

Draft PPS 4:

**Competition & Choice in retail planning after the
Competition Commission**

David Elvin QC

June 2009

Draft PPS 4: Competition & Choice in retail planning after the Competition Commission

David Elvin QC

Introduction

1. Competition and choice has been an important aspect of Government policy on town centre and retail planning for some time though in terms that:

“1.7 It is not the role of the planning system to restrict competition, preserve existing commercial interests or to prevent innovation.” [PPS 6]

2. However, in the last 18 months, the role of competition and choice has provided focus for further debate and concern given the recommendations by the Competition Commission (“CC”) in its Report of the Groceries Inquiry (April 2008) to put competition on a more regulated footing. The CC would give competition a role far more distinct, and potentially separate role from tradition land use planning although the problem which it saw as requiring remedy was a supposed failure in land use planning.
3. However, the CC’s Report was successfully challenged before the Competition Appeals Tribunal (“CAT”) by Tesco, albeit on a relatively narrow ground, and the issue has been remitted to the CC for further consideration. That process is underway.
4. Meantime, DCLG has issued, in two phases, new policy statements neither of which on their face purport to resolve the issue definitively due to the lack of conclusion in the CC Groceries Inquiry process:
 - (1) Draft PPS4 and amendments to PPS6; and
 - (2) The new draft PPS4 which will replace PPGs 4 & 5, PPS6, and parts of PPS 7, issued last month with the “living draft” guidance which will be dealt with by other speakers.
5. The prospect of a new, complex issue being introduced into the planning system, already criticised by the CC as over complex and costly, is not necessarily a tempting one particularly in the current economic climate. Indeed, there are clear signs in draft PPS4 that DCLG may share this view and, more importantly, appears to be seeking to remedy the barrier to entry identified by the CC though the more rational means of addressing retail planning policy rather than adopting the counter-intuitive approach of the CC of grafting yet more complexity onto the existent development control system and policy structure.
6. Draft PPS4 offers, if not a wholly new approach, one which is to be welcomed:

- (1) An increased emphasis on economic development, although it would have been preferable if the strong emphasis in the Ministerial Forward had been more closely incorporated as an overriding policy objective¹ –

“In uncertain economic times, the planning system needs to do all that it can to support the economic aspirations of our communities, whether in cities, market towns or rural villages. For the first time, this comprehensive new draft statement brings together in one place all of the Government’s key planning policies relating to the economy and streamlines and simplifies policy to focus on what is important to allow the economy to grow in a sustainable manner. It sends a clear signal that we are determined to ensure the long term economic success of our communities with a coherent and modern set of policies designed to meet the challenges of global competition for jobs and investment and rapid advances in technology and working patterns. Our policies will also help local communities to grasp the economic opportunities arising from the global shift towards low carbon products and services.

...

At the heart of our policy is the requirement that development plans need to have clear, proactive, proportionate and flexible policies aimed at supporting the start up and growth of businesses, attracting inward investment and increasing employment, particularly in deprived areas. It emphasises that we need also to protect existing investment in our cities and towns by safeguarding the town centres which are the bedrock of our economic future.”

Compare the statement by the DOE NI Planning Minister, Sammy Wilson, on 11 May 2009 which (although set in a more detailed context) sends a strong message:

“I want to give decision-makers the confidence and support to make judgements which will give greater weight to economic considerations where it is appropriate to do so. I want to give clarity and to leave no one in any doubt about how to deal with economic considerations.

This is not a change of policy. The purpose of this statement is to provide certainty and to give guidance so that the planning system can play a positive role in encouraging investment and kick-starting regeneration. To that end, the following paragraph clarifies the weight that should be accorded to economic aspects in the making of planning decisions.

Full account shall be taken of the economic aspects of a planning proposal, including the wider benefits to the regional or local economy, alongside social and environmental aspects, in so far as they as they are material considerations in the determination of the planning application to which they relate. In cases where the economic benefits of a proposal are significant, substantial weight shall be afforded to them in the determination of that planning application.”

- (2) The format of the PPS is welcome since it sets out the key policy statements and does not mix them up with more detailed explanations as to the application of policy. It has been a tendency of policy in the last 10 or so years to have a constant accretion of additional points and explanation to policy and for the key messages to become lost in the mass of text;
- (3) The new impact test at EC20 which pulls together the various considerations which have

¹ It takes until EC4.1 and EC12.1 for the more general economic objective to be stated, rather than at the outset.

previously been spread around policy and adds issues such as scale, accessibility, design to more traditional vitality and viability impact considerations. Oddly, climate change resilience appears first although it does not appear an impact as such and it might have been thought that economic benefits would have been placed first given the general emphasis of the paper;

- (4) The abolition of the need test which adds little if anything, other than greater complexity, to the requirements of the sequential approach;
- (5) The production of separate practice guidance on the new impact test and the sequential approach which is not intended to create policy but to provide guidance as to how to carry out the various assessments.

7. This paper examines:

- (1) The position under current/former planning policy;
- (2) The CC recommendations, including the prospect of ensuring appropriate choice between different retailers (“fascia choice”) and competition; and
- (3) The current position under draft PPS4.

Current planning policy

8. PPS 6 (2006) introduced a series of provisions referring to choice which were not present in the earlier versions of PPG 6 (other than PPS6 para. 1.7):

“1.4 There are other Government objectives which need to be taken account of in the context of the key objective in Paragraph 1.3 above:

- enhancing consumer choice by making provision for a range of shopping, leisure and local services, which allow genuine choice to meet the needs of the entire community, and particularly socially-excluded groups;
- supporting efficient, competitive and innovative retail, leisure, tourism and other sectors, with improving productivity; and

...

1.5 The following of the Government’s wider policy objectives are also relevant, insofar as they would not be inconsistent with the key objective in Paragraph 1.3 above:

- to promote social inclusion, ensuring that communities have access to a range of main town centre uses, and that deficiencies in provision in areas with poor access to facilities are remedied;

...

1.7 It is not the role of the planning system to restrict competition, preserve existing commercial interests or to prevent innovation.”

....

“Site Selection and Land Assembly

....

