to enable retailers to understand their customers better, although we understand that the insights provided are less granular than with other types of scheme such as loyalty cards. Consistent with the economic theory discussed at paragraph 7.14, others suggested an important driver was to shift consumer perceptions, in particular about the price and value the retailer offered.

### ***The operation of price match schemes***

- 7.23 As observed by Which? in their analysis, there are differences in the details of how the schemes operate. These differences can be broadly divided into three categories:
- Competitor coverage.
  - Product coverage.
  - Method of reimbursement.

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<sup>114</sup> This is consistent with the findings of the CMA's consumer survey (see Annex E) where 53% of respondents had visited more than one supermarket in the last seven days.

### *Competitor coverage*

- 7.24 A number of schemes match the prices of one major competitor, potentially one seen as a price or market leader. In contrast, others compare prices with a number of competitors.
- 7.25 The comparison data is gathered through automated or manual means. During our investigation, a number of retailers have told us they use pricing information extracted from online stores and this appears to be a relatively common approach. In some cases, prices are collected on a regular basis through physical visits to a number of stores several times per week, either to validate that in store prices are the same as online or because certain matched competitors do not have online stores.
- 7.26 Many retailers outsource the data gathering, or the price match scheme in its entirety, to a third party and specifically refer to their data sources in their advertising and terms and conditions. Part of the stated rationale for doing this was to provide greater confidence for consumers about the accuracy and robustness of the process. It is also likely to be required to be in line with guidance from the ASA in relation to advertisers holding documentary evidence to provide claims made and justify the basis of comparison.

### *Product coverage*

- 7.27 Price match schemes take different approaches, in a number of areas, to which products are compared. In particular:
- Some only provide consumer vouchers for in store purchases. Other schemes cover both in store and online purchases.
  - A number are specifically brand match schemes, where only branded products are compared. Others compare similar own-brand products where they consider an appropriate match can be made, for example by reference to whether products meet the same consumer need and whether they are a similar grade or ingredient mix.
  - Some also claim to match promotional prices on certain types of promotion<sup>115</sup> at their competitors.

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<sup>115</sup> This may depend upon whether the requisite volume of products was purchased, in relation to volume promotions.

- Some match only products that are identical in size while others match products within a certain size tolerance, such as 10% or 20% of the package size.<sup>116</sup>

### *Method of reimbursement*

- 7.28 As noted above, price match schemes exist to inform consumers about retailers' pricing strategies. For some, that is the extent of the output. Consumers may feel confident that the prices are matched, although they do not receive bespoke reimbursement if their shopping was more expensive than elsewhere. Some retailers told us that, where the scheme has identified certain prices as being higher, they will change their prices within a certain period of time, in some cases within a couple of days. In addition, some retailers use the price match data to provide comparison information on shelf edge labels to give immediate and relevant information on individual products.
- 7.29 Certain schemes additionally include a form of consumer compensation, such as money-off vouchers, based on consumers' individual shopping trips, with either the difference refunded or a variant of this (for example a certain additional amount of money or points which can be redeemed in future shopping trips). Such approaches provide specific reimbursement, though will tend to require the consumer to take some steps to achieve this, through taking the voucher to the store or entering details from their receipt online to process the price match. This creates some potential cost to the consumer (for example a 'hassle' factor) which may result in not everyone taking up the full use of the scheme.
- 7.30 For those schemes where there is a consumer refund offered, the results are typically applied on the whole basket of goods purchased, not for each individual item. There are differences in the restrictions that apply to whether shopping trips are eligible. These require the purchase of a certain number of products (typically a minimum of 8 or 10) or a certain minimum spend. As noted by Which? in the super-complaint, there is also some variation in the time period for which vouchers or redeemable points are valid, ranging from 14 days to, in one case, 56 weeks.

### ***Communication to consumers***

- 7.31 Information about price match schemes is provided to consumers in a number of ways. It has been the subject of a number of advertising campaigns in which retailers compare the cost of products or baskets of goods with their

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<sup>116</sup> In some cases where there is a pack size difference, the retailer will pro rate the competitor's price.

competitors. As discussed below, certain such advertising campaigns have been considered in detail by the ASA following complaints, which has provided guidance about comparative advertising and made a number of relevant rulings.

