



Brand Briefing

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GSCOP: The UK's approach to tackling unfair trading practices

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BACKGROUND

Unfair trading practices appeared on the radar of the UK's Competition Commission (CC) during an investigation in 2000 into the leading supermarkets. The investigation, prompted by a concerns over prices and the impact of supermarkets on the high street, found a range of practices that supermarkets applied to suppliers, 27 of which were found to be anti-competitive and against the interests of consumers. The CC saw the potential for a code of practice to be a remedy.

TIMELINE

2000 The CC's [report](#) analysed 52 practices applied by major supermarkets on their suppliers, finding that 5 supermarkets, each with at least an 8% share of purchases, had the buyer power to affect the competitiveness of suppliers.

In outlining a code as the remedy, the CC dismissed a voluntary approach, opting instead for the 5 affected supermarkets to give binding undertakings to comply. The code itself was to be developed by retailers and suppliers and approved by the Office of Fair Trading (OFT) as meeting the CC's concerns.

2002 The Supermarkets Code of Practice (SCOP) was introduced, with an obligation on the OFT to report annually on its performance. The Code required supermarkets to negotiate in good faith and if disputes could not be resolved after 90 days, they were to go to mediation.

2004 The first review found a widespread belief the Code was not working but with no hard evidence, no mediations and no information from suppliers or their associations on breaches. Dissatisfaction amongst suppliers was driven by a fear of complaining and vague wording of the Code, notably the meaning of 'reasonableness'.

The OFT, finding that "the Code is not working effectively", opted to undertake a further review and audit of supermarkets' records.

2005 The independent audit revealed that supermarkets were largely complying with SCOP though there was concern over requests for lump sum payments. Suppliers however had not complained. The OFT recommended the Code remain unchanged but be used more effectively and declined to refer supermarkets for further competition scrutiny. The process of this review was subject to legal appeal, prompting the OFT to withdraw its decision.

- 2006 Following further consultation, the OFT announced the referral of the supply of groceries by retailers for a market investigation by the CC.
- 2007 The CC published a working paper reviewing SCOP, finding that there had been 17 complaints since its establishment affecting all supermarkets covered. No complaint resulted in an adverse finding by the OFT, for a variety of reasons.
- 2008 The CC published its [final report](#), concluding that the anti-competitive practices identified in 2000 persisted, transferring excessive risks and unexpected costs to suppliers. This harmed consumers as it inhibited suppliers' investment in quality, choice and innovation. Its remedy was a stronger code of practice, the Groceries Supply Code of Practice (GSCOP), and it sought undertakings from retailers to set up an ombudsman to oversee it. If such undertakings were not forthcoming, Government should establish an ombudsman with the power to fine. [Note: the CC had the authority to impose a code but not an ombudsman funded by retailers.]
- 2009 The CC published the [GSCOP Order](#), at the same time announcing it had been unable to secure undertakings from retailers to establish an ombudsman. It therefore made a formal recommendation to Government to set one up as quickly as possible.
- 2010 GSCOP came into force on 4 February, overseen by the OFT in the absence of an ombudsman.
- 2011 Government published a draft Groceries Code Adjudicator Bill for consultation.
- 2012 The Groceries Code Adjudicator Bill received its First Reading in Parliament.
- 2013 The [Groceries Code Adjudicator Act](#) became law in May. The GCA was to be funded by the 10 designated retailers and a provision to levy fines was included. Christine Tacon was appointed as the first Groceries Code Adjudicator (GCA). In December her powers came into full force, with the exception of the power to fine.
- 2014 The GCA published case studies, guidance, a quarterly newsletter and her first [annual report](#). She launched the annual supplier survey and held her first conference.
- 2015 The GCA launched an investigation into Tesco, the UK's largest retailer, specifically looking at delays in payment and charges for better shelf positioning.
- Parliament granted the GCA the power to fine up to 1% of a retailer's annual UK turnover, putting in place the final element of the remedy recommended by the CC in 2008.
- 2016 The GCA found Tesco had seriously breached GSCOP, ordering the retailer to make significant changes in the way it dealt with payments to suppliers. Because the investigation was launched prior to the introduction of her fining powers, no fine could be levied. The GCA imposed a charge of £1 million on Tesco to cover the cost of her investigation. Tesco accepted the findings and said it would act on them and report progress. No finding was made on charges for shelf positioning though she undertook to, and did, consult further, publishing [her findings](#) in 2017.

