INTRODUCTION

1. These Explanatory Notes refer to the Groceries Code Adjudicator Bill [HL] as brought from the House of Lords on 24 July 2012. They have been prepared by the Department for Business, Innovation and Skills to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.

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. Twelve 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 small 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**

8. 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, and further retailers can be designated by the Office of Fair Trading if they have such a turnover of over £1 billion.

9. 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.

10. 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

11. 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.

12. 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.

13. 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.

14. The Groceries Supply Order protects direct suppliers to the large retailers, wherever these suppliers are based in the world.

15. 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

16. 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.

17. 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

18. 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.

19. 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 makes an order authorising the Adjudicator 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
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• recommend changes to the Groceries Code.

How the Adjudicator will be funded and supervised
20. 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.

21. The Secretary of State will review the Adjudicator’s performance (initially after approximately two years, and then 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
22. The Bill would extend to, and apply in, all parts of the United Kingdom.

23. This Bill does not contain any provisions which would require any Legislative Consent Motions in respect of devolved legislatures.

24. If there are amendments relating to devolved matters, which trigger the need for a Legislative Consent Motion, the consent of the respective devolved legislature will be sought.

COMMENTARY ON CLAUSES

Clause 1: The Adjudicator
25. 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
26. 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.

27. 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).

28. 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 many 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. Article 11 of the Groceries Supply Order provides for the arbitration to be conducted in accordance with the Rules of the Chartered Institute of Arbitrators, or such other dispute resolution body as is nominated by the arbitrator. Under Article 11, all costs of the arbitrator 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 those costs will be assigned at the arbitrator’s discretion. Article 11 also provides that all other costs of the arbitration will be assigned at the arbitrator’s discretion.

29. 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.

30. As regards England and Wales and Northern Ireland, section 94 of the Arbitration Act 1996 applies the provisions of Part 1 of that Act to arbitrations carried out under the Groceries Supply Order and this Bill, subject to the adaptations and exclusions specified in sections 95 to 98 of that Act and 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 have a similar effect in applying the Scottish Arbitration Rules, subject to the exceptions stated in that section and except so far as this would be inconsistent with the Groceries Supply Order or the Bill. Pending commencement of section 16, clause 21(6) of this Bill applies the Arbitration (Scotland) Act 2010 to arbitrations carried out by the Adjudicator, or a person appointed by the Adjudicator, as if that Act were in force in relation to those arbitrations.

Clause 3: Information about arbitration

31. This clause enables the Adjudicator to obtain information on an arbitration carried out by another person appointed by the Adjudicator to arbitrate a dispute. 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 18 prevents the Adjudicator making unauthorised disclosures of information relating to an arbitration which would identify a party to the arbitration.

Clause 4: Investigations

32. This clause enables the Adjudicator to carry out an investigation about whether a large retailer has broken the Groceries Code if the Adjudicator has reasonable grounds to suspect that a large retailer has broken the Groceries Code or has failed to follow a
recommendation made under clause 7.

33. As the Adjudicator will have a limited budget, it may be necessary for the Adjudicator to prioritise which investigations to carry out in order to ensure he or she most effectively fulfils the role of enforcing the Groceries Code and encouraging compliance with it. This is a matter which the Adjudicator would be likely to address in the guidance published under clause 12.

34. The Adjudicator will be able to begin an investigation if he or she has reasonable grounds to suspect that a large retailer has broken the Groceries Code. In addition, if a large retailer has previously been found to have broken the Groceries Code and this has resulted in a recommendation by the Adjudicator under clause 7, then the Adjudicator will be required by clause 7 to monitor whether the recommendation has been followed. If the Adjudicator has reasonable grounds to suspect that a recommendation has not been followed, he or she may carry out an investigation. In some cases this further investigation could lead to the Adjudicator taking additional enforcement measures against the retailer if it had failed to follow the earlier recommendation. However, in order to take additional measures, the Adjudicator would need to be satisfied that there had been a further breach of the Groceries Code (see clause 6). This further breach could include a repetition of the breach which had led to the original recommendation being made.

35. The Adjudicator may consider any information that it seems appropriate to consider, both when determining whether or not to commence an investigation and when carrying out an investigation. During an investigation, the Adjudicator has extensive powers to require people to provide information, which are set out in Schedule 2. The Adjudicator has no similar power to require people to provide information for the purpose of deciding whether to commence an investigation, except for the powers in Schedule 2 which allow the Adjudicator to require retailers to provide information about whether they have complied with a previous recommendation. This limit on the Adjudicator’s information gathering powers does not prevent the Adjudicator from making contacts and receiving information voluntarily, so far as this is permitted by the general law.

