



Groceries Code
Adjudicator

December 2013

**Statutory guidance on how the Groceries Code
Adjudicator will carry out investigation and
enforcement functions**

Consultation response summary

Executive Summary

Purpose of the consultation

A requirement of the Groceries Code Adjudicator Act 2013 (the Act) is that the Adjudicator publish guidance explaining how the Groceries Code Adjudicator will run investigations, decide on enforcement actions and the penalty to impose, as a result of information about suspected breaches of the Groceries Supply Code of Practice (the Code). The guidance sets out the steps the Adjudicator will follow and the actions available, including how and when sanctions will be applied.

The Adjudicator has been created to ensure that large retailers treat their main suppliers lawfully and fairly, to investigate suspected breaches of the Code and arbitrate in disputes. The role of the Adjudicator is to enforce the Code set out in the Groceries (Supply Chain Practices) Market Investigation Order 2009 (the Order). The Order came into force on 4th February 2010. The Act came into force on 25th June 2013.

This response accompanies publication of the statutory guidance on how the Groceries Code Adjudicator will carry out the Adjudicator's investigative and enforcement functions.

The Groceries Code Adjudicator has written to seek the approval of the Secretary of State for Business to the recommended approach on financial penalties. The Secretary of State will lay an Order in Parliament which will permit the Groceries Code Adjudicator to apply financial penalties up to the stated maximum. The timing will be subject to the parliamentary process but we hope that this will come into force in Spring 2014. Separate guidance will be issued on the financial penalties Order, in due course.

Consultation process

The consultation opened on 31st July 2013 and closed on 22nd October 2013. It sought the views of the groceries sector and in particular, large retailers covered by the Code and direct suppliers to those large retailers and their respective

representative bodies. Views were also welcomed from other retailers, indirect suppliers, other representative bodies and those with an interest in the groceries sector such as producers, farmers and consumers.

In addition to the consultation launch, we held 15 events (meetings, conferences, seminars) with large retailers, direct suppliers, the wider supply chain, trade bodies, government officials and Ministers.

We received 17 responses to our consultation which can be broken down as set out in the table below and the list of respondents is set out in Annex A.

Large Retailers and their representative bodies	Suppliers and their representative bodies	Others
6	8	3

The Adjudicator would like to thank all those who responded to the consultation and whose comments have informed the statutory guidance on investigations and enforcement and the financial penalties regime.

The statutory guidance

The guidance sets out the steps the Adjudicator will follow and the actions available, including how and when enforcement measures will be applied. Whilst we have sought to make this response self-standing, it may help with interpretation to read this document alongside the statutory guidance which is published separately.

In our response to the submissions we have reviewed each comment for relevance and validity. There was a good understanding of the role of the Groceries Code Adjudicator across the responses we received and how the functions of the office will be performed. In areas where respondents have drawn different conclusions from the guidance, we have sought to address these in our response and in the final guidance document. We felt a few general points are worth clarifying.

The **GCA's role is limited to enforcing the Code, encouraging and monitoring compliance with it.** Where there are issues which affect the effectiveness of how the groceries market supply chain functions but which are beyond the scope of the GCA, we will make the appropriate bodies or agencies aware of these issues but cannot intervene.

We have taken on board comments made on the **consistency of terminology** in the guidance. Our general approach will be to follow the terminology set out in the Act. So we will refer to the retailers to which the Code applies as “large retailers” except where we quote from the Order when we will use the term “designated retailer”. We used the term “complaint” in the draft investigations and enforcement guidance produced for consultation which led some respondents to believe that individual cases might result in investigations, and to concern about the possible problems with maintaining anonymity that this might entail. We will now use the term “issue” to describe matters brought to the GCA. The dispute escalation process under Article 11 of the Order, which can lead to arbitration, is quite different from the way in which the Adjudicator will gather evidence and information about suspected breaches from a variety of sources, including direct suppliers. The Adjudicator will investigate those issues which best fit the prioritisation principles set out in the guidance.

From some responses, there appears to be confusion over the **effective dates of the powers** which the Adjudicator has and how those are exercised. The table below sets out the effective dates of key events and their application:

Date	Action	Detail
4 Feb 2010	Groceries Supply Code of Practice came into force	The Code became a statutory obligation on designated retailers
25 Jun 2013	Groceries Code Adjudicator is established	Groceries Code Adjudicator can collect information and evidence; but cannot launch any investigation until the statutory guidance on investigation and enforcement functions is published
18 Dec 2013	Statutory guidance on investigation and enforcement functions is published	Groceries Code Adjudicator can launch investigations but cannot apply financial penalties
April 2014*	GCA Penalties Order comes into force	Groceries Code Adjudicator can apply financial penalties, subject to Ministerial agreement and the laying of the Order to extend the Adjudicator's powers

*Date subject to parliamentary approval

The Adjudicator can only launch an investigation into breaches of the Code which occurred after 25th June 2013.

