



Draft Groceries Code Adjudicator Bill



Draft Groceries Code Adjudicator Bill

Presented to Parliament
by the Secretary of State for Business, Innovation and Skills
By Command of Her Majesty
May 2011

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This document is related to the Government's proposals to establish a Groceries Code Adjudicator. It contains a draft Bill and Explanatory Notes. It is intended for pre-legislative scrutiny by Parliament.

INTRODUCTION

1. These Explanatory Notes relate to the Groceries Code Adjudicator Bill as published in draft on 24th May 2011. They have been provided by the Department for Business Innovation and Skills to assist the reader of the draft Bill and to help inform debate on it. They do not form part of the draft Bill. References to “the Bill” in these Explanatory Notes are to the draft Bill.

2. The Notes are to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. Where a clause or part of a clause does not seem to require any explanation or comment, none is given.

BACKGROUND AND OVERVIEW

Reports of the Competition Commission

3. This Bill creates a Groceries Code Adjudicator (Adjudicator).
4. Eleven years ago, the Competition Commission published a report which raised concerns about the relationship between large supermarket chains and their suppliers, who include farmers and small-scale producers. The report showed that suppliers felt that some practices carried out by these large retailers could reduce the incentives and ability of suppliers to invest and innovate in new product lines or production processes. The concerns raised by the Competition Commission included retailers demanding retrospective charges from suppliers and altering contractual arrangements.
5. In response, the Commission produced a Supermarket Code of Practice to regulate the market. However, over time it became clear that there was more that could be done. The Office of Fair Trading therefore initiated a new investigation through the Competition Commission in May 2006. In April 2008, the Competition Commission published its report.
6. The Competition Commission were concerned that some practices by big supermarkets were still having an anti-competitive effect, harming the long term interests of consumers. This led to a new Code of Practice – the Groceries Supply Code of Practice (Groceries Code) – which is designed to improve the relationship between big retailers and their suppliers by preventing certain practices from occurring. The Groceries Code is established by, and is part of, the Groceries (Supply Chain Practices) Market Investigation Order 2009 (Groceries Supply Order).

The Groceries Code

7. The new Groceries Code currently applies to all retailers with a turnover of more than £1 billion in groceries in the United Kingdom. There are ten such retailers (referred to in the Bill as large retailers) in the UK.
8. The Groceries Code obliges these large retailers to do the following things:
 - deal fairly and lawfully with their suppliers;
 - not vary supply agreements retrospectively, except in circumstances beyond the retailer's control which are clearly set out in the supply agreement; and
 - pay suppliers within a reasonable time.
9. In addition, the Groceries Code:
 - limits large retailers' power to make suppliers change their supply chain procedures;
 - limits large retailers' power to make suppliers pay marketing costs and compensation for wastage;
 - requires large retailers to pay compensation for forecasting errors in certain circumstances;

- limits large retailers' power to make suppliers obtain goods or services from third parties who pay the retailer for that arrangement;
- limits large retailers' power to make suppliers pay them for stocking their products;
- limits large retailers' power to make suppliers pay for promotions;
- requires large retailers to take due care when ordering for promotions;
- limits large retailers' power to make suppliers pay for resolving customer complaints; and
- limits large retailers' power to "de-list" suppliers – in other words, to stop dealing with a supplier or make significant reductions to the volume of purchases from a supplier.

The Groceries Supply Order

10. The Groceries Supply Order requires large retailers to incorporate the Groceries Code into agreements for the supply of groceries for resale in the United Kingdom and to supply a written copy of the agreement and certain other information to the supplier. This means that if a large retailer breaches the Groceries Code it will be in breach of its contract with the relevant supplier, who may then have contractual remedies against the retailer such as a claim for damages.

11. Large retailers are required by the Groceries Supply Order to train their buying teams about the order and the Groceries Code. They must also appoint a compliance officer to act as a point of contact with suppliers and to prepare an annual compliance report for the Office of Fair Trading.

12. The Groceries Supply Order also includes a dispute resolution scheme. A supplier who believes that a large retailer has breached the Groceries Code may notify the retailer's compliance officer. If the dispute is not resolved within 21 days then, at any time within four months of the dispute arising, the supplier may refer the dispute to arbitration. The Bill requires that such an arbitration will be carried out by the Groceries Code Adjudicator or another person appointed by him or her.

13. The Groceries Supply Order protects direct suppliers, based anywhere in the world, to the large retailers.

14. The Groceries Supply Order (apart from the Groceries Code) will not be enforced by the Groceries Code Adjudicator. The Office of Fair Trading is responsible, under the Enterprise Act 2002, for monitoring and reviewing the operation of the order. The Groceries Supply Order itself includes a power for the Competition Commission to direct large retailers and others to take or refrain from particular action to comply with the order.

The need for an adjudicator

15. The Groceries Supply Order and new Groceries Code came into force on 4th February 2010. However, the Competition Commission considered that the Groceries Code would be more effective with an ombudsman or adjudicator in place to enforce it – in effect, to act as a referee and police the new rules. This was because many small suppliers were worried that raising disputes against retailers would jeopardise future commercial agreements with these companies.

16. After failing to gain sufficient agreement from the large retailers to establish such an enforcer voluntarily, the Competition Commission recommended the last Government to take the necessary steps to establish an Adjudicator as soon as was practicably possible. The consultation carried out by the last Government has been carried forward by the Coalition Government and is the basis for this Bill.

Purposes of the Bill and of the Adjudicator

17. The sole purpose of the Adjudicator will be to enforce and oversee the Groceries Code in the ways described in the Bill. This will help to remedy some of the imbalance between large retailers and suppliers which was reported on by the Competition Commission. The report of the Competition Commission also considered that this would operate in the long term interests of consumers, because the Groceries Code would help to encourage innovation and investment by suppliers.

18. In order to help deliver these objectives, the Adjudicator established by the Bill will do the following things:

- arbitrate disputes between large retailers and their direct suppliers, or appoint another person to do so. This will be part of the dispute resolution scheme provided by the Groceries Supply Order;
- investigate possible breaches of the Groceries Code by large retailers;
- where an investigation finds that a large retailer has breached the Groceries Code, decide whether to make recommendations to the retailer, require it to publish information about the investigation or (if the Secretary of State adds a power to do so) impose a financial penalty on the retailer;
- publish guidance on when and how investigations will proceed and how these enforcement powers will be used;
- advise large retailers and suppliers on the Groceries Code;
- report annually on his or her work; and
- recommend changes to the Groceries Code.

How the Adjudicator will be funded and supervised

19. The Adjudicator will be funded by a levy to be paid by the large retailers. The Secretary of State will also have the power to make grants or loans to the Adjudicator. This power will help ensure that the Adjudicator is adequately resourced to undertake his or her functions.

20. The Secretary of State will review the Adjudicator's performance every three years and will consider the effectiveness of the Adjudicator and whether the office should continue. The Secretary of State will also have the power to transfer the Adjudicator's functions to a public body. This will give flexibility if a body which is more appropriate to carry out the functions is identified or established.

TERRITORIAL EXTENT AND APPLICATION

21. The draft Bill would extend to, and apply in, the United Kingdom.

Draft Groceries Code Adjudicator Bill

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EXPLANATORY NOTES

COMMENTARY ON CLAUSES

Clause 1: The Adjudicator

22. This clause establishes a Groceries Code Adjudicator. The Adjudicator will be a statutory office holder appointed by the Secretary of State. Further provision about the Adjudicator is in Schedule 1.

Clause 2: Arbitration

23. Article 11 of the Groceries Supply Order provides that, where a dispute arises under the Groceries Code and is not resolved to the satisfaction of the supplier within 21 days, the supplier may make an arbitration request. The large retailer must submit to that request.

24. The Groceries Supply Order envisages that an arbitration requested by the supplier will be administered by the Adjudicator (referred to in the Groceries Supply Order as the Ombudsman).