2.30 Local authorities should work closely with business, including retailers, leisure operators,

developers, other stakeholders and the community when considering sites for allocation in development plan documents.

2.31 Local planning authorities may need to make choices between competing development pressures in town centres and should use the allocation of new sites to secure their strategy for strengthening and improving the performance of the centre, particularly those areas requiring regeneration.

a) Assess the Need for Development

....

ii) *Qualitative Need*

2.35 In assessing the qualitative need for additional development when preparing its development plan documents, **a key consideration for a local planning authority will be to provide for consumer choice**, by ensuring that:

- an appropriate distribution of locations is achieved, subject to the key objective of promoting the vitality and viability of town centres and the application of the sequential approach, to improve accessibility for the whole community; and
- provision is made for **a range of sites** for shopping, leisure and local services, **which allow genuine choice to meet the needs of the whole community**, particularly the needs of those living in deprived areas (see also paragraphs 2.55-2.58)."

9. These provisions are applied to development control decisions: see paras. 3.4 and 3.11.

10. The June 1996 version of PPG 6 put the matter much more simply:

"1.1 The Government's objectives are:

- to sustain and enhance the vitality and viability of town centres;
- to focus development, especially retail development, in locations where the proximity of businesses facilitates competition from which all consumers are able to benefit and maximises the opportunity to use means of transport other than the car;
- to maintain an efficient, competitive and innovative retail sector; and
- to ensure the availability of a wide range of shops, employment, services and facilities to which people have easy access by a choice of means of transport.

It is not the role of the planning system to restrict competition, preserve existing commercial interests or to prevent innovation."

11. The use of the concept of "choice" in PPG 6 was found in the context of choice of *means of transport* e.g. paras. 1.3, 1.11 etc.

12. CB Hillier Parker's report on PPG 6 ***Policy Evaluation of the Effectiveness of PPG 6*** (ODPM, January 2004) does not appear to have been the impetus for the introduction of the "choice" provisions into PPS 6 since it largely contented itself on referring to the CC's 2000 Report: see e.g. paras. 2.45-2.48 and the Recommendations (pp. 15-16). It did, however, recommend a more general proactive approach to development by local authorities:

"The revised guidance should re-emphasise the obligation on local authorities, in partnership with the private sector, to actively encourage and promote development in town centres. The revised guidance should provide a more positive development framework for actively promoting town centre development..."

13. CBHP also advised clarification of the elements on “need” although without providing specific advice as to what that might be. See *Executive Summary* para. 51 p. 14 and Chapter 5 paras. 5.30-5.33 pp. 85-86:

“51. The issue of ‘need’ has been a key theme throughout this research; our consultation and analysis of decisions has revealed a considerable amount of confusion surrounding the factors that constitute need, and how to measure it. In addition, the assessment of the impact of retail development has been raised as an issue on which good practice guidance is needed. In this respect, we endorse the decision to commission good practice guidance on methods of assessing need and impact in relation to retail development.”

14. It seems clear that there was a decision in government at the time of PPS6 to focus more on the provision of “genuine choice” and requiring local authorities to take a proactive approach in plan making, development control and town centre management. However, the context in which choice arose was that of qualitative need rather than as a separate or overarching requirement.
15. More importantly, the approach to competition and choice was set firmly within the framework of land use planning. In other words, the focus was on the use and development of land and not generally on the identity of the occupier or developer. See well-known statements of principle on such issues in *East Barnet Urban District Council v. British Transport Commission* [1962] 2 Q.B. 484, *Stringer v. Minister for Housing and Local Government* [1970] 1 W.L.R. 1281, at 1294-5, *Westminster City Council v. Great Portland Estates Ltd.* [1985] A.C. 661, at 669-671 and *R. v. Westminster City Council ex p. Monahan* [1990] 1 Q.B. 87, 110-117.

Construction of policy: PPS 6

16. There is no express policy requirement for fascia choice or choice of retailer for its own sake and “choice” simply comes into account generally only once the primary consideration of quantitative need has been considered: PPS6 para. 2.33.
17. “Choice” in 1.4, fortified by paras. 2.27 and 2.35, relates to choice within retail as opposed to choice among retail, leisure and services. Choice is related to the substance of the provision of “genuine choice to meet the needs of the entire community”. Note:
- (1) The fact that choice is referred to in the context of the “needs of the entire community”;
 - (2) The reference to markets at 2.27 since they “can make a valuable contribution to local choice and diversity in shopping”, which shows focus on meeting the substance of choice rather than mere question of retailer identity;
 - (3) The requirement is placed in the context of *qualitative need* considerations; and

- (4) Para. 1.7 still retains the policy that the PPS is not intended to restrict competition or innovation.
18. PPS6 is capable of embracing the issue of choice of retailer to the limited extent that such choice is related to the issue of providing genuine choice to meet the needs of all, which is itself a proper land use consideration². For example, choice might be related to the overprovision of stores by retailers who provide restrictive ranges of goods or only serve a limited part of the local community.
19. This approach remains consistent with the general feature of planning that it is concerned with the *use of land* and not with the identity of the occupiers, owners or developers, see above. Current policy is also disposed against personal and/or occupancy restrictions³ though it accepts that they may be justifiable but only as an exception to the general approach. Planning obligations must still be entered into for a “planning purpose”, *per* Lord Hoffman in **Tesco Stores Ltd. v. Secretary of State** [1995] 1 W.L.R. 759 at 779, which, as Lord Scarman explained in the **Westminster** case, means a land use consideration⁴.
20. However, that principle is not absolute and there are a number of areas where, exceptionally, planning does consider specific occupiers or types of occupier e.g. gypsy hardship cases, affordable housing and occupancy conditions tied to agriculture.
21. It is very doubtful a lawful approach to “choice” would include choice of operator as an element *in its own right*, apart from other land use consequences, given the factors set out above and the general disposition of land use planning to focus on the use rather than the identity of the owner/occupier. This would leave it open to consider a justification for considering retailer identity on the facts of a specific case in terms of providing genuine choice to all elements of the local population.
22. Indeed, that approach is consistent with that adopted by DCLG in its representation to the CC.

