

Under pressure

Food suppliers now have a voice that could help turn the pressures from supermarkets into something positive. **Chris Shaw** reports.

WHENEVER THE PRESSURES IMPOSED by supermarkets upon food processors and suppliers are discussed, the conversations often end up conducted in extremely hushed tones. It's only when suppliers share their 'off the record' comments that a pattern of stories starts to emerge.

The unsubstantiated stories shared by some of these companies, unless backed up by evidence, invariably remain just that – unsubstantiated stories. Unsurprisingly, many within the food industry are afraid to openly discuss the matter, especially when contract renewals can make or break a smaller business. After all, why would a food processing firm that supplies one of the leading supermarkets actively bite the hand that feeds it?

However, the daunting shadow of the supermarket behemoth could be about to diminish because food processing suppliers now have a voice that not only has the power to name and shame, but ultimately fine any of the major supermarkets that it deems to be acting illegally.

On 25 April, following an agreement by Houses, a Bill received Royal Assent and is now an Act of Parliament. The role of the new Groceries Code Adjudicator Act 2013 (GCA Act) which comes into force in June

2013 is to enforce the Groceries Supply Code of Practice. This Code regulates the relationship between the 10 largest supermarkets with an annual turnover of £1 billion and their direct suppliers. The Code was a result of the Competition Commission's investigation of the groceries market which it undertook between May 2006 and April 2008.

The Competition Commission found that although the groceries sector was broadly competitive, there were instances of large retailers transferring excessive risks and unexpected costs to their direct suppliers, which could lead to consumer detriment in the long term. It recommended various remedies to address these adverse effects, such as an improved code of practice in the form of the Code, together with an ombudsman to ensure effective enforcement of the new provisions for suppliers and retailers.

Now the UK's first independent Groceries Code Adjudicator, Christine Tacon has been appointed by Parliamentary Under Secretary of State for Employment relations, consumer and postal affairs, Jo Swinson, to oversee the relationship between large supermarkets and their direct suppliers. In her role, she aims to give suppliers the stability to help them grow, innovate and

compete, while providing protection so they are treated fairly and lawfully by large supermarkets.

In her role as Adjudicator, Tacon is responsible for enforcing the Groceries Supply Code of Practice and has the power to launch investigations into suspected breaches of the Code, including those arising from confidential complaints from any source. If evidence of a breach is found, the Adjudicator will be able to make recommendations against a supermarket, require them to publish details of their breach, or, in the most extreme cases, to impose fines. She also has the power to arbitrate disputes between large supermarkets and their direct suppliers.

"The Code of Practice which followed the two competition commission investigations was drawn up by the Office of Fair Trading (OFT) and has actually been law since February 2010," Tacon told *Food Processing*. "The OFT set up the Groceries Suppliers Code of Practice and they required all retailers to have written agreements with their direct suppliers. They also required all of the retailers to have a Code Compliance Officer to whom suppliers could refer with concerns over potential breaches of the Code.

"In their annual report the retailers were



told to declare any complaints they've had that they've handled: the majority of them have had no complaints at all. The OFT asked the retailers when they brought out the Code of Practice to set up their own independent ombudsmen that people could go to complain. The retailers did not set one up; as I think they felt they weren't breaking the code.

"There was a huge amount of pressure to have an Adjudicator and this whole Act is only about an Adjudicator to oversee adherence to the Code of Compliance that has been law for over three years. This is largely because there's a view that there's a climate of fear and people aren't complaining when the Code is being broken."

So if Tacon's role is to make sure that the Code is adhered to, what are the different ways that she can enforce it? "There are two routes," she explained, "one of which is arbitration: if a direct supplier to a retailer believes the code is being breached their first step is to go the Code of Compliance Officer. They have to get a response within 21 days. If they can't agree whether it's been breached or not, or to the extent to which it's been breached, they can come to me for arbitration. In that situation, the entire costs of the arbitration have to be paid by the retailer and I can award compensation as well if I find against the retailer. The only way that the direct supplier is liable for any costs is if we deem the case to be frivolous, or not based on fact. So in this situation there's a third party involved in the process as opposed to just going to the Code Compliance Officer."

