



Supermarkets: controls over buyer power

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- Some related concerns are discussed in [Supermarkets: Competition Concerns](#) (SN/BTS/3653). Another note, [Town centres, planning and supermarkets](#) (SN/SC/1106), deals with planning aspects of major shopping centres.
 - The 2008 Competition Commission (CC) Report on the Grocery sector concluded that UK grocery retailers were in many respects delivering a good deal for consumers.
 - However, it recommended a Groceries Supply Code of Practice (GSCOP). That extended the previous Code of Practice to medium-sized supermarkets and introduced some new rules.
 - The CC failed to establish the ombudsman by voluntary agreement so then favoured a statutory solution.
 - Albert Owen's *Grocery Market Ombudsman Bill* 2009/10 did not become law, but the Labour Government accepted the principle of an ombudsman to enforce GSCOP.
 - GSCOP came into force in February 2010 and the Labour Government published consultation on enforcement.
 - The May 2010 Coalition Agreement said that an Ombudsman would be appointed within the Office of Fair Trading.
 - The Government published its response to consultation in August 2010

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1 The May 2010 Coalition Agreement

[The Coalition: Our Programme for Government](#) (May 2010) contained the following commitment:

We will introduce, as a first step, an Ombudsman in the Office of Fair Trading who can proactively enforce the Grocery Supply Code of Practice and curb abuses of power, which undermine our farmers and act against the long-term interest of consumers.

2 Competition Commission report 2008

In April 2008, the Competition Commission published their final recommendations on the groceries sector. They recommended relying upon the sector voluntarily agreeing to a code of practice and an ombudsman to enforce compliance with the code. Only if that approach failed should Government become involved:

Establishing a Groceries Supply Code of Practice (GSCOP), based on the existing SCOP, but amended such that:

- All retailers controlled by corporate groups with UK retail groceries turnover in excess of £1 billion a year are included within its scope.
- An overarching fair dealing provision is included.
- Retailers are prohibited from making retrospective adjustments to terms of supply.
- Retailers are prohibited from entering into arrangements that result in suppliers being held liable for losses due to shrinkage.
- Retailers are required to enter into binding arbitration to resolve any dispute with a supplier under the GSCOP.
- Retailers are required to provide notice of and reasons for de-listing suppliers or significantly reducing suppliers' business.
- Retailers are required to establish an in-house compliance officer responsible for compliance with the GSCOP, with a direct reporting line to the audit committee (or non-executive director).
- Retailers are required to keep written records of all agreements with suppliers on terms of supply.

- Retailers are required to provide to the body monitoring and enforcing the GSCOP such information as it may reasonably require in pursuit of its functions.

In addition to the above remedies, the CC (Competition Commission) will seek undertakings from grocery retailers to establish a GSCOP Ombudsman to monitor and enforce compliance with the GSCOP, and whose functions are to include:

- the arbitration of disputes between suppliers and retailers arising under the GSCOP;
- gathering of information (for example, by receiving confidential complaints from suppliers and primary producers) and proactively investigating retailers' records in areas subject to complaint in order to identify whether breaches of the GSCOP have occurred;
- the publication of guidance on specific provisions of the GSCOP where it considers that differences of interpretation exist; and
- the publication of an annual report on the operation of the GSCOP.

In addition, the CC is recommending to BERR that if the CC does not secure satisfactory undertakings from the retailers creating the GSCOP Ombudsman within a reasonable period, BERR should take such steps as are necessary to establish the Ombudsman. The CC further recommends that, if this is the case, BERR take steps to give the Ombudsman the power to levy significant financial penalties on the retailers for non-compliance.

If neither the CC nor BERR are successful in establishing the Ombudsman within a reasonable period of time, the functions of the Ombudsman will be carried out by the OFT, although arbitration of disputes under the GSCOP will be conducted by an independent body with expertise in dispute resolution.

The CC's terms of reference do not permit it to make a finding with respect to relations between primary producers and intermediaries, and it is therefore unable to make any formal recommendations in this regard. However, if it subsequently appears that, despite the operation of the GSCOP (and the Ombudsman) intermediaries continue to transfer excessive risks and unexpected costs further up the supply chain, it suggests that Defra and BERR should consider the introduction of appropriate measures, including the extension of the GSCOP and the role of the Ombudsman or the introduction of a similar, complementary code and arrangements to cover the intermediaries and primary producers, such as farmers.¹

3 Competition Commission developments in 2009

On 26 February 2009 the Competition Commission (CC) published a draft Order for consultation which would create the proposed new strengthened and extended Groceries Supply Code of Practice (GSCOP).² The press release announcing the consultation summarised how the GSCOP would address buyer power concerns:

The new Code of Practice will be included in all retailers' contracts with their suppliers and provide a much clearer framework for these agreements. We want to ensure that suppliers do not have costs imposed on them unexpectedly or unfairly by retailers.

¹ Competition Commission Press Release, [Groceries Market Investigation – Final Report](#), 30 April 2008

² Competition Commission, [The Groceries \(Supply Chain Practices\) Market Investigation Order 2009](#), February 2009

The Code will prohibit retrospective changes to terms and conditions, and limit the extent to which suppliers are required to pay for listings, promotions, inaccurate forecasts or customer complaints. It will also set out a clear procedure for resolving disputes and the requirement for retailers to provide reasonable notice and commercial justification before a supplier is de-listed.

