



Groceries Code  
Adjudicator

# Groceries Code Adjudicator **Annual Report**

23 June 2013 – 31 March 2014





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# The Groceries Code Adjudicator – Working for fairness in the groceries supply chain

The Groceries Code Adjudicator (GCA) was formally established on 25 June 2013 by an Act of Parliament. It was set up to ensure supermarkets treat their suppliers lawfully and fairly.

The appointment followed a 2008 Competition Commission Market Investigation into the groceries sector. The Competition Commission found that, while the sector was broadly competitive, some large retailers were transferring excessive risk and unexpected costs to their direct suppliers. This could discourage suppliers from investing in quality and innovation; small businesses could fail and, ultimately, there could be potential disadvantage to consumers.

Following the Commission's recommendation, the government introduced the Groceries Supply Code of Practice (the Code) in 2010. This was designed to regulate the relationship between the 10 groceries retailers with UK annual turnover of more than £1 billion (the large retailers) and their direct suppliers. The government gave the large retailers some time to set up a voluntary Ombudsman; the GCA was established on a statutory basis when the self-regulatory approach did not progress.

Christine Tacon – the first Adjudicator – is responsible for monitoring and encouraging compliance with and enforcing the Code. The GCA is funded by a levy on the large retailers. Suppliers, trade associations and other representative bodies are encouraged to provide the GCA with information and evidence about how the large retailers are treating their direct suppliers. All information received is dealt with on a confidential basis and the GCA has a legal duty to preserve anonymity.

The GCA can launch investigations, which are likely to be into practices that appear widespread. The GCA must arbitrate in disputes at the request of suppliers and may also do so following a request from a large retailer. Arbitration awards are binding and may include compensation.

Tough powers and a range of enforcement actions are available to the GCA to achieve fairness for suppliers. If a breach of the Code is found following an investigation, the GCA can make recommendations, require large retailers to publish details of any breach and in the most serious cases can impose a fine.

Under the Code the large retailers are obliged to deal fairly and lawfully with groceries suppliers across a range of supply chain practices. These include: making payments on time; no variations to supply agreements without notice; compensation payments for forecasting errors; no charges for shrinkage or wastage; restrictions on listing fees, marketing costs and delisting.

However, the Code does not cover issues such as price setting, the relationship between indirect suppliers and the large retailers, food safety or labelling. These issues are outside the GCA's remit.

## The way the GCA works

The GCA gathers information from suppliers, retailers, trade associations and others to inform its activities. The GCA encourages suppliers to continue to bring Code issues to its attention in order to inform decisions and actions and suppliers should be reassured that their anonymity will be preserved. The stronger the evidence base, the greater the justification for action.

As a small regulator the GCA must effectively prioritise its activities. The statutory guidance on investigation and enforcement functions sets out four prioritisation principles to guide decisions about whether to launch an investigation and the GCA will apply these principles when considering other activities, too. The four principles are:

Impact	The greater the impact of the practice raised, the more likely it is that the GCA will take action
Strategic importance	Whether the proposed action would further the GCA's statutory purposes
Risks and benefits	The likelihood of achieving an outcome that stops practices that breach the Code
Resources	A decision to take action will be based on whether the GCA is satisfied that it is proportionate to do so

The GCA must carry out its statutory functions set out in the Groceries Code Adjudicator Act 2013 (the Act). In setting the direction for the GCA, the Adjudicator has determined that these functions will be carried out through a three-stage process, beginning with a less formal approach. When issues are raised, the GCA:

**Stage 1:** Will consider whether the issue raised falls under one or more provisions of the Code and if so, against the prioritisation principles. In particular, the GCA will consider whether it appears to be more than an isolated occurrence. In some circumstances the GCA will also raise single incidents with large retailers' Code Compliance Officers (CCOs).

**Stage 2:** Will discuss the issue with the relevant CCOs, who will look into whether a breach has occurred. As a result of what CCOs find and subsequent discussions or correspondence, the GCA may issue advice clarifying or interpreting the relevant provisions of the Code for the retailer and others to follow. A summary of the issue raised and the outcome of discussions, including the view taken by the GCA of the incident, will be published as a case study on the GCA website.

**Stage 3:** May, if the practice continues, issue more formal guidance and/or launch an investigation.

Through this process the GCA ensures that issues are raised with and promptly considered by the large retailers and that any necessary action is agreed and taken as swiftly as possible. This is an efficient way to deal with current groceries sector practices which may not be consistent with the Code. The GCA believes that this will significantly reduce the cost of regulating the large retailers by only carrying out costly investigations when other means of effecting change have failed.

This approach has been discussed with every CCO and all have welcomed this way of working. The GCA believes that this will engender a more collaborative approach and get results faster.

