

Market Investigation into the Supply of Groceries in the UK

Notice of proposal to accept undertakings pursuant to section 165 of, and Schedule 10 to, the Enterprise Act 2002 and public consultation on the proposed Undertakings

1. On 9 May 2006, the Office of Fair Trading (OFT), in exercise of its powers under section 131 of the Enterprise Act 2002 (the Act), referred to the Competition Commission (CC), for investigation and report, the supply of groceries by retailers in the UK.
2. The CC investigated the matters referred to it in accordance with section 131 of the Act and concluded, in accordance with section 134(1), that there were features of the market, either alone or in combination, which prevent, restrict or distort competition within the relevant market, and in accordance with section 134(2) that an adverse effect on competition existed.
3. The CC found that one of the features that adversely affected competition in the market was the exercise of buyer power by certain grocery retailers with respect to their suppliers of groceries, through the adoption of supply chain practices that transfer excessive risks and unexpected costs to those suppliers.
4. The CC found that there was a detrimental effect on customers resulting from the adverse effect on competition and considered, in accordance with section 134(4), whether action should be taken by it, or whether it should recommend the taking of action by others, for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or the detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition.
5. The CC consulted on a range of possible actions in a Remedies Notice published on 31 October 2007. In the report the CC considered that a package of remedies including the following key elements would be effective and proportionate in remedying the various features of the market identified as having an adverse effect on competition:
 - (a) the establishment of a Groceries Supply Code of Practice (GSCOP); and
 - (b) the establishment of a GSCOP Ombudsman to monitor and enforce compliance with the GSCOP.
6. The CC indicated in the report that it intended to implement the remedy set out in paragraph 5(b) above by an undertaking.
7. The CC now gives notice of the draft Final Undertakings and invites written representations on them from any person or persons who wish to comment. Representations should reach the CC by 28 May 2009 and should be addressed to:

Tim Oyler
Groceries Investigation
Competition Commission
Victoria House
Southampton Row
London
WC1B 4AD
or email: tim.oyler@cc.gsi.gov.uk

8. The CC proposes to accept Undertakings from groceries retailers for a groceries ombudsman scheme in the form attached. The CC has not yet received agreement from any of the groceries retailers to enter Undertakings and will have regard to any representations made in response to this notice. However, the CC considers that it is appropriate at this stage to formally consult on the proposed form of the Undertakings.
9. The Undertakings may be varied, superseded or released by the CC under section 82(2) of the Act.

Peter Freeman
Group Chairman
28 April 2009

Market Investigation into the Supply of Groceries in the UK

Undertakings to establish a Groceries Supply Code of Practice Ombudsman Scheme

1. Final Undertakings given by [Parties] to the Competition Commission, under sections 138 and 159 of the Act, to take action requisite as part of a package of remedies for the purpose of, mitigating or preventing the adverse effects on competition identified in the report of the CC on the supply of groceries in the UK published on 30 April 2008.
2. [The Parties] give the following Undertakings to the CC:

General

Citation and commencement

1. Commencement

- 1.1 The obligations in these Undertakings will come into force on [XX XX 2009].
- 1.2 For the purposes of these Undertakings, no Party shall, without the prior written consent of the OFT, assign or transfer control of any Supply Agreement, except to another Party to these Undertakings or to a person that is a member of the same Group of Interconnected Bodies Corporate.
- 1.3 Each Party will procure that each of its subsidiaries complies with these Undertakings, as if each subsidiary has given them. In these Undertakings a company is a subsidiary of another company if that other company:
 - (a) holds a majority of the voting rights in it; or
 - (b) is a member of it and has the right to appoint or remove a majority of its board or directors; or
 - (c) is a member of it and controls alone, pursuant to an agreement with other members, a majority of the voting rights in it; or
 - (d) it is a subsidiary of a company that is itself a subsidiary of that other company.

