



BRIEFING PAPER

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Supermarkets: the Groceries Code Adjudicator

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Summary

Following an investigation by the competition authorities in the groceries market, in 2001 a code of practice was introduced to govern the relations between the major supermarkets and their suppliers. Over the next few years there continued to be many complaints from suppliers, smaller retailers and commentators that supermarkets were using their market dominance to compete unfairly. In April 2008 the Competition Commission completed a second enquiry, and as part of its recommendations, it proposed a strengthened and extended code, to be overseen and enforced by an independent ombudsman.¹ In August 2009 the Commission recommended that the Government should put this body on a statutory basis, as it had proved impossible to reach a voluntary agreement on setting up an ombudsman with the supermarkets. In February 2010 the Labour Government launched a consultation exercise on doing this, but this was interrupted by the 2010 General Election.

In its Coalition agreement published in May 2010, the new Conservative-Liberal Democrat Government confirmed that it would establish an ombudsman to “proactively enforce the Grocery Supply Code of Practice and curb abuses of power.”² Following consultation, the Coalition Government published a draft Bill in May 2011.³ In July 2011 the Business, Innovation and Skills Committee completed scrutiny of the draft Bill, recommending that it should be proceeded with forthwith.⁴ In May 2012 the *Groceries Code Adjudicator Bill* was introduced in the House of Lords as one of the first Bills of the 2012/13 Session, and received Royal Assent on 25 April 2013.⁵ The GCA began life on 25 June 2013;⁶ further details of its operations are [given in its site](#).

This note gives a short history to these events that led up to the establishment of the GCA, and recent debates as to the Adjudicator’s impact and the review of its remit which is to be undertaken in 2016.

¹ For more details of the enquiry and earlier investigations by the competition authorities see, [Supermarkets: competition enquiries into the groceries market, Commons Briefing Paper SN3653](#), 2 August 2012.

² HM Government, [The Coalition: our programme for government](#), 20 May 2010 p13

³ HC Deb 24 May 2011 c47WS

⁴ [Ninth Report : Time to bring on the referee? The Government’s proposed Adjudicator for the Groceries Code](#), 28 July 2011 HC 1224 2010–12

⁵ Two Library papers provide an overview of the Bill when first published ([Library Research paper 12/44, 14 August 2012](#)) and its scrutiny in Committee ([Library Research paper 13/05](#), 10 January 2013). The Bill and its scrutiny history are available on its page on the [Parliament site](#).

⁶ GCA press notice, [Groceries Code Adjudicator formally established](#), 24 June 2014

1. Concerns about supermarkets

Historically the grocery market in the UK has been dominated by the four major supermarkets. Although there were around 93,000 grocery stores across the country in 2009, with sales of just over £143bn – large grocery retailers took about 85% of the market share, with Asda, Morrisons, Sainsbury's and Tesco accounting for two-thirds of the total.⁷

In April 2008 the Competition Commission completed an enquiry on the UK grocery market, following long-running concerns that the four major chains exploited their market power to put undue pressure on suppliers and to compete unfairly with smaller retailers.⁸ Although, in the Commission's view, the country's supermarkets were delivering a 'good deal for consumers', it concluded "the transfer of excessive risk and unexpected costs by grocery retailers to their suppliers through various supply chain practices if unchecked will have an adverse effect on investment and innovation in the supply chain, and ultimately on consumers."⁹ To counteract this the Commission proposed making changes to the existing code of practice governing these relations:

To address the AEC ['adverse effect on competition'] that we found in relation to supply chain practices we decided to implement remedies establishing a Groceries Supply Code of Practice (GSCOP), based on the existing Supermarkets Code of Practice (SCOP), but amended such that:

- (a) All grocery retailers with groceries turnover in excess of £1 billion a year are included within its scope.
- (b) An overarching fair-dealing provision is included.
- (c) Grocery retailers are prohibited from making retrospective adjustments to terms and conditions of supply.
- (d) Grocery retailers are prohibited from entering into arrangements with suppliers that result in suppliers being held liable for losses due to shrinkage.
- (e) Grocery retailers are required to enter into binding arbitration to resolve any dispute with a supplier arising under the GSCOP.
- (f) Grocery retailers are required to keep written records of all agreements with suppliers on terms and conditions of supply.
- (g) Grocery retailers are required to provide to the body monitoring and enforcing the GSCOP any information as it may reasonably require in pursuit of its functions, those functions to include the investigation of issues not the subject of dispute, including complaints from primary producers.

The Commission proposed that an ombudsman should monitor and enforce the new code:

⁷ BIS, [Groceries Code Adjudicator: Impact Assessment, May 2011](#) pp8-9

⁸ The UK's independent competition authorities, the Commission and the Office of Fair Trading, were merged to form the [Competition & Markets Authority](#) in April 2014. Details of the Commission's enquiry into the UK groceries market is collated on the [National Archives site](#).

⁹ *The supply of groceries in the UK market investigation*, 30 April 2008 p6

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In addition to the above remedies, we 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:

- (a) the gathering of information and proactive investigation of retailers' records in areas subject to complaint in order to identify whether breaches of the GSCOP have occurred;
- (b) the publication of guidance on specific provisions of the GSCOP where it considers that differences of interpretation exist; and
- (c) the publication of an annual report on the operation of the GSCOP.

We do not seek any role for the GSCOP Ombudsman that goes beyond that necessary to monitor and enforce the GSCOP, and will ensure that the responsibilities and functions of the GSCOP Ombudsman do not inadvertently facilitate collusion or coordination between grocery retailers and suppliers. We envisage that the GSCOP Ombudsman would prioritize the resources of its office to focus on those disputes and complaints concerning suppliers without market power over and above those concerning suppliers of major branded products that have market power.

In addition, we recommend to BERR that if we do not obtain satisfactory undertakings from the retailers creating the GSCOP Ombudsman within a reasonable period, it should take the necessary steps to establish the Ombudsman. We further recommend that, if this is the case, BERR should take steps to give the Ombudsman the power to levy significant financial penalties on the retailers for non-compliance.¹⁰

In August 2009 the Commission completed the new GSCOP with which retailers would have six months to comply, but conceded that agreement on an ombudsman had proved impossible.¹¹ (Provision to establish GSCOP was made by the *Groceries (Supply Chain Practices) Market Investigation Order 2009*, which took effect on 4 February 2010.)

In January 2010 the Labour Government confirmed it would consult on establishing an statutory ombudsman,¹² and it launched a formal consultation the next month:

Government accepts that GSCOP compliance needs independent monitoring and enforcement and a mechanism to hear anonymous complaints. This last point is very important. However, there are differing views on whether Government creates a new body or whether this can sit within an existing structure. At the same time we need to consider the regulatory burden that this might impose in developing any policy proposals.

This consultation is therefore seeking views on:

- What powers the body monitoring and enforcing compliance with the GSCOP should have, in addition to the body being able to hear anonymous complaints;

¹⁰ *The supply of groceries in the UK market investigation*, 30 April 2008 pp14-15

¹¹ Competition Commission News Release 36/09, *CC publishes code of practice and ombudsman recommendation*, 4 August 2009.

¹² HC Deb 13 January 2010 cc23-4WS

- Access to the body;
- Who the monitoring and enforcement body could be, including some possible options;
- Should a sanctions regime be introduced and how might it operate alongside any appeals mechanism, and;
- The funding of the body monitoring and enforcing compliance with the GSCOP.

Therefore, we are consulting with all those who have an interest in the grocery supply chain. This includes the largest grocery retailers who are directly covered by the GSCOP, alongside medium sized and smaller grocery retailers for which independent monitoring and enforcement might have an impact. We also want to hear the views of those who supply large grocery retailers either directly or through other routes. The GSCOP itself applies only to direct suppliers to retailers but the CC has proposed that the body should be able to investigate complaints from any other person.¹³

On 5 March 2010 the House gave a second reading to a Private Member's Bill, introduced by Albert Owen MP, to establish an independent grocery market ombudsman along these lines.¹⁴ Responding to the debate the then Minister for Regional Economic Development and Co-ordination, Rosie Winterton, noted that the Government were "sympathetic to the Bill's objectives" and "content for it to go forward into Committee", although it would want "to ensure that the views expressed by respondents to the consultation are adequately reflected in the legislation that brings the ombudsman into being."¹⁵ Further proceedings on the Bill were prevented by the Dissolution of the House on 12 April, in anticipation of the General Election on 6 May.

Subsequently, in the agreement underpinning the Coalition, the new Conservative-Liberal Democrat Government stated that it would "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."¹⁶

A few weeks later the Coalition Government published its response to its predecessor's consultation, and in this it set out plans to establish a 'Groceries Code Adjudicator' (GCA), within the OFT, to "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." As the GCA's primary purpose would be to ensure the GSCOP was adhered to: as such, it would only invite complaints from affected businesses, rather than the full range of interested parties, but it would accept anonymous complaints:

¹³ Dept for Business, Innovation & Skills, [Taking forward the establishment of a body to monitor and enforce compliance with the groceries supply code of practice \(GSCOP\) – a consultation](#), February 2010 pp7-8. Responses were invited by 30 April 2010.

