



Groceries Code Adjudicator

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Statutory guidance on how the Groceries Code Adjudicator will carry out investigation and enforcement functions

STATUTORY GUIDANCE ON INVESTIGATIONS AND ENFORCEMENT

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INTRODUCTION

1. The role of the Groceries Code Adjudicator ('the Adjudicator'), conferred upon it by the Groceries Code Adjudicator Act 2013 ('the Act'), is to enforce the Groceries Supply Code of Practice ("the Code") and to encourage compliance with it.
2. The Code was put in place by the Competition Commission ('CC') following its [market investigation](#) of the supply of groceries in 2006-08. It is intended to remedy adverse effects on competition found by the CC to arise from grocery supply chain practices which transferred excessive risks and unexpected costs to suppliers and which prevented, restricted or distorted competition in connection with the acquisition of groceries by the larger grocery retailers.
3. The Code applies to the 'Designated Retailers', listed in Schedule 2 to the [Groceries \(Supply Chain Practices\) Market Investigation Order 2009](#) (referred to in this document, as they are in the Act, as 'large retailers'. These are retailers with a turnover of more than £1 billion with respect to the retail supply of groceries in the United Kingdom. The Code applies to the large retailers' dealings with their direct suppliers based in the UK.

The large retailers are:

Aldi Stores Limited
Asda Stores Limited
Co-operative Group Limited
Iceland Foods Limited
Lidl UK GmbH
Marks & Spencer plc
Wm Morrison Supermarkets plc
J Sainsbury plc
Tesco plc
Waitrose Limited

4. In brief, the Code obliges the large retailers:
 - a) to deal fairly and lawfully with their suppliers;
 - b) not to vary supply agreements retrospectively, except in circumstances beyond the retailer's control which are clearly set out in the supply agreement;
 - c) to pay suppliers within a reasonable time;
 - d) not to seek contributions to marketing costs unless this is provided for in the relevant Supply Agreement;
 - e) not to seek compensation for shrinkage;
 - f) not to seek payments for wastage except in limited circumstances;
 - g) not to charge listing fees, except in limited circumstances;
 - h) to compensate suppliers for forecasting errors;
 - i) except in limited circumstances, not to tell suppliers which third party suppliers to use;
 - j) not to charge position payments unless they relate to a promotion;
 - k) not to require suppliers predominantly to fund promotions;
 - l) not to over-order at promotional prices;
 - m) not to require suppliers to make unjustified payments for consumer complaints; and
 - n) to de-list suppliers only for genuine commercial reasons and give reasonable notice of, and opportunity to, discuss delisting with the large retailer's Code Compliance Officer.

5. The Adjudicator's statutory functions are to:
 - a) provide advice to both suppliers and large retailers on matters relating to the Code;
 - b) arbitrate bilateral disputes between suppliers and large retailers;
 - c) investigate complaints to ascertain whether there has been a breach of the Code;
 - d) enforce the Code;
 - e) impose sanctions and other remedies for breaches of the Code; and
 - f) publish an annual report on the Adjudicator's activities.

6. This guidance relates only to the Adjudicator's investigation and enforcement functions.
7. Disputes and complaints may of course be resolved informally, without involving the Adjudicator. Suppliers will be encouraged to talk to the large retailers' Code Compliance Officers about practices covered by the Code. Contractual remedies should be considered alongside any complaint to the Adjudicator or request for arbitration. The Adjudicator cannot award financial compensation to suppliers, other than as a result of arbitration, which is not covered in this guidance.

INVESTIGATIONS

Criteria for initiating an investigation

8. The Adjudicator may carry out an investigation if the Adjudicator has reasonable grounds to suspect that a large retailer has broken the Code or has failed to follow a recommendation by the Adjudicator on action it should take to comply with the Code.
9. The reasonable grounds for suspicion might be based on evidence supplied by direct or indirect suppliers, third parties such as trade associations, other retailers, whistle-blowers or information which is in the public domain.
10. To ensure the Adjudicator targets resources effectively and proportionately the Adjudicator will prioritise complaints in order to decide whether to initiate, and whether to continue to pursue any investigation.
11. The following four prioritisation principles will be used:
 - Impact;
 - Strategic importance;
 - Risks and benefits;
 - Resources.