Investigations

For food processors, suppliers and retailers, the most interesting area of the Adjudicator's powers is her ability to order investigations. According to Tacon, it's anticipated that she'll only conduct a maximum of four investigations a year. "If I am frequently hearing what I consider to be a breach of the Code I'll need to do an investigation on behalf of the whole industry," she noted. "I think it's very, very unlikely that I will use any one of my four investigations to follow up an issue that one supplier may have with one retailer. Therefore I'm looking for the things that I think are endemic or that happen frequently."

Investigations will take the form of legal inquiries and the process will require documents from any parties involved. Indeed, Tacon's team of four people will expand during an investigation, with people

being seconded in from the Civil Service. "I'll be based in the Competition Commission office and many of the procedures will be similar to how a Competition Commission inquiry would be held," Tacon observed. "At the end of an inquiry if I find that there's been a breach my first sanction is to make a recommendation. I expect this to be in a situation where the Code talks about 'reasonable' or 'fair', and my recommendation may well be that I decide what constitutes 'reasonable'.

"For example, if a retailer massively over orders on a promotion and has surplus stock that they then sell at full price later on, the supplier is allowed to be compensated. We may well get into a dispute as to whether over ordering by a factor of three is within the realms of 'good forecasting' or not. I can see where I might have to define what I think is 'reasonable' for the cost of handling a customer complaint: I have heard of charges from nothing up to £85.

"Having done an investigation I can make a recommendation which then becomes a breach from then onwards if it's breached. My second sanction is requiring a retailer who has breached to 'name and shame'. My final sanction, which was pushed for very hard towards the end of last year when the Bill was in Parliament, is for the ability to fine. Once I've started, I've got to issue guidance and one of the things I have to put into the guidance is what the maximum level of fines can be. Then that's got to go before the House of Commons to agree as a maximum level of fine."

While Tacon doesn't yet have a specific figure in mind, she suspects it may be a percentage of turnover. "Because, at the end of the day, a fine is likely to be for a repeated breach or something that is blatantly a breach of the Code, not a misunderstanding of what the Code actually meant. That's what the recommendation sanction is for."