We are not seeking to impose overly restrictive rules on commercial negotiations and it is not possible to set rules for every set of circumstances in supply agreements, given the variety of products, suppliers and situations.

What we are introducing are clear standards so that, for example, those elements in a supply agreement that could be subject to uncertainty and change payments will be allocated in those situations.

Suppliers are entitled to know where they stand and invest with greater security, which is provided by the strengthened Code. By extending the Code to include other retailers, it will also ensure that more suppliers benefit from this protection. Without it, the uncertainty and hardship caused by certain practices could significantly damage investment and innovation by suppliers and in turn, therefore, also harm consumers.

We remain clear that an Ombudsman is needed but the Code in itself will be a major improvement to relationships between retailers and suppliers and ultimately we think that will be in everyone's interest.³

On 28 April 2009, the CC started a public consultation on draft Undertakings to establish an Ombudsman to arbitrate on disputes between retailers and suppliers and investigate complaints under the new GSCOP.⁴ The Ombudsman would be appointed by the OFT, which would also set an annual budget for costs and expenses. These costs will be reimbursed from retailers using a formula which will take into account the size of retailers as well as the number of complaints involving them and requiring resolution.

4 Large Retailers' Opposition to the Ombudsman Proposal, 2009

The big four retailers rejected the idea of an ombudsman, although Waitrose and Marks & Spencer disagreed. Sainsbury's opposition was based on several key concerns:

- the ombudsman would duplicate powers already available to the Office of Fair Trading (OFT);
- the proposal to allow complainants to remain anonymous would not allow the retailer a proper right of defence and would be contrary to the principles of natural justice;
- retailers would be asked to agree an unlimited budget for the Ombudsman, to be set at the discretion of the OFT;
- many suppliers are large multinational businesses, frequently larger than Sainsbury's, that do not need protection.⁵

³ Competition Commission press release, [CC Publishes Code of Practice Order](#), 26 February 2009

⁴ Competition Commission press release, [CC Consults on Ombudsman Plan](#), 28 April 2009

⁵ Sainsbury's, [Competition Commission Groceries Market investigation – Sainsbury's Views](#), 28 August 2009

5 Coalition Government position on Groceries Code Adjudicator

On 3 August 2010, the Government published its response to the consultation on the Grocery Code Adjudicator (GCA).

On 3 August 2010, under the new Coalition Government, BIS published its response to the consultation on establishing an independent body to monitor and enforce the GSCOP. This takes forward a strand of the new coalition agreement (of 18 May) which committed the Government to introduce, as a first step, an Ombudsman in the OFT to enforce the GSCOP which will require primary legislation. The response focuses on 5 main areas; the housing of the body, access, the powers it should have, sanctions, and funding of the body.

In summary, Government accepts that:

- The body will be based within the OFT but will be independent from the normal activities of the OFT;
- The body's title will be the Groceries Code Adjudicator (GCA);
- The GCA will be able to receive complaints and conduct investigations where it considers necessary;
- The GCA will have powers to receive complaints from anyone in the supply chain at home or overseas and deal with them anonymously;
- The GCA will be given powers to introduce financial penalties if future experience indicates that reputation of retailer behaviour is not considered as a sufficient deterrent.

The fair and appropriate funding of the GCA by retailers will be considered further.

The full document is BIS, [Taking forward the establishment of a body to monitor and enforce compliance with the groceries supply code of practice \(GSCOP\): The Groceries Code Adjudicator - Government response to the consultation](#).

A PQ in September 2010 updated the Government's position:

Mr Sanders: To ask the Secretary of State for Environment, Food and Rural Affairs what steps are being taken to establish (a) an ombudsman for the food supply chain and (b) a Red Meat Road Map.

Mr Paice: On 3 August the Government published their response to their consultation to take forward the establishment of a body to monitor and enforce the Groceries Supply Code of Practice. They announced that the Department for Business, Innovation and Skills (BIS) will bring forward new legislation in order to set up the Grocery Code Adjudicator, which will reside within the Office of Fair Trading. The proposal will require primary legislation and BIS will be seeking Parliamentary Business and Legislation Committee approval to publish a draft Bill later this year with the intention of bringing forward a Bill in the second session.⁶

Another PQ raised the question of the scope of the ombudsman:

⁶ HC Deb 7 September 2010 c422W

Karl McCartney: To ask the Secretary of State for Business, Innovation and Skills if he will consider the merits of altering the remit of the proposed Grocery Supply Chain Ombudsman to cover investigations of the carbon dioxide emissions incurred by supermarkets in transporting food.

Mr Davey: The coalition programme for Government, published on 18 May, makes a commitment to introduce a Groceries Code Adjudicator (GCA) to enforce the Grocery Supply Code of Practice (GSCOP) and curb abuses of power which undermine our farmers and act against the long-term interest of consumers.

The GSCOP contains specific provisions that aim to address the Competition Commission's concerns over the exercise of buyer power by large supermarkets and their suppliers. (...) The Government have no plans to extend the remit of the GCA to cover matters outside of the GSCOP.⁷

⁷ HC Deb 18 October 2010 cc613-4W