



**Submission by RGDATA to the Department of Jobs, Enterprise & Innovation  
on the draft Grocery Goods Regulations  
February 2015**

1. Introduction

RGDATA, the representative body for the independent retail grocery sector in Ireland, would like to make the following submission in relation to the draft Grocery Goods Regulations (the Regulations).

RGDATA represents the owners of 4,000 local shops, convenience stores, forecourt stores and supermarkets providing Irish consumers with competition, choice and innovative services in different formats in the retail grocery/convenience sector. The contribution of a strong, vibrant independent sector is a particular feature of the Irish grocery market. It provides consumers with a diversity in choice of retailers with no one group achieving dominance. A strong independent sector also means that at local level most communities have access to at least one dynamic, innovative and customer focused independent retail outlet.

Providing consumer choice, diversity, value for money and access to locally produced goods have been centre points in the growth, development and success of the independent retail grocery sector in Ireland.

A strong and vibrant independent retail grocery sector gives customers and suppliers a choice of outlets and at a retail level acts as a counterbalance to the potential market dominance by a small number of global players operating generally in larger centres of population.

In assessing the competitive dynamic of the retail grocery trade and for the purposes of commenting on the Regulations it is important to recognise that a competitive and dynamic retail grocery/convenience sector is not just about offering low prices and cheap food to consumers. A competitive retail grocery/convenience sector exhibits the following characteristics;

- Low price offerings for consumers
- Choice of products for consumers
- A selection and choice of retail formats
- A spread of retail outlets that cater for local communities
- A range of routes to market for suppliers with a diverse market base
- Opportunities for local suppliers to access retail outlets to grow their business
- The adoption of trading practices which are fair, transparent and conducted in good faith.
- The opportunity for retailers and suppliers to agree competitive terms of supply
- Room for innovation and growth in retailing
- The presence of retailers that sustain employment, contribute to local communities and ensure vibrancy and vitality and local self-sufficiency.

Any Regulations considered by the Government must be carefully proofed to ensure that they succeed in achieving these objectives and contribute to maintaining a healthy, vibrant and dynamic grocery/convenience sector in Ireland.

In announcing the necessity for the Regulations the Minister has said that they derive from challenges that the market has faced over recent years from trading behaviour from some multiple retailers which has had the effect of distorting competition in the market. This has included some very large retailers adopting trading practices which impose penal obligations on suppliers which are a reflection of the retailer's market scale, rather than any fair and reasonable term and condition that might be expected in a trading relationship.

Some of the practices that suppliers complain about include;

- Demanding hello money
- Abusing credit terms
- The unilateral and unfair alteration in terms of supply
- The imposition of ancillary and unrelated terms and conditions unrelated to the supply of the goods in question
- Compelling suppliers to pay for services incurred by the retailer unrelated to the supply of the goods in question.

Independent family owned shops do not engage in demanding hello money, shelf space payments, promotional budgets or other ad hoc payments from suppliers – this is anathema to the way that they operate their supplier relationships. For most independent retailers they have limited market power in dealing with suppliers who are larger and frequently dominant in their category offerings typically operating as an Irish subsidiary of a large international supplier. In reality the relationship between the supplier and the retailer is more likely to be skewed in favour of the supplier given their differing scale and market power.

For example, RGDATA is aware of many instances where independent retailers have been delisted or threatened with delisting as a mechanism to ensure they purchase their entire stock of a branded product from one supplier or distributor rather than sourcing the product at more advantageous terms from third parties, including some outside the State. RGDATA is also aware of some instances where suppliers have put independent retailers under commercial pressure on specified purchase volumes or retail prices.

These practices on the part of suppliers have a knock on impact on the price offering that independent retailers can provide to customers for certain branded products. RGDATA is also aware of instances of suppliers unilaterally changing their terms and conditions of supply to independent retailers on a take it or leave it basis.

It is important to note that RGDATA receives complaints not just about grocery goods suppliers but also suppliers of other products and services to independent shops including newspapers, mobile phone tops up, postage stamps, payments services, banking services etc. all of which form part of the general product and service categories offered by modern grocery/convenience stores and in respect of which the same considerations of supplier market abuse apply.

Additionally independent shops are impacted if a supplier is subject to excessive demands from a large multiple retailer and then seeks to recover the costs of such extortive demands and practices from others in the supply chain. This impacts on the trade as a whole, both in terms of adding to the cost of supply of products to retailers and ultimately consumers. In both Ireland and other jurisdictions it has been demonstrated that the existing Competition Law framework has not been sufficient to prevent such market abuses. However, RGDATA has serious concerns that the Regulations (as drafted) will not address these issues for the reasons set out in this submission.

## **2. General observations on the Regulations**

RGDATA has a number of general observations on the Regulations and some specific comments on particular provisions.

### **i. Scope**

The Regulations apply to the supply of *grocery goods* as defined by a *supplier* to a *grocery goods undertaking* in the State. There are a number of aspects to the definitions in the Regulations that concern RGDATA and which have implications for the success or failure of their subsequent application.