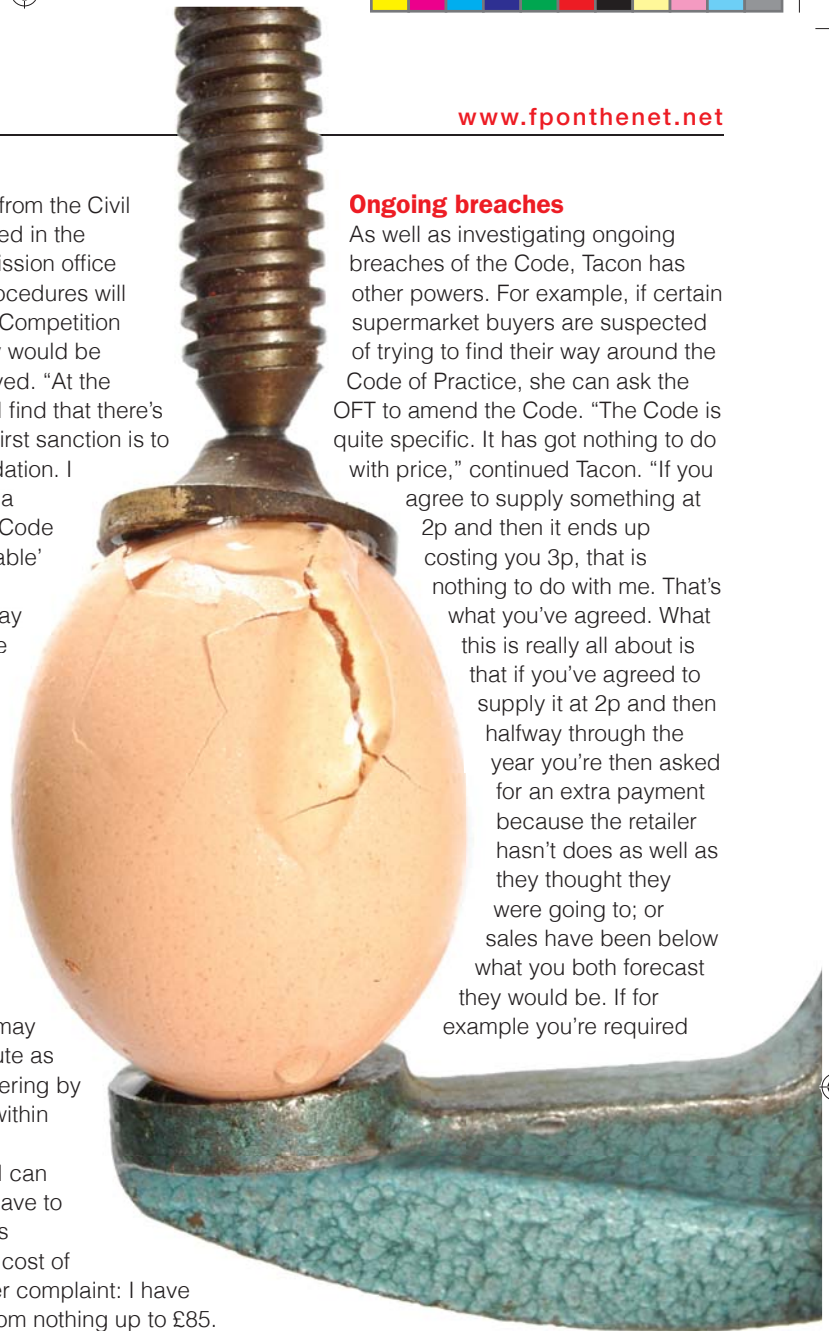
Ongoing breaches

As well as investigating ongoing breaches of the Code, Tacon has other powers. For example, if certain supermarket buyers are suspected of trying to find their way around the Code of Practice, she can ask the OFT to amend the Code. "The Code is quite specific. It has got nothing to do with price," continued Tacon. "If you agree to supply something at 2p and then it ends up costing you 3p, that is nothing to do with me. That's what you've agreed. What this is really all about is that if you've agreed to supply it at 2p and then halfway through the year you're then asked for an extra payment because the retailer hasn't done as well as they thought they were going to; or sales have been below what you both forecast they would be. If for example you're required

to use a third party packaging supplier and it's at a premium to what you could get it for, and the retailer is getting a kick back from the third party, then it's likely to be an outright breach of the code.

"If these sorts of things happen after the point at which you've agreed everything, it is not allowed.

"I think there's a possibility that some of the retailers might have got into the habit of seeing packaging as a profit centre, haulage as a profit centre, and potentially – and I don't know this – customer complaints might be seen as a profit centre, as could audits, laboratory checks or even merchandising. Do the supermarkets realise that if they're asking a supplier to use a merchandiser that is paying them something for the right to be an exclusive merchandiser, and the supplier could have got the merchandising done cheaper, it's potentially a breach?"



Anonymity

Christine believes that much of her role at the beginning will be taken up by trying to get direct suppliers to talk to her. "I have to guarantee their anonymity if they request it, but generally I'm just looking for things that are endemic," she said. "So, once someone starts telling me, I may say, 'Yes, I've heard that', but I will not launch an investigation on the basis of one supplier saying something's going on.

Generally, people in the farming industry feel reasonably confident that they know me and so I'm hearing things from them. Trade associations are another good route because I hear complaints from them but once a trade association has tipped me off that such and such is happening I will then want to go out and speak to people who will give me first hand support of that. I wouldn't ever conduct an investigation on the basis of second hand information.

Such is the gravitas of the Adjudicator that since Christine's role was announced, supermarkets have already reacted positively.

"So far, I'm not finding it difficult talking to people because, once they start talking, they realise that I know exactly what they're talking about and they are not alone! Since taking on this role, I'm hearing about a few things happening already. People are starting to get letters – supplier agreements, just in recent weeks! I spoke to a packer who has been told that they can now get their packaging from whoever they want to. And somebody showed me a piece of paper from a retailer which laid out the terms of the agreement – when it started, when it finished, what the prices were for the packs, what the promotional prices were and how many weeks of that promotion there would be within the trading year. There was also a list at the bottom, with various ways they would assess that supplier's performance when it came to re-listing.

"I've heard from other suppliers to a different retailer that they're now getting chapter and verse whenever a product is being de-listed. These are all things that are required by the Code – sufficient notice of change of agreements and all that sort of thing. So it's almost as if what I'm saying is going in the press and people are hearing about this, it's starting to be picked up. When I met the British Retail Consortium I said to the representatives of most of the retailers: 'Look, I don't actually want to do investigations. I want to find out what's going on and give you the chance to do something about it'. Most of the Code

Compliance Officers, as far as I can tell, but I haven't met them all yet, are either based in legal or audit or in a role that is there to protect the company from breaking the law.

