

The Groceries (Supply Chain Practices) Market Investigation Order 2009

Notice of intention to make an Order under section 165 of, and Schedule 10 to, the Enterprise Act 2002 and public consultation on the proposed Order

1. On 9 May 2006, the Office of Fair Trading (OFT), in exercise of its powers under section 131 of the Enterprise Act 2002 (the Act), referred to the Competition Commission (CC), for investigation and report, the supply of groceries by retailers in the United Kingdom.
2. The CC investigated the matters referred to it in accordance with section 131 of the Act and concluded, in accordance with section 134(1), that there were features of the market, either alone or in combination, which prevent, restrict or distort competition within the relevant market, and in accordance with section 134(2) that an adverse effect on competition existed.
3. The CC found that one of the features that adversely affected competition in the market 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.
4. The CC found that there was a detrimental effect on customers resulting from the adverse effect on competition and considered, in accordance with section 134(4), whether action should be taken by it, or whether it should recommend the taking of action by others, for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or the detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition.
5. The CC consulted on a range of possible actions in a Remedies Notice published on 31 October 2007. In the report the CC considered that a package of remedies consisting of the following key elements would be effective and proportionate in remedying the various features of the market identified as having an adverse effect on competition:
 - (a) the establishment of a Groceries Supply Code of Practice (GSCOP); and
 - (b) the establishment of a GSCOP Ombudsman to monitor and enforce compliance with the GSCOP.
6. The CC indicated in the report that it intended to implement the remedy set out in paragraph 5(a) above by an order rather than an undertaking. The CC now gives notice of its intention to make an Order.
7. This notice and the draft Order have been published on the CC website.
8. In accordance with paragraph 2(2)(f) of Schedule 10 to the Act, which requires that consultation extends for a period of not less than 30 days from the date of publication of this notice, representations should reach the CC by 17.00 on 30 March 2009.
9. Comments on the draft Order should be provided to the CC, preferably electronically, or in writing and should be addressed to: tim.oyster@cc.gsi.gov.uk or T J Oyster Esq, Inquiry Manager, Competition Commission, Victoria House, Southampton Row, London WC1 4AD.

Peter Freeman
Group Chairman
Competition Commission
26 February 2009

Explanatory note

[This Note is not part of the Order. Nothing in this Explanatory Note is legally binding. In the event of a conflict between this Explanatory Note and any provision of the Order, the Order shall prevail.]

Introduction

1. 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).¹ 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.
2. 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. This Order gives effect to part of these remedies.

Structure of the Order

3. The Order is divided into five Parts:
 - (a) Part 1 contains general provisions, including the commencement date for the Order, to whom the Order applies, definition and interpretation provisions and the power to issue directions.
 - (b) Part 2 lists the retailers who will be covered by the Groceries Supply Code of Practice (the Code), and establishes a duty on those retailers to incorporate the Code into its agreements with suppliers.
 - (c) Part 3 sets out duties on retailers to provide information to suppliers and to the Office of Fair Trading (OFT).
 - (d) Part 4 set outs the retailers' compliance obligations with respect to the Code and the Order.
 - (e) Part 5 sets the dispute resolution procedure for disputes arising in relation to the Code.
4. The Order has two Schedules: Schedule 1 contains the provisions of the GSCOP and Schedule 2 contains a list of retailers who will be covered by the Code at the date of its commencement.
5. The CC seeks to avoid placing undue burdens on business. In drafting the Order, we have attempted to balance the need for minimum standards in supply agreements with the need to maintain scope for commercial negotiations, particularly where these negotiations are mutually beneficial to suppliers and retailers. This is consistent with the many different supply arrangements that currently exist between retailers and

¹www.competition-commission.org.uk/rep_pub/reports/2008/fulltext/538.pdf.

suppliers, which reflect the very different characteristics of products supplied and of suppliers themselves.

6. This Order comes into force on *[insert date six months from date of the Order]*. It is not intended that there should be any further transitional period in relation to any of the provisions contained within the Order.

Possible consequences of not complying with the Order

7. Section 167 of the Enterprise Act 2002 (the Act) places a duty on any person to whom this Order applies to comply with it. Subject to the defences in the section, any person who suffers loss or damage due to a breach of this duty may bring an action.
8. Section 167 of the Act also provides that the OFT and the CC can seek to enforce this Order by civil proceedings for an injunction or for any other appropriate relief or remedy.

Review of this Order

9. The OFT has a general duty to monitor the operation of the Order under section 162 of the Act. This includes the duty to consider, from time to time, whether the Order should be varied or revoked in the light of a change of circumstances. Article 7 of the Order requires retailers to provide the OFT with information to allow it to monitor and review the operation of the Order.
10. The rest of this Explanatory Note deals in detail with each of the articles in the draft Order.

PART 1

Citation, commencement and interpretation

11. Article 1 has two functions. It gives the Order its name and it sets the dates on which the obligations in the Order come into force.
12. Article 2 contains a number of definitions applicable throughout the Order.
13. *Buying team*: the definition of buying team in the Order is likely to be wider than the traditional definition of 'buying team' used by many retailers. In addition to those persons employed by the retailer to manage the relationship between the retailer and its suppliers, the definition is framed to encompass all those employees whose role includes the interpretation and/or application of the provisions of the Code or the Order—it also includes the managers of those employees. The scope of the buying team will differ between retailers depending on how a particular retailer interacts with its suppliers. A retailer who, for example, manages all aspects of a buyer relationship within a concentrated group of employees will have a smaller 'buying team' for the purposes of the Order than a retailer who has different parts of the organization dealing with different aspects of the supplier relationship.
14. *De-list*: de-listing occurs where a retailer ceases to purchase goods from a particular supplier, or significantly reduces its purchases. 'Significant' in this regard is determined by the amount of product that the individual supplier supplies to the retailer, as rarely will a decision to de-list have a significant impact on a retailer's total purchases. Whether a reduction of purchases is 'significant' is likely to vary depending on, among other things, the supplier, the type of goods supplied and the significance

to the supplier of the product the retailer ceases to purchase (where the supplier supplies a number of different products). The Report does not provide guidance on what will be 'significant' for the purposes of the de-listing provision, and as such we have not expanded on the definition in the Order, instead leaving this for an arbitrator (or the Ombudsman, when appointed) to decide on a case-by-case basis. However, the CC considers that the primary factor in determining whether a decision to de-list is consistent with the Code will be whether the decision is made for genuine commercial reasons (see discussion at paragraph 57 below).

