House of Commons
Environment, Food and Rural Affairs Committee

Draft Groceries Code Adjudicator Bill

Written Evidence

Only those submissions written specifically for the Committee and accepted by the Committee as evidence for the inquiry Draft Groceries Code Adjudicator Bill are included.
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Written evidence submitted by the British Independent Fruit Growers’ Association  
(GCA 01)

Draft Groceries Code Adjudicator Bill

Thank you for your letter dated 25th May 2011, inviting the British Independent Fruit Growers’ Association (BIFGA) to give evidence on the draft Groceries Code Adjudicator Bill, published on the 24th May 2011.

BIFGA has been calling for the regulation of major multiple retailers for more than 16 years, and we have made a number of written and oral submissions to this effect (to Parliament, the Office of Fair Trading, and the Competition Commission) over this period. Our view, that there is a need for regulation of the major multiples, has remained constant throughout. Accordingly, we would like to make the following points which incorporate responses to your particular questions:

1. If the adverse finding of the last Competition Commission’s supermarket enquiry relating to retailers’ treatment of suppliers is ever to be addressed, there is a very definite need for the Adjudicator to be appointed, without delay.

2. If consumers are to be given the opportunity of buying more British produce, it is essential that primary producers have the confidence to invest for the future. This requires a “fair deal” for producers, with adequate returns to enable them to make such investments – continuing to operate in a “climate of fear” with excessive risks and unexpected costs being imposed by retailers is not a viable option.

3. To illustrate in monetary terms the need for grower-confidence in our sector, it can now cost in excess of £20,000 per hectare to plant a new orchard, and take at least 5 years before it reaches full cropping. It is essential that such investments cannot be ruined “at a stroke”, e.g. by a supermarket buyer (perhaps acting on a whim) deciding to reverse an agreement made by his or her predecessor, and delisting a particular variety which growers had been encouraged to plant. An Adjudicator should be able to monitor such action, and act accordingly.

4. As far as the Groceries Supermarket Code of Practice (the Code) is concerned, whilst we welcome its introduction, we believe that there are still a number of “exclusion loopholes” that need to be removed in due course.

5. We suspect that little use has been made of the Code so far for fear of the damage this would cause to commercial relationships, and we believe that the Adjudicator should be given the power, and encouraged, to act pro-actively. This should include making random checks on the way that the Code is operating without waiting for complaints to be made by direct suppliers – a most unlikely event due to the fear of “de-listing”.

6. Indirect suppliers, such as our Members, should be contacted by the Adjudicator in all pro-active investigations, and they should also have the option of directly contacting the Adjudicator with complaints, in complete confidence of anonymity.

7. Associations such as BIFGA should also have the option of being able to contact the Adjudicator to bring to his/her attention not only information about possible infringements of the Code, but also suggestions as to how the Code might be modified to better serve the needs of suppliers and consumers alike.

8. Whilst we certainly do not wish to be at loggerheads with any of the supermarkets, it is because they have such a large share of the fresh produce market that they need to act in a way that gives our Members confidence to invest for the future. Indeed, it is the sheer
size of the supermarkets and their market share, that seems to cause many of the problems, and has inhibited investments (e.g. in new packhouses) by many growers.

9. We believe that investigation costs should come entirely from the supermarkets’ “not inconsiderable” net profits – they should not be allowed to push the costs either “down” to the suppliers or “up” to the consumers.

10. Whilst we believe that “naming and shaming” is an effective enforcement tool, this must be backed up with the provision that “appropriate” fines will be levied on supermarkets who break the Code.

11. Supermarkets constantly claim to be working on behalf of consumers to keep down prices. As an alternative to constantly trying to force down the price paid to primary producers, they could do much more to reduce costs. One particular area which needs attention is the use of “over the top” farm assurance schemes as part of their marketing/brand offer. These are largely “box-ticking” schemes carried out by an “army of clipboarders” and are, in great measure, unnecessary because the safety of food can easily be demonstrated using random product analysis.

We do hope that you will find our comments helpful, and we look forward to the early establishment of the Adjudicator.

7 June 2011
About the National Pig Association (NPA) and the British pig sector

The NPA is the representative trade association for British commercial pig producers and is allied to the NFU and represents the pig interests of NFU members. The NPA negotiates with processors and retailers on a regular basis to discuss supply chain issues and help British farmers get a fair price for their produce.

The need for the Groceries Code Adjudicator

1.1 The Adjudicator is a very important role that has the potential to have a very positive impact on the pig supply chain. Over the past few years, UK pig producers have faced difficulties in their negotiations with large retailers. This is because the supply chain in the pig industry does not currently function in a way that is economically sustainable for producers.

1.2 Rising production costs driven by the increases in the global price of wheat, and to a lesser extent soya, have not been equally distributed along the chain, instead the impact has been almost entirely passed on to producers. Despite a recent rise in pig prices which we understand has all be financed by processors, producers are continuing to lose a crippling average of up to £12 on every pig produced while supermarkets continue to make large profits. Currently supermarkets are making collective profits of £16million per week. This is a stark comparison to producers who are losing £1.8 million every week, effectively subsidising the top tiers of the supply chain.

1.3 Some supermarkets, particularly those with the dominant market share, try to deflect criticism away from themselves by arguing that they do not have a direct relationship with producers. An Adjudicator is needed to ensure that supermarkets deal with supply chain wide issues fairly and lawfully.

The functions and powers appropriate for any Code Adjudicator

**Interpretation of point one of the groceries code ‘deal fairly and lawfully with their suppliers’**

2.1 Retailers very rarely buy directly from pig producers but that should not absolve them of the responsibility to deal with them fairly and lawfully. We contend that the grocery adjudicator should be able to enforce supermarkets to deal with their suppliers “lawfully and fairly” whether directly or indirectly.

2.2 However, dealing ‘fairly’ must mean allowing British pork producers to maintain a sustainable business by providing them with a fair price for their produce that reflects higher costs of inputs. If the Adjudicator is not able to examine how these indirect relationships affect the whole supply chain then it will ultimately be powerless to fulfil this remit.

2.3 British consumers now face the real prospect of high welfare, British pork, bacon, ham and sausages disappearing from supermarket shelves as British farmers go out of business and British pork is replaced by lower welfare, imported alternatives.
2.4 The Adjudicator must be able to investigate the supply chain proactively to ensure that ‘fair dealings’ between all parts of the supply chain benefits consumers in the long run and provide a “level playing field” for producers.

**Must be able to investigate confidential material**

2.5 So far as investigations are concerned, the Government's policy is to restrict admissible evidence for the Adjudicator to investigate to material that is publicly available. The justification for this is to prevent the complainant suppliers from potentially being identified. However, much of the proof of unfair dealings will lie in commercially confidential material or private behaviour not in the public eye. Therefore we propose that the Government introduce safeguards to protect anonymity, while ensuring that vital evidence can be admitted.

**Coverage of indirect suppliers**

3.1 In the main, pork producers do not negotiate directly with those who are selling the produce to consumers, whether that is the food service sector, or retail outlets. However, when there are problems in the supply chain, such as higher costs at the producer end, it is the retailers at the top of the chain that fail to respond in a way that is fair to their suppliers. Therefore the Adjudicator must be given the power to investigate problems and arbitrate complaints arising from indirect suppliers which relate to the behaviour of supermarkets.

3.2 The deadweight average pig price (DAPP) records the price producers are paid for each pig slaughtered in the UK. At the time of submission the DAPP was 149p/kg. In 2010 the DAPP averaged 142p/kg, 3% lower than 2009. In addition to the falling DAPP, pig farmers have also had to contend with rising feed costs, leading to an increase in the overall cost of production. In January 2011 the cost of pig production was 25% higher than the 2009 average and 34% higher than the 2007 figure. This level of change cannot be managed by simply telling producers to improve their efficiency.

3.3 Rising production costs are not being matched by an equivalent rise in the price that producers get for their pigs, meaning their profit margins are squeezed so much that they now make a significant loss on each pig they produce. This has been the case for most producers since August 2010. This, in our view, is a clear cut example of supply chain failure. If the supply chain were working correctly pig producers would be able to pass some of the increased production costs up the chain with each level taking a small reduction in profit and ultimately the consumer potentially paying only a small amount more.

3.4 One such issue we hope the Adjudicator will have the power to investigate is the use of aggressive cut price discounting by supermarkets. In the vast majority of cases this has absolutely no relation to over-supply at the bottom of the chain and in reality involves cheaper imported products often produced to far lower animal welfare standards. It is more often than not the result of supermarkets competing for business amongst each other. However, the loss is forced down the chain and so rather than being borne by the supermarket it comes out of producers’ bottom lines.