25. Where a supplier refers a dispute to arbitration, clause 2 therefore requires the Adjudicator either to act as arbitrator or to appoint another person to do so. The Government expects that in most circumstances it will be the Adjudicator who will arbitrate such disputes. However, the Adjudicator could appoint another person where a conflict of interest may exist (for example where the Adjudicator has previously advised on or investigated an issue which is relevant to the dispute) or where the Adjudicator does not have enough time to act as the arbitrator. Under Article 11 of the Groceries Supply Order, all costs of the arbitration will be borne by the large 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.

26. Article 11 of the Groceries Supply Order does not prevent large retailers from referring a dispute under a supply agreement to arbitration. Clause 2(2) allows the Adjudicator to accept appointment as arbitrator in such a case.

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Create a Groceries Code Adjudicator and confer functions on the Adjudicator.

BE IT ENACTED by the Queen’s most Excellent Majesty, by and with the advice and 5
consent of the Lords Spiritual and Temporal, and Commons, in this present
Parliament assembled, and by the authority of the same, as follows: –

Introduction

1 The Adjudicator

There is to be a Groceries Code Adjudicator (see Schedule 1). 10

How does the Adjudicator arbitrate disputes?

2 Arbitration

- (1) If a supplier refers a dispute to arbitration under the Groceries Supply Order, the Adjudicator must either – 15
- (a) arbitrate the dispute; or
 - (b) appoint another person to arbitrate.
- (2) If a large retailer refers a dispute to arbitration under a supply agreement, the Adjudicator may accept appointment as the arbitrator.

27. As regards England and Wales and Northern Ireland, section 94 of the Arbitration Act 1996 broadly applies the provisions of Part 1 of that Act to arbitrations carried out under the Groceries Supply Order and this Bill, except so far as those provisions are inconsistent with the Groceries Supply Order or the Bill. As regards Scotland, section 16 of the Arbitration (Scotland) Act 2010 will broadly have a similar effect in applying the Scottish Arbitration Rules, except so far as inconsistent. The drafting of the Bill assumes for the present that section 16 will be commenced before the Bill is enacted.

Clause 3: Information about arbitration

28. This clause enables the Adjudicator to obtain information on an arbitration carried out by an alternative arbitrator to the Adjudicator. Together with information gained by the Adjudicator by acting as arbitrator, this helps to supplement the Adjudicator's knowledge and experience of the operation of the Groceries Code, including those aspects which give rise to disputes. This should help the Adjudicator carry out functions such as preparation of the annual report and giving advice and guidance on the Groceries Code. However, clause 19 generally prevents the Adjudicator disclosing information relating to an arbitration which would identify a party to the arbitration.

Clause 4: Investigations

29. This clause enables the Adjudicator to carry out an investigation if the Adjudicator has reasonable grounds to suspect that a large retailer has breached the Groceries Code. The Adjudicator can only consider certain information when deciding whether to start an investigation: information from suppliers (including both direct and indirect suppliers) and information that is publicly available. The Adjudicator has no power to require people to provide information for the purpose of deciding whether to commence an investigation.

30. Before carrying out the first investigation the Adjudicator must publish guidance under clause 13(1). This will ensure that large retailers and suppliers know in advance how the Adjudicator proposes to go about investigations generally.

Clause 5: Investigations: information

31. This clause enables the Adjudicator to consider any appropriate information when conducting an investigation. It confirms that the information does not need to be limited to those sources which enable the Adjudicator to initiate an investigation which are specified in clause 4. Although information referred to in clause 4 may indicate that certain types of practice by large retailers require investigation, the scope of a resulting investigation, once commenced, is not intended to be limited by that information. It is unlikely that the sources specified in clause 4 would be sufficient in themselves to make findings at the conclusion of an investigation. In particular, the Adjudicator is likely to need to obtain information from the relevant large retailers. Similarly, it is not intended that the findings of an investigation need be limited to the possible breaches that gave the Adjudicator reasonable grounds for suspicion as referred to in clause 4(1).

32. Schedule 2 gives the Adjudicator powers to obtain information for the purposes of an investigation.

3 Information about arbitration

- (1) If the Adjudicator appoints another person as arbitrator under section 2(1)(b), the Adjudicator may require the arbitrator, or a party to the dispute, to provide information to assist the Adjudicator in carrying out functions under this Act.
- (2) The Adjudicator may enforce the requirement to provide information by 5 bringing civil proceedings to obtain—
 - (a) in England and Wales or Northern Ireland, an injunction; or
 - (b) in Scotland an order for specific performance under section 45 of the Court of Session Act 1988.

How does the Adjudicator carry out investigations and enforce their findings? 10

4 Investigations

- (1) If the Adjudicator has reasonable grounds to suspect that a large retailer has broken the Groceries Code, the Adjudicator may carry out an investigation (but only after the guidance about investigations required by section 13(1) has been published). 15
- (2) In deciding whether to carry out an investigation the Adjudicator may consider only one or both of the following—
 - (a) information provided by a supplier;
 - (b) information that is publicly available.

5 Investigations: information 20

- (1) When carrying out an investigation the Adjudicator may consider any information that it seems appropriate to consider.
- (2) In particular, the Adjudicator is not limited to considering the information mentioned in section 4(2).
- (3) Schedule 2 confers powers to obtain information. 25

Clause 6: Investigation reports

33. This clause requires the Adjudicator to publish a report at the end of an investigation.

34. The report must specify any findings and any action taken or proposed. The report does not have to disclose the identity of the large retailer. This is because there may be cases where the Adjudicator considers that the objectives of the Groceries Code can be effectively achieved whilst dealing with the relevant retailer privately. A large retailer must be given an opportunity to comment on a draft of an investigation report in which it is identified. This should give that large retailer an opportunity to correct errors and give any views to the Adjudicator before publication.

35. Where an investigation finds that a large retailer has breached the Groceries Code, and this breach has affected a particular supplier, the finding of the investigation will not constitute a determination of liability of the retailer to that supplier on which the supplier can rely. The supplier would need to make its own claim against the retailer in order to obtain a remedy.

Clause 7: Investigations: forms of enforcement

36. If the Adjudicator concludes that a large retailer has broken the Groceries Code it may make recommendations under clause 8, require information to be published under clause 9 or impose financial penalties under clause 10 (but financial penalties may only be used if the Secretary of State has made an order allowing this – see also Schedule 3).

Clause 8: Investigations: enforcement using recommendations

37. If the Adjudicator concludes that a large retailer has breached the Groceries Code, he or she can recommend what the large retailer should do to comply with the Groceries Code. The Adjudicator is then required to monitor whether recommendations are followed and report on this in the annual report under clause 15. Recommendations are likely to be used in circumstances where the breach of the Groceries Code is less serious. There is no express sanction for failure to comply with a recommendation, but failure might be taken into account in a future arbitration or investigation.

Clause 9: Investigations: enforcement using requirements to publish information

38. Clause 9 allows the Adjudicator to require a large retailer who the Adjudicator is satisfied has breached the Groceries Code to publish information about the Adjudicator's investigation, including its outcome. The Adjudicator will need to inform the retailer in writing of the information required to be published, the manner in which it must be published and the time by which it must be published. For example, the Adjudicator could require publication by press release, through the large retailer's annual report or website or through a newspaper advertisement. The information could then be taken into account by those dealing with that large retailer in future.

6 Investigation reports

- (1) Following an investigation the Adjudicator must –
 - (a) publish a report on the outcome of the investigation; and
 - (b) consider whether to use any of the enforcement powers mentioned in section 7. 5
- (2) An investigation report must, in particular, specify –
 - (a) any findings that the Adjudicator has made; and
 - (b) any action that the Adjudicator has taken or proposes to take.
- (3) It is not necessary for an investigation report to identify the retailer concerned.
- (4) If a retailer is identified in a report, the retailer must have been given a¹⁰ reasonable opportunity to comment on a draft of the report before publication.