15. *Groceries*: the definition of Groceries closely follows that in the Terms of Reference for the Groceries market investigation.
16. *Supplier*: the definition sets out which suppliers will be covered by the Code. It captures all suppliers who supply directly to retailers, but excludes internal supply, ie supply by bodies within the same group of companies as the retailer.
17. Article 3 provides that the CC can give directions for the purposes of securing compliance with the Order.

PART 2

Code of Practice

18. Article 4 specifies those retailers who will be 'Designated Retailers' for the purposes of the Order. The Article lists retailers identified in the Report as those who would be covered by the Code, and sets out the criteria which the OFT will consider to determine whether additional retailers will be covered by the Code in the future. As currently drafted, the OFT will designate a grocery retailer as a Designated Retailer as soon as it obtains evidence that it meets the £1 billion turnover threshold. There is no express provision for the removal of a retailer from the list of designated retailers. Any request for removal from the list of designated retailers would be considered by the OFT under its duty to monitor undertakings in section 162 of the Act.
19. Article 5 requires Designated Retailers to incorporate the Code into their agreements with suppliers. While there is a requirement not to perform agreements that do not incorporate the Code, the retailer is still required to accept and pay for goods in relation to existing agreements.
20. Article 6 requires Designated Retailers to ensure that their suppliers have a written copy of supply agreements, as well as any subsequent contractual agreements or contractual arrangements made under or pursuant to that agreement. Designated Retailers are required to hold written copies of all terms of a supply agreement, as well as any subsequent agreements or arrangements made in accordance with the supply agreement, and to ensure that their suppliers also have a copy of these documents. The article also requires the Designated Retailer to send a cover letter highlighting certain information regarding the terms of supply.
21. Many retailers use electronic communication, including email and shared computer systems, to provide terms and conditions to suppliers. These means of communication fall within the definition of 'in writing', as expressed in the Interpretation Act 1978.² However, merely including terms and conditions on a retailer's website for a supplier to view will not be sufficient to meet the requirements set out in Article 6.

²See the Law Commission's advice in an e-commerce paper of December 2001: www.lawcom.gov.uk/docs/e-commerce.pdf.

Documents stored on a computer system will also be sufficient to satisfy a requirement to hold 'written' copies of agreements.

PART 3

Supply of information to the OFT

22. Article 7 requires a Designated Retailer to provide certain information to the OFT under certain circumstances. The information is for the purposes of enabling the OFT to monitor and review the operation of the Order or any provisions of the Order.

PART 4

Compliance obligations

23. Article 8 sets out information and training requirements for employees of a Designated Retailer. An awareness of the Code and its requirements by all those employees who interact with a retailer's suppliers is an important step in maintaining compliance with the Code. In addition to initial training, Article 8 also requires retailers to provide refresher training on the Code once in each calendar year. The CC does not envisage this retraining being as extensive as initial training, but would be an opportunity to remind employees of the key elements of the Code, as well as updating them on any developments in the previous year.
24. Article 9 establishes the Code Compliance Officer (CCO), whom the CC expects to help facilitate a Designated Retailer's compliance with the Code, primarily by acting as a point of contact for suppliers in relation to issues arising under the Code, but also to encourage the development of best practice for individual retailers in order to improve relationships with its suppliers. A retailer's CCO will be an employee of the retailer, but will remain independent from those employees who are involved with suppliers on a day-to-day basis.
25. The CCO's duties are aimed at ensuring suppliers have a person to contact within a retailer who is independent from the supplier's day-to-day buying contact. This includes being a point of contact for suppliers in relation to both queries and disputes. The CC expects that this will encourage, among other things, a greater amount of dialogue between retailers and suppliers, the development of consistent supply chain procedures for all of a retailer's suppliers, and the swift resolution of disputes in relation to the Code.
26. Article 10 sets out the reporting requirement for those retailers covered by the Order. The CCO is required to report to the retailer's audit committee on an annual basis, detailing and describing matters relating to the retailer's compliance with the Code and the Order. The report must be signed off by the audit committee (or similar body) of the retailer and delivered to the OFT for review.
27. A summary of the CCO's report must be included in the Designated Retailer's annual report. The CC has limited the publication to a summary, as we expect the CCO report to include a large amount of information which is commercially sensitive to the retailer. However, the summary should provide a general overview of each of the matters that are required to be in the full report.
28. Part 5 of the Order sets out the dispute resolution procedure under the terms of the GSCOP. The procedure seeks to encourage retailers and suppliers to engage in a

dialogue prior to undertaking formal dispute resolution, without unduly delaying a swift resolution of complaints.

29. It is important for both retailers and suppliers to be aware when a dispute has arisen, as this will influence the timing of the various steps in the dispute resolution procedure. The article is drafted so that the CCO and the supplier have an opportunity to discuss supply chain issues without a formal dispute arising. However, the article requires the retailer to establish at an early stage whether the supplier wishes to invoke the formal dispute resolution procedure. We expect that, if a retailer has sufficient procedures in place to encourage dialogue between the supplier and the retailer's buying team and/or CCO regarding supply chain issues, this should reduce the need for the dispute to be escalated to the formal dispute resolution procedure set out in the article.
30. As set out in Article 11, the onus will generally be on the retailer's CCO to establish whether a supplier wishes to elevate a complaint regarding a retailer to a formal dispute under the GSCOP. A supplier may refer the dispute to arbitration if it cannot be resolved within 21 days from the date on which the dispute arises. However, we expect that in a number of cases the parties will wish to continue to attempt to resolve disputes between themselves beyond the 21-day period. Therefore, while the right to arbitration will become available after 21 days, the dispute will not automatically be referred to arbitration at that time, nor will the right to refer the dispute to arbitration extinguish if it is not exercised immediately.
31. Article 11 provides for the OFT to designate a dispute resolution body for the arbitration. Consistent with the Report,³ we would expect the OFT to nominate the Ombudsman as an arbitrator of disputes, and in the event that an Ombudsman is not established, an independent arbitrator nominated by an external body. In the event that more than one dispute resolution body is designated by the OFT, the choice of arbitrator rests with the supplier.
32. The rules of the arbitration, and the rights of appeal, are set out in paragraphs 11(6) and 11(8) respectively. All costs of the arbitration will be borne by the retailer, unless the arbitrator decides that the supplier's claim is vexatious or wholly without merit. The Report concluded that this presumption was necessary, given the current 'climate of fear' among suppliers in relation to disputes under the existing SCOP, to reduce the risk to the suppliers of bringing disputes and to encourage them to do so.⁴
33. While the dispute resolution procedure specifies that only a supplier may invoke the arbitration requirement, Article 11(9) allows a retailer to include a clause in a Supply Agreement giving a retailer the right to invoke arbitration, in a similar manner to that set out in Article 11(4).