The GCA's responsibilities do not extend to acting as a complaints body, nor can it advise on individual complaints or disputes where a supplier seeks a view on whether a large retailer has breached the Code. This is because the GCA may later be asked to arbitrate in the same dispute between the supplier and the large retailer or the GCA may later launch an investigation into the practice raised by the supplier. Providing a view on individual cases would compromise the GCA's objectivity and may lead to legal challenge. However, the GCA encourages suppliers to approach CCOs directly because they can deal with issues quickly and, where needed, discreetly.

The ultimate goal of the GCA is to promote a stronger, more innovative and more efficient groceries market through compliance with the Code and as a result to bring better value to consumers. The GCA is working with suppliers and the large retailers to respond to issues swiftly and is building the necessary strong relationships to achieve this goal.



# Foreword by Christine Tacon Groceries Code Adjudicator



The creation of a significant new role in the form of an Adjudicator to monitor and enforce the Code has meant a hectic and exciting nine months for me.

It helped that I was able to start work as Adjudicator designate six months before the GCA was formally established. In that period I was only able to work one day a week but demands for speaking engagements alone took up more time than this. I was therefore delighted when the the Act came into force and I was able to build a small team which currently stands at three full-time and two part-time members. Thanks to the team's hard

work, focus and dedication I can report good progress in our first year.

My personal experience, supported by much of what I have heard as Adjudicator, is that the groceries supply chain has become so complex that it has added significant costs to doing business. Large retailers have looked beyond straight price negotiation to reduce their costs and exposure to what might be considered normal risks in the supply chain. This has been attempted and, to some extent, achieved through practices involving promotions, packaging and haulage as well as retrospective audits, margin maintenance and requests for lump sum payments. Suppliers have responded to these new demands by seeking something in return further increasing complexity. The success of the discounters, offering simplified ranges and terms of business, is causing people to rethink these approaches. Some of these practices may be in breach of the Code and my office is raising awareness of this. A better approach for suppliers, retailers and consumers would be to make the supply chain simpler and more efficient and this is likely to involve significant culture change from some of the large retailers.

I want to ensure that the UK has a world-leading groceries supply chain. There are indications that overseas suppliers are beginning to recognise that it is easier to do business in other areas of the world than in the UK. With tightening food security, we need to ensure that supplying to overseas markets does not become more attractive than supplying to the UK.

## Providing guidance

To meet the GCA's legal and policy responsibilities our first major task was to issue statutory guidance on investigations and enforcement within six months of the Act coming into force, which included 12 weeks for consultation. The response to the consultation was very positive in terms of its thoroughness and no major areas of concern were raised, although several responses helped us to improve the clarity of the final guidance.

At the same time as we published the statutory guidance, we submitted a recommendation to the Secretary of State for Business, Innovation and Skills on the maximum level of fine. At the time of writing the statutory instrument required to set the maximum level of fine has not yet been laid before Parliament. We have also issued guidance on escalation of disputes and on how we will conduct arbitrations.

## **Developing strong relationships**

The team and I have also worked hard to build strong relationships with large retailers, suppliers and others well-placed to provide information and evidence to the GCA about practices in the groceries supply sector, such as trade associations. We have introduced quarterly meetings with the 10 CCOs and have now met them three times; we also brought all CCOs together for a group meeting which will be repeated twice yearly. I have spent much of my time raising awareness of my role and responsibilities with suppliers and trade associations across the UK. I have attended nearly 100 engagements, travelling thousands of miles and spoken at over 70 conferences and smaller meetings. As a result I estimate over 3,000 people have heard first-hand about the Code and the role of the GCA.

I have also held a stakeholder meeting with a number of trade association representatives and will continue to build relationships with these bodies as they are a very important channel of communication to and from suppliers, who remain reluctant about bringing issues to me or to CCOs. Additionally, trade associations can present issues experienced by a number of suppliers which helps me to assess impact and preserve supplier anonymity.

And of course, we have developed close relationships with the Office of Fair Trading (OFT), with whom we must work closely given its continuing responsibility for the Groceries (Supply Chain Practices) Market Investigation Order 2009 (the Order), and the Competition Commission (CC), who have all the history on why we were set up. Both organisations have since joined to form the Competition and Markets Authority (CMA) and we are co-located in the same building.

## **Building awareness of the GCA's role**

With such a new organisation it has been important to raise awareness of what the GCA does. We have set up a comprehensive website on *gov.uk* which includes details of significant activities and all guidance issued, together with records of key meetings and internal policies. An important way that we will make suppliers and all large retailers aware of our interpretation of relevant parts of the Code is through case studies; in the period covered by this report we have published two case studies where large retailers have accepted that the Code has been breached. We have also developed our first survey run by YouGov to hear directly from suppliers and others about Code compliance and their understanding of the role of the GCA. This will set a baseline of market understanding of the Code and of perceptions of large retailers' compliance with it which I will use in future years to monitor progress.

An important event in the GCA calendar is our first annual conference at which I will report on the year's performance and present my programme for the year ahead. It will also provide a forum for interested overseas representatives to follow our progress. We will hold this on the anniversary of the establishment of the GCA in June.

