



**Marks and Spencer plc**

**Food Commercial Terms of Trade Supply  
Agreement**

Incorporating

The Groceries Supply Code of Practice

**April 2019**

## Food Commercial Terms of Trade Supply Agreement

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## 1 Contract and Basis of Appointment

- 1.1 These Conditions set out the terms on which the Supplier shall supply the Goods. The Conditions form part of the Contract between the Supplier and M&S which, together with all other documents expressly incorporated into the Contract (including but not limited to the Food Technical Terms of Trade and the Food Logistics Handbook) and any Ancillary Agreement, contain the entire agreement between the parties in relation to the Order and supersede any prior written or oral agreements, representations, statements or understandings between the parties in relation to such Order.
- 1.2 The provision of the Goods shall be subject to these Conditions to the exclusion of all other terms and conditions that the Supplier seeks to impose or incorporate, or which are implied by trade, custom, practice, course of dealing or otherwise.
- 1.3 The provision of any Exclusive Goods shall be done so on an exclusive basis to M&S and shall not be sold by the Supplier to third parties unless otherwise agreed in writing by M&S.
- 1.4 M&S shall make available to the Supplier a copy of the Contract (including, for the avoidance of doubt, all variations and/or additions agreed to them) upon written request by the Supplier.

## 2 Charges, Funding and Discounts

- 2.1 The Supplier acknowledges that various charges, discounts and funding arrangements (together, “**Charges**”) apply to the supply of Goods to M&S and the invoices raised by the Supplier in respect of such supply. The Supplier shall at all times pay the Charges in accordance with this Condition 2 and in such manner as may be further detailed in the Food Technical Terms of Trade or Food Logistics Handbook (as appropriate). A summary of the applicable Charges is set out below.

### ***Underlying Growth Discount***

- 2.2 The current underlying growth discounts (also known as Business Growth Incentives, or BGIs) have been agreed by supplier/site and are charged weekly and deducted from supplier invoices by our payments team at Salford Quays.
- 2.3 Any applicable discount rates are subject to review by M&S from time to time.

### ***Central Marketing Charge***

- 2.4 A central marketing flat fee of 2.0% per supplier will be deducted from all invoices at cost value inclusive of multi-buys.
- 2.5 Central marketing is defined as activity initiated by M&S to build the overall brand. These activities are designed to have a halo effect bringing benefit to all suppliers by driving footfall to M&S stores.
- 2.6 M&S reserves the right to approach suppliers from time to time to agree additional funding above this Central Marketing Charge for extraordinary marketing activities.

### ***Promotional Funding***

- 2.7 M&S expects to share the costs of promotional activity with its suppliers. This level of funding will be specific to each individual product area and determined by the product characteristics and promotional mechanic used. Funding will be agreed with individual categories.
- 2.8 M&S expects an improved level of supplier funding for all gondola end promotions to reflect the higher rate of sale this position will deliver.

### ***Waste Funding***

- 2.10 The Supplier will be required to pay for any incremental waste and associated costs incurred as a result of default or negligence by the Supplier.

***Vendor Managed Inventory (VMI)***

- 2.11 Large suppliers will be given the opportunity to work with M&S to develop a vendor managed inventory (VMI) programme.
- 2.12 VMI schemes support relationship building and provide an opportunity to unlock significant mutual value.
- 2.13 Any VMI programme will be funded by the Supplier and will require sign-up to a formal framework with clearly defined KPI's and a confidentiality agreement (NDA).

***IRI Data***

- 2.14 The Supplier will have the opportunity to purchase iRi data, which will give the Supplier access to a full suite of sales performance and customer data on the Supplier's product area. This service is provided by iRi, a strategic partner to M&S, with whom the Supplier will be required to liaise directly. For any questions on iRi the Supplier should contact [UKgatewayteam@iriworldwide.com](mailto:UKgatewayteam@iriworldwide.com) or speak to its M&S Buyer.

***Ecrebo and Sparks***

- 2.15 The Supplier may be invited to participate in targeted promotions using an "at till" voucher process (Ecrebo) and/or the M&S loyalty programme (Sparks). As with other M&S promotional activity, the Supplier may at its discretion participate in this programme, on agreement with the Supplier's M&S Buyer.

***Loss of Profit***

- 2.16 Without prejudice to the remedies available to M&S as set out in these Conditions, M&S shall have the right to charge the Supplier for M&S's loss of profits arising from the Supplier's failure to meet full supply of any Goods in accordance with any applicable Order, other than in the event of Force Majeure. Any such claim for loss of profits will be discussed on a case by case basis with the Supplier.

***Additional Charges***

- 2.17 The following Charges may also apply in respect of the Supplier's supply of Goods under the Contract and are detailed in the relevant part of the M&S Food Terms of Trade as indicated:
- (a) Artwork and Design (packaging charges) – Food Technical Terms of Trade
  - (b) Customer Complaint Charges – Food Technical Terms of Trade
  - (c) Operations charges – Food Logistics Handbook
  - (d) Product Benchmarking Charges – Food Technical Terms of Trade
  - (e) Supplier Auditing Charges – Food Technical Terms of Trade
  - (f) Tray and Cardboard Charges – Food Logistics Handbook

***Credits and Contingent Discounts***

- 2.18 M&S may agree credits and or contingent discounts with the Supplier to adjust the original price charged for goods supplied. Where such a discount is agreed, the discount will be accounted as follows:
- (a) M&S will issue a tax debit note to the Supplier to reflect the agreed reduction; and

- (b) Both parties agree that the tax debit note will not include VAT (i.e. no adjustment will be made to adjust the original VAT charged by the Supplier).

The agreement not to adjust VAT is in accordance with HMRC's guidance for such adjustments in Section 18.2 of VAT Notice 700.

### **3 The GSCOP Order and GSCOP**

- 3.1 M&S is a Designated Retailer for the purposes of the GSCOP Order and, as such, the GSCOP Order and GSCOP shall apply to M&S and its relationship with its Suppliers who supply Groceries to M&S. This Condition 3 is intended to fulfil the obligations on M&S arising under Article 5 of the GSCOP Order.
- 3.2 The parties acknowledge and agree that, in so far as it relates to the supply of Groceries, the Contract (together with any Ancillary Agreement(s)) constitutes the Supply Agreement between M&S and the Supplier.
- 3.3 If the Goods to be purchased under a Contract are Groceries then, solely in relation to such Goods: (a) the provisions of GSCOP shall be incorporated into the applicable Supply Agreement; and (b) if, and to the extent that, any provision in the Contract is inconsistent with any provision in GSCOP, the provisions of GSCOP shall prevail.

### **4 Orders**

- 4.1 The Supplier shall manufacture and supply, and M&S shall purchase, such quantities of Goods as set out in Orders submitted by M&S and accepted by the Supplier in accordance with these Conditions from time to time.
- 4.2 The purchase of the Goods is made on a non-exclusive basis. Nothing in these Conditions shall prevent M&S from purchasing identical or similar products and/or services from a third party. Save as expressly stated in the Contract or an Ancillary Agreement, and subject to M&S's obligations under the GSCOP Order, M&S: (a) will not be tied to any minimum volume or minimum purchase commitment when ordering Goods; and (b) makes no warranty, guarantee or commitment as to the term of the relationship with the Supplier.

#### ***Ordering***

- 4.3 Each Order submitted by M&S to the Supplier constitutes an offer made by M&S to the Supplier for the purchase of Goods. Each Order shall be deemed to be accepted by the Supplier upon either: (a) the Supplier providing written acknowledgement of the Order to M&S; or (b) failing such acknowledgement (but in the absence of any communication to the contrary), the earlier of (i) 24 hours after the time of submission of the Order by M&S and (ii) the Supplier doing any act consistent with fulfilling the Order. Once an Order has been accepted by the Supplier, such Order shall automatically be binding on both parties and a Contract between M&S and the Supplier shall come into existence. For the avoidance of doubt, each Order shall form a standalone Contract between the parties.

#### ***Reference Data Approval (RDA)***

- 4.4 The Supplier acknowledges that Conditions 4.5 and 4.6 below shall apply to all Goods save for beers, wines, spirits, hospitality and magazines.
- 4.5 RDA is a systemic way of maintaining accurate cost price, Units per Tray/Case Size and equipment type. It formalises the agreement between the Supplier and M&S buyer to ensure accurate product commercial information, enables the timely management of commercial changes within the relevant M&S systems and forms the foundations for accurate invoicing and timely payments.
- 4.6 The Supplier will log onto the RDA portal, enter the product UPC and will be able to review and amend the product information, either for reference or to amend based on the written agreement with the

M&S buyer. Once submitted by the Supplier and approved by the M&S buyer, the information will feed through to all reference data systems to ensure optimal accuracy of ordering and payments. Changes will be recorded centrally and reports can be extracted by all stakeholders, ensuring consistent sharing of information and a comprehensive audit trail.

