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Dear Mr Oyler

**Market Investigation into the Supply of Groceries by Retailers in the UK  
Remittal of the Competition Test by the Competition Appeal Tribunal - Provisional  
Decision published 16 July 2009**

We refer to the CC's Provisional Decision dated 16 July 2009 ('Provisional Decision') and we set out below Marks and Spencer plc's ("M&S") comments.

**1 Overall Findings**

1.1 M&S strongly supports the CC's recommendation that a competition test (the "Test") should be applied to grocery retail planning applications as part of the package of remedies addressing the adverse effects on competition (the "AEC"), identified by the CC in its main report published on 30 April 2008. M&S agrees with the conclusions drawn by the CC in its Provisional Decision and in particular endorses the conclusion that the benefits of introducing the Test are likely to substantially outweigh the costs and that the Test would be effective and proportionate in addressing the AEC in relation to highly concentrated local markets.

1.2 In the remainder of this letter, M&S identifies certain areas of the Provisional Decision which it considers would benefit from further clarification by the CC.

**2 Effects of the Test - Object and Rationale**

2.1 In paragraph 4.6 of the Provisional Decision, there is reference to the fact that a strong incumbent can reduce a competitor's ability to enter or expand through the development of a new store or extension to an existing store. This is partly because the expansion by the strong incumbent reduces the likelihood of a new large store passing the need test which currently applies to planning applications.

2.2 In footnote 16 on page 16, the CC refers briefly to the current consultation on replacement national planning policies for retail development, where it is proposed that the need test be removed. Whilst this is an accurate description of the current position, M&S considers that the analysis would benefit from a clearer indication that the proposed replacement policies would retain considerations of need in the preparation of development plan policy and that need would still be considered in the context of the impact test (when assessing the magnitude of the likely impact on existing town centres and other stores). In other words, even if the need test for planning applications is replaced by an impact test as currently proposed, the relevance of "need" to the assessment of impact and to policy-making means that there remains a case for saying

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that a strong incumbent can reduce the likelihood of a new large store addressing concerns about need at the planning application stage.

- 2.3 In addition, M&S takes issue with the last sentence of paragraph 4.8 of the Provisional Decision. Whilst M&S recognises that allowing new entry by a strong incumbent outside the 10 minute drive time isochrone is a necessary consequence of the Test, M&S does not agree that this brings significantly greater choice to consumers; rather the creation potentially of a new highly concentrated market as a consequence of this is undesirable in terms of consumer choice and competition. M&S fails to see that this sentence adds materially to the CC's analysis other than to suggest that in qualitative terms the Test imposes a significant cost to consumers, which M&S believes is not the case.

### 3 The Benefits and Costs of the Test

- 3.1 M&S considers that the CC's conclusions relating to non-quantifiable costs and benefits merit further clarification.
- 3.2 First, M&S considers that the CC could better explain why certain costs are non-quantifiable (see especially paragraphs 5.20 and 5.21). On the basis of the current analysis, M&S is unable to ascertain why this is so.
- 3.3 Secondly, M&S notes that at paragraph 5.21 of the Provisional Decision the CC effectively sets off uncoded benefits against non-quantifiable costs. However, elsewhere (for example at paragraph 7.2 of the Provisional Decision and paragraph 10 of the summary) uncoded benefits have been characterised as "significant" and this conclusion does not appear to be tempered by the fact that in the course of the Provisional Decision the CC has used those benefits to set-off non-quantifiable costs. M&S believes, therefore, that the CC's analysis would benefit from some form of value judgment regarding the *extent* to which uncoded benefits outweigh non-quantifiable costs (if at all) and that the way in which the uncoded benefits are characterised in the Provisional Decision remains consistent with such a judgment.
- 3.4 At paragraph 5.33, M&S is concerned that the CC should emphasise for the avoidance of doubt that the *per store* net benefit would translate into a substantial and significant net benefit nationwide.
- 3.5 Finally, M&S also considers that the CC's analysis of the cost of delay and in particular the way in which the CC has estimated the length of such delay could be better reasoned - see in particular paragraphs 5.64 (and footnote 51), 5.65 and 5.73.
- 3.6 In particular, at paragraph 5.73 of the Provisional Decision, the basis of the CC's estimate that the delay involved in a new store being built by a competitor, instead of an extension by a strong incumbent of its existing store, would fall from four years to one year after the Test has been in operation for some time is unclear. In M&S' view there would still be potential land supply issues and delays caused by the complexity and inefficiency of the planning system, which could result in a delay that is significantly greater than one year. M&S would welcome a better explanation of how the CC sees retailers apprehending the Test and reducing potential delay.

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**4 Conclusion**

M&S would like to reiterate its strong support for the CC's Provisional Decision and its endorsement of the overall finding that the benefits of introducing the Test are likely to substantially outweigh the costs. If the CC would like clarification of any aspect of M&S' more detailed comments, please do not hesitate to contact us.

Yours faithfully

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