Schedule 1

The Groceries Supply Code of Practice

34. Schedule 1 contains the provisions of the Code which must be incorporated into covered retailers' supply agreements, as required by Article 5 of the Order.

³See paragraphs 11.344 & 11.358.

⁴See paragraph 11.3.

35. Part 1 of the Code contains a number of definitions, many of which mirror those in the Order. The definitions have been repeated in the Code in order to allow it to be read and understood without needing to revert back to the Order.
36. *Reasonable notice*: given the different situations within the Order as to when reasonable notice must be given, and the myriad different relationships between retailers and their suppliers, the CC has not defined a specific period in which notice will be reasonable. The CC has set out a series of factors that will assist with the assessment of when notice is reasonable, none of which will be determinative in any particular case.
37. *Required*: many of the practices covered by the Code are beneficial to both suppliers and retailers (eg promotions, marketing, and the modification of supply chain procedures), and outright prohibitions on particular conduct would unnecessarily limit the scope of commercial negotiations between retailers and suppliers. The Order seeks to ensure that suppliers are not under duress to acquiesce to requests made by suppliers in respect of certain practices. The definition of *Required* places the onus on the retailer to demonstrate that, where it makes a request of a supplier, that supplier has genuinely volunteered to undertake a particular action in response to ordinary commercial pressures.
38. The Code consists of six parts, relating to different aspects of the retailer/supply relationship.
39. Part 2 contains an overarching fair dealing principle, which will add a useful overarching context in which provision of the GSCOP should be interpreted. The fair dealing provision emphasizes the need for certainty between suppliers regarding the risks and costs of trading, particularly in relation to key elements of the supply chain: production (including volume and sizes of products), delivery and payment (including prices and payment terms).
40. Part 3 of the Code contains principles relating to variations to the supply chain or to supply agreements. Paragraph 3 prohibits retrospective changes to terms of supply, once they have been agreed by the parties.
41. A discussion of when a variation of a supply agreement will be retrospective is set out in the Report in the footnote to paragraph 9.46:

In our view, where a retailer and a supplier have concluded an agreement for the supply of goods, any subsequent unexpected unilateral change of the contractual terms governing the provision of those particular goods is generally not appropriate when the supplier has itself already sunk significant costs in order to meet the objectives set out in the agreement. Even when the renegotiation occurs prior to delivery of the goods and acceptance of them by the retailer, it is likely that a supplier will have taken irrevocable steps as a result of the contract.
42. Paragraph 3(2) allows for adjustment to terms of supply to have retrospective effect where the supply agreement clearly and unambiguously allows for such changes, and the basis for how such adjustments can be made. This encourages retailers and suppliers to consider how risk will be allocated at the time supply agreements are entered into.
43. The types of practice that are intended to be prohibited by paragraph 3 are described in Appendix 9(8), paragraphs 27 to 42 of the Report. Some examples are also provided in the Annex to this Explanatory Note.

44. Paragraph 4 obliges a retailer to provide written notice to a supplier when changes are made to its supply chain procedures, or compensate a supplier for any costs incurred by the supplier due to a failure to provide such notice.
45. Part 4 of the Code sets out minimum standards in relation to prices and payment. Paragraph 5 requires retailers to pay for goods received from suppliers within a reasonable time after the date of the Supplier's invoice. We note in this context that the EU Late Payments Directive considers, in the absence of a fixed payment period in a contract, that a payment will be considered late if it is not made within 30 days of the receipt of the invoice requesting payment.⁵
46. Paragraph 6 prohibits a retailer from requiring a supplier to make any payment towards a retailer's marketing costs unless such a contribution has been agreed in the supply agreement.
47. Paragraph 7 prohibits completely a supply agreement containing a provision which makes a supplier liable for shrinkage from a retailer's premises. Shrinkage broadly covers any loss of goods after they have been delivered to the retailer. The Report⁶ states that shrinkage is an area where the CC felt that even an upfront allocation of risk may be excessive. Hence, the paragraph prohibits any express liability for shrinkage (whether upfront or retrospective) in a supply agreement.
48. Paragraph 8 prohibits retailers from requiring a supplier to make any payment for wastage. In respect of some types of goods it would be reasonable for suppliers and retailers to share the cost of wastage. Paragraph 8 provides for a retailer and a supplier to agree upfront how wastage will be allocated under the Supply Agreement.
49. Paragraph 9 prohibits a retailer requiring payments in order to secure the stocking or listing of a supplier's product. An exception exists when such payments are made in relation to promotions. In order to encourage retailers to stock new and innovative products, an exception also exists for payments to secure stocking or listing of new products. However, such payments must reflect the risk run by that retailer in stocking, displaying or listing new products.
50. Paragraph 10 requires retailers to compensate suppliers for erroneous forecasts. Forecasts are important to both retailers and suppliers, and are particularly beneficial in allowing suppliers to plan their production to meet retailer's expected needs. Paragraph 10 requires retailers to ensure that any forecasts are sufficiently transparent so as to allow suppliers to make their own assessment as to the veracity of any forecast made (to the extent that suppliers have not been involved in the forecasting process). Unless the supply agreement expressly provides otherwise, a retailer will be liable for any cost incurred by the supplier as a result of any forecasting error attributable to that retailer, and where the retailer has prepared the forecasts in good faith, with due care, and following consultation with the supplier.
51. Paragraph 11 limits the extent to which a retailer can require a supplier to obtain goods, services or property from any third party where the retailer acquires a benefit from the third-party arrangement. A retailer must only tie a supplier to a third party where the supplier's alternative fails to meet objective quality standards laid down by the retailer, or where the alternative source charges more than the third party for the goods, service or property.

⁵Directive 2000/35/EC.

⁶See paragraphs 9.48, 11.316 & 11.317 of the Report.