## 5 Delivery of Goods

- 5.1 The Supplier shall provide M&S with regular updates as to the status of the Orders including the expected quantities and date of delivery to the Delivery Point.
- 5.2 The Supplier shall deliver the Goods to the Delivery Point strictly in accordance with the Order at the date and time stipulated in the Order or otherwise notified by M&S to the Supplier in writing ("**Delivery Time**"). Time of delivery shall be of the essence. If at any time the Supplier becomes aware that it shall not (or is unlikely to) supply the Goods by the Delivery Time, the Supplier shall immediately notify M&S and provide details of the reasons for it.
- 5.3 The Supplier will load the Goods at its own risk as directed by M&S at the Delivery Point.
- 5.4 Delivery of the Goods shall be completed immediately at the point at which the Goods have been loaded, closed and sealed into M&S or its authorised agent's transport at the Delivery Point.
- 5.5 The Supplier shall ensure that:
- (a) the Goods are properly packed and secured in such manner as to enable them to reach their destination in good condition; and
  - (b) each delivery of the Goods is accompanied by a delivery note that shows the date of the Order, the purchase order number and the type and quantity of the Goods; and
  - (c) where the Supplier is a supplier of chilled and/or short life ambient Goods, it adheres to Tray End Label (TEL), Advanced Shipping Note (ASN), Serial Shipping Container Code (SSCC) and Date Life compliance.
- 5.6 Any failure to mark and pack the Goods in accordance with Condition 5.5(a) above may, at M&S's sole discretion, be rectified by M&S and M&S may charge the Supplier for any reasonable costs incurred by M&S in connection with such failure.
- 5.7 If the Supplier:
- (a) delivers more or less than the quantity of Goods ordered, and M&S accepts the delivery, then (subject to Condition 5.7(b)(iii)) the Supplier shall make a pro rata adjustment to its invoice for the Goods;
  - (b) delivers Goods in excess of the quantity ordered ("**Excess Goods**"), M&S may (without prejudice to its rights in Condition 5.7(a)) at its discretion:
    - (i) reject all of the Goods delivered;
    - (ii) reject the Excess Goods; or
    - (iii) take the Excess Goods free of charge,
 and any rejected Goods shall be returnable at the Supplier's risk and expense.
- 5.8 Subject to Condition 3, if the Supplier fails to deliver the Goods for any reason, M&S may reject the Goods on the basis that they have not been supplied in accordance with the Contract. Regardless of whether the delayed or non-delivery is due to a Force Majeure event, M&S will not be required to make any payment in respect of such Goods and the Supplier will promptly reimburse any payment that has been made in respect of such Goods and will not charge for any such Goods in any invoice. In addition, other than where the delayed or non-delivery is due to a Force Majeure event, M&S may choose to terminate such Order immediately on notice to the Supplier.

- 5.9 M&S shall not be obliged to accept delivery of the Goods in part or instalments unless it has previously agreed to do so in writing.

## **6 Inspection and Rejection of Goods**

- 6.1 M&S has the right to inspect and test the Goods at any time, including in the course of their manufacture or at the premises of the Supplier, the Supplier's sub-contractors or manufacturer (as appropriate).
- 6.2 M&S shall not be deemed to have accepted any Goods until it has had a reasonable time to inspect them following delivery or after any latent defect has become apparent. For the avoidance of doubt, no inspection or testing by M&S whether before or after delivery of the Goods, nor the signing of any delivery note or other document acknowledging physical receipt of any Goods, shall absolve the Supplier from responsibility or liability nor imply acceptance of the Goods by M&S or approval of the Goods for the purposes of the Sale of Goods Act 1979 (as amended) and, shall not prejudice M&S' rights of rejection if the Goods are found to be defective, unsuitable or not in accordance with the Contract.
- 6.3 In addition to M&S' rights pursuant to Condition 5, M&S may either reject Goods or request a replacement for Goods which are deemed to be faulty or not in accordance with the Order. This shall, for the avoidance of doubt, include Goods which are incorrectly packaged, labelled or barcoded.
- 6.4 The Supplier shall (unless otherwise agreed with M&S) collect rejected Goods within 3 (three) days of being rejected by M&S. The Supplier shall refund to M&S the cost of any storage and handling costs M&S has to pay to store and handle Goods which M&S has rejected. M&S shall be entitled to destroy (and charge the Supplier for the cost of destruction of) perishable Goods which have been rejected and which are not collected by the Supplier within a reasonable time.
- 6.5 Goods which are rejected, replaced or which M&S otherwise does not receive, which carry or contain Intellectual Property Rights of an M&S Affiliate or which would otherwise reasonably be associated with M&S, must not be supplied to any third party without M&S's written consent.

## **7 Title and Risk**

- 7.1 Title in the Goods shall pass to M&S as follows:
- (a) in the case of fresh, short life or ambient Goods, upon the completion of delivery of such Goods to M&S or its agent;
  - (b) in the case of wine, at the time M&S or its agent takes possession of such Goods from the Supplier;
  - (c) in the case of frozen Goods, at the point such Goods are picked for M&S.
- 7.2 Risk of damage or loss to the Goods shall pass to M&S on successful delivery of the Goods to M&S at the Delivery Point in accordance with Condition 5 (or as otherwise agreed by the parties in writing) and the Supplier shall be responsible for and shall insure the Goods against all relevant risks with a reputable insurance company until that point.
- 7.3 From the time title has passed to M&S until such time as the Goods have been delivered to M&S and M&S has physical possession of such Goods then the Supplier shall:
- (a) hold the Goods on a fiduciary basis as bailee for M&S;
  - (b) store the Goods in a proper manner in conditions which adequately protect and preserve the Goods;
  - (c) keep such Goods insured against all risks;

- (d) ensure the Goods are clearly identified as belonging to M&S and that such identification is not tampered with;
- (e) not sell, charge, pledge, mortgage or otherwise dispose of the Goods or any part of them, nor permit any lien to arise over the Goods or part of them, nor lease or part with possession of the Goods or any part of them;
- (f) keep the Goods free from distress, execution and other legal process;
- (g) allow M&S (and all members of M&S' Group and its agents) free and unrestricted access to any premises owned, occupied or controlled by the Supplier and/or any location where any of the Goods are situated at any time without prior notice; and
- (h) on M&S' demand and without prior notice deliver the Goods up to M&S.

## **8 Price and Payment**

- 8.1 The Contract Price is not subject to alteration without the prior written agreement of M&S.
- 8.2 Payment of the Contract Price will be made as follows:
- (a) in the case of fresh, shortlife and ambient Goods, in the fourth week following the date on which the Goods are delivered by the Supplier to M&S;
  - (b) in the case of wine, in the fourth week following the date on which M&S takes possession of the Goods from the Supplier; and
  - (c) in the case of frozen Goods, in the fourth week following the date on which the Goods are picked for M&S,  
on condition that the Supplier has provided properly raised invoices to M&S for receipt in the second week following the dates set out in paragraphs 8.2 (a) to (c) above. M&S shall provide payment forms (with a remittance advice and any accompanying adjustment detail) to the Supplier in the third week following the dates set out in paragraphs 8.2 (a) to (c) above.
- 8.3 The Supplier shall at all times pay the Charges in the circumstances and in the manner set out in Condition 2 and as may be further detailed in the Food Technical Terms of Trade and/or the Food Logistics Handbook (as appropriate).
- 8.4 Payments will be effected by BACS transfer or such other method as the parties may agree in writing.
- 8.5 The Contract Price shall be exclusive of VAT (which will be chargeable by the Supplier in addition to the sum in question at the rate prescribed by law) but inclusive of all other taxes, costs, charges, transport and delivery costs, packing, packaging, labelling, insurance and all other costs incurred by the Supplier in relation to the Goods and their delay unless otherwise specified in the Order.
- 8.6 If any dispute arises between the parties relating to the Contract Price, M&S will continue to pay the Contract Price in accordance with the Contract but the payment of the sum in dispute or that part of it as is disputed will be suspended pending the settlement of the dispute between the parties.
- 8.7 M&S will be entitled to set off against any amount due from M&S or any member of M&S' Group to the Supplier under this Contract or any other contract, any amounts owing to M&S or any member of the M&S Group by the Supplier under the Contract or any other contract. The Supplier shall not be entitled to apply any amount due to M&S or any member of the M&S Group in or towards payment of any sum owing by M&S or any member of the M&S Group to the Supplier for any matter whatsoever.
- 8.8 If either party fails to pay any amount due under Contract, the other party will be entitled to charge interest on the overdue amount, from the due date up to the date of actual payment, after as well



as before judgment, at the rate of 2% per annum above the base rate for the time being of Barclays Bank plc. Such interest will accrue on a daily basis.

