

**Exploration of the Possibilities of the Agreement of a  
Voluntary Code of Practice for Grocery Goods  
Undertakings**

**Report of the Facilitator**

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# **Proposed Voluntary Code of Practice for Grocery Goods Undertakings: Report on Facilitation Process Initiated by the Minister for Enterprise, Trade & Innovation in May 2010**

## **1. Introduction**

- 1.1 The Renewed Programme for Government (published in October 2010) set out a specific commitment to “implement a Code of Practice for doing business in the grocery goods sector to develop a fair trading relationship between retailers and their suppliers” and “to review progress of the Code and, if necessary, to put in place a mandatory code”. In this context the Government indicated that it would include specific legislative provision for the introduction of such a Code in the legislation it intended to introduce to provide for the merging of the National Consumer Agency and the Competition Authority.
- 1.2 Pending the introduction and enactment of the proposed legislation the Minister for Enterprise, Trade & Innovation indicated that he would explore with the relevant stakeholders the possibilities of achieving agreement on a Voluntary Code of Practice for Grocery Goods Undertakings. For this purpose the Minister appointed me on 12<sup>th</sup> May 2010 to act as facilitator with the stakeholders.

## **2. Role of the Facilitator: Assignment by Minister**

- 2.1 The role assigned by the Minister to me as facilitator was as follows:
- consider existing submissions made, following the public consultation undertaken in Autumn 2009 in the matter, as well as the experience of Voluntary Codes in other similar jurisdictions;
  - meet with key stakeholders to discuss and ascertain their views on the explicit provisions to be included in any Voluntary Code of Practice;
  - examine and evaluate all suggestions for the elements of such a Code with a view to drawing-up a draft Voluntary Code for consideration initially by the stakeholders;
  - ensure the inclusion of specific provisions relating to thresholds for applicability in any such Code, enforcement and dispute resolution provisions and how such enforcement would be funded;
  - ensure that any Voluntary Code would take into account the interests of consumers and ensure that there would be no impediment to the passing on of lower prices to consumers or any restriction or distortion of competition.
  - endeavour to get agreement from all stakeholders to the provisions of a draft Voluntary Code;
  - report to the Minister for Enterprise, Trade & Innovation by 29<sup>th</sup> September 2010 on my findings, including a draft Voluntary Code and with any recommendations I wished to make on the matter.

## **3. Role of Facilitator: Clarification by Facilitator**

- 3.1 In accepting the assignment set out in the previous paragraph, I, as facilitator, made it clear at the time of accepting the assignment, and subsequently with the Department of Enterprise, Trade and Innovation, that the undertaking of the assignment implied no particular views on my part as to the desirability or otherwise of a Code of Practice for Grocery Goods Undertakings. Indeed the eschewing of any such views was essential in ensuring the objectivity and

credibility of that facilitation process with the wide range of stakeholders who had an interest in the process.

I provided the same clarification to stakeholders as the need arose during the course of the many meetings and consultations during the assignment given to me by the Minister. I do so again in the context of this report. The essential core of the assignment and task I have undertaken has been to facilitate a process of engagement with, and between, the key stakeholders to explore whether or not a Voluntary Code of Practice for Grocery Goods Undertakings could or was likely to be agreed between the main undertakings in the sector.

#### **4. Acknowledgement**

4.1 It is appropriate for me to acknowledge that in undertaking the assignment, the support and advice received from the Department of Enterprise, Trade & Innovation, facilitated by Secretary General, Sean Gorman and by Assistant Secretary, Breda Power in particular, was, at all times, top class. The support and advice, in addition to that of the Secretary General and Assistant Secretary, came, in particular, from Kieran Grace, Cathal O’Gorman, Margaret Ryan, Bridget Cosgrave and the legal advisor to the Department, Nicholas Donnelly. Cathal O’Gorman was my main point of contact with the Department and Mr. O’Gorman’s knowledge of the issues involved in the assignment is of a high order; and his capacity and objectivity in imparting to me such knowledge and advice as was necessary to facilitate the assignment I was asked to undertake was of the highest professional standard.

4.2 I also wish to acknowledge the time and care taken by the many organisations and individuals with whom I engaged in the course of the assignment and the insights and views they provided. The people and their organisations concerned together with a summary of my discussions with them are set out in the annexes to this report. These engagements were frank and forthright with strong views expressed on either side of the issues under consideration in the assignment. They were, nevertheless, conducted, without exception, in a business-like way and for this I am grateful.

In this context, I would like, in particular, to acknowledge the professional way in which the representatives of the main suppliers and retailers in the sector, Retail Ireland (RI) and Food and Drink Industry of Ireland (FDII) dealt with issues upon which they have strongly opposed views when eventually I got them to agree to come together on 20<sup>th</sup> December 2010 to discuss the core elements of what a Voluntary Code of Practice for Grocery Goods Undertakings might contain.

#### **5. Overview of the Facilitation Process**

##### **5.1 Meetings with Stakeholders/Interest Groups**

Over a period from 30<sup>th</sup> June to mid-September 2010 I met/engaged with 28 stakeholders/interest groups in the groceries goods sector in Ireland to discuss and seek their views on the facilitation process initiated by the Minister to explore the possibility of achieving a Voluntary Code of Practice for Grocery Goods Undertakings. All of these had made submissions to the Department of Enterprise, Trade & Innovation in response to the consultation paper issued by the Department in August 2009 on the proposal to introduce such a Code of Practice on either a voluntary or a mandatory basis. Summary reports on each of these meetings, and on a number of follow-up meetings that took place subsequently in the period up to 20<sup>th</sup> December 2010, are set out at Annex A to this report.

## 5.2 Views on whether a Code of Practice (if any) should be on a Statutory or Voluntary basis

5.2.1 In general, the stakeholder/interest groups with whom I met reiterated the views that they had set out in response to the consultation paper issued by the Department in August 2009.

[see: <http://www.deti.ie/commerce/competition/whatsnew.htm>]

5.2.2 As regards whether there should be a Code at all, the representatives of producers and suppliers were firmly of the view that a Code is necessary. In general, their views are based on their belief and perceived experience that the buying power of large retailers is excessive and gives rise to the transfer of excessive risks and unanticipated costs to suppliers with knock-on negative consequences for producers and consumers in both the shorter and longer terms. They consider that these negative consequences include: the discouragement of innovation by suppliers/producers, feather-bedding of retailer inefficiencies, lower quality goods and less choice for consumers. They point out that a Code of Practice for Retailers has been introduced in the U.K and implemented there by a number of the larger retailers that operate in the Irish grocery goods market. They further aver that similar codes have been introduced in a number of other EU countries and that the EU Commission and Parliament have advocated that the national authorities of Member States give consideration to the introduction of such a Code. They point out that the Joint Oireachtas Committee on Enterprise, Trade & Innovation has recommended the introduction of such a code in Ireland.

5.2.3 Retailers and their representative groups, on the other hand, were equally firmly of the view that a Code of Practice, is neither necessary nor desirable. They state generally that no objective underlying analysis of the grocery goods sector in Ireland has been undertaken which justifies the introduction of a Code and that no analysis has been undertaken which establishes the costs and benefits that would arise. They aver that the introduction of such a Code would result in the imposition of a significant level of additional administrative and compliance costs on retailers (and suppliers), that these costs would be passed on in higher consumer prices and would incentivise retailers to resort to increased imports, to avoid such costs and that these imports would be at the expense of Irish suppliers and producers.

5.3.4 Views were also expressed by a number of stakeholders/interest groups who are not themselves part of the grocery goods supply chain but have good knowledge of its operation:

- **The Competition Authority** in its submission in response to the August 2009 consultation paper of the Department of Enterprise, Trade & Innovation argued strongly against the introduction of the proposed Code. In doing so it argued that a Code modelled (as proposed) on that which operates in the U.K is not justified in that the features and competitive dynamics of the grocery sector are different in Ireland to that of the U.K, that the U.K Code has, in any event, been considered ineffective in meeting the concerns of suppliers/producers, that the proposed Code for Ireland is likely to be similarly ineffective and that the proposed Code would impose costs on taxpayers and/or consumers. Instead the Authority proposed that a

more effective approach to the concerns expressed by suppliers and producers in relation to the abuse of buying power by large retailers would be through the strengthening of part 2A of the Competition (Amendment) Act 2006 to encourage injured parties to overcome their fear of retaliation by retailers if they take action to remedy such injuries and to overcome their fear of the risks of litigation.

The representative of the Competition Authority whom I met (Dr. Stanley Wong) in relation to the facilitation process stood over the provisions of the Authority's submission in response to the consultation paper but emphasised that the Authority would work assiduously to support whatever decisions Government would take on the matter. The Authority offered to provide its views and advice on the provisions of any Code that might be formulated if the Government, ultimately, decided to introduce a Code.

- **The National Consumer Agency (NCA)**, while advocating the desirability of ensuring that the relationships between producers, suppliers and retailers in the grocery goods sector provide a reasonable degree of certainty and an equitable sharing of risk between them, does not believe that a Code of Practice will achieve this. The NCA proposed that a better alternative would be to make legislative provision for the introduction of a general prohibition on unfair commercial practices between grocery goods undertakings. The Agency believes that the introduction of such a general prohibition for business-to-business transactions, which would replicate the existing prohibition on unfair commercial practices for business-to-consumer transactions enshrined in the Consumer Protection Act 2007, would address the evidential difficulties in enforcing the existing provisions of the 2006 Competition (Amendment) Act. It would do this by allowing for a number of enforcement options including risk-based audits across the entire grocery goods sector or of all suppliers to a particular retailer(s) and the undertaking of complaint driven enquiries.

In this regard I asked the Department to seek the views of the Sales Law Review Group in relation to the suggestions made by the National Consumer Agency. I was advised that the Group had already been requested by the then Tánaiste to examine this matter and I understand that the Group's will cover this issue in its forthcoming report on its work.

- **Dr. Paul Gorecki/ESRI** also made a submission to the facilitation process in a personal capacity, and reiterated the views he had previously submitted to the consultation paper. In summary, these views are that no convincing objective case from an economic, competition or consumer welfare position, has been adduced to support the introduction of a Code on the lines proposed in Ireland. In his view, the introduction of such a Code would result in higher prices to consumers, a protectionist framework for suppliers and an increase in the level of imports of grocery products. He suggests that if, despite the strong arguments against it, a Code is introduced, it should aim to be the least prescriptive and burdensome possible and that a consumer welfare test should attach to any proposed Code to ensure that it does not result in the payment of increased prices by consumers.
- **A competition specialist** in a leading law firm closely involved with the grocery goods sector in Ireland, expressed the view that a statutory Code of

Practice for Grocery Goods Undertakings is needed in Ireland but advocated that the underlying justification for such a Code should first be articulated on the basis of a robust investigation and research on supplier/retailer relationships. He expressed the view, from his experience, that suppliers are reluctant to challenge or “inform on” unfair practices by certain retailers for fear of repercussions from these retailers. In that context he pointed to the merger notification process and to the High Court Judgement (2009) in the Kerry Group plc and Rye Investments Limited v Competition Authority case during which concrete examples of retailer buyer power in practice were provided by industry participants and commented upon by Judge Cooke in his judgement.

### **5.3 Revised Draft Code of Practice for Grocery Goods Undertakings (August 2010)**

- 5.3.1 At my request the Department of Enterprise, Trade & Innovation prepared a revised draft Code in mid-August 2010. The draft Code was forwarded, again at my request, to Food & Drink Industry Ireland (FDII) and Retail Ireland (RI), the main representative bodies of suppliers and large retailers, respectively, in the grocery goods sector for their consideration. The revised draft Code was based on the Code attached to the consultation paper published by the Department in August 2009. The 2009 draft Code was itself similar, in many ways, to the Code that operates for large grocery goods retailers in the U.K and which is implemented there by a number of the large retailers operating in the Irish grocery goods sector. The August 2010 draft was an amended version of the 2009 draft to take account of the discussions held with stakeholders during the facilitation process over the previous two months.
- 5.3.2 The purpose of the draft was to provide a base document which might provide a framework within which Retail Ireland and FDII might negotiate a Voluntary Code with my support as facilitator. A copy of the revised Code (August 2010) is attached at Annex B.
- 5.3.3 I met separately with representatives of Retail Ireland and FDII to discuss the revised draft Code. FDII indicated that while they had certain reservations about the content of the revised draft Code, they were willing to enter into discussions with Retail Ireland on the basis of the document under my chairmanship to explore whether a Voluntary Code could be agreed and without prejudice to their principled position that a Statutory Code was their preferred option. In this context FDII submitted to me on 9th September 2010 a detailed initial response to the revised draft Code of Practice that had been sent to them and to Retail Ireland on 16<sup>th</sup> August 2010.
- 5.3.4. Retail Ireland, on the other hand, expressed the following views in response to the draft revised Code:
- “(a) Retailers do not want a code, do not believe that the need for one has been demonstrated and think that a code will be a futile time wasting burden that will inhibit competition and fuel inflation.
  - (b) Retailers are disappointed at the content of the draft code circulated by the facilitator last week because it is essentially the same document that was appended to the Department’s 2009 consultation paper and because it does not reflect the issues raised by retailers collectively and bilaterally with the

facilitator. They believe it to be written from a supplier perspective exclusively.

- (c) Retail Ireland wishes to indicate to the facilitator that the retail sector is willing to continue to engage in the process to evolve a voluntary code provided the draft circulated last week is withdrawn and a more balanced version produced.
  
- (d) Retailers would like clarification as to how enforcement will be funded and in due course how the National Consumer Agency/Competition Authority would administer the code.”

5.3.5. Following a number of further engagements which I had with it, Retail Ireland indicated, in a submission to me on 9<sup>th</sup> September, that Retail Ireland wished to continue to engage with the facilitation process on the following basis:

- “(i) Retail Ireland will prepare a detailed written submission in relation to the proposal for a Voluntary Code of Practice.
- (ii) This will go beyond previous submissions of Retail Ireland on the matter in that it will inter alia, focus strongly on the provisions of such a code from a practical, operational point of view.
- (iii) It will put forward a common position on the part of the members of Retail Ireland
- (iv) This paper will form the basis for further engagement between Retail Ireland and the facilitator.
- (v) Because of the complexity of the issues involved it will take Retail Ireland some time to finalise this submission-certainly beyond the end of next week.
- (vi) The headings in the draft Code of Practice circulated by the Department last year and updated in recent weeks form a reasonable framework from which the Retail Ireland submission can be developed.
- (vii) Retail Ireland envisages meeting with the facilitator once its submission has been made.
- (viii) Retail Ireland accepts that progress towards achieving a Voluntary Code of Practice will require engagement with representatives of suppliers and, in particular, with FDII, which would be facilitated by the facilitator.
- (ix) Retail Ireland accepts readily (as had been emphasised by the facilitator) “that any such engagement will need to fully respect the requirements of Competition Law in spirit and in practice.”

#### **5.4. Report to Minister 16 September 2010**

5.4.1. I reported to the Minister of Enterprise, Trade & Innovation, Mr. Batt O’Keeffe, TD, on 16th September 2010 on the facilitation process to that date. In doing so I indicated that there had been extensive engagement with a wide range of stakeholders to explore the possibilities for a Voluntary Code of Practice for Grocery Goods Undertakings. I outlined for the Minister the range of representative bodies of producers, suppliers and retailers and the individual large retailers and other interested parties with whom I had discussed matters.

- 5.4.2. I indicated that, without exception, producer and supplier representative bodies were strongly of the view that a Code of Practice should be introduced on a statutory basis. The main representative body for suppliers, FDII, were also of this view but indicated that they were prepared to further explore the possibility of a Voluntary Code without prejudice to this view.
- 5.4.3. I outlined to the Minister that large retailers and Retail Ireland, the representative body for all of them, other than Dunnes Stores, were strongly opposed in principle to the introduction of a Code of Practice on any basis but they also indicated, after some initial hesitation, that they were prepared to further explore the possibility of a Voluntary Code without prejudice to their opposition to a Code in principle and for operational reasons. I informed the Minister that Dunnes Stores had indicated that they were opposed to a Code and did not wish to engage in any discussions on a Code of Practice.
- 5.4.4. I informed the Minister that while both FDII and Retail Ireland had individually provided submissions to the facilitation process the basis for a joint meeting between FDII and Retail Ireland was not yet in place. Both representative bodies had indicated that they were open to such a joint meeting to explore the possibility of a Voluntary Code without prejudice to their principled positions. However, Retail Ireland had indicated in the week previous to my meeting to brief the Minister that they wished to make a further detailed submission to the process and had stated that this was likely to take some considerable time because of the complexity of the issues from the standpoint of their members.
- 5.4.5. I indicated to the Minister my view that the likelihood of achieving the agreement of FDII and Retail Ireland to a Voluntary Code was less than certain. However, I suggested that it might be worthwhile to allow the process of facilitation to proceed for a further period with a view to receiving the proposed further submission from Retail Ireland and with the objective of bringing both sides together under the facilitation process to establish whether they could move towards a mutually acceptable Voluntary Code on the basis of face-to face meetings.
- 5.4.6. The Minister indicated that he would allow the process of facilitation to proceed for a further period to allow for the receipt of the proposed Retail Ireland submission and subsequent further engagement with, and hopefully between, both FDII and Retail Ireland under the facilitation process. He envisaged that such further period would be for a further two months from the end of September. He asked that I report back to him on the facilitation process soon after the 1st December 2010.

## **5.5 Period of Further Facilitation**

### **Engagement with Retail Ireland**

- 5.5.1. In the event the further submission from Retail Ireland was not received until 5th November 2010. A copy of the submission is attached at Annex C.
- 5.5.2. The main points in the letter of Retail Ireland of 5th November are as follows:
- (a) Retail Ireland wished to engage constructively in the facilitation process and wished to meet with me as facilitator to outline and discuss some principles that they felt should inform any Code.



- (b) The Department's August 2009 "Consultation Paper: Code of Practice for Grocery Goods Undertakings" raised many important issues. A Regulatory Impact Assessment of the effect of introducing a Code should now be undertaken.

5.5.3. In the Appendix to their submission (attached at Annex C) Retail Ireland set out 15 comments on the specific provisions of the draft Code of Practice forwarded to Retail Ireland and FDII by the Department, at my request, in August 2010. These are covered under 3 headings: (i) Scope of the Code (5 comments), (ii) Code Provisions (7 comments), and (iii) Investigations, Disputes and Compensation (3 comments).

Taken together, the letter from Retail Ireland on 5<sup>th</sup> November and its Appendix suggested a serious intent by Retail Ireland to engage in the facilitation process. Accordingly, I indicated that I was very open to meeting with them to discuss their submission as requested.

5.5.4. The meeting with Retail Ireland took place on 22<sup>nd</sup> November 2010. I was accompanied at the meeting by officials of the Department of Enterprise, Trade & Innovation and by the legal advisor to the Department. A copy of the report of the meeting is set out in the compendium of reports of meetings with stakeholders at Annex A of this report.

The main points raised by Retail Ireland at the meeting were as follows:

- (a) The introduction of a Code, particularly one framed in the manner of the revised Code circulated in August, would only add extra cost and regulation and would not, in any way, aid competitiveness.
- (b) Notwithstanding the debate that has been ongoing in relation to the grocery goods sector, no concrete evidence had been provided of particular problems in the grocery goods supply line.
- (c) Retail Ireland was of the view that a Regulatory Impact Assessment (RIA) could usefully look at the operation of the grocery goods supply line to see what problems, if any, existed and whether or not there was a need for a Code of Practice. I pointed out that while it would not be unusual that an RIA should and would be carried out in instances where Government proposed to introduce a Code of Practice on a mandatory basis through legislation, the question of whether an RIA should be undertaken in the context of the establishment of a Voluntary Code of Practice was a matter for discussion between the parties to a voluntary code.
- (d) In response to my request to discuss the 15 separate observations in relation to the revised draft Code which Retail Ireland had submitted as an appendix to their letter to me on 5<sup>th</sup> November 2010, Retail Ireland expressed the view that such a discussion at this stage would not be useful as they considered that the revised Code is not a balanced document, is essentially biased towards suppliers and does not sufficiently take into account the legitimate concerns of retailers.
- (e) Retail Ireland stated that instead that they would be happy to move forward in the facilitation process on the basis that both retailers and suppliers would first outline the problems each perceive they experience with current supply chain arrangements

and the principles that each consider should govern the seeking of solutions to these problems. In that context Retail Ireland indicated that they would be prepared to forward to me at short notice a list of the problems retailers consider they had with the current method of operation of the grocery supply chain together with a high level set of principles for dealing with these problems. Retail Ireland advised that they would also require that consideration be given to how any set of principles would be enforced and how all the major players in the grocery goods sector would be covered by such principles.

5.5.5. In response to the views put forward by Retail Ireland at the meeting, I indicated that I could not anticipate what views FDII might take on behalf of suppliers on the proposition put forward by Retail Ireland but that I was prepared to put their proposition to FDII at a meeting with them. I also reminded Retail Ireland that the period of facilitation to explore the possibility of agreeing a voluntary Code had been extended by the Minister for Enterprise, Trade & Innovation from mid/late September 2010 to 1<sup>st</sup> December 2010, largely to enable an early and more detailed engagement by Retail Ireland with the process. I indicated that I was not in a position to say if the Minister would agree to a further extension of time in the circumstances, but that I would brief him on the positions of Retail Ireland and of FDII after I had met the latter representative body on 29<sup>th</sup> November 2010 to discuss with them their detailed response to the revised draft Code of Practice (August 2010) and the approach proposed by Retail Ireland at my meeting with them on 22<sup>nd</sup> November 2010 to move the process forward.

#### **Engagement with FDII**

5.5.6. I met with the representatives of FDII on 29<sup>th</sup> November to discuss with them their submission on the draft revised Code of Practice (August 2010), the nature of the process in the intervening period and the outcome of my meeting with Retail Ireland on 22<sup>nd</sup> November 2010. I was accompanied at the meeting by officials of the Department of Enterprise, Trade & Innovation and by the legal advisor to the Department. A copy of the report of the meeting is set out in the compendium of reports of meetings with stakeholders at Annex A of this report. At the meeting I made the following main points:

- (a) The delay in meeting with FDII following their submission on the revised draft Code of Practice (August 2010) on 9<sup>th</sup> September 2010 was due to the fact that the detailed Retail Ireland response to that document had not been received until 5<sup>th</sup> November 2010 and that in the nature of the facilitation process, both submissions best needed to be considered jointly.
- (b) I had met with Retail Ireland on 22<sup>nd</sup> November 2010 accompanied by officials of, and the legal advisor to, the Department.
- (c) At that meeting Retail Ireland had indicated that it was prepared, within the facilitation process, to engage with FDII in relation to the perceived problems in the grocery goods supply chain and how they might be resolved. Retail Ireland envisaged such an engagement being founded, in the first instance, on a statement of problems and on a set of principles which would apply to the relationships and interactions between the various stakeholders in the grocery goods supply chain. The specifics of such principles should, in the view of Retail Ireland, be framed with the objective of addressing particular problems in the supply chain. Retail Ireland, for its part, was prepared to put forward, as soon as may be, its views of the problems in relation to the current operation

of the grocery goods supply chain and the set of principles that should govern the relationships and the various practices between stakeholders in the chain.

- (d) While the willingness of Retail Ireland to engage with FDII on the lines set out was welcome, it was a matter for FDII to consider whether it was satisfied to engage with Retail Ireland on the basis outlined. I emphasised that my role as facilitator was to encourage the engagement of both sides in seeking to agree a Voluntary Code.

5.5.7. In response FDII made the following points:

- (a) It has no particular objection to trying to agree a common set of principles for dealing with relationships and practices in the grocery goods sector. It was concerned that any such engagement should not amount to a step backwards from the provisions of the revised draft Code circulated in August 2010 or to a delay in the introduction of a Code.
- (b) Nevertheless, FDII indicated they would be prepared to submit to the facilitation process a list of problems which affect suppliers in the grocery supply chain and a set of principles which they considered should govern the various practices and relationships in the chain. This would be without prejudice to the detailed comments they submitted on 9<sup>th</sup> September 2010 in relation to the revised draft Code (August 2010) which they regarded as the context within which the problems (and principles) aforementioned should be discussed and also without prejudice to the FDII position regarding the need for the introduction of a Statutory Code of Practice.

5.5.8. I indicated that on the basis of both FDII and Retail Ireland being prepared to submit to me an outline of the problems they perceived in the grocery goods supply chain and the principles within which these problems could be overcome, I would, with the agreement of both sides, convene a joint meeting at which the respective views of each side would be discussed. The submissions of each side would be forwarded to the other side by me in advance of this joint meeting with the agreement of each side. I indicated that while the emerging agreement of both Retail Ireland and FDII to meet along the lines set out above was welcome, I would first have to convey to the Minister for Enterprise, Trade & Innovation the current position in relation to the facilitation process and ascertain from him whether he was once again prepared to extend the period of facilitation (beyond early December) to see if FDII and Retail Ireland could move closer towards agreeing a Voluntary Code.

#### **Engagement with Irish Farmers Association (IFA)**

5.5.9. Accompanied by Mr. Cathal O’Gorman, I met with the IFA for the second time at their request, on the 26<sup>th</sup> November 2010. The president of the IFA, Mr. John Bryan, was accompanied by General Secretary Pat Smith, Retail Liaison Executive Ms. Elaine Farrell as well as by the Chairmen of the IFA Committees for Livestock, Pigs, Poultry, Dairy, Liquid Milk, Horticulture and Potatoes. The IFA sought an update on the facilitation process which I provided. The President, the General Secretary and the Chairmen of the various IFA committees present spelt out a range of what they considered to be unfair practices by large retailers. They strongly reiterated their view that a Statutory Code of Practice for the grocery goods sector is essential, that retailers were stalling the facilitation process and that a short deadline for the conclusion of the process should be set

following which the Minister should proceed to bring in a Statutory Code. A copy of the report of the meeting is included in the compendium of reports on my meetings with stakeholders set out in Annex A to this report.

**Report to Minister for Enterprise, Trade & Innovation, December 8<sup>th</sup> 2010**

5.5.10. I reported to the Minister for Enterprise, Trade & Innovation on 8th December 2010 the position in relation to the facilitation process to that date.

The main points which I made to the Minister included:

- (a) I recalled that the Minister had decided on 16 September 2010 to extend the time for the facilitation process to 1<sup>st</sup> December 2010 in order to allow Retail Ireland further time to make a detailed submission in relation to the draft revised Code of Practice (August 2010) prepared by the Department, similar to what FDII had submitted on 9<sup>th</sup> September 2010. The extension was also to facilitate further engagement with, and prospectively between, Retail Ireland and FDII.
- (b) In the event the submission from Retail Ireland was not received until 5<sup>th</sup> November 2010.
- (c) Accompanied by officials of the Department and the Department's legal advisor I had held detailed discussions separately with Retail Ireland and FDII.
- (d) I reported that while considerable differences remained between them both sides had reiterated their commitment to engage further with the facilitation process.
- (e) Retail Ireland had proposed that engagement with the process should now be on the basis of a high level statement of the principles that would govern the content and operation of a Voluntary Code and of a statement of the problems to be addressed as perceived by both sides.
- (f) FDII had responded to the proposal from Retail Ireland to the effect that it would be willing to engage on the basis suggested but without prejudice to the views expressed in its detailed submission on 9<sup>th</sup> September 2010.
- (g) Both sides had committed to the immediate submission of their statements of problems and of principles if the Minister agreed to extend the period for facilitation once more. If the time for the facilitation process was extended, the respective submissions of each side would be forwarded by me to the other side and I would then convene a meeting between them to explore the possibilities of them agreeing a voluntary Code.
- (h) Progress had been slow in getting both sides to agree to direct engagement. This was highly frustrating to the facilitation process. While it would be incorrect to read too much into it, the agreement of both sides to meet each other within the framework of the facilitation process was a move in the right direction.
- (i) I also informed the Minister of my discussions with the IFA on 26<sup>th</sup> November as outlined above.

5.5.11. The Minister asked whether it was worth further extending the deadline for facilitation and what were the prospects of a successful outcome. I responded by saying it was a difficult to offer a definitive view on the likelihood of success

given there had not been any meaningful direct engagement between the parties to this point. I suggested, nevertheless, that there could be merit in allowing the facilitation to proceed for a further limited period in order to allow the first direct engagement between both sides within the facilitation process and to see what might arise from that.

5.5.12. The Minister stated that he accepted the merit of continuing the facilitation process for a limited further period. To that end he was prepared to extend the deadline for the completion of the process until 15<sup>th</sup> January 2011 but that in the interim the Department would work on preparing bespoke legislation which would allow for the introduction of a Statutory Code of Practice as early as possible in the New Year. The Minister asked me to inform the stakeholders involved of his decision.

### **Facilitation Process December 2010 - January 2011**

5.6. I conveyed to both Retail Ireland and FDII the decision of the Minister with respect to the further limited extension of the facilitation process to 15th January 2011 and his decision that the Department of Enterprise, Trade & Innovation should start to prepare legislation to allow for the introduction of a Statutory Code of Practice early in 2011 in the event of a failure by Retail Ireland and FDII to agree a Voluntary Code. I asked both sides to immediately submit to me their individual statements of problems with the grocery supply chain and of the principles that should govern the engagement between suppliers and retailers in the context of these perceived problems by either side. These submissions were received by 14th December. A copy of the Retail Ireland submission is at Annex E and a copy of the FDII submission is at Annex F of this report. With the agreement of both FDII and Retail Ireland these submissions were cross-circulated by me on 14th December.

5.7. I convened a joint meeting with Retail Ireland and FDII which took place on 20th December 2010. At the meeting I was accompanied by officials of, and the legal advisor to, the Department of Enterprise, Trade & Innovation. A copy of the report of the meeting is included in the compendium of reports at Annex A of this report.

5.7.1 It was noted at the meeting that the FDII submission of the previous week was detailed and based on the headings and structures set out in the draft revised Code of August 2010. It covered both the principles and problems which the Code would need to address as FDII perceived them. The Retail Ireland submission of the previous week, on the other hand, was a short document of a little over one page setting out what was described as Retail Ireland's Proposed Principles for Underpinning any Voluntary Code of Practice for Grocery Sector."

5.7.2 Following the expression of general opening positions by myself, Retail Ireland and FDII, the meeting moved on, in the context of the submissions that had been received the previous week from both Retail Ireland and FDII and cross-circulated, to discuss both the principles that should govern any Code of Practice and the problems that any such Code should address. The draft revised Code prepared by the Department in August 2010 was used, without prejudice to the positions of either Retail Ireland or FDII, as a vehicle to draw out what might be acceptable or not acceptable to either side in any Code.

5.7.3. In summary, it can be said that at the meeting FDII engaged in some detail with the substance of the provisions set out in the draft revised Code. Many of the provisions were acceptable to FDII as drafted or with minor changes. A number of the provisions were unacceptable to FDII. In the case of other provisions in the draft revised Code, FDII indicated that they would need to discuss these with their members before adopting a final position after which they would revert back to me.

5.7.4. Retail Ireland, on the other hand, while it entered into discussion on all the principles and provisions for a Code raised at the meeting, was not in a position to provide a definitive position on the majority of the issues discussed. Some few of the principles and provisions of the draft revised Code were acceptable to Retail Ireland and many were unacceptable in any form. For the most part, Retail Ireland indicated that it would need to consult with its members before adopting a final position after which they would revert back to me.

5.7.5 In concluding the meeting I reminded the representatives of both Retail I Ireland and FDII of the revised deadline set by the Minister for Enterprise, Trade & Innovation. Since both Retail Ireland and FDII had indicated at the meeting that they wished to consult further with their members before conveying a final position on a number of issues, I requested both sides to revert to me on these matters by 10<sup>th</sup> January 2011 so that I could consider the submissions received and report to the Minister on the outcome of the facilitation process by the 15<sup>th</sup> January 2011 deadline. Both sides agreed to revert to me by the 10<sup>th</sup> January 2011.

5.8 In the event the FDII submission was received on 10<sup>th</sup> January 2011, (copy attached at Annex F). The Retail Ireland submission was received on 14<sup>th</sup> January (copy attached at Annex G).

5.8.1 The FDII submission of 10<sup>th</sup> January 2011 proposed a number of changes in the revised draft Code of Practice (August 2010). These related to:

- (1) The Definition of Consumer Interest
- (2) The Principle of Fair Dealing
- (3) Who the Code applies to
- (4) Variation of Business Agreements
- (5) Compensation for Forecasting Errors
- (6) Proof of Mutual Benefits of Marketing Promotions
- (7) Compensation for Incorrect Ordering for Promotions
- (8) Delisting Procedures by Suppliers in relation to Small Retailers
- (9) Definitions with Respect to:
  - Grocery Goods Undertakings
  - Supplier
  - Retailers

The FDII submission reiterated its view that a mandatory code should be introduced but that it committed to continue to engage in the effort to achieve a successful conclusion to the facilitation process to introduce a Voluntary Code based on the draft Code circulated by the Department of Enterprise, Trade & Innovation.