² Although note that in Barker’s *Interim Report* at para. 5.48 it was said to be too early to judge the impact of PPS6 (as DCLG pointed out in the summary of its hearing before the CC in October 2006, para. 10):

“5.48 It is too early to assess the impact of PPS6 both on the allocation of sites in the local plan and at the development control stage. PPS6 may deliver some welcome flexibility required to aid competition and choice...”

³ DOE Circular 11/95 Annex paras. 92-105. Para. 92: “Since planning controls are concerned with the use of land rather than the identity of the user, the question of who is to occupy premises for which permission is to be granted will normally be irrelevant. Conditions restricting occupancy to a particular occupier or class of occupier should only be used when special planning grounds can be demonstrated, and where the alternative would normally be refusal of permission.”

⁴ See also Circular 05/2005 at

The CC summary of the DCLG hearing in October 2006 noted⁵:

“13. The DCLG said that there were likely to be limits as to what could be achieved through the planning system. The DCLG told us that an express policy to favour any particular operator, or even any category of operator, would likely pose significant difficulties. The DCLG told us that no distinction was made on the actual occupier itself, rather an assessment of the scope of the goods proposed to be sold by two competing stores would be made.”

Competition Commission (April 2008)⁶

23. The OFT referred the groceries market again to the CC⁷ on 9.5.06 and hearings began in Summer and Autumn 2006. On 22.1.07 the CC announced its *Emerging Thinking* and gave *Notice of Provisional Findings* and *Notice of Possible Remedies* on 31.10.07 following a further round of representations and hearings. Its *Provisional Decision on Remedies* was issued on 15.2.08 and its *Final Report* on 30.4.08. The CC dealt only with grocery retailing and not other forms of retailing or town centre use.

24. Although the reference of the groceries market to the CC generated a great deal of publicity and interest relating to a wide variety of matters, including the practice of land-banking, many of which did not lead to criticisms or recommendations, one of the primary concerns of the CC was concerned as to the impact of the planning system on competition. It was this impact that led to its recommendation as to the remedies that it thought Government ought to pursue though they are matters only within Government's, not the CC's power, to secure.

25. In its *Final Report* of 30.4.08 the CC said this in para. 2 of the Summary of the Report:

“2. We found that, in many important respects, competition in the UK groceries industry is effective and delivers good outcomes for consumers, but not all is well. We have concerns in two principal areas. First, we found that several grocery retailers have strong positions in a number of local markets. Barriers faced by competing grocery retailers that could otherwise enter these markets mean that consumers get a poorer retail offer in terms of prices, quality and service than would otherwise be the case, while those grocery retailers with strong local market positions earn additional profits due to weak competition in those markets.”

26. However, the concerns of smaller retailers were not considered to be well-founded:

“6. The competitive position of convenience stores relative to large grocery retailers was a key concern for many in our investigation. We received a considerable body of evidence from the Association of Convenience Stores (ACS) and others showing that the competitive pressure on convenience store operators is intense. It is clear that the process of competition can be challenging, and in some cases, even leads to the closure of businesses. But, however sympathetic we may be to the effects of such pressure, we must, as a competition authority, assess the effects

⁵ See www.competition-commission.org.uk/inquiries/ref2006/grocery/hearing_summaries.htm.

⁶ For the inquiry documentation see

www.competition-commission.org.uk/inquiries/ref2006/grocery/index.htm.

⁷ The previous CC report was in 2000.

of the process of competition on the interests of consumers. Having examined thoroughly the full range of concerns that have been raised with us regarding possible distortions in competition between large grocery retailers and convenience store operators, we did not find that these concerns were substantiated.”

27. The criticisms which some had made of the market position of Tesco were rejected:

“8. Many parties raised the strong market position of Tesco as a matter of concern. We did not find there to be competition concerns that apply to Tesco over and above those that apply to other grocery retailers. There would obviously be cause for concern if any one retailer was able to achieve and exploit significant market power to the detriment of consumers. Our assessment is that the basis of Tesco’s position is not insurmountable; there is nothing that Tesco does that could not, over time, be challenged by competitors. There is a risk that at some point in the future the number of Tesco stores that do not face strong competition increases and there would be further deterioration of the retail offer that would harm consumers. Such a development could also take place with any other large retailer. We expect our remedies to contribute to preventing such a situation occurring.”

28. However, the CC did have specific concerns as to the impact of the planning system in terms of larger grocery stores, providing a barrier to entry into the market and an adverse effect on competition (AEC):

“29. We found that the planning system, in pursuing the broad-based objectives for which it is intended, necessarily constrained the development of new larger grocery stores, but placed more limited constraints on entry by mid-sized grocery stores and convenience stores as well as extensions to existing larger grocery stores. Securing planning permission for a new larger grocery store takes a significant amount of time in terms of site assembly and the planning process. We found that the costs associated with these activities, together with the risk of permission not being granted, represented a more significant barrier to entry for other grocery retailers and new entrants than for existing large grocery retailers.

30. The shortage of land available for new larger grocery stores, arising in part from the planning system, meant that the control of this land by grocery retailers in certain highly-concentrated local markets frustrates new entry that would strengthen competition. We did not find that grocery retailers were engaging in holding undeveloped land (landbanking) as a strategy to impede the entry by rival grocery retailers into local markets. However, we found 90 ‘controlled landsites’, that is, sites which grocery retailers had prevented from being used for grocery retailing that each act as a barrier to entry in a highly-concentrated local market and have an AEC.

31. In terms of the three major product markets that we identified, we concluded that:

- for larger grocery stores, an AEC arises from the planning system, which necessarily constrains overall entry and also acts in favour of the existing large grocery retailers, and controlled landsites, which act as a barrier to entry in a number of highly-concentrated local markets;
- for mid-sized and larger grocery stores, an AEC arises from controlled landsites, which act as a barrier to entry in a number of highly-concentrated local markets; and
- for all grocery stores, limited barriers to entry or expansion mean that we have not identified an AEC.”

