

The Groceries (Supply Chain Practices) Market Investigation Order 2009

Response to consultation

Introduction

1. The CC has received 24 responses to our formal consultation on the draft Order, published on 26 February 2009. The CC has taken these submissions into account and has now issued an amended draft Order for further consultation. In this paper the CC summarizes the changes of substance it has made to the draft as a result of submissions accepted and gives its reasons for rejecting other submissions. Very minor changes are not discussed. Consequential amendments to the explanatory note have been made following the changes made to the draft Order.
2. The CC received a number of responses to the consultation which suggested changes to the draft order. This follows an earlier informal consultation with a large number of parties, which informed the initial drafting of the Order. While we carefully considered each of the changes requested, a number would have required the Group to change the draft Order in such a way as to depart from its findings in the groceries market investigation final report (the report). Such changes can only be made if there is a 'special reason' or 'changed circumstance' that justify a departure from the report.¹
3. We note that the Groceries Supply Code of Practice (GSCOP) is based on the existing Supply Code of Practice (SCOP) which was amended to reflect the findings in the report and, in particular, the changes set out in Appendix 11.2. However, Appendix 11.2 states that these are suggested changes only and that the final text of the GSCOP is a matter to be settled during consultation. Consequently, where we believe the obligations in the GSCOP could be more clearly expressed (as identified through consultation) or where alternative wording would better reflect the findings in the report than the particular wording proposed by Appendix 11.2, we have considered departing from Appendix 11.2.

Changes made

The Order

Article 2

4. In relation to the definition of 'Supplier' we have clarified what 'direct supply' means in the Explanatory Note.

Article 3

5. We have included an additional provision in the Order to allow the CC to publish those directions made pursuant to its powers of direction.

Article 4

6. We have revised the list of persons specified in Schedule 2 to reflect the ultimate holding company (or its highest UK subsidiary) of the retailers to be bound by the

¹See section 138(3) of the Act.

Order. We have revised the turnover figure to relate to a particular time period. We have also provided for the OFT to specify when a Designated Retailer it appoints shall be covered by the obligations in the Order.

Article 5

7. We have clarified what is meant by stating that a 'Supply Agreement incorporates the Code' by adding Article 5(4).
8. Further clarification was requested on the consequences of failing to incorporate the GSCOP into supply agreements. We have made a change to the Explanatory Note to reflect this. It was also requested that the Explanatory Note address the right for retailers to make claims in respect of goods already delivered. We have made a change to the Order to reflect this.
9. It was suggested that it was not clear how the duties in the Code would cut across other agreed contractual terms such as force majeure. We have considered this point and have set out that it would not be inconsistent with the GSCOP to include a 'force majeure' provision for events outside the reasonable control of the parties, provided the provision is not materially different and not more burdensome to suppliers than the terms set out in Schedule 3 of the Order.

Article 6

10. We have amended the wording of Article 6 to remove the implication that a retailer's terms and conditions will always apply to supply agreements. We have required retailers to provide suppliers with contact details for the Ombudsman. We have also replaced the requirement to provide a 'letter' in Article 6(5) with 'notice' to allow retailers to provide this information by less formal means, eg an email.
11. We have amended the Explanatory Note to clarify what is meant by electronic communication as this is likely to have an important impact on the costs of retailers when complying with this requirement although we have not amended the Order.
12. It was submitted that the drafting of Article 6 and the definition of supply agreement suggested that each individual order from a supplier would incur all the obligations required by the GSCOP for a new supply agreement. We have added further discussion on Article 6 to the Explanatory Note and have limited the obligation in Article 6(6) where a retailer has an ongoing relationship with a supplier that is characterized by a series of repeated, but distinct, supply agreements.
13. Concern was expressed that retailers might seek to exclude 'spot buying' and 'sale or return' contracts from the scope of the GSCOP. We believe that the current definition is sufficient to cover such arrangements. However, we have added a reference to these types of contracts in the Explanatory Note.

