

**MARKET INVESTIGATION (REMEDIES PHASE): THE SUPPLY OF GROCERIES  
BY RETAILERS IN THE UK – RESPONSE TO FORMAL CONSULTATION IN  
RESPECT OF THE INTRODUCTION OF AN OMBUDSMAN TO OVERSEE THE  
GROCERIES SUPPLY CODE OF PRACTICE (GSCOP)  
NON-CONFIDENTIAL VERSION**

1. As a consumer co-operative, the Co-operative Group is owned by the very people who shop with us. Unsurprisingly, therefore, we do not intend, nor do we expect, our relationships with our suppliers to harm the interests of our owner-members and the consumer population at large – quite the opposite in fact. Accordingly, we have consistently striven to establish partnerships with our suppliers which do require them to be highly efficient in their costs', production and logistics' management but also incentivise them to invest for the medium term (at least) and to innovate. A testimony to the success of this strategy in recent times is the fact that we have frequently had more suppliers wishing to do business with us than we have been able to accommodate.
2. This balancing of efficiency and innovation is not necessarily a straightforward one to strike in negotiations but it remains, in the interests of securing the best deal we can for those who shop with us and who own our business, the overriding objective of our commercial dealings with the supplier community. We aim to deal fairly with all members of that community, believe we do so and further believe that in the past we have, and in the future we will, provide assurance and protection to our suppliers above and beyond that which may ultimately be incorporated within the framework of GSCOP.
3. All of this we have done without having been party to the current Supermarkets Code of Practice (SCOP) and without the presence of a supervising Ombudsman across the retail grocery sector as a whole. We would anticipate going forward, as we continue to champion the interests of our consumer-owners, to conduct firm but fair negotiations with suppliers and to respect the agreements we reach with them – from time to time they may not get what they want from us (nor we from them), but that we say is no more than the inevitable, intermittent consequence of commercial life in which accommodation and compromise are integral components.
4. All of this said, we have to acknowledge the Commission's findings of (i) an adverse effect on competition (AEC) within the supply chain (as described as paragraphs 9.83 and 9.84 of its final report) and (ii) we and nine other grocery retailers being the primary creators of or contributors to that effect.
5. The remedies the Commission advocates to redress the AEC are the introduction of GSCOP (and we responded to the Commission's consultation on this element of the remedies' package on 3 April 2009) and the appointment of an Ombudsman to oversee and supervise GSCOP compliance and to arbitrate disputes arising under it.
6. A number of, at times, divergent views have been expressed as to the merits of an Ombudsman by a variety of stakeholders in the overall process be they suppliers and their representatives, other retailers, the BRC, parliamentarians



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and “action groups” of one sort or another. With our supplier relationships in the health we believe them to be, and with a determination to improve them still further, we regard it as appropriate that we think twice before committing to an Ombudsman Scheme which at its worst could result in:

- a) additional, and unjustifiable, cost and distraction for retailers and suppliers alike at a time when the country's economy is arguably at its lowest point for sixty years or more; and
- b) the art of commercial negotiation (an absolute pre-requisite of a vital and dynamic supply chain) being emasculated by the over-rigid hand of an Ombudsman giving guidance or recommendations in relation to GSCOP.

Against this, the Commission's proposals deserve serious consideration given the extent of the analysis carried out by it and the breadth and depth of suppliers with whom it engaged or from whom it received information.

