

The Groceries (Supply Chain Practices) Market Investigation Order 2009

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

1. On 9 May 2006, the Office of Fair Trading (OFT), in exercise of its powers under section 131 of the Enterprise Act 2002 (the Act), referred to the Competition Commission (CC), for investigation and report, the supply of groceries by retailers in the United Kingdom.
2. The CC investigated the matters referred to it in accordance with section 131 of the Act and concluded, in accordance with section 134(1), that there were features of the market, either alone or in combination, which prevent, restrict or distort competition within the relevant market, and in accordance with section 134(2) that an adverse effect on competition (AEC) existed.
3. The CC found that one of the features that adversely affected competition in the market was the exercise of buyer power by certain grocery retailers with respect to their suppliers of groceries, through the adoption of supply chain practices that transfer excessive risks and unexpected costs to those suppliers.
4. The CC found that there was a detrimental effect on customers resulting from the adverse effect on competition and considered, in accordance with section 134(4), whether action should be taken by it, or whether it should recommend the taking of action by others, for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or the detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition.
5. The CC consulted on a range of possible actions in a Remedies Notice published on 31 October 2007. In the report the CC considered that a package of remedies consisting of the following key elements would be effective and proportionate in remedying the feature of the market identified in paragraph 3 above as having an adverse effect on competition:
 - (a) the establishment of a Groceries Supply Code of Practice (GSCOP); and
 - (b) the establishment of a GSCOP Ombudsman to monitor and enforce compliance with the GSCOP.
6. The CC indicated in the report that it intended to implement the remedy set out in paragraph 5(a) above by an order rather than an undertaking. The CC published a notice of intention to make an Order on 26 February 2009. In light of responses received to that consultation the CC has revised the Order. The revised Order is annexed in Appendix 1 to this Notice, a marked-up version showing changes to the previous proposal is also attached as Appendix 2. A revised Explanatory Note is annexed in Appendix 3. A summary of responses received and the reasons for the amendments is attached as Appendix 4 to this Notice.
7. The CC now gives notice of the proposed Order and invites written representations on them. Representations should reach the CC by 5pm, 29 June 2009 and should be addressed to:

T J Oyler
Remedies Manager
Groceries inquiry
Competition Commission
Victoria House
Southampton Row
London WC1B 4AD

Or email: tim.oyler@cc.gsi.gov.uk.

8. The CC will have regard to any representations made in response to this Notice and may make modification to the draft Order as a result. The CC may publish non-confidential versions of the representations on the CC website. In the absence of any written representations, or in the event that the CC decides on consideration of representations made not to amend the draft Order, the CC proposes to make the draft Order in its present form pursuant to section 161 of the Act. If the CC considers that any representation necessitates changes to the draft Order, it will give notice of the proposed modifications.

Peter Freeman
Group Chairman
Competition Commission
22 June 2008

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

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Background

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

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

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

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

PART 1

Citation, commencement and interpretation

1. Citation and commencement

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

2. General interpretation, index of defined expressions etc

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

Act means the Enterprise Act 2002;

Buying Team means those employees of a Retailer from time to time:

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

CC means the Competition Commission;

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

Code Compliance Officer means the person appointed from time to time in accordance with Article 9(1) of this Order;

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

Designated Retailer means a retailer listed in Article 4(1)(a) of this Order or who is designated as a Designated Retailer in accordance with Article 4(1)(b) of this Order;

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

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

OFT means the Office of Fair Trading;

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

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

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

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

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

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

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

3. Powers of direction

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

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

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

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

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

- (4) Subject to its obligations under Part 9 of the Act, the CC may publish directions made pursuant to its powers of direction.

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

PART 2

Code of Practice

4. Designated Retailer

(1) The following will be Designated Retailers for the purposes of this Order:

(a) from the date of this Order, each of those persons specified in Schedule 2.

(b) any Retailer with a turnover exceeding £1 billion with respect to the retail supply of Groceries in the United Kingdom, and which is designated in writing as a Designated Retailer by the OFT.

(c) any person who carries on the whole, or a substantial part, of the business of any of the persons specified in Articles 4(1)(a) or 4(1)(b) above.

(2) A Designated Retailer designated pursuant to Article 4(1)(b) will not be bound by the terms of this Order until such date as is specified by the OFT in the notice of designation.

(3) For the purposes of Article 4(1)(b), a Retailer's turnover with respect to the retail supply of Groceries in the United Kingdom, on any particular date, will be the applicable turnover figure for the financial year preceding that date.