36. It is not intended that the findings of an investigation need be limited to the possible breaches, or possible failure to follow a recommendation, that gave the Adjudicator reasonable grounds for suspicion as referred to in clause 4(1).

37. Before carrying out the first investigation the Adjudicator must publish guidance under clause 12(1). This will ensure that large retailers, suppliers and others with an interest in the Adjudicator’s work know in advance how he or she proposes to go about investigations generally.

Clause 5: Investigation reports

38. This clause requires the Adjudicator to publish a report at the end of an investigation.
39. The report must specify any findings, any action taken or proposed, and the reasons for these findings and actions. 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.

40. 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 6: Investigations: forms of enforcement**

41. If the Adjudicator concludes that a large retailer has broken the Groceries Code the Adjudicator may make recommendations under clause 7, require information to be published under clause 8 or impose financial penalties under clause 9 (but financial penalties may only be used if the Secretary of State has made an order allowing this – see also Schedule 3).

**Clause 7: Investigations: enforcement using recommendations**

42. 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 14. For the purposes of this monitoring, large retailers can be required to provide information to the Adjudicator (see Schedule 2).

43. Recommendations are likely to be used in circumstances where the breach of the Groceries Code is less serious. They may also be used alongside a requirement to publish information or the imposition of financial penalties (if the Secretary of State has made an Order allowing this – see clause 9 and Schedule 3) for more serious breaches of the Code. There is no express sanction for failure to comply with a recommendation, but failure to show that a recommendation has been followed could trigger a new investigation (see clause 4(1)) or be taken into account when considering what sanction to impose following a future investigation.

**Clause 8: Investigations: enforcement using requirements to publish information**

44. Clause 8 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
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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.

Clause 9: Investigations: enforcement using financial penalties

45. 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.

46. 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 10: Recovery of investigation costs

47. 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 19, whereas clause 10 enables some or all of that cost to be recovered from a culpable large retailer.

48. Where a person has made a complaint which was found to be vexatious or wholly without merit, the Adjudicator may require that person 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 false complaints or, in the case of complaints from suppliers, use of the Adjudicator for tactical reasons in contract negotiations.

49. The Adjudicator must inform the person who is required to make a payment 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 person required to pay could appeal the decision to the court.

Clause 11: Advice

50. 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. As a public authority, the Adjudicator will be required to act responsively and
reasonably in dealing with requests for advice, taking into account relevant circumstances including constraints on the Adjudicator’s resources, any effect the giving of advice might have on the ability to carry out other functions, and the facts of the particular case.

**Clause 12: Guidance**

51. Clause 12 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. If the Secretary of State makes an order authorising the imposition of financial penalties, the Adjudicator must also publish guidance about the criteria to be adopted in deciding the amount of financial penalties. The Adjudicator will be able to publish this guidance on the amount of financial penalties at any time, including before the Secretary of State makes such an order. This ability to publish at any time could enable financial penalties to be imposed more swiftly following an order by the Secretary of State. For example, the Adjudicator could consult on the guidance at the same time as the Secretary of State carried out the consultation required under Schedule 3 before making an order.

52. 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. Guidance about the Groceries Code can be used to encourage both compliance by large retailers and a good level of understanding of the code by retailers and suppliers. Indirectly, this may reduce the need for disputes and investigations. As a public authority, the Adjudicator will be required to act reasonably in considering whether to publish additional guidance, taking into account these and other relevant factors.

53. 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 13: Recommendations to Office of Fair Trading**

54. 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 14: Annual report**

55. 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. The Secretary of State must lay a copy of this report before Parliament. 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 report must also include any recommendations made under clause 13 to amend the Groceries Code.

56. 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 15, 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 15: Review of the Adjudicator and guidance from Secretary of State**

57. The Secretary of State is required to review the performance of the Adjudicator’s functions after approximately two years, and then every three years. The Secretary of State must consult interested parties and publish a report of the findings. These requirements are 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.

58. 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 it into account. 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.