29. The report considered the impact of the planning system in more detail at paras. 7.34 to 7.68. Having noted the broad public interest objectives of the planning system and the town-centre first focus of policy it stated:

“7.37 An inevitable consequence of a plan-led system that seeks to meet the broad range of objectives set out in paragraph 7.35 is that grocery retailers may not always be able to open a new larger grocery store in the location of their choice. That is, the planning system will, quite deliberately and appropriately for the purposes of meeting its objectives, act—to some extent—as a barrier to entry and/or expansion.

7.38 The planning regime acts as a barrier to entry or expansion primarily for larger grocery stores. This is because, in general, it is easier to secure suitable sites for mid-sized grocery stores or convenience stores in those areas where planning consent is already in place or where planning requirements are significantly less onerous, in particular in town centres.

7.39 A number of grocery retailers told us that the increased town-centre focus since 1996 had led them to focus on developing smaller stores in town centres and edge-of-centre locations. Tesco told us that it had increased the range and variety of store formats to gain access to a greater number of potential sites. Sainsbury’s told us that ‘since the 1996 change to retail policy in PPG6,220 retailers prepared to accept the policy focus of retailing on centre and edge-of-town centre sites of an appropriate scale have not been unduly constrained by the planning system’. To the extent that the planning regime has encouraged convenience and mid-sized stores rather than larger grocery stores through impacting on the development strategy of grocery retailers, this is a further indicator that the planning regime represents a barrier to entry for larger grocery stores.”

30. It considered the costs of planning, delay in terms of the size of stores applied for and objections received and concluded:

“7.65 In conclusion, the planning system, in pursuing the broad-based objectives for which it is intended, necessarily constrains new entry by larger grocery stores. It also has the effect of increasing the time for new larger grocery store entry to take place due to the need to assemble sites likely to be granted planning permission as well as the time required by LPAs to consider planning applications.

7.66 The costs associated with site assembly and submitting a planning application, and the risk of planning permission not being granted, mean that the existing large grocery retailers with substantial experience of the planning system are in a better position to mitigate or absorb these costs and risks than regional grocery retailers and new entrants to the industry, such as international operators without a UK presence.

7.67 The planning regime places more limited constraints on the extension of existing stores by grocery retailers compared with new larger grocery store entry. An incumbent grocery retailer, by extending its store, will make new larger grocery store entry by a rival grocery retailer more difficult.

7.68 Finally, the planning regime for grocery retailing places limited barriers on entry or expansion by mid-sized grocery stores and convenience stores.”

31. It may strike those, perhaps more familiar with the operation of the planning system than the CC, that concern with regard to large grocery retailers and the costs of the planning system on their ability to compete as opposed to the rejection of concerns regarding smaller stores, is a curious one. On the other hand, the CC did not find fault with the holding onto land for land assembly purposes by retailers until sufficient land had been found for an acceptable development:

“7.81 In conclusion, we do not find that grocery retailers are engaging in the holding of undeveloped land (or landbanking) as a strategy to impede the entry by rival grocery retailers into local markets. The distribution of land holdings held by grocery retailers shows that these are, in

the main, in areas where the grocery retailer does not have a strong presence. The four largest grocery retailers are taking longer to develop land into stores than has been the case in the past, and while this may be consistent with a landbanking strategy, it may also be explained by other factors such as time preparing planning applications. Finally, holding land undeveloped as a land bank seems a relatively expensive means of controlling land for the purposes of impeding competitor entry compared with other means of controlling land, such as leasing land to third parties or selling it with a restrictive covenant. We discuss these other practices in the following paragraphs.”

32. The use of restrictive covenants that impede or prohibit grocery retail use did come in for heavy criticism (although there only appeared to be 30 cases of concern) and remedies have been announced to prevent such covenants (including in s. 106 obligations). See the *Final Report* at paras. 7.88-7.93 and 11.137-11.184.

CC recommended remedy

33. The CC considered that the current policy did not adequately take account of competition issues and that a new competition test should be introduced. Whilst it was preferable for that test to operate within the current planning system, if this could not be delivered by DCLG the CC recommended that it should then be delivered by DBERR through the introduction of a new regulatory regime which would impose a competition test outside, and additional to, the requirements of the planning system. The second recommendation would, of course, mean that the competition issue would not be able to be weighed against other relevant public interest considerations that, in specific cases, might be more compelling than competition issues. Even in the context of the planning system, the CC recommendations seek to tie down the discretion of the planning decision-maker in an unprecedented manner.
34. It is unfortunate that the CC’s remit and experience is so limited particularly since it was looking to integrate competition considerations in the planning context that was not an area within its own expertise. However, it is for Government, and DCLG and DBERR in particular, to determine how best to deal with the CC’s recommendations and provide an overall balance of issues which best serves the wider public interest.
35. The CC summarised its own recommendations as follows:

“Summary of remedy

11.12 To address the AEC that we found in relation to local market concentration, we decided to recommend the following measures in order to establish the competition test within the planning system:

- (a) that CLG and the devolved administrations take such steps as are necessary for the OFT become a statutory consultee;
- (b) that CLG and the devolved administrations take such steps as are necessary (including changes to the Town and Country Planning (General Development Procedure) Order (GDPO) and its equivalents and to planning policy) to ensure that the OFT is consulted by LPAs on all

planning applications for grocery store developments (including new stores and extensions, whether submitted by large grocery retailers or third parties including other grocery retailers) where the developed store will be in excess of 1,000 sq metres net sales area;

(c) that CLG and the devolved administrations take such steps as are necessary (including changes to planning policy) to ensure that where LPAs give open A1 planning permission that is not to be used for grocery retail, planning conditions are applied that limit groceries floor space to less than 1,000 sq metres;

(d) that CLG and the devolved administrations take such steps as are necessary (including changes to the GDPO and its equivalents and to planning policy) to ensure that LPAs take account of the OFT's advice on the result of the competition test (see below) and that LPAs may only determine planning applications in a manner inconsistent with that advice where they are satisfied that:

(i) the particular development would produce identified benefits for the local area that would clearly outweigh the detriment to local people from the area becoming or remaining highly concentrated in terms of grocery retailing; and

(ii) the development, or any similar development, would not take place without the involvement of a large grocery retailer that had failed the competition test (see below);

(e) that CLG and the devolved administrations take such steps as are necessary (including changes to planning policy) to make clear that where LPAs determine planning applications in a manner inconsistent with the OFT's advice on the result of the competition test, they do so only when they have demonstrated on the basis of sound evidence that the criteria set out above have been satisfied and set out publicly the reasons for overriding the OFT's advice; and

(f) that CLG and the devolved administrations take such steps as are necessary (including changes to planning policy) to ensure that section 106 contributions in connection with matters unrelated to competition should not be considered by LPAs as sufficient to offset the effect the development would have on concentration in the local market.