5.9. The Retail Ireland submission of 14th January 2011 consisted of three parts:

- (1) A four page cover letter of substantive points
- (2) A commentary of some detail on the FDII submission for the joint meeting between both sides which I facilitated on 20<sup>th</sup> December 2010
- (3) The appendix to the letter which Retail Ireland submitted to me on 5<sup>th</sup> December 2010 setting out a number of points in relation to the revised Code of Practice (August 2010) on the Scope of the Code (5 points), Code Provisions (7 points) and Investigations, Disputes & Compensation (3 points)

5.9.1. In summary Retail Ireland's cover letter makes the following main points:

- “The Code as currently drafted has clear adverse consequences for the consumer. It is likely to impose a significant bureaucratic burden on the grocery sector which will increase costs and lead to higher prices for consumers.”
- “The macroeconomic environment has fundamentally changed” since “the concept of a code was set out in the Department's August 2009 Consultation Paper”. “The price difference between this country and Northern Ireland has reduced to a single digit percentage point.”
- “The EU/IMF Programme of Financial Support has changed the public policy environment.”
- “The EU Competitiveness Council's meeting on the Single Market Act on 10th December 2010 referred to the wholesale and retail market and called on the EU Commission to examine the need for measures to address unfair commercial practices in business-to-business relations. We suggest that it would be prudent for Government to await finalisation of the EU review process, consider the outcome and then align Irish practice with any European standards that may emerge.”
- “It appears to us that the Irish sales and distribution outlets of global multinational food producers stand to gain most (from a Code). Any proposed code needs to include a balance of responsibility and accountability between both retailers and suppliers.”
- “The FDII December document contains no data, evidence or analysis and does not represent the basis for coherent debate or the development of policy.”
- “Retail Ireland cannot reasonably be expected to respond to the list of general grievances put forward by FDII.”
- “FDII expect that complaints to be resolved without reference to the courts. At the very least this would require significant legislation and may possibly be unconstitutional.”

5.9.2 As indicated, the Retail Ireland submission of 14<sup>th</sup> January 2011 (attached at Annex G) included a commentary on the FDII submission for the joint meeting which I facilitated on 20<sup>th</sup> December 2010. It also includes the Appendix to the Retail Ireland letter of submission to me on 5<sup>th</sup> November

2010. Both of these documents set out further concerns of Retail Ireland in relation to the introduction of a Code of Practice on the lines proposed.

- 5.10 It is clear from the submissions made to me by Retail Ireland and FDII from the start of the facilitation process and from the discussions that I held with them both separately and jointly that their respective positions in respect of a Code of Practice were far apart at the start of the facilitation process and remained far apart at the end. The face-to-face meeting between them that I eventually was able to convene on 20th December 2010 and their respective follow-on submissions in January 2011 confirmed this to be the case.

Accordingly, Retail Ireland and FDII were unable to agree to a mutually acceptable Voluntary Code of Practice within the period of facilitation provided for by the Minister for Enterprise, Trade & Innovation and which he extended on two occasions to facilitate the process of engagement between them on the possible formulation of a Voluntary Code.

Furthermore, on the basis of their submissions and their discussions with me and with each other at the meeting which I facilitated between them on 20<sup>th</sup> December 2010 it seems highly unlikely that Retail Ireland and FDII will agree to a mutually acceptable Voluntary Code of Practice in the immediate or foreseeable future despite the continued commitment expressed by each side to the consultation/facilitation process initiated by the Minister.

- 5.11 In the circumstances outlined, I reported to the then Minister on 19<sup>th</sup> January 2010 as follows:

“ I have now completed my engagements with the various stakeholders in the groceries section in Ireland. These engagements, in line with my appointment by you, had the objective of seeking to facilitate agreement on the establishment of a Voluntary Code of Practice to govern the business-to-business relationships between grocery goods undertakings.

On the basis of these engagements, the various submissions made by a range of stakeholders and the direct engagement I facilitated in recent weeks between the main representative body of large retailers in Ireland, Retail Ireland, and the main representative of food and drink suppliers in Ireland, FDII, I have concluded that it is very unlikely that a Voluntary Code of Practice will be agreed between the bodies concerned at this time. It is, therefore, my recommendation that the process of facilitation which I was asked to undertake by you be now brought to conclusion.”



## List of Annexes

- A. Reports of meetings on a proposed Voluntary Code for the grocery Goods Sector
- B. Revised draft Code August 2010
- C. Retail Ireland submission 5 November 2010
- D. Retail Ireland submission December 2010
- E. FDII submission December 2010
- F. FDII submission 10 January 2011
- G. Retail Ireland submission 14 January 2011

## ANNEX A

### Reports of meetings with stakeholders

1. Alcohol Beverage Federation of Ireland (ABFI)	05/07/2010
2. Aldi	08/07/2010
3. BWG Group	15/07/2010
4. Consumers Association of Ireland (CAI)	06/08/2010
5. Convenience Stores & Newsagents Association (CSNA)	01/07/2010
6. Competition Authority	26/08/2010
7. Department of Agriculture & Food	10/09/2010
8. Dunnes Stores, Mr. Dick Reeves – note of discussion	21/09/2010
9. Economic Social and Research Institute (ESRI)	15/07/2010
10. Food and Drink Industry Ireland (FDII)	07/07/2010 17/08/2010 29/11/2010 20/12/2010
11. Irish Cattle & Sheep Farmers Association (ICSA)	16/07/2010
12. Irish Creamery Milk Suppliers Association (ICMSA)	09/07/2010
13. Irish Dairies Industries Association (IDIA)	16/07/2010
14. Irish Farmers Association	05/07/2010 26/11/2010
15. Lidl	07/08/2010
16. Marks & Spencer	02/07/2010
17. Legal Adviser with solicitors involved in grocery goods sector	09/09/2010
18. McHugh, Neil Mr.	21/07/2010
19. Meat Industry Ireland (MII)	07/07/2010
20. Musgraves	14/07/2010
21. National Consumer Agency	06/07/2010
22. National Dairies Association (NDA)	01/07/2010
23. National Milk Agency (NMA)	06/07/2010 27/04/2011
24. Retail Excellence Ireland	08/07/2010
25. Regional Grocery Dairy Allied Trades' Association (RGDATA)	30/06/2010
26. Retail Ireland (RI)	02/07/2010
(Discussion with Mr. Torlach Denihan, RI)	09/09/2010 22/11/2010 20/12/2010
27. Superquinn	30/06/2010
28. Tesco	14/07/2010

**Note of meeting with the Alcohol Beverage Federation of Ireland (ABFI) on 5<sup>th</sup> July 2010 at 2.30pm regarding the proposed Code for grocery goods undertakings**

In attendance: Mr. John Travers, Facilitator  
 Ms. Rosemary Garth, ABFI  
 Mr. Stephen Lynam, ABFI  
 Mr. Cathal O’Gorman, DETI  
 Ms. Margaret Ryan, DETI

1. The agenda was circulated and agreed. Mr. Travers opened the meeting by referring to the ongoing debate in relation to the state of the relationships between the various stakeholders in the grocery goods sector and the commitment in the Renewed Programme for Government to introduce a Code of Practice for the Grocery Goods Sector. Mr. Travers advised that in advance of statutory provision for introducing such a Code, which he understood would be included in legislation currently being prepared by the Department, he had been asked by the Minister to engage with all relevant stakeholders to explore the possibility of agreeing a voluntary Code. Mr. Travers advised that he intended to meet with as many stakeholders as possible and that he envisaged reporting back to the Minister on this matter by the middle/end of September.
2. Mr. O’Gorman spoke briefly on the Consultation Paper which was published by the Tánaiste in August 2009 to which 29 responses were received, all of which are available on the Department’s website.
3. Ms. Garth advised that the ABFI was the umbrella representative organisation for alcoholic drinks manufacturers and suppliers in Ireland. ABFI’s constituents include the beer, spirits, wine and cider associations. ABFI like FDII is a sector association within IBEC and whilst it is separate from FDII, it fully supports the position taken by FDII in relation to the introduction of a statutory Code. For that reason FDII did not make a separate response to the Consultation Paper issued by the Tánaiste last year.
4. Ms. Garth advised that ABFI members in addition to the concerns affecting other manufacturers in the grocery goods sector also had particular concerns as manufacturers of alcohol products, particularly in terms of responsible selling etc. Ms. Garth advised that ABFI had opposed the abolition of the Groceries Order as it was concerned that deregulation would lead to problems particularly in relation to the manner in which alcohol would be sold in large retail outlets, all of which she added had come to pass as could be evidenced by the way retailers were using alcohol products as loss leaders.
5. Mr. Travers wondered as to whether ABFI had any views as to the merit in seeking agreement on a voluntary Code as a first step, which could then lead by progression to a statutory Code. He also wondered as to whether the ABFI favoured the application of the Code to suppliers as well as retailers, whether any thresholds should apply in terms of those who would be covered by the Code, whether such thresholds should be set by reference to market turnover, if turnover data was

available for ABFI members and whether ABFI had any views as to who should fund the enforcement of the Code.

6. Ms. Garth expressed concern as to effectiveness of a voluntary Code particularly in terms of the enforceability of such a Code and advised that ABFI supported FDII's view that a statutory rather than a voluntary Code was warranted to address the current imbalance in the relationships between suppliers and retailers and that such a Code should be enforced by an Ombudsman. She advised that whilst ABFI acknowledged the logic of applying any Code to both retailers and suppliers, it was of the view that the major detriment in this area was being experienced by suppliers and manufacturers. Insofar as the issue of a threshold was concerned ABFI agreed with the threshold of €50 million turnover suggested by FDII. As regards the issue of market turnover figures, ABFI undertook to revert to Mr. Travers in relation to the position of its members on this matter. In terms of funding, ABFI believe that the enforcement of the Code and the activities of the Ombudsman should be paid for by retailers as is the case in the Code on the Selling of Alcohol in Mixed Premises.
7. Mr. Travers advised that he noted that ABFI were content that its views were essentially encapsulated by the submission submitted by FDII. Nevertheless it was open to ABFI to submit any views it might on the particular provisions of the draft Code including any views as to how the Code might be improved by the addition, removal, amendment of particular provisions. Mr. Travers advised that in the course of his meetings with stakeholders he was attempting to find as much common ground as possible in relation to how the Code should be framed. He advised that he would appreciate if ABFI would keep this in mind in submitting any views on the detailed provisions that it wished to see included in the Code, which he would appreciate receiving by the middle of July.
8. As regards the next steps Mr. Travers indicated that having met with all the relevant stakeholders, he would consider whether further meetings were necessary but that in any event he hoped to report back to the Minister on the matter by end September.

**Note of meeting with Aldi Stores on 8<sup>th</sup> July at 9.30am regarding proposed Code for grocery goods undertakings**

In attendance: Mr. John Travers, Facilitator  
Mr. Donald McKay, Aldi Stores  
Mr. Giles Hurley, Aldi Stores  
Mr. Cathal O’Gorman, DETI

The agenda was circulated and agreed. Mr. Travers opened the meeting by referring to the ongoing debate in relation to the state of the relationships between the various stakeholders in the grocery goods sector and the commitment in the Renewed Programme for Government to introduce a Code of Practice for the Grocery Goods Sector. Mr. Travers advised that in advance of statutory provision for introducing such a Code, which he understood would be included in legislation currently being prepared by the Department, he had been asked by the Minister to engage with all relevant stakeholders to explore the possibility of agreeing a voluntary Code. Mr. Travers advised that he intended to meet with as many stakeholders as possible and that he envisaged reporting back to the Minister on this matter by the middle/end of September.

Mr. O’Gorman spoke briefly on the Consultation Paper which was published by the Tánaiste in August 2009 to which 29 responses were received, all of which are available on the Department’s website.

Mr. McKay advised that since its entry into the Irish market Aldi has opened 77 stores in the Republic and expects to open 3 or 4 more stores this year, it also has a distribution centre in Naas, where its Irish operations are based and is currently constructing a further distribution centre in Mitchelstown. Aldi advised that insofar as its supply chain is concerned, its strategy is to foster long term relationships with its Irish supply base, that it currently sources approximately 45% of its grocery goods turnover from Irish suppliers and that it actively seeking to grow this by 10%

Aldi advised that insofar as the question of introducing a Code for the Grocery Goods sector is concerned, Aldi is aligned with the position as espoused by Retail Ireland and for that reason did not make a separate response to the Consultation Paper published by the Tánaiste in 2009. Aldi advised that it does not engage in practices referred to in the consultation paper and would not, therefore, be affected by the introduction of a Code in terms of its interactions with suppliers.

Aldi advised that its modus operandi was based on striking a price with its suppliers following a keen engagement and sticking to that price. Aldi advised that suppliers deliver product to its distribution centre and Aldi takes it from there and does not engage in seeking payments for spillages, wastage etc. Aldi advised that whilst it does engage in promotional campaigns, the cost of such campaigns are borne by Aldi and it does not require suppliers to provide products for such promotions at less than the original agreed price. Where promotions involve selling products at less than the agreed price, Aldi strongly feels that it should be permitted to do so as it is Aldi not the supplier who is bearing the cost of such promotions.

Aldi’s principal concern in relation to the introduction of a Code is that it will add a layer of cost, particularly in terms of compliance, administration and enforcement costs. In this regard Aldi was concerned that it should not have to pay for the indiscretions of

others. Aldi was strongly of the view that any Code should cover suppliers as well as retailers as the Code should not just be a mechanism to punish retailers but should be balanced and recognise that smaller retailers are also vulnerable to the actions of big suppliers.

Mr. Travers wondered as to whether Aldi had any views in relation to the contention that retailers were transferring disproportionate risk to suppliers and therefore had no incentive to extract efficiencies from their own operations. Aldi advised that it did not engage in transferring risks to its suppliers that it was common knowledge that efficiency was at the heart of its operations but that it was not being fully rewarded for its high levels of efficiency due to the ability of other retailers to extract efficiencies from suppliers rather than from their own operations.

Mr. Travers advised that part of his task was to examine a number of specific issues including who should be covered by the Code, whether the Code should have a threshold, what specific provisions should be included in the Code. In this regard he wondered as to whether Aldi had views on the draft Code which had been appended to the Consultation Paper published by the Tánaiste last year. Aldi advised that insofar as the specific provisions of the Code were concerned, Aldi concurred with the views proffered by Retail Ireland, it was concerned, however, that the Code should not be rigid and needed to reflect the dynamics of the Fast Moving Consumer Goods sector. Aldi also wondered as to what net effect the Code would have on large retailers given the qualifications in the draft code allowing for restrictions on practices such as payments for wastage etc to be overridden by agreed clauses in the terms of business agreements. Aldi was of the view that this essentially would mean that large retailers would look to have prohibited practices incorporated into terms of business agreements.

Mr. Travers advised that in the course of his meetings with stakeholders he was attempting to find as much common ground as possible in relation to how the Code should be framed. He thanked Aldi for outlining its views on the Code and advised that he would be glad to receive any further views on any specific provisions Aldi might wish to see in the Code. As regards the next steps Mr. Travers indicated that having met with all the relevant stakeholders, he would consider whether further meetings were necessary but that in any event he hoped to report back to the Minister on the matter by end September.

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Competition & Consumer Policy Section  
12<sup>th</sup> July 2010

## Note of meeting with BWG on 15 July 2010 at 2.30 pm regarding the Code of Practice for Grocery Goods Undertakings

In attendance: John Travers, Facilitator  
Willie O'Byrne, BWG  
Simon Marriott, BWG  
Kieran Grace & Margaret Ryan, Department of Enterprise, Trade and Innovation

The agenda for the meeting was circulated and agreed. Mr. Travers opened the meeting by referring to the ongoing debate in relation to the state of the relationships between the various stakeholders in the grocery goods sector and the commitment in the Renewed Programme for Government to introduce a Code of Practice for the Grocery Goods Sector. Mr. Travers advised that in advance of statutory provision for introducing such a Code, he had been asked by the Minister to engage with all relevant stakeholders to explore the possibility of agreeing a voluntary Code. Mr. Travers advised that he intended to meet with as many stakeholders as possible and that he envisaged reporting back to the Minister on this matter by the middle/end of September.

Mr. O'Byrne gave an overview of BWG's operations, stating that BWG Foods distributes a comprehensive range of ambient goods on a national basis to their symbol group stores (Spar, Eurospar, Mace and XL) and also operates a nationwide chain of Cash & Carries. He added that their annual turnover is in the region of €1.1bn. making BWG 4<sup>th</sup> in the marketplace after Musgraves, Dunnes and Tesco with 740 employees excluding the stores which have approximately 15,000. He added that BWG has a central distribution business and a central billing business. Suppliers invoice BWG who re-invoice their customer base. Mr. Marriott stated that BWG has a list of 425 approved suppliers and maintain 50,000 single stocking units (SKU's).

Mr. Travers asked if BWG's position on the proposed Code was the same as Retail Ireland. Mr. O'Byrne responded that it was very close to it. BWG sees no need for a Code but if there was one it should be voluntary.

Mr. Travers asked if BWG thought a voluntary code was possible. Mr. O'Byrne replied that it was and gave the example of the code of practice around the sale of alcohol which he felt was a good model. However, he added that the code being proposed for the grocery sector was biased in favour of suppliers. Mr. Travers made the point that the Code for alcohol was much simpler as it dealt with the location of products within a store. He added that while it was not the function of Government to get between business partners the process leading up to a Code was sparked by repeated complaints of unfair treatment of suppliers. He went on to say that the Oireachtas Committee, chaired by Willie Penrose, recorded complaints of various substance from 7 suppliers on a confidential basis and that both the Government and the Opposition were in favour of a code. He went on to say that the message coming from the retail sector was that they would prefer a voluntary code while suppliers favoured a statutory code. He proposed the establishment of a broadly representative group of key players of both retailers and employers to discuss the possible content of a code while avoiding any breaches of competition law. Mr. O'Byrne said he feared nobody would say anything when surrounded by their competitors.

Mr. Travers suggested that a revised version of the current draft of the code be put on the table for discussion with a set of governing principles as a preamble.

Mr. O'Byrne suggested that the trade associations rather than the players themselves should be in the group and the retailers and suppliers would feed into the process. However he pointed out that Retail Ireland is not a homogenous group and he wondered to what extent one body could represent all of the views of members. Mr. Marriott added that BWG had nothing to fear from dialogue with suppliers as they have a good track record. Mr. O'Byrne said that they would reflect on the fact that a code will come in, be it voluntary or statutory, and the extent to which they can get reciprocity in a code was paramount.

Mr. Travers raised the question of a threshold and who should pay, citing the UK threshold and suggesting that a comparative threshold for Ireland would be in the region of €50-€100m. Mr. O'Byrne replied that as far as BWG is concerned charges relating to the code for alcohol supply are passed back to the retailer. Their largest retailer has a turnover of €10m. while the average would be approximately €1.5m.

Mr. Travers asked for BWG's view on the publication of margins. Mr. O'Byrne stated that BWG has become unlimited in the last few months as their accounts had been open to all competitors heretofore and that this gave rise to competitors being able to access information that was commercially sensitive from the perspective of BWG. He added that on a €1.2bn turnover pre-recession they had a return of c. 3%. He suggested that their needs to be a definition of margin for any meaningful discussion on the matter. Mr. Marriott added that the position was more straightforward for the likes of Dunnes while BWG has a split-margin business, being middle-men between suppliers and small retailers. Mr. O'Byrne added that they were very aware of the position of many small retailers who are in arrears and going out of business and that, clearly, no significant margin was being made by them. He continued that BWG were used to living on a very small margin but the make-up of margins across different products was a very sensitive issue and as much so for suppliers as well as retailers.

Mr. Travers raised the issue of an Ombudsman. Mr. O'Byrne stated that it would be desirable to undertakings in the grocery goods sector if it was funded at no direct cost to grocery undertakings. They had a concern about the likely costs arising if they were to be funded by levies on retailers and/or suppliers. Mr. Travers cited the UK example where there is a levy on retailers based on turnover. He added that compliance officers were appointed and that education and training is provided. Mr. O'Byrne thought this sounded like overkill for the Irish market. Mr. Grace stated that the code shouldn't be a hindrance to passing on lower prices to the consumer. Mr. Travers suggested an appropriate threshold for both retailers and suppliers might need to be considered. Mr. O'Byrne wondered how that would work with middlemen aggregators such as BWG. Mr. Travers said that it would be necessary to give more thought to the different structures within the industry. Mr. Grace asked if the code would work without all players signing up to a voluntary agreement. He added that the bad publicity from not signing up might provide an incentive for undertakings to sign up to such an agreement. Mr. Marriott replied that there were 2 issues; firstly, that not all retailers are member of Retail Ireland and, secondly, BWG as a retail and wholesale group feel aggrieved that having signed up for the code on alcohol supply specialists alcohol sales outlets in the alcohol trade have not. He felt that their affiliate retail stores were being disadvantaged for being good corporate citizens in this instance relative to specialist alcohol retail stores.

On the issue of having written contracts Mr. O'Byrne stated that they have a multiplicity of relationships and to record all agreements in writing would be a very



heavy workload. Mr. Travers pointed out that it would be difficult to police without written contracts. Mr. O'Byrne responded that they record agreements made in meetings by way of minutes which should suffice.

Mr. O'Byrne stated that the point in the draft code attached to the Consultation Paper circulated by the Department relating to marketing costs was a bit ominous from a BWG perspective. He explained that BWG couldn't underpin all marketing costs but are open to discussing the case for such costs in an open and non-coercive manner in conjunction with suppliers or they would be curtailed from doing promotions to the ultimate detriment of the consumer. Mr. Grace made reference to alleged arbitrary costs foisted on suppliers by retailers with overbearing buyer power that were referenced in the Report of the Oireachtas Committee on supplier/retailer relationships in the groceries goods market published earlier this year. Mr. O'Byrne explained that retailing was a fast moving business where 3 weeks was a significant trend and the impracticality of including provision for all possibilities that might occur in a market where it is impossible to anticipate every change. He added that he wasn't aware of any supplier being railroaded into paying for promotions.

Mr. Grace asked if BWG saw a danger that retailers would source produce outside the State if the code was too onerous. Mr. O'Byrne replied that there are already parallel imports and with overnight transport and refrigeration the supply chain is getting shorter.

Mr. Travers asked for BWG's views on the impact of a code on prices for consumers. Mr. O'Byrne replied that cost of monitoring and arbitration would only push up prices.

Mr. Travers raised the issue of consumer welfare as there is a danger the consumer will be forgotten in this process. Mr. O'Byrne responded that the pressure for a Code of Practice to govern negotiation relationships between suppliers and retailers are shifting focus away from the market consumer market towards overriding concern for the supplier base. He added that the disappearance of exclusive brands from retailer shelves in favour of retailer own brands operates to restrict consumer choice.

Mr. Grace indicated that BWG might want to submit comments independently of Retail Ireland. Mr. O'Byrne said they would do some reflecting, adding that it was better to be involved in shaping a code that will happen anyway than to stay opposed to it.

Mr. Travers closed the meetings and thanked Mr. O'Byrne and Mr. Marriott for their co-operation and informed them that a summary note of the meeting would be sent to them for their agreement or amendment if required.

**Note of meeting with the Consumers Association of Ireland (CAI) on 6 August 2010 regarding a Proposed Code of Practice for Grocery Goods Undertakings**

In attendance: John Travers, Facilitator

Dermott Jewell, CAI

Cathal O’Gorman & Margaret Ryan, Department of Enterprise, Trade and Innovation

1. The agenda for the meeting was circulated and agreed. Mr. Travers opened the meeting by referring to the ongoing debate in relation to the state of the relationships between the various stakeholders in the grocery goods sector, the alleged unfair practices and the reports by Forfas and the Competition Authority. He referred to the commitment in the Renewed Programme for Government to introduce a Code of Practice for the Grocery Goods Sector. Mr. Travers advised that in advance of statutory provision for introducing such a Code, he had been asked by the Minister to engage with all relevant stakeholders to explore the possibility of agreeing a voluntary Code. Mr. Travers advised that he intended to meet with as many stakeholders as possible and that he envisaged reporting back to the Minister on this matter by the middle/end of September. He added that a lot had changed since the consultation paper had been published and therefore responses to the paper may need to be updated.
2. Mr. Jewell advised that the CAI is an independent, non-profit organisation working on behalf of Irish consumers. The CAI is essentially funded by way of membership and the publication of its Consumer Choice magazine. He advised that the Association had been affected by the recession and had experienced a fall in membership. He advised that because of its independence the Association did not take money from commercial undertakings by way of endorsements or sponsorships. Mr. Travers enquired if he could have a copy of the most recent accounts of the CAI. Mr. Jewell responded that they would be available in 3 weeks time.
3. Mr. Travers advised that a number of stakeholders, particularly retailers, had opposed the introduction of a Code on the basis that it would lead to higher prices for consumers. Mr O’Gorman noted that the issue of prices continued to be very much to the forefront of public debate as evidenced by the results of the recent Eurostat survey. Mr. Jewell agreed that the issue of prices was particularly important for consumers, especially in these difficult economic times. Mr. Jewell advised that the CAI did not agree that the introduction of a Code should lead to higher consumer prices. He stated that what was needed was greater transparency in pricing. He advised that whilst the CAI had done some work in relation to raising consumer awareness regarding prices, it was limited in its efforts by the level of available resources. He was concerned that the National Consumer Agency’s activity in this area seemed to have tapered off. He suggested that a price comparison website would be beneficial and entirely feasible given that most of large retailers are now selling online.
4. Mr. Travers referred to the various codes for retailers across Europe and their focus on big retailers. He added that the threshold under the UK code was a turnover of £1 billion and that a number of submissions had suggested that an equivalent threshold for Ireland would be in the region of €50-100 million. He asked for the

CAI view on this. Mr. Jewell replied that realistically it made sense to stick to such a level on the basis of administrative practicality.

5. Mr. Jewell stated that one of the main difficulties in the whole groceries and grocery prices debate was the lack of transparency in relation to the margins being achieved by the various players in the grocery goods chain. Mr. O’Gorman advised that obligations in relation to disclosure by companies were set out under company law. Under the existing framework of company law, it is possible for companies who have operations in a number of member states of the EU to file their accounts on a group basis. It was also the case that under company law, companies who are registered as private limited companies have less onerous reporting obligations than public companies. He advised that changing company law to require more detailed disclosure/reporting obligations would require careful consideration, particularly given the possible FDI implications of such changes.
6. Mr. Travers enquired if the CAI had anything to add to their submission to the 2009 Public Consultation. Mr. Jewell said that for him what fuelled the whole perception of over-pricing in Ireland was that, for example, an item costing €62 in the Republic is sold for £25 in the North and that the latter price already contains a profit margin. Mr. O’Gorman noted that when the issue of north- south price differentials originally came into the public consciousness, a number of different reasons were proffered for the differentials including buying of currency, cost of doing business, cost of sourcing products etc.
7. Mr. Travers asked if the CAI had any views on the retail planning guidelines. Mr. Jewell replied that the CAI had looked at the Guidelines previously and was of the view that the Guidelines needed to be framed so as to ensure that consumers are well served both in terms of in town and out of town retail development. .
8. Mr. Travers closed the meeting and thanked Mr. Jewell for his cooperation. He added that a note of the meeting would be drafted and circulated for agreement or amendment.

**Note of meeting with CSNA on 1 July 2010 regarding proposed Code for grocery goods undertakings**

In attendance: Mr. John Travers, Facilitator  
Mr. Vincent Jennings, CSNA  
Mr. Cathal O’Gorman, DETI  
Ms. Margaret Ryan, DETI

An agenda was circulated and agreed. Mr. Travers opened the meeting by referring to the ongoing debate in relation to the state of the relationships between the various stakeholders in the grocery goods sector and the commitment in the Renewed Programme for Government to introduce a Code of Practice for the Grocery Goods Sector. Mr. Travers advised that in advance of statutory provision for introducing such a Code, which he understood would be included in legislation currently being prepared by the Department, he had been asked by the Minister to engage with all relevant stakeholders to explore the possibility of agreeing a voluntary Code. Mr. Travers advised that he intended to meet with as many stakeholders as possible and that he envisaged reporting back to the Minister on this matter by the middle/end of September.

Mr. O’Gorman spoke briefly on the Consultation Paper which was published by the Tanaiste in August 2009 and which received twenty-nine submissions, all of which are available on the Department’s website. Mr. O’Gorman outlined the main points made in CSNA’s submission and acknowledged that the CSNA are in favour of a statutory Code rather than a voluntary one.

Mr. Travers stated that it was worth focusing on the content of a Code as opposed to debating the merits of voluntary and statutory. He added that the Government has indicated that they will use the legislation merging the NCA and the Competition Authority to provide an enabling provision for a statutory Code.

Mr. Jennings acknowledged that he understood the rationale for a voluntary Code but in his view it would not work. He cited the experience of the Voluntary Code on the Display and Sale of Alcohol Products in Mixed Trading Premises which he stated clearly demonstrated that essentially voluntary commitments mean you don’t have to.

Mr. Jennings stated that competition law is well developed in Ireland but there was a marked absence of complaints. In the 19 years of its existence there has only been one complaint to the Competition Authority on the abuse of a dominant position. He advised that from the CSNA’s standpoint the Competition Authority sees its brief as to look after the consumer and is not concerned with B2B issues/disputes.

Mr. Jennings stated that small shops provide additional services to the public that the multiples won’t, such as bill payment in the absence of an EBS office, post office, etc. This and other services provide no profit to the retailer but are essential to the sustainability of the community. CSNA was anxious that the Code should cater for the unique nature of small community based shops.

The CSNA was concerned that the draft Code should not be confined to food items but should also apply to other household necessities as some of the more serious unfair practices suffered by its members occur in areas such as the supply of newspapers, mobile phone top-ups etc. He considered that this was a particularly important

consideration given that such necessities represent a significant element of turnover of small retailers. It was important, therefore, that the Code would deal with all unfair practices that distort trading relationships.

Mr. Travers advised that part of his task was to examine what specific provisions should be included in the Code and in this regard he wondered as to whether the CSNA had views on the draft Code which had been appended to the Consultation Paper published by the Tánaiste last year. Mr. Jennings advised that the CSNA were not in a position to comment on the detailed provisions of the draft Code at this stage but would be happy to do so and revert to Mr. Travers on the matter. Mr. Travers asked if CSNA could submit its comments by the middle of July and suggested that in addition to commenting on the provisions of the draft Code, the CSNA might wish to suggest how in its view the Code might be improved by the addition, removal, amendment of particular provisions.

Mr. O’Gorman spoke about the UK Code which has been in place for some months and asked if Mr Jennings saw the possibility of introducing scope for anonymous complaints as worthwhile. Mr. Jennings did not see much point in providing for anonymous complaints as he felt the names of complainants would eventually come out and they would suffer the consequences.

Mr. Travers the raised the issue of the possible impact of a Code on consumer prices and the argument made by some stakeholders that any Code would result in higher prices to the consumer. Mr. Jennings expressed the view that if the market were to be solely driven by price, you would end up with a marketplace dominated by a very few large retailers with no presence by small community based outlets. In this regard he would be very concerned that the high street in Ireland which has a wide variety of retail outlets should not end up like a replica of the high street that currently exists in the UK.

Mr. Travers advised that he looked forward to receiving the CSNA’s detailed comments on the draft Code. Mr. Travers undertook to forward a short note to the CSNA recording the details of the issues discussed at the meeting and invited the CSNA to submit any amendments that it wished to the note. Mr. Travers concluded by thanking Mr. Jennings for his co-operation in relation to his task.

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Margaret Ryan  
Consumer Policy  
1 July 2010

**Note of Meeting with Competition Authority on 26<sup>th</sup> August 2010 at 10.00am  
regarding the Code of Practice for Grocery Goods Undertakings**

In attendance: John Travers, Facilitator

Stanley Wong, Competition Authority

Dave O'Connell, Competition Authority

Cathal O'Gorman & Margaret Ryan, Department of Enterprise, Trade and Innovation

1. Mr. Travers opened the meeting by thanking the Competition Authority delegation for their attendance and also for the comprehensive document prepared by the Authority in relation to the specific provisions of the draft Code, which had been appended to the Consultation Paper published by the Tánaiste in 2009.
2. Mr. Wong advised that the Authority was more than happy to give its views on the specific provisions of the draft Code as requested by Mr. Travers. He apologised that it had not been possible to forward the document detailing the Authority's views earlier and that the Authority would be happy to attend a further meeting when Mr. Travers had the opportunity to fully consider the Authority's document.
3. Mr. Travers advised that he appreciated the Authority's offer of further meetings, if necessary. He suggested that for the purpose of to-day's meeting the Authority might wish to give an overview of any issues/concerns it had identified in relation to the specific provisions of the outline of the draft Code.
4. Mr. Wong stated that as the Authority had already advised Mr. Travers of its objection in principle to the introduction of a Code, he did not intend to reiterate the reasons for its objection at this stage. Rather he proposed to give an overview of particular concerns that the Authority had identified in relation to the provisions of the Code as currently drafted.
5. Mr. Wong advised that the Authority's concerns could be grouped under three headings that the
  - the clauses of the draft Code will create market inflexibilities which hinder innovation and efficiency by requiring consultation and written agreement in respect of any proposed change to contract terms which has not already been written into the original contract
  - the clauses of the draft Code will place smaller suppliers under a comparatively greater compliance burden, as they will be less likely to have prior in-house legal or contractual expertise to, firstly, examine contract terms and, secondly, to effectively police the other party's compliance with the contract and with the Code: and
  - that the Code will result in smaller suppliers being less able to resist demands by retailers for prohibited actions to be included in the contract, and therefore permitted, whereas large suppliers, with their greater bargaining power, may be better positioned to do so and therefore, the Code is unlikely to assist smaller suppliers.
6. Mr. Travers advised that whilst he noted the concerns raised by the Authority, it was the case that the outline draft Code had been framed in the image of the provisions of the Groceries Supply Code of Practice that operates in the UK. Insofar as the provision requiring supply agreements to be in writing is concerned, Mr. O'Gorman

advised that a number of stakeholders had made the point that this requirement would afford parties some certainty as to how supply agreements would operate and therefore would allow them to plan for the future with greater confidence.

