



Groceries Code  
Adjudicator

# Groceries Code Adjudicator **Investigation into Tesco plc**

26 January 2016



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On 5 February 2015 I announced an investigation into the compliance of Tesco plc with paragraph 5 of the Groceries Supply Code of Practice which relates to delay in payments and paragraph 12 relating to payment by suppliers in order to secure better positioning or an increase in shelf space. The period under investigation was 25 June 2013 until 5 February 2015. My investigation is now complete. This report sets out the investigation process, my findings and my decision regarding the use of any enforcement measures.

*Christine Tacon.*

**Christine Tacon**

**Groceries Code Adjudicator**

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# Executive Summary

This summary sets out in brief my findings and decisions.

## Findings on paragraph 5 – delay in payments

Paragraph 5 of the Groceries Supply Code of Practice (“the Code”) requires retailers to pay a supplier for groceries delivered in accordance with the contractual terms agreed with the supplier and in any event within a reasonable time after the date of the invoice. The vast majority of the evidence that I received demonstrated that Tesco plc (“Tesco”) paid regular, undisputed invoices in accordance with its contractual terms with suppliers. However I also found extensive evidence that where payments were otherwise than for goods supplied or there was any disagreement over amounts due, this resulted in Tesco deducting or deferring payment of money owed to suppliers for goods supplied. Sometimes this involved significant amounts that were delayed for long periods of time. Even in circumstances where a debt had been acknowledged by Tesco, on occasions the money was not repaid until over 12 months later with some amounts taking up to 24 months to be repaid.

I received evidence of a number of factors that caused delay in payments, including the following:

### Data input errors

I saw numerous instances when data input errors by Tesco into its systems resulted in suppliers being overcharged or underpaid by Tesco. Tesco failed to rectify data input errors within a reasonable time and also failed to pay money owed to suppliers as a result of these errors within a reasonable time. I found that the frequency and scale of the issues resulted in business practices which were unfair.

### Duplicate invoicing

I received evidence of duplicate invoices being issued to suppliers, usually relating to promotional activities. Tesco would sometimes deduct both invoiced amounts from the total sum that it paid to suppliers. I found that there were instances when Tesco failed to rectify these errors and repay the money owed to suppliers within a reasonable time.

### Tesco focus on meeting financial targets

It was clear from the evidence that a major focus of the Tesco commercial team during the investigation period was on hitting budgeted margin targets. A percentage margin target was a key element of many of the Joint Business Plans (“JBP”) which Tesco negotiated with suppliers on a periodic basis. Payments to maintain the margin target were requested from suppliers by Tesco regardless of whether the planned growth had been achieved and regardless of whether Tesco had delivered on its own JBP commitments. I found that the direction being given to Tesco’s buying team as to the status and enforceability of JBP targets was contradictory and unclear.

I received internal Tesco emails which encouraged Tesco staff to seek agreement from suppliers to the deferral of payments due to them in order temporarily to help Tesco margin. I also saw internal Tesco emails suggesting that payments should not be made to suppliers before a certain date in order to avoid underperformance against a forecasted margin. I found that Tesco knowingly delayed paying money to suppliers in order to improve its own financial position.

## Unilateral deductions made in relation to historic claims

I received evidence of unilateral deductions being made by Tesco for historic claims, also referred to as forensic audit claims. Tesco used third party auditors to review its accounts for historic invoicing errors or omissions that would provide evidence that suppliers had previously underpaid Tesco. These were then claimed even when suppliers believed that they had made payments to “close” previous financial periods. I found that unilateral deductions from suppliers were made based on historic claims and these resulted in delay in payments to suppliers. Unilateral deductions for historic claims are unreasonable.

## Unilateral deductions for short deliveries and service level charges

Tesco standard terms and conditions impose charges on suppliers where they fail to deliver products in accordance with orders placed by Tesco. Most suppliers also have service level targets which are based upon the supplier’s performance over a set period of time and which they will be fined for failing to meet. I found evidence of Tesco seeking to enforce these terms where the supplier disputed the charges and some evidence of Tesco unilaterally deducting such charges from the supplier. There were instances of unreasonable delay in resolving disputed charges and paying back money owed to the supplier. I found that the delay by Tesco in resolving these disputed charges and the delay in repaying monies unilaterally deducted was unreasonable.

## Unilateral deductions made for other items or unknown items

I received limited evidence that Tesco charged promotional fixed costs (known as gate fees) for activities which were not carried out, following which repayment of money to suppliers was sometimes significantly delayed. I found that any failure to promptly repay money a supplier has paid for a promotion which did not run was an unreasonable delay in payment.

## Factors that contributed to delay in payments

In my report I set out a number of factors that I found had contributed to delay in payments, particularly Tesco systems and procedures and Tesco practices and behaviours. Suppliers reported poor administration and poor communication within Tesco. I found that Tesco had inadequate processes and systems for correcting data errors or incorrect deductions. Errors and complications in Tesco’s systems resulted in delay in payments which frequently extended to many months. I consider such delay to be unacceptable and unreasonable.

One of the key cultural factors which contributed to delay in payments was the apparent reluctance of some Tesco buyers to pro-actively engage in the resolution of payment disputes. There were times when Tesco did not appear to even attempt to resolve supplier concerns before unilaterally deducting money from suppliers. I found the delay that resulted from a failure by Tesco to fully engage in resolving difficulties to be unfair and unreasonable.

Buyers frequently sought to use money owed to a supplier as leverage in negotiations for future agreements or promotions. I found that Tesco acted unreasonably when seeking to bring the resolution of debts into other commercial negotiations and delaying payment of monies owed until other negotiated terms were agreed.

## Conclusions on delay in payments

I am satisfied that Tesco has acted in breach of paragraph 5 of the Code.

I found that delay in payments was a widespread issue that affected a broad range of Tesco suppliers on a significant scale. The delay in payments had a financial impact on suppliers, was an administrative burden to resolve, detracted from the time available to develop customer-focused business and had a detrimental impact on some suppliers' relationships with Tesco.

## Paragraph 12 – better positioning of goods

The investigation has not revealed any evidence that Tesco has breached paragraph 12 of the Code by directly requiring suppliers to make payments in order to secure better positioning or increased allocation of shelf space. I am not satisfied that Tesco has acted in breach of paragraph 12 of the Code.

However I found evidence arising from the investigation into Tesco of a range of practices on which I would like to consult further. These practices may amount to an indirect requirement for a supplier to make a payment in order to secure better positioning or an increase in shelf space. They include requests for “investment” by Tesco in exchange for benefits to be agreed with the supplier. The benefits sought by suppliers included better positioning or increased shelf space. This may amount to an indirect requirement by Tesco for payment contrary to paragraph 12 of the Code. I also received evidence during my investigation of payment by suppliers of large sums of money in exchange for category captaincy or participation in a range review. The evidence suggests that this may have become common practice in Tesco. I received some evidence that the benefits that suppliers derive from these arrangements may include maintained or improved share of shelf or better positioning.

I am concerned that as a consequence of these behaviours the purpose of the Code may be circumvented. The arrangements appear to have the potential to have an adverse effect on competition through the acceptance of large sums of money from suppliers in exchange for better positioning or increased shelf space. I am mindful that this is a significant issue and not one upon which I am currently in a position to make findings. I will therefore be obtaining further information and undertaking a formal consultation into these issues following publication of this report. I will then reach a position on whether or not these practices are acceptable.

## Tesco engagement with the Code

Tesco has informed me of a number of changes it is making to improve its Code compliance programme, including improvements to its handling of payment disputes with suppliers, the introduction of a Supplier Helpline and improved internal training and monitoring. The overwhelming majority of the suppliers I spoke to during my investigation told me that their relationships with Tesco were more positive today compared to during the period under investigation. Suppliers spoke of improvements in the way issues were handled by Tesco, a more open and collaborative approach and more attention being paid to the customer.



## Enforcement measures

The enforcement powers available at the conclusion of my investigation were to make recommendations or require information to be published. I had no power to impose a financial penalty because the Order granting me this power only applies to breaches of the Code occurring on or after 6 April 2015.

I consider Tesco's breach of paragraph 5 of the Code to be a serious breach due to the varying and widespread nature of the delay in payments. I have decided that recommendations are a proportionate and effective measure to reduce the likelihood of repetition of non-compliance with paragraph 5 by Tesco. I also believe that the implementation of these recommendations will provide greater certainty to suppliers that they will be paid on time and that disputes and errors will be resolved promptly. My recommendations are as follows:

**Recommendation 1: Money owed to suppliers for goods supplied must be paid in accordance with the terms for payment agreed between Tesco and the supplier.**

**Recommendation 2: Tesco must not make unilateral deductions.**

**Recommendation 3: Data input errors identified by suppliers must be resolved promptly.**

**Recommendation 4: Tesco must provide transparency and clarity in its dealings with suppliers.**

**Recommendation 5: Tesco finance teams and buyers must be trained in the findings from this investigation.**

I will now be working with Tesco on the implementation of my recommendations. I require Tesco to provide a detailed implementation plan within four weeks of the publication of this report setting out how it will comply with my recommendations. Tesco is then required to respond to the recommendations on a quarterly basis and provide specific information to me as part of this response, in order for me to monitor its compliance with my recommendations.

# Introduction

## 1. The Groceries Code Adjudicator and my role as GCA

- 1.1 The office of the Groceries Code Adjudicator (“GCA”) was established by the Groceries Code Adjudicator Act 2013 (“the Act”). I was appointed as GCA designate on 21 January 2013 and formally took office when the Act came into force on 25 June 2013. My role is to enforce the Groceries Supply Code of Practice (“the Code”) and to encourage and monitor compliance with it. The Code is annexed to this report as Annex A. The purpose of the Code is to ensure that the UK’s largest supermarkets treat their direct suppliers fairly. The Code is set out in Schedule 1 to the Groceries (Supply Chain Practices) Market Investigation Order 2009 (“the Order”). The Code was developed from the Supermarket Code of Practice, which was initially introduced as a non-statutory code in 2002.
- 1.2 The Code applies to all retailers with UK annual groceries turnover exceeding £1 billion that are designated in the Order. The Code currently applies to 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, and Waitrose Limited (“the Retailers”). The Code applies to the Retailers’ dealings with their direct groceries suppliers, whether based in the UK or elsewhere, in relation to the supply of groceries for resale in the UK.

## 2. My legislative powers and statutory guidance in relation to investigations

- 2.1 The Act provides me with the power to undertake investigations into the Retailers where I have reasonable grounds to suspect that a retailer has broken the Code. In December 2013 I published my “Statutory guidance on how the Groceries Code Adjudicator will carry out investigations and enforcement functions” (“the Guidance”). This explains the process I will follow both when deciding whether to launch an investigation and during the course of an investigation. The Guidance is annexed to this report as Annex B.
- 2.2 The Guidance also sets out how I will apply the enforcement powers given to me under the Act. The enforcement powers available to me are to make recommendations; to require information to be published and to impose financial penalties. The power to issue a financial penalty was brought into effect by the Groceries Code Adjudicator (Permitted Maximum Financial Penalty) Order 2015 (“the Financial Penalties Order”). This came into force on 6 April 2015 and provides for a maximum level of fine of 1% of the relevant retailer’s annual UK turnover. The power to impose financial penalties only applies to breaches occurring on or after 6 April 2015 and therefore does not apply to the period covered by this investigation.

### **3. My investigation and report into Tesco plc**

- 3.1 On 5 February 2015 I announced that I would be commencing an investigation into Tesco plc (“Tesco”) in relation to practices which came to light during Tesco’s own enquiries associated with the profit over-statement it announced in September 2014. I have now concluded my investigation. This report sets out the investigation process I undertook, the findings from the investigation and my decision in respect of any enforcement action to be taken.
- 3.2 Under the Act I may decide not to make public the name of the retailer or retailers under investigation. In this instance I was required publicly to name Tesco at the outset in order to make clear the connection between the retailer’s own trading announcements and the questions of Code compliance which concerned me. It was also necessary to name the retailer to enable suppliers and third parties to decide whether or not they held information which might be relevant to my investigation.
- 3.3 I have not made any substantive public statements during the course of the investigation. The only public statement I have made was to confirm when the report was likely to be published. This statement was made in order to signal a slightly longer timeframe for the review than I had initially envisaged in the Notice of Investigation. The Notice of Investigation was published when I announced my investigation and is annexed to this report as Annex C.
- 3.4 As Tesco is named in the report, it has been given a reasonable opportunity to comment on a draft of this report prior to publication. I have also liaised with other relevant agencies prior to publication.