11.13 We note that the introduction of the competition test into the planning system is contingent on action by CLG and the devolved administrations. We recommend to BERR that, if the competition test is not established within the planning system by CLG and the devolved administrations, it should take such steps as are necessary to implement the competition test outside the planning system.

11.14 In applying the competition test as part of the planning system, we recommend that the OFT provide advice on the result of the competition test to LPAs. In applying the competition test, we recommend that the OFT:

(a) assess concentration across an area defined using a 10-minute isochrone (calculated using a standard, readily available package such as MapInfo/ Drivetime) around the store that is to be developed;

(b) count the number of fascias (including that of the retailer that might operate the developed store) operating large grocery retail stores within the isochrone, such fascias to include all full-range national or regional grocery retailers and symbol groups and independently-owned full-range grocery store operators;

(c) (where the number of such fascias is three or fewer) calculate the share of groceries floorspace within the isochrone that the grocery retailer operating the developed store would have after the development had been implemented, such calculation to include all full-range national or regional grocery retailers and symbol groups and independently-owned full-range grocery store operators;

(d) where a planning application was submitted by a large grocery retailer, provide advice to the LPA on whether that grocery retailer had passed or failed the test;

(e) where a planning application was submitted by a third party (including a grocery retailer that is not a large grocery retailer), provide advice to the LPA on which grocery retailers would fail the test;

(f) a particular retailer will pass the test for a particular local area (ie within a 10-minute isochrone around the store to be developed) if:

- (i) it would operate the developed store as a new entrant in the local area;
- (ii) the total number of fascias in the local area were four or more; or
- (iii) the total number of fascias were three or fewer and the grocery retailer operating the developed store would have less than 60 per cent of groceries sales area in the local area (this decision taken on the basis of a majority of four to two);

(g) a particular retailer would fail the test if:

- (i) the grocery retailer was not a new entrant in the local area; and
- (ii) the total number of fascias in the local area were three or fewer; and
- (iii) the retailer would have 60 per cent or more of groceries sales area (including the new store) in the local area (this decision taken on the basis of a majority of four to two).

11.15 In order to ensure the effective working of the competition test remedy, we will require all grocery retailers to provide to the OFT on request accurate figures for the groceries sales area of any store in the UK, and any other information that the OFT may require for the application of the competition test.

11.16 As a complement to our competition test remedy, we will also require large grocery retailers to notify to the OFT all acquisitions of existing stores of more than 1,000 sq metres.

11.17 We recognize that the OFT will need to allocate its resources to fulfil these new functions.”

36. Absent a new planning test, the CC made the alternative recommendation of legislation by BERR to regulate applications from outside the planning system: see para. 11.13, above.

37. The proposed test is a mechanistic one focusing on:

- (1) Proposals (new or extensions) for grocery stores with a net sales area in excess of 1,000 sq m (meaning probably grocery floor space, not non-food); and
- (2) Concentrations of grocery retailers within a 10 minute isochrone of the proposed store/extension.

38. The test would be passed if

- (1) The proposed retailer it would operate the developed store as a new entrant in the local area; or
- (2) the total number of (grocery) retailer fascias in the local area were four or more; or
- (3) the total number of fascias were three or fewer and the grocery retailer operating the developed store would have less than 60 per cent of groceries sales area in the local area (this decision taken on the basis of a majority of four to two);

39. A grocery retailer would fail the new test if:
- (1) It was not a new entrant in the local area; and
 - (2) the total number of fascias in the local area were three or fewer; and
 - (3) the retailer would have 60 per cent or more of groceries sales area (including the new store) in the local area (this decision taken on the basis of a majority of four to two).
40. OFT would be made a statutory consultee and advise the LPA whether the applicant passed or failed the test, and also provide advice as to which other retailers might pass or fail. This would necessitate amendments to the GDPO.
41. However, unlike other material planning considerations, the CC wants to restrict the ability of the decision-maker in terms of disregarding the advice of OFT or an assessed failure to meet the new test. It advised that DCLG should take steps (policy and other) to:
- (1) ensure that LPAs take account of the OFT's advice on the result of the competition test and may only determine planning applications in a manner inconsistent with that advice where they are satisfied that -
 - (a) the particular development would produce identified benefits for the local area that would clearly outweigh the detriment to local people from the area becoming or remaining highly concentrated in terms of grocery retailing; and
 - (b) the development, or any similar development, would not take place without the involvement of a large grocery retailer that had failed the test
 - (2) make it clear that where LPAs determine planning applications in a manner inconsistent with the OFT's advice on the result of the competition test, they do so only when they have demonstrated on the basis of sound evidence that the criteria set out above have been satisfied and set out publicly the reasons for overriding the OFT's advice; and
 - (3) ensure that section 106 contributions in connection with matters unrelated to competition should not be considered by LPAs as sufficient to offset the effect the development would have on concentration in the local market.
42. This is plainly an attempt to prevent LPAs from regularly finding that benefits identified by the planning application scheme outweigh competition issues, e.g. regeneration benefits, and might be seen as an encroachment on the local decision-making process and local democracy. This would as a matter of principle place competition ahead of most other material considerations, which is questionable and possibly objectionable, when looking at the

potential range of competing public interests.