"At the end of the day, the Code of Practice is the law. So I think that the Compliance Officers will be an incredibly useful asset to resolve these things without me having to run an investigation. If there's one thing I can guarantee, if I have to launch an investigation, it's going to cost the retailers.

"This is because they're going to have to go and get all of the evidence, all of my costs have to be picked up by the retailers and I think the worse thing, which people don't necessarily think about, isn't the cost of the investigation, it's what value those people who are doing the investigation would have been adding to their business if they weren't doing the investigation. You often have very senior people getting involved who are then no longer driving the business forward. So I think it's in all of our interests not to have investigations, but I will be trying to feed into them what I'm finding, in the hope that some of these things can get sorted without me having to go and investigate."

Combating fear

While Christine Tacon's appointment as the Adjudicator may have sent tremors throughout the whole food industry, is she not concerned that many suppliers will simply be too scared to contact her?

"People tell me that these things are happening and are widespread," she explained. "But the Code Compliance Officers genuinely believe that they aren't going on and that's what they're saying to me. But I will be spending more time with Code Compliance Officers once I've started and talking to them about what I'm hearing. They may well be thinking, 'It's probably our competitors' but we may disagree with my interpretation of the Code, in which case we need to discuss it.

"What I'm really saying is that if one company phones up and quotes an incident, I won't be responding to that unless they ask me to. What I will be doing is thinking 'that's the fourth one I've had of those from that retailer. I think it's about time I went and spoke to their Compliance Officer' and, unless I hear directly from these people that it's stopped, I will launch an investigation.

"My powers don't come into effect until June 2013 and I can't do anything about anything that's happened before I start. But anything from that date, even though I can't

launch an investigation until the guidance has all been issued and consulted and finalised, which has to be within six months, I can investigate something that happened on the day that I started.

"What I need people to do is to let me know what's going on and to recognise that I don't expect to sort the past out, even from the first day I start. What I'm trying to do is to clean things up for the future. And if people don't tell me what's going on, then I haven't got enough evidence to do it.

Positive pressure

According to Tacon, retail buyers are under enormous pressure themselves. Their main aim is to get good value food to customers and over the years they've been achieving this by applying pressure on food suppliers. However, Tacon believes this is not necessarily a bad thing, as it inspires innovation.

"From having worked at the bottom of the food chain and been a packer and processor myself, it's this incessant pressure from the retailers that makes you innovate and do things that you would never have done were the pressure not there. It's almost like you have to have that pressure or you won't keep thinking of more efficient ways of working or whether a robot could save you money.

"We all need to be going around thinking 'is there a more efficient way of doing this?'. I know it sounds hard but this pressure is healthy, as long as it's done in the right way and that people are responding, but the buyers are very capable and driven. If you're a limited company they will look up your accounts and they'll know what percentage of your business they are. If they constitute 50% of your business and you've just had a good year, they will be looking for more money, one way or another. But they should only be doing that when it comes to re-negotiation. Once you've agreed something they can't come back and try and get it changed.

"It's actually trying to focus on trust where a supermarket may say, 'We'd quite like to get rid of cardboard in store, so if you put food products into trays what would be the savings or cost implications?'. It's also about trying to get a relationship of trust between the two so that they are working together to make the supply chain more efficient. I think everybody would accept that if you find a major innovation that makes things cheaper, that the starting point would be that the benefits are shared 50/50. You don't expect the supplier to take it all and you don't expect the retailer to

Groceries Code Adjudicator,
Christine Tacon



take it all, but if you can work together and start taking costs out you'll just end up with a completely different approach to the supply chain. But, realistically, I just want to reinforce that pressure is essential because you have to keep innovating."

But surely this pressure is the same pressure that resulted in 'shortcuts' being made in the supply chain – and, in particular, the cause of the horsemeat scandal?

"Well that's fraud, where someone's seen a way of making a fast one. People along the supply chain were not thinking 'How can they possibly do it for that amount of money? Maybe I ought to go and find out?'. It was just 'that's great, I'll take it'. Generally if it's too good to be true, it's too good to be true - and there's something else going on.