Interpretation

2. General interpretation, index of defined expressions etc

- 2.1 In these Undertakings (including, for the avoidance of doubt, the Schedule):

| | |
|--------------------------------|---|
| Buying Team | means those employees of a Retailer: <ul style="list-style-type: none"> (a) who are directly involved in buying Groceries for resale; and/or (b) whose role (excluding the role of the Code Compliance Officer) requires the interpretation and application of the provisions of the Code or this Order; and (c) who have immediate management responsibility for any of those employees described in (a) and (b) above; |
| Code Compliance Officer | means the person appointed in accordance with Article 10(1) of the Order; and |
| Schedule | means the Schedule to these Undertakings. |

2.2 All defined terms in paragraph 1 of the Schedule shall have the same meaning in this Undertaking as set out in the Schedule.

Operative provisions

3. Obligation to comply with the scheme

- 3.1 Each Party undertakes to comply with and fulfil all of the obligations placed upon it under the Scheme.
- 3.2 Each Party undertakes to ensure that its Buying Team is aware of the Ombudsman and of the Party's duties under these Undertakings.
- 3.3 Each Party whom the OFT reasonably believes to have information which may be relevant to the monitoring or review of the operation of the Scheme and/or any provisions of these Undertakings may be required by the OFT to attend and provide such information in person.

4. Powers of direction

- 4.1 Each Party undertakes that it will comply with any directions that the OFT may give:
 - (a) to take such actions as may be specified or described in the directions for the purpose of carrying out, or ensuring compliance with, these Undertakings; or
 - (b) to do, or refrain from doing, anything so specified or described which the Party is required by these Undertakings to do or refrain from doing.
- 4.2 In paragraph 4.1 above, actions include steps to introduce and maintain arrangements to ensure any director, employee or agent of a Party carries out, or secures compliance with, these Undertakings.
- 4.3 The OFT may vary or revoke any directions so given.

5. Termination

5.1 These Undertakings shall be in force until such time as they are varied, released or superseded under the Act.

5.2 The variation, release or superseding of these Undertakings shall not affect the validity and enforceability of any rights or obligations that arose prior to such variation, release or supersession.

FOR AND ON BEHALF OF [NAME OF PARTY]

..... Signature

..... Signature

..... Name

..... Name

..... Title

..... Title

..... Date

..... Date

Schedule

Groceries Supply Code of Practice Ombudsman Scheme

1. Interpretation

1.1 In this Scheme:

| | |
|---|--|
| Act | means the Enterprise Act 2002; |
| CC | means Competition Commission; |
| Code | means the Groceries Supply Code of Practice set out in Schedule 1 of the Order; |
| Designated Retailer | means each of those retailers who is a Designated Retailer pursuant to the Order; |
| Dispute | means a dispute arising under Articles 11(2) or 11(3) of the Order; |
| Groceries | means food (other than that sold for consumption in the store), pet food, drinks (alcoholic and non-alcoholic, other than that sold for consumption in the store), cleaning products, toiletries and household goods, but excludes petrol, clothing, DIY products, financial services, pharmaceuticals, newspapers magazines, greetings cards, CDs, DVDs, videos and audio tapes, toys, plants, flowers, perfumes, cosmetics, electrical appliances, kitchen hardware, gardening equipment, books, tobacco and tobacco products; |
| Group of Interconnected Bodies Corporate | has the definition provided in section 129(2) of the Act; |
| Investigation | means the activity of the Ombudsman described in paragraph 5.2 of the Scheme; |
| OFT | means the Office of Fair Trading; |
| Ombudsman | means a person appointed as the Grocery Supply Code of Practice Ombudsman, in accordance with either paragraph 2.1 or paragraph 2.2 of the Scheme; |
| Order | means The Groceries (Supply Chain Practices) Market Investigation Order 2009; |
| Party | means a party to these Undertakings, and Parties shall mean more than one of the parties to these Undertakings; |
| Report | means the CC's final report of 30 April 2008 on the Supply of Groceries UK Market Investigation; |
| Retailer | means any person carrying on a business, in whole or in part, in the UK for the retail supply of Groceries; |

| | |
|------------------------------|---|
| Scheme | means the Groceries Supply Code of Practice Ombudsman Scheme set out in the Schedule to these Undertakings; |
| Specified Information | means information which comes to the Ombudsman in connection with the exercise of any function it has under or by virtue of the Undertakings; |
| Supplier | means any person carrying on (or actively seeking to carry on) a business in the direct supply to any Retailer of Groceries for resale in the UK, and includes any such person established anywhere in the world, but excludes any person who is part of the same Group of Interconnected Bodies Corporate as the Retailer it supplies; and |
| Supply Agreement | means any agreement which must be recorded in writing pursuant to Article 6(1) of the Order. |

