

**UNDERTAKINGS GIVEN BY [Asda, Safeway, Sainsbury and Tesco]
TO THE SECRETARY OF STATE FOR TRADE AND INDUSTRY
UNDER SECTION 88(2) OF THE FAIR TRADING ACT 1973**

WHEREAS on 8 April 1999 the Director referred to the Commission under sections 10, 47, 49 and 50 of the Act the matter of the existence or possible existence of a monopoly situation in relation to the supply in Great Britain of certain groceries from certain supermarkets;

WHEREAS on 16 April 1999 the Director varied that reference under section 52(1) of the Act in order to extend its scope to the United Kingdom;

WHEREAS the Report of the Commission sets out adverse public interest findings in relation to the exercise of buyer power by certain supermarkets;

AND WHEREAS pursuant to a request by the Secretary of State, the Director has consulted with the Company with a view to obtaining from it undertakings to take certain action;

NOW THEREFORE the Company gives to the Secretary of State under section 88(2) of the Act the undertakings below to take action requisite for the purpose of remedying or preventing the adverse effects specified in the Report:

Compliance with the Code

- 1.- (1) Subject to paragraphs (2), (3) and (4) below, the Company shall comply with the Code on and after the Starting Date.

- (2) The Code need not apply to agreements made before 1 November 2001.

- (3) Where relevant on or after the Starting Date, the Code shall be read as if amended by the provisions set out in Schedule 1.

- (4) The Company need not comply with the Code during the period between:
- (a) the day on which the Secretary of State determines that the Company no longer has a Relevant Market Share; and
 - (b) the fourteenth day after the day on which the Secretary of State subsequently determines that the Company again has a Relevant Market Share ('the Restarting Date'), and where relevant on or after that Restarting Date, where the words 'Starting Date' appear in Schedule 1, they shall be replaced with 'Restarting Date'.

Compliance with these undertakings

2.- The Company shall furnish promptly to the Director such information as the Director considers necessary from time to time to monitor these undertakings.

3.- The Company shall comply promptly with such written directions as the Director may from time to time give:

- (a) to take such steps as may be specified or described in the directions for the purpose of carrying out or securing compliance with these undertakings or the Code; or
- (b) to do or refrain from doing anything so specified or described which it might be required by these undertakings or the Code to do or to refrain from doing.

4.- The Company shall procure that any member of the same Group of Interconnected Bodies Corporate as the Company shall comply with these undertakings as if it had given them.

Interpretation

5.- The Interpretation Act 1978 shall apply to these undertakings as it does to Acts of Parliament.

6.- For the avoidance of doubt, compliance with these undertakings does not affect the duty on the Company to comply with or restrict the application of the Competition Act 1998.

7.- In these undertakings:

‘the Acceptance Date’ is the day on which these undertakings are accepted by the Secretary of State;

‘the Act’ means the Fair Trading Act 1973;

‘the Code’ means the code set out in Schedule 2 or such code as may be amended pursuant to section 88 of the Act;

‘the Commission’ means the Competition Commission;

‘the Company’ means [];

‘the Director’ means the Director General of Fair Trading;

‘Groceries’ has the meaning given in the Code;

‘Group of Interconnected Bodies Corporate’ has the meaning given in section 137(5) of the Act;

‘Reference Stores’ means multiple stores in the United Kingdom being supermarkets with 600 square metres or more of grocery sales area, where the space devoted to the retail sale of food and non-alcoholic drinks exceeds 300 square metres and which are controlled by a person who controls ten or more such stores;

‘Relevant Market Share’ means 8% share of the market for the purchase of Groceries for resale from all stores operated in the United Kingdom by persons who operate Reference Stores or, without prejudice to section 88 of the Act, such other market as may be agreed by the Company and the Secretary of State following consultation with the Director;

‘the Report’ means the report of the Commission on the supply of groceries from multiple stores in the United Kingdom presented to Parliament in October 2000 (Cm 4842);

‘the Restarting Date’ has the meaning given in subparagraph 1(4)(b) above;

‘the Secretary of State’ means the Secretary of State for Trade and Industry; and

‘the Starting Date’ is the ninetieth day after the Acceptance Date.

FOR AND ON BEHALF OF []

.....

Date

Name.....(Director)

.....