7 Investigations: forms of enforcement

- If, as a result of an investigation, the Adjudicator is satisfied that a large retailer has broken the Groceries Code, the Adjudicator may take one or more of the following enforcement measures – 15
- (a) make recommendations;
 - (b) require information to be published;
 - (c) impose financial penalties.

8 Investigations: enforcement using recommendations

- (1) If the Adjudicator chooses to enforce through making recommendations, that²⁰ means recommending what the large retailer should do in order to comply with the Groceries Code.
- (2) The Adjudicator must monitor whether the recommendations are followed.

9 Investigations: enforcement using requirements to publish information

- (1) If the Adjudicator chooses to enforce through requiring information to be²⁵ published, that means requiring the large retailer to publish information relating to the investigation.
- (2) The publication requirement is imposed by giving written notice to the large retailer specifying –
 - (a) what information is to be published; 30
 - (b) how it must be published; and
 - (c) the time by which it must be published.
- (3) The Adjudicator may enforce the requirement to publish information by bringing civil proceedings to obtain –
 - (a) in England and Wales or Northern Ireland, an injunction or any other³⁵ appropriate remedy or relief; or

Clause 10: Investigations: enforcement using financial penalties

39. Financial penalties are the most severe of the enforcement powers available to the Adjudicator following an investigation. They may not be necessary in order to secure a high level of compliance. This power therefore applies only if the Secretary of State has authorised the Adjudicator to impose financial penalties. Further provision about authorisation is in Schedule 3 to the Bill. Any authorisation would be given generally, not on a case by case basis.

40. If that authorisation is given, the Adjudicator will be able to impose a financial penalty on a large retailer who the Adjudicator is satisfied has breached the Groceries Code. The Adjudicator would need to specify in writing to the large retailer the reasons for the penalty, the amount of the penalty and the period within which it must be paid. The large retailer could appeal to the court against the imposition of the penalty, whether on grounds that it claims not to be in breach of the Groceries Code or otherwise. The retailer could also appeal against the amount of a penalty. Financial penalties would be paid into the Consolidated Fund and so would not be used to support the Adjudicator's activities.

Clause 11: Recovery of investigation costs

41. This clause provides that the Adjudicator may require the large retailer to pay some or all of the costs of an investigation if the Adjudicator finds that the retailer has breached the Groceries Code. The ultimate cost of the investigation would otherwise be likely to fall on all large retailers, who are required to pay the levy under clause 20, whereas clause 11 enables some or all of that cost to be recovered from a culpable large retailer.

42. Where a supplier has made a complaint which was found to be vexatious or wholly without merit, the Adjudicator may require that supplier to pay some or all of the costs of a resulting investigation. This is intended to be a high threshold but is intended, in particular, to deter suppliers from making false complaints or using the Adjudicator for tactical reasons in contract negotiations.

43. The Adjudicator must inform the large retailer or supplier of the requirement to pay costs in writing and should include the reasons for imposing the requirement, the amount to be paid and the time period within which it must be paid. The large retailer or supplier could appeal the decision to the court.

- (b) in Scotland, an order for specific performance under section 45 of the Court of Session Act 1988 or any other appropriate remedy or relief.

10 Investigations: enforcement using financial penalties

- (1) The Adjudicator may enforce through imposing financial penalties only if an order made by the Secretary of State is in force authorising the Adjudicator to do so (see Schedule 3). 5
- (2) If the Adjudicator chooses to use this method of enforcement, that means imposing a financial penalty on the large retailer.
- (3) The financial penalty is imposed by giving the large retailer written notice specifying – 10
 - (a) the grounds for imposing the penalty;
 - (b) the amount of the penalty; and
 - (c) the period within which it must be paid.
- (4) The large retailer may appeal against the imposition of a financial penalty or its amount – 15
 - (a) to the High Court, in England and Wales or Northern Ireland; or
 - (b) to the Court of Session, in Scotland.
- (5) Financial penalties under this section are recoverable by the Adjudicator as a debt.
- (6) Financial penalties received by the Adjudicator must be paid into the 20 Consolidated Fund.

11 Recovery of investigation costs

- (1) The Adjudicator may require a large retailer to pay some or all of the costs of an investigation (including any costs incurred in exercising the enforcement powers) if satisfied that the retailer has breached the Groceries Code. 25
- (2) The Adjudicator may require a supplier to pay some or all of the costs of an investigation if the Adjudicator carried out the investigation as a result of a complaint by the supplier which, the Adjudicator is satisfied, was vexatious or wholly without merit.
- (3) A requirement to pay costs is imposed by giving written notice specifying – 30
 - (a) the grounds for imposing the requirement to pay costs;
 - (b) how much is to be paid; and
 - (c) by when the costs are to be paid.
- (4) A person required to pay costs under this section may appeal against the imposition of the requirement or the amount to which it relates – 35
 - (a) to the High Court, in England and Wales or Northern Ireland; or
 - (b) to the Court of Session, in Scotland.
- (5) Costs required to be paid under this section are recoverable by the Adjudicator as a debt.

Clause 12: Advice

44. This clause allows the Adjudicator to give suppliers and large retailers, whether generally or individually, advice about any aspect of the Groceries Code. This power is likely to be exercised with a view to encouraging compliance with the Groceries Code.

Clause 13: Guidance

45. Clause 13 provides that, within six months of being established, the Adjudicator must publish guidance on (1) the criteria for deciding whether to carry out investigations, (2) the practices and procedures for investigations and (3) the criteria for using enforcement powers. This ensures that guidance is available before the coercive powers involved in investigations are exercised.

46. The Adjudicator may also publish additional guidance about practices and procedures to be followed in carrying out other functions and about any matter relating to the Groceries Code. For example, this power would enable the Adjudicator to give general guidance about the interpretation of a particular provision of the Groceries Code.

47. The Adjudicator must consult as appropriate before issuing any guidance. Guidance is not binding on any person but the Adjudicator must take it into account in carrying out functions. Therefore well advised large retailers and suppliers are themselves likely to consider any relevant guidance in complying and dealing with the Groceries Code because, for example, the guidance may be relevant when the Adjudicator is considering enforcement.

Clause 14: Recommendations to Office of Fair Trading

48. If the Adjudicator considers it appropriate for any changes to be made to the Groceries Code, he or she must make a recommendation to the Office of Fair Trading. The Office of Fair Trading is responsible under section 162 of the Enterprise Act 2002 for monitoring the Groceries Supply Order, which includes considering whether it should be amended.

Clause 15: Annual report

49. This clause provides that the Adjudicator must publish an annual report after the end of each reporting period and send it to the Secretary of State and the Office of Fair Trading. Reporting periods will end on 31st March. The annual report must include summaries of disputes which are referred to arbitration under the Groceries Supply Order, investigations conducted by the Adjudicator and the use of enforcement powers. Where the use of enforcement powers has included recommendations, the report should include an assessment of whether these have been followed. The Adjudicator has no coercive powers to obtain this information from large retailers, although one possibility is that Article 10 of the Groceries Supply Order is amended to require the information to be included in the large retailer's annual compliance report referred to in that Article. Where the necessary information is not

What advice, guidance and recommendations does the Adjudicator give?

12 Advice

The Adjudicator may give advice on any matter relating to the Groceries Code to suppliers or large retailers.

