



Groceries Code
Adjudicator

Groceries Code Adjudicator

**Supporting facts
with
Questions and answers**

**This document will be updated from time to time to reflect the
evolving work of the Adjudicator**

Update: July 2013

Interesting Statistics

- **£146bn** groceries market
- **93,000** grocery stores
- The top 5 retailers have around **75% of market share**
- The Groceries Code applies to the **retailers with turnover > £1bn**
- Business groups supporting the establishment of the Adjudicator included the **National Farmers Union**, the **British Brands Group** and the **Food and Drink Federation**
- **Initial levy will be £800,000 a year**, split between the largest retailers

The consultation

Statutory Guidance Consultation

- The guidance explains in detail how the Groceries Code Adjudicator will carry out investigations and enforce decisions. It also includes details of proposed financial penalties.
- Anyone can make a complaint to the Adjudicator: retailers, suppliers, trade bodies, other organisations and individuals, however, the Adjudicator will only act where there is corroborated evidence of a potential breach of the Groceries Code.
- The decision to launch an investigation will be based on 4 criteria: i) impact, ii) strategic importance, iii) risks and iv) benefits and resources.
- If the Adjudicator decides that there has been a breach of the Groceries Code, there are a number of sanctions available, ranging from issuing advice, making recommendations for change of practice or options reflecting best practice, to imposing financial penalties.
- No investigations can be launched by the Adjudicator until the statutory guidance is in place, which must be by 25th December 2013 (6 months from when the Groceries Code Adjudicator Act came into force).
- The consultation was launched on 31st July and closes on 22nd October 2013. Final guidance will be published by 25th December 2013.

Fines and penalties

- The Adjudicator proposes a maximum penalty of 1% of UK turnover from the retailer or retailers found to have breached the Groceries Code. This would equate to a maximum financial penalty ranging from £10m to £500m (based on 2012 annual accounts) depending on the UK turnover of the retailer concerned.

- The financial penalties limit requires the approval of Parliament, through the BIS Secretary of State, before fines can be imposed. The BIS Secretary of State will make an order setting the maximum penalty or how it will be determined, taking into account the Adjudicator's recommendation following this consultation.
- The Adjudicator can fine the supermarkets for breaching the Groceries Code but cannot retain the funding or compensate suppliers following an investigation.

Role and remit of the Groceries Code Adjudicator

The Adjudicator

- The Adjudicator has been appointed to ensure large supermarkets treat their suppliers fairly and lawfully.
- The Adjudicator's role is focused on encouraging and monitoring compliance with, and enforcing the Groceries Supply Code of Practice.
- The Adjudicator has tough powers and a range of enforcement actions available to ensure suppliers are treated fairly.
- The Adjudicator is funded by a levy on the largest supermarkets with UK groceries turnover greater than £1bn.

The Groceries Supply Code of Practice

- The Groceries Code applies to the largest supermarkets, with UK groceries turnover greater than £1bn, and governs their relationships with their direct suppliers.
- There are 10 supermarkets covered by the Groceries Code and these 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.
- The Groceries Code was introduced in 2010 by the Competition Commission following the 2009 Competition Commission investigation.
- The Groceries Code obliges the large retailers to deal fairly and lawfully with their suppliers on areas including: unilateral variations to supply agreements; compensation payments for shrinkage/wastage/retailer forecasting errors; allowing suppliers to choose their on suppliers for things such as haulage and packaging.
- The Groceries Code does not cover issues such as: price setting; relationships between indirect suppliers to the supermarkets; food safety and labelling; and the Voluntary Dairy Code or horsemeat mis-labelling.