¹⁴ More detail on this particular Bill is given in, [Library Research paper 10/21, 2 March 2010](#).

¹⁵ [HC Deb 5 March 2010 cc1163-4](#)

¹⁶ HM Government, *The Coalition: our programme for government*, 20 May 2010 p13

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In light of the views received during the consultation and the agreed Government position published on 18 May, the Government has decided to proceed to establish the GCA as follows:

- **Where the body is based** - In line with the Coalition Programme the GCA will be based within the OFT, but will be kept independent from the normal decision route in the OFT. The Government recognises that it is important to separate out this new role from the OFT's normal competition and consumer activities.
- **What powers the body should have** – The Government supports the view that the GCA should have the overriding objective to work in the long term interest of consumers. The GCA should not facilitate or encourage coordination among suppliers and retailers. The GCA's main attention should be the GSCOP and avoid any activity that is not focused on the overriding objective of the Scheme. The Government agrees that the GCA should be able to receive complaints and conduct investigations where the body considers it necessary to do so. Investigations should be based on complaints that have merit or other appropriate information in the public domain.

The responses to the consultation identified some further activities that the Government is prepared to accept. These include the power to monitor emerging new practices and be able to recommend changes to the GSCOP. Among the other proposals Government accepts is for the GCA to visit overseas suppliers in appropriate circumstances and to issue warnings at certain times of the year when abuse is more likely to occur.

- **Access to the body** – The Government has decided that the GCA should have the power to receive anonymous complaints from anyone in the supply chain at home or overseas. This includes farmers who may not directly supply the large supermarkets and is consistent with the Coalition Programme to support farmers. Trade associations, NGOs and other organisations still have a useful role to play in offering advice and assistance to their stakeholders, but complaints must come direct from the business affected. Large suppliers should have access to the GCA.¹⁷

The Government asked for views on whether the GCA would have powers to impose financial penalties and how the adjudicator should be funded:

- **Should a sanctions regime be introduced and how might it operate alongside any appeals mechanism** – The Government has listened to all sides of the debate in regards to penalties. It has decided that the deterrent that it expects to have the greatest impact on changes in retailer behaviour is that of reputation. However, powers will be provided in the primary legislation for the Government to introduce financial penalties should future experience indicate that reputation alone is not sufficient.

¹⁷ 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, August 2010](#) p5, pp6-7

- **The funding of the body monitoring and enforcing compliance with the GSCOP** – The Government will reflect further on the fairest and most appropriate mechanism for retailers to fund the GCA.¹⁸

As to its title, the Government suggested that the term ‘ombudsman’ was “not an appropriate name for a body of this nature. An Ombudsman normally provides effective redress mechanisms for individual consumers and citizens [whereas] this body is concerned with business to business relationships within the groceries supply chain.”¹⁹ At this time the Department anticipated that it would “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.”²⁰

Consumer and supplier groups generally welcomed this announcement, while retail groups, such as the British Retail Consortium, were critical,²¹ though the *Financial Times* quoted an executive “of a big grocery chain” as saying, “it’s what we were expecting – only it is an adjudicator rather than an ombudsman, which suggests that it is a watered-down role.”²² The question of *when* the Government might bring forward legislation was raised several times in the House,²³ and 43 Members signed an EDM in November arguing that there was “a need for greater urgency to introduce the adjudicator.”²⁴ These concerns were reiterated some months later in a Westminster Hall debate on the GCA in early April 2011; the then Parliamentary Under-Secretary of State, Edward Davey, gave some details on the Government’s thinking about the way in which the new office would receive complaints:

The groceries code adjudicator will act as arbitrator in disputes arising under the code. He will receive complaints about potential breaches and, when appropriate, conduct investigations. The adjudicator will have the power to accept complaints about retailers’ treatment of primary suppliers from anyone in the supply chain, at home or overseas. That will include indirect suppliers who, like many farmers, may not supply the large supermarkets directly. The adjudicator will have the power to require information from retailers in the course of an investigation so that conclusions are based on reliable evidence. He will also take account of other evidence in the public domain, but will not be obliged to investigate every complaint.

I emphasise that last point, because it deals with questions about how the adjudicator will act. The adjudicator can take complaints from suppliers directly, as I said, but it can also take account of other evidence that has been published. That is important; in my judgment, it strikes the right balance between preventing the

¹⁸ *The Groceries Code Adjudicator - Government response to the consultation*, August 2010 p7

¹⁹ *op.cit.* p7

²⁰ *op.cit.* p35

²¹ “Grocery suppliers get ombudsman for disputes with supermarkets”, *Guardian*, 3 August 2010

²² “Supermarket suppliers win right to complain”, *Financial Times*, 3 August 2010

²³ For example, by Andrew George MP at BIS questions on 14 October (HC Deb c476).

²⁴ EDM 1110 of 2010-12, 30 November 2010

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adjudicator going on fishing trips and enabling him to consider information that is available to others.²⁵

The Minister also addressed concerns about whether the GCA would have sufficient powers to be effective:

Another issue raised during [today's] ... debate was whether the groceries code adjudicator would have teeth. I believe that the code will help the adjudicator to impose the necessary sanctions on retailers guilty of breaching it. The initial sanctions include the naming and shaming of individual retailers, and I believe that the ensuing negative publicity will be an effective deterrent. In a highly competitive market, retailers will not want to risk customers going elsewhere in protest at their shoddy behaviour towards suppliers. However, I make it clear that the draft Bill will include a reserve power for the Government to introduce financial penalties if experience shows that recommendations and negative publicity do not work.²⁶

²⁵ HC Deb 5 April 2011 c251WH

²⁶ HC Deb 5 April 2011 cc251-2WH

2. Publication of a draft Bill

In May 2011 the Government published its draft Bill (Cm 8080); in his statement to the House the Minister Edward Davey noted that the draft legislation had been drafted to ensure that its potential impact was fully understood:

The draft Groceries Code Adjudicator Bill is presented in a way that helps wider understanding of the purpose of the proposed new law and how it would work. This is part of the Government's commitment to increase transparency and accountability of Parliament to the public. The Bill is drafted in simpler language and an explanation is given alongside each part of the legal text. It is hoped that this approach will allow those affected by the legislation, parliamentarians, interested groups and the public, to engage more actively in the legislative process and understand the impacts of the Bill, without compromising its legal clarity and force.²⁷

Accompanying the draft Bill the Government set out its approach in a policy document; this gave a summary description of the new Groceries Supply Code of Practice:

2.1 As of 4th February 2010, all retailers with groceries turnover in excess of £1 billion per year are now parties to the Code. The Code's provisions are now included in each of these retailers' contracts with their suppliers. The Code has an overarching fair dealing provision. It prohibits retailers from imposing retrospective changes to terms and conditions of supply unless reasonable notice is given to the supplier in writing.

If reasonable notice is not given, the retailer must fully compensate the supplier for any net resulting costs incurred as a result of their failure to do so. It limits the extent to which suppliers are required to pay for listings, promotions, inaccurate forecasts by retailers or customer complaints. It also sets out the requirement for retailers to provide reasonable notice and commercial justification before a supplier is de-listed.

It went on to set out the proposed functions and powers of the Adjudicator:

3.1 The sole purpose of the Adjudicator will be to oversee and enforce the Code as set out in the draft legislation.

3.2 The Government proposes that, in carrying out this duty, the Adjudicator should have the following statutory functions and powers:

Arbitration: to act as arbitrator, if a supplier refers a dispute to arbitration under the Code, or to appoint another person to act as arbitrator. The Government intends arbitration to be the Adjudicator's main function.

Investigation: to carry out an investigation of a suspected breach of the Code by a retailer. The Government proposes that in deciding whether to initiate an investigation, the Adjudicator may only consider information from direct and indirect suppliers or information which is publicly available. However, he or she may

²⁷ HC Deb 24 May 2011 c47WS. Gov.uk has [an archive of material](#) on the development of this policy.

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consider other appropriate information in the course of an investigation. This Government's rationale for this distinction is explained further in paragraphs 4.1 – 4.2 below on confidentiality and who can complain.

Enforcement: the Adjudicator must publish a report of any investigation and, if the retailer is mentioned in it, give them the opportunity to comment on it. If the Adjudicator is satisfied there has been a breach of the Code, he or she can:

- recommend steps be taken by the retailer to improve compliance with the Code;
- require the retailer to publish information about the investigation and the breach; and
- subject to paragraph 5.2 below, impose financial penalties on retailers for breach of the Code.

Advice and guidance: The Adjudicator must publish guidance on investigations. It will also be able to publish guidance on aspects of the Code and how it intends to fulfil its functions and publish an annual report on its work. More generally, the Adjudicator may choose to advise suppliers and retailers on any matter relating to the Code.²⁸

The Government proposed that the Adjudicator should base its investigations either on publicly available information and submissions from affected suppliers *only*.