59. As a result of the findings of a review, the Secretary of State may also decide by order to restrict the classes of information that the Adjudicator may consider when deciding whether to carry out an investigation. Although there are advantages to the Adjudicator being able to consider as wide a range as possible of information, it may be the case that receiving such a wide range of information causes the Adjudicator to receive large volumes of poor quality or irrelevant information. As the Adjudicator’s budget is expected to be small, dealing with such information could impair his or her ability to carry out their functions. The Secretary of State can therefore restrict the information the Adjudicator may consider to four specific classes of information, which are those that might be expected to be most useful in determining whether or not a breach of the Groceries Code had occurred or a retailer had complied with a recommendation.

60. These classes would include suppliers (both direct and indirect) and information from
workers employed by the relevant retailer or another company in its group. The latter class is intended to continue to allow the Adjudicator to consider information provided by “whistleblowers”. If the Secretary of State were to restrict the classes of information in this way, the Government would be able to amend the Public Interest Disclosure (Prescribed Persons) Order 1999 to make the Adjudicator a “prescribed person” to whom protected disclosures may be made in accordance with the Employment Rights Act 1996. The making of an Order to impose this restriction would not affect the information that the Adjudicator may consider during an investigation and for this purpose the Adjudicator would continue to be able to exercise the same information gathering powers set out in Schedule 2.

61. If the Secretary of State has not made such a restriction, he or she is obliged to consider doing so at each review. If he or she does decide by order to restrict the information that can be considered, this order would operate as a permanent restriction and would not be capable of being amended or revoked.

Clause 16: Transfer of Adjudicator functions and abolition etc

62. 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 23) need not necessarily be exercised following a review under clause 15. On 23 May 2012 the Enterprise and Regulatory Reform Bill had its first reading in the House of Commons. This Bill includes provisions to merge 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.

63. 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 23) is where a review by the Secretary of State (under clause 15) 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 17: Information to Secretary of State

64. 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 18: Confidentiality

65. This clause prohibits the Adjudicator from disclosing information about an arbitration
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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.

66. Secondly, the clause prohibits the Adjudicator from disclosing the identity of any person who has complained to the Adjudicator about a breach of the Groceries Code. This prohibition applies to any complaint made to the Adjudicator, whether or not the complaint is made in connection with an investigation by the Adjudicator. 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. The duty of confidentiality extends to all complainants rather than only suppliers: it would therefore include, for example, whistleblowers and trade associations (the identification of which might enable a retailer to draw inferences about particular suppliers).

67. The prohibitions in clause 18 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 18 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).

68. The prohibitions on disclosure in clause 18 are additional to those that apply under Part 9 of the Enterprise Act – see clause 21.

Clause 19: Levy funding

69. 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. The Adjudicator may repay a surplus to large retailers at any time, and if a surplus remained at the end of a financial year, there would be an expectation that it would be taken into account in determining the levy for the following financial year.

70. Initially the levy will be equally divided between the large retailers. 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 of an 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).

71. The Adjudicator is also able 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. Any unequal division of the levy would have to be based on such an assessment, and could not be based on more general factors, such as turnover (unless the Adjudicator found that there was a correlation between turnover and expense and time spent by the Adjudicator). The requirement for the Secretary of State to consent to a levy provides a safeguard in relation to its division by the Adjudicator. By implication, the prospect of the levy being divided on these terms 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.

Clause 20: Payments by Secretary of State
72. Clause 20 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 21: Amendments and transition
73. Clause 21(3) ensures that the Adjudicator will be a public authority for the purposes of the Freedom of Information Act 2000.

74. The intention of clause 21(4) is to apply the provisions of Part 9 of the Enterprise Act 2002 to the Adjudicator.

75. Part 9 of the Enterprise Act 2002 (which applies in addition to the prohibition on disclosure in clause 18 of the Bill) 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.

76. 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.

77. The intention of clause 21(6) is to apply the Arbitration (Scotland) Act 2010 to arbitrations carried out by the Adjudicator, or a person appointed by the Adjudicator,
pending commencement of that Act with that effect. See further the explanation above in relation to clause 2 of this Bill. Clause 21(6) does not have any other effect in relation to the Arbitration (Scotland) Act 2010.

**Schedule 1: The Adjudicator**

**Status**

78. 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**

79. 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. The Deputy will not have any separate functions and will be subject to the provisions of the Bill in carrying out any functions of the Adjudicator.

**Term of office etc**

80. Under paragraph 6, the Adjudicator and any Deputy may each be appointed for an initial term of up to four 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**

81. 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**

82. 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 any other public authority. This would be on arms’ length terms and would be likely to be by agreement as to the identity of the individuals in question.

