

Working paper on supply chain practices and the Supermarkets Code of Practice

Introduction

1. This paper reviews the findings of the CC investigation in 1999–2000¹ ('the 2000 investigation') that led to the Supermarkets Code of Practice (SCOP), the operation of the SCOP since its establishment, and the views of retailers and suppliers on its effectiveness. The paper then provides a further assessment of the practices identified in the 2000 investigation, building on the *Working paper on supply chain practices* published alongside Emerging Thinking in January 2007, and reviews the evidence we have collected to date regarding these practices.
2. We also include, at Annex A of this paper, an overview of the Australian Produce and Grocery Industry Code of Conduct, which provides an example of the operation of an industry code in the groceries sector where numerous suppliers have been willing to come forward and seek mediation of their disputes with grocery retailers.

The 2000 investigation, findings and recommendations concerning supply chain practices

3. In the 2000 investigation, the CC received information from suppliers about a number of practices without specific retailers being named in connection with those practices. As a result, a list of 52 practices was sent to grocery retailers² and each was asked whether any of these practices had been carried out in the five years to 31 December 1999. The CC found that 42 of these practices had been carried out by various grocery retailers in the previous five years.³

¹ *Supermarkets: a report on the supply of groceries from multiple stores in the United Kingdom*, TSO, Cm 4842, October 2000.

² Aldi, Asda, Booth, Budgens, Co-op, Iceland, M&S, Morrisons, Netto, Safeway, Sainsbury's, Somerfield, Tesco and Waitrose.

³ Three of the ten practices that the CC did not find evidence of having been carried out in the previous five years related to category management. However, late in the inquiry, it emerged that Asda was engaging in at least one of these practices. Given the late stage of the inquiry, the CC was unable to reach a view on the effect of this practice although it noted its concerns in its report (see CC, 2000, paragraphs 2.535 and 2.536).

4. The CC categorized these 42 practices into eight broader categories for the purposes of its assessment (see Table 1). The CC found that 30 of these practices, when carried out by one of five grocery retailers considered to have sufficient buyer power (Asda, Sainsbury's, Somerfield, Tesco), had the effect of adversely affecting the competitiveness of some of their suppliers and distorting competition among grocery suppliers—and in 18 cases grocery retailers—and that 27 of these practices operated against the public interest.

TABLE 1 Grocery retailer practices on which the CC reached findings in its 2000 investigation

Categories of practices	Number of practices in each category	Findings on each practice:		
		Complex monopoly: distorts competition between: Suppliers	Retailers	Adversely affects the public interest
A Requiring suppliers to make payments or concessions to gain access to supermarket shelf space	8	6	0	4
B Imposing conditions relating to suppliers' trade with other retailers	2	0	0	0
C Applying different standards to different suppliers' offers	1	1	1	1
D Imposing an unfair imbalance of risk	12	10	10	10
E Imposing of retrospective changes to contractual terms with suppliers	8	6	6	6
F Restricting the access of suppliers to the market	1	0	0	0
G Imposing charges, or transferring costs, to suppliers	8	6	1	5
H Requiring suppliers of groceries to use third party suppliers nominated by a multiple	2	1	0	1
Total	42	30	18	27

Source: CC based on CC, 2000.

5. For the 12 practices (out of 42) where the CC did not reach an adverse finding in terms of the impact of that particular practice on competition in the supply of groceries:

- In four cases (ID8, ID37, ID30, ID35⁴), the CC could find only isolated examples of the practice in question and did not consider this sufficient to support an adverse finding.

⁴The ID numbers refer to the numbering system adopted during the 2000 investigation for the purpose of identifying each of the 52 practices considered by the CC in that investigation (see Annex B of this paper as well as CC, 2000, Annex 11.3).

- In three cases (ID29, ID31, ID33), the CC considered that the practice could lead to a distortion but considered the evidence to be insufficient to support an adverse finding.
- In five cases (ID44, ID43, ID28, ID12, ID20) the CC could not be entirely satisfied that the practice distorted competition, although in three of these (ID28, ID12, ID20), it considered the practice to be widespread.⁵

6. For those practices that the CC considered distorted competition, its reasoning was common within each of the category of practices that it had identified and this is set out in Table 2. A complete list of the 42 practices and the CC's findings in relation to each practice is at Annex B.

TABLE 2 **Reasons for considering certain practices distorted competition in the supply of groceries**

<i>Categories of practices</i>	<i>Reasons for considering certain practices in each category distort competition</i>
A Requiring suppliers to make payments or concessions to gain access to supermarket shelf space	Distorts competition between suppliers as grocery retailer does not necessarily select the best, or most efficiently produced, product or that preferred by consumers, but to some extent is influenced by whoever is best able to make the payment requested.
B Imposing conditions relating to suppliers' trade with other retailers	No adverse finding regarding practices in this category.
C Applying different standards to different suppliers' offers	Distorts competition by forcing some suppliers to compete on more onerous terms than others and by distorting consumer choice of products.
D Imposing an unfair imbalance of risk	Distorts competition by disadvantaging those retailers that do not receive the discounts. Also distorts competition between suppliers by tending to transfer an undue element of that risk to the supplier.
E Imposing of retrospective changes to contractual terms with suppliers	Distorts competition between the major grocery retailers that engage in the practice and smaller retailers that have no such advantage in their dealings with suppliers. Also, to the extent that larger suppliers are able to absorb such delays, competition is distorted in supplier markets.
F Restricting the access of suppliers to the market	No adverse finding regarding practices in this category
G Imposing charges, or transferring costs, to suppliers	Distorts competition between suppliers because, to some extent, it insulates the major grocery retailers that engage in the practice from risk, by transferring an undue element of that risk to the supplier.
H Requiring suppliers of groceries to use third party suppliers nominated by a multiple	Distorts competition in the supply of groceries at two levels. First, it distorts by preventing some grocery suppliers from seeking out efficient third party suppliers and having the opportunity to gain a competitive advantage over their rivals. Second, it directly restricts competition between the third party suppliers to the grocery industry.

Source: CC based on CC, 2000.

⁵The three practices that the CC found to be widespread but could not be entirely satisfied that the practice distorted competition related to invoicing disputes between suppliers and grocery retailers.

7. As noted above, all of the 30 practices found to distort competition were considered to distort competition between suppliers. For 18 of these practices, these were also considered as likely to distort competition at the retail level, both in the 'one-stop shop' and secondary markets for grocery shopping. The CC also found that in the case of one practice, there were effects in other markets one step further up the supply chain, namely on goods and services purchased by the suppliers.

8. The CC found that the effect of each of the 30 practices was that suppliers were likely to be less able to devote the resources required to build up their brands or to introduce new products, and innovation was likely thereby to be reduced. This would reduce their competitiveness both in terms of the suppliers' expenditure on research and development and in other new investment. The CC said that it also expected that in the longer term the practices of the major grocery retailers would increase the pressure on the resources of the weaker suppliers and in extreme cases could contribute to their leaving the market. In addition, it would expect less new entry into these markets as a result of these practices, whether on the part of suppliers who are already operating in related markets and have experience of any of the practices when carried out by a major grocery retailer, or on the part of new entrants to the food sector as a whole. The CC considered that this process was likely to reduce the quality and choice available to consumers.

9. In terms of the 18 practices identified as distorting competition between retailers, the CC considered that those multiples with buyer power were able to gain a significant advantage over other retailers. It considered that the outcome for small retailers in particular was exacerbated by their own weakness relative to middle-ranking suppliers, who were likely to have the ability to compensate for the harder terms imposed on them by the major buyers by raising their prices and hardening their own terms to small retailers. The CC considered that in some cases this would contribute

to small retailers exiting the marketplace as well as having an adverse impact on entry into the secondary market for grocery shopping (ie non-one-stop shopping). It considered that these effects on retailers would have a knock-on effect on consumers in the form of higher prices for consumers shopping with these smaller retailers, and reduced choice of retailer.

10. For those three practices where the CC found that the practice distorted competition, but did not have an adverse impact on the public interest:
 - The practice (ID9) of requesting or requiring a financial contribution from suppliers in return for products being promoted, while considered as resulting in a distortion of competition, was also considered as being more likely to increase the number of promotions rather than as a means of extracting additional payments from suppliers. (This was contrasted to other practices (ID52, ID45) where promotion-related payments extracted from suppliers were viewed as a means of retailers obtaining larger payments than would otherwise be the case.)
 - The practice (ID26) of discriminating between suppliers in terms of credit periods was considered as resulting in a distortion of competition in that there was no cost-based justification for these differences. However, the CC considered that many small suppliers benefited from shorter credit periods and this had been beneficial in terms of promoting entry and innovation and hence wider product choice for consumers.
 - The practice (ID51) of grocery retailers requesting charitable contributions by suppliers was found to distort competition but in view of the beneficial effects on the charities concerned, the CC was not sufficiently persuaded that it should make an adverse finding.

11. The CC recommended that a code of practice should be drawn up governing relations between grocery retailers and suppliers to ensure that buyer power was not

exploited. In general terms, the CC considered that the code should be designed to ensure that: (a) suppliers have reasonable certainty as to the price they would receive when they accept orders; (b) not be required to vary terms on which they are trading without reasonable notice; and (c) not face unreasonable or discriminatory trading terms or conditions. It recommended that the code contain the provisions set out in Annex C.