- 8.9 Suppliers are to provide a monthly statement to [BSC.VendorStatements@marks-and-spencer.com](mailto:BSC.VendorStatements@marks-and-spencer.com) to assist with account management

## 9 Warranties

- 9.1 The Supplier warrants and represents that:
- (a) it has full capacity and all necessary licences, permits and consents to enter into the Contract and to fulfil deliveries of the Goods;
  - (b) the supply, use and sale of the Goods and/or any other material, information or item provided by or on behalf of the Supplier does not and shall not infringe the Intellectual Property Rights or any other proprietary rights of any third party;
  - (c) the Goods (including their packaging and labelling) shall:
    - (i) conform and comply with the Order, the Contract and all Applicable Laws;
    - (ii) comply with EU Regulation on the Provision of Food Information to Consumers (1169/2011) and any implementing and ancillary related legislation;
    - (iii) be of satisfactory quality, free from defects and fit for their intended purpose (whether such purpose is implied or expressly stated in the Specification, Orders or Contract);
    - (iv) conform strictly as to quality, quantity and description with any samples provided by the Supplier for the purpose of supply of Goods;
    - (v) conform strictly with the Product Quality Contract; and
    - (vi) be within their expiration date and allow a reasonable amount of time before their expiry to enable M&S to sell the Goods to its customers;
  - (d) it shall not make any statement, orally or in writing, privately or publicly, or do any act or otherwise conduct itself in such a manner as shall or may in the reasonable opinion of M&S disparage M&S or the M&S Affiliates, or its or their customers, or its or their business products or services;

## 10 Remedies

- 10.1 If the Goods are not delivered in accordance with Condition 5 or if the Supplier is in breach of any obligation, warranty or requirement under the Contract in respect of the Goods, M&S shall (without limiting or excluding its other rights or remedies) have the right to:
- (a) reject the relevant Goods (in whole or in part) and any Goods already delivered which cannot be effectively and commercially used without the rejected Goods; and/or
  - (b) refuse to accept any subsequent delivery of the Goods; and/or
  - (c) recover from the Supplier any costs reasonably incurred by M&S in obtaining substitute goods or services from another supplier; and/or
  - (d) require the Supplier at its sole cost to replace the Goods or carry out such work as is necessary within a timeframe determined by M&S (acting reasonably) so that the Goods conform to the Contract, Order and Specification; and/or
  - (e) treat the Contract as discharged by the Supplier's breach and:
    - (i) delay payment of the price for the Goods until the requirements of this Contract, Order and any Specification are entirely fulfilled;

- (ii) refuse to make payment of the price of the Goods; or
- (iii) require the repayment of any part of the price of the Goods which M&S has paid whether or not M&S has previously required the Supplier to supply any replacement Goods.

10.2 These Conditions shall apply to any replaced Goods supplied by the Supplier.

## 11 Termination

11.1 Subject always to its obligations under paragraph 16 of GSCOP, and notwithstanding any other termination or other rights M&S may have in the Contract, M&S may terminate any Order, the Contract or any part of them immediately on written notice if any of the following events happens:

- (a) the Supplier commits a material breach of any of its obligations under the Contract;
- (b) the Supplier fails to remedy, where it is capable of remedy, or persists in any breach of any of its obligations under the Contract after having been required in writing to remedy or desist from such breach within a period of 30 days;
- (c) the Supplier commits a breach of any of its obligations under the Contract in respect of the Modern Slavery Act 2015 or is found to have committed an offence under the Modern Slavery Act 2015 (whether in relation to the Contract or otherwise); or
- (d) the Supplier becomes Insolvent.

11.2 If the Supplier undergoes a Change of Control (or if it anticipates a Change of Control and subject to M&S entering into a reasonable confidentiality agreement the Supplier can disclose that potential Change of Control) the following provisions shall apply:

- (a) the Supplier shall promptly (and in any event within 5 (five) Business Days of the Change of Control) notify M&S in writing of that Change of Control, or potential Change of Control;
- (b) the parties will then discuss the effect of that Change of Control and if M&S has concerns about that Change of Control, it may (in its absolute discretion, but subject always to its obligations under paragraph 16 of GSCOP) terminate the Contract immediately by written notice to the Supplier;
- (c) in the event M&S elects not to terminate the Contract in response to a Change of Control (or anticipated Change of Control), then the Supplier will:
  - (i) update M&S regularly on the sale process;
  - (ii) guarantee continued production at the current product specification;
  - (iii) provide assurance of service levels;
  - (iv) conduct formal discussions with M&S to enable M&S to understand planned implications for the M&S business both pre- and post-acquisition;
  - (v) agree with M&S any site moves (and the Supplier acknowledges that M&S may require a share of the benefits derived from the move to be paid to M&S in return for such agreement); and
  - (vi) re-negotiate all supply contracts with M&S on completion of the sale process;
- (d) in the event that the Supplier (whether before, during or after a Change of Control) fails to comply with the provisions of Condition 11.2(c) above, M&S may terminate the Contract immediately by written notice to the Supplier at any time.

11.3 The termination of the Contract or any Order shall be without prejudice to the rights and remedies of either party which may have accrued up to the date of termination.

## 12 Consequences of Termination

- 12.1 With effect from the effective date of termination of all or part of any Order or the Contract for any reason whatsoever,
- (a) any provision in these Conditions which expressly or by implication is intended to come into or remain in force on or after termination shall continue in full force and effect; and
  - (b) each of the parties shall immediately return to the other party (or, if the other party so requests by notice in writing, destroy) all of the other party's property in its possession at the date of termination, including all of its Confidential Information and M&S Data, together with all copies of such Confidential Information and M&S Data, and shall make no further use of the same.

## 13 Liability and Indemnity

- 13.1 Nothing in this Agreement shall exclude or limit a party's liability for:
- (a) death or personal injury arising from its negligence;
  - (b) fraud; or
  - (c) fraudulent misrepresentation.
- 13.2 In addition to any other remedy available to M&S, the Supplier hereby indemnifies M&S on demand against any and all losses (including loss of profit), damages, liabilities (including any liability to taxation), claims, costs and expenses, including fines, penalties, legal and other professional fees and expenses arising out of, or in connection with:
- (a) any breach by the Supplier of any of the warranties in these Conditions;
  - (b) any claim by a third party against any member of M&S' Group arising from a breach of the Contract by the Supplier;
  - (c) any breach of Condition 17 (Intellectual Property);
  - (d) any breach of Condition 24 (Gifts and Bribery); and
  - (e) any breach of Conditions 18 (Confidentiality) or 19 (Announcements and Notifications).
- 13.3 M&S shall determine, in its sole discretion, whether it or the Supplier shall have conduct of any negotiations, claim, litigation or proceedings (together "**Actions**") in respect of which M&S is indemnified under Condition 13.2. The party not having conduct shall, on request, co-operate fully with the other. If M&S elects to have conduct of the Actions, the indemnity set out in Condition 13.1 above shall extend to all legal and associated expenses incurred by M&S in such conduct and/or awarded against M&S as a result of such Actions. In the event that M&S or a member of its Group takes any such Actions, the Supplier shall ensure that neither it, nor any member of its Group, shall make any admission as to liability nor shall agree to any settlement or compromise of any such action without M&S's written consent. The Supplier shall at its own cost give M&S all reasonable assistance in respect of any such actions including, without limitation, lending its name where necessary, to any proceedings brought or defended by M&S. M&S shall apply any recovery obtained from such proceedings first to reimburse any costs and expenses incurred by the parties pursuant to this Condition 13.3 and thereafter any surplus shall accrue solely to the benefit of M&S.
- 13.4 The Supplier acknowledges that in some instances, certain Goods as specified by M&S from time to time will be ordered and paid for by other M&S suppliers (for example, where the Goods will be used as a component of a M&S hamper product). In these instances, although the contract for the supply of those Goods shall be between the Supplier and the relevant M&S supplier, the Supplier shall ensure that those Goods comply with the Conditions and shall remain liable to M&S for any breach of the Conditions.