2. Appointment and conflict of interest

- 2.1 The CC will specify a person to be appointed by the OFT to an office known as the Groceries Supply Code of Practice Ombudsman.
- 2.2 The Ombudsman shall be appointed for any period or periods specified by the OFT, provided that his appointment shall end if the Scheme is revoked and any outstanding functions have been discharged. The OFT shall appoint a new Ombudsman in the event of the death, retirement, incapacity, removal or resignation of the Ombudsman after appointment.
- 2.3 The terms of the Ombudsman's appointment will include those provisions that are necessary to give effect to the Scheme.
- 2.4 The role of the Ombudsman shall be independent from any Retailer or Supplier. The Ombudsman shall be under an obligation to declare immediately any conflict of interest, financial or otherwise, in any matter relating to an Investigation he conducts or any Dispute he is asked to determine.
- 2.5 Where the Ombudsman declares a conflict of interest pursuant to paragraph 2.4, he may designate a temporary replacement to undertake those activities to which the conflict of interest relates.
- 2.6 In the event that a new Ombudsman is appointed as a result of the Ombudsman ceasing to be independent or for any other reason, any direction or decision made by a former Ombudsman shall remain effective unless reviewed by the new Ombudsman.

3. Functions of the Ombudsman

- 3.1 The overriding objective of the Ombudsman will be to undertake Investigations and arbitrate Disputes arising from the Code to promote the interests of consumers.
- 3.2 The Ombudsman's principal duties are:

- (a) if designated by the OFT pursuant to Article 11(5) of the Order, to act as an arbitrator between Designated Retailers and Suppliers in relation to Disputes arising under the Code;
- (b) to receive complaints in relation to a breach of the Code, and where appropriate to conduct Investigations;
- (c) to publish guidance on specific provisions of the Code and the Scheme when necessary;
- (d) to make recommendations to Designated Retailers on how to improve compliance with the Code and to monitor progress on the implementation of such recommendations; and
- (e) to advise and report to the OFT on the operation of the Scheme and the Code.

3.3 In discharging his duties the Ombudsman shall:

- (a) have regard to the overriding objective of the Scheme as set out in paragraph 3.1 above, and the findings of the CC in the Report;
- (b) not facilitate or encourage coordination among Retailers and/or Suppliers. Such coordination could arise from, for example, round-table meetings, dissemination of best practice, and the encouragement of any dialogue between Suppliers and Retailers outside normal bilateral commercial arrangements; and
- (c) avoid any activity that is not focused on the overriding objective of the Scheme as set out in paragraph 3.1 above. In particular, in undertaking his functions the Ombudsman should confine his activities to evaluating the operation of the Code and should not consider other commercial elements of the Supply Agreement.

4. Disputes

- 4.1 The Ombudsman will act as an arbitrator of Disputes when designated by the OFT pursuant to Article 11(5) of the Order.
- 4.2 The Ombudsman will decline to act as an arbitrator in relation to any Dispute where he considers that doing so will create a conflict of interest. A conflict of interest will include, but is not limited to, circumstances where an Ombudsman has provided advice to a Supplier on an issue which is subsequently the subject of a Dispute.
- 4.3 The Ombudsman shall conduct any arbitration in accordance with Articles 11(6) to 11(8) of the Order.

5. Investigations

- 5.1 The Ombudsman shall receive and may investigate complaints regarding a Party's (or Parties') obligations under the Code.
- 5.2 The Ombudsman shall use his discretion when deciding whether to investigate complaints regarding a Party's (or Parties') obligations under the Code (an Investigation). Before exercising this discretion, the Ombudsman will consider the following information in relation to the obligations under the Code that it proposes to investigate:
 - (a) complaints from Suppliers, including but not limited to, those complaints that