Impact

12. The greater the impact of the practice complained of on suppliers (and indirectly on consumers), the more likely the Adjudicator is to open or continue an investigation.
13. When assessing the impact on suppliers, the Adjudicator will consider direct and indirect impact.
14. The direct impact on suppliers is the adverse impact the practice complained of appears to be having on direct suppliers. This could be an immediate and significant impact on a small number of suppliers (for example, a practice that might put one or more suppliers out of business) or a practice that imposes costs or may have other adverse effects on a larger number of suppliers.
15. The Adjudicator will also consider indirect impact, for example the benefit as a result of a change in behaviour of large retailers that are the subject of the Adjudicator's investigation. An action by the Adjudicator that leads to the prevention or termination of activity that would in the future have distorted competition in the groceries supply chain is also an example of indirect impact. The Adjudicator will have regard to the potential effects if an investigation is undertaken.
16. When considering impact, the Adjudicator will also consider the wider impact, for example improvements to suppliers' and consumers' abilities to make informed choices, or whether action is likely to have any deterrent effect encouraging wider compliance with the Code and/or leading to changes in the behaviour of the large retailers which may enhance competition for the benefit of consumers.

Strategic importance

17. The Adjudicator will consider whether the proposed investigation or action would further the Adjudicator's statutory purposes.

18. For example, the Adjudicator may consider whether a complaint which is the prospective subject of an investigation concerns conduct that is, or appears to be, a repeated, intentional or particularly flagrant breach of the Code and whether there is a point of wider public importance at stake, for example, when the practice affects indirect suppliers such as farmers or where it will have direct adverse effects on consumers such as reducing choice or availability of certain products. The Adjudicator will consider the number of suppliers affected, number of products or product categories affected and the importance of the category to consumers.

19. There may be options other than the Adjudicator taking action in order to address the problem. In some cases, it may be more appropriate for another body to take action, for example, in competition law cases. The Adjudicator will consider whether the OFT to 31st March 2014 or the CMA from 1st April 2014, or another regulator, such as Trading Standards, might be best placed to deal with a particular case.

Risks and benefits

20. The Adjudicator will take into account the likelihood of achieving an outcome that stops practices that breach the Code and that will improve the grocery supply chain, including the likely effectiveness of potential remedies.

21. The Adjudicator will also consider resource issues such as the possible costs and complexity associated with initiating an investigation and conversely, the risks of failing to investigate. It is possible for an investigation to have a significant impact and generate significant strategic benefits even if there is no finding by the Adjudicator that there has been a breach of the Code by any particular retailer, for example, clarifying the scope or application of the Code.

22. There may be instances when the adverse effect on suppliers and consumers is so great that even where the likelihood of finding a breach and improving behaviour appears low it will be important to take action to seek to address the

problem and/or where taking action might clarify the rules and send long term messages to retailers.

Resources

23. The Adjudicator will only decide to open or continue an investigation or to take action if the Adjudicator is satisfied that it is proportionate to do so.

24. The Adjudicator may decide to open or continue an investigation or to take enforcement action that is resource-intensive because the Adjudicator considers that, having regard to its impact on retailers, suppliers and consumers, strategic significance and risk, it is a good use of the Adjudicator's resources, including time.

25. Conversely, the Adjudicator may decide to terminate or not to open an investigation or not to take enforcement action that is relatively resource-light if it would still not be a proportionate use of the Adjudicator's resources.

26. The amount of resource required is likely to differ depending on the issue and the type of investigation. When assessing resources, the Adjudicator will consider:

- a) the possible informal and formal actions that the Adjudicator could take to resolve the issue and the relative resource requirements for each;
- b) the possibility of tackling an issue quickly to ensure it does not become more widespread;
- c) the anticipated length of the investigation and other time factors;
- d) the resources required for the investigation compared to the benefits of taking action; and
- e) the possible impact of taking resources away from other work.