4.1 Investigations are intended to be broad ranging and to be based upon general patterns of behaviour by the retailers. One of the fundamental principles of the Adjudicator will be its ability to investigate complaints and maintain the confidentiality of the identity of complainants. The Competition Commission found that many suppliers were afraid to make complaints as they were concerned that it would lead to retaliatory treatment by the retailer, for example that the retailer might stop trading with them. Protecting the identity of suppliers should help them feel safer in raising disputes with retailers who have breached the Code. With limited exceptions, the Government therefore proposes that the Bill should prohibit the Adjudicator from disclosing any information that may lead to disclosure of the fact that a particular supplier has complained about a retailer failing to comply with the Code.

4.2 The Government proposes that only information provided by direct and indirect suppliers in the UK and overseas should be able to be used by the Adjudicator as the basis for starting an investigation. As these are contractual matters it is likely that only a direct or indirect supplier would have sufficient information to make an appropriate complaint. Third parties, trade associations and non-governmental organisations (NGOs) will still have a useful role to play in offering advice and assistance to their stakeholders, but information on which the Adjudicator may base an investigation must come direct from the business affected. The Adjudicator will also be able to act on other appropriate information it obtains that is in the public domain.²⁹

²⁸ BIS, [The Government's policy for a Groceries Code Adjudicator](#), May 2011 pp7-8

²⁹ *op.cit.* p9

It also explained what sanctions the Adjudicator would have at its disposal, and why it was *not* envisaged that it should be able to fine companies from day one:

5.1 The Government's view is that a requirement for a retailer to publish information about an investigation which finds it in breach of the Code will be an effective deterrent ...

5.2 However, should this level of deterrence prove insufficient in promoting successful compliance with the Code, the Government will consider introducing financial penalties against retailers who breach the Code. The draft Bill provides the Secretary of State with a residual power to enable the Adjudicator to levy penalties.³⁰

The department also published an impact assessment for the draft Bill, and in this, said a little more about the reasons for this decision:

140. An important factor that may affect the net benefits of adding penalty powers is the risk of the adjudicator's investigations finding 'false positives'. These involve erroneously finding breaches of the GSCOP (though these will ultimately be corrected by the appeals process), or finding breaches of the GSCOP that do not contribute to the adverse effects on supplier investment and innovation identified by the CC. To the extent that there are 'false positives', penalty powers could induce behaviour by retailers that is costly rather than beneficial.

141. An additional risk is that the punitive element imposed by the adjudicator in upholding a complaint could then be passed on to consumers in the form of higher prices. This could be particularly problematic for low-income consumers, for whom expenditure on food makes up a higher proportion of their income.

142. The adjudicator would only impose penalties where there is strong and convincing evidence that a retailer has committed a breach of the GSCOP. The CC accepted that it would not be appropriate to impose penalties based on anonymous complaints from suppliers (CC report, 11.372) Therefore, any dispute that could result in the imposition of a penalty would involve the supplier(s) being identified to the retailer. This may deter suppliers from seeking such resolutions if they consider the risk of delisting to be sufficiently high.

143. It has been decided that powers will be provided in the primary legislation for the Government to introduce financial penalties, should future experience indicate that reputation alone is not a sufficient deterrent for retailers. Without more accurate information on how these penalties will be levied in practice, we have calculated some illustrative impacts above, but more precise impacts will be calculated if this power is exercised.³¹

Finally, in its strategy document the Government proposed that, contrary to the Commission's initial recommendations on costs, the Adjudicator would not be funded by retailers on the basis of a fixed formula:

9.2 The Competition Commission proposed a formula to calculate each party's share of the cost of the Adjudicator, taking into account the retailer's turnover, the number of recommendations

³⁰ *op.cit.* p10

³¹ BIS, *Groceries Code Adjudicator: Impact Assessment*, May 2011 p29

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made to the retailer by the Adjudicator and the number of disputes between the retailer and suppliers. The Government is not in favour of using this formula as, although it is intended to be fair and capture the costs associated with each retailer, it would not do so accurately. Currently, there is insufficient evidence to suggest a relationship between the turnover of a retailer and the extent to which it would breach the Code. In addition the formula does not take it into account that the cost of a dispute would vary according to the length and scale of an investigation conducted by the Adjudicator.³²

As an alternative, three aspects of the Adjudicator's costs would be funded differently:

9.3 The costs of the Adjudicator will fall into three main categories:

- i) the costs of the Adjudicator's arbitration function. The Adjudicator will be able to apportion the costs of its arbitration function as set out in Part 5 of the Competition Commission's 2009 Order [which established the new Groceries Supply Code of Practice].
- ii) the costs of an investigation under the Code where the Adjudicator is satisfied that a retailer has breached the Code. The Government intends that costs of such investigations should be recovered from the retailer concerned, and the draft Bill empowers the Adjudicator to do so.
- iii) all other costs of the Adjudicator in carrying out his or her functions under the Code, including the costs of investigations where the Adjudicator is satisfied that the retailer is not in breach of the Code. The Government intends that these costs should be shared equally between all the retailers to which the Code applies, and that the Adjudicator should recover these costs by means of a levy on retailers. The amount of the levy must be agreed with the Secretary of State.

9.4 Costs will be calculated on a full cost recovery basis.

9.5 The Adjudicator will be able to recover costs from a supplier if he or she finds that a complaint which initiated an investigation was vexatious or wholly without merit.

9.6 The draft Bill requires the Adjudicator to inform retailers when levy payments are due, how much they will be and to publish the details of the levy and how it has been arrived at.

9.7 The Bill also proposes that the Secretary of State may by order enable the Adjudicator to require retailers to pay a greater or lesser share of the levy if this is justified in the light of experience. For example, this might be in order to reflect the level of complaints generated by individual retailers and thus the impact on the costs of the Adjudicator. The Government hopes this prospect will be an additional incentive for retailers to comply with the Code so as to be liable in the future for less of the Adjudicator's costs.³³

It is worth underlining that the Government anticipated the Adjudicator's *sole purpose* would be to enforce and oversee the Code; this should be distinguished from the enforcement order – the Grocery

³² *The Government's policy for a Groceries Code Adjudicator*, May 2011 p12

³³ *op.cit.* pp12-13

Code Supplies Order – which established it; more details were given in the introduction to the draft Bill:

10. The Groceries Supply Order requires large retailers to incorporate the Groceries Code into agreements for the supply of groceries for resale in the United Kingdom and to supply a written copy of the agreement and certain other information to the supplier. This means that if a large retailer breaches the Groceries Code it will be in breach of its contract with the relevant supplier, who may then have contractual remedies against the retailer such as a claim for damages.

11. Large retailers are required by the Groceries Supply Order to train their buying teams about the order and the Groceries Code. They must also appoint a compliance officer to act as a point of contact with suppliers and to prepare an annual compliance report for the Office of Fair Trading.

12. The Groceries Supply Order also includes a dispute resolution scheme. A supplier who believes that a large retailer has breached the Groceries Code may notify the retailer's compliance officer. If the dispute is not resolved within 21 days then, at any time within four months of the dispute arising, the supplier may refer the dispute to arbitration. The Bill requires that such an arbitration will be carried out by the Groceries Code Adjudicator or another person appointed by him or her.

13. The Groceries Supply Order protects direct suppliers, based anywhere in the world, to the large retailers.

14. The Groceries Supply Order (apart from the Groceries Code) will not be enforced by the Groceries Code Adjudicator. The Office of Fair Trading is responsible, under the Enterprise Act 2002, for monitoring and reviewing the operation of the order. The Groceries Supply Order itself includes a power for the Competition Commission to direct large retailers and others to take or refrain from particular action to comply with the order.³⁴

3. Scrutiny by the BIS Select Committee

When the Government published its draft Bill it noted that the Business, Innovation & Skills Select Committee had “expressed its willingness to conduct [pre-legislative] scrutiny.”³⁵ The Committee launched this enquiry in mid-June, and presented its final report on 28 July 2011.³⁶ In the course of this enquiry, the Environment, Food & Rural Affairs Committee held a one-off evidence session and wrote to its fellow Committee with its views on the Bill.³⁷

The first question addressed by the Committee was whether there were sufficient grounds to proceed with legislation, given the period of time that had passed since the Commission’s inquiry and the actions of supermarkets to comply with the new GSCOP. The Committee took the view that there was “sufficient additional recent evidence of continuing problems to support the original data.” Furthermore, the Committee had received some representation that suppliers were put off from taking legal action to contest infringements with the Code because of the potential costs, and it thought that setting up an Adjudicator “might also help address [these concerns].”³⁸

Overall the Committee welcomed the draft Bill but recommended that certain provisions should be “more robust”, specifically, “powers to fine should be on the face of the bill, and that the Adjudicator should also be given the power to escalate from a lower to a higher-level penalty if Code breaches continue.” On the question of fines the Committee acknowledged that the arguments were ‘finely balanced’, quoting the Minister, Edward Davey, when he appeared before them – but went on to concur with the views of the Environment, Food & Rural Affairs Committee:

[In evidence to the Committee, the Minister] pointed to the deterrent effect of keeping fines as a backup remedy:

“Retailers do not just think about the next six months or the next year; they are thinking about the next 10 years. They will know that if they continually breach the code, the Government might say, “Hold on a minute. The sanctions are not proving tough enough. We will come back with financial penalties.” Given that it is an order making power, the Government will be able to do that relatively swiftly. We are holding a sword, in effect, over the sector: “There are sanctions here. There are recommendations and there is the naming and shaming requirement, but if you don't get your act together, we will come back with financial

³⁵ HC Deb 24 May 2011 c47WS

³⁶ *Ninth Report : Time to bring on the referee? The Government’s proposed Adjudicator for the Groceries Code*, 28 July 2011 HC 1224 2010–12

³⁷ *Draft Groceries Code Adjudicator Bill* 14 June 2010 HC 1199-i 2010-12; [Letter from Miss Anne McIntosh MP \(Chair, DEFRA Committee\) to Adrian Bailey MP \(Chair, BIS Committee\)](#), 22 June 2011. The Committee also published written evidence it had received from farmers’ organisations, supermarkets and DEFRA (HC 1199 2010-12, 27 June 2011).

