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Competition and Consumer Policy Section
Department of Jobs Enterprise and Innovation
Earlsfort Centre
Lower Hatch Street
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For the Attention of Mr Kieran Grace

29 February 2016

Dear Sirs

This letter sets out the comments from Musgrave on the draft guidelines (“**Guidelines**”) accompanying the Consumer Protection Act (Grocery Goods Undertakings) Regulations 2016 (the “**Regulations**”) which were signed into law on 1 February 2016.

Commentary on the Guidelines

Guideline 2 – Scope of the Regulations

Guideline 2.1

This repeats the guidance in Guideline 3 but in a slightly different way. To avoid risk of confusion it is possible to make these entirely consistent. It would be helpful if the Guideline and Regulations were self-contained. This would avoid duplication of the same definitions in the Consumer Protection Act and the Regulations.

Guideline 2.3 – Independent retailers

This Guideline states that the Regulations only apply to direct suppliers who have a contractual relationship with a retailer or a wholesaler operating in the State which meets the turnover threshold (“**Regulated Grocery Goods Undertaking**” or “**RGGU**”).

Musgrave is a wholesaler and supplies a number of licensed independent retailers who operate within the State under the SuperValu and Centra fascias as well as operating a cash & carry business which also supplies foodservice undertakings, retailers and other customers. The bulk of the purchasing for SuperValu and Centra retailers is done through Musgrave. These independent retailer customers of Musgrave buy approximately 5% of their turnover direct from other suppliers. These suppliers tend to be local suppliers of

products such as vegetables, bread, milk etc. It would help if this guideline could clarify that the Regulations do not apply to turnover between two RGGUs such as Musgrave and one of its larger retailers as some of them may qualify as RGGUs in their own right. For instance we encourage our retailers to purchase local produce from local farmers and artisan producers to ensure their offer is relevant to local consumers. These goods are not purchased through Musgrave and the Regulations may be construed as applying to these contractual relationships. We believe this is not the intent of the Regulations and it would be helpful if the Guidelines could clarify the position.

We believe the Guideline should say that the turnover threshold test in Regulation 3(2) only applies to supply from direct suppliers in the State. It should clarify that it does not apply to supplies made by wholesaler RGGUs to retailer customers which also qualify as RGGUs for the purposes of determining whether a retailer meets the threshold to be an RGGU in Regulation 3(2).

Otherwise the effect will be that a SuperValu retailer for example which qualifies as an RGGU because of its turnover has to comply with the Regulations in respect of the relatively small proportion of its turnover which it purchases direct from suppliers other than Musgrave. We believe this is a disproportionate and unintended consequence as the vast majority of their turnover is already subject to the Regulations through Musgrave's purchases of those goods from direct suppliers.

Guideline 2.4 – Grocery Goods Contracts – Signature - Implementation

There is no one single grocery goods contract between suppliers and RGGUs. The typical contractual arrangement with suppliers involves ongoing agreements in relation to promotions and sales, agreements as to the cost price of goods, standard terms and conditions that relate to each purchase and finally individual orders for goods which each constitute a contract if the order is accepted. In addition, some of the larger suppliers will have an annual framework agreement.

It is critical that the Guideline could confirm that a supply contract, as defined in Regulation 2(1) of the Regulations, can consist of a number of separate but related agreements which would be considered as one single contract for the purposes of the Regulations and that it is not necessary to have one single document that includes all the relevant terms and conditions that are applicable to the supply arrangement. Rather the Guidelines should recognise that the supply contract can consist of a number of different documents. The Guideline should confirm the application of the Electronic Commerce Act 2000 by permitting the formation or acknowledgement of the above contracts through electronic communications. Such communications permit the retail industry to maintain competitiveness in a world where increasing competition and costs affect relationships with suppliers.

The Guideline should clarify, in line with the Electronic Commerce Act, 2000, that the requirements for supply contracts to be in writing and to be signed do not exclude the use of electronic signatures and electronic communications such as email. The Guideline should further clarify that "wet-ink" signatures of both parties are not required.

The implementation date applies to all contracts entered into or renewed after that date. As explained above, there are a large number of separate contractual documents. It would be helpful if the Guideline could provide clarity in relation to the common business practice of having a number of contracts between suppliers and RGGUs including a framework agreement or Long Term Agreement ("LTA"). We would propose that the requirement to sign a grocery goods contract applies to LTA's that are in place for a period of longer

than 6 months and are up for renewal. Given the LTA and any incorporated Terms & Conditions govern the entire relationship between the RGGU and the supplier; we would submit that signing the LTA, rather than all contractual documentation from 30 April 2016, would demonstrate compliance with the requirements of the Regulation.

We would also propose that standard Terms and Conditions which are applicable to all contracts be supplemented to take account of the Regulations and be signed by both parties rather than signing every individual contract itself.

Otherwise the Regulations appear to require us to change all of our contracts with all of our suppliers within 2 months which will be extremely challenging and we will need to start this work before final Guidelines as to how the Regulations will operate in practice have been issued.

Please provide recognition in the Guidelines that it will take a period of at least 6 months for signed documentation to be in place.

Guideline 3

Part I Preliminary Matters

See comment on Guideline 2.1 above.

The Regulations refer to any substance or thing for use as an additive ingredient or "*processing aid in the preparation of food*". It would be helpful if guidance was given as to what is a processing aid in the preparation of food. We assume the intended class of goods is food ingredients or products such as oils and fats in which food can be cooked rather than kitchen implements/utensils used in the preparation of food.

Part 2 Contracts

Regulation 4

Independent retailer customers of Musgrave

See comment on Guideline 2.3 above – the heading says the Regulations relate to contracts between Suppliers and retailers or wholesalers. It would be helpful to add a line to the effect that the Regulations do not apply to contracts between wholesalers and their customers to avoid any unintended consequences.