- Products covered by the Groceries Code:

| Included | Excluded |
|---|---|
| <ul style="list-style-type: none"> • Food (other than that sold for consumption in the store) • Pet food • Drinks (alcoholic and non-alcoholic, other than that sold for consumption in the store) • Cleaning products • Toiletries • Household goods | <ul style="list-style-type: none"> • Petrol • Clothing • DIY products • Financial services • Pharmaceuticals • Newspapers, magazines and books • Greetings cards • CDs, DVDs, videos and audio tapes • Toys • Plants and flowers • Perfumes • Cosmetics • Electrical appliances • Kitchen hardware • Gardening equipment • Tobacco and tobacco products |

Arbitration

- The policy on arbitration is still under development. It is not a requirement that it is included in the statutory guidance and advice on how requests for arbitration will be handled will follow.
- Unlike investigations where the Adjudicator has no ability to provide compensation to suppliers, financial redress for suppliers may be possible through the arbitration process, as well as by direct contractual action in the courts.

Questions and Answers

supporting the consultation and broader work of the Adjudicator

Q: What will success look like?

A: The Adjudicator has stated publicly that the ultimate aim of the GCA is to promote a stronger and more efficient groceries market bringing better value to consumers. This will be achieved through increasing trust between suppliers and retailers by changing their behaviour to follow the Groceries Code.

Q: How are we getting the messages out that the Adjudicator is in place and ready to hear about issues?

A: We are using a number of channels. The main one is the Adjudicator getting out and speaking at events, seminars and conferences to start to build relationships and trust with retailers and suppliers, as well as meeting all Code Compliance Officers. We are also using trade press as well as national and local media and our website will be an important way to keep the sector up to date with the work of the Adjudicator.

Role of the Groceries Code Adjudicator

Q: Why do we need a new regulator?

A: For the Groceries Code to be effective, someone needs to monitor and ensure compliance with it. Recognising the government's aim of limiting regulation and looking for alternative options, the large supermarkets were given an opportunity to create an Adjudicator themselves. The industry was unable to agree a means to self-regulate and so the statutory approach has proved necessary.

Q: There have been very few supplier complaints under GSCOP so why do we need an Adjudicator?

A: The compliance reports do not tell the whole story – people may have been reluctant to come forward with complaints for a variety of reasons. Since the Adjudicator has been appointed there have been a number of issues raised by third parties which don't appear to be in line with the spirit of the Code.

Q: Why has this taken so long to come about given the Competition Commission report was in 2008?

A: This may seem like a long time but a lot has happened since the Competition Commission Report was published. The Competition Commission introduced the Groceries (Supply Chain Practices) Market Investigation Order in 2010 and time was then given to the retailers to fulfil the conditions of the Order and agree to set up a voluntary Adjudicator. Only when the industry was unable to agree a means to self-regulate did the Government move to legislate.

Q: Are the problems with how large supermarkets treat their suppliers just a UK problem?

A: Not at all. In fact the UK is leading the way in improving the groceries market. The EU is considering a voluntary code of practice and we have had interest from other countries including Finland, Norway and Australia.

Groceries Supply Code of Practice

Q: What does the Code cover?

A: The Code obliges the large retailers to deal fairly and lawfully with their suppliers by:

- a) not varying supply agreements retrospectively, except in circumstances beyond the retailer's control which are clearly set out in the supply agreement;
- b) paying suppliers within a reasonable time;
- c) not seeking contributions to marketing costs unless this is provided for in the relevant Supply Agreement;
- d) not seeking compensation for shrinkage;
- e) not seeking payments for wastage except in limited circumstances;
- f) not charging listing fees, except in limited circumstances;
- g) compensating suppliers for forecasting errors;
- h) except in limited circumstances, not to telling suppliers which third party suppliers to use;
- i) not charging position payments unless they relate to a promotion;
- j) not requiring suppliers predominantly to fund promotions;
- k) not over-ordering at promotional prices;
- l) not requiring suppliers to make unjustified payments for consumer complaints; and
- m) de-listing suppliers only for genuine commercial reasons and give reasonable notice of, and opportunity to, discuss delisting with the large retailer's Code Compliance Officer.

Q: Does the Adjudicator only deal with retailers and suppliers in England?

A: No. The remit of the Adjudicator covers Wales, Scotland and Northern Ireland, too. It also extends to direct suppliers to the retailers for their UK business from wherever they are in the world.

Q: What powers does the Adjudicator have to change the Code of Practice?

