

# The Groceries (Supply Chain Practices) Market Investigation Order 2009

## Response to second consultation

### Introduction

1. The CC received 14 responses to its second formal consultation on the draft Order, published on 22 June 2009. We have taken these submissions into account and have now issued a final Order. In this paper we summarize the changes we have made to the Order and explanatory note as a result of submissions accepted and give our reasons for rejecting other submissions.

### Changes made

#### *The Order and the Groceries Supply Code of Practice (GSCOP)*

2. We have added some definitions to both the Order and the GSCOP to ensure that all defined terms in both documents are reflected in the definition section. We have made a minor amendment to the definition of 'Buying Team' for the purposes of clarification. We have also made a number of amendments to both the Order and the GSCOP to reflect that the obligations relate only to 'Grocery' products (as defined in the Order) rather than all products supplied to retailers.
3. We have further clarified the obligation in Article 6(1) requiring terms to be agreed in writing. We have amended the duty on retailers in Article 6(4) to hold written copies of agreements of contractual arrangements made under any supply agreement. In order to maintain consistency with Article 6(2), these terms must now be held for a period of 12 months from the date the obligations in the contractual agreement of arrangements come to an end.
4. We have amended Schedule 2 to provide that Waitrose Limited is the Designated Retailer for the purposes of the Order, as Waitrose submitted that its Waitrose grocery business is distinct from John Lewis plc, and that all supplier relationships for the business are with Waitrose Limited. We have also clarified that any subsidiaries of a Designated Retailer will be required to comply with the Order to the extent that they enter into the supply agreements to which the Order relates.

#### *Explanatory Note*

5. In response to requests from a number of parties, we expressly set out in the Explanatory Note that we would act with the Office of Fair Trading (OFT) to ensure that the current Supermarkets Code of Practice would be revoked upon the coming into effect of the Order (paragraph 11).
6. We provided examples of when a retailer might request removal from the list of 'Designated Retailers' (paragraph 18).
7. One respondent requested that we take further steps to clarify that there is no assumption that retailers' rather than suppliers' terms and conditions apply in any supply agreement, and that the changes we have made to paragraph 21 of the Explanatory Note and Article 6 of the Order in response to the first consultation were insufficient. We do not think that any further amendments should be made to the Order in this regard. Further, we are not able to specify which terms of supply should

dictate the relationship between a supplier and a retailer. However, we have made a further, minor, change to the Explanatory Note.

8. In response to a request by a retailer, we provided further details on the requirement for retailers to provide terms and conditions of supply agreements, and subsequent contractual arrangements (paragraph 22).
9. We clarified that it was the responsibility of the parties (as opposed to the OFT) to appoint the arbitrator in relation to a referred dispute (paragraph 34).

## **Suggested changes not made**

### ***The Order***

10. As set out above, we received 14 responses to the second consultation on the Order. The substance of these responses varied. A number of respondents made further submissions on points raised in response to the first consultation, asking that we reconsider requests for changes that we refused (or partially refused). These requests are set out below (referenced by the appropriate paragraph in the CC's *Response to consultation* of 22 June 2009):

- *Paragraph 30*: that retailers should be given more time to arrange for compliance with the Order. Given the time taken between both the date of the Groceries Investigation final report (the report) and the making of this Order, and the making of the Order and its commencement date (six months), we believe that all retailers have sufficient time to comply with the Order.
- *Paragraphs 34 and 87*: that the Code Compliance Officer be removed from the de-listing process, and that more detail be provided on the meaning of 'significant' for the purposes of de-listing. The respondent submitted that where a de-listing issue is purely commercial it would not raise issues under the GSCOP. However, we consider that de-listing is an important element of the GSCOP, particularly with regard to the issue of whether or not the decision to de-list has been made in accordance with the GSCOP. We therefore decided that the role of the Code Compliance Officer in relation to de-listing, as set out in the Order, should not be amended.
- *Paragraphs 39 and 40*: that the GSCOP be incorporated directly into the Order. In our previous consultation response, we noted that the incorporation of the GSCOP directly into the Order would result in a multi-layered dispute regime potentially involving a combination of private arbitration, investigations by the Ombudsman, and proactive direct enforcement by the OFT.

Some respondents submitted that such a result depended on the existence of the Ombudsman, and given the likely delays in establishing the Ombudsman, it was essential that the OFT be given the power to directly enforce the GSCOP through the incorporation of the GSCOP in the Order. We considered these submissions in the light of our powers under the Enterprise Act 2002 (EA02). We concluded that the best approach to enforcement and compliance with the GSCOP is through its implementation in accordance with our powers as an obligation to incorporate the GSCOP into every supply agreement, and separately to recommend the establishment of an Ombudsman to investigate and monitor compliance. We have made a recommendation to the Department for Business, Innovation and Skills to establish an Ombudsman through primary legislation. We do not wish to pre-judge any action to be taken pursuant to this recommendation.