GSCOP – KEY FEATURES

The GSCOP Order

This underpins and includes GSCOP and applies to 10 designated grocery retailers. The CC found that all retailers and wholesalers in some instances had buyer power but, in the interests of proportionality, the remedy would only apply to retailers with annual grocery sales over £1 billion.

Only relationships between the 10 retailers and their direct suppliers are covered (irrespective of where in the world those direct suppliers are based). It does not cover indirect suppliers who may be affected were any unfair practices passed up the supply chain. Indirect suppliers may however pass information and evidence to the GCA.

Groceries are defined as food, pet food, drinks, cleaning products, toiletries and household goods.

The Order (which is enforced by the competition authority, now the Competition and Markets Authority (CMA)), requires the designated retailers to do certain things:

- The Code must be incorporated into all supply agreements. In this way, compliance with the Code becomes a matter of contract law. A supplier's terms and conditions may apply, in which case these should incorporate the Code too;
- All agreements, including any changes to agreements, must be recorded in writing. Any failure by a retailer to do this would be a breach of the Order;
- A retailer must provide a supplier with a notice, separate to the supply agreement, setting out:
 - Its obligations not to require, directly or indirectly, actions in relation to marketing costs, wastage, payments, promotions, changes to supply chain procedures and tying. It is for the retailer to demonstrate it has not required an action;
 - The identity and contact details of the Senior Buyer nominated by each retailer;
 - The retailer's obligations to allow a supplier to escalate a decision of a buyer to the Senior Buyer for review;
 - The identity and contact details of the Code Compliance Officer nominated by each retailer;
 - The mechanism for the supplier to provide feedback to the retailer;
 - The procedure relating to de-listing;
 - The dispute resolution procedure.
- Information must be supplied to the CMA to allow the operation of the Order to be monitored;
- Buying teams must be trained within a month of joining and retrained annually;
- Each financial year a report on compliance must be sent to the CMA, copied to the GCA. A summary of this report, giving an overview of breaches or alleged breaches, steps taken to ensure compliance (including training and guidance), disputes and the outcome of such disputes, must be published in the retailer's annual company report. If it does not produce such a report, the information must be published clearly and prominently on the retailer's website.

The Order imposes no duties on suppliers.

The Order also sets out a dispute resolution procedure for suppliers to resolve Code-related disputes with the retailer.

The Groceries Supply Code of Practice

The Code itself (which is monitored and enforced by the GCA) has an over-arching principle of fair dealing, requiring designated retailers to deal fairly and lawfully with suppliers, conducting trading relationships in good faith, without duress and recognising suppliers' need for certainty over the risks and costs of trading, particularly in relation to production, delivery and payment. This is not a wide provision, but rather gives context for the interpretation of the Code's specific provisions.

The specific provisions cover:

- variations of supply agreements and supply chain procedures;
- payment delays; charges for marketing costs, shrinkage, wastage and being a supplier; compensation for forecasting errors; and tying of third party goods and service;
- promotions, including payments for better positioning and the need for care when ordering promotions;
- other duties, such as charges for consumer complaints and duties relating to de-listing.

Groceries Code Adjudicator (GCA)

The GCA is established by [Act of Parliament](#), the role being to enforce GSCOP and encourage compliance with it. The Act lays out how this role is to be carried out:

- arbitration of disputes: it is understood there have been 4 disputes since the GCA took office in 2013. Arbitrations are confidential so no further information is available;
- investigations: these can only be carried out when the GCA has reasonable grounds to suspect the Code has been broken and must be followed by the publication of a report on the outcome. It has been accepted that trade associations have a role in bringing matters to the attention of GCA justifying an investigation. She has the power to require anyone to provide documents and information. If a breach is found, three enforcement measures are available:
 - make recommendations
 - require information to be published (for example in the national press)
 - financial penalties, up to 1% of UK turnover.
- Advice and guidance: the GCA can give specific advice to suppliers or retailers and can publish general guidance. Guidance must be published on investigations, the criteria for enforcement and determining any financial penalty.