3.5 This situation is evidently unsustainable in the long term and threatens the UK livestock sector. If it continues then we will see farmers going out of business and the industry shrink. This has knock on effects for a range of issues including employment, tax revenue, skills and sustainability.
Enforcement powers, penalties, appeals, and funding

4.1 In terms of penalties, ‘naming and shaming’ is potentially a tougher sanction than the financial penalties suggested, unless the latter are very tough. The commercial advantage in squeezing supplier prices is likely to exceed by some margin any proposed fines.

4.2 The proposal that an unsuccessful complainant should pay costs if their complaint is found vexatious or wholly without merit is very unwelcome. The alternative is for a gatekeeper to evaluate all complaints quickly and discard them quickly if they fall into those categories. Otherwise supermarkets’ lawyers will use the costs regime to deter complainants by immediately arguing that they are vexatious and therefore exposed to costs.

8 June 2011
1. This response is from the Agriculture and Horticulture Development Board (AHDB), an independent, evidence-based 'Levy Board' which plays a pivotal role in improving industry competitiveness and sustainability. We are funded through a statutory levy paid by farmers, growers and others in the food supply chain and these funds are ring-fenced to benefit the individual sectors they are raised from. Because the levy is statutory AHDB is classified as a non-departmental public body.

2. We undertake R&D and farm-level knowledge transfer activity. We provide essential market information to improve supply chain transparency. We also undertake some marketing promotion activities to help stimulate demand and also work to maintain and develop export markets.

3. AHDB’s functions cover the six sectors of:
   - Pig meat in England – delivery focus through our BPEX division
   - Beef and lamb in England – delivery focus through our EBLEX division
   - Commercial horticulture in Great Britain – delivery focus through our HDC division
   - Milk in Great Britain – delivery focus through our DairyCo division
   - Potatoes in Great Britain – delivery focus through our Potato Council division
   - Cereals and oilseeds in the UK – delivery focus through our HGCA division.

4. AHDB’s statutory functions are defined in the AHDB Order 2008 and can be summarised as:
   - Increasing efficiency or productivity in the industry
   - Improving marketing in the industry
   - Improving or developing services that the industry provides or could provide to the community
   - Improving the ways in which the industry contributes to sustainable development.

The Groceries Code

5. The Groceries Code established by, and is part of, the Groceries (Supply Chain Practices) Market Investigation Order 2009 (Groceries Supply Order).

6. The Groceries Code obliges large retailers to do the following things:
   - 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.

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

8. Our experience and knowledge across most of the sectors that AHDB is involved in suggests that there is a need for an Adjudicator because the Groceries Code is not being implemented in its intended spirit.

9. We are mindful that, in some supply chains, levy cost recovery could be pushed back to primary production so feel mechanisms to prevent this would need consideration, although we recognise and welcome the adoption of a 'perpetrator pays' principle.

10. Evidence will be hard to collect as there is/will be a strong reluctance by suppliers, particularly in dedicated supply chains, to raise issues and come forward with specific complaints because they fear they will upset their customers.

11. AHDB believes it will be important that the Adjudicator has the powers to implement proactive compliance audits/investigations within supply chains. This will both discourage and help reveal malpractice in terms of the Groceries Code and also help to bring greater transparency and understanding to the whole supply chain to the benefit of all parties.

12. So far as investigations are concerned, the draft bill aims to restrict admissible evidence for the Adjudicator to investigate to material that is publicly available to prevent the complainant suppliers from potentially being identified. However proof, if any, of unfair dealings will predominantly lie in commercially confidential material or private material not in the public domain. Therefore there should be safeguards introduced to protect anonymity, while ensuring that vital evidence can be admitted.

13. We welcome the tiered approach to enforcement but can find no provision for escalation from one tier to another. For example, it is unclear how non-compliance with a recommendation at the lowest tier would be pursued thereafter.

8 June 2011
1. This submission is made by the Food and Drink Federation (FDF), the trade association for food and drink manufacturing. Food and drink is the largest manufacturing sector in the UK (about 15% of total manufacturing output) turning over £72.3bn per annum, creating GVA of around £20bn. FDF represents manufacturers of all sizes although 68% of our membership falls into the small to medium sized enterprise (SME) bracket. SMEs are the backbone of, the food and drink industry and where much of the innovation and hence growth happens. The creation of a Groceries Code Adjudicator (GCA) to monitor and enforce the Grocery Code of Practice (GSCOP) will help to ensure there are no abuses of market power, so that SMEs have the confidence to invest.

2. After years of Competition Commission market enquiries, reports and proposed remedies, suppliers should wait no longer for a much needed GCA. FDF therefore welcomes the publication of a draft Bill which brings us one step closer to the introduction of an Adjudicator. But there must be no further delays in establishing the body which could still take another 12-18 months. We are also concerned that the draft Bill must be strengthened to ensure the GSCOP is enforced effectively and any improper use of market power is identified and dealt with. Two key issues for FDF members are the need for the Adjudicator to be able to: initiate investigations on the basis of credible information; and impose financial penalties.

The need for a Groceries Code Adjudicator

3. We adhere to the findings of the Competition Commission's 2008 report on the UK groceries market, particularly with regard to the transfer of excessive risk and unexpected costs by grocery retailers to their suppliers through various supply chain practices. The report concluded that if these supply chain practices were left unchecked, they would have an adverse effect on suppliers' ability to invest and innovate, which could ultimately reduce choice, availability and value for consumers. The Competition Commission made a recommendation to establish a body with the power to gather information following complaints from suppliers and to proactively investigate breaches of the GSCOP. The recent challenging economic climate for businesses and consumers, and the volatility and underlying upward pressure on commodity prices, make it all the more important that the supply chain operates and is seen to operate fairly and in the best long-term interests of consumers.

4. We are aware that some seek to argue that a lack of complaints since the GSCOP has come into force means that there are no issues for an Adjudicator to address. On the contrary we believe that this demonstrates that the GSCOP will only work fully if there is a proactive Adjudicator in place to police it, enforcing its terms through access to credible information on abuses of market power.
Are the draft Bill's provisions relating to investigations and recovery of investigation costs by the Adjudicator sufficient and appropriate?

5. No, we do not consider the draft Bill's provisions relating to investigations to be sufficient to ensure the GCA is able to effectively gather evidence and conduct investigations into what appears to be systematic behaviour contrary to the letter or spirit of the Code. Many suppliers will not have the confidence to come forward to complain to the Adjudicator despite promises of anonymity to protect complainants. It is therefore vital for the Adjudicator to be able to initiate investigations on the basis of credible information about potential breaches of the Code. We believe that such credible sources of information could be tightly defined to bodies such as trade associations which exist to represent companies and are well placed to provide anonymised market information. The draft Bill should therefore allow for three ways in which the Adjudicator may consider whether to carry out an investigation:

(a) information provided by a supplier
(b) information that is publicly available; and
(c) information from a credible source i.e. trade association representing suppliers.

6. By having three different sources of information available to initiate an investigation, it will be difficult for retailers to identify suppliers through the process of deduction which in turn will give suppliers more confidence. If the Adjudicator is to be successful then suppliers must have confidence and trust in the system. Trade associations such as FDF could play a key role in providing confidence and trust to suppliers who are afraid of making a formal complaint. Trade associations are also well placed to identify systematic abuses of the Code of which individual companies would be unaware and we believe this could be of significant assistance to the Adjudicator, who will need to have the ability to set apart rogue complaints from legitimate ones.

Are the draft Bill's provisions relating to the Adjudicator's forms of enforcement following an investigation sufficient and appropriate?

7. No, we do not believe that the Adjudicator's forms of enforcement such as making recommendations or requiring a retailer to publish information relating to an investigation would act as a sufficient deterrent. In particular, our concern is that name and shame mechanisms tend to be highly transitory and may not have the desired effect given that their effectiveness and impact may depend on external factors (e.g. the wider news agenda).

8. FDF therefore considers the levying of penalties to be an essential part of the enforcement measures available to the GCA. Our members believe that financial penalties set at an appropriate level would be likely to have a significant deterrent effect, particularly since they would be subject to greater shareholder scrutiny and thereby pressure on a company's future behaviour. Furthermore, any financial penalties imposed could be used to fund the Adjudicator which could result in lower fees charged to those retailers who comply with the GSCOP. The Adjudicator should have the ability to impose financial penalties from the start of its operation.
The UK Food and Drink Manufacturing Industry

The Food and Drink Federation (FDF) represents the food and drink manufacturing industry, the largest manufacturing sector in the UK, employing up to 400,000 people. The industry has an annual turnover of over £72.3bn accounting for 15% of the total manufacturing sector. Exports amount to nearly £11bn of which 77% goes to EU members. The industry buys two-thirds of all UK's agricultural produce.