12. The CC also recommended that the code should make provision for dispute resolution, first involving internal dispute resolution procedures at the retailer, then moving to an independent third party, which would report any breach of the code to the OFT.
13. The CC stated that while it was not possible to require any of the main parties other than the five major grocery retailers to comply with its proposed code, as it had not found them to be operating against the public interest, it would be right for them to do so, so as to achieve an industry-wide benchmark for appropriate behaviour.
14. The CC also stated that it had remaining concerns about two practices on which it was unable to reach findings, but which it also recommended be included in the Code. The first related to category management: the CC recommended that where category management is practised it should not discriminate between suppliers in terms of access to information. Also that responsibility for the allocation of shelf space should remain with the multiple, and not with the category manager. Second, the CC recommended that where fines or charges are imposed on suppliers, the code should provide for these penalties to be cost related and that the retailers should have written procedures covering the imposition of penalties.

Establishment of the SCOP

15. Following the publication of the CC's report in October 2000, the OFT entered discussions with the five supermarkets identified by the CC as having buyer power regarding the content of the proposed code. The OFT's discussions with the grocery retailers followed the CC's recommendation that its proposed remedies be implemented by way of undertakings rather than an Order. The Secretary of State for Trade and Industry, acting on the advice of the OFT, subsequently accepted undertakings, which encompass the terms of the Code, from four of these grocery retailers (Asda, Safeway, Sainsbury's and Tesco),⁶ The Code came into force on 17 March 2002.⁷

16. The process of negotiation between the OFT and the grocery retailers led to a number of differences between the final version of the SCOP that came into force and the provisions recommended by the CC (see Annex C). The major changes evident from this comparison are that in a number of cases, the CC recommended that retailers *not seek* certain payments or other support from their suppliers, but in the final version of the SCOP, this had changed into retailers *not requiring or unreasonably requiring* payments or support from their suppliers.

17. The difference between the CC's recommendations in terms of retailers *not seeking* payments or other support, and the SCOP's provisions regarding retailers *not requiring or unreasonably requiring* payments or other support is significant in two respects. First, the 2000 report found that there was no clear-cut distinction between a request and a requirement by a retailer with buyer power.⁸ The SCOP, however,

⁶Somerfield was excluded from having to provide undertakings to the OFT to comply with the SCOP as it was subsequently found to have a market share of less than the 8 per cent identified by the CC as being the threshold for the possession of buyer power.

⁷ Following its acquisition of Safeway in 2003, Morrisons agreed to abide by the Code although it is not statutorily obliged to do so.

⁸See CC, 2000, paragraph 2.470.

appears to introduce this distinction, and this is certainly reflected in the training that a number of grocery retailers provide to their buyers.

18. Second, the SCOP introduces the concept of reasonableness in relation to retailer requirements on their suppliers. In 2004, the OFT stated that the wording proposed by the CC would have inhibited significantly the ability of the supermarkets to decide not to do, or stop doing, business with a particular supplier, and this led to the Code being drafted so that stress was laid on transparency and reasonableness.⁹ In 2005, the OFT, in a further report on the operation of the Code, stated that it considered that the concept of 'reasonableness' avoided undue regulatory prescriptiveness that could introduce rigidities in the relationships between grocery retailers and their suppliers.¹⁰
19. The SCOP provides for obligatory training of buyers in the SCOP, as per the CC's recommendations in 2000, the supply of a copy of the Code to all grocery buying staff, and an annual return to the OFT detailing staff training and guidance. The SCOP also provides for the use of external mediators as per the CC's recommendation.
20. The SCOP does not contain any provisions in relation to category management or the imposition of fines or charges on suppliers as per the CC's recommendations. In drawing up the SCOP, the OFT also excluded from its scope two practices identified by the CC (ID49 and ID52) as only being carried out by Somerfield given Somerfield's exclusion from the scope of the Code.

⁹OFT, *The Supermarkets code of practice: Report on the review of the operation of the code of practice in the undertakings given by Tesco, Asda, Sainsbury and Safeway to the Secretary of State for Trade and Industry on 18 December 2001*, OFT697, February 2004, paragraph 3.5.

¹⁰OFT, *Supermarkets: The code of practice and other competition issues*, OFT783, March 2005, paragraph 3.3.

Complaints under the SCOP

21. The OFT has informed us of 17 complaints under the SCOP since its establishment in 2002. Details of the complainant, the relevant grocery retailer, the nature of the complaint and the outcome are set out in Table 3.

22. Five of the complaints relate to grocery retailers' requests or requirements for lump sum payments from suppliers, four relate to unreasonable notice of delisting and three relate to third party suppliers. The four grocery retailers covered by the SCOP have each been subject to a broadly similar number of complaints [✂].

23. None of the complaints has resulted in an adverse finding by the OFT regarding the conduct of a grocery retailer. In three cases, the OFT took the view that there was no breach of the Code, four cases lapsed when complainants were unwilling to proceed, five cases were resolved independently between the parties following advice from the OFT, and in three cases, the OFT did not consider that the Code applied to the matter in question.

OFT monitoring of compliance with the SCOP

24. The SCOP provides that 'a supermarket shall furnish to the Director [General of Fair Trading] an annual return detailing staff training and guidance issued in relation to this code in such form and on such days as the Director may specify from time to time' (clause 25). The OFT advised that it obtained such a return in 2003, and used the two reviews it has undertaken of the SCOP, and which were published in 2004 and 2005, the latter including an independent audit undertaken by PKF, to monitor compliance.

TABLE 3 **Complaints under the SCOP**

<i>Complainant</i>	<i>Grocery retailer</i>	<i>Issue</i>	<i>Outcome</i>
[X]			

Source: OFT.

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25. The first review, conducted in 2003 and published in February 2004,¹¹ followed a Government response to a recommendation in the report of the Policy Commission on the Future of Farming and Food that committed the OFT to preparing an annual report on how the Code was working. The process of the review involved the OFT writing to around 60 trade associations seeking submissions from their members as well as the four grocery retailers covered by the Code. The OFT received 35 responses from trade associations and 16 submissions from individual suppliers and other bodies.
26. The review found a widespread belief among suppliers that the Code was not working effectively, and the principle reason for this was the fear among suppliers of complaining due to the threat of delisting. The review notes that these findings were in line with the views expressed by third parties on the Code in the CC's 2003 report into the Safeway merger. The four grocery retailers, however, told the OFT that they were committed to the Code and that they generally had good relations with their suppliers, but that their practices had not changed significantly since the introduction of the Code. Given the difficulties in obtaining information from suppliers, a key decision arising from the review was to commission a compliance audit of the SCOP.

¹¹OFT, *The Supermarkets code of practice: Report on the review of the operation of the code of practice in the undertakings given by Tesco, Asda, Sainsbury and Safeway to the Secretary of State for Trade and Industry on 18 December 2001*, OFT697, February 2004.

27. The OFT commissioned the accountancy firm PKF to undertake the compliance audit of the SCOP in 2004, and the results were published in March 2005.¹² The audit covered the 2003 calendar year and focused on six aspects of the Code where claims of breaches were most common. In addition, the OFT asked PKF to examine the grocery retailers' handling of supplier complaints and disputes. The audit was based on a sample of 500 grocery supplier relationships with grocery retailers, representing around 5 per cent of all such relationships.

28. The OFT in publishing the PKF audit in March 2005 noted that, by and large, the four grocery retailers had complied with the Code, and that while the audit detected some breaches of the Code, the nature and extent of the breaches did not suggest that non-compliance was widespread. The breaches that were detected related to the payment of lump sums from suppliers to grocery retailers. In 44 cases, these payments were requested by Safeway (prior to its acquisition by Morrisons), and in two cases by Sainsbury's.

29. The OFT noted that whatever the audit's findings on compliance, concerns may legitimately remain about the Code's effectiveness in addressing the adverse effects identified in the CC's 2000 report. The OFT sought further comments from interested parties on the effectiveness of the Code. The OFT published its conclusions on this consultation in August 2005 and stated that based on the audit and the consultation process it saw no case for revoking or changing the Code. It noted its intention to continue monitoring the Code pro-actively, to secure better recording in writing of grocery retailer–supplier dealings, and confirmed that trade associations could take group actions on behalf of their members under the Code. It stated that it saw no case for the creation of a supermarket ombudsman or regulator to deal with Code issues.

¹²OFT, *Supermarkets: The code of practice and other competition issues*, OFT783, March 2005.

Views of grocery retailers on the SCOP

30. The four major grocery retailers have told us that the introduction of the SCOP has had little impact on the way in which they conduct their business and their relationships with suppliers. Asda, Morrisons and Sainsbury's each told us that they were observing their own codes of practice, in the case of Asda and Sainsbury's, prior to the introduction of the SCOP, and in the case of Morrisons, prior to the application of the Code to it following its acquisition of Safeway.

31. Asda told us that it considered that the SCOP had improved the awareness of buyers of the need for documenting key discussions. It considered that it strictly adhered to the SCOP, and saw the SCOP's principles as reflecting sound business practice as applied by Asda before the SCOP was introduced.

32. Asda told us that it observed the Code across all of its business—not just grocery lines. It told us that it extended SCOP training and SCOP awareness to staff in supply, marketing and customer services that needed to be aware of various SCOP provisions. It provided all buyers with a copy of the Code and a short form that enshrined the key principles.