## 14 Product Recall

- 14.1 The Supplier shall supply to M&S in writing on receipt of an Order a contact name and telephone number of a person who will be available 24 hours a day, every day of the year. That nominated contact must be sufficiently competent to deal with any crisis which affects M&S, including product recall, at all times. Appropriate details will be retained on the Supplier Portal.
- 14.2 The Supplier shall at all times comply with the Food Technical Terms of Trade in relation to product recalls and shall immediately notify the relevant Head of Technology within M&S (whether or not there is a product recall) in writing providing all relevant details if it discovers that there is:
- (a) any defect in the Goods which have been delivered to M&S at any time;
  - (b) any error or omission in the packaging, labelling or instructions for the Goods; or
  - (c) a risk that any Supplier incident may damage the reputation of M&S or any of its brands, (whether or not any such defect, error, omission or incident represents a breach of the warranty in Condition 9 or any other Condition), which causes or may cause any risk of death, injury, damage to property or loss of reputation.
- 14.3 M&S may in its absolute discretion and at the Supplier's own cost:
- (a) recall any Goods, or any other products into which the Goods have been incorporated, already sold by M&S to its customers (whether for a refund, credit or replacement, which shall in each case be undertaken by the Supplier at M&S's option); and/or
  - (b) issue any notification whether in writing or otherwise to its customers about the manner of use or operation of any Goods, or any other products into which the Goods have been incorporated, already sold by M&S to its customers,
- in each case on the basis of the identification, whether by M&S, its customers or any third party, of any defect, error, omission or risk as referred to in Condition 14.2 above, which M&S reasonably concludes affects or may affect any of the Goods supplied ("**Product Recall**").

## 15 Insurance

- 15.1 The Supplier shall (at its own cost) throughout the term of the Contract and for a period of 6 (six) years following termination or expiry of the Contract effect and keep in place with reputable insurers such insurance policies as are appropriate and adequate having regard to its obligations and liabilities under the Contract, including but not limited to the following:
- (a) employers' liability insurance subject to minimum statutory requirements;
  - (b) public liability insurance (including product liability) at a minimum amount of £10,000,000 (ten million pounds) in respect of any one incident; and
  - (c) product recall insurance at a minimum amount of £10,000,000 (ten million pounds) in respect of any one incident.
- 15.2 The Supplier shall on the written request of M&S from time to time provide M&S with reasonable details of the insurance policies maintained in force by the Supplier.

## 16 Marketing

The parties hereby agree that M&S shall be under no obligation to undertake any marketing, advertising or associated promotional activity ("**Marketing**") relating to any Goods. For the avoidance of doubt, M&S has and shall retain complete discretion to decide whether it engages in any Marketing and if so to determine the nature and extent of the Marketing. Furthermore, M&S shall be under no obligation to adhere to any plan, schedule, timetable or similar proposal relating

to future Marketing (“**Marketing Plan**”), irrespective of whether such Marketing Plan is disclosed to the Supplier

## 17 Intellectual Property

- 17.1 All Intellectual Property Rights owned by, or licensed from a third party to, M&S or the Supplier (as applicable) that are or have been created independently of this Contract (the “**Background Rights**”) shall remain vested in and remain the property of that party or its third party licensors as appropriate.
- 17.2 The Supplier hereby grants to M&S a worldwide, irrevocable, assignable, royalty-free licence and all necessary permissions and/or consents required (with full right to sub-license) to use, reproduce, exploit, modify and alter the Supplier’s Background Rights to enable M&S to use, manufacture (either through the Supplier or any other third parties), promote and/or sell the Goods.
- 17.3 All logos, trade names or trademarks owned or used by M&S in the course of its business (the “**M&S Trade Marks**”) are the property of M&S. M&S reserves all Intellectual Property Rights in relation to the use of such Marks. The Supplier may not use such M&S Trade Marks or any similar logos, trade names or trademarks without the prior written permission of M&S.
- 17.4 All Intellectual Property Rights in all and any Goods commissioned by, and produced specifically for, M&S (“**Commissioned Goods**”) shall, on creation, immediately vest in M&S and the Supplier hereby assigns or agrees to procure the assignment of all those Intellectual Property Rights to M&S with full title guarantee and free of any encumbrances The Supplier shall execute all documents and take all steps as M&S may reasonably require to give M&S the full benefit of this Agreement.
- 17.5 The Supplier undertakes not to register nor attempt to register any Intellectual Property Rights in the Commissioned Goods, unless requested to do so by M&S.
- 17.6 The Supplier shall promptly (and in any event, within one (1) Business Day) notify M&S upon becoming aware or suspecting that any third party has made, is making or may make any challenge or opposition to the ownership, subsistence, validity or enforceability of any of the M&S Trade Marks, the Goods or any of M&S’s other Intellectual Property. M&S may elect to take action pursuant to Condition 13.3 in response to such notification.
- 17.7 Without prejudice to any other rights M&S may have, if at any time an allegation of infringement of Intellectual Property Rights is made in respect of the Goods supplied by the Supplier to M&S pursuant to the Contract or the normal use, sale or possession of such Goods or if, in M&S’s reasonable opinion, such an allegation is likely to be made, the Supplier shall promptly and at its own expense (at M&S’ election):
- (a) procure for M&S the right to continue using, possessing and selling the relevant Goods; or
  - (b) modify or replace the relevant Goods in a manner acceptable to M&S, without detracting from the Supplier’s obligations under the Contract, and will indemnify M&S for the amount of any loss and/or damage incurred or sustained by M&S during such modification or replacement.

## 18 Confidentiality

- 18.1 Each party shall keep and procure to be kept secret and confidential all Confidential Information belonging to the other party disclosed or obtained as a result of the relationship of the parties under the Contract and shall not use nor disclose the same save for the purposes of the proper performance of the Contract or with the prior written consent of the other party. Where disclosure is made to any Personnel, it shall be done subject to obligations equivalent to those set out in the Contract. Each party shall use its best endeavours to procure that any Personnel to whom

Confidential Information is disclosed complies with such obligations. Each party shall be responsible to the other party in respect of any disclosure or use of such Confidential Information by a person to whom disclosure is made.

18.2 The obligations of confidentiality in this Condition 18 shall not extend to any information which the party that wishes to disclose such information can show:

- (a) is in, or has become part of, the public domain other than as a result of a breach of the obligations of confidentiality under the Contract; or
- (b) was in its written records prior to the date of the Contract or if earlier the receipt of an Order and not subject to any confidentiality obligations; or
- (c) was independently disclosed to it by a third party entitled to disclose the same; or
- (d) is required to be disclosed under any Applicable Laws, or by order of a court or governmental body or authority of competent jurisdiction or any recognised Stock Exchange, subject to the disclosing party notifying and consulting with the other party a reasonable time prior to such disclosure.

18.3 Each party:

- (a) except as otherwise set out in the Contract, shall not make copies or reproductions of the Confidential Information except to the extent necessary for the purposes of the proper performance of the Contract;
- (b) shall promptly notify the other if it becomes aware of any unauthorised publication or disclosure of the Confidential Information and the recipient party shall take all possible action to prevent further publication or disclosure of the same; and
- (c) acknowledges that during the term of the Contract and at the direction of the disclosing party and to the extent reasonably practicable, it shall deliver up all copies of all documents relating to the disclosing party or to any company of the disclosing party's Group and any records made or compiled by the recipient party containing extracts of any such document or any Confidential Information (whether or not lawfully made or obtained) and if requested shall delete any Confidential Information from any re-usable medium. If following such delivery or destruction, the recipient party requires the Confidential Information of the disclosing party to comply with Applicable Laws, it may request such Confidential Information from the disclosing party and the disclosing party shall, where possible, provide such information.

18.4 For the avoidance of doubt, M&S shall be entitled to disclose the Contract and any other Confidential Information provided by or on behalf of the Supplier to any M&S Affiliates and/or to third parties as necessary to enable M&S to make use of the Goods supplied under the Contract.

18.5 The Supplier understands that M&S is a publicly held corporation traded on the London Stock Exchange and that some or all of the Confidential Information and M&S Sales Data may in whole or in part contain sensitive financial data. The Supplier shall not make use of the Confidential Information and/or M&S Sales Data for the purposes of dealing or encouraging another person to deal in the M&S securities and shall not disclose the Confidential Information and/or M&S Sales Data to any person or persons unless permitted to do so under the Contract. The Supplier shall also ensure that all recipients of Confidential Information and/or M&S Sales Data understand and agree to their obligations regarding the trading in the M&S securities under London Stock Exchange regulations. The Supplier shall indemnify the M&S in full for any claims, demands, actions, proceedings, damages, losses, costs and expenses (including legal and other professional advisers' fees) whether direct or indirect incurred as a result of a breach of this provision including but not limited to trading violations or irregularities that occur as a result of any such breach.

- 18.6 If requested by M&S, the Supplier shall promptly notify M&S in writing in the form of a project list of all Personnel who have or have had access to the M&S Sales Data (and any Confidential Information) (the “**Project List**”). The Supplier shall promptly update and supply to M&S in writing the Project List as and when requested by M&S during the term of the Contract.