- **Definition of grocery goods**

There is no indication why the definition of *grocery goods* excludes household cleaning products and toiletries – or products where which were otherwise defined as “household necessities” in the Groceries Order.

The practices which the Regulations seek to address are seen as inappropriate and contrary to the requirements for trading relations to be concluded in an open and fair manner, transparently and in good faith.

It is hard to understand why a significant category of goods is excluded from this definition given that suppliers of these products are equally likely to be impacted by the practices which are addressed in the Regulations. RGDATA believes that the definition of Grocery Goods should be broadened to include household cleaning products and toiletries, as provided for in Section 63A of the Competition and Consumer Protection Act 2014.

- **Definition of grocery goods undertakings**

The definition of grocery goods undertakings refers only to businesses engaged in wholesale or retail sale of grocery goods with a worldwide turnover of €50m. Given that the objective of these regulations is to stamp out the practice of very large players abusing their market power by imposing ad hoc payments/costs/unilateral changes in agreements on others then it should be possible to identify the parties that have the power to engage in these practices and only include them in the list of undertakings covered by the regulations.

It is also unclear from the Regulations as to whether they will apply in the relationship between wholesalers and retailers who fall within the thresholds. While the application of the Regulations between suppliers and qualifying wholesalers and retailers is clear, is it intended that the Regulations should apply to grocery goods contracts between wholesalers and retailers who fall within the thresholds? There are some retailers that are serviced by wholesalers that would exceed the turnover threshold. Again in the interests of clarity, this should be addressed and such trading relationships excluded from the scope of the application of the Regulations. The Regulations have been prepared to deal with the relationships between suppliers and large retailers/wholesalers – they were never intended to catch the relationship between wholesalers and retailers.

Given the structure and dynamics of the independent retail grocery trade, where businesses operate independently of each other at the supply, distribution and retail trade there is merit in treating independently owned retail operations as distinct from vertically integrated retail grocery undertakings, where all purchasing is centralised and all outlets are under a single central ownership and control. The independent sector is different in that all outlets are independently owned.

While some retailers may have supply agreements with wholesalers (under franchise agreements), the nature and function of these stores is fundamentally different. Additionally in many cases while a significant element of their supplies will be sourced centrally from a wholesaler, the relationship between the wholesaler and the retailer is fundamentally different to that between a supplier and a wholesaler/retailer. The retailer has the capacity to move to a different wholesale supplier and to renegotiate the terms if necessary. Where a retailer with a turnover in excess of €50m secures the vast majority of its products from a wholesaler (up to 90%) the relevant relationship with the supplier is managed by the wholesaler and not the retailer – accordingly including such a retailer is neither necessary or desirable and amounts to double regulation with the imposition of additional costs and regulatory burdens.

Applying the Regulations to independent retailers that exceed the threshold requirements may also impact on their relationships with smaller and more local suppliers given that the full compliance requirements introduced by the Regulations will apply to all grocery goods contracts regardless of the scale of the supply arrangements. For example an independent retailer who is part of a buying group will always seek the flexibility to source some aspect of their supplies locally from craft businesses, small local producers or suppliers. This flexibility in supply terms does not apply to vertically integrated retail outlet where all the buying is done centrally.

Applying the full rigour of the terms of the Regulations to local arrangements with small craft suppliers that are providing grocery goods to local shops that fall within the qualifying thresholds by virtue of their membership of a group could curtail future local supply arrangements by introducing a compliance burden disproportionate to the trading relationship involved. The Regulations need to reflect these differences or else they will have unintended consequences that will impact on small local suppliers, local jobs and the ability of independent shops to collaborate with small local producers and give them their first route to market.

In terms of scope, RGDATA also believes that the Regulations should be amended to address the imbalance in trading relationships between some larger suppliers and independent retailers. The instances outlined above are a sufficient indication of a dysfunctional and abusive trading relationship which needs to be addressed through a new legal mechanism given that the current legal remedies are not effective. There is a need for Regulations to address the imbalances created by suppliers with excessive market power.

ii. Impact

The impact of the Regulations on different stakeholders in the Grocery sector needs to be assessed. A proper, informed Regulatory Impact Assessment should be completed and published to assess this. It would be ironic if a new set of regulatory controls were issued by the Department of Jobs, Enterprise & Innovation without a regulatory impact assessment in light of the work of the Better Regulation Group on both RIAs and the drive to reduce the regulatory burden on businesses. The RIA must examine in detail the impact the proposed Regulations will have on the regulatory burden, the additional costs associated with compliance and the impact on wholesale and retail prices.

- **Consumers**

The Regulations should succeed in facilitating a competitive, dynamic and diverse retail grocery sector with differing options for consumer choice, selection and value. The competitive dynamic in the trade should ensure that the costs of compliance by multiples are not passed to consumers or independent shops.

- **Retailers**

The Regulations, if properly applied, should assist in facilitating a competitive and dynamic retailing environment by reducing the potential for market abuse by larger players. While retailers that exceed the threshold will have some compliance costs certainly in the early stages of the new regime, these costs will need to be assessed to ensure that they are proportionate and necessary. It would be important to assess the potential impact on independent retailers that exceed the threshold, but are not part of a vertically integrated undertaking.