7. Mr. Travers stated that he was grateful to receive the Authority's analysis of the specific provisions of the draft Code and that he would consider the issues raised by the Authority in further detail over the coming weeks. Mr. Travers went on to advise that as part of the facilitation process which he was engaged in with the various stakeholders in the grocery goods sector, he was attempting to find as much common ground as possible in relation to how the Code should be framed. As regards the next steps Mr. Travers indicated that having met with all the relevant stakeholders, he would consider whether further meetings were necessary but that in any event he hoped to report back to the Minister on the matter by end September.
8. Mr. Wong advised that notwithstanding the Authority's principled objection to the introduction of a Code, it appreciated Mr. Travers' position and the role he had been asked to carry out by the Minister given the commitment in the Renewed Programme for Government to introduce a Code in the grocery goods sector. Mr Wong advised that the Authority would be more than happy to provide any further analysis or observations to Mr. Travers if he so wished.
9. Mr. Travers thanked Mr. Wong and Mr. O' Connell for their analysis and their co-operation. The meeting then concluded.

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Competition and Consumer Policy Section  
15<sup>th</sup> September 2010

**Note of meeting with Department of Agriculture, Fisheries and Food on 10th September at 11.30am regarding proposed Code for grocery goods undertakings**

In attendance: Mr. John Travers, Facilitator

Ms. Marion Byrne, Principal, Food Division, Dept. of Agric

Mr. Cathal O’Gorman and Ms. Margaret Ryan, DETI

1. Mr. Travers opened the meeting by thanking Ms. Byrne for her attendance. He noted that there had been ongoing contact between the DETI and the Dept. of Agriculture throughout the course of the debate regarding the nature of relationships in the food supply chain and the need for the introduction of a Code of Practice to regulate practices within the chain. He advised that following on from the commitment in the Programme for Government to introduce a Code of Practice in the grocery goods sector, he had been asked by the Minister, in advance of legislative provision being made for the introduction of a statutory Code, to engage with stakeholders to explore the possibilities of developing a voluntary Code.
2. Mr. Travers advised that he had met with almost all those who had responded to the public consultation process on the Code carried out by the Tánaiste in 2009. Following on from those meetings, the draft outline of the Code which had been published as part of the consultation process had been updated and circulated to the main representatives of suppliers, Food and Drink Industry Ireland (FDII) and the main representatives of retailers, (Retail Ireland). Mr. Travers stated that once he received the responses of both sides, which he expected to have in the next week or so, he would then consider as to how best to move forward. Mr. Travers wondered if there were any particular issues which the Dept. Of Agric was anxious should be taken into account in the framing of any Code, be it either voluntary or statutory.
3. Ms. Byrne thanked Mr. Travers for the opportunity of the meeting. She advised that as far the Minister for Agric. was concerned the food supply chain was not working as it should and that he fully supported the commitment to introduce a Code. She advised that her Dept agreed with the strategy of proceeding by first trying to develop a voluntary Code. In this regard she advised that Dept. Of Agric had experience of negotiating a voluntary Code for Farmers Markets where it had been possible to achieve a measure of success. She felt, therefore, that the appointment of a facilitator in this instance was well worth a punt.
4. Insofar as the details of any prospective Code were concerned, she advised that numerous concerns had been expressed to her Department in relation to the difficulties being caused by retrospective changes to supply agreements and her Department was of the view, therefore, that it was important the Code should seek to bring greater certainty to the relationships between suppliers and retailers. Ms. Byrne was also of the view that specific provisions should be included in the Code to deal with issues such as prompt payments and credit terms
5. Ms. Byrne advised that the issue of enforcement was also important and that careful consideration should be given as to how the provisions of any Code should be enforced.
6. Mr. Travers wondered if the Department of Agriculture had any views as to whether the Code should apply to suppliers as well as retailers. Ms. Byrne did not believe



that a case for imposing the Code on suppliers had been made, albeit that the Department did consider it important that the Code should be framed in such a manner as to achieve a fair balance between suppliers and retailers.

7. Mr. Travers concluded the meeting by thanking Ms. Byrne for her Department's views. He advised that it was his intention to report back to Minister O' Keefe in the coming days to update him on the position.

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Competition and Consumer Policy Section  
26<sup>th</sup> September 2010

**Phone discussion with Dick Reeves of Dunnes Stores**

RE: Phone discussion with Mr. Dick Reeves on Tuesday 27th sept. 2010 re. Proposed Code of Practice for Grocery Goods Undertakings

John Travers  
to:

22/09/2010 14:28

Cc:  
Cathal.OGorman  
Show Details

Dear X

Thanks for the response. The amended summary of points will be retained as a summary record of my discussion with Dick Reeves.

Best Regards,

John Travers

From: X  
Sent: 22 September 2010 10:32  
To: John Travers  
Subject: Re: Phone discussion with Mr. Dick Reeves on Tuesday 27th Sept. 2010 re. Proposed Code of Practice for Grocery Goods Undertakings

Dear John,

Below please find the slightly amended summary of points raised by Dick Reeves which you sent to us. The only change is in point 8, the first line, where we have inserted the word satisfactory before "voluntary code",

Summary Of Points Raised by Mr. Reeves:

1. Dunnes Stores are not members of any Retail Industry retail representative group in Ireland.
2. Dunnes Stores do not consider that a coherent, objective basis for the introduction of a Code of Practice has been established or articulated in the Consultation Paper published by the Department or elsewhere in Ireland.
3. The published draft Code purports to be neutral between the obligations of both retailers and suppliers under the Code but in effect the provisions are more onerous on retailers and there is a lack of balance in the Code in that respect.
4. There is pressure on retailers to source more product from non-Irish sources for cost/efficiency reasons and the introduction of a Code on the lines proposed will accelerate this process.
5. With the overall bulk of products in Irish retail stores coming from sources external to Ireland the task of enforcing/policing any Code on a meaningful basis is well-nigh impossible. These difficulties will be compounded by the withdrawal of large multinational suppliers from their bases in Ireland if these take place for costs/efficiency reasons as has been suggested/rumoured.

6. The provisions of the draft Code would greatly curtail the essential need to be able to respond quickly to volatile and unexpected changes in market conditions to the detriment of consumers, retailers and suppliers.  
7. Proposals for retrospective changes in terms and conditions come from suppliers as well as from retailers (e.g in the case of currency changes which negatively affect the prices at which suppliers can supply ).  
8. Dunnes Stores consider that it will be extremely difficult to get agreement to a satisfactory voluntary Code given the difference in interests between retailers that operate in the Irish market themselves ,similarly in the case of suppliers and the natural business-to-business tensions that operate between suppliers and retailers.

Directors Office

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to IT\_Helpdesk@dunnes-stores.ie, including a copy of this message. Please then delete this email and destroy any copies of it.

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**Note of meeting with Paul Gorecki, ESRI on 15 July 2010 at 9.00am regarding the Code of Practice for Grocery Goods Undertakings**

In attendance: John Travers, Facilitator

Paul Gorecki, ESRI

Kieran Grace, Department of Enterprise, Trade and Innovation

The agenda for the meeting was circulated. Mr. Travers opened the meeting by referring to the ongoing debate in relation to the state of the relationships between the various stakeholders in the grocery goods sector and the commitment in the Renewed Programme for Government to introduce a Code of Practice for the Grocery Goods Sector. Mr. Travers advised that in advance of statutory provision for introducing such a Code, he had been asked by the Minister to engage with all relevant stakeholders to explore the possibility of agreeing a voluntary Code. He indicated that this was without prejudice to any personal views he might have on the justification or substance for a Code. Mr. Travers advised that he intended to meet with as many stakeholders as possible and that he envisaged reporting back to the Minister on this matter by the middle/end of September.

Mr. Travers noted that Mr Gorecki had made a clear and comprehensive submission in September 2009 in response to the public consultation process and that he had also sent in a further letter and attachments in July 2010 in the matter. All the points in these documents had been noted. In view of Mr Gorecki's clear and well-reasoned views on the issue, Mr Travers asked if there was anything further he wanted to add.

Mr. Gorecki noted that, in his view, there was no market failure to be addressed and thus there was no rationale for such a Code. On the issue of a Code obliging parties to have written contracts, he referred to his letter of July 2010 and the appended article in the "Financial Times" by John Kay on this matter. Mr Gorecki's view was that imposing written contracts would change the current relationships between suppliers and retailers as it would not longer be a long-term one based on trust: such an imposition would see a more antagonistic relationship develop.

On the issue of a Code being introduced, Mr Gorecki's view was that if this happened, then it should be the least prescriptive and burdensome possible. Otherwise he believed that there was a danger that one would see very complex contracts being drawn-up with an associated rise on costs for business, a less competitive food processing industry and higher prices for consumers. He believed that large suppliers with strong brands had as much power as retailers. He also believed that there should be clear criteria on what should be in any Code in relation to the exact types of products to be covered. In effect, he felt that as little as possible should be included in any Code. In the context of achieving a voluntary Code, he believed that incentives would need to be aligned between both retailers and suppliers and that this would be difficult to achieve.

On the issue of the consumer aspect of any Code, Mr Gorecki stated that nothing in the body of the draft Code (sent out as part of the public consultation process) protected the consumer. He was of the strong view that a consumer welfare test would be required to ensure that there was no increase in prices paid by consumers. Only where there was compelling evidence that there would be a danger to consumer welfare could such a Code be possible.

Mr. Travers concluded by thanking Mr. Gorecki for his co-operation in relation to his task.

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Competition and Consumer Policy Section  
Department of Enterprise, Trade and Innovation  
15 July 2010

**Note of meeting with Food and Drink Industry Ireland (FDII) on 7<sup>th</sup> July at 4.30pm  
regarding proposed Code for grocery goods undertakings**

In attendance: Mr. John Travers, Facilitator  
Mr. Paul Kelly, FDII  
Mr. Colin Gordon, FDII  
Mr. Cathal O’Gorman, DETI

1. Mr. Travers thanked the representatives of FDII for their attendance at short notice as he was anxious to have a run through of the issues in advance of the full meeting with FDII on the 16<sup>th</sup> July. Mr. Travers advised that he had been asked by the Minister to explore with stakeholders the possibility of developing a Voluntary Code for the grocery goods sector which could be the precursor to a statutory Code and that he felt it would be useful to hear FDII’s preliminary views on this issue.
2. Mr. Kelly advised that FDII’s position is that it favours the establishment of a statutory rather than a voluntary Code as outlined in its response to the public consultation launched by the Tánaiste last year. FDII appreciated the task that Mr. Travers had been asked to carry out and whilst it would be prepared to engage with the process, it had concerns as to how a voluntary Code would work.
3. Mr. Gordon advised that it was important for both the Government and the major retailers to establish their bona fides in relation to the process and in particular for the Government to declare its intentions in relation to the indigenous agri-food and distribution sectors and for the major retailers to declare their strategic interest in the Irish market.
4. FDII advised that it was concerned at the delay in introducing a Code given that measures had already been introduced in a number of member states in the EU including Belgium, UK, France and were imminent in a number of others such as Spain. FDII undertook to forward further information in relation to the various initiatives, which have been taken or are under consideration in the various member states in the coming days
5. FDII advised that in advance of the meeting it had prepared a set of slides which outlined its position and built upon its formal response to the Public Consultation. As far as FDII is concerned, the current position where retail buying power has allowed retailers to transfer excessive risks and unexpected costs to suppliers has created a dysfunctional market. FDII contends that the extent of retailer buying power can be gleaned from the High Court judgement of Justice Cook in the Kerry Breeo v Competition Authority case and that the existence of this level of retailer buying power clearly shows that current competition law is not working. FDII, therefore, believes that there is a need for the establishment of a statutory Code and an Ombudsman to proactively investigate and enforce the Code.
6. FDII believes that the Code must be based on a set of principles which, whilst respecting the exigencies of normal commercial practices and the importance of rapidly responding to market conditions, should prohibit practices such as demands for rebates/payments, arbitrary delistings. The Code should also ensure that there is a fair sharing of costs/benefits deriving from promotions and that commitments in

relation to promotion plans should be honoured. FDII believes that the Code should also cover suppliers' relationships with retailers.

7. FDII also believes that the Code should prohibit specific practices such as payment delays over minor invoice queries, selling of positioning space, planograms based on buyer income, deductions or retrospective amendments to agreed terms, delisting without sufficient notice etc.
8. FDII advised that it had conducted a survey of its members as recently as last week to ascertain how many had or were experiencing the aforementioned practices. The results of the survey show that very high percentages of FDII members had experienced such practices, which FDII maintained clearly showed that they were endemic in the grocery goods sector.
9. Mr. Travers noted FDII's views as to what should be included in the Code. He advised that in the course of his meetings with stakeholders he was attempting to find as much common ground as possible in relation to how the Code should be framed. FDII stated that it saw the merit in trying to establish common ground but that any progress in this area would depend on full engagement by all players. FDII was also concerned as to how any voluntary Code could be enforced as it was its view that an Ombudsman with powers of proactive investigation and audit were a prerequisite for the success of any Code.
10. Mr. Travers advised that from listening to FDII and having heard from Retail Ireland, he felt that there could be a merit in convening a round table meeting, which he might chair with both bodies to see how this issue could be progressed. Mr. Travers advised that in view of possible competition law implications, he had informally discussed the matter with the Chairperson of the Competition Authority who did not see any difficulty in terms of the propriety of such a meeting but suggested that the various parties might wish to include a legal representative within their delegations who could ensure that the discussion fully respected the boundaries of competition law.
11. FDII was of the view that such a meeting might be useful. It was concerned, however, that if the meeting/meetings were not successful and a Code could not be agreed, the fall out could be damaging for its members. Mr. Travers advised that his responsibility was to report back to the Minister and that in the event of failure to agree a voluntary Code, he would present his report in a fair and reasonable manner outlining the reasons to the Minister.
12. Mr. Travers advised that he would seek to set up a meeting in the coming weeks. In advance of the meeting, a set of possible principles and contents on which the voluntary Code might be based would be drawn up which together with the issue of enforcement could form the basis of the agenda for the meeting.
13. Mr. Travers thanked the FDII representatives for their attendance and advised that he would be in touch in the coming weeks.

**Note of Meeting with Food and Drink Industry Ireland (FDII) at 11.00am on Tuesday  
17<sup>th</sup> August 2010**

In attendance: John Travers, Facilitator

Paul Kelly FDII

Shane Dempsey FDII

Cathal O' Gorman & Margaret Ryan, Department of Enterprise, Trade and Innovation

1. Mr. Travers opened the meeting by expressing his appreciation to the FDII delegation for their attendance at short notice. He advised that as facilitator he had at this stage met with most of the stakeholders who had responded to the public consultation process on the proposed Code of Practice for Grocery Goods Undertakings. He advised that following these meetings he was anxious to see how the issue could be progressed. To that end, a revised draft outline of a Code of Practice had been prepared. Mr. Travers advised that the revised draft had been prepared having regard to the issues which had arisen in his meetings with stakeholders. He stated that the document should not be regarded as being set in stone but hopefully could form the basis for discussion and negotiation. To that end, he was anxious that to hear the views of FDII, as the organisation representing the main body of suppliers, as to whether the revised draft represented an acceptable basis for discussion.
2. Mr. Kelly stated that he appreciated the opportunity of the further meeting. He advised that FDII remained of the principled view that any Code should be statutory in its nature. Notwithstanding this, FDII understood the task given to Mr. Travers and was committed to play its part in progressing this issue, should that be possible.
3. Mr. Travers whilst acknowledging FDII's principled position that any Code should be statutory, stated that the merit of a Voluntary Code was that it could be introduced without any undue delay and could, therefore, begin addressing the concerns raised by suppliers relatively quickly, whereas a Statutory Code would by definition require legislation and thus take time. He also advised that the introduction of a voluntary code did not preclude the subsequent promulgation of a statutory code, albeit that this would be a matter for Government.
4. Mr. Kelly noted that the revised Code essentially comprised of 4 distinct parts, definitions, guiding principles, specific obligations/requirements and enforcement. Mr. Kelly advised that FDII remained particularly concerned as to how a voluntary code could be effectively enforced. Mr. Travers wondered whether there might be a merit in seeking to get agreement of the specific provisions of a Code in the first instance, which could then aid discussions on the enforcement of those provisions.
5. Mr. Kelly stated that FDII would have to canvass its members as to whether they were happy to enter into negotiations on the basis of the revised Code.
6. Mr. Travers welcomed FDII's intention to consult with its members on the terms of the revised code. He stated that if the representatives of suppliers and retailers agreed to enter into negotiations on developing a voluntary code, he would hope to proceed by determining those provisions of the revised Code upon which there was general agreement and identifying those other provisions which required discussion and negotiation. Mr. Travers stated that if suppliers and retailers agreed to enter into negotiations, it was important that both parties should do so in as constructive



manner as possible and it would be difficult to make any progress if parties stuck rigidly to their opening positions.

7. Mr. Travers drew attention to the proposed turnover threshold of €50 million in the revised code and wondered if FDII had any views on this figure and how the turnover figures of undertakings, particularly undertakings operating as private companies could be established. Mr. Kelly advised that he would canvass the views of members in relation to the suggested threshold.
8. Mr. Travers asked if FDII could revert in relation to its position as the regards engaging in discussions/negotiations on a voluntary code as soon as possible. Mr. Kelly advised that FDII would carry out an urgent canvass of its members and would endeavour to revert back with its position in the coming days.
9. Mr. Travers advised that he appreciated FDII's commitment to dealing with this matter as expeditiously as possible particularly given his deadline for reporting back to the Minister and looked for to hearing from FDII in the coming days. The meeting then concluded.

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Competition and Consumer Policy Section  
August 2010

**Report of meeting with Food and Drink Industry Ireland in relation to its response to  
the revised Code of Practice for Grocery Goods Undertakings on Monday 29<sup>th</sup>  
November 2010**

*Present*

*John Travers Facilitator*

*Nicholas Donnelly Legal Advisor DET&I*

*Cathal O' Gorman DET&I*

*Paul Kelly, FDII*

*Shane Dempsey, FDII*

Mr. Travers opened the meeting by thanking the FDII for its response to the revised Code of Practice which had been circulated back in August. Mr. Travers apologised for the delay since receiving FDII's response in September which he advised was due to the fact that the response of Retail Ireland (RI) to the revised Code had only been received recently.

Mr. Travers advised that having received the responses of both FDII and RI, he had arranged to meet both bodies to see how the matter could be progressed. In this regard he advised that he had already met with RI on Monday the 22nd November. In the course of that meeting R.I. indicated that it would be prepared to enter into an engagement with FDII in relation to perceived problems in the grocery goods supply chain and how they might be resolved. RI envisaged such an engagement being founded in the first instance on a set of principles which would apply to the relationships and interactions between the various stakeholders in the grocery goods supply chain. Mr. Travers advised that RI had indicated that any consideration of the specifics of such principles should be framed with the objective of addressing particular problems in the supply chain. Mr. Travers stated that he had asked RI to put forward its view of the problems in relation to the current operation of the grocery goods supply line and the set of principles that should govern the relationships and the various practices between stakeholders in the supply chain.

Mr. Travers advised that whilst the willingness of RI to engage was welcome, it was a matter for FDII to consider whether it was also happy to engage on the basis of setting out its view of the problems regarding the manner in which the supply chain currently operates and the principles FDII believes should apply to address those problems.

FDII advised that the response it had made to the revised Code already contained a set of principles and a list of individual provisions to deal with specific practices in the grocery goods supply chain, which are causing problems for suppliers. FDII advised that whilst they had no particular objection to trying to agree a common set of principles for dealing with relationships/practices in the grocery goods sector, it would be concerned that this should not amount to a step backwards from the provisions of the revised Code that had been circulated in August. FDII was also concerned that any refocus of the process should not have the effect of unduly delaying the introduction of a Code of Practice.

Mr. Travers in noting the concerns expressed by FDII advised that although he understood that the Government remained fully committed to introducing a Code in the Grocery Goods Sector, it was likely that the enactment of the legislation to allow for the introduction of a Statutory Code could take some time. It was for that reason that the Minister was anxious to use this interregnum to explore the options of developing a Voluntary Code, hence his appointment as facilitator. Mr. Travers advised that a Voluntary Code by definition would require engagement and discussion between FDII and RI. Mr. Travers pointed out that RI had agreed to engage on the basis that retailers and suppliers would each set out their view

of the problems in relation to the current operation of the grocery goods supply line and the set of principles that should govern the relationships and the various practices between stakeholders in the supply chain. Mr. Travers asked if FDII would be prepared to proceed on the same basis.

FDII acknowledged that the position adopted by retailers seemed to mark a step forward and on that basis FDII would be prepared to supply Mr. Travers with a list of problems which affect suppliers in the grocery supply chain and a set of principles which FDII believes should govern the various practices/relationships in the chain.

FDII acknowledged the willingness of retailers to engage in the process but expressed concern that listing problems and seeking to discuss them was a backwards step in the process. FDII stated that it had made comments on both the provisions and principles contained in the revised DETI Code and felt that a discussion on the comments made should be the starting point to each provision. FDII was willing to subsequently discuss them in the context of the relevant linked provision but was not willing to go back to a debate on problems per se as this would be a retrogressive step.

Furthermore, this would be without prejudice to the position that FDII has consistently expressed on the need for the introduction of a statutory Code. FDII advised that in making a further submission as agreed, it would use the revised Code as the template for framing its set of principles and would also list out the problems suppliers encounter under the various headings specified in the revised Code.

Mr. Travers advised that if both sides were agreeable to this suggestion, it would be his wish that each side would share with the other, probably through him, the details of their respective problems and principles. He advised that he would then seek to convene a joint meeting at which the respective problems and principles could be discussed with a view to establishing if a measure of agreement could be achieved on a common position on these issues. FDII advised that it was only prepared to discuss respective problems in the context of the linked provisions as set out in DETI's draft code and their subsequent submission on same.

Mr. Travers advised that he would proceed on the basis outlined and that he would appreciate, therefore, if FDII could forward its observations on the problems and principles that should apply in the grocery goods sector as soon as possible.

Insofar as his own task was concerned, Mr. Travers advised that Minister O' Keeffe had extended the deadline for reporting on his efforts to facilitate agreement on a Voluntary Code up until the 1<sup>st</sup> December. Mr. Travers indicated that he would meet with the Minister shortly to update him on the position. Mr. Travers said that he could not anticipate what the Minister's position would be on the current state of play between RI and FDII as outlined at the meeting.

**Note of Meeting with Food and Drink Industry Ireland (FDII) and Retail Ireland (RI)  
on Monday 20<sup>th</sup> December 2010 at 11.30am**

In attendance:

Paul Kelly FDII  
Shane Dempsey FDII

Torlach Denihan RI

John Travers, Facilitator  
Kieran Grace & Cathal O' Gorman, Department of Enterprise, Trade and  
Innovation  
Nicholas Donnelly, Legal Advisor, Department of Enterprise, Trade and  
Innovation

Mr. Travers opened the meeting by thanking the FDII and the RI delegations for their attendance. He advised that he had recently met with the Minister to update him on the facilitation process. At that meeting the Minister had stated that whilst he was prepared to extend the deadline for the completion of the process for a further period until the 15<sup>th</sup> January, he also wished that the officials in the Consumer Policy Section should begin work on preparing bespoke legislation which would allow for the introduction of a statutory Code of Practice as early as possible in the new year. Mr. Travers advised that the Minister had requested that the stakeholders engaged in the facilitation process should be informed of his decision, which he hoped would have the effect of concentrating minds.

Mr. Travers welcomed the fact that both sides had submitted their respective principles for governing relationships between stakeholders in the grocery goods chain. He advised that, with the agreement of both sides, he had forwarded the submissions of each side to the other. He noted the differences in the approach taken by both sides in that the document submitted by RI was framed on the basis of a high level set of principles whereas FDII approach had been more detailed. Mr. Travers advised that he hoped to use the documents submitted by RI and FDII to explore what measure of agreement there was on the various issues and to see how that might be built upon.

Mr. Denihan advised that RI's document was made up of 3 parts. The first part was concerned with meeting the needs of consumer and the importance of supporting the development of an efficient and competitive industry. The second part was more specific in nature and was concerned with the principle of clear, regular and open communication including in relation to such issues as agreements being recorded in writing, reasonable notice to be given to changes to supply arrangements, payments for supplies to be made within a reasonable time. The 3rd part of the document was concerned with the handling of disputes.

Mr. Kelly advised that FDII's document detailing its view of the principles for governing relationships between stakeholders in the grocery goods sector was framed in the light of the revised draft Code prepared by the Department. In addition he advised that FDII had used the specific headings in the revised Code to list the particular problems being experienced by suppliers as had been requested.

Mr. Travers suggested that as there was a measure of agreement between suppliers and retailers that relationships in the grocery goods sector should be underpinned by a set of principles, as a starting point it might be useful to explore what those principles should

be. He noted that the first principle in the Department's revised draft was concerned with the Consumer Interest. RI advised that it did not have any specific issue with the principle as espoused but would like the opportunity to examine the wording of the principle.

As regards the principle of fair dealing, Mr. Travers wondered what views FDII and RI had on the principle as proposed in the revised draft. FDII advised that it very much supported the inclusion of a fair dealing principle but that it wished to consider whether the principle as worded was sufficiently adequate to prevent the transfer of excessive risk by retailers to suppliers. RI advised that whilst it was not opposed in principle to a fair dealing provision, the wording of any such provision was important and that it wished to examine the wording of the proposed provision in the revised draft in further detail.

Mr. Travers then referred to the proposed principle providing for a strong supplier base and noted that unlike the UK the revised draft Code would apply to all grocery goods undertakings, including suppliers, above the specified threshold. FDII stated that it was strongly of the view that the Code should focus on those practices which allowed retailers to transfer excessive risk to suppliers and that it did not, therefore, see the justification for applying the Code to suppliers. Mr. Travers stated that in his meetings with a number of stakeholders the case had been put that whilst suppliers may experience difficulties in relation to the practices of large retailers, small retailers likewise also suffered from unfair commercial practices from larger suppliers. FDII advised that it wished to consider this issue further. RI advised that it accepted that it would not be possible or desirable to make every contractual arrangement between grocery goods suppliers, no matter what size, subject to the provisions of a Code and that it, therefore, supported the logic of applying a threshold and did not have any particular objection to the threshold of €50 million proposed in the revised draft Code.

Mr. Travers wondered if either FDII or RI had any observations in relation to the final principle in the revised draft namely that any Code should seek to promote the development of a competitive retail sector. Neither FDII or RI had any specific observations to make in relation to this proposed principle.

Mr. Travers stated that whilst establishing general principles was important in laying the foundation for governing relationships between stakeholders in the grocery goods change, it was also important to push on and discuss the detailed provisions that might be included in any Code. In this regard he noted that FDII had forwarded its views in relation to the specific provisions/obligations proposed in the draft revised Code and whilst he was aware of RI's previously expressed concerns in relation to the revised draft prepared by the Department, he felt that it would be useful, and indeed essential, for RI to also submit its views in relation to what specific provisions should be included in a Code.

Mr. Travers suggested that for the purposes of the meeting it might be useful to go through the particular provisions detailed in the Department's revised draft and for FDII or RI to offer any views/observations they may have on these provisions. Insofar as the first provision requiring that *Terms of Business Agreements be in writing*, he noted that there appeared to be a measure of agreement between FDII and RI on this issue. FDII advised that it was broadly satisfied with the provision as worded in the Department's revised draft but that they would have a concern in relation to the suggestion made by RI that only the main provisions of agreements should be recorded and that agreements

could be recorded in writing after they had been concluded. RI advised that it would consult with its members in relation to the issues raised in relation to this provision.

Mr. Travers then referred to the next provision in the Department's revised draft, namely that relating to the *Variation of Terms of Business Agreements*. FDII advised that it was happy with the provision as worded. RI stated that that it wished to consider the problems cited by FDII and to revert back with its views.

Insofar as the next provision regarding *Changes to Supply Agreements*, Mr. Travers noted that there was a degree of complementarity between the Department's revised draft and the principle of Clear, Regular and Open Communication as set out in the principles submitted by RI. FDII advised that whilst it fully supported the importance of clear, regular and open communication, it was concerned that that any provision in this area should ensure that where there are changes to supply agreements, there should be an obligation that reasonable notice be given of such changes. For that reason, FDII advised that it preferred the wording as proposed in the Department's revised draft. RI advised that whilst it had no problem with the principle that reasonable notice be given of changes to supply agreements, it should be recognised that such changes can be at the behest of suppliers as well as retailers. RI was concerned that any provision in this area should not strait jacket suppliers and retailers into restrictive and uncompetitive supply arrangements and that the details of any provision in this area would best be discussed between those on both the supplier and retailer side who are familiar with the day to day logistics of supply arrangements. RI advised that the proposal in the Department's revised draft that compensation be paid in cases of failure to provide reasonable notice of supply changes would be problematic for its members.

Mr. Travers then raised the next provision in the Department's revised draft, namely the provision concerning *Prompt Payments*. Mr. Travers noted that payments in relation to commercial contracts, including those in the grocery goods sector, were covered by the terms of the European Communities Regulations (Late Payments in Commercial Transactions) Regulations 2002 which stipulates that unless otherwise agreed, payments made after 30 days shall be subject to interest charges. FDII advised that notwithstanding the existence of the aforementioned Regulations, its members continued to experience late payment and other practices such as payments being unreasonably delayed for reasons of minor substance. FDII believed that any provision in this area should be prescriptive in terms of definitions of phrases such as reasons of minor substance so as to ensure that its members no longer suffer from late payment practices. RI stated that its members were fully aware of the requirements of the 2002 Regulations. RI advised that it noted the list of problems identified by FDII in the area of late payments and that it would look into these issues and revert back.

Mr. Travers wondered as to whether RI or FDII had any observations/views in relation to the provision on *Marketing Costs* as set out in the Department's revised draft. FDII advised that that it was strongly of the view that the supplier/retailer relationship should be solely based on a buy/sell dynamic and should not be distorted by issues such as marketing costs. FDII expressed the view that the provision as drafted by the Department recognised that marketing costs could be incorporated into Terms of Business Agreements and that evidence available to FDII showed that since the introduction of the GSCOP in the UK, retailers were insisting that marketing costs be incorporated into Supply Agreements. FDII stated that it preferred an outright ban in this area and suggested that the wording that it had previously submitted in relation to Marketing Costs should be incorporated into the Code. RI stated that it was important to realize that marketing can offer benefits to all stakeholders, including suppliers. It was

also important to understand the reality that marketing costs often arise unexpectedly. Mr. Denihan noted the specific problems raised by FDII in relation to marketing costs and stated that he would consult with his members on these matters and would revert back.

Mr. Travers then referred to the provision in the Department's revised draft concerning *Shrinkage Payments*. FDII advised that had no issue with the provision as worded. RI stated that the provision was broadly acceptable but that it would revert shortly with any comments that its members might have.

The meeting then proceeded to discuss the *Wastage Payments* provision in the Department's revised draft. RI advised that it did not agree with FDII's contention that retailers were engaging in unfair practices in relation to wastage payments and that it would respond shortly with its members' views on this area.

Mr. Travers enquired as to whether RI or FDII had any observations in relation to the proposed provision on *Limited conditions for Payments as a condition of being a Supplier*. FDII advised that it had no issues with the provision as worded. RI advised that it noted the list of problems identified by FDII in this area and that it would look into these issues and revert back.

Mr. Travers then referred to the provision in the Department's revised draft concerning *Compensation for Forecasting Errors*. RI advised that it did not accept the premise upon which this provision was based as forecasting was a joint exercise and responsibility and this needed to be recognised in any provision in this area. RI advised that it would look again at this issue with a view to suggesting an alternative to the provision proposed in the Department's wording.

The meeting then proceeded to discuss the *No Payments for Better Positioning of Goods unless in relation to Promotions* provision as proposed in the Department's revised draft. FDII and RI advised that they would consider this issue further and revert.

Mr. Travers then referred to the provision on *Promotions* as outlined in the Department's revised draft. FDII expressed the view that any provision in this area should be predicated on ensuring that suppliers are not expected to disproportionately fund the costs of promotions and that before suppliers are requested to enter into a promotion, there must be clear and realizable benefits for both the supplier and the retailer. RI noted the problems which the FDII had highlighted in relation to the area of promotions and advised that it wished to consider these further in conjunction with its members and that it would revert back with its views.

Mr. Travers enquired as to whether either FDII or RI had any particular views in relation to the *Due Care to be taken when ordering for Promotions* provision in the Department's revised draft. FDII advised that it did not have any objection in principle to the provision as drafted. RI advised that the proposal that retailers should compensate suppliers in relation to ordering difficulties would be problematic for its members. RI advised that it would further consult its members on this issue and revert back with its considered views.

FDII and RI advised that they did not have any objection in principle to the proposed provision regarding *Payment for Consumer Complaints* in the Department's revised draft.

The meeting then proceeded to discuss the provision relating to *Continuation, Renewal and Termination of Business Agreements*. FDII expressed concern that the provision as worded in the revised draft did not deal with the main problem in this area, namely the arbitrary delisting of suppliers by retailers. FDII was strongly of the view that the Code should include a specific provision in relation to delisting as in the case of the GSOP in the UK and that any such provision should stipulate that delisting should only occur for genuine commercial reasons. RI stated that it totally rejected FDII's view on this matter as it was essentially the consumer and consumer demand which determined what products were stocked by retailers.

As regards the provision on *Enforcement* in the revised draft, Mr. Travers noted that RI and FDII had different views as to how any Code might be enforced. Mr. Travers expressed the view that it might be more fruitful to focus on seeking agreement on the principles and the detail provisions to be incorporated into any Code following which the issue of enforcement could then be considered.

Mr. Travers stated that he hoped that the run through of the particular provisions in the Department's revised draft was useful. He noted from the discussion that RI and FDII had indicated that they wished to give further consideration to a number of the provisions of the Department's revised draft. RI advised that it would urgently consult with its members and would seek to draw together a comprehensive response on all the issues raised. FDII advised that it would also consult further with its members on the issues which it had flagged in the course of the meeting following which it would forward a response outlining its position. Mr. Travers in noting the Minister's revised deadline of 15<sup>th</sup> January 2011 for completing the facilitation process, requested that RI and FDII both forward their responses by close of business on the 10<sup>th</sup> January. RI and FDII undertook to respond within that timeframe.