The following Associations are members of the Food and Drink Federation:

ABIM Association of Bakery Ingredient Manufacturers
ACFM Association of Cereal Food Manufacturers
BCA British Coffee Association
BOBMA British Oats and Barley Millers Association
BSIA British Starch Industry Association
CIMA Cereal Ingredient Manufacturers' Association
EMMA European Malt Product Manufacturers' Association
FA Food Association
FOB Federation of Bakers
FPA Food Processors' Association
GPA General Products Association
MSA Margarine and Spreads Association
SB Sugar Bureau
SMA Salt Manufacturers' Association
SNACMA Snack, Nut and Crisp Manufacturers' Association
SPA Soya Protein Association
SSA Seasoning and Spice Association
UKAMBY UK Association of Manufacturers of Bakers' Yeast
UKHIA UK Herbal Infusions Association
UKTC UK Tea Council

Within FDF there are the following sectoral organisations:

BCCC Biscuit, Cake, Chocolate and Confectionery Group
FF Frozen Food Group
MG Meat Group
ORG Organic Food and Drink Manufacturers' Group
SG Seafood Group
VEG Vegetarian and Meat Free Industry Group
YOG Yoghurt and Chilled Dessert Group

8 June 2011
Written evidence submitted by the Food Ethics Council (GCA 05)

1. The Food Ethics Council (FEC) is a charity that provides independent advice on the ethics of food and farming. Our aim is to create a food system that is fair and healthy for people and the environment.

The need for a Groceries Code Adjudicator (GCA)

2. In July last year the FEC published ‘Food Justice’, the report of a year-long investigation into social justice in food and farming, which was undertaken by a committee of leading figures from business, academia, civil society and the public sector. One of the report’s main themes was the extent to which corporate consolidation has contributed to the severe and varied social injustice that characterises much of today’s food sector.

3. We received substantial evidence of the adverse consequences of retailer concentration for farmers and other suppliers – including reduced margins, additional costs, unreliability of contracts, and the transfer of risk. Many of these experiences fall within the provisions of the Groceries Supply Code of Practice (GSCOP), so the effective enforcement of the GSCOP – which is the role of the GCA – will be an important step towards addressing this facet of unfairness in the food sector, and thereby safeguarding the interests of consumers.

4. Our Food and Fairness Inquiry also considered evidence of how retailers’ demands for flexibility contributed to the increasing casualisation and insecurity of food sector employment. Price and standards pressures, coupled with flexible arrangements like ‘just-in-time’ delivery, short lead times and last-minute changes to orders have pushed many producers to transfer risk onto their workers – in the form of higher performance standards and less favourable contractual arrangements. The combined effect is to worsen the employment conditions of the most vulnerable food sector workers, and to exacerbate the labour shortages that afflict much of the sector by making it unattractive to job seekers. An effective GCA could therefore play an important role in addressing these wider employment-related issues, which represent real threats to the sustainability of our food sector and so to the interests of consumers as well as producers and workers.

5. The FEC’s current work on sustainable livestock suggests that the GCA could also make a valuable contribution towards promoting environmental sustainability. A key element of the Government’s approach is to ensure that natural resources are correctly valued, so that production costs reflect resource intensity. Prices will in turn reflect these more realistic production costs, and consumer behaviour will be influenced – or ‘nudged’ – accordingly, in the direction of more sustainable diets, to the benefit of consumers and the wider public.

6. However, the fact that farmers are in a weak bargaining position within food supply chains limits their capacity to pass higher resource costs down to retailers – and so undermines the potential impact on consumer behaviour. The viability of efforts to place a higher value on natural resources, and the effectiveness of these efforts in promoting sustainable consumption, depends on ensuring that costs and rewards are shared fairly along the value chain. By
effectively addressing the unfair consequences of farmers’ relative weakness in their dealings with retailers, the GCA can therefore support an important strand of the government’s sustainability agenda. (Although not directly relevant to the GCA proposals, it is nevertheless worth stressing that our work on sustainable livestock is about ensuring that UK livestock farmers benefit from the move to more sustainable consumption.)

**Provisions relating to investigations**

7. One of the main concerns that stakeholders from business and civil society have expressed in response to the Government’s proposals is that the approach to protecting suppliers’ anonymity is inadequate. It is suggested that because many suppliers are in effect wholly dependent upon their relationships with the retailers that they supply, they will be reluctant to take complaints to the GCA unless they are confident that the retailer will not be able to deduce the identity of the complainant. Our experience in conducting our Food and Fairness Inquiry confirmed just how far-reaching this anxiety on the part of suppliers can be – one supplier explained that they could not even submit anonymised evidence to our inquiry committee, because of the perceived risk of jeopardising his relationship with his retail partner. If a supplier feels unable to submit evidence to a body that has no intention of pursuing the matter with the retailer (or in any other way), it is not hard to imagine how much more anxious they will feel about the prospect of triggering an investigation into the retailer concerned.

8. Confidence of anonymity on the part of suppliers is of course essential if the GCA is to function effectively. We therefore support calls for the GCA to be empowered to initiate investigations proactively, on the basis of information provided by third parties – such as trade associations – as well as in response to information from suppliers as currently proposed.

**Provisions relating to enforcement**

9. Another widely-shared concern is that, contrary to the government’s assessment, the threat of adverse publicity will not prove an adequate deterrent against unfair practices by retailers. While the FEC does not have the same kind of direct experience to bring to bear on this issue, we do find the arguments in favour of the proportionate use of financial penalties persuasive. There has been media coverage of unfair practices by large retailers in the past, and yet the problems persist. Also, financial penalties are a routine element in the enforcement of statutory regulations, and there does not appear to be any compelling argument as to why there should be an exception in this case. On these grounds, we believe that the power to impose financial penalties should be available to the GCA immediately, rather than held in reserve as a ‘residual power’.

8 June 2011
Written evidence submitted by Dairy UK (GCA 06)

Summary

1. Dairy UK broadly welcomes the Government’s proposals to set up an Adjudicator to oversee the Groceries Supply Code of Practice. The creation of an Adjudicator will help to ensure the enforcement of the Code and create a common understanding on acceptable commercial practices between retailers and their direct suppliers. This should help to create a more predictable market place with suppliers being less exposed to unexpected transfers of risk.

2. There is widespread misunderstanding over the potential impact of an Adjudicator. Its establishment is not likely to result in a fundamental transformation of the commercial landscape for food processors. The same market challenges will remain, and it is in addressing those challenges that food processors become more competitive and profitable. Complaining to an Adjudicator will not be viewed as a sustainable route to success.

3. There is some debate as to whether the functions of the Adjudicator should be widened beyond those proposed in the Bill to include relations between food processors and their supplying farmers. We would argue that this is not warranted by the conclusions of the Competition Commission inquiry which undertook a protracted and exhaustive investigation of supply chain relationships.

4. The Commission concluded that only specific action was required in respect of restricting certain practices by retailers that transferred risk to direct suppliers and this would be achieved through strengthening the implementation of the GSCOP. The investigation did not conclude that further action was required in respect of other segments of the supply chain, i.e.; food processors and their primary product suppliers. An extension of the functions of the Adjudicator could reasonably only be justified if a similarly exhaustive inquiry demonstrated the need to do so.

5. The type of practices excluded by the Code are not used by milk buyers in their relations with dairy farmers. The only practice that is similar to those banned by the Code is retrospective price adjustments. Dairy UK is strongly opposed to the use of retrospective price changes. Fortunately their use by milk buyers is exceptionally rare because of the inevitable reputational damage they cause to the buyer. In fact, in the last major instance when a retrospective price change was made, it hastened the collapse of the milk buyer due to the resulting resignation of farmers. This demonstrates that the market provides a strong safeguard against the use of retrospective price changes.

6. Dairy UK’s primary concern with the Adjudicator is that in undertaking its investigations and publishing the results of those investigations, the Adjudicator should not do anything that would prejudice the commercial interests of companies that did not wish to support the complaint being made against any particular retailer. As such suppliers should not be under an obligation to provide information if they did not wish to do so, but if they are to be compelled, then that information should not be divulged without the consent of the supplier.
7. Further, whilst the Adjudicator should be able to initiate any type of investigation that it considers appropriate, it should not do so without substantive evidence from a variety of sources that an issue needed addressing. Dairy UK does not want to see a situation where competing companies can seek to embarrass each other by asking for an investigation because they lost out on certain contracts, or farmers supplying one company likewise seeking to make life awkward for a company they do not supply. This would threaten to politicize commercial relationships in the supply chain. It would also expose companies to tremendous cost and mis-direction of managerial resources if they were constantly being drawn into inquiries.