³⁸ HC 1224 2010–12 paras 46, 48

penalties." I think that both gets the balance right and sends a really strong signal to the sector.[Q326]"

In its letter to us, the Environment, Food Rural Affairs Committee noted that the Competition Commission recommended that financial penalties should be available the Adjudicator if large retailers were found to be breach of the Code. That Committee concluded that:

We see no reason for the Adjudicator's powers to levy fines on retailers found to be in breach of the GSCOP to be delayed by the requirement for the Secretary of State to make an order. We therefore consider it appropriate for the legislation to be amended to provide the necessary powers from commencement of the Act.

The arguments on whether to introduce fines from inception are finely balanced but we agree with the Committee on Environment, Food and Rural Affairs that the Competition Commission's recommendation on this should be adhered to. We therefore recommend that the Government amend the draft Bill to include fines as a sanction available to the Adjudicator. This would allow the Adjudicator's effectiveness to be evaluated on the basis that a full spectrum of remedies was available from the start.³⁹

The Committee also addressed the question of whether indirect suppliers and other parties should be allowed to make submissions to the GCA. It acknowledged the case that this might encourage a flood of largely groundless complaints, with serious cost consequences for the GCA, but that indirect suppliers were very likely to have vital information on possible infringements of the Code:

Clearly concerns about a potential deluge of complaints have a measure of validity. However, the expectations are that the Adjudicator will be undertaking only a handful of investigations a year, possibly even less, and therefore one of his or her most important priorities will be to establish a 'triage' system to categorise the significance of complaints. If necessary, standardised responses can deal with correspondence on matters that are wholly outside the scope of the GSCOP. Guidance and press releases will also help in managing expectations around what is not within the Adjudicator's remit.

It might be that a proportion of the Adjudicator's resources might initially need to be dedicated to dealing with issues that are either de minimis or of marginal relevance before the Adjudicator's 'customers' develop a proper understanding of his or her role. However, we are not convinced that indirect suppliers' behaviour will in practice be so persistently self-defeating as to swamp the Adjudicator with a continuous series of spurious claims.

The complexity of the supply chain and lack of awareness of GSCOP-governed contractual relations could provoke instances where an indirect supplier might incorrectly assume a large retailer to be at fault for, say, a retrospective contract variation affecting that indirect supplier. Equally, we find it extremely hard to believe that there are not instances where a farmer or indirect supplier is aware of contract terms or behaviours pertaining between the direct supplier and the large retailer at the end of the supply chain. In fact, we would be surprised if that were not the case

³⁹ HC 1224 2010–12 p3, paras 111-3

given that contractual relations and behaviours between parties often ultimately affect that those further down the line ...

The point about multiplicity of suppliers and hence traceability of behaviour is valid, but we are not convinced that in practice it will confuse a claim. If an indirect supplier can only point to a grievance and not give any evidence of where that grievance can be traced to, that will simply be the end of the matter and the Adjudicator should say so.

We conclude that it is right for the draft Bill to include indirect suppliers within the scope of those whose information can found an investigation under the GSCOP. The Adjudicator will need to put effective filters in place to guard against irrelevant or spurious claims, but that should be an expected early objective in any event.⁴⁰

The Committee also thought that trade associations should also be allowed to submit complaints, quoting in particular the views of the NFU that without this, evidence from whistle-blowers could not be acted on: “a whistle-blower within a retailer may be aware of breaches of the code by his employer. However, any evidence he supplies to the Adjudicator confidentially will be inadmissible as grounds for launching an investigation, as he is not a supplier. Furthermore, he would probably be unwilling to make such information publicly available in case it identified him to his employer. Therefore, no investigation can be launched.”⁴¹

In October 2011 the Government published its response to the report.⁴² It agreed to incorporate some of the Committee’s recommendations, “in particular that the Adjudicator should have some power to escalate remedies, to have the first review after two, rather than three, years, and to extend the source of secondments to the Adjudicator from the current provision of BIS and the OFT, to the entire public sector.” However, it was *not* convinced of the case for amending the Bill to allow the GCA to impose penalties from its establishment:

The immediate introduction of financial penalties would provide an additional and immediate incentive for retailers to comply with the Groceries Code. However, the Government remains of the view that financial penalties should be kept as a reserve power.

First, the Government considers that the appointment of the Adjudicator is in itself important to the effectiveness of the Groceries Code. The Adjudicator will quickly be publishing guidance and can, from the outset, start to give advice and encourage compliance with the Groceries Code. This activity should give the Groceries Code fresh impetus. Second, the large retailers will know that, if they breach the Groceries Code, this may now (in addition to the existing possibility of a contractual claim) lead to complaints by suppliers and potentially to an investigation by the Adjudicator. An investigation is something that—quite apart from any sanctions which may result—retailers will want to avoid.

⁴⁰ HC 1224 2010–12 paras 66–9

⁴¹ HC 1224 2010–12 para 77

⁴² [Eleventh report: Government response to the Committee’s Ninth report](#), 15 October 2011 HC 1546 2010–12

Third, there is the possibility of an investigation leading to a recommendation or to a requirement to publish information about the investigation. Publicity given to breaches of the Groceries Code by a retailer can be taken into account by those dealing with it and is likely to encourage that retailer to improve its compliance with the Groceries Code. Fourth, large retailers will immediately be conscious that if there is evidence of significant non-compliance with the Groceries Code and the existing regime seems not to be sufficiently effective, there is the prospect of a swift introduction of financial penalties, without the need for primary legislation. Clearly, all large retailers will prefer to avoid any risk of financial penalties being imposed.⁴³

In addition the Government said that it was “still considering” whether other parties, such as trade associations, would submit information – expressing concern over the “additional risk of procedural unfairness to retailers which might arise from the Adjudicator having less direct access to the evidence from the suppliers themselves.”

The Government reaffirms its position from the policy document, ‘...As these are contractual matters it is likely that only a direct or indirect supplier would have sufficient information to make an appropriate complaint. Third parties, trade associations and nongovernmental organisations will still have a useful role to play in offering advice and assistance to their stakeholders, but information on which the Adjudicator may base an investigation must come direct from the business affected’.

In assessing the potential benefits of allowing information from trade associations to be used as a trigger for starting investigations, the Government must balance this with the additional risk of procedural unfairness to retailers which might arise from the Adjudicator having less direct access to the evidence from the suppliers themselves. The Government recognises that the Adjudicator will need to develop the trust and support of the supply chain to ensure that suppliers have the confidence to come forward. The Government envisages trade associations and other bodies having an important role to play in ensuring that the provisions of Clause 19 (i.e. the Adjudicator’s duty to protect the identities of complainant suppliers) are communicated as quickly and thoroughly as possible.

The Government also notes that any publicly available reports of trade associations may be considered by the Adjudicator when deciding whether or not to carry out an investigation. It will make this clear in the explanatory notes to the Bill. This would provide a means by which trade associations, through their ability to collate information from many different members, may help the Adjudicator to become aware of systematic patterns of behaviour or breaches of the Code. The Government will also actively work with trade associations between now and the introduction of the Bill to identify ways in which they can help to ensure the Adjudicator is as effective as possible.

While the Government acknowledged the same concerns would not apply to evidence from whistle-blowers – “the Adjudicator would be receiving information from a named individual who would in most cases be the direct source of the information provided” – there was the further risk that “if the information could come from former as well as

⁴³ HC 1546 2010-12 p3, p8

current employees, retailers could use this strategically to draw the Adjudicator's attention to their competitors."

With regards to whistle-blowers, the Government recognises that the same issue of procedural unfairness ... does not apply: the Adjudicator would be receiving information from a named individual who would in most cases be the direct source of the information provided. Furthermore, the Government recognises that a whistle-blower might have information that related to a contractual relationship.