Mr. Travers advised that on receipt of the respective responses, he would then take a view as to whether the gap between the sides was bridgeable or whether it was too large and he would advise the Minister accordingly. The meeting then concluded.

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Competition and Consumer Policy Section  
11<sup>th</sup> January 2011



**Note of Meeting with Irish Cattle & Sheep Farmers' Association (ICSA) on 16 July 2010 at 2pm regarding the Code of Practice for Grocery Goods Undertakings**

In attendance: John Travers, Facilitator

Gabriel Gilmartin, ICSA

Edmund Phelan, ICSA

Eddie Punch, ICSA

Gillian Westbrook, ICSA

Kieran Grace & Margaret Ryan, Department of Enterprise, Trade and Innovation

The agenda for the meeting was circulated and agreed. Mr. Travers opened the meeting by referring to the ongoing debate in relation to the state of the relationships between the various stakeholders in the grocery goods sector and the commitment in the Renewed Programme for Government to introduce a Code of Practice for the Grocery Goods Sector. Mr. Travers advised that in advance of statutory provision for introducing such a Code, he had been asked by the Minister to engage with all relevant stakeholders to explore the possibility of agreeing a voluntary Code. Mr. Travers advised that he intended to meet with as many stakeholders as possible and that he envisaged reporting back to the Minister on this matter by the middle/end of September.

Mr. Grace stated that a lot had changed since the consultation paper had been published and therefore responses to the paper may need to be updated. He added that legislation to merge the NCA and the Competition Authority will be published later this year and will contain an enabling provision that allows the Minister to introduce a statutory code at short notice. He explained the difference between primary and secondary legislation, emphasizing the latter's flexibility for introducing new regulation without the lengthy process of going through the Houses of the Oireachtas. He also stated that the work done to draft a voluntary code would feed into the establishment of a statutory code.

Mr. Gilmartin expressed concern in relation to the number of retail giants operating in Ireland to the detriment of small retailers. He added that prompt payment was also an issue and that the ICSA wanted to see a fair price paid to primary producers. He stated that the proposed code needed to address this as the single farm payment which kept farmers in operation until now has been totally eroded.

Mr. Punch said that they are dubious of the idea of a voluntary code but understood the strategy of the Minister and the Government in using the voluntary code as a stepping-stone to a statutory code. However, he added, that a voluntary code wasn't going to take effect overnight, no more than a statutory code. He is concerned that the food chain in Ireland from producer to consumer is out of balance and is not working as it should. He said that while beef prices paid to producers in Ireland are very low, retail prices in Ireland for beef are among the highest in the EU. He went on to say that Irish farmers were paid the least in the EU 15. Mr. Travers noted that retailers cite the high cost of doing business in Ireland. Mr. Punch replied that these high costs also apply to farmers as they too are operating in a high cost economy. He added that there is a food security issue also. He advised that ICSA was concerned in relation to the bona fides of retailers and whilst the ICSA would not object to a voluntary code as a stepping stone to the introduction of a statutory code, it would be particularly concerned if the effect of a voluntary code was to allow the present unsatisfactory situation to continue for the next 3 years with retailers stone-walling on the matter. Mr. Travers replied that his was a

short-term role to report to the Minister by the end of September to establish whether it is possible to introduce a voluntary code.

Mr. Punch note that the draft code appended to the 2009 consultation paper dealt with a number of specific issues including hello money. He said that this wasn't a big issue for them but was more relevant to small vegetable growers. He feared that there would be a watered down code after the negotiation process and added that this would be of little use as a stepping-stone. On the subject of mark-ups Mr. Punch stated that the Competition Authority considered it important to look at mark-ups in the pharmaceutical industry and that they should also look at the food industry. He added that New York State had introduced anti-gouging legislation to control prices.

Ms. Westbrook enquired about the legislation and the proposed provision to enable the introduction of a statutory code. Mr. Grace advised that the enabling provision would set out the criteria while the statutory instrument would lay out the code. He added that it is easier to change secondary legislation and it was also faster to introduce.

Mr. Travers enquired as to whether the ICSA saw value in the introduction of a voluntary code, even as an interim measure. Mr. Gilmartin asked if a statutory code would come in regardless. Mr. Travers replied that the Government is committed to bringing in a code as stipulated in the Renewed Programme for Government. He added that if a voluntary code was introduced it could be reviewed thereafter by the Government to establish if a statutory code is required. Ms. Westbrook wondered how its effectiveness would be measured, given that it would take a few years for a pattern to emerge. Mr. Travers replied that effectiveness would have to be measured whether the Code was voluntary or statutory code. He said that the issue was one of trust in the negotiation process between suppliers and retailers and asked if the ICSA saw a problem only with retailers. Mr. Punch replied that processors haven't clean hands either, particularly in the key meat and dairy sectors. He noted that the meat sector was effectively dominated by 3 large processors and that in the case of the dairy sector, there were lots of inefficiencies, especially in milk collection and the cost of pasteurisation and packaging, which seemed inordinately expensive.

Mr. Travers asked whether the ICSA saw a difference between production for the export market and production for the domestic market. Mr. Punch said that the players in the export market are quite similar to those in the domestic market with the same dominant players. He added that the ICSA had little contact with retailers. Mr. Phelan said that retailers won't entertain complaints from primary producers as they maintain that they get their produce from processors, not farmers.

Mr. Punch suggested that the lack of available information on the food chain might be looked into outside the issue of a Code along with the question of margins and what information might be made available and to whom.

Mr. Travers referred to several submissions made in response to the consultation paper, which asserted that the case for a Code and the necessary analysis to underpin the need for a Code had not been made. Mr. Punch wondered if this was due primarily to the unwillingness of retailers to provide the information necessary to conduct such an analysis and suggested that retailers should be obliged to provide the required information. He felt that the abolition of the groceries order favoured retailers and that consumers got nothing out of it. He wondered why more detailed information in relation to the Irish based operations of foreign owned retailers is not available and particularly in relation to the returns these retailers are achieving from their Irish

operations. Mr. Travers indicated that the annual reports of companies operating in Ireland are subject to Irish company law. He pointed out that private companies do not have to produce the same level of information in their reported accounts as public companies and that companies operating in different jurisdictions can choose to report on a group basis.

Ms. Westbrook asked how the Code would be enforced. Mr. Travers indicated that this was one of the issues to be considered as part of the consultation process but that under any code it is likely that an independent investigation process would be needed. Ms. Westbrook suggested that in the UK they are having significant problems in putting an enforcement process in place. Mr. Grace advised that he was aware of reports indicating that obtaining evidence for an effective enforcement process has proved difficult in Ireland as well as in the UK. He added that any enforcement process attaching to a voluntary or a statutory code, whether that involved an Ombudsman or any similar enforcement mechanism, would require complainants to provide the evidence required to justify enforcement action. Mr. Phelan cited by way of example the case of the Dublin Meath Growers who gave evidence of their experience of inappropriate retailer buying power to the Joint Oireachtas Committee on Enterprise, Trade and Employment. Mr. Travers stated that he understood that the retailer concerned did not accept that it had exercised inappropriate buying power in the said situation and that as far as it was concerned it was satisfied that it had developed a very good and positive relationship with the individual producers concerned. Mr. Punch suggested that there should be an annual report compiled of the various developments occurring in the industry. He added that retailers feel they are in a light touch regulatory situation but that if an annual report cited particular examples of unfair practices by retailers in their relationships with processors and producers that this could act as a useful constraint on such practices. He went on to say that a lot of the publicity by the multiples in relation to job creation is nonsense as what is involved is simply displacing jobs by putting small operators out of business. He hoped that the new body being created with the merger of the NCA and the Competition Authority would “tell it like it is”. Mr. Grace suggested that any retailer who would refuse to sign up to a voluntary code would have to contend with the adverse publicity stemming from such refusal. Mr. Punch noted that if the big players all refused to sign up, the code would be redundant.

Mr. Travers referred to threshold of £1 billion (sterling) in annual turnover, which applied to retailers covered by the Groceries Supply Code of Practice in the UK. He advised that in the view of a number of the respondents to the 2009 public consultation, this would translate to a threshold of €50 to €100 million in the case of Ireland. Mr. Punch questioned whether big retailers might seek to break their operations into a number of entities in order that they would fall below such a threshold. He wondered if a threshold of €5 million per annum might be more appropriate. Mr. Travers indicated that the main thrust of the responses to the public consultation by processors and producers related to unfair practices arising from inordinate buyer power exercised by the large retailers and that the case had been made strongly that this is where the main problem lay. It would be difficult to police effectively a code which applied to many thousands of retailers. Mr. Gilmartin suggested starting with the dominant players. Ms. Westbrook asked if all franchise models would be captured by the threshold and pointed out that some retailers also have wholesale businesses which buy huge amounts of food. Mr. Punch suggested that the threshold should be low enough to discourage the very big players, either through franchises or otherwise, from splitting their business to avoid being over the threshold.

Mr. Travers extended an invitation to the ICSA to submit any specific suggestions in relation to the make up of a code in writing in the next few weeks. He asked that in framing such suggestions the ICSA keep the bigger picture in mind. He pointed out that the Government had made clear its intention to introduce a statutory Code if a voluntary code did not prove feasible. Given these circumstances, he asked the ICSA to consider if it is worthwhile supporting a voluntary code as a first step. Mr. Phelan indicated that the ICSA accepted that high prices are an important issue. He said that most farmers operated at a loss last year and were only kept afloat by the single farm payment. Mr. Travers indicated that consumers are increasingly seeking lower prices especially in the current circumstances of reducing incomes and higher unemployment. He added that price levels in Ireland are also an issue for the tourism industry. Mr. Phelan responded that in Italy beef farmers are paid some 15% more than their Irish counterparts while Italian consumers pay some 12% less for beef than Irish consumers. Ms. Westbrook suggested that if the issue of margins on basic food products was not addressed the value of any code would be comprised. Mr. Punch added that whilst some of the issues need to be addressed at EU level, the Competition Authority should be looking carefully at the big players in the Irish market.

Mr. Travers closed the meeting and thanked the ICSA for their participation.

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Competition and Consumer Policy Section  
Department of Enterprise, Trade and Innovation  
28 July 2010

**Note of meeting with the Irish Creamery Milk Suppliers Association (ICMSA) on 9<sup>th</sup> July at 11.30am regarding the proposed Code for grocery goods undertakings**

In attendance: Mr. John Travers, Facilitator  
Mr. Kieran Dolan, ICMSA  
Mr. Jackie Cahill, ICMSA  
Mr. Cathal O’Gorman, DETI  
Ms. Margaret Ryan, DETI

The agenda was circulated and agreed.

Mr. Travers opened the meeting by referring to the ongoing debate in relation to the state of the relationships between the various stakeholders in the grocery goods sector and the commitment in the Renewed Programme for Government to introduce a Code of Practice for the Grocery Goods Sector. Mr. Travers advised that in advance of statutory provision for introducing such a Code, which he understood would be included in legislation currently being prepared by the Department, he had been asked by the Minister to engage with all relevant stakeholders to explore the possibility of agreeing a voluntary Code. Mr. Travers advised that he intended to meet with as many stakeholders as possible and that he envisaged reporting back to the Minister on this matter by the middle/end of September.

Mr. O’Gorman spoke about the consultation paper and gave a flavour of the responses, including that of the ICMSA in which the Association expressed its strong support for the establishment of a statutory Code.

Mr. Dolan stated that competition law is used against farmers in Ireland and is biased towards retailers. He gave the examples of the grain case in Drogheda and the dawn raid on ICOS regarding the liquid milk trade. Mr Travers asked if the ICMSA had particular material to support the position outlined which they wished him to consider. Mr Dolan indicated that they would give consideration to this and revert as necessary.

Mr. Cahill referred to the Eurostat survey which was published the previous week. He said it indicated that Ireland has the highest retail prices for dairy products but the lowest prices paid to farmers. He said that the ICMSA had opposed the abolition of the Groceries Order which, in their view has resulted in greater powers for retailers.

Mr. Dolan stated that the EU dimension was very important and that a voluntary code will not afford any protection against companies based outside Ireland. Mr. Travers drew attention to the fact that a number of EU position papers advocated that countries consider the introduction of appropriate Codes of Practice and that the Government commitment was in line with this.

Mr. Dolan emphasised the need for a requirement for transparency in the code including disclosure of profitability or margins on certain food items.

Mr. Travers indicated that legal advice would be needed to establish if such a disclosure requirement for the retail sector would be possible under existing company law .He said that the impact of such a requirement on the attractiveness of Ireland as a location for internationally mobile investment would also need to be considered.

Mr. Dolan asked about the timescale for the merger of the National Consumer Agency and the Competition Authority and whether that Agency will have statutory powers to introduce a mandatory code. Mr. O’Gorman replied that it is intended that the merged Agency be established next year and that the legislation to merge the bodies, which will be published later this year, will have a provision that enables the Minister to introduce a statutory code. A voluntary code could be introduced in the meanwhile.

Mr. Dolan asked what a code would mean for a British retailer with outlets in Ireland. Mr Travers and Mr. O’Gorman Pointed out that discrimination on the basis of nationality would not be possible or desirable under any code . Mr. Travers stated that three big retailers accounted for a high percentage of the Irish market. If they are all committed to an effective code it will mean fairer dealing all round. He added that suppliers have pushed strongly for a code because of their stated fear of unfair delisting and other practices by retailers. Producers have argued that what are perceived as unfair pressures on suppliers by the large retailers have consequential unfair knock-on effects on producers and small retailers by suppliers. He said that the purpose of any code introduced is likely to seek to provide a balance to meet the legitimate interests of the consumer, producer, supplier and large and small retailer.

Mr. Dolan suggested suppliers would have some security if they had written contracts. However, in the absence of transparency he had no confidence in a voluntary code. Mr. Travers noted that it had been argued by producers that food products are frequently used as loss leaders and that they consider that this is highly undesirable from their perspective. retailers made their profits He inquired whether the ICMSA considered that the margins of suppliers as well as that of retailers should also be divulged Mr. Cahill stated that this was the view of the ICMSA.

Mr. Dolan asked if it was intended to require all large retailers to be members of a voluntary code. Mr. Travers replied that this is a question he was exploring with retailers. He added that options were being explored with both sides at present. Mr. Cahill asked if it would be a requirement of the code that margins be revealed. Mr. Travers that this could be explored with stakeholders and that consideration would need to be given to how codes worked across Europe. He pointed to the content of the draft code published with the Consultation Paper issued by the Department last August and on which the ICMSA had made a strong submission. However, he added that it was likely that there would be strong resistance by retailers and by suppliers to the publication of commercially sensitive information. He noted that if a voluntary code became operational in the short-term it could form a pilot process on the need and format for a statutory code to be decided by the Government as deemed necessary.

Mr. Dolan asked if the Competition Authority would have the power to carry out enquiries. Mr. O’Gorman stated that the Competition Authority are the enforcement body for competition law and that they also do studies including studies into aspects of the retail trade. He added that they had powers to investigate as well as taking action on foot of complaints.

In summary Mr. Dolan stated that whether there was a voluntary or a statutory code the ICMSA wanted to see transparency.

Mr. Travers pointed out that the task which he had been asked to undertake was to explore with the main stakeholders the possibility or otherwise of a voluntary code. He thanked both Mr. Dolan and Mr. Cahill for attending the meeting and for their inputs.

He informed them that a summary report of the meeting would be sent to them for their agreement. The meeting concluded.

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Competition & Consumer Policy Section  
13 July 2010

**Note of Meeting with IDIA on 16 July 2010 at 11 am regarding the Code of Practice for Grocery Goods Undertakings**

In attendance: John Travers, Facilitator

Michael Barry, IDIA

Claire McGee, IDIA

Kieran Grace & Margaret Ryan, Department of Enterprise, Trade and Innovation

The agenda for the meeting was circulated and agreed. Mr. Travers opened the meeting by referring to the ongoing debate in relation to the state of the relationships between the various stakeholders in the grocery goods sector and the commitment in the Renewed Programme for Government to introduce a Code of Practice for the Grocery Goods Sector. Mr. Travers advised that in advance of statutory provision for introducing such a Code, he had been asked by the Minister to engage with all relevant stakeholders to explore the possibility of agreeing a voluntary Code. Mr. Travers advised that he intended to meet with as many stakeholders as possible and that he envisaged reporting back to the Minister on this matter by the middle/end of September.

Mr. Barry gave the background to IDIA stating that it's an association which represents both primary and secondary processors for both the domestic and international markets. He said that 85% of produce was exported leaving 15% for the domestic market. He added that the IDIA wouldn't have the global reach it has without the big retailers which gave them access to China and soon to India also. He went on to refer to a strategy document on Ireland's agrifood industry, Strategy 2020, which is being published shortly by the Minister for Agriculture and which predicts a 40% growth in the dairy sector with the abolition of milk quotas in 2015. He said that this means a 40% growth in exports and, that therefore, collaboration with retailers, who are in a position to facilitate such exports, is very important.

Mr. Travers asked if IDIA produce an annual report. Mr. Barry said that they did not but their main task was to deal with problems arising. He referred to the IDIA's submission and the graph therein which showed a period of stability caused by the CAP which is now gone and the period of volatility which is the current reality.

Mr. Travers asked Mr Barry to elaborate on the underlying reasons for the spike in prices in 2007/8 shown in the IDIA submission. Mr. Barry replied that the global demand was very strong at that point and that the EU and US had depleted their public stocks which meant no cooling impact on prices. He added that New Zealand and Australia didn't have product to export for climatic and other reasons adding further to upward price pressures so that prices to increase. He went on to explain that this period was followed by an oversupply with the subsequent drop in prices. Mr. Travers asked for any data that is available to IDIA from its contacts in Europe. Mr. Barry replied that the EU collects data which is fed into by the Department of Agriculture from the Irish Dairy Board. He added that the EU High level Group on dairying has suggested amending competition rules in order to better regulate prices. Mr. Grace stated that there is a clash of ideologies within the Commission between producer groups and the competition side. Mr. Barry stated that the producer groups and co-ops operated within their own specific rules and that the IDIA did not see any necessity for the Commission to regulate for them.



Mr. Travers said that while the market ultimately determined prices it had been argued in a number of submissions to the Department following the publication of the Consultation document on a Code of Practice last August and to him since he had been appointed as a Facilitator recently that the distribution of margins between the various players along the supply chain is imbalanced in favour of the retail sector. Mr. Barry replied that the IDIA accepted that price is largely determined by the marketplace but the IDIA is concerned about the lack of trust in the relationship between suppliers and retailers. He added that trust is vital and that suppliers represented by IDIA depend on retailers, especially the big retailers, to get their product to the market. He pointed out that the problem that producers have is that they feel powerless to influence the changes which impact on them, as there are many producers and few buyers. He said that unfair commercial practices which are currently going on are damaging the integrity and reputation of the business. He felt that reputation is paramount and cited the dioxin case where one and a half hours after the media broke the story he got a call from China about Irish exports.

Mr. Travers referred to a recent article by John Kay in the Financial Times which emphasised that trust is of the essence in business relationships and that, in its absence, voluminous contractual documentation which attempts to compensate for lack of trust is a poor substitute. Mr Kay had pointed out that the relationships between Toyota in Japan and its suppliers has been characterised by mutual trust and minimal contractual documentation in contrast with the motor industry in the United States where the opposite appeared to be the case and has been associated with a less successful industry. In this context it appeared that a one-page code was preferable to reams of paper. Mr. Barry concurred. He added that issues regarding food safety were no longer an issue between suppliers and retailers as they are taken as a given for all producers and suppliers.

Mr. Travers raised the subject of efficiency and alluded to the retailers argument that by putting pressure on processors forces them to implement efficiencies that wouldn't otherwise happen. He continued that processors and suppliers argue that cost-reducing efficiencies forced on them by the buying power of large retailers shield retailers from implementing required cost-reducing efficiencies at retail level. Mr. Barry responded that IDIA members accept that a continual search for efficiencies are an essential requirement for business and for success in the global markets they serve in particular. He added that the crucial reason that the type of regulation proposed in a Code of Practice is required is that, in current circumstances suppliers cannot "cry foul" when the rules of engagement are changed unilaterally by large retailers as there is no referee. He cited the example of food safety where the Food Safety Authority acts as referee to resolve differences that might otherwise arise between producers, suppliers and retailers.

Mr. Travers refereed back to the comment made by Mr. Barry on retailers helping get their produce into China and asked for the views of IDIA in relation to the growing strength in the retail market of own brands. Mr. Barry stated that IDIA was not in favour of country of origin labelling as 40% of own brand cheddar sold in the UK is Irish sold largely under the own brand labels of major retailers. IDIA supported the idea of EU origin labelling as it doesn't want customers to be misled.

Mr. Travers asked about the IDIA's position regarding the voluntary nature of the proposed Code. Mr. Barry gave the reason for his organisation advocating a statutory code is that he couldn't see how a voluntary code would address the problem of trust. Mr. Travers suggested that a voluntary code might be seen to imply a positive level of

trust between suppliers and retailers whereas a statutory code by its very nature would imply a lack of trust. Mr. Barry said that the IDIA's experience of a voluntary code in relation to food safety was very positive as both sides sat down together and agreed collectively to do something. However, he added, in the case of grocery goods the problem is the deep mistrust which exists at present between suppliers and retailers. He stated that because of the buying power of retailers many suppliers are reluctant to complain of unfair business practices by retailers for fear of punitive delisting and, that, therefore the situation requires an independent referee with legislative backing in the view of IDIA. Mr. Travers said that an independent referee was not inconsistent with a voluntary code. Mr. Barry expressed the view that, while IDIA could give further consideration to the matter it is difficult to see how a balanced agreement on a Code of Practice could be achieved when one side of the parties had an imbalance of power e.g. the power of a retailer to unilaterally de-list a supplier for retaliatory negotiation reasons.

Mr. Travers mooted the idea of convening a meeting with representatives of retailers and suppliers to explore the possibility of a voluntary code with a legal person sitting in to ensure that competition law issues are not breached. He added that he understood that Retail Ireland and the FDII were prepared to consider such an approach without prejudice. He referred to the Department's draft code which was intended as a vehicle around which discussions could take place. The current proposition is that these discussions would take place between the executives of the representative bodies concerned in the first instance. He said that an updated document similar to the Consultation document circulated last August would be prepared by the Department for consideration at such a meeting. Mr. Barry said that he would, without prejudice, consult IDIA's members on the matter. However, he expressed concern. Mr. Travers suggested that the only way to see if a voluntary code can become a reality is to get both sides together to consider the matter under an independent chairman such as himself. He mentioned the voluntary code for the sale of alcohol agreed between retailers in strong competition with each other in recent years and how that worked while noting that a Code of Practice for the grocery trade would be of a much different scale and scope. He said that the proposed new body to be formed from the merging of the NCA and the Competition Authority had been suggested in a number of submissions as a suitable means to monitor any Code of Practice for the grocery sector. He suggested that there, if possible, in the first instance which both sides would jointly shape rather than having Government imposing a Code with which no side might be satisfied. If such a voluntary Code is established the Government has indicated that it would review its operation to determine if it should be made statutory. He said that, he understood that it is intended to make enabling provision for a statutory Code in the legislation being prepared to achieve the merging of the National Consumer Agency and the Competition Authority. The draft Bill is scheduled for publication in the coming months with enactment expected during the course of 2011. Mr. Barry said he would favour a small cost effective system to an expensive structure and referred again to food safety and how everyone accepts the arbiter. Mr. Grace pointed out that safety measures are very different to relationship issues and went on to say that even written contracts can be read differently by lawyers. He said it wasn't an analogous situation. Mr. Barry accepted this but added that you need a regulator with teeth although Ireland Inc doesn't want a policeman for everything.

Mr. Travers raised the issue of the alleged coercion of payments by retailers from suppliers that had been raised in a number of submissions. Mr. Barry replied that there is a strong view that records such as e-mails would show this to be the case but that these are never produced to the regulatory authorities for fear of de-listing.

Mr. Travers said that the voluntary code, if it worked, would be likely to stay but if it did not the Government had indicated that it would become statutory. Mr. Barry replied that the focus should be on resolving the issue of mistrust and not whether the code would be voluntary or statutory. However, he added that the IDIA's members can't see a voluntary code working. Mr. Travers replied that this is the purpose of the task that he had been asked to undertake is to explore with the interested parties if an agreed voluntary Code is possible at this time as a first step. He suggested that the IDIA might consider the issues following this meeting to establish if its members would be agreeable to discussions along the lines outlined.

Ms. McGee stated that IDIA wants to see the problem of mistrust resolved and the development of an environment of trust. She added that price wasn't the only issue and suggested that any code should be robust enough to deal with all problems. She didn't want to see a voluntary code that was ineffective getting in the way of the introduction of a more robust statutory code. Mr. Travers suggested that there could be a sunset clause for any voluntary code without prejudice to what comes after it. He added that if a voluntary code doesn't work a statutory code could be developed using the experience gained in establishing a voluntary code. Mr. Grace stated that the Bill which would merge the NCA and the Competition Authority, which was expected to be published before the end of the year, would contain an enabling provision for the introduction of a statutory code at short notice by way of a statutory instrument. He explained that secondary legislation could be introduced quickly and also amended quickly if the need arose.

Mr. Travers raised the issue of costs and the likelihood that costs would have to be borne by those being regulated. He cited the UK situation where retailers with turnover over a certain threshold were levied. Mr. Barry said he would be disappointed if nothing were done because of costs but cautioned on using turnover as it can be misleading. He added that regulation should be effective but as light touch as possible. Mr. Grace stated that the Irish market is different to the UK and that if the code is balanced through discussion between retailers and suppliers it could effectively help to address the trust issue. He said that balance might suggest that suppliers, who are strong advocates of a Code, should also be levied. Mr. Barry accepted that this is an issue that required further consideration. He added that the supplies can easily be changed by retailers but that the converse is not the case, however, because of the relative numbers.

Mr. Travers closed the meeting and thanked Mr. Barry and Ms. McGee for their participation. He added that they should provide any additional comments as soon as possible. Mr. Grace commented that the overarching issue is consumer welfare and this should be considered as there should be no hindrance to passing on of low prices to consumers. Mr. Barry reiterated that IDIA accepted that price be dictated by the market place and that the main focus required is on the trust issue.

**Note of meeting with the Irish Farmers Association on 5<sup>th</sup> July 2010 at 10.00am  
regarding proposed Code for grocery goods undertakings**

In attendance: Mr. John Travers, Facilitator  
Mr. John Bryan, IFA  
Mr. Pat Smith, IFA  
Ms. Elaine Farrell, IFA  
Mr. Cathal O’Gorman, DETI  
Mr. Kieran Grace, DETI

The agenda was circulated and agreed. Mr. Travers opened the meeting by referring to the ongoing debate in relation to the state of the relationships between the various stakeholders in the grocery goods sector and the commitment in the Renewed Programme for Government to introduce a Code of Practice for the Grocery Goods Sector. Mr. Travers advised that in advance of statutory provision for introducing such a Code, which he understood would be included in legislation currently being prepared by the Department, he had been asked by the Minister to engage with all relevant stakeholders to explore the possibility of agreeing a voluntary Code. Mr. Travers advised that he intended to meet with as many stakeholders as possible and that he envisaged reporting back to the Minister on this matter by the middle/end of September.

Mr. O’Gorman spoke briefly on the Consultation Paper which was published by the Tanaiste in August 2009 to which 29 responses were received, including one from the IFA, all of which are available on the Department’s website.

Mr. Bryan advised that the Association welcomed the opportunity to meet with Mr. Travers. He advised that the IFA’s position was clearly set out in its submission to the Consultation Paper and that its strong view was that there should be a statutory rather than a voluntary Code. The IFA’s recently published document Equity in the Food Supply Chain clearly demonstrated the significant imbalance between the price being paid to primary producers and the prices being charged by retailers. He added that this was further borne out by the findings of the recent Eurostat report, which showed Ireland to have amongst the highest food prices in the EU27 at a time where the price being paid to primary producers had decreased significantly. This compared with the Report’s findings in relation to the UK, where although the price to the consumer was less than the EU27 average, primary producers were receiving higher prices than their counterparts in Ireland. The IFA was of the view that the findings of the aforementioned reports clearly demonstrate that the food supply chain in Ireland is broken and needs to be fixed. The IFA was of the view that there was a need for greater transparency and that retailers should be obliged to disclose their margins so that the proportion of the share-out of the final retail price achieved by the various links in the supply chain can be determined.

The Association, whilst it noted the commitment in the Programme for Government and the appointment of Mr. Travers, was disappointed in the delay in regulating this area. For that reason the IFA strongly believed that there was a need for greater urgency and was anxious that a statutory Code, which would cover all elements of the grocery chain, be introduced without delay.

Mr. Travers noted that the IFA's strong preference was for the establishment of a statutory Code. Insofar as his task was concerned, he felt it important to focus on the detail and the specific provisions that might be included in any Code, whether such a Code might be statutory or voluntary. In this regard he wondered as to whether the IFA had views on the draft Code which had been appended to the Consultation Paper published by the Tánaiste last year.

Mr. Smith advised that IFA was not in a position to comment on the detailed provisions of the draft Code at this stage but would be happy to do so and revert to Mr. Travers on the matter. He advised that it most important that the Code ensures that retailers, who are effectively the price setters, acknowledge their responsibility to those operating further up the supply chain and particularly to primary producers who are price takers and who are ultimately most affected by the unfair practices engaged in by retailers. In this regard it was important to realise that retailers were engaging in practices in various areas such as labelling, promotions etc. which were effectively transferring unfair risk from the retailer to the producer. The IFA supported the promulgation of a Code based on set of clear and simple principles which included at its heart an overarching principle of fair dealing.

Mr. Travers wondered whether the IFA had any particular views on the Code that had been promulgated in the UK. The IFA pointed out that whilst it was important to realise that the dynamics of the Irish and the UK markets were very different, not least in terms of their respective sizes, the launch of the Code in the UK demonstrated the UK authorities' acceptance of and willingness to act in this area. The IFA advised that whilst primary producers and others in the supply chain had been subject to unfair practices in the UK in the past which had resulted in significant consolidation there, UK retailers were beginning to reassess their relationships with suppliers and primary producers through initiatives such as guaranteed contracts. Mr. Travers advised that he would be glad to receive any details the IFA might be able to provide in relation to these UK initiatives. Mr. Bryan also advised that aside from developments in the UK, the issue of relationships between the various stakeholders in the food supply chain was also a matter of concern at European level, as evidenced by the Communication on the Food Supply Chain published by the EU Commission in 2009.

Mr. Travers wondered as to whether the IFA had any particular views as to how the Code might be enforced, particularly given the criticisms of the enforcement difficulties in relation to the existing provisions of the 2006 Competition Amendment Act and also similar criticisms of the enforcement of the UK Code of Practice. The IFA advised that it supported the creation of an Ombudsman to enforce the Code and that the funding of the activities of the Ombudsman should be borne by retailers who are the ones engaging in the unfair commercial practices being suffered by primary producers

Mr. Travers advised that in the course of his meetings with stakeholders he was attempting to find as much common ground as possible in relation to how the Code should be framed. He advised that he would appreciate if the IFA would keep this in mind when submitting its comments on the detailed provisions that it wished to see included in the Code, which he would appreciate receiving by the middle of July. Mr. Travers thanked the IFA representatives for their attendance and looked forward to receiving their details comments on the Code in due course.

**Note of Meeting with the Irish Farmers Association's Retail Project Team on Friday  
26<sup>th</sup> November 2010**

*In attendance:*

*John Travers, Facilitator*

*Cathal O' Gorman, Department of Enterprise, Trade and Innovation*

*John Bryan President*

*Michael Doran, Chairman Livestock Committee*

*James Murphy, Chairman Sheep Committee*

*Thomas Carpenter, Chairman Potato Committee*

*Brian O'Reilly, Chairman Horticulture Committee*

*Alo Mohan, Chairman Poultry Committee*

*Kevin Kiersey, Chairman Dairy Committee*

*Padraig Mulligan, Chairman Liquid Milk Committee*

*Pat Smith, General Secretary*

*Elaine Farrell, Retail Liaison Executive*

Mr. Travers opened the meeting by welcoming the delegation from the Irish Farmers' Association. Mr. Bryan thanked Mr. Travers for the opportunity of the meeting. He advised that whilst that the Association appreciated the task that Mr. Travers had been asked to carry out, it did not have any faith that a voluntary Code would be effective and remained of the belief that a statutory Code was needed. Mr. Bryan advised that he had asked the Chairmen of the various Commodity Committees of the Association to attend the meeting in order that they could give a first hand account as to how the practices of the retail sector were affecting producers in the different commodity areas. Before asking the Chairmen to give their accounts, he wondered if Mr. Travers might give an update on the facilitation process.

Mr. Travers advised that in advance of the enactment of the necessary legislation to allow the Minister to introduce a statutory Code, he had been asked to facilitate discussions with relevant stakeholders to explore the possibilities of developing a voluntary Code. Mr. Travers stated that he had met with most of the stakeholders who had responded to the public consultation carried out by the Department in 2009. Following on from this round of meetings the Department, at his request, had drawn up a revised draft of the Code. The revised draft Code had been circulated to Food and Drink Industry Ireland (FDII), as the main representatives of suppliers, and also to Retail Ireland (RI), as the main representatives of retailers, seeking their observations. Mr. Travers advised that whilst FDII's observations on the revised draft Code had been received in September, the observations of RI had not been received until more recently. Mr. Travers advised that he had arranged to meet both sides to see how the matter could be progressed in the light of their respective views on the revised draft Code. In this regard he had already met RI in the past number of days and intended to meet FDII in the following week.