8. It is therefore important that the Adjudicator should operate:

   a. under a tightly defined remit and institutional safeguards to prevent mission creep

   b. with clearly defined obligations of confidentiality and a duty to protect the interests of companies not wishing to disclose their participation in any investigation

   c. with operational procedures designed to produce rapid and timely outcomes to investigations.

Committee Questions:

1. The need for an Adjudicator to enforce the Groceries Code,

It could be presumed that the Adjudicator will help to ensure greater adherence to the Code because it will create a formal route to arbitration and lift the onus from suppliers to initiate complaints. The more substantive change brought about by the advent of an Adjudicator may be the powers conferred on it to undertake investigations. This means that suppliers will not themselves have to take action under the Code to seek redress.

2. Whether the draft Bill's provisions relating to investigations and recovery of investigation costs by the Adjudicator are sufficient and appropriate,

To be effective and achieve the outcomes desired by the Bill it is important that the Adjudicator is given sufficient powers to obtain information. The provisions in the Bill would seem to be adequate to achieve this purpose.

However, we would caution that the Adjudicator should use its powers judiciously. As stated above, Dairy UK's concern is that the identity of suppliers not wishing to publicly disclose concerns should not be revealed. Suppliers should also not be subject to indiscriminate requests for data. If investigations are protracted and involve a lot of managerial time by suppliers, then some consideration could be given to compensating suppliers for participating.
3. Whether the concerns of indirect suppliers are met by the Draft Bill,

The objective of the Bill is to eliminate certain commercial practices between retailers and suppliers in respect of transferring risks, as opposed to changing the operation of the market. In the dairy industry, indirect suppliers (dairy farmers) are not normally subject to the commercial practices covered by the Code. This is not to say that some farmers do not have concerns about the operation of the market. However, the Competition Commission investigation, which included a detailed look at the milk sector*, didn’t conclude that regulation further down the supply chain was necessary. Extending the scope of the Adjudicator could only reasonably be justified if the OFT or Competition Commission undertook a further investigation which concluded it was desirable. Dairy UK would argue strongly that the market is operating correctly and that further regulation is not required.


4. Whether the draft Bill’s provisions relating to the Adjudicator’s forms of enforcement following an investigation are sufficient and appropriate,

There is a case for arguing that reputational damage will act as a sufficient penalty to ensure enforcement. If this is considered insufficient and a penalties regime adopted then it should be borne in mind that there is a risk that any penalties will simply be transferred down the supply chain. Arrangements need to put in place to ensure that this is not the case.

8 June 2011
Written evidence submitted by the National Farmers’ Union (NFU) (GCA 07)

The NFU represents more than 55,000 farming members in England and Wales. In addition we have 41,000 countryside members with an interest in farming and the country. The NFU welcomes the opportunity to make a submission to the Environment, Food and Rural Affairs (EFRA) Select Committee’s inquiry into the Draft Groceries Code Adjudicator Bill.

Introductory Comments

1. The NFU has welcomed the publication of the draft Groceries Code Adjudicator Bill – an important event in our long-running campaign for a fairer functioning groceries supply chain. It is three years since the Competition Commission recommended the establishment of an Ombudsman, and well over a year since the Groceries Supply Code of Practice (GSCOP) came into force. For some time there has been cross-party consensus that, as the Competition Commission concluded in its 2008 report on the supply of groceries in the UK, an Adjudicator or similar body is necessary for the effective monitoring and enforcement of the GSCOP. We now hope that those same parties will work together in ensuring that the final Bill enables the new body to do that job effectively and remedy the adverse effect on competition identified by the Competition Commission.

2. We believe there are now two priorities in completing this process. Firstly, Parliament must act speedily in scrutinising the text so that the formal Bill itself can be brought forward without further delay. Secondly, aspects of the draft Bill must be amended so that the final Bill provides both a watertight framework protecting the anonymity of those wishing to complain about breaches of the code, and an appropriate and effective enforcement mechanism, including fines from the outset and adequate remedies for suppliers who have suffered a breach of the code.

Is there a need for an adjudicator to enforce the Groceries Code?

3. Yes. The Competition Commission’s 2008 report, recommended that “a GSCOP Ombudsman should be established to monitor and enforce the GSCOP, and to resolve disputes between retailers and suppliers under the GSCOP.”¹ This recommendation was made, in part, on the basis that the existing mechanisms for enforcing the GSCOP’s predecessor, the SCOP, involving the OFT were inadequate. Indeed the OFT itself has recognised the benefits of establishing a new body to enforce the GSCOP.

4. Currently, if a supplier has cause to complain about an alleged breach of the GSCOP, there are only two possible courses of action. Firstly, he can use the dispute resolution procedure set out in the Order establishing the GSCOP. This requires him to raise the potential breach with the retailer concerned. This is an unattractive course of action for many suppliers, who are understandably

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¹ Competition Commission, The supply of groceries in the UK market investigation, April 2008, para 11.337
reluctant to complain if their identities are not protected for fear of reprisals, for instance the loss of future business with that retailer. Secondly, a supplier can (on the basis that the GSCOP has been incorporated into any supply agreements as required under the Order) bring a legal action for breach of contract. Litigation is, understandably, also an unattractive option, leading to lengthy, stressful and sometimes costly actions which again do not protect the anonymity of parties.

5. It has been stated by some that as no claims of a breach of the GSCOP have been made since its commencement over a year ago (as far as we know), the system must be working well in the absence of a body to enforce it. Such arguments are plainly misleading – one of the clearest benefits the Adjudicator will provide, if established correctly, is the protection of the anonymity of complainants; a feature wholly absent from current arrangements for the GSCOP. The system can only work if complainants have the confidence to come forward.

**Are the draft Bill’s provisions relating to investigations and recovery of investigation costs by the Adjudicator sufficient and appropriate? Are the concerns of indirect suppliers met by the Draft Bill?**

6. In short, no. We are very concerned about the Bill’s provisions relating to investigations. Clause 4 of the Bill allows the Adjudicator to carry out an investigation of a suspected breach of the Code by a retailer, if he has reasonable grounds, but he may only consider information provided by a supplier (direct or indirect) or which is publicly available.

7. This would not matter if suppliers were generally happy to pass information directly to the Adjudicator. However, some will be unwilling to do so, as in spite of their identities being kept confidential, other information (for instance their product sector if they are one of a small number of suppliers of a specific product) may make identification easy. Given that the only basis for the investigation would have been a supplier complaint (knowing that no such information is in the public domain), it would be clear which supplier (or at least one of a small number of suppliers) has complained.

8. To rectify this, the Bill needs to be amended to allow the Adjudicator to launch an investigation on the basis of “credible evidence,” however obtained. In doing so, retailers can no longer be sure that an investigation is the result of a direct complaint by a supplier, thereby bolstering the anonymity provisions of the Bill. A supplier who wishes to complain will now be more confident of doing so – essentially it is plausible that any investigation is the result of evidence obtained confidentially elsewhere, something that would be impossible under the current Bill.

9. Importantly, under the current Bill the Adjudicator may be prevented from investigating a breach of the code in some instances, even when possessed of convincing evidence of a breach. If, in pursuing a complaint, the Adjudicator is unable to avoid revealing the identity of a complainant through disclosing information (as per paragraph 7 above), then clause 19(2) of the Bill prevents him from doing so. This could very possibly make continuation of the investigation
impossible. If the Adjudicator is able to initiate an investigation in wider circumstances than those set out in clause 4, for instance on the basis of credible evidence, this obstacle can be overcome.

10. This would also allow organisations outside the supply chain to privately provide the Adjudicator with information for an investigation. We believe that third parties, such as the NFU, can play a vital role in assisting the work of the Adjudicator. For instance, by allowing third parties to collate and present evidence on behalf of suppliers, important resource efficiencies can be achieved, and they can act as important conduits for identifying systemic breaches of the code of which individual suppliers would be unaware, and which otherwise might not come to the attention of the Adjudicator.

_Are the draft Bill's provisions relating to the Adjudicator's forms of enforcement following an investigation sufficient and appropriate?_

11. We do not believe the enforcement powers available to the Adjudicator are adequate. Firstly, we believe the ability to impose financial penalties should be available to the Adjudicator from the outset, and not following the passing of further legislation, as is currently the case. The current powers to “name and shame” transgressors are unlikely to garner media interest in the absence of corresponding fines, and so will remain largely unnoticed by customers. Furthermore, only a significant financial penalty can be guaranteed to act as a deterrent to retailer behaviour that breaches the code.