## 19 Announcements and Notifications

- 19.1 Subject to Condition 19.3 below, M&S shall be solely responsible for the publication of any notices or press releases associated with the Contract and/or the Goods, including but not limited to in relation to any Product Recall.
- 19.2 Subject to Condition 19.3 below, the Supplier shall not (and shall ensure that its Personnel shall not) make any announcements relating to the Goods or the Contract or its existence, execution or its subject matter or any notices received by either party in respect of the same, nor shall it issue, publish or distribute any press release or other external publicity (in whatever media), or enter into any advertising or marketing in relation to the Contract without the prior written approval of M&S (at its absolute discretion).
- 19.3 Where the Supplier is required by Applicable Laws or by any legal or regulatory authority to make an announcement or issue any communication in relation to the Goods and/or the Contract, it shall (to the extent permitted by law) first use all reasonable endeavours to consult with M&S prior to complying with any such requirement.

## 20 Business Continuity

- 20.1 The Supplier shall implement and maintain disaster recovery and business continuity practices and procedures in respect of the provision of the Goods in accordance with Good Industry Practice.
- 20.2 The Supplier shall maintain and regularly update a business disaster recovery plan (or equivalent) and shall, at least once a year, test such plan and take any necessary remedial action that it or M&S consider reasonable and expedient.
- 20.3 The Supplier shall:
- (a) ensure that it can implement the provisions of any business disaster recovery plan;
  - (b) promptly implement the relevant business disaster recovery plan if the affected Goods are unavailable for supply for more than 6 (six) hours beyond the relevant Delivery Time (or such other delay window as agreed between M&S and the Supplier from time to time);
  - (c) ensure that where there are conflicting demands on the Supplier’s contingency resource, it will give priority of resource to M&S; and
  - (d) notwithstanding the provisions of the business disaster recovery plan, ensure that normal business operations in relation to the supply of Goods in accordance with any Order and the Contract are restored as expeditiously as possible.

## 21 Force Majeure

- 21.1 If a party performing an obligation under the Contract (the “**Performing Party**”) is affected by Force Majeure it shall promptly notify the other party (the “**Non-Performing Party**”) in writing of the matters constituting the Force Majeure and shall keep the Non-Performing Party fully informed of their continuance and of any relevant change of circumstances whilst such Force Majeure continues.
- 21.2 The Performing Party affected by Force Majeure shall take all reasonable steps available to it to minimise the effects of Force Majeure on the performance of its obligations under the Contract including, where the Supplier is the Performing Party, implementation of any business disaster recovery plan and/or business continuity measures in accordance with Condition 20 above.

- 21.3 Save as provided in Condition 21.6 below, and subject to Condition 21.5 below, a Force Majeure shall not entitle either party to terminate the Contract and neither party shall be in breach of the Contract, or otherwise liable to the other, by reason of any delay or failure in performance of any of its obligations due to such Force Majeure and the date for performance of the obligations affected will be deemed suspended only for a period equal to the delay caused by such Force Majeure.
- 21.4 The Non-Performing Party is entitled to suspend its own performance of the Contract, including any obligation to make any payment under the Contract, while the Force Majeure continues, without liability to the Performing Party, and the Performing Party will not be entitled to payment from the Non-Performing Party in respect of extra costs and expenses incurred as a result of the Force Majeure.
- 21.5 If the Performing Party affected by Force Majeure fails to comply with its obligations under this Condition 21 then no relief for Force Majeure, including the provisions of Condition 21.3 above, shall be available to it and the obligations of each party shall continue in force.
- 21.6 If the Force Majeure continues for longer than 14 (fourteen) days the Non-Performing Party may, at any time whilst such Force Majeure continues, immediately terminate the Contract by giving written notice to the Performing Party.
- 21.7 Following the cessation of Force Majeure, the Performing Party will promptly notify the Non-Performing Party in writing of such cessation and will resume performance of its obligations under the Contract.

## **22 Applicable Laws and M&S Policies**

### **Compliance with Applicable Laws**

- 22.1 The Supplier shall comply with all Applicable Laws in connection with the exercise of its rights and performance of its obligations under this Agreement including, without limitation, in respect of the supply of Goods.
- 22.2 The Supplier shall immediately notify M&S of any notification received by the Supplier that it or M&S may be in breach of any Applicable Laws relevant to the Contract.
- 22.3 The Supplier warrants and represents that in relation to this Agreement, the Supplier will comply with all the requirements of the Privacy Laws as may be amended from time to time (and regulations made under it).

### **Health and Safety**

- 22.4 The Supplier shall:
- (a) immediately notify M&S of any health and safety hazards that may arise in connection with the supply of the Goods and in the case of emergency deal with such health and safety hazards immediately (including promptly sending to M&S a copy of every formal notice or other communication received by the Supplier in connection with the Goods concerning health and safety); and
  - (b) maintain a record of every incident required by Applicable Laws in relation to health and safety, whether or not the same results in any personal injury or damage to property. The Supplier shall provide M&S, on request, with access to such records for inspection purposes and shall submit a written report of any accident or dangerous occurrence, as is required by Applicable Laws, to provide to the relevant authority and shall promptly provide a copy of such report to M&S where reasonably required by M&S.

### **Compliance with Policies**

- 22.5 The Supplier shall ensure that the Goods (including their packaging and labelling) comply with the Food Technical Terms of Trade and all M&S Policies.



- 22.6 The Supplier agrees to comply, in all material respects, with all M&S Policies and standards and any other codes of conduct notified from time to time to the Supplier by M&S.

**Plan A**

- 22.7 The Supplier shall work with M&S to seek to ensure that at all times the parties comply with M&S's Plan A Commitments as set out at <http://corporate.marksandspencer.com/>.

## 23 Data Protection

- 23.1 All terms used in this Condition 23 shall have the meaning ascribed to them in the GDPR unless otherwise stated or self-evident from the context. All references to Article numbers in this Condition 23 shall relate to the GDPR unless otherwise stated.
- 23.2 As between the parties, all Personal Data processed under or in connection with this Agreement shall be and shall remain the property of M&S and in respect of the same the Supplier shall be acting as data processor and M&S shall be acting as data controller.
- 23.3 The contractual obligations which a data controller is required to impose on a data processor under Article 28(3) ("**Statutory Processor Obligations**") shall be fully incorporated into this Agreement and shall apply to the Supplier in respect of all and any processing of M&S Data by the Supplier and shall prevail in the event of any conflict with any other obligations imposed on the Supplier under this Condition 23, the relevant Statutory Processor Obligations shall prevail and apply. To the extent that the Supplier processes Personal Data in the capacity of a data processor on behalf of M&S, then in order to comply with Article 28(3), the parties will document the subject-matter, duration, nature and purpose of the processing by way of a data protection annexe to the Contract.
- 23.4 To the extent that the Supplier processes M&S Data it shall, at its own cost (and subject to Condition 23.3):
- (a) only use the M&S Data for the legitimate purposes of performing its obligations under this Agreement and for no other purposes unless instructed to do so by M&S;
  - (b) act only on instructions from M&S given from time to time in relation to the M&S Data, which instructions shall be documented;
  - (c) not do or permit anything to be done through any act or omission which would cause M&S or any M&S Affiliate to incur any liability under any Privacy Laws;
  - (d) immediately notify M&S if it is contacted or approached in relation to:
    - (i) any subject access request under the DPA or other request for information;
    - (ii) any other request from a data subject;
    - (iii) any claim for damages under the Privacy Laws; and/or
    - (iv) any investigation or enforcement activity by the Information Commissioner or any other regulator,

in each case relating to, connected with, or arising out of, the Supplier's processing of M&S Data;
  - (e) provide to M&S all reasonable assistance and cooperation M&S requests in relation to any request, claim, investigation or enforcement activity notified to M&S pursuant to Condition 23.4(d), any claim and/or exercise or purported exercise of rights by a data subject under Privacy Laws or any investigation or enforcement activity by the Information Commissioner or any other regulator, relating to, connected with or arising out of the Supplier's processing of M&S Data;