Article 7

14. Requests were received for clarification regarding any requirement to provide confidential and privileged information. We note that any information required to be provided pursuant to the Order will be subject to the same rules regarding confidentiality as information provided in relation to the Act. We have included a reference to this in the Explanatory Note. We have also included a reference in Article 7 to section 109(7) of the Act to make clear that the OFT cannot require parties to provide them with privileged information.

15. Concerns were raised regarding the broad drafting of these provisions, which would require retailers to put in place document creation and retention policies, and might result in retailers inadvertently failing to maintain appropriate records or require costly exercises to produce such information. We have made some amendments to Article 7 of the Order to reflect these concerns, although we have not placed limits on the type of information that the OFT may require in order effectively to monitor and enforce the Order.

Article 9

16. We have amended Article 9 to remove the obligation on retailers to develop an anonymous feedback procedure. It was submitted by some respondents that the original draft went beyond the requirement set out in the report (paragraph 11.325) which proposed that retailers use their CCO for this role. Other respondents submitted that it would be difficult to maintain anonymity while at the same time allowing the CCO to act on feedback. We consider that the change we have made reflects these comments and in this respect aligns the GSCOP with the report. However, there remains in Article 6 a requirement for retailers to provide their suppliers with a mechanism for providing feedback on the supplier's relationship with the retailer. This is consistent with the report, which requires retailers to encourage suppliers to give such feedback.

Article 10

17. We have amended Article 10 to provide that the first compliance report shall be required at the end of the first full financial year following the commencement of the Order and that it should also cover any part of the previous financial year in which the Order was in force. We have also included a deadline within which the summary of the annual report must be published on the retailer's website.
18. Consistent with our revisions to Article 9(1)(d), we have excluded any requirement to include in the compliance report any feedback from suppliers to the CCO.
19. Concern was expressed about the extent of information that was required to be included in the annual report and suggested that anything more than a high level summary would be impractical. Others had concerns as to the lack of detail on what is required to be included in the compliance report and what other reports may also be necessary. We have provided further detail the extent of the required information in the Explanatory Note.

Article 11

20. We have amended the arbitration provisions of the Order to clarify that the costs of the arbitrator shall be paid by the retailer and the costs of each party may be subject to allocation by the arbitrator. It was noted that a presumption requiring retailers to pay all costs of any arbitration (including those of the supplier) would be highly unusual for a commercial contract, possibly promote unnecessary legal action by suppliers, make retailers responsible for the cost of negligent advice given by suppliers' advisers and was against principles of natural justice. We considered paragraph 11.359 of the report and concluded that the retailer should only be obliged to pay for the costs of the arbitrator and that the arbitrator should be entitled to decide other costs on a case-by-case basis.

21. It was queried whether arbitration should also cover disputes as to whether the Code applies. We consider that arbitration should cover such disputes, and we have included a reference to this in the Explanatory Note.
22. We have included a reference to the Ombudsman as the first choice of arbitrator in the event of a dispute and required arbitration requests to be in writing. We have also amended the arbitrator appointment provisions in the event that the Ombudsman is not established.

The Groceries Supply Code of Practice

Paragraph 1

23. We have amended criterion (d) in the definition of 'Reasonable Notice' as retailers could not reasonably assess the impact of the information given in such a notice on the business of a supplier.
24. We have amended the definition of 'Require' by removing 'genuinely volunteering' and replacing it with 'absence of duress' as the latter is a more commonly understood legal term.

Paragraph 10

25. We have amended the requirements in paragraph 10(1) so that they are not cumulative, which we consider is more consistent with the report.

Paragraph 11

26. We have limited paragraph 11(1)(b) to only apply to a change in goods, services or property of an equivalent standard and specified that the objective standard in paragraph 11(1)(a) should be reasonable.

Paragraph 14

27. We have defined 'compensation' as the sum equal to the difference between the promotional wholesale price and the non-promotional wholesale price. We have amended 'take all reasonable steps' to 'take all due care'—which is the same wording as that used in the report.