33. Morrisons told us that it was a key part of the Morrisons trading culture that its buyers conducted business in a fair and proper manner with all its suppliers. Morrisons told us that it worked on the premise that it needed good suppliers as much as it needed a good, loyal and growing customer base. As a result, relationships with its suppliers were critical to the totality of its in-store offer and therefore, while it expected strong support and loyalty from its suppliers, it also generally needed them as much as they need it. Morrisons said that it was demanding of its suppliers, just as its customers were of it, but it knew that its suppliers would only continue to support it if Morrisons delivered to them relative to its supply agreements.

34. Morrisons told us that it had heard of other grocery retailers demanding sums of money from their supply base to support their profit and loss position, and had also heard of unilateral decisions by competitors to extend payment terms to their supply base. However, these were negotiating stances that it would not recognize itself. Morrisons believed that this behaviour was not acceptable as it clearly understood that payment terms were an element of cost prices and the supply agreement.

35. Sainsbury's told us that it believed that the lack of complaints being escalated through the SCOP and the fact that issues were resolved on a bilateral basis between retailers and suppliers is evidence that the Code was working effectively. Sainsbury's told us that retailers currently not covered by the SCOP, such as Waitrose, M&S, Somerfield, Co-op, Aldi, Lidl, Netto, Booths and Budgens, could wield buyer power and lead price movements based on their regional or category strength, regardless of their national market share. It views the current 8 per cent national market share threshold for the application of the SCOP as purely arbitrary and believes that the Code should be extended to all 'one-stop shop' retailers.

36. Sainsbury's told us that it prided itself on the integrity of its relationship with suppliers, and had introduced its own best practice guide. It considered that the introduction of the SCOP had not significantly changed its relationships with suppliers, but had had the benefit of providing a clear framework within which to operate.

37. Sainsbury's told us that it has been working to its own voluntary code of commercial practice since June 2000 when 'Working with Suppliers' became the first statement of its kind to be published. The latest edition restates Sainsbury's commitment to best practice and incorporates the SCOP, which frames and guides its relationships with suppliers. The foreword from the Trading Director reminds colleagues that the

provisions of the Code have the force of law and therefore form an extremely important part of the trading relationship with suppliers.

38. Sainsbury's told us that it ensured full compliance by making sure that all trading colleagues were aware of the Code and abided by its requirements in all their dealings with suppliers, as well as communicating these commitments to its suppliers in its handbooks. It told us that each buyer attended a mandatory commercial law course including modules on Competition Law, SCOP and Data Protection as part of their induction programme. This was monitored centrally by its human resources department and the line manager, and recorded on the 'Trading Division Training Plan'.
39. Tesco told us that it believed that the Code had had a positive effect on relations between suppliers and retailers in determining the boundary as between acceptable and unacceptable conduct. It considered, however, that the Code was not, and was not intended to be, a substitute for the kind of partnering with the supply base that Tesco believed in.
40. Tesco told us that it followed the SCOP in letter and in spirit. It told us that it was supportive of the SCOP as a means of promoting various good buying practices that it already observed, and viewed the Code as setting out means of introducing welcome transparency in respect of retailer/supplier relationships. Tesco noted that it had appointed a Code Compliance Officer to hear formal supplier complaints, confidentially, if requested, and commissioned an annual supplier survey by an independent research company to help it identify and act on supplier concerns. All of Tesco's buyers underwent Code-specific training as well as competition law training.

41. In terms of other retailers not covered by the SCOP, Somerfield told us that it applied its own version of the Code of Practice and that it saw little evidence for tightening the provisions of the Code.

Views of suppliers and other third parties on the SCOP

42. Supplier organizations and others with an interest in the grocery supply chain generally considered the SCOP to have failed in moderating relationships between grocery retailers and their suppliers. Three major problems were identified with the SCOP and the related institutional arrangements for its monitoring and enforcement.
43. First, a number of organizations (British Brands Group, British Independent Fruit Growers Association (BIFGA), Country Land and Business Association, Farmers Union of Wales, Federation of Small Business, Friends of the Earth, Meat and Livestock Corporation, National Association of Master Bakers, TescoPol, Traidcraft, Ulster Farmers Union) told us that suppliers were unwilling to make complaints due to concerns about confidentiality and retribution from grocery retailers. The Federation of Small Business told us that it considered that the Code had been insufficiently publicized and was not well known among the smaller suppliers. Friends of the Earth told us that the informational burden placed on suppliers also discouraged complaints. NFU Scotland told us that its members felt frustration with the SCOP which required evidence to accompany a complaint. The Scottish Executive told us that it was aware of reported concerns among suppliers in relation to enforcement of the SCOP and lack of confidence in making complaints.
44. Second, a number of organizations raised concerns about the wording of the Code. The NFU, BIFGA, the Environment and Rural Development Committee of the Scottish Parliament, and TescoPol all told us that the use of the word 'reasonable' in certain key provisions in the Code caused problems as they were open to broad

interpretation. Friends of the Earth told us that the caveats and conditions in the Code made it difficult to prove that the Code was being breached. Similarly, the Farmers Union of Wales considered that the current vagueness of the wording meant that it would be very hard to prove a breach of the Code even if a supplier were to have the confidence to bring a complaint forward. The Federation of Small Business told us that here was also a question about the term 'reasonableness' within the Code, but the Federation recognized that it would be difficult to arrive at a satisfactory definition that did not constrict diversity in supply contracts.

45. Third, a number of parties considered that the SCOP required active monitoring to be effective. The BBG told us that one of the reasons why the SCOP had not been effective in redressing abuses in buyer power was because it was not regularly monitored. A number of other parties (Country Land and Business Association, NFU Scotland, Scottish Grocers Federation, Tescopoly) also told us of the need for more pro-active monitoring and enforcement of the Code.
46. Tescopoly told us that the Code needed to be strengthened to take account of possible new practices that were being used by grocery retailers. Similarly, the British Brands Group told us that to be effective the SCOP needed to have broader provisions, while the NFU told us that since the inception of the Code it had believed that it had lacked the scope and teeth to address the issues raised in the 2000 report. The National Association of Master Bakers also told us that the SCOP was not effective because it only applied to the four largest grocery retailers.
47. One supplier [redacted] told us that it had never chosen to take a dispute to the SCOP as it recognized that it could not win on every issue but that it always was given the opportunity to fully negotiate and discuss with its customers. A further supplier [redacted] said that to date it had not discovered anything on Code compliance that it was

concerned about. Another supplier [X] told us that while it was aware of the Code of Practice, it had never had a requirement to use it or refer to it with any grocery retailer in any negotiation. It told us that this was because the behaviour of the grocery retailers had not warranted it, rather than [X] being concerned about the consequences of complaining under the Code.

48. Amicus, the trade union, told us that the pressure grocery retailers exerted on suppliers was causing its members increasing concern, especially when taking into account the continued move into the convenience market by grocery retailers.

Practices of particular concern identified by Amicus included:

- payment schedules;
- retrospective reductions in price during the period of a contract;
- supplier contributions to marketing costs;
- lump sum payments as a condition of supply;
- payments in respect of consumer complaints; and
- tying of third party goods or services.

49. ActionAid told us that while the OFT had confirmed that the Code applied to overseas suppliers, many overseas suppliers were unaware of the Code and who or what it applied to.

50. Edwin Coe, a law firm, writing in its own capacity, but drawing on its experience representing a complainant under the Code, told us that the lack of willingness of suppliers to put their heads above the parapet even on an anonymous basis clearly caused significant difficulties for the regulatory authorities. However, it believed that it was wrong to conclude that the resulting lack of evidence suggested that the Code was working according to plan. It considered that by its very structure the Code was not effective. As a negotiated document, Edwin Coe considered that it seemed to

bear the markings of the dominant parties in that negotiation. It said that as a negotiated document it was poorly drafted, leading to considerable uncertainties, and that as it stood, if anything the Code supported the dominance of grocery retailers against suppliers.

51. Grant Thornton, an accountancy firm, told us that the Code was ineffective, citing the lack of suppliers making representations to the OFT despite steadily corrosive and increasingly heavy-handed buyer behaviour. It noted that such behaviour continued to include short-notice delisting and retrospective demands for supplier contributions, whether in the guise of contributions to promotions, volume overrides and other supply- or listing-based contributions.
52. Mr Danny Alexander MP, Member for Inverness, Nairn, Badenoch and Strathspey, told us that because the Code only dealt with the relationship between the supermarket and suppliers, the Code offered little protection to farmers, who generally supplied their produce indirectly to supermarkets through a third party such as a processor.
53. The Environment and Rural Development Committee of the Scottish Parliament stated in its 8th report in 2006 that it considered that the OFT's view of how the SCOP should work was unrealistic and contributed to the current system being ineffectual. The Committee did not accept that the current system was working well, and believed that a different form of regulation was required.

CC findings in relation to the SCOP in the Safeway merger case

54. As part of its inquiry into the proposed acquisition of Safeway by each of Asda, Morrisons, Sainsbury's and Tesco, the CC considered whether the SCOP would be likely to counteract to any extent any increased buyer power on the part of the

grocery retailer that acquired Safeway. To this end, the CC included a number of questions regarding the SCOP in a survey of suppliers.

55. The CC reported that a high proportion of respondents stated that their dealings with the grocery retailers covered by the SCOP had not changed subsequent to the introduction of the SCOP, and that among the relatively few large suppliers reporting a change, there were more negative than positive responses. So far as small suppliers were concerned, the most common response was that the SCOP had had no effect. The CC went on to say that the evidence from both submissions made and its surveys suggested that the SCOP had not been working to protect suppliers.