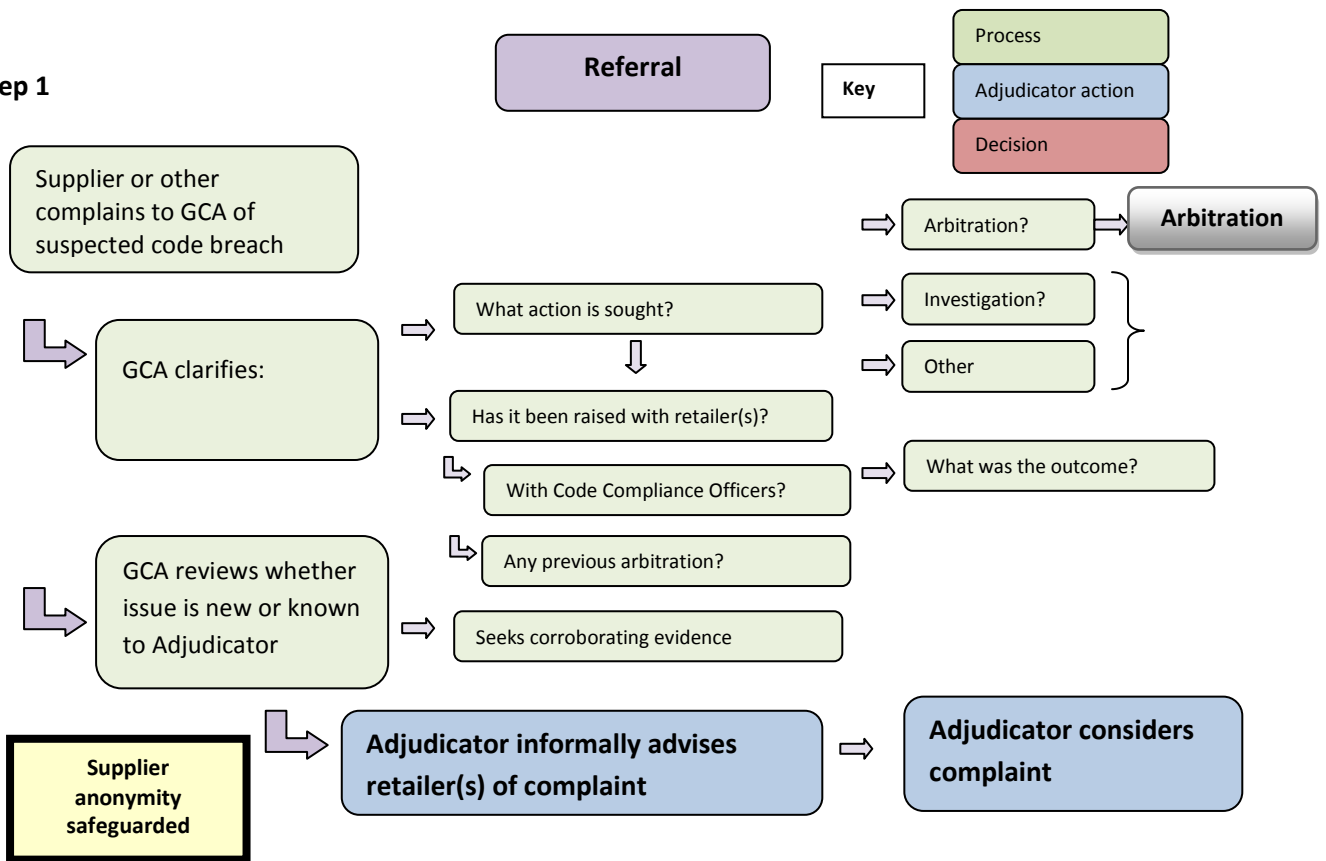
Consultation question 1

Is the guidance clear on how **the investigation criteria** will be applied?

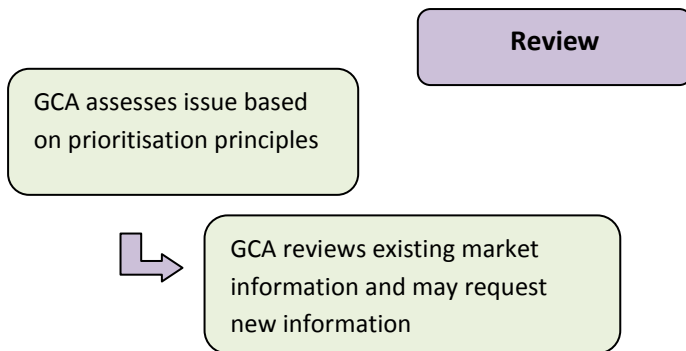
If not, how can this be improved?