# The investigation process

## 4. Tesco trading update on profit mis-statement and my early communications with Tesco

- 4.1 On 22 September 2014, Tesco released a trading update statement stating that it had:
- “identified an overstatement of its expected profit for the half-year, principally due to the accelerated recognition of commercial income and delayed accrual of costs...the Board believes that the guidance issued on 29 August 2014 for the Group profits for the six months to 23 August 2014 was overstated by an estimated £250m.”*
- 4.2 Tesco also announced that Deloitte had been commissioned to undertake an independent and comprehensive review of the issues contributing to that mis-statement.
- 4.3 Shortly after making this announcement Tesco contacted my office in order to brief me on actions it was taking as a result of the statement. I requested that the issue of compliance with the Code be included in the Deloitte review, to which Tesco agreed. I briefed Deloitte about the Code and the issues covered by the Code. Following the conclusion of the Deloitte review, Tesco provided me, on a confidential basis, with a copy of the report prepared by Deloitte.
- 4.4 On 5 November 2014 I requested further information from Tesco to supplement the information contained in the Deloitte report. Tesco agreed to undertake an internal review specifically for evidence of practices which might be in breach of the Code. The findings from this review were provided to me in a report received on 9 January 2015 (“the Tesco Report”). A meeting between me and Tesco then took place to discuss the Tesco Report. The Tesco Report had identified concerns about likely breaches of certain provisions of the Code and “*very clear indications*” of breaches in relation to two areas of the Code, namely: paragraph 5 relating to delay in payments and paragraph 2 relating to fair and lawful dealing.
- 4.5 During the course of these events the Financial Conduct Authority and Serious Fraud Office both announced separate investigations into Tesco. I have engaged with these authorities in relation to their respective investigations only to the extent necessary for my work, and we have each kept our respective information sets and activities independent of one another.
- 4.6 The Serious Fraud Office is conducting its own investigation. My findings, as set out in this report, represent the conclusions I have reached following my investigation and on the basis of evidence I have gathered. My findings are made in the context of the specific regulatory requirements of the Act. I have made no findings as to whether a criminal offence has been committed. The Serious Fraud Office’s investigation may result in the institution of criminal proceedings.

## 5. Other information available to me prior to launching my investigation

5.1 When deciding whether to launch an investigation into Tesco, in addition to the information received from Tesco, I also had available to me information that I had received from the sector as part of my routine engagement with the Retailers and suppliers. This included information from suppliers about their concerns regarding potential Code breaches by Tesco as well as information available from my 2014 survey of suppliers. This annual GCA-commissioned YouGov survey (“the Survey”) is used as a tool to assist me in identifying the areas that I should prioritise for my work.

## 6. The decision to launch an investigation

6.1 In order to launch an investigation I must have reasonable grounds to suspect that a retailer has broken the Code. In reaching a decision, I must carefully consider the Guidance.

6.2 The Act does not limit the potential sources of information that I may take into account when considering whether or not to launch an investigation. The Guidance states that in deciding whether I have reasonable grounds to suspect that a retailer has broken the Code, I may take into account evidence provided by direct or indirect suppliers, retailers, third parties, whistle-blowers or information in the public domain. I considered all the information that had been provided to me in deciding whether to launch an investigation into Tesco.

6.3 I also considered the four prioritisation principles set out in the Guidance, which direct me to prioritise issues and target my resources effectively and proportionately. These prioritisation principles assist me in deciding whether to initiate, and subsequently whether to continue, an investigation. They are as follows:

<b>Impact</b>	The greater the impact of the practice raised, the more likely it is that the GCA will take action.
<b>Strategic importance</b>	Whether the proposed action would further the GCA’s statutory purposes.
<b>Risks and benefits</b>	The likelihood of achieving an outcome that stops breaches of the Code and prevents further or future breaches and ensures Code compliance.
<b>Resources</b>	A decision to take action will be based on whether the GCA is satisfied the proposed action is proportionate.

6.4 In prioritising the issues to be investigated, I considered the strength of evidence in relation to potential breaches, the scale of potential breaches and the likely effect of the potential breaches on suppliers. I also took into account the extent to which a potential breach related to an issue on which I had engaged with the Retailers previously.

- 6.5 My collaborative approach to working means that I will normally raise an issue with a retailer before launching an investigation. This is articulated most clearly in the escalation process set out in my 2014 annual report which sets out the three stages that I will normally follow in dealing with any issues of potential Code breaches that come to my attention:

### **Stage 1 - The GCA will make retailers aware of issues reported by suppliers**

The GCA will consider whether the issue raised appears to be more than an isolated occurrence. If so, it will be raised with retailers' Code Compliance Officers (CCOs) for their own action. In some circumstances if they are judged to have significant impact the GCA will also raise single incidence issues with CCOs so long as confidentiality can be maintained.

### **Stage 2 - The GCA will request that CCOs investigate the issue and report back to the GCA**

The GCA will raise the issue with the relevant CCO or all CCOs, either if the issue is widespread or to protect the confidentiality of the supplier(s) experiencing the issue. The CCO will be expected to look into whether a breach has occurred in their organisation. Depending on what is found by the CCO, the GCA may issue advice clarifying or interpreting the relevant provisions of the Code for the retailer and others to follow. Where a retailer accepts a Code breach has taken place the GCA may publish a case study on the GCA website.

### **Stage 3 - The GCA may take formal action if the practice continues**

If the GCA continues to hear of suppliers experiencing the same issue then the outcome may be to publish more formal guidance and/or launch an investigation.

- 6.6 I took all of these factors into account when deciding whether to launch an investigation into Tesco. This included the information that Tesco had provided to me prior to my decision and its statement to me that it had found "*very clear indications*" that it had breached the Code. Tesco's statements were not determinative of whether the Code had been breached but were a factor that contributed to my decision to launch an investigation.
- 6.7 Based on the information that had been provided to me, I had a reasonable suspicion that Tesco had engaged in conduct in breach of paragraphs 5 and 12 of the Code, interpreted together with paragraph 2; the overarching fair-dealing provision of the Code. Having then considered this against my prioritisation principles, I concluded that it was proportionate to investigate Tesco conduct in relation to these paragraphs. For each of these paragraphs I had evidence to suggest that the suspected breaches were not isolated incidents, that they involved a number of suppliers and that, in respect of potential breaches of paragraph 5, they related to significant sums of money. Further detail in respect of each paragraph is set out below.

# Parameters of my investigation

## 7. Paragraph 5 of the Code

- 7.1 Paragraph 5 of the Code states that “A Retailer must pay a Supplier for Groceries delivered to that Retailer’s specification in accordance with the relevant Supply Agreement, and, in any case, within a reasonable time after the date of the Supplier’s invoice”.
- 7.2 The Tesco Report stated that Tesco had identified “very clear indications” that breaches of the Code had occurred in relation to paragraph 5. The information available suggested that the practices of concern were repeated actions. The totality of the information I considered referred to a range of behaviours that may have resulted in delay in payments to suppliers. On this basis, I had reasonable grounds to suspect that Tesco had breached paragraph 5 of the Code.
- 7.3 Delay in payments by retailers to suppliers has a significant history of being recognised as an issue by competition authorities. A Competition Commission report published in 2000 noted that retailers delaying payments to suppliers beyond contractual payment periods or by more than 30 days from the date of invoices may adversely affect the competitiveness of some suppliers. Following the 2000 report a provision requiring retailers to pay suppliers within a reasonable time was included in the 2002 voluntary Supermarket Code of Practice.
- 7.4 The Competition Commission carried out a further groceries market investigation in 2008. Its 2008 report said that one-third to one-half of suppliers surveyed had experienced practices such as payment delays.<sup>2</sup> The report noted that unexpected delay beyond invoice deadlines may impose a cost on suppliers that would not have been factored into the negotiated price, which could accordingly reduce suppliers’ incentive to innovate.<sup>3</sup> The resultant provision included in the Code stipulated that payment must be made in accordance with pre-agreed terms and in any event within a reasonable time.
- 7.5 Since I have taken office, suppliers and trade bodies have consistently raised a range of specific issues on how delay in payments affects suppliers in their day-to-day business with the Retailers. Delay has resulted from practices including deductions for alleged short deliveries (resulting from a practice commonly referred to as drop-and-drive), duplicate invoicing, deductions for unknown or unagreed items, deductions for current and historic promotion fees and delay in paying entire invoices where only part of an invoice is disputed. The Survey has also underlined the importance of the issue to suppliers. In 2014 35% of direct suppliers responding to the Survey said they had

<sup>1</sup> Competition Commission (2000) Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom; Volume 1: Summary and Conclusions. London, p.122.

<sup>2</sup> Competition Commission (2008) The supply of groceries in the UK market investigation. London, p.168.

<sup>3</sup> Competition Commission (2008) The supply of groceries in the UK market investigation; Appendix 9.8. London, p.24.

experienced delay in payments from the Retailers. For these reasons, I chose delay in payments as a “Top 5” issue and have raised it consistently as part of my normal dealings with all the Retailers since January 2014.<sup>4</sup>

- 7.6 As part of my ongoing engagement on these issues, I have informed the sector that I consider paragraph 5 of the Code to cover situations where a retailer does not adhere to payment terms because it does not pay a supplier when payment is due or makes only a part payment at that time. It can also apply to situations in which a retailer makes deductions from a supplier invoice or trading account without the agreement of the supplier and not in accordance with the terms of supply. I have concluded that any money that I deem to be unfairly withheld from a supplier without its agreement is a unilateral deduction. Agreement from a supplier may be explicit, or may be implicit where the retailer has given the supplier a reasonable period of notice of the proposed deduction and the supplier has not objected to it. I consider a reasonable period of notice to be 30 days. I have used the term “unilateral deduction” throughout this report. I consider any unilateral deduction to be a delay in payment.
- 7.7 I have previously stated that paragraph 5 may cover situations in which payment in relation to the whole amount invoiced is withheld when only a part of that invoice is disputed. I have also said that paragraph 5 may cover automatic deductions made as a result of third party and internal audit processes or delivery discrepancies. I have stated that a retailer’s delay in reverting to normal prices after promotional activity may also constitute a delay in payment. Further details on these issues are included in my annual report and accounts in 2014, as well as in notes of meetings with Code Compliance Officers (“CCOs”), published on my website.
- 7.8 I have previously asked each of the Retailers, including Tesco, for an explanation of its practices in this area and I have engaged in discussions with them about my interpretation of the Code in respect of delay. I escalated the issue with the Retailers and worked with them to understand how different circumstances arise in which payments might be delayed. For these reasons, on receipt of the Tesco Report identifying “*very clear indications*” of a breach in relation to delay in payments, I considered it appropriate and proportionate to investigate Tesco compliance with paragraph 5 of the Code.
- 7.9 From the information available to me, I identified examples of the behaviours that I would investigate under paragraph 5 for the purposes of the Notice of Investigation. I included these in the Notice of Investigation in order that the Retailers and suppliers, in particular, had an indication of the issues in which I was most interested.
- 7.10 The examples I identified were delay in payments associated with:
- Short deliveries, including imposition of penalties;
  - Consumer complaints where the amounts were not agreed;

<sup>4</sup> The Top 5 issues are issues that have come to my attention during the course of my work. Following the prioritisation principles and as part of my collaborative work, I identify five key areas where suppliers believe that the Retailers may have breached the Code. I then focus on these during my regular discussions with the Retailers. I keep the Top 5 issues under review and these change according to changes in supplier concerns and retailer improvements.



- Invoicing discrepancies such as duplicate invoicing where two invoices were issued for the same product;
- Deductions for unknown or un-agreed items;
- Deductions for promotional fixed costs (gate fees) that were incorrect; and
- Deductions in relation to historic promotions which had not been agreed.

## 8. Paragraph 12 of the Code

- 8.1 Paragraph 12 of the Code states that “*No Payments for better positioning of goods unless in relation to Promotions: A Retailer must not directly or indirectly Require<sup>5</sup> a Supplier to make any Payment in order to secure better positioning or an increase in the allocation of shelf space for any Grocery products of that Supplier within a store unless such Payment is made in relation to a Promotion.*” I consider any payment made in order to avoid a detrimental change of positioning or reduction in shelf space to equate to a payment in order to secure better positioning or increased shelf space.
- 8.2 The issue of payment for better positioning was recognised by the Competition Commission in its 2000 supermarket inquiry. It found that “*the practice of requiring or requesting suppliers to make payments for better positioning of products within their stores.... adversely affects the competitiveness of some of their suppliers and distorts competition in the supply of groceries between suppliers*”<sup>6</sup> because “*the multiple engaging in the practice does not necessarily select the best, or most efficiently produced product, or that preferred by consumers, but to some extent is influenced by whoever is best able to make the payment requested.*”<sup>7</sup> The report discussed the distinction between a requirement and a request. It stated that “*where the request came from a main party with buyer power, it amounted to the same thing as a requirement.*”<sup>8</sup> These conclusions, set out in the analysis underpinning the 2000 report, resulted in the inclusion of the provision on better positioning in the 2002 Supermarket Code of Practice. The 2008 Competition Commission report did not recommend any changes to that provision and it was subsequently included in the Code.
- 8.3 The Tesco Report stated that it had not been possible to determine whether there had been a breach of paragraph 12 of the Code. Possible breaches of paragraph 12 were identified in relation to more than one supplier. On the basis of the information available to me, I had reasonable grounds to suspect that Tesco had breached paragraph 12 of the Code relating to better positioning of goods.