On the other hand, it is necessary to balance this against the risk that, especially if the information could come from former as well as current employees, retailers could use this strategically to draw the Adjudicator's attention to their competitors (in the case of an employee moving from one retailer to another). It is also the case that any rights granted to whistle-blowers under this Bill would need to be compatible with the existing framework of law governing whistle-blowers in the economy as a whole. The Government will consider this matter further, taking into account the wider legal framework, before introducing the Bill.⁴⁴

Nevertheless this issue continued to be raised by Members; for example, in January 2012 John McDonnell MP put down an EDM in support of legislation to establish the GCA, signed by 37 Members, arguing that the Adjudicator should "have the power to launch investigations based on credible evidence from third parties."⁴⁵

⁴⁴ HC 1546 2010-12 pp5-6

⁴⁵ EDM 2661 of 2010-12, *Market power of supermarkets*, 30 January 2012

4. The Groceries Code Adjudicator Act 2013

In the months after the BIS Committee's report, the question of *when* the Bill would be presented was often raised in the House, though without the Government giving any firm date.⁴⁶ On 23 January 2012 the House debated an Opposition motion on food prices and food poverty which expressed dismay over "Government delays" in introducing the Bill, and suggested that the Adjudicator should "have the power to fine retailers and that third party organisations should be able to report retailers for unfair practices." Speaking for the Opposition on this occasion, Mary Creagh said:

We want a fair and competitive supply chain for growers, processors and retailers. The Competition Commission in 2008 found that there was an adverse effect on competition from unfair supply chain practices. It recommended that supermarkets with a turnover of more than £1 billion a year should be prevented from imposing retrospective discounts and from changing terms and conditions for suppliers. That leads to an unfair spread of risk and cost down the grocery supply chain, and to short-termism in relationships ... That is why Labour in government secured cross-party agreement for a groceries code ombudsman to ensure a fair deal for farmers and producers. This Government's delays and procrastination mean that the adjudicator will probably not be up and running until 2014-15 ...

The commission recommended the powers to levy significant financial penalties, but the Government are recommending that only in reserve powers in the Bill, not on the face of the Bill, meaning that fines for anti-competitive practices are even further away than 2015.⁴⁷

In response the then Secretary of State for Environment, Food & Rural Affairs, Mrs Caroline Spelman, made the following points:

We have been very clear as a Government that we are fully committed to introducing the adjudicator as soon as possible.

Free and fair competition is the key to a healthy market, and it is right that the adjudicator should make sure the market is working in the best long-term interest of consumers. In this Session, we published a draft Bill to allow pre-legislative scrutiny. It was a popular measure, welcomed on both sides of the House ... So there is no delay, but it has to be done right.

It is important to bear it in mind that, overall, the Competition Commission found that retailers are providing a good deal for their customers, and they should not be prevented from securing the best deals and passing the benefits on to their customers, but, similarly, we are clear that they should be required to treat their suppliers lawfully and fairly.

During pre-legislative scrutiny, the Business, Innovation and Skills Committee suggested that third parties should be allowed to lodge complaints. Our position remains that it is more appropriate

⁴⁶ For example, HC Deb 22 November 2011 c330W, HC 6 Deb December 2011 c287W, HC Deb 15 December 2011 c937, HC Deb 7 February 2012 c251W

⁴⁷ HC Deb 23 January 2012 cc45-6

for complaints to be lodged directly or indirectly by suppliers, but we are open to considering further arguments on extending the range of those who can trigger an investigation. That is the benefit of pre-legislative scrutiny. We recognise that third parties, including trade associations, have a valuable role to play, so the adjudicator will be fully free to gather evidence from trade associations once an investigation has begun.

The draft Bill provides the adjudicator with the power to name and shame retailers that are in breach of the code, and we believe that, in a highly competitive market, retailers will not risk reputational damage from unacceptable behaviour towards suppliers. If negative publicity proves insufficient, however, the draft Bill contains a reserve power for the adjudicator to impose financial penalties, subject to an order made by the Business Secretary but without the need for primary legislation.

I hope the House agrees, therefore, that these measures represent significantly more progress than was made under the previous Government and should be generally welcomed.⁴⁸

Finally, in the Queen's Speech on 9 May 2012 the Government confirmed that it would introduce legislation to set up the GCA in the 2012/13 Session; a press notice gave a brief summary of the Bill:

The main elements of the Bill are:

Creating an Adjudicator, as set out in the draft Bill. The Adjudicator's role would be to ensure adherence to the Groceries Code. He or she would do this by arbitrating disputes between retailers and suppliers, investigating anonymous complaints and taking sanctions against retailers who break the rules.

The Groceries Code which the Adjudicator would be responsible for upholding was put in place by the Competition Commission. It obliges large retailers (those with a groceries turnover in the UK of more than £1 billion) to: deal fairly and lawfully with their suppliers; not vary supply agreements retrospectively, except in circumstances beyond the retailer's control which are clearly set out in the supply agreement; and pay suppliers within a reasonable time.

In addition, the Groceries Code limits large retailers' power to: make suppliers change their supply chain procedures or pay marketing costs and compensation for wastage; make suppliers obtain goods or services from third parties who pay the retailer for that arrangement; make suppliers pay them for stocking their products or pay for promotions; make suppliers pay for resolving customer complaints; and "de-list" suppliers – in other words, to stop dealing with a supplier or make significant reductions to the volume of purchases from a supplier.⁴⁹

The *Groceries Code Adjudicator Bill [HL]*, Bill 2 of 2012-13, was introduced on 10 May and received a second reading in the Lords on 22 May.⁵⁰ During the debates on the Address many Members welcomed the Bill's introduction. The then Secretary of State Vince Cable set out the Government's intentions for the Adjudicator in the debate on 14 May focusing on business and the economy:

⁴⁸ HC Deb 23 January 2012 cc 48-9

⁴⁹ Cabinet Office, [The Queen's Speech 2012 – Briefing Notes](#), 9 May 2012 p9

⁵⁰ HL Deb 22 May 2012 cc724-765

One area in which good regulation strengthens a market economy is competition policy ... [These concerns] underpin our decision to bring forward a separate Bill, establishing an independent groceries code adjudicator, which will protect suppliers—small firms and farmers—from unfair treatment. In doing so, we will support investment and innovation in the groceries supply chain, and support British food manufacturing and British farming. The measure has been welcomed by the Food and Drink Federation, the National Farmers Union and the Association of Convenience Stores.

The case of a highly concentrated industry buying from and selling to large numbers of suppliers and customers is a classic, economic textbook case in which intervention is needed to prevent monopoly profits. Retailers should not of course be prevented from securing the best deals and passing on the benefits to consumers, but equally retailers should be required to treat their suppliers fairly and lawfully.

An independent adjudicator will ensure that the market is working in the best long-term interest of consumers. It will have the powers to intervene proactively and to name and shame offenders. In such a competitive market we consider that those powers will be an effective tool, but if it appears that they are not adequate, I, as Secretary of State, will be able to grant the adjudicator the power to impose financial penalties.⁵¹

Asked by Andrew George MP when the Bill might come into effect, the Minister added, “of course, I have no control over the parliamentary timetable, but given that the Bill is small and there is a consensus, it should go through very quickly.” Confirming the Opposition’s support for the Bill the then Shadow Business Secretary, Chuka Umunna MP, said, “we will work to ensure that the grocery adjudicator is given powers to ensure fair access across the supply chain.”⁵²

As the Secretary of State noted in his speech, as with the draft Bill, the Bill provided for the Minister to make an Order giving the adjudicator the power to fine. The Bill *differed* from its draft predecessor in one respect because it *allowed* for the GCA to commence an investigation on the basis of evidence from third parties – as underlined at the time:

Huw Irranca-Davies: To ask the Secretary of State for Business, Innovation and Skills whether his proposed Groceries Code Adjudicator Bill will include provisions for the submission of (a) third party evidence and (b) evidence given anonymously.

Norman Lamb: The Groceries Code Adjudicator Bill allows for the adjudicator to consider third party evidence, both when deciding whether to initiate an investigation and as part of an ongoing investigation. The Bill also requires the adjudicator to protect the confidentiality of complainants.⁵³

⁵¹ HC Deb 14 May 2012 c285

⁵² HC Deb 14 May 2012 c285, 292. Other Members mentioning the Bill on this occasion included Adrian Bailey MP (c314), Neil Carmichael MP (c326), Nia Griffith MP (cc326-7) & Andrew George MP (cc328-9). In the debate on May 16 focusing on the cost of living, the Bill was mentioned by Robin Walker MP (HC Deb c599), Albert Owen MP (c603), Laura Sandys MP (c615), Tim Farron MP (c620), Jim Dowd MP (c628) & Stephen Phillips MP (c631) – as well as Elfyn Llwyd in the earlier debate on 9 May (HC Deb c61).

