

DRAFT

**Code of Practice for Designated Grocery Goods
Undertakings**

Code of Practice:
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DRAFT OUTLINE OF CODE OF PRACTICE FOR DESIGNATED GROCERY GOODS UNDERTAKINGS

PART 1: INTERPRETATION

1. Interpretation

Objective

- (1) The objective of the Code is to foster and promote a sustainable and efficient grocery supply chain in Ireland to the benefit of consumers and the wider economy.
- (2) The Code is concerned with practices in the grocery goods trade and includes specific provisions to facilitate fair trade with Designated Grocery Goods Undertakings within a framework of governing principles. The Code requires that these provisions be incorporated into standard contracts or Terms of Business Agreement of Designated Grocery Goods Undertakings for the production, supply or distribution of grocery goods.

2. General Interpretation, index of definitions etc

2.1 In this Code:

Acts: The Acts mean the Competition Acts 2002 to 2010.

Buying Team means employees or representatives of a retailer from time to time whose responsibilities include at least one of the following functions:

- (a) directly involved in buying grocery goods for resale
- (b) other than the Code Compliance Officer, directly involved in the interpretation and application of the provisions of the Code on behalf of a grocery goods undertaking involved in retailing
- (c) immediate line management responsibility for any or all persons described in (a) and (b) above.

Competition Authority (CA) means the Authority established under the Competition Act, 1991 and continued in being by section 29 of the Competition Act 2002

Compliance Report means an annual compliance report as described in Article 22 of the Code

Code Compliance Officer means a person employed from time to time in a grocery goods undertaking as described in Article 20 of the Code.

Complaint means a complaint arising under Article 24 of the Code.

Dispute means a dispute arising under Article 24 of the Code.

Designated Grocery Goods Undertaking means a grocery goods undertakings designated by Order under Part 3 of the Code.

Grocery goods means any food or drink for human consumption that it is intended to be sold as groceries, and includes:

- Any substance or thing sold or represented for use as food or drink for human consumption,
- Any substance or thing sold or represented for use as an additive, ingredient or processing aid in the preparation or production of food or drink for human consumption
- Intoxicating liquors

Grocery goods do not include food or drink served or supplied on a grocery goods undertaking's premises in the course of providing catering, restaurant or take-away services or intoxicating liquor served or supplied for consumption on a grocery goods undertaking's premises or any similar hospitality services.

Grocery Goods Undertakings means an undertaking that is engaged for gain in the production, supply or distribution of grocery goods, whether or not the undertaking is engaged in the direct sale of those goods to the public. In the case of undertakings producing, supplying or distributing additives, ingredients or processing aids in the preparation of or production of food or drink for human consumption, such undertakings are not grocery goods undertaking unless the additive, ingredients or processing aid is intended to be sold by a retailer as an additive, ingredient or processing aid.

Investigation means an investigation under Article 25 of the Code

Minister means the Minister for Enterprise, Trade & Innovation

National Consumer Agency (NCA) means the Agency of that name established under section 7 of the Consumer Protection Act 2007

Payment or Payments means any compensation or inducement in any form (monetary or otherwise) and includes more favourable contractual terms.

Promotion means any offer for sale at an introductory or a reduced retail price or with some other benefit to consumers that is intended to subsist only for a specific period.

Reasonable Notice means a period of notice, the reasonableness of which will depend on the circumstances of the individual case, including:

- (a) The duration of the Terms of Business Agreement to which the notice relates, or the frequency with which orders are placed by a retailer for relevant grocery goods;
 - (b) The characteristics of the relevant grocery goods including durability and external factors affecting their production;
 - (c) The value of any relevant order relative to the turnover of a supplier;
- and

- (d) The overall impact of the information given or the provisions included in the notice on the business of a supplier;

Require or Required as set out in Articles 10 and 11 of the Code means actions which a grocery goods undertaking is compelled by another grocery goods undertaking to undertake, or to have undertaken, against its agreement unless such actions arise from “ordinary commercial pressures”. Where these “ordinary commercial pressures” are partly or entirely attributable to the grocery goods undertaking seeking to have these actions undertaken by another grocery goods undertaking they will be deemed to be “ordinary commercial pressures” where they do not involve or constitute duress (including economic duress), are objectively justifiable and transparent and result in similar cases being treated in the same way. Where a grocery goods undertaking seeks to have another grocery goods undertaking carry out a particular action or actions, it shall be for the former grocery goods undertaking to demonstrate, on the balance of probabilities, that the action or actions are not “required” actions as defined in this article.

Retailer means a grocery goods undertaking that sells or resells grocery goods directly to the public in the Republic or Ireland.