<sup>5</sup> See Section 1 of the Code which states that “a Retailer will ‘Require’ particular actions on the part of a Supplier if the relevant Supplier does not agree, whether or not in response to a request or suggestion from the Retailer, to undertake an action in response to ordinary commercial pressures. Where those ordinary commercial pressures are partly or wholly attributable to the Retailer, they will only be deemed to be ordinary commercial pressures where they do not constitute or involve duress (including economic duress), are objectively justifiable and transparent and result in similar cases being treated alike. The burden of proof will fall on the Retailer to demonstrate that, on the balance of probabilities, an action was not Required by the Retailer.”

<sup>6</sup> Competition Commission (2000) Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom; Volume 1: Summary and Conclusions. London, p.103.

<sup>7</sup> Competition Commission (2000) Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom; Volume 1: Summary and Conclusions. London, p.102.

<sup>8</sup> Competition Commission (2000) Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom; Volume 1: Summary and Conclusions. London, p.6.

- 8.4 I have previously discussed compliance with paragraph 12 of the Code with Tesco. In December 2013 Tesco had been found to have engaged in behaviour inconsistent with paragraph 12. Tesco admitted to a breach of the Code. As a result of this, in March 2014 a Code clarification case study was published on my website to assist the sector in understanding the practice that had been inconsistent with the Code. The case study explained that to request payment for better positioning, if the consequences to a supplier of declining the request are, or are understood by that supplier to be, comparatively worse positioning, is contrary to the spirit if not the letter of the Code, and is effectively a requirement.
- 8.5 Considering this information alongside the possible breaches identified in the Tesco Report, I determined that it was appropriate and proportionate to commence an investigation into Tesco compliance with paragraph 12.

## 9. Paragraph 2 of the Code

- 9.1 Paragraph 2 of the Code states that “*A Retailer must at all times deal with its Suppliers fairly and lawfully. Fair and lawful dealing will be understood as requiring the Retailer to conduct its trading relationships with suppliers in good faith, without distinction between formal or informal arrangements, without duress and in recognition of the suppliers’ need for certainty as regards the risks and costs of trading, particularly in relation to production, delivery and payment issues.*”
- 9.2 The 2008 Competition Commission report recommended that a principle of fair dealing be included in the Code as “*an important safeguard against the transfer of excessive risk and un-expected cost from grocery retailers to their suppliers*”.<sup>9</sup> Paragraph 2 of the Code adds an overarching principle of fairness to all of the other, practice-specific provisions of the Code. The principle stems from recognition of the inequality of bargaining power that sometimes exists between the Retailers and their suppliers. The thinking behind the provision is further explained in the Explanatory Note to the Code, which states that the provision “*will add a useful context within which the GSCOP should be interpreted. The fair dealing provision emphasises the need for certainty on the part of suppliers regarding the risks and costs of trading*”.
- 9.3 The Tesco Report identified “*very clear indications*” that Tesco had breached paragraph 2 in relation to paragraph 5. Although I do not make findings on the basis of paragraph 2 in isolation, this was a clear signal to me that there may have been issues of fairness towards suppliers to be considered as part of my investigation. My investigation into Tesco conduct in relation to paragraphs 5 and 12 has incorporated paragraph 2 to the extent that it is relevant to interpreting these paragraphs of the Code. In reaching my findings on whether there have been breaches of paragraphs 5 and 12, I have taken into account the overarching requirement of fairness which paragraph 2 imposes on the Retailers in their dealings with their direct suppliers. References to issues of fairness in this report are made in light of my consideration of paragraph 2.

<sup>9</sup> Competition Commission (2008) The supply of groceries in the UK market investigation. London, p.238.

## 10. Other paragraphs of the Code

- 10.1 Tesco provided me with some details of practices falling under other paragraphs of the Code in relation to which Tesco stated that it had not been possible to determine whether a breach had occurred. Having considered each of these practices against the statutory threshold for commencing an investigation into an issue, and having applied my prioritisation principles, I decided that it was not proportionate to investigate Tesco conduct in relation to these provisions of the Code.

## 11. Period under investigation

- 11.1 I chose to investigate Tesco practices between 25 June 2013, when the office of the GCA was established, and 5 February 2015, the date of the Notice of Investigation. In deciding upon this period of time I sought to ensure that a sufficient time period was covered so that I could gain an accurate understanding of whether or not Tesco had been acting in breach of the Code, and, if so, in what ways. I also wanted to see evidence of Tesco behaviour before and after the profit mis-statement.
- 11.2 For the purposes of my findings I have not considered any information that related to Tesco practices other than during the period covered by the investigation. I have received information about Tesco conduct which post-dates the period I investigated. I have recorded this and have been mindful of the changes that have been made when determining what enforcement measures are appropriate to impose.

## 12. Information I received during the course of the investigation which was outside its scope

- 12.1 Information I have received during the course of my investigation that does not fall within the scope of the investigation has not been considered for the purposes of my findings. This includes information relating to other provisions of the Code, information relating to events taking place outside the relevant time period and information relating to other Retailers. None of this information has caused me to consider that it is necessary or appropriate to widen the scope of my investigation. Consistent with my published approach, I am retaining this information for consideration as part of my usual engagement with the Retailers and may feed some or all of this into my collaborative work.

## 13. My power to issue statutory requests for material relevant to my investigation

- 13.1 The Act provides me with the power to compel persons to provide documents or information to me for the purposes of an investigation. This includes a power to require information to be provided orally. Requests may be made of any entity or person, including the Retailers, suppliers, customers and third parties. An intentional failure to comply with the request without reasonable excuse is a criminal offence.

- 13.2 I have exercised these powers when seeking disclosure of material during the course of my investigation. Statutory requests were issued to Tesco and to a number of suppliers to obtain information and material. I have sought to keep requests for information proportionate by requiring disclosure of sufficient information to conduct a thorough investigation whilst seeking to minimise the burden on the recipient of my request. I am extremely grateful for the co-operation of and assistance provided by suppliers in preparing material for disclosure to me. Further details about these requests are set out later in the report.

## **14. Confidentiality**

- 14.1 I have a statutory duty to keep certain information confidential. This includes any information that I think might cause someone to think that a particular person has complained about a retailer failing to comply with the Code.
- 14.2 I take this duty very seriously. I have sought to protect the identity of any supplier who has provided me with information during the course of this investigation. No suppliers are named in this report or described in a way that might enable them to be identified.

## **15. Notice of Investigation**

- 15.1 I took the decision to launch an investigation into Tesco compliance with paragraphs 5, 12 and 2 of the Code on 5 February 2015. Dave Lewis, Chief Executive of Tesco, was notified accordingly. The Notice of Investigation was published on the GCA website. As part of the Notice of Investigation, I made a public call for any evidence relevant to my determination of whether Tesco had breached paragraphs 5 and 12 of the Code. The purpose of the call for evidence was to give any organisation or individual the opportunity to voluntarily provide me with information relevant to the investigation. Material which I received in response to the public call for evidence assisted me in deciding what statutory requests I needed to make and ultimately, whether or not Tesco had breached the Code.

## **16. Statutory requests made to Tesco**

- 16.1 I made three statutory requests to Tesco for information and material during the course of my investigation.
- 16.2 The first of these was made on 16 February 2015. In response Tesco provided the material compiled as part of the work undertaken by Deloitte. This had been categorised according to supplier scenarios, general background documentation, and other documents referred to as the “full data set”.
- 16.3 A second request was issued on 20 May 2015, which sought a number of specific documents. These were provided by Tesco. It was clear to me following receipt of Tesco’s response to the second request that Tesco held further relevant information. I therefore issued a third request on 24 July 2015. I asked Tesco to respond to specific questions in relation to particular supplier scenarios and I also asked for disclosure of documentation which evidenced Tesco’s Code compliance and related corporate policies. The final part of Tesco’s response to this request was submitted on 22 September 2015.

## 17. Statutory requests made to suppliers

- 17.1 I also issued statutory requests to suppliers whom I considered may have relevant information that would assist my investigation. In some cases representatives from the supplier attended a meeting with me to discuss the information held by the supplier and its experiences with Tesco during the relevant period. I sought this information to obtain a rounded understanding of Tesco behaviour in relation to paragraphs 5, 12 and 2 of the Code. I chose the suppliers to include different sized suppliers, from different parts of the UK, and a range of product categories covered by the Code. I also had contact with an overseas supplier about its experience of working as a direct supplier to Tesco in the UK. The suppliers included both those who supplied own-brand and branded products to Tesco.
- 17.2 In making these statutory requests I have been aware that a proportion of the subset of suppliers with whom I have been engaging were pre-selected as a consequence of Deloitte's review. This was not a random selection of suppliers but nevertheless I am satisfied that this subset represented a broad cross section of companies that supply groceries to Tesco. These suppliers provided me with a significant quantity of evidential material in response to the requests. Suppliers were asked to provide me with narrative summaries to explain the context of any documentation they provided.
- 17.3 The meetings that took place with suppliers were of great assistance to me in understanding and expanding upon the information provided in writing. They also gave me a much better understanding of each of the suppliers' relationships with Tesco. I had the opportunity to review the written material from each supplier before each meeting. On occasions I asked suppliers to provide additional information after the meeting where it had become clear that they had further information that would assist the investigation. At all times I assured suppliers of my confidentiality obligations in relation to all the material they provided to me.

# Tesco background information

## 18. Underlying trading performance

- 18.1 In undertaking my investigation I was mindful of the information that had been published about Tesco performance as a business during the relevant period. This provided important context to my findings and I have summarised the significant points below.
- 18.2 In early 2013, many supermarkets including Tesco faced intense criticism about the horsemeat scandal. In April 2013, Tesco conceded that the scandal had caused a “*small but discernible*” impact on its sales, as it announced its first fall in profits for 20 years. Tesco further attributed this fall in profits to its decision to sell 199 Fresh & Easy stores in the US in April 2013; as well as announcing a write-down of £804 million in the value of its UK property portfolio. By October 2013, Tesco profits had dropped by 23.5%, difficulties it put down to the challenging retail environment. Profits continued to fall into the third quarter, with Tesco announcing a 1.5% drop in like-for-like UK sales. Tesco again attributed this to the financial climate and pressures on household finances.
- 18.3 It is well publicised that 2014 was also a challenging year for Tesco. Following a disappointing 2013/2014 Christmas period, with like-for-like sales down 2.4%, Tesco announced that at least 100 of its largest stores would be scaled down. Store revamps and price cuts followed in February 2014, with a fall in Tesco profit margin. Despite these attempts to improve Tesco performance, by March 2014 Tesco market share had fallen to its lowest level since January 2005. A profit warning followed shortly after, with Tesco reporting a 6% fall in full-year group trading profits and a cut announced in its credit rating.
- 18.4 This increasing pressure and a further profit warning led to a decision by the Tesco board in July 2014 to replace the then Chief Executive, Philip Clarke, with Dave Lewis, who remains Chief Executive today. The profit warning led to further cuts to Tesco’s credit rating and a decline in Tesco stock market value. By the end of August 2014, shares in Tesco had reached an 11 year low, after the company cut its full-year profit forecast from £2.8 billion to £2.4 billion. Shortly afterward, Tesco made an announcement in September 2014 that its profits had been over-stated by £250 million.
- 18.5 The period under investigation was clearly a challenging time for Tesco. It has been evident from the information that I have seen during the course of my investigation that it was a stressful and pressurised period for employees throughout the organisation.

# Findings from my investigation

19. In reaching my findings I have carefully considered all the information provided by Tesco and Tesco suppliers. I have analysed the material that is relevant to paragraphs 5, 12 and 2. In this section of the report I set out the findings that I have made in respect of paragraphs 5 and 12 and the reasons for these findings. In accordance with the Guidance, I have also used the investigation as an opportunity to clarify the Code where I consider this to be necessary.

# Findings of fact on delay in payments

What the Code says:

## 5. No delay in Payments

A Retailer must pay a Supplier for Groceries delivered to that Retailer's specification in accordance with the relevant Supply Agreement, and, in any case, within a reasonable time after the date of the Supplier's invoice.