Paragraph 15

28. It was submitted that it should be made clear that paragraph 15 does not undermine a retailer's ordinary contractual position to claim for contractual damages for any loss caused by faulty goods. Further detail on this point has been added to the Explanatory Note. We have amended paragraph 15 to provide further clarity on when a retailer can attribute a consumer complaint to a supplier.

Paragraph 17

29. It was noted that it might be difficult in practice to give 'Reasonable Notice' of a change in senior buyer where contractual requirements mean a change might occur relatively quickly. We have amended paragraph 17 to provide that a change in senior buyer should be notified to suppliers as soon as reasonably practicable.

Suggested changes not made

The Order

Article 1

30. A longer time frame (between 9 and 12 months) was sought between the Order being made and its application to reflect that significant changes to retailer supplier processes will be necessary, including the requirement for all supply agreements to be in writing. We have considered these submissions carefully as this was also an important issue that was considered in the context of drafting the Order. It was decided, on balance, that six months is an adequate period for retailers to refine their supplier processes and we note that the development of this Order has taken around a year in which retailers have been in a position to consider those of their processes that need revision.

Article 2

31. It was suggested that this article be amended to include situations where a supplier contracts through one company but delivers the product through a sub-contractor. The final report is clear in setting out that the GSCOP is focused on the relationship between the retailer and direct suppliers. Thus the GSCOP cannot be extended beyond the contractual relationship that a retailer has with its supplier. We have made no change to the Order to reflect this comment.
32. We have repeated definitions in both the Order and in the Code to ensure that the Code will act as a stand-alone document. We did not agree that the terms 'supply chain' and 'designated buyer' require definition given that the context in which they were used in the GSCOP is clear. We have not amended the definition of 'Supply Agreement' to refer to 'contractual' agreements, as we consider that there is sufficient explanation of the type of agreement covered by the Code in Article 5.
33. It was submitted that the definition of 'Buying Team' was too wide as it would cover people such as the finance directors, trade liaison, public affairs managers and in-house counsel. Other parties requested further clarification on which employees would be covered by the definition of 'Buying Team'. The main obligation imposed on retailers in respect of the buying team is to undertake training on the GSCOP. The CC considers it important that all employees of a retailer who are involved in interpreting and applying the GSCOP, including finance and legal staff, undertake training on the GSCOP. It is also important that the CCO is independent from those employees of a retailer who regularly interpret and apply the GSCOP.
34. It was submitted that the definition of 'de-listing' needed further clarification. Some respondents noted that it would be difficult for a retailer to determine what was 'significant' in the context of a particular supplier. It was also suggested that the standard industry definition of 'de-listing' was limited to 'ceasing to trade with'. However, the report specifies that 'de-listing' includes both circumstances in which a retailer ceases to purchase from a supplier, and where a supplier loses a significant amount of business from a retailer (paragraph 11.330). Provided that the decision to de-list is for genuine commercial reasons and is not intended as a means of 'punishing' a supplier, a retailer will not breach this provision of the Code. We remain of the view that 'significant' should depend on the individual circumstances of the supplier and we have clarified in the Explanatory Note that the term should be measured relative to the total purchases from that particular supplier.

35. It was submitted that the OFT should undertake the role of the Ombudsman until this office is formally appointed. The report clearly sets out the CC's process for implementing that remedy and we will review the role of the OFT further in that context. However, the Order does not envisage the OFT taking a proactive role in the enforcement of the GSCOP (i.e. proactively investigating confidential complaints, guidance on the interpretation of the GSCOP, or close involvement in dispute resolution). The role of the OFT is to monitor and enforcement the obligations on retailers that are set out in the Order, including designating retailers, ensuring that retailers incorporate the GSCOP into supply agreements and ensuring compliance reports are completed and provided to the OFT.
36. It was submitted that 'Supplier' should include manufacturers. Manufacturers will already be included in the definition of 'Supplier' if they supply groceries to a retailer for resale.