Insofar as the meeting with RI was concerned, Mr. Travers stated that whilst RI remained opposed in principle to the introduction of a Code, it had made a proposition for engagement with suppliers based on developing an agreed set of principles which would be framed with the intention of dealing with particular problems in the supply chain. Mr. Travers advised that he intended to put R.I.'s proposition for engagement to suppliers at the meeting he had arranged with them for the following week. Whilst he could not anticipate what the reaction of the suppliers would be, Mr. Travers stated he had requested that RI set out a list of retailers' problems with the current method of operation of the grocery supply

chain together with a suggested High Level set of Principles for dealing with those problems.

Mr. Travers stated that in his forthcoming meeting with FDII, he would advise them of R.I.'s position and that he would invite them also to forward a list of their problems together with their set of principles for dealing with those problems. Mr. Travers advised that if both sides were agreeable to this suggestion, it would be his wish that each side would share with the other the details of their respective problems and principles. He advised that he would then seek to convene a joint meeting at which the respective problems and principles could be discussed with a view to establishing if a measure of agreement could be achieved on a common position on these issues.

Mr. Bryan thanked Mr. Travers for the update. In his view it was clear that the retailers were foot dragging and did not appear to be interested in engaging meaningfully with any Code. Insofar as primary producers were concerned, the introduction of a Statutory Code was all the more necessary as they continue to suffer from the unfair practices of retailers to the extent that the returns they are getting from their produce often do not cover the cost of production. Mr. Bryan suggested that to illustrate the reality of these unfair practices, he would ask the Chairmen of the different commodity committees to appraise Mr. Travers of the effect that the said practices are having on their particular sectors.

Mr. Mohan advised that as Chairman of the Poultry Committee he wished to make the point that poultry producers were suffering considerably from the practices of the multiples, who were using their significant buying power to engage in abusive practices. Poultry producers were particularly concerned at the manner in which the multiples were targeting branded products and seeking to replace them with own brands. Mr. Mohan cited an example whereby a particular retailer, selling both branded and own brand eggs, had deliberately reduced the price of their own brand eggs by 30c which significantly undercut the price of the branded eggs it stocked. Mr. Mohan advised that this was clear evidence of the intentions of the retailer concerned to undermine the branded product and to replace it with the retailer's own brand.

Mr. Kiersey stated that as Chairman of the Dairy Producers Committee he wished to reiterate dairy producers' strong support for the immediate introduction of a statutory Code. Mr. Kiersey advised that dairy producers had invested heavily in promoting their products through such means of the National Dairy Council's labelling campaign etc. and were concerned that this was being severely undermined by the practices of retailers. Mr. Kiersey advised that dairy producers remained strongly of the view that a statutory Code was necessary to deal with the excessive demands of retailers.

Mr. Doran advised that whilst only 10% of national beef production is actually sold in Ireland, livestock farmers were also suffering from the orchestrated race to the bottom by retailers. He advised that beef producers were particularly concerned by the ongoing demands of retailers for continual promotions, which were undermining the viability of beef producers. He was of the view that the ability of retailers to insist on continual promotions reflected the reality of the disproportionate market power they exercise.

Mr. Murphy advised that as Chairman of the Sheep Committee he was also concerned by the activities of the multiples. He advised that his members had invested heavily with the Bord Bia Quality Assurance Programme and that the various assurance schemes operating under the Programme, including the scheme for lamb, were highly valued by consumers. Mr. Murphy was concerned that the integrity of the assurance schemes was not being honoured by retailers as he was aware of instances where retailers had tried to pass off New

Zealand lamb as Quality Assurance Irish lamb. Mr. Murphy was strongly of the view that such abuse should not be permitted and felt that this was an issue to be addressed under the statutory Code of Practice.

Mr. O' Reilly stated that horticulture producers also believed that a statutory Code was the only credible way of effectively addressing the current imbalance in the supply chain. Mr. O' Reilly was concerned that the introduction of a statutory Code should be accompanied by robust enforcement measures so as to ensure that the Code will be effective.

Mr. Cullinan stated that as 60% of pig production is sold on the home market, pig producers were particularly affected by the activities/practices of the multiples. In this regard pig producers shared the concerns of others in relation to abuses of the Bord Bia Quality Assurance Schemes. He advised that his members were also concerned that the Code should address the issue of prompt payment which was very important. Mr. Cullinan stated that it was also important that there be greater transparency in the margins being achieved by the various stakeholders in the supply chain and particularly in the case of the margins of the multiples, which he felt were excessive.

Mr. Mulligan stated that the net issue for milk producers is that they should receive adequate compensation for production as currently the returns received by milk producers were by any measure inadequate and did not reflect the production process.

Mr. Carpenter stated that insofar as potato producers were concerned, given that practically 100% of production is sold in Ireland and as the nature of the product did not involve much processing, potato producers were particularly affected by the activities of retailers. A primary concern of potato producers was the ongoing price promotions by retailers and the effect these promotions were having on the viability of potato producers.

Mr. Bryan stated that he hoped that the contribution from the Chairmen of the various commodity committees had demonstrated the reality of the effect that the unfair practices of the multiples are having on primary producers in all areas of the food sector. He stated that retailers had to realise that they had a responsibility to others in the supply chain and that it was clear that the only way this could be done would be through the introduction of a statutory Code of Practice.

Ms. Farrell enquired as to whether Mr. Travers believed if the multiples would engage with the facilitation process. Mr. Travers stated that the retailers had indicated to him that they were prepared to engage and had outlined the basis of that as they saw it. Mr. Travers advised that he would be meeting with the representatives of suppliers in the coming days and he would put the retailers' proposition to them to see if this could form the basis of discussions.

Mr. Smith advised that from the primary producers point of view the timeline for the introduction of a Code was very important. Insofar as the IFA was concerned, it was clear that the retailers were stalling and it believed that a short deadline for the conclusion of process should be set following which the Minister should proceed immediately to promulgate a statutory Code.

Mr. Travers advised that the introduction of a statutory Code was a matter for the Minister and was not a matter he could comment on. Insofar as the task he had been given, namely to facilitate discussions in relation to the development of a voluntary Code, he would be reporting to the Minister shortly to update him on his efforts and that it would be a matter for the Minister if he wished to extend the period for the facilitation process.



Mr. Travers concluded the meeting by thanking the IFA delegation and the Chairmen of the Commodity Committees for their contributions. He advised that the secretariat would draft a note of the meeting, which would be forwarded to IFA as a record of what was discussed.

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Competition and Consumer Policy Section  
15<sup>th</sup> December 2010

**Note of Meeting with Lidl Ireland on 7<sup>th</sup> August 2010 at 12noon regarding a Proposed Code of Practice for Grocery Goods Undertakings**

In attendance: John Travers, Facilitator

Kenneth McGrath & Ryan McDonnell, Lidl Ireland GmbH  
Cathal O' Gorman, & Margaret Ryan, Department of Enterprise, Trade and Innovation

The agenda for the meeting was circulated and agreed. Mr. Travers opened the meeting by referring to the ongoing debate in relation to the state of the relationships between the various stakeholders in the grocery goods sector and the commitment in the Renewed Programme for Government to introduce a Code of Practice for the Grocery Goods Sector. Mr. Travers advised that in advance of further consideration of statutory provision for introducing such a Code, he had been asked by the Minister to engage with all relevant stakeholders to explore the possibility of agreeing a voluntary Code. Mr. Travers advised that he intended to meet with as many stakeholders as possible and that he envisaged reporting back to the Minister on this matter by the middle/end of September.

Mr McGrath advised that Lidl, which began operating in Ireland in 2000, currently operates 121 stores which are located right across the whole country in every city, county and major town employing approximately 2,800 staff. He explained that the typical Lidl store is approximately 1,500 square metres in size (gross) and sells in excess of 1,200 listed product lines, most of which are own brand as well as special lines, both food and non food, featured on two main advertising days, Monday and Thursday. Insofar as its supply chain is concerned, Lidl as a European discount retailer of food and non food has an international supply base. Lidl advised that it has over its 10 year history in Ireland steadily increased its Irish supplier base. In terms of logistics, Lidl advised that it only requires its suppliers to deliver to Lidl's distribution centres, of which there are 3 in the Republic (Newbridge, Mullingar and Charleville), and that Lidl then supplies its stores directly from these centres unlike other retailers who require much more of their suppliers.

Mr. Travers stated that he was aware from Lidl's response to the 2009 Public Consultation process on a Code of Practice initiated by the Department of its opposition to the introduction of a Code of Practice for the Grocery Goods Sector. He referred to the commitment in the Renewed Programme for Government to establish a Code and wondered whether this development affected Lidl's view. Mr. McGrath advised that Lidl remained opposed to the introduction of a Code but acknowledged the statement of intent in the Programme for Government and the reality of the actions likely to flow from this.

Mr. McGrath advised that Lidl operates its own Code of Conduct for engaging with all its business partners, including with its suppliers, as appended to its submission of September last. The principles underlying its Code are based on dealing with its partners in a fair and equal manner and to that end Lidl does not engage in those practices, such as demanding shelf positioning money etc, which have given rise to the calls for the introduction of a statutory Code.

Mr. McGrath advised that although the introduction of a Code based on the draft which had been appended to the 2009 Consultation Paper would not particularly affect Lidl, given that it did not engage in unfair commercial practices, Lidl would be concerned that the introduction of any Code could add a layer of additional cost, particularly in

terms of compliance costs etc. Lidl was of the view that in these difficult times Government should be focussed on extracting rather than adding cost.

Mr. McGrath advised that if a Code were to be introduced, there should be no question of it being a protectionist measure but rather it should have the consumer and the consumer's interest at its heart. Any Code should seek to deal with those undertakings that are engaging in unfair commercial practices and should not just be confined to retailers but should also cover suppliers, particularly large suppliers, who also occupy positions of dominance in their own areas.

In terms of the specific provisions of the draft code appended to the Consultation Paper, Mr. McGrath expressed concern that proposed provisions such as the form of business agreements, variations in business agreements, changes to supply arrangements etc. would create unnecessary rigidities and would not reflect the reality of operating in the grocery goods sector, particularly in areas such as fast moving goods where there needs to be flexibility and the ability to react to circumstances and opportunity. In such circumstances it is often necessary that agreements between retailers and suppliers be made quickly including the undertaking of verbal agreements.

Mr. Travers wondered as to Lidl's experience of Codes operating in other countries given its international presence. Mr. McGrath advised that whilst Lidl was covered by the UK GSCOP that Code had only been promulgated relatively recently and in any event the practices prohibited under the UK Code were not engaged in by Lidl. In relation to other countries, Mr McGrath advised that as a discount retailer Lidl had a limited share of those markets and most likely fell outside the ambit of any codes operating in other member states. Lidl queried what the Department's research highlighted in respect of the introduction by other EU countries of codes in this area. Mr. O' Gorman advised that the Department was aware of a mixture of different types of codes and legislation operating in different member states. Mr. O' Gorman undertook to forward a note on this matter to Lidl.

Mr. Travers advised that one of the issues that had been raised was who should be covered by any Code and that a number of stakeholders had suggested that extrapolating from the £1 billion threshold in the UK Code, a turnover threshold of €50 to €100million might apply to any Code in this jurisdiction. Mr. McGrath responded that such a threshold would cover Lidl's business in Ireland.

Mr. Travers enquired as to whether Lidl had any particular views in relation to the impact the Retail Planning Guidelines were having on retail development and competition. Mr McGrath noted that the Guidelines were currently being reviewed by the Department of Environment, Heritage and Local Government. He advised that Lidl had made a submission to Environment outlining its views in relation to the operation of the Guidelines. He understood that the review of the Guidelines would be completed later this year or early in 2011.

Mr. Travers advised that part of his task in meeting with stakeholders was to try to find as much common ground as possible in relation to how the Code should be framed. Mr. Travers enquired as to whether there was any particular message Lidl would wish to convey back to the Minister. Lidl advised that notwithstanding its principled opposition to the introduction of a Code, it was strongly of the view that any Code should not impose any additional layer of costs, that the Code should look at the relationships between small retailers and big suppliers and that it should take full account of the diverse nature of the various stakeholders in the grocery goods sector.

Mr. Travers thanked Lidl for outlining its position in relation to the Code. He advised that if Lidl wished to make any additional points in the aftermath of the meeting, he would be glad to receive them. As regards the next steps Mr. Travers indicated that having met with all the relevant stakeholders, he would consider whether further meetings were necessary but that in any event he expected to report back to the Minister on the matter by end September.

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Competition and Consumer Policy Section  
11<sup>th</sup> August 2010

**Note of Meeting with Marks & Spencer on Friday 2<sup>nd</sup> July 2010 at 2.30pm regarding the Code of Practice for Grocery Goods Undertakings**

In attendance: Mr. John Travers, Facilitator  
Mr. Jonathan Smith, Marks & Spencer  
Mr Stewart Nisbet, Marks & Spencer  
Mr. Cathal O’Gorman, DETI  
Ms. Margaret Ryan, DETI

The agenda for the meeting was circulated and agreed. Mr. Travers opened the meeting by referring to the ongoing debate in relation to the state of the relationships between the various stakeholders in the grocery goods sector and the commitment in the Renewed Programme for Government to introduce a Code of Practice for the Grocery Goods Sector. Mr. Travers advised that in advance of statutory provision for introducing such a Code, which he understood would be included in legislation currently being prepared by the Department, he had been asked by the Minister to engage with all relevant stakeholders to explore the possibility of agreeing a voluntary Code. Mr. Travers advised that he intended to meet with as many stakeholders as possible and that he envisaged reporting back to the Minister on this matter by the middle/end of September.

Mr. Travers noted that Marks & Spencer (M&S) as a UK company had experience of operating the UK Supermarkets Code of Practice since its introduction in 2002 and more recently the revised Groceries Supply Code of Practice which was promulgated in February this year. In the light of that experience Mr. Travers wondered how M&S viewed the operation of the UK and whether it had any particular views on the introduction of a voluntary Code in this jurisdiction.

M&S advised that as the revised GSCOP was only promulgated in the UK a little over 4 months ago, it was too early at this stage to know what impact it might have. For its part M&S fully supports the fair dealing principle enshrined in the UK Code. Insofar as its operations in Ireland are concerned, M&S has a total of approximately 25 suppliers on the island of Ireland and its strategy is to build strong relationships with Irish suppliers. In this regard it has taken particular initiatives such as its select farm policy which are intended to cement its relationships with its suppliers.

Mr. Travers said that he understood that as part of the consultation process in relation to the development of the UK Code M&S had submitted the general terms of trade that it employs with suppliers in its UK operations. Mr. Travers wondered if M&S would be prepared to forward on a copy of its general terms of trade. Mr. Smith undertook to check this matter out and to revert to Mr. Travers on the position.

Mr. Travers advised that part of his task was to examine what specific provisions should be included in the Code and in this regard he wondered as to whether the M&S had views on the draft Code which had been appended to the Consultation Paper published by the Tánaiste last year. M&S advised that it subscribed to the response its representative body Retail Ireland had submitted to the Consultation Paper, which also dealt with the draft Code.. Mr. Travers advised that it was his intention to invite all those partaking in this process to submit their views on the provisions of the draft Code including how the Code might be improved by the addition, removal, amendment of particular provisions. Mr. Travers asked if M&S wished to submit any views of the specifics of the draft views if they would forward those views by the middle of July.

M&S advised that it was strongly of the view that any Code must be based on the principle of fair dealing between all elements of the supply chain and should not only deal with the relationships between large retailers and suppliers but also the relationships between large suppliers and small retailers. In this regard M&S noted that the Irish food retail map was significantly different to that in the UK in that the small retailer continues to be a significant presence in towns and villages in Ireland unlike the UK.

M&S advised that in considering the question of the enforcement of the Code regard should be had to the Voluntary Code on the Display and Advertising of Alcohol in mixed premises. Mr. Travers advised that he understood that this Code was funded by retailers based on their turnover in the market. M&S, whilst accepting that this was the case, pointed out that the Code on Alcohol essentially only involved retailers and thus was funded solely by them, whereas the Code proposed for the Grocery Goods Sector involved suppliers as well as retailers and that this would have to be taken into account in any funding model for the Grocery Code.

M&S advised that notwithstanding the establishment of the voluntary Code on Alcohol and the proposal to introduce a Code in the Grocery Goods Sector, that it would be important to recognise that undue interference in markets can sometimes lead to unintended consequences such as happened in the licensed trade in the UK, where the experience has been that pub landlords have hampered by restrictive agreements from sourcing cheaper product thus preventing them from passing on lower prices to the consumer.

Mr. Travers concluded by thanking Mr. Smith and Mr. Nesbitt for the meeting. He reiterated his invitation to M&S to forward any detailed comments it may have on the draft Code and he hoped M&S would be in a position to forward on a copy of its general terms of trade with its suppliers. Mr. Travers undertook to forward a short note recording the details of the issues discussed at the meeting and invited M&S to submit any amendments that it wished to the note. The meeting then concluded.

**Note of meeting with Legal Advisor Working with Firm of Solicitors on 9th September at 11.30am regarding proposed Code for grocery goods undertakings**

In attendance: *Mr. John Travers, Facilitator*  
*Legal Advisor from Firm of Solicitors*  
*Mr. Cathal O’Gorman and Ms. Margaret Ryan, DETI*

1. The agenda was circulated and agreed. Mr. Travers opened the meeting by thanking the Legal Advisor for his attendance. He advised that as part of his task he was seeking to engage with as many of the stakeholders that had replied to the 2009 public consultation on the Code as possible. Mr. Travers noted that the Legal Advisor had expert knowledge from his work with firms in the groceries goods trade and that he had expressed his support for the introduction of a Code. Given the task he had been asked to carry out by the Minister, namely to engage with stakeholders in relation to the possible development of a voluntary Code, Mr. Travers wondered as to whether the Legal Advisor had any views as to how the position could be moved forward.
2. The Legal Advisor stated that he wished to place on record that any views he would offer were personal views. The Legal Advisor stated that in considering the arguments in relation to the introduction of a Code, it was important to realise the extent to which the grocery goods market was influenced by the buying power of the large supermarkets. He advised that the reality was that the multiples were in effect gatekeepers to the market which effectively meant that suppliers were unduly dependant on the multiples. This dependency effectively meant that the multiples yielded very significant buyer power over suppliers. He noted that the reality and the extent of that buying power could be seen in the judgments of the European Court in the Colgate-Palmolive case and more particularly in the domestic arena in the recent Kerry Breeo-Competition Authority High Court case.
3. The Legal Advisor stated it was important that the necessary research and analysis be undertaken in relation to the extent of countervailing retailer buying power in the Irish market. On the question of whether any Code should be voluntary or statutory, he expressed the view that the Code should be statutory as he did not see how a voluntary Code could be effectively enforced. In terms of enforcement, he suggested that one area that might be looked at would be to make provision in company law requiring retailers to include in their annual returns/reports a statement attesting to the retailer’s compliance with the requirements of the Code. He was of the view that requiring such a statement could get over the reluctance of suppliers to give evidence against retailers engaging in anti-competitive practices. Mr. O’ Gorman recalled that the issue of the directors’ compliance statements had been the subject of considerable debate in the company law compliance area which had not resulted in any great degree of consensus.
4. The Legal Advisor also noted that another particular concern was the ever increasing presence of own label products on retailers’ shelves which he felt was having considerable damaging effects not only in terms of the impact on branded goods but also in terms of the dynamic between retailers and their suppliers and in addition in terms of the level of choice being offered to the consumer. Mr. Travers noted that a number of suppliers’ representatives had made similar contentions but

that on the other hand retailers had contended that their outlets stocked own label produce side by side with branded produce and that it was ultimately a matter for the consumer to choose which produce they wished to support. The Legal Advisor, however, expressed the view that the multiples controlled the shelf space and what went on the shelves. He said that the multiples can use the countervailing buying power on what goes on and what does not go on the shelves.

5. The Legal Advisor stated that it was felt by some that the multiples have, in the use of their buyer power, kept prices down to the benefit of consumers. He said that whilst this might appear to be plausible, the evidence does not show that the benefits have been passed on to consumers. Indeed many commentators have expressed the view that lower supplier prices have largely been absorbed by the multiples rather than being passed on to consumers. He expressed the view that the exercise of buyer power and the strength of own label can also lead to suppliers reducing their research into new products or being innovative which in the medium to long term would be to the detriment of consumers.
6. Mr. Travers wondered if the Legal Advisor had any suggestions in relation to the facilitation process he had been asked to carry out by the Minister. The Legal Advisor stated that he did not underestimate Mr. Travers' task but, that in his view, the best way to proceed would be to try to focus the agenda on addressing the specific issues/practices which are giving rise to the difficulties between suppliers and retailers. He suggested that consideration be also given to the mechanics as to how any code would operate and the training that should be given to those charged with operating the Code, such as purchasing managers.
7. Mr. Travers wondered as to whether the Legal Advisor had any views in relation to the draft outline Code which had been appended to the Consultation Paper published by the Tánaiste as part of the 2009 public consultation process. The Legal Advisor stated that in his view care needed be taken in relation to the framing of the language to be used in the Code so as to lessen the possibility of those coming within the ambit of the Code using loopholes to legally evade their obligations under the Code. He also stated that any Code would need to be transparent in its terms and objectives.
8. Mr. Travers concluded by thanking the Legal Advisor for his attendance and advised that a draft note would be drawn up detailing the various points discussed at the meeting and would be forwarded on to him with the objective of setting down an agreed note of the meeting for the record. Mr. Travers advised that he was currently in discussions with stakeholders to see if there is an appetite to engage in relation to developing an agreed voluntary Code and that he would ultimately report back to the Minister on his efforts in due course.
9. It was noted that the Department of Enterprise, Trade and Innovation and activities under its aegis are governed by the Freedom of Information Acts. Within that context, it was intended, insofar as is legally possible that the meeting and the note be treated as strictly confidential and that its use would only be used in the context of the proposed Code and without attribution by name. Further, it was agreed that the meeting and this note would be treated as sensitive information and that any such information disclosed to the Minister relating to the Legal Advisor would be likewise so treated by the Facilitator. It was further agreed that prior to any decision on any Freedom of Information request concerning this note or its contents, the Department would consult with the Legal Advisor with a view to obtaining his



representations as regards the release of the information concerned. This consultation would apply to all situations and not just to situations where the procedure laid down in Section 29 of the Freedom of Information Acts, 1997 and 2003 applies

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Competition and Consumer Policy Section  
23<sup>rd</sup> September 2010

## **Note of Meeting with Neil McHugh on 21 July 2010 at 9.30am regarding the Code of Practice for Grocery Goods Undertakings**

In attendance: John Travers, Facilitator

Neil McHugh

Kieran Grace & Margaret Ryan, Department of Enterprise, Trade and Innovation

The agenda for the meeting was circulated and agreed. Mr. Travers opened the meeting by referring to the ongoing debate in relation to the state of the relationships between the various stakeholders in the grocery goods sector and the commitment in the Renewed Programme for Government to introduce a Code of Practice for the Grocery Goods Sector. Mr. Travers advised that in advance of statutory provision for introducing such a Code, he had been asked by the Minister to engage with all relevant stakeholders to explore the possibility of agreeing a voluntary Code. Mr. Travers advised that he intended to meet with as many stakeholders as possible and that he envisaged reporting back to the Minister on this matter by the middle/end of September.

Mr. Grace stated that a lot had changed since the consultation paper had been published and therefore responses to the paper may need to be updated. He added that legislation to merge the NCA and the Competition Authority will be published later this year and will contain an enabling provision that allows the Minister to introduce a statutory code at short notice. He explained the difference between primary and secondary legislation, emphasizing the latter's flexibility for introducing new regulation or amending existing legislation without the lengthy process of going through the Houses of the Oireachtas. He also stated that the work done to draft a voluntary code would feed into the establishment of a statutory code.

Mr. McHugh circulated a document outlining his involvement in the retail and manufacturing industry and went on to make a presentation on the "Route to Market" (document circulated) which highlights the inefficiencies that cause products manufactured in Ireland to sell at a higher price in Ireland than overseas. He went on to say that the logistics model used by most retailers in Ireland, with the exception of Tesco's, adds some 7-10% to Irish retail prices. He said that the modernisation of logistics should be a priority for Irish retailers and would result in increased retail competition on a like for like basis. He suggested that these could be achieved by a radical improvement in logistics capability and systems of the main players and by the introduction of new best practice competition. Finally, he suggested that the planning guidelines should be revised to allow for an increase in efficient retail space.

Mr. Travers asked Mr. McHugh for any observations of the draft code, given his extensive experience in both the retail trade and in processing and manufacturing. Mr. McHugh stated that the retailer will always try to get the best possible price and will use methods that benefit his business. He added that like with like competition between retailers is the best way to keep them in line and the lack of such competition underpinned unfair practices such as demands for "hello money" and threats of de-listing. He added that in the UK greater competition between retailers provided a stronger disincentive to such unfair practices. In relation to the suggestion that the proposed voluntary code of practice might be expected to foster a more fair way of doing business, Mr. McHugh expressed the view that it would do little of positive value and would not solve the underlying problem of inadequate competition, the inefficient route to market and high retail prices. Mr. Travers asked Mr. McHugh what advice he

would give the Minister and the Government in relation to the content of a Code of Practice in the context of the commitment outlined in the Government Programme to the introduction of such a Code. Mr. McHugh said that he would like to give further consideration to the question posed by Mr. Travers and that he would respond in a week or two.

Mr. Travers said that he will be reporting back to Government on what arises out of his exploration with retailers and suppliers. Mr. McHugh said that his biggest issue in addressing the subject is that he can't see it contributing to price reductions for consumers or to improving the future for the food industry in Ireland.

Mr. Grace asked if a code might drive retailers to source goods overseas. Mr. McHugh responded that this was not as likely as it might seem because of the poor logistics capability of many retailers apart from Tesco. Mr. Grace asked if prices were likely to go up as a result of a code. Mr. McHugh expressed the view that they may do and they certainly won't go down.

On the issue of written legal contracts with suppliers Mr. McHugh said this was a non-runner as it would greatly constrain the flexibility and need to respond quickly to market needs (e.g. the impact of weather conditions on the demand for salads, ice-cream etc), would add extra costs and limit competition. However, he added that he understood Mr. Travers' brief and will respond in writing in that light.

Mr. Travers closed the meeting and thanked Mr. McHugh for his input.

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Competition and Consumer Policy Section  
Department of Enterprise, Trade and Innovation  
3 August 2010

**Note of meeting with Meat Industry Ireland (MII) on 7th July 2010 at 3.00pm  
regarding the Code of Practice for Grocery Goods Undertakings**

In attendance: Mr. John Travers, Facilitator  
Mr. Ciaran Fitzgerald, Chairman, MII  
Mr. Cormac Healy, Director, MII  
Mr. Cathal O’Gorman, DETI  
Mr. Brian Dalton, DETI

1. The agenda for the meeting was circulated and agreed. Mr. Travers opened the meeting by referring to the ongoing debate in relation to the state of the relationships between the various stakeholders in the grocery goods sector and the commitment in the Renewed Programme for Government to introduce a Code of Practice for the Grocery Goods Sector. Mr. Travers advised that in advance of statutory provision for introducing such a Code, which he understood would be included in legislation currently being prepared by the Department, he had been asked by the Minister to engage with all relevant stakeholders to explore the possibility of agreeing a voluntary Code. Mr. Travers advised that he intended to meet with as many stakeholders as possible and that he envisaged reporting back to the Minister on this matter by the middle/end of September,
2. Mr. O’Gorman outlined the response that had been received to the Public Consultation Process carried out by the Tánaiste last year. He advised that a total of 29 responses had been received, including one from Meat Industry Ireland (MII), and that all the responses were available on the Department’s website.
3. Mr. Fitzgerald advised that MII is the meat processing sector representative organisation within IBEC. MII represents the beef and lamb primary processing sector in Ireland. The importance of the meat industry to the Irish economy is underlined by the fact that exports in 2008 were over 2.2bn (1.7bn for beef) accounting for 1/4 of total food exports and 1/6 of exports by indigenous industries.
4. MII advised that it supports the introduction of a Code of Practice in the grocery goods sector but only one established on a statutory basis. MII believes that a statutory Code is the only way to tackle the issue of unfair practices within the grocery goods sector particularly given that retailers wield very significant buying power, which is creating an unsustainable imbalance in the relationship between supplier and retailer to the detriment of suppliers, primary producers and smaller retailers.
5. MII is of the view that a statutory Code must address those practices which allow retailers to transfer excessive commercial risks and costs to suppliers. MII advised that the reality of the excessive buying power of the big retailers was acknowledged by a number of different Member States of the EU and indeed by the EU Commission itself. MII contended that the effect of that buying power was illustrated by a number of published reports including the Tansey and Bonner reports, which showed in the case of processors the very low margins they were achieving. MII said any Code of Practice must have a statutory footing in order to ensure enforcement. Such enforcement should be by an independent Ombudsman. MII believes that the Code should apply to all grocery goods undertakings operating in the Irish market, including retailers, buying groups, wholesalers etc. In terms of a

threshold, MII said that any proposed threshold should ensure that the Code applies most rigorously to those retailers who can exert buying power over their suppliers and was of the view that a threshold of €50million in turnover would be appropriate given the size of the Irish market.

6. MII advised that in Ireland (and also the UK) meat products are used as loss leaders by large retailers to drive footfall with the consequence that retailers by their buying power are effectively divesting themselves of all risks and are unfairly transferring those risks and costs onto their suppliers through various commercial practices. The consequence of these actions is that the supplier is unable to invest, innovate, retain staff, export or improve their efficiency. MII pointed out that the top three retailers control 75% of the market in Ireland and this effectively meant that suppliers had to supply some or all of these retailers in order to remain viable, which in turn gave those retailers huge scope to abuse their strong buying power. MII was concerned as to why the Competition Authority when carrying out its studies and investigations of the grocery goods sector did not look at this disproportionate transfer of risk by retailers and the effect that this was having not only on suppliers but also in terms of the disincentive for efficiencies by retailers. The MII felt this was all the more puzzling given that this transfer of risk was undoubtedly acting as a barrier to entry for both suppliers and retailers alike. In this regard MII queried the continuing failure by bodies such as the Competition Authority and others to examine the extent of the margin being enjoyed by retailers, particularly given the recent leaked Tesco memo suggesting that it was achieving a margin of 9.5% in Ireland when the international norm for retailers with buying power was 2 to 4%
7. Mr. Travers wondered if a voluntary Code could be a useful first step, which could be used as a means of ironing out teething problems and testing the bona fides of signatories to the Code. MII advised that although it would be prepared to consult its members on their support for the introduction of a voluntary Code, it did not see the point as a temporary voluntary code would just postpone the introduction of what is urgently needed.
8. Mr. Travers noted the MII's position and its strong view that there needs to be a statutory Code. Mr. Travers advised that in the course of his meetings with stakeholders he was attempting to find as much common ground as possible in relation to how the Code should be framed. Given MII's position, he would be glad to hear what MII would wish him to convey back to the Minister. MII advised that it would consult quickly with its members and revert back as soon as possible. As regards the next steps Mr. Travers indicated that having met with all the relevant stakeholders, he would consider whether further meetings were necessary but that in any event he hoped to report back to the Minister on the matter by end September.

## **Note of Meeting with Musgraves on 14 July 2010 at 10.30 am regarding the Code of Practice for Grocery Goods Undertakings**

In attendance: John Travers, Facilitator

Chris Martin, Edel Clancy & Donal Horgan, Musgraves

Kieran Grace & Margaret Ryan, Department of Enterprise, Trade and Innovation

The agenda for the meeting was circulated and agreed. Mr. Travers opened the meeting by referring to the ongoing debate in relation to the state of the relationships between the various stakeholders in the grocery goods sector and the commitment in the Renewed Programme for Government to introduce a Code of Practice for the Grocery Goods Sector. Mr. Travers advised that in advance of statutory provision for introducing such a Code, he had been asked by the Minister to engage with all relevant stakeholders to explore the possibility of agreeing a voluntary Code. Mr. Travers advised that he intended to meet with as many stakeholders as possible and that he envisaged reporting back to the Minister on this matter by the middle/end of September.

Mr. Martin gave an overview of price developments in the last 2 years and what was done, and is being done, to address the differential in prices between Ireland and UK. He went on to state that the most important issue in this exercise was to ensure a better underpinning of mutually beneficial relationships between retailers and suppliers. Both had to work together in a spirit of cooperation and trust. Examples where this had occurred in recent times were in the case of the news distribution sector and in relation to socially responsible arrangements for the sale of alcohol. Musgraves agreed the need for a Code but stated that the details of any such Code would be crucial. As a matter of principle, there needed to be a mutuality of benefits for all sides. Mr Martin stated that any Code should cover both suppliers and retailers, as there were suppliers who had strong negotiating power.

Mr Martin raised the issue of a possible meeting between FDII and Retail Ireland to discuss the contents of a possible Code. Mr Travers noted this and agreed that this was a worthwhile way forward, which he had suggested at his meetings with Retail Ireland and with FDII and other supplier representative groups. He noted the need to bear in mind competition law strictures. In this regard he had suggested that such meetings might be convened by him as facilitator with an appropriate legal advisory presence to ensure that discussions were in compliance with competition law. Musgraves concurred with such an approach but also emphasised that individual members of such groups may need to be able to make recommendations outside of any made by their representative bodies in this facilitation process where they disagreed with the latter's positions on given issues.

Mr Martin agreed that even if all retailers and suppliers did not sign up to a voluntary Code, it would be worthwhile, as such non-adherents would be exposed as not behaving in a socially responsible way. However, for it work properly, Mr Martin stated that parties must be willing to use it, there had to be a strong arbitrator, and such arbitration should happen in a confidential (rather than a public) manner. It was also critical that it be very clear what the Code was meant to tackle. In Musgrave's view it was to deal with establishing mutually beneficial relationships of trust and cooperation between retailers and suppliers without impeding the passing of lower prices on to consumers.