Complaints procedure

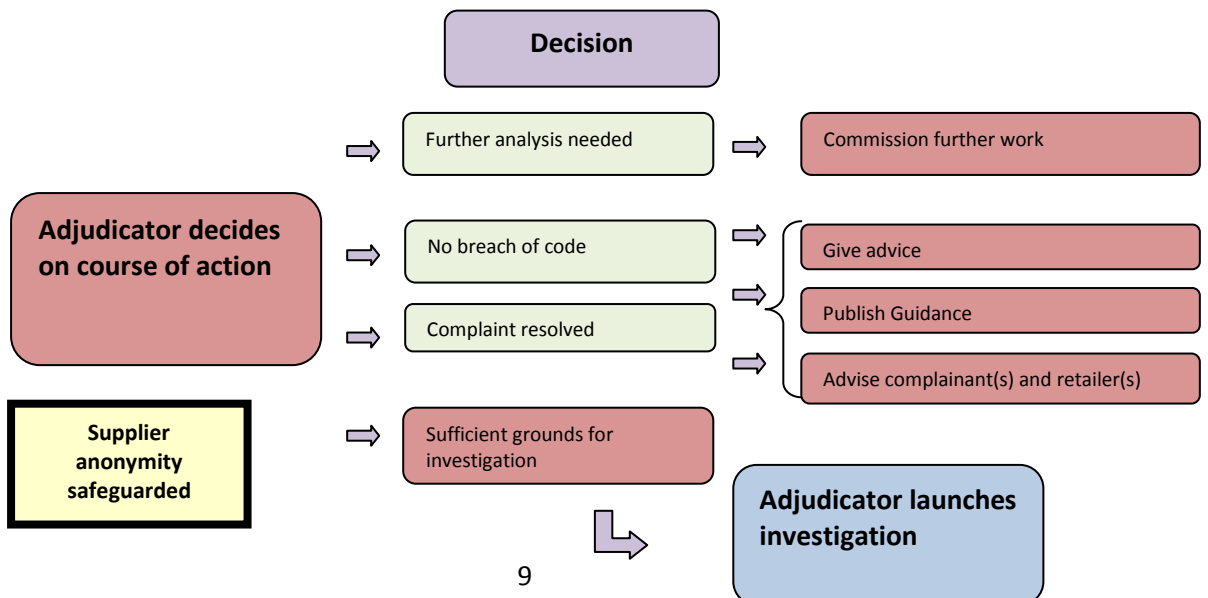
Step 1



Step 2



Step 3



Investigation procedure

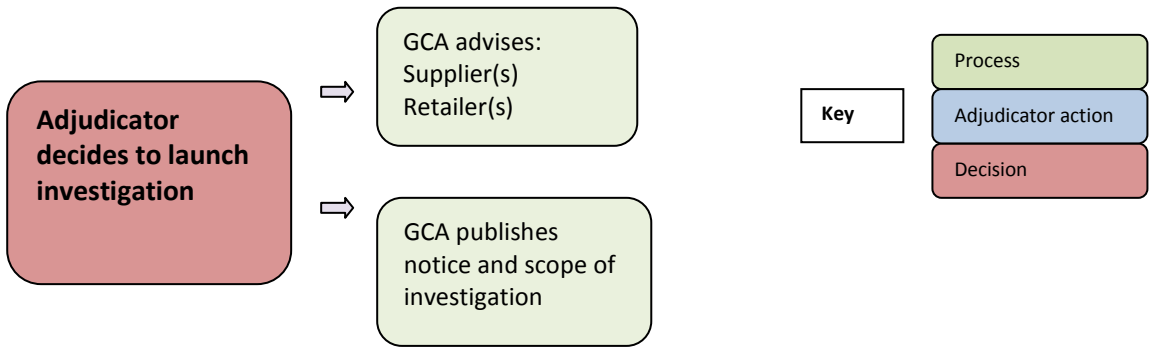
27. Once a formal investigation is opened, the Adjudicator has statutory powers to require a person to provide information. The Adjudicator has a duty to keep information confidential.
28. The Adjudicator may require any person to provide documents or other information in that person's possession or control. The Adjudicator is not limited to approaching the large retailer or retailers suspected of breaching the Code; the Adjudicator may request documents or information from third parties such as complainants, direct and indirect suppliers, customers and competitors.
29. The term 'document' includes records, such as invoices or sales figures held on paper and in digital format. The Adjudicator can use the power to require the production of information that is not already in recorded form. For example, the Adjudicator may ask a person to provide information about a particular market using their knowledge and experience or the knowledge and experience of their staff, or information about informal meetings and contacts between a large retailers' buying staff and its suppliers.
30. If the Adjudicator requests information from any person, the Adjudicator will set this out in a written notice, specifying:
- a) The power under which the information is requested;
 - b) Who is required to provide the information;
 - c) What information is required;
 - d) To whom the information is to be provided;
 - e) In what form it is to be communicated (e.g. post, e-mail);
 - f) Where it is to be provided;
 - g) When, or the time by which, it is to be provided; and
 - h) The possible consequences of failing to comply.
31. When setting out the appropriate time limit for the production of documents or information, the Adjudicator will consider the amount and the complexity of the information required, the resources that might be available to the individual or company concerned, the urgency of the case and the public policy justification for speed of action.

