

Briefing note on Groceries Supply Code of Practice (GSCOP)

Background to GSCOP

The GSCOP is a result of the Competition Commission's investigation of the groceries market which it undertook between May 2006 and April 2008.

The Competition Commission found an adverse effect on competition due to a number of market features, including supply chain practices, that were detrimental to suppliers. The Competition Commission recommended various remedies to address these adverse effects (including a competition law planning test and other remedies relating to restrictions on the use of land for grocery purposes). One of the remedies was an improved version of the existing Supply Code of Practice (SCOP) in the form of the GSCOP, together with an Ombudsman to ensure effective enforcement of the new provisions for suppliers and retailers.

The GSCOP remedy was consulted on and the Competition Commission published in August 2009 the final version of the Order setting out the GSCOP. The Competition Commission sought the large supermarkets' voluntary agreement to the establishment and funding of an Ombudsman to enforce the GSCOP. However, although the GSCOP and accompanying Order were eventually finalised, an agreement on the Ombudsman could not be reached.

In the absence of voluntary agreement, and without the power to establish a funded authority itself, the Competition Commission recommended to the government (BIS) that it should establish an Ombudsman. On 13 January 2010, BIS gave the go-ahead for the establishment of a body to enforce the GSCOP. BIS announced that it will commence a consultation in February 2010 on how best to enforce the GSCOP, who the enforcement body might be and the powers it could have. BIS's press release indicates that the Office of Fair Trading (*OFT*) is being considered as a contender for acting as the enforcement body.

Key aspects of the Order

It is important to draw a distinction between the provisions of the actual Order and those included in the GSCOP schedule (it is schedule 1 of the Order that forms the actual code). This is because, at

present, the *OFT* only has power to monitor and enforce the requirements set out in the Order, and can take action in respect of these. If the *OFT*'s monitoring shows a breach of the Order, the *OFT* can investigate and ask the Competition Commission to issue directions as appropriate. The *OFT* cannot interpret the GSCOP or resolve or intervene in disputes relating to the GSCOP provisions. This would be the role of the Ombudsman (or other enforcement body) if and when it is established.

The key aspects of the Order and main duties of the retailers under the Order which can be enforced by the *OFT* are as follows:

- The Competition Commission can give directions to take or refrain from action to ensure compliance with the Order and may publish these;
- The *OFT* may designate retailers that are to be bound by the Order and the GSCOP: there is a list of major supermarkets already bound set out in the Order itself (comprising Asda, Co-op, M&S, Morrisons, J Sainsbury, Tesco, Waitrose, Aldi, Iceland and Lidl), but more can be designated if they hit the requisite £1bn turnover threshold;
- A duty for designated retailers to incorporate the GSCOP into supply agreements before entering into such agreements, so that the GSCOP terms become part of the terms and conditions and would lead to contractual breach if broken (although breach does not affect the designated retailer's obligation to accept and pay for goods);
- A duty on the part of designated retailers to provide certain information to suppliers (written terms including subsequent arrangements agreed, information about the retailer's obligation not to "require" certain practices under the GSCOP, the identity of the 'Senior Buyer' at the retailer to whom problems can be escalated, the identity of the Code Compliance Officer (who is independent from the buying team and who is responsible for reporting on GSCOP compliance and dealing with complaints), what feedback mechanism is in place for suppliers, the de-listing procedure as set out in the GSCOP, dispute resolution procedures as set out in the Order, oral terms to be confirmed in writing);

- A duty to supply information to the OFT for monitoring purposes according to the OFT's powers in this regard;
- A duty to train staff with respect to the GSCOP;
- A duty to appoint a Code Compliance Officer;
- Delivery of an annual compliance report to the OFT (copied to the Ombudsman as and when appointed);
- Duty to follow the dispute resolution procedure set out in the Order (i.e. retailer must submit to independent arbitration at the supplier's request if a dispute cannot be resolved inter partes, the result of this will be binding and the retailer will bear the costs of the arbitration unless the supplier's claim was vexatious etc. as adjudicated by the arbitrator).

Key aspects of the GSCOP

The GSCOP is set out at schedule 1 of the Order.

The GSCOP applies to any arrangements between suppliers and retailers which include an element of supply of groceries (groceries are defined in the Code and include a very wide range of products). Potentially this could cover a range of agreements and possibly also include ancillary documents such as joint business plans.

The GSCOP provisions frequently use the term 'Require' when referring to actions by the supplier which the retailer will often request or suggest (although such actions may not always be suggested by the retailers). 'Require' is defined as a situation where a supplier does not agree to undertake an action in response to 'ordinary commercial pressures', i.e. which do not constitute or involve duress including economic duress and which are objectively justifiable and transparent. The retailer must show that it did not 'Require' an action from a supplier. This is an important concept, but difficult to define.

As described above, breaches of the GSCOP will be dealt with either by (i) the dispute resolution procedure set out in the Order; (ii) claims for breach of contract (probably in reality only ancillary to other contractual breaches rather than standalone actions); or (iii) complaints to and investigation by the Ombudsman (as and when established). The first two routes mean that the retailer will know the identity of the supplier in question, whereas the third also encompasses the possibility of anonymous complaints (although it is not clear what effective enforcement action could be taken where the supplier remains anonymous).