"But I do think that for retailers to say 'I can get this cheaper from overseas, why would I get it from you?' - and there's no fraud involved and it's a genuine price - then there's something wrong with the way we're doing things and we need to see how we can improve. This Code and my

position are not there to be a charter for people to be inefficient and to start passing the cost on to the retailers and then to the consumer. It's about fairness, so that people will know where they stand, can afford to invest and know that if they are going to put in a huge investment that someone's not going to then come and ask for a big lump sum back payment because they've now made a big saving. This is something that will be worked on together.

"Generally my experience is that if two sides are working together, then the net benefit to both will be far greater than having adversarial relationships, but it takes more time."

Since the Act was passed, there hasn't yet been a notable increase in the number of food suppliers contacting Christine, something that she is all too aware of. "Somebody once joked that I'd have the emptiest in-tray in the business," she continued, "and I sort of expect that. I would be very surprised if people started putting things in writing to me. But I've been going to places and people have been slipping me bits of paper, business cards,

The GCA Act and you

Parliamentary Under Secretary of State for Employment relations, consumer and postal affairs, **Jo Swinson MP**, explains to **Chris Shaw** how the Groceries Code Adjudicator Act will affect you.

JS: First of all the Code is something which your readers, whether they're supermarkets or suppliers, will be familiar with because that's already in place.

What this does is to build on that by making sure that we've got a procedure in place for it to be enforced if it isn't being. So it's not about new obligations, but it is about making sure that Code is absolutely complied with. And there've been a lot of concerns put forward by various suppliers and groups representing suppliers that have raised significant concerns over a course of years. This dates back to the Competition Commission's initial investigation and they recommended that the Code be put into place but also took the view that it would actually need to have an Adjudicator function to make sure that it runs as well as it should.

So we have passed the Bill which got Royal Assent at the end of April and it formally commences two months after that, at the end of June. Christine Tacon, as you know, has been appointed as the Adjudicator and she's been spending this time to get to know people within the industry and do that preliminary relationship building. Obviously, she's familiar with a lot of the industry already, given her past career, so she's been able to hit the ground running, which is really positive and helpful. Her appointment has generally been very much welcomed by people across the industry.

She will have a range of different functions, one of which will be arbitration so if there's a dispute between a supplier and the supermarket about whether or not a particular behaviour or a particular contract is actually compliant with the Code then she'll be able to look at that case and arbitrate. This will be a useful service and she'll also have powers to conduct investigations. If she finds that the code is being breached, then ultimately she can create sanctions and impose them. Those sanctions will be able to vary from naming and shaming to an extreme case to be able to impose fines as well. So she'll be able to have real teeth behind her powers to do her job. Obviously I think we'd all love it if there are never any fines issued because people choose to comply with the Code and that would be the ideal outcome.

But if that doesn't happen then at least suppliers know that they've got somebody who's independent who they feel they can go to. She has to work under a basis of confidentiality – which I also think is very

important because there has been some fear and concern about people coming forward, and she'll be able to protect that confidentiality in her investigations. There will be cases perhaps where people don't even feel that they can go directly to her and so third parties, such as trade associations would be able to make complaints. That was one of the changes that we made to the Bill in response to the feedback and the comments that we'd had.

So I think through the whole process of taking the Bill through Parliament it's been well scrutinised. We've obviously had a lot of interest from the Select Committee as well – Select Committees plural actually, because DEFRA and BIS are both taking an interest in this issue. I think what we've got is an Act of Parliament that is a strong Act and we've got a strong Groceries Code Adjudicator that has the powers that she needs to do the job, but also very much with an attitude that she also needs to be working with both sides and have the confidence of both sides. If things can be resolved without resorting to confrontation then that's great too."

CS: Since Christine Tacon's appointment was announced, supermarkets already seem to have taken notice.

JS: Yes, which sounds really positive – that's what we want. We want this to encourage good behaviour and we know that in many cases suppliers have positive relationships with the supermarkets which is great. But we've also heard about the examples where that's not the case. The supermarkets varied in their views about the adjudicator – some of them welcomed it, some of them less so. That said, when I met with them recently, they've been at pains to outline how they have already – in the run up to this even coming in – been improving their compliance, making sure that they ensure that they are absolutely adhering to the Code and if that means that there don't need to be investigations or if investigations don't find that anything untoward has happened then that's wonderful.