- 7.32 In addition, information is provided in store or online about the general terms of price match schemes. In our discussions with them, retailers told us that they ensure the rules, restrictions and methodology for their price match schemes, including how the data is gathered and the basis for the comparisons, are clearly set out in terms and conditions and other material, either in store or online. Some retailers also explicitly provide customer helpline details alongside their information about price match schemes to assist where consumers have queries.
- 7.33 From our analysis of the information provided by retailers, there are differences in the level of detail provided and the accessibility of the information. Some give a range of plain English information, for example through frequently asked questions, and show worked examples of which types of products or promotions are, and are not, eligible for price-matching. They also, in certain cases, explain how the data is processed, the factors that influence whether non-identical products are compared and any potential system limitations and how these affect the operation of the scheme. One retailer publishes on their website a detailed list of which of their products are compared to which of their competitors. By contrast, others provide less granular or user-friendly information, in terms of accessibility and language.
- 7.34 More detailed terms and conditions are also available on retailers' websites. Again, there is some variation in the clarity of these and different approaches to the style (in terms of simplicity of language) and level of detail given.
- 7.35 Certain price match schemes also give information to consumers after the transaction has been completed to enable them to verify the results. The level of detail provided varies. For some schemes this includes a detailed breakdown of how the comparison was made, with information about which products were included, the competitor prices used as the basis of the match and, in some cases, information about the promotions running in other stores that have affected the price match result. For other schemes, such detailed information appears to be either unavailable or needs to be requested specifically. To access the detailed breakdown information, where it is available, this is typically done for in store purchases through an ability to enter details from the receipt on to the retailer's website. For online purchases, the information is typically provided more automatically via email without requiring specific action from the consumer other than, in some circumstances, signing up to the price-matching scheme.

## ***The effect of price match schemes on consumer behaviour***

- 7.36 We sought specific evidence from retailers, and commissioned a survey of consumers, to understand more about the impact of price-matching on consumer decision making. This is an important element in considering the potential for consumer detriment in line with the above theories of harm.

### *Evidence from retailers*

- 7.37 Some retailers undertake evaluations of consumer awareness of, or engagement with, price-matching schemes and the potential impact they have on customers' perceptions of the value offered. However, they told us that it is not always easy to identify the effectiveness of a price-matching strategy on, for example, sales volumes or market share. In both areas there are difficulties in separating the specific role that price-matching plays from other factors.
- 7.38 Overall, therefore, the analysis of the direct impact of price-matching on consumer purchasing, where it is available, appears to be relatively high-level. We were not able to gather specific evidence about the cost to the retailers of running the price-matching schemes, though there must be both initial set-up and ongoing operational costs of running them. Data from the Advertising Association for 2014 suggests that some retailers spent significant amounts of money advertising their price match schemes. Retailers must consider that such costs are outweighed by beneficial effects on sales performance.
- 7.39 Retailers do keep data on the operation of their price match schemes, in terms of how many price checks are made, how many times they come out cheaper than their competitors and how many vouchers are issued. However, this information is considered confidential. There is evidence from some retailers that the take-up by consumers of price-matching schemes (eg opting into schemes or entering details from receipts online to process the price match) is low in some instances. In a similar way, certain retailers have undertaken research which suggests their consumers do not consider price-matching as a significant factor in their decision making.
- 7.40 Some retailers we spoke to during our investigation argued that consumers' behaviour is changing in important ways, both in their use of information and their choice of shops and that this has a bearing on assessing the impact of price match schemes. They argued that consumers are now typically more price-savvy than previously and have greater access to comparative pricing information, through mobile phones while they shop in store or through online shopping. They can therefore evaluate for themselves whether price match schemes are delivering what they say they will in more accessible ways than

previously. In addition, as set out in paragraph 7.21, retailers suggested that there was less brand loyalty in consumers' choice of retailer, with many consumers shopping at several different retailers over the course of a month and that therefore the existence of price match schemes may not be leading to a material reduction in the extent to which consumers shop around.

