EXPLANATORY MEMORANDUM TO

THE GROCERIES CODE ADJUDICATOR (PERMITTED MAXIMUM FINANCIAL PENALTY) ORDER 2015

2015 No. XXXX

1. This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 The Order sets the maximum financial penalty that can be imposed on a large retailer if the Groceries Code Adjudicator chooses to enforce a breach of the Groceries Supply Code of Practice (the Code) by imposing a fine, following an investigation. The Order sets the maximum financial penalty at 1% of UK turnover of the relevant retailer, but does not extend to group turnover where a retailer is a subsidiary of a larger group.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 The Groceries Code Adjudicator Act 2013 gives the Adjudicator the power to carry out investigations if she has reasonable grounds to suspect that a large retailer has broken the Code or has failed to follow a recommendation following an earlier investigation. Imposing a financial penalty is one of the enforcement measures available if, following an investigation, the Adjudicator finds that a retailer has breached the Code. If the Adjudicator chooses to impose a financial penalty, the GCA Act provides that it must not exceed the amount of the permitted maximum. The Act requires the Secretary of State to make an order either specifying the amount of the permitted maximum or specifying how that amount is to be determined. The Act requires the Adjudicator to make a recommendation as to this maximum and to consult before making this recommendation to the Secretary of State.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 Jo Swinson, Minister for Employment Relations and Consumer Affairs, has made the following statement regarding Human Rights:

In my view the provisions of The Groceries Code Adjudicator (Permitted Maximum Financial Penalty) Order is compatible with the Convention rights.

7. Policy background

7.1 The Groceries Supply Code of Practice was introduced in 2008 to ensure fairness in the commercial relationships between the ten largest UK supermarkets – those with turnovers over £1 billion – and their direct suppliers in respect of a range of groceries. Currently ten retailers are subject to the Code: Aldi, Asda, Cooperative, Iceland, Lidl, Marks and Spencer, Morrisons, Sainsbury's, Tesco and Waitrose.

7.2 The Groceries Code Adjudicator was created by the Groceries Code Adjudicator Act 2013 to enforce the Code. Specifically, the Adjudicator's role is to arbitrate in disputes between retailers and their direct suppliers and to carry out investigations into suspected breaches of the Code. This Order relates to the Adjudicator's investigatory function.

7.3 The GCA Act gives the Adjudicator the power to carry out investigations if she has reasonable grounds to suspect that one of the ten large retailers has broken the Code. Where she rules that there has been a breach of the Code, the Act provides the Adjudicator with a range of enforcement measures. She has the option of issuing large retailers with recommendations as to their future conduct to ensure compliance with the Code; of requiring the retailer to publish information about an investigation of which it was the subject (a form of 'naming and shaming'); or of imposing a financial penalty.

7.4 In determining the appropriate sanction, the Adjudicator will take into account factors such as the seriousness of the breach and any history of previous breaches. A financial penalty is the most onerous sanction available to the Adjudicator and should be proportionate to the impact of the breach, but also sufficient to have a deterrent effect. Financial penalties received from retailers will be paid into the Consolidated Fund.

7.5 While the Adjudicator already has the power to launch an investigation, she does not have the power to impose a fine until this Order is made.

8. Consultation outcome

8.1 The Adjudicator undertook a 12 week consultation between 31st July and 22nd October 2013 on how investigations into suspected breaches of the Code will be carried out; and on how decisions on enforcement actions will be made. The consultation also sought views on a proposed maximum financial penalty of 1% of UK turnover.

8.2 The consultation sought the views of the groceries sector – in particular large retailers covered by the Code; direct suppliers to those large retailers; and their respective representative bodies. Views were also sought from other retailers; indirect suppliers; other representative bodies; and those with an interest in the groceries sector such as producers, farmers and consumers. The Adjudicator also held 15 events with large retailers, direct suppliers, the wider supply chain, trade bodies, Government officials and Ministers.

8.3 Seventeen responses were submitted – six from large retailers and their representative bodies; eight from suppliers and their representative bodies; and three other responses. The Adjudicator's response to the consultation was published in December 2013 and can be found at www.gov.uk/gca.

8.4 The response noted that large retailers opposed the proposed maximum penalty of 1% of UK large retailer turnover; and that they had suggested an alternative of 1% of

turnover of the products supplied by the affected supplier(s). Suppliers and their representatives supported the level of proposed penalty, with some suggesting higher penalty levels of 3% and 10% of UK turnover.

8.5 The responses to the consultation informed the Adjudicator's recommendation to the Secretary of State. The Adjudicator considered four turnover options:

- global;
- UK;
- by category; and
- by product.

8.6 The Adjudicator rejected the retailer proposals of using groceries turnover or turnover relevant to the suppliers involved in the breach, on the basis that this would require lengthy analysis to calculate the qualifying turnover – which would be difficult for the GCA to verify without expensive and burdensome audits. It would also require the calculation to be based on actual orders from the suppliers affected, which the GCA held would make it harder to uphold the statutory duty to preserve supplier anonymity. It would also be contrary to the principle that the Adjudicator's investigatory function is focused on industry practices and not on detriment individual supply relationships.

8.7 The Adjudicator recommended the use of UK turnover as the basis for calculating the financial penalty as this is a straightforward, easily understood and readily available metric.

8.8 The Secretary of State has accepted the Adjudicator's recommendation of 1% of UK turnover.

9. Guidance

9.1 The Adjudicator published Statutory Guidance on 18th December 2013 explaining how she will run investigations; and decide on enforcement action – including how and when sanctions will be applied.

10. Impact

10.1 An Impact Assessment has not been prepared for this Order. The penalty provisions were covered in the original IA for the 2013 Act; and any penalty will only have an impact on one of the ten large retailers if they are found to be in breach of the Code following an investigation.

10.2 No impact on the private or voluntary sector is foreseen.

10.3 There is no impact on the public sector.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The 2013 Act provides for the Secretary of State to review the Adjudicator's performance initially after two years and every three years thereafter. The first review

will be for the period ending 31st March 2016. The Act provides that a review must cover the extent to which the Adjudicator has exercised her powers; and her effectiveness in enforcing the Code. A review may consider whether the level of the maximum financial penalty should be amended.

13. Contact

Stephen Childerstone at the Department of Business, Innovation and Skills Tel: 0207-215 0354 or email: Stephen.childerstone@bis.gsi.gov.uk can answer any queries regarding the instrument.