The GCA must report annually and the role is reviewed every 3 years. There are specific provisions to prevent disclosure of information about arbitrations or anything that may infer someone has complained about a retailer's compliance.

The GCA's office is funded by a levy imposed on the 10 designated retailers. The initial budget was set at £800,000 per year. The GCA is part-time, working 3 days a week, and has a staff of 5 including a Head of Policy and Operations and a Chief Legal Adviser.

GSCOP IN OPERATION

Since the GCA took up her role in 2013, there are some notable insights into how she sees and performs her role and how GSCOP is working:

- Code Compliance Officers: the GCA works closely with retailers' Code Compliance Officers, meeting them both individually and collectively on a regular basis. She raises issues with them and seeks resolution of problem areas, as a result addressing more potential breaches than would be possible were she to rely solely on arbitrations and investigations;
- 5 priority areas: The GCA publicises her priority areas which provide a focus for her work at any one time. As one priority area is addressed, another will tend to take its place;
- Culture change: The GCA considers there to be more to an efficient, fair supply chain than compliance with GSCOP. The culture within retailers must be aligned too so that, for example, buyers are not incentivised to act in a way that may be contrary to GSCOP. To achieve culture change, the GCA meets regularly with the Heads of retailers' Audit Committees;

- Annual supplier survey: This [quantitative survey](#) gives valuable insights into suppliers' awareness, attitudes and experiences, along with their perceptions of retailers' compliance;
- Trade associations: the GCA recognises their value for keeping their members informed, providing training and as a source of intelligence on practices in the marketplace. This latter role is particularly important in a climate where market insights are essential but suppliers are reluctant to come forward. Information from associations on potential breaches is given particular weight when it gives an aggregated picture across a range of suppliers. The GCA meets trade associations annually;
- Transparency: The GCA holds an annual conference and publishes the minutes of her meetings with Code Compliance Officers. Suppliers are therefore aware of her priorities and, with the case studies and reports she publishes, how she is interpreting GSCOP;
- Training: While retailers are required under the Order to train buying teams annually, there is no such requirement on suppliers and even today, 5 years after the introduction of GSCOP, nearly two thirds have not been trained, according to the most recent supplier survey. As a result the GCA has been promoting strongly the need for supplier training;
- Promotion: the GCA has been active in reaching out to suppliers, meeting trade associations and their members, holding regional seminars and speaking at events. Despite these efforts and media coverage, supplier awareness of GSCOP remains low (28% of direct suppliers completing the last supplier survey rated their understanding of GSCOP as 'poor' or 'unaware').

THE BRITISH BRANDS GROUP

The British Brands Group, a trade association of brand owners of all sizes covering a wide range of categories, has a mission to build in Britain the optimum climate for brands. Since 2001 it has had a mandate from members to address abuses of buyer and unfair trading practices.

Since the introduction of GSCOP, the Group has undertaken a range of supportive initiatives:

1. It introduced the first training module for all suppliers and has introduced a refresher course to help suppliers keep up to date. Retailers are required to train their staff but there is no such requirement for suppliers to have the knowledge and skills to match.

The Group has now run over 70 courses, both open courses for multiple suppliers and closed, tailored courses for individual companies. The GCA and her staff have all attended. Apart from enhancing suppliers' skills, the training has raised the credibility of the Group as competent to comment on compliance generally and on specific practices;

2. It arranges both group and private meetings between the GCA and members to support the exchange of information on market conditions, suppliers' concerns and retailer compliance;
3. Annually it carries out and publishes a critical analysis of retailers' annual compliance reports;
4. It has put in place a free advice line and, if necessary, free expert counsel for members when there are instances of potential non-compliance.

These initiatives have contributed to the overall success of GSCOP since the appointment of the GCA and have supported her in bringing about a more GSCOP-compliant market. Importantly, GSCOP gives suppliers a relatively neutral language to discuss with their retail customers issues that are possibly not GSCOP-compliant without damaging trading relationships. The built-in escalation process, retailers' active focus on and desire for compliance and professionalism on both sides all help to resolve issues early, with minimal interference from outsiders such as lawyers and indeed the GCA.