Nature of contracts between suppliers and Regulated Grocery Goods Undertakings

See comment on Guideline 2.4 above – the Guideline should reflect the fact that there is rarely one contract between suppliers and RGGUs and should acknowledge that these contractual arrangements normally consist of a number of interrelated contractual agreements.

See our comments on Guideline 2.4 above in relation to the signature of documents.

Regulation 5 – Varying contracts

The line at the end of this Guideline says that the term "variation" includes variation in the frequency, timing or volume of the supply or delivery of the grocery goods.

This does not add clarity and goes further than what is set out in the Regulations. Some of these matters may not be the subject of a contract. It would be anti-competitive to require Regulated Grocery Goods Undertakings to purchase fixed volumes from suppliers unless this has been agreed between them and it would have detrimental effects on the operation of the market and on consumers. RGGUs must be able to purchase goods at the best price they can and volumes can vary in accordance with consumer demand. This sentence in the Guideline confuses that position and should be deleted or it should say that the term “variation” relates to variation in any contractually agreed term between suppliers and RGGUs for the supply of grocery goods covered by the Regulations.

Regulation 6 – Third party services

It is difficult to see what the current guideline adds as it simply repeats the text of this Regulation and should be deleted.

Regulation 7 – Force majeure

There should be a provision in the Guideline to recommend that all parties to have disaster recovery systems to cover any loss of data and contingency plans to deal with foreseeable events, such as mechanical failure of plant or machinery and that suppliers have alternative sources of raw materials available to them where possible.

Regulation 8 – Forecasts of standard demand

The Guideline should point out that suppliers need to assist RGGUs in the creation of these forecasts by complying with reasonable requests for relevant information. It is likely that the supplier will understand how the market reacts more broadly as a whole and the impact on likely sales in a specific retailer and suppliers will need to provide sales data to be used as an input into any such forecasts.

Regulation 9 – Listing Fees

This Regulation permits payments from suppliers as a condition of stocking, displaying or listing new products or products which have less than 25% penetration in the RGGU’s stores provided the payment is based on an objective and reasonable estimate of the cost to the RGGU of stocking, displaying or listing those grocery goods.

We assume the reference in clause 9(1)(b) relates to stores which licence their brand names from an RGGU and not just the stores owned or operated by the RGGU. It would be helpful if the Guideline could clarify this point otherwise the Regulations will have the effect of forcing alignment of business operating models which we would hope is not the intention of the Regulations.

Regulation 14 prohibits the compulsion of any payment for the advertising or display of grocery goods under any circumstances. There is a risk of conflict between these two Regulations. It should be clarified that a payment agreed under Regulation 9 will not breach Regulation 14.

Regulation 10 – Payment terms

No comment.

Regulation 11 – Promotions

It would be helpful if the Guideline could clarify that Regulation 11 could be interpreted as permitting RGGUs and suppliers to have payment or allowance arrangements in relation to the promotion of goods provided RGGUs do not compel the suppliers to make such payments or provide allowances.

While suppliers cannot be compelled to make payments to RGGUs in relation to a promotion, once a payment has been freely agreed, the supplier should be required to pay any such sum that has been agreed and it would be helpful if the Guidelines could give clarity on this point.

See comment on Regulation 8 above. Suppliers should be recommended to give reasonable assistance and comply with reasonable requests from RGGUs in relation to forecasts.

Regulation 12 – Marketing Costs

The examples given of marketing costs in the Guideline are the same as those used in the text of the GSCOP regulations in the UK. There is an important difference. In the GSCOP regulations the list of marketing costs is an exhaustive list. In the Guideline to the Regulations, the list is not exhaustive and says that the term “marketing costs” includes the items listed. For the purposes of providing certainty in the application of the Regulations, it would be helpful if the list of marketing costs provided in the Guidelines was stated to be definitive as marketing is not a defined term and it can cover a number of areas, including matters covered by other Regulations. For instance the items covered by Regulations 13 and 14 could also be called marketing costs and “marketing” could potentially cover all costs related to the sale of products which we believe is not intended.

If the examples in the Guideline were set out as an exhaustive list as is the case in the UK this would avoid any conflict.

Regulations 13 & 14

See comment in relation to Regulations 9 and 12. Please provide clarity as to payment terms for marketing costs/retention, increased allocation or better positioning of shelf space/payment for advertising or display of grocery goods.

Regulation 14 prohibits an RGGU from compelling a supplier from making a payment or granting an allowance for the advertising or display of grocery goods in the premises of the RGGU. It would be helpful if the Guidelines could clarify that this does not apply to payments or allowances which are freely entered into and that this does not apply to payments contractually agreed under Regulations 9, 12 or 13.

Regulation 15 – Wastage

No Comment

Regulation 16 – Shrinkage

This Regulation states that it only applies to retailers. Musgrave is predominantly a wholesaler, with licensed retailers and other customers, but also owns a small number of retail stores. Can the Guideline clarify that this clause applies to RGGUs whose principal business is as a retailer.

Part 3 – Compliance requirements

Regulation 17 – Training

No comment

Regulation 18 – Annual Compliance Report

Please confirm if the Annual Compliance Report will be a publically available document. This is not apparent from the Regulations which only say it is to be made available to the Competition and Consumer Protection Commission.

Regulation 19 - Records

The records referred to are confidential business records and it would be helpful for the Guideline to note the importance of confidentiality.

Regulation 20 Penalties

We do not see what this Guideline adds to the text of the Regulation and the terms of the Consumer Protection Act. The application of *Res Judicata* is a matter for the courts to decide and this Guideline cannot change the position or the application of that principle by a court.

Yours sincerely



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