- 7.41 In summary, therefore, the evidence we gathered from the retailers themselves does not give a clear sense of the impact price-matching has on consumer behaviour. What information there is may suggest it is not a particularly significant factor.

### *Consumer complaints*

- 7.42 There are very few examples of consumer complaints made to Citizens Advice or TSS about price match schemes. This may mean a number of things. It may support the notion that consumers do not engage very proactively with them, or have a high-level understanding of them that is sufficient for their needs. It may suggest they are generally content with how they operate. Conversely, it may indicate that they do not have the information needed to challenge the outputs from the schemes. As discussed above, there is some variation in the quality of information provided to consumers and some areas in which this could be improved to ensure that suitably accessible information is available to people should they want to refer to it.
- 7.43 It may also mean that consumers are increasingly turning to other mechanisms to complain. We have seen examples of consumers using social media to report dissatisfaction with price match schemes. These included complaints about specific results from price match schemes and the mechanics of how they operate (for example the required minimum spend or the application to a basket rather than individual products). From our high-level assessment, price match schemes appear to generate more discussion on social media by consumers than the other issues highlighted in the super-complaint and also generate more engagement by the retailers in responding to queries or clarifying the details of the schemes.

### *Survey evidence*

- 7.44 The CMA commissioned a survey of consumers to understand more about their interaction with, and experience of, price-matching schemes. The survey was carried out by TNS, a major market research company, as part of its face-to-face Omnibus survey. Further details on the survey and its findings are set out in Annex E.

7.45 The survey was based on a large representative sample of adults aged 18 and above. A sample of 1,625 principal shoppers<sup>117</sup> was obtained from across Great Britain and Northern Ireland when the survey was in field between the 22 and 25 May 2015. As the population of interest to the CMA was the main shopper in a household who had been to one of the main retailer chains within the last week, the sample size was reduced to 1,493.

7.46 There were a number of themes explored by the survey, covering consumers' awareness of the schemes, the role they play in decision making and the impact of price-matching on consumers' perceptions of the relative value of retailers. In summary:

7.47 In relation to **consumers' awareness of the schemes**:

- A significant proportion of respondents did not know whether the retailer they used most recently for a planned shop had a price-matching scheme or not (31% for those whose retailer did and 38% for those whose retailer did not). Additionally, some respondents (9%) believed that the retailer had a price-matching scheme when it did not or thought that it did not have one when it did (9%).<sup>118</sup>
- Many respondents (65%) who correctly knew that a retailer had a price-matching scheme thought that they did not have a good idea of how that scheme works.<sup>119</sup>
- Of those who correctly knew their retailer had a price-matching scheme, most recalled receiving some information about whether their shop was cheaper or more expensive than at a different retailer (71%) and whether this information indicated their shop was cheaper or more expensive than at a different retailer (76%).
- The majority (57%) of those who believed they received information on whether their shop was cheaper or more expensive than at a different retailer recalled being told that their shop was cheaper than at that retailer.<sup>120</sup>

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<sup>117</sup> 'Principal shopper' is the individual within a household who does at least half of the shopping trips for that household.

<sup>118</sup> This could be due to possible confusion between everyday low prices type marketing and price-matching schemes.

<sup>119</sup> Note: this contrasts with the findings of the consumer survey undertaken by Which? discussed in paragraphs 7.8 to 7.9.

<sup>120</sup> However, this results should be treated with caution as this result only relates to those who remembered receiving this information. Further, respondents may be basing their response to this question on their perceptions of the relative pricing across price-matching supermarkets, rather than the actual information provided.



- There were observable differences between retailers. Respondents whose planned shop was at a certain retailer were less likely to know that it had a price-matching scheme, were less likely to have a good understanding of how the scheme works and were less likely to believe they received information about whether their shop was cheaper or more expensive than at a different retailer.