32. If a person is required to attend a particular place, the Adjudicator will offer to pay the necessary travel expenses.
33. A person may receive a notice requiring the production of documents or information on more than one occasion during the course of an investigation.
34. However, in specifying documents or information in a written notice, the Adjudicator will not seek more documents or information than the Adjudicator believes are necessary for the investigation.
35. It is an offence intentionally to fail to provide documents or information following a formal request by the Adjudicator. It is also an offence to provide false information in response to a formal request by the Adjudicator.
36. A person is not required to produce a document if they can prove that the document was not in their possession or control. It is also a defence if the person can prove they had a reasonable excuse for failing to comply with the requirement.
37. Failing to comply with a requirement to disclose documents or information is not an offence if the Adjudicator has failed to act in accordance with the requirements of the Act.
38. Delays in the provision of information can have a significant impact on overall timescales. The Adjudicator, therefore, expects individuals to respond to information requests in the timeframe specified in the request.
39. The Adjudicator is not legally required to complete investigations within a specific period. However, the Adjudicator will try to complete investigations as soon as reasonably practicable having regard to all the circumstances.
40. The Adjudicator may require a large retailer to pay some or all of the costs of the investigation if the Adjudicator is satisfied that the retailer has broken the Code.

41. A person who has made a complaint that is found to be vexatious or wholly without merit may also be required to pay some or all of the costs of an investigation. The Adjudicator will use this power to deter false complaints or, in the case of complaints from suppliers, use of the Adjudicator for tactical reasons in negotiating contracts. The fact that a complaint has not led to a finding by the Adjudicator that the Code has been breached does not necessarily mean that it will be considered to have been vexatious or without merit.
42. If the Adjudicator requires a large retailer or other person to pay for the costs of the investigation, the Adjudicator will inform the relevant person in writing and will provide:
- a) The reasons for imposing the requirement;
 - b) The amount to be paid; and
 - c) The period of time within which it must be paid.
43. A retailer or other person is entitled to appeal to the High Court, in England and Wales or Northern Ireland; or the Court of Session, in Scotland against the decision to impose costs or the amount to which it relates.

Investigation procedure

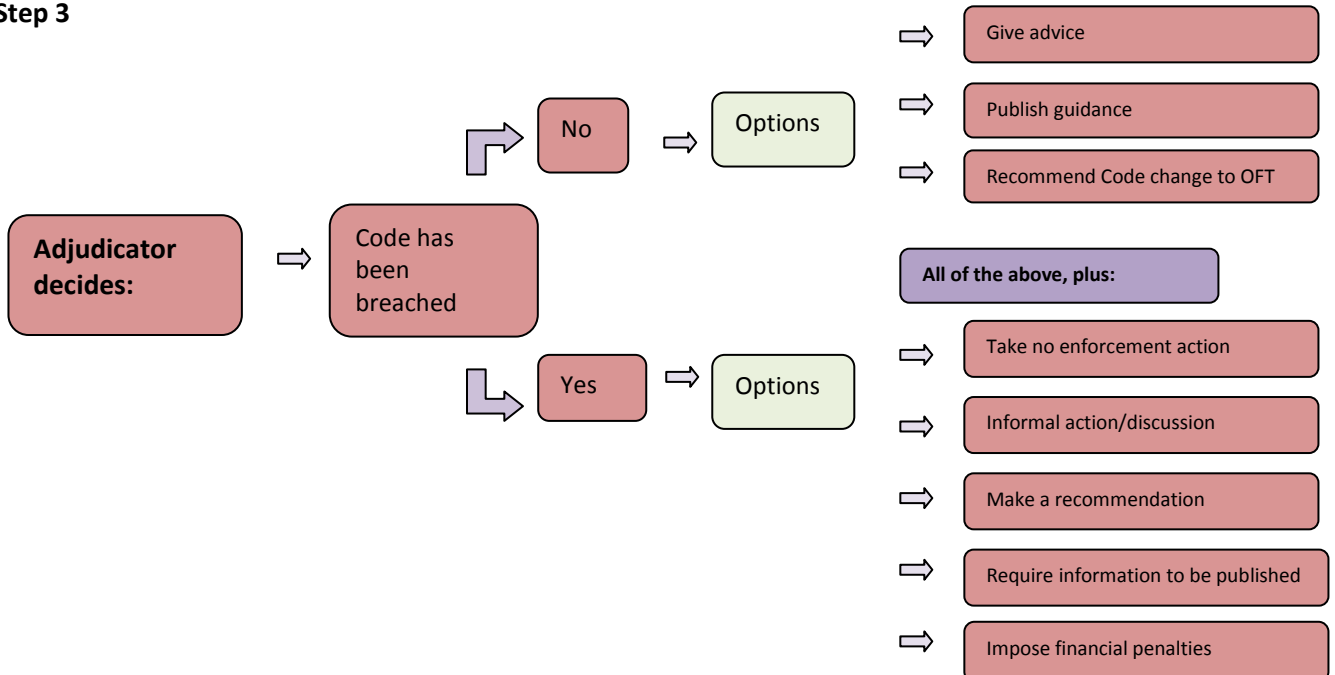
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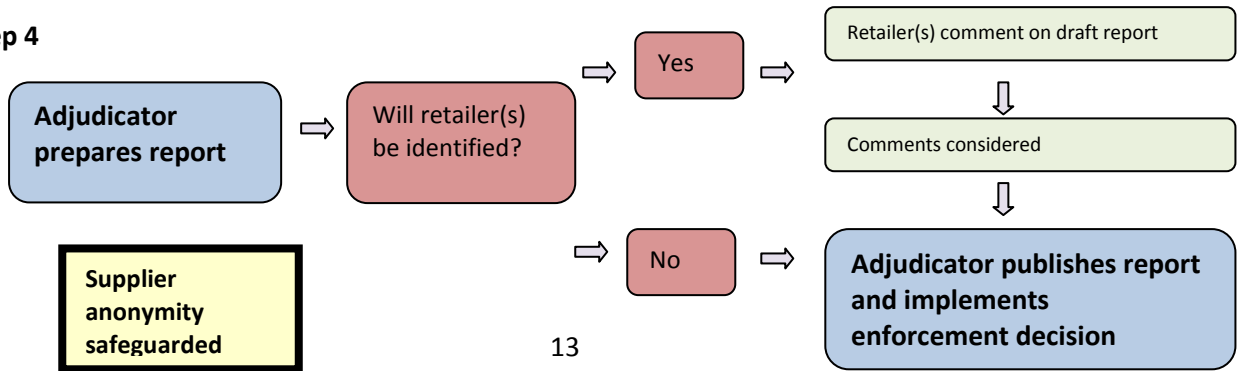
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Step 3