- (f) not engage another processor to process M&S Data (or otherwise sub-contract or outsource the processing of any of the M&S Data to any third party) without the prior consent of M&S. Any consent so granted shall be conditional on the Supplier obtaining the third party's written agreement to abide by and honour terms relating to the processing of M&S Data which are materially identical to those imposed on the Supplier under this Agreement;
- (g) ensure that appropriate technical and organisational measures are in place to ensure the security of M&S Data (including appropriate encryption) and that appropriate technical and organisational measures are taken against unauthorised or unlawful processing of M&S Data and against accidental loss or destruction of, or damage to, M&S Data. When considering what measures are appropriate, the Supplier shall have regard to the state of technological development and the cost of implementing any measures to ensure a level of security appropriate to the harm that might result from such unauthorised or unlawful processing or accidental loss or destruction, and to the nature of the data to be protected and the Supplier shall keep abreast of current regulatory trends in security as reported on the Information Commissioner's website at [www.ico.org.uk](http://www.ico.org.uk);
- (h) not transmit or transfer any M&S Data to any country or place outside the European Economic Area without M&S' prior written consent;
- (i) allow M&S and/or its representatives access to premises (including all locations where the Supplier, or any sub-contractors acting on its behalf, may process M&S Data) during normal business hours to audit and inspect the processing and storage of M&S Data being performed under or in connection with this Agreement. The Supplier shall also, at its cost, provide to M&S and/or its representatives all reasonable assistance in the performance of such an audit or inspection; and
- (j) inform M&S immediately on becoming aware of a Data Breach (meaning any breach of the Supplier's obligations under this Condition 23, other loss, destruction, damage of, or compromise to, M&S Data or any other event relating to M&S Data that falls within the definition of 'personal data breach' set out in Article 4(12) of the GDPR) and co-operate fully with M&S in respect of the measures that should be taken in response. The Supplier shall also co-operate fully with M&S in respect of any matter which in the opinion of M&S is required for ensuring M&S' continued compliance with the Privacy Laws. For the avoidance of doubt, the cooperation of the Supplier under this Condition 23.4 shall be provided solely at the Supplier's own cost and will include, without limitation, providing M&S and/or its representatives access to any premises under the Supplier's control (if necessary without notice).

## 24 Gifts and Bribery

- 24.1 The Supplier warrants that it has never committed an offence under Sections 1, 2, 6 or 7 of the Bribery Act 2010 (a "**Bribery Offence**") or engaged in any conduct, whether by act or omission, which if it had been made or carried out after the Bribery Act 2010 came into force, would have constituted a Bribery Offence ("**Bribery Conduct**").
- 24.2 The Supplier agrees that in respect of all matters connected with or arising out of the Goods and the Contract, it:
- (a) shall not, and shall procure that its Personnel shall not, commit any Bribery Offence;
  - (b) has in place, and will maintain until termination or expiry of the Contract, adequate procedures designed to prevent persons associated with the Supplier from bribing another person intending to obtain or retain business for the Supplier or to obtain or retain an advantage in the conduct of business for the Supplier (as envisaged under section 7(2) of the Bribery Act 2010); and

- (c) shall comply at all times with all obligations arising out of the Bribery Act 2010.
- 24.3 The Supplier will not do or permit anything to be done through act or omission which would cause M&S, any Personnel of M&S or any M&S Affiliate to incur any liability under the Bribery Act 2010 or any other applicable legislation which prohibits any form of bribery including, but not limited to, any legislation intended to implement the UN Convention Against Corruption.
- 24.4 The Supplier will not offer or give or agree to give any employee or agent of M&S or any M&S Affiliate any gift or consideration of any kind as an inducement or reward for doing or forbearing to do or for having done or forborne to do any act in relation to the obtaining or execution of the Contract, the provision of Goods or any other agreement for M&S or any M&S Affiliate or for showing or forbearing to show favour or disfavour to any person in relation to the Contract or any other agreement for M&S or any M&S Affiliate.
- 24.5 Any breach of this Condition by the Supplier or its Personnel (whether with or without the knowledge of the Supplier) in relation to the Contract or any other agreement for M&S or any M&S Affiliate, will be deemed a material breach of the Contract entitling M&S to terminate, and, in addition, entitle M&S to recover from the Supplier the amount of any losses resulting from such material breach and to recover from the Supplier the amount or value of any such gift, consideration or commission.
- 24.6 The Supplier will notify M&S immediately if it becomes aware, or has reason to believe, that:
- (a) it has breached any of its obligations arising out of this Condition 24; or
  - (b) any person or party directly or indirectly connected with the Supplier's performance of its duties or exercise of its rights under the Contract has committed any Bribery Offence, engaged in any Bribery Conduct, or otherwise made, given, procured, received, or obtained any bribe (or attempted to do so).

## **25 Modern Slavery**

- 25.1 The Supplier warrants that:
- (a) neither it nor any of its Personnel:
    - (i) has committed an offence under the Modern Slavery Act 2015;
    - (ii) has been notified that it is subject to prosecution under or an investigation relating to an alleged offence under the Modern Slavery Act 2015; or
    - (iii) is aware of any circumstances within any part of its own business or supply chains which could give rise to prosecution under, or an investigation relating to the alleged commission of an offence under, the Modern Slavery Act 2015; and
  - (b) it has appropriate controls in place to ensure that no offences under the Modern Slavery Act 2015 (or equivalent behaviours) are taking place in any of its supply chains or in any part of its own business and that it shall notify M&S immediately in writing (with full details) if it becomes aware or has reason to believe that it has, or any of its Personnel have, breached or potentially breached any of the Supplier's obligations under Conditions 25.1(a) and (b).

## **26 Records and Audit**

- 26.1 The Supplier shall, and shall procure that any of its sub-contractors shall, during the term of the Contract (or supply of Goods if longer) and for the period of six (6) years thereafter:
- (a) maintain such records relating to the supply of the Goods, the calculation of the Contract Price and other amounts due under the Contract and/or the performance by the Supplier or sub-contractor of its obligations under the Contract as required under any Applicable

Laws and as may be necessary to trace and audit the supply chain of any Goods, as M&S may reasonably require in any form (including any electronic form) (the “**Records**”);

- (b) within two (2) Business Days of a request from M&S (or such other time frame as agreed by the parties) produce the Records for inspection by M&S or allow or procure for M&S and/or its authorised representatives access to any premises where any such Records are stored for the purposes of inspecting and/or taking copies of and extracts from such Records free of charge and for the purposes of carrying out an audit of the Supplier’s and/or its sub-contractor’s compliance with the Contract, including all activities of the Supplier or sub-contractor, the charges due under the Contract and the performance, security and integrity of the Supplier or sub-contractor in fulfilling its obligations under the Contract;
  - (c) preserve the integrity of the Records in the possession or control of the Supplier, its sub-contractor and/or its Personnel and all data which is used in, or generated as a result of, fulfilling its obligations under the Contract and to prevent any corruption or loss of that data; and
  - (d) provide any assistance reasonably requested by M&S in order to interpret or understand any of the Records.
- 26.2 At M&S’s request, the Supplier shall attend review meetings with M&S concerning the results of any inspection of Records and shall make all reasonable changes required by, and take any other action necessitated by any inspection.
- 26.3 The Supplier shall, and shall procure that sub-contractors shall, provide M&S with such information as is reasonably necessary to enable M&S to determine the Supplier’s or sub-contractor’s compliance with the terms of the Contract, and allow M&S, its employees or authorised agents access to such information to carry out appropriate inspections.
- 26.4 The Supplier shall, and shall procure that a sub-contractor shall, ensure that during any inspection of Records M&S receives all reasonable assistance and access to all relevant personnel, premises, systems, data, details of rebates and discounts received by the Supplier or sub-contractor and other information and records relating to the Contract (whether manual or electronic) at the Supplier’s or sub-contractor’s premises, any premises where Records are kept and at all locations from which (in whole or in part) the Supplier or sub-contractor fulfils the terms of the Contract.
- 26.5 If, following any inspection of Records M&S can demonstrate that any amounts it has paid to the Supplier exceed the charges which should have been payable as calculated in accordance with the Contract, the Supplier shall forthwith pay or allow to M&S the amount of such over-payment and in the case of an over-payment exceeding 2% of the charges which should have been payable, as determined in the course of any such inspection and audit, the Supplier shall also (without prejudice to any other rights which M&S may have) reimburse M&S for the reasonable costs in conducting such inspection and audit together with interest at the rate of 2% per annum above the base rate for the time being of Barclays Bank plc on such over-payment being charged from the date on which it was paid by M&S until the date on which M&S is reimbursed by the Supplier.
- 26.6 Without prejudice to Conditions 26.4 and 26.7, in the event of an investigation into suspected fraudulent activity or other impropriety (including in respect of any Applicable Law) that is connected with the Contract, M&S reserves for itself, any auditors and/or legal advisers of M&S, and their respective authorised agents, the right of immediate access to any relevant documents or materials held by the Supplier, its sub-contractors or third parties under the Supplier’s supervision and the Supplier agrees, and shall procure that a sub-contractor agrees, to provide all necessary assistance to the conduct of such investigation at all times during or after the term of the Contract.
- 26.7 M&S shall have the right from time to time at its own cost to conduct an audit of the Supplier’s or sub-contractor’s operations and facilities and its quality, environmental and health and safety

procedures and systems to ensure that the Supplier or sub-contractor has the appropriate facilities, procedures, systems and personnel appropriate to and as may be required for the Supplier or sub-contractor to fulfil its obligations under the Contract, and otherwise in accordance with the Contract and for that purpose shall be entitled to have access to the Supplier's premises and to any premises where the Supplier, its sub-contractors or agents fulfil the Supplier's obligations (part or all) under the Contract during normal working hours on giving reasonable notice to the Supplier for that purpose.