The guidance published alongside this summary is the **definitive guidance on investigations and enforcement**. Updates would only be made where there is a material change to the role or functions of the Adjudicator or to the Code.

A number of points were made which are not within the scope of the investigations and enforcement guidance but relevant to the broader role of the GCA and we have indicated where further guidance may follow.

On one point regarding the way in which the large retailers fund the GCA (the Levy) and how it is calculated, we have already published our approach which is set out in the letter to large retailers of 20th September and published on the GCA [website](#). That letter sets out the Levy levels and when the next review of the Levy methodology will take place.

Main changes to the statutory guidance from the draft issued for consultation are listed in Annex B.

The statutory guidance consultation questions

Consultation question 1

Is the guidance clear on how **the investigation criteria** will be applied? If not, how can this be improved?

This section of the guidance sets out the criteria the Adjudicator will apply in deciding whether to launch an investigation.

In general, supplier-focused responses were predominantly content with the level of detail provided in the guidance and large retailer-focused responses sought much more detail.

Further clarity was sought on the complaints process, level of evidence required and what makes good evidence. We accept the points made below.

We have clarified the guidance to better explain how the GCA will deal with issues raised and information received. Additionally, we have added a [checklist](#) to our website as a guide for suppliers on how to raise an issue with the Adjudicator. This additional information reflects that the level and nature of evidence required will vary depending on the circumstances.

The Adjudicator is of the view that, in order to maintain appropriate flexibility in carrying out the statutory functions of the office, the guidance must not attempt to prejudge future decisions each of which must be reasonable and proportionate. Therefore, with the exception of the areas above which have been clarified, this aspect of the guidance will not be expanded to meet all respondent requests.

We received a number of comments regarding paragraph 15, where we discussed taking account of the indirect impact of Code breaches, and paragraph 22, which discussed action which may be taken by the Adjudicator even when a breach is not proven. We have considered the comments carefully and accept that these paragraphs could have been confusing and might possibly have implied that the

Adjudicator would be acting beyond the powers granted in the Act. This was not the intention and we have removed both paragraphs from the final guidance.

Points we have not accepted

Several respondents asked for greater clarity on what the Adjudicator would consider as “reasonable grounds”. The term “reasonable grounds” is well understood, as a key public law principle and the standard applied in judicial review. It is a well established test. Therefore we do not accept that further clarity is needed.

We appreciate that some respondents are seeking greater detail in a number of areas – e.g. prioritisation principles, evidence gathering. However, we feel that the level of detail provided in the guidance strikes the right balance between providing the degree of clarity required of statutory guidance and not fettering the Adjudicator’s discretion. It also allows for a proportionate and targeted approach to a range of possible investigations of differing complexity.

We were asked to consider providing detail on the weighting of the principles which will be applied. We do not accept that this is necessary. We think this would limit the Adjudicator’s discretion in dealing with a potentially diverse range of issues.

Consultation question 2

Does the complaints procedure explain how the Adjudicator will deal with complaints? If not, how can this be improved?

The draft guidance explained the proposed process for handling issues raised and information received and investigations and was supported by the flow diagrams.

Some respondents sought more clarity about what might be an issue or complaint. We have addressed this in our response to question 1. We would also repeat that the Adjudicator can only investigate issues arising out of large retailer/direct supplier agreements. We may take evidence from other organisations but the issue must refer to a breach of the Code i.e. between a large retailer and a direct supplier.

Several respondents, particularly suppliers and their representatives, questioned if the approach set out in the flow diagram in the draft guidance that “*the Adjudicator will establish whether an issue has been raised by a supplier with a retailer or its Code Compliance Officer*” is a requirement. We can confirm that this is not a requirement for suppliers to raise issues with the Code Compliance Officers (“CCOs”) before mentioning them to the Adjudicator and the guidance has been clarified. The flow charts were an aid and not part of the statutory guidance itself. They will now be published separately on the GCA website in the New Year.