**7.48 In relation to the role price-matching plays in consumers' choice of store:**

- Price-matching schemes were rarely (only 2% of all respondents) mentioned as a determining factor in choice of retailer
- Even when prompted, price-matching schemes were only seen as 'very important' by a small proportion of respondents (16%), although those whose planned shop was at a price-matching retailer were more likely to cite price-matching schemes as very important (20% for price-matching retailers compared to 8% for non-price-matching retailers), and
- The most important determining factors in a consumer's choice of planned shop retailer appear to be convenience (43%), perceived cheapness<sup>121</sup> (25%) and habit (23%). Further, when prompted the factors cited most as being very important were convenience (55%), good product range (46%) and parking (40%) while the factors cited most as being 'not at all important' were whether the retailer has a petrol station (43%) and whether or not they run a loyalty card scheme (27%).

**7.49 In relation to the impact of price-matching schemes on consumers' perceptions of the relative value of retailers:**

- Many (44%) believed their shop would have been more expensive at a comparator retailer.
- When asked about the reasons for their perceptions regarding relative prices between retailers, respondents rarely cited price-matching schemes (6%).
- Instead many respondents (42%) outlined that the basis of their perceptions of relative pricing was that 'I often shop at ... so know their prices'. This indicates that many consumers believe they have a good knowledge of relative prices based on having visited different retailers.

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<sup>121</sup> We note that price matching schemes may affect consumers' assessment of this although there are likely to be a number of other factors.

- 7.50 The survey data represents only a high-level snap shot. It nevertheless suggests that a number of consumers are unaware of the existence of price match schemes or do not think they understand them very well. In addition, the existence of a price match scheme appears to be unlikely to be central to consumers' choice of retailer compared to other more important factors. This suggests that price match schemes may not be having a significant impact on consumer decision making.

### ***The effect of price match schemes on competition***

- 7.51 In addition to evidence from the retailers and the survey the CMA has also looked at whether there are any studies in the academic literature that measure the impact of price-matching schemes on, for example, prices.
- 7.52 In doing this the CMA found that there is little empirical evidence on the impact of price-matching schemes and, what is available, provides a mixed picture about the potentially pro- and anti-competitive effects of price-matching. For example, some studies provide evidence that the use of schemes is consistent with a softening of competition and higher prices while others suggest that it may represent efficient signalling and lower prices.<sup>122</sup>

### ***Regulation and compliance***

#### ***The potential for misleading or unfair practices under the legislation***

- 7.53 Two of the specific areas of concern raised by Which? in the super-complaint relate to the fact that retailers set their own rules for what prices and products their schemes compare and that this has the potential to confuse consumers.
- 7.54 As set out above, we have identified a number of differences between how the price match schemes operate. There are important differences in the way comparisons are done, the range of products included, and the nature of any restrictions that apply. We have heard of certain commercial or technical reasons as to why retailers approach price-matching in different ways. Where identical products are on sale outside of complex promotions, it is likely that the comparisons can be made in a straightforward way. However, where retailers commit to price match products which have slight differences, for example in size or ingredient mix, there is an increasing requirement for judgements to be made as to which products are most appropriately compared. The sophistication of such comparisons may be enabled or limited by the data set which the retailer uses. In addition, there appear to be some

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<sup>122</sup> For a discussion of these papers see Annex C.

technical limitations which create differences in whether online and in store purchases can be included, as well as in the timescale for how price matches are done and vouchers issued.