## 2. Fair and Lawful dealing

A Retailer must at all times deal with its Suppliers fairly and lawfully. Fair and lawful dealing will be understood as requiring the Retailer to conduct its trading relationships with suppliers in good faith, without distinction between formal or informal arrangements, without duress and in recognition of the suppliers' need for certainty as regards the risks and costs of trading, particularly in relation to production, delivery and payment issues.

## 20. Principal findings on delay in payments

- 20.1 The vast majority of the evidence I received demonstrated that Tesco paid regular, undisputed invoices in accordance with the time period prescribed by its contractual terms with suppliers. It was referred to by a number of suppliers as a "good payer".
- 20.2 However there was also extensive evidence that where payments were otherwise than for goods supplied or there was any disagreement over amounts due, this resulted in Tesco deducting or deferring payment of money that was owed to suppliers for goods supplied. Sometimes this involved significant amounts that were delayed for long periods of time. Even where a debt had been acknowledged by Tesco, the money was sometimes not repaid for over 12 months. I received evidence that some repayments were not made for nearly 24 months and on other occasions the supplier gave up pursuing the amount owed.
- 20.3 I have received evidence of a number of different factors which caused delay in payments by Tesco. I have set these out in this section of the report. I have also identified a number of issues that contributed to the situation and further extended the time taken to resolve the payments that were due to suppliers. These are also set out below.

## 21. Introduction to the causes of delay

- 21.1 I acknowledge that Tesco will, as a business which sells fast moving consumer goods and operates on a global scale, have a complex set of systems and practices in place. In undertaking my investigation I am also aware that mistakes occur during the course of



normal business and individuals will sometimes make errors. However the extent and range of the delay in payments that I have seen go beyond what I consider to be an acceptable level of errors and result in business practices which are unfair.

- 21.2 Many of the instances of delay that I found originated from Tesco deducting money from suppliers. It is evident that Tesco invoiced some suppliers for arrangements including promotional feature space, also known as gate fees, margin payments and additional investment. I understand from suppliers that where payment to Tesco for invoiced amounts was agreed, Tesco usually had the right to set off the amounts from suppliers' trading accounts against payments otherwise due for goods delivered. It is apparent that this arrangement also enabled Tesco to unilaterally deduct money from suppliers' accounts where invoiced amounts were not agreed. The following sections include reference to some of the occasions on which I identified unilateral deductions being made by Tesco.

## 22. Data input errors

- 22.1 I have received evidence of numerous instances when data input errors by Tesco into its systems resulted in suppliers being overcharged or underpaid by Tesco. This included instances when Tesco failed accurately to enter product prices on its systems or correctly to record price changes (such as discounted prices or cost price increases) agreed with suppliers. I have also seen instances when Tesco overstated the promotional funding to be paid by suppliers.
- 22.2 When suppliers identified discrepancies, and sometimes even when Tesco acknowledged that the systems held incorrect data, it often took an unreasonable amount of time to correct the errors. This occurred even where the supplier was making regular requests for an error to be corrected. During this time the incorrect price continued to form the basis on which Tesco invoiced or charged the suppliers, compounding the original error. For some suppliers the scale of their day-to-day business with Tesco meant that relatively small pricing errors for individual products built up to large discrepancies within a short period of time. I heard from some suppliers that Tesco took 12 months or more to repay money owed as a result of pricing errors.
- 22.3 Examples of delay in payments arising from data input errors were:
- (a) A multi-million pound sum owed to a supplier as a result of price changes being incorrectly applied over a long period. This was paid back by Tesco more than two years after the incorrect charging had begun;
  - (b) A multi-million pound sum owed to a supplier as a result of issues including being invoiced by Tesco for products it did not supply at all. This amount was paid back to the supplier around two years after the error;
  - (c) £200,000 owed to a supplier due to an agreed discount mechanism being recorded incorrectly. This amount was not repaid by Tesco for nearly 11 months; and
  - (d) Over £250,000 owed to a supplier due to pricing errors which took place over a five month period. This was paid to the supplier by Tesco nine months after the errors were corrected.

22.4 Suppliers accepted that on occasions their own error could have been the cause of a pricing mis-match. However this did not explain or justify the time that was then often taken for the errors to be rectified and the correct money to be paid to the supplier.

22.5 I have concluded that Tesco failed to rectify data input errors within a reasonable time and also failed to pay money owed to suppliers as a result of these errors within a reasonable time.

**22.6 I find that the frequency and scale of the issues identified go beyond what I consider to be an acceptable level of errors and resulted in business practices which were unfair.**

### 23. Duplicate invoicing

23.1 During the investigation I received evidence of duplicate invoices being issued to suppliers, some of which were for significant amounts. The duplicate invoices were generally in respect of promotional activity. Tesco would sometimes deduct both invoiced amounts from the total sum that it paid to suppliers.

23.2 I saw many examples of large amounts owed to suppliers, of which money owed for duplicate invoices formed part of the total, including:

(a) nearly £2 million which took over 12 months to be repaid;

(b) over £400,000 which took over five months to be repaid; and

(c) another sum of over £100,000 which took around 12 months to be repaid.

23.3 In addition to these specific examples, suppliers also told me of other instances when it took Tesco many months or even years to repay a duplicate invoice. Repayment was probably complicated by the duplicate invoices often being issued together with other incorrect invoices or unilateral deductions which may have been less straightforward to resolve.

23.4 Issues relating to duplicate invoicing appeared to be limited to suppliers of branded products. I did not find any evidence of Tesco issuing duplicate invoices to suppliers of its own-branded products. Since Tesco is less likely to require own-brand suppliers to pay for promotional activity there are fewer occasions when such invoices (and therefore errors arising from them) might be raised.

**23.5 I find that there were instances when Tesco issued duplicate invoices to suppliers and failed to rectify these errors and pay the money owed to suppliers as a result of these errors within a reasonable time.**

## 24. Tesco focus on meeting financial targets – percentage margin targets

- 24.1 It was clear from the evidence that a major focus of the Tesco commercial team during this period was on hitting budgeted margin targets. A percentage margin target was one of the key elements of many of the Joint Business Plans (“JBP”) which were negotiated with suppliers on a periodic basis. The status within Tesco of a JBP seemed to lack clarity and it was also not clear to many suppliers. I saw Tesco internal training documents describing the targets as “*aspirational*”. One document from November 2013 directed buyers that there should be no deductions made at the end of the year “*because it’s in the JBP*”. Another training document from January 2014 stated that “*Where we have agreed a margin target with a supplier, this is not a guarantee for securing income...Joint Business Plans in their current format are not legally binding...the targets included in JBPs are aspirational. We would not expect our suppliers to sue us if we failed to reach our sales targets and we should not, therefore, use the JBP as a guarantee of income*”.
- 24.2 In the January 2014 internal training material, Tesco also set out how buyers should respond if suppliers resisted requests for payment to close percentage margin targets. The document recommends that buyers tell suppliers that the “*aspirations have always been understood by us and treated by us as commitments that should be honoured*.” I have also seen internal Tesco correspondence suggesting that suppliers should be held to their JBP margin percentage target even where sales were lower than those envisaged in their JBP. The correspondence listed possible ways to achieve half-year targets which included “*Holding suppliers to JBP margin % even when sales adverse to joint plan*.”

### 24.3 I find that the direction being given to buyers as to the status and enforceability of JBP targets was contradictory and unclear.

- 24.4 Suppliers I spoke to were clear that their understanding was that a JBP margin target was an aspirational margin target that both Tesco and the supplier would aim for, as it represented their mutual benefit. Suppliers consistently stated that their signing up to a JBP was not an agreement to underwrite Tesco margin aspirations, not least because achieving a projected margin would depend on factors outside suppliers’ control, including the sale price of products to consumers. Some suppliers also reported concerns about the accuracy of the Tesco online supplier site, Tesco Link. I understand that Tesco Link provides Tesco suppliers with access to Tesco terms and conditions, web form documents and sales information, direct access to store level sales data as well as information on wastage, margin and stock availability. Tesco would issue invoices in accordance with Tesco Link data and Tesco Link was used by Tesco to track the margin to which it would hold suppliers to account. A number of suppliers reported to me that they ran their own margin tracker to compare this to the Tesco Link data and challenge any inaccuracies.
- 24.5 Margin payments were requested by Tesco regardless of whether growth had been achieved and regardless of whether Tesco had delivered on its own JBP commitments. In particular, requests for payments to meet margin targets appeared to be more prevalent at the end of trading periods. Some suppliers reported that what set Tesco apart from other of the Retailers was the pressure it put on suppliers at the end of a financial quarter, half-year or full-year to

close a JBP to the margin projected in that JBP. I have seen internal Tesco documentation which suggests that Tesco purposely over-estimated the margin gap on one supplier's account in order to meet a wider category target, and the supplier was told that this gap needed to be closed.

24.6 The amounts requested by Tesco in order to maintain its margin were often significant, for example:

- (a) I have received evidence that a number of suppliers made margin payments to Tesco of over £1 million;
- (b) I reviewed internal Tesco correspondence noting that a supplier had paid over £800,000 in margin maintenance for a half-year period; and
- (c) I am aware of one example when a seven figure sum was unilaterally deducted from the supplier in order to meet a JBP margin target.

24.7 Payment requests for margin maintenance were again primarily an issue for suppliers of branded products. Most suppliers of own-brand products that I received information from were not under pressure to meet margin targets or asked by Tesco to make payments for margin maintenance.

**24.8 I find that any unilateral deduction made in order to satisfy an unachieved aspirational target is unreasonable.**

## **25. Tesco focus on meeting financial targets – deferral of payments**

25.1 I have received internal Tesco emails which encouraged Tesco staff to seek agreement from suppliers to the deferral of payments due to them in order temporarily to help Tesco margin. I have also seen internal Tesco emails suggesting that payments should not be made to suppliers before a certain date in order to avoid underperformance against a forecasted margin. A Tesco list of methods for meeting the half-year target included "*Not paying back money owed*".

25.2 The evidence I received revealed a number of examples of Tesco deliberately deferring payment of money in order to maintain its margin at key financial reporting periods. This sometimes occurred despite requests from the supplier for payment and Tesco acknowledging that this money was due to be paid. On other occasions the supplier consented to delay payments on the basis that money would be repaid after the financial period in question. However repayment was sometimes further delayed.

25.3 The internal Tesco emails encouraging deferral of payments to suppliers contrasts with a Tesco training presentation I have seen from November 2014 entitled "Trading Fairly and Doing the Right Thing". This presentation includes a situation where at the half-year a buyer is behind target but owes a supplier money. It states that the buyer must "*Pay the supplier back without delay and ensure the payment is processed.*" It appears therefore that Tesco training about the need to pay suppliers promptly improved during the period covered by my investigation.

**25.4 I find that Tesco knowingly delayed paying money to suppliers in order to improve its own financial position. Any delay in payment deliberately caused by a retailer is unreasonable.**

## **26. Unilateral deductions made in relation to historic claims**

- 26.1 In the course of my investigation I received evidence of unilateral deductions being made by Tesco for historic claims, also referred to as forensic audit claims. Tesco used third party auditors to review its accounts for historic invoicing errors or omissions to see if there was evidence that the supplier had previously underpaid Tesco. The historic claims generally related to promotional activity, which can be a complex area in which to determine whether money is owed to the retailer by the supplier, especially a long time after the event.
- 26.2 Where Tesco identified historic amounts to which it believed it was entitled to be repaid, Tesco issued suppliers with a claim and often insisted on them providing responses to very tight timescales, sometimes within two weeks. Suppliers' reports varied as to the documentation which Tesco provided to them to support the audit claims. Whilst some said that the auditors provided copious detailed data which required extensive analysis, others stated that the materials provided to support the claim were light in volume and often vague. Some requests contained indications that deductions would be made from trading accounts or from future invoices. Suppliers were often faced with spending many hours undertaking their own analysis to establish if claims were valid. Occasionally sums were unilaterally deducted. More typically, significant pressure was applied to suppliers to expedite settlement of the claim.
- 26.3 Disputes about historic payments that Tesco claimed it was owed by suppliers frequently centred on the fact that a supplier believed that it had 'closed' previous year-end positions with Tesco by paying a lump sum for that period to Tesco, usually to reach a margin target. Where these payments had been made, suppliers told me that they believed that they were in full and final settlement of trading periods. Yet Tesco still made claims for allegedly unpaid amounts originating from these periods. It was apparent from the information I received that Tesco did not make clear to suppliers whether a period had been closed in "full and final" settlement.
- 26.4 Examples of delay relating to historic claims include the following:
- (a) An instance where a five figure sum was unilaterally deducted from a supplier for audit claims, which was repaid over two years later;
  - (b) More than one instance of Tesco making unilateral deductions for audit claims of over £1 million which were subsequently acknowledged as not being due. Repayment was not made until some months later; and
  - (c) Tesco agreeing that audit claims which had been deducted were invalid but nonetheless refused to issue credit notes until the supplier agreed to review new claims.