On some points of detail, Musgraves stated that if accounts and margins were to be made public, this must apply to all parties on both the supplier and retailer sides. It was

not clear that the imposition of a requirement to publish such financial details, many of which involve commercially sensitive information, is feasible under Irish Company Law. Legal advice should be obtained on this. On definitions, cognisance would have to be made of the status of “wholesale franchisors” in the Code. All costs would need to be shared by all parties to the Code. Musgraves agreed with the need for written contracts. It did not feel that compensation for forecasting errors was appropriate in a Code.

Mr. Travers concluded by thanking Musgraves for their co-operation in relation to his task. He asked that if they wished to update any issues in their very comprehensive submission of 30 September 2009, they should do so as soon as possible. Musgraves also committed to sending more details on the news-distributors example to the Dept.

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Competition and Consumer Policy Section  
Department of Enterprise, Trade and Innovation  
14 July 2010

**Note of meeting with the National Consumer Agency (NCA) on 6<sup>th</sup> July at 10.00am  
regarding proposed Code for grocery goods undertakings**

In attendance: Mr. John Travers, Facilitator  
Ms. Ann Fitzgerald, NCA  
Mr. John Shine, NCA  
Mr. Sean Murphy, NCA  
Mr. Cathal O’Gorman, DETI  
Ms. Margaret Ryan, DETI

The agenda was circulated and agreed. Mr. Travers opened the meeting by referring to the ongoing debate in relation to the state of the relationships between the various stakeholders in the grocery goods sector and the commitment in the Renewed Programme for Government to introduce a Code of Practice for the Grocery Goods Sector. Mr. Travers advised that in advance of statutory provision for introducing such a Code, which he understood would be included in legislation currently being prepared by the Department, he had been asked by the Minister to engage with all relevant stakeholders to explore the possibility of agreeing a voluntary Code. Mr. Travers advised that he intended to meet with as many stakeholders as possible and that he envisaged reporting back to the Minister on this matter by the middle/end of September.

Ms. Fitzgerald advised that the NCA had set out its position in relation to the introduction of a Code in the grocery goods sector in its response to the Consultation Paper issued by the Tánaiste in August 2009. The NCA pointed to the work carried out in the UK prior to the introduction of their Code which was considerably more extensive than that which had been carried out in Ireland to date.

Mr. Travers advised that part of his task was to examine a number of specific issues including who should be covered by the Code, whether the Code should have a threshold, what specific provisions should be included in the Code. In this regard he wondered as to whether NCA had any views on the draft Code which had been appended to the Consultation Paper published by the Tánaiste. Ms. Fitzgerald advised that she appreciated the task that Mr. Travers had been asked to carry out. She was of the view that given the complex nature of the grocery industry, it would be more appropriate for the NCA to await the outcome of Mr Travers’ discussion with retailers and suppliers and to then comment on the proposed draft Code, once developed, from an enforcement perspective. This was in the expectation that the amalgamated NCA and CA would have responsibility for enforcing the Code. She considered that the Agency would be best able to add value at that stage. The NCA supported the involvement of the amalgamated body in enforcement from a purely pragmatic perspective, given scarce resources and the Government’s decision to cut down the number of quangos.

Aside from what specific provisions that might be included in the Code, the NCA was concerned as to how the Code would be enforced. It was primarily because of these concerns that the NCA had suggested in its response to the Consultation Paper that legislative provision be made for the introduction of a general prohibition on unfair commercial practices between grocery goods undertakings. The NCA believes that the introduction of such a general prohibition for business to business transactions, which would replicate the existing general prohibition on unfair commercial practices for business to consumer transactions as enshrined in the Consumer Protection Act 2007, would address the evidential difficulties in enforcing the existing provisions of the 2006



Competition Amendment Act by allowing for a number of enforcement options including risk based audits across the entire grocery goods sector or of all suppliers to a particular retailer(s) and complaint driven enquiries.

Mr. O' Gorman advised that following on from the NCA's suggestion, the Department, at the request of the Tánaiste, had asked the Sales Law Review Group to look at the issue of the regulation of unfair terms in business-to-business contracts. Mr. O' Gorman advised that the Group's consideration of this issue would not just be confined to B2B contracts in the grocery goods sector but would encompass B2B contracts across the whole spectrum of the economy. Mr. O' Gorman understood that the Group would include its considerations on this issue in its final overall report on the review of Irish Sales Law which it hoped to present to the Minister later this year.

Mr. Travers noted that he appreciated the position as articulated by the NCA and the Agency's view that it would best be in a position to add value to the process by giving its considered views of the details of any Code that might emanate from the discussions being held with stakeholders. Mr. Travers concluded the meeting by thanking the NCA representatives for their attendance and their co-operation.

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Competition & Consumer Policy Section  
8<sup>th</sup> July 2010

**Note of Meeting with the National Dairies Association on 1st July 2010 at 2.30pm  
regarding the Code of Practice for Grocery Goods Undertakings**

In attendance: Mr. John Travers, Facilitator  
 Mr. George Kearns, NDA  
 Mr. Tony O’Driscoll, NDA  
 Mr. Etienne Gerard, NDA  
 Mr. Ger McGrath, NDA  
 Mr. Cathal O’Gorman, DETI  
 Ms. Margaret Ryan, DETI

The agenda for the meeting was circulated and agreed. Mr. Travers opened the meeting by referring to the ongoing debate in relation to the state of the relationships between the various stakeholders in the grocery goods sector and the commitment in the Renewed Programme for Government to introduce a Code of Practice for the Grocery Goods Sector. Mr. Travers advised that in advance of statutory provision for introducing such a Code, which he understood would be included in legislation currently being prepared by the Department, he had been asked by the Minister to engage with all relevant stakeholders to explore the possibility of agreeing a voluntary Code. Mr. Travers advised that he intended to meet with as many stakeholders as possible and that he envisaged reporting back to the Minister on this matter by the middle/end of September.

Mr. McGrath enquired as to who the stakeholders were. Mr. Travers stated that they were various representative bodies for retailers, suppliers, etc. and referred him to the Department’s website where the responses received to Consultation Paper published by the Tánaiste in 2009 were available.

Mr. O’Gorman spoke about the Consultation paper and gave a flavour of the responses, including that of the NDA in which the Association expressed its strong support for the establishment of a statutory Code.

The NDA stated that it strongly favoured the introduction of a statutory Code as it did not believe that a voluntary Code would work or would be honoured. The NDA was anxious that the unique characteristics of milk be taken into account and was concerned that the Code should be sufficiently robust to address the blatant excesses and abuse of power by the large retailers. The NDA was of the view that the Code should be enforced by an independent Ombudsman.

Mr. Travers advised that part of his task was to examine what specific provisions should be included in the Code and in this regard he wondered as to whether the NDA had views on the draft Code which had been appended to the Consultation Paper published by the Tánaiste last year. Mr. Kearns advised that the NDA were not in a position to comment on the detailed provisions of the draft Code at this stage but would be happy to do so and revert to Mr. Travers on the matter. Mr. Travers asked if the NDA could submit its comments by the middle of July and suggested that in addition to commenting on the provisions of the draft Code, the NDA might wish to suggest how in its view the Code might be improved by the addition, removal, amendment of particular provisions.

Mr. Travers advised that he looked forward to receiving the NDA's detailed comments on the draft Code. Mr. Travers undertook to forward a short note recording the details of the issues discussed at the meeting and invited the NDA to submit any amendments that it wished to the note. The meeting then concluded.

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Competition and Consumer Policy Section  
5<sup>th</sup> July 2010

**Note of meeting with the National Milk Agency (NMA) on 6<sup>th</sup> July at 2.00pm  
regarding the proposed Code for grocery goods undertakings**

In attendance: Mr. John Travers, Facilitator  
 Mr. Denis Murphy, NMA  
 Dr. Muiris Ó Céidigh, NMA  
 Mr. Pádraig Mulligan, NMA  
 Mr. Walter Maloney, NMA  
 Mr. John Foster, NMA  
 Mr. Cathal O’Gorman, DETI  
 Ms. Margaret Ryan, DETI

The agenda was circulated and agreed. Mr. Travers opened the meeting by referring to the ongoing debate in relation to the state of the relationships between the various stakeholders in the grocery goods sector and the commitment in the Renewed Programme for Government to introduce a Code of Practice for the Grocery Goods Sector. Mr. Travers advised that in advance of statutory provision for introducing such a Code, which he understood would be included in legislation currently being prepared by the Department, he had been asked by the Minister to engage with all relevant stakeholders to explore the possibility of agreeing a voluntary Code. Mr. Travers advised that he intended to meet with as many stakeholders as possible and that he envisaged reporting back to the Minister on this matter by the middle/end of September.

Mr. Murphy introduced the other members of the National Milk Agency delegation. Dr. Ó Céidigh explained that the NMA was established under the Milk (Regulation of Supply) Act, 1994 for the purposes of maintaining an adequate supply of fresh milk for liquid consumption within the State given the extra costs associated with all year round production of raw milk of a sufficient quality for processing into heat treated milk for liquid consumption. The National Milk Agency is financed by the liquid milk sector itself by means of a levy. Dr. Ó Céidigh presented Mr. Travers with a copy of the NMA’s 2009 annual report and annual accounts which he advised gave a good overview of the Agency’s activities together with a further note outlining the NMA’s position in relation to the Code and the Consultation Paper.

Dr. Ó Céidigh stated that the NMA was firmly of the view that a statutory Code was warranted if any impact was to be made on the retail sector. The Agency was further of the view that an overarching obligation to trade fairly must be at the heart of any Code. The NMA was concerned that the particular characteristics of Fresh Perishable Products (FPPs) such as milk, meat, fish and vegetables need to be recognised. The use of FPPs as key value indicators and footfall generators by the large multiples is severely impacting on the viability of producers who have seen their margins continue to decline and that it was particularly important specific statutory protection be afforded FPPs in the Code.

The NMA was also concerned that the issue of the compulsory disclosure of retailers’ wholesale prices of FPPs and the general profitability of the Irish operations of all multiples should be addressed, as it was important that there would be transparency as to what percentage of the final retail price was being achieved by the different stakeholders. The NMA were strongly of the view that a proper disclosure obligation, which it contended could only be brought about by a statutory Code, would clearly show that the major retailers were getting a totally disproportionate and increasing

percentage of the final price whilst the return for the producer, processor and distributor continued to decline.

Mr. Travers wondered as how such disclosure requirements could apply only to one sector and how the mechanics of any disclosure requirements would work. Dr. Ó Céidigh pointed out that margin transparency was possible in the UK and that in the NMA's view disclosure would shine a light on the arrangements between processors and retailers as the retail price is readily available, whilst the NMA as part of its statutory role would have details of the prices and contractual agreements between producers and processors.

Mr. Travers advised that other stakeholders had raised the issue of who should be covered by the Code, whether the Code should apply to suppliers as well as retailers and whether the Code should incorporate a threshold. The NMA noted that stakeholders should be considered in the widest sense of the term and that not only should suppliers of goods be entitled to make complaints but also producer groups such as the IFA, the ICMSA and ICOS. For its part, it was of the view that a threshold of €100 million in retail turnover would be appropriate given the size of the Irish market.

In terms of specifics, the NMA believes that the Code should require that

- terms of business agreements be in writing and any changes to the terms should be outlined in that agreement
- invoices are paid promptly
- marketing costs, including payments for promotions, in-store positioning etc should be restricted and outlawed entirely in the case of FPPs
- retailers should bear the costs of returns and in-house wastages and particularly so in the case of FPPs
- retailers should adhere to the volume of traded products agreed in the terms of business and be obliged to compensate the supplier if different
- retailers should not be allowed to use FPPs as key value indicators

Mr. Travers noted the NMA's preference for a statutory Code and the specific provisions that should be contained in such a Code. Mr. Travers advised that in the course of his meetings with stakeholders he was attempting to find as much common ground as possible in relation to how the Code should be framed. As regards the next steps Mr. Travers indicated that having met with all the relevant stakeholders, he would consider whether further meetings were necessary but that in any event he hoped to report back to the Minister on the matter by end September.

27<sup>th</sup> April 2011



NATIONAL MILK AGENCY

IPC House  
35-39 Shelbourne Road  
Ballsbridge  
Dublin 4

Mr. John Travers,  
Consumer Policy Section,  
Department Enterprise, Trade and Innovation,  
Earlsfort Centre,  
Hatch Road,  
Dublin 2

Tel: 01 660 3396

Fax: 01 660 3389

Re: Proposed Code of Practice for Grocery Goods Undertakings

Dear John,

I refer to the meeting which I, Denis and members of the National Milk Agency, who represent the interests of producers, processors, distributors, retailers and consumers of milk had with you last July.

At their recent meeting of the Agency the members requested that I write to you and seek an update on progress in relation to the Code of Practice for Grocery Goods Undertakings.

The Agency members requested that I should reinforce the points made at the July meeting and set out in the presentation so that adequate consideration would be given to the establishment of a Statutory Code as the members consider that a voluntary code would not be effective given the current serious issues in the grocery sector.

The members requested me to again bring to your attention stakeholder concerns regarding the growing dominance of retail multiples and the economic impact of that dominance on the prices and margins being received by producers, processors and distributors.

At their meeting, the Agency's members expressed their unanimous concern at prevailing developments which may threaten the viability and sustainability of the indigenous supply chain for fresh milk for liquid consumption in the State, while as of

yet, no resolution had been reached as to how the State proposes to introduce a Code of Practice for Grocery Goods Undertakings.

This indigenous supply chain, which is comprised of producers, processors, milk collectors and milk distributors is a particularly robust chain which, despite the challenges of the very harsh, winter weather conditions of 2010 and 2009 did not fail to ensure the availability of adequate daily supplies of fresh, wholesome milk to retailers (large and small) and to customers and consumers.

The following have been submitted to the members of the Agency as matters or developments which give rise to serious concern in the industry and which the members felt should be forwarded to you as you reach recommendations concerning the Code: -

1. The supply of indigenous fresh milk in the domestic market for fresh milk has dramatically reduced suggesting a substantial reliance upon increasing volumes of packaged, fresh milk being imported by retailers and increasing volumes of bulk milk being imported for processing for liquid milk consumption in the State. Imports of fresh milk for liquid consumption, both packaged and bulk, now represent one in every four litres of fresh milk being consumed in the State.
2. Confidence in the market for fresh milk and in the retail sector is being diminished by developments in relation to the discounting of own label milk by retailers and by the devaluation of milk through its promotion as a loss leader.
3. Registered milk producers who are specialist milk producers dedicated to supplying milk on an all year round basis for processing for liquid consumption, have experienced substantial increases in feed, fertiliser and energy costs.
4. The above developments are undermining the confidence of stakeholders in the indigenous supply chain for fresh milk. Profitability has been squeezed out of the supply chain at producer, processor and distributor levels and the security and sustainability of the all year round milk supply is being impaired. The security of a traceable supply, which is such an intrinsic feature of indigenous milk supplies, is being placed in jeopardy.

As a result of the above developments the Agency has been advised, as the State body charged with responsibility in the area, that registered producers are evaluating their future options from both business and life style viewpoints and changing their business model from a high cost system of the daily supply of milk on an all year round basis for processing for liquid consumption on the domestic market to a system of low cost, seasonal milk production for manufactured dairy products for export.

The members of the Agency are of the view that an overarching obligation to *trade fairly* must be at the heart of any Code. The particular characteristics of Fresh Perishable Products (FPPs) such as milk, meat, fish and vegetables need to be recognised. The members are informed that the use of FPPs as key value indicators

and footfall generators by the large multiples is severely impacting on the viability of producers who have seen their margins continue to decline and that it was particularly important specific statutory protection be afforded FPPs in the Code.

I would welcome the opportunity to meet with you again to discuss the above developments and concerns, and to hear your views on the various matters involved.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Muiris O Ceidigh". The signature is written in a cursive style and is positioned to the left of the typed name below.

Dr. Muiris O Ceidigh Chief Executive.



**Note of meeting with Retail Excellence Ireland (REI) on 8<sup>th</sup> July at 2.30pm regarding the proposed Code for grocery goods undertakings**

In attendance: Mr. John Travers, Facilitator  
Mr. David Fitzsimons, CEO, REI  
Mr. Kevin Jephson, REI  
Mr. Joe Doyle, REI  
Mr. Cathal O’Gorman, DETI

The agenda was circulated and agreed. Mr. Travers opened the meeting by referring to the ongoing debate in relation to the state of the relationships between the various stakeholders in the grocery goods sector and the commitment in the Renewed Programme for Government to introduce a Code of Practice for the Grocery Goods Sector. Mr. Travers advised that in advance of statutory provision for introducing such a Code, which he understood would be included in legislation currently being prepared by the Department, he had been asked by the Minister to engage with all relevant stakeholders to explore the possibility of agreeing a voluntary Code. Mr. Travers advised that he intended to meet with as many stakeholders as possible and that he envisaged reporting back to the Minister on this matter by the middle/end of September.

Mr. O’Gorman spoke briefly on the Consultation Paper which was published by the Tanaiste in August 2009 to which 29 responses were received, all of which are available on the Department’s website.

Mr. Fitzsimons advised that REI is a not for profits organisation which invests in innovative and exciting learning, market intelligence, commercial services, Government representation and member networking initiatives. Retail Excellence Ireland involves 590 leading retail companies who operate over 8,000 stores in the Irish market.

REI advised that its members occupied a distinct segment of the retail sector. REI members are essentially rooted in their local communities, providing local employment and often acting as the debut forum for local suppliers entering the market.

REI advised that whilst it did not support the introduction of a Code as it did not believe that the case for a Code had been made, it appreciated the task Mr. Travers had been asked to carry out. Insofar as REI was concerned, it appeared that the draft Code which had been appended to the Tánaiste’s Consultation Paper was essentially focussed on the activities of large retailers. REI advised that if there was to be a Code it should also cover the relationships between suppliers and smaller retailers. REI was of the view that the buying power being exercised by the multiples on suppliers effectively meant that little was left for small retailers in their negotiations with suppliers. REI accepted that the big retailers would always get better terms from suppliers given the volumes involved, but it felt that these terms should be proportionate and that small retailers should also be able to negotiate proportionate terms on issues such as promotions etc.

REI advised that it was important that the difference in the cost of sourcing product in Ireland as against sourcing costs elsewhere and particularly in Northern Ireland and the UK, especially for small retailers, should also be borne in mind. REI undertook to forward details of these sourcing cost differentials in the coming days.

REI wondered as to why the activities of some large retailers who in its view were engaged in predatory pricing were not being investigated by the bodies such as the Competition Authority.

Mr. Travers advised that part of his task in meeting with stakeholders was to try to find as much common ground as possible in relation to how the Code should be framed. Mr. Travers enquired as to whether there was any particular message REI would wish to convey back to the Minister. REI advised that whilst it was somewhat ambivalent regarding the introduction of a Code, it was strongly of the view that any Code should not impose any additional costs on its members, that the Code should look at the relationships between small retailers and big suppliers and that it should take full account of the diverse nature of the various stakeholders in the grocery goods sector.

Mr. Travers thanked the REI delegation for outlining its position in relation to the Code. He advised that if REI wished to make any additional points in the aftermath of the meeting, he would be glad to receive them. As regards the next steps Mr. Travers indicated that having met with all the relevant stakeholders, he would consider whether further meetings were necessary but that in any event he hoped to report back to the Minister on the matter by end September.

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Competition and Consumer Policy Section  
13<sup>th</sup> July 2010

**Note of meeting with RGDATA on 30 June 2010 regarding proposed Code for grocery goods undertakings**

In attendance: Mr. John Travers, Facilitator  
 Ms. Tara Buckley, RGDATA  
 Mr. Gareth Fennell, RGDATA  
 Mr. Cathal O’Gorman, DETI  
 Ms. Margaret Ryan, DETI

The agenda was circulated and agreed. Mr. Travers opened the meeting by referring to the ongoing debate in relation to the state of the relationships between the various stakeholders in the grocery goods sector and the commitment in the Renewed Programme for Government to introduce a Code of Practice for the Grocery Goods Sector. Mr. Travers advised that in advance of statutory provision for introducing such a Code, which he understood would be included in legislation currently being prepared by the Department, he had been asked by the Minister to engage with all relevant stakeholders to explore the possibility of agreeing a voluntary Code. Mr. Travers advised that he intended to meet with as many stakeholders as possible and that he envisaged reporting back to the Minister on this matter by the middle/end of September.

Mr. O’Gorman spoke briefly on the Consultation Paper which was published by the Tanaiste in August 2009 to which 29 responses were received, all of which are available on the Department’s website. Mr. O’Gorman then outlined the main points made in RGDATA’s submission.

Ms. Buckley concurred with the main points and added that RGDATA has a unique view as they represent 4,000 shops of all sizes, some of which are aligned to symbol groups and others who are independent supermarkets. The general feeling among its members is that the Grocery Order worked. RGDATA’s members don’t seek “hello money” and don’t look for shelf space rental. Independent shops are currently working in very difficult trading circumstances. What they don’t need is another layer of costs or regulation and that it was most important that the introduction of the Code should not add to those costs.

RGDATA stressed that the Code should take into account the how embedded independent shops are in their local communities and the particularly important role they play in terms of the local employment that they provide, the support they give to the community in terms of sponsorship etc.

Ms. Buckley was also concerned that the Code should offer some avenue of redress to protect small businesses, such as RGDATA members, from unfair practices imposed on them by other larger businesses. RGDATA advised that in previous instances where it had referred cases of B2B unfair commercial practices to the Competition Authority, the Authority had taken the view that it was a matter for the business affected by such practices to take a civil case before the courts. Small retailers can’t afford to take this course of action.

She added that the reality was that because of “Paddy taxes” imposed on RGDATA members by suppliers in a variety of ways, which can be as much as 30% on top of the UK price, small retailers can’t even buy at the prices at which goods are sold in Northern Ireland. Ms. Buckley reiterated the vulnerable position of retailers for whom even a 3% margin would be considered “good”. In terms of prices they can charge they are back in 2005 levels.

Insofar as the scope of the Code is concerned, RGDATA was strongly of the view that the Code should not be solely confined to food items as defined in the 2006 Act but should cover other household necessities as some of the more serious unfair practices suffered by its members occur in areas such as the supply of newspapers, mobile phone top-ups etc. It was important, therefore, that the Code would deal with all unfair practices that distort trading relationships.

Mr. Travers enquired as to who should bear the burden of the administrative costs of enforcing the Code. RGDATA was of the view that in line with the precedent in the Groceries Order, where enforcement was accepted to be a public duty and thus carried out by the Director of Consumer Affairs, the cost of enforcing the Code should be borne by the State. RGDATA was of the view that these costs could be defrayed by the imposition of appropriate penalties on transgressors of the Code.

Mr. Travers advised that part of his task was to examine a number of specific issues including who should be covered by the Code, whether the Code should have a threshold, what specific provisions should be included in the Code. In this regard he wondered as to whether RGDATA had views on the draft Code which had been appended to the Consultation Paper published by the Tánaiste last year. Ms. Buckley advised that RGDATA were not in a position to comment on the detailed provisions of the draft Code at this stage but would be happy to do so and revert to Mr. Travers on the matter. Mr. Travers asked if RGDATA could submit its comments by the middle of July and suggested that in addition to commenting on the provisions of the draft Code, RGDATA might wish to suggest how in its view the Code might be improved by the addition, removal, amendment of particular provisions.

As regards the next steps Mr. Travers indicated that having met with all the relevant stakeholders, he would consider whether further meetings were necessary but that in any event he hoped to report back to the Minister on the matter by end September.

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Margaret Ryan  
Consumer Policy  
1 July 2010

**Note of meeting with Retail Ireland on 2<sup>nd</sup> July 2010 at 12 noon regarding  
proposed Code for Grocery Goods Undertakings**

In attendance: Mr. John Travers, Facilitator  
Mr. Torlach Denihan, Retail Ireland  
Mr. Cathal O’Gorman, DETI  
Ms. Margaret Ryan, DETI

The agenda was circulated and agreed. Mr. Travers opened the meeting by referring to the ongoing debate in relation to the state of the relationships between the various stakeholders in the grocery goods sector and the commitment in the Renewed Programme for Government to introduce a Code of Practice for the Grocery Goods Sector. Mr. Travers advised that in advance of statutory provision for introducing such a Code, which he understood would be included in legislation currently being prepared by the Department, he had been asked by the Minister to engage with all relevant stakeholders to explore the possibility of agreeing a voluntary Code. Mr. Travers advised that he intended to meet with as many stakeholders as possible and that he envisaged reporting back to the Minister on this matter by the middle/end of September.

Mr. Denihan advised that in its submission to the public consultation Retail Ireland were opposed to the introduction of a Code as it did not believe that the rationale for the Code had been demonstrated, that the Code had not been justified by identifiable consumer benefit, that the introduction of the Code would inhibit legitimate commercial behaviour that benefits the consumer, that the Code would add an unnecessary regulation and cost burden, that the Competition Authority had concluded that retail sector is intensely competitive and that the introduction of a Code would not help to address the uncompetitive cost base currently being imposed on the grocery sector.

Mr. Denihan advised that RI without prejudice to its principled objection to the introduction of a Code acknowledged Government’s intention in this area to progress the commitment in the Renewed Programme for Government by the appointment of the facilitator. Given these circumstances, RI was firmly of the view that if a Code is to be introduced it should be on a voluntary basis. To this end RI will co-operate fully with the facilitator and engage constructively in the facilitated process.

Mr. Travers noted that given RI’s stated preference, the introduction of a voluntary Code would logically involve a process of engagement by all stakeholders and in particular by retailers and by suppliers. Mr. Travers wondered as to whether there had been any form of engagement between RI given its representative role and suppliers’ representative bodies such as Food and Drink Industry Ireland (FDII), particularly as both bodies were themselves constituent parts of IBEC. Mr. Denihan advised that there had not been any such engagement to-date due to concerns regarding competition law. Mr. Travers wondered as to whether RI would see merit in a round table forum chaired by an independent facilitator at which stakeholders including suppliers and retailers could engage in relation to developing an agreed voluntary Code. Mr. Denihan felt that provided

the possible competition law implications of such a forum were resolved, that members of RI would be open to such a suggestion. Mr. Travers advised that he would raise this issue with suppliers and other stakeholders

Mr. Travers advised that part of his task was to examine a number of specific issues including who should be covered by the Code, whether the Code should have a threshold, what specific provisions should be included in the Code. In this regard he noted that RI in its response to the Consultation Paper published by the Tánaiste last year had included specific comments regarding the provisions of the draft Code appended to the Consultation Paper. Mr. Travers advised that it was his intention to invite all those partaking in this process to submit their views on the provisions of the draft Code including how the Code might be improved by the addition, removal, amendment of particular provisions. Mr. Travers advised that he would then consider the various submissions in relation to the detail of the Code with a view to determining the possibility of developing a voluntary Code.

Mr. Denihan advised that RI was of the view that the principles underlying any voluntary Code should reflect a balance between the obligations on retailers and suppliers. RI was also concerned that the Code should not merely ape the provisions of the UK Code but should respect the differences in market structures, circumstances and respective national competition authority conclusions between the UK and Ireland. RI was of the view that the enforcement of any voluntary Code should be a matter for an independent honest broker and that there should be no question of the establishment of an Ombudsman which would only be appropriate in the circumstances of a statutory Code.

Mr. Denihan advised that RI had prepared a draft of a voluntary Code of Practice which in its view recognised the dynamics of the Irish grocery goods sector. Mr. Denihan provided a copy and advised that whilst there was a deal of similarity between the Code drafted by RI and the one appended to the 2009 Consultation Paper on issues such as the definitions outlining the scope of the Code etc, the RI Code did differ in a number of particular areas such as the provisions regarding the terms of business agreements, variation of terms of business, changes to supply agreements etc. Mr. Denihan also advised that RI was firmly of the view that the cost of policing any Code should be borne equally by suppliers as well as retailers as cost considerations were a major factor for retailers particularly in today's economic climate.

Mr. Travers thanked RI for their submission which he advised would be fully considered along with the submissions of other stakeholders. As regards the next steps Mr. Travers indicated that having met with all the relevant stakeholders, he would then consider how best to progress the development of a voluntary Code but that in any event he hoped to report back to the Minister on the matter by end September.

**Discussion with Mr. Torlach Denihan, Director, Retail Ireland on Thursday Sept. 9<sup>th</sup> at @ 10.30a.m.**

1. I have conducted a number of discussions with Torlach Denihan in recent weeks to explore how best to progress the facilitator task I was asked to undertake by the Minister and the Department with respect to the introduction of a Voluntary Code of Practice for Grocery Goods Undertakings. Mr. Denihan contacted me this morning to say that Retail Ireland wished to proceed at present on the following basis:
  - (i) Retail Ireland will prepare a detailed written submission in relation to the proposal for a Voluntary Code of Practice.
  - (ii) This will go beyond previous submissions of Retail Ireland on the matter in that it will, inter alia, focus strongly on the provisions of such a code from a practical, operational point of view.
  - (iii) It will put forward a common position on the part of the members of Retail Ireland.
  - (iv) This paper will form the basis for further engagement between Retail Ireland and the facilitator.
  - (v) Because of the complexity of the issues involved for its members, it will take Retail Ireland some time to finalise this submission – certainly beyond the end of next week.
  - (vi) The headings in the draft Code of Practice circulated by the Department last year and updated in recent weeks form a reasonable framework from which the Retail Ireland submission can be developed.
  - (vii) Retail Ireland envisages meeting with the facilitator once its submission has been made.
  - (viii) Retail Ireland accepts that progress towards achieving a Voluntary Code of Practice will require engagement with representatives of suppliers and, in particular, with FDII, which would be facilitated by the facilitator.
  - (ix) Retail Ireland accept readily that any such engagement will need to fully respect the requirements of Competition Law in spirit and in practice.
2. I reminded Mr. Denihan of the timeframe within which it was envisaged that the facilitator would report back to the Minister (by mid/end September). Mr. Denihan indicated that Retail Ireland is very conscious of this and that they would attempt to make their submission as early as possible within the framework which applies to their consideration of matters.
3. I indicated that I would be available at short notice at any time to meet the members of Retail Ireland, en bloc or otherwise, to progress the facilitation process which I was asked to undertake. I emphasised that my role is to facilitate and support the consultative process but that a successful outcome would require a substantive and bona-fide direct engagement on the part of retailers and suppliers under the chairmanship of the facilitator. Mr. Denihan indicated that this is well understood.

4. I ended by saying that I looked forward to receiving the additional Retail Ireland submission Mr. Denihan had outlined at the earliest possible time and that I would do everything I could to facilitate the process of engagement which was a prerequisite in meeting the objective of the task I had been asked to undertake.

John Travers  
Facilitator  
9<sup>th</sup> September 2010



**Report of meeting with Retail Ireland in relation to its response to the revised Code of Practice for Grocery Goods Undertakings on Monday 22nd November 2010 at 10.00am in Retail Ireland's premises in Baggot Street**

Present

*John Travers Facilitator*

*Nicholas Donnelly Legal Advisor DET&I*

*Cathal O' Gorman DET&I*

*Torlach Denihan Director Retail Ireland*

*Owen Connolly Legal Advisor Musgraves*

*Edel Clancy Musgraves*

*Dermot Breen, Tesco Ireland*

Mr. Denihan opened the meeting by thanking Mr. Travers and the Department for agreeing to facilitate the meeting in Retail Ireland's (R.I.) premises. In advance of discussing the detail of R.I.'s response to the revised Code, Mr. Denihan wondered if Mr. Travers might outline the up-to-date position in relation to his task as facilitator.

Mr. Travers advised that following on from the initial round of consultations with stakeholders, the Department at his request had drafted an updated version of the Code. The revised Code was circulated to both Food and Drink Industry Ireland (FDII), as the main representative body of suppliers, and Retail Ireland, as the main representative body of retailers, in August. Mr. Travers advised that having received observations on the revised Code from both FDII, which were forwarded on 9th September and more recently from R.I., he had arranged to meet both bodies to see how the matter could be progressed. In this regard he advised that he would be meeting FDII on Monday the 29<sup>th</sup> November.

Mr. Denihan advised that since RI had last met with Mr. Travers and even since the revised Code had been circulated, the economic climate had deteriorated considerably. This deterioration added to R.I.'s original concerns that the introduction of a Code, particularly one framed in the manner of the revised Code circulated in August, would only add extra cost and regulation and would not in any way aid competitiveness.

Mr. Travers noted that RI in its response to the revised Code had offered a number of detailed observations. In relation to the observation submitted by RI that a Regulatory Impact Analysis (RIA) should be undertaken by the Department as part of the consultation process on the draft Code, Mr. Travers pointed out that the Government had already committed in the Renewed Programme for Government to introduce a Code in the Grocery Goods Sector. Mr. Travers advised that the Government had publicly stated that it intended to implement this commitment by including the necessary legislative provision to allow for the introduction of a Code in legislation currently being prepared by the Department to merge the Competition Authority and the National Consumer Agency. Mr. Travers understood that a RIA would be carried out on this legislation in accordance with the Principles of Better Government.

However, the current discussions in relation to the possibility of establishing a voluntary Code, which he had been asked to facilitate, are concerned with a different process. This was a process through which particular stakeholder groups would, themselves, with the aid of a facilitator, voluntarily formulate, agree and subscribe to the terms of such a Code of Practice. Accordingly, Mr. Travers wondered as to the appropriateness of carrying out a RIA within such a process, given that the RIA is essentially a tool to deliver better Government regulation rather than something that should, necessarily, be part of a voluntary agreement between willing stakeholders. This was a matter that RI might wish to raise with other participants involved in attempting to frame a voluntary Code.

RI expressed the view that notwithstanding the debate that has been ongoing in relation to the grocery goods sector, no concrete evidence had been produced of particular problems in the grocery goods supply line. RI was of the view that a RIA could usefully look at the operation of the grocery goods supply line to see what problems, if any, existed and whether or not there was a need for a Code of Practice in this area.

