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The Grocery Supply Chain Code of Practice (GSCOP) – a guide for NFU Members

The GSCOP came in to force on 4th February 2010 aiming to regulate relationships between retailers and their direct suppliers. It established a number of conditions preventing retailers engaging in unfair practices with their suppliers. This guide summarises the main provisions of the GSCOP and sets out what it means in practice for farmers and growers

Who is affected by the GSCOP?

The GSCOP affects those businesses that are directly supplying groceries to one, or more, of the 10 largest supermarkets with a turnover of over £1 billion, currently Aldi, Asda, Co-op, Iceland, Lidl, M&S, Morrisons, Sainsburys, Tesco and Waitrose. It may also apply to other businesses that carry out a substantial part of the business over those 10 retailers (eg a trading subsidiary).

Often, farmers and growers will be supplying to an independent processor or packer that in turn supplies a number of retail customers. The relationships between farmers and these intermediaries are **not** covered by the GSCOP. However, in many cases, farmers and growers are dealing directly with supermarkets and in these cases the regulations do apply, as they do for relations between any farmer owned packer or processor and the retailer. The benefits of the GSCOP also come in eliminating bad behaviour further up the supply chain which could ultimately have repercussions on farmers.

What is covered by the GSCOP?

Fundamentally, the GSCOP regulates **relationships and behaviour** between retailers and suppliers. It does not influence prices, curb robust (but legal) commercial negotiations or reduce the competitive nature of the retail environment. It contains a number of provisions that retailers must adhere to in their dealings with suppliers. The GSCOP must be incorporated into all supply agreements. No provisions are permitted that are inconsistent with the GSCOP.

1. Compulsory written agreements

A fundamental requirement is for a **written agreement** (Supply Agreement) containing all terms and conditions to exist between supplier and retailer. Any agreed changes to the agreement must be confirmed in writing by the retailer within 3 days. Email is accepted as a written agreement but failure on the part of the retailer to provide a written agreement is a breach of the GSCOP.

Prior to entering into any agreement, a retailer must also provide a supplier with a notice, which confirms:

- The obligation that the retailer will not directly or indirectly require supplier actions in relation to specific elements (marketing costs, wastage, payments, promotions, changes to supply chain procedures or tying) that are more specifically set out in the GSCOP.
- The contact details of the Senior Buyer, Code Compliance Officer and Adjudicator (when established).
- The responsibilities of the Senior Buyer, which include the review of any decision in relation to the GSCOP.
- Procedures relating to the mechanism to provide feedback on the retailer's compliance with GSCOP, the dispute resolution process, an obligation on the retailer to allow a supplier to escalate a decision of a buyer to the senior buyer for review
- Procedures for delisting

2. Principle of Fair Dealing

The code also includes a principle of **fair dealing**, which stipulates that a retailer must deal with its suppliers fairly and lawfully and without distinction between formal or informal arrangements. It also includes the requirement to conduct trading relationships in good faith and emphasises that no duress should be placed on suppliers. It established that there should be certainty for suppliers regarding risks and costs of trading, particularly in relation to production, delivery and payment issues.

3. Exclusions

The GSCOP sets out a number of exclusions, i.e. activities that must not be carried out unless certain conditions are met. These are:

a) Any retrospective variation to Supply Agreements

There should be no retrospective changes to an agreement unless the agreement sets out clearly and unambiguously the specific changes of circumstance (outside the retailer's control) that would allow for such changes and details the rules that will be used for calculating the adjustment. Where an agreement provides for unilateral variation by the retailer, it must give reasonable notice of any changes.

b) Forced changes to supply chain procedures

There should be no changes to supply chain procedures unless the retailer gives reasonable notice in writing or fully compensates the supplier for not giving reasonable notice.

c) Forced contributions

A retailer must not require a supplier to pay for marketing costs, artwork or packaging design, consumer or market research, the opening or refurbishing of a store or hospitality for a retailer's staff, unless specifically provided for in the Supply Agreement

d) Payments for shrinkage

A supply agreement must not include provisions for payments to a retailer as compensation for shrinkage.

e) Payments for wastage

A retailer must not require a supplier to make payments for wastage unless it is due to the negligence or default of the supplier and the supply agreement sets out expressly and unambiguously what constitutes negligence or default. Payments for wastage may be permitted where the basis of such payments is set out in the agreement.

f) Tying

A retailer must not tie a supplier to third party goods, services or property in order to receive payment, unless the supplier's alternative source fails to meet the reasonable objective quality standards laid down by the retailer or charges more than any other third party recommended by that retailer.

g) Payments for better positioning of goods or an increase in the allocation of shelf space

These must not be required by retailers unless the payment is made in relation to a promotion.

h) Payments as a condition of being a supplier

Suppliers must not be required to make any payment as a condition of stocking or listing a product unless a payment is made in relation to a promotion.

Payments can be required if they are made in respect of products that have not been stocked, displayed or listed during the preceding 365 days in 25 per cent or more of the retailer's stores. The payment should reflect a reasonable estimate of the risk run by the retailer in stocking, displaying or listing the new product.

i) Unjustified payments for consumer complaints

Should a consumer complaint be received, the retailer should verify and be satisfied that a complaint is genuine and attributable to negligence or default or breach of the supply agreement on the part of that supplier before requiring any payments from them.

If a consumer complaint can be resolved in store by refunding the retail price or replacing the product, the retailer should not require a payment from the supplier that is greater than the retail price of the product.