52. Part 5 of the Code sets out minimum standards in relation to promotions. Paragraph 12 prohibits a retailer requiring payments from the supplier in order for the supplier to secure better positioning or an increase in the allocation of shelf space. As with paragraph 8, an exception exists when such payments are made in relation to promotions.
53. Paragraph 13 provides that a retailer will not require a supplier predominantly to fund the costs of a promotion. The ordinary meaning of the word predominantly suggests an amount greater than half of the costs of a promotion. Where some payment is required by the retailer, paragraph 13(2) requires the retailer to provide reasonable notice only after reasonable notice, in writing, has been given to the supplier.
54. Paragraph 14 requires the retailer to take precautions during promotional periods to ensure that it orders only so much of the relevant products at promotional prices so as to cover the expected sales during the promotional period. In particular, the retailer must ensure that the basis on which any order is made in relation to promotional products is transparent. If a retailer does not take such precautions, paragraph 14(1) requires the retailer to compensate the supplier for any product purchased from the supplier at the promotional price, but sold by the retailer at a higher non-promotional price.
55. Part 6 sets out other duties on retailers. Paragraph 15 provides that suppliers will be responsible for the cost of customer complaints which are attributable to their negligence or default, while ensuring that payment for customer complaints does not become a 'profit centre' for retailers. It sets out instances when a retailer may require a supplier to make a payment in relation to a consumer complaint, and sets out procedures a retailer must follow in these instances. Paragraph 15 allows a retailer to charge a supplier in relation to consumer complaints when:
- (a) the retailer and the supplier have agreed on an average figure for payments in relation to resolving customer complaints, and that this average figure does not exceed the expected costs to the retailer of resolving the complaints; or
 - (b) if the retailer has not adopted the procedure in (a) above, the retailer is satisfied that the customer complaint is justifiable and attributable to the negligence or default of the supplier. In some instances the retailer must also provide evidence of this to the supplier.
56. If the retailer wishes to adopt the practice set out in (b) above, the extent of the costs recoverable, and the procedures the retailer must go through to verify the complaint, differ depending on how the complaint can be resolved:
- (a) If a complaint can be resolved in-store by a refund or exchange, the payment required from the supplier should not be greater than the retail price of the product charged by the retailer.
 - (b) If a complaint cannot be resolved in-store through a refund or exchange, the payment required from the supplier can be all those costs reasonably related to that retailer's costs arising from the complaint. However, there are further steps involved in establishing fault in these circumstances, as the retailer must provide the supplier with a full report regarding the complaint, including evidence that the consumer complaint is justifiable and attributable to negligence or default on the part of the supplier. The greater standard of evidence reflects the greater cost that is likely to be incurred by a supplier in such instances.

57. Paragraph 16 imposes duties on retailers seeking to de-list a supplier. The definition of de-list is discussed in paragraph 14 of this Explanatory Note. However, the key factor in determining whether a decision to de-list is justifiable under the Code is whether it is for 'genuine commercial reasons'. Particular examples where de-listing will not be for genuine commercial reasons are where a retailer de-lists a supplier as a consequence of the supplier exercising its rights under the Code or its supply agreement with the retailer, or the failure by a retailer to fulfil its obligations under the Code.
58. The procedure for de-listing a supplier is set out in paragraph 16(2). Prior to de-listing a supplier, a retailer must provide reasonable notice to the supplier of the decision to de-list. The amount of notice will vary depending on the case—notice periods should have regard to the investment and costs that have been made by the supplier in order to meet the requirements of the supply agreement, and should include sufficient time for the supplier to exercise its rights to have the decision reviewed internally by the supplier. These rights include attending an interview with the retailer's CCO to discuss the decision to de-list, and having the decision reviewed by a senior buyer of the retailer.
59. Paragraph 17 allows a supplier to require a Designated Retailer's senior buyer to review any decision taken by a Designated Retailer in relation to issues to which the Code relates. The Designated Retailer must ensure that a supplier is aware of contact details for its Senior Buyer(s).

Examples: retrospective variations to supply agreements

Example 1

A supplier of produce meets with a retailer to discuss and agree forecast volumes for the upcoming season. The forecast clearly states that the volumes agreed are indicative only, and will be subject to orders actually made by the retailer.

A forecast is a planning tool beneficial to both retailers and suppliers. Where there is a clear and unambiguous provision in the supply agreement that a forecast is subject to revision and does not create obligations on the other party, subsequent amendment of a forecast will not be a retrospective variation of a supply agreement. In this example, the risk of the forecast overstating the amount of produce required by the retailer has been assumed by the supplier, provided that the forecast does not breach the erroneous forecast provisions in the Code.

Example 2

To encourage a supplier to commence supplying a new product line, a retailer commits to purchasing a minimum volume of that product for each of the first three years in which it is supplied. Half way through the first year of the supply agreement, the retailer amends the minimum volume requirement.

This example can be contrasted with that relating to forecasts. By agreeing to a minimum annual purchase, the retailer is making an express commitment for the forthcoming year, designed to encourage a supplier to undertake significant investment to achieve the agreed volume. Any change to this volume will be a retrospective variation of a supply agreement. However, given the level of uncertainty that is inherent in establishing sales for a new product line, it seems likely the retailer and supplier should turn their minds to how variation in the minimum volume required might be adjusted. Any provision in the supply agreement for adjustment should be clear and unambiguous.

Example 3

A retailer agrees to purchase a certain volume of produce from a supplier and places an order to this effect. Prior to delivery of the order, the retailer decides that it wishes to run a promotion on the produce to be delivered, and requires the supplier to fund some of this promotion. Following delivery, the retailer fails to sell a significant proportion of the produce due to a sudden change in consumer demand. The retailer therefore discounts the amount paid to the supplier to recoup lost profit from the lack of sales.

In this example, there has been a clear agreement for the supply of goods, and the subsequent change of the contractual terms, both in relation to the promotion and the discounting of the price paid, will be retrospective changes to the supply agreement.

Example 4

A supplier of seasonal produce is unable to deliver goods to the specifications set out in the supply agreement, due to unforeseen weather conditions. The retailer and the supplier agreed that the retailer will accept the goods that do not meet specifications, but at a lower price than previously agreed.

Such an arrangement will not be a retrospective variation to a supply agreement. In this case, there has been a breach of the supply agreement by the supplier, and the retailer has agreed to take action to mitigate any loss that will arise from that breach.

Example 5

A retailer and supplier reach an agreement for the supply of a product that is made primarily from a particular input. A price has been agreed for all volumes ordered by the retailer during the period of the contract. Three months into the agreement, the price of the input decreases by 30 per cent. The retailer wishes to decrease the retail price for the product to reflect the decrease in the cost of production. The retailer consequently wishes to reflect the decrease in retail price in the purchase price paid to the supplier.

