



**FDII Response to Department of Jobs, Enterprise & Innovation's Consultation
on:**

**CONSUMER PROTECTION ACT 2007 (SECTION 63B) (REGULATION OF
ASPECTS OF THE COMMERCIAL RELATIONSHIPS BETWEEN SUPPLIERS AND
RELEVANT GROCERY GOODS UNDERTAKINGS) REGULATIONS 2015.**

February 2015

Introduction & General Comments

FDII welcomes the Government's commitment to introduce and enforce statutory regulations in the grocery sector. These regulations are essential to redress the power imbalance between retailers and suppliers. This will ensure that retailers' commercial success is purely dependent on meeting consumer demand efficiently. This will benefit all stakeholders operating in the domestic grocery sector including the consumer.

Application of Regulations

FDII welcomes the Government's commitment to apply regulations to retailers only. FDII states in the strongest terms that any suite of regulations on unfair trading practices should only apply to retailers. The abuse of buying power is now accepted by all stakeholders as commonplace and problematic across EU markets including the UK.

There is no corresponding evidence necessitating regulation of large supplier's relationships with retailers. As such, FDII believes that none of the draft regulations as outlined are applicable to their relationships with small retailers.

Implementation

FDII strongly requests that these regulations are put in place immediately after this consultation process. Many food companies have ceased trading, downgraded investment and reduced headcount during the past decade due, in part, to retailer buying power. No more than 30 days should be allowed for retailers to become compliant with the regulations. However, all contracts in existence from the date of the regulations being brought into existence by the Minister should be covered.

Enforcement

FDII's view is that strong enforcement by the Competition and Consumer Protection Commission (CCPC) of these regulations is key to their success. The CCPC must be adequately resourced immediately to enable them to proactively investigate compliance amongst retailers in one of the

most complex sectors of the economy. The CCPC should be equipped to carry out these investigations without making complaints public – this is essential to the effectiveness of enforcement.

The CCPC must be equipped to drive awareness of the new compliance regime across the sector and to carry out proactive investigations of Relevant Grocery Goods Undertakings. In addition, the CCPC must be empowered power to publicise, through annual report, public statements and stakeholder engagement compliance rates and contraventions amongst designated Grocery Goods Undertakings.

Fines and Penalties

The schedule of penalties outlined in the Competition Protection Act 2007 is grossly inadequate when considered in relation to the turnover threshold of €50million of Relevant Grocery Goods Undertakings. A fine/penalty schedule comparable to that in the UK should be adopted. Recently, the Grocery Sector Adjudicator secured the power to fine non-compliant retailers up to 1% of turnover for contraventions of the GSCOP. Similar levels of penalties should be put in place in the Irish context to ensure regulation acts as a deterrent.

Delisting & Imposition of fines

Delisting and the threat of delisting are often used by retailers as a method of compelling suppliers to accept arbitrary and unfair demands. In terms of enforcement, delisting should raise a red flag in terms of addressing an abuse of buying power. A specific regulation banning arbitrary delisting and setting out an agreed and fair delisting procedure should be incorporated into these regulations. The CCPC should monitor the effectiveness of internal appeals process within relevant Grocery Goods Undertakings for companies that are delisted. These processes should be driven by retailer's internal compliance officers who are obliged to notify delisting to local senior management.

In addition, the practice of retailers imposing fines on suppliers should be banned in these regulations. These fines are often placed on suppliers on an arbitrary basis negatively affecting supplier's cashflow and placing business under threat. The imposition of fines by retailers should again act as a red flag for the CCPC in relation to enforcement of regulations.

Specific Responses to additional related questions

☐ The Act provides that Guidelines may also be issued in respect of any regulations brought into force: suggestions as to what might be included in any such Guidelines would be appreciated (in relation to the draft Regulations);

Supplementary guidelines should be provided to relevant Grocery Goods Undertakings and all suppliers. These should outline in specific details the sorts of practices that contravene regulations. FDII has submitted to the Department many examples of the sorts of practices and demands suppliers face that should inform these guidelines. In addition, the CCPC should regularly update these guidelines as it executes its enforcement duties.

For example, guidelines should clarify the following:

Draft Regulation 12 (1): provides that if a retailer asks its supplier to ‘significantly’ change the terms of supply or delivery, the retailer must give the supplier reasonable notice. Guidelines should clarify what ‘significantly’ means relative to particular relationships between relevant Grocery Goods Undertakings and suppliers.

These guidelines should also recognise that particular products in Food and Drink have unique characteristics, such as short-lifespans for fresh products. These factors should be taken into account when determining what ‘significant’ and ‘reasonable time frames’ means under particular regulations.

The guidelines should also outline how a complaint can be made to the CCPC and the procedures once a complaint is made.