12. Secondly, we believe the Bill needs to be clearer as to what the Adjudicator can require when using recommendations as an enforcement measure. At present, it does not appear that the Adjudicator will be able to require a retailer found in breach of the code to directly remedy that breach or compensate the supplier in question for damages resulting from that breach. We believe consideration should be given for compensatory measures to be included in the Bill.

9 June 2011
During our oral evidence to the Committee on 14th June, the Chair suggested the Committee would be able to suggest amendments to the draft Bill, particularly in light of our comments on the difference between the Bill’s provisions as they currently stand, and the 2008 recommendations from the Competition Commission. In light of this, we are pleased to make the following points about how the Bill might be improved.

In 2008, the Competition Commission reported on its investigation into the supply of groceries in the UK market. It recommended the establishment of an Ombudsman to monitor and enforce the Groceries Supply Code of Practice (GSCOP), and it was on this basis that BIS proposed the Groceries Code Adjudicator in August 2010. In order to effectively address the adverse effect on competition identified during the investigation, the Competition Commission made the following recommendations on the powers of the Ombudsman:

11.272 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 such steps as are necessary to establish the Ombudsman. We further recommend that, if this is the case, BERR take steps to give the Ombudsman the power to levy significant monetary penalties on retailers for non-compliance with the GSCOP.

11.350 In our view, the effective monitoring and enforcing of the GSCOP requires both the resolution of disputes and proactive investigation of retailers’ behaviour in respect of particular practices, sectors or types of supplier in order to identify whether breaches of the GSCOP have occurred. We think it is appropriate for individual suppliers to be able to use the GSCOP as a means of ensuring that specific disputes are resolved. However, we also believe that relying on such disputes as the basis for the monitoring and enforcement of the GSCOP would undermine its effectiveness as a remedy. This is because in order to resolve a dispute, the grocery retailer would need to be told the identity of the supplier bringing the dispute. We therefore believe that proactive investigation of practices by the body responsible for monitoring and enforcement will be critical to the success of the GSCOP. Such investigations will provide a basis for breaches of the GSCOP to be identified without revealing the identity of particular suppliers, and without the implication that any particular supplier has complained. (NFU emphasis)

It is clear that these two important recommendations – the ability of the Adjudicator to launch proactive investigations and his ability to impose financial penalties – are not appropriately dealt with by the draft Bill. We believe that the final Bill should reflect the recommendations of the Competition Commission, and it is not clear to us why the government has chosen not to include these seemingly crucial aspects of the Adjudicator’s powers. By addressing these issues, the Bill can establish the sort of Adjudicator deemed necessary to remedy the adverse effects on competition identified in the Commission’s report. Below we set out why we believe these two
aspects of the Adjudicator’s powers are so crucial to its ability to effectively monitor and enforce the GSCOP.

1. **Improving the investigatory powers in the draft Bill (Clause 4)**

As it stands, the provisions in the draft Bill relating to the ability of the Adjudicator to carry out investigations into breaches of the code are unsatisfactory. Investigations can be launched if there are reasonable grounds to suspect a breach of the code, only on the basis of information provided by a supplier (direct or indirect), or information that is publicly available. There are further provisions in the Bill requiring the Adjudicator to protect the identity of suppliers providing information – the so called confidentiality, or anonymity provisions. At the moment, we do not believe the provisions relating to investigations will sufficiently enable the Adjudicator to monitor and enforce the GSCOP.

Firstly, the narrow bases on which investigations can be launched will make it obvious in many cases where a complaint of a breach of the code has come from. This weakens the anonymity provisions, rendering them useless in some instances. As the Adjudicator is bound to protect complainants’ anonymity, he will be prevented from undertaking investigations even if he has been provided with evidence of a breach by a supplier. Furthermore, this obvious weakness will discourage suppliers from providing information to the Adjudicator, for fear their identity will become apparent. Examples illustrating this point are made below.

<table>
<thead>
<tr>
<th>Illustrations of problems with anonymity in Clause 4 of the draft Bill</th>
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<tbody>
<tr>
<td><strong>As the Bill stands:</strong></td>
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<tr>
<td>1. The Adjudicator launches an investigation on a specific product line following a supplier complaint.</td>
</tr>
<tr>
<td>2. It is clear that there is no information in the public domain that could have led to this investigation.</td>
</tr>
<tr>
<td>3. A retailer can then assumethat one of a limited number of suppliers in this product area has complained - the investigation could not have been launched for any other reason.</td>
</tr>
<tr>
<td>4. The retailer therefore is able, with a high degree of confidence, to predict who has complained.</td>
</tr>
<tr>
<td>5. Knowing this to be the case, the supplier is unlikely to make the complaint in the first place, as any ensuing investigation would reveal his identity, and he is fearful of retaliatory action from the retailer.</td>
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<tr>
<td>6. Moreover, as revealing the complainant's identity is more or less inevitable, the Adjudicator cannot, in fact, launch the investigation, as it would be in conflict with his obligations on anonymity under Clause 19.</td>
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</tbody>
</table>

**Amended Bill to broaden grounds for investigation:**

1. The Adjudicator launches an investigation on a specific product line following a supplier complaint.
2. It is clear that there is no information in the public domain that could have led to this investigation.
3. It remains plausible that evidence presented by a third party - for instance a whistle-blower or a trade association - led to the investigation.
4. A retailer cannot, then, assume that one of a limited number of suppliers in this product area has complained, as an investigation could have been launched in the absence of such a complaint (notwithstanding that there indeed was such a complaint in this instance).
5. The complainant's anonymity is protected.
6. The investigation can proceed.
7. Suppliers recognise that they are able to complain without their identity being obvious.

Secondly, the narrow bases for launching investigations will simply prevent some information leading to an investigation being launched by the Adjudicator, even if it provides strong evidence of a breach of the code. For instance, 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. Similarly, suppliers who are unwilling to provide information to the Adjudicator and risk their identities becoming known, may instead be happy to pass information to trade associations, who they trust to anonymise the evidence and provide it to the Adjudicator on their behalf. In such an event, the Adjudicator would not be able to launch an investigation.

To overcome these two issues, therefore, the bases on which investigations can be undertaken must be broadened. The Adjudicator must be allowed to initiate an investigation on any evidence, regardless of its source, as long as he can satisfy himself that it is credible. The anonymity provisions in the Bill will then be adequate to protect complainants' identities, and the Adjudicator will not be prevented from launching investigations into breaches of the code even when he has persuasive evidence, simply because of its source.

**Amending the Bill**

There are two possible ways of amending the draft Bill to remedy the shortcomings identified above. Firstly, simply remove Clause 4(2) of the Bill. This would mean the Adjudicator could launch an investigation where it had “reasonable grounds” to do so, under Clause 4(1). This would be consistent with the powers granted to the Director General of Fair Trading under the Competition Act 1998 when launching an investigation into abuse of a dominant position or into anti-competitive agreements.
SUGGESTED AMENDMENT

Clause 4

Page 15, line 16, leave out subsection (2)

Page 15, line 23, leave out subsection (2)

Alternatively, add an additional sub-clause in Clause 4(2) allowing the Adjudicator to consider “credible evidence” when deciding if there are reasonable grounds for an investigation. An additional sub-clause in the guidance provisions could also be added, requiring the Adjudicator to set out what he will consider to be “credible evidence”. This might address concerns that the Adjudicator will undertake investigations on the basis of a low threshold of what constitutes “reasonable grounds” under Clause 4(1).

SUGGESTED AMENDMENT

Clause 4

Page 15, line 17, replace “both” with “all”

Page 15, line 19, at end insert –

(c) credible evidence, as defined under the procedure set out in section 13(1)(d)

Clause 13

Page 21, line 12, at end insert –

(d) what will constitute credible evidence, under section 4(2)(c). The Adjudicator must have regard, when issuing guidance under this subsection, to establishing a threshold that, in his view, will prevent him from carrying out an investigation on the basis of evidence that is vexatious or wholly without merit.
Improving the enforcement powers in the draft Bill (Clause 10)

As stated in our original evidence to the Committee, we do not believe the enforcement powers available to the Adjudicator are adequate. In particular, we believe the ability to impose financial penalties should be available to the Adjudicator from the outset, and not following the passing of further legislation, as is currently the case. The current powers to “name and shame” transgressors are unlikely to garner media interest in the absence of corresponding fines, and so will remain largely unnoticed by customers. Furthermore, only a significant financial penalty can be guaranteed to act as a deterrent to retailer behaviour that breaches the code.