## **27 Personnel**

- 27.1 The Supplier shall ensure that any Personnel are committed to the extent reasonably necessary to fulfil that individual's role in the provision of the Goods during the term of the Contract.
- 27.2 Whilst the parties do not anticipate TUPE applying in respect of any Personnel under the Contract, if any contract of employment relating to any Personnel has effect or is alleged to have effect as if originally made between M&S or any successor to the Supplier and that such Personnel, the Supplier will indemnify M&S and any such successor supplier against all losses which M&S and that successor may incur on account of or arising from:
- (a) terminating (or purporting to terminate) the employment of those Personnel;
  - (b) its employment of those Personnel up to the date of re-employment by the Supplier or its termination (or purported termination), as applicable;
  - (c) any claim by those Personnel in respect of any fact or matter to the extent that such claim concerns or arises from employment with the Supplier or the termination of that employment;
  - (d) any claim by those Personnel in respect of which M&S or the successor supplier incurs liability as a result of the operation of TUPE;
  - (e) any claim arising from any failure by any person to comply with information and consultation obligations under TUPE.

## **28 Assignment, Sub-Contracting and Third Party Rights**

- 28.1 The Supplier shall not assign, delegate, transfer, charge, sub-contract or deal with the Contract or any Order or any of its rights or obligations under them or purport to do any of the same without having obtained the prior written consent of M&S.
- 28.2 If M&S does consent to the appointment of a sub-contractor by the Supplier, the Supplier shall:
- (a) at all times remain liable to M&S for the performance of all of its duties and obligations under the Contract (including any duties or obligations performed by the sub-contractor);
  - (b) be fully responsible for any acts or defaults of any sub-contractor, its employees and agents as if they were the acts or defaults of the Supplier;
  - (c) require any such sub-contractor to be bound by all appropriate obligations corresponding to those placed on the Supplier by the Contract;
  - (d) ensure that it has the right to terminate any agreement with any such sub-contractor in the event of any material breach by the sub-contractor of such an agreement, irrespective of whether such breach is remediable or not; and
  - (e) carry out an annual audit, using an independent third party auditor, to assess the extent of compliance with the Modern Slavery Act 2015 obligations and principles by the sub-contractor within its own business and its supply chains.
- 28.3 Any M&S Affiliate may enforce any provision of the Contract. Except for M&S Affiliates, no person who is not a party to this Agreement shall have the right (whether under the Contracts (Rights of

Third Parties) Act 1999 or otherwise) to enforce any provision of the Contract without the express prior agreement in writing of the parties.

## 29 General

- 29.1 The Supplier shall not pledge the credit of M&S nor represent itself as being M&S nor an agent, partner, employee or representative of M&S nor as having any power or authority to incur any obligation of any nature, express or implied, on behalf of M&S. Nothing in the Contract, and no action taken by the parties pursuant to the Contract, shall create, or be deemed to create, a partnership or joint venture or relationship of employer and employee or principal and agent between the parties.
- 29.2 The rights and remedies of either party in respect of the Contract shall not be diminished, waived or extinguished by the granting of any indulgence, forbearance or extension of time granted by such party to the other nor by any failure of, or delay by the said party in ascertaining or exercising any such rights or remedies. Any waiver of any breach of the Contract shall be in writing. The waiver by M&S of any breach of the Contract shall not prevent the subsequent enforcement of that provision and shall not be deemed to be a waiver of any subsequent breach of that or any other provision.
- 29.3 If at any time any part of the Contract (including any one or more of the Conditions or any sub-clause or paragraph or any part of one or more of these clauses) is held to be or becomes void or otherwise unenforceable for any reason under any applicable law, the same shall be deemed omitted from the Contract and the validity and/or enforceability of the remaining provisions of the Contract shall not in any way be affected or impaired as a result of that omission.
- 29.4 These Conditions and/or the Contract may be varied by M&S upon the giving of reasonable notice in writing to the Supplier of M&S' intention to do so.

## 30 Notices

- 30.1 Any notice or other communication under or in connection with these Conditions or any Contract or Order will be in writing and will be delivered personally or sent by pre-paid recorded delivery (or where the Supplier is located outside of the UK, by airmail), or email transmission to the representative of the relevant party at the address the relevant party may specify by notice in writing to the other.
- 30.2 Any such notice will be deemed to have been given: (a) when it was personally delivered or served; or (b) if sent by post, forty-eight hours after it was posted or if sent by airmail, 4 (four) Business Days after it was posted (and in each case proof of due posting will be sufficient evidence of delivery); or (c) if sent by email, the beginning of the next Business Day (and proof of the email having been received by the recipient inbox will be sufficient evidence of delivery).

## 31 GSCOP Disputes and Arbitration

- 31.1 M&S will comply with its obligations under Article 11 of the GSCOP Order ("**Article 11**") in the event of any GSCOP Dispute.
- 31.2 The parties agree that the provisions of Article 11 shall be incorporated into the Contract. In the event that any GSCOP Dispute is not resolved to the satisfaction of either party (the "**Dissatisfied Party**") within 21 days from the date the GSCOP Dispute arose, the Dissatisfied Party shall be entitled to initiate an arbitration by service of a written arbitration request (an "**Arbitration Request**") on the other party ("**Other Party**") in accordance with Article 11. The Other Party shall submit to the Arbitration Request and the arbitration (the "**GSCOP Arbitration**") shall be on the terms set out in Article 11. The language to be used in any GSCOP Arbitration shall be English. In accordance with section 2 of the GCA Act, in respect of any GSCOP Arbitration the GCA must either arbitrate the GSCOP Arbitration or appoint another person to do so.

- 31.3 For the avoidance of doubt, neither party is obliged to submit to arbitration in the event of any dispute or claim arising out of or in connection with the Contract which is not a GSCOP Dispute (a “non-GSCOP Dispute”).

## **32 Governing Law and Jurisdiction**

- 32.1 These Conditions, the Contract and each Order and any disputes or claims arising out of or in connection with it (whether contractual or non-contractual in nature such as claims in tort, from breach of statute or regulation or otherwise) shall be governed by and interpreted in accordance with the law of England and Wales.
- 32.2 All non-GSCOP Disputes arising out of or relating to the Contract, each Order, these Conditions and the Commercial Handbook shall be subject to the exclusive jurisdiction of the English Courts to which the parties irrevocably submit.

## Annexe 1 – Definitions and Interpretation

### 1. Definitions

For the purposes of these Conditions:

<b>“Applicable Laws”</b>	means all applicable laws, regulations, regulatory requirements, codes of practice and guidance in force from time to time governing the supply of the Goods;
<b>“Ancillary Agreement”</b>	means a separate written agreement that has been negotiated, agreed and signed by M&S and the Supplier in respect of the Goods;
<b>“Business Day”</b>	means any day that is not a Saturday, Sunday or a public holiday in the United Kingdom;
<b>“Change of Control”</b>	means that the person or persons who controlled or had the power to control the affairs and policies of the applicable entity (being either the Supplier (or any factory, site or plant owned or leased by the Supplier) or any company who manufactures products for the Supplier) whether directly or indirectly and either by ownership of share capital, possession of voting power, ability to appoint directors, contract or otherwise, ceases to have such control;
<b>“Charges”</b>	means any charges, funding or discounts applied by M&S to the Supplier in respect of the supply of the Goods, as variously set out in Condition 2 or elsewhere within the Contract;
<b>“Conditions”</b>	means these Commercial Terms of Trade as amended from time to time, together with all attachments, exhibits and appendices hereto;
<b>“Confidential Information”</b>	means the provisions of the Contract and all information in any form or medium that is secret or otherwise not publicly available (either in its entirety or in part, including the configuration or assembly of its components) including accounts, business plans, business methods, strategies and financial forecasts, tax records, correspondence, designs, drawings, manuals, specifications, customer sales or supplier information, technical or commercial expertise, software, formulae, processes, methods, knowledge, know-how, trade secrets and other information in any form or medium whether disclosed orally or in writing before or after the date of the Contract together with any copies, summaries, reproductions or extracts of such information clearly designated by a party as being confidential or which can reasonably be considered confidential;
<b>“Contract”</b>	means the contract between M&S and the Supplier for the purchase of Goods, comprising the Order, these Conditions and all documents expressly referred to in these Conditions;
<b>“Contract Price”</b>	means the price payable for the Goods as set out in an Order;
<b>“Delivery Point”</b>	means the point of delivery for the Goods as specified in the Order or as otherwise notified by M&S to the Supplier from time to time;
<b>“Designated Retailer”</b>	has the meaning ascribed to it in the GSCOP Order;
<b>“DPA”</b>	means the Data Protection Act 2018;
<b>“Exclusive Goods”</b>	means M&S-branded Goods;