Media interest in the GCA has been very encouraging and there has been significant coverage in the national and trade press. I have also been interviewed on a wide range of BBC Radio programmes.

Additionally, I have received many enquiries from overseas governments and interested organisations looking to create a similar body to the GCA. We are in close contact with the European Commission as it adopts a voluntary approach across European member states which could lead to a new Directive. I am mindful that a common code of practice with local regulation would allow the GCA to continue and perhaps extend the work we have started.

## Acting to ensure Code compliance

However, the primary purpose of my role is to ensure compliance with the Code. Despite the fact that the Code has been law since February 2010, there appears to be a lack of understanding of what it covers amongst suppliers, both direct and indirect. Many of the issues raised with the GCA have been out of scope. A significant number of correspondents want to bring challenges based on the price they are paid under the “spirit of fair dealing”, although this is not a stand-alone Code provision and there are no provisions of the Code which address price specifically. Indeed, price was explicitly not part of the CC investigation that led to the making of the Order and the Code. I have also been approached about the inclusion of additional retailers. I am not able to extend the reach of the Code; nor would I wish to at present, as there is quite enough to deal with as it currently stands. But I am committed to helping to set a level playing field, so I will continue to direct these questions to the CMA as they fall under the Order and not the Code.

From the outset it has been clear that CCOs, many of whom took up their posts during 2013, wanted to ensure that their businesses complied with the law and all have been happy to work collaboratively with me. I have assured them that I would not launch any investigation based on a single occurrence of issues raised. I will instead work with them to determine the extent of the practice and its compliance with the Code and if necessary, to clarify the Code and change practice. The quarterly meetings and case studies have proved invaluable in doing this and now I note that some large retailers are tightening up their internal processes, improving training and documentation as a result.

I have publicly stated the five areas of Code compliance in respect of which I receive most information and evidence. I am continually checking these with direct suppliers to ensure that these are the key issues for them. These five areas are set out below and are explained more fully later in this annual report:

- **Forensics: third party audits**
- **Drop and drive: delivery performance**
- **Forecasting/service levels**
- **Request for lump sum payments**
- **Packaging and design charges**

I am pleased to report that most of the large retailers are being proactive in addressing these issues and we are starting to make progress. Some of the issues, e.g. improving forecasting, are very complex and will take time to resolve.

I am pleased to report that we have now had three instances where a large retailer has approached us to discuss the Code-related implications of a new corporate initiative before launching it.

It will be clear from this report that we are yet to launch an investigation. We had no power to do so until our statutory guidance on investigations and enforcement was published in December 2013. In the meantime, we developed our collaborative approach to working with CCOs and others, and this is working well. We have not yet reached the point where an investigation would be merited in relation to any issue. No arbitrations have yet been resolved, although we have received two formal requests for arbitration. It would not have been appropriate to proceed with these until the GCA arbitration policy was published on 31 March 2014. It is noteworthy that no requests for arbitration were made to the OFT in the three years since the Code was introduced, yet we have received two in a very short time.

## **Challenges and future look**

The GCA has coped with a heavy start-up workload while I have spent much time out of the office explaining the Code and my role. We have faced a few operational challenges which I did not anticipate. In particular, recruitment for two positions has stalled due to the requirement for all employees to be secondments from the public sector at a time when departments face severe pressure to reduce staff numbers. Other challenges relate to accounting issues which are addressed in the annual accounts.

My goals for the next 12 months include:

- Working with the large retailers to improve the culture of Code compliance in each, from the Board downwards.
- Improving awareness of the reach of the Code and building supplier confidence to raise Code-related issues with the GCA and CCOs.
- Making progress on each of the five priority issues identified this year.
- Increasing the number of responses to the annual market survey to get an even more accurate measure of Code compliance.
- Being fully prepared to launch an investigation when merited.

This new regulatory role is one that I believe can do much to help strengthen the supply chain and bring further innovation to the groceries sector, together with benefits to suppliers, retailers and customers. In the year to come I am determined to maintain the pace of progress that we have achieved in our first nine months.

# About the GCA

The GCA was formally established in June 2013. Before formal appointment Christine had spent one day each week preparing to make a swift and effective official start. This mostly involved raising awareness of the GCA and the Code.

The aim throughout the year has been to establish an efficient and prudent office, only appointing staff as the workload required. The Adjudicator dedicates three days each week to the role and has been supported from the outset by a Chief Legal Adviser who also works three days each week.

In July a full-time Head of Policy and Operations was appointed and an Office Manager joined in October. As the planning of investigations got underway an Investigations Manager was appointed at the beginning of March. Major operational achievements included establishing the GCA office, effectively managing GCA finance and providing skilled support to the GCA. The GCA adheres to the standard civil service governance policies issued by the Cabinet Office and will issue tailored policies specific to the GCA where appropriate.