☐ In relation to household cleaning products and toiletries (which the Act also foresees may be covered by regulations), which specific provisions in the draft Regulations (covering food and drink) should be included in any separate regulations covering such products?

FDII believes that all regulations as amended below should apply to householder cleaning products and toiletries. Suppliers of these products face a broadly similar range of unfair demands from large retailers. These regulations should be drafted to ensure that a realistic range of toiletries that includes cosmetics are covered. In the UK, cosmetics are not covered in household items meaning suppliers of such products are exposed when dealing with designated retailers/wholesalers.

☐ In relation to large suppliers which supply smaller retailers (viz. those with an annual turnover of less than €50 million), which specific provisions in the draft Regulations (covering food and drink) should be included in any separate regulations covering such situations?

FDII's position is that the Code should be applicable to retailers ONLY and that it should not apply to suppliers. Imposing these regulations on suppliers is not substantiated by an adequate, well-tested body of evidence of clearly identified harm to competition or other stakeholders in grocery sector. Issues pertaining to the supplier/small retailer relationship, if they even occur, would not be materially affected by these regulations. So placing these regulations on suppliers will only increase cost and negate the benefit of reducing abuses of buying power.

Ireland would be the only country to penalise the victims of retailer buying power ie suppliers through regulation. This would also set us at odds with our key trading partner; the UK where many Irish companies supply UK retailers governed by the Grocery Sector Code of Practice. Regulatory harmonisation is desirable from an efficient markets and business practice standardisation perspectives.

Specific Comments on draft Regulations

Overall, these regulations are reasonably balanced. Certain areas need to be addressed as there is still too little protection for suppliers. FDII appreciates that regulations (Part 2, 4-22) are general with a view to allowing Competition and Consumer Protection Commission flexibility to new types of unfair practices that will arise in future.

In the following section, FDII sets out comments and suggested amendments to the draft regulations.

Regulation	Suggested Wording/Comments
<p>Pg 5, Part 1: Interpretation</p> <p>Definition of 'relevant Grocery Goods Undertakings'</p>	<p>FDII believes that these regulations should only apply to retailers. The definition of "Relevant Grocery Goods Undertaking" should be refined to 'Designated Retailer/Wholesaler' or 'Qualifying Resellers'. Those retailers/wholesalers identified by the turnover threshold are then clearly identifiable. This definition should cover buying groups and stores that may not explicitly be part of the Relevant Grocery Goods Undertaking but benefit from relationships with Relevant Grocery Goods Undertakings.</p>
<p>Pg 9, Part 2, Regulation 5</p> <p>Grocery goods contracts to be in writing</p>	<p>FDII believes that written contracts are essential to the effectiveness of these regulations. These written contracts must include established contractual terms that retailers have imposed before the introduction of regulations that are still applied by Relevant Grocery Goods Undertakings.</p> <p>It should be stated clearly, that suppliers are entitled to draft contracts under this regulation for consideration.</p> <p>In addition, wherever written contracts do not exist between Relevant Grocery Goods Undertakings and suppliers, these regulations as set out constitute the implied contract governing these relationships. .</p> <p>FDII believes that written contracts are essential to the effectiveness of these regulations. It is also important to state that the draft regulations as set out now constitute any implied contracts between retailer and supplier.</p> <p>Our additional suggested text is outlined below.</p> <p>Terms of Business Agreements must be in Written Agreements between a Relevant Grocery Goods Undertaking and another Grocery Goods Undertakings, including agreements between suppliers and retailers, for the supply of grocery goods for the purpose of resale, must</p>

	<p>record in writing (this includes electronic format) all the terms and conditions attaching to such agreements. Subsequent contractual agreements or contractual arrangements made pursuant to an original agreement should also be set out in writing</p> <p>(1) A Relevant Grocery Goods Undertaking is prohibited from entering into or performing any business agreement with another Grocery Goods Undertaking unless the business agreement incorporates regulations (Part 2 and Part 3 Regulation 4-22) and the agreement does not contain any provisions that are inconsistent with same.</p> <p>(2) Agreed provisions ((Part 2 and Part 3 Regulation 4-22) will be taken as incorporated into a Terms of Business Agreements if they form part of the contractually enforceable terms of that agreement.</p> <p>(3) The inclusion of a clause in Terms of Business Agreements between Grocery Goods Undertakings which makes provision for events of a force majeure nature which are not materially different from, or more onerous on the undertakings than those agreed from Regulations 4-22 will be acceptable.</p> <p>(4) Regulation 5 (2) requires a “grocery goods contract” to be signed by the supplier and the Relevant Grocery Goods Undertaking. For the avoidance of doubt, this can be effected electronically (e.g. by EDI, by email exchange or by digital signature)</p>
<p>Pg 11, Part 2, Regulation 6</p> <p>Unilateral variation etc, of grocery goods contract</p>	<p>Unilateral and arbitrary changes to written contracts fundamentally undermine supplier businesses and negatively impact business planning.</p> <p>As this regulation currently stands, it may allow Relevant Grocery Goods Undertakings to insist on unrealistic terms that suppliers are compelled to adopt. The Competition and Consumer Protection Commission will have to monitor this area carefully to address this potential issue.</p>