- result in the arbitration of a Dispute under Part 5 of the Order;
- (b) complaints from Retailers regarding the practices of a Party when interacting with its suppliers;
 - (c) complaints from any other person, to the extent that it relates to a breach of the Code and/or the Undertakings; and
 - (d) any other information obtained by the Ombudsman or the OFT, whether in the public domain or as a result of a Designated Retailer's reporting obligations under the Order or these Undertakings.
- 5.3 Subject to its obligations in paragraph 13 below, the Ombudsman will, before commencing an Investigation, inform the Party (or Parties) concerned of the general nature of the practices which the Ombudsman intends to investigate, and allow the Party (or Parties) a reasonable time in which to respond to the proposed Investigation.
- 5.4 The Ombudsman will develop his own practices and procedures for Investigations, except to the extent that they are provided for in this Scheme. Within six months of the appointment of the first Ombudsman by the OFT, and before commencing any Investigation, the Ombudsman will publish and consult on general advice and information on the procedures that will apply to Investigations (including appropriate criteria for determining if an Investigation is justified).
- 5.5 At the conclusion of an Investigation, the Ombudsman must publish a report which will include (but not be limited to):
- (a) a summary of the information that prompted the Ombudsman to commence the Investigation;
 - (b) a description of the practices the subject of the Investigation;
 - (c) a summary of any information obtained during the Investigation;
 - (d) any findings of the Ombudsman in relation to the operation of the Code; and
 - (e) the reason(s) for any action taken as a result of the Investigation.
- 5.6 As a result of an Investigation, the Ombudsman may undertake one or more of the following actions:
- (a) pursuant to paragraph 5.7 below, recommend to a Party (or Parties) that it change its practice(s) when interacting with Suppliers in order to comply with the Code;
 - (b) include in his annual report pursuant to paragraph 8.2 a suggestion to the OFT that it vary the Undertakings (including this Scheme) and/or the Code;
 - (c) publish guidance on the interpretation of the Code, pursuant to paragraph 6 below; and
 - (d) advise a Supplier (or Suppliers) on the nature of a Designated Retailer's obligations under the Code.
- 5.7 The Ombudsman may suspend or cancel an Investigation for any reason.

6. Guidance

- 6.1 The Ombudsman may, from time to time, publish guidance on:
- (a) the interpretation of specific provisions of the Code, and/or how the Ombudsman expects such provisions to operate; and
 - (b) the practices and procedures necessary to complete his functions pursuant to this Scheme, whether to replace or compliment existing guidance on such functions.
- 6.2 In publishing guidance on specific provisions of the Code, the Ombudsman will have regard to the following matters in relation to those provisions:
- (a) any Dispute reported pursuant to paragraph 8.1 of this Scheme or Article 10(1)(c) of the Code;
 - (b) any complaints or inquiries from the Parties or Suppliers; and
 - (c) the Ombudsman's findings in relation to any Investigation, or any other information obtained during the course of an Investigation.
- 6.3 Before publishing any guidance in accordance with this paragraph 6, the Ombudsman will publish his proposed guidance for consultation, and will consider any representations made on the proposed guidance.
- 6.4 The Ombudsman shall not publish guidance on matters other than specific provisions of the Code or the practices and procedures relating to this Scheme.

7. Recommendations

- 7.1 Following an Investigation, the Ombudsman may make recommendations to a Party (or Parties) on how to improve their compliance with the Code.
- 7.2 A recommendation should specify:
- (a) the relevant provisions of the Code;
 - (b) the practice of the Party (or Parties) when interacting with its Suppliers which gives rise to the need for the recommendation; and
 - (c) those actions which should be undertaken or discontinued by the Party (or Parties) to prevent the practice from continuing.

8. Reports to the OFT

- 8.1 The Ombudsman shall keep the Code and the Undertakings under review and report to the OFT on them annually. Such reports shall include, for the period since the previous report to the OFT:
- (a) a summary of each Dispute between Designated Retailers and Suppliers which have been resolved using the dispute procedure set out in Part 5 of the Order;
 - (b) a summary of each Investigation undertaken by the Ombudsman;
 - (c) any recommendations the Ombudsman has made to a Party;

(d) a summary of progress made by any Party in implementing previous recommendations made by the Ombudsman and identifying any recommendations not implemented by any Party; and

(e) a summary of any lack of information or information that has not been provided that has hindered the progress of an Investigation.

8.2 The Ombudsman may also include in the report to the OFT any suggestion to vary the Undertakings and/or the Code (pursuant to and as limited by section 162 of the Act).

