

LAW SOCIETY SUBMISSION



DRAFT REGULATIONS ON THE GROCERY GOODS SECTOR

DEPARTMENT OF JOBS, ENTERPRISE & INNOVATION

MARCH 2015

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

1. Background

- 1.1. The Law Society of Ireland (the 'Law Society') welcomes the opportunity to comment on the draft Grocery Goods Regulations (full proposed title: *Consumer Protection Act 2007 (Section 63B) (Regulation of Aspects of the Commercial Relationships between Suppliers and Relevant Grocery Goods Undertakings) Regulations 2015*).
- 1.2. The Law Society notes that the draft Grocery Goods Regulations (the 'Draft Regulations') are proposed under Part 6 of the Competition and Consumer Protection Act 2014, which amends the Consumer Protection Act 2007, and are proposed to implement a commitment in the Programme for Government "to ban a number of unfair trading practices in the retail sector, such as 'hello money' from food suppliers".
- 1.3. The Regulatory Impact Statement to the Competition and Consumer Protection Bill, when first proposed in March 2014, identified the potential benefit of the proposed regulation of the grocery sector as introducing a greater "balance in the relationship between the various players in the grocery goods sector" and "possible higher prices for primary producers (including some vulnerable groups like small farmers)". At the same time, the Regulatory Impact Statement recognised that regulation of the grocery sector may give rise to "an additional compliance burden for retailers and suppliers in the grocery goods sector."
- 1.4. A regime created in 2006 via the Competition (Amendment) Act 2006 for regulation of grocery goods undertakings has remained largely, if not wholly, unenforced. At the same time, the grocery sector has been subject to detailed review by the Competition Authority, now the Competition and Consumer Protection Commission (the CCPC), including in particular in 2008 (following adoption of the Grocery Monitoring Project). Attempts, in 2009, to introduce a voluntary code of practice for the Grocery Goods Sector were also unsuccessful. Finally, the Law Society notes that the European Commission has established a *High Level Forum for a Better Function Food Supply Chain* and adopted a Communication and Green Paper on Europe's grocery retail sector.
- 1.5. From the foregoing, the grocery sector clearly raises important domestic and European policy issues across all levels of the supply chain, from farm-gate to retail shelf. Whilst the Law Society welcomes the opportunity to comment on the Draft Regulations, the comments we make are confined to legal and not policy issues.
- 1.6. The Society's Business Law Committee, which had input into the preparation of this submission, is comprised of practitioners acting for suppliers, retailers and other undertakings in the sector.

2. Draft Regulation 4: The ‘Good Faith’ & ‘Fair, Open & Transparent’ Standards

2.1. The Draft Regulations propose that grocery goods undertakings must “conduct their trading relationship in good faith and in a fair, open and transparent manner” (Draft Regulation 4(1)). Further, the Draft Regulations would require that “[i]n assessing the compliance of a relevant grocery goods undertaking with the provisions of these Regulations, the Commission and a court may take into account the undertaking’s compliance with the obligations of good faith, openness and transparency” (Draft Regulation 4(2)).

2.2. Law Society observations:

2.2.1. What precisely is required in law by the words *good faith* and *fair, open and transparent* manner set out in Draft Regulation 4(1) is not clear. This is particularly so in the context of commercial, arms’ length negotiations between large retailers and multinational food companies.¹ In turn, this lack of clarity may impede compliance and enforcement of the Draft Regulations.

2.2.2. The Law Society also notes that, from an Irish common law perspective, a ‘good faith’ obligation on one party when negotiating a contract on normal commercial terms may in practice be difficult to apply. Indeed, according to a leading UK contract law case, to imply a good faith obligation in contract law is “inherently repugnant to the adversarial position of the parties when involved in negotiations.”² Just like English law, Irish law generally places great weight on the freedom of contracting parties, including in the legitimate pursuit of economic self-interest (which may ultimately enhance economic efficiency and consumer welfare). The Law Society accordingly wishes to acknowledge the potential significance of the good faith obligation and how it may alter established contract law in Ireland.

2.2.3. No definition of or guidance on the meaning of *good faith* and *fair, open and transparent* is provided in the Draft Regulations. The Law Society recognises that the Draft Regulations anticipate possible publication of guidance documents. This would be welcome. But in measuring and commenting on the potential impact of the Draft Regulations, it would be important to understand what obligations the Draft Regulation 4(1) standards impose in advance of their adoption. The language used in Draft Regulation 4(1) (i.e., “good faith,” but particularly “fair, open and transparent”) is broad and potentially far-reaching.

¹ According to Clarke, *Contract Law in Ireland* 7th Ed. Round Hall, “[t]here are isolated instances of cases where an Irish court has held that an express contract is the subject of implied duties to act in good faith” (at page 202). One example is cited: “[a] purchaser who enters into a “subject to finance” agreement is not free to withdraw from the transaction or refuse to take a commercially satisfactory finance package when offered” (citing *Rooney v Byrne* [1993] I.R. 609.

² *Walford v Miles* [1992] 2 A.C. 128 *per* Lord Ackner, at 138.

