

RGDATA SUBMISSION TO THE DEPARTMENT OF ENTERPRISE TRADE & EMPLOYMENT IN RELATION TO THE PROPOSED CODE OF PRACTICE FOR GROCERY GOODS UNDERTAKINGS.

1. Introduction

RGDATA would like to make the following submission to the Department of Enterprise, Trade and Employment in response to the request on 11 August 2009 for submissions in relation to a proposed Code of Practice for Grocery Goods Undertakings. RGDATA, the Retail Grocery, Dairy & Allied Trades' Association, is the representative organisation for family owned grocery shops, convenience stores, forecourt stores and supermarkets.

The submission is informed by RGDATA's long standing involvement in the grocery trade, individual submissions made by retailers to RGDATA and contacts with suppliers and wholesalers involved in the food distribution and production sector.

The production of a draft Code of Practice by the Department clearly indicates that there is awareness that undertakings involved in the supply, distribution and sale of retail groceries in the State are encountering difficulties in relation to trading and supply relationships which are not being adequately addressed by the existing legal and regulatory mechanisms. Recent evidence to an Oireachtas Committee highlights the extent to which the imbalance in buying power between large retailers and suppliers is problematical and creates distortions ultimately favouring the large retailer but which leave the supplier in an unfortunate and highly dependent situation.

There are a number of aspects to this dynamic impacting on the relationship between retailers and suppliers. In the first instance RGDATA is aware of a number of situations where suppliers have been subject to excessive demands for ad hoc payments by a large retailer – the demanding of these payments is unjustified and can have significant adverse impacts for the food and retail sector in Ireland. For supplier companies operating in the Irish market, there are limited numbers of customers from which they must take their business. A large retail customer can have a disproportionate amount of power and distort the basis on which goods are supplied through the imposition of ad hoc demands or other onerous obligations. This has knock on impacts for other retailers with less scale as the natural response of a supplier would be to seek to impose more onerous terms on retailers who are not as powerful in the market. Traditionally this has had a disproportionately negative impact on smaller retailers.

RGDATA would like to clarify at this point that independent, family owned shops do not engage in practices such as demanding hello money, shelf space payments, promotional budgets or other ad hoc payments from suppliers. However we are very aware that large players in the market do engage in these practises.

RGDATA is also aware of circumstances where larger suppliers have behaved unreasonably towards retailers in Ireland, who have sought to source some of their products from other markets in circumstances where they can be secured on more favourable terms. There are a number of instances where retailers have been de-listed by suppliers as a mechanism to ensure that they purchase their entire stock of a branded product from that supplier or distributor, rather than sourcing the product on more advantageous terms from third parties. This has a knock on impact on the price offering that retailers can provide to customers for certain branded products.

The RGDATA objectives regarding any new regulatory or legislative measure that touches on the relationships between suppliers, distributors and retailers in the retail grocery trade are five fold;

- 1 To ensure that a regulatory system can be put in place that is effective, responsive and respected.
- 2 To ensure that the regulatory structure in place properly attacks practises which should be illegal and which distort the competitive landscape for retailing food in Ireland.
- 3 To ensure that an indigenous Irish supply base is maintained and encouraged and not subject to the ad hoc vagaries of large retail concerns.
- 4 To ensure that retailers who are independent of the multiple chains are facilitated in competing on a fair and equal basis with retail competitors who are larger. In particular the independent sector should not have to carry the can for excesses practised by large multiples in their trading relationships with suppliers or wholesalers.
- 5 To prevent discriminatory practices by brand holders which prevent independent retailers from getting goods on competitive terms for their customers.

2. Current legal provisions affecting grocery sector.

RGDATA will respond to the submission circulated by the Department in the order of the questions raised in that submission.

At the outset it is important that RGDATA clarifies the existing legislative provisions relative to the grocery sector, which are stated in Appendix 2 of the consultation document. In RGDATA's view the current legal situation as set out in Appendix 2 is inaccurate and needs to be corrected; to highlight the current inadequacy in existing regulatory structures.

In particular Appendix 2 states that the Competition (Amendment) Act 2006;

“strengthens the existing provisions of the 2002 Act by continuing to prohibit certain practises previously prohibited by the Groceries Order”.

This is of course entirely incorrect. The Competition (Amendment) Act 2006 merely prohibits certain practises listed in that Act on a conditional basis, and subject only to the conduct involved having as its object or effect the prevention, restriction or distortion of competition of trade in grocery goods in the State or any part of the State. This substantially qualifies the prohibition and this qualification is not noted in the appendix. Secondly the prohibition contained in the Competition (Amendment) Act 2006 is not equivalent to the prohibitions previously contained in the Groceries Order and the Restrictive Practices Acts.