9. Remuneration and budget

9.1 Each Party undertakes to reimburse the OFT for all costs and expenses of the Ombudsman paid by the OFT in accordance with paragraph 9.5 that are not recovered from Designated Retailers in relation to dispute resolution under Article 11(7) of the Code.

9.2 There shall be paid to the Ombudsman such reasonable remuneration, travelling and other allowances as the OFT may determine.

9.3 The Ombudsman may incur such other costs and expenses as may be required for the fulfilment of his functions, including for office accommodation, staff, legal advice and any other requirements, up to but not exceeding the amount of the Budget set in accordance with paragraph 9.4.

9.4 The OFT will set a budget for the total costs and expenses of the Ombudsman and his office for each financial year in advance (the Budget). Such Budget will be for an amount sufficient in the view of the OFT alone to enable the Ombudsman properly to discharge his functions and will also cover the costs and expenses of recruitment of the Ombudsman (and any substitute Ombudsman) and any staff or advisers. Any Budget may be increased by the OFT on one or more occasions. For the purpose of the first Budget and any subsequent annual increase in the Budget of greater than 10 per cent on the previous year, the OFT will undertake a consultation process with the Parties and consider any submissions received as it considers appropriate.

9.5 The OFT shall pay all such remuneration, travelling and other allowances, pension, gratuities, contributions or payments and costs and expenses of the Ombudsman and his office as set out in paragraphs 9.2 and 9.3 inclusive in the first instance.

9.6 The OFT will invoice each of the Parties quarterly for their share of the costs and expenses incurred by the Ombudsman up to the maximum of the Budget for that quarter, less any costs and expenses of the Ombudsman recovered from Designated Retailers under Article 11(7) of the Code. The share of costs and expenses attributable to each Party shall be determined by the Ombudsman and shall be borne by each Party according to the formula in Annex 1 to this Schedule.

9.7 Each Party undertakes to pay any invoice provided to them by OFT in accordance with paragraph 9.6 above within 30 days of the date of receipt of the invoice, notwithstanding any ongoing dispute it may have regarding its share of the Ombudsman's costs and expenses.

10. Ombudsman's staff

- 10.1 The Ombudsman may appoint staff, subject to any restrictions contained in the Budget or provided by the OFT. Any staff of the Ombudsman shall be appointed on terms and conditions as determined by the Ombudsman.
- 10.2 Any function of the Ombudsman, other than making a final determination in relation to the arbitration of any Dispute or a recommendation or suggestion arising from any Investigation, may be exercised by any member of staff authorized for the purpose by the Ombudsman, whether specially or generally.

11. Resignation or removal from office

- 11.1 A person may resign from office as the Ombudsman at any time by giving three months' notice in writing to the OFT.
- 11.2 The OFT may remove a person from office as the Ombudsman by giving three months' notice in writing on any grounds it considers justify its decision. The OFT may take into account, but is not limited to:
- (a) reasons of incapacity or misbehaviour;
 - (b) unreasonable delay in the discharge of his duties; and/or
 - (c) the reasonableness of the cost incurred when discharging his duties.
- 11.3 Following the termination of his appointment, the Ombudsman shall:
- (a) not accept employment from or act as consultant or adviser to any Retailer or Supplier in the UK (without the consent of the OFT which shall not be unreasonably withheld) for a period which will expire on the later of:
 - (i) 31 January following the termination of the Ombudsman's appointment; or
 - (ii) the date six months after the date of such termination; and
 - (b) not disclose to any person any confidential information or confidential document provided to the Ombudsman in connection with his appointment as Ombudsman.

12. Immunity and appeal

- 12.1 Neither the CC, the OFT nor the Ombudsman, nor their staff, employees or agents (including advisers) shall be liable for anything done or omitted in the discharge or purported discharge of their functions in relation to this Undertaking, unless the act or omission is in bad faith.

13. Disclosure of information

- 13.1 The Ombudsman may disclose any information he receives to the OFT.
- 13.2 Each of the Parties and the OFT may disclose to the Ombudsman any information or document which it holds (whether pursuant to the Undertakings or otherwise) which it considers may be relevant to, and assist the Ombudsman in, the carrying out of his functions.