5. Duty to incorporate Code in Supply Agreements

(1) A Designated Retailer must not enter into or perform any Supply Agreement unless that Supply Agreement incorporates the Code and does not contain any provisions that are inconsistent with the Code.

(2) The inclusion in a Supply Agreement of a clause which makes provision for events of force majeure in terms which are not materially different from or more burdensome to the Supplier than those set out in Schedule 3 to this Order will not be inconsistent with the Code.

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

(4) For the purposes of Article 5(1), the Code will have been incorporated into a Supply Agreement if it forms part of the enforceable contractual terms of that Supply Agreement.

6. Duty to provide information to Suppliers

(1) A Designated Retailer must ensure that all the terms of any agreement with a Supplier for the supply of Groceries for the purpose of resale in the United Kingdom are recorded in writing, as well as any subsequent contractual or contractual arrangements made under or pursuant to that agreement.

- (2) A Designated Retailer must not enter into a Supply Agreement with a Supplier unless the Supplier has a written copy of the Supply Agreement and of all terms and conditions which are intended by the Retailer and the Supplier to be incorporated, but are not fully documented, in the Supply Agreement.
- (3) Written terms of a Supply Agreement must be held by the Designated Retailer for a period of 12 months after the relevant Supply Agreement has expired or otherwise come to an end.
- (4) Written terms of any agreements or contractual arrangements made under or pursuant to a Supply Agreement must be held by the Designated Retailer for a period of 12 months after the relevant contractual agreement or arrangement is made.
- (5) All such records held by the Designated Retailer in accordance with Articles 6(3) and 6(4) must be made available on request to the Supplier to which they relate.
- (6) A Designated Retailer must not enter into a Supply Agreement with a Supplier unless it has first provided the Supplier with a notice, distinct from the Supply Agreement, which sets out:
 - (a) the obligation on the Designated Retailer not directly or indirectly to Require actions by the Supplier in relation to marketing costs, wastage, payments, promotions, changes to supply chain procedures, and tying, as more specifically set out in the Code;
 - (b) the identity and contact details of the Senior Buyer for that Supplier;
 - (c) the Designated Retailer's obligation under the Code to allow a Supplier to escalate a decision of a Primary Buyer (including a decision to De-list) to the Senior Buyer for review;
 - (d) the identity and contact details of the Designated Retailer's Code Compliance Officer;
 - (e) the identity and contact details of the Ombudsman;
 - (f) a mechanism by which the Supplier can provide feedback to the Retailer on the Supplier's relationship with the Designated Retailer's Buying Team and the Designated Retailer's compliance with the Code and this Order;
 - (g) the procedures relating to De-listing, as set out in paragraph 16 of the Code; and
 - (h) the dispute resolution procedure set out in Article 11 of this Order.
- (7) The obligation in Article 6(6) shall not apply in instances where a Designated Retailer and a Supplier have a relationship characterized by a number of separate and distinct Supply Agreements over a period of time, provided that:
 - (a) the notice required by Article 6(6) is provided to the Supplier before the first Supply Agreement is entered into after the Order comes into force; and
 - (b) the Designated Retailer provides the Supplier with notice of any changes to any of the matters set out in Article 6(6).
- (8) Where any subsequent agreements or arrangements made under or pursuant to

a Supply Agreement are agreed orally between the Supplier and a Designated Retailer, the Designated Retailer must confirm the terms of such arrangements in writing with the relevant Supplier within three working days of such arrangements being agreed.

PART 3

Supply of information to the OFT

7. Supply of information to the OFT

- (1) A Designated Retailer must provide to the OFT any information and documents which the OFT reasonably requires for the purposes of enabling the OFT to monitor and review the operation of this Order or any provisions of this Order.
- (2) A Designated Retailer may be required by the OFT to keep, maintain and produce those records specified in writing by the OFT that relate to the operation of any provisions of this Order.
- (3) Any Designated Retailer whom the OFT reasonably believes to have information which may be relevant to the monitoring or review of the operation of any provisions of this Order may be required by the OFT to attend and provide such information in person.
- (4) No person shall be required under this Article 7 to provide any information or documents to which section 109(7) of the Act would apply.