⁵³ HC Deb 17 May 2012 cc324-5W. Clause 4 of the draft Bill allowed the GCA to start an investigation on the basis of evidence that was either from direct & indirect

In the Lords, the Bill was debated in Grand Committee over two days, before completing its progress on Report and Third Reading on 16 & 24 July, respectively. A number of amendments were made to the Bill at these stages, though none of these changed the Bill substantially. Much of the debate in the Lords focused on the question of the Adjudicator being entitled to impose fines on retailers, though the Government maintained the view that the power should only be given if, once established, it was proven that the Adjudicator's existing powers to issue recommendations and 'name and shame' retailers were insufficient.⁵⁴

The Bill was introduced in the Commons on 3 September 2012, and received a Second Reading on 19 November. On this occasion the then Competition Minister, Jo Swinson, underlined the Government's view that "the sanctions that are in place and that will be available immediately are robust and will be sufficient to achieve the change we require":

If the adjudicator, as a result of the evidence they have been provided with, has reasonable grounds to suspect that the code has been breached, they will be able to start an investigation and gather more information from relevant retailers and others. If the investigation finds that a retailer has broken the code, the adjudicator will have tough sanctions, for example the so-called "name and shame" powers to require retailers to publish information about a breach in the trade or national press. We think that those sanctions are powerful enough to uphold the code. However, if that proves not to be the case, the Bill allows the Secretary of State to grant the adjudicator a power to impose financial penalties as well.⁵⁵

In answer to questions, the Minister stated that an order to give the Adjudicator the power to impose fines "could be done within six months ... if it was determined that things were not working", but argued there was a risk to granting this power from the start:

We do not want the groceries code adjudicator to be tied up in appeal after appeal, but want them to be able to get on with their investigations. That is why we think that it is helpful to proceed with the range of sanctions in the Bill ... A move straight to fines would risk creating an unnecessarily adversarial environment, which would ultimately detract from our key objective of achieving long-lasting change in the culture of retailers.⁵⁶

Speaking for the Labour Party, Ian Murray said that the Opposition welcomed the Bill though the Government had "dragged their feet" on bringing it forward; in addition, the Opposition would "seek to strengthen [the Bill] so that the adjudicator has the powers it needs to be effective from day one." Mr Murray noted that the BIS Committee had taken this position in their report on the draft Bill, and that a series

suppliers or that was publicly available. This restriction was removed in clause 4 of the final Bill.

⁵⁴ For more details of the Bill's scrutiny in the Lords see, [Library Research paper 12/44](#) pp16-35.

⁵⁵ HC Deb 19 November 2012 cc321-2

⁵⁶ *op.cit.* c335

of stakeholders had made this case in a recent letter to the *Sunday Telegraph*:

It is worth my quoting from it, because it touches on the crucial part of the Bill:

“Sir, Having got the Groceries Code Adjudicator Bill this far, the government will be scoring an own goal if it denies the supermarket watchdog the one tool that will make it effective: the power to levy fines from the outset. The evidence of supermarkets’ unfair treatment of suppliers—which includes farmers both here and in developing countries—is all too clear. Watering down the bill so that penalties only go as far as ‘naming and shaming’ will not be a sufficient deterrent and the Adjudicator risks failing in its job to hold supermarkets to account.”

That letter was signed by ActionAid UK, the National Farmers Union, the Federation of Small Businesses, the Campaign to Protect Rural England, the National Federation of Women’s Institutes, Traidcraft, the Tenant Farmers Association, the Country Land and Business Association, the Independent Fruit Growers Association, the Catholic Agency for Overseas Development, Friends of the Earth, War on Want, RedOrange and Great Glemham Farms. Clearly, then, there is a great movement to provide for fines in the Bill, and I cannot understand why the Government have not listened to the letter.⁵⁷

In general other Members who spoke during the debate all supported the principle of the Bill, and argued strongly that the Bill should give the Adjudicator the power to levy penalties from its establishment. Even Members who did not give wholehearted support for this amendment acknowledged that there was a strong case for the Adjudicator being able to impose fines.

Subsequently on 4 December 2012, prior to the Bill’s Committee Stage, the Competition Minister announced that the Government had accepted these arguments:

“We have heard the views of the stakeholders who were keen to give the Adjudicator a power to fine, and recognise that this change would give the Adjudicator more teeth to enforce the Groceries Code. We expect fines to be used as a last resort, but the fact that the Adjudicator has the power to impose them will send a strong message to retailers that compliance with the Code is not optional. I am confident that these changes will mean that the Adjudicator is able to ensure fair play in the food supply chain and keep the industry growing.”

The Adjudicator will publish guidance within six months after the Bill comes into effect to propose the maximum amount he or she will be able to fine. Retailers would have a full right of appeal against any fines imposed.⁵⁸

Amendments to this effect were tabled by the Government and agreed, without division, during the Committee stage of the Bill.⁵⁹ No other

⁵⁷ *op.cit.* cc337-8, c342

⁵⁸ BIS press notice, *Groceries Adjudicator to have new power to fine supermarkets*, 4 December 2012

⁵⁹ Public Bill Committee (*Groceries Code Adjudicator Bill [Lords]*), 13 December 2012 cc cc93-105

changes were made to the Bill by the Committee,⁶⁰ and the *Groceries Code Adjudicator Act 2013* received Royal Assent on 25 April.

The Act includes provision for the Secretary of State to review the Adjudicator's power to use information from third parties – along with information from supermarkets and suppliers – in a decision to launch an investigation.⁶¹ In Committee the Minister, Ms Swinson, explained that if it proved that the Adjudicator was being deluged with irrelevant or misleading information, the Secretary of State could bring forward an Order to strike out this category of information. It should be underlined that this would apply only to the preparatory stage before an investigation began: once triggered, the Adjudicator would be able to consider information from any source.⁶² At the Report stage of the Bill the Government moved amendments to stipulate that such a change could only be made if the Secretary of State had concluded this would “enable the Adjudicator to be more effective.” Although Members raised a number of issues about the Bill, these particular amendments were not discussed, and were adopted without a vote.⁶³

One issue raised in Public Bill Committee was how the Secretary of State's appointment of the Adjudicator might be scrutinised by the House. Although the Minister opposed making this appointment subject to approval by the relevant Select Committee, she indicated that she would consider the case for pre-appointment scrutiny. In January 2012 Ms Swinson announced her appointment, Christine Tacon, and said she had asked the BIS Committee to take evidence from Ms Tacon before her appointment:

I am delighted to announce that I have selected Christine Tacon to be the first groceries code adjudicator, subject to security clearance. In the spirit of open Government, I have also asked the BIS Select Committee to conduct pre-appointment scrutiny of this candidate, although the final decision will remain that of the Secretary of State. Christine has a background in both food production and in retail, culminating in 12 years as managing director of the Co-operative Farms. She has a strong knowledge of both supermarkets and suppliers, having held senior corporate responsibility within the co-operative group and running the largest farming operation in the UK.⁶⁴

Ms Tacon gave evidence to the Committee the next month, and the Committee welcomed her appointment.⁶⁵

The Adjudicator began operations on 25 June 2013;⁶⁶ further details of its operations are [given on its site](#).

⁶⁰ [Library Research paper 13/05](#), 10 January 2013 provides a summary of the Committee's proceedings.

⁶¹ Under s15(5) of the Act. See also, [Library Research paper 13/05](#), 10 January 2013 pp 20-21.

⁶² PBC, 13 December 2012 cc139-140

⁶³ HC Deb 26 February 2013 c235

⁶⁴ HC Deb 21 January 2012 c1WS

⁶⁵ *Eighth report of Session 2012-13*, HC 1011, 28 February 2013

⁶⁶ GCA press notice, [Groceries Code Adjudicator formally established](#), 24 June 2013. This change was made by Order (SI 2013/1236).

Of related interest, in 2013 the European Commission published a Green Paper on unfair trading practices (UTPs) in the business-to-business food and non-food supply chain in Europe; details of the consultation are collated [on the Commission's site](#). As part of this the Commission asked these practices were recognised, and mitigated, in each Member State,⁶⁷ and subsequently published a substantive study of the different regulatory frameworks in the 28 Member States.⁶⁸ In July 2014 the Commission published a 'communication' on UTPs in the food supply chain, "to encourage a common understanding between Member States about measures to address UTPs", taking the view that there was no 'one-size fits all' solution, and making no proposal for legislative action at an EU level.⁶⁹ This document gives a short summary of enforcement provisions across Member States:

Any party exposed to UTPs may in principle seek redress via litigation in court under provisions of general civil law against abusive contract clauses. However, some stakeholders especially SMEs have highlighted that litigation through courts is, in practice, often not an effective way of addressing UTPs. Firstly, litigation is generally costly and time consuming.

Secondly, and perhaps more importantly, the weaker party in a commercial relationship in the food supply chain (in most cases an SME) often fears that initiating litigation may lead the stronger party to terminate the commercial relationship (the 'fear factor'). This can discourage parties that are subject to UTPs from taking legal action, which in turn can limit the deterrence factor for the trading party applying UTPs.

Against this background, some Member States have put in place other redress mechanisms to tackle UTPs in vertical supply chains. A number of Member States have designated an enforcement authority which is independent from the market players concerned, and some other Member States are currently discussing possible reforms in this direction.

In some cases, the national competition authority has been designated for the enforcement of rules against abusive behaviour towards economically dependent undertakings and/or abuse of a superior bargaining position. However, there are also examples of Member States having designated other existing authorities (e.g. authorities responsible for food-related issues or consumer protection) or having established new administrative authorities to enforce rules against UTPs. Several of these authorities have the power to conduct investigations and they typically accept confidential complaints.

In some other Member States a voluntary dispute resolution mechanism has been established by stakeholders to try to settle disputes out of court. In other cases, a 'mixed approach', consisting of voluntary schemes complemented with public enforcement, was retained.⁷⁰

⁶⁷ The [response document](#) sets these out (see pp6-9).