Supplier means a grocery goods undertaking carrying on (or actively seeking to carry on) a business in the direct supply to any retailer of grocery goods for resale in the Republic of Ireland, and includes any such undertaking located anywhere in the world.

Supplying Team means those employees or representatives of a supplier or distributor whose responsibilities from time to time include at least one of the following functions:

- (a) directly involved in supplying or distributing grocery goods for resale
- (b) other than the Code Compliance Officer, directly involved in the interpretation and application of the provisions of the Code on behalf of a grocery goods undertaking involved in the supply or distribution of grocery goods
- (c) immediate line management responsibility for any or all persons described in (a) and (b) above.

Sustainable Prices for the purpose of the Code means the minimum prices that are justifiable in maintaining an efficient grocery goods sector in Ireland.

Shrinkage means losses that occur after goods are delivered to a retailer’s premises and arise whether due to theft, the goods being lost or accounting error;

Terms of Business Agreements means the details of the contractual agreements between grocery goods undertakings for the supply of grocery goods for the purpose of resale

Wastage means grocery goods, which become unfit for sale subsequent to their delivery to retailers.

2.2 Compliance with the Code does not exclude any person or grocery goods undertaking from the application of the Competition Acts 2002-2010 or restrict the application of these Acts in respect of any actions under the Code

PART 2: GOVERNING PRINCIPLES

3. Governing Principles

- (1) **Consumer Interest:** The interests of consumers in achieving wide choice, high quality and good value for money at the lowest sustainable prices will be paramount. Grocery goods undertakings will ensure the passing on of sustainable lower prices to consumers.
- (2) **Fair Dealing:** Insofar as dealings and contractual relations in respect of the supply and sale of grocery goods are concerned, grocery goods undertakings covered by the Code will conduct their trading relationships in good faith in a fair, open and transparent manner. In doing so, undertakings will ensure that any arrangements they enter into with another undertaking, whether formal or informal, are fair and lawful, provide reasonable certainty in respect of the risks and costs of trading (including in relation to production, delivery and payment arrangements), do not involve the transfer of excessive risk from one undertaking to another and do not involve the exercise of duress by any grocery goods undertaking on another or conduct inconsistent with the maintenance of mutually beneficial and sustainable trading relationships.
- (3) **Strong Supplier Base:** The Code will seek to promote the development and maintenance of a strong, innovative, efficient and competitive supplier/producer base in Ireland, which meets the needs of consumers and embraces the principle of fair dealing as outlined.
- (4) **Competitive Retail Sector:** The Code will seek to promote the development and maintenance of a competitive retail sector in Ireland which best meets the needs of consumers and proactively embraces the principle of fair dealing as outlined.

PART 3: DESIGNATED GROCERY GOODS UNDERTAKINGS

4. Designated Grocery Goods Undertakings

- (1) The Minister shall, by Order, designate those grocery goods undertakings to which the terms of this Code will be binding.
- (2) Grocery goods undertakings which have an annual turnover of more than €50m with respect to the supply or retailing of grocery goods in

the Republic of Ireland, either directly and/or through subsidiaries, will be designated by the Minister by Order for the purposes of the Code.

- (3) For the purposes of the Article 4(2) the turnover of a grocery goods undertaking and/or its subsidiaries with respect to the supply or retailing of grocery goods in the Republic of Ireland, on any particular date, will be the applicable turnover figure for the financial year preceding that date.
- (4) Each Designated Grocery Goods Undertaking will procure that each and every subsidiary (if any) of the undertaking, engaged in the supply or retailing of grocery goods, will comply with the Code as if such subsidiary itself is bound by the Code.
- (5) Where the Code applies to a grocery goods undertaking and its subsidiaries (if any), it is sufficient for the purposes of Article 21 of the Code that one Code Compliance Officer be appointed for the undertaking and its subsidiaries (if any).
- (6) Where the Code applies to a grocery goods undertaking and its subsidiaries (if any), it is sufficient for the purposes of Article 22 of the Code that the compliance report required under that Article is completed by the Designated Grocery Goods Undertaking and that it reports on the activities of the undertaking and all of its subsidiaries.