- **Suppliers**

The Regulations should assist in facilitating listed suppliers in engaging in open, transparent and fair trading relations with retailers.

It is equally important that larger suppliers are required to treat with independent retailers in an open, fair and transparent manner – this could be achieved by extending the scope of the Regulations to suppliers and imposing obligations on them in their dealings with suppliers. It would also be important to assess if the impact of the Regulations on very small suppliers acts as a deterrent to them engaging with the larger retail groups given the differences in scale. RGDATA believes that small suppliers dealing with local independent retailers should have the choice to elect to opt out of the regulations and the compliance costs.

- **Wholesalers**

The Regulations will capture the trading relationship between suppliers and wholesalers that exceed the threshold. It would be helpful to have clarity on whether the trading relationship between wholesalers and independent retailers exceeding the threshold is also caught by the Regulations. This would place wholesalers under a burden to ensure compliance with the Regulations at both a supplier and distribution level, which would differentiate them from the position that applies with vertically integrated retailers.



### **3. Specific comments on the Regulations**

#### **Part 1 – Preliminary matters**

RGDATA has already commented on issues concerning the scope of the Regulations (see above).

#### **Part 2 – Commercial relationships and contracts between suppliers and relevant grocery goods undertakings**

Numbers below refer to the number of the regulation

4(1) – Good faith and transparency – RGDATA has no comments on this clause.

5. – Grocery goods contracts to be in writing – again this requirement is understandable in the context of securing compliance with the legislation. It is likely that some contracts between suppliers and retailers, particularly smaller craft suppliers are not in writing and are more informal in nature – some allowance may need to be made to facilitate the transition of these arrangements to a formal structure or the exclusion of some of the smallest craft suppliers from the scope of the Regulations.

6. Unilateral variation of a grocery goods contract – RGDATA has no comments on this clause.

7. Goods or services from third party – RGDATA has no comments on this clause.

8, Non- performance due to factors beyond the reasonable control of party to contract – again this clause is fair and reasonable.

9. Forecasts of supply of grocery goods – RGDATA has no comments on this clause.

10. Payment for purchase of grocery goods – this provision addresses instances where retailers seek listing fees of suppliers – These fees are not charged by the independent retail sector and RGDATA cannot see any circumstances where the charging of these fees is either necessary or allowable. It is a practice which has the potential to distort the market for the supply of goods.

11. Payment terms and conditions – RGDATA is broadly supportive of this clause – however it would need to be recognised that there may be instances where a payment due is disputed or contested for legitimate reasons (non - supply, returns, etc.) and might be delayed in the normal course.

12. Variation of supply or delivery arrangements – RGDATA has no comments on this clause.

13. Promotions – RGDATA has no comments on this clause.

14. Payment for marketing costs – RGDATA is supportive of this clause. It would be helpful if the definition of marketing costs (and promotions) contained in the Act could be restated in the Regulations so that suppliers, wholesalers and retailers are aware of what is covered without the need to refer back to the primary Act in each instance.

15. Payment for shelf space – this is the practice known as “hello money”. RGDATA cannot countenance any instance where the demanding of hello money is in the interests of trading relationships that are fair, transparent and conducted in good faith and believes that the Regulations should not facilitate such a practice. The current provision represents an invitation for multiple retailers to legitimise the practice by including it in contractual arrangements.

16. Payment for advertising - RGDATA has no comments on this clause.

17. Payment for wastage – RGDATA has no comments on this clause.

18. Payment for shrinkage – RGDATA does not see any circumstance where a supplier should be made liable for shrinkage at the retailers' premises – this is not a practice that the independent sector is engaged with and does not see how facilitating its inclusion in a contract can be seen as facilitating fair, open and transparent trading relations.

19. Payment for customer complaints – RGDATA has no comments on this clause.

### **Part 3 – Compliance Requirements for relevant grocery goods undertakings**

20. Designation and training of staff – RGDATA has no comments on this clause.

21. Annual compliance report – It is important to ensure that any regulatory burden is shown to be proportionate and necessary. This has not been demonstrated in this instance given the absence of a Regulatory Impact Analysis.

22. Maintenance of records - RGDATA has no comments on this clause other than to clarify that the relevant material can be retained in electronic format and does not have to be kept in documentary format

### **Part 4 – Enforcement**

23. Regulations cannot be waived - In light of the comments above about the need to avoid the Regulations capturing the trading relationship between wholesalers and Retailers, the Regulations should be changed to allow them to be waived in contracts between Wholesalers and Retailers, given that this trading relationship was never the focus of the Regulations in the first instance. Equally there may be some benefit if having a de minimus requirement introduced that would aid to facilitate craft suppliers to access the market opportunities presented by retailers above the threshold.

24. Penal provisions – RGDATA has no comments on this clause.

#### **4. Conclusion**

RGDATA is available to elaborate further on any of the observations contained in this submission.

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