Under the terms of the Code the price cannot be changed for goods where the price has already been agreed. In many circumstances, a supply agreement will be an overarching agreement, with price and quantity agreed as orders are placed. In such situations, any change in input price can be reflected in the next order. However, the Code prohibits changes to the price paid by retailers for goods already ordered, or where the price has been set for a certain period.

The retailer will be able to vary the price paid to the supplier for goods already ordered if the supply agreement clearly and unambiguously provides that the price at which goods will be supplied will vary depending on input price, and provides for a formula setting out how the new price will be calculated (eg goods supplied on a cost plus basis). Such a clause will fall under the exception set out in paragraph 2(3) of the Code.

**THE GROCERIES (SUPPLY CHAIN PRACTICES) MARKET
INVESTIGATION ORDER 2009**

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Background

On 9 May 2006, the Office of Fair Trading (OFT), in the exercise of its powers under section 131 of the Enterprise Act 2002 (the Act), referred to the Competition Commission (CC), for investigation and report, the supply of groceries by retailers in the United Kingdom.

On 30 April 2008 the CC published a report on the investigation and it contained the decision that there were adverse effects on competition.

On 26 February 2009 the CC gave notice of its intention to make this order in accordance with paragraph 2 of Schedule 10 to the Act as applied by section 165 of the Act.

The CC, in accordance with section 138 of the Act and in exercise of the powers conferred by sections 161 and 164 and Schedule 8, and for the purpose of remedying, mitigating or preventing the adverse effects on competition concerned and for the purpose of remedying, mitigating or preventing detrimental effects on customers so far as they have resulted from, or may be expected to result from, the adverse effects on competition, makes the following Order.

PART 1

Citation, commencement and interpretation

1. Citation and commencement

- (1) This Order may be cited as 'The Groceries Market Investigation (Supply Chain Practices) Order 2009'.
- (2) The obligations in this Order will come into force on the [date six months from date on which Order is made].

2. General interpretation, index of defined expressions etc

- (1) In this Order (including the Schedule):

Act means the Enterprise Act 2002;

Buying Team means those employees of a Retailer:

- (a) who are directly involved in buying Groceries for resale; and/or
- (b) whose role (excluding the role of the Code Compliance Officer) requires the interpretation and application of the provisions of the Code or this Order; and
- (c) who have immediate management responsibility for any of those employees described in (a) and (b) above;

CC means the Competition Commission;

Code means the Groceries Supply Code of Practice set out in Schedule 1;

Code Compliance Officer means the person appointed in accordance with Article 10(1) of this Order;

De-list means to cease to purchase Groceries for resale from a Supplier, or significantly to reduce the volume of purchases made from that Supplier. Whether a reduction in volumes purchased is 'significant' will be determined by reference to the amount of Groceries supplied by that Supplier to the Retailer, rather than the total volume of Groceries purchased by the Retailer from all of its Suppliers;

Designated Retailer means a retailer listed in Article 4(a) of this Order or who is designated as a Designated Retailer in accordance with Article 4(b) of this Order;

Dispute means a dispute arising under Articles 11(2) or 11(3) of this Order;

Groceries means food (other than that sold for consumption in the store), pet food, drinks (alcoholic and non-alcoholic, other than that sold for consumption in the store), cleaning products, toiletries and household goods, but excludes petrol, clothing, DIY products, financial services, pharmaceuticals, newspapers, magazines, greetings cards, CDs, DVDs, videos and audio tapes, toys, plants, flowers, perfumes, cosmetics, electrical appliances, kitchen hardware, gardening equipment, books, tobacco and tobacco products;

OFT means the Office of Fair Trading;

Ombudsman means a person appointed as the Grocery Supply Code of Practice Ombudsman, at any time when such office is in existence;

Primary Buyer means, in relation to any individual Supplier, the employee or employees of a Retailer who are responsible for the day-to-day buying functions of the Retailer in respect of that individual Supplier;

Retailer means any person carrying on a business in the United Kingdom for the retail supply of Groceries;

Senior Buyer means, in relation to any individual Supplier, an employee or employees within a Retailer's Buying Team who manage that Supplier's Primary Buyer or Primary Buyers (or is otherwise at a higher level than the Primary Buyer(s) within the management structure of the Retailer);

Supplier means any person carrying on (or actively seeking to carry on) a business in the direct supply to any Retailer of Groceries for resale in the UK, and includes any such person established anywhere in the world, but excludes any person who is part of the same group of interconnected bodies corporate (as defined in section 129(2) of the Act);

as the Retailer to which it supplies; and

Supply Agreement means any agreement which must be recorded in writing pursuant to Article 6(1) of this Order.

- (2) Compliance with the Code and this Order should not be interpreted so as to exclude any person from, or restrict the application of, the Competition Act 1998.

3. Powers of direction

- (1) The CC may give directions falling within Article 3(2) to:

- (a) a person specified in the directions; or
- (b) a holder for the time being of an office so specified in any body of persons corporate or unincorporate.

- (2) Directions fall within this Article 3(2) if they are directions:

- (a) to take such actions as may be specified or described in the directions for the purpose of carrying out, or ensuring compliance with, this Order; or
- (b) to do, or refrain from doing, anything so specified or described which the person might be required by this Order to do or refrain from doing.

- (3) In Article 3(2) above 'actions' includes steps to introduce and maintain arrangements to ensure any director, employee or agent of a Designated Retailer carries out, or secures compliance with, this Order.

- (4) The CC may vary or revoke any directions so given.

PART 2
Code of Practice

4. Designated Retailer

- (1) The following will be Designated Retailers for the purposes of this Order:
- (a) any of those persons specified in Schedule 2.
 - (b) any Retailer with a turnover exceeding £1 billion with respect to the retail supply of Groceries in the United Kingdom, and which is designated in writing as a Designated Retailer by the OFT.
 - (c) any person who carries on the whole, or a substantial part, of the business of any of the persons specified in Articles 4(1)(a) or 4(1)(b) above.

5. Duty to incorporate Code in Supply Agreements

- (1) 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.
- (2) The prohibition in Article 5(1) above will not apply to any obligation of the Designated Retailer to accept and pay for goods ordered prior to the [date on which the Order comes into force] or to the rights of the Designated Retailer to make any claim in respect of such goods.