Amending the Bill

Clause 10(1) of the Bill should be amended to remove the requirement allowing the Adjudicator to impose financial penalties on those found to have breached the code only once secondary legislation has been brought forward. Additional provisions can be added requiring the Secretary of State to set out, by order within three months of the Act coming into force, what the maximum penalty will be, or how it will be calculated. Alternatively, this can simply be added to the face of the Bill, although at this stage we have not proposed a specific maximum fine. We believe that the opinion of experts in competition law may need to be consulted in order to assess what an appropriate level of fine might be.

SUGGESTED AMENDMENT

Clause 10

Page 19, line 4, leave out from “only if” to the end of line 6

Page 19, line 21, at end insert –

(7) The Secretary of State must make an order within 3 months of the coming into force of this Act, specifying the maximum penalty that may be imposed under this section, or how the maximum penalty is to be calculated.

(8) The order may require the Adjudicator to publish guidance about the criteria the Adjudicator intends to adopt in deciding the amount of a financial penalty.

(9) The order may require the Adjudicator to consult before publishing guidance about financial penalties.

Clause 24

Page 31, line 18, leave out “section 10(1)” and insert “section 10(7)”

17 June 2011
Asda is one of the 10 designated retailers bound by the Grocery Supply Code of Practice (GSCOP) and is an integral part of the food supply chain. We welcome the EFRA Select Committee’s inquiry into the Draft Groceries Code Adjudicator Bill and offer the following comments on the four areas the Committee will be considering.

The need for an Adjudicator to enforce the Groceries Code

Asda supported the establishment of the GSCOP and is fully committed to making it a success. Whilst we recognise the benefits of a body to monitor compliance with the code we consider that additional legislation to create an Adjudicator is unnecessary and risks unintended consequences. The GSCOP is in place to legally guarantee transparent fair relations between retailers and suppliers, and already gives suppliers sufficient protection, including recourse to arbitration in the event of disputes and enforcement through the courts and importantly, protection from delisting.

Whilst the Competition Commission was well intentioned in seeking to provide some additional redress for suppliers, through a new institution governed by additional legislation, we have genuine concerns that this could have the unintended consequence of creating legal and commercial gridlock, and risks enabling large suppliers to treat an Adjudicator as a tactical commercial tool.

The GSCOP came into effect only in February 2010 and Asda’s first annual compliance report which covers the period from the commencement of the GSCOP until the end of Asda’s first full financial year in which the GSCOP is in force is not due until April 2012. We are, therefore, also concerned that by proposing legislation at this time, the Government is acting prematurely as it has not had the opportunity to adequately assess the effectiveness of the GSCOP.

A new regulatory body, of the type proposed by the Bill, acting outside of the OFT would add nothing meaningful to the GSCOP regime and could be counterproductive to the existing work undertaken by the OFT. Asda’s position is consistent with that of Professor Bruce Lyons, Professor of Economics at the University of East Anglia and a former member of the Competition Commission, who considered that the role would be better performed by the OFT itself, as it is “well placed to refrain from undesirable intervention because it has an embedded mission to make markets work well for consumers.” The OFT is ideally suited for the monitoring role as an impartial body with expertise in competition issues and investigations, and a remit to make markets work better for consumers.

We cannot see any evidence to support that an Adjudicator should be able to act on anonymous or third party complaints. The Adjudicator’s primary function relates to compliance with the GSCOP and therefore should only receive complaints from direct suppliers covered by the GSCOP that are particularised, clearly set out and relate to a specific breach of GSCOP. Fundamental rules of natural justice require that defendants know the allegations against them (including the identity of the claimant), so they can investigate the allegation and prepare a defence. The prospect of anonymous complaints which could be outside the scope of the GSCOP could prejudice retailers’ rights of defence. We cannot understand how an indirect supplier not covered by the GSCOP and with no contractual relationship with a retailer can allege a breach of the GSCOP in relation to its dealings.
Whether the draft Bill’s provisions relating to investigations and recovery of investigation costs by the Adjudicator are sufficient and appropriate

As stated earlier, Asda believes it is the role of the OFT and not a separate Adjudicator to undertake investigations. It is also difficult to effectively answer the first part of this question because guidance relating to:

(a) the criteria that the Adjudicator intends to adopt in deciding whether to carry out investigations;
(b) the practices and procedures that the Adjudicator intends to adopt in carrying out investigations; and
(c) the criteria that the Adjudicator intends to adopt in choosing whether to use the enforcement powers and which ones

is yet to be published and may only be published by the Adjudicator within 6 months of the role coming into force (Clause 13 (5)). This is not consistent with the Government's own principles for better regulation.

When the guidance is published it should require the Adjudicator to ascertain the credibility of the complaint with the supplier – a pre screening of whether it is in the scope of the GSCP and prior authentication of the complaint – before passing it to the retailer or launching an investigation. There is a high risk that inaccurate complaints and investigations will tie up retailers’ businesses, adding direct and indirect costs to the supply chain. The draft legislation provides suppliers no disincentive from making speculative and unfounded complaints – or threatening to make complaints – in the hope of getting better commercial terms, or getting the retailer to settle.

Any investigation should be limited to the retailer alleged to have breached the GSCOP – it should not involve a “benchmarking” of other retailers’ practices, as this will add unwarranted cost both to the investigating body and the other retailers investigated and risk homogenisation of approach by retailers. This issue would again be resolved by the OFT being the lead on such matters.

Whether the concerns of indirect suppliers are met by the Draft Bill

As stated earlier, the Adjudicator should be able to receive complaints from direct suppliers only – the group covered by GSCOP - not trade associations or indirect suppliers, and should not be able to receive anonymous, non-transparent complaints.

Whether the draft Bill’s provisions relating to the Adjudicator’s forms of enforcement following an investigation are sufficient and appropriate

The three levels of enforcement clearly provide the Adjudicator a variety of options. The legislation should however prescribe the maximum level of financial penalty that the Secretary of State can order.

10 June 2011
Introduction

1. We have given fuller evidence about the Adjudicator to the Business Innovation and Skills Select Committee. This submission therefore focuses on the issues we understand are of most interest to the Environment, Food and Rural Affairs Select Committee.

Is an Adjudicator needed?

2. Sainsbury’s has consistently supported the strengthened and widened Groceries Supply Code of Practice (the Code) and we have made significant investments to implement it throughout our business. We support effective Code enforcement, but we do not believe that an additional enforcement body is necessary, as the strengthened provisions in the Code and the existing enforcement regime are already self sufficient. These provisions, which were not in place in connection with the old Code, provide suppliers with an effective route to resolve complaints. Since the new Code came into force on 4 February 2010, we have received fewer than 10 supplier complaints out of over 3,000 suppliers, and all of them have been settled internally to the satisfaction of the supplier without the need for recourse to the “Dispute” process under the Code. Sainsbury’s therefore believes that the right approach would be to refrain from establishing an Adjudicator until the need for further enforcement mechanisms can be properly assessed using the reporting methods already in place under the Code.

3. However we recognise that the Government is committed to bringing in this new role, in which case there are some principles that we believe should underpin the Adjudicator:

- 3.1 it should sit within the OFT
- 3.2 it should focus only on overseeing and enforcing the Code and, as the Competition Commission directed, serve the interests of consumers
- 3.3 the Adjudicator must not get involved in any other aspect of the commercial relationship between retailers and their suppliers, eg pricing or costs which are outside the remit of the Code
- 3.4 the limited resources of the Adjudicator should be focused on complaints from smaller suppliers, rather than larger suppliers many of whom are multinational businesses that are larger than the retailers they supply.
- 3.5 if anonymous complaints are to be permitted then there should be appropriate checks and balances such as requiring the Adjudicator to involve the retailer concerned well before an investigation is launched, and large suppliers (with annual UK turnovers of £1billion or more) should not be permitted to make anonymous complaints
- 3.6 all mechanisms in the Code should be exhausted before referral to the Adjudicator
- 3.7 guidance on how the Adjudicator will operate should be drawn up in advance of appointment, following consultation with retailers
- 3.8 investigations should be subject to checks and balances that limit the potential for delayed and lengthy or vexatious investigations, and hence the costs
- 3.9 enforcement powers should be proportionate
- 3.10 there should be greater accountability by the Adjudicator both to the retailers that will be paying the costs and to the Secretary of State.

The remainder of this submission addresses two particular aspects highlighted by the Committee.
Indirect suppliers
4. We agree that the Adjudicator should be able to consider representations from indirect suppliers, ie those with whom we do not contract but are part of our supply chain, but for information-gathering purposes only. Moreover, consistent with our view that the Adjudicator should focus solely on overseeing and enforcing the Code, the original complaint from an indirect supplier must be accompanied by evidence relating to a specific breach of the Code. This is to avoid spurious investigations.