- 2.2.4.** In practice, it is unclear whether a duty to be open and transparent may extend to retailers disclosing confidential arrangements with other comparable suppliers. More generally, could it be used to require retailers to subordinate their interests to that of the other contracting party? The Law Society would welcome an opportunity to clarify these and other observations with the Department.

3. Draft Regulation 5

- 3.1. Draft Regulation 5 imposes an obligation on “relevant grocery goods undertakings” to ensure that “all of the terms and conditions of a grocery good contract to which it is a party” and “any subsequent contractual agreements or arrangements” are expressed in plain intelligible language and recorded in writing.” Further, Draft Regulation 5(2) requires the retailer to maintain a signed copy of the contract.

3.2. Law Society observations:

- 3.2.1.** This obligation, by requiring retailers to create and retain a signed written contract that fully details all aspects of arrangements with suppliers, may assist in enforcement of the Draft Regulations.

- 3.2.2.** The Law Society questions whether imposition of this obligation solely on one party to a supply arrangement (the retailer) may undermine enforcement. Conceivably, a supplier may refuse to agree to sign a written contract. Can it be fairly assumed that such a refusal would constitute a “reasonable excuse” under Section 63E(2) of the Competition and Consumer Protection Act 2014?³ The Law Society notes in this regard that Draft Regulations 5(1) and 5(2) are “penal provisions,” meaning that a breach gives rise to criminal liability (and sanctions ranging from a maximum of €60,000 to €100,000 fines, with jail terms of up to 24 months on prosecution on indictment for “any person being a director, manager, secretary or any other officer” implicated).

³ We understand that Draft Regulations 4(1) and 4(2) are not “penal provisions” to which sections 63D and 63E(2) of the Competition and Consumer Protection Act 2014 apply (meaning that no penalties or other criminal sanction may apply for breach). At the same time, Draft Regulation 4(2) expressly requires the CCPC and a court to take these standards into account when “assessing the compliance of a relevant grocery goods undertaking with the provisions of these Regulations.” In so doing, the Draft Regulations appear to permit both the CCPC and a court to hold “relevant grocery goods undertakings” (*i.e.*, large grocery retailers) to a higher standard of conduct than their contracting parties, even where those contracting parties/suppliers have equivalent negotiating power. According to section 63E(2) of the 2014 Act, a relevant grocery goods undertaking is liable to criminal conviction where that undertaking is involved in a contravention of penal provisions of the Regulations “without reasonable excuse.”

4. General Comments

4.1. It is a view expressed by some practitioners in this sector that the Draft Regulations are, overall, geared towards the protection of suppliers. The argument made in support of this contention points to the fact that the compliance burden falls almost - if not entirely - on relevant grocery goods undertakings (i.e., large retailers, including wholesale franchise groups).⁴

4.2. Law Society observations:

4.2.1. The definition of a relevant grocery goods undertaking would include any undertaking engaged for gain in the wholesale or retail of groceries (even if that activity is an ancillary and limited part of its activities), where that undertaking or group to which it belongs has an annual worldwide turnover of more than €50 million. The Law Society recommends that the Department examine, in conjunction with industry, whether this definition may be overly broad to the extent that it applies to companies that have marginal grocery retail or wholesale activity, but which meet the turnover threshold.

4.2.2. The Law Society notes that many suppliers to Irish retailers are large multinational food companies. Whether protection of the interests of such companies is justified or necessary is a policy issue rather than a legal one. But creation of a legal/regulatory framework that significantly advantages one side over the other, in bilateral arms-length commercial negotiations, obviously has legal implications. To ensure resulting limitations on freedom to contract principles do not have disproportionate or distortionary effects, the Law Society suggests that a sectoral impact assessment be conducted by the CCPC, within a defined period following the adoption of the Draft Regulations.

⁴ The Draft Regulations regulate “relevant grocery goods undertakings.” A relevant grocery goods undertaking is defined in the Section 2(1) in the Draft Regulations as a “grocery goods undertaking engaged in the wholesale or retail of grocery goods in the State that has, or is a member of a group of related undertakings that has, an annual worldwide turnover of more than €50 million.” From an explanatory note in the Draft Regulations, the definition of relevant grocery goods undertaking includes only such undertakings engaged in the wholesale or retail of grocery goods, and excludes those engaged in the production, supply or distribution of grocery goods.

5. Enforcement

5.1. Two categories of violations or breaches of the Draft Regulations are effectively provided for in the Competition and Consumer Protection Act 2014 (at section 63E). According to section 63E(2), a “relevant grocery goods undertaking” that, “without reasonable excuse, contravenes a provision of regulations under section 63B that is declared in the regulation to be a penal provision commits an offence” (emphasis added). Section 63E(1) provides that a “relevant grocery goods undertaking” that “contravenes a requirement in a contravention notice commits an offence.” Thus, the Competition and Consumer Protection Commission may elect either to serve a contravention notice or to move immediately to prosecution.

5.2. **Law Society observations:**

5.2.1. It would be important that the Competition and Consumer Protection Commission adopt and publish clear guidelines on the circumstances in which it will serve a contravention notice and those in which it will move immediately to criminal prosecution.

The Law Society hopes that the Department will find the above comments constructive and helpful and would be happy to engage further with the Department if required.

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