Article 4

37. It was suggested that turnover should be assessed on a rolling 12 month basis and that retailers should automatically become designated retailers. Another respondent submitted that the OFT should actively investigate whether retailers met the revenue threshold to ensure that they were required to comply with the Order as soon as they reached the revenue threshold. We have not amended the Order because we anticipate that the Order will be self-policing in this respect. Regardless of any proactive steps the OFT (and the Ombudsman, when appointed) may decide to take to identify Designated Retailers, we would expect retailers to inform the OFT when they believe that another retailer has reached the £1 billion threshold..
38. It was submitted that, if other retailers and businesses that were not already Designated Retailers were found to be engaging in practices which would be in breach of the Code, they should be added to the list of Designated Retailers. Another suggested that all wholesalers meeting the turnover threshold should be added to the list. However, the report is clear that only retailers with groceries revenue over £1 billion will be bound by the Order. The reasons for this are set out at length in the report.

Article 5

39. Requests were made that the GSCOP be incorporated directly into the Order instead of into supply agreements. Respondents submitted that incorporating the GSCOP into the Order would allow the OFT to take a proactive role in monitoring and enforcing the GSCOP and that this was necessary as the Ombudsman might not be established promptly, if at all. They further submitted that, if the GSCOP were incorporated into the Order, suppliers would not necessarily be required to have their complaint made public for the OFT to then take action to enforce compliance with the GSCOP.
40. The incorporation of the GSCOP into the Order would result in a multi-layered and confusing complaint regime: the dispute resolution mechanism in the GSCOP, the investigation powers of the Ombudsman, and, if this submission is accepted, the monitoring and enforcement of the Order by the OFT. This regime would be confusing for both suppliers and retailers and was not envisaged in the report, which expressly refers to the CC's preference for a dedicated body (ie the Ombudsman) to arbitrate disputes and investigate complaints relating to the GSCOP. Furthermore, the report also provides that there will be no automatic right for anonymous complain-

ants to have their complaints investigated. We have therefore not made any change to the Order in response to these submissions.

41. It was submitted that the GSCOP should not be incorporated into existing agreements as these would reflect agreed risks and costs which would be affected by new GSCOP terms and conditions. One of the primary aims of the GSCOP is to protect suppliers against the retrospective transfer of risks or costs. This cannot be achieved without the incorporation of the GSCOP into existing supply agreements, many of which are overarching supply contracts for an extended time period. Nor do we believe that it is disproportionate to ensure that retailers are not currently transferring excessive risk and unexpected costs to suppliers. We have not made any change as a result of this submission.
42. It was submitted that if a retailer did not include the GSCOP into supply agreements then it should be implied. However, we do not believe this is necessary—if a retailer does not include the GSCOP into supply agreements then a supplier can make a statutory claim against that retailer to the OFT because it will be a breach of the Order.² Another respondent proposed that the obligation should be limited to a ‘best endeavours’ obligation. However, we believe that a limitation like that would introduce an added element of uncertainty to the enforcement of the GSCOP.
43. Concern was expressed about its liability in the event of other terms of the supply agreement unintentionally being inconsistent with the GSCOP. For example, it was stated that there was usually a 13-week notice period for de-listing in supplier agreements and there was concern that this might somehow be argued to be ‘unreasonable’ in the context of paragraph 16 of the GSCOP. However, we do not believe that this submission justifies a change to the Order.

Article 6

44. We have not adopted a suggestion that if a retailer did not confirm terms in accordance with Article 6(7) the supplier shall be entitled to confirm its own choice of terms. We note that there is nothing to prevent the supplier confirming (or refusing to confirm) the terms of any arrangement with a retailer, irrespective of whether this is specified in the Order.
45. It was queried why a requirement for contracts in writing was necessary to meet the aims of the GSCOP. The CC considers that such a term is necessary to provide suppliers with certainty as to their supply terms. As set out in the report, the absence of written agreements may make it more difficult to establish whether terms of supply have been changed retrospectively (paragraph 11.328).
46. It was submitted that problems might arise if subsequent agreements were merely notified to the supplier and not formally agreed. However, the purpose of this article is to formalize such arrangements so no change was necessary. Another submitted that suppliers’ terms should prevail at all times in respect of the sale of goods. However, such a provision would be outside the scope of the agreement and inconsistent with the AEC identified.
47. A suggestion was received to replace the three-working-day time limit for confirming arrangements under the supply agreement with an obligation to confirm ‘as soon as reasonably practicable’. However, we believe that three days is sufficient time within which a retailer can confirm terms of orders and price changes. It was also submitted

²Section 167 of the Enterprise Act 2002.

that Article 6(6)(c) goes further than the report, which should be limited to decisions to de-list. However, we consider that this obligation is consistent with paragraph 11.330 of the report and we have made no change to the draft Order as a result of this comment.