26.5 Deductions that I saw relating to historic claims tended to be made from suppliers of branded products. This accords with my earlier observation that own-brand suppliers were unlikely to participate in payment for promotional activity.

**26.6 I find that unilateral deductions from suppliers were made based on historic claims and these resulted in delay in payment to suppliers. Unilateral deductions for historic claims are unreasonable.**

## **27. Unilateral deductions for short deliveries and service level charges**

27.1 Tesco standard terms and conditions impose charges on suppliers where they fail to deliver products in accordance with orders placed by Tesco. I saw evidence of Tesco seeking to enforce these terms where the supplier disputed whether it had indeed fallen short of orders placed by Tesco. Disputes sometimes arose about the volume of product that had actually been delivered to Tesco, with Tesco and the supplier having different numbers in their records. I received evidence from a small number of suppliers that they were required to produce evidence to rebut an incorrect claim. Some suppliers experienced difficulties as a result of not receiving electronic proof of delivery notes from Tesco. I heard from a small number of suppliers that Tesco unilaterally deducted such charges from the supplier.

27.2 In addition to penalties for short deliveries, most suppliers have service level targets which are assessed from data held on Tesco Link. I understand that an average service level will be calculated to reflect a supplier's service levels over a set period of time. This service level will be based upon satisfying orders with deliveries and meeting quality standards. I heard repeatedly that the levels and penalties were incorporated into suppliers' terms of supply although I have received evidence from at least one supplier that these were not agreed.

27.3 I have seen instances where suppliers successfully resisted or recovered payment of penalties that Tesco was seeking to impose. These were resisted or recovered on the basis that service levels had not been met because of poor forecasting by Tesco and that delivery shortages had occurred because of promotional activity for which the supplier had not been given sufficient notice. One supplier reported facing a "*constant fight*" with Tesco about prospective deductions for service level charges which were usually successfully resisted by the supplier.

27.4 Where short delivery or service level charges were imposed and unilateral deductions made from suppliers, there were instances of unreasonable delay in resolving disputed charges and paying money owed to the supplier. For example I received evidence that Tesco had unilaterally deducted a significant sum of money from a supplier for incorrect short delivery charges which took six months to be repaid.

**27.5 I find that the delay by Tesco in resolving disputed charges for short deliveries and service levels and the delay in repaying monies unilaterally deducted was unreasonable.**

## **28. Unilateral deductions made for other items or unknown items**

- 28.1 During the investigation, some suppliers told me that Tesco unilaterally deducted customer complaint charges without providing evidence of the nature of the complaint and without giving the supplier sufficient opportunity to challenge the charge.
- 28.2 I considered one situation in which Tesco raised an invoice and unilaterally deducted a six figure sum from a supplier where the reason for the charge was unknown to the supplier. Although this was not one of the major issues raised during the investigation, it is a practice which can lead to an unreasonable delay in payments.
- 28.3 The Notice of Investigation stated that I would consider in my investigation whether any delay in payments was identified in relation to incorrect promotional fixed costs (known as gate fees). I have identified limited evidence of Tesco charging gate fees for activities which were not carried out, following which money was owed back to suppliers, and for which repayment was sometimes significantly delayed. I received evidence of a supplier being charged a promotional activity gate fee for a promotion which did not run and for which repayment was delayed.

- 28.4 I find that any failure to promptly repay money a supplier has paid for a promotion which did not run to be an unreasonable delay in payment.**

# Factors that contributed to delay in payments

29. My investigation has not uncovered an identifiable focal cause of the delay in payments that has been set out above. This is not surprising when looking at a business as large and complex as Tesco. However throughout the course of my investigation a number of issues have been repeatedly referenced in material and discussions involving delay in payments. I have set these out in the following section, grouped according to factors relating to “Tesco systems and procedures” and “Tesco practices and behaviours”.

## 30. Tesco systems and procedures

30.1 From the information I have received it appears that Tesco had systems for dealing with supplier finances which suppliers found inefficient at times. Tesco did not seem to me to be well-equipped to handle changes to product pricing information or to clarify and, where necessary, correct invoices or rectify deductions.

30.2 Suppliers told me that they had access to some information about Tesco pricing records from Tesco Link. However some reported that this was insufficient to be able to ensure that Tesco pricing data matched its own. The information available from Tesco did not always enable suppliers to identify and raise discrepancies before the incorrect amounts were processed by Tesco. This left suppliers in the position of chasing payment from Tesco rather than being able to resolve pricing errors before money was deducted.

30.3 Some suppliers reported that it was difficult for them to understand the reasons for payments or deductions because of the way in which they were presented to them by Tesco. Invoices were sometimes unclear and invoice information was non-specific, using descriptions such as “investments” without any indication as to what the investment was for. On some Tesco invoices that I have reviewed, the descriptions used did not link to supply agreements nor to subsequent supplier proposals.

30.4 Suppliers also described real difficulties in resolving issues, even in situations in which Tesco accepted that it had made a mistake. Suppliers reported poor administration by the buying team at Tesco and poor communication between different teams within Tesco. A frequent issue that arose for suppliers was the process involved in correcting errors. Suppliers reported that there appeared to be many steps to the process including numerous forms and different levels of approval required for amendments to be made. Suppliers said that it was difficult for them to find a person with the right level of authority to resolve an issue. I have also seen internal Tesco correspondence which suggests that credit notes over a certain value were loaded onto a credit note tracker to await senior approval. The correspondence suggests that there was reluctance to authorise some credit notes before key financial reporting periods. I have seen evidence that payment of a £100,000 debt owed to a supplier was delayed due to lack of internal approvals at Tesco. I saw evidence of Tesco enforcing stricter requirements for sign-off for payments at its year end. I also heard



evidence that it was more difficult for suppliers to retrieve money that was owed from a previous financial year.

30.5 Part of the complexity associated with payments made to suppliers arose from the outsourcing by Tesco of some of its payment services to the Hindustan Service Centre (“HSC”). Suppliers would usually be referred to HSC when a query arose about a payment issue. HSC appeared not to have sufficient authority to resolve all issues, which meant that sometimes even if it was trying to resolve a payment dispute it could not do so. Suppliers felt that the process was further complicated by the fact that they were unable to communicate with specific individuals at HSC and were sometimes passed from person to person.

30.6 Suppliers reported to me that the Tesco system, or the way it was administered, hindered the resolution of their payment queries and disputes. The complexity of the system made it very difficult for suppliers to identify errors made by Tesco and to rectify an error once it was identified. This resulted in a protracted and time-consuming process for resolving payment disputes and contributed to the delay in the payment of money Tesco owed to its suppliers.

**30.7 I find that Tesco had inadequate processes for correcting data errors or incorrect deductions. The delay in payments that resulted from errors and complications in Tesco systems frequently extended to many months. I consider such delay to be unacceptable and unreasonable.**

## 31. Tesco practices and behaviours

31.1 In deciding whether delay is unreasonable and in breach of paragraph 5 of the Code, I have attached great significance to the approach and efforts made by Tesco to resolve payment disputes. I expect disputes over payments to a supplier to be resolved promptly and in any event within 30 days of notification; I consider this to be a reasonable time to resolve any disputes or complications. Where I see evidence that the parties are engaging in constructive discussions to resolve a disagreement this may lead me to conclude that a period of longer than 30 days is reasonable for resolution in the circumstances. Where there is evidence of intent by a retailer to withhold money that it is aware should be paid to the supplier, I will almost always consider this to be unreasonable and unfair regardless of the period for which the money is withheld.

31.2 It is clear to me that practices and behaviours within Tesco aggravated delay in the payment of money due to suppliers. Where notice of charges or deductions was given by Tesco, this was often insufficient to enable the supplier properly to challenge the payment before it was processed. I have already noted at paragraph 7.6 above that I consider reasonable notice to be 30 days. Any unilateral deductions made without the supplier being given reasonable time to challenge the accuracy of the deduction are unfair and unreasonable.

31.3 A significant proportion of the issues which led to payment disputes arose from a lack of clarity between Tesco and the supplier as to the agreed terms of supply. As described above the status of a JBP and the margin targets it contained appeared to be unclear; likewise the ability for Tesco to make historic claims. The lack of clear agreed terms of supply led to difficulties in agreeing whether or not particular deductions were valid and whether or not specific sums of money were owed to the supplier or Tesco.

- 31.4 One of the key cultural factors which contributed to the problems was the apparent reluctance of some Tesco buyers to pro-actively engage in the resolution of payment disputes. It was usual for the onus to be placed on the supplier to prove that it did not owe Tesco money, or that Tesco owed the supplier money, even where it was alleged by the supplier that Tesco had made an error. Tesco often did not appear to take responsibility for providing a timely explanation as to the basis for the deductions and charges. There were times when Tesco did not appear to even attempt to resolve supplier concerns before unilaterally deducting money from suppliers.
- 31.5 The evidence demonstrated that Tesco was sometimes unresponsive and appeared to give low priority to repaying suppliers and correcting mistakes. For example a supplier and Tesco exchanged more than 40 emails over a five month period regarding the supplier's claim for a refund of less than £5,000 from Tesco. The supplier sent up to six consecutive chaser emails before receiving any response from the Tesco team with responsibility for resolving the dispute. It was also clear from this correspondence that another Tesco team was itself unable to achieve a resolution with the Tesco team with responsibility.
- 31.6 Some suppliers reported that buyers were particularly reluctant to resolve issues that had arisen under a previous Tesco buyer. This became particularly difficult for suppliers who reported high turnover of staff within the Tesco buying team they were dealing with, especially when outgoing buyers left without closing outstanding issues. Some suppliers felt that they had to start from scratch whenever a new buyer was assigned to them. In my view many payment disputes that resulted in delay in payments to suppliers could have been resolved much more effectively if Tesco had properly engaged with and endeavoured to resolve issues with its suppliers.

**31.7 I find the delay that resulted from a failure by Tesco to fully engage in resolving difficulties to be unfair and unreasonable.**

- 31.8 As stated above, I received evidence of Tesco prioritising its own finances over fairly repaying money due to suppliers. I received evidence of Tesco knowingly obstructing payment of money owed to a supplier where a supplier expressed concern about the size of the debt in relation to its business. In internal correspondence, a Tesco employee said *"I am tactically making this difficult for them ("Misunderstanding" in recent negotiation training-speak!) so they provide me with written evidence that they have underpaid for YTD initiatives and we can ultimately secure more funding."*
- 31.9 Buyers frequently sought to use money owed to a supplier as leverage in negotiations for future agreements or promotions. I have evidence that repayment of debt was used as a bargaining tool to encourage suppliers to make proposals for the next trading year and that Tesco repayment of debts was sometimes included in JBPs in which suppliers committed to make significant payments. Sometimes suppliers felt that they achieved a good deal out of these negotiations. Others felt under pressure to accept the terms put forward by Tesco in order to ensure they received something in return for money that they had feared they would not recover.

31.10 Suppliers sometimes offered to fund future activities on condition that outstanding debts were repaid. I am aware of a situation where the supplier agreed that once a multi-million pound debt was paid to it by Tesco it would invest over half that amount in the next trading period. On occasions suppliers reported that they would end up waiving the amount they believed was owed to them by Tesco because ongoing negotiations were proving difficult and might start to damage their longer term relationship with Tesco.

**31.11 I find that Tesco acted unreasonably when seeking to bring the resolution of debts into other commercial negotiations and delaying payment of monies owed until other negotiated terms were agreed.**

31.12 It would appear that on occasion buyers were being given mixed messages as to the behaviour that was expected of them by the business in respect of Code related issues. I have highlighted in paragraph 24 above examples of the contradictory directions given to buyers. Although the majority of the formal training material appears to reflect Code compliant behaviour, the evidence suggests that this was not always followed and at times, buyers were directed to act in a manner which was contrary to the Code.

## Scale of delay in payments

32. The circumstances which prompted the launch of my investigation stemmed from the trading announcement made by Tesco in September 2014. In its announcement, Tesco reported an earlier profit over-statement of £250 million. A considerable proportion of the mis-statement amount was attributed to money associated with the supply of groceries.
33. Tesco provided information about its engagement with suppliers where it had identified that the Code may have been broken. Suppliers who provided responses to my call for evidence considered that Tesco may have breached the Code. I have only seen a selection of Tesco suppliers in reaching a view on the scale of the issues.
34. A significant proportion of the suppliers I received information from had experienced delay in payments. The Tesco Report identified “*apparent*” delay in payment in relation to over two thirds of the suppliers considered as part of the internal review. As I have stated in paragraph 17.1 above, these suppliers dealt with different categories of Tesco business and were of different sizes and from different locations. I did not identify a correlation between the size of a supplier’s business and the delay in payments it experienced but I did note that own-brand suppliers did not tend to experience as frequent or serious delay in payment as suppliers of branded products.
35. It is very clear that delay in payments was a widespread issue that affected a broad range of Tesco suppliers on a significant scale.