If a consumer complaint can't be resolved in store (by refunding the retail price or replacing the product) the retailer should not require a payment from the supplier unless it is reasonably related to that retailer's costs arising from that complaint. A full report about the complaint (including the basis of the attribution) and adequate evidence of the fact that the consumer complaint is justifiable and attributable to the supplier must be provided by the retailer.

Alternatively the supplier and retailer may agree an average figure for payments for resolving customer complaints but this average figure must not exceed the expected costs to the retailer of resolving such complaints.

4. Promotions

The GSCOP sets out that suppliers must not be required to *predominantly* fund the costs of a promotion. Where a payment from a supplier to support a promotion is required, a retailer must only hold that promotion after reasonable notice has been given in writing. A retailer must not require or request a supplier to participate in a promotion where this would entail a retrospective variation to the agreement.

Retailers must take due care when ordering for promotions not to over-order at promotional wholesale prices, and ensure that the basis on which the quantity of any order for a promotion is calculated is transparent. If the retailer fails to take such steps it must compensate the supplier if it subsequently sells the groceries at a higher non-promotional retail price with the compensation being the difference between the promotional wholesale price paid and the non-promotional wholesale price.

5. Other provisions**j) Provide full compensation for forecasting errors**

Retailers must compensate suppliers for any costs incurred as a result of a forecasting error by the retailer, unless the retailer prepared the forecasts in good faith, due care and in consultation with the supplier or unless the supply agreement includes an express provision that full compensation is not appropriate. Also, the retailer must ensure that the basis on which it prepares any forecast has been communicated to the supplier.

k) Make prompt payments

Payments should be made in accordance with the supply agreement and, in any case, within a reasonable time after the date of the supplier's invoice.

l) Delisting

The GSCOP stipulates that delisting of a supplier must be for genuine commercial reasons only. These **do not** include a supplier exercising its rights under the supply agreement or the failure of the retailer to fulfil its obligations under the GSCOP.

Should the retailer wish to delist a supplier it must provide reasonable notice in writing. This should also inform the supplier of its right to have the decision reviewed by the retailer's senior buyer and allow the supplier the opportunity to attend an interview on the de-listing with the retailer's Code

Compliance Officer. The notice given should also provide the supplier with sufficient time within which to exercise these rights.

Resolving disputes under the GSCOP

Retailers are required to negotiate in good faith when dealing with disputes raised by suppliers under the GSCOP.

The GSCOP sets out a process for resolving disputes between suppliers and retailers. In the first instance, suppliers may request that the retailer's senior buyer review any decisions that have been made. He/she may also inform the retailer's **Code Compliance Officer**, who carries responsibility for overseeing implementation and enforcement of the GSCOP within the retailer. Where any dispute is not resolved to the satisfaction of the supplier within 21 days of the dispute being initiated then the retailer must submit the dispute for arbitration by the Groceries Code Adjudicator.

What is the role of the Adjudicator?

Christine Tacon, who used to run the 50,000-acre Co-op Farms operation across England and Scotland, was appointed as Groceries Code Adjudicator in January 2013 by competition minister Jo Swinson to ensure 'large supermarkets treat their suppliers fairly and lawfully'. And, after receiving Royal assent in spring, Christine formally began her role in July.

Under the Groceries Code Adjudicator Bill, the Adjudicator has the powers to investigate breaches of the GSCOP and deliver sanctions against offending retailers, including 'naming and shaming' and issuing fines. In an interview with the NFU in June, Christine explained: "I can make a retailer advertise nationally what they have done, which is the naming and shaming part. Any retailer would be mortified to have to do that. I don't want to get to that point. I would rather talk to the retailers about what they are doing and iron out any bad practices before punishment because sometimes they might not know what they're doing is wrong.

"The first step is that I can recommend what they can do differently. Then comes the naming and shaming part where I can make them put adverts in national newspapers. The last resort is the fine."

Importantly, the Adjudicator is able to gather evidence from suppliers anonymously, therefore protecting the identity of the complainant. It is clear that in the climate of fear that exists among suppliers, many have been reluctant to pursue what they believe to be breaches of the GSCOP with the retailer in question. The establishment of the Adjudicator will provide a mechanism for suppliers to raise complaints confidentially and anonymously.

In addition, the Adjudicator's role also allows for these poor practices to be reported by either the farmer or a credible third party like the NFU without fear of retribution.

Not every complaint will be investigated – the Adjudicator will look at where there are 'patterns' reported by numerous suppliers which could lead to three or four investigations a year.

What should I do if I have a complaint to make?

Although Christine has formally begun her role, her powers of investigation are not likely to commence until 2014, until which point the process for investigation is formulated.

On 31st July 2013, an open consultation was launched to 'seek feedback on how the Groceries Code Adjudicator will investigate, enforce and penalise suspected breaches of the Groceries Supply Code of Practice.' The consultation closes on 22nd October 2013 and the NFU is encouraging members to send in their views.

Once the consultation closes and is discussed and agreed in Parliament, Christine will be able to begin formal investigations.

Generally, farmers and growers are encouraged to try to resolve disputes directly with retailers as part of regular commercial discussions/negotiations and farmers should ensure they are familiar with the Code Compliance Officers within the retailer.

The investigative powers of the Adjudicator will provide another means by which disputes can be addressed in the near future and the NFU will be producing a simple format for which members can raise their complaints through the NFU, in due course.

Any NFU members wishing to discuss these or the GSCOP in more detail may contact Deborah Cawood, NFU Head of Food Chain Unit on 02476 858646 or by email to deborah.cawood@nfu.org.uk