It is worth noting that the Adjudicator has stated that the preferred approach is to recommend that suppliers raise issues with the CCOs as only this way could they get any immediate resolution. It also means that the CCOs can better understand their supplier issues and ensure that practices change more quickly. A GCA investigation will inevitably take up to 12 months and therefore a delay in any change in practice coming into effect. And so the intent of the recommendation is to more swiftly address behaviours which are not consistent with the Code. However, we are mindful of the reluctance of some suppliers to challenge large retailers. We will do all we can to encourage suppliers to raise their issues with the GCA so we can drive change informally with the CCOs whilst maintaining supplier anonymity, as well as doing so by investigating those issues or practices having the greatest or most widespread impact.

Some respondents highlighted the differing levels of detail between the text and the flow diagrams and we have addressed these points by expanding our explanation in the guidance. Large retailers also sought clarification that discussions between the Adjudicator and the large retailer concerned would be held before a final decision is taken to launch an investigation. We have said in discussions with large retailers and suppliers that we will not launch an investigation into a practice without having brought it to the attention of CCOs and given them the chance to remedy any breaches found internally. We would also notify the large retailers concerned before making any public announcement or call for evidence, although the scope of any investigation may widen to include additional large retailers as evidence is gathered about any particular practice.

We have not set timescales in our guidance for investigations and enforcement activity and do not have a prescribed timetable set out in the Act. However, respondents have noted that an indicative timetable would be helpful. We expect that investigations would take no longer than an investigation by other regulatory authorities and may be considerably quicker. Given the limited scope of the Code, we would expect an investigation to take no longer than 12 months. As each case will be different, we will set out the proposed investigation timetable for each investigation within its public notification although this may need to be altered during the course of an investigation, for example if it is widened to include more large retailers suspected of the same practice.

Consultation question 3

Does the investigations procedure explain how the Adjudicator will deal with investigations? If not, how can this be improved?

This section explained the procedures the Adjudicator will follow in carrying out investigations.

Large retailers made a number of points which we accept and have clarified in the guidance, as well as points about informal action outside the Adjudicator's investigative and enforcement approach. These include clearer guidance on the timetable for investigations. Respondents made a number of points on anonymity. The main point made from both large retailers and suppliers was how supplier anonymity will be assured.

The Adjudicator is legally bound to safeguard the anonymity of the supplier and absolute confidentiality will be given to suppliers in any contact with the GCA. Issues raised with the Office will be treated in two ways; (1) they will be added to the Adjudicator's body of evidence of potential breaches which may result in an investigation; and (2) if suppliers raise the same issue consistently, the Adjudicator will raise the issue with all Code Compliance Officers for them to investigate their individual business practices. In the event of an investigation, and particularly where there are a small number of suppliers in a particular area, supplier anonymity will be preserved by broadening the scope of the investigation. We have clarified this in the

guidance. In practice, the very limited number of investigations we can conduct in any year will mean that we are highly unlikely to investigate breaches by just one large retailer with one supplier, but will instead focus on practices which have become widespread.

Points we have not accepted

It was proposed that anonymity should be voluntary; this is not possible as the Adjudicator is legally bound to safeguard the anonymity of the supplier. Only the supplier may chose to waive that right.

Large retailers proposed that during an investigation, they should be consulted at various points through the process and prior to a decision about which enforcement measure to apply. This point misunderstands the status of an investigation. An investigation by the Adjudicator is not the same as a market investigation. All parties will have the opportunity to provide evidence during the investigation in written and oral form. It is then for the Adjudicator to decide on whether there has been any breach of the Code, whether the Code needs clarifying and what, if any, enforcement measures to apply. This is solely a matter for the Adjudicator and there will be no consultation. There is, however, the commitment to provide the large retailer(s) with an advance copy of the report for comment ahead of publication should the Adjudicator choose to name the large retailer(s), and to consider representations as to confidentiality and material errors of fact. Should large retailers or others be unhappy with a decision by the Adjudicator, the route to challenge the Adjudicator's decision on enforcement actions is to the High Court in England Wales and Northern Ireland, and the Court of Session in Scotland.

Consultation question 4

Does the section on enforcement powers explain how the Adjudicator will choose whether to use these and which ones?

This section of the guidance sets out the enforcement options open to the Adjudicator, what considerations will be taken into account in deciding upon the enforcement measure and what that enforcement measure requires.

The majority of respondents welcomed the staged approach to enforcement measures set out in the guidance.

Several points were made on the selection of enforcement measures. Some respondents, whilst accepting the staged approach, were less content with financial penalties as the final sanction.