The significant distinction between the prohibitions contained in the Groceries Order and the Competition (Amendment) Act, is that the provisions of the Order made it a criminal offence to breach its terms. That is not the case with the Competition (Amendment) Act 2006 where enforcement is left up to the parties involved, although there is a residual right for the Authority to take a civil action.

Given the conditional basis to the prohibition which applies in the 2006 Act, it is not surprising that no suppliers have taken any action against retailers. The chances of succeeding in such an action in relation to a specific action practised by a retailer against a supplier must be very slim in light of the caveat contained in section 15b (5). In the light of this caveat the assertion by larger retailers that the absence of any prosecutions under the 2006 Act indicates an absence of excessive and unfair buying power being exercised over suppliers by large retailers is completely misplaced. The 2006 Act contains no provision for prosecutions and the absence of any civil actions is testament to the condition nature of the prohibition.

3. Detailed responses to consultative questions

Question 1: Should the introduction of any code be on a statutory or voluntary basis? Who should draw up such a code? How do you see compliance costs varying between a voluntary and a statutory code?

RGDATA believes that the disproportionate power wielded by some of the main retailers and some of the large suppliers operating in the retail grocery trade would mean that any voluntary code would be impractical unworkable and unlikely to effective.

The consultation document notes that “the term voluntary code would imply that the relevant grocery goods undertakings” would be responsible for drawing up a voluntary code.

To any person with an understanding of the grocery trade, it would be apparent that the participants in the trade would be entirely incapable of reaching an agreement on the main provisions of a voluntary code. Additionally, any voluntary code, if possible to conclude, would not be enforceable against the larger players.

Recently a voluntary code was agreed by elements in the retail grocery sector in relation to the sale of alcohol in shops. The Intoxicating Liquor Act 2008 contained an express provision in Section 8 requiring the construction of a separate portion of the premises for the sale of alcohol.

The Minister for Justice, Equality and Law Reform agreed to stay the making of a commencement order in respect of that section if the various players in the retail grocery trade agreed to a voluntary code on the responsible sale of alcohol and adhered to this code.

This code has now been put in place, but evidence suggests that at least one major retailer has not participated in the code and is not prepared to comply with the provisions of the code in its recent operations. RGDATA believes that a key reason for this reticence to participate or respect the provisions of the code lies in the fact there is a lack of any real or meaningful sanction for a breach of the code. The threat of the Minister invoking Section 8 of the 2008 Act is not it would appear, of itself, a sufficient incentive for some retailers to comply with in terms of the voluntary code.

If a code is to be effective it must be a code that has statutory effect and which carries with it penalties for breaching the terms of the code. It must be supervised by an independent authority, with powers to enforce and prosecute.

Given that RGDATA considers that a voluntary code for the retail grocery trade is impractical and unworkable, the question of addressing compliance costs between a statutory and a voluntary code does not arise.

RGDATA believes that there should be power in relevant primary legislation for a statutory instrument which can set out a detailed statutory code (such as that provided in the code of practice for grocery goods undertakings in appendix 1 of the consultation document). It is not appropriate for such a detailed code to be contained in primary legislation given the need for flexibility to change the provisions of any code given changes in commercial practises over time.

Question 2 – Depending on whether any code is voluntary or statutory, how should it be enforced? How should such enforcement be funded?

RGDATA does not believe that a code should be voluntary in nature and therefore the question of enforcement of a voluntary code does not arise.

In relation to a statutory code, RGDATA believes that it could be enforced by an independent statutory agency with powers to investigate and prosecute.

In terms of enforcement of a statutory code RGDATA believes that this is a matter which should fall within the remit of the new proposed National Consumer Agency, Competition Authority Body, but should only do so once the structure for this body is fundamentally overhauled and replaced.

The Competition Authority at present does not have the confidence of those within the grocery trade as to its appetite or ability to enforce competition provisions to prevent the behaviour which has given rise to the industry demands for new measures.

While large retailers may claim that the absence of legal actions for breaches of the Competition (Amendment) Act 2006 is a consequence of an absence of any pressure being placed on suppliers, others in the trade believe that the absence of prosecution is more a factor of a perceived unwillingness of the Competition Authority to actively police this area, *allied* to the weak statutory provisions contained in the 2006 Act.