Mr. Travers noted that RI had made 15 separate observations in relation to the revised Code circulated by the Department. He advised that he was anxious to discuss with RI and FDII the details of their respective responses to the revised Code to see if there was sufficient elements of agreement that could be built upon as a basis for the formulation of a voluntary Code.

R.I. advised that a detailed discussion of the provisions of the revised Code and RI's concerns in relation to the various individual provisions would take a considerable period of time. RI did not consider that such a discussion at this stage would be useful given that RI does not believe that the revised draft Code that had been circulated as a means of advancing the process towards the formulation of a voluntary Code represents a balanced document. R.I. believes that the revised Code is essentially biased towards suppliers and does not sufficiently take into account the legitimate concerns of retailers.

Mr. Travers in noting RI's views on the revised Code pointed out that many of the Code's provisions were similar if not identical to like provisions in the UK Code and that some of RI's own members were operating those provisions in the UK. RI did not feel that comparison with the UK was valid as the Irish and UK grocery markets were very different. For example the percentage of food sold in the UK which is produced in the UK is 75%, whereas the respective percentage in Ireland is only 33%. RI also advised that it is their understanding that since the promulgation of the UK Code in February, UK retailers have begun to source more produce from outside the UK. RI expressed the view that as Irish suppliers were much more exposed to outsourcing than their UK counterparts, the introduction of Code in this jurisdiction could have serious consequences in terms of greater outsourcing for produce.

R.I., whilst acknowledging the task that Mr. Travers had been asked to undertake, was of the view that rather than concentrating on the provisions of the revised Code, consideration should be given to trying to develop an agreed set of principles which would govern relationships between suppliers and retailers. R.I. advised that any

consideration of the specifics of such principles should be framed with the objective of addressing particular problems in the supply chain. In this regard R.I. considered it important that suppliers should detail the specific problems/practices which were concerning them. R.I. advised that retailers also had problems with supply chain issues. They expressed the view that the best approach would be to identify the problems experienced by suppliers and retailers with the current supply chain arrangements and the principles that should govern the seeking of solutions to these problems. RI would be happy to move forward on such a basis.

Mr. Travers welcomed R.I.'s intention to engage in exploring the possibilities of agreeing a way forward. Insofar as RI's stated basis for its engagement, Mr. Travers advised that he was not in a position to anticipate what the views of suppliers might be but he was willing to put forward to them the proposition suggested by RI. He suggested that if both sides were amenable to proceed on such a basis that it would be useful if both retailers and suppliers were each to set out their view of the problems in relation to the current operation of the grocery goods supply line and the set of principles that should govern the relationships and the various practices between stakeholders in the supply chain.

RI advised that on the basis that the revised Code circulated in August would be parked, it would be prepared to forward to Mr. Travers a list of retailers' problems with the current method of operation of the grocery supply chain together with a suggested High Level set of Principles for dealing with those problems.

Mr. Travers stated that in his forthcoming meeting with FDII, he would advise them of R.I.'s position and that he would invite them also to forward a list of their problems together with their set of principles for dealing with those problems. Mr. Travers advised that if both sides were agreeable to this suggestion, it would be his wish that each side would share with the other the details of their respective problems and principles. He advised that he would then seek to convene a joint meeting at which the respective problems and principles could be discussed with a view to establishing if a measure of agreement could be achieved on a common position on these issues.

R.I. advised that whilst it was happy to proceed along the lines suggested by Mr. Travers, there were a number of other important issues which would also have to be considered, such as how any set of principles would be enforced, that all the major players in the grocery goods sector would be covered by such principles, etc.

Mr. Travers noted the points raised by RI and advised that he would proceed on the basis outlined and that he would be anxious that both RI would forward its observations on the problems and principles that should apply in the grocery goods sector as soon as possible. R.I. indicated that they expected to be in a position to do this by the 3<sup>rd</sup> of December.

Insofar as his own task was concerned, Mr. Travers reminded RI that Minister O'Keefe had extended the deadline for reporting on his efforts to facilitate agreement on a Voluntary Code up until the 1<sup>st</sup> December, largely to facilitate a submission by RI to the process and discussion on it beyond the original deadline of mid to end September. He did not know if the time for establishing the possibility of a voluntary Code, with the aide of a facilitator appointed by the Minister, would be further

extended by the Minister. Mr. Travers indicated that he would meet with the Minister shortly to update him on the position.

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Competition & Consumer Policy Section  
7<sup>th</sup> December 2010.

**Note of Meeting with Food and Drink Industry Ireland (FDII) and Retail Ireland (RI) on Monday 20<sup>th</sup> December 2010 at 11.30am**

In attendance:

Paul Kelly FDII  
Shane Dempsey FDII

Torlach Denihan RI

John Travers, Facilitator  
Kieran Grace & Cathal O' Gorman, Department of Enterprise, Trade and Innovation  
Nicholas Donnelly, Legal Advisor, Department of Enterprise, Trade and Innovation

Mr. Travers opened the meeting by thanking the FDII and the RI delegations for their attendance. He advised that he had recently met with the Minister to update him on the facilitation process. At that meeting the Minister had stated that whilst he was prepared to extend the deadline for the completion of the process for a further period until the 15<sup>th</sup> January, he also wished that the officials in the Consumer Policy Section should begin work on preparing bespoke legislation which would allow for the introduction of a statutory Code of Practice as early as possible in the new year. Mr. Travers advised that the Minister had requested that the stakeholders engaged in the facilitation process should be informed of his decision, which he hoped would have the effect of concentrating minds.

Mr. Travers welcomed the fact that both sides had submitted their respective principles for governing relationships between stakeholders in the grocery goods chain. He advised that, with the agreement of both sides, he had forwarded the submissions of each side to the other. He noted the differences in the approach taken by both sides in that the document submitted by RI was framed on the basis of a high level set of principles whereas FDII approach had been more detailed. Mr. Travers advised that he hoped to use the documents submitted by RI and FDII to explore what measure of agreement there was on the various issues and to see how that might be built upon.

Mr. Denihan advised that RI's document was made up of 3 parts. The first part was concerned with meeting the needs of consumer and the importance of supporting the development of an efficient and competitive industry. The second part was more specific in nature and was concerned with the principle of clear, regular and open communication including in relation to such issues as agreements being recorded in writing, reasonable notice to be given to changes to supply arrangements, payments for supplies to be made within a reasonable time. The 3rd part of the document was concerned with the handling of disputes.

Mr. Kelly advised that FDII's document detailing its view of the principles for governing relationships between stakeholders in the grocery goods sector was framed in the light of the revised draft Code prepared by the Department. In addition he advised that FDII had used the specific headings in the revised Code

to list the particular problems being experienced by suppliers as had been requested.

Mr. Travers suggested that as there was a measure of agreement between suppliers and retailers that relationships in the grocery goods sector should be underpinned by a set of principles, as a starting point it might be useful to explore what those principles should be. He noted that the first principle in the Department's revised draft was concerned with the Consumer Interest. RI advised that it did not have any specific issue with the principle as espoused but would like the opportunity to examine the wording of the principle.

As regards the principle of fair dealing, Mr. Travers wondered what views FDII and RI had on the principle as proposed in the revised draft. FDII advised that it very much supported the inclusion of a fair dealing principle but that it wished to consider whether the principle as worded was sufficiently adequate to prevent the transfer of excessive risk by retailers to suppliers. RI advised that whilst it was not opposed in principle to a fair dealing provision, the wording of any such provision was important and that it wished to examine the wording of the proposed provision in the revised draft in further detail.

Mr. Travers then referred to the proposed principle providing for a strong supplier base and noted that unlike the UK the revised draft Code would apply to all grocery goods undertakings, including suppliers, above the specified threshold. FDII stated that it was strongly of the view that the Code should focus on those practices which allowed retailers to transfer excessive risk to suppliers and that it did not, therefore, see the justification for applying the Code to suppliers. Mr. Travers stated that in his meetings with a number of stakeholders the case had been put that whilst suppliers may experience difficulties in relation to the practices of large retailers, small retailers likewise also suffered from unfair commercial practices from larger suppliers. FDII advised that it wished to consider this issue further. RI advised that it accepted that it would not be possible or desirable to make every contractual arrangement between grocery goods suppliers, no matter what size, subject to the provisions of a Code and that it, therefore, supported the logic of applying a threshold and did not have any particular objection to the threshold of €50 million proposed in the revised draft Code.

Mr. Travers wondered if either FDII or RI had any observations in relation to the final principle in the revised draft namely that any Code should seek to promote the development of a competitive retail sector. Neither FDII or RI had any specific observations to make in relation to this proposed principle.

Mr. Travers stated that whilst establishing general principles was important in laying the foundation for governing relationships between stakeholders in the grocery goods change, it was also important to push on and discuss the detailed provisions that might be included in any Code. In this regard he noted that FDII had forwarded its views in relation to the specific provisions/obligations proposed in the draft revised Code and whilst he was aware of RI's previously expressed concerns in relation to the revised draft prepared by the Department, he felt that it

would be useful, and indeed essential, for RI to also submit its views in relation to what specific provisions should be included in a Code.

Mr. Travers suggested that for the purposes of the meeting it might be useful to go through the particular provisions detailed in the Department's revised draft and for FDII or RI to offer any views/observations they may have on these provisions. Insofar as the first provision requiring that *Terms of Business Agreements be in writing*, he noted that there appeared to be a measure of agreement between FDII and RI on this issue. FDII advised that it was broadly satisfied with the provision as worded in the Department's revised draft but that they would have a concern in relation to the suggestion made by RI that only the main provisions of agreements should be recorded and that agreements could be recorded in writing after they had been concluded. RI advised that it would consult with its members in relation to the issues raised in relation to this provision.

Mr. Travers then referred to the next provision in the Department's revised draft, namely that relating to the *Variation of Terms of Business Agreements*. FDII advised that it was happy with the provision as worded. RI stated that that it wished to consider the problems cited by FDII and to revert back with its views.

Insofar as the next provision regarding *Changes to Supply Agreements*, Mr. Travers noted that there was a degree of complementarity between the Department's revised draft and the principle of Clear, Regular and Open Communication as set out in the principles submitted by RI. FDII advised that whilst it fully supported the importance of clear, regular and open communication, it was concerned that that any provision in this area should ensure that where there are changes to supply agreements, there should be an obligation that reasonable notice be given of such changes. For that reason, FDII advised that it preferred the wording as proposed in the Department's revised draft. RI advised that whilst it had no problem with the principle that reasonable notice be given of changes to supply agreements, it should be recognised that such changes can be at the behest of suppliers as well as retailers. RI was concerned that any provision in this area should not strait jacket suppliers and retailers into restrictive and uncompetitive supply arrangements and that the details of any provision in this area would best be discussed between those on both the supplier and retailer side who are familiar with the day to day logistics of supply arrangements. RI advised that the proposal in the Department's revised draft that compensation be paid in cases of failure to provide reasonable notice of supply changes would be problematic for its members.

Mr. Travers then raised the next provision in the Department's revised draft, namely the provision concerning *Prompt Payments*. Mr. Travers noted that payments in relation to commercial contracts, including those in the grocery goods sector, were covered by the terms of the European Communities Regulations (Late Payments in Commercial Transactions) Regulations 2002 which stipulates that unless otherwise agreed, payments made after 30 days shall be subject to interest charges. FDII advised that notwithstanding the existence of the aforementioned Regulations, it members continued to experience late payment and other practices such as payments being unreasonably delayed for reasons of minor substance. FDII believed that any provision in this area should be prescriptive in terms of

definitions of phrases such as reasons of minor substance so as to ensure that its members no longer suffer from late payment practices. RI stated that its members were fully aware of the requirements of the 2002 Regulations. RI advised that it noted the list of problems identified by FDII in the area of late payments and that it would look into these issues and revert back.

Mr. Travers wondered as to whether RI or FDII had any observations/views in relation to the provision on *Marketing Costs* as set out in the Department's revised draft. FDII advised that it was strongly of the view that the supplier/retailer relationship should be solely based on a buy/sell dynamic and should not be distorted by issues such as marketing costs. FDII expressed the view that the provision as drafted by the Department recognised that marketing costs could be incorporated into Terms of Business Agreements and that evidence available to FDII showed that since the introduction of the GSCOP in the UK, retailers were insisting that marketing costs be incorporated into Supply Agreements. FDII stated that it preferred an outright ban in this area and suggested that the wording that it had previously submitted in relation to Marketing Costs should be incorporated into the Code. RI stated that it was important to realize that marketing can offer benefits to all stakeholders, including suppliers. It was also important to understand the reality that marketing costs often arise unexpectedly. Mr. Denihan noted the specific problems raised by FDII in relation to marketing costs and stated that he would consult with his members on these matters and would revert back.

Mr. Travers then referred to the provision in the Department's revised draft concerning *Shrinkage Payments*. FDII advised that it had no issue with the provision as worded. RI stated that the provision was broadly acceptable but that it would revert shortly with any comments that its members might have.

The meeting then proceeded to discuss the *Wastage Payments* provision in the Department's revised draft. RI advised that it did not agree with FDII's contention that retailers were engaging in unfair practices in relation to wastage payments and that it would respond shortly with its members' views on this area.

Mr. Travers enquired as to whether RI or FDII had any observations in relation to the proposed provision on *Limited conditions for Payments as a condition of being a Supplier*. FDII advised that it had no issues with the provision as worded. RI advised that it noted the list of problems identified by FDII in this area and that it would look into these issues and revert back.

Mr. Travers then referred to the provision in the Department's revised draft concerning *Compensation for Forecasting Errors*. RI advised that it did not accept the premise upon which this provision was based as forecasting was a joint exercise and responsibility and this needed to be recognised in any provision in this area. RI advised that it would look again at this issue with a view to suggesting an alternative to the provision proposed in the Department's wording.

The meeting then proceeded to discuss the *No Payments for Better Positioning of Goods unless in relation to Promotions* provision as proposed in the Department's



revised draft. FDII and RI advised that they would consider this issue further and revert.

Mr. Travers then referred to the provision on *Promotions* as outlined in the Department's revised draft. FDII expressed the view that any provision in this area should be predicated on ensuring that suppliers are not expected to disproportionately fund the costs of promotions and that before suppliers are requested to enter into a promotion, there must be clear and realizable benefits for both the supplier and the retailer. RI noted the problems which the FDII had highlighted in relation to the area of promotions and advised that it wished to consider these further in conjunction with its members and that it would revert back with its views.

Mr. Travers enquired as to whether either FDII or RI had any particular views in relation to the *Due Care to be taken when ordering for Promotions* provision in the Department's revised draft. FDII advised that it did not have any objection in principle to the provision as drafted. RI advised that the proposal that retailers should compensate suppliers in relation to ordering difficulties would be problematic for its members. RI advised that it would further consult its members on this issue and revert back with its considered views.

FDII and RI advised that they did not have any objection in principle to the proposed provision regarding *Payment for Consumer Complaints* in the Department's revised draft.

The meeting then proceeded to discuss the provision relating to *Continuation, Renewal and Termination of Business Agreements*. FDII expressed concern that the provision as worded in the revised draft did not deal with the main problem in this area, namely the arbitrary delisting of suppliers by retailers. FDII was strongly of the view that the Code should include a specific provision in relation to delisting as in the case of the GSOP in the UK and that any such provision should stipulate that delisting should only occur for genuine commercial reasons. RI stated that it totally rejected FDII's view on this matter as it was essentially the consumer and consumer demand which determined what products were stocked by retailers.

As regards the provision on *Enforcement* in the revised draft, Mr. Travers noted that RI and FDII had different views as to how any Code might be enforced. Mr. Travers expressed the view that it might be more fruitful to focus on seeking agreement on the principles and the detail provisions to be incorporated into any Code following which the issue of enforcement could then be considered.

Mr. Travers stated that he hoped that the run through of the particular provisions in the Department's revised draft was useful. He noted from the discussion that RI and FDII had indicated that they wished to give further consideration to a number of the provisions of the Department's revised draft. RI advised that it would urgently consult with its members and would seek to draw together a comprehensive response on all the issues raised. FDII advised that it would also consult further with its members on the issues which it had flagged in the course of the meeting following which it would forward a response outlining its position.

Mr. Travers in noting the Minister's revised deadline of 15<sup>th</sup> January 2011 for completing the facilitation process, requested that RI and FDII both forward their responses by close of business on the 10<sup>th</sup> January. RI and FDII undertook to respond within that timeframe.

Mr. Travers advised that on receipt of the respective responses, he would then take a view as to whether the gap between the sides was bridgeable or whether it was too large and he would advise the Minister accordingly. The meeting then concluded.

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Competition and Consumer Policy Section  
11<sup>th</sup> January 2011

**Note of Meeting with Superquinn on 30<sup>th</sup> June 2010 at 2.30pm regarding the Code of Practice for Grocery Goods Undertakings**

In attendance: John Travers, Facilitator  
Simon Burke, Superquinn  
James Wilson, Superquinn  
Cathal O' Gorman, Department of Enterprise, Trade and Innovation

The agenda for the meeting was circulated and agreed. Mr. Travers opened the meeting by referring to the ongoing debate in relation to the state of the relationships between the various stakeholders in the grocery goods sector and the commitment in the Renewed Programme for Government to introduce a Code of Practice for the Grocery Goods Sector. Mr. Travers advised that in advance of statutory provision for introducing such a Code, which he understood would be included in legislation currently being prepared by the Department, he had been asked by the Minister to engage with all relevant stakeholders to explore the possibility of agreeing a voluntary Code. Mr. Travers advised that he intended to meet with as many stakeholders as possible and that he envisaged reporting back to the Minister on this matter by the middle/end of September.

Mr. Burke advised that whilst Superquinn was opposed to the introduction of a Code in principle, it appreciated the role that Mr. Travers had been asked to carry out and welcomed the opportunity to engage with him on this issue. Mr. Burke advised that Superquinn had a number of concerns in relation to the introduction of a Code. Superquinn was concerned as to what the purpose of the Code was, who should be covered by the Code, how would the Code ensure proportionality in its obligations, what threshold should apply to the Code, would all stakeholders be covered by the Code, would the Code apply equally to suppliers as well as retailers, how would the Code square the circle between imposing additional regulation on the retail sector whilst also delivering lower prices to the consumer.

Mr. Burke advised that it was important that any Code should respect the differences in the dynamics of the relationships between suppliers, particularly international suppliers and retailers like Superquinn and the corresponding contractual relationships between such suppliers and larger multinational retailers, who are in a stronger position to negotiate much more advantageous terms. Mr. Burke further advised that Superquinn favoured a Code that would be based on a set of principles rather than seeking to prescribe specific practices, which Superquinn believed would lead to cosmetic changes in nomenclature and/or attempts to subvert restrictions on specific practices. Mr. Burke stated that maintaining the indigenous aspect of both the retail and the supplier network was also an important consideration to take into account in drawing up any Code.

Mr. Travers expressed his appreciation for Superquinn's overview on the Code and what the Code should encompass. Mr. Travers advised that part of his task was to examine what specific provisions should be included in the Code and in this regard he wondered as to whether Superquinn had views on the draft Code which had been appended to the Consultation Paper published by the Tánaiste last year. Mr. Burke advised that Superquinn were not in a position to comment on the detailed provisions of the draft Code at this stage but would be happy to do so and

revert to Mr. Travers on the matter. Mr. Travers asked if Superquinn could submit its comments by the middle of July and suggested that in addition to commenting on the provisions of the draft Code, Superquinn might wish to suggest how in its view the Code might be improved by the addition, removal, amendment of particular provisions.

Mr. Travers advised that he looked forward to receiving Superquinn's detailed comments on the draft Code. Mr. Travers undertook to forward a short note to Superquinn recording the details of the issues discussed at the meeting and invited Superquinn to submit any amendments that it wished to the note. Mr. Travers concluded by thanking Mr. Burke and Mr. Wilson for their co-operation in relation to his task.

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Competition and Consumer Policy Section  
Department of Enterprise, Trade and Innovation  
30<sup>th</sup> June 2010

**Note of Meeting with Tesco on 14 July 2010 at 10.30 am regarding the Code of Practice for Grocery Goods Undertakings**

In attendance: John Travers, Facilitator

Dermot Breen, Tesco

Kieran Grace & Margaret Ryan, Department of Enterprise, Trade and Innovation

The agenda for the meeting was circulated and agreed. Mr. Travers opened the meeting by referring to the ongoing debate in relation to the state of the relationships between the various stakeholders in the grocery goods sector and the commitment in the Renewed Programme for Government to introduce a Code of Practice for the Grocery Goods Sector. Mr. Travers advised that in advance of statutory provision for introducing such a Code, he had been asked by the Minister to engage with all relevant stakeholders to explore the possibility of agreeing a voluntary Code. Mr. Travers advised that he intended to meet with as many stakeholders as possible and that he envisaged reporting back to the Minister on this matter by the middle/end of September.

Mr. Breen advised that whilst Tesco was opposed to the introduction of a Code in principle, it appreciated the role that Mr. Travers had been asked to carry out and welcomed the opportunity to engage with him on this issue. Mr. Breen advised that Tesco had a number of concerns in relation to the introduction of a Code. Unlike the UK, where a code had been introduced to tackle an identified problem, no such problem had been identified in Ireland. Thus, Tesco struggled to see any benefits in such a code. He felt that would be very difficult to get an agreed code. In his view, a code would give suppliers' more leverage in negotiations and would see an increase in prices for consumers. Thus, it would be seen as a return to the previous groceries' orders under a different guise. Without prejudice to that position, a level playing field, applying equally to all parties, was required as a basic prerequisite.

Mr Breen stated that the only code of value would be one that was aimed at consumers' welfare and interests: the draft included in the consultation paper was, in the view of Tesco, aimed solely at protecting suppliers, especially large multinational suppliers. He also noted the danger that increased sourcing of goods from outside of the State would result from the introduction of a code. Irish suppliers who invest in their products, innovate and are competitive will never go out of business according to Mr Breen. Those that do not invest or innovate will be in difficulties and these are the ones that are calling for protection through the introduction of a code.

On the issue of promotion, marketing etc, and reported demands for monies from suppliers for these activities, Mr. Breen advised that all supplies are very active in marketing and set aside annual budgets in this respect. These were normally dealt with through "off-price negotiations" and have been a feature of the trade for decades and would continue to do so. Mr Breen also proffered the opinion that, unlike retailers, suppliers do not have a direct interface with consumers: as a result, many put the suppliers' interests before those of the consumers which retailers could not afford to do if they wished to retain business.

On the issue of a threshold Mr Breen stated that the code should apply to all concerns irrespective of turnover as to do otherwise would be to give a competitive advantage to some parties over others (especially franchises). He also advised that Tesco was against the establishment of a separate office of Ombudsman for the enforcement of any code. In particular, he stated that he could see no reason for expecting parties to pay for enforcement if a code was skewed against them. Tesco considered that the proposed new body to be established, incorporating the NCA and the Competition Authority, would be a more effective and efficient location for enforcement purposes.

Mr. Travers raised the issue of a possible meeting, facilitated by himself, between FDII and Retail Ireland to discuss the contents of a possible code bearing in mind competition law strictures. Mr Breen reserved his position on this issue, noting that Tesco Board approval would be needed and that Tesco would not necessarily be bound by any Retail Ireland agreement. However he stated that the principles underpinning any code should be equity, balance, mutual obligations on all parties, support for competition and, above all, the interests of the consumer at all stages.

Mr. Travers concluded by thanking Mr. Breen for his co-operation in relation to his task. He asked that if Mr Breen wished to update any issues in their very comprehensive submission of 30 September 2009, they should do so as soon as possible.

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Competition and Consumer Policy Section  
Department of Enterprise, Trade and Innovation  
14 July 2010

## ANNEX B

### **Revised Draft Outline of Code of Practice for Grocery Goods Undertakings – August 2010**

The Code is concerned with practices in the grocery goods trade and includes specific provisions to facilitate fair trade between grocery goods undertakings within an agreed framework of governing principles. The Code requires that these provisions be incorporated into contracts or terms of business agreements between grocery goods undertakings for the production, supply or distribution of grocery goods.

#### **1. In this 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 Undertaking** 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 and whose annual turnover exceeds €50 million in respect of its operations in the Republic of Ireland. 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, ingredient or processing aid is intended to be sold by a retailer as an additive, ingredient or processing aid.

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

**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 specified 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;

**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 them being delivered to retailers.

## 2. **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 work together to ensure that there is no impediment to 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 into which they enter with another undertaking, whether formal or informal, are fair and lawful 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.

## 3. **Terms of Business Agreements to be in writing**

Agreements between grocery goods undertakings, 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.

**4. Variation of Terms of Business Agreements**

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.

**5. Changes to Supply Chain Procedures**

Where a 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 undertaking or shall compensate the undertaking for any costs incurred by the undertaking due to a failure to provide such notice.

**6. Prompt Payments**

Terms of business agreements between grocery goods undertaking shall provide that grocery goods undertakings shall pay for goods and services received from other grocery goods undertakings 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.

**7. Marketing costs**

A retailer is prohibited from requiring a supplier to make any payment towards a retailer's marketing costs unless such a contribution has been agreed in the Terms of Business Agreement.

**8. Shrinkage Payments**

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.

**9. Wastage Payments**

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

**10. Limited conditions for Payments as a condition of being a Supplier**

A retailer is prohibited from requiring payments as a condition of listing a supplier's products unless such payments are made in relation to a promotion or the payments reflect the reasonable risk run by the retailer in listing new products.

**11. Compensation for forecasting errors**

Terms of Business Agreements shall require that 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 and in consultation with the supplier or unless the Terms of Business Agreement includes an unambiguous provision that full compensation is not appropriate.

## **12. No Payments for better positioning of goods unless in relation to Promotions**

Unless provided for in the Terms of Business Agreements, a Retailer may not seek payments from a supplier to secure better positioning or an increase in the allocation of shelf space unless such payment is made in relation to a promotion.

## **13. 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 grocery goods undertaking shall not directly or indirectly seek to compel another grocery goods undertaking to make any payment or grant any allowance for the advertising or display of grocery goods. A retailer shall not seek a supplier's participation in a promotion regarding 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.

## **14. 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. Retailers are obliged to take reasonable care when ordering grocery goods at a promotional wholesale price and not to over-order. Where 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.

## **15. Payment for consumer complaints`**

Unless otherwise agreed in the Terms of Business Agreements between grocery goods undertakings, 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 profit accruing to another grocery goods undertaking.

## **16. Continuation, Renewal and Termination of Terms of Business Agreements**

Terms of Business Agreements between 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 a grocery goods undertaking who wishes to terminate a Business Agreement with another grocery goods undertaking.

## **17. Enforcement**

Investigations, complaints and disputes between grocery goods undertakings in relation to the provisions of this Code shall be investigated by the National Consumer Agency/Competition Authority.

The National Consumer Agency/Competition Authority's principal duties in relation to the Code will be:

- to investigate complaints in relation to alleged breaches of the Code and where it considers it appropriate to name any undertaking found to be breaching the terms of the Code
- to act as an arbitrator between grocery goods undertakings in relation to disputes arising under the Code;
- to gather information (for example, by receiving confidential complaints from retailers, suppliers, primary producers and consumer organizations or interest groups) and proactively investigate records in areas subject to complaint in order to identify whether breaches of the Code have occurred;
- to publish guidance on specific provisions of the Code as appropriate;
- 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;
- to advise and report to the Minister for Enterprise, Trade and Innovation on the operation of the Code.

## ANNEX C

*the voice of the retail industry in Ireland*



Mr John Travers  
c/o Department of Enterprise, Trade and  
Employment Kildare Street  
Dublin 2

5 November 2010

Dear John

The members of Retail Ireland wish to engage constructively with you in the process you have been entrusted with by the Minister for Enterprise, Trade and Innovation in regard to the development of an agreed and workable Code of Practice. We appreciate your efforts to progress this matter and are anxious to assist you as much as possible.

On foot of detailed analysis of the issue, a Retail Ireland delegation would like to meet you for a further discussion in a spirit of constructive engagement. At this meeting we would like to outline some principles that we feel should inform any code and discuss them with you with a view to developing a workable position.

The Department's August 2009 'Consultation Paper: Code of Practice for Grocery Undertakings' raised many important issues. As this was a consultation paper it did not offer answers. Now that the Department has moved on to the next stage we suggest that a Regulatory Impact Assessment be conducted. Under the Government's Better Regulating Principles it is standard practice that a Regulatory Impact Assessment is carried out when a proposal with significant economic implications is under consideration. This proposal falls into this category because of the size of the grocery market. There are, in our view, a number of unintended consequences likely to emerge from a Code in its current form which we would like to discuss with you and which we feel have not received sufficient attention to date.

In the interests of saving time, I enclose an appendix that sets out some points regarding the draft Code prepared by the Department of Enterprise, Trade and Innovation.

Please let me know if you are willing to meet so that the necessary arrangements can be made.

Yours sincerely,

Torlach Denihan

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CHAIRMAN RIO IARD NF5131IT  
DIRECTOR TORLACH DEN IHAN

## Appendix

Points on the draft code of practice circulated by the Department of Enterprise, Trade and Innovation titled Draft Outline Code of Practice for Grocery Goods Undertakings:

### Scope of the Code

1. Definition of Retailer: The definition in the Code does not include the *operators* of symbol groups (wholesaler/franchisors), but it does propose to regulate the relationship between the symbol group franchisor and franchisee. We believe that this is not intended and the definition should apply to relationships between wholesaler/franchisors and their suppliers but not also to the relationship between wholesaler/franchisors and their franchised retailers.
2. Turnover threshold: We are happy with the proposed turnover threshold of €50M so that the Code applies only to grocery goods undertakings, whether suppliers or retailers, which have more than €50M turnover in the state. There should be a mechanism to ensure that this threshold will be automatically indexed upwards with inflation.
3. The turnover threshold relates to all turnover of Grocery Goods Undertakings, as it probably should given that alternative measures may not be available. However, there may be undertakings which have a limited involvement in the retail or supply of goods for food and drink for human consumption, but which do have a turnover of more than €50M in the state. For example it may apply to non-food retailers who have a turnover of more than €50M, but who do sell food or drink for human consumption. The Code should clarify if the turnover threshold relates to Grocery Goods and if it does not there should probably be an opt-out for undertakings that only supply or retail Grocery Goods as an incidental part of their business.
4. Definition of Supplier: The definition of Supplier states that it includes suppliers based anywhere in the world, but it is not clear how this activity is to be regulated. This may already be covered by the turnover requirement in any event.
5. Legal Status: It would be preferable if the Code did not state that it will be "incorporated" into contracts between Suppliers and Retailers. While those contracts can reflect best practice as set out in the Code, it will create difficulties if the Code formed part of those contracts and parties should be allowed to contract out of individual provisions. A number of the proposed provisions of the draft Code allow parties to specify that they can include terms which are prohibited provided the parties set this out in

their terms of business agreements. For example, articles 8, 9, 10, 11, 12 and 15 of the draft Code include such provisions. This should apply generally and parties should have freedom by mutual agreement to agree the terms of business that apply or do not apply between them so that they have the necessary flexibility to deal with commercial reality.

### Code Provisions

6. **Governing Principles:** While these new Principles are a useful addition to the Code, it would be very useful if the application of the Principles to the detailed provisions of the Code could be clarified. A discussion on this point would be beneficial. More generally, the Governing Principles are hard to reconcile with each other in some respects. A discussion on the purpose of the Code and how that purpose has been reflected in these Principles would be helpful in ensuring that the Code will work in practice. While we all accept that consumers must not be prejudiced by the operation of this Code, the governing principle which cleats with this is overly broad and is already covered by competition law.
7. **Terms of Business.** There is a general principle in the draft Code that retailers and suppliers must have standard terms of business. We believe that the Code should set out what is believed to be best practice and if parties wish to include other matters or to vary the terms of price, sale or supply of grocery goods then they should be free to do so provided this is permitted by terms agreed. We also agree that there should not be any variation to those terms by one party. If there is a breach of these terms or a unilateral breach or alteration of those terms then remedies would be available through the courts.
8. **Supplier Obligations:** The Governing Principles could be supported by the addition of some obligations on suppliers. For example, suppliers should not be able to withdraw their supply of products without reasonable notice and to meet agreed standards in relation to packaging, bar-coding, labelling and so on. The Code should in addition recognise that all parties in the supply chain (and not retailers alone) need to be able to respond and bear some of the cost of responding to changes in consumer demand and other market circumstances. These provisions would go towards the stated aim of the Code in delivering a more efficient grocery industry in Ireland.
9. **Confidentiality:** Although the principle of Fair Dealing is a welcome addition to the Code, the principle of openness and transparency it contains should not jeopardise the confidentiality of commercial relations, which must be preserved to ensure a competitive market and this is required as a matter of competition law. There are stringent provisions relating to confidentiality in the Competition Acts and the Consumer Protection Act

which apply to the proposed body which may regulate the operation of the Code and the Code needs to reflect these requirements.

10. Scope of Code: It is not clear why some provisions of the Code apply to all Grocery Goods Undertakings and some apply only to relationships between Retailers and Suppliers. Articles 7-12, Article 14 and elements of Article 13 apply only to retailers and suppliers but the remaining sections of the Code apply to all Grocery Goods Undertakings. This may be clarified by further discussion on the scope of the Code.
11. Reasonableness: The provisions of the Code need to be looked at in more detail to examine their reasonableness. For example the provision relating to "reasonable notice" in Articles 1 and 5 clearly only applies to Retailers when it should equally apply to Suppliers. Some other provisions appear to cross over into existing contract law or competition law and it will be important to ensure that the Code is consistent with existing law. We would welcome the opportunity to engage in more detailed discussions on these provisions.
12. Forecasting: There are a number of provisions in the draft Code which deal with forecasting errors for promotions and ordering goods. The Code needs to recognise that forecasting of requirements of supply for promotions and otherwise is a joint exercise. It might be more appropriate for the Code to recommend that forecasting be carried out jointly and perhaps for certain representations to be made by the parties. If these were made recklessly or negligently then there may be a remedy in the courts for the aggrieved party.