- 7.55 It is worth noting that there is no legal requirement for each scheme to operate in the same way and there may be many valid ways of running such a scheme that are likely to be possible under the relevant regulatory provisions. The CMA does not consider that a one-size-fits-all approach would necessarily lead to the best outcome for consumers.
- 7.56 It is important that retailers communicate clearly with consumers to help them understand how the schemes operate and enable them to take informed decisions. The CPRs regulate the way that information in commercial practices is provided to consumers. The key elements are whether the information is misleading for consumers, either in the details they provide (misleading actions under regulation 5 of the CPRs) or fail to provide (misleading omissions under regulation 6 of the CPRs) in such a way as to cause the average consumer to take a transactional decision that they would not otherwise have done.
- 7.57 Evidence from the TNS survey (see paragraph 7.44) indicates that significant numbers of consumers do not feel that they have a good understanding of how the schemes operate. However, it is unclear whether this is partly a result of, or a potential contributing factor to, the small role that price match schemes seem to have in consumers' choice of retailer. In addition, where consumers do not understand the details of the scheme, this does not necessarily mean that the information retailers provide is misleading, by action or omission, as assessed under the CPRs.
- 7.58 From our analysis of the information provided to consumers, considered from the perspective of the regulatory framework, the CMA considers that information available on the retailers' websites is generally reasonably clear in describing how the schemes operate. However, there are some approaches that are clearer than others and we have found instances where more information could be provided or could be made clearer and we intend to raise these issues with retailers and their primary authorities. It is important that retailers ensure the information they give is as transparent as possible and helps to flag key elements of the schemes (for example any restrictions that apply to minimum purchase requirements, types of promotions which are and are not included, etc). In particular, retailers should consider whether the information they convey is available in a suitable format and medium for consumers who are unlikely to read the detailed terms and conditions at the point they are faced with transactional decisions.

- 7.59 From the different approaches we have assessed, in the CMA's view information on price match schemes is less likely to be misleading under the CPRs where:
- it is accurate, and provides the information the average consumer needs;
  - it is written in plain English, within the terms and conditions themselves and/or in FAQs and in store information;
  - it provides worked examples of how comparisons are done; and
  - it provides accessible detailed breakdowns of the specific comparisons; these are more likely to increase the overall transparency of the scheme and help consumers see how it operates in practice.
- 7.60 One of the criticisms made by Which? about the price match schemes, on the basis of their small sample of shopping visits (see paragraph 7.5), was that the retailer running the scheme tended to come out the cheapest.
- 7.61 Obviously the choices about how the schemes operate will affect the likely outcomes from price matches (in particular, the choice of which competitors their scheme will match). As mentioned above, there is no objectively right or wrong basis for undertaking price match schemes and there may be a range of judgements and limitations which inform or constrain its detailed design. From the information we have seen and the detailed terms and conditions of the price match schemes, we do not see evidence that retailers manipulate the details of their schemes to ensure they deliver a particular and erroneous outcome. There may be other factors which affect whether individual shopping trips are cheaper, most notably specific promotions run by that particular retailer.
- 7.62 It is important that price match schemes are processed in accordance with the terms and conditions, correctly applying the stated basis for product comparison to competitors' products, using accurate data and without significant errors. If there were situations where this was not the case, these would in all likelihood be misleading under the CPRs. We also consider that it is important that the product comparisons made are fair, ie the retailers, or those acting for them, are comparing like with like. If not, this could lead to non-compliance with the CPRs or BPRs.
- 7.63 Another of the issues specifically raised by Which? relates to the expiry periods for vouchers or similar compensation schemes. As noted above, there are differences in the expiry periods, with most being either 14 or 28 days. As with other details of the scheme, there is no legal requirement for the periods

to be aligned or a certain length; the key again is whether information provided to consumers is clear and not misleading.

- 7.64 The survey information included in Which?'s November 2013 report suggested that many consumers do not redeem their vouchers before the expiry date. However, it is unclear what the factors were that caused this and, in particular, whether a lack of awareness of the expiry date was a key contributing factor compared to, for example, the consumer forgetting to use them. From the specific examples of vouchers assessed during our investigation, the expiry date appears relatively prominently and unambiguously.
- 7.65 We have also undertaken an initial assessment of the terms and conditions for price match schemes against the requirements of the UTCCRs, in particular relating to prominence, clarity and the potential for a significant imbalance between the rights of the trader and consumer. We identified certain areas where individual terms and conditions could be improved. However, we did not identify systematic and significant issues of concern.