# Impact on suppliers of delay in payments

36. It has been difficult to quantify with any precision the overall impact on suppliers of the Tesco unilateral deductions and delay in payments practices that I identified in my investigation. This is partly due to the complex and widespread nature of the practices. I have restricted my statutory requests to requests for proportionate information and have not undertaken any detailed analysis of the impact of delay on suppliers individually or taken together as a group.
37. Nevertheless, suppliers have informed me of their views on how the delay in payments has affected their businesses. Tesco was the largest customer for a significant proportion of the suppliers. The majority indicated that Tesco accounted for more than a quarter of their overall business. The impact of delay in payments on the suppliers' businesses was amplified by the importance of the Tesco relationship. This meant that they were more heavily dependent on Tesco to maintain their current financial position and their future prospects than they might otherwise have been. This placed Tesco in a powerful negotiating position with these suppliers.
38. I have set out in this section the different types of impact that I identified of delay in payments by Tesco.

## 39. Financial impact

- 39.1 The financial impact on suppliers of unilateral deductions and delay varied depending on the size of the supplier's business and the amount of money in question. Some larger suppliers reported that the delay had minimal impact on their day-to-day liquidity and that their main concern was that the amounts were eventually repaid in full. However for other suppliers the withholding of money owed to them by Tesco had a significant impact on cash flow. I saw evidence of suppliers being concerned that they would breach bank covenants or be required to obtain an increased loan from a parent company or take out a bridging loan if money owed to them by Tesco was not paid promptly. Impact on profit margin also occurred where suppliers abandoned a claim for repayment or negotiated a settlement which was for a lesser amount than they believed they were due.
- 39.2 Where a delay in payment owed to a supplier was only resolved in the subsequent trading period, it had an even greater impact on the supplier. If Tesco paid the money owed in the new trading period, the supplier was unfairly disadvantaged for two reasons. Firstly, the supplier's new margin target was incorrectly based upon the previous year's margin which failed to recognise that money was owed to the supplier. Then when Tesco paid the money, the margin target was further increased to counter the negative effect on actual margin of the delayed payment having been credited.

## 40. Resources used and the time taken from other business

- 40.1 A further impact not only on suppliers but also on Tesco was the time spent by account managers and finance teams alongside Tesco buyers and administrators pursuing and resolving delay in payments.
- 40.2 I received evidence from some suppliers that their Tesco account managers spent between 5% and 20% of their time seeking to resolve payment issues with Tesco. Some suppliers have people dedicated to this work. At Tesco and at suppliers, people at senior levels in management and finance were drawn into discussions about disputed debts. In one instance, I received evidence that a supplier had sought a board level decision not to pursue a debt it believed it was owed from Tesco because the supplier was given the impression by Tesco that its future business with Tesco was at risk if it pursued the debt.
- 40.3 Some suppliers reported that discussions about demands for money and payment of money owed interfered with undertaking business which focussed on customer benefit. These suppliers considered the time spent resolving payment issues to be counterproductive to the mutual objective of selling products to consumers. One supplier said *"Sometimes it feels like everything is about the money rather than how do we do better for the customers."* A similar view was expressed by a supplier who said that it seemed that Tesco was more worried about the cost of its product than how to sell it.

## 41. Detriment to suppliers' relationships with Tesco

- 41.1 Suppliers said that the process and repetitive nature of challenging charges and recovering money owed caused tensions between themselves and Tesco that were not conducive to a healthy working relationship. One supplier expressed the view that its relationship with Tesco had been severely damaged after it challenged Tesco invoices. There was also evidence of a buyer implying that future business would be put at risk if the supplier continued to pursue unpaid debts. Suppliers were sometimes reluctant to engage new buyers on outstanding issues in order not to sour relationships they were trying to build.

# Conclusions on delay in payments

42. A large proportion of the delay in payments that I have seen were unreasonable as a result of the combination of three key issues:
- Tesco making unilateral deductions from suppliers;
  - the length of time taken to repay the money due; and
  - on occasion the intentional delay in making payment to the supplier.
43. I am satisfied that Tesco has acted in breach of paragraph 5 of the Code.

# Findings of fact on better positioning of goods

What the Code says:

## 12. No Payments for better positioning of goods unless in relation to Promotions

A Retailer must not directly or indirectly Require a Supplier to make any Payment in order to secure better positioning or an increase in the allocation of shelf space for any Grocery products of that Supplier within a store unless such Payment is made in relation to a Promotion.

## 2. Fair and Lawful dealing

A Retailer must at all times deal with its Suppliers fairly and lawfully. Fair and lawful dealing will be understood as requiring the Retailer to conduct its trading relationships with suppliers in good faith, without distinction between formal or informal arrangements, without duress and in recognition of the suppliers' need for certainty as regards the risks and costs of trading, particularly in relation to production, delivery and payment issues.

## 44. Principal findings on better positioning

- 44.1 My interpretation of this paragraph of the Code is set out in paragraph 8 above.
- 44.2 During the course of my investigation I did not find evidence of Tesco directly requiring a supplier to make any payment in order to secure better positioning or an increase in shelf space.<sup>10</sup> The suppliers that I received information from were unanimous in confirming that Tesco did not require payments from them in exchange for better positioning or an increase in the allocation of shelf space. I am not satisfied that Tesco has acted in breach of paragraph 12.
- 44.3 However I have seen evidence arising from the investigation into Tesco of a range of practices on which I would like to consult further. These practices may amount to an indirect requirement for a supplier to make a payment in order to secure better positioning or an increase in shelf space. As stated above, I consider a request by a retailer for payment from a supplier in order to secure better positioning or increased shelf space to effectively be a requirement, if the consequences to a supplier of declining the request are, or are understood by that supplier to be, comparatively worse positioning. I have reminded myself, as noted above, of the Competition Commission's interpretation of a requirement. From the evidence that I saw, these

<sup>10</sup> See Code clarification case study 'charging for optimum shelf positioning', <https://www.gov.uk/government/case-studies/code-clarification-charging-for-optimum-shelf-positioning>. In December 2013 Tesco had been found to have engaged in behaviour inconsistent with paragraph 12. Tesco admitted to a breach of the Code.



practices were not a regular feature of the relationship between Tesco and own-brand suppliers. Better positioning and increased shelf space appeared to be factors relevant only to suppliers of branded products to Tesco, with one exception which I note below.

44.4 The categories of behaviour that I considered during my investigation which may relate to payments in order to secure better positioning or increased shelf space are as follows.

## **45. Indirect requirements for money from suppliers specifically for better positioning or increased shelf space**

45.1 As stated above, in March 2014 I published a case study which provided guidance to the sector that I was likely to interpret requests for payments in order to secure better positioning or increased shelf space as requirements, if the consequences to a supplier of declining the request are, or are understood by that supplier to be, comparatively worse positioning. This set out my view that for a large retailer to ask for payment in order to secure better positioning or increased shelf space is often contrary to the spirit of the Code and amounts to a requirement.

45.2 In Tesco training material for buyers from January 2014 under a heading "*Request versus Require*" it states "*You can request payment for better shelf positioning or for an increase in shelf space.*" However in guidance from October 2014 Tesco appeared to have changed its advice to buyers as it directed them that "*You can neither request nor require a supplier to pay for a better shelf position. However, if payment is offered by a supplier to improve the shelf position of their product you can accept it.*" Therefore it appears that during the course of 2014 Tesco's position on requesting payment in order to secure better positioning or increased shelf space had altered, reflecting the additional guidance I had issued on the interpretation of requirement in March 2014.

45.3 There are some references in the documentation I reviewed which do not demonstrate who initiated discussions about payment from suppliers for better positioning or increased shelf space. I have received evidence that these discussions were sometimes initiated by the suppliers and not by Tesco. I have received no evidence that they were initiated by Tesco. Therefore I have concluded that Tesco did not indirectly require money from suppliers specifically in order to secure better positioning or increased shelf space.

## **46. Tesco requests for investment that result in suppliers making payments for better positioning or increased shelf space**

46.1 There was evidence on a number of occasions of Tesco asking for "investment" from suppliers in exchange for benefits to be agreed with the supplier or as part of wider negotiations about meeting margin targets at the end of trading periods. The amounts involved in these negotiations varied but were often for significant sums of money, sometimes amounting to millions of pounds.

46.2 Some suppliers refused or were unable to offer investment. Other suppliers agreed to make payments but made counter-proposals for a range of benefits in exchange for investment. One of the benefits requested by suppliers in these circumstances was better positioning or an increase in shelf space. Some suppliers reported to me that they saw it as beneficial to their business to be able to make payments in exchange for shelf space and positioning.

- 46.3 The requests made by suppliers included requests for:
- Increased or maintenance of share of shelf;
  - Increased facings of products;
  - Specification of actual positioning (e.g. next to other products/brands);
  - Brand blocking, where all the variants of a brand were displayed together rather than each variant alongside its direct competitive set;
  - Request for a reduction in shelf space for a competitor's products; and
  - Exclusivity (for example of a sub-category).
- 46.4 These proposals would often be followed by negotiations on the terms of investment. At times Tesco resisted supplier requests for better positioning or increased share of shelf on the basis that it would not be customer focussed or would not be in the best interests of the overall category of products. However on other occasions Tesco accepted money from the supplier in exchange for agreeing to specific product placement or for the allocation of shelf space to be maintained or increased.
- 46.5 I would like to consult further on the question whether, where a retailer requests investment from a supplier and one of the resulting terms of investment is better positioning or increased shelf space, this may amount to an indirect requirement for payment contrary to paragraph 12. These requests and payments appear to have become accepted by some Tesco suppliers as custom and practice. Some suppliers reported that they requested better positioning agreements to ensure that they received something in exchange for the lump sums they were paying to Tesco. Suppliers told me that they viewed payments for better positioning or increased shelf space in these circumstances as "*one of the few things we can leverage*". Given these supplier reports, further consultation with the sector as a whole is merited in order that I may determine whether this conduct breaches the Code.
- 46.6 The issue is illustrated by one of the arrangements that I became aware of during my investigation. Tesco was in ongoing negotiations with a supplier about payments to meet a financial target. Tesco was requesting payment of a large amount from the supplier. As part of these negotiations the supplier proposed that a seven figure sum would be paid in exchange for a specified share of shelf for certain products. From Tesco internal correspondence it is evident that one of the ways in which it had anticipated that the supplier would counter the request for investment was with an arrangement for increased shelf space. I would like to consider further whether this conduct may amount to an indirect requirement.

## **47. Suppliers offering money to Tesco for better positioning or increased shelf space with no previous discussions about investment**

- 47.1 A number of suppliers reported to me that they had initiated discussions with Tesco about making payments in return for better positioning. Tesco internal guidance on the Code in October 2014 states that "*If payment is offered by a supplier to improve the shelf position of their product you can accept it*". It is clear that Tesco had interpreted the Code in a way that permitted it to accept such payments.

- 47.2 The documentary evidence that I received during the investigation suggests that when suppliers have referred to initiating payment in exchange for better positioning, this mostly occurred in the context of wider negotiations in which Tesco was requesting investment. It is currently unclear to me the extent to which suppliers have offered money for better positioning or increased shelf space where money had not already been requested from them by Tesco.
- 47.3 Although there may have been some suppliers who chose to engage in these discussions because they had the resources to leverage benefit from them, other suppliers may not have been in a financial position to do so. These suppliers may have been disadvantaged. Detriment could occur regardless of whether discussions were initiated by Tesco or the supplier. This might have an anti-competitive impact with only the larger suppliers able to make payments in exchange for improved position or more space.
- 47.4 From the evidence I have received it is unclear whether Tesco buyers were able to deliver upon the better positioning and increased shelf space agreements that were made with suppliers. The Tesco Space Range and Display Policies and Principles corporate document sets out the company's procedures for making decisions on shelf space and positioning. The policy documents state that display teams will "*Create logical and simple displays so customers find the products they want easily*". Commercial teams will "*Provide the right breadth and depth of range ensuring sufficient choice and range completeness*". It makes no reference to buyers having an influence over these decisions or to suppliers being able to influence them by making payments. Suppliers had mixed views on the influence that buyers could assert over shelf space or positioning in stores.
- 47.5 I have been unable to determine whether buyers could deliver or even influence product positioning or allocation of shelf space within a store. It is also unclear from the evidence whether or not Tesco delivered upon agreements for better positioning or increased shelf space made in return for investment. These are points on which I may seek further information from the Retailers and suppliers in due course.