43. It is open to debate whether this requires amendment to primary legislation in some parts or whether it can be achieved by policy and amendments to the GDPO.
44. As already noted, is curious that a regulatory mechanism of such complexity is required when the problem identified is the barrier to entry caused by the cost and complexity of the planning system itself. It seems counter-intuitive to increase complexity and cost rather than the CC recommending the simplification of policy and process. The Barker Report (December 2006) also focused on the need to streamline the planning system and policy, which was the first key recommendation: see e.g. p. 6 of the Report. It is instructive to compare the successive versions of retail policy, from the 4 sheets of the first PPG 6 in 1988 to the 33 pages of PPS 6.
45. If the test is adopted other concerns might include:
 - (1) Whether the CC were correct to reject the contentions that the test would lead to greater delays and costs than it had assessed
 - (2) Use of the competition test strategically, for objection purposes
 - (3) How the test will play on appeal or call-in
 - (4) Whether the OFT would attend any appeal or hearing and be able to be questioned as to its application of the test
 - (5) The role of expert evidence to contradict the OFT's assessment
 - (6) The ability of planning authorities to take a different view from the OFT

Challenge to the competition test

46. As noted, Tesco successfully challenged the CC Report. The CAT's judgment of 4 March 2009 upheld Tesco's appeal on two grounds:
 - (1) it found that the CC had not properly assessed the economic costs of the competition test, ie the risk that the application of the competition test might have adverse effects on consumers in terms of leaving consumer demand unmet (see paragraph 111 of the judgment). Further, the CC had not established how long any such unmet demand might persist; and
 - (2) it found that the CC had failed sufficiently to address proportionality and effectiveness (see paragraph 165 of the judgment).

47. On 3 April, the CAT directed the CC to reconsider and make a new decision on the competition test, requiring the CC to reconsider its recommendation that the competition test be imposed as part of a package of remedies to address the adverse effect on competition, and resulting detrimental effects on customers, that were identified in certain highly-concentrated markets. If the CC concludes that the competition test as originally recommended would not be an appropriate remedy in light of the reconsideration, the CC must consider whether an alternative remedy would be appropriate.
48. See www.competition-commission.org.uk/inquiries/ref2009/groceries_remittal/index.htm. The timetable currently set has the publication of provisional findings on 6 July 2009 and the final (supplementary) report out late august/early September.

The response from Government

49. The initial response was muted, in part as a result of CAT appeal.
50. In July 2008 BERR in *The Supply of Groceries in the UK - The Government Response to the Competition Commission Market Investigation* stated:

“It is the job of Government to provide the right market conditions to enable fair and free competition. The Government is keen to establish what can be done, working with others, to address the issues identified by the CC most effectively. This response is therefore the start of an ongoing dialogue and plan of work that we hope to have with our delivery partners.

The CC has the powers to implement the majority of the remedies outlined in the report. These cover the creation of a new grocery supplier code of practice (GSCOP) and a package of planning remedies including the lifting of existing exclusivity arrangements and restricting future ones, a ban on the imposition of future restrictive covenants, and a requirement for grocery retailers to release existing restrictive land covenants.

The remainder of this Response considers each of the recommendations and sets out a Government response to each. ... The response also reflects the fact that Tesco has, under section 179 of the Enterprise Act 2002, challenged the legality of certain findings made by the Competition Commission.”

51. In its specific response to the CC’s main planning recommendations, BERR says little:

“The Government accepts that this is an important recommendation both for the Competition Commission and for large grocery retailers. We are considering this recommendation carefully and are working through a number of implementation issues were we to decide to introduce such a competition test into the planning regime. We note that Tesco has appealed this decision to the Competition Appeal Tribunal (CAT). CLG are also separately consulting on wider planning reforms which include the recently published proposed revisions to town centre policy in Planning Policy Statement 6: Planning for town centres. **We want to reflect further on the Commission recommendation. Government will report more fully on its decision later in the year in the light of developments.**”

52. DCLG embarked on its draft review to PPS6 notwithstanding the lack of conclusion to the CC process and the initial consultation draft revision to PPS 6 enlarged on the “choice” and

competition aspects of the current version in conventional land use terminology:

“2.18a Successful town centres need a good mix of shops and services. Different but complementary uses, during the day and in the evening, can reinforce each other, making town centres more attractive to local residents, shoppers and visitors. **For example, a broad range of retailer representation is likely to increase the attractiveness of a town centre and will promote competition and consumer choice.** Larger retail stores can strengthen a centre’s retail offer and perform an important anchor role, increase linked trips and pedestrian activity. Smaller shops can significantly enhance the character and vibrancy of a centre and make a valuable contribution to consumer choice. **Although the identity of the occupier is not normally material to a planning decision, local authorities can help create the right conditions to help diversity flourish.** Local planning authorities should **proactively use the planning process** to support the diversification of uses in the town centre as a whole, and ensure that tourism, leisure and cultural activities, which appeal to a wide range of age and social groups, are dispersed throughout the centre.

2.18b When planning for their town centres local authorities should **seek to promote competitive town centre environments.** This may include, where appropriate, giving priority consideration to whether the established character and diversity of their town centres should be protected and enhanced.

2.18c When addressing these considerations local authorities should make full and effective use of the tools available to them.”

Draft PPS 4

53. The recent Draft PPS4 supersedes the earlier consultation drafts of PPS6 and PPS4: see para. 1 of the draft PPS. It will also replace PPG5 and aspects of PPS7 and PPG13 (see para. 1). As with the earlier draft PPS6 amendments, issues of competition and choice are further emphasised over current PPS6. However, perhaps more clearly than in the draft amendments to PPS6, the draft is set firmly in the following context:

- (1) land use planning considerations, not issues of retailer identity and fascia choice;
- (2) the lack of a concluded view on the CC recommendations;
- (3) the view that given the new structure of policy which clarifies the main policies and policy structure, provides detailed and separate guidance as to the new impact test and sequential appraisal, and the abolition of the need test, may well remove the barrier to entry identified by the CC. The logic of that conclusion would be that the change to the policy structure and the content of policy would render unnecessary the addition of a competition test.