PART 4

Compliance obligations

8. Duty to train staff with respect to the Code

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

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

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

10. Compliance

- (1) A Designated Retailer must ensure that, for each complete financial year in which this Order is in force, the Code Compliance Officer delivers an annual compliance report to the OFT, copied to the Ombudsman if there is an Ombudsman established at the relevant date, within four months after the end of the financial year to which the annual compliance report relates.
- (2) The annual compliance report must have been submitted to, and approved by, the chair of the Designated Retailer's audit committee and must include a detailed and accurate account, for the financial year to which the annual compliance report relates, of:
 - (a) the Designated Retailer's compliance with the Code and this Order in the preceding year, including instances where a breach or alleged breach of the Code or this Order has been identified by a Supplier, and the steps taken to rectify it;
 - (b) steps taken during the preceding year to ensure compliance with the Code and this Order, including details of employee training undertaken and guidance issued in relation to the Code; and
 - (c) Disputes between the Designated Retailer and its Suppliers regarding the terms of any Supply Agreement, or the application of the Code, and the outcome of any such Dispute.
- (3) The first annual compliance report required for the purposes of Article 10(1) shall cover the period from the commencement of this Order until the end of the first full financial year in which this Order is in force.
- (4) A Designated Retailer must ensure that:
 - (a) the Code Compliance Officer provides such other reports as are necessary to ensure that the Designated Retailer's audit committee retains effective

oversight over the Designated Retailer's compliance with the Code and this Order.

- (b) if the Designated Retailer does not have an audit committee, the Code Compliance Officer should report directly to the non-executive director of the Designated Retailer who carries out the functions typically associated with an audit committee, or in the absence of such non-executive director, to the Designated Retailer's Chief Executive Officer or Managing Director.
- (5) A summary of the annual compliance report described in Article 10(1) must be included in the Designated Retailer's annual company report, and will contain an overview of each of the matters set out in Article 10(1) above. If the Designated Retailer does not produce an annual company report, the summary of the annual compliance report will be published clearly and prominently on the Designated Retailer's website within four months after the end of the financial year to which the compliance report relates.

PART 5

Dispute resolution

11. Dispute resolution scheme

- (1) A Designated Retailer must negotiate in good faith with a Supplier to resolve any dispute arising under the Code.
- (2) A Dispute will arise under the Code when a Supplier informs the Code Compliance Officer that the Supplier believes that the Designated Retailer has not fulfilled its obligations under the Code, and that the Supplier wishes to initiate the dispute resolution procedure set out in this Article.
- (3) Whenever a Supplier contacts the Code Compliance Officer regarding an alleged breach of the Code by the Designated Retailer, the Code Compliance Officer will inform the Supplier of its right to initiate a Dispute under Article 11(2) above, and confirm whether the Supplier wishes to initiate a Dispute. In the absence of the Code Compliance Officer requesting confirmation, a Dispute will be deemed to arise.
- (4) If any Dispute is not resolved by the parties to the satisfaction of the Supplier within 21 days from the date the Dispute arises, then at any time during a period expiring four calendar months after the Dispute arises the Designated Retailer will submit to an arbitration request made in writing by the Supplier in accordance with Articles 11(5) to 11(8).
- (5) The arbitration will be administered by the Ombudsman, if established. In the event that the Ombudsman is not established, or has a conflict of interest in relation to a particular Dispute, the arbitration will be administered by a single arbitrator appointed in accordance with the Rules of the Chartered Institute of Arbitrators in force for the time being.
- (6) To the extent that they do not conflict with this Article 11, the arbitration will be conducted in accordance with the Rules of the Chartered Institute of Arbitrators in force for the time being, or such other dispute resolution body as is nominated by the arbitrator. In any arbitration commenced pursuant to this Order, the number of arbitrators will be one and the seat or legal place of arbitration will be London,

England or such other city within the United Kingdom as the Supplier nominates.

- (7) All costs of the arbitrator will be borne by the Designated Retailer, unless the arbitrator decides that the Supplier's claim was vexatious or wholly without merit, in which case costs will be assigned at the arbitrator's discretion. All other costs of the arbitration will be assigned at the arbitrator's discretion.
- (8) The decision of the arbitrator will be binding and final on both the Designated Retailer and the Supplier, with the exception that either party may appeal on the grounds set out in sections 67 to 69 inclusive of the Arbitration Act 1996.
- (9) Nothing in this Article will prevent a Designated Retailer including in a Supply Agreement a right for the Designated Retailer also to refer a Dispute to arbitration if the Dispute is not resolved to the satisfaction of the Designated Retailer within 21 days from the date the Dispute arises, provided that such arbitration is on the same terms as those set out in this Article.