#### *Trading standards enforcement*

- 7.66 We have asked retailers' primary authorities about the number of issues which are referred to them by other TSS. In relation to price match schemes, only one reported having received any referrals and the number was low (four over a six month period). The primary authority in this case did not take further action to investigate given this low number. We did not hear of specific consideration being given by primary authorities or other TSS to price match schemes.

#### *The Advertising Standards Authority*

- 7.67 Several retailers referred to the role of the ASA in relation to price match schemes. The ASA oversees and enforces compliance with the Advertising Codes for broadcast and non-broadcast advertising, developed by the Committees of Advertising Practice. Of most relevance to price match schemes, both the broadcast<sup>123</sup> and non-broadcast<sup>124</sup> codes contain rules relating to misleading advertisements, significant qualifications, substantiation of claims and (price) comparisons. These include requirements for comparative advertising not to be misleading (rule 3.33 of the relevant code),

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<sup>123</sup> UK Code of Broadcast Advertising (BCAP Code).

<sup>124</sup> UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (CAP Code).

for price comparisons to show the basis for the comparison (rule 3.39) and not to mislead consumers by falsely claiming a price advantage (rule 3.40).

- 7.68 In addition, the Committees of Advertising Practice (CAP) have published advice on various elements including on advertising of prices,<sup>125</sup> savings claims<sup>126</sup> and comparisons of baskets of goods.<sup>127</sup> It has also published guidance on retailers' price comparisons.<sup>128</sup> In addition, it provides bespoke copy advice on specific advertisements or promotions, where requested by traders.
- 7.69 In addition to providing advice, the ASA has made a number of formal rulings relating to retailers. Our investigation found there have been over 60 formal rulings in relation to retailers since 2010. Around 20 of these specifically related to advertising of price match schemes. While some of these have come from complaints from consumers, a number have been raised by retailers in relation to comparative advertising claims made by their competitors.
- 7.70 The issues raised include:
- whether price match advertisements misleadingly excluded certain ranges of products without this being made clear (eg 'everyday', own-label, non-grocery products)
  - whether the data used as the basis for the match was current and accurate
  - whether the details of the advertised comparison were sufficiently accessible
  - whether advertisements incorrectly implied that all branded products were cheaper and hence there was no advantage to the consumer to shop around, and
  - whether advertisements were clear where certain stores were excluded from the price match scheme.
- 7.71 Of the 20 or so rulings, around three quarters were upheld or partially upheld, requiring changes to be made to the advertisements to ensure they were compatible with the relevant CAP Code.

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<sup>125</sup> CAP Advice: Prices

<sup>126</sup> CAP Advice: Savings claims

<sup>127</sup> CAP Advice: Comparisons: basket of goods

<sup>128</sup> CAP, *Retailers' price comparisons*.

## Conclusions

- 7.72 Using the evidence gathered over the course of our investigation described above, we have considered whether there is the potential for the operation of the price match schemes identified to be misleading and/or unfair under the relevant consumer protection legislation. We have also considered the potential for negative impacts of price-matching schemes on competition, the potential for consumer detriment to arise and the role played by the ASA in regulating comparative advertising.
- 7.73 The CMA notes that there are differences in how price match schemes are designed and operated, including in the choice of which competitors they match to and how non-identical products are matched. There are many valid ways of running such a scheme that are likely to be possible under the relevant regulatory provisions and there is no requirement for them all to be the same. The CMA does not consider that a one-size-fits-all approach would necessarily lead to the best outcome for consumers.
- 7.74 In the CMA's view, the retailers generally provide information to consumers that is reasonably clear about how the schemes operate. Nevertheless, where we have found that further clarity could be provided in certain areas, we will share our findings with retailers and primary authority officers, as relevant.
- 7.75 **Recommendation 6:** The CMA recommends that retailers ensure the information they provide about their price match schemes is as clear and transparent as possible in terms and conditions, online FAQs and in store. In particular, consideration should be given to whether the information is sufficiently accessible and in plain English.