Name.....(Director/Secretary)

SCHEDULE 1

ADDITIONAL PROVISIONS FOR THE CODE THAT MAY BE APPLICABLE

CLAUSE	PROVISION
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| 3 | At the end of the clause, insert 'where that invoice is dated on or after the Starting Date'. |
| 4 | In line 2, insert 'where such reduction or increase takes place on or after the Starting Date' between 'product' and ' <i>unless</i> '. |
| 5 | At the end of the clause, delete the full stop and insert on a new line flushed left 'where such costs are incurred or the relevant activity described in paragraphs (a) to (e) above takes place wholly or partially on or after the Starting Date.' |
| 6 | In line 3, insert 'where such Payment is made wholly or partially on or after the Starting Date' between 'Supermarket' and ' <i>unless</i> ' and at the end of the clause, delete the full stop and insert 'or unless the basis of any such Payment is agreed before the Starting Date in respect of products delivered before the Starting Date.' |
| 7 | In line 3, insert 'where such wastage is incurred wholly or partially on or after the Starting Date' between 'stores' and ' <i>unless</i> ' and at the end of paragraph (b), delete the full stop and insert '; or' and then insert on a new line flushed left '(c) the basis of any such Payment is agreed before the Starting Date in respect of products delivered before the Starting Date.' |
| 9 | In line 2, insert 'where such lump sum payment is made wholly or partially on or after the Starting Date' between 'products' and ' <i>unless</i> ' and at the end of subparagraph (ii), delete the full stop and insert '; or' and then insert on a new line flushed left '(c) the basis of any such payment is agreed before the Starting Date in respect of products delivered before the Starting Date.' |
| 10 | In line 3, insert 'where such lump sum payment is made wholly or partially on or after the Starting Date' between 'store' and ' <i>unless</i> ' and at the end of the clause, delete the full stop and insert 'or unless the basis of any such payment is agreed before the Starting Date in respect of products delivered before the Starting Date.' |
| 11 | In line 2, insert 'and such Payment is made wholly or partially on or after the |

Starting Date’ between ‘products’ and the comma and at the end of the clause, delete the full stop and insert ‘unless in respect of a Promotion which takes place wholly before the Starting Date.’.

12 At the beginning of the clause, delete ‘A’ and insert ‘Where a Promotion begins on or after the Starting Date, a’.

14 At the end of the clause, insert ‘where such Promotion begins on or after the Starting Date’.

15 In line 3, insert ‘where such change takes place wholly or partially on or after the Starting Date’ between ‘procedures’ and ‘*unless*’.

16 In line 3, insert ‘where such change takes place wholly or partially on or after the Starting Date’ between ‘order’ and ‘*unless*’.

17 In line 2, insert ‘to the extent that such cost is incurred wholly on or after the Starting Date as a result of a forecast made in respect of products delivered on or after the Starting Date’ between ‘Supermarket’ and ‘*unless*’.

19 In line 1, insert ‘which is made in respect of a product delivered on or after the Starting Date’ between ‘complaint’ and ‘can’.

20 In line 1, insert ‘which is made in respect of a product delivered on or after the Starting Date’ between ‘complaint’ and ‘cannot’.

22 In line 2, insert ‘delivered on or after the Starting Date’ between ‘property’ and ‘from’.

32 After ‘In this Code:’, insert, each on an indented new line, “‘the Acceptance Date’ is the day on which the undertakings in which this Schedule appears are accepted by the Secretary of State;’ and “‘the Starting Date’ is the ninetieth day after the Acceptance Date;’.

SCHEDULE 2

CODE OF PRACTICE ON SUPERMARKETS' DEALINGS WITH SUPPLIERS

HAVING REGARD TO the Fair Trading Act 1973;

HAVING REGARD TO the Supermarkets Report of the Competition Commission;

RECOGNISING that:

- (a) a competitive market is the most effective way of protecting the interests of UK consumers;
- (b) in a free and fair market place, the Supermarkets compete with each other in the level of service, quality of product and value for money that they offer to UK consumers; and
- (c) it is in the interests of UK consumers that Supermarkets should constantly seek to improve their operating efficiency.