Article 8

48. It was submitted that three months should be an acceptable time for retailers to comply with the staff training requirement in Article 8(2)(b). However, we consider it important that employees in the buying team receive training on the GSCOP as soon as possible upon becoming involved in activities that involve applying the GSCOP.
49. It was submitted that a further obligation should be imposed on the buying team to ensure that staff were not rewarded for activities that led suppliers to incur unexpected costs or bear a disproportionate risk. This requirement would be outside the scope of the report.
50. More detail was requested on the retraining requirements for staff required by Article 8. As set out in the Explanatory Note, we expect that the annual staff retraining required by the GSCOP will include informing the buying team of any changes to the GSCOP and/or the interpretation of the GSCOP as a consequence of activities in the previous year and will serve to refresh all staff of the importance of the GSCOP when dealing with suppliers.

Article 9

51. It was submitted that that the CCO should be required, if requested by the supplier, actively to investigate decisions made by a Designated Retailer to ensure compliance with the Code. Another respondent submitted that the CCO should be required to report publicly on non-compliance with the Code. However, these suggestions both go beyond the scope of the report. We also did not agree with the submission that Article 9(1) should specify that the CCO should have experience with supplier relations: we consider that independence from the buying team is a sufficient criterion.
52. A specific reference was requested in this article to the escalation process set out in Article 6(6)(c) of the Order (ie referring decisions of a Primary Buyer to a Senior Buyer for review) and that this escalation process should be followed before reference is made to the CCO. However, the purpose of the CCO is to establish an alternative first point of contact for suppliers should they be uncomfortable with approaching their buying contacts, in addition to any internal escalation process of the retailer. We do not consider that suppliers should be required to consult members of the buying team before approaching the CCO, although we expect that this would occur where retailers and suppliers have a good working relationship.

Article 10

53. It was submitted that UK-based retailers would be disadvantaged by the reporting obligations, as retailers from outside the UK might not have an audit committee or be required to publish an annual report. However, given that there is an obligation to publish the summary clearly and prominently on the company's website we do not agree that this would result in any disadvantage which would be sufficient to justify a change to this article.

54. It was submitted that it should be sufficient for a summary of the CCO's compliance report to be provided to the OFT/Ombudsman. However, we consider that it is important that the Ombudsman and the OFT obtain a complete copy of the CCO report for compliance and monitoring purposes as well as the summary.
55. It was submitted that all annual compliance reports should cover the same time period, so that all data was received at the same time by the OFT. Another submitted that the Order should require a confidential annual audit. However, we do not believe that these requirements are necessary for the Ombudsman and/or the OFT to monitor compliance with the GSCOP.