13 Guidance

5

- (1) The Adjudicator must publish guidance about—
 - (a) the criteria that the Adjudicator intends to adopt in deciding whether to carry out investigations;
 - (b) the practices and procedures that the Adjudicator intends to adopt in carrying out investigations; and 10
 - (c) the criteria that the Adjudicator intends to adopt in choosing whether to use the enforcement powers and which ones.
- (2) In addition, the Adjudicator may publish guidance about the practices and procedures that the Adjudicator intends to adopt in carrying out other functions. 15
- (3) The Adjudicator may publish guidance about—
 - (a) the application of any provision of the Groceries Code;
 - (b) steps that large retailers need to take in order to comply with the Groceries Code;
 - (c) any other matter relating to the Groceries Code. 20
- (4) Before publishing guidance under this section the Adjudicator must consult any persons he or she thinks appropriate.
- (5) The Adjudicator must publish the first guidance under subsection (1)(a), (b) and (c) within 6 months beginning with the day on which section 1 comes into force. 25
- (6) Where there is any guidance in force under this section, the Adjudicator must take account of it in carrying out functions.

14 Recommendations to Office of Fair Trading

If the Adjudicator considers it appropriate for any changes to be made to the Groceries Code, he or she must recommend them to the Office of Fair Trading. 30

What are the Adjudicator's reporting requirements?

15 Annual report

- (1) After the end of each reporting period the Adjudicator must prepare and publish a report describing what the Adjudicator has done during the period.
- (2) The report must include a summary of— 35
 - (a) disputes referred to arbitration under the Groceries Supply Order;
 - (b) investigations carried out by the Adjudicator; and

available, the Adjudicator can simply report this. The report must also include any recommendations made under clause 14 to amend the Code.

50. Each annual report should therefore contain information which is useful to the Office of Fair Trading in monitoring the Groceries Supply Order and the Secretary of State in reviewing the Adjudicator under clause 16, as well as to users of the Groceries Code generally. These reports are in addition to the annual accounts required under paragraph 15 of Schedule 1.

Clause 16: Review of the Adjudicator and guidance from Secretary of State

51. The Secretary of State is required to review the performance of the Adjudicator's functions approximately every three years, consulting interested parties and publishing a report of the findings. This is in line with the Government's better regulation objective that all regulators should be reviewed as to their effectiveness and whether they are achieving their objectives.

52. The Secretary of State may issue guidance to the Adjudicator following a review. The guidance will not bind the Adjudicator but he or she will need to take into account the guidance. For example, the Secretary of State might consider that enforcement powers might be exercised differently or that the Adjudicator should be more active in giving advice or guidance.

- (c) cases in which the Adjudicator has used the enforcement measures mentioned in section 7.
- (3) If the Adjudicator has made recommendations under section 8, the report must include—
 - (a) an assessment of whether they have been followed; or 5
 - (b) a statement that the Adjudicator does not have the necessary information to make that assessment.
- (4) The report must set out any recommendations that the Adjudicator has made to the Office of Fair Trading for changes to the Groceries Code.
- (5) As well as publishing the report, the Adjudicator must send a copy to— 10
 - (a) the Secretary of State; and
 - (b) the Office of Fair Trading.
- (6) In this section “reporting period” means—
 - (a) the period beginning with the day on which section 1 comes into force and ending with the following 31 March; and 15
 - (b) each successive period of 12 months.

How is the Adjudicator supervised?

16 Review of Adjudicator and guidance from Secretary of State

- (1) The Secretary of State must review the Adjudicator’s performance for each review period. 20
- (2) The first review period is the period ending on the first 31 March that is at least 3 years after section 1 comes into force.
- (3) Subsequent review periods are each successive period of 3 years after the first review period.
- (4) A review must, in particular— 25
 - (a) consider how much the Adjudicator’s powers have been exercised; and
 - (b) assess how effective the Adjudicator has been in enforcing the Groceries Code.
- (5) As soon as practicable after a review period, the Secretary of State must—
 - (a) publish a report of the findings of the review for that period; and 30
 - (b) lay a copy of the report before Parliament.
- (6) In carrying out a review, the Secretary of State must consult—
 - (a) the Adjudicator;
 - (b) the Competition Commission;
 - (c) the Office of Fair Trading; 35
 - (d) the large retailers;
 - (e) one or more persons appearing to the Secretary of State to represent the interests of suppliers;
 - (f) one or more persons appearing to the Secretary of State to represent the interests of consumers; and 40
 - (g) any other person the Secretary of State thinks appropriate.

Clause 17: Transfer of Adjudicator functions and abolition etc

53. The Secretary of State may transfer some or all of the Adjudicator's functions to a public body. This power (which is exercisable by order requiring approval by each House of Parliament – see clause 24) need not necessarily be exercised following a review under clause 16. The Government is currently consulting on merging the competition functions of the Office of Fair Trading and the Competition Commission to create a single Competition and Markets Authority. Should this body be created then one possibility is that the Adjudicator's functions could sit within this body. In exercising the power, the Secretary of State must consider whether the functions could be exercised effectively and with appropriate accountability to Ministers following any transfer. In the case of a transfer to a single Competition and Markets Authority, this might, for example, require the Secretary of State to consider appropriate separation of the Adjudicator's functions from the other functions of that authority.

54. The Secretary of State can abolish the Adjudicator in three circumstances. The first (which requires an order approved by each House of Parliament – see clause 24) is where a review by the Secretary of State (under clause 16) finds that the Adjudicator has not been sufficiently effective in enforcing the Groceries Code or that there is no longer a need for the Adjudicator. The second is where all the functions are transferred to another body. The third is where the Groceries Supply Order is revoked and not replaced.

Clause 18: Information to Secretary of State

55. The Secretary of State will be able to require information from the Adjudicator to assist the Secretary of State in carrying out a review or other functions under the Bill.

Clause 19: Confidentiality

56. This clause prohibits the Adjudicator from disclosing information about an arbitration if this would identify a party, either directly or by deduction. The broad intention is to protect the normal privacy of an arbitration whilst enabling lessons to be learned by other users of the Groceries Code where this is appropriate.

57. Secondly, the clause prohibits the Adjudicator from disclosing the identity of a direct or indirect supplier who has complained to the Adjudicator about a breach of the Groceries Code. Protecting the identity of complainants was considered by the Competition Commission to be important in order to reduce the threat of retaliatory treatment by a large retailer if the retailer found out that a particular supplier had raised a complaint. This prohibition does not enable suppliers to complain without revealing their identity to the

- (7) As a result of the findings of a review, the Secretary of State may give guidance to the Adjudicator about any matter relating to the Adjudicator's functions.
- (8) The Adjudicator is to take account of the guidance in carrying out functions.

17 Transfer of Adjudicator functions and abolition etc

- (1) The Secretary of State may by order transfer some or all of the Adjudicator's 5 functions to a public body and in deciding whether to do so must take account of the desirability of –
 - (a) increasing efficiency, effectiveness and economy in the exercise of public functions; and
 - (b) ensuring appropriate accountability to Ministers in the exercise of 10 public functions.
- (2) The Secretary of State may by order abolish the Adjudicator –
 - (a) if, as a result of the findings of a review, the Secretary of State is satisfied that the Adjudicator has not been sufficiently effective in enforcing the Groceries Code to justify the continued existence of an 15 Adjudicator;
 - (b) if, as a result of the findings of a review, the Secretary of State is satisfied that it is no longer necessary for there to be an Adjudicator to enforce the Groceries Code;
 - (c) if the Secretary of State transfers all of the Adjudicator's functions 20 under subsection (1); or
 - (d) if the Groceries Supply Order is revoked and not replaced.
- (3) An order under subsection (2) may include provision transferring the Adjudicator's property, rights and liabilities.
- (4) The Secretary of State may by order amend this Act in consequence of any 25 order amending or replacing the Groceries Supply Order.
- (5) For the purpose of giving effect to a transfer of functions or to the abolition of the Adjudicator an order under this section may amend or repeal this Act or any other enactment.

18 Information to Secretary of State 30

- (1) The Secretary of State may require the Adjudicator to provide information to assist the Secretary of State in carrying out functions under this Act.
- (2) The requirement to provide information to the Secretary of State does not override section 19.