WHEREAS:

- (a) The Competition Commission has recommended that a code of practice should be introduced to put relations between Supermarkets and their Suppliers on a clearer and more predictable basis.
- (b) The Competition Commission found that the undue exercise of buyer power by Supermarkets in the circumstances identified in the Supermarkets Report has effects which are against the public interest.
- (c) The Director, following consultation with the Supermarkets, has devised this Code of practice to meet the concerns of the Competition Commission without wishing to inhibit mutually beneficial arrangements genuinely entered into by Supermarkets and their

Suppliers.

- (d) The effective operation of this Code depends upon both the Supermarkets and their Suppliers being reasonable in their dealings with each other.
- (e) The Director expects that the dispute resolution procedure provided for in this Code will be effective and that mediation is the most appropriate way of resolving disputes arising under the Code.
- (f) The Supermarkets are fully committed to the objectives of this Code and undertake to operate under this Code in good faith.

NOW THEREFORE this Code has effect:

PART 1 - STANDARD TERMS OF BUSINESS

Terms of business to be available in writing

- 1 The terms of business offered by a Supermarket for its dealings with a Supplier shall be available in writing at the request of that Supplier such that:
 - (a) the standard terms of business offered to all Suppliers, or to all Suppliers in a particular category, shall be available at the request of any Supplier in that category; and
 - (b) the particular terms of business offered to any one Supplier shall be available at the request of that Supplier.
- 2 Reasonable Notice of variation of a Supermarket's terms of business shall be given to the affected Supplier(s).

No undue delay in Payments

- 3 A Supermarket shall pay a Supplier for products delivered to that Supermarket's specification within a reasonable time after the date of that Supplier's invoice.

PART 2 – PRICES & PAYMENTS

No retrospective reduction in price without Reasonable Notice

- 4 A Supermarket shall not directly or indirectly require a Supplier to reduce the agreed price of or increase the agreed discount for any product *unless* Reasonable Notice of such requirement is given to that Supplier in writing before the relevant supplies of that product are made.

No obligation to contribute to marketing costs

- 5 A Supermarket shall not, directly or indirectly, Unreasonably Require a Supplier to make any Payment towards that Supermarket's costs of:
- (a) buyer visits to new or prospective Suppliers;
 - (b) artwork or packaging design;
 - (c) consumer or market research;
 - (d) the opening or refurbishing of a store; or
 - (e) hospitality for that Supermarket's staff.

No Payments for lower profits *unless* the basis of Payment is agreed in advance

- 6 A Supermarket shall not directly or indirectly require a Supplier to make any Payment to compensate that Supermarket when profits from the sale of that Supplier's products are lower than expected by that Supermarket *unless* the basis of any such Payment is agreed

in writing between that Supermarket and that Supplier before the relevant supplies of that product are made.

No Payments for wastage without prior agreement, negligence or default

7 A Supermarket shall not directly or indirectly require a Supplier to make any Payment to cover any wastage of that Supplier's products incurred at that Supermarket's stores *unless*:

- (a) such wastage is due to the negligence or default of that Supplier; or
- (b) the basis of such Payment is agreed in writing between that Supermarket and that Supplier before the relevant supplies of that product are made.

8 A Supermarket shall use its best endeavours to agree in writing with a Supplier what principal factors in their dealings would be likely to amount to negligence or default on the part of that Supplier.

Limited circumstances for lump sum payments as a condition of being a Supplier

9 A Supermarket shall not directly or indirectly require a Supplier to make any lump sum payment as a condition of stocking or listing that Supplier's products *unless* either:

- (a) such payment is made in relation to a Promotion; or
- (b) such payment:
 - (i) is made in respect of new products which have not been stocked, displayed or listed by that Supermarket during the preceding 365 days in 25% or more of its stores; and
 - (ii) reflects a reasonable estimate by that Supermarket of the risk run by that

Supermarket in stocking, displaying or listing such new products.

No lump sum payments for better positioning of goods *unless* in relation to Promotions

- 10 A Supermarket shall not directly or indirectly require a Supplier to make any lump sum payment in order to secure better positioning or an increase in the allocation of shelf space for any products of that Supplier within a store *unless* such payment is made in relation to a Promotion.

PART 3 – PROMOTIONS

No Promotions without Reasonable Notice

- 11 Where a Supermarket directly or indirectly requires any Payment from a Supplier in support of a Promotion of one of that Supplier's products, a Supermarket shall only hold that Promotion after Reasonable Notice has been given to that Supplier in writing.