Article 11

56. We received comments on the dispute resolution provisions, concentrating on two main issues: the weighting of the process in favour of the supplier, and the procedure itself. The issue of the costs of the arbitration has been discussed in paragraph 20 above. There was also objection to the supplier having the right to nominate the arbitrator and the venue for the arbitration. We have amended the arbitration appointment procedure in response to an unrelated submission, but we believe that the venue clause goes some way to addressing the problems identified by the CC in the report, in particular the 'significant imbalance of power between parties to disputes under the GSCOP' and the 'climate of fear' among suppliers in relation to disputes under the existing SCOP.
57. It was submitted that the requirement to negotiate in good faith (Article 11(1)) should be applied equally to suppliers and retailers. We have not adopted this amendment, although retailers can incorporate this requirement into their supply agreements should they wish to do so.
58. It was submitted that a longer time should be given for the parties to attempt to resolve disputes before they could request arbitration and that arbitration should only be an option after all other reasonable endeavours to resolve the dispute have failed. However, the 21-day time period was specifically mentioned in the report as it is considered that a shorter time period for instigating dispute resolution will improve suppliers' confidence in the effectiveness of the process (paragraph 11.357). As set out in the Explanatory Note, this provision does not mean that any dispute will automatically be referred to arbitration. Rather the supplier has a discretion to exercise this right and we expect that the supplier will be less likely to exercise this right if the retailer's internal dispute resolution process provides adequate opportunity for the dispute to be settled (within the time frame provided).
59. It was also submitted that the dispute resolution procedure should only be available to small- and medium-sized businesses, noting that the report recognized that some larger suppliers may have market power in excess of even the largest retailers. However, such an amendment is outside the scope of the report.
60. It was noted that there was no obligation on the supplier to enter into arbitration on the request of the retailer (as provided for in the report). However, retailers may seek to incorporate such an obligation into supply agreements if they consider it beneficial as this is not precluded by the GSCOP. It was also proposed a number of other amendments to the arbitration process: an amendment to the dispute 'trigger'; the possibility of mediation; and a limitation period for claims. However, we have not made any amendments to this clause as a result of these submissions because they are outside the ambit provided by the report.

61. It was suggested that disputes should be initiated in writing. We have not adopted this suggestion as we consider that it would not always be practical and there is already an onus on the CCO to clarify if a dispute has been initiated.
62. It was submitted that the dispute resolution mechanism should include a time frame within which remedial action must take place. We do not consider such an addition to be appropriate.
63. It was suggested that many suppliers may opt to refer disputes directly to the Ombudsman in the first instance, so as not to appear as a whistleblower. The CC acknowledges that this is a procedure anticipated to be part of the Ombudsman activities but considers that there are clear incentives for suppliers to settle disputes with the relevant retailer in most instances as this is likely to provide more direct redress for the supplier.

The Groceries Supply Code of Practice

Paragraph 1

64. Concern was expressed at the lack of clarity for the term 'promotion' (and for the definition of 'reasonable notice'). Respondents felt that in commercial situations where one party was significantly more powerful than the other, the more powerful party had the ability to interpret general definitions in its favour. However, given the range of promotions undertaken by retailers we do not consider that a more specific definition would be appropriate. We also consider that it goes beyond the scope of the report to adopt an assumption that either party's interpretation of any terms should be the default one.
65. We received submissions on which elements should be taken into account when defining 'Reasonable Notice'. It was submitted that this definition should be replaced with a requirement of 30 days, consistent with the example provided in the Explanatory Note. However, such a notice period may not be reasonable for all of the situations covered by the definition and may become a default requirement resulting in a longer payment period than what may have otherwise been achieved through agreement. Other respondents requested the removal of the second part of criterion (a), submitting that the frequency of orders should not be used as a benchmark for reasonable notice. However, we consider that the inclusion of the criterion 'frequency of order' will not be a benchmark or determinative factor for the required amount of notice in any particular case and note that it is only one factor in the assessment of reasonable notice. It was submitted that the definition be amended to include 'a notice period agreed in writing by the parties'. However, we do not think that such a change is consistent with the report.
66. In relation to the definition of 'Require', It was submitted that the term 'ordinary commercial pressures' was vague and difficult to interpret in practice. However, we consider that the revised definition now provides sufficient guidance for retailers and suppliers.
67. Concerns were expressed that, even if a supplier volunteered to undertake something in response to 'ordinary commercial pressures' from a retailer, this may transfer excessive risks and unexpected costs to suppliers. Other respondents also expressed concerns regarding the use of the term 'ordinary commercial pressures', suggesting that this wording could still allow for the transfer of excessive risk and unexpected costs from retailers to suppliers. However, we consider that the suggested changes would unnecessarily circumscribe the commercial flexibility of the supplier/retailer relationship. For example, in many cases a promotion suggested by

a retailer would be mutually beneficial for both parties. It was submitted that suppliers should have to agree specifically to requests from retailers in writing. However, on balance we did not adopt this requirement.