## Establishing the GCA office

- A significant part of the GCA's early activity was to establish effective operational processes meeting the expected standards of a public body. Our aspiration is to be an exemplar in delivering our public body responsibilities. These processes included:
  - Establishing the Executive Board to support GCA decision making and performance management.
  - Developing corporate policies.
  - Negotiating service level agreements with the CC to provide our accommodation, finance and ICT services.

## Effectively managing GCA finance

- Developing robust financial forecasting and operational protocols to account for the levy paid by the large retailers and on which to base the calculation of future levy payments.
- Establishing arrangements for levy payments to be made.
- Reaching agreement with the Department for Business, Innovation and Skills (BIS) to provide the GCA's procurement service.
- Arranging audit services.

## Providing skilled support to the GCA

- Establishing a values and people policy.
- Developing a training and development plan, including an induction pack for new staff.

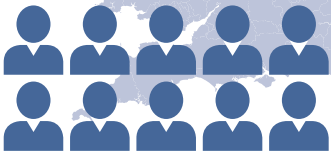
**100** EVENTS AND MEETINGS ATTENDED BY THE GROCERIES CODE ADJUDICATOR

IN TOTAL MORE THAN **3,000** PEOPLE PRESENT

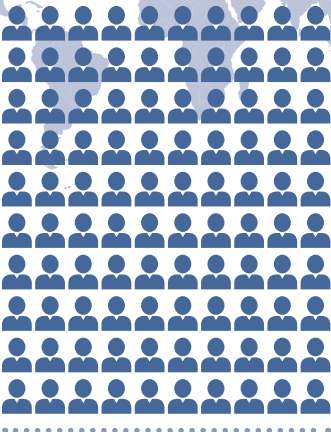
**1** ADJUDICATOR



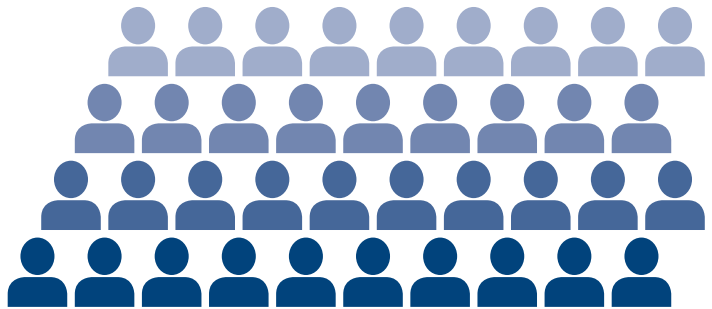
**10** RETAILERS



MORE THAN **10,000** SUPPLIERS



AND A SECTOR WORTH **£170bn**



**9,912** MILES TRAVELLED BY THE ADJUDICATOR



# Strategic objectives 2013/14

In its first year of operation, the GCA concentrated on three strategic objectives. These were promoting the work of the GCA, providing advice and guidance and acting on suppliers' issues and information.

## Objective 1 – Promoting the work of the GCA

Because it is a new regulatory body, raising awareness of the work and responsibilities of the GCA has been paramount. The GCA has approached this by:

- Speaking at a comprehensive range of events.
- Meeting stakeholders on a regular basis.
- Engaging proactively with the media.
- Providing timely, accurate and accessible information on the GCA website.

### Speaking at a comprehensive range of events

- During a hectic first year the Adjudicator has travelled to all regions of the UK and attended and spoken at over 70 events. This programme has enabled the Adjudicator to make direct contact with at least 3,000 suppliers as well as their representative bodies.
  - All sectors including dairy, arable and livestock farmers, groceries producers and toiletries manufacturers have been reached through these speaking engagements.
  - At each event the Adjudicator has explained the remit of the GCA and has encouraged suppliers and trade associations to raise Code-related issues directly with the GCA and with the large retailers' CCOs. Suppliers are reassured that the GCA has a statutory duty to handle all information confidentially.
  - The Adjudicator has also held face-to-face discussions with more than 130 suppliers.
  - A video presentation was given to an expert symposium in Australia to respond to interest in the GCA's work.
  - The GCA's work has also attracted interest from overseas. Enquiries have been received from: Australia, Belgium, Canada, Denmark, New Zealand, Norway, Portugal and the European Commission.

### Meeting stakeholders on a regular basis

- The Adjudicator has met Ministers and officials representing the three devolved administrations as well as UK Government Ministers from BIS and the Department for Environment, Food and Rural Affairs.
  - The Adjudicator has also visited Brussels to meet members of the EU Commission and interested MEPs, who are developing a common EU approach to regulating the sector, to explain the GCA approach and to inform EU plans which may affect the GCA.
  - The Adjudicator has given evidence to the Northern Ireland Select Committee and the House of Lords Environment and Agriculture sub-Committee.

- The GCA is holding its inaugural annual conference in June 2014. This will be held at the Queen Elizabeth II Conference Centre in Westminster and will provide an opportunity for the Adjudicator to report to UK and overseas attendees on the first year's work programme and to set out her plans for the coming year.