<b>“Food Logistics Handbook”</b>	means together the Food Logistics Handbook – Ambient and the Food Logistics Handbook – Chilled, each as may be amended by M&S from time to time. The current version of which can be accessed via the Supplier Portal <a href="http://www.marksandspencerconnect.com">www.marksandspencerconnect.com</a> or via the Supplier’s nominated M&S Supply Chain planner;
<b>“Force Majeure”</b>	means any event outside the reasonable control of the performing party that materially affects its ability to perform its obligations under this Agreement, including an act of God, fire, earthquake, war, revolution, act of terrorism, riot or civil commotion, but excluding severe adverse weather, strikes, lock-outs or other industrial action of the performing party’s own employees and/or sub-contractors and/or failure or delays by sub-contractors or suppliers (except where they themselves are affected by an event of Force Majeure);
<b>“GCA”</b>	means the Groceries Code Adjudicator established under the GCA Act;
<b>“GCA Act”</b>	means the Groceries Code Adjudicator Act 2013;
<b>“GDPR”</b>	means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) as supplemented and modified by the DPA;
<b>“Goods”</b>	means the goods (including any part or parts of them) which the Supplier is to provide to M&S pursuant to an Order including without limitation food and drink products, merchandise, packaging, labelling and promotional materials. “Goods” in these Conditions shall be taken to mean the same as “Groceries” under GSCOP;
<b>“Good Industry Practice”</b>	means the exercise of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced supplier engaged in the same type of undertaking and under the same or similar circumstances and conditions, seeking in good faith to comply with its contractual obligations, complying with all Applicable Laws, including codes of practice and conduct in force from time to time relating to Goods;
<b>“Group”</b>	means, in relation to any company, that company and every other company which from time to time is or becomes a subsidiary or holding company of that company or a subsidiary of any such holding company (and the terms “subsidiary” and “holding company” shall have the meanings given to them by Section 1159 Companies Act 2006);
<b>“Groceries”</b>	has the meaning given to it in the GSCOP Order;
<b>“GSCOP”</b>	means the Groceries Supply Code of Practice as set out at Schedule 1 of the GSCOP Order;
<b>“GSCOP Dispute”</b>	means a Dispute, as defined in the GSCOP Order, between M&S and the Supplier;
<b>“GSCOP Order”</b>	means the Groceries (Supply Chain Practices) Market Investigation Order 2009;
<b>“Insolvent”</b>	means:

- (a) the Supplier has any distress or execution levied or enforced on any of its assets which is not paid out within seven days of it being levied; or
- (b) the Supplier is deemed to be unable to pay its debts within the meaning of Section 123 of the Insolvency Act 1986; or
- (c) the Supplier calls a meeting for the purpose of passing a resolution to wind it up, or such a resolution is passed; or
- (d) the Supplier presents, or has presented, a petition for a winding up order; or
- (e) an application to appoint an administrator is made in respect of the Supplier or a notice of intention to appoint an administrator is filed in respect of the Supplier; or
- (f) any other steps are taken by the Supplier or any other person to appoint an administrator over the Supplier; or
- (g) the Supplier has an administrator, administrative receiver, or receiver appointed over all or any part of its business, undertaking, property or assets; or
- (h) the Supplier takes any steps in connection with proposing a company voluntary arrangement or a company voluntary arrangement is passed in relation to it; or
- (i) the Supplier ceases or suspends or appears likely (in the reasonable opinion of M&S) or is threatening to suspend or cease to trade; or
- (j) the Supplier stops or suspends making payments (whether or principal or interest) with respect to all or any class of its debts or announces an intention to do so; or
- (k) a secured lender to the Supplier takes any steps to obtain possession of the property on which it has security or otherwise to enforce its security; or
- (l) the Supplier suffers or undergoes any procedure analogous to any of those specified in (a) to (k) inclusive above or any other procedure available in the country in which the Supplier is constituted, established or domiciled against or to an insolvent debtor or available to the creditors of such a debtor;

**“Intellectual Property  
Right”**

means patents, rights to inventions, copyright and related rights, trade marks, trade names and domain names, rights in get-up, rights in goodwill or to sue for passing off, rights in designs, database rights, rights in computer software, rights in confidential information (including know-how and trade secrets) and any other intellectual property rights, in each case whether registered or unregistered and including all applications for and renewals or extensions of (and rights to apply for, renew or extend), such rights and all similar or equivalent rights or forms of protection which may now or in the future subsist in any part of the world, together in each case with the right to claim and retain damages for past, current and future infringements of such rights;

<b>“M&amp;S”</b>	means Marks and Spencer plc (a company registered in England No. 214436) or such other M&S Affiliate stipulated specifically in the Order;
<b>“M&amp;S Affiliate”</b>	means any member of M&S’ Group (other than M&S), any joint venture to which M&S is a party, any M&S franchisee and any person permitted to trade under the M&S brand;
<b>“M&amp;S Data”</b>	means Personal Data in respect of which M&S is data controller (as defined in the DPA);
<b>“M&amp;S Exclusive Goods”</b>	means Goods that are commissioned by, and produced by the Supplier specifically for, M&S;
<b>“M&amp;S Policies”</b>	means: <ul style="list-style-type: none"> <li>• Cyber Security Policy;</li> <li>• Ethical Trading Standards;</li> <li>• Global Sourcing Principles; and</li> <li>• such other policies as may be notified by M&amp;S in writing to Supplier from time to time.</li> </ul>
<b>“M&amp;S Sales Data”</b>	means any and all commercial, financial, technical, data elements and/or sales data that is made available by or on behalf of M&S to the Supplier or its representatives in connection with the Contract;
<b>“Order”</b>	means any order from M&S to the Supplier for the supply of Goods in the form of a Purchase Order or in such form as M&S determines from time to time;
<b>“Personal Data”</b>	has the meaning given to it in the GDPR;
<b>“Personnel”</b>	means in respect of a party to the Contract, that party’s employees, officers, agents, sub-contractors and/or authorised representatives;
<b>“Privacy Laws”</b>	means the DPA, GDPR, the Privacy and Electronic Communications (EC Directive) Regulations 2003 and all Applicable Laws relating to the processing of Personal Data and privacy (including any legislation amending or replacing the same);
<b>“Product Quality Contract”</b>	means the contract between the Supplier and M&S governing the quality requirements stipulated by M&S in respect of the Goods, with which the Supplier shall ensure the Goods comply at all times;
<b>“Specification”</b>	means M&S’ specification or stipulations for the Goods set out in the Contract or otherwise stipulated in writing to the Supplier;
<b>“Supplier”</b>	means the person, firm or company to whom the Order is addressed; and
<b>“Supplier Portal”</b>	means the Technical Connect portal located at <a href="http://www.marksandspencerconnect.com">www.marksandspencerconnect.com</a>
<b>“Supply Agreement”</b>	has the meaning set out in Article 2(1) of the GSCOP Order; and
<b>“Technical Terms of Trade”</b>	means M&S’s Food Technical Terms of Trade (the current version of which is available via the Supplier Portal) as amended by M&S from time to time;
<b>“TUPE”</b>	means the Transfer of Undertakings (Protection of Employment) Regulations 2006.

**2. Interpretation:**

- 2.1 The headings to Conditions are inserted for convenience only and shall not affect the interpretation or construction of these Conditions.
- 2.2 Words expressed in the singular shall include the plural and vice versa. Words referring to a particular gender include every gender. References to a person include an individual, company, body corporate, corporation, unincorporated association, firm, partnership, joint venture, government, state or agency of state.
- 2.3 The words and phrases "other", "including" and "in particular" shall be construed without limitation.
- 2.4 References to any statute, statutory provision, enactment, order, regulation or other similar instrument shall include (i) any subordinate legislation made under it; (ii) any provision which it has modified or re-enacted (whether with or without modification), and (iii) any provision which subsequently supersedes it or re-enacts it (whether with or without modification) whether made before or after the date of the Contract.
- 2.5 Where a provision of these Conditions is subject to agreement of the parties, or requires approval, consent or permission of a party, such agreement, approval, consent or permission must be evidenced in writing and given by an authorised representative of the parties.
- 2.6 Unless expressly stated otherwise, in the case of any conflict or inconsistency in relation to an Ancillary Agreement (if any) and/or any of the following elements of the Contract, they shall prevail in the following order:
  - (a) Ancillary Agreement (if any); and
  - (b) these Conditions; and
  - (c) the Order(s).