PART 4: BUSINESS AGREEMENTS

5. Terms of Business Agreements to be in Writing

Agreements between a Designated Grocery Goods Undertaking and another grocery goods undertaking, including agreements between suppliers and retailers, for the supply of grocery goods for the purpose of resale, must record in writing (including electronic format) all the terms and conditions attaching to such agreements as should subsequent contractual agreements or contractual arrangements made pursuant to an original agreement

6. Requirement to incorporate Code in Terms of Business Agreements

- (1) A Designated Grocery Goods Undertaking is prohibited from entering into or performing any business agreement with another grocery goods undertaking unless the business agreement incorporates the Code and the agreement does not contain any provisions that are inconsistent with the Code.
- (2) For the purposes of Article 5, the Code will be taken as incorporated into a Terms of Business Agreements if it forms part of the contractually enforceable terms of that agreement.
- (3) The inclusion of a clause in Terms of Business Agreements between grocery goods undertakings which makes provision for events of a

force majeure nature which are not materially different from, or more onerous on, the undertakings than those set out at Schedule 2 to the Code will not be inconsistent with the Code.

7. Variation of Terms of Business Agreements to be in writing

Designated Grocery Goods Undertakings, including suppliers and retailers, are prohibited from varying the Terms of Business Agreements retrospectively once they have been agreed unless the Agreement includes specific provisions allowing for such changes and details the specific circumstances and the manner in which changes may occur and the amount of notice to be given by the party seeking to change the agreement to the other party/parties to the agreement.

8. Changes to Supply Chain Procedures

Where a Designated Grocery Goods Undertaking requests another grocery goods undertaking to make significant changes to previously agreed supply chain procedures, the undertaking making the request shall provide reasonable written notice of these changes to the other party, or shall compensate the other party, for any resulting net cost incurred by the other party due to a failure to provide such notice.

PART 5: PAYMENTS

9. Prompt Payments

Terms of Business Agreements, shall provide that Designated Grocery Goods Undertakings shall pay for goods and services received from other grocery goods undertakings in accordance with the specifications set out in the Terms of Business Agreements and within a specified period of time after the date of the receipt of the invoice for such goods and services and that payments are not withheld unreasonably for reasons of minor substance.

10. Marketing Costs

A Designated Grocery Goods Undertaking which is a retailer shall not require a supplier to make any payment towards the retailer's marketing costs unless such a contribution has been agreed in the Terms of Business Agreement. Such retailer marketing costs include:

- (i) buyer visits to suppliers;
- (ii) artwork or packaging design;
- (iii) consumer or marketing research;
- (iv) the opening or refurbishment of a store, or
- (v) hospitality for the staff or representatives of the retailer.

11. Shrinkage Payments

A Designated Grocery Goods Undertaking which is a retailer shall not require a supplier to make any payment to cover shrinkage unless the Terms of Business Agreement specifically provides for the making of such payment and details the circumstances in which such payments may arise.

12. Wastage Payments

A Designated Grocery Goods Undertaking which is a retailer shall not require a supplier to make any payment to cover wastage which occurs at the premises of that retailer unless such wastage is due to the negligence or the fault of the supplier and unless the Terms of Business Agreement specifically provides for the making of such payment and details the circumstances in which such payments may arise.

13. Limited conditions for Payments as a condition of being a Supplier

A Designated Grocery Goods Undertaking which is a retailer is prohibited from requiring payment or payments as a condition of listing a supplier's grocery products unless such payment or payments:

- (a) are made in relation to a promotion;
- (b) in the case of a supplier to an individual store the payment or payments are in respect of grocery products from that supplier that have not been stocked, displayed or listed in that store in the previous 365 days and reflect a reasonable estimate by the retailer of the risk run by that retailer in stocking, displaying or listing such new grocery products; or
- (c) in the case of a supplier to multiple stores the payment or payments are in respect of grocery products that have not been stocked, displayed or listed by that retailer during the previous 365 days in 25 per cent or more of the retailer's stores and reflects a reasonable estimate by the retailer of the risk run by that retailer in stocking, displaying or listing such new grocery products.

14. Compensation for forecasting errors

Terms of Business Agreements shall require that Designated Grocery Goods Undertaking which are retailers shall communicate to suppliers the basis upon which forecasts for supply have been prepared. Retailers are required to compensate suppliers for erroneous forecasts unless the retailer can demonstrate that those forecasts had been prepared in good faith, with due care and in consultation with the supplier or unless the Terms of Business Agreement includes an unambiguous provision that full compensation is not appropriate.

PART 6: PROMOTIONS

15. No payments for better positioning of goods unless in relation to Promotions

Unless provided for in the Terms of Business Agreements, a Designated Grocery Goods Undertaking which is a retailer may not seek payments from a supplier to secure better positioning or an increase in the allocation of shelf space for the grocery goods of that supplier unless such payment is made in relation to a promotion.