54. On the basis of the current draft and Government response generally, there is no basis at present for assuming that the CC’s recommended competition test is a material planning consideration since:

- (1) it has not been adopted as even interim or draft government policy;

- (2) draft PPS4 does not apply an approach which would justify decisions based on retailer or fascia indemnity and/or choice of retailer as an end in itself; and
- (3) the CC's approach appears to lie outside of land use planning considerations as explained by the authorities.
55. Although it is only draft policy, it is consistent with the approach to land use planning found in PPS6 since it states in the *Introduction* p. 7 a principle found in PPS6:

“The planning system affects investment by providing certainty about the uses land can be put to and by coordinating the pattern of infrastructure needed to support development. ... Competition and enterprise can also be improved when new firms are able to enter markets and challenge existing firms. However, whilst planning policy can positively influence the drivers of productivity, and facilitate employment growth, if it is not based on an understanding of the needs of business it can also represent a barrier to employment and productivity growth. **It is not the role of the planning system to restrict competition, preserve existing individual commercial interests or to prevent innovation.**”

56. Further, in the objectives in para. 6 it is stated (emphasis added):

“• promote the vitality and viability of town and other centres as important places for communities and ensure that they are economically successful recognising that they are important drivers for regional, sub-regional and local economies. To do this, the Government wants:

— new economic growth and development to be focused in existing centres, with the aim of offering a wide range of services in an attractive and safe environment

— **competition between retailers and enhanced consumer choice through the provision of innovative and efficient shopping, leisure, tourism and local services in town centres, which allow genuine choice to meet the needs of the entire community, and particularly socially excluded groups**

— the historic, archaeological, architectural heritage of centres to be conserved and, where appropriate, enhanced to provide a sense of place and a focus for the community and for civic activity

• promote social inclusion, ensuring that communities have access to a range of main town centre uses, and that deficiencies in provision in areas with poor access to facilities are remedied”

57. Competition is to be promoted not by restrictions on the identity of retailers but by the normal planning means referred to above.
58. The draft refers to the CC Report at p. 9 and to the fact that no decision has yet been made:

“The draft statement does not include any specific proposals for a ‘competition test’ that was recommended by the Competition Commission. In June 2008, Tesco PLC challenged the Commission’s recommendation in the Competition Appeal Tribunal. In March 2009, the application by Tesco was allowed and the recommendation quashed. The Tribunal unanimously concluded that the Commission, in its Report, had failed properly to consider certain matters which were relevant to its recommendation that the competition test be imposed as part of a package of remedies to address the adverse effect on competition identified by the Commission. **The Government will await the Competition Commission’s reconsideration of the issue before deciding how to proceed.**”

59. As already explained, the CC viewed the complexity and costs of the planning system so far as convenience retailing was concerned to be a barrier to entry in certain cases and proposed the imposition of a competition test as part of the development control process.
60. There are suggestions in the impact report included in the PPS4 Consultation Draft that the new approach in the draft, the clarification of policy, composite impact test, removal of the need test (following the Barker and CC recommendations) and the provision of guidance for new retail impact assessments may meet the objectives of the CC Report and, by implication, may render unnecessary the introduction of a competition test. See, for example, p. 73 of the Draft (emphases added):

“Competition Assessment

The Barker review noted that local authorities refusing planning permission on the basis of absence of need was likely to result in more limited choice and higher prices of goods in stores. The report also noted that the current policy in PPS6 requiring the demonstration of need can have unintended effects, including adverse impacts on competition. The Competition Commission’s investigation of the grocery market identified evidence that the current need test may be, or may become, a barrier to entry in many local areas when the available capacity has been absorbed by new development.

The removal of the current need test will remove identified barriers and, in principle, facilitate a greater likelihood of entry by operators who may not otherwise have been able to enter a local market where identified local need is taken up by existing incumbents and/or unimplemented planning permissions. **In addition, the strengthened approach to plan making requires local authorities and regions to consider the promotion of choice and competition when developing policies.** Additionally at the development control stage, **the new impact test will promote competition by enabling a more thorough assessment of the impact of development upon consumer choice and retail diversity.** Where development is permitted, this would be likely to increase competition, resulting in greater consumer choice, and potentially reducing prices. However, local authorities would also be able to turn down development where it would have a significant adverse effect on a struggling town centre, particularly where the town centre would be adversely affected by loss of trade or turnover, or where there are other significant negative impacts related to other key impact considerations.

Taking account of these considerations the proposal is expected to enhance competition, with no significant redistributive effects, and will improve entry to local markets.”

61. Draft policy EC1.4 refers to competition benefits although not in terms which would warrant the exclusion of any retailer from a specific development and in terms which are reworking of 2.35 of PPS6, based on land use factors:

“5. when assessing qualitative need for retail and leisure uses, ensuring that additional benefits in respect of regeneration and employment are not taken into account (although they may be material considerations in the site selection process) assess whether:

- a) there is an appropriate **distribution of locations** for retail and leisure uses, in light of the objective of promoting the vitality and viability of town centres and the application of the sequential approach, to improve accessibility for the whole community
- b) there is **provision for a range of sites for shopping, leisure and local services, which allow genuine choice to meet the needs of the whole community**, particularly the needs of those

living in deprived areas

c) other considerations are also taken into account, such as the degree to which shops may be overtrading, **the benefits for competition and retail mix.**”

62. Similarly, draft EC6 focuses on land use considerations, diversification of uses and retail mix, and not the identity of specific retailers:

“Policy EC6: Local planning approach to planning for consumer choice and promoting competition for town centre development

EC6.1 Local planning authorities should proactively plan for consumer choice and promote competitive town centre environments by:

1. supporting the **diversification of uses** in the town centre as a whole
2. planning for a strong **retail mix** so that the **range and quality of the comparison and convenience retail offer** meets the requirements of the local catchment area
3. recognising that smaller shops can significantly enhance the character and vibrancy of a centre and make a valuable contribution to consumer choice
4. retaining and enhancing existing markets and, where appropriate, re-introducing or creating new ones, ensuring that markets remain attractive and competitive by investing in their improvement
5. planning for a range of tourism, leisure and cultural activities, which appeal to a wide range of age and social groups, and ensuring that these are distributed throughout the centre and
6. taking measures to conserve and, where appropriate, enhance the established character and diversity of their town centres”

63. The land use nature of the policies is underlined by the Impact Assessment consideration of the promotion of consumer choice at p. 69 of the draft (my emphasis):

“Promoting greater choice for consumers

The proposals emphasise the need for local authorities to consider consumer choice in respect to both plan making and determining planning applications. In terms of plan making, the proposals require local authorities to plan for a range of shopping, leisure, tourism and cultural services in terms of the range of goods and stores that are available to consumers, and identify sites for varying uses and store types, having regard to consumer choice and promoting competition. **In respect to planning applications**, local authorities will be required to consider the impact of proposals on consumer choice. This consideration will mean that **new development that increases retail diversity may be allowed** where, inter alia, it secures high quality design and does not have significantly adverse impacts in respect to any of the key impact considerations, and is consistent with the Government’s policy objectives for town centres.”