- *Paragraph 42*: that a ‘best endeavours’ clause limits the obligation in Article 5 of the GSCOP. It was submitted that retailers should not be subject to a unilateral legal obligation which in practice can only be satisfied as a result of a bilateral agreement with their suppliers. However, we remain of the view that such a clause would lead to uncertainty in the application of the GSCOP. We note also that the EA02 provides some comfort to persons who take ‘all reasonable steps and exercised all due diligence’ to avoid contravening an order.<sup>1</sup>
- *Paragraph 47*: that the three-working-day time limit for confirming arrangements under the supply agreement be replaced with an obligation to confirm ‘as soon as reasonably practicable’ (paragraph 47). We remain of the view that three working days is sufficient time with which suppliers can confirm terms of orders and price changes.
- *Paragraphs 52, 58 and 60*: that a formal dispute escalation process be set up in relation to the GSCOP, that a longer period be allowed before a dispute could proceed to arbitration, and various other changes to the arbitration process. However, access to arbitration within a reasonable time frame is an important step in ensuring an effective dispute resolution process under the GSCOP. It was stated in the report (in paragraph 11.356) that arbitration, rather than mediation, should be a required part of the dispute resolution process. We reiterate that the right for suppliers to refer a dispute to arbitration need not be exercised immediately, and we expect that the supplier will be less likely to exercise this right if a retailer’s internal dispute resolution process provides adequate opportunity for the dispute to be settled.
- *Paragraph 69*: that the scope of the fair dealing provision should be limited. We considered further submissions on limiting the scope of the fair dealing provision. However, the report is clear as to the intended wording of the fair dealing provision (see paragraphs 11.314 and 11.315) and we did not consider that the submissions constituted ‘special reasons’<sup>2</sup> for amending this provision.
- *Paragraph 73*: to allow a specified period for payments to be made to override the obligation in paragraph 5 of the GSCOP to make payments with a ‘reasonable time’. While we agree that certainty regarding payment time is important, one of the problems identified in the report was delayed or withheld payments to suppliers. We therefore believe that payment within a reasonable time is a necessary part of the GSCOP.
- *Paragraph 70*: to allow retrospective changes to supply agreements if agreed by the supplier. It was submitted that there are many occasions where such retrospective changes would be to the benefit of both the supplier and the retailer. However, the report is clear that retrospective changes to agreed terms of supply should be prohibited outright, and we did not receive any submissions from suppliers during the consultation process to suggest that this obligation was inappropriate. We have therefore not made any amendment to this provision.
- *Paragraph 76*: a number of respondents remained concerned regarding the practical consequences of an outright prohibition on payments for shrinkage. However, the report (in paragraph 11.317) is clear that shrinkage should not be charged to a supplier.

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<sup>1</sup>Section 167(5).

<sup>2</sup>See section 138(3) of the EA02.

- *Paragraph 79*: that the obligation in the GSCOP relating to forecasting should not be amended. In particular, it was submitted that such a change was inconsistent with Appendix 11.2 and the findings in the report. However, we remain of the view that this change provides clarification as to what is required in order to ensure that such a forecast is 'transparent'.
  - *Paragraph 81*: that the obligation in relation to tying (in addition to some other ID practices) should be removed. However, we remain of the view that such practices were not intended to be removed from the scope of the GSCOP.
  - *Paragraph 85*: that retailers and suppliers should be able to agree to an average figure for resolving complaints. We consider that the GSCOP already allows for such a figure to be agreed, provided that any average figure must relate to the expected costs of the retailer of resolving such complaints.
11. After careful consideration of the above submissions, we decided that further changes to the Order were not required in relation to these issues.
  12. Some respondents queried the amendment to the feedback provisions in the Order, noting that a feedback procedure that did not provide for anonymity would be unlikely to be used by suppliers. We agree that suppliers may be less likely to provide feedback to retailers if a 'climate of fear' remains among suppliers. However, we do not believe that *requiring* retailers to implement a procedure for anonymous feedback is within the scope of the remedy set out in the report. We anticipate that the establishment of the Ombudsman will provide a means by which suppliers can voice complaints anonymously.
  13. A number of respondents reiterated their view that the Order, and in particular the GSCOP, would not be effective without the establishment of an independent, well-resourced Ombudsman to monitor compliance.