Assessment of the practices identified in the 2000 report

56. The approach of the CC to assessing the different supply chain practices of grocery retailers that were brought to its attention in the 2000 investigation is set out in paragraphs 3 to 10. Our working paper on supply chain practices, published alongside Emerging Thinking in January 2007, sets out an alternative system of categorization appropriate for the various supply chain practices that had been brought to the CC's attention in the context of this investigation. In particular, the working paper focuses on:

- lack of contractual terms in, and 'unilateral' changes to, agreements between grocery retailers and suppliers;
- payments by suppliers to grocery retailers to obtain shelf space for new or existing products;
- the provision of category management and other marketing support services to grocery retailers by suppliers;
- exclusive purchasing and dealing agreements;
- the stocking of own-brand products by grocery retailers; and
- recommended retail prices.

57. In relation to each of these areas, the working paper identifies the potential pro- and anti-competitive effects of the relevant practices. In the following paragraphs, we consider the practices identified in the 2000 report in terms of the categorization system developed for this investigation (outlined above) and the pro- and anti-competitive effects identified as being potentially associated with these practices.
58. Given that the SCOP is based on 25 practices identified by the CC as distorting competition and against the public interest, it is of importance to specifically reassess whether the CC still considers these practices to have an adverse effect on competition given the change in the legislative basis for market investigations by the CC (see paragraph 57 of Emerging Thinking) as well as developments in thinking regarding the possible adverse consequences of buyer power.
59. Of the 25 practices that the SCOP was designed to address, we consider that 23 of these practices are, in certain circumstances, likely to have an adverse effect on competition. Our reasoning in relation to individual practices is set out in Annex E. However, in general terms, our greatest concern in relation to these practices is the element of retrospectivity or uncertainty for suppliers regarding payment terms that many of these practices imply. We are also concerned with practices requiring the payment of lump sums for the placement of new products or access to shelves for existing products given the potential impact on small suppliers. (We discuss this further in the working paper on the impact of payments on small suppliers.)
60. We note that there are a small number of practices identified in the 2000 inquiry as being against the public interest, but which at this point we think may not have an adverse effect on competition under the current framework for CC market investigations. Again, in general terms, we are less concerned with those practices that simply represent an alternative way of reaching or expressing an agreed price of

supply between supplier and grocery retailer. For example, we question whether supplier funding of retailer promotions should be regarded as problematic where a supplier has advance notice of planned promotions at the time at which a supply agreement is negotiated. Many suppliers agree business plans with grocery retailers at the outset of each supply agreement that set out factors such as the number, timing and other details of planned promotions and should allow the supplier to have sufficient certainty regarding the net price that will be achieved during the year.

61. Turning to the remaining 27 practices that were identified by the CC in 2000 but were not incorporated into the scope of the Code, we consider that 16 of these may also have an adverse effect on competition (see Annex E).

Evidence on practices relevant to the SCOP

62. In considering whether the practices addressed under the SCOP, and more broadly the practices identified in the 2000 investigation, continue to be carried out by grocery retailers, we have considered information provided by suppliers, industry associations, the OFT and grocery retailers. In a number of cases, the CC has exercised its powers under section 109 of the Enterprise Act to compel the provision of this information.
63. In terms of assessing whether the practices identified in the 2000 investigation continue to be carried out, our starting point for reaching a view on this matter is that, given that the various practices covered by the SCOP are regulated rather than prohibited, we see no reason to consider that the grocery retailers have ceased to practise them. This view is supported by our review of the internal guidance and training provided to buying staff by the grocery retailers. In a number of instances, the guidance provided to buyers makes it clear that many of the practices addressed

under the SCOP can continue to be used provided that the buyer complies with the reasonableness or other conditions set out in the Code.

64. Our survey of suppliers asked respondents whether they had experienced in the past five years a number of practices addressed under the SCOP. The responses are set out in Table 4. Obligatory contributions to the marketing costs of grocery retailers was the most commonly reported practice, by 61 per cent of suppliers in relation to all grocery retailers and 38 per cent of suppliers in relation to the four grocery retailers covered by the SCOP.
65. When asked whether each of the practices had increased, decreased or stayed the same in terms of their frequency in the past 12 months compared with the previous four years, 58 per cent of suppliers reported that the frequency of retrospective price reductions had increased. The proportion of suppliers reporting a decrease in the frequency of each of these practices over the past 12 months ranged from 5 to 15 per cent.

TABLE 4 Suppliers reporting various practices carried out by grocery retailers in past five years

	<i>per cent</i>		
	<i>All grocery retailers</i>	<i>Four grocery retailers covered by the SCOP</i>	<i>Increased frequency over past 12 months</i>
Obligatory contributions to the marketing costs of grocery retailers	61	38	53
Delays in receiving payments from a grocery retailer substantially beyond the agreed time	48	28	37
Required to make excessive payments to grocery retailers for customer complaints	48	36	40
Additional services required in relation to packaging and distribution	37	29	49
Requested price reductions for products soon before or after delivery	37	26	58
Obligatory payments in return for stocking or listing products	35	22	33
Not provided with standard terms of business when requested	19	12	32

Source: GfK, *Research on suppliers to the UK grocery market, A report for the Competition Commission*, January 2007.

66. In terms of the specific practices and incidents that have been brought to our attention during the investigation, details of individual suppliers, the retailer concerned and a summary of the practice are set out in Annex D. While, in a number of cases, we are still in the process of collecting details from the supplier concerned, we have—to date—been provided with information on practices and incidents concerning in the region of 100 suppliers. In a number of cases, a number of different practices are associated with the same supplier.
67. The most common practices and issues arising from our review of the various incidents brought to our attention relate to:
- requirements for lump sum payments (ID2–18);
 - requirements for compensation payments to grocery retailers when profits from a product have been less than expected (ID13–16);
 - invoicing and payment problems associated with grocery retailers (ID12/25–13);
 - retrospective price reductions (ID 11–13);
 - changes in supply chain procedures that increase a supplier’s costs without compensation (ID24–10); and
 - fines levied on suppliers by grocery retailers (ID20/22–8).
68. Many of these practices have the potential to be a source of considerable uncertainty for suppliers and, as noted previously, act as a disincentive to investment and innovation as well as potential barriers to entry for small suppliers.
69. The extent to which these practices are causing substantial problems could be expected to be reflected in aggregate data on innovation activity and the extent to which small firms supply the grocery retailers. We reviewed evidence on innovation in the working paper on buyer power that was published in January 2007. Concerns have been raised with us that the evidence reviewed in that paper was insufficiently

detailed to allow us to draw robust conclusions regarding trends in innovation activity. We continue to look at this matter. Also, as noted previously, we look further at the impact of various payments on small suppliers in a separate working paper.

70. In the period leading up to provisional findings, we will continue to collect information on the supply chain practices of grocery retailers, and will also seek submissions from the grocery retailers in relation to the various practices that have been brought to our attention. We will continue to exercise the legal powers available to us concerning the collection of information where this is necessary.
71. We remain acutely aware of the confidentiality concerns of many of the suppliers and industry organizations that have provided information to us. We will continue to work to ensure that the legitimate commercial interests of these businesses and organizations are not damaged as we investigate these matters.

Conclusion

72. Our review of the Supermarkets Code of Practice and the supply chain practices of grocery retailers indicates that many of the practices that were identified in the 2000 investigation continue to be carried out. This is evidenced by:
 - the fact that the SCOP seeks to regulate rather than prohibit these practices;
 - statements from the grocery retailers that the SCOP has not changed the way in which they interact with suppliers;
 - the guidance and training provided to buying staff by grocery retailers;
 - our survey of suppliers to the grocery retailers; and
 - submissions from suppliers and supplier organizations regarding specific incidents in their dealings with grocery retailers.

73. Having further reviewed these practices, taking into account the changes in legislation governing CC market investigations since 2000 as well as developments in thinking concerning buyer power, we are currently of the view that many, although not all, of the practices identified in 2000 are likely to have an adverse effect on competition. This is primarily as a result of the uncertainty created for suppliers and the consequent adverse effects on investment and innovation. We are also concerned about possible barriers to entry for small suppliers and consequent impacts on innovation and product choice for consumers.