### *ASA regulation*

- 7.76 We have seen, from our engagement with retailers and the ASA, that the ASA plays an important role in relation to regulating comparative advertising through price match schemes. The CMA considers that the number of rulings made, and fact that retailers are active in holding each other to account through raising complaints to the ASA, indicates there is a strong potential for effective self-regulation in this area. The requirements of the BCAP Code and CAP Code reflect the legislative framework relating to advertising (CPRs and BPRs), with the intention being that they are neither more permissive nor more restrictive than the law, and the Committees of Advertising Practice additionally have published a range of guidance and advice in this area. The issues covered, such as the need to be able to substantiate claims about cheaper offers, make comparisons between the same or very similar products

and make the basis for comparison clear are all highly relevant to price match schemes.

- 7.77 We have noted that an independent review of an ASA ruling relating to product comparisons by one retailer was unsuccessfully challenged by a competitor in the High Court in November 2014. This indicates to us the preparedness of retailers to invest significant resources in challenging each other's advertising claims in relation to product and price comparison, again indicating the strong role for self-regulation. The fact that the High Court upheld the independent review decision additionally indicates the robustness of the process and decision which was delivered by the ASA.
- 7.78 The ASA operates under a framework that is separate from that of assured advice given by retailers' primary authorities and it is responsible for enforcing similar, though not identical, requirements. The CMA notes that the ASA has taken steps to increase its engagement with groceries retailers, for example through the Primary Authority Supermarkets Group, and has agreed to contact proactively the relevant primary authority whenever a substantive complaint is being considered about a supermarket. It has also, more generally, amended its procedures to flag cases where there is a relevant primary authority partnership in existence and whether they have given specific assured advice in relation to the issue being considered by the ASA. The CMA considers these are constructive changes.



## **8. Summary of recommendations and proposed next steps**

- 8.1 In this chapter we outline our recommendations in respect of the issues raised by Which? in the super-complaint. In particular, we highlight further action that the CMA intends to undertake as well as recommendations for action to be taken by others.

### **Further action to be undertaken by the CMA**

#### ***In relation to special offers***

- 8.2 Following the publication of this response, the CMA will undertake further action in the following areas:
- (a) The evidence and data gathered by the CMA have highlighted examples of particular pricing and promotional practices which, in our view, have the potential to mislead consumers and thus lead to a breach of the CPRs. Where we have encountered such practices, the CMA will take further action with the businesses concerned to address these issues and secure any changes necessary. If this further work reveals clear evidence of breaches of consumer law, this could lead to enforcement action.
  - (b) The CMA will also take account of our analysis of the data commissioned from mySupermarket and, to the extent that this identifies particular issues, share our conclusions with TSS and primary authority officers to assist in focussing their resources on monitoring and enforcement activity on the practices that have the greater potential for detriment.

#### ***In relation to price match schemes***

- 8.3 Where we have found that further clarity could be provided in certain areas, the CMA will share our findings with retailers and primary authority officers, as relevant.

### **Recommendations for action to be taken by others**

- 8.4 In addition, in this response the CMA has made a number of recommendations, set out below.

### ***In relation to special offers***

- 8.5 **Recommendation 1:** We recommend that the CTSI clarifies how the legislation applies to certain promotional practices. This includes bringing together the requirements of the existing PPG and the OFT Principles into a revised set of guidance as to the likely application of the CPRs. In doing so, we recommend they give particular consideration to:
- (a) clarifying the features of a genuine retail price and set out whether, and in what circumstances:
    - (i) promotional practices can be run sequentially and use a reference price 'established' in a previous volume promotion
    - (ii) an earlier reference price frame ('was' price) can be used after the price of the product has already been lowered for a period (so the reference price does not refer to the last applicable price)
    - (iii) a reference price promotion that involves two consecutive stages of promotional pricing can be used, where the second stage affords a less generous discount than the first stage. For example, a product is involved in a 'half price, now £4.50' and then a '1/3 off, now £6' promotion
    - (iv) out of season prices can be used as reference prices for seasonal products, and
    - (v) businesses can use a reference price when they have not sold a product at that price in the store where the discount is applied.
  - (b) setting out good practice in relation to whether, and in what circumstances, it is appropriate and not misleading for the prices of individual products to change before and during a volume promotion.
  - (c) clarifying the circumstances in which stating an end date for promotions would be appropriate and the specific application of this to online purchases where consumers may not pay the price they expect when the promotion ends between the consumer ordering the goods and them being delivered.