Step 4



Consultation question 2

Does the complaints procedure explain how the Adjudicator will deal with complaints?

If not, how can this be improved?

Consultation question 3

Does the investigations procedure explain how the Adjudicator will deal with investigations?

If not, how can this be improved?

ENFORCEMENT POWERS

44. Not all of the Adjudicator's investigations will result in a finding that there has been a breach of the Code.

45. The Adjudicator may decide that a formal investigation no longer merits the continued allocation of resources, for example because it no longer fits with the prioritisation principles or because there is insufficient evidence to determine whether a breach has been committed and further investigation is not warranted.

46. If the Adjudicator is satisfied that a large retailer has breached the Code, the Adjudicator may take one or more of the following enforcement measures:

- a) Make recommendations;
- b) Require information to be published;
- c) Impose financial penalties.

47. If the Adjudicator finds that a breach has occurred, the Adjudicator will consider whether an enforcement measure would be appropriate and if so, which one or combination of them. The Adjudicator may also have informal discussions with large retailers, give advice to large retailers or suppliers, publish guidance and recommend changes to the Code, within the limits set by the Enterprise Act 2002.

Deciding which enforcement power to use

48. The Adjudicator's decision on appropriate sanctions will be informed by the principles established by the Macrory Report (November 2006):

- a) a sanction should aim to change the behaviour of the offender;
- b) a sanction should aim to eliminate any financial gain or benefit from non-compliance;
- c) a sanction should be responsive and consider what is appropriate for the particular offender and the regulatory issue;
- d) a sanction should be proportionate to the nature of the offence and the harm caused;
- e) a sanction should aim to restore the harm caused by regulatory non-compliance where appropriate, although this does not include awarding compensation to suppliers; and
- f) a sanction should aim to deter future non-compliance.

49. In accordance with the Macrory principles, the Adjudicator will pursue sanctions that are proportionate to the nature and seriousness of the breach and its impact.

50. The Adjudicator will take a stepped approach, escalating regulatory and enforcement action to secure compliance with the Code. The Adjudicator will pursue informal regulatory action with large retailers where that is the most appropriate means of making sure that they meet their obligations. However, there may be some breaches of the Code that are sufficiently serious to lead the Adjudicator straight to enforcement action. Recommendations may be combined with or followed by publication of information and, for the most serious and / or persistent breaches, financial penalties.

51. Informal regulatory action may include discussions with retailers, giving advice to suppliers or large retailers or publishing guidance.

52. In considering which, if any, enforcement powers to use, the Adjudicator's main aim is to ensure that any action helps to promote compliance with the Code.