The key aspects of the GSCOP including the main obligations of designated retailers are as follows:

Doing business

- There is an overarching fair dealing principle which gives context to the GSCOP, emphasises its key points (no duress, certainty for suppliers regarding risk) and constrains the behaviour of retailers whilst also allowing flexibility;
- No retrospective variations of supply agreements are permitted unless such variations are negotiated to be a clear and unambiguous part of the trading arrangement from the outset;
- There are to be no changes to supply chain procedures without reasonable notice in writing or full compensation for costs incurred as a result of the failure to give reasonable notice.

Prices and payments

- Payment for goods must be made in accordance with the relevant supply agreement, and in any case, within a reasonable time after invoice;
- A retailer may not require a supplier to contribute to the retailer's marketing costs unless provided for in the supply agreement;
- No supply agreement is to include obligations on the supplier to compensate the retailer for shrinkage;
- Suppliers should not be required to make payments for wastage unless due to the supplier's default or negligence, or as provided for in the supply agreement;
- Retailers may not require suppliers to pay for shelf space, although payments may be allowable for promotions or new product listings, where the payments are proportional to the risk incurred by the retailer in stocking the new line;
- Retailers must inform suppliers of the basis on which forecasts are produced and in certain circumstances will be obliged to compensate suppliers for forecasting errors;
- A retailer must not require a supplier to obtain goods from any third party where the retailer gains from this.

Promotions

- Retailers may not require suppliers to pay for shelf space allocations or positioning unless made in relation to a promotion;
- Retailers may not require suppliers to fund the majority of the costs of a promotion, and any promotion in which a supplier makes a payment must only be held after reasonable notice has been given to the supplier;

- Retailers must take care not to over-order promotionally priced goods.

Other duties

- No unjustified payments for consumer complaints where a retailer has made payments in response to consumer complaints;
- There are a number of duties placed on retailers in relation to de-listing, in particular that this must be for genuine commercial reasons and there is a procedure to be followed (and de-listing is defined to include both a decision to stop purchasing from a supplier entirely, or a decision to reduce significantly the volume of purchases from the supplier).

Benefits of the Order and the GSCOP for suppliers

The Order and GSCOP is an improved regime for suppliers and provides a number of benefits:

- Better dispute resolution procedure than relying on mediation as under SCOP;
- OFT has oversight in some areas;
- SCOP provisions have been tightened and clarified;
- More monitoring/reporting and therefore publicity of supermarkets' good or bad records of compliance with the GSCOP;
- Terms must be in writing so evidence available to back up suppliers' complaints.

However, it remains to be seen whether it will be effective and there are still a number of drawbacks with the use of a code scheme.

Drawbacks of the Order and the GSCOP for suppliers

- Although the Government has commenced the process of establishing an enforcement body, there is no Ombudsman at present and it will take some time to establish one. Therefore there will be a lack of useful interpretation and enforcement by a specialised and knowledgeable body for an initial period. Potentially this means uncertainty and a lack of overall review of what supermarkets are doing;
- The initial lack of any Ombudsman means that currently there is no opportunity for anonymous/representative complaints and the perceived "climate of fear", due to actions that retailers could take against suppliers if complaints are made, may continue;

- Preparation costs could be significant for both retailers **and** suppliers (negotiations across a number of retailers, changes to trading arrangements);
- It adds a new dimension to negotiations between retailers and suppliers – retailers could seek to use this as an opportunity to improve their own position (e.g. "you must use our terms as they are GSCOP-compliant, otherwise it will be impossible for us to deal with you");
- De-listing provisions do not appear particularly helpful for large suppliers offering many lines as it is not clear what a "significant" reduction in volumes is – how many lines must be de-listed before the GSCOP requirements apply?
- The use of the concept "Require" – this may be difficult to appraise and may be open to differing interpretation.

Practical guidance for suppliers going forward

- Whilst a retailer must not enter into or perform any supply agreement unless that supply agreement incorporates the GSCOP, the supply of goods can be made on either the retailer's terms and conditions, or those of the supplier. It is not the case that the terms and conditions of the retailer should prevail. Suppliers should not, therefore, be pressurised into accepting the terms and conditions of the retailer, but can deal on their own terms and conditions which include provisions incorporating the GSCOP.
- However, currently a number of suppliers are experiencing 'battle of the forms' problems with the retailers. Suppliers should avoid including terms which state that the supplier's terms and conditions will prevail. Case-law has not upheld such provisions. Whilst suppliers are encouraged to ensure that they fire the 'last-shot' by sending an order acknowledgment setting out the supplier's terms and conditions, suppliers should also be careful of retailers stamping delivery notes expressing that the goods are accepted on the retailer's terms and conditions. It is essential that suppliers keep records of all paperwork when supplying goods.
- Records should also be kept of all written correspondence with retailers. The requirement for any supply agreement to be 'in writing' captures any email correspondence. Sales teams should therefore be advised to implement document retention and filing policies to ensure that all written records are maintained centrally and can be referred to easily in the event of any dispute.

- Any oral agreements are to be confirmed in writing within 3 working days. It is good practice to encourage commercial personnel to make contemporaneous notes of such discussions to ensure that the written communication or agreement properly reflects the oral agreement.
- On receipt of any written terms and conditions from the retailer, the supplier should clarify any uncertainties or correct any errors without delay.
- Any instances of non-compliance by a retailer should be recorded in writing by the supplier, ideally at the same time as the instance of non-compliance occurs, so that in the event of any complaint or dispute, accurate and complete records can be referred to.
- Sales teams should be provided with training to educate them on the terms of the GSCOP so as to give them guidance on the obligations that can and cannot be included in supply agreements, and to allow them to identify behaviour or practices of a retailer which would place it in breach of its obligations in the GSCOP.

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