16. Promotions

The basis of the arrangements for promotions in relation to the supply of grocery goods agreed between retailers and suppliers may be incorporated into the Terms of Business Agreements. A Designated Grocery Goods Undertaking shall not directly or indirectly seek to compel another grocery goods undertaking to make any payment in respect of a promotion or to grant any allowance for the advertising or display of grocery goods. A Designated Grocery Goods Undertaking which is a retailer shall not seek a supplier's participation in a promotion or otherwise in respect of the advertising or display of grocery goods where this would entail a retrospective variation to the Terms of Business Agreement between the retailer and the supplier.

17. Due care to be taken when ordering for promotions

Where retailers and suppliers have agreed to participate in a promotion in relation to certain grocery goods, the basis on which any order is made in relation to promotional products shall be agreed between both parties. Designated Grocery Goods Undertaking which are retailers are obliged to take reasonable care when ordering grocery goods at a promotional wholesale price and not to over-order. Where a Designated Grocery Goods Undertaking being a retailer fails to take such steps, the retailer must compensate the supplier for any product over-ordered and which it subsequently sells at a higher non-promotional retail price. Such compensation will be the difference between the promotional wholesale price paid by the retailer and the non-promotional price of the supplier.

PART 7: OTHER PROVISIONS

18. Payment for consumer complaints

Unless otherwise agreed in the Terms of Business Agreements entered into with a Designated Grocery Goods Undertaking, a grocery goods undertaking's responsibility for costs arising from consumer complaints shall be limited to those complaints which are attributable to the undertaking's negligence or default and shall not result in a payment greater than the costs of resolving the complaints.

19. Continuation, Renewal and Termination of Terms of Business Agreements

(1) Terms of Business Agreements with Designated Grocery Goods Undertakings shall include specific provisions in relation to the circumstances in which Agreements relating to the supply of grocery goods may be continued, renewed or terminated. The provisions in relation to termination should also set out the period of notice to be given by the party who wishes to terminate the Business Agreement.

- (2) The exercise by a grocery goods undertaking of its rights under the Terms of a Business Agreement, including under this Code shall not be a reason for the termination or non-renewal of the Business Agreement.

PART 8: COMPLIANCE REQUIREMENTS

20. Compliance Officer

- (1) Each Designated Grocery Goods Undertaking must appoint a suitably qualified employee as the Code Compliance Officer for that undertaking
- (2) A Designated Grocery Goods Undertaking is required to ensure that the Code Compliance Officer:
- is independent of and not managed by any relevant person within the undertaking as defined at Article 21(2) of the Code.
 - oversees the provision of training in the requirements of the Code for any relevant persons within the undertaking as provided for in Articles 21(1), 21(2) and 21(3) of the Code.
 - is provided with the resources necessary for the adequate fulfilment of the role of the Code Compliance Officer under the Code
 - has full access to all documentation and all relevant persons (as defined in Article 21(2)) in the undertaking necessary for the fulfilment of the role of Code Compliance Officer under the Code.
 - acts as a point of contact for other grocery goods undertakings with whom the Designated Grocery Goods Undertaking has entered into a Terms Business Agreement
 - is available as a point of contact for any body duly authorised to monitor or otherwise oversee compliance with the Code.

21. Requirement to train staff with respect to the Code

- (1) Prior to the date on which the Code enters into force, as may be prescribed by Order by the Minister, a Designated Grocery Goods Undertaking must ensure all relevant persons associated with the undertaking are provided with:
- (i) a copy of the Code
 - (ii) adequate training in the requirements of the Code
- (2) For the purposes of Article 21(1) relevant persons will mean the buying team of grocery goods undertakings in the case of retailers and the supplying team in the case of suppliers as defined under Article 2 of the Code.

- (3) Any person who becomes a relevant person for the purposes of the Code under Articles 21(1) and 21(2) after the date on which the Code enters into force is required to be provided with:
 - (i) a copy of the Code within one week of becoming such a relevant person and
 - (ii) adequate training, as determined by the Code Compliance Officer, on the requirements of the Code within one month of becoming such a relevant person
- (4) A Designated Grocery Goods undertaking under the Code is required to provide training on the requirements of the Code to all relevant persons as defined in Articles 21(1) of the Code at least once in each calendar year.
- (5) Records of the training provided to relevant persons under the Code must be maintained for inspection by any body established, or to which responsibility is given, by the Minister to monitor or enforce the Code.