#### Investigations, Disputes and Compensation

13. Powers of Investigation: At present the Competition Authority/NCA is nominated as the regulator with potentially wide powers of investigation. We believe that these additional functions and powers are unnecessary given that these regulators already have wide ranging powers of investigation in relation to their existing functions and their regulatory burden should not be increased in this way. In any event this may require legislation to be effective. A discussion on this subject would be useful.
14. Dispute Resolution: The Code would benefit from some further discussion in relation to the resolution of disputes, as at present, the only route available to Retailers or Suppliers appears to be a reference to the Competition Authority/NCA. Given that this would add to their existing regulatory burden, it may be worth investigating the possibility of non-binding mediation or arbitration mechanisms. The operation of the Code and the resolution of legal disputes should be kept separate.



15. Compensation Payments: The draft Code provides for compensation to be paid in a number of situations and always by retailers to suppliers. Without a greater level of detail on the way in which these provisions would work if they fall into dispute, it will be hard to get agreement from any prudent retailer to be bound by the Code. In the event there is a dispute between Grocery Goods Undertakings which cannot be resolved then the only available sanction to the regulator should be the naming and shaming of the relevant offenders. If there are further remedies available to the parties to a contract then these should be sought through the courts or existing regulators.

## **ANNEX D**

### **Retail Ireland's Proposed Principles for Underpinning Any Voluntary Code of Practice for Grocery Sector**

#### **Meet Consumer Needs**

Retailers, Wholesalers and suppliers support the development of an efficient and competitive grocery industry that is focused on meeting consumers' needs and gives equal respect to:

- The right of suppliers to have their products fairly evaluated for purchase against reasonable and consistent standards; and
- The right of retailers and wholesalers to buy the best products at the best price.

#### **Clear, Regular and Open Communication**

Retailers, wholesalers and suppliers shall communicate to each other clearly and regularly throughout their business relationships so that they are able to respond effectively to consumer demand.

Retailers and wholesalers shall communicate openly to suppliers any expected changes to their relationship, whether because of changes in demand or consumer behaviour or any other reason.

Retailers, wholesalers and suppliers shall maintain any information that they are provided about the others' business in strict confidence.

#### **Agreements to be Recorded in Writing**

The main provisions of all agreements between retailers, wholesalers and suppliers on commercial matters should be recorded in writing either at the time they are reached or as soon as possible thereafter.

#### **Reasonable Notice of Changes**

Retailers, wholesalers and suppliers shall give each other reasonable notice of any changes that they need to make to their relationship, including but not limited to:

- Changes to existing supply arrangements;
- Volumes of orders;
- Prices.

#### **Payments**

Retailers, wholesalers and suppliers will pay each other within a reasonable time. They will agree standard payment terms for this purpose.

#### **Disputes**

Disputes between retailers, wholesalers and suppliers shall be referred promptly to a senior member of management in each company who shall discuss the matter in dispute and seek to reach agreement on it. If they cannot agree, the matter shall be referred to the chief executive or managing director of each company who shall discuss the matter in dispute and seek to

reach agreement on it. Retailers, wholesalers and suppliers shall be free to agree other dispute resolution procedures.

## **ANNEX E**

### **FDII's list of Grocery Sector Problem Definitions and set of proposed principles**

#### **BACKGROUND**

FDII submits this document to the Department of Enterprise, Trade & Innovation as part of the facilitated process to create a voluntary code of practice in the grocery sector. FDII reiterates its preference for a mandatory code and makes this submission without prejudice. FDII believes that the existing draft code should be the basis of the creation of the voluntary code. This document, at the request of the facilitator John Travers, expands the comments submitted in September 2010 on the draft DETI code by prefacing each provision with the related problem that the provision was created to address. It also sets out the supplier perspective on the principles in the code i.e. the comments submitted in FDII's September response.

The document is divided into two sections across the following pages. The principles and provisions of the code are captured in the left hand column of the page. The rationale and the practices that necessitate each provision are captured in the right hand column.

On a general note, it is impossible to provide specific data from suppliers about the unfair practices they have experienced. The nature of the imbalance in power between supplier and retailer means the latter cannot risk their identification by providing specific details of unfair practices. FDII has synthesized specific experiences into general practices and outlined them within this document.

FDII reiterates its belief that a grocery code must be statutory and must be policed by an Ombudsman. It is unrealistic to expect retailers to cease of their own volition practices that generate significant income for their organisations.

***Section 1: Principles and Rationale of the Code***

<p><b>PRINCIPLES OF CODE</b></p>	
<p><b>RATIONALE</b></p> <p><b>(1) Consumer Interest:</b> 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 work together to ensure that there is no impediment to the passing on of sustainable lower prices to consumers.</p>	<p>FDII agrees with this principle and believes that significant consumer benefits will accrue when the relationship between retailer and supplier is recalibrated onto a buy/sell dynamic. As a result, we believe that the phrase 'lowest sustainable prices' is unnecessary as this principle is a 'given' amongst the stakeholders in the sector. FDI[ believes that consumer interest in the context of the code is more accurately: a diverse choice of products available from a wide range of retailers, high quality product, value for money and convenience</p>
<p><b>(2) Fair Dealing:</b> 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 into which they enter with another undertaking, whether formal or informal, are fair and lawful, do not involve the transfer of excessive risks or unexpected costs to the supplier, 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</p>	<p>We believe that this principle needs to include the condition "<i>do not involve the transfer of excessive risk or unexpected costs to the supplier.</i>"</p> <p>Simply put, the imbalance of power between supplier and retailer necessitates an explicit statement in support of suppliers, particularly as unfair practices are perpetuated on suppliers where retailers place the entire cost of responding to market conditions on suppliers. Whilst there are practices that suppliers engage in that retailer would wish to cease, these are not driven by an <i>imbalance</i> of power.</p> <p>The only people who now deny that there are unfair practices in the sector are retailers. It's also been established that suppliers will not provide evidence against their main customers due to commercial realities. It behooves Government and state agencies to ensure there is a facility to allow suppliers to identify unfair practices without fear of commercial reprisal.</p>

<p><b>(3) Strong Supplier Base:</b> 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.</p> <p>FDII agrees with this principle but reiterates that the code should only apply to retailers with turnover &gt;E50 million in the context of their dealings with their suppliers.</p>	<p>As suppliers are incapable of applying market power over their customers ie retailers, there is no rational reason to not specifically that the code should apply to this cohort.</p>
<p><b>(4) Competitive Retail Sector:</b> 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.</p>	<p>FDII agrees with this principle. However, FDII points out that the competitiveness of the retail sector does not depend entirely on the competitiveness of those retailers with turnover &gt;E50 million euro. A fully functional code will curtail the power of these large retailers to the betterment of the consumer, the supplier, the producer and indeed the small retailers of Ireland.</p>

**Section 2: FDII Grocery Sector Problem Definition**

<b>PROVISION</b>	<b>RATIONALE</b>
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<p><b>3. Terms of Business Agreements to be in writing</b></p> <p>Agreements between grocery goods undertakings, 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.</p>	<p>To provide an Ombudsman with a paper trail in relation to supplier/retailer relations, all terms of business agreements must be in writing. If an investigation is undertaken, these agreements can be compared against the records of relevant suppliers and retailers. Whilst we acknowledging that many 'unfair' demands are never put in writing, FDII believe written agreements formed with reference to the code of practice form the minimum requirement of a correctly functioning grocery sector.</p>
<p><b>4. Variations in terms of business agreements</b></p> <p>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.</p> <p>FDII believes that the single most important aspect of the code is the prevention of retrospective and arbitrary demands_ As a result, we resubmit our original wording on this point below</p> <p>1.1.1 A Retailer must not vary the written terms of a supply agreement retrospectively, and must not request or require that a Supplier consent to retrospective variations of any Supply Agreement.</p> <p>1.2 A retailer may make an adjustment to terms of supply that has retroactive effect where the relevant Supply Agreement sets out clearly and unambiguously:</p> <p><u>- any specific change of circumstances (such</u></p>	<p>FDII believes that the following reported unfair contractual and commercial practices in terms of the variations of terms warrant this provision:</p> <ol style="list-style-type: none"> <li>I. Retrospective changes to contract terms (e.g. retroactive price adjustments without justification), related to the whole quantity of supplied products</li> <li>2. Retailers will regularly place arbitrary financial demands on suppliers throughout the financial year. These are outlined in more detail in further sections.</li> <li>3. Retailers requesting payment from the supplier in case they sell goods at discount and they do not reach target</li> <li>4. Demands for payment for wastage (i.e. goods unfit for sale) after delivery at the retailer</li> </ol>

<ul style="list-style-type: none"> <li>— circumstances being outside the Retailer's control) that will allow for such adjustments to be made;</li> <li>— and detailed rules that will be used as the basis for calculating the adjustment to the terms of supply.</li> </ul> <p>1.2 If a retailer has the right to vary a supply agreement unilaterally, it must give reasonable notice of any such variation to the Supplier</p>	
<p><b>5. Changes to Supply Chain Procedures</b></p> <p>Where a 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 undertaking or shall compensate the undertaking for any costs incurred by the undertaking due to a failure to provide such notice.</p>	<p>Examples of practices</p> <ol style="list-style-type: none"> <li>1. Demands for supplier recovering the retailer's unsold items at his full cost (logistics, manipulation etc)</li> <li>2. Demands to change distribution and logistical platforms without adequate notice</li> </ol>
<p><b>6. Prompt Payments</b></p> <p>This is a central issue for suppliers, particularly in the current economic climate, where cashflow is vital to their <b>survival</b></p> <p>Terms of business agreements between grocery goods undertaking shall provide that grocery goods undertakings shall pay for goods and services received from other grocery goods undertakings 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.</p> <p>More specific detail defining 'reasons of minor substance' is required. For example, payments cannot be withheld over queries where there</p>	<p>Examples of practices:</p> <ol style="list-style-type: none"> <li>1. Changes of invoices to decrease the payout and extend the time for final payment;</li> <li>2. Invoices not paid as soon as one single pricing or delivery query or where a challenge is not justified by evidence;</li> <li>3. Expecting suppliers to prove all pricing/ delivery queries;</li> <li>4. Withholding payment of proven invoices.</li> <li>5. Demands for immediate net price decreases</li> <li>6. Immediate deduction of penalties even when they are disputed</li> <li>7. Payments made outside the agreed payment period or an excessively long payment period imposed in the contract (in</li> </ol>



<p>is &gt;90% invoice accuracy. Payments should be made separately to such queries being resolved. Prompt payment should also be defined as 30 days as a general principle.</p>	<p>general, non-observance of cash discount periods, expensive rates for settlement accounts)</p> <p>8. To offset legislation enforced payment terms, retailers transform the cash loss into higher demands for discounts or extra payments for financial losses (and will not accept objections) Deducting amount of money without agreement _</p>
<p><b>7. Marketing costs</b> A retailer is prohibited from requiring a supplier to make any payment towards a retailer's marketing costs unless such a contribution has been agreed in the Terms of Business Agreement.</p> <p><b>FDII</b> has outlined the need to base the relationship between suppliers and retailers solely on a buy/sell dynamic. Arbitrary marketing costs represent a significant distortion of this dynamic, and as a result, FDII resubmits its original wording for inclusion in the voluntary code. This compliments the principles of the buy/sell relationship</p> <p>A retailer must not, directly or indirectly, require a supplier to make any payment towards that retailer's costs of:</p> <ul style="list-style-type: none"> <li>● buyer visits to new or prospective suppliers;</li> <li>● artwork or packaging design;</li> <li>● consumer or market research;</li> <li>● the opening or refurbishing of a store; or</li> <li>● hospitality for that retailer s staff</li> <li>● establishing a presence within the ROI jurisdiction</li> </ul>	<p>Examples of these practices are:</p> <ol style="list-style-type: none"> <li>1. Unreasonable requests for investments without justification (not performance related)</li> <li>2. Disproportionate contributions: overpriced data sharing from loyalty cards versus price from panelist/ financing of stores/ warehouses</li> <li>3. Retailer requirement that supplier pays for fictitious services (e.g. useless statistics, celebration of store anniversary, IT systems)</li> <li>4. Retailer requiring suppliers to absorb the cost of retailer-led discounts</li> <li>5. Retailer demand for payment for "branding" on supplier's own displays/stands in the stores</li> <li>6. Demands for 'support' at certain junctures in the financial year</li> <li>7. Payment for display ends which take marketing spend away from consumer pricing</li> </ol>
<p><b>8. Shrinkage Payments</b></p>	<p>Examples of practices</p>

<p>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.</p>	<p>1. Retailers insisting on suppliers accepting liability for losses due to shrinkage or theft in the retailers' own stores</p>
<p><b>9. Wastage Payments</b></p> <p>A retailer shall not require a supplier to make any payment to cover wastage unless the Terms of Business Agreement specifically provides for the making of such payment and details the circumstances in which such payments may arise.</p>	<p>Example of practices</p> <p>1. Retailers have demanded payment for wastage (i.e. goods unfit for sale) well after delivery at the retailer's stores</p>
<p><b>10. Limited conditions for Payments as a condition of being a Supplier</b></p> <p>A retailer is prohibited from requiring payments as a condition of listing a supplier's products unless such payments are made in relation to a promotion or the payments reflect the reasonable risk run by the retailer in listing new products.</p>	<p>Examples of practices</p> <p>1. A number of suppliers, particularly SMEs, have reported having to make payments to initially secure shelf space. These demands are made 'off the record'.</p>
<p><b>11. Compensation for forecasting errors</b></p> <p>Terms of Business Agreements shall require that 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 and in consultation with the supplier or unless the Terms of Business Agreement includes an unambiguous provision that full compensation is not appropriate.</p>	<p>Examples of practices</p> <p>1. A number of retailers have placed substantial orders with suppliers which have then be altered significantly leaving suppliers with a huge overhang of product and associated costs. Smaller suppliers are acutely exposed to this type of forecasting error. Firstly, the costs of production are high; secondly cost of disposal is an additional cost. Finally, securing another route to market through another retailer, if possible at all will add further cost onto the supplier. In the case of perishable goods this may be not even be possible.</p>

<p><b>12. No Payments for better positioning of goods unless in relation to Promotions</b></p> <p>Unless provided for in the Terms of Business Agreements, a Retailer may not seek payments from a supplier to secure better positioning or an increase in the allocation of shelf space unless such payment is made in relation to a promotion.</p> <p>Again, this practice is a significant generator of buyer income, and as a result, it prevents the accrual of consumer benefits in the grocery sector, so FDII believes this practice should be banned outright. The following provision should be included in the code:</p> <p>A retailer must not directly or indirectly require a supplier to make any payment in order to secure better positioning or an increase in the allocation of shelf space for any products of that supplier within a store unless under an agreed promotion.</p>	<p>Examples of practices</p> <ol style="list-style-type: none"> <li>1. Retailers have demanded payments from suppliers to improve their position on the store planogram. Some suppliers have reported that retailers have demanded/requested payments in exchange for suppliers to simply 'retain' their current positioning.</li> <li>2. Retailers have also demanded extra payments from suppliers to ensure that they retain/maintain the current scale of space on shelf in stores</li> </ol>
<p><b>13. Promotions</b></p> <p>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 grocery goods undertaking shall not directly or indirectly seek to compel another grocery goods undertaking to make any payment or grant any allowance for the advertising or display of grocery goods. A retailer shall not seek a supplier's participation in a promotion regarding 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.</p> <p>FDII resubmits its original wording for this provision as it is central to the legitimacy of the code and a key step towards fairness in the sector</p> <ol style="list-style-type: none"> <li>1. A retailer must not, directly or indirectly, require a supplier</li> </ol>	<p>Example of practices</p> <ol style="list-style-type: none"> <li>1. Retailers have insisted that suppliers enter into promotions at</li> <li>2. arbitrary times</li> <li>3. Retailers have threatened delisting if promotions are not</li> <li>4. entered into</li> <li>5. In addition, suppliers have been forced to fund entirely these</li> <li>6. promotions</li> <li>7. Often there is no forecasting or performance indicators</li> <li>8. agreed before entering a promotion</li> <li>9. Retailers have forced suppliers into promotions where there</li> <li>10. is no discernible return to the supplier</li> <li>11. Retailers have insisted that they sell suppliers products on</li> <li>12. value promotions and then demanded suppliers compensate</li> <li>13. them for any shortfall in terms of original targets</li> <li>14. Retailers have over-ordered on promotion and subsequently</li> </ol>

<p>predominantly to fund the costs of a promotion. There must be a clear immediately realizable benefit to both supplier and retailer before a promotion is entered into.</p> <p>1.1 Where a retailer directly or indirectly requires any payment from a supplier in support of a promotion, a retailer must only hold that promotion after reasonable notice has been given in writing. For the avoidance of doubt, a Retailer must not require or request a supplier to participate in a promotion where this would entail a retrospective variation to the supply agreement.</p>	<p>sold some product at higher prices with no return to the supplier.</p> <p>8. In BOGOF arrangements, suppliers have been forced to pay the profit 'forgone' on the 'free' product that the retailer nominally would have made selling the product separately</p> <p>9. Retailers have demanded money for promotions which have never been run or were of a much smaller scale than agreed.</p> <p>10. Retailers requesting payment from the supplier in case they sell goods at discount and they do not reach target</p>
<p><b>14. Due care to be taken when ordering for promotions</b></p> <p>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. Retailers are obliged to take reasonable care when ordering grocery goods at a promotional wholesale price and not to over- order. Where 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.</p>	<p>See section 9 relating to 'forecasting errors'</p>
<p><b>15. Payment for consumer complaints</b></p> <p>Unless otherwise agreed in the Terms of Business Agreements between grocery goods undertakings, 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 profit accruing to another grocery goods undertaking.</p>	

## 16. Continuation, Renewal and Termination of Terms of Business Agreements

FDII believes that this section concerns a key facet of fairness in the sector. The practice of arbitrary and immediate delisting acts is significantly imbalances power relations between suppliers and retailers. Delisting may need to occur in the sector but it should only be on the basis of verifiable consumer demand. Retailers seeking to delist should follow a strict procedure and be able to provide verifiable evidence that consumer demand necessitates this course of action through EPOS data and other credible sources.

Terms of Business Agreements between 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 a grocery goods undertaking who wishes to terminate a Business Agreement with another grocery goods undertaking.

FDII resubmits its original wording on this provision in addition to the above condition:

A Retailer may only de-list a supplier for genuine commercial reasons.

For the avoidance of doubt, the exercise by the supplier of its rights under any supply agreement or the failure by a retailer to fulfil its obligations under the Code will not be a genuine commercial reason to de-list a Supplier.

Prior to de-listing a supplier, a retailer must:

- Provide reasonable notice to the supplier, including written reasons including time for the decision to be reviewed under mediation by the Ombudsman,
- Allow the supplier to attend an interview with the retailer to discuss the decision to de-list the Supplier.

Examples of practices

1. De-listing (significantly/completely reducing the purchases from a particular supplier) without reasonable terms of notice and conditions for the interruption of business relations
2. De-listing products on the basis of not meeting arbitrary demands listed above
3. Payments for re-listing products
4. Disproportionate listing fees
5. Listing fees for products already introduced by the retailer in some/all of its shops at earlier stage
6. Listing fees are charged for branded products but not for private labels products
7. Refusal to replace one de-listed product with another product from the same supplier, without paying again the listing fee

## ANNEX F

### FDII RESPONSE TO DETI CODE OF PRACTICE FACILITATION PROCESS

During discussions between FDII, Retail Ireland and DETI officials and Mr John Travers, the facilitator appointed by the Minister for Enterprise, on 20/12/10, a number of issues arose requiring further consideration. FDII committed to consulting with its members on these issues with a view to helping finalise the voluntary code of practice for the grocery sector. The outcomes of these discussions are outlined in the table below.

Notwithstanding our view that a mandatory code should be introduced in the sector, FDII reiterates its commitment to the successful conclusion of the work being facilitated by Mr John Travers to introduce a voluntary code.

FDII has at all times in this process operated on the basis of the draft code circulated by DETI. We believe the Department's draft is an effective basis to move forward with the creation of a voluntary code. FDII's responses have been consistently made on this basis throughout this process.

At this stage, FDII believes there are only minor differences between the DETI code and the needs of a sustainable grocery sector in Ireland.

#### 1. Definition of Consumer Interest

In the Code's governing principles, the Department includes the phrase:

"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."

#### FDII Comment:

FDII believes that the phrase 'lowest sustainable prices' should not form part of the voluntary code. The principle of consumer interest is and should be paramount in the code. To ensure the long-term consumer welfare, the code should focus on ensuring that wide choice, high quality and value. Focusing on lowest sustainable prices would place an onus on an ombudsman or the Department to ascertain this prices level. This task/function would be nigh impossible to execute witness the difficulties faced by the National Consumer Agency in establishing an accurate analysis of current prices. Trying to establish a sustainable level of pricing into the future would add another impossible hurdle to this task.

It s our strong belief that this phrase be removed from the Department s draft. The code is

intended to govern trading behavior in the market. The objective of the code is to enable suppliers and retailers to meet changing consumer demands rapidly into the long term by spreading the risk fairly between retailer and supplier. This is the best approach to creating a sustainable grocery sector that meets the consumer interest.

### **Principle of Fair Dealing**

In the second principle (fair dealing) we proposed the inclusion of the phrase excessive risk/unexpected costs. DETI proposes that the phrase exercise of duress cover this comment sufficiently

### **FDII Recommendation:**

After discussion, with John Travers and Department, FDII accept the DETI proposal

### **Who the Code applies to**

DETI want the entire code to apply to suppliers with a turnover of 50million in their dealings with their suppliers and small retailers

### **FDII Comment:**

This is a fundamental issue for FDII members. The code is designed to recalibrate the relationship between retailers who abuse their significant buying power against Irish suppliers. A significant body of work has been done to scope out this problem and to identify a potential solution. No such case has been made in similar detail to justify a code governing large suppliers. In addition, whilst the case has been made by FDII for the code governing large retailers and their suppliers in the context of a sustainable Irish grocery sector, this argument has not been made by those who advocate the application of the code to more stakeholders in the sector.

FDII insists that the code should only apply to all suppliers in their dealings with grocery goods undertakings with turnover of 50 million upwards. Any variation in this application would significantly alter FDII s approach to the creation of a voluntary code.

### **4. Variation of Business Agreements provision should apply to suppliers also**

DETI wish for the following provision to apply to suppliers in their dealings with retailers

Variation of Terms of Business Agreements: 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

**FDII Comment:**

FDII members were willing to discuss *this* aspect of the code applying to their dealings with retailers in the interest of good trading practice in the sector.

**Compensation for forecasting errors**

Retailers disagree with provision 11 of the DETI code (retailers must compensate suppliers for forecasting errors).

**FDII Comments**

FDII believes that this is a valid provision that is necessary to protect suppliers from bearing the risk of forecasting errors. It is also a provision in the UK grocery code.

FDII believes its inclusion in the voluntary code is essential to the legitimacy of the code.

**Proof of the mutual benefits of a marketing promotion**

DETI's wording in provision 13 differs from FDII's preferred wording that outlined that there must be a clear immediately realizable benefit to both supplier and retailer before a promotion is entered into. DETI believes that their wording stating that retailers shall not directly or indirectly seek to compel another grocery goods undertaking to make any payment or grant any allowance for the advertising or display of grocery goods is sufficient.

**FDII Comments:**

FDII believes that the Department's wording is ambiguous. Tackling this area is central to addressing a majority of the unfair practices in the sector as many marketing initiatives are



cover for the generation of buyer income.

A clearly agreed business plan/agreement needs to be in place in advance of marketing initiatives to enable an ombudsman to ascertain if a supplier has been compelled to partake.

**Compensation for suppliers when retailers don't take reasonable care ordering for promotions**

Retailers object to provision 14, where retailers would have to provide compensation for not taking reasonable care in ordering for promotions on the basis that this practice is not widespread

**FDII Comment**

FDII believes that this is a significant issue for certain members of the supplier base and this provision should be included in the voluntary code. This is also a provision in the UK grocery code. FDII believes its inclusion in the voluntary code is essential to the legitimacy of the code.

**Delisting procedure to apply to Suppliers in their dealings with smaller retailers**

DETI believes that the provision on delisting should apply as is to suppliers in their dealings with large retailers, smaller retailers and their suppliers

**FDII Comment:**

This may be an area for further discussion in terms of good trading practice in the sector.

## Supplemental Comment

In our response to the Department's consultation paper in September, FDII submitted a number of definitions which clearly identified the key stakeholders covered by the code. FDII reiterates the need for these definitions to be adopted into the voluntary code to ensure that all relevant grocery goods undertakings are covered by the code. Without these definitions, it is likely that significant GGUs would be unaffected by the code which would undermine the voluntary code.

As a result, FDII resubmits its original definitions of the stakeholders who should be governed by the code. These are the only stakeholders that the code will potentially affect now and in the future. The following definitions should apply to the voluntary code.

**Grocery Goods Undertakings:** *are all undertakings that are 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.*

**Supplier:** *means a grocery goods undertaking carrying on (or actively seeking to carry on) a business in the direct supply to any retailer of groceries for sale or resale to the public.*

**Retailers:** *for the purposes of this submission are defined as the grocery chain customers of suppliers and are undertakings that sells or resells grocery goods in the Republic of Ireland. This group includes inter-alia: multiple retailers, wholesalers, buying groups, independent retailers, independent retailers represented by buying groups and retailers with headquarters in foreign jurisdictions.*

*It is our belief, that for the purposes of the code, only retailers with a turnover of 50 million will be covered by the code. To reiterate, the code should only apply to the relationship between any retailer over this threshold and their suppliers as defined above.*

*It categorically should not apply to relationships between any other forms of GGUs in the sector including inter alia; retailers under the threshold and their suppliers, suppliers of any size and their sub-suppliers, producers and retailers below the threshold etc.*

## ANNEX G

*the voice of the retail industry in  
Ireland*



Mr John Travers  
c/o Department of Enterprise, Trade  
and Innovation Kildare Street  
Dublin 2

14 January 2011

Dear John

Thank you for meeting with me on 20 December last. The members of Retail Ireland wish to place on record their appreciation of the time and effort you have put into the process you have been entrusted with by the Minister for Enterprise, Trade and Innovation in regard to the development of an agreed and workable code of practice. We in turn remain committed to reaching a voluntary code through the facilitated consultative process provided all parties agree the terms of the code and it contributes positively to the operation of the grocery market in Ireland. However, the code as it is currently drafted contains certain fundamental issues that could have a serious and detrimental effect on the industry and on consumers. These are outlined below.

### Impact on Consumers

The code as currently drafted has clear adverse consequences for the consumer. It is likely to impose a significant bureaucratic burden on the grocery sector which will increase costs and lead to higher prices for consumers.

Since early 2009 food prices have fallen back to 2006 levels largely because retailers negotiated lower prices from suppliers and general deflationary economic conditions, resulting in lower prices to consumers. Retailers negotiate hard with suppliers to get lower prices that can be passed on to the consumer, something that is legitimate commercial behaviour. The proposed code in its current form will make it significantly more difficult for retailers to obtain best value from suppliers and this will be reflected in retail prices.

The Competition Authority's May 2009 'Report on the Retail Related Import and Distribution Sector' states that it is 'of the utmost importance that the abusive exercise of market power is not confused with legitimate actions by businesses seeking to protect their business in the face of the fall off in consumer spending and Irish consumers' expectations for lower prices.' We believe that the current

draft of the code would inhibit such legitimate actions that benefit the consumer and are primarily designed to insulate suppliers from market forces. In the long term, this will be contrary to the interests of suppliers as it is likely to reduce their competitiveness.

#### Changed Macroeconomic Environment

The concept of a code was set out in the Department's August 2009 'Consultation Paper Code of Practice for Grocery Undertakings'. Since then the macroeconomic environment has fundamentally changed. The price difference between this country and Northern Ireland has reduced to a single digit percentage which reflects ongoing business cost differences between the two jurisdictions. In addition the EU/IMF Programme of Financial Support for Ireland has changed the public policy environment. We believe that account needs to be taken of these changed circumstances.

#### EU Developments

The conclusions of the EU Competitiveness Council's meeting on the Single Market Act on 10 December refer to the wholesale and retail market and call on the EU Commission to examine the need for measures to address unfair commercial practices in business-to-business relations'. It should be noted that no such 'unfair commercial practices' have been identified either by the EU or by the Competition Authority which carried out an extensive review of the grocery market in Ireland in its 2008 Grocery Monitor Reports. We suggest that it would be prudent for Government to await finalisation of the EU review process, consider the outcome and then align Irish practice with any European standards that may emerge. This would ensure that Irish food producers would not be at risk of competitive disadvantage vis-à-vis their European counterparts as a result of either a potentially more onerous and costly local code or not having the benefit of a level playing field.

#### Benefits of the Code

The question needs to be asked as to what group benefits from the code as currently proposed? it appears to us that the Irish sales and distribution outlets of global multinational food producers stand to gain most.

Suppliers allege that it is self evident that there is some fundamental imbalance in the relationship between retailers and suppliers. This is simply not the case and none of the allegations set out in FDII's document have been substantiated. If there was some fundamental deficiency with the Irish grocery industry, then the industry would not be able to produce a wide range of products, compete against products from other EU member states or deliver new products to market on a regular basis. Any proposed Code needs to include a balance of responsibility and accountability between both retailers and suppliers.

### Our Unanswered Concerns

Retail Ireland raised a series of important issues in the annex to our letter of 5 November 2010 but these remain unaddressed. (This annex is enclosed for ease of reference.) For instance the critical issue of a requirement for confidentiality remains unanswered. In addition the draft Code suggests that compensation would be payable by retailers to suppliers without setting out the process and requirements of enforcing and managing the proposed code. There is no information in the draft code as to the requirements, expectations and accountability regarding administration and enforcement of the principles contained in it. This is clearly unreasonable from a retailer's perspective and makes it impossible to assess the likely impact of the code on retailers and suppliers alike.

### FDII December Document

A more detailed note on the FDII December document is attached; however we wish to make the following general observations on the FDII document:

The FDII December document contains no data, evidence or analysis. It is a list of non-specific grievances and so does not represent the basis for coherent debate or the development of policy. It expressly avoids giving either any indication as to the extent of these practices or, more importantly, the damage that they allegedly do to the consumer, to the economy or to the industry. FD11 are trying to develop policy on the basis of unsubstantiated allegations.

Retail Ireland cannot reasonably be expected to respond to the list of general grievances put forward by FDII. Some of the practices complained of are illegal and most (if true) could be dealt with by the courts or the Competition Authority under current law.

To the extent that the FDII document casts any useful light on the question of what form of code should be put in place, it seems only to indicate that suppliers' fundamental concern is based on retrospective changes to the supplier/retailer relationship. For the purposes of clarity we wish to point out that retrospective changes are different from suppliers and retailers agreeing that payments may have retroactive effect, e.g. volume rebates.

FDII is asserting that suppliers have made a vast number of different payments to retailers and that these payments were made and required to be made by retailers without the agreement of suppliers. If those payments were only made because the suppliers were under duress or because retailers exercised undue influence over suppliers then they may be illegal under the law of contract.

The law of contract already prevents one party from changing a contract without the other's consent. In fact the terms between suppliers and retailers have to change on a continuous basis as pricing, market conditions and the cost base for both retailers and suppliers are in a constant state of flux. Of necessity changes to terms are made all the time. The idea that terms would be fixed in stone at the start of a contractual period does not make sense and ignores the reality of how the commercial relationship operates.

The position seems to be that suppliers agree to make payments or to a price regime or to a promotion regime relating to the supply of goods with retailers but inevitably some of these contracts do not work out as expected or hoped by suppliers. In these circumstances suppliers have complained in general terms to whoever will listen and through FDII have sought the imposition of a code to protect them from the negotiation process. It would be preferable if they made their complaints directly at the time the perceived injustice took place. If suppliers have a complaint they cannot expect a resolution unless they identify their specific complaint and the retailer in question has an opportunity to reply to it.

FDII expect complaints to be resolved and compensation to be payable without reference to the courts. At the very least this would require significant legislation and may possibly be unconstitutional.

The assertion made by FDII that suppliers are asked (or forced) to bear all or an excessive part of the cost of responding to market conditions as a general practice in the industry is simply wrong. Suppliers compete for market share and are the ones who will naturally bear more risk for the success or failure of their products in the marketplace. Retailers must negotiate the best prices for products they buy so that their offer to consumers is as competitive as possible and reflects consumer demand for price, quality and range. This is an indication of a healthy competitive grocery market, and not something that warrants regulation.

Retail Ireland has fundamental reservations as set out above regarding the December FDII document. The enclosed document contains Retail Ireland's observations (shown in 'track change') on the December FDII document and should be read in conjunction with these reservations.

#### Continued Constructive Engagement by Retail

We look forward to receiving a considered and consumer focused response from FDII to the Code of principles submitted by Retail Ireland at the start of December, as that proposal addresses what seems to be the fundamental concern of FDII's members, namely retrospective changes to agreed commercial arrangements. Retail Ireland is open to continuing a discussion of alternative approaches along the lines set out in this document. We will be glad

to provide a prompt response to the FDII position regarding our December document or have a further meeting if that would be helpful.

I would like to conclude by stating that Retail Ireland remains committed to the consultation process as facilitated by you and to supporting Government policy objectives on this matter where they can be demonstrated to support the interests of consumers and reflect a balance of responsibility and accountability.

Yours sincerely

Torlach Denihan