GSCOP is alive in the market. The Group's members are now reasonably satisfied that the practices identified by the CC as transferring excessive risks and unexpected costs to suppliers to the detriment of consumers are less in number and degree and more capable of sensible resolution than was previously the case.

The market is also evolving. A number of vectors are moving the market more towards an EDLP model. Tesco's issues in relation to promotional payments, the pressure from regulators for pricing transparency on high-low offers, competitive pressure from heavy discount chains and the impact of GSCOP in preventing demands for lump sums to balance the books are all having an impact.

Although suppliers of branded goods may see these changes as positive, it does require a great deal of faith that, having exposed the net net net price to retail customers, further demands for support will not be forthcoming. Although GSCOP cannot completely dispel such fears, it does create a climate in which demands can be assessed and, if need be, resisted as not compliant when they are excessive, unexpected and / or retrospective.

LOOKING FORWARD

The Group's members therefore say that the GSCOP remedy, at least since being given teeth with the appointment of the GCA and the recent granting of fining powers, is working effectively to address and mitigate the adverse effects of strong retailer power, the abuse of which was harming both them and consumers.

As an observation, in helping to reduce transactional aspects of the retailer-supplier relationship and thereby enhancing the partnership aspects, it has been good for retailers also. At the very least it is in the process of creating the much-beloved level playing field in relation to retailer behaviour. Put more cynically, none of the major retailers need be concerned that its competitors are gaining competitive advantage by being better at abusing suppliers.

So we ask for "more of the above". The scheme is still in its infancy. It was a slow burn from the recognition in 2000 that abuses cause distortions and costs that harm consumers to where we are now. The GCA has only been in office four years with only one investigation under her belt and her resources continue to be limited but the remedy seems to be working. It is having a real impact on a well-established, highly concentrated and notoriously competitive market...no mean feat.

However, there are straws in the wind that arouse potential concern and which the Group is monitoring before adopting a position, should competitive and antitrust considerations allow.

1. Mission creep. There are demands, notably from farming interests, for the scheme to be extended to cover the whole supply chain i.e. including primary suppliers and intermediaries in its scope. Just extending the Code from the 10 designated retailers to their 8,000 direct suppliers would be a step-change in scale. Even were resources available to the GCA, this would expand significantly a role established as part of a specific competition remedy to a problem found on hard evidence. The existence of a successful model of light touch regulation in part of the grocery market does not mean that it should, or even practically could, be loaded with more work without diminishing its effectiveness. Furthermore, where demands for an extended role are led by concerns over wholesale prices, GSCOP's provisions offer little help.
2. Duty to trade fairly. This GSCOP provision sets a good context for how the rest of the Code should be interpreted and understood practically. However it is writ large and, as GSCOP is statutorily part of trading agreements, has become part of the contract law of this sector. Several commentators have discussed using this provision's broad terms to bring more trading practices within the ambit of GSCOP, the jurisdiction of the GCA and ultimately the courts. This

is potentially another form of mission creep, carrying the risk of diluting efforts against those original practices where a consumer welfare interest has been identified. There may also be unexpected consequences to the way trade is conducted in an essential, large and hugely successful part of the economy.

3. Category captaincy. Following the investigation into Tesco, the GCA has referred category captaincy to the CMA and has consulted on its GSCOP implications. This followed her finding that some suppliers were paying significant sums to be category captain, with implications for small, less well-resourced suppliers, hence the referral to the CMA, and may amount to an indirect payment for better shelf position, hence the GSCOP dimension. There was insufficient evidence to make a regulatory intervention, though retailers were urged to have policies in place on involving suppliers in both category management and range reviews. The subject remains under review and it is just hoped that uncertainty is not cast on a complex business practice scrutinised many times by many competition regulators and been found to benefit consumers and improve efficiency in all but the most egregious cases.

In the UK, retailers take the Code very seriously. In turn, we are encouraging suppliers to understand the Code, develop the skills to use it constructively and to embrace it in the spirit of improved trading relations that benefit both parties. This in turn will enhance consumer welfare that inevitably comes from more efficient supply chains.

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