### **Engaging proactively with the media**

- Media engagement has been targeted and proactive in order to ensure that awareness of the GCA's work reaches appropriate audiences.
- The Adjudicator has given interviews to journalists in the national, trade and regional media.
- There have also been regular broadcasts on a range of BBC Radio programmes including Farming Today, You and Yours, Costing the Earth and Any Questions, to increase understanding of activities and successes.

### **Providing timely, accurate and accessible information on the GCA website**

- Information provided on the GCA website has been designed to explain the regulator's role and responsibilities, to provide clarity about the Code and to publicise new developments or activities.
- The GCA has published two case studies, prompted by individual retailer practice, to clarify elements of the Code.
- The GCA team keeps the website content and format under regular review and seeks ways to increase the reach and accessibility of its communications.



## Objective 2 – Providing advice and guidance on the work of the GCA

The GCA made a priority of publishing advice and guidance to describe how the Adjudicator would deal with issues raised. Activity has been focused in three areas:

- Statutory guidance on investigations and enforcement.
- Guidance on escalation of disputes.
- An arbitration policy.

Clarification of elements of the Code has been provided by the published case studies and further guidance will follow in the coming year.

### Providing statutory guidance on investigations and enforcement

- Within four weeks of the office opening the GCA had prepared draft guidance on investigations, enforcement and financial penalties and published it for consultation.
- An active consultation was launched and we held 15 meetings with retailers, suppliers and their representative bodies.
- In December 2013, the GCA published its investigations and enforcement guidance, which included the four prioritisation principles which will guide the GCA's activities.
- In line with the Act, the GCA has written to the Secretary of State for Business setting out the recommendation as to the method by which the maximum financial penalty will be calculated. A statutory instrument is required to permit financial penalties to be applied. This has yet to be made and is likely to come into force in the second half of 2014.
- Separate guidance will be issued by BIS on the financial penalties order.

### Developing an appropriate arbitration policy

- The GCA arbitration policy was published on 31 March 2014. The first step in the process is to complete an arbitration request form. Advice is provided on how the form should be completed.
- Now the policy is published, the GCA can arbitrate in disputes arising after 23 June 2013.

### Issuing other guidance

- Guidance is also available on the GCA website on how to raise an issue with, or provide information to, the Adjudicator; and on escalation of disputes.

## Objective 3: Acting on suppliers' issues and information

The primary purpose of the GCA is to monitor and enforce compliance with the Code. The Adjudicator has two ways of doing that: by raising issues directly with CCOs, and through investigations.

### Raising issues directly with CCOs

- The GCA introduced a regular programme of meetings with CCOs to discuss issues raised and for a CCO progress update on Code compliance. These meetings follow a standard agenda where all large retailers are made aware of the issues raised with the GCA, irrespective of whether particular large retailers have been identified in connection with the practice. This is because, until an investigation is concluded, it is not possible to identify which large retailers are involved in any practice thought to breach the Code; practices may be particular to one large retailer, common to some or all.
  - Issues raised at these meetings have included: late payment and forecasting practices; supplier contribution to sales performance targets; third party auditing and delisting policies.
- The GCA is committed to transparency and has published the notes of meetings with CCOs on the GCA website.
- Two case studies have been published on the GCA website. The details are set out below. The aim in preparing and publishing these has been to clarify the GCA interpretation of elements of the Code, for wider benefit.

#### – Charging for optimum shelf positioning

The GCA received information from suppliers, a trade body and the media asserting that Tesco plc had requested a payment from suppliers for better shelf positioning of their products. The GCA considered that this was contrary to the Code Part (12): *No Payments for better positioning of goods unless in relation to promotions*. The GCA's view is that to ask for payment for shelf positioning is contrary to the spirit, if not the letter of the Code, and is effectively a requirement. This is because the inference a supplier would draw from such a request is that, unless they agreed to it, they would suffer some detriment.

Tesco plc investigated the issue and assured the GCA that all buyers had been reminded that the Code does not permit payments to be requested in this way; and that all suppliers affected had been contacted to rescind the request which was issued in error.

#### – Payments for failure to meet target service levels

The GCA was advised that some suppliers had been approached to make compensation payments to the Co-operative Group Limited for failure to meet target service levels against actual performance. The suppliers reported that the request was not supported by evidence relating to performance and that suppliers did not recognise that a service level target was in place. The large retailer was reported to have said that under the terms of joint business plans (JBPs), there had been an associated loss of profit and suppliers should reimburse the Co-operative Group Limited. The GCA considered that this was contrary to the Code Part 3(1): *Variation of supply agreement and terms of supply*.

The GCA was pleased to note that the large retailer had recognised the practice was not consistent with the Code that it had been stopped and all affected suppliers had been notified.

### Planning for investigations

- An Investigations Manager was appointed in March and work has begun to prepare the GCA's approach to investigations.

# Groceries Code Adjudicator Act 2013: Statutory reporting requirements

The GCA has reporting requirements set out in the Act. These are set out below together with the GCA report in respect of each item.