5. We note that the Committee will be taking evidence from farming bodies. Sainsbury’s does not contract direct with farmers. In the agriculture sector our contractual relationships are with processors and it is they, in turn, who contract with farmers. The majority of our products are supplied by large, often multinational businesses. We recognise that as a responsible retailer we have a role to play in ensuring that our supply chains are sustainable, so farmers are key partners. A good example of this partnership approach with farmers is the Sainsbury’s Dairy Development Group (SDDG) which is one of the dedicated supply chains we have set up to bring together all the farmers who supply our fresh milk; membership of the SDDG has, amongst other things, helped the farms to become more efficient businesses.

6. We agree with the Government that it is not necessary for representative bodies or other special interest groups to be able to make complaints. We do not support the concept of anonymous complaints since we believe it will be impracticable to investigate them, will encourage vexatious complaints and may lead to wide-ranging and burdensome investigations. However, if anonymous complaints are to be allowed, it is entirely consistent not to permit complaints from those who are not involved at all in retailers’ supply chains. It is also important that the Adjudicator resists initiating investigations in response to concerted pressure from representative or public misconceptions about supply chain issues.

Enforcement powers
7. We believe that the levying of financial penalties is unnecessary. The Code already contains a number of deterrents that will encourage compliance in addition to the proposed publication of remedies by the Adjudicator. We consider that the levying of penalties would be disproportionate and would risk undermining the dispute resolution process already available whereby potential breaches of the Code can be dealt with effectively, to the direct benefit of the affected suppliers, via an arbitration award. Financial penalties may also be more liable to appeal than an arbitration award under the Code (which may only be appealed in limited circumstances) or recommendation, resulting in increased costs and delays for all parties. Giving the Adjudicator the power to require retailers to publish information about a breach of the Code is a significant deterrent because of the risk of considerable reputational damage to the retailer concerned.

14 June 2011
The British Brands Group is a trade organisation that provides the voice for brand manufacturers in the UK. Branded products represent well over 50% of packaged goods sales in supermarkets. The majority of our members supply branded products, including food and drink products, to the grocery market.

BACKGROUND

The Competition Commission (CC) found competition problems in its 2008 investigation of the groceries market concerning the transfer of risks and costs from retailers to suppliers to the detriment of consumers. The CC reached a similar finding in 2000, declaring 27 retail practices uncompetitive. It can be deduced that such practices have been (and we believe remain) persistent in sections of the groceries market.

The CC’s recommended remedy in 2000 was diluted by the OFT. As a result, the SCOP did not command the confidence of suppliers and did not work well. There is a strong risk of similar dilution of the CC’s recommendations concerning the adjudicator.

This is the first major test of the CC’s remedy powers under the Enterprise Act regime, which de-politicised competition enforcement. It would cast the new regime into significant doubt if the government failed to implement in full the CC’s recommendation.

THE NEED FOR THE GROCERIES CODE ADJUDICATOR

The GCA is an integral part of the CC’s consumer remedy that will bring tangible benefits to the supply chain and to consumers. It is being implemented by legislation as the CC does not have the necessary powers itself to introduce it.

The adjudicator has two distinct roles in relation to breaches of the GSCOP – arbitrating disputes between a specific supplier and retailer and carrying out investigations into more widespread practices. Investigations are far more significant to the effective working of the remedy than bilateral disputes.

Experience shows that suppliers are extremely unlikely to bring disputes, invoke their contract rights or complain, yet without their participation practices that act to the detriment of consumers are nigh impossible to detect, let alone prevent. An independent adjudicator to whom suppliers or their representatives can speak anonymously is essential to overcome this obstacle.
8   Practices that transfer risks and costs to suppliers persist. This is demonstrated by a confidential survey of suppliers undertaken immediately prior to the introduction of the GSCOP and our members confirming it to be “business as usual” under the GSCOP.

9   The current regime is weaker than under the old SCOP. Under the SCOP suppliers and trade organisations could contact the OFT. This is no longer possible.

10  PROVISIONS RELATING TO INVESTIGATIONS

Threshold for investigations
   The threshold to be reached before the adjudicator may launch an investigation represents a significant and damaging dilution of the CC’s recommendation.

11  The CC stated that the adjudicator should, when launching an investigation, consider complaints from any other person, to the extent that it relates to a breach of the Code [our emphasis] (Para 5.2, Schedule to Final Undertakings, 28th April 2009). In its response to the consequent consultation, the CC considered this threshold too narrow, suggesting something similar to Section 25 of the Competition Act 1998:

   The Director may conduct an investigation if there are reasonable grounds for suspecting—
   (a) that the Chapter I prohibition has been infringed; or
   (b) that the Chapter II prohibition has been infringed.

12  In contrast, the Draft Bill ignores this recommendation, making the evidence threshold extremely high, being information from a supplier or in the public domain only. This is perverse, in light of the years of experience that suppliers do not inform, that practices are not discussed publicly (hence the dearth of published evidence) and that investigations are crucial to preventing the most significant breaches of the GSCOP.

13  Clause 4.2 of the Draft Bill therefore requires amendment to allow the adjudicator to launch an investigation if it has reasonable grounds to suspect a breach of the GSCOP, consistent with Section 5 of the Competition Act 1998.

14  Staffing
   The Bill’s provisions on staffing also run counter to the CC’s recommendations:

   The Ombudsman may appoint staff, subject to any restrictions contained in the Budget or provided by the OFT. (Para 10.1, Schedule to the Draft Undertakings)

   The Draft Bill is significantly more narrow, restricting staffing to secondments by the Secretary of State or from the OFT (Schedule 1, Para 9 and Explanatory note 72).
As investigations may require the review of significant evidence, such restrictions impose great inflexibility on the adjudicator, compounded by the fact that hopefully BIS and the OFT are not awash with suitably qualified personnel available for secondment at short notice.

Schedule 1, paragraph 9 of the Draft Bill requires amending to permit the adjudicator to appoint staff as recommended by the CC.

ADJUDICATOR’S FORMS OF ENFORCEMENT

The CC made it clear that, were retailers to fail to establish an adjudicator voluntarily, BIS should establish one with “the power to levy significant financial penalties on the retailers for non-compliance” (Para 49, Final Report). This is confirmed in the CC’s formal recommendation to the Secretary of State:

The CC recommends that BIS take the steps necessary to establish an effective Ombudsman as soon as practicable. It is further recommended that the Ombudsman be given the power to levy significant monetary penalties on retailers for non-compliance with the GSCOP. (Para 5.1, Memorandum, 4th August 2009)

This recommendation should be followed in order for the “naming and shaming” penalty to work. If retailers are able to breach the GSCOP and act against consumers’ interests with impunity, such breaches will be perceived as trivial (and, from the media’s perspective, not worth reporting).

The passing of the Bill needs to be accompanied by an order by the Secretary of State authorising the adjudicator to levy penalties from day one.

15 June 2011
1. Why is an adjudicator needed to enforce the Groceries Code?

The Competition Commission’s (CC) investigation of the groceries market found in 2008 that large retailers with buyer power could transfer excessive risks or unexpected costs onto their suppliers. This could lessen suppliers’ incentives to invest in new capacity, products and production processes and ultimately have a detrimental effect on consumer choice and value.

In response, and to address this finding, the Commission established a new, strengthened code of practice, the Groceries Supply Code of Practice (GSCOP), which entered into force in February 2010.

The Groceries Code Adjudicator is needed for the Groceries Supply Code of Practice to be independently monitored and enforced. By receiving complaints confidentially the adjudicator will help address the ‘climate of fear’ that many suppliers mentioned existed under the previous Supermarkets Code of Practice.

The Government has agreed to establish the Groceries Code Adjudicator in response to the Competition Commission’s recommendation that there was a need for a body to monitor and enforce the new Groceries Supply Code of Practice (as contained within the Groceries [Supply Chain Practices] Market Investigation Order 2009). This recommendation was made because the retailers did not voluntarily accept to set up such a body.

An effective, enforced GSCOP will help future investment and innovation by increasing confidence amongst suppliers and consumers.

2. Are the draft Bill’s provisions relating to investigations and recovery of investigation costs by the Adjudicator sufficient and appropriate?

Yes. The Adjudicator will have the power to carry out an investigation if he/she has reasonable grounds to suspect that there has been a breach of the GSCOP. Once the Adjudicator has started an investigation, they will have appropriate powers to gather relevant information, investigate and make decisions related to potential breaches of the Groceries Supply Code of Practice. This includes powers to require persons to cooperate with an investigation by supplying information – with failure to do so being a criminal offence. Investigations will only be carried out once the Adjudicator has published appropriate guidance but provided this is done in the adjudicator’s first six months, as stipulated in the draft Bill, this should not be a hindrance.
The draft Bill gives the Adjudicator the power to recover the cost of an investigation from the retailer concerned, where a breach of the Code is found. This will mean that those retailers that abide by the Code are not unnecessarily penalised by the bad behaviour of others.