Australian Produce and Grocery Industry Code of Conduct

1. The Australian Produce and Grocery Industry Code of Conduct has been brought to our attention as an example of a successful scheme aimed at addressing concerns about supplier–retailer relationships. In particular, the scheme has been successful in encouraging significant numbers of suppliers to come forward and seek independent mediation of their disputes with retailers. This is particularly notable given that the grocery retail sector in Australia, with two major grocery retailers, would appear to be significantly more concentrated than that in the UK.
2. The following provides a brief description of the Code, based on publicly available information, and notes the recent introduction of a further mandatory code covering the supply of fresh fruit and vegetables from growers to wholesalers. We plan to look further at these two codes in the period leading up to provisional findings and would welcome submissions from parties with direct knowledge of the operation of these codes.
3. The Australian Producer and Grocery Industry Code of Conduct (previously known as the Retail Grocery Industry Code of Conduct) was developed by the Retail Grocery Industry Code of Conduct Committee, an industry-funded committee appointed by the Federal Government on 13 February 2000. The Committee was established to draft the Code as part of the Government’s response to the Report of the Joint Select Committee on the Retailing Sector, *Fair Market or Market Failure*, December 1999.
4. The Code is a voluntary code of conduct for the retail grocery industry. It is based around a number of core principles:

- All industry participants support an efficient and competitive retail grocery industry which accords equal respect to:
 - the right of retailers to buy the best produce at the best price; and
 - the right of suppliers to have their produce fairly evaluated for purchase against clear and objective standards and specifications.
- All industry participants support the right of suppliers and retailers to freely negotiate the terms and conditions of any supply contract, including the right to determine whether or not that contract is evidenced in writing.
- All industry participants accept the right of retailers to determine labelling, packaging and preparation requirements, subject to the standards imposed or promoted by the relevant regulating authorities or industry associations, including any voluntary codes of conduct or practice.
- All industry participants support a dispute resolution scheme which:
 - considers all vertical supply disputes arising between industry participants;
 - gives all industry participants an opportunity to resolve disputes, in the first instance, under internal procedures;
 - encourages unresolved disputes to be referred to the Industry Ombudsman as an alternative to litigation;
 - will not jeopardize the underlying commercial relationship;
 - respects the confidentiality of applicants and respondents; and
 - encourages an equitable and timely resolution of disputes.
- All industry participants support a dispute resolution procedure in which:
 - industry participants will publish internal dispute resolution principles consistent with the two-stage dispute resolution procedure described in the Code;
 - all industry participants, industry associations and signatories to this Code will promote the existence of internal dispute resolution procedures in a genuine effort to resolve disputes;

- all internal dispute resolution procedures will provide both a statement to the effect that the industry participant supports the Retail Grocery Industry Code of Conduct and contact details for the Industry Ombudsman;
 - retailers and suppliers will participate in the mediation process in a spirit of goodwill and good faith; and
 - matters discussed and documents produced in the course of mediation will be treated as confidential and without prejudice.
5. The Produce and Grocery Industry Code Administration Committee, which administers the Code of Conduct, in March 2007 produced a Terms of Trade checklist, which seeks to provide a practical list of those areas that should be included in any supply chain contract to avoid misunderstandings, such as supplier obligations, price determination, variation and notification, and procedures to manage compliance. It represents best practice for developing contractual arrangements with participants in the produce and grocery industry throughout the supply chain.
6. Between 2001 and 2006, 523 dispute inquiries were recorded under the Code leading to 234 mediation applications, of which 21 were rejected, 35 were joined with other mediation applications and 150 resulted in a signed agreement between the parties.
7. In September 2006, the Government moved to implement a mandatory code of conduct for the wholesale horticulture sector. In announcing the new code the government stated that the Code will clarify the responsibilities and obligations of growers and wholesale traders, and improve the transparency of transactions across the fresh fruit and vegetable industry. As a mandatory code, breaches of the Code may result in enforcement action being taken by the Australian Competition and Consumer Commission (ACCC), the Australian competition regulator.

8. According to the new Horticulture Mediation Adviser, key elements of the Code are:
 - wholesalers publish their preferred 'terms of trade';
 - wholesalers are clearly identified as either agents or merchants;
 - wholesalers provide written transaction information to growers;
 - independent assessment is available on transactions; and
 - low-cost mediation is available if disputes arise.

9. Wholesalers are required to prepare a 'terms of trade' document that sets out basic information on how they intend to do business with growers and to make them freely available. They are also required to provide copies to growers who request them.

10. Before any produce can be traded, growers and wholesalers are required to use written agreements. Agreements must include details such as whether the wholesaler will trade as an agent or a merchant and payment and reporting time frames.

CC findings in relation to 42 practices identified as having been carried out by retailers in previous five years

Practice	Adverse finding: distorts competition between:		Explanation of adverse finding	Adversely affecting the public interest	
	Suppliers	Retailers			
<i>Category A: Requiring suppliers to make payments or concessions to gain access to supermarket shelf space</i>					
ID2	Required or requested payments from suppliers as a condition of stocking and displaying their products or as a pre-condition for being on your list of suppliers	✓		Adversely affects the competitiveness of some of their suppliers and distorts competition in the supply of groceries between suppliers, because the multiple engaging in the practice does not necessarily select the best, or most efficiently produced, product or that preferred by consumers, but to some extent is influenced by whoever is best able to make the payment requested.	✓
ID3	Required or requested suppliers to make a payment for better positioning of their products within your stores	✓		Same explanation as for ID2	✓
ID4	Required or requested suppliers to give you an improvement in terms in return for increasing the range or depth of distribution of their products within your stores	✓		Same explanation as for ID2	✓
ID9	Required or requested a financial contribution from a supplier in return for its products being promoted within the store during the year	✓		Same explanation as for ID2	
ID26	Discriminated between suppliers in the length of the credit period a multiple accepts	✓		Same explanation as for ID2	
ID28	Delisted a supplier, or caused a supplier to reduce prices at a multiple's request under threat of delisting			It is evident that delisting is a common practice, and we believe it may, in certain circumstances (for example, where it is not solely linked to product quality), lead to a distortion in the supplier market. But on the evidence we have received we cannot be satisfied that this is the case.	
ID29	Suggested to a supplier that you would delist a product and later withdrew suggestion having received a discount on an unrelated product or a general improvement in terms			This practice would, in our view, affect the competitiveness of suppliers and distort competition between suppliers for the same reasons as those set out for ID2. However, the responses from the major buyers which said that they engaged in the practice did not address the question as asked (which concerned discounts on products other than the one threatened with delisting). In these circumstances we cannot be satisfied that the competitiveness of any suppliers has been adversely affected or that there has been a prevention, restriction or distortion of competition.	

		<i>Adverse finding: distorts competition between:</i>		<i>Explanation of adverse finding</i>	<i>Adversely affecting the public interest</i>
<i>Practice</i>		<i>Suppliers</i>	<i>Retailers</i>		
ID52	Required or requested suppliers to make payments for a specific promotion (eg gondola ends) where the payments exceeded the actual costs to your company	✓		Same explanation as for ID2	✓
<i>Category B: imposing conditions relating to suppliers' trade with other retailers</i>					
ID8	Required solus (exclusive) supply of a product (other than the retailer's own-label)			In many circumstances, exclusive supply of branded products restricts or distorts competition between retailers by putting those retailers which do not have access to the products in a disadvantageous trading position. And it is clear from the comments made by several suppliers that they believe there is distortion in this market. However, the evidence from the main parties which told us they engaged in this practice is that, other than in isolated cases, solus supply is limited to what are effectively own-label products. We are unable to be satisfied that this practice, in the circumstances described to us by the parties engaging in it, adversely affects the competitiveness of suppliers, or distorts competition in the supply of groceries between suppliers.	
ID37	Sought to influence a supplier not to supply a product to another retailer where that retailer was, or was believed to be, offering the product at a lower price			No clear evidence that the practice is more widely observed than the single example provided to the investigation.	
<i>Category C: applying different standards to different suppliers' offers</i>					
ID40	Sold a product on which the labelling indicated, or might be taken to indicate, that the product was of UK/British origin when the consumable originated overseas (eg when it was packed in the UK after being imported from abroad)	✓	✓	Adversely affects the competitiveness of some suppliers and distorts competition in the supply of groceries by forcing some suppliers to compete on more onerous terms than others and by distorting consumer choice of products.	✓
<i>Category D: imposing an unfair imbalance of risk</i>					
ID10	Required suppliers to give overriding or 'in anticipation' discounts	✓	✓	Adversely affects the competitiveness of some suppliers, particularly small suppliers, and distorts competition in the supply of groceries between retailers by disadvantaging those retailers that do not receive the discounts. The practice also distorts competition between suppliers by tending to insulate the major buyers that engage in the practice from risk, by transferring an undue element of that risk to the supplier.	✓
ID11	Sought discounts from suppliers retrospectively which reduced the price of the product agreed at the time of sale	✓	✓	Same explanation as for ID10	✓

	Practice	Adverse finding: distorts competition between:		Explanation of adverse finding	Adversely affecting the public interest
		Suppliers	Retailers		
ID13	Required or requested compensation from a supplier when your profits from a product were less than you expected (excluding promotional activity)	✓	✓	Same explanation as for ID10	✓
ID14	Sought support from a supplier to match a lower retail price of a product by competing retailer	✓	✓	Same explanation as for ID10	✓
ID16	Required or requested suppliers to make payments to cover product wastage	✓	✓	Same explanation as for ID10	✓
ID17	Required or requested suppliers to buy back unsold products, or failed to pay for them outside a written agreement that 'sale or return' was in the terms of the sale	✓	✓	Same explanation as for ID10	✓
ID21	Failed to compensate suppliers for costs caused through your company's forecasting errors or order changes	✓	✓	Same explanation as for ID10	✓
ID22	Levied charges on suppliers for consumer complaints which exceeded your actual costs, or were not for a product fault, or for which written information was not provided to the supplier	✓	✓	Same explanation as for ID10	✓
ID30	Delisted any producers/growers who had failed to deliver agreed quantities due to weather conditions			We are not satisfied that this practice is indicative of more than one or two isolated incidents. We therefore do not find that it adversely affects the competitiveness of suppliers or prevents, restricts or distorts competition in the supply of groceries between suppliers or between retailers	
ID35	Sought information from a supplier on the supply or pricing of its product(s) to other retailers			We have received no clear evidence to suggest that any undue pressure has been used against any suppliers to provide information about the supply or pricing of their products to other retailers, nor that suppliers have complied with requests reluctantly. We do not find that this practice adversely affects the competitiveness of suppliers, or prevents, restricts or distorts competition in the supply of groceries.	
ID48	Required or requested suppliers to make a financial contribution if a promotional activity carried out by your company failed to meet expected target	✓	✓	Same explanation as for ID10	✓
ID49	Required supplier to bear the costs of surplus special packaging ordered by your company for a promotion when sales did not meet expectations	✓	✓	Same explanation as for ID10	✓
<i>Category E – imposing of retrospective changes to contractual terms with suppliers</i>					
ID12	Debited suppliers' invoices, or otherwise claimed from them, without their agreement			This practice has been the subject of many supplier complaints and we believe it is probably widespread. We are not persuaded that it is reasonable for a multiple with buyer power to deduct payments from suppliers without their agreement, in all circumstances.	