## **Disputes referred to arbitration under the Groceries Supply Order**

The GCA has received two requests for arbitration. The GCA arbitration policy was published on 31 March 2014. The GCA made it clear to potential claimants that no arbitration could commence until the GCA policy had been published.

## **Investigations carried out by the GCA**

No investigation has been launched by the GCA.

## **Cases in which the GCA has used enforcement measures**

As no investigation has been launched, no enforcement measure has been recommended.

## **Recommendations that the GCA has made to the Office of Fair Trading for changes to the Code**

The GCA has made no recommendation to the Office of Fair Trading for any change to the Code.

The GCA is also fully committed to meeting its wider duties as a public body. In this reporting period the GCA has fulfilled these duties in three ways:

## **The Regulators' Code**

The GCA is a non-economic regulator which must have regard to the Regulators' Code. The Regulators' Code obliges the GCA to follow stated principles when developing policy or operational procedures and when setting standards or giving guidance which inform GCA regulatory activity. The GCA contributed to a consultation on the implementation plan for the revised Regulators' Code and is committed to applying it.

## **Growth duty**

The GCA is committed to following the government's better regulation agenda. In particular the government's Deregulation Bill, progressing through Parliament which, includes a growth duty. The duty, if approved, would oblige bodies exercising regulatory functions to have regard to economic growth when making decisions. The GCA would support the need to take account of the economic impact of its regulatory activities by ensuring our actions are proportionate, cost effective, take account of the business lifecycle and keep burdens on business to a minimum.

## **Building a responsible payment culture**

The GCA was used as a case study in the BIS discussion paper calling for action to address the late payment culture which disadvantages businesses, especially Small to Medium (SMEs). The Code contains specific provision that large retailers should not delay in paying suppliers Part (5): *No delay on payments*.

# Issues raised on Code compliance

The GCA has heard from direct and indirect suppliers, trade associations, other bodies and the media on a range of issues covered by the Code and relating to large retailer practice. These issues form part of the GCA evidence base which will inform future actions. These are set out below.

Part of the Code	Issues raised
<p><b>Variation</b></p> <p>(3) Of supply agreements and terms of supply</p> <p>(4) To supply chain procedures</p>	<p><b>Terms of supply varied during the contract term:</b></p> <ul style="list-style-type: none"> <li>■ Written supply agreements not in place</li> <li>■ Request for lump sum payments, particularly at certain times of year</li> <li>■ Retailer margin maintenance: inclusion in agreements (contracts and JBPs) of elements over which suppliers have no influence</li> <li>■ Attempts to alter prices paid to suppliers once agreement/contract in place</li> <li>■ Use of service levels: not agreed with supplier or unclear methodology; and where penalties are applied for failing to meet targets</li> <li>■ Inclusion of terms of supply notified only after supply agreement has been negotiated and terms agreed (particular to new suppliers); administration charges for trading accounts; product testing; packaging/artwork charges</li> <li>■ Introduction of audits paid for by suppliers, e.g. ethical, traceability</li> </ul>

Part of the Code	Issues raised
<p><b>Prices and payments</b></p> <p>(5) No delay in payments <i>(includes deductions without notice)</i></p> <p>(6) No obligation to contribute to marketing costs <i>(including artwork and design of packaging; market research; retailer hospitality)</i></p> <p>(7) No payments for shrinkage</p> <p>(8) No payments for wastage (unless set out in the Supply Agreement)</p> <p>(9) No payments as a condition of being a supplier <i>(including listing fees)</i></p> <p>(10) Compensation for forecasting errors</p> <p>(11) No tying of third party goods and services for payment <i>(including payment of packaging and haulage costs)</i></p>	<p><b>Payment terms not adhered to</b></p> <p><b>Automatic deductions from invoices or trading accounts:</b></p> <ul style="list-style-type: none"> <li>■ Without notice</li> <li>■ Without sufficient or any explanation (particularly where large sums of money are involved or where deductions are acute for smaller supplier cash flows)</li> <li>■ Withholding payment for entire invoice where only one element of invoice is in dispute</li> <li>■ Lack of supplier access to decision-maker in respect of deductions, to understand the deduction and recover monies taken in error</li> <li>■ Third party and internal audit practices</li> <li>■ For delivery discrepancies where there is no agreement to the deduction</li> <li>■ Delay in reverting pricing systems to standard price after promotions</li> <li>■ Individual invoices in multiple batches regularly going missing</li> </ul> <p><b>Perceived high charges for mandated packaging and artwork; where supplier believes they can secure cheaper service elsewhere:</b></p> <ul style="list-style-type: none"> <li>■ Flat rate charge for images</li> <li>■ Numerous design changes through the year; lack of reasonable notice of change resulting in cost of excess packaging stock being borne by supplier</li> <li>■ Charge for packaging changes invoiced without prior agreement that this would be required</li> <li>■ Preferred supplier packaging suppliers more expensive than comparable competitors</li> <li>■ Cost of use of plastic crates (e.g. for fresh produce) and reasonableness of hire conditions</li> </ul>