53. In deciding what action is most appropriate in the circumstances of the particular case and which enforcement powers, if any, the Adjudicator intends to use, the Adjudicator will take into account relevant considerations including:

- a) The seriousness of the breach;
- b) The number of suppliers affected;
- c) The harm caused by the breach;
- d) The importance of the product and / or category concerned;
- e) How to ensure future compliance with the Code;
- f) Deterring similar breaches;
- g) Restoring the supply chain to what it would have been without the breach, although this does not include awarding compensation to suppliers;
- h) The proportionality of the enforcement power to the nature of the breach;
- i) The likelihood of a successful outcome; and
- j) The likelihood of bringing about beneficial change in the groceries supply chain, resulting in fewer complaints in the future.

54. In considering the seriousness of the breach, the Adjudicator is concerned primarily with the nature and scale of the harm the breach caused, or was capable of causing. In considering the nature of the harm, the Adjudicator intends to assess who has been affected and the extent to which any harm can be reversed and remedied. In considering the scale of the harm, the Adjudicator may consider the number of suppliers affected and how widespread any potential harmful effects may be, including harm to consumers. The greater the harm caused (or which could have been caused), the more likely the Adjudicator is to use an enforcement power.

55. In deciding which enforcement power, if any, to use, the Adjudicator will consider what action is necessary to ensure that the breach does not continue and is not repeated. In order to deter similar breaches by other retailers, the Adjudicator intends to consider how the action taken in one case might affect the incentives on other retailers to comply. The Adjudicator's primary aim is to enforce the Code and encourage compliance with it.

56. The Adjudicator is likely to use a recommendation in circumstances where the breach of the Code is less serious and / or where there is a reasonable prospect of a breach being quickly put right before it has any significant adverse effect on suppliers. The Adjudicator may also use recommendations alongside a requirement to publish information or the imposition of financial penalties for more serious breaches of the Code. There is no express sanction for failing to comply with a recommendation, but if a large retailer does not follow a recommendation the Adjudicator could open a new investigation. The Adjudicator may also take the failure into account when considering what sanction to impose following any future investigation.

57. Before using an enforcement power, the Adjudicator will ensure that the action is proportionate and reasonable in the circumstances.

The Legal Framework

58. The Adjudicator's enforcement powers are set out in sections 6 to 9 of the Act and are summarised below.

Recommendations

59. If the Adjudicator concludes that a large retailer has breached the Code, the Adjudicator may make a recommendation. If the Adjudicator chooses to make recommendations, the Adjudicator will recommend what the large retailer should do in order to comply with the Code.

60. If the Adjudicator makes a recommendation, the recommendation will be monitored to see whether it has been followed.

61. The Adjudicator can only impose an enforcement measure for a breach of the Code, not for simple failure to follow a recommendation. However, if a large

retailer continues to breach the Code, the Adjudicator will be able to follow that up and impose another enforcement measure. Failure to follow a recommendation could be taken into account when considering what enforcement measure to impose following a new investigation. The Adjudicator will consider repeated non-compliance with the Code as being a more serious breach. However, the Adjudicator will only take into account breaches of the Code occurring after 25th June 2013 in deciding what sanction to impose.

62. If the Adjudicator makes a recommendation, the Adjudicator will continue to monitor whether the recommendation has been followed. For the purposes of monitoring, the Adjudicator may require the large retailer to produce documents or any other information in the retailer's possession or control. If the Adjudicator requests information from the large retailer, the request will be set out in writing, specifying:

- a) The power under which the information is requested;
- b) Who is required to provide the information;
- c) What information is required;
- d) To whom the information is to be provided;
- e) In what form it is to be communicated (e.g. post, e-mail);
- f) Where it is to be provided;
- g) When, or the time by which, it is to be provided; and
- h) The possible consequences of failing to comply.

63. Again, if an individual from a large retailer or a supplier is required to attend a particular place, the Adjudicator will offer to pay the necessary travel expenses.

Publication of information

64. The Adjudicator may require the large retailer to publish information. If the Adjudicator requires information to be published, the Adjudicator will give written notice to the large retailer. The notice will specify the following:

- a) What information is to be published;

- b) In which media;
- c) For how long;
- d) How it must be published, including size and prominence; and
- e) The time by which it must be published.

65. For example, the Adjudicator could require publication by press release, through the large retailer's annual report or website, through a newspaper advertisement and/or an open letter to any relevant trade associations. The information could then be taken into account by those dealing with the large retailer in future.