68. It was queried whether 'shrinkage' would include losses from a retailer's depot (as opposed to its store). Shrinkage will include all losses that occur after goods have been delivered to a retailer's premises, including losses at the retailer's depot, that arise after goods have been delivered. We have not made a change to the Order in relation to this submission.

Paragraph 2

69. It was submitted that the principle of fair dealing was too broad, vague and introduced a degree of uncertainty. Further detail was requested in the definition in relation to 'production, delivery and payment issues'. It was submitted that the term 'lawfully' was superfluous, as parties were required to act lawfully in any event. However, we do not think that these submissions justified a change to the fair dealing principle, which is expressly set out in the report as an overarching obligation to be included in the GSCOP.

Paragraph 3

70. It was submitted that the GSCOP should not allow for any retrospective changes to supply agreements and that retailers should not have the right to alter unilaterally the terms of a supply agreement. It was proposed that the GSCOP should allow for retrospective changes to supply agreements where they were volunteered by the supplier or requested by the retailer. However, all of these changes would be inconsistent with the report, which concluded that retrospective changes to agreed terms of supply should be prohibited outright, except for those that are agreed upfront and which clearly set out how the allocation of costs and risk will be allocated (paragraphs 11.306 and 11.307).

Paragraph 4

71. Requests were received for the removal of the ability for a retailer to require a supplier to change supply chain procedures where compensation is provided 'as a direct result of the failure to give reasonable notice'. It was submitted that a significant change to the supply chain might result in higher costs to consumers and distortion of competition between retailers. It was also submitted that: paragraph 4(a) should be removed; and that a retailer should be prevented from allowing any costs from changes to its supply chain procedures to suppliers being passed onto suppliers. However, all of these suggested changes go beyond the scope of the report where it was set out that supply chain procedures might be required to be changed in some circumstances.
72. Further clarification was requested for the term 'significantly'. However, we believe that whether a change in supply chain procedures will be 'significant' will depend on a number of factors including the supplier, the existing terms of supply, and the nature of the goods being supplied. We have not amended this definition as a result of the submission.

Paragraph 5

73. It was submitted that interference in contractual payment times was not necessary to rectify the AEC, that the term 'reasonable' was uncertain and that suppliers already had access to certain statutory protections in regard to payment times. It was also submitted that this obligation should not override contractually agreed payment terms. Other respondents submitted that this clause should impose stricter obligations on retailers: that 'reasonable time' be replaced with '30 days'. In addition it was suggested that retailers be required to pay invoices notwithstanding disputes as to the good delivered and that suppliers should be able to specify the terms of payment. There was also concern that a retailer may require invoices to be submitted a long period after delivery of goods. On balance, we do not consider that any of these submissions justified amendments to this paragraph.

Paragraph 6

74. It was submitted that clauses which allowed for terms to be agreed in advance would lead to retailers extracting harsher terms from their suppliers earlier in the relationship, as such terms were not prohibited from the supply agreement. However, the principal focus of the GSCOP is the prevention of the retrospective allocation of risk. With the exception of a limited number of practices identified by the CC in the report, the CC considers that parties should retain the commercial freedom to agree terms including costs and risk at the time a supply agreement is entered into.
75. Respondents also submitted that the list of specified marketing costs should be made non-exhaustive. However, this is outside the scope of the report.

Paragraph 7

76. It was submitted that a total prohibition on shrinkage was unnecessary and disproportionate and the prohibition on any form of 'payment', including more favourable contract terms, went beyond the scope of the report. It has been suggested that this paragraph should instead provide that a supply agreement should not impose liability on suppliers for losses incurred by a retailer as a result of shrinkage. It was also considered that the extended definition of 'Payment' was beyond the scope of the report and should be more limited. We consider that the report is particularly clear on this matter where it is stated that shrinkage should not be charged to a supplier (paragraph 11.317) and we have not made any adjustment to this paragraph.