Signed by authority of the CC

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Peter Freeman
Chairman
Competition Commission
[] 2009

Schedule 1

The Groceries Supply Code of Practice

PART 1—INTERPRETATION

1. Interpretation

(1) In this Code:

Code Compliance Officer means the person from time to time appointed in accordance with Article 9(1) of the Order;

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

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

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

Promotion means any offer for sale at an introductory or a reduced retail price, whether or not accompanied by some other benefit to consumers that is in either case intended to subsist only for a specified period;

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

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

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

a Retailer will **Require** particular actions on the part of a Supplier if the relevant Supplier does not agree, whether or not in response to a request or suggestion from the Retailer, to undertake an action in response to ordinary commercial pressures. Where those ordinary commercial pressures are partly or wholly attributable to the Retailer, they will only be deemed to be ordinary commercial

pressures where they do not constitute or involve duress (including economic duress), are objectively justifiable and transparent and result in similar cases being treated alike. The burden of proof will fall on the Retailer to demonstrate that, on the balance of probabilities, an action was not Required by the Retailer;

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

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

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

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

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

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

PART 2—FAIR DEALING

2. Principle of fair dealing

A Retailer must at all times deal with its Suppliers fairly and lawfully. Fair and lawful dealing will be understood as requiring the Retailer to conduct its trading relationships with Suppliers in good faith, without distinction between formal or informal arrangements, without duress and in recognition of the Suppliers' need for certainty as regards the risks and costs of trading, particularly in relation to production, delivery and payment issues.

PART 3—VARIATION

3. Variation of Supply Agreements and terms of supply

- (1) Subject to paragraph 3(2), a Retailer must not vary any Supply Agreement retrospectively, and must not request or require that a Supplier consent to retrospective variations of any Supply Agreement.
- (2) A Retailer may make an adjustment to terms of supply which has retroactive effect where the relevant Supply Agreement sets out clearly and unambiguously:
 - (a) any specific change of circumstances (such circumstances being outside the Retailer's control) that will allow for such adjustments to be made; and

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

4. Changes to supply chain procedures

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

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

PART 4—PRICES AND PAYMENTS

5. No delay in Payments

A Retailer must pay a Supplier for products delivered to that Retailer's specification in accordance with the relevant Supply Agreement, and, in any case, within a reasonable time after the date of the Supplier's invoice.

6. No obligation to contribute to marketing costs

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

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

7. No Payments for shrinkage

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

8. Payments for Wastage

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

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

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

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

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

10. Compensation for forecasting errors

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

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

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

PART 5—PROMOTIONS

12. No Payments for better positioning of goods unless in relation to Promotions

A Retailer must not directly or indirectly Require a Supplier to make any Payment in order to secure better positioning or an increase in the allocation of shelf space for

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

13. Promotions

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

14. Due care to be taken when ordering for Promotions

- (1) A Retailer must take all due care to ensure that when ordering products from a Supplier at a promotional wholesale price, not to over-order, and if that Retailer fails to take such steps it must compensate that Supplier for any product over-ordered and which it subsequently sells at a higher non-promotional retail price.
- (2) Any compensation paid in relation to paragraph 14(1) above will be the difference between the promotional wholesale price paid by the Retailer and the Supplier's non-promotional wholesale price.
- (3) A Retailer must ensure that the basis on which the quantity of any order for a Promotion is calculated is transparent.

PART 6—OTHER DUTIES

15. No unjustified payment for consumer complaints

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

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

16. Duties in relation to De-listing

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

17. Senior Buyer

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

Schedule 2

Designated Retailers

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

Co-operative Group Limited

Marks & Spencer plc

Wm Morrison Supermarkets plc

J Sainsbury plc

Tesco plc

John Lewis plc

Aldi Stores Limited

Iceland Foods Limited, a subsidiary of the Big Food Group

Lidl UK GmbH

Schedule 3

Provision for force majeure

A force majeure clause may provide:

- that neither party to a Supply Agreement shall have any liability under or be deemed to be in breach of the Supply Agreement as a result of any delays or failures in performance which result from circumstances beyond the reasonable control of that party;
- that the party affected by the relevant circumstances will promptly notify the other party in writing when such circumstances cause a delay or failure in performance and when they cease to do so; and that
- if such circumstances continue for a specified continuous period either party may terminate the agreement by written notice to the other party.