How does the Adjudicator handle information? 35

19 Confidentiality

- (1) The Adjudicator may not make an unauthorised disclosure of information relating to an arbitration under the Groceries Supply Order or under a supply agreement if –
 - (a) the information identifies a party to the arbitration; or 40
 - (b) the Adjudicator thinks that the identity of a party to the arbitration could be deduced from it.

Adjudicator: in particular, the Adjudicator will need to know that information has been provided by a direct or indirect supplier in order to take it into account under clause 4.

58. The prohibitions in clause 19 do not apply if (1) the relevant parties consent to disclosure, (2) disclosure is required to comply with an EU obligation (as defined in Schedule 1 to the European Communities Act 1972; any such obligation could not be overridden by the Bill) or (3) disclosure is required by court rules or a court order for the purpose of legal proceedings. However, clause 19 is intended to prevent the disclosure of information to which the clause applies being required by a request under the Freedom of Information Act 2000 (see section 44 of that Act).

59. The prohibitions on disclosure in clause 19 are additional to those that apply under Part 9 of the Enterprise Act – see clause 22.

Clause 20: Levy funding

60. The Adjudicator is to be funded wholly or mainly by the large retailers. This clause therefore enables the Adjudicator to require large retailers to pay a levy towards the Adjudicator's expenses. It will be for the Adjudicator to decide when to impose a levy, and of how much, but each levy must be approved by the Secretary of State and the Adjudicator must publish an explanation of how the amounts have been decided.

61. Initially the levy will be equally divided between each large retailer. However, the broad intention is that large retailers who breach the Groceries Code should contribute more to the costs of the Adjudicator. Under Article 11 of the Groceries Supply Order, all arbitrator's costs for arbitrations will be funded by the particular retailer involved (with the possible exception of where the supplier's claim was vexatious or wholly without merit). Costs for investigations may be required to be funded by a large retailer found to have breached the Groceries Code (see clause 11). Any surplus funds held at the end of a financial year (whether due to the payment of such costs by particular large retailers or otherwise) may be repaid by the Adjudicator to the large retailers generally.

62. Clause 20(5) enables the Secretary of State to make an order authorising the Adjudicator to require large retailers to pay differing amounts based on criteria reflecting the time and expense the Adjudicator expects to incur in dealing with matters relating to different retailers. The intention is that once the Adjudicator is functioning it will be easier to determine, based on evidence, which retailers, or which types of retailer activity, are creating the most work for the Adjudicator and determine a funding model which reflects this. By implication, this may give additional incentives for large retailers to comply with the Groceries Code in order to reduce their contributions to the Adjudicator's costs. It would however be important for the Adjudicator to avoid a model which risked "double counting" additional charges to certain large retailers, taking into account the existing means to charge additional amounts to retailers who breach the Groceries Code, as referred to above.

- (2) The Adjudicator may not make an unauthorised disclosure of information that the Adjudicator thinks might cause someone to think that a particular supplier has complained about a large retailer failing to comply with the Groceries Code.
- (3) For the purposes of this section a disclosure of information is unauthorised unless –
- (a) the Adjudicator has obtained the required consent;
 - (b) the disclosure is required for the purpose of an EU obligation; or
 - (c) the disclosure is required, under rules of court or a court order, for the purposes of legal proceedings of any description. 10
- (4) The required consent is –
- (a) in the case of information to which subsection (1) applies, the consent of the parties to the arbitration;
 - (b) in the case of information to which subsection (2) applies, the consent of the supplier. 15
- (5) The prohibitions contained in this section are in addition to any that apply by virtue of Part 9 of the Enterprise Act 2002.

How is the Adjudicator funded?

20 Levy funding

- (1) The Adjudicator may require large retailers to pay a levy towards the Adjudicator's expenses. 20
- (2) Before imposing a levy the Adjudicator must obtain the Secretary of State's consent.
- (3) In deciding the amount of a levy the Adjudicator must take into account any sums received or expected to be received from other sources. 25
- (4) The Adjudicator may take into account estimated as well as actual expenses.
- (5) The amount of a levy must be the same for each large retailer, unless an order made by the Secretary of State is in force conferring power on the Adjudicator to require large retailers to pay different amounts based on criteria broadly intended to reflect the time and expense that the Adjudicator expects (in the light of previous experience) to incur in dealing with matters relating to different retailers. 30
- (6) The Adjudicator must inform each large retailer of –
- (a) the amount of any levy payable by the retailer; and
 - (b) when payments are due. 35
- (7) A levy required to be paid under this section is recoverable by the Adjudicator as a debt.
- (8) The Adjudicator must publish details of levies and an explanation of how the amounts have been decided.
- (9) If the Adjudicator has a surplus, the Adjudicator may repay some or all of it to the large retailers. 40

Clause 21: Payments by Secretary of State

63. Clause 21 enables the Secretary of State to make grants or loans to the Adjudicator. This is only envisaged in limited circumstances, for example in raising sufficient funds for the set up costs of the Adjudicator, which the retailers will pay for in due course through the levy.

Clause 22: Amendments

64. Clause 22(3) ensures that the Adjudicator will be a public authority for the purposes of the Freedom of Information Act 2000.

65. The intention of clause 22(4) is to apply the provisions of Part 9 of the Enterprise Act 2002 to the Adjudicator.

66. Part 9 of the Enterprise Act 2002 will prevent the Adjudicator from disclosing information which comes to the Adjudicator in connection with the exercise of his or her functions. There are a number of exceptions (usually referred to as “gateways”) set out in Part 9. These gateways include disclosure for the purpose of facilitating the exercise by the Adjudicator of any of his or her functions and disclosure to another person (such as the Office of Fair Trading) for the purpose of facilitating the exercise by that person of certain statutory functions.

67. Part 9 applies to many other public authorities exercising functions which are comparable with those of the Adjudicator. It already applies to the exercise by the Office of Fair Trading and the Competition Commission of their functions under the Groceries Supply Order.

- (10) In subsection (9) “surplus” means money held by the Adjudicator at the end of a financial year less –
- (a) liabilities shown in the Adjudicator’s statement of accounts for that financial year; and
 - (b) the total amount of any grants made by the Secretary of State under 5 section 21 during that financial year or earlier ones.

21 Payments by Secretary of State

- (1) The Secretary of State may make grants or loans to the Adjudicator.
- (2) The grants or loans may be subject to conditions (including conditions as to repayment with or without interest). 10

Will this law mean other changes to the law?

22 Amendments

- (1) *Parliamentary Commissioner Act 1967 (c. 13)*
In Schedule 2 to the Parliamentary Commissioner Act 1967 (departments etc subject to investigation) at the appropriate place insert – 15
“Groceries Code Adjudicator.”
- (2) *House of Commons Disqualification Act 1975 (c. 24)*
In Part 2 of Schedule 1 to the House of Commons Disqualification Act 1975 (bodies of which all members are disqualified) at the appropriate place insert – 20
“Groceries Code Adjudicator.”
- (3) *Freedom of Information Act 2000 (c. 36)*
In Part 6 of Schedule 1 to the Freedom of Information Act 2000 (public authorities) at the appropriate place insert -
“Groceries Code Adjudicator.”
- (4) *Enterprise Act 2002 (c. 40)* 25
In each of Schedules 14 and 15 to the Enterprise Act 2002 (provisions about disclosure of information) at the appropriate place insert –
“Groceries Code Adjudicator Act 2011.”
- (5) Section 161(5) the Enterprise Act 2002 (limitation on variation or revocation of orders) does not apply to a variation of the Groceries Supply Order made in 30 consequence of this Act.