Paragraph 8

77. It was submitted that the criteria in paragraph 8 should be cumulative. Another respondent submitted that if the opt-out provisions were to remain they should require the basis for any wastage payment to reflect a fair apportionment of risk and the retailer should be required to ensure wastage was minimized. However, we do not consider that there is scope for these amendments given the clear direction in the report on this issue.
78. Clarification was sought on whether retailers could continue to agree with suppliers the terms on which the supplier could make payments to cover wastage. This is already provided in the GSCOP. In relation to wastage the GSCOP allows retailers and suppliers to agree the basis for any wastage payments in the supply agreement.

Paragraph 10

79. It was submitted that the obligations that forecasts be 'communicated to the Supplier' went beyond the scope of the report. We have retained this obligation as we consider that it provides a more certain way to meet the requirement that a forecast is 'transparent'.
80. It was submitted that paragraph 9(1)(b) should be removed as reasonable exceptions of where payments might be permitted under the GSCOP. However, we do not consider that this is consistent with the report.

Paragraph 11

81. It was submitted that prohibiting tying suppliers to third party goods and services (in addition to some other ID practices) was not identified as part of the AEC found by the CC in Appendix 9.8, Annex 3 of the report, and hence could not be remedied in the GSCOP. This Annex of Appendix 9.8 sets out the CC's view on certain practices identified in the 2000 *Supermarkets* investigation. The GSCOP remedy set out in paragraph 11.301 of the report expressly states that it should be based on a modification of the existing SCOP, rather than an entirely new regulation. This is consistent with the results of the GfK survey which was reported in Section 9 of the report and which indicated that the SCOP had made a difference in the prevalence of certain supplier practices by those retailers that were covered by the SCOP. Moreover, Appendix 11.2 of the report sets out specific amendments to the GSCOP that the CC considered appropriate, subject to further consultation on the draft Order and does not indicate that the obligations referred to should be excluded from the GSCOP. We have not made any changes to the Order as a result of this comment.
82. It was submitted that there should be an outright prohibition on tying. However, this would be inconsistent with the report.

Paragraph 13

83. It was suggested the removal or amendment of the sentence beginning 'for the avoidance of doubt' (which refers to the exclusion of retrospective variations to any agreement for a promotion) so a retailer might be allowed to 'request' retrospective promotions. However, this would be inconsistent with the general prohibition on retrospective changes to supply agreements, as set out in the report.

Paragraph 15

84. It was submitted that the price a retailer could claim for replaced products (paragraph 15(1)(a)) should be the wholesale price rather than the retail price. However, the report does not specify such a change to this clause from the existing SCOP, and we did not consider there were convincing reasons for a change to this paragraph. It was also submitted that the supplier should provide evidence of customer complaints to which paragraph 15(1) applied. However, given that individual complaints are likely to involve small sums we do not think this obligation is proportionate. For similar reasons, we did not make a change to prohibit suppliers from being required to pay administrative costs of the retailer in the event of a consumer complaint.
85. It was submitted that retailers should be able to agree an average figure for resolving complaints. Paragraph 14(3) already provides for this, although such a figure must relate to the expected costs of the retailer of resolving such complaints. It was also submitted that there should be a cap on the amount of retailers' costs that could be

levied for complaint handling. However, as the costs of complaint handling will vary depending on the nature of the product and the nature of complaint it would not be possible to set an appropriate monetary figure for such a cap which applied to all possible complaint situations.

86. There was concern that the requirement for 'negligence or default on the part of a supplier' was an insurmountable burden for a retailer to prove. It was submitted that 'negligence' and 'default' were specific legal terms that were out of place in the context of the GSCOP. However, we do not consider that such a standard is insurmountable, and have therefore not made a change to the Order.

Paragraph 16

87. It was submitted that the CCO should not be involved in de-listing decisions, particularly if any de-listing decision did not raise any issues in relation to the GSCOP. However, de-listing is a key element of the GSCOP and to remove the CCO from the de-listing process would be contrary to the conclusions in the report (paragraph 11. 331).