### ***In relation to unit pricing***

- 8.6 **Recommendation 2:** The CMA recommends that BIS produces best practice guidelines on the legibility of unit pricing information, to provide greater clarity about the requirements of the PMO in this regard. This would help TSS and

Primary Authorities assess compliance. We also recommend that retailers introduce any resulting changes to labelling as soon as practicable.

- 8.7 **Recommendation 3:** We recommend that BIS continues its review, with the Expert Working Group, of Schedule 1 to the PMO, but changes the focus to give particular consideration to:
- (a) Ways to clarify and simplify the requirements, considering evidence about the advantages and disadvantages of simpler and more future-proofed approaches, with fewer exceptions, used in other countries, and
  - (b) What further research, building on the findings from our qualitative research, is needed into how consumers use unit prices to ensure the requirements help as many people as possible to use them in their decision-making.
- 8.8 **Recommendation 4:** To encourage a more consistent use of unit pricing for products on promotion, the CMA recommends that BIS considers reviewing and clarifying the legal requirements set out in Article 9 of the PMO, and the associated guidance. This should be done with particular reference to the requirements of the CPRs and the ongoing review of the PPG.
- 8.9 **Recommendation 5:** The CMA recommends that Which? and other consumer representative organisations consider whether there is a further role they can play in consumer education on the effective use of unit prices. Further, following any further work by BIS on our above recommendations, there will be a further need to educate consumers on any changes to unit pricing.

#### ***In relation to price match schemes***

- 8.10 **Recommendation 6:** The CMA recommends that retailers ensure the information they provide about their price match schemes is as clear and transparent as possible in terms and conditions, online FAQs and in store. In particular, consideration should be given to whether the information is sufficiently accessible and in plain English.

## 9. Glossary

<b>BOGOF</b>	Buy one get one free.
<b>EDLP</b>	'Every Day Low Pricing' – a business model employed by some supermarkets.
<b>Multi-buy</b>	A type of volume promotion, e.g. '3 for the price of 2' or BOGOF.
<b>PASG</b>	Primary Authority Supermarket Group – a forum in which primary authority officers meet to discuss common issues.
<b>Price frames/ mechanisms</b>	Methods used by retailers to communicate prices to consumers.
<b>Price matching schemes</b>	Price matching schemes are pricing policies employed by some UK grocery retailers. Under price matching schemes, the retailer matches the prices of some of its products with those of at least one other retailer.
<b>Primary Authority officers/ primary authorities</b>	A Trading Standards officer/ local TSS carrying out Primary Authority responsibilities dedicated to a particular business.
<b>Primary Authority scheme</b>	A statutory scheme established by the Regulatory Enforcement and Sanctions Act 2008 in which businesses can choose to form a partnership with a local TSS known as a 'primary authority'.
<b>Reference pricing</b>	A type of price frame, usually comparing a product's old price to its new price, eg 'Was £3, Now £2' or 'Half Price' labels.
<b>SKU</b>	Stock Keeping Unit – a unique inventory or product code which represents an individual product.

<b>TPR</b>	Temporary price reduction – a type of promotion in which the average price of a product drops from a higher price for a short period of time before increasing again.
<b>TSS</b>	In this report TSS refers collectively to Trading Standards Services in England and Wales, Trading Standards Scotland and Trading Standards in Northern Ireland.
<b>Unit pricing</b>	Unit pricing is a labelling system that helps compare prices of groceries. Using ‘per kilogram’ or ‘per litre’, consumers can compare prices of products, regardless of their size or brand.
<b>Yo-yo pricing</b>	Promotion of certain products on near-constant cycles of ‘high / low’ pricing.