Under any revised primary legislation establishing the merged National Consumer Agency/Competition Authority Body, it would be necessary to provide for real and meaningful sanctions and powers of investigation in relation to breaches of the primary legislation and any statutory code issued under the

primary legislation. In particular there should be powers for the new authority to recover the costs of prosecution and enforcement from undertakings found to have been in breach of the primary legislation or a statutory code.

It is important to understand that the introduction of new measures whether through primary legislation with the subsequent statutory instrument, are not measures being undertaken to serve or benefit one trade but are being taken in the interests of a common good. The control of abusive behaviour within the grocery trade is necessary in the public interest to ensure that consumers receive a fair deal, that suppliers are not penalised, that competition can flourish and that the manufacturing base for food within the State is not challenged by abusive or excessive behaviour on the part of large retailers. In those circumstances the funding of the NCA/Competition Authority Agency as reformed must be treated in like manner to the current funding arrangements for both the NCA and the Competition Authority provided that the power should rest with the courts to make an order allowing the Competition Authority to recover the full costs of funds.

In order for this new emerged body to be effective RGDATA believes that significant reforms will be required to the current structure of both the NCA and the Competition Authority including;

- 1 **Board** - Changes in the composition of the board of the Authority to ensure that it is reflective of stakeholders. The composition of An Bord Pleanála is a key example of the manner in which a regulatory body, (albeit with an appellate jurisdiction) is suitably composed to ensure that its membership is reflective of the stakeholders that are the subject of its regulatory function.

- 2 **Timeliness** - Time limits should be imposed on the new Authority for the investigation and determination of matters. Regrettably it has been the experience of RGDATA that investigations by the Competition Authority drag on for an inordinate time before producing ultimately an unproductive outcome.
- 3 **Appeals** - It is imperative that is some appeals or review process of decisions by the new authority to their determinations. At present it is onerous and burdensome for a small business person that has made a complaint to the Authority to have to fund a full High Court or Circuit Court action to judicially review or second guess a decision of the Authority.
- 4 **Codes** – There should be a provision for the newly created Authority to produce codes, similar to the consumer protection code introduced by the Financial Regulator. There should also be a statutory sanction for failure to comply with these codes. It should also still be open for parties to initiate a civil action for breach of the code or statutory provision. However this should not be used as an excuse by the new Authority for not acting in relation to a particular matter.

Question 3 - Should a separate Ombudsman office be established and if so how and by whom will this be funded, both on establishment and on an ongoing basis?

RGDATA does not believe that a new grocery ombudsman is required to enforce provisions of a code.

A properly functioning, outwardly focused Authority comprised of the National Consumer Agency and the Competition Authority, both substantially reformed should be able to perform the functions required under this legislation.

In circumstances where there is a move against the creation of new agencies and an amalgamation of existing expertise it would be wasteful in the extreme to set up an Ombudsman solely for the grocery trade.

Again emphasis in the consultation document on seeking funding for this body from the trade ignores that the matters which are being addressed in the consultation document are matters that impact on the public good and not issues that confer a commercial benefit on one sector of the trade or other. It also ignores that the grocery trade is significantly under pressure at present with a downturn in sales, an increase in taxes and an extremely difficult operating environment.

Question 4 – What type of Grocery Goods undertakings should be covered by the code? Should a threshold be introduced to limit the application of the code? If so on what criteria should it be based and on what level should it be set?

To be effective the code should not be limited or restricted. While the code would be primarily addressed at tackling abusive behaviour by large retailers against suppliers wholesalers or distributors, it is equally likely to have impact for small retailers that are seeking to access services from large suppliers or distributors.

To introduce a *de minimus* requirement would of itself prevent a segment of the retail grocery sector in Ireland from accessing recourse to law in circumstances where the impact of the abusive behaviour, albeit by a supplier against the retailer, was equally damaging to a conventional situation where a supplier is disadvantaged by large retailers behaviour.

RGDATA has already seen a situation where as consumers of services, retailers are excluded from the protection afforded by the National Consumer Agency for such transactions, given that the agency does not deal with complaints involving businesses. The Financial Regulator takes a similar line. This places smaller businesses at a distinct disadvantage and leaves enforcement of consumer law up to them on an individual basis, which is both impractical and prohibitive. On that basis RGDATA believes that the provisions of any statutory code should be available to all within the trade to avail of and be subject to as required.

Question 5 – Should any code be limited in geographical extent and if so what should that limitation be and how would the provisions of the code be enforced against grocery undertakings located outside the jurisdiction?

RGDATA has already stated that it does not believe that a voluntary code would work in Ireland. RGDATA believes that a statutory code is required.