22. Compliance Reports

- (1) A Designated Grocery Goods Undertaking must ensure that the Code Compliance Officer prepares an annual report in respect of the undertaking's compliance with the Code for each complete financial year in which the Code is in force for that undertaking
- (2) A Designated Grocery Goods Undertaking must ensure that the Code Compliance Officer delivers the compliance report referred to in Article 22(1) to any body duly authorised to receive such Report
- (3) The Compliance Report referred to at Article 22(1) must set out accurately and in detail a description of:
 - (i) The compliance by the designated grocery goods undertaking in the preceding year including breaches or alleged breaches of the Code and the steps taken to rectify such breaches or to respond to such alleged breaches.
 - (ii) Steps taken during the preceding year to ensure compliance with the Code including details of the training of relevant persons as set out in Articles 21(1) and 21(3) of the Code and any guidance issues in respect of the Code.
 - (iii) Disputes between the Designated Grocery Goods Undertaking and other grocery goods undertakings in relation to any Terms of Business Agreement between them, or the application of the Code and the outcome of such disputes.
- (4) The annual compliance report is required to be submitted and approved by the Chair of the audit committee of the designated grocery goods undertaking. The undertaking must ensure that:
 - (i) Such other reports as are necessary for the effective oversight of the undertaking's compliance with the Code by the audit committee are provided by the Code Compliance Officer.

(ii) Where the Designated Grocery Goods Undertaking does not have an audit committee the Code Compliance Officer will report to any non-executive director or directors of the undertaking who carry out the functions typically undertaken by an audit committee. In the absence of such non-executive directors, the Code Compliance Officer will report to the Chief Executive Officer or Managing Director of the undertaking or to such other person or persons who carry out the functions normally carried out in a company by the Chief Executive Officer or the Managing Director.

(5) A summary of the annual compliance report as described in this Article must be included in the annual company report of Designated Grocery Goods Undertakings. If such an annual report is not produced by a Designated Grocery Goods Undertaking it is a requirement of the Code that the summary of the compliance report is published on the website of the Designated Grocery Goods Undertaking within four months after the end of the financial year to which the report relates.

PART 9: MAINTENANCE OF RECORDS AND SUPPLY OF INFORMATION TO ANY BODY OR BODIES DULY AUTHORISED FOR THE PURPOSES OF MONITORING, ENFORCEMENT AND DISPUTE RESOLUTION UNDER THE CODE

23. Supply of information

In the case of any body or bodies duly authorised for the purposes of monitoring, enforcement or dispute resolution in respect of the Code a grocery goods undertaking is required:

- (i) To provide any information or documents which the body or bodies may reasonably require for the purpose of its functions under the Code.
- (ii) To keep, maintain and produce such records as may be specified by the body or bodies concerned for the purpose of its functions under the Code.
- (iii) To keep and maintain such records specified by the body or bodies concerned for the time period specified by such body or bodies
- (iv) To attend and provide in person to any such body or bodies any information relevant to the functions of the body or bodies under the Code which the undertaking might reasonably be expected to have in its possession given its obligations under the Code.

PART 10: ENFORCEMENT

24. Enforcement

Complaints and disputes between grocery goods undertakings in relation to the provisions of this Code shall be investigated by the body duly authorised to do so.

25. Duties of Enforcement Body

The principal duties of the body/bodies referred to in Article 24 in relation to the Code will be:

- (1) To investigate complaints in relation to alleged breaches of the Code and where it considers it appropriate to name any undertaking found to be in breach of the terms of the Code;
- (2) To act to resolve disputes between grocery goods undertakings arising under the Code;
- (3) To gather information (for example, by receiving confidential complaints from retailers, suppliers, primary producers and consumer organisations or interest groups) and to proactively investigate issues subject to complaint in order to identify whether breaches of the Code have occurred;
- (4) To publish guidance on specific provisions of the Code, including the content of annual compliance reports as provided for in Article 22, as appropriate;
- (5) To make recommendations to grocery goods undertakings on how to improve compliance with the Code and to monitor progress on the implementation of such recommendations;
- (6) To advise and report to the Minister for Enterprise, Trade and Innovation on the operation of the Code.
- (7) To include in the annual report of the body/bodies, or otherwise issue, an annual report on compliance with the Code within six months of the previous calendar year.

SCHEDULE 1

Designated Grocery Goods Undertaking

SCHEDULE 2

Provision for force majeure

A force majeure clause may provide:

- that neither party to a Terms of Business Agreement shall have any liability under or be deemed to be in breach of the Terms of Business Agreement as a result of any delays or failures in performance which result from circumstances beyond the reasonable control of that party
- that the party affected by the relevant circumstances will promptly notify the other party in writing when circumstances cause a delay or failure in performance and when they cease to do so; and that
- if such circumstances continue for a specified continuous period either party may terminate the agreement by written notice to the other party.