- 13.3 Where Specified Information relates to the affairs of an individual or the business of an undertaking, such information must not be disclosed during the lifetime of the individual, or while the undertaking continues in existence, unless the disclosure is permitted under paragraph 13.4. This paragraph does not prevent the disclosure of any information which has on an earlier occasion been disclosed to the public in circumstances that do not contravene this paragraph or any other enactment or rule of law prohibiting or restricting the disclosure of the information.
- 13.4 The Ombudsman may disclose specified information to which paragraph 13.3 relates in the following circumstances:
- (a) if the Ombudsman obtains each required consent, as construed in accordance with sections 239(2) to (5) of the Act;
 - (b) if the disclosure is made for the purpose of facilitating the exercise by the Ombudsman of any function he has under or by virtue of the Undertakings; or
 - (c) if the information is disclosed to another person for the purpose of facilitating the exercise by that person of any function he has under or by virtue of the Act, the Undertakings or the Order.
- 13.5 If information is disclosed in the circumstance described in paragraph 13.4(b) but it is not made available to the public, it must not be further disclosed by a person to whom it is disclosed other than with the agreement of the Ombudsman for the purpose of facilitating the functions of the Ombudsman under the Undertakings.
- 13.6 Information disclosed in the circumstance described in paragraph 13.4(c) must not be used by the person to whom it is disclosed for any purpose other than a purpose relating to a function of that person under or by virtue of the Act, the Undertakings or the Order.
- 13.7 Before disclosing any specified information pursuant to paragraph 13.4, the Ombudsman is required to have regard to the following considerations:
- (a) the need to exclude from disclosure the identity of any individual or undertaking making a complaint to the Ombudsman regarding the Code and/or the Undertakings;
 - (b) the need to exclude from disclosure (so far as practicable) any information whose disclosure the Ombudsman thinks is contrary to the public interest;
 - (c) the need to exclude from disclosure (so far as practicable):
 - (i) commercial information whose disclosure the Ombudsman thinks might significantly harm the legitimate business interests of the undertaking to which it relates; or
 - (ii) information relating to the private affairs of an individual whose disclosure the Ombudsman thinks might significantly harm the individual's interests;
 - (d) the extent to which the disclosure of the information mentioned in paragraph 13.7(c) is necessary for the purpose for which the Ombudsman is permitted to make disclosure.
- 13.8 Where a Party provides information to the Ombudsman, it (or any other Party to which the information relates) may make representations to the Ombudsman that all or any part of that information should not be disclosed pursuant to paragraph 13.7.

Formula to calculate each Party's share of the Ombudsman costs

1. The following formula shall be used to calculate each Party's share of the Ombudsman's costs:

$$\text{A party's proportion of total Ombudsman cost} = \frac{a(Rp/Ra)+b(Tp/Ta)+c(Ap/Aa)+d(Dp/Da)}{e+f+g+h}$$

Where:

$$a = 4$$

$$b = 3$$

$$c = 2$$

$$d = 1$$

Rp = Number of Recommendations made to that Party by the Ombudsman

Ra = All Recommendations made by the Ombudsman

Tp = That Party's turnover for retail supply of Groceries

Ta = All Parties' turnover for retail supply of Groceries

Ap = Number of Disputes between that Party and its Suppliers reported pursuant to paragraph 8.1 of the Scheme

Aa = All Disputes between the Parties and Suppliers reported pursuant to paragraph 8.1 of the Scheme

Dp = Number of Disputes between that Party and its Suppliers reported pursuant to Article 10(1)(c) of the Code

Da = All Disputes between Designated Retailers and Suppliers reported pursuant to Article 10(1)(c) of the Code

e = 4 unless if $a(Rp/Ra)$ equals 0 then it also equals 0

f = 3 unless if $b(Tp/Ta)$ equals 0 then it also equals 0

g = 2 unless if $c(Ap/Aa)$ equals 0 then it also equals 0

h = 1 unless if $d(Dp/Da)$ equals 0 then it also equals 0

2. For the purposes of this formula, turnover shall include the Party's turnover, and the turnover of any Group of Interconnected Bodies Corporate to which the Party belongs, for the last complete financial year.