Part of the Code	Issues raised
<p><b>Prices and payments –</b> <i>Continued</i></p>	<p><b>Request for listing fees:</b></p> <ul style="list-style-type: none"> <li>■ Requests by retailer for supplier to stop supplying specific competitors</li> <li>■ Multi-channel listing charges</li> </ul> <p><b>Poor forecasting accuracy:</b></p> <ul style="list-style-type: none"> <li>■ Lack of clarity about what is a forecast and what constitutes an order</li> <li>■ Excessive charges applied for short delivery, particularly when the forecast volume has been met, but the order exceeded forecast</li> <li>■ Failure by large retailers to take account of compensation for the impact of poor forecasting on suppliers, including changes to agreed distribution levels, over-ordering prior to a promotion or at the start of a listing</li> <li>■ No evidence of compensation for suppliers</li> </ul> <p><b>Lack of choice on haulage provider:</b></p> <ul style="list-style-type: none"> <li>■ Where supplier has cheaper alternative</li> </ul>
<p><b>Promotions</b></p> <p>(12) No payments for better positioning of goods unless in relation to promotions</p> <p>(13) No requirement to predominantly fund a promotion</p> <p>(14) Not applying due care when ordering for promotions</p>	<p><b>Attempted charges for better shelf position not related to a promotion</b></p> <p><b>Over-ordering at promotional price</b></p>

Part of the Code	Issues raised
<p><b>Other duties</b></p> <p>(15) No unjustified charges for consumer complaints</p> <p>(16) Not meeting duties in relation to de-listing (<i>including giving reasonable notice and giving commercial reasons behind the decision</i>)</p> <p>(17) Not escalating concerns over breaches of the Code to the Senior Buyer</p>	<p><b>Lack of transparency on customer complaint charges</b></p> <p><b>Unclear large retailer de-listing practice</b></p> <p><b>Different perspectives (retailers compared to suppliers) on reasonable notice periods:</b></p> <ul style="list-style-type: none"> <li>■ Short notice periods don't take account of supplier circumstances</li> </ul> <p><b>Delisting following supplier investment to meet retailer demands</b></p>

In order to ensure we meet the duty to preserve the anonymity of those who provide information to the GCA, the GCA will not publish numbers of issues raised.

# GCA key actions

The GCA has considered the issues raised, followed the prioritisation principles and decided to focus on five key areas where suppliers believe that large retailer practices breach the Code. These issues were discussed with CCOs at a group meeting in January 2014 and are set out below.

**It should be noted that while the GCA discussed the following areas with all CCOs, the issues raised should not be interpreted as attributable to any particular large retailer or all large retailers, unless specified.**

## ▪ Forensics: third party audits

### Description:

Under the Limitation Act 1980, contracting parties are able to make claims against one another going back up to six years. This is reportedly being used proactively by some large retailers to make claims against suppliers for historic invoicing errors or omissions. It has been reported that suppliers are being asked for significant sums of money, and that large retailers or their agents have suggested that the burden of proof falls on suppliers to show that alleged discrepancies are not valid claims. The documentary audit trail is often complex and difficult to piece together after a long period of time, during which there will usually have been significant change to both suppliers' and large retailers' systems and staff. In some cases it has been reported that deductions are made from invoices/trading accounts without notice to, or the agreement of the supplier. With little or no notice of when these types of deductions will be applied, suppliers report that they are unable to plan their cash flow effectively. Some sums can be particularly significant for suppliers at certain times of the year and can require considerable resource to challenge. It has been reported that in many cases a negotiated agreement is reached to shortcut the potentially lengthy process of establishing the actual payment due or where there is sufficient doubt about the validity of the claim.

### Potential Code breach:

- Although it cannot and would not interfere with statutory rights to bring contractual claims, the GCA considers that where unilateral deductions are made by large retailers against suppliers' current invoices, the effect of this practice falls under Part (5) of the Code: *Delay in payments*.

### GCA proposal:

The GCA has asked large retailers to consider whether they would be prepared to make a voluntary commitment to settle accounts by the end of the current and previous two financial years. This may oblige suppliers to agree to a reciprocal commitment.



## ■ Drop and drive: delivery performance

### Description:

Suppliers have reported that they experience problems where there is a disparity between what suppliers say they have delivered and invoiced, and what the large retailer says has been received. It has been reported that in some cases large retailers appear to automatically make deductions from invoices for alleged shortages. These deductions are difficult to challenge, dependent on the haulage method but particularly when using prescribed hauliers. Suppliers have informed the GCA that this is a major issue. There appear to be different patterns of deductions among the large retailers in respect of the same suppliers. For example, some large retailers record twice the percentage error rate of others when the supplier believes it uses exactly the same procedures in packing the order for collection by the haulier. The GCA is keen to understand where and how this is happening, at what point in the supply chain and in relation to which products.