6. Duty to provide information to Suppliers

- (1) A Designated Retailer must record in writing all terms of any agreement with a Supplier for the supply of Groceries for the purpose of resale in the United Kingdom, as well as any subsequent contractual agreements or contractual arrangements made under or pursuant to that agreement.
- (2) A Designated Retailer must not enter into a Supply Agreement with a Supplier unless the Supplier has a written copy of the Supply Agreement, including any proposed terms and conditions which are intended to form part of, but are not fully documented in, the Supply Agreement.
- (3) Written terms of a Supply Agreement must be held by the Designated Retailer for a period of 12 months after the relevant Supply Agreement has expired or otherwise concluded.
- (4) Written terms of any agreements or arrangements made under or pursuant to a Supply Agreement must be held by the Designated Retailer for a period of 12 months after the relevant contractual agreement or arrangement is made.
- (5) All such records held by the Designated Retailer in accordance with Articles 6(3) and 6(4) must be made available on request to the Supplier to which they relate.
- (6) A Designated Retailer must not enter into a Supply Agreement with a Supplier unless it has first provided the Supplier with a letter which sets out:
- (a) the obligation on the Designated Retailer not directly or indirectly to require

actions by the Supplier in relation to marketing costs, wastage, payments, promotions, changes to supply chain procedures, and tying, as more specifically set out in the Code;

- (b) the identity and contact details of the Senior Buyer for that Supplier;
 - (c) the Designated Retailer's obligation under the Code to allow a Supplier to escalate a decision of a Primary Buyer (including a decision to De-list) to the Senior Buyer for review;
 - (d) the identity and contact details of the Designated Retailer's Code Compliance Officer;
 - (e) the feedback procedure established by the Code Compliance Officer in accordance with Article 9(2)(d) of this Order;
 - (f) the procedures relating to De-listing, as set out in paragraph 16 of the Code; and
 - (g) the dispute resolution procedure set out in Article 11 of this Order.
- (7) Where any subsequent agreements or arrangements made under or pursuant to a Supply Agreement are agreed orally between the Supplier and a Designated Retailer, the Designated Retailer must confirm the terms of such arrangements in writing with the relevant Supplier within three working days of such arrangements being agreed.

PART 3

Supply of information to the OFT

7. Supply of information to the OFT

- (1) A Designated Retailer must provide to the OFT any information and documents reasonably required for the purposes of enabling the OFT to monitor and review the operation of this Order or any provisions of this Order.
- (2) A Designated Retailer must keep, maintain and produce those records specified in writing by the OFT that relate to the operation of any provisions of this Order.
- (3) Any Designated Retailer whom the OFT reasonably believes to have information which may be relevant to the monitoring or review of the operation of any provisions of this Order may be required by the OFT to attend and provide such information in person.

PART 4

Compliance obligations

8. Duty to train staff with respect to the Code

- (1) Prior to the [date on which the Order comes into force] a Designated Retailer must provide to its Buying Team:

- (a) a copy of the Code; and
 - (b) training on the requirements of this Order and the Code.
- (2) Any person who becomes part of a Designated Retailer's Buying Team after [date on which the Order comes into force] must be provided with:
 - (a) a copy of the Code within one week of becoming part of the Designated Retailer's Buying Team; and
 - (b) training on the requirements of this Order and the Code within one calendar month of becoming part of the Designated Retailer's Buying Team,
- (3) With the exception of the year in which this Order commences, a Designated Retailer must provide retraining on the requirements of this Order and the Code to all staff in its Buying Team at least once each calendar year.

9. Duty to appoint in-house compliance officer and the role of the compliance officer

- (1) A Designated Retailer must appoint a suitably qualified employee as the Code Compliance Officer.
- (2) A Designated Retailer must ensure that the Code Compliance Officer:
 - (a) will be provided with all resources necessary for the fulfilment of its role, including access to all documentation relating to, and availability of the Designated Retailer's Buying Team to discuss issues with, the Designated Retailer's obligations under the Code and/or this Order;
 - (b) will be available as a point of contact for Suppliers and any authority or other body making enquiries in relation to the Code or this Order;
 - (c) will be independent of, and must not be managed by, any member of the Buying Team of the Designated Retailer;
 - (d) will develop a procedure by which the Designated Retailer's Suppliers can provide anonymous feedback to the Code Compliance Officer on, amongst other things, the Supplier's relationship with the Designated Retailer's Buying Team and the Designated Retailer's compliance with the Code and this Order; and
 - (e) will be available to discuss with the Supplier the reason for any decisions made by the Designated Retailer in relation to the Code or this Order.

10. Compliance

- (1) A Designated Retailer must ensure that, for each financial year, the Code Compliance Officer delivers an annual compliance report to the OFT, copied to the Ombudsman if there is an Ombudsman established at the relevant date, within four months of the financial year to which the annual compliance report relates. The annual compliance report must have been submitted to, and approved by, the chair of the Designated Retailer's audit committee and must include a detailed and accurate account, for the financial year to which the annual compliance report relates, of:

- (a) the Designated Retailer's compliance with the Code and this Order in the preceding year, including instances where a breach or potential breach of the Code or this Order has been identified, and the steps taken to rectify it;
 - (b) steps taken during the preceding year to ensure compliance with the Code and this Order, including details of staff training undertaken and guidance issued in relation to the Code;
 - (c) Disputes between the Designated Retailer and its Suppliers regarding the terms of any Supply Agreement, or the application of the Code, and the outcome of any such Dispute; and
 - (d) any feedback provided to the Code Compliance Officer by Suppliers on the commercial terms of Suppliers' Supply Agreements or any other aspect of the Designated Retailer's relationship with its Suppliers.
- (2) A Designated Retailer must ensure that:
- (a) the Code Compliance Officer provides such other reports as are necessary to ensure that the Designated Retailer's audit committee retains effective oversight over the Designated Retailer's compliance with the Code and this Order.
 - (b) if the Designated Retailer does not have an audit committee, the Code Compliance Officer reports directly to the non-executive director of the Designated Retailer who carries out the functions typically associated with an audit committee, or in the absence of such non-executive director, to the Designated Retailer's CEO or Managing Director.
- (3) A summary of the annual compliance report described in Article 10(1) must be included in the Designated Retailer's annual company report, and will contain an overview of each of the matters set out in Article 10(1) above. If the Designated Retailer does not produce an annual company report, the summary of the annual compliance report will be published clearly and prominently on the Designated Retailer's website.

