



FDII Submission

Consultation on Guidelines for Grocery Goods Regulations

February 2016

Introduction and opening comments

FDII welcomes the publication of the Grocery Goods Regulations and the opportunity to make a submission to the consultation on the draft guidelines. The regulations will help address the major imbalance in the relationship between major grocery retailers and suppliers. Unfair practices faced by food companies include a failure to respect contractual terms, de-listing threats and unilateral deductions off-invoice without sound business reasons. In the short-term these demands impact on individual suppliers, but ultimately they are also bad for consumers.

Consumers are best served by a grocery market that is both fair and competitive, one that offers choice and convenience, and provides an outlet for new products and suppliers. The new rules will help to address some of the unfair pressures currently put on suppliers by major retailers.

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.

2. Scope of the Regulations

2.1

FDII believes that the regulations should apply to household and personal hygiene products. 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 personal hygiene, household and 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.

2.3

FDII wishes to reiterate its position that the regulations should remain applicable to retailers and wholesalers ONLY and that they 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 would only increase cost and negate the benefit of reducing abuses of buying power. The Competition and Consumer Protection Commission (CCPC) has highlighted that grocery businesses are now obliged to assess whether the regulations apply to them. How will this be monitored in order to ensure all who reach the turnover threshold are included and will there be a maintained / publically available list?

3. Guidance on Specific Parts of the Regulations

Part 2 – Contracts between Suppliers and Retailer or Wholesaler

Regulation 4: Grocery Goods Contracts

This section should state that written contracts are essential to the effectiveness of these regulations and that these written contracts must include established contractual terms that retailers have imposed before the introduction of the Regulations.

The contextual bullet points should also address:

- Written contracts between suppliers and retailers, for the supply of grocery goods for the purpose of resale, must 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
- A retailer or wholesaler is prohibited from entering into or performing any business agreement with a supplier unless the business agreement incorporates the provisions in this part of the regulations and the agreement does not contain any provisions that are inconsistent with same.
- The inclusion of a clause in written contract between both sides 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 the provisions in this part of the regulations will be acceptable.
- The second bullet point references the requirement for the contract to be signed by both the supplier and the retailer or wholesaler. For the avoidance of doubt it should be stated that this can also be effected electronically (e.g. by EDI, by email exchange or by digital signature).
- A specific reference that both sides should conduct their trading relationships in good faith and in a fair, open and transparent manner should be included.
- Consideration should be given to the provision of guidance as to a process for the handling of consumer complaints.

Regulation 5: Variation, etc. of grocery good contracts

Unilateral and arbitrary changes to written contracts fundamentally undermine supplier businesses and negatively impact business planning. The guidance should emphasise more strongly the prohibition on retrospective variations.

The guidance should emphasise that the exercise by a supplier of its rights under the terms of a written contract, including under these regulations shall not be a reason for the termination or non-renewal of the Business Agreement.

The guidance should emphasise that where a retailer or wholesaler requests a supplier to make significant changes to previously agreed supply chain procedures, the party 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.

Regulation 7: Non-performance due to factors beyond reasonable control of party to contract

The final sentence in this section states that the regulations provide for the circumstances whereby the contract may be terminated. The regulations state that termination would be in accordance with the terms specified in the contract. The guidance should specify that this should be 'within a reasonable timeframe'.

Regulation 8: Forecast of supply of grocery goods

The guidance should specify that compensation is provided to suppliers where erroneous forecasts are made by retailers or wholesalers. The guidance should also be more prescriptive as to how in the case of an erroneous forecast compensation would be calculated. The guidance should also address the issue of retailer fines for 'lost sales' where unilateral promotional activity by the retailer causes the supplier to be unable to supply sufficient product.

Regulation 9: Payment from a supplier

The guidance should specify that there should be no assumption in practice that a retailer or wholesalers conditions of purchase supersede the provisions in the regulations. In some cases, the need for agreement has been used to force suppliers to accept conditions that would contravene provisions in the regulations.

Regulation 10: Payment terms and conditions

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 supplier's ability to operate in business. As such, it must be a key focus for the Competition and Consumer Protection Commission in terms of enforcement. The guidance should clearly stipulate that payment is to be received by the supplier from retailer or wholesaler on the 30th day after delivery.

In relation to invoice queries which are referenced in the second paragraph, FDII reiterates its view that retailer and wholesalers 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. For the avoidance of doubt there should be a prescribed process for disputing invoices.

Regulation 11: Promotions

Written notice in relation to specifying certain features of promotions need to be elaborated to include specifying that the onus is on retailers and wholesalers to provide precise volumes in relation

to promotional activity. Retailers and wholesalers 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 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.

Regulation 12: Payment for marketing costs

FDII does not support the provision for non-application of restrictions for payments for marketing costs in the guidance - no provisions should be allowed in contracts to cover retailer marketing costs.

Regulation 13: Payment for retention, increased allocation or better positioning of shelf space / Regulation 14: Payment for advertising or display of grocery goods

The guidance should describe the range of arbitrary financial demands placed on suppliers including demands for store openings, refurbishments, new sales formats, retailer marketing campaigns and any developments in relation to retailer logistics and delivery.

Regulation 15: Payment for wastage

In the second full paragraph, the 'basis for that estimate' should be changed to 'the detailed circumstances for the basis of that estimate'.

Regulation 16: Payment for shrinkage

FDII believes that shrinkage is entirely an issue for retailers and wholesalers. Once goods have been delivered to the retailer or wholesaler 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. As a result, this regulation and guidance should never allow under any circumstances a provision in a contract where a supplier is asked to make payments in relation to shrinkage.

Part 3 – Compliance Requirements for Retailer or Wholesalers

FDII agrees with compliance requirements only being applicable to retailers and wholesalers.

As stated in earlier submissions, 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.

Part 4 – Enforcement

The regulations and associated guidance present a unique opportunity to create a fair trading environment in the Irish grocery sector. It is now up to the Competition and Consumer Protection Commission (CCPC) to effectively and efficiently enforce the rules.

FDII's view is that strong enforcement by the 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 also be equipped to drive awareness of the new compliance regime across the sector and to carry out proactive investigations in the sector. In addition, the CCPC must be empowered to publicise, through annual reports, public statements and stakeholder engagement, compliance rates and contraventions amongst retailers and wholesalers.

The CCPC should outline their compliance monitoring process and plans for on-going dialogue with retailers. The CCPC should also agree a complaints process for suppliers that ensures anonymity.