Definitions and final provisions

23 Definitions

In this Act –

- “the Adjudicator” means the Groceries Code Adjudicator; 35
- “dispute” has the meaning given by Article 2 of the Groceries Supply Order;
- “financial year” means –
 - (a) the period beginning with the day on which section 1 comes into force and ending with the following 31 March; and 40

- (b) each successive period of 12 months;
- “Groceries Code” means the code of practice set out in Schedule 1 to the Groceries Supply Order;
- “Groceries Supply Order” means the Groceries (Supply Chain Practices) Market Investigation Order 2009, made by the Competition 5 Commission under section 161 of the Enterprise Act 2002;
- “large retailer” means a designated retailer as defined by Article 2 of the Groceries Supply Order;
- “supplier” means a person who—
 - (a) is a supplier within the meaning given by Article 2 of the 10 Groceries Supply Order; or
 - (b) would be a supplier within the meaning given by that Article but for the reference to direct supply;
- “supply agreement” has the meaning given by Article 2 of the Groceries Supply Order. 15

24 Orders

- (1) Orders under this Act are to be made by statutory instrument.
- (2) A statutory instrument containing an order under section 10(1) or 17(1) or (2)(a) or (b) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament. 20
- (3) Any other statutory instrument under this Act, other than one that contains only an order under section 26, is subject to annulment as an instrument to which section 5(1) of the Statutory Instruments Act 1946 applies.
- (4) Orders under this Act may include measures that are consequential, supplementary, incidental, transitional or transitory. 25

25 Extent

- This Act extends to—
- (a) England and Wales;
 - (b) Scotland; and
 - (c) Northern Ireland. 30

26 Commencement

- (1) Sections 1 to 22 and the Schedules come into force on whatever day the Secretary of State by order appoints.
- (2) The other provisions of this Act come into force on the day on which this Act is passed. 35
- (3) An order under subsection (1) may make different provision for different purposes.

27 Short title

This Act may be cited as the Groceries Code Adjudicator Act 2011.

Schedule 1: The Adjudicator

Status

68. The Adjudicator will be a corporation sole (paragraph 1). Being a corporation sole will ensure that the Adjudicator is able to enter contracts, and to sue and be sued, in his or her capacity as an office holder rather than any individual capacity.

Deputy Adjudicator

69. Under paragraph 4, the Secretary of State may appoint a Deputy Adjudicator. Paragraph 5 allows any deputy to carry out any of the Adjudicator's functions and this should provide flexibility if the Adjudicator is, for example, absent through illness or occupied with other functions.

Term of office etc

70. Under paragraph 6, the Adjudicator and any Deputy may each be appointed for an initial term of up to five years and for one or two further terms of up to three years. During a term the Secretary of State may dismiss a person if satisfied that the person is unable, unwilling or unfit to perform his or her functions. This is intended to be a relatively high threshold.

Remuneration

71. Although paragraph 8 allows the Adjudicator to pay remuneration and other amounts to the Adjudicator and any Deputy, the amounts are controlled by the Secretary of State.

Staff

72. The Adjudicator is not permitted to engage staff but, under paragraph 9, may make arrangements for staff to be seconded by the Secretary of State or the Office of Fair Trading. This would be on arms' length terms and by agreement as to the identity of the individuals in question.

Conflicts of interest

73. Paragraph 10 requires the Adjudicator to make and publish procedural arrangements for dealing with conflicts of interest. If both the Adjudicator and any Deputy are unable to act due to a conflict of interest, under paragraph 11 the Adjudicator may require the Secretary of State to appoint an acting Deputy to deal with the matter which in respect of which the conflict arises. Clause 2 of the Bill would enable the Adjudicator to appoint another person to act as arbitrator in a dispute where the Adjudicator would have a conflict, and so paragraph 11 is primarily intended to assist in relation to other functions such as the investigation function. It is relatively unlikely that the Adjudicator will need to use paragraph 11, but it provides a safeguard for the Adjudicator and the functions.

SCHEDULES

SCHEDULE 1

Section 1

THE ADJUDICATOR

Status

- 1 The Adjudicator is a corporation sole. 5
- 2 The Adjudicator carries out functions on behalf of the Crown.

Appointment

- 3 The Adjudicator is to be appointed by the Secretary of State.

Deputy Adjudicator

- 4 The Secretary of State may appoint a Deputy Adjudicator. 10
- 5 The Deputy Adjudicator may carry out any of the Adjudicator's functions.

Term of office etc

- 6 A person holds and vacates office as the Adjudicator or Deputy Adjudicator in accordance with the terms of his or her appointment, but –
 - (a) a person's initial term of office may not be more than five years; 15
 - (b) a person may be appointed for one or two further terms of office;
 - (c) a further term may not be more than three years;
 - (d) a person may resign by giving written notice to the Secretary of State; and
 - (e) the Secretary of State may dismiss the person if satisfied that the 20 person is unable, unwilling or unfit to perform his or her functions.
- 7 Service as the Adjudicator, or as the Deputy Adjudicator, is not service in the civil service of the state.

Remuneration

- 8 (1) The Adjudicator may pay to or in respect of the person holding office as the 25 Adjudicator or the Deputy Adjudicator –
 - (a) remuneration;
 - (b) allowances;
 - (c) sums by way of or in respect of pensions.
- (2) The Secretary of State must determine rates and eligibility criteria for the 30 payments.

Staff

- 9 (1) The Adjudicator may make arrangements with the Secretary of State or the Office of Fair Trading for staff to be seconded to the Adjudicator.

Accounts

74. Paragraph 15 provides for the preparation of a statement of accounts for each financial year, and for these to be reported on by the Comptroller and Auditor General and laid before Parliament.

Assistance from Office of Fair Trading

75. Paragraph 17 allows the Office of Fair Trading to provide staff, premises and other facilities to the Adjudicator. The Government intends that the Adjudicator will help to keep down costs by sharing premises and back office facilities with the Office of Fair Trading. This would be on arms' length terms and subject to appropriate safeguards being in place to protect confidentiality, avoid conflicts of interest and so on.

Exemption from liability for damages

76. Paragraph 18 protects the Adjudicator, any Deputy and any staff from claims for damages by third parties, except where they have acted in bad faith or in breach of human rights. In the absence of this protection it might, for example, be possible for a supplier or large retailer to claim against the Adjudicator in the tort of negligence in relation to some advice given by the Adjudicator or the way the Adjudicator had carried out an investigation. The Government intends that the Adjudicator should not be required to spend time and funding in dealing with such claims. The Adjudicator will be subject to the normal public law duties and constraints of a public authority.

- (2) The arrangements may include provision for payments by the Adjudicator.

Conflicts of interest

- 10 (1) The Adjudicator must make procedural arrangements for dealing with any conflict of interest affecting –
- (a) the Adjudicator; 5
 - (b) the Deputy Adjudicator; or
 - (c) staff working for the Adjudicator.
- (2) The Adjudicator must consult the Secretary of State before making or revising the arrangements.
- (3) The Adjudicator must publish a summary of the arrangements. 10
- 11 (1) This paragraph applies if both the Adjudicator and the Deputy Adjudicator are unable to act in relation to a matter because of conflicts of interest.
- (2) The Secretary of State must appoint a person to act as a Deputy Adjudicator if asked to do so by the Adjudicator.
- (3) An acting Deputy Adjudicator may carry out any of the Adjudicator’s 15 functions for the purpose of dealing with the matter in respect of which he or she is appointed.
- (4) A person holds and vacates office as an acting Deputy Adjudicator in accordance with the terms of his or her appointment (subject to subparagraph (5)). 20
- (5) Paragraphs 6(d) and (e) and 7 and 8 apply to an acting Deputy Adjudicator as they apply to the Deputy Adjudicator.

Validity of acts

- 12 A defect in appointment does not affect the validity of things done by –
- (a) the Adjudicator; 25
 - (b) the Deputy Adjudicator; or
 - (c) an acting Deputy Adjudicator.