In such circumstances, where the code is part of the laws of the State it would be deemed to apply to all persons doing business within the State, in like manner to which other statutory provisions apply to businesses operating in the State. Difficulties perceived could be addressed through requiring all businesses operating in the State to nominate a registered office for the purpose of compliance with the code. If evidence exists of any illegality within the State the registered office and the location of any breach would be visited.

In so far as the UK code addresses the retail supplier groceries, the definition that it contains (as specified in page 10 of the consultation document) would seem appropriate.

Question 6 – Will the provisions of the attached initial draft outline code help to achieve a fair balance in relationships between retailers and suppliers? Are there any specific provisions which inhibit achieving that balance? Are there other provisions which might help to achieve that balance?

Looking at the provisions of the draft code, without examining the sanctions that apply for breach of the code make it difficult to examine the effectiveness of the outline contained in the consultation document. It is also important to examine the enforcement mechanisms to ensure compliance with a statutory code (given that RGDATA does not believe that a voluntary code is either appropriate or practical).

The code covers the abuse of suppliers by retailers but must also make provision for retailers who are subject to abusive or excessive behaviour by large suppliers. In particular some suppliers can treat retailers who wish to source goods from outside the jurisdiction, at a disadvantage and prevent those retailers accessing cheaper prices, cheaper products and more innovative services and products from foreign markets for fear that the supplier will 'black' the retailer. This is having a significant adverse impact on the independent retail grocery trade and customers served by the trade.

It is also important that the code should not just be confined to the provision of limited categories of grocery goods, but should also include a broader range of goods and certain services which are supplied to retailers and which are subsequently sold onto customers. For example in recent years there has been the development of certain new services that are forming an increasing part of the offering of grocery stores, such as phone top ups, lottery tickets, parking tickets, toll passes, bill pay services.

Similarly the practices that have given rise to complaints by suppliers also relate to other household necessities, newspapers and periodicals, cosmetics and toiletries. There is no logic from excluding these categories of goods from the provisions of the code and it should be widened to encompass them.

Question 7 - What would be the impact of any code on the consumer and the prices of goods for consumers and how should any code be framed to enhance consumer welfare and the need to ensure that there is no impediment to the passing on of lower prices to consumers?

The position of consumers under the code is of course important but not the primary and sole concern. Statutory intervention in this market is required not just in the interests of consumers but also to encourage and protect investment by suppliers, to ensure diversity in retail function and to ensure that local communities are adequately served by shops and retail facilities. While consumer concerns are of critical importance they are not the only concern in this matter.

RGDATA does not believe that properly functioning and effective regulatory measures in this sector will necessarily correlate to an increase in retail prices to consumers.

One leading retailer has already maintained that it will be in a position to offer significant discounts to consumers, and yet maintain its profit margin at an increased level in the current year.

A key measure required, in conjunction with the code and to assist in the provision of information to consumers on prices, is some mechanism to force the largest retailers operating in the jurisdiction to reveal details of their profitability here. Pending the release of such information, consumers, policy makers and competitors will be in the dark as to the profit levels of retailers operating in this jurisdiction.

Greater transparency also makes it more difficult for a retailer to argue that the only way in which they can fund price promotions is to gouge suppliers.

An effective code should facilitate the achievement of lower prices. It will enable smaller retailers to access goods and services at increasingly competitive prices and encourage suppliers to supply them rather than block them in circumstances where smaller retailers are able to access cheaper products and prices from other markets and jurisdictions. This is good for consumers.

Question 8 - Have you any specific comments to make on the content of the draft outline code of practice for grocery goods undertakings appended to this document?

RGDATA's comments in response to the questions raised in this consultation paper already addressed a number of key aspects in relation to the draft code. For the sake of clarity they are repeated as follows;

- RGDATA does not believe that a voluntary code will be effective
- It is difficult to review a code without seeing the enforcement mechanism to apply to ensure adherence to the code and to the sanction regime that will apply for breaches of provisions of the code.
- The code must not just regulate the relationship between large retailers and suppliers, but must also address issues relating to retailers being treated unfairly by suppliers.
- RGDATA believes that the detailed provisions in the code are not appropriate to be incorporated in primary legislation, but should be contained within a code introduced by way of statutory instrument with sufficient sanctions for any breach.
- RGDATA does not believe that an Ombudsman is required provided a suitable effective and focused regulatory agency emerges from the proposed merger of the Competition Authority and National Consumer Agency.

RGDATA would be pleased to answer any queries in relation to this submission.

30 September 2009