7. Having taken matters in the round, we have reached the conclusion that if (i) the AEC as described by the Commission does indeed exist (and it may), and (ii) our behaviour and that of the nine other retailers identified by the Commission has been the principal source of the AEC and (iii) a supervising Ombudsman in respect of GSCOP is a proportionate and apt response to the AEC in terms of being highly likely to remedy, mitigate or prevent its continuance, then it seems obvious to us that such an Ombudsman has to command the full support of all ten retailers concerned. In this regard, we have been troubled by a number of our exchanges with Commission Officials during which the possibility has not been discounted of an Ombudsman installed to supervise GSCOP compliance on the part of those retailers who might choose to commit to the Undertakings voluntarily but having no jurisdiction over retailers (were there to be some) who did not make that commitment. This strikes us as remarkable – were the ten retailers to divide into two groups in this way, the credibility of the Ombudsman would be impaired from the start and, ironically, the case might be made that those who had elected not to provide the Undertakings would enjoy a competitive advantage (unencumbered, as they would be, by the attendant direct and indirect costs' burden) over those who had.
8. In short, we believe our own house to be in good order; and, owned by those who shop with us, we already have every incentive to enhance supplier partnerships continuously for the benefit of consumers. If the Ombudsman is meaningfully to ameliorate the crystallised AEC in the supply chain and allay those “fears” which have been ascribed to some suppliers in the context of an allegedly “toothless” SCOP, he or she must have concurrent jurisdiction over all ten retailers proposed to be in scope initially. Accordingly, we confirm our intention to provide Undertakings in respect of the Ombudsman Scheme that are materially the same as the draft accompanying Tim Oyler's 27 April 2009 at 14:34 e-mail to us strictly subject to the conditions that (i) each of the other nine retailers prospectively in scope to the Scheme confirms its willingness to be bound by the same Undertakings and (ii) the matters raised by us in paragraph 9 below, with regard to the content of the current draft of the Undertakings and the Ombudsman Scheme, are resolved by the Commission to our satisfaction (including by amendment of the draft where needs be).

9. With regard to the specific language of the draft Undertakings and the scheduled Ombudsman Scheme our uncertainties are:
- (a) **Undertakings paragraph 1.2:** we remain puzzled by the control on Supply Agreement transferability imposed here. The GSCOP does not tackle this question, and we would expect the Ombudsman to have to tolerate that retail grocery businesses and with them or, less likely, in isolation Supply Agreements may change hands;
  - (b) **Undertakings paragraph 1.3:** the definition of "subsidiary" and that of "Group of Interconnected Bodies Corporate" ought to form a cohesive whole. Does this paragraph render one company the subsidiary of another where the latter has the right to appoint a numerical minority but voting majority of the former's board of directors, for example?;
  - (c) **Undertakings paragraph 3.3 and 4:** we have raised in the past the question of our being able to maintain legal advisory and litigation privilege in documents prospectively in scope to the OFT's information gathering powers under these paragraphs. That concern persists, and we are advised that Enterprise Act 2002 Part 9 does not entirely ameliorate the position;
  - (d) **Schedule paragraph 2.2:** we would hope that the longevity of the Ombudsman's appointment would be limited to two three-year terms or three two-year terms (unless all the Parties agree otherwise);
  - (e) **Schedule paragraphs 2.4, 2.5 and 4.2:** is it the intention that the Ombudsman will "referee" his/her own conflicts of interest in terms of whether or not they prevent him/her discharging his/her functions in any particular case?;
  - (f) **Schedule paragraph 3.3(c):** [REDACT 1];
  - (g) **Schedule paragraph 9.4:** given current rates of inflation and the medium term (at least) economic outlook, we would expect the OFT to be put under a duty to consult as to the Ombudsman's budget for any forthcoming year where that budget was in excess of a modest premium to RPI compared with the previous year;
  - (h) **Schedule paragraph 9.6:** in relation to the annexed formula, the likely relative frequency of items "A" and "D" is such that one should not be weighted at twice the value of the other - a parity weighting would be wholly reasonable. Items relating to supplier or Ombudsman activity relative to GSCOP should all take priority in the weighting over retailer turnover;
  - (i) **Schedule paragraph 10.2:** the Ombudsman should not be able to delegate the function of publishing guidance on GSCOP and the Ombudsman Scheme;
  - (j) **Schedule paragraph 11.2:** in the unlikely event of serious dereliction of duty on the part of the Ombudsman (or similar), the OFT should be able to remove him/her summarily;

- (k) **Schedule paragraph 12.1:** in the context of a voluntary Scheme, we believe the level of immunity extended to the Ombudsman to be excessive. Rights of appeal against his/her decisions as an arbitrator of GSCOP disputes are already dealt with in the draft GSCOP Order, but away from this he/she should be in no different position to that of any public official/body tasked with discharging administrative-type functions.

**Co-operative Group Limited**  
**12 June 2009**