Due care to be taken when ordering for Promotions

- 12 A Supermarket shall take due care when ordering products from a Supplier at a promotional wholesale price not to over-order, and, if that Supermarket fails to take such care, it shall compensate that Supplier for any product over-ordered and which it subsequently sells at a higher non-promotional retail price.
- 13 A Supermarket shall ensure that the basis on which any order for a Promotion is calculated is transparent.

Suppliers not predominantly to fund Promotions

- 14 A Supermarket shall not, directly or indirectly, Unreasonably Require a Supplier predominantly to fund the costs of a Promotion.

PART 4 - COMPENSATION

No change to supply chain procedures without Reasonable Notice or compensation

- 15 A Supermarket shall not directly or indirectly require a Supplier to change significantly any aspect of the normal supply chain procedures *unless* that Supermarket either:
- (a) gives Reasonable Notice of such change to that Supplier in writing; or
 - (b) fully compensates that Supplier for any net resulting costs incurred as a direct result of the failure to give Reasonable Notice.

No change to specifications without Reasonable Notice or compensation

- 16 A Supermarket shall not directly or indirectly require a Supplier to change the specification (including the quantity of products required) of any agreed order *unless* that Supermarket either:
- (a) gives Reasonable Notice of such change to that Supplier in writing; or
 - (b) fully compensates that Supplier for any net resulting costs incurred as a direct result of the failure to give Reasonable Notice.

Limited circumstances for compensation for erroneous forecasts

- 17 Notwithstanding clauses 15 and 16 above, a Supermarket shall fully compensate a Supplier for any cost incurred by that Supplier as a result of any forecasting error attributable to that Supermarket *unless*:
- (a) that Supermarket has prepared those forecasts in good faith and with due care; or
 - (b) there is an agreement in writing between that Supermarket and that Supplier

before the relevant supplies of the product are made that such compensation is not appropriate.

18 A Supermarket shall ensure that the basis on which it prepares any forecast is transparent.

PART 5 – CONSUMER COMPLAINTS

No unjustified Payment for consumer complaints

19 Subject to clause 21 below, where any consumer complaint can be resolved in store by a Supermarket refunding the retail price or replacing the relevant product, that Supermarket shall not directly or indirectly require a Supplier to make any Payment for resolving such a complaint *unless*:

- (a) the Payment does not exceed the retail price of the product charged by that Supermarket;
- (b) that Supermarket is satisfied on reasonable grounds that the consumer complaint is justifiable and attributable to a failing on the part of that Supplier; and
- (c) that Supermarket gives notice to that Supplier of such complaint.

20 Subject to clause 21 below, where any consumer complaint cannot be resolved in store by a Supermarket refunding the retail price or replacing the relevant product, that Supermarket shall not directly or indirectly require a Supplier to make any Payment for resolving such a complaint *unless*:

- (a) the Payment is reasonably related to that Supermarket's costs arising from that complaint;
- (b) that Supermarket has verified that the consumer complaint is justifiable and attributable to a failing on the part of that Supplier; and

- (c) a full report about the complaint (including the basis of the attribution) has been made by that Supermarket to that Supplier.

21 A Supermarket may agree with a Supplier an average figure for Payments for resolving such complaints as an alternative to accounting for complaints individually.

PART 6 – THIRD PARTY DEALINGS

No tying third party goods and services for Payment

22 A Supermarket shall not directly or indirectly require a Supplier to obtain any goods, services or property from any third party where that Supermarket obtains any Payment for this arrangement from any third party, *unless* the Supplier's alternative source for those goods, services or property:

- (a) fails to meet the objective quality standards laid down for that Supplier by that Supermarket for the supply of such goods, services or property; or
- (b) charges more than any other third party recommended by that Supermarket for the supply of such goods, services or property.

PART 7 – STAFF TRAINING

Obligatory training for buyers

23 A Supermarket shall supply a copy of this Code to all Grocery buying staff.

24 A Supermarket shall provide training on the requirements of this Code to all Grocery buying staff.

25 A Supermarket shall furnish to the Director an annual return detailing staff training and guidance issued in relation to this Code in such form and on such days as the Director may

specify from time to time.