64. The fact that proposals may be permitted where they allow greater retail diversity (not retailer diversity) does not itself signal a breach of recognised land use considerations. It is the development that is seen as increasing diversity. There are many retail diversity issues (e.g. small retail units, types of retail etc) which are capable of falling within that guidance, as is the case with current guidance in PPS6.
65. While, therefore, draft PPS4 does place greater emphasis on choice and competition this is

consistent with ordinary land use planning considerations and I do not consider references to such to warrant considerations of retailer or fascia mix, or simple choice of retailers as opposed to consideration of the types and nature of the retailing mix and choice available – i.e. focussing on the size, nature and location of the development rather than the operator.

66. To read it otherwise would be to suppose that DCLG was seeking to effect a silent revolution with regard to material land use factors, which is highly unlikely, and inconsistent with DCLG’s own response to the CC. Indeed, it is consistent as I have already indicated with the general approach to land use issues. To read it even as bringing in a species of “personal circumstances” i.e. considerations of individual retailers or retail fascias, would be to elevate what Lord Scarman described as “exceptional”, and requiring individual justification in a specific case, into a regular general consideration in the application of policy. In my opinion, this is very unlikely to be what DCLG intends or means by the draft PPS 4.
67. Although this is only draft policy, it is useful since:
- (1) It represents current Government thinking on retail and town centre policy;
 - (2) It reaffirms the operation of traditional land use planning considerations, albeit that it places greater emphasis on choice without seeking to restrict competition;
 - (3) It does not support an early adoption of the CC’s approach. If anything, it suggests that the CC’s concerns may be met by more traditional means.

Draft Guidance

68. DCLG has also published the “living draft” guidance on the new composite impact test, *Planning For Town Centres - Good Practice Guide on Need, Impact and the Sequential Approach*. While para. 1.11 of the draft states that does not set out new government policy, it can provide useful indicators as to the practical operation of policy.
69. Indeed, in the section on competition and choice, the draft Guidance emphasises the fact that policy is dealing with land use considerations (emphases added):

“(b) Consumer Choice and Competition

4.12 The Government is strongly committed to promoting consumer choice and competition as part of its approach to town centre development. Competition between firms increases choice for consumers, and can result in productivity and efficiency gains, which in turn lowers the price of goods and services. Competition for consumer expenditure and investment between centres (and between centres and out-of-centre retail development) is a key challenge when planning for new development in town centres and making strategic choices about where to allocate new floorspace.

4.13 Healthy town centres need to have a critical mass and diversity of retail development which

attracts consumers on a regular basis throughout the year. **To remain competitive, they need a good mix of different types of multiple and independent retailers. This can include specialist shops and niche retailers, providing quality retail space that offers sufficient product ranges to meet the requirements of the local catchment.** Such retail development also needs to be supported by a range of tourism, leisure and cultural activities.

4.14 Local planning authorities can use their LDFs to support the diversification of town centres by providing more choice and competition. However, there are three important considerations: -

- **Whilst planning can secure specific sizes of unit or types of use, it currently cannot be used to give preference to one retailer over another. Similarly, it should not be used to restrict competition or preserve existing commercial interests. This includes restricting occupancy of premises to specific retailers;** restricting the rent of premises; controlling the price of goods sold or the change of use from one type of shop to another within the same use class.
- The positive effects of providing more choice and competition should always be balanced against any adverse impacts. For example, where a development is on the edge or out-of-centre, **care needs to be taken not to promote new or improved facilities simply on the basis of fostering choice or competition where there is insufficient quantitative need** and the development may undermine investment or harm the vitality and viability of a the centre itself or a nearby town centre.
- Conversely, there may be circumstances where a lack of quantitative need may be offset by choice and competition considerations. For example, a development on the edge of an existing centre may provide additional choice and competition, be consistent with sustaining and enhancing the vitality and viability of the centre, and be supported by a robust impact assessment which shows a diversion of expenditure from less accessible out-of-centre locations to a more accessible edge-of-centre location. This is exemplified by the Beverley case study.”

70. Whilst it may be relevant for planning authorities to plan for a range of shops, large and small, and create an environment within which groups of small independent retailers may flourish, and may have regard to the character of the retail centre in so doing, what it may not do is restrict occupancy or take decisions based on the identity of specific retailers or trading fascias.

Provisional conclusions

71. In view of the fact that Government has now had over 12 months to consider the CC’s report on the Groceries Inquiry, notwithstanding the current remission due to the decision of the CAT, the following provisional conclusions can be drawn from both current and emerging policy:

- (1) Government has now stated on several occasions that it has not made any final decision as to how to respond to the CC’s recommendations;
- (2) It follows that the CC’s competition test is not Government policy, current or draft;
- (3) The current role of competition and choice is set firmly by both PPS6 and draft PPS4 in the context of the current approach to land use planning, namely that it focuses on the

objective characteristics of the use of land and does not allow a distinction to be drawn simply on the basis of the identity of the occupier/developer or the proposed retail fascia. To do so will require a change to be made to the current planning system, which has not yet been decided;

- (4) The CC is currently considering on the remission by the CAT whether it should change its recommendations;
- (5) There are distinct signs in the consultation draft of PPS4 (including the impact assessment) that the changes proposed in terms of the clarification of policy, abolition of the need test, creation of a unified impact test with new guidance may be considered to be a basis for rejecting a proposed competition test on the footing that retail planning policy has materially changed since the CC's consideration of the issue.

David Elvin QC

1 June 2009

This seminar paper is made available for educational purposes only. The views expressed in it are those of the author. The contents of this paper do not constitute legal advice and should not be relied on as such advice. The author and Landmark Chambers accept no responsibility for the continuing accuracy of the contents