	Practice	Adverse finding: distorts competition between:		Explanation of adverse finding	Adversely affecting the public interest
		Suppliers	Retailers		
				However, we cannot be entirely satisfied that the practice as described above adversely affects the competitiveness of their suppliers, nor that it prevents, restricts or distorts competition in the supply of groceries.	
ID25	Delayed payments to suppliers outside agreed contractual periods, or by more than 30 days from the date of invoice, where deliveries had been made to your specification	✓	✓	Adversely affects the competitiveness of suppliers and distorts competition in the supply of groceries between the major buyers that engage in the practice and smaller retailers that have no such advantage in their dealings with suppliers. Also, to the extent that larger suppliers are able to absorb such delays, competition is distorted in supplier markets.	✓
ID27	Changed the quantities or specifications of a product previously agreed with a supplier with less than 3 days notice without financially compensating the supplier for any losses it incurred	✓	✓	Same explanation as for ID25	✓
ID38	Required suppliers to maintain a lower wholesale price previously negotiated for an increased order when the volumes you purchased were subsequently reduced	✓	✓	Same explanation as for ID25	✓
ID39	Over-ordered goods at a promotional price from a supplier, which you subsequently sold into retail at a higher price without compensating the supplier	✓	✓	Same explanation as for ID25	✓
ID44	Debited suppliers' invoices (or otherwise claimed) for monies for promotions which were not for the sum previously agreed with the supplier, or had not yet taken place, or which were without provision of back-up data to the supplier			We are not persuaded that it is reasonable for a multiple with buyer power to debit suppliers for promotional activities without their agreement in all circumstances. However, we cannot be entirely satisfied that the practice adversely affects the competitiveness of their suppliers, nor that the practice as described above necessarily prevents, restricts or distorts competition in the supply of groceries.	
ID46	Instigated a promotion on a product without the agreement of the supplier and requested the supplier retrospectively fund the promotion	✓	✓	Same explanation as for ID25	✓
ID47	Required or requested suppliers permanently to reduce the previously agreed wholesale price of products in support of the marketing initiatives with which the price initially was associated	✓	✓	Same explanation as for ID25	✓
<i>Category F: restricting the access of suppliers to the market</i>					
ID31	Delisted any suppliers of branded products in favour of your nearest own-label equivalent			We believe that, in certain circumstances, for example where the delisting of a branded product is not solely linked to product quality, the practice may lead to a distortion in the supplier market. But on the evidence we have received we	

	Practice	Adverse finding: distorts competition between:		Explanation of adverse finding cannot be satisfied that this has been the case.	Adversely affecting the public interest
		Suppliers	Retailers		
<i>Category G: imposing charges, or transferring costs, to suppliers</i>					
ID19	Required or requested suppliers to contribute to your costs of buyer visits to new or prospective suppliers, artwork and packaging design, consumer panels, market research, or to provide hospitality to your company or its employees	✓		Adversely effects the competitiveness of some suppliers and distorts competition in the supply of groceries between suppliers because, to some extent, it insulates the major buyers that engage in the practice from risk, by transferring an undue element of that risk to the supplier.	✓
ID20	Levied charges on suppliers for discrepancies in supply where the source of the discrepancy had not been agreed with the supplier, or where written information on the circumstances was not provided to the supplier			This practice has been the subject of many supplier complaints and we believe it is widespread. We are not persuaded that it is always reasonable for a multiple with buyer power to levy such charges on suppliers without their agreement, in all circumstances. However, we cannot be entirely satisfied that the practice as described adversely affects the competitiveness of suppliers, nor that the practice prevents, restricts or distorts competition in the supply of groceries.	
ID23	Required or requested suppliers to contribute specifically to the costs of store refurbishment or the opening of a new store	✓		Same explanation as for ID19	✓
ID24	Introduced a change to any aspect of the supply chain procedures which reasonably could be expected to increase a supplier's costs without compensating the supplier or sharing any savings achieved	✓		Same explanation as for ID19	✓
ID43	Unilaterally imposed charges on suppliers for not meeting product specifications without proven investigation that the problem might have originated at the store (eg through mishandling or poor stock rotation)			We are not persuaded that it is reasonable for a multiple with buyer power to levy such charges on suppliers without their agreement, in all circumstances. However, we cannot be entirely satisfied that the practice as described adversely affects the competitiveness of suppliers, nor that the practice prevents, restricts or distorts competition in the supply of groceries.	
ID45	Required suppliers predominantly to fund the cost of promotions such as 'buy one get one free'	✓	✓	Same explanation as for ID19	✓
ID50	Required or requested suppliers to make a financial contribution to the costs of bar-code changes or reduced price-marked packs	✓		Same explanation as for ID19	✓
ID51	Invited suppliers to make contributions to charitable organisations (directly or by participation in events designed to raise money for such bodies)	✓		Same explanation as for ID19	

<i>Practice</i>		<i>Adverse finding: distorts competition between:</i>		<i>Explanation of adverse finding</i>	<i>Adversely affecting the public interest</i>
		<i>Suppliers</i>	<i>Retailers</i>		
<i>Category H – requiring suppliers of groceries to use third party suppliers nominated by a multiple</i>					
ID32	Required suppliers to purchase goods or services from designated companies, eg hauliers, packaging companies, labelling companies	✓		Adversely affects the competitiveness of some suppliers. The practice distorts competition in the supply of groceries at two levels. First, it distorts by preventing some grocery suppliers from seeking out efficient third party suppliers and having the opportunity to gain a competitive advantage over their rivals. Second, it directly restricts competition between the third party suppliers to the grocery industry.	✓
ID33	Instructed intermediaries (eg packing houses) not to allow goods to be handled or processed which were intended for delivery to other retailers, where those goods originated from producers with which your company had ceased trading			We believe that this practice may, in certain circumstances (for example, where the instruction to the intermediary is not solely linked to product quality), lead to a distortion in the supplier market. But on the evidence we have received we cannot be satisfied that this is the case.	

Code of practice, CC recommendations and equivalent provision(s) in the final version

<i>Provisions recommended by the CC</i>	<i>Equivalent provision in the final version of the SCOP</i>	<i>Key differences (if any)</i>
<i>(a) Retailers should ensure that standard terms on which they do business are in writing, and are made available to suppliers.</i>	1. The terms of business offered by a supermarket for its dealings with a supplier shall be available in writing at the request of that supplier such that: <i>(a)</i> the standard terms of business offered to all suppliers, or to all suppliers in a particular category, shall be available at the request of any supplier in that category; and <i>(b)</i> the particular terms of business offered to any one supplier shall be available at the request of that supplier.	No key difference.
<i>(b) If retailers wish to vary those terms reasonable notice should be given to the supplier.</i>	2. Reasonable notice of variation of a supermarket's terms of business shall be given to the affected supplier(s).	No key difference.
<i>(c) Retailers should pay suppliers within the time specified in the agreement, and in any event within a reasonable time after the date of the invoice.</i>	3. A supermarket shall pay a supplier for products delivered to that supermarket's specification within a reasonable time after the date of that supplier's invoice.	No key difference.
<i>(d) Retailers should give suppliers reasonable notice of any intention to change a price previously agreed; and should not request retrospectively any form of discount or override; nor seek a change in price to match the price offered by a competing retailer.</i>	4. A supermarket shall not directly or indirectly require a supplier to reduce the agreed price of or increase the agreed discount for any product unless reasonable notice of such requirement is given to that supplier in writing before the relevant supplies of that product are made.	CC recommended no retrospective discounts nor requests for price matching. SCOP allows retrospective discounts or price reductions provided reasonable notice is given. SCOP is silent on requests for price matching.
<i>(e) Retailers should not request suppliers to contribute to retailers' costs of buyer visits; or to contribute to the retailer's costs of artwork and packaging design; consumer or market research; to the costs of store refurbishment or opening; or to provide hospitality.</i>	5. A supermarket shall not, directly or indirectly, unreasonably require a supplier to make any payment towards that supermarket's costs of; <i>(a)</i> buyer visits; <i>(b)</i> artwork or packaging design; <i>(c)</i> consumer or market research; <i>(d)</i> the opening or refurbishment of a store; or <i>(e)</i> hospitality for supermarket staff.	CC recommended retailers should <i>not request</i> . SCOP says retailers should <i>not unreasonably require</i> .
<i>(f) Retailers should not seek any form of compensation for profits being less than expected, whether on a promotion or otherwise, or for product wastage.</i>	6. A supermarket shall not directly or indirectly require a supplier to make any payment to compensate that supermarket when profits from the sale of that supplier's products are lower than expected by that supermarket unless the basis of any such payment is agreed in writing between that supermarket and that supplier before the relevant supplies of that product are made.	CC recommended <i>no seeking</i> by retailers for compensation from suppliers for lower profits. SCOP says <i>no retailer requirement</i> for compensation unless basis is agreed in writing before supply commences.
<i>(g) Where retailers change any volume ordered, or the specification of any goods, or introduce changes to any supply chain procedure they should give reasonable notice (sufficient for the supplier to make arrangements for changes to production schedules), and should compensate suppliers for any costs or losses to them where reasonable</i>	15. A supermarket shall not directly or indirectly require a supplier to change significantly any aspect of the normal supply chain procedures unless that supermarket either: <i>(a)</i> gives reasonable notice of such change to that supplier in writing; and <i>(b)</i> fully compensates that supplier for any net resulting costs incurred as a direct result of the failure to give reasonable notice. 16. A supermarket shall not directly or indirectly require	CC recommendations cover any changes in volume, specification etc, while SCOP focuses on where a supermarket <i>requires</i> these changes to be made by a supplier.