But, if it is the case that things are happening that shouldn't be, then we have that Adjudicator in place."

CS: If there is an endemic fear from suppliers, how would you encourage them to contact the Adjudicator if they feel there has been a breach of the Code?

JS: I think that one of the challenges up until now has been that we have the Code in place but if people have been worried that it's been broken then the remedies available have really involved legal processes which are not easy for people to launch. They can also be very costly and, as you say, there is also that sort of fear factor which I know people have spoken to me about and is very genuinely felt.

So the advantage of the Adjudicator is that she's in a position where she has power at her disposal. She has not just power to impose sanctions but powers to investigate and get to the bottom of things and so people can go to her knowing that she has that independent position and also that she will respect their confidentiality.

This isn't something where they need to be sticking their own head above the parapet because it's understandably many people would be reluctant to do that – but they can have that reassurance that she will professionally and independently be able to investigate if she is concerned that there has been a breach of the Code. They can bring forward issues to her – whether to arbitrate or indeed whether for a potential investigation. And obviously it's up to her to look at the evidence that's brought forward and see whether she thinks that merits a further full investigation.

So I would encourage suppliers that are worried about this to make sure that they have that conversation and I know that Christine will be making herself available. She is a very approachable person, but none the less has that credibility of her career within the industry and because she is not taking an overtly confrontational approach, then I think that she will also have great power. If she finds that something's wrong she'll be able to take action and the supermarkets will have to listen.





practically under the table or in the corridor at a function and saying 'could you come and see me?' 'Could you visit?' 'Can I have a chat?'

"Once I start giving them examples of things I've been hearing, people will then start saying 'Yes!'. So you start to see what's happening and I think on the whole, I'm going out and hearing things and picking them up. But the trade associations are working quite hard and are giving me their own summaries of things that are going on, so I can go and substantiate it.

As the final details of the Adjudicator role are being put into place, Christine thinks that the Compliance Officers' major concern is that she will be swamped by complaints that are out of scope. She explained: "Because they were covering the cost of my office, that would be very unfair, so I've been bending over backwards to try and make it clear about what I can and can't do.

"The supermarkets' main concern was about the cost of the office, about mission creep and going outside what it was supposed to do. As far as I'm concerned I think the Code is very clear.

"Supermarkets' genuinely believe that as they're training all of their people - they have to train their buyers before they start and they have to refresh that training every year - their view is nothing is going wrong. I think that's interesting and I do wonder if they even know about the alleged problems. Is anybody telling them? So, to a degree, that will be some of my role.

"I also find it interesting that although they might be training their buyers, it might not be the buyers that are doing it, it might be the packaging people or the technical people, who've all been set targets and budgets. I honestly believe that, once I've started, I'll be working alongside the Code Compliance Officers explaining what does and what doesn't constitute a breach and potentially both sides may need legal advice to help interpret the Code.

To a degree, Christine believes her role gives power to the Compliance Officers. Indeed, they are the ones who she expects to sort out any problems. "These are the people who have the internal powers and they can ask their own questions. If retailers break the Code, they will then be doing it with their eyes open, knowing that if I get to hear about it, and we have agreed what the Code means, that's going to make the situation much more difficult for them.

"I had a very good question from one of the Code Compliance Officers who asked, 'How are you going to prove you're doing a good job if you haven't done an investigation or fined anybody?' I replied, 'I haven't been given a target for investigations, I've been given a budget for how many I can do, which is where this 'two to four' comes from. Nor have I been given targets for how much money I'm supposed

to raise from fines'. But if I need to prove I'm doing a good job, I will just get suppliers who are prepared to go on the record, and say, 'we no longer are told who to get our packaging from, we have not in the last two years been asked for a lump sum payment, our payment terms are something that we are negotiating every year, I know exactly where I stand, and I'm paid on time.'

"And that's what it's all about. It's about cleaning it up, not about making the job easy. So I need suppliers to come out and say these things. People need to get into the habit that once a negotiation has been made, the negotiation has been done! Supermarkets can't come back and keep asking for more! Once the negotiation has been made it should be about 'how do I sell as much of this product as I can because that's going to be right for me and right for my supplier?'"