Application of seal and proof of documents

- 13 The application of the Adjudicator’s seal must be authenticated by the signature of – 30
- (a) the Adjudicator; or
 - (b) some other person who has been authorised by the Adjudicator for that purpose (whether generally or specially).
- 14 A document purporting to be duly executed under the seal – 35
- (a) is to be received in evidence; and
 - (b) is to be treated as duly executed unless the contrary is shown.

Accounts

- 15 (1) The Adjudicator must keep proper accounts and proper records in relation to the accounts.

Schedule 2: Investigation powers

Requirement to provide information

77. The Adjudicator will have powers to require information for the purposes of an investigation under clause 5. These powers will be exercisable against large retailers and others. Paragraph 1 enables the Adjudicator to require a person to provide documents or other information, including orally (but not under oath). Sub-paragraph 1(6) protects information that could not be required to be provided in civil proceedings, such as information subject to legal privilege. These powers can only be used by the Adjudicator once an investigation is commenced, not for the purpose of deciding whether to commence an investigation.

- (2) For each financial year the Adjudicator must prepare a statement of accounts in respect of that financial year.
- (3) The statement must be in whatever form the Secretary of State directs.
- (4) The Adjudicator must send a copy of the statement, within a period specified by the Secretary of State, to – 5
 - (a) the Secretary of State; and
 - (b) the Comptroller and Auditor General.
- (5) After the Adjudicator has sent a copy of a statement of accounts to the Comptroller and Auditor General, the Comptroller and Auditor General must – 10
 - (a) examine, certify and report on the statement; and
 - (b) send a copy of the certified statement and the report to the Secretary of State as soon as possible.
- (6) The Secretary of State must lay before Parliament a copy of the certified statement and of the report. 15

Incidental powers

- 16 The Adjudicator may do anything that is calculated to facilitate the carrying out of the Adjudicator's functions or is conducive or incidental to the carrying out of those functions.

Assistance from Office of Fair Trading 20

- 17 The Office of Fair Trading may provide staff, premises, facilities or other assistance to the Adjudicator (with or without charge).

Exemption from liability for damages

- 18 (1) The following are exempt from liability in damages for anything done or omitted in the exercise or purported exercise of their functions – 25
 - (a) the Adjudicator;
 - (b) the Deputy Adjudicator;
 - (c) acting Deputy Adjudicators;
 - (d) staff working for the Adjudicator.
- (2) But this sub-paragraph (1) does not apply – 30
 - (a) if the act or omission is shown to have been in bad faith; or
 - (b) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the Human Rights Act 1998.

SCHEDULE 2

Section 535

INVESTIGATION POWERS

- 1 (1) The Adjudicator may, for the purposes of an investigation, require any person –
 - (a) to provide documents in the person's possession or control;

Offences

78. Paragraphs 2, 3 and 4 create offences for intentional failure to comply with a requirement to provide information (subject to a defence of reasonable excuse) and for knowingly providing false information.

Schedule 3: Order conferring power to impose financial penalties

79. The Government considers that financial penalties may not be necessary in order to secure a high level of compliance with the Groceries Code by large retailers.

80. The Secretary of State would need to authorise financial penalties by order under clause 10, approved by each House of Parliament (see clause 24).

81. Under paragraph 1 of Schedule 3, the Secretary of State could only make an order if, following consultation under paragraph 6, he or she thought the Adjudicator's other powers (including recommendations and requirements to publish) were inadequate. The order would need to specify the maximum penalty that could be imposed or how to calculate the maximum: for example by reference to the retailer's groceries turnover or the value of relevant supply arrangements. The order could also require the Adjudicator to publish guidance about the criteria the Adjudicator intends to adopt in deciding the amount of a financial penalty. By delaying and leaving open the question of whether financial penalties are needed, clause 10 and Schedule 3 allow the Secretary of State to take into account the history of enforcement of the Groceries Code by the Adjudicator, together with the views of those affected.

- (b) to provide other information in the person’s possession or control.
- (2) A requirement to provide information may include a requirement to attend at a place at a particular time and to provide it orally.
- (3) A requirement must be imposed by giving a written notice specifying –
- (a) to whom the information is to be provided; 5
 - (b) where it is to be provided;
 - (c) when, or the time by which, it is to be provided;
 - (d) the form and manner in which it is to be provided.
- (4) A notice must also explain the possible consequences of failing to comply.
- (5) If a person is required to attend at a place that is more than 10 miles from his¹⁰ or her place of residence the Adjudicator must offer to pay necessary travelling expenses.
- (6) A person may not be required under this paragraph to do anything that he or she could not be compelled to do in civil proceedings before –
- (a) the High Court in England and Wales or Northern Ireland, or 15
 - (b) the Court of Session in Scotland.
- 2 (1) It is an offence for a person intentionally to fail to comply with a requirement under this Schedule.
- (2) It is a defence for a person charged with that offence to prove that there was a reasonable excuse for the person’s failure. 20
- 3 It is an offence for a person knowingly to provide false information in response to a requirement under this Schedule.
- 4 A person guilty of an offence under this Schedule is liable –
- (a) on summary conviction, to a fine not exceeding the statutory maximum; 25
 - (b) on conviction on indictment, to a fine.

SCHEDULE 3

Section 10

ORDER CONFERRING POWER TO IMPOSE FINANCIAL PENALTIES

- 1 The Secretary of State may make an order under section 10 authorising the Adjudicator to impose financial penalties only if the Secretary of State thinks³⁰ that the Adjudicator’s other powers are inadequate.
- 2 The order must specify the maximum penalty that may be imposed or how the maximum penalty is to be calculated.
- 3 The order may include further measures about procedural matters.
- 4 The order may require the Adjudicator to publish guidance about the³⁵ criteria the Adjudicator intends to adopt in deciding the amount of a financial penalty.
- 5 The order may require the Adjudicator to consult before publishing guidance about financial penalties.
- 6 Before making an order, the Secretary of State must consult – 40

- (a) the Adjudicator;
- (b) the Competition Commission;
- (c) the Office of Fair Trading;
- (d) the large retailers;
- (e) one or more persons appearing to the Secretary of State to represent 5
the interests of suppliers;
- (f) one or more persons appearing to the Secretary of State to represent
the interests of consumers; and
- (g) any other person the Secretary of State thinks appropriate.

FINANCIAL EFFECTS OF THE BILL

82. The Adjudicator will have set-up and additional running costs, which are discussed in the Impact Assessment.

EFFECTS OF THE BILL ON PUBLIC MANPOWER

83. The draft Bill will have some impact on public service manpower as the Adjudicator will be staffed by individuals seconded either by the Office of Fair Trading or the Secretary of State for Business, Innovation and Skills. However, the impact will be small, given the nature and extent of the Adjudicator's functions.

SUMMARY OF THE IMPACT ASSESSMENT

84. The Impact Assessment (IA) accompanying this draft Bill can be found online at www.bis.gov.uk [] [TO BE COMPLETED] or in hard copy in the Vote Office (House of Commons) or Printed Paper Office (House of Lords). The IA has been cleared by Chief Economist of the Department for Business, Innovation and Skills and by the Government's Regulatory Policy Committee.

85. The IA provides evidence to show that large retailers have significant buyer power when negotiating with suppliers and how the market has consequently been adversely affected. It explains why the establishment of the Adjudicator to monitor and enforce the Groceries Code of Practice is an appropriate response.

86. The IA estimates the costs of setting up the Adjudicator to be around £0.2m. The operational costs of the Adjudicator are estimated to be £0.8m per year. Retailers would incur their own costs as a result of responding to the Adjudicator carrying out investigations and these are estimated to be £120,000 per large retailer per year (that is £1.2 million per year in total). However, these costs may vary, depending on the number of investigations the Adjudicator chooses to carry out.

87. The benefits in creating a GCA include potential improvements in investment and innovation within the groceries supply chain, which could ultimately lead to improvements in quality and choice for consumers, as well as lower prices in the long run. Although it has not been possible to quantify the potential improvement in investment and innovation and its consequent impacts, this will be monitored in the future and addressed as part of the Secretary of State's review of the performance and effectiveness of the Adjudicator.