Provisions recommended by the CC	Equivalent provision in the final version of the SCOP	Key differences (if any)
notice is not given.	a supplier to change the specification (including the quantity of products required) of any agreed order unless that supermarket either (a) gives reasonable notice of such change to that supplier in writing; and (b) fully compensates that supplier for any net resulting costs incurred as a direct result of the failure to give reasonable notice.	
(h) Retailers should compensate suppliers for costs caused through the retailers' forecasting errors.	<p>17. Notwithstanding clauses 15 and 16, a supermarket shall fully compensate a supplier for any cost incurred by that supplier as a result of any forecasting error attributable to that supermarket unless: (a) the supermarket has prepared those forecasts in good faith and with due care; or (b) there is an agreement in writing between the supermarket and the supplier before the relevant supplies of the product are made that such compensation is not appropriate.</p> <p>18. A supermarket shall ensure that the basis on which it prepares any forecast is transparent.</p>	CC recommends that retailers be held liable for all forecasting errors. SCOP limits this where retailer acts in good faith and with due care supported by an obligation for transparency in forecasting methodology.
(i) Retailers should give suppliers reasonable notice of any intention to hold a promotion in relation to the suppliers' products where there is likely to be a significant impact on suppliers' costs; they should not over-order goods at a promotional price; and they should not require suppliers predominantly to fund promotions.	<p>11. Where a supermarket directly or indirectly requires any payment from a supplier in support of a promotion of one of that supplier's products, a supermarket shall only hold that promotion after reasonable notice has been given to that supplier in writing.</p> <p>12. A supermarket shall take due care when ordering products from a supplier at a promotional wholesale price not to over-order, and, if that supermarket fails to take such care, it shall compensate that supplier for any product over-ordered and which it subsequently sells at a higher non-promotional retail price.</p> <p>13. A supermarket shall ensure that the basis on which any order for a promotion is calculated is transparent.</p> <p>14. A supermarket shall not, directly or indirectly, unreasonably require a supplier predominantly to fund the costs of a promotion.</p>	<p>CC recommends retailers should not require suppliers predominantly to fund promotions.</p> <p>SCOP says that any requirement for suppliers to predominantly fund a promotion should not be unreasonable.</p>
(j) Retailers should not seek payments or better terms as a condition of stocking or listing existing products, or for better positioning of any products within a store, or for increasing shelf space.	<p>9. A supermarket shall not directly or indirectly require a supplier to make any lump sum payment as a condition of stocking or listing that supplier's products unless either (a) such payment is made in relation to a promotion; or (b) such payment (i) is made in relation to new products not listed by that supermarket in the previous 365 days in 25 per cent or more of its stores or (ii) reflects a reasonable estimate by that supermarket of the risk run by that supermarket in stocking, displaying or listing such new products.</p> <p>10. A supermarket shall not directly or indirectly require a supplier to make any lump sum payment in order to secure better positioning or an increase in the allocation of shelf space for any products of that supplier within a store unless such payment is made in relation to a promotion.</p>	<p>CC recommends retailers should not seek listing or stocking fees for existing products (but by implication allows them for new products).</p> <p>SCOP says new product listing fees should reflect the risk run by the supermarket.</p> <p>CC recommends retailers should <i>not seek</i> payments for better positioning of products.</p> <p>SCOP says supermarkets should <i>not require</i> payments for better positioning.</p>

*Provisions recommended by the
CC*

Equivalent provision in the final version of the SCOP

Key differences (if any)

(k) Retailers should not charge suppliers in respect of consumer complaints unless the complaint has been verified as being justified, and as being caused by the supplier, and the supplier has been notified of the outcome; charges should not exceed the purchase cost of the goods to the retailer.

19. Subject to clause 21, where any consumer complaint can be resolved in store by a supermarket refunding the retail price or replacing the relevant product, that supermarket shall not directly or indirectly require a supplier to make any payment for resolving such a complaint unless: (a) the payment does not exceed the retail price of the product charged by that supermarket; (b) that supermarket is satisfied on reasonable grounds that the consumer complaint is justifiable and attributable to a failing on the part of that supplier; and (c) that supermarket gives notice to that supplier of such complaint.

No key difference.

20. Subject to clause 21, where any consumer complaint cannot be resolved in store by a supermarket refunding the retail price or replacing the relevant product, that supermarket shall not directly or indirectly require a supplier to make any payment for resolving such a complaint unless: (a) the payment is reasonably related to that supermarket's costs arising from that complaint; (b) that supermarket has verified that the consumer complaint is justifiable and attributable to a failing on the part of that supplier; and (c) a full report about the complaint (including the basis of the attribution) has been made by that supermarket to that supplier.

21. A supermarket may agree with a supplier an average figure for payments for resolving such complaints as an alternative to accounting for complaints individually.

(l) Retailers should not require suppliers to use particular third party suppliers of goods or services where the retailer receives a payment from that third party supplier in respect of that requirement.

22. A supermarket shall not directly or indirectly require a supplier to obtain any goods, services or property from any third party where that supermarket obtains any payment for this arrangement from any third party, unless the supplier's alternative source for those goods, services or property: (a) fails to meet the objective quality standards laid down for that supplier by that supermarket for the supply of such goods, services or property; or (b) charges more than any other third party recommended by that supermarket for the supply of such goods, services or property.

CC recommended no requirement by retailers for suppliers to use third parties where retailer receives a payment from that third party. SCOP allows this under certain circumstances.

Source: CC, 2000 and OFT.

Evidence from individual suppliers regarding the practices of grocery retailers

<i>Supplier</i>	<i>Retailer</i>	<i>Description of practice</i>	<i>CC 2000 classification</i>	<i>Relevant SCOP clause</i>	<i>CC 2007 classification</i>
[✂]					

Assessment of the 52 practices identified in the CC's 2000 investigation

	<i>Practice</i>	<i>Complex monopoly finding in 2000</i>	<i>Current view: problem?</i>	<i>Explanation of the difference between 2000 finding and our current thinking</i>
ID1.	Held a formal or informal list of suppliers from which the majority of goods you stock are purchased and such listing is normally a condition of supply to you.	Not carried out	No	
ID2.	Required or requested payments from suppliers as a condition of stocking and displaying their products, or as a pre-condition for being on your list of suppliers (see Practice 1).	Yes	Possibly	The CC 2000 position (see Annex A) refers to a reduction in the competitiveness of some suppliers and implies that choosing the lowest priced good distorts competition as this is not necessarily the 'best', more efficient product. We do not think that obtaining payments and better terms from some suppliers distorts competition between suppliers or retailers per se as this is part of a normal competitive process. Further, it is not at all clear why choosing a supplier on the basis of it being able to supply products at better terms (suppliers able to make such payments) implies that the goods produced are of lower quality or less efficiently produced. However, we identified possible harm if such payments create an extra barrier to entry for small suppliers.
ID3.	Required or requested suppliers to make a payment for better positioning of their products within your stores.	Yes	Possibly	As in ID2
ID4.	Required or requested suppliers to give you an improvement in terms in return for increasing the range or depth of distribution of their products within your stores.	Yes	Possibly	As in ID2
ID5.	Required payment from a supplier in return for it being appointed by you to manage a category of products.	Not carried out	Possibly	We are investigating category management as a whole rather than focussing on the practice of receiving payments from a supplier to act as category manager.
ID6.	Allowed or agreed suppliers designated by your company as category managers to charge other suppliers for display space within your stores.	Not carried out	Possibly	As in ID5.
ID7.	Refused to provide sales data to some suppliers concerning their products whilst providing such data to suppliers designated as category managers.	Not carried out	Possibly	As in ID5