	<p>FDII suggests the following wording for this regulation to mitigate against such practices:</p> <p>Relevant Grocery Goods Undertakings 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 relevant Grocery Goods Undertaking seeking to change the agreement</p> <p>Terms of Business Agreements with Relevant Grocery Goods Undertakings shall include specific provisions in relation to the circumstances in which Agreements relating to the supply of grocery goods may be continued, renewed or terminated. The provisions in relation to termination should also set out the period of notice to be given by the Relevant Grocery Goods Undertaking that wishes to terminate the Business Agreement.</p> <p>The exercise by a Relevant Grocery Goods Undertaking of its rights under the Terms of a Business Agreement, including under these regulations shall not be a reason for the termination or non-renewal of the Business Agreement.</p> <p>Where a Relevant Grocery Goods Undertaking requests a supplier to make significant changes to previously agreed supply chain procedures, the Relevant Grocery Goods Undertaking making the request shall provide reasonable written notice of these changes to the other party, or shall compensate the other party, for any resulting net cost incurred by the other party due to a failure to provide such notice.</p>
Pg 12, Part 2, Regulation 7	FDII believes that in addition to the current text, this regulation should explicitly state that Relevant Grocery Goods Undertakings may not compel

<p>Goods or services from a third party</p>	<p>suppliers to enter into commercial agreements/arrangements with any third party as a condition of their own agreement or on-going business relationships.</p> <p>In section (2) “payment” should include any form of consideration e.g. database management services, business analysis, etc</p>
<p>Pg 13, Part 2, Regulation 8</p> <p>Non-performance due to factors beyond reasonable control of party to contract</p>	<p>Para 4 should state that ‘either party may terminate the contract by written notice <i>within a reasonable timeframe</i>’</p>
<p>Pg 14, part 2, Regulation 9</p> <p>Forecasts of supply of grocery goods</p>	<p>FDII requests that in this regulation compensation is provided to suppliers where erroneous forecasts are made by Relevant Grocery Goods Undertakings.</p> <p>FDII suggests the following wording is added to this regulation:</p> <p>Terms of Business Agreements shall require that Relevant Grocery Goods Undertaking shall communicate to suppliers the basis upon which forecasts for supply have been prepared. Retailers are required to compensate suppliers for erroneous forecasts unless the retailer can demonstrate that those forecasts had been prepared in good faith, with due care and in consultation with the supplier or unless the Terms of Business Agreement includes an unambiguous provision that full compensation is not appropriate.</p>
<p>Pg 15, Part 2, Regulation 10</p>	<p>This regulation needs to be correctly calibrated to ensure retailers do not place any costs on a supplier for listing goods in store.</p>

<p>Payment for purchase of grocery goods</p>	<p>Whilst it may be that when trialling the sale of a particular item in a limited number of stores may incur some additional costs for the retailer, once that trial has proven to be a success such as to warrant a larger roll out across the retailers estate, we believe in such circumstances the risk of roll out should sit with the retailer and not the supplier.</p> <p>Paragraph 2 should provide that any payments sought by retailers in accordance with this regulation should only be those reasonably and necessarily incurred.</p> <p>FDI's suggested wording is as follows:</p> <p>A Relevant Grocery Goods Undertaking is prohibited from requiring payment or payments as a condition of listing a supplier's grocery products unless such payment or payments:</p> <ul style="list-style-type: none"> (a) are made in relation to a promotion; (b) in the case of a supplier to an individual store the payment or payments are in respect of grocery products from that supplier that have not been stocked, displayed or listed in that store in the previous 365 days and reflect a reasonable estimate by the retailer of the risk run by that retailer in stocking, displaying or listing such new grocery products; or (c) in the case of a supplier to multiple stores the payment or payments are in respect of grocery products that have not been stocked, displayed or listed by that retailer during the previous 365 days in 25 per cent or more of the retailer's stores and reflects a reasonable estimate by the retailer of the risk run by that retailer in stocking, displaying or listing such new grocery products. <p>Finally, there should be no assumption in practice that a Relevant Grocery Goods Undertaking's conditions of purchase supersede these regulations. In some cases, the need for agreement has been used to force suppliers to</p>
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	accept conditions that would contravene draft regulations.
<p>Pg 16, Part 2, Regulation 11</p> <p>Payment Terms and Conditions</p>	<p>FDII welcomes the requirement that payment should be made to the supplier within 30 days of the date of delivery of the goods. Prompt payment is essential to suppliers' ability to operate in business. As such, it must be a key focus for the Competition and Consumer Protection Commission in terms of enforcement. This regulation should clearly stipulate that payment is to be received by the supplier from Relevant Grocery Goods Undertakings on the 30th day after delivery.</p> <p>Retailers should not withhold or delay payment on the basis of disputes. Retailers currently will delay full payments for goods over minor disputes and invoice issues. Despite this regulation allowing for the retailers and suppliers to agree longer payment terms, the CCPC must examine and monitor payment terms and conditions of Relevant Grocery Goods Undertakings with their suppliers.</p>
<p>Pg 18 Part 2, Regulation 13</p> <p>Promotions</p>	<p>FDII welcomes the proposed regulation in relation to promotions. Promotional activity is very often used as cover to make unfair arbitrary demands on suppliers.</p> <p>FDII suggests that the following consideration in relation to all promotional activity as in paragraph 4):</p> <p>(4) Where a Relevant Grocery Goods Undertaking seeks payment from a supplier in accordance with this Regulation, it shall, on request from the supplier, provide the supplier with its estimate of the cost of the promotion and the basis on which this estimate has been prepared.</p> <p>The onus is and should be on retailers is to provide precise volumes in relation to promotional activity. Relevant Grocery Goods Undertakings must be obliged to take reasonable care when ordering grocery goods at a promotional wholesale price and not to over-order. Where a retailer fails to</p>