## 48. Category management

- 48.1 During my investigation I came across several instances of suppliers paying for category captaincy. A supplier may be appointed by a retailer as a category captain as part of the retailer's management of a category, which may also involve other suppliers. Category management is defined in the 2000 Competition Commission report as "*a leading supplier being responsible for analysing data on consumer preferences; identifying the best means of meeting these; determining the most effective ways in which suppliers provide the relevant products, in terms of range and allocation of space; and advising the multiple accordingly.*" Category captaincy is defined in the 2008 Competition Commission report as "*a particular form of Category Management in which a supplier (usually a large supplier) is designated by the retailer to have full responsibility for the way in which products within a category are presented and sold to customers*".

- 48.2 I am aware that suppliers carry out their own market research and will often have a superior understanding of their category to Tesco (or others of the Retailers). Suppliers therefore propose solutions for product range and layout to maximise the return to Tesco and satisfy customer demand. Often this is done in collaboration with the Retailers using both supplier and retailer data. Category captaincy is commonplace in the groceries sector and can, in some circumstances, provide benefits to the wider sector. It may facilitate interaction between the Retailers and their suppliers, involving the exchange of valuable consumer data which can lead to improvement in the performance of categories. I recognise that the practice can lead to efficiencies in the market because suppliers may be best placed to advise on their own category. Efficiencies can benefit the Retailers, suppliers and customers.
- 48.3 I received information about a number of suppliers who had acted as category captains for Tesco. It was evident that some suppliers were of the view that category captains were required to remain neutral in their analysis of the market. However many also viewed category captaincy as a competitive advantage because of the increased knowledge of the category and the influence over Tesco decision making that it was perceived the position brought.
- 48.4 From the evidence that I received it was apparent that suppliers paid significant sums for category captaincy, often millions of pounds. Suppliers stated that they paid for category captaincy because of the commercial and strategic benefits of the position, to ensure that decisions about the category were customer focused or because of a fear that their products would be detrimentally affected if a competitor were advising Tesco. Generally the suppliers appointed as category captains were the larger and better resourced suppliers. They tended to be suppliers of branded products although I have seen evidence of an own-brand supplier paying for category captaincy.
- 48.5 The nature and description of a category captaincy arrangement appears to vary between different categories and suppliers. For example, I have been provided with a copy of a category captaincy agreement between Tesco and a supplier which states that the role of the supplier will include advising on recommendations for range and share of shelf space. However, in an email to a different supplier relating to category captaincy Tesco state that *“to be clear, the investment in category captaincy or advisory roles does not guarantee any supplier: maintenance of existing space or range...”*. The 2008 Competition Commission report also noted the variation in the functions performed by different category captains. I have taken into account the fact that the Competition Commission has considered the issue of category management and category captaincy in its reports. The 2000 Competition Commission report identified concerns about the fact that in some category management arrangements decisions on the allocation of shelf space were made by the supplier designated as category manager rather than by the retailer. The 2008 Competition Commission report identified possible anti-competitive effects of category management, but concluded that these were not sufficiently borne out to require a provision to address category management in the Code.

48.6 I am concerned that practices in relation to category management and captaincy have evolved since these reports were produced. It is not apparent from the Competition Commission reports that it was considering category management or captaincy arrangements in which large lump sums of money had been paid by the supplier. The evidence that I have seen during my investigation leads me to believe that payment for category captaincy may now be common practice at Tesco. In my view this is a potentially significant development. If large sums are being paid by suppliers to Tesco for category captaincy it suggests that the supplier must believe that it is obtaining significant financial benefits for its business from the arrangement. It also suggests that smaller suppliers are potentially “priced out” of being category captains and from obtaining the benefits that accompany such an arrangement. From the current evidence base it is not clear to me the extent to which this is happening. However it appears to me that there is a risk of the purpose of the Code being circumvented through indirect payments being made in order to secure better positioning or increased shelf space via other business arrangements.

## 49. Range reviews

49.1 Another practice which has been referenced frequently during my investigation is range reviews. Range reviews appear to be undertaken by Tesco periodically in order to assess whether changes should be made to the products being listed in a category or the space given to, and position of, particular products or ranges. Reviews sometimes take place in respect of the whole category whilst at other times they will be smaller and more focussed.

49.2 I received evidence that Tesco sometimes provides suppliers with the opportunity to pay to participate in these range reviews. I saw evidence that suppliers made payments to Tesco in order to participate in range reviews. The sums paid by suppliers to participate were significant, with some amounting to hundreds of thousands of pounds. The majority of the suppliers paying to participate in range reviews were the larger suppliers.

49.3 One supplier reported that it would pay to participate in the reviews because it wanted the opportunity to contribute its ideas and help to steer the category for the future. Another supplier said that it wanted to be involved to ensure that its products did not suffer as a result of any review. This implies that those participating in the reviews believed that they had some degree of influence over the products listed and space given to products. One supplier confirmed to me that it had sought better positioning commitments from Tesco in return for its investment in range reviews. This suggests that on at least some occasions payment to participate in a range review was directly linked to better positioning or increased shelf space for that supplier’s products.

49.4 My reservations in relation to this practice align with my concerns about category captaincy. If large sums are being paid by suppliers to Tesco in order to participate in range reviews it suggests that the supplier must believe that it is obtaining significant financial benefit from the arrangement for its business. The evidence suggests that benefits may include better positioning or maintained or increased shelf space. It also means that smaller suppliers may be “priced out” of participating in range reviews.

# Conclusions in relation to better positioning of goods

50. The investigation has not revealed any evidence that Tesco has breached the Code by directly requiring suppliers to make payments in order to secure better positioning or increased share of shelf space. I have not found that Tesco has acted in breach of paragraph 12.
51. However I have received evidence of practices at Tesco that merit further consideration. The Code was established to address the adverse effect on competition arising from the exercise of buyer power by grocery retailers with respect to their direct suppliers of groceries. A particular concern was the adoption of supply chain practices that transfer excessive risk and unexpected costs to suppliers<sup>11</sup>. The practices that I have outlined need to be considered further with respect to their effect on competition through the payment of money by suppliers in exchange for better positioning or increased shelf space. I am concerned that as a consequence of these behaviours the purpose of the Code may be circumvented. This may be to the detriment of smaller suppliers who cannot offer payments for better positioning, increased shelf space, category captaincy or to participate in range reviews.
52. I am mindful that this is a significant issue and not one upon which I am currently in a position to make findings. I wish to seek the views of the Retailers and consult formally with their suppliers on these points before reaching any firm conclusions about these practices. Following the publication of this report I will be taking steps to obtain further information on the practices outlined in this section of the report. This will include a formal consultation with the sector about the practices I have identified. I will then reach a position on whether or not these practices are acceptable.
53. In light of the Competition Commission's previous consideration of category management and the evidence I have received of large lump sum payments now being made as part of this practice, I will be writing to the Competition and Markets Authority ("CMA") with my findings on the issue of category captaincy.

<sup>11</sup> See Explanatory Note to the Order, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/348360/GSCOP\\_Explanatory\\_Note.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/348360/GSCOP_Explanatory_Note.pdf) "The Competition Commission (CC) published its final report on the market investigation into the supply of groceries in the UK on 30 April 2008 (the report). The report set out the CC's findings that there are features of the markets for the supply of groceries which adversely affect competition in the UK. One of these features was the exercise of buyer power by certain grocery retailers with respect to their suppliers of groceries, through the adoption of supply chain practices that transfer excessive risks and unexpected costs to those suppliers. To address the adverse effect on competition arising from these grocery chain practices, the CC has decided on a package of remedies to address the adverse effect on competition and the consequential detrimental effects on customers. The Groceries (Supply Chain Practices) Market Investigation Order gives effect to part of these remedies."

# Tesco engagement with the Code

## 54. Tesco engagement with the Code during the investigation period

- 54.1 Tesco has provided me with evidence regarding its engagement with the Code. Tesco introduced a formalised Code compliance programme in 2013 based on its six-part ethics and compliance model, comprising governance and leadership; risk assessment; policies; guidance and procedures; awareness, training and communication; and monitoring and review. This programme began with face-to-face training of buying teams and technical managers on Code compliance and was followed by the launch in Autumn 2013 of the “GSCOP e-learning module”. The module provides interactive examples of commercial situations. Tesco said that this was supplemented by face-to-face training for buyers in November 2013.
- 54.2 In 2014 a further e-learning module was developed which new joiners were required to complete within four weeks of starting at Tesco and further face-to-face training was provided. I have seen copies of Code-related guidance Tesco provided to its commercial teams during the period under investigation, on issues including dealing with deductions made without suppliers’ agreement, financial recovery, better positioning and fair dealing. Tesco has informed me that since 2012, Code-related issues have been considered at board level, by the leadership team and at committee level.
- 54.3 I was aware prior to launching the investigation that Tesco had introduced a web form agreement with suppliers in March 2014 which Tesco referred to as the “GSCOP Agreement”. I have learned more about the “GSCOP Agreement” during my investigation. The document appears to have been an attempt by Tesco to promote its compliance with the Code and clarify matters that may not have previously been recorded in a supply agreement but which are covered by the Code. It detailed penalties associated with last-minute supplier-driven amendments to promotional activity, failure to meet service levels, emergency product withdrawal, and customer complaint charges. Tesco appear to have considered this web based tool to be an improvement in its procedures.
- 54.4 However it is apparent from the material I have seen that there was no negotiation about the terms of the “GSCOP Agreement” and suppliers were asked to sign the document without the option of being able to change any of the terms. Many of the electronic form fields were frozen and could not be amended by suppliers. One supplier described it as a “*tool to beat suppliers*” with. Some suppliers reported that the agreement confused them rather than simplifying the relationship, and that it was used by Tesco as a method to enforce penalties and charges on suppliers. Tesco itself confirmed to me in January 2015 that feedback had indicated that some suppliers viewed the agreement as an attempt by Tesco to impose terms. I am disappointed to see that Tesco introduced a “GSCOP Agreement” in a manner which was neither constructive nor in the spirit of the Code.

## 55. Changes to Code compliance at Tesco

- 55.1 In November 2014, before I launched the investigation, Tesco told me about some of its plans for ongoing compliance efforts in relation to the Code. These included refresher training for buyers on the established “*GSCOP e-learning module*”, training commercial buyers on the rules relating to recognition of commercial income and the re-launch of a whistleblowing hotline for UK staff, with the plan for this to be opened up to the supplier base. Tesco planned to launch a new Code of Business Conduct supported by an e-learning programme. This was launched in March 2015 and contained a specific section on the Code.
- 55.2 Tesco announced to the market in October 2014 that it was making changes to the food buying model it used to buy from its suppliers. This involved a move away from a margin-based buying model towards a cost-based one, in which Tesco seeks to agree the best cost prices with suppliers throughout the year rather than accept increased prices in return for increased back-margin support. Tesco told me that it hoped this move would lend itself to a more collaborative approach and would give rise to less delay in payments because it said the model is simpler and less reliant on back-margin payments.
- 55.3 In January 2015, when Tesco reported back to me on “*very clear indications*” that breaches of the Code had occurred it also said that it was “*committed to taking action to improve the effectiveness of our GCSOP compliance programme with a particular focus on preventing delays in payment from occurring in future*”. Tesco said that some changes to its buying model and the wider Tesco ethics and compliance programme were already underway.
- 55.4 Tesco also informed me in January 2015 that it was planning to focus its compliance programme over the coming years on developing a stronger “speak up” culture at Tesco to emphasise the importance of colleagues raising concerns. Tesco recognised that it takes time to change the underlying culture of a business.
- 55.5 Tesco also provided details of its Code compliance e-learning systems including new starter training and an annual refresher training, which is supplemented by face-to-face training. It said that buyers had been retrained on key parts of the Code including delay in payments and fair dealing.
- 55.6 Tesco also set out some further changes it proposed to make, including:
- a) The creation of a risk register on the Code to be regularly reviewed by the Commercial team so that issues can be identified and enable Tesco to be satisfied it is well-managed;
  - b) Encouraging the Tesco senior leaders, directors and managers to lead by example in its commitment to compliance with the Code;
  - c) Adding the Code as a standing item on the leadership team weekly meeting agenda;
  - d) A review of compliance with the Code to be carried out by the Compliance Committee on a regular basis;
  - e) Reviewing procedures to ensure compliance with accounting policies including when commercial income can be recognised;



- f) Requiring commercial teams to confirm that they understand paragraphs 5 and 2 of the Code and will comply with them and introducing a process of bi-annual compliance declarations for buyers;
- g) Communicating to suppliers about the role of the CCO; and
- h) Changing the way audits on compliance with the Code are carried out to make them more dynamic and based on document reviews and to include deep-dive audits.