**Conflicts of interest**

83. 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 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
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Adjudicator and the functions.

**Accounts**

84. 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**

85. 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**

86. 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.

**Schedule 2: Investigation powers**

**Requirement to provide information**

87. The Adjudicator will have powers to require information for the purposes specified in Schedule 2. Paragraph 1(1) allows the Adjudicator to require information for the purposes of an investigation under clause 4. This power will be exercisable against large retailers and others, but only once an investigation is commenced. Paragraph 1(2) allows the Adjudicator to require information from large retailers for the purposes of monitoring whether a retailer has followed an earlier recommendation. This information could be used to help decide whether to commence an investigation.

88. In each case the Adjudicator may require a person to provide documents or other information, including orally (but not under oath). Paragraph 1(7) protects information that could not be required to be provided in civil proceedings, such as information subject to legal privilege.

**Offences**

89. Paragraphs 2 and 3 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**

90. 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.

91. The Secretary of State would need to authorise financial penalties by order under clause 9, approved by each House of Parliament (see clause 23).

92. 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. By delaying and leaving open the question of whether financial penalties are needed, clause 9 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.

FINANCIAL EFFECTS OF THE BILL

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

EFFECTS OF THE BILL ON PUBLIC MANPOWER

94. The Bill will have some impact on public service manpower as the Adjudicator will be staffed by individuals seconded either by the Secretary of State for Business, Innovation and Skills or by other public authorities. However, the impact will be small, given the nature and extent of the Adjudicator’s functions.

SUMMARY OF THE IMPACT ASSESSMENT

95. The Impact Assessment (IA) accompanying this Bill can be found online at http://www.bis.gov.uk/policies/business-law/competition-matters/market-studies/cc-market-investigation-on-the-uk-supply-of-groceries or in hard copy in the Vote Office (House of Commons) or Printed Paper Office (House of Lords). The IA has been cleared by the Chief Economist of the Department for Business, Innovation and Skills and by the Government’s Regulatory Policy Committee.

96. 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.

97. 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
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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.

98. The benefits in creating an Adjudicator 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.

99. Specific impact assessments, including one relating to equality impacts, are considered in an annex to the Impact Assessment.

*Impact on Carbon Emissions*

100. The Bill will not have a significant impact on the environment or carbon emissions.

**COMPATIBILITY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS**

*Compatibility*

101. 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).

102. Vince Cable, Secretary of State for Business, Innovation and Skills, has made the following statement:

“In my view the provisions of the Groceries Code Adjudicator Bill are compatible with the Convention rights”.

103. Although of the view that the Bill is compatible with the rights in the Convention, the Department has considered the arguments that might be made in relation to the potential engagement of such rights by the provisions in the Bill. The main arguments are identified below.

*Arbitration (clause 2)*

104. 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.
105. 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.

106. The parties to an arbitration will also be protected by the requirements for fairness and impartiality in the Arbitration Act 1996 and the Arbitration (Scotland) Act 2010.

107. 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)**

108. 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 18 from disclosing information which would identify a party to an arbitration.

**Investigations (clauses 4 to 10 and Schedule 2)**

109. Schedule 2 enables the Adjudicator to require others to provide documents and information for the purposes of an investigation or for the purposes of monitoring whether a large retailer has followed a recommendation under clause 7. 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 to be confident as to whether recommendations are being followed (which may be relevant to a decision to commence a new investigation). These powers can be justified under Article 8 as being in the interests of the economic well-being of the country.
110. 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 9 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. However, clause 9 provides a full right of appeal to the court against a financial penalty.

111. 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 7, 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 8, 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. Nor would the publication of a report by the Adjudicator be determinative of the reputation of a large retailer. 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.

112. In carrying out investigations, the Adjudicator will normally be prohibited by clause 18 of the Bill from disclosing the identity of a person 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 complainants 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. Even if a complainant were not itself a supplier, the identity of a complainant (such as a trade association active in a particular market or a “whistleblowing” employee who worked with particular suppliers) could implicate specific suppliers in the eyes of a large retailer. This protection of confidentiality 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.

113. 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.

114. 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 9, and (2) the ability under clause 10 for the Adjudicator to require large retailers and complainants 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 19)

115. 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.

116. 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.
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COMMENCEMENT

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

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