

T J Oyler
Inquiry Secretary
Groceries Investigation
Competition Commission
Floor 6, Zone 4, Point 58
Victoria House
Southampton Row
London WC1 4AD

th June 2006

Dear Mr Oyler,

Proposals for a new Supermarket Code of Practice

Further to our recent conversation, the Breaking the Armlock Alliance (an alliance of 16 farmer, consumer, development and environmental organisations) very much welcomes this opportunity to submit proposals to strengthen and improve the effectiveness of the Supermarket Code of Practice in line with the Competition Commission's original recommendation in its 2000 report on Supermarkets.

The Office of Fair Trading recognises that there is sufficient evidence of the failure of the existing supermarket Code of Practice, and there is already plenty of evidence from suppliers that the Code is ineffective.

We consider that there are two key areas that need addressing. Firstly the climate of fear amongst suppliers means that the dispute resolution process must be made truly independent of the supermarkets so that individual suppliers cannot be identified. Secondly the wording of the Code must be strengthened, the current vagueness of the wording means that it would be very hard to prove a breach of the code even if a supplier were to have the confidence to bring a complaint forward.

The changes must then be put on a statutory basis, if supermarkets are merely asked to give undertakings to a new Code as they have done with the existing Code they will have the opportunity to weaken it. The Code can easily be put on a statutory basis without the need for primary legislation using the powers given to the CC by sections 138 and 161 of the Enterprise Act. The retailers to whom the CC's decision or order is addressed will then be under a statutory duty to comply under section 167(2) of the Act. In the mean time, and given the well-publicised failure of the Code, we would like the CC to consider using its powers under the Act to impose interim orders to ensure more effective compliance with the existing Code during the period of the CC's investigation.

We believe that the Code should automatically apply to any supermarket that reaches an 8% share in the grocery market since this was the share identified by the Competition Commission (CC) as giving supermarkets significant buyer power. The CC concluded that where a request to a supplier came from a retailer with this level of market share *"it amounted to the same thing as a requirement"*.

The importance of the Code

The primary purpose of the Code should be to protect suppliers to the major supermarkets. In particular smaller suppliers would benefit from a stronger and statutory code. Greater protection for first tier suppliers to the supermarkets could benefit those further up the supply chain including farmers who do not supply direct, and farm workers who may also suffer lower wages or poorer working conditions due to pressure on suppliers to cut costs. However we also believe it would be useful for the Competition Commission to consider how the Code could be applied to farmers who do not sell direct to supermarkets especially where they supply via large companies such as dairies.

In making recommendations for a Code of Practice in 2000 the Competition Commission also warned that if the practices continued suppliers would be likely to invest less on new product development and innovation *“leading to lower quality and less consumer choice”* and some suppliers would leave the market. The CC also noted that these practices enabled the big supermarkets *“to gain a significant advantage over other retailers who are not able to negotiate comparable terms”* and that *“in some cases we would expect these practices to contribute to small retailers exiting from the market place”* leading to further reduction in consumer choice.

We also urge the CC to clarify how the Code can best protect overseas suppliers that supply UK supermarkets. Evidence gathered by Action Aid, Banana Link and others shows that the trading practices identified by the CC in its 2000 report are being used by the supermarkets in their dealings with overseas suppliers. The same issues arise as for UK suppliers in terms of being unable to invest in product innovation or small suppliers becoming unviable, which reduces choice for UK consumers. There are other serious impacts along the supply chain such as workers being unable to make a living wage or having to work in unsafe conditions. Although such issues are not directly the responsibility of the CC they are important to consumers wishing to make more ethical purchases.

We acknowledge that most overseas suppliers will deal with a UK based intermediary to whom the Code will apply. The CC should therefore consider whether and how these intermediaries could then apply the Code in their dealings with suppliers (and to require all the suppliers and intermediaries up the chain of supply to apply the same terms so that are applied right back to the primary producer).

Dispute Resolution and Investigative Powers

The investigating authority (either a dedicated unit within the OFT – as recommended by the CC in paragraph 2.606 of the Supermarkets report - or a new independent regulator), should ensure that suppliers have confidence in it as an independent body to which it can take a complaint. It needs to be more proactive in contacting suppliers to find out whether the code is working for them. The authority should ensure that it is accessible to suppliers e.g. making sure that suppliers know who they should contact within the authority and providing a 'hotline' phone number.