COMPATIBILITY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Compatibility

88. Section 19(1)(a) of the Human Rights Act 1998 requires the Minister in charge of the Bill to make a statement confirming compatibility with the European Convention on Human Rights (ECHR). The Bill engages a number of Articles of the Convention but is not incompatible with them.

Arbitration (clause 2)

89. Clause 2 of the Bill supplements Article 11 of the Groceries Supply Order, which requires large retailers to submit to a request for arbitration by a direct supplier. This engages Article 6 ECHR (right to a fair trial) because the arbitration will involve a determination of civil rights and obligations of the relevant retailer and supplier.

90. The Adjudicator or any deputy carrying out an arbitration will be independent of the Government and of the parties and in most cases can be expected to carry out an arbitration impartially. Although one purpose of the Groceries Supply Order and the Groceries Code is to help rectify certain imbalances in the relationships between large retailers and their suppliers, the Adjudicator is to carry out his or her functions objectively and not as the advocate of suppliers. There are possible circumstances where the Adjudicator might have a conflict of interest or might be considered to have some bias, for example where the Adjudicator had had some previous involvement in the facts of the dispute. In such a case the Adjudicator would use the power in clause 2 to appoint another independent and impartial person to carry out the arbitration.

91. The parties to an arbitration will also be protected by the requirements for fairness and impartiality in the Arbitration Act 1996 and (subject to commencement of section 16 of this Act) the Arbitration (Scotland) Act 2010.

92. ECHR Article 6 normally requires a public hearing. This is unusual in an arbitration as privacy is often regarded as one of the main advantages of arbitration. The Government expects that in most cases the parties to an arbitration under the Groceries Code will prefer their dispute to be heard in private, in which case this would be respected by the Adjudicator or other arbitrator. In an appropriate case the arbitrator or a court could require a public hearing, if necessary to comply with the human rights of a party.

Information about arbitration (clause 3)

93. Clause 3 enables the Adjudicator to obtain information about arbitrations which are not carried out by the Adjudicator, if this would assist the Adjudicator in carrying out his or her functions. This engages ECHR Article 8 (right to privacy), given that arbitrations will normally remain private. However, the benefit to the Adjudicator of improving his or her knowledge and expertise, which could then be applied generically to assist others, could be significant and can be taken into account under Article 8. The Adjudicator will be required to exercise the power in clause 3 so as to respect the human rights of the parties to arbitrations, and will generally be prohibited by clause 19 from disclosing information which would identify a party to an arbitration.

Investigations (clauses 4 to 11 and Schedule 2)

94. Schedule 2 enables the Adjudicator to require others to provide documents and information for the purposes of an investigation. These powers engage ECHR Article 8 (right to privacy) because they could require a person to hand over documents and other information they would normally expect to be private. However, these powers are needed in order for the Adjudicator to carry out investigations effectively and can be justified under Article 8 as being in the interests of the economic well-being of the country.

95. The Adjudicator's investigation function, more generally, will also engage ECHR Article 6 (right to a fair trial) if the Secretary of State exercises the power under clause 10 to authorise the Adjudicator to impose financial penalties on a large retailer who is found to have breached the Groceries Code. A financial penalty will involve a determination of civil rights and obligations. Notwithstanding the Adjudicator's independence and impartiality and the objectivity with which investigations will be carried out, it is not clear that the process of an investigation by the Adjudicator will necessarily have all the characteristics needed to comply with ECHR Article 6. This is essentially because the Adjudicator will here act both as investigator and decision maker. Clause 10 provides a full right of appeal to the court against a financial penalty.

96. The other sanctions which may follow an investigation by the Adjudicator either do not engage ECHR Article 6 or, if they do, are compatible as a result of safeguards including the possibility of judicial review of a decision by the Adjudicator. Where the sanction is a

recommendation to the retailer under clause 8, it is plain that Article 6 is not engaged as this does not have binding effect and is merely advisory. Where the sanction is a requirement for the retailer to publish information about the investigation under clause 9, it is more arguable that ECHR Article 6 is engaged. However, the findings of the Adjudicator in the investigation, and the publication of information about those findings, do not in themselves determine that the retailer has any particular obligation to a supplier under any relevant supply agreement which incorporates the Groceries Code. In particular, it would still be necessary for such a supplier to prove their case, and make a claim for damages or another remedy, through arbitration. If, on the contrary, an investigation leading to a requirement to publish did engage ECHR Article 6, then the ability for a court to judicially review the Adjudicator's decision will be sufficient to rectify any failure by the investigation process to comply with ECHR Article 6.

97. In carrying out investigations, the Adjudicator will normally be prohibited by clause 19 of the Bill from disclosing the identity of a direct or indirect supplier who has complained to the Adjudicator about alleged breaches of the Groceries Code. Disclosure will be permitted if the complainant consents to this, or if ordered by a court. This protection for complainant suppliers is an important part of the Government's policy because the Competition Commission's 2008 report identified a "climate of fear" among suppliers around raising disputes with the large retailers. The protection raises issues under ECHR Article 6 because the normal presumption in a process such as an investigation would be that the person under investigation should be entitled to know the identity of persons making allegations against them.

98. However, whilst complaints may be the trigger for an investigation, the matters and material considered in an investigation are expected to be very wide ranging. The Government does not see it as the purpose of an investigation to decide whether to uphold a particular complaint, but rather to consider a pattern of behaviour by one or more retailers. The material relied upon by the Adjudicator is likely to be provided primarily by the retailer itself. This will diminish the importance of any particular complaint. It will be up to the Adjudicator, as a public authority, to conduct the investigation in a way which respects the rights of the retailer to a fair process. The Government therefore expects that it will not usually be possible for the Adjudicator to base findings of an investigation to any material extent on information provided by complainants whose identity is kept confidential from the relevant retailer. To the extent that a retailer considers that the Adjudicator has got such a decision wrong, there is the possibility of appeal to, or review by, the court, as described above.

99. Two aspects of the Adjudicator's investigation powers also engage ECHR Article 1 of Protocol 1 (right to property). These are (1) financial penalties, if the Secretary of State authorises the Adjudicator to impose them under clause 10, and (2) the ability under clause 11 for the Adjudicator to require large retailers and complainant suppliers to pay the costs of an investigation in certain circumstances. Article 1 of Protocol 1 allows a state to enforce laws to control the use of property in the general interest. The Government considers that these powers are proportionate: in particular, the Secretary of State can only allow financial penalties if the Adjudicator's other powers are considered inadequate, and must set a maximum penalty. The powers can also be justified by: (1) in the case of financial penalties, the need to deter large retailers from breaching the Groceries Code, in the interests of suppliers and (indirectly) consumers; and (2) in the case of costs orders, (a) the advantage of retailers found to have breached the Groceries Code paying a greater contribution to the Adjudicator's costs than other retailers and (b) the need to deter vexatious and wholly bad complaints. In each case there is also the safeguard of a right of appeal to the court.

Levy funding (clause 20)

100. The Adjudicator will be funded wholly or mainly by a levy imposed by the Adjudicator on the large retailers. This engages ECHR Article 1 of Protocol 1, but again the Government considers that this is justified in the general interest. The alternative to funding by large retailers would be for the Adjudicator to be funded out of general taxation. But given that the background to the Groceries Supply Order and the Bill is the adverse effect on competition

reported upon by the Competition Commission, the Government considers it fair that the cost will fall primarily on the large retailers.

101. There are also a number of safeguards in the Bill to help to ensure that the power to levy is exercised proportionately by the Adjudicator. These include the need for the Secretary of State to consent to the amount of any levy.

COMMENCEMENT

102. The Bill will come into force on such day as the Secretary of State may specify by order.



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