	<i>Practice</i>	<i>Complex monopoly finding in 2000</i>	<i>Current view: problem?</i>	<i>Explanation of the difference between 2000 finding and our current thinking</i>
ID8.	Required solus supply ¹³ of a product (other than retailer's own-label).	No	Possibly	The 2000 conclusion was based on the lack of sufficient evidence to support an adverse finding (see Annex A). We consider that exclusive dealing could in principle increase barriers to entry.
ID9.	Required or requested a financial contribution from a supplier in return for its products being promoted within the store during the year (described by some suppliers as 'pay to play' or 'TAA').	Yes	No	The CC 2000 rationale is the same as for practices ID2-4. However, we are less concerned if the timing and nature of promotions are agreed at the beginning of a supply period such that the supplier has certainty regarding this activity.
ID10.	Required suppliers to give overriding or 'in anticipation' discounts.	Yes	Possibly	Whether this is a problem depends on whether the overrider is agreed in advance or is imposed retrospectively. We are concerned that retrospective changes could reduce suppliers' incentives to innovate.
ID11.	Sought discounts from suppliers retrospectively which reduced the price of the product agreed at the time of the sale.	Yes	Possibly	We are concerned that retrospective changes could reduce suppliers' incentives to innovate.
ID12.	Debited suppliers' invoices, or otherwise claimed from them, without their agreement.	No	Possibly	The CC 2000 conclusion was based on there not being enough evidence showing this to be a problem. Our concern in this investigation focuses on the uncertainty that can be created by ongoing invoicing and payment issues.
ID13.	Required or requested compensation from a supplier when your profits from a product were less than you expected (excluding promotional activity which is covered by Activity 48).	Yes	Possibly	As in ID11.
ID14.	Sought support from a supplier to match a lower retail price of a product by a competing retailer.	Yes	Possibly	Where this implies a change of agreed contractual terms, we have concerns about the uncertainty that this creates for suppliers.
ID15.	Requested a supplier to reduce the discounts it had offered to other retailer(s).	Not carried out	Possibly	The practice suggests behaviour aimed at raising rivals' costs.
ID16.	Required or requested suppliers to make payments to cover product wastage.	Yes	Possibly	Whether this is a problem depends on whether the payment is agreed in advance or is imposed retrospectively.
ID17.	Required or requested suppliers to buy back unsold items, or failed to pay for them outside a written agreement that 'sale or return' was in the terms of the sale.	Yes	Possibly	As in ID16
ID18.	Charged suppliers for retailer audits of food safety above the actual costs of the audit to your company.	Not carried out	No	We do not see this as a problem provided that the charges have been agreed in advance with the supplier.

¹³'Solus supply' is equivalent to exclusive dealing.

	<i>Practice</i>	<i>Complex monopoly finding in 2000</i>	<i>Current view: problem?</i>	<i>Explanation of the difference between 2000 finding and our current thinking</i>
ID19.	Required or requested suppliers to contribute to your costs of buyer visits to new or prospective suppliers, artwork and packaging design, consumer panels, market research, or to provide hospitality to your company or its employees.	Yes	Possibly	As in ID16
ID20.	Levied charges on suppliers for discrepancies in supply where the source of the discrepancy had not been agreed with the supplier, or where written information on the circumstances was not provided to the supplier.	No	Possibly	As in ID12
ID21.	Failed to compensate suppliers for costs caused through your company's forecasting errors or order changes.	Yes	Possibly	As in ID12
ID22.	Levied charges on suppliers for consumer complaints which exceeded your actual costs, or were not for a product fault, or for which written information was not provided to the supplier.	Yes	Possibly	As in ID12
ID23.	Required or requested suppliers to contribute specifically to the costs of store refurbishment or the opening of a new store.	Yes	Possibly	As in ID16
ID24.	Introduced a change to any aspect of the supply chain procedures which reasonably could be expected to increase a supplier's costs without compensating the supplier or sharing any savings achieved.	Yes	Possibly	As in ID16
<i>Contractual arrangements</i>				
ID25.	Delayed payments to suppliers outside agreed contractual periods, or by more than 30 days from the date of invoice, where deliveries had been made to your specification.	Yes	Possibly	As in ID12
ID26.	Discriminated between suppliers in the length of the credit period you accepted.	Yes	No	The CC 2000 rationale is as in ID2. See comments to ID2. Offering different credit terms to different suppliers is not substantially different from paying different prices to suppliers, which we do not regard as a particular problem.
ID27.	Changed the quantities or specification of a product previously agreed with a supplier with less than 3 days notice without financially compensating the supplier for any losses it incurred.	Yes	Possibly	As in ID10
<i>Delisting*</i>				
ID28.	Delisted a supplier or caused a supplier to reduce prices at your request under threat of delisting.	No	No	Retailers should be able to freely engage in price negotiations.
ID29.	Suggested to a supplier that you would delist a product and later withdrew suggestion having received a discount on an unrelated product or a general improvement in terms.	No	No	Retailers should be able to freely engage in price negotiations.

	<i>Practice</i>	<i>Complex monopoly finding in 2000</i>	<i>Current view: problem?</i>	<i>Explanation of the difference between 2000 finding and our current thinking</i>
ID30.	Delisted any producer/growers who had failed to deliver agreed quantities owing to weather conditions.	No	No	CC 2000 thought this only occurred in isolated cases. The circumstances of any individual delisting may raise concerns about the fairness of certain business practices, but this issue does not imply a distortion of competition.
ID31.	Delisted any suppliers of branded products in favour of your nearest own-label equivalent.	No	No	We have separately published a working paper on own-label goods.
ID32.	Required suppliers to purchase goods or services from designated companies eg hauliers, packaging companies, labelling companies.	Yes	No	The CC 2000 argued that the practice prevented suppliers from seeking the most efficient third party supplier. However, it is not clear that if the choice rests with the retailer this should lead to a worse outcome.
ID33.	Instructed intermediaries (eg packing houses) not to allow goods to be handled or processed which were intended for delivery to other retailers, where those goods originated from producers with which your company had ceased trading.	No	No	
ID34.	Suggested to one supplier that unless it agreed to pay a listing charge to your company, you would recommend to a second supplier that it should not trade with the first company.	Not occurring	Possibly	The practice suggests a degree of collusion amongst retailers.
<i>Prices</i>				
ID35.	Sought information from a supplier on the supply or pricing of its product(s) to other retailers.	No	No	
ID36.	Made it a condition of supply to your company that a supplier did not supply the same or similar product to another retailer at lower prices.	Not occurring	No	
ID37.	Sought to influence a supplier not to supply a product to another retailer where that retailer was, or was believed to be, offering the product at a lower price.	Not occurring	Possibly	As in ID8
ID38.	Required suppliers to maintain a lower wholesale price previously renegotiated for an increased order when the volumes you purchased were subsequently reduced.	Yes	Possibly	As in ID10
ID39.	Over-ordered goods at a promotional price from a supplier, which you subsequently sold into retail at a higher price without compensating the supplier.	Yes	No	The CC 2000 rationale is the same as for ID25-38 (see Annex A). As above, we do not consider practices that arise from some retailers being able to extract better terms to be in themselves a distortion of competition.
<i>Product specifications</i>				
ID40.	Sold a product on which the labelling indicated, or might be taken to indicate, that the product was of British/UK origin when the consumable originated overseas (eg when it was packed in the UK after being imported from abroad).	Yes	Possibly	This practice leads to clear consumer detriment although may be more of a consumer protection than competition issue.

	<i>Practice</i>	<i>Complex monopoly finding in 2000</i>	<i>Current view: problem?</i>	<i>Explanation of the difference between 2000 finding and our current thinking</i>
ID41.	Bought products from one supplier (including imports) with no guarantee that the products met the standards required by you or other suppliers.	Not occurring	Possibly	This may raise issues in terms of how these products are presented to consumers in terms of production standards. However, this is likely to be more of a consumer protection than a competition issue.
ID42.	Differentiated in the quality or quantity of auditing or monitoring of quality standards between UK and overseas sources of supply.	Not occurring	Possibly	As in ID41
ID43.	Unilaterally imposed charges on suppliers for not meeting product specifications without proven investigation that the problem might have originated at the store (eg through mis-handling or poor stock rotation).	No	Possibly	As in ID12
<i>Supplier contributions to marketing/promotional activities</i>				
ID44.	Debited suppliers' invoices (or otherwise claimed) for monies for promotions which were not for the sum previously agreed with the supplier, or had not yet taken place, or which were without provision of back-up data to the supplier.	No	Possibly	As in ID12
ID45.	Required suppliers predominantly to fund the cost of promotions such as 'buy one get one free'.	Yes	Possibly	As in ID16
ID46.	Instigated a promotion on a product without the agreement of the supplier and requested the supplier retrospectively to fund the promotion.	Yes	Possibly	As in ID11
ID47.	Required or requested suppliers permanently to reduce the previously agreed wholesale price of products in support of the marketing initiatives within which the price initially was associated.	Yes	Possibly	As in ID11
ID48.	Required or requested suppliers to make a financial contribution if a promotional activity carried out by your company failed to meet expected target.	Yes	Possibly	As in ID11
ID49.	Required supplier to bear the costs of surplus special packaging ordered by your company for a promotion when sales did not meet expectations.	Yes	Possibly	As in ID11
ID50.	Required or requested suppliers to make a financial contribution to the costs of bar-code changes or reduced price-marked packs.	Yes	Possibly	As in ID11

<i>Practice</i>	<i>Complex monopoly finding in 2000</i>	<i>Current view: problem?</i>	<i>Explanation of the difference between 2000 finding and our current thinking</i>
ID51. Invited suppliers to make contributions to charitable organizations (directly or by participation in events designed to raise money for such bodies). If 'Yes', please comment on the form such invitations took and any monitoring you undertook of the outcome.	Yes	Possibly	As in ID11
ID52. Required or requested suppliers to make payments for a specific promotion (eg gondola ends, advertising allowances) where the payments exceeded the actual costs to your company.	Yes	Possibly	As in ID16