	<p>take such steps, the retailer must compensate the supplier for any product over-ordered and which it subsequently sells at a higher non-promotional retail price. Such compensation will be the difference between the promotional wholesale price paid by the retailer and the non-promotional price of the supplier.</p>
<p>Pg 19, Part 2, Regulation 14</p> <p>Payment for marketing costs</p>	<p>FDII believes that no provisions should be allowed in contracts to cover retailer marketing costs. These including <i>inter-alia</i>:</p> <ul style="list-style-type: none"> (i) buyer visits to suppliers; (ii) artwork or packaging design; (iii) consumer or marketing research; (iv) the opening or refurbishment of a store, or (v) hospitality for the staff or representatives of the retailer
<p>Pg 21, Part 2, Regulations 15 & 16</p> <p>Payment for shelf-space</p> <p>Payment for advertising</p>	<p>FDII welcomes these regulations. However, these regulations do not cover the gamut of arbitrary financial demands placed on suppliers that should be specifically regulated against including demands for store openings, refurbishments, new sales formats, retailer marketing campaigns and any developments in relation to retailer logistics and delivery.</p>
<p>Pg 22, Part 2, Regulation 17</p>	<p>FDII believes that this regulation should reflect the following text more closely:</p> <p>A Relevant Grocery Goods Undertaking shall not require a supplier to make any payment to cover wastage which occurs at the premises of that retailer unless such wastage is due to the negligence or the fault of the supplier and unless the Terms of Business Agreement specifically provides for the making of such payment under detailed circumstances.</p>

<p>Pg 23, Part 2, Regulation 18</p> <p>Payment for Shrinkage</p>	<p>FDII believes that shrinkage is entirely an issue for Relevant Grocery Goods Undertakings. Once goods have been delivered to the retailer then they should be wholly responsible for their safe keeping. This has been the position in the UK under the Grocery Supply Code of Practice. In the UK, retailers and suppliers have adopted systems to minimise shrinkage to the advantage of all concerned.</p> <p>As a result, this regulation should never allow under any circumstances a provision in a contract where a supplier is asked to make payments in relation to shrinkage.</p>
<p>Pg 24, Part 2, Regulation 19</p> <p>Payments for customer complaints</p>	<p>FDII believes that in the enforcement of this regulation, the immediate cost of the complaint is covered by the Relevant Grocery Goods Undertaking. No contract provision can be agreed which requires the supplier to cover the cost of all customer complaints. A supplier's responsibility for costs arising from consumer complaints shall be limited to those complaints which are attributable to the negligence or fault of the supplier and shall not result in a payment greater than the costs of resolving the complaints.</p>

FDII again states that none of the regulations outlined above are relevant to supplier's relationships with smaller retailers. As such, FDII do not believe suppliers should incur compliance costs in relation to these regulations.

Optimum timing and phasing for the introduction of any regulations

Upon consultation with members, FDII proposes the following indicative timeframe for the introduction of these regulations. It should be noted that regardless of the following timeframe, contracts entered into after these regulations are brought into existence by the Minister should be covered.

- Phase 1: On-going consultation between the Department and FDI on drafting regulation
- Phase 2: Commencement of the CCP Bill (October 2014)
- Phase 3: End of consultation process and Ministerial decision (March 2015)
- Phase 4: Formal enforcement of regulations begins 30 days post enactment
- Phase 5: On-going CCPC engagement with Relevant Grocery Goods Undertakings
- Phase 7: Review (August/October 2016)