The investigating authority also needs to have greater power for dispute resolution, specifically to:

1. Carry out proactive research into supermarket practices including regular surveys of suppliers.
2. Take complaints from suppliers, in confidence without them having to go to the supermarket first.
3. Take complaints from third parties including groups representing suppliers or other retailers where these include evidence of a breach of the code.
4. Investigate complaints where they appear to have breached the code.

Strengthening the Code of Practice

Most of the key issues which need to be covered in the Code are already there and the problem is with the vagueness of the wording. It would therefore be a straightforward task for the CC to tighten the wording of the Code. The CC's recommended Code was more specific about ruling out certain practices than the existing Code is. The following is an illustration of how the existing Code could be tightened; it is not intended to be a replacement Code which would need more detailed legal definitions, but we believe that it demonstrates that providing more certainty for suppliers is a reasonably straightforward task.

The new Code should include provisions that:

- i) Supermarkets must not make retrospective and unilateral reductions on an agreed price or demand rebates retrospectively. The price must be agreed between supplier and supermarket and recorded in writing, if any changes are made these should also be agreed by both parties and recorded in writing by the supermarket.
- ii) The invoice price paid to the supplier, and the retail price subsequently charged for that product, must be recorded in writing and made available on request by the investigating authority.
- iii) Supermarkets must not make retrospective changes to quantities ordered which result in a reduction of the agreed price to the supplier.
- iv) The original specifications for the product, plus any subsequent changes in those specifications, must be agreed by both parties, recorded in writing and made available on request by the investigating authority.
- v) All invoices must be paid by the supermarket within 30 days of the date of the invoice.
- vi) There must be no obligation for suppliers to contribute to the supermarket's marketing costs (e.g. consumer or market research, costs of store refurbishment or opening, artwork or packaging design, better positioning of products, or increasing shelf space.)
- vii) Suppliers must not be required to pay for wastage of their products by the supermarket (for example due to damage to the product that happens on supermarket premises or due to the supermarkets own forecasting errors) after that product has been delivered to the supermarket.

- viii) Suppliers must not be required to make payments to the supermarket to compensate for lower sales of their product than anticipated by the supermarket.
- ix) Reductions in agreed price must not be passed back to suppliers when the supermarket decides to use their product for a promotion which reduces the retail price (including “2 for the price of 1” or “3 for the price of 2” type promotions), unless there is an agreement in writing between the supplier and the supermarket 30 days before the promotion starts.
- x) No charges for consumer complaints must be passed to suppliers unless the complaint is related to a proven problem directly relating to the quality of that suppliers product. Compensation to customers for any damage to the product which occurs after the supermarket has taken delivery of the product must be met by the supermarket.
- xi) Packaging and transport specifications must be agreed between supplier and supermarket and put in writing. Any subsequent changes which incur costs to the supplier and which are at the request of the supermarket must be paid for by the supermarket.
- xii) Suppliers should be able to use any supplier of goods and services (e.g. for packaging of their product) as long as this meets the supermarket specifications. The supermarket must not specify a third party supplier of such goods and services from which it receives a payment in respect of that requirement.
- xii) Supermarkets must not require payments or better terms as a condition of stocking or listing a suppliers products nor must they require payments for better positioning of a suppliers products within the store.

The new Statutory Code should apply to all retailers with a market share of 8% or above. The Code will apply to any retailer reaching a market share of 8% if they have a lower market share at the time the new Code first comes into force.

We urge the Competition Commission to also consider whether the Code should apply to other types of retailers (e.g. DIY stores) following an appropriate level of investigation.

We hope that you will agree that the steps we are recommending to strengthen the Code, put it on a statutory basis and ensure better enforcement are all entirely reasonable actions.

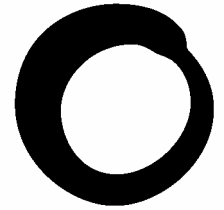
We would very much welcome an opportunity to discuss these recommendations with you in more detail.

Yours sincerely

Sandra Bell
On behalf of the 'Breaking the Armlock' Alliance
(Banana Link, British Independent Fruit Growers Association, FARM,

Judith Whateley

Farmers for Action, Farmers' Link, Farmers' Union of Wales,
Friends of the Earth, Grassroots Action for Food and Farming,
International Institute for Environment and Development,
National Federation of Women's Institutes, National Sheep Association,
New Economics Foundation, Pesticide Action Network UK,
Soil Association, Small and Family Farms Alliance, WyeCycle)



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