Defra fully supports the measure in place to safeguard against complaints being made in bad faith. This is the Adjudicator’s power to recover the cost of an investigation from a supplier whose complaint, which initiated an investigation, was vexatious or wholly without merit.

3. Are the concerns of indirect suppliers met by the Draft Bill?

Yes. Anyone within the supply chain will be able to raise complaints with the GCA if they believe that they may have suffered from an alleged breach of the GSCOP. Complaints should be evidence based.

Even though farmers and other suppliers who don’t supply supermarkets directly fell outside the terms of reference of the Competition Commission’s investigation, to increase transparency in supply chain practices the Commission suggested that primary producers and other suppliers to intermediaries and processors should be permitted to make complaints about alleged breaches of the GSCOP where that breach is believed to have had a direct or indirect effect on them. This proposal has been included in the draft Bill so that the Adjudicator will be able to start an investigation based on complaints from either direct or indirect suppliers, including those based overseas. This provides indirect suppliers with the same route to investigation as those that supply the retailers direct. It should be noted however, that whilst any supplier can complain, the Adjudicator will not be obliged to respond to each complaint.

The Bill also includes a duty for the Adjudicator to protect the confidentiality of suppliers who complain, irrespective of their position in the supply chain, so indirect suppliers will have the same protection as direct suppliers.

4. Are the draft Bill’s provisions relating to the Adjudicator’s forms of enforcement following an investigation sufficient and appropriate?

If, as a result of an investigation, the Adjudicator is satisfied that a retailer has breached the GSCOP the draft Bill sets out three possible enforcement measures – to make recommendations on how the retailer can improve compliance with the code, to require the retailer to publish information about the investigation and the breach or to impose financial penalties. The Adjudicator can take one or more of these measures which Defra considers appropriate and sufficient enforcement. The enforcement measures in the draft Bill are as set out in the original Government response to its consultation on the Adjudicator’s statutory functions.
In a highly competitive market, the prospect of large grocery retailers receiving negative publicity is an effective deterrent against breaching the GSCOP and should also act as a very effective penalty, particularly if customers change their preferred retailer as a result. Retailers should not want to risk the reputational damage associated with unacceptable behaviour towards suppliers. The reserve power for the Government to provide the Adjudicator with the power, by order from the Secretary of State for Business, Innovation and Skills, to impose financial penalties is an effective back up mechanism, should the name and shame route not work as expected.

15 June 2011
Written evidence submitted by Wm Morrison Supermarkets plc (GCA 12)

1 Introduction

1.1 Morrisons is the fourth largest food retailer in the UK with more than 450 stores and an annual turnover in excess of £16bn. We are closer to source than any other major food retailer, sourcing 100% British fresh meat and buying direct from farmers and growers. We have a unique ‘vertically integrated’ model, operating our own abattoirs, food manufacturing facilities and pack houses. As a result we are not just one of the UK’s major food retailers, but food manufacturers as well.

1.2 Since 2009, we have operated the Morrisons Farm at Dumfries House, Ayrshire. The Morrisons Farm is designed to provide the company first-hand experience of the challenges that farmers face, and is part of our UK-wide farm research programme aimed at helping to build a sustainable British farming industry.

1.3 Morrisons understands the pressures facing small suppliers and the concerns over the perceived power of supermarkets. We rely on a secure supply base to help us deliver a diverse range of quality, affordable products to our customers. It is therefore in our interests to uphold fair and stable supply chain relationships.

2 The need for an adjudicator to enforce GSCOP

2.1 We are proud of the strong relationships we have with our direct suppliers (thousands of whom are farmers and growers, owing to our unique model) and have invested in extensive training of our buying teams to ensure compliance with the Groceries Supply Code of Practice (GSCOP). Since the code came into force in February 2010, a very small number of alleged breaches have been brought to our attention. These cases have all been resolved to the satisfaction of suppliers without recourse to independent arbitration (which we offer to suppliers as required by GSCOP).

2.2 Our position, informed by recent experience, remains that the consumer interest would be better served by allowing the GSCOP to become properly established before creating a new body to oversee it. However, we recognise the cross-party support that exists for an Adjudicator. This submission therefore focuses on operational aspects of the GCA, and in particular:

- the need for clear and early guidance on the threshold for GCA investigations
- concerns surrounding the power of the GCA to accept complaints from indirect suppliers; and to deal with complaints anonymously
3 Are the draft Bill’s provisions relating to investigations and recovery of investigation costs by the Adjudicator sufficient and appropriate?

3.1 It is difficult to properly assess the impact of the Adjudicator under the current terms of the Bill. Clause 13 provides that, within six months of being established, the Adjudicator must publish guidance on (1) the criteria for deciding whether to carry out investigations, (2) the practices and procedures for investigations and (3) the criteria for using enforcement powers. This guidance is fundamental to the scope and operation of the GCA. It will help to determine the Adjudicator’s workload, and consequently, the financial and regulatory burden for retailers.

3.2 We believe it is imperative that this guidance is published before the GCA comes into operation, to allow for proper scrutiny of the threshold for investigations and to enable all parties to understand how the GCA will operate.

3.3 One of Morrisons’ main concerns about the GCA is the potential for the office to grow out of control at the expense of grocery retailers, and ultimately to the detriment of consumers. Not only is clear guidance important. We believe the Adjudicator should focus its resources on small suppliers who may be less well equipped to resolve disputes falling within the GSCOP. Encouraging complaints from multinational suppliers about their competitors’ conduct is unlikely to benefit the consumer interest.

3.4 Clause 19 (Confidentiality) prohibits the Adjudicator from disclosing information about an arbitration if this would identify a party, either directly or by deduction. However, the Explanatory Notes for Clause 5 (Investigations: information) state that: “It is unlikely that the sources specified in Clause 4 [information provided by the supplier...or that which is publicly available] would be sufficient in themselves to make findings at the conclusion of an investigation. In particular, the Adjudicator is likely to need to obtain information from the relevant large retailers.” It is unclear how these two statements can be reconciled.

3.5 Any request for information would have to be so broad as to multiply greatly the volume of information required from the retailer in order to protect a complainant’s identity. This would impose a significant bureaucratic burden on retailers and greatly delay the resolution procedure, which could prove to the detriment of the complainant.

3.6 If full cost recovery is the preferred mechanism for funding the GCA, then we support the “broad intention” of Clause 20 (Levy funding) to require large retailers to pay sums relative to the proportion of complaints upheld against each one. We believe that those retailers with the best record should contribute the least.

3.7 We support the principle outlined in Clause 11 (Recovery of investigation costs) that where a supplier has made a complaint which was found to be vexatious or wholly without merit, the Adjudicator may require that supplier to pay some or all of the costs of a resulting investigation. However, we note that “this is
intended to be a high threshold” and are concerned that the cost of the majority of complaints will fall on large retailers, regardless of whether or not they are upheld.

3.8 Given that it is the large retailers who will be funding the GCA, we are disappointed in the lack of consultation with retailers on the Adjudicator’s budget. Appropriate scrutiny and annual review of the GCA budget should be enshrined in the legislation to ensure that costs are reasonable and proportionate, and to prevent unnecessary costs being passed to the retailer and, ultimately, the consumer. Governance in all respects must be clear and transparent.

4 **Are the concerns of indirect suppliers met by the Draft Bill?**

4.1 There are potentially thousands of indirect suppliers who may wish to make complaints to the GCA, which will each need to be checked and answered. This will push up the cost of the GCA, which will be met by all retailers, regardless of whether there has been any breach.

4.2 The GSCOP is concerned only with certain aspects of the bilateral relationship between suppliers and designated retailers. Given that a breach of the GSCOP will directly affect the parties to a contract, it is difficult to see how an indirect supplier could be better placed to identify any infringement if neither party of the original contract adjudges an infringement to have taken (or potentially to have taken) place.

5 **Are the draft Bill’s provisions relating to the Adjudicator’s forms of enforcement following an investigation sufficient and appropriate?**

5.1 Morrisons does not oppose the Adjudicator’s enforcement powers in so far as it can make a recommendation or require information to be published. We welcome both that the Government has taken a cautious view of the Adjudicator’s right to levy financial penalties, which would add delay and complexity to dispute resolution, and that the Secretary of State is obliged to consult broadly before making an order to grant such a power.

17 June 2011