PART 8 - GENERAL

Compliance and Dispute Resolution

- 26 A Supermarket shall negotiate in good faith with a Supplier to resolve any dispute arising under the terms of this Code.
- 27 If bi-lateral negotiations under clause 26 above cannot resolve a dispute within 90 days of that dispute arising, a Supermarket shall at its own expense offer the services of the Mediator to assist.
- 28 If the Mediator under clause 27 above has failed to resolve a dispute, the Supermarket shall give notice to the Director.
- 29 A Supermarket shall notify the contact details of any Mediator to the Director.
- 30 A Supermarket shall procure the Mediator to supply to the Director:
- (a) an annual return of its work under this Code in such form and on such days as the Director may specify from time to time; and
 - (b) such other information as the Director may specify from time to time in relation to individual cases on which the Director is considering taking action.

Interpretation

- 31 For the avoidance of doubt, compliance with this Code does not affect the duty on any person to comply with or restrict the application of the Competition Act 1998.
- 32 In this Code:

‘the Director’ means the Director General of Fair Trading;

‘Groceries’ are products sold from any retail store in the United Kingdom and include food, pet food, alcoholic and non alcoholic drinks, cleaning products, toiletries (dental care products, soap, hair care, sanitary protection, nappies and similar products) and household goods (tissues, kitchen rolls, food wraps, bin liners, light bulbs and similar products) but exclude food and alcoholic and non alcoholic drinks sold for consumption in the store where it is purchased, petrol, clothing, DIY products, financial services, pharmaceuticals, newspapers, magazines, greetings cards, compact discs, video and audio tapes, toys, plants, flowers, perfumes, cosmetics, electrical appliances, kitchen hardware, gardening equipment, books, tobacco and tobacco products and Grocery means any one of them;

‘Group of Interconnected Bodies Corporate’ has the meaning given in section 137(5) of the Fair Trading Act 1973;

‘the Mediator’ means such independent person or persons as shall be appointed by a Supermarket under clause 27 above from time to time to provide mediation services;

‘Payment’ or ‘Payments’ includes an inducement in any form (monetary or otherwise) and includes better contractual terms;

‘Person’ includes a body of persons corporate or unincorporate;

‘Promotion’ means any offer for sale at an introductory or a reduced retail price, or with some additional benefit to consumers that is intended to be only for a specified period;

the meaning of ‘Reasonable Notice’ in clauses 2, 4, 11, 15 or 16 depends on the circumstances of each case including, for example:

- (a) whether the notice period given is objectively justifiable and this depends on the circumstances of each case including, for example:
 - (i) the duration of any relevant contract or the frequency with which orders are placed by the Supermarket for relevant Groceries;
 - (ii) the characteristics of the relevant Groceries and their production including durability and dependency on external factors such as the weather;
 - (iii) the value of any relevant order relative to the turnover of the Supplier in question; and
 - (iv) the overall impact on the business of the Supplier of the information given in the notice;
- (b) whether the reasons for the notice period given are transparent; and
- (c) whether similar cases are treated alike;

‘Reference Stores’ means multiple stores in the United Kingdom being supermarkets with 600 square metres or more of grocery sales area, where the space devoted to the retail sale of food and non-alcoholic drinks exceeds 300 square metres and which are controlled by a person who controls ten or more such stores;

‘the Supermarkets Report’ means the report of the Competition Commission on the supply of Groceries from multiple stores in the United Kingdom presented to Parliament in October 2000 (Cm 4842);

‘Supermarkets’ means all retailers of Groceries which operate Reference Stores with 8% or more of the market for the purchase of Groceries for resale from their stores in the United Kingdom and ‘Supermarket’ means any one of them;

‘Supplier’ means any Person actually or potentially carrying on a business in the supply of Groceries to any Supermarket, such Person being established anywhere in the world but, in relation to any Supermarket, excludes any Person which is a member of the same Group of Interconnected Bodies Corporate as that Supermarket;

‘Unreasonably Require’ in clauses 5 and 14 excludes a case where a Supplier genuinely volunteers to make a Payment in response to ordinary commercial pressures, provided that, where those pressures are partly or wholly attributable to a Supermarket, they shall only be deemed to be ordinary commercial pressures where they are objectively justifiable, transparent and result in similar cases being treated alike; and

‘in writing’ includes by e-mail.

FOR AND ON BEHALF OF [], A SUPERMARKET

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Date

Name.....(Director)

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Name.....(Director/Secretary)