55.7 A major focus of Tesco plans in January 2015 was the procedures for handling payment disputes with suppliers, with the goal of reducing the likelihood of delay in payments. Tesco said it was considering changes including:

- a) Raising the financial threshold so that the price query team in the HSC can resolve pricing issues from £5,000 to at least £25,000 without involving the buyer;
- b) Introducing a new Data Operator role with responsibilities including ensuring that new line data and cost price data is accurate before it is loaded onto buying systems and managing the process for promotions data. This was intended to improve the accuracy and timeliness of commercial data, including by communicating to suppliers when cost price changes have been loaded so that they have an immediate opportunity to review and challenge changes they believe to be incorrect. Tesco confirmed that by January 2015, there were more than 20 Data Operators working in the buying teams;
- c) Tracking the number of days since a price dispute was raised by a supplier and reporting this data to Category Directors on a regular basis;
- d) Investigating variance in volumes reported as supplied and received which result in payment disputes; and
- e) Looking at processes for recording deals with suppliers so that they are on agreed forms rather than emails.

55.8 Since January 2015, Tesco has also kept me closely informed about its new initiative, the Supplier Helpline. The helpline is tasked with resolving administrative issues such as delayed payments and pricing issues and giving a response within 48 hours. It resulted from supplier feedback on the time and energy that suppliers were spending unnecessarily on resolving administrative issues with Tesco. The suppliers who told me that they have used the Supplier Helpline had mixed feedback; whilst I heard evidence that some issues were resolved satisfactorily, I also heard that the helpline had not assisted other suppliers in resolving issues. During 2015, Tesco has stated its intention to reduce the 24 potential types of back margin agreement with suppliers to three margin options, which are common across the grocery sector.

55.9 In October 2015, at the IGD Big Debate conference, Dave Lewis apologised to the supplier community for the actions of Tesco, accepting that the company had made bad choices in making margin targets its key performance indicator and the most important thing for the organisation. He said that the Code compliance issues referred to me in January 2015 were consequences of these poor choices and acknowledged that supplier and customer trust had been damaged. He encouraged suppliers to co-operate with my investigation.

## 56. Suppliers' feedback about Tesco since February 2015

- 56.1 The overwhelming majority of the suppliers I spoke to told me that their relationships with Tesco were more positive today compared to during the period under investigation. Where suppliers spoke of an improvement, some noted a change in the way issues were handled and some perceived that Tesco was moving towards a more open and collaborative approach to its suppliers. Many reported that there seemed to be less of a strong focus on meeting margin targets and more attention on the customer. I received evidence that suppliers experienced less frequent delay in payment issues or that resolution of delay in payment issues was now easier. Several suppliers reported that there had been significant change in the buyers they work with and some suppliers said they had no Tesco contact at any level who was in the same role as during the period under investigation.
- 56.2 A small number of suppliers reported that they still experienced difficulties in their relationships with Tesco; one supplier referred to its ongoing relationship as "*transactional, conflict based*".

# Enforcement measures

## 57. My decision on enforcement

- 57.1 The forms of enforcement available to me as a result of finding a breach of the Code are set out in paragraph 2.2 above. In deciding whether to use any enforcement measures, and if so which ones, I have taken into account the Guidance. In view of my findings and my conclusion that Tesco has breached paragraph 5 of the Code I consider that it would be inappropriate to take no enforcement action against Tesco. As stated above I have already engaged with the Retailers about practices associated with paragraph 5 and have expressed my interpretation of delay in payments. Therefore I did not consider that issuing further advice or guidance would serve any purpose.
- 57.2 In view of my findings I have decided to make recommendations to Tesco. I have set out below the reasons that I consider recommendations to be an appropriate measure.

## 58. Recommendations

- 58.1 I consider Tesco's breach of paragraph 5 of the Code to be a serious breach due to the varying and widespread nature of the delay in payments that I found. I have decided that recommendations are a proportionate and effective measure to reduce the likelihood of repetition of non-compliance with paragraph 5 by Tesco. I also believe that the implementation of these recommendations will provide greater certainty to suppliers that they will be paid on time and that disputes and errors will be resolved promptly. My recommendations have been written to address the factors identified in my report as contributing to delay in payments and to address the weaknesses of Tesco practice in complying with paragraph 5 of the Code.
- 58.2 My recommendations are as follows:
- 58.2.1 **Recommendation 1: Money owed to suppliers for goods supplied must be paid in accordance with the terms for payment agreed between Tesco and the supplier.**
- 58.2.2 **Recommendation 2: Tesco must not make unilateral deductions.**
- (a) Suppliers must be given at least 30 days to challenge any proposed deduction. Tesco must provide the supplier with an explanation of the proposed deduction, referring to the supply agreement methodology (see Recommendation 4).
- (b) Where a supplier challenges a proposed deduction, Tesco is not entitled to deduct the disputed sum from the supplier's trading account or otherwise from money owed to the supplier for goods supplied.

**58.2.3 Recommendation 3: Data input errors identified by suppliers must be resolved promptly.**

- (a) Tesco should ensure that its systems and internal processes are designed to facilitate prompt resolution of disputed invoices and should provide a single point of contact for suppliers to resolve queries which have not been resolved promptly.
- (b) Pricing errors should be fast-tracked for review and resolved within seven days of notification by the supplier.

**58.2.4 Recommendation 4: Tesco must provide transparency and clarity in its dealings with suppliers.**

- (a) The methodology for calculating any money due from suppliers, whether for promotional funding, short deliveries, service level charges, customer complaints, forensic audit claims or penalties, should be clear and explained in the supply agreement. This will allow the supplier to understand, predict and be in a position to challenge charges.
- (b) Consistent language in invoices must be adopted across Tesco and supporting documentation must accompany the invoice or be referred to where appropriate and readily available to the supplier.
- (c) The status of agreements should be clear and should put beyond doubt that targets are only aspirational regarding factors such as Tesco margin, which are beyond the control of the supplier.

**58.2.5 Recommendation 5: Tesco finance teams and buyers must be trained in the findings from this investigation.****59. Requirement to publish information**

59.1 This report contains the information that I consider is relevant to Tesco compliance with the Code and makes this information publicly available. Tesco has made efforts to improve its processes and has apologised to the supplier community. In light of these factors I will not be using my enforcement power to require information to be published. I do not think it would serve any additional purpose in the context of this investigation.

**60. Financial penalties**

60.1 As set out above, the Financial Penalties Order giving me the power to fine did not come into force until 6 April 2015 and applies only to breaches of the Code occurring on or after that date. The period under investigation ends on 5 February 2015. Had I the power to impose a financial penalty for the behaviour identified in this report, I would have considered whether it was appropriate in all the circumstances and, if it was, what level of penalty should be imposed.

## 61. Requirements of Tesco to enable me to monitor its compliance with my recommendations

61.1 I require Tesco to provide a detailed implementation plan within four weeks of the publication of this report setting out how it will comply with my recommendations. I will engage with Tesco to ensure that the recommendations are implemented efficiently and effectively.

I require a response from Tesco to the recommendations on a quarterly basis and specifically to include:

- An analysis of reasons for invoice errors and evidence that systems are being improved to reduce errors caused by Tesco;
- Value of invoices in dispute;
- Number of invoices in dispute; and
- Average length of time of invoices in dispute, by value and number.

I also require sample documentation from Tesco to illustrate how it is providing suppliers with greater transparency and clarity.

I am aware that Tesco has already taken steps to address some of the issues that have been identified and I look forward to seeing evidence of continued progress. I will now be working with Tesco on the implementation of my recommendations.

# Referral of information to the Competition and Markets Authority

62. The Order specifies at Article 6 a number of steps which the Retailers must take in providing suppliers with written supply agreements. The CMA has responsibility for ensuring compliance with the Order, which sets the framework for the Code. This provision of the Order, the first sub-paragraph of which is set out below, is fundamental to the application of the Code. This is because many issues associated with compliance with the Code rely on a supply agreement being in place which contains details of the terms of supply.

The Order states that:

## 6. Duty to provide information to Suppliers

(1) A Designated Retailer must ensure that all the terms of any agreement with a Supplier for the supply of Groceries for the purpose of resale in the United Kingdom are recorded in writing, as well as any subsequent contractual agreements or arrangements made under or pursuant or in relation to that agreement.

63. I have seen evidence that Tesco may be operating without all of its terms of agreement with a supplier being recorded in writing. Tesco indicated in its evidence to me that there were instances in which it had not fully complied with its obligations under Article 6 of the Order. This was supported by evidence from suppliers. I have identified this as a factor that may have contributed to payment disputes and delay in payments arising. I will be referring the relevant information to the CMA for its consideration.

# Annex C

## Notice of Investigation



# Groceries Code Adjudicator

## Notice of Investigation

### GCA statutory responsibilities:

1. The role of the Groceries Code Adjudicator (GCA) 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 and monitor compliance with it.
2. The Code applies to 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, and Waitrose Limited.

### GCA decision to launch investigation

The GCA has considered information submitted to it and has made an assessment of that information in line with the published *Statutory guidance on how the Groceries Code Adjudicator will carry out investigation and enforcement functions*.

The GCA holds a reasonable suspicion that the Code has been breached by Tesco plc by some of its practices associated with the profit over-statement announced by the company in September 2014.

The GCA has applied its published prioritisation principles to each of the practices under consideration and has evidence that they were not isolated incidents, each involving a number of suppliers and significant sums of money.

The GCA has discussed the practices with Tesco plc and now needs more information from direct suppliers and others to determine what further action to take.

Accordingly, the GCA is launching an investigation into the conduct of Tesco plc under the following provisions of the Code:

**i) Part 4 (paragraph 5) of the Code: No delay in Payments:**

A Retailer must pay a Supplier for Groceries delivered to that Retailer's specification in accordance with the relevant Supply Agreement, and, in any case, within a reasonable time after the date of the Supplier's invoice.

**ii) Part 5 (paragraph 12) of the Code: No Payments for better positioning of goods unless in relation to Promotions**

A Retailer must not directly or indirectly Require a Supplier to make any Payment in order to secure better positioning or an increase in the allocation of shelf space for any Grocery products of that Supplier within a store unless such Payment is made in relation to a Promotion.



The investigation will also consider the extent to which Tesco plc has complied with the following paragraph in relation to paragraphs 5 and 12 of the Code:

**iii) Part 2 (paragraph 2) of the Code: Principle of fair dealing**

A Retailer must at all times deal with its Suppliers fairly and lawfully. Fair and lawful dealing will be understood as requiring the Retailer to conduct its trading relationships with Suppliers in good faith, without distinction between formal or informal arrangements, without duress and in recognition of the Suppliers' need for certainty as regards the risks and costs of trading, particularly in relation to production, delivery and payment issues.

**Investigation scope**

The investigation will consider the existence and extent of practices which have resulted in delay in payments to suppliers. This will include in particular, but not be limited to, delay in payments associated with:

- Short deliveries, including imposition of penalties
- Consumer complaints where the amounts were not agreed
- Invoicing discrepancies such as duplicate invoicing where two invoices were issued for the same product
- Deductions for unknown or un-agreed items
- Deductions for promotional fixed costs (gate fees) that were incorrect
- Deductions in relation to historic promotions which had not been agreed.

The investigation will also consider the existence and extent of practices where suppliers have been required to make payments for better positioning of goods (shelf-positioning) which are not related to a promotion.

**Retailers to be investigated**

The investigation will focus on Tesco plc and, at this stage, will not extend to other designated retailers. If during the course of the investigation evidence is presented to the GCA which indicates that the same practices have been carried out by other designated retailers, consideration will be given to extending the scope of the investigation to include them, in line with published GCA guidance including its prioritisation principles.

**Investigation review time period**

The investigation will consider the conduct of Tesco plc from 25 June 2013 (when the GCA was created) to 5 February 2015 (the date of this notice).

**Call for evidence**

The GCA accordingly calls for evidence relevant to its determination of whether Tesco plc has breached paragraphs 5 and 12 of the Code in the ways described in this notice.

The deadline for submission of evidence is 5pm on **3 April 2015**. Submissions may be made in paper or electronic form.

Evidence should be submitted to the GCA at:

Groceries Code Adjudicator  
2nd Floor  
Victoria House  
Southampton Row  
London, WC1B 4DA

Email to: [enquiries@gca.gsi.gov.uk](mailto:enquiries@gca.gsi.gov.uk)

All suppliers who have previously contacted the GCA directly with information about the practices under investigation or who are otherwise believed to have been directly affected by them will be contacted by the GCA before 5pm on **18 March 2015** for more information.

**The anonymity of all those providing information will be preserved and no individual or business will be identified without their consent.**

**5 February 2015**