⁶⁸ [Study on the legal framework covering Business-to-Business unfair trading practices in the retail supply chain: final report \(DG MARKT/2012/049/E\)](#), 26 February 2014

⁶⁹ European Commission [press notice IP/14/831](#), & [Memo 14/485, 14 July 2015](#)

⁷⁰ [Tackling unfair trading practices in the business-to-business food supply chain, COM\(2014\) 472 final](#), 15 July 2014 p7. See also, European Parliament, [Unfair Trading Practices in the Business-to-Business Food Supply Chain](#), August 2015

5. Recent developments

Following the establishment of the GCA, there has been relatively little discussion of the GCA's work in the House. As noted above, in April 2014 the Competition & Markets Authority took over responsibility for enforcing competition law from the OFT and the Competition Commission. It remains the case that the responsibility for launching market investigations lies with the competition authorities and not with Ministers:

Zac Goldsmith: To ask the Secretary of State for Business, Innovation and Skills what plans the Competition and Markets Authority has to assess market features restricting, preventing or distorting competition between supermarkets and small independent retailers.

Jo Swinson: The new Competition and Markets Authority (CMA) will come into force formally in April 2014. It will take forward the responsibilities of the Office of Fair Trading and Competition Commission, which have previously investigated the groceries market and put in place remedies. The CMA will similarly have access to powers (under the Enterprise Act 2002) to deal with anti-competitive behaviour in UK markets. Decisions on individual cases will be a matter for the CMA. Following the Competition Commission's recommendation in its groceries market investigation, the Government have established a Groceries Code Adjudicator which focuses on contract issues between supermarkets and suppliers.⁷¹

In June 2014 the GCA published its first annual report;⁷² in this, the Adjudicator underlined the scope of the GCA's remit, which, as noted, is only to monitor, encourage compliance with, and enforce, the Code:

Under the Code the large retailers are obliged to deal fairly and lawfully with groceries suppliers across a range of supply chain practices. These include: making payments on time; no variations to supply agreements without notice; compensation payments for forecasting errors; no charges for shrinkage or wastage; restrictions on listing fees, marketing costs and delisting.

However, the Code does not cover issues such as price setting, the relationship between indirect suppliers and the large retailers, food safety or labelling. These issues are outside the GCA's remit...

The GCA's responsibilities do not extend to acting as a complaints body, nor can it advise on individual complaints or disputes where a supplier seeks a view on whether a large retailer has breached the Code. This is because the GCA may later be asked to arbitrate in the same dispute between the supplier and the large retailer or the GCA may later launch an investigation into the practice raised by the supplier. Providing a view on individual cases would compromise the GCA's objectivity and may lead to legal challenge. However, the GCA encourages suppliers to approach Code Compliance Officers (CCOs) [the individual in each large retailer charged with ensuring the business remains compliant

⁷¹ HC Deb 18 July 2013 c921-2W

⁷² [GCA Annual Report 23 June 2013 – 31 March 2014](#), June 2014

with the Code] directly because they can deal with issues quickly and, where needed, discreetly.⁷³

In its overview of the GCA's first year, the report discussed a number of key areas where individual business practices might be in contravention of the Code, and gave details of two cases studies where the GCA clarified their view of the Code so as to change retailer behaviour. The Adjudicator also established a schedule of regular meetings with the retailers' Code Compliance Officers.⁷⁴

In September 2014 Tesco revealed that it had overstated its profits by over £250m,⁷⁵ and in February 2015 Ms Tacon announced a formal investigation into whether the company had breached the Code.⁷⁶ In its formal notice the Adjudicator noted that the scope of its investigation could be extended, should evidence come to light of other retailers using similar practices:

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.⁷⁷

On the question of penalties, during 2014 the GCA consulted on how the maximum financial penalty should be calculated.⁷⁸ In turn, in January 2015 the then Secretary of State, Vince Cable, confirmed the introduction of secondary legislation to give effect to these powers:

The Adjudicator will be able to impose penalties on the large supermarkets of up to 1% of their annual UK turnover, dependant on the seriousness of the breach. The GCA has [published guidance](#) on the principles that will be used to calculate the level of any fine. These new measures will sit alongside existing powers to issue supermarkets with recommendations as to their future conduct, and to 'name and shame' those that have breached the code ...

Business Secretary Vince Cable said: "This important final step will give the Groceries Code Adjudicator the power it needs to address the most serious disputes between the large supermarkets and their direct suppliers. I created the Groceries Code Adjudicator to ensure a fair deal for those who supply goods to supermarkets such as farmers and small businesses. I am pleased today ... to be giving the Adjudicator the final element in a set of powers that will give this new body all the tools it needs to succeed in this challenging and important role."⁷⁹

⁷³ *op.cit.* pp4-5. See also, [HC Deb 26 June 2014 c287W](#)

⁷⁴ Details of these meetings to date [are published on the GCA's site](#).

⁷⁵ "Tesco loses £2bn in value as investigation of profit overstatement begins", *Guardian*, 22 September 2014

⁷⁶ GCA press notice, [GCA launches investigation into Tesco plc](#), 5 February 2015. See also, "Probe into how Tesco treats suppliers could spread to rivals, warns watchdog", *Financial Times*, 5 February 2015

⁷⁷ GCA, [Notice of investigation](#), 5 February 2015

⁷⁸ *GCA Annual Report 2013/14*, June 2014 p15

⁷⁹ BIS press notice, [Fines for supermarkets move a step closer](#), 29 January 2015. See also, "Supermarkets watchdog sharpens its teeth", *Financial Times*, 2 February 2015

When this legislation was debated in the House, Mel Stride MP, speaking for the Government, set out the Government's approach to the issue of fines, and gave details of how the GCA would use these powers:

It was the will of Parliament that the adjudicator should also have the power to impose a financial penalty. Provisions to introduce a fining power by secondary legislation were therefore added to the Groceries Code Adjudicator Bill during its parliamentary passage. Those required the adjudicator to consult on the method for determining the maximum penalty, which she did between July and December 2013, and to make a recommendation to the Secretary of State. That recommendation was for a maximum penalty of up to 1% of UK turnover, which Ministers accepted. The order implements that recommendation. I should put on record that the order cannot have any retrospective effect. That means that the adjudicator will not have the power to impose a penalty for any breach of the code that predates the making of the order.

I know that some of the supermarkets have expressed concern about the maximum penalty level. They have pointed out that, for the largest retailers, 1% equates to hundreds of millions of pounds. On the other hand, suppliers who responded to the GCA's consultation tended to favour a much higher maximum, in some cases up to 5% of turnover. On balance, Ministers consider the recommended 1% an appropriate and proportionate maximum. It is modest compared with the figures of 10% and more in the competition regime, and it is a maximum.

The adjudicator's published guidance makes it clear that the GCA will adopt a proportionate approach to its enforcement powers and will seek voluntary compliance wherever possible. The agreement that she has secured from most of the supermarkets to limit their forensic accounting exercises to the previous two years, when six had been common, is an excellent example of her ability to get results without the need to pursue formal proceedings.

Where the adjudicator relies on her formal enforcement powers, she will do so by applying the well-established Macrory principles on regulatory penalties. Those state that a sanction must be proportionate, must deter future non-compliance and must aim to eliminate any financial benefit from non-compliance.

We have recently seen that how supermarkets account for their income can quickly have a huge positive impact on their finances. The Government believe that the 1% maximum in the order is appropriate if a full and proportionate range of sanctions is to be available to the adjudicator. However, there must be a statutory review of the GCA's performance next year, during which the order may, of course, be looked at again.⁸⁰

In July the GCA published its second annual report.⁸¹ The 2013 Act places specific reporting requirements on the GCA, and this section of the report is reproduced below (p22):

⁸⁰ [Second Delegated Legislation Committee, 9 March 2015](#) cc4-5. This secondary legislation – [SI 2015/722](#) – took effect from 6 April 2015.

⁸¹ [GCA Annual Report and Accounts 2014 – 2015](#), HC 154, July 2015

Disputes referred to arbitration under the Groceries Supply Order
The GCA received two requests for arbitration in reporting year 2013/14. The cases have progressed through this accounting year but no final decision has been reached in either dispute.
Investigations carried out by the GCA
The GCA launched its first investigation on 5 February 2015, into Tesco plc.
Cases in which the GCA has used enforcement measures
The investigation continues and therefore no enforcement measure has been imposed.
Recommendations that the GCA has made to the Competitions and Markets Authority (formerly Office of Fair Trading) for changes to the Code
The GCA has made no recommendation to the CMA for any change to be made to the Code.

As this notes, the Adjudicator has not completed its first investigation; Ms Tacon gives more details in her foreword to the report:

On 5 February 2015 I launched an investigation into Tesco plc. This was followed swiftly by the draft publication of the Statutory Instrument which would give me the power to apply a financial penalty. Press coverage of both events was considerable and this has been extremely useful in raising the profile of my role and the Code with suppliers and others.

The investigation arose from the circumstances underpinning the mis-statement of profits announcement by Tesco plc in September 2014. Following the announcement I sought information from a number of sources including: from Deloitte, who were appointed by Tesco plc to assess the relevant accounting practices and profit level; from Tesco plc for their own assessment of Code compliance related to the reported accounting practices; and from suppliers and trade associations. Together this information gave me reasonable suspicion that the Code had been breached and triggered my investigation, which at the time of reporting is still underway.