Points we have not accepted

Some respondents requested further detail on aspects on enforcement measures such as: more detail on how the Adjudicator will judge the seriousness of the breach; further detail on the factors taken into account in determining the enforcement measure to be applied; and whether large retailers will be given the opportunity to make representations before a sanction is applied.

We have carefully considered these requests but have concluded that no changes are needed as the guidance provides an appropriate level of detail for those investigated by the Adjudicator on which enforcement measure may be applied.

Consultation question 5

The Adjudicator proposes that the maximum financial penalty for breaches of the Code is 1% of UK turnover. Do you agree? If not, what do you think the maximum financial penalty for Code breaches should be?

This section of the guidance explained the proposed maximum financial penalty that the Adjudicator will apply and how that penalty will be calculated.

There was an expected level of disagreement to the proposed maximum penalty of 1% of UK large retailer turnover. Large retailers did not support the proposed level of penalty and an alternative option was offered: 1% of turnover of the products supplied by the affected supplier(s). Suppliers and their representatives took a different view and supported the level of proposed penalty with some suggesting higher penalty levels of 3% of UK turnover and 10% of UK turnover.

Several respondents asked about how the turnover would be determined in cases where large retailers are part of a larger group or where subsidiaries had been involved or are responsible for the breach.

The designated retailers are those set out in Schedule 2 of the Order. For the purposes of the penalty calculation, the turnover of the retailers set out in Schedule 2 will be the basis for the calculation. This will not extend to Group turnover, where designated retailers are subsidiaries of a larger group. Additionally, Part 2 section 4 states that a designated retailer includes “any person who carries on the whole, or substantial part, of the business” of a designated retailer [4(1c)]. Other parts of this section of the Order make clear that subsidiaries must comply with the Code. Therefore the Adjudicator is of the view that a subsidiaries’ turnover will form part of the qualifying turnover, where the subsidiary is found to be involved in a breach of the Code.

Next steps

The Adjudicator’s proposals on the maximum financial penalty or the methodology for calculating the financial penalty requires approval of the Secretary of State for Business Innovation and Skills. We have considered the responses carefully and the views received have informed the recommendation to the Secretary of State. As the recommendation from the Adjudicator will inform future policy, we are not able to detail the recommendation.

When the Secretary of State has decided on the maximum penalty an Order will be laid empowering the Groceries Code Adjudicator to apply financial penalties to large retailers found to have breached the Code. The Order is likely to be laid in time for commencement in April 2014 and will make the maximum penalty clear.

This will not form an element of the investigations and enforcement statutory guidance. We hope that the Order will come into force in Spring 2014, subject to parliamentary procedures, when further guidance will be issued.

Consultation question 6

This statutory guidance explains: (i) how the Adjudicator will decide whether to carry out investigations; (ii) how the Adjudicator will carry out investigations; (iii) how the enforcement powers will be applied; and (iv) the criteria the Adjudicator intends to adopt in calculating financial penalties.

The Adjudicator is happy to provide later, **additional guidance** should that be useful. For example, we expect to provide guidance on the appeals process and arbitration. What additional guidance would you like to see?

We recognise that the statutory guidance deals only with investigative and enforcement activities and that large retailers and suppliers may need further guidance on other areas of the Code and the GCA's approach. We have stated that we are currently drawing up guidance on arbitration and respondents were invited to nominate other areas where further guidance would be welcomed. This will inform our prioritisation process.

We received a short list of requests for guidance on the following topics:

Large Retailers

- Format and content of large retailer annual compliance reports
- How do subsidiaries or intermediaries of the large retailers fall under the scope of the Code
- Future methodology of calculating the levy payment from large retailers

Suppliers

- How a supplier escalates a dispute with a large retailer
- How a supplier raises an issue or provides information which may lead to an investigation and what evidence should be provided to the Adjudicator

The Code

- Ongoing advice and guidance on the interpretation of the Code and on prevailing practices (e.g. shelf-positioning; de-listing; what constitutes a significant reduction in the volume of purchases made from a supplier).
- Definition of Groceries should be simplified to make it clear which products fall in and out of the Code

GCA activities

- The Appeals process
- How the GCA will monitor and enforce decisions
- Evidence that would be required to give reasonable grounds for suspecting a breach of the Code
- What powers does the GCA have to investigate the reasons behind an action or decision by the large retailer when suppliers are, for example, de-listed or refused supply by the large retailer shortly after the issue is raised?

Next steps

We will consider the need to provide additional guidance as resources allow and on the basis of the degree of demand. Our priorities will be to provide guidance on arbitration followed by appeals in the New Year and we will publish further plans on future guidance on the GCA website.