PART 5

Dispute Resolution

11. Duty to negotiate in good faith to resolve disputes

- (1) A Designated Retailer must negotiate in good faith with a Supplier to resolve any dispute arising under the Code.
- (2) A Dispute will arise under the Code when a Supplier informs the Code Compliance Officer that it believes that the Designated Retailer has not fulfilled its obligations under the Code, and that the Supplier wishes to initiate the dispute resolution procedure set out in this Article.
- (3) Whenever a Supplier contacts the Code Compliance Officer regarding a potential breach of the Code by the Designated Retailer, the Code Compliance Officer will inform the Supplier of its right to initiate a Dispute under Article 11(2) above, and confirm whether the Supplier wishes to initiate a Dispute. In the absence of the

Code Compliance Officer requesting confirmation, a Dispute will be deemed to arise.

- (4) If any Dispute is not resolved to the satisfaction of the Supplier within 21 days from the date the Dispute arises, then at any time during a period expiring four calendar months after the Dispute arises the Designated Retailer will submit to an arbitration request by the Supplier in accordance with Articles 11(5) to 11(8).
- (5) The arbitration will be administered by a dispute resolution body approved and designated by the OFT and nominated by the Supplier in the event that more than one such body is designated by the OFT.
- (6) To the extent that they do not conflict with the this Article 11, the arbitration will be conducted in accordance with the Rules of the Chartered Institute of Arbitrators in force for the time being, or such other dispute resolution body as is nominated by the arbitrator. In any arbitration commenced pursuant to this Order, the number of arbitrators will be one and the seat or legal place of arbitration will be London, England or such other city within the United Kingdom as the Supplier nominates.
- (7) All costs of the arbitration, including the fees and expenses of the arbitrator, will be borne by the Designated Retailer, unless the arbitrator decides that the Supplier's claim was vexatious or wholly without merit, in which case costs will be assigned at the arbitration's discretion.
- (8) The decision of the arbitrator will be binding and final on both the Designated Retailer and the Supplier, with the exception that either party may appeal on the grounds set out in sections 67 to 69 inclusive of the Arbitration Act 1996.
- (9) Nothing in this Article will prevent a Designated Retailer including in a Supply Agreement a right for the Designated Retailer also to refer a Dispute to arbitration if the Dispute is not resolved to the satisfaction of the Retailer within 21 days from the date the Dispute arises, provided that such arbitration is on the same terms as that set out in this Article.

Signed by authority of the CC

.....
Peter Freeman
Chairman
Competition Commission
[] 2009

Schedule 1

The Groceries Supply Code of Practice

PART 1—INTERPRETATION

1. Interpretation

(1) In this Code:

Code Compliance Officer means the person appointed in accordance with Article 10(1) of the Order;

Groceries means food (other than that sold for consumption in the store), pet food, drinks (alcoholic and non-alcoholic, other than that sold for consumption in the store), cleaning products, toiletries and household goods, but excludes petrol, clothing, DIY products, financial services, pharmaceuticals, newspapers, magazines, greetings cards, CDs, DVDs, videos and audio tapes, toys, plants, flowers, perfumes, cosmetics, electrical appliances, kitchen hardware, gardening equipment, books, tobacco and tobacco products;

Order means The Groceries (Supply Chain Practices) Market Investigation Order 2009;

Payment or **Payments** means any compensation or inducement in any form (monetary or otherwise) and includes more favourable contractual terms;

Promotion means any offer for sale at an introductory or a reduced retail price, or with some other benefit to consumers that is intended to subsist only for a specified period;

Reasonable Notice means a period of notice, the reasonableness of which will depend on the circumstances of the individual case, including:

- (a) the duration of the Supply Agreement to which the notice relates, or the frequency with which orders are placed by the Retailer for relevant Groceries;
- (b) the characteristics of the relevant Groceries including durability and external factors affecting their production;
- (c) the value of any relevant order relative to the turnover of the Supplier in question; and
- (d) the overall impact of the information given in the notice on the business of the Supplier;

Retailer means any person carrying on a business in the United Kingdom for the retail supply of Groceries;

a Retailer will **'Require'** particular actions on the part of a Supplier if the relevant Supplier does not genuinely volunteer, whether or not in response to a 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 are objectively justifiable, 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;

Senior Buyer means, in relation to any individual Supplier, an employee (or employees) within a Retailer's Buying Team, who manages that Supplier's Primary Buyer (or Primary Buyers) (or is otherwise at a higher level than the Primary Buyer within the management structure of the Retailer);

Shrinkage means losses that occur after goods are delivered to a Retailer's premises and arise where due to theft, the goods being lost or accounting error;

Supplier means any person carrying on (or actively seeking to carry on) a business in the direct supply to any Retailer of Groceries for resale in the UK, and includes any such person established anywhere in the world, but excludes any person who is part of the same group of interconnected bodies corporate (as defined in section 129(2) of the Act) as the Retailer to which it supplies; and

Supply Agreement means any agreement which must be recorded in writing pursuant to Article 6(1) of this Order.

Wastage means Groceries which become unfit for sale subsequent to them being delivered to Retailers.

(2) Compliance with the Code does not exclude any person from, or restrict the application of, the Competition Act 1998.

(3) The Interpretation Act 1978 applies to this Order as it does to Acts of Parliament.

PART 2—FAIR DEALING

2. 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.

PART 3—VARIATION

3. Variation of Supply Agreements and terms of supply

(1) Subject to paragraph 3(2), a Retailer must not vary any Supply Agreement retrospectively, and must not request or require that a Supplier consent to retrospective variations of any Supply Agreement.

(2) A Retailer may make an adjustment to terms of supply which has retroactive effect where the relevant Supply Agreement sets out clearly and unambiguously:

(a) any specific change of circumstances (such circumstances being outside the Retailer's control) that will allow for such adjustments to be made; and

- (b) detailed rules that will be used as the basis for calculating the adjustment to the terms of supply.
- (3) If a Retailer has the right to vary a Supply Agreement unilaterally, it must give Reasonable Notice of any such variation to the Supplier.

4. Changes to supply chain procedures

A Retailer must not directly or indirectly Require a Supplier to change significantly any aspect of its supply chain procedures during the period of a Supply Agreement unless that Retailer either:

- (a) gives Reasonable Notice of such change to that Supplier in writing; or
- (b) fully compensates that Supplier for any net resulting costs incurred as a direct result of the failure to give Reasonable Notice.

PART 4—PRICES AND PAYMENTS

5. No delay in Payments

A Retailer must pay a Supplier for products 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.

6. No obligation to contribute to marketing costs

Unless provided for in the relevant Supply Agreement between the Retailer and the Supplier, a Retailer must not, directly or indirectly, Require a Supplier to make any Payment towards that Retailer's costs of:

- (a) buyer visits to new or prospective Suppliers;
- (b) artwork or packaging design;
- (c) consumer or market research;
- (d) the opening or refurbishing of a store; or
- (e) hospitality for that Retailer's staff.