66. If the large retailer does not publish the information, the Adjudicator may bring civil proceedings in the courts of England, Wales, Northern Ireland or Scotland to obtain an injunction/ order or any other appropriate remedy or relief.

Financial penalties, including calculation

When will the Adjudicator impose a financial penalty?

67. The Adjudicator will use this power to impose penalties on large retailers to reflect the seriousness of the breach. Financial penalties may also be used where the Adjudicator considers that they would constitute a serious and effective deterrent, both specifically to the retailer concerned and more generally to other large retailers who may be considering activities contrary to the Code.

68. In deciding whether to impose a financial penalty and the amount, the Adjudicator may take into account any evidence relating to whether the infringement was committed intentionally or negligently.

69. If the Adjudicator decides to impose a financial penalty, the Adjudicator will also give written notice to the large retailer. The notice will specify the following:

- a) The grounds for imposing the penalty;
- b) Reasons why other measures are inadequate;
- c) The nature of the breach;

- d) The seriousness of the breach;
- e) The adverse impact of the breach on suppliers.
- f) The amount of the penalty;
- g) The period within which it must be paid; and
- h) How it must be paid.

70. A large retailer may appeal against the imposition of a financial penalty or its amount to the High Court, in England and Wales or Northern Ireland; or the Court of Session, in Scotland.

71. The Adjudicator is not able to impose a financial penalty for a breach of the Code before the Secretary of State makes an order specifying the maximum amount of any penalty or how the maximum amount is to be determined.

72. Financial penalties would be paid into the Consolidated Fund and so would not be used to fund the Adjudicator's activities.

Consultation question 4

Does the section on enforcement powers explain how the Adjudicator will choose whether to use these and which ones?

Calculating a financial penalty

73. In calculating the amount of any financial penalty, as well as in recommending to the Secretary of State how the maximum financial penalty should be determined, the Adjudicator will consider the maximum permitted under comparable competition regimes.

74. Some examples of penalties applied for anti-competitive practices are:

- a) under the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000, as amended, a financial penalty may not exceed the maximum of 10% of worldwide turnover;

- b) in the Office of Fair Trading penalty setting guidance following Competition Appeal Tribunal decisions in construction and recruitment industry cases (September 2012), the maximum level of financial penalty was increased from 10% to 30% of relevant turnover (not worldwide turnover) but considerations of proportionality were given correspondingly greater weight; and
- c) in the impact assessment for the Adjudicator published by BIS (May 2011), there was a base case put in which the Adjudicator could award only financial costs equal to the amount originally imposed on the complainant or complainants, and the deterrent effect would be the reputational risk to the retailer. This was expanded to include a punitive element, although it was acknowledged that this may lead to higher prices for consumers.

The Adjudicator proposes that the maximum financial penalty for breaches of the Code is 1% of UK turnover.

75. A financial penalty imposed by the Adjudicator will be calculated following a five step approach:

- a) Calculation of the starting point having regard to the seriousness of the infringement and by reference to the UK, rather than worldwide, turnover of the retailer;
- b) Adjustment for duration of the infringement since 25th June 2013;
- c) Adjustment for aggravating factors, such as intentional and repeated breaches and failures to comply with recommendations, and for mitigating factors, such as cooperation with the investigation or remedying the breach promptly;
- d) Adjustment for other factors, such as specific deterrence and proportionality; and
- e) Adjustment if the maximum penalty as specified by the Secretary of State is exceeded.

Consultation question 5

The Adjudicator proposes that the maximum financial penalty for breaches of the Code is 1% of UK turnover. Do you agree? If not, what do you think the maximum financial penalty for Code breaches should be?

Publication of outcome of investigation

76. Under section 5 of the Act, the Adjudicator must publish the outcome of an investigation. The investigation report will contain the following information:

- a) Any findings that the Adjudicator has made;
- b) Any action that the Adjudicator has taken or proposes to take; and
- c) The reasons for the findings and any action taken or proposed.

77. The investigation report will not necessarily identify the large retailer concerned. If the large retailer is identified in the report, that retailer will be given a reasonable opportunity to comment on a draft report before it is published.

78. The complainant or complainants will not be identified without their consent.

Consultation question 6

This statutory guidance explains: (i) how the Adjudicator will decide whether to carry out investigations; (ii) how the Adjudicator will carry out investigations; (iii) how the enforcement powers will be applied; and (iv) the criteria the Adjudicator intends to adopt in calculating financial penalties.

The Adjudicator is happy to provide later, **additional guidance** should that be useful. For example, we expect to provide guidance on the appeals process and arbitration. What additional guidance would you like to see?

Consultation question 7

Do you have any other comments to make on the guidance?

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