At this stage my public call for evidence has closed, and I am considering what further information I require from Tesco plc, suppliers and others to allow me to determine if and what Code breaches have occurred. Until I properly consider the evidence available from Tesco plc and from suppliers and others, I cannot determine whether and in what way the Code has been breached. As any regulator, I must follow the procedures I have already published, including my guidance on investigation and enforcement functions.

If I establish a breach my available sanctions are making recommendations to Tesco plc and/or requiring the company to publish information. My ability to use financial penalty powers became law on 6 April 2015 and so I can only apply a fine to retailers for breaches occurring after that date. It is possible that any recommendations I make may lead to guidance to the sector as a whole, which will inform all the large retailers and others about my interpretation of the relevant paragraphs of the Code.⁸²

At this time the Adjudicator published the results of a survey it had commissioned, which indicated that, over the previous year, there had been a growing awareness of the GCA's role among suppliers, although

⁸² HC 154, July 2015 p9

a majority of suppliers still expressed scepticism as to whether they would raise an issue with the GCA:

The YouGov survey carried out on behalf of the Groceries Code Adjudicator (GCA) shows a drop in the number of suppliers reporting Groceries Code-related issues in their dealings with the ten large retailers in the last 12 months from 70 percent in 2015 compared to 79 percent in 2014. At the same time a larger proportion of suppliers would consider raising issues with the GCA – up 9 points to 47 percent – with concerns about retribution still the dominant reason for holding back ...

Adjudicator Christine Tacon hailed [the survey results] as signs of making a difference in a challenging year for suppliers and retailers. “We still have some way to go in important areas but this is a clear sign we are on the right track. Suppliers are more aware of the GCA and its work and fewer now believe the GCA will not be able to do anything if they bring an issue to me”, she said.⁸³

Of related interest, there have been concerns over the impact on the dairy industry of the huge volatility in milk prices seen over the last two years.⁸⁴ The GCA has no remit to investigate prices, and may only investigate the relationship between the largest supermarkets and their direct suppliers. As very few dairy farmers sell direct to supermarkets, there have been calls for the scope of the GCA’s powers to be extended, to provide a mechanism to tackle this problem. Under [section 15 of the 2013 Act](#), the Secretary of State is required to initially review the GCA performance in 2016. Subsequent reviews are to take place every three years.⁸⁵ In January 2015 the EFRA Committee published a report on dairy prices, which recommended the Government give “urgent consideration” of how the GCA’s remit could be amended:

Confusion exists over what precisely the GCA can do in respect to dairy products: in fact, because of the structure of the milk supply sector, only about 3% of milk producers are direct suppliers to retailers and the vast majority are, therefore, not covered by the Groceries Code. The GCA has no role in influencing prices offered to farmers for milk and other dairy products.

The GCA herself, Christine Tacon, told us: “I think very many farmers thought I was going to be there to get involved with price. I have been asked to get involved in the price of beef and milk and fleece. None of these can I get involved with: first, because I cannot get involved on price, and secondly they are very rarely direct suppliers themselves” ...

The GCA’s role is not due to be reviewed before 2016, by its parent department, the Department for Business, Innovation and Skills. The farming Minister told us that, with the GCA being little over a year old, it made sense to give time for its operations to be judged before being reviewed. We have heard calls for that role to be reviewed sooner, however, and for the GCA’s remit to be

⁸³ GCA press notice, [Survey shows Groceries Code Adjudicator is making a difference, 22 June 2015](#). The GCA’s 2014/15 Annual Report has a section discussing these survey results ([HC 154, July 2015 pp17-20](#)).

⁸⁴ DEFRA publishes [regular statistical data](#) on milk prices. To date the most recent briefing has been for September 2015 ([29/10/2105](#)).

⁸⁵ The legislation stipulates that the first review period for the GCA “is the period ending on the first 31 March that is at least 2 years after section 1 [which established the GCA] comes into force”; that date was 25/6/2013.

extended to include relationships all the way down the supply chain, so that the relationships between milk producers, processors and the ultimate retailer could be considered ...

We believe that the terms under which the Groceries Code Adjudicator may operate are too restrictive and that a means must be found to protect suppliers of products to major retailers whether or not they are direct suppliers, as under the current arrangement. We note that the Government is committed to review the operation of the GCA in 2016 but we recommend urgent consideration of how the GCA remit can be extended to incorporate suppliers throughout the supply chain.⁸⁶

The Committee's report was debated on 4 February 2015, when several Members discussed the potential role of the GCA in helping the industry. In responding to the debate the Minister, George Eustice, noted that one way that the existing code could help would be if suppliers used it more effectively:

When I met Christine Tacon recently to discuss this matter, she said that one of the biggest things she is trying to encourage is better training of processors and those dealing with supermarkets to ensure that they use the code effectively and say to supermarkets, "You'll understand that I can't accept what you are asking me to accept, because it would be in breach of the code", and to do so in a way that ensures everybody abides by the code. That is how we can help those further down the supply chain, because one of the issues is that it might sometimes be easier for processors to take the hit from the supermarket and pass it on to farmers. We need to ensure that they hold their retail customers to the code.⁸⁷

At BIS questions a few days after this debate, the Competition Minister said that the Government would look at extending the GCA's remit, but made no firm proposals of how this might be done:

Mr Alan Reid (Argyll and Bute) (LD): I welcome the introduction of big fines for supermarkets that breach the groceries supply code of practice, but I urge the Government to bring forward the review. We need to extend the code to indirect suppliers such as dairy farmers, who are suffering greatly at the moment. They cannot wait another year. May we have the review much sooner, please?

The Parliamentary Under-Secretary of State for Business, Innovation and Skills (Jo Swinson): I thank my hon. Friend for that question. I know that my hon. Friend the Member for Somerton and Frome (Mr Heath) has also been raising this issue assiduously. It is one that Members across the House are, understandably, very concerned about. The groceries code adjudicator is already proving to be a great success in her work with supermarket companies, by encouraging them to change their behaviour. We have ensured that she has, and will have, the power to fine as well as to launch investigations—the first, of course, was launched recently. The question whether the remit should be extended needs to be looked at, and I commit the Government to doing that.⁸⁸

⁸⁶ [Dairy Prices, 20 January 2015, HC 817 of 2014/15](#) pp15-16

⁸⁷ HC Deb 4 February 2015 c90WH

⁸⁸ HC Deb 12 February 2015 c949

In March 2015 the Coalition Government published its response to the Committee's report. In this the Government underlined that the statutory review of the GCA would not be undertaken before 2016. Moreover, any changes to the Adjudicator's remit would require either a decision by the CMA to conduct a further investigation into the sector or primary legislation:

The GCA's jurisdiction is tightly defined by the Groceries Supply Code of Practice. The Groceries Code pre-dates the creation of the GCA, and reflects the findings of an investigation of the supermarket sector by the Competition Commission from 2006-08. This established that the most significant problems in the sector were focused on the commercial relationships between the ten largest supermarkets and their direct suppliers.

There are no powers within the Groceries Code Adjudicator Act 2013 that would allow Ministers to extend the GCA's jurisdiction. Changes to the GCA's remit would require either a decision by the Competition and Markets Authority to conduct a further investigation into the sector or primary legislation to amend the 2013 Act.

The provisions in the GCA Act for reviews of the Adjudicator by the Secretary of State focus on how effectively the Adjudicator has exercised her powers and enforced the Code. They permit the Secretary of State to make changes to the GCA's *modus operandi*; but not to amend the Groceries Code itself. Ministers have no power to conduct this statutory review before 2016.

The Government believes that concerns about fairness and transparency in the dairy supply chain should be addressed through an industry-led approach. Defra has established and is facilitating a dairy industry group to look at contracts in the dairy sector and build on progress under the existing voluntary dairy code of practice. BIS and the GCA will participate as required in the Industry Group. Its findings will be considered as part of the statutory review of the GCA in 2016.⁸⁹

Insofar as the question of the GCA's remit continues to come up in the House, this remains the focus of Members' concerns.⁹⁰ In September 2015 the DEFRA Committee launched [an inquiry on farm gate prices](#), which is ongoing. Notably, in evidence submitted by the GCA, the Adjudicator underlines the point that the scope of the GCA's remit continues to be misunderstood:

I continue to spend a great deal of my time explaining the remit of the GCA. This has hampered my ability to pursue important work that is within my remit ... The continued misrepresentation of my role is of great concern to me and I am keen to resolve this issue swiftly.⁹¹

⁸⁹ EFRA Committee, [Sixth special report, 26 March 2015 HC 1147 of 2014-15](#) pp3-4

⁹⁰ For example, [PO HL3007, 9 November 2015](#); DEFRA Questions on [5 November 2015 \(cc1091-2\)](#); [PO12254, 21 October 2015](#); and, [PO11457, 19 October 2015](#).

⁹¹ DEFRA Committee, [Farm Gate prices inquiry: GCA written evidence, FGP00019, 21 October 2015](#)

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