7. No Payments for shrinkage

A Supply Agreement must not include provisions under which a Supplier makes Payments to a Retailer as compensation for shrinkage.

8. Payments for wastage

A Retailer must not directly or indirectly Require a Supplier to make any Payment to cover any wastage of that Supplier's products incurred at that Retailer's stores unless:

- (a) such wastage is due to the negligence or default of that Supplier, and the relevant Supply Agreement sets out expressly and unambiguously what will constitute negligence or default on the part of the Supplier; or
- (b) the basis of such Payment is set out in the Supply Agreement.

9. Limited circumstances for Payments as a condition of being a Supplier

A Retailer must not directly or indirectly Require a Supplier to make any Payment as a condition of stocking or listing that Supplier's products unless either:

- (a) such Payment is made in relation to a Promotion; or
- (b) such Payment:
 - (i) is made in respect of products which have not been stocked, displayed or listed by that Retailer during the preceding 365 days in 25 per cent or more of its stores; and
 - (ii) reflects a reasonable estimate by that Retailer of the risk run by that Retailer in stocking, displaying or listing such new products.

10. Compensation for forecasting errors

- (1) A Retailer must fully compensate a Supplier for any cost incurred by that Supplier as a result of any forecasting error attributable to that Retailer unless:
 - (a) that Retailer has prepared those forecasts in good faith and with due care, and following consultation with the Supplier; and
 - (b) the Supply Agreement includes an express and unambiguous provision that full compensation is not appropriate.
- (2) A Retailer must ensure that the basis on which it prepares any forecast has been communicated to the Supplier.

11. No tying of third party goods and services for Payment

- (1) A Retailer must not directly or indirectly Require a Supplier to obtain any goods, services or property from any third party where that Retailer obtains any Payment for this arrangement from any third party, unless the Supplier's alternative source for those goods, services or property:
 - (a) fails to meet the objective quality standards laid down for that Supplier by that Retailer for the supply of such goods, services or property; or
 - (b) charges more than any other third party recommended by that Retailer for the supply of such goods, services or property.

PART 5—PROMOTIONS

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 products of that Supplier within a store unless such Payment is made in relation to a Promotion.

13. Promotions

- (1) A Retailer must not, directly or indirectly, Require a Supplier predominantly to fund the costs of a Promotion.
- (2) Where a Retailer directly or indirectly Requires any Payment from a Supplier in support of a Promotion of one of that Supplier's products, a Retailer must only hold that Promotion after Reasonable Notice has been given to that Supplier in writing. For the avoidance of doubt, a Retailer must not require or request a Supplier to participate in a Promotion where this would entail a retrospective variation to the Supply Agreement.

14. Due care to be taken when ordering for Promotions

- (1) A Retailer must take all reasonable steps to ensure that when ordering products from a Supplier at a promotional wholesale price, not to over-order, and if that Retailer fails to take such steps it must compensate that Supplier for any product over-ordered and which it subsequently sells at a higher non-promotional retail price.
- (2) A Retailer must ensure that the basis on which the quantity of any order for a Promotion is calculated is transparent.

PART 6—OTHER DUTIES

15. No unjustified payment for consumer complaints

- (1) Subject to paragraph 15(3) below, where any consumer complaint can be resolved in store by a Retailer refunding the retail price or replacing the relevant product, that Retailer must not directly or indirectly Require a Supplier to make any Payment for resolving such a complaint unless:
 - (a) the Payment does not exceed the retail price of the product charged by that Retailer; and
 - (b) that Retailer is satisfied on reasonable grounds that the consumer complaint is justifiable and attributable to a failing on the part of that Supplier.
- (2) Subject to paragraph 15(3) below, where any consumer complaint cannot be resolved in store by a Retailer refunding the retail price or replacing the relevant product, that Retailer must not directly or indirectly Require a Supplier to make any Payment for resolving such a complaint unless:

- (a) the Payment is reasonably related to that Retailer's costs arising from that complaint;
 - (b) that Retailer has verified that the consumer complaint is justifiable and attributable to a negligence or default on the part of that Supplier;
 - (c) a full report about the complaint (including the basis of the attribution) has been made by that Retailer to that Supplier; and
 - (d) the Retailer has provided the Supplier with adequate evidence of the fact that the consumer complaint is justifiable and attributable to negligence or default on the part of the Supplier.
- (3) A Retailer may agree with a Supplier an average figure for Payments for resolving customer complaints as an alternative to accounting for complaints in accordance with paragraphs 15(1) and 15(2) above. This average figure must not exceed the expected costs to the retailer of resolving such complaints.

16. Duties in relation to De-listing

- (1) A Retailer may only De-list a Supplier for genuine commercial reasons. For the avoidance of doubt, the exercise by the Supplier of its rights under any Supply Agreement or the failure by a Retailer to fulfil its obligations under the Code or this Order will not be a genuine commercial reason to De-list a Supplier.
- (2) Prior to De-listing a Supplier, a Retailer must:
- (a) provide Reasonable Notice to the Supplier of the Retailer's decision to De-list, including written reasons for the Retailer's decision. In addition to the elements identified in paragraph 1(1) of this Code, for the purposes of this paragraph 'Reasonable Notice' will include providing the Supplier with sufficient time to have the decision to De-list reviewed using the measures set out in paragraphs 16(2)(b) and 16(2)(c) below;
 - (b) inform the Supplier of its right to have the decision reviewed by a Senior Buyer, as described in paragraph 17 of this Code; and
 - (c) allow the Supplier to attend an interview with the Retailer's Code Compliance Officer to discuss the decision to De-list the Supplier.

17. Senior Buyer

- (1) A Retailer's Senior Buyer will, on receipt of a request from a Supplier, review any decisions made by the Retailer in relation to the Code or this Order.
- (2) A Retailer must ensure that a Supplier is given Reasonable Notice of any change to the identity and/or contact details of the Senior Buyer for that Supplier.

Schedule 2

Designated Retailers

Asda Stores Limited, a subsidiary of Wal-Mart Stores Inc

Co-operative Group (CWS) Limited

Marks & Spencer plc

Wm Morrison Supermarkets plc

J Sainsbury plc

Somerfield plc

Tesco plc

Waitrose Limited, a subsidiary of John Lewis plc

[Aldi Stores Limited]

Iceland Foods Limited, a subsidiary of the Big Food Group

Lidl UK GmbH