A: The Adjudicator can recommend, to the Office of Fair Trading, changes to the Order which contains the Code of Practice. This is a narrow duty. Changes to the Code are limited to 'change in circumstances' events prescribed by the Enterprise Act 2002. A 'change in circumstances' would be a new event which was not contained in the Competition Commission report 'The supply of groceries in the UK market investigation' of 2008. An example would be technological change on stock management may allow retailers to change their procedures and pass new and excessive risk onto suppliers.

Q: Have the retailers been taking the Code of Practice seriously?

A: The Adjudicator has met almost all the Code Compliance Officers and they have all responded positively. The retailers have introduced Groceries Code training for their buyers and others involved in dealing with suppliers and have been providing the OFT with annual compliance reports, which they will also share with the Adjudicator from now on.

Q: Are there any signs of change?

A: The Adjudicator has heard of a change in behaviour by the retailers with suppliers seeing positive changes such flexibility over where they source their packaging and reasons for de-listing being set out more clearly and with reasonable notice being given. **The Statutory Guidance**

Q: Why does the consultation document only cover some of the Adjudicator's responsibilities?

A: The Act sets out the requirements for statutory guidance dealing with investigations and enforcement. This must be published by 25th December 2013, being the date 6 months after the Act came into force, so we have focused our efforts on these elements for now.

However, the Adjudicator can provide further guidance on other topics and will aim to do so on, e.g. arbitration and appeals

Investigations

Q: When will the Adjudicator be launching the first investigation?

A: The Adjudicator cannot launch an investigation until the investigations and enforcement guidance is published. However, suppliers and others can provide the Adjudicator with issues and complaints now, together with supporting evidence, which will be taken into account in future actions the Adjudicator may take. In order to launch an investigation, the Adjudicator will need reasonable grounds to suspect that one or more large retailers has broken the Code.

Q: Shouldn't the ability to make complaints be limited to direct suppliers?

A: The ability of others to make complaints was considered carefully in pre-legislative scrutiny and it was successfully argued that trade bodies, for example, may have a better overall picture of practices in a sector which indicate systemic breaches of the Code. It is very unlikely that the Adjudicator would start any investigative action without evidence from direct suppliers. Third party evidence may however lead to an opportunity to obtain the direct evidence required.

Q: How will you ensure that supplier confidentiality is protected?

A: The Adjudicator has a legal duty to protect supplier confidentiality. The Adjudicator has the power to broaden the scope of an investigation to preserve the anonymity of the supplier. There may however be situations in which it is difficult or impractical to continue to investigate without indirectly revealing the identity of a supplier. In these situations, the supplier may be asked to consent to their name being revealed so that the investigation can proceed effectively.

Q: Does the Adjudicator have priorities on investigations may be launched?

A: The Adjudicator must consider complaints raised and therefore there are no priorities at this time. However, there may be endemic widespread issues affecting a number of suppliers which would be a worthwhile place to start if an investigation is called for. The prioritisation principles set out in the draft guidance indicate how the Adjudicator intends to approach choosing what to investigate.

Q: How many investigations do you plan to hold each year?

A: There are no targets on the number of investigations. There is provision for 2-4 per year in the resource plan for the GCA and complaints will be prioritised according to the investigations criteria - impact, strategic importance, risks and benefits and resources – before an investigation is launched.

Penalties

Q: Why is the financial penalty limit proposed in the consultation so low?

A: This may seem low in percentage terms but it represents a considerable financial penalty. Based on recent turnover figures, a penalty of 1% of UK groceries turnover would be in the range of £10m to £500m (based on 2012 annual accounts) depending on the UK turnover of the retailer concerned.

Q: Why is this less than the OFT maximum penalty?

A: There is a maximum penalty limit already set out in law of 10% of global turnover for anti-competitive practices in the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000, as amended. This would be a high limit for breaches of GSCOP with its narrow remit, as opposed to the Competition Act which is intended to cover a much wider range of anti-competitive behaviour, such as worldwide major cartel activity.