Consultation question 7

Do you have any other comments to make on the guidance?

This was an open question allowing respondents to make broader comments on the guidance, beyond the specific consultation questions.

We received a number of additional comments.

Large retailers' related comments included: a call for recognition of the resource impact on large retailers of an investigation; that the Adjudicator provides advance warning to all parties in an investigation to allow them time to prepare a public comment; that the Adjudicator can advise all large retailers or a large retailer could request advice or further clarification outside of the investigation process.

The implications on resource are a matter for large retailers themselves to manage and not for the GCA. The Act clearly sets out the large retailer compliance requirements and this guidance follows the legislation. On the matter of advanced warning of the timing of an investigations report, we will provide appropriate notice of the timing of publication but the date is a matter for the Adjudicator and will not be for negotiation. On additional guidance beyond investigations and enforcement, the

Adjudicator will be issuing further guidance in due course on the range of aspects of the Code, some of which may well be in response to large retailer, or for that matter supplier, requests.

Supplier related comments included: whether suppliers can appeal the Adjudicator's decisions from an investigation and the choice of enforcement action; will the Adjudicator set a binding precedent from the outcome of an investigation and enforcement action.

Suppliers will have the right to challenge decisions by the Adjudicator and the route to challenge enforcement actions is to the High Court in England Wales and Northern Ireland, and the Court of Session in Scotland. The Adjudicator's decisions do not have the force of precedent in the way judgments of the courts do, but the Adjudicator's interpretation of the Code is intended to be binding on all large retailers and their suppliers and the Adjudicator will apply the Code consistently in similar circumstances.

We were also asked how the Department for Business Innovation and Skills consultation on *How regulatory appeals are conducted* relates to the GCA. We expect the GCA to be covered by any future legislation on regulatory appeals.

Consultation respondents

Aldi Stores Limited

British Brands Group

British Retail Consortium

Britvic

Co-operative Group Limited

Dairy UK

Food and Drink Federation

Moore Stephens LLP

National Farmers Union

National Farmers Union Scotland

Office of Fair Trading

Pinsent Masons LLP

J Sainsbury plc

Tesco plc

Traidcraft

Waitrose Limited

Independent Supplier

Main changes to draft statutory guidance issued for consultation

Paragraph	Detail
General	Conforming references to retailers listed in the Order and covered by the Act throughout to “large retailers”. See also paragraph 3.
General	Clarifying how the Adjudicator will deal with issues raised, complaints and information received, and referring to the formal dispute escalation process set out in Article 11 of the Order. See also paragraph 7.
1	Clarification that the Adjudicator’s role is also to monitor compliance.
5	Minor clarification of description of statutory functions.
6	Minor clarification on informal practice.
7	Clarification that it is not a requirement for suppliers to contact Code Compliance Officers about practices covered by the Code.
15*	Removed. The Adjudicator will consider each case on its merits and judge the extent on the impact on a case-by-case basis. (*numbering from consultation version.)
22*	Removed. This was not felt by many respondents to the consultation to be clear and, in particular, the wording about “sending a long-term message to retailers” was thought to be unhelpful. The remaining points have been added to the slightly changed wording of the preceding paragraph. (*numbering from consultation version.)
24	Further clarification about informal practice.
25	Clarification of the statutory duty on the Adjudicator to keep information provided in the course of an investigation confidential.
37	Expanded to set out indicative duration of a review of up to 12 months.
40	Clarification that the Adjudicator is highly unlikely to launch an investigation based on a single complaint.
44	Clarification on when an investigation may be stopped.
69	Minor clarification on financial penalty notices.
72	Clarification made on why the income from penalties cannot be used for compensation or to cover supplier costs.
73	Clarification that financial penalties will be additive and not deductive from the maximum penalty.
75	Clarification of types of comments that will be considered on a draft investigation report.
76	Clarification that people providing supply-side information will not be identified in any investigation report.
	Process diagrams have been removed from the guidance document and will instead be made available in revised form on the GCA website. This will allow them to be amended from time to time as processes evolve further and to sit alongside other process guidance on e.g. arbitration and appeals, in due course. Also added to the website are revised guidelines and forms for raising issues with, or reporting information to, the Adjudicator.

Consultation principles

The consultation was conducted in line with the Government's key consultation principles and further information on these is available on the gov.uk website at: <https://www.gov.uk/government/publications/consultation-principles-guidance>

The Groceries Code Adjudicator

Further information on the GCA can be found at: www.gov.uk/gca

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