### Potential Code breach:

- The GCA considers that the effect of this practice falls under Part (5) of the Code: *Delay in payments*.

### GCA proposal:

Without a more detailed understanding of each large retailer's delivery practice, the GCA is unable to make an assessment of the cause or extent of this issue. CCOs were asked if they would be prepared to provide the GCA with an overview of their delivery practice and a sample review of the percentage of under-deliveries recorded at one of their distribution centres over a period of three months. When this information has been received from all CCOs, the GCA will discuss it with each large retailer individually and consider what further action may be merited.

## ■ Forecasting/service levels

### Description:

Suppliers report that the accuracy of large retailers' forecasts is poor and that significant variations occur between forecasts and orders placed, sometimes at very short notice. In some cases suppliers are charged for non-delivery against orders with inconsistent reference to forecasts. For those with JBPs, this may be used as a means to justify penalties applied. This pushes the risk of managing variability of demand onto the supplier. Some large retailers are reported to be applying penalties for failure to meet service levels set out in supply agreements, without regard to the accuracy of forecasts (both high and low). This can lead to significant wastage in the chain, particularly with regard to fresh produce. The penalty for non-delivery per case tends to be fixed and can be more than the cost of production.

The GCA was informed by large retailers that some suppliers knowingly accept orders that they are unable to fulfil. The GCA is of the view that both parties should contract in good faith and that suppliers should alert large retailers as soon as they know that they will be unable to meet a forecast, and if the subsequent order is not filled then the procedure set out in the relevant supply agreement should be followed.

#### Potential Code breach:

- The GCA considers that the effect of this practice falls under Part (2) of the Code: *Principle of fair dealing*, specifically as it applies to Part (10) of the Code: *Compensation for forecasting errors*.

#### GCA proposal:

The GCA acknowledges that forecasting cannot be 100% accurate. However, inaccurate forecasting by the retailer should not lead to the supplier being penalised. The standard set out in the Code is that forecasts should be prepared with due care and attention. The GCA has asked CCOs to review their forecasting practice and accuracy rate.

## ■ Request for lump sum payments

#### Description:

It has been widely reported that, particularly at the end of the financial year, some large retailers request lump sum payments from suppliers for a variety of reasons, with margin maintenance through JBPs being the most frequently quoted. Large retailers are said to be using JBP in different ways and the GCA will be looking more closely at this and more particularly, whether practice in relation to any particular large retailer's JBP is effectively requiring suppliers to waive their rights under the Code. The GCA has stated that including something in a JBP mid-contract does not necessarily prevent it from becoming a retrospective demand, although it would depend on how the JBP was used and what it comprised in each case. Some suppliers are reporting that JBPs are imposed and not agreed. This issue is of most concern to those suppliers with JBPs, followed by deductions from payments.

#### Potential Code breach:

- The GCA considers that the effect of this practice falls under Part (2) of the Code: *Principle of fair dealing*, specifically as it applies to Part (3): *Variation of supply agreements and terms of supply*.

#### GCA proposal:

CCOs were asked to review their practice on lump sum payments. Where these are included in supply agreements as a payment against a large retailer commitment, there should be a review of whether those commitments have been met throughout the course of the supply agreement and if not, the lump sum should be repaid to suppliers.

## ■ Packaging and design charges

#### Description:

Some reported charges applied for photography and packaging design do not appear to be reasonable. Some suppliers that buy their own packaging and design consider the charges made by some large retailers for a similar product to be expensive. A few large retailers have been told by suppliers that prescribed sources are overcharging for packaging. Some suppliers have reported that they have been charged for up to three changes to design in a single year. Another practice raised is the charge for photographs which is reported to have increased four-fold over the past two years.

#### Potential Code breach:

- The GCA considers that the effect of this practice falls under Part (6) *Obligation to contribute to marketing costs*; and Part (11) *Tying of third party goods and services for payment*.

#### GCA proposal:

CCOs were asked to consider if it was practicable to make a voluntary commitment that a supplier would only be charged for one redesign in any year with any subsequent changes paid for by the large retailer. CCOs were also asked to look into their practice and charges to ensure these were compliant with the Code.

## Case studies

The GCA has adopted a case-study based approach to providing an early view on some topical areas of Code compliance. The GCA has in this way provided clarification of some elements of the Code. During this first reporting year the GCA has published two case studies and is satisfied that the large retailers involved have each taken action to address the breach of the Code.

# Glossary

BIS	Department for Business Innovation and Skills
CC	Competition Commission
CMA	Competition and Markets Authority
CCO	Code Compliance Officer
EU	European Union
GCA	Groceries Code Adjudicator
JBP	Joint Business Plan
MEP	Member of European Parliament
OFT	Office of Fair Trading
SME	Small to Medium Enterprise
The Act	Groceries Code Adjudicator Act 2013
The Code	Groceries Supply Code of Practice
The Order	The Groceries (Supply Chain Practices) Market Investigation Order 2009







