

MONITORING AND ENFORCEMENT BY THE OFFICE OF FAIR TRADING OF THE GROCERIES (SUPPLY CHAIN PRACTICES) MARKET INVESTIGATION ORDER 2009

[First issued August 2009, updated December 2009 and February 2010]

Purpose

1. The purpose of this document is to explain the OFT's role in the monitoring and enforcement of the Groceries (Supply Chain Practices) Market Investigation Order 2009 (the Order), and what suppliers should do if they want to pursue a dispute under the Groceries Supply Code of Practice (GSCOP).
2. Annex 1 reflects issues arising at the Order's implementation stage.
3. Annex 2 lists the ten retailers to which the Order and the GSCOP apply.

Background

4. Following a reference by the OFT under section 131 of the Enterprise Act 2002, the Competition Commission (CC) published a report on 30 April 2008 on its investigation into the supply of groceries in the United Kingdom.¹ The CC concluded that there were features of the market which prevent, restrict or distort competition, and that an adverse effect on competition therefore existed. It found that one of the features that adversely affected competition in the market was the exercise of buyer power by certain grocery retailers, through the adoption of supply chain practices that transfer excessive risks and unexpected costs to suppliers. To address the adverse effect of these practices, the CC proposed:

- the establishment of the GSCOP to supersede the existing code of practice that was put in place by way of undertakings following the

¹ The Supply of Groceries in the UK - www.competition-commission.org.uk/rep_pub/reports/2008/538grocery.htm

CC's 2000 report on the supply of groceries from multiple stores in the United Kingdom,² and

- the establishment of an ombudsman to monitor and enforce compliance with the GSCOP.
5. The Order³ was published on 4 August 2009 and came into effect on 4 February 2010. It established the GSCOP, which is set out in Schedule 1 of the Order. The retailers who are bound by the Order ('designated retailers') are listed in Schedule 2 to the Order, and Annex 2 to this advice. Further retailers with a turnover in the supply of groceries in the UK exceeding £1 billion may be designated in the future by the OFT under Article 4 of the Order.
 6. The CC does not have the power to establish an ombudsman by means of an order, so it initially sought undertakings from retailers to do so. Since a number of retailers declined to give such undertakings, the CC recommended to the Department for Business, Innovation and Skills on 4 August 2009⁴ that it legislate to establish an ombudsman. On 5 February 2010, the Government issued a consultation document on proposals to establish an ombudsman.⁵ We set out below the OFT's role in connection with the enforcement of the Order. This will change if an ombudsman is established.
 7. Sections 162-167 of the Enterprise Act 2002 set out the powers and duties of the OFT in relation to the monitoring and enforcement of undertakings and orders arising from market investigation reports by the CC. In particular, section 162(2)(a) requires the OFT to keep compliance with enforcement undertakings and orders under review, and section 167(6) enables the OFT to bring enforcement proceedings.

² Cmnd 4842 – see www.competition-commission.org.uk/inquiries/completed/2000/index.htm and scroll down to 'supermarkets' Further information as to how the existing undertakings will be released is set out on page 5.

³ See www.of.gov.uk/advice_and_resources/resource_base/register-orders-undertakings/monopoly

⁴ See www.competition-commission.org.uk/inquiries/ref2006/grocery/pdf/gscop_2_bis_letter.pdf

⁵ See BIS's press statement and consultation document at <http://nds.coi.gov.uk/clientmicrosite/content/Detail.aspx?ReleaseID=410960&NewsAreaID=2&ClientID=431>

The OFT's role from 4 February 2010

8. The main elements of the OFT's role are:

- to designate retailers who meet the designation criteria in Article 4 of the Order
- to monitor and enforce the obligations on designated retailers that are set out in the Order, ensuring that these retailers:
 - incorporate the GSCOP into supply agreements and make those agreements available in writing to their suppliers
 - train staff on the GSCOP
 - appoint compliance officers
 - respond to requests from suppliers to initiate dispute resolution proceedings
 - produce compliance reports and submit them to the OFT.

9. The OFT's role is confined to the operation and enforcement of the Order rather than the GSCOP. The OFT will not, therefore, provide guidance on the interpretation of the GSCOP or determine whether matters fall within the GSCOP's scope. The OFT does not have a role in resolving disputes between suppliers and retailers as to the operation of the GSCOP, nor will it proactively investigate complaints by suppliers about breaches of the GSCOP.

What should suppliers do if they want to pursue a dispute under the GSCOP?

10. Because the GSCOP does not form part of the Order itself, the OFT's statutory monitoring and enforcement powers do not apply to it. Complaints about breaches of the GSCOP should therefore be pursued with the retailer, to be handled in accordance with the dispute resolution procedure set out in the Order.

11. The procedure for resolving disputes under the GSCOP is set out in Article 11 of the Order. In the first instance, the supplier should inform the Code Compliance Officer at the relevant retailer that it believes that the retailer has not fulfilled its obligations under the Code, and wishes to initiate the dispute resolution procedure.
12. If the issue is not resolved at the level of Code Compliance Officer then the matter may be referred to arbitration. Article 11 of the Order provides that the arbitrator's costs in any arbitration will be borne by the retailer concerned, unless the arbitrator decides that the supplier's claim was vexatious or wholly without merit, in which case costs will be assigned at the arbitrator's discretion. All other costs of the arbitration will be assigned at the arbitrator's discretion.

In what circumstances should suppliers bring concerns to the attention of the OFT?

13. Suppliers should inform the OFT if they believe that a retailer is in breach of any of the requirements of the Order (as opposed to breaches of the GSCOP). Such breaches might include, for example: failure to incorporate the GSCOP into supply agreements, failure to ensure that their suppliers have a written copy of the supply agreement, or failure to follow the dispute resolution procedure when a dispute is raised by a supplier.
14. Complaints about breaches of the Order will be investigated and pursued as the OFT considers appropriate. The OFT may seek in the first instance to resolve matters informally with retailers. Compliance with the Order is also enforceable by civil proceedings brought by the OFT or CC for an injunction (under sections 167(6) and 167(7) of the Enterprise Act). The OFT may also ask the CC to give a direction under Article 3(2) of the Order to secure compliance. Suppliers should be aware that in order for the OFT to pursue alleged breaches of the Order brought to their attention by suppliers, it will normally be necessary to disclose their identity to the relevant retailer. This may be necessary in order to ensure that the retailer is made aware of the nature of the alleged breach and that the matter can be dealt with as effectively and efficiently as possible. Alternatively, it may be the case that it is impossible to pursue the matter without revealing information that will enable the retailer to deduce the identity of the supplier.

What did the OFT do in the lead up to the Order coming into effect?

15. After publication of the Order in August 2009, the OFT met designated retailers to discuss their arrangements for compliance, covering such matters as the appointment of Code Compliance Officers, the training of staff, and the incorporation of the GSCOP into supply agreements. Some of the issues arising from these discussions are described in Annex 1 of this note. The OFT continues to discuss with designated retailers the form and content of the compliance reports which they will be required in due course to submit.
16. In line with the OFT's advice, on 4 February, the CC released certain retailers from undertakings given following the CC's report in 2000 to comply with a Code of Practice on their dealings with suppliers.⁶ The GSCOP has superseded these undertakings.
17. Enquiries about the issues covered by this document should be addressed to:

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EC4Y 8JX

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Phone 020 7211 8574

⁶ See www.competition-commission.org.uk/inquiries/ref2006/grocery/groceries_inquiry_news.htm

Annex 1

Updating amendment reflecting points arising at implementation stage: December 2009

Incorporating the GSCOP into Supply Agreements, retailer and supplier terms and conditions

Article 5(1) of the Order requires that a Designated Retailer must not enter into or perform any Supply Agreement unless that Supply Agreement incorporates the Code and does not contain any provisions that are inconsistent with the Code. The Explanatory Note on the Order makes it clear that supply may be either on retailer terms and conditions or those of the supplier (see paragraph 21). Where it is agreed that supply is to take place on the retailer's terms and conditions, these must incorporate the GSCOP. Where supply is on the supplier's terms and conditions, a Designated Retailer should draw the attention of the supplier to the requirements of Article 5(1). Where agreement is not reached as to on which set of terms and conditions (retailer's or supplier's) supply is to take place, a Designated Retailer should ensure that its own terms and conditions incorporate the GSCOP and should draw the attention of the supplier to the requirements of Article 5(1).

Other compliance practice suggestions for consideration by Designated Retailers

Incorporating the GSCOP into Supply Agreements

- When communicating with suppliers on Supply Agreements, Designated Retailers communicating by e-mail may wish to consider making use of 'delivery receipt' and 'read receipt' functions to confirm that addressees have received the documents sent.
- Establishing a dedicated e-mail address for supplier queries relating to the implications of the GSCOP for Supply Agreements may assist retailers in encouraging and managing communication on this with suppliers.

Training

- In addition to training staff with responsibilities under the Order and GSCOP, a Designated Retailer may wish to consider creating a dedicated e-mail address to which staff are encouraged to send any queries that arise about compliance with the GSCOP or Order.
- Where a Designated Retailer operates a performance management system, it may wish to consider whether performance management may have a role in contributing to a culture of compliance with the GSCOP and Order. An example might be where one or more objectives relating to Order/GSCOP compliance is/are measured as part of performance assessment.

Note: The above points have been offered as suggestions only. They are not presented as guidance. It is for each Designated Retailer to consider how best to ensure compliance within the context of its own organisation. Each Designated Retailer is best placed to consider the extent to which suggestions made here have value and relevance in that context.

Annex 2

LIST OF GROCERY RETAILERS TO WHICH THE GROCERIES (SUPPLY CHAIN PRACTICES) MARKET INVESTIGATION ORDER 2009 AND THE GROCERIES SUPPLY CODE OF PRACTICE APPLY

Aldi Stores Limited

Asda Stores Limited

Co-operative Group Limited

Iceland Foods Limited

J Sainsbury plc

Lidl UK GmbH

Marks and Spencer plc

Tesco plc

Waitrose Limited

Wm Morrison Supermarkets plc