

23rd February 2015,



ICMSA

THE FAMILY FARM ORGANISATION

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Mr. Kieran Grace,
Principal,
Competition and Consumer Policy Section,
Department of Jobs, Enterprise and Innovation,
1 Earlsfort Centre,
Lower Hatch St.,
Dublin 2.

Re: “Grocery Regulations Consultation”

Dear Mr. Grace,

Further to your letter dated 22nd December 2014, in which you requested comments on the Draft “Consumer Protection Act 2007 (Section 63B)(Regulation of Aspects of the Commercial Relationships Between Suppliers and Relevant Grocery Goods Undertakings) Regulations 2015, ICMSA would like to make the following comments:

The overall public policy behind this legislation, both the primary Act and the Draft Regulations is to regulate the relationship between supplier and wholesaler/retailer from the point of view of strengthening the negotiating and contractual position of the weaker or smaller party in the sense of scale of operation. ICMSA believes such Regulations are necessary to ensure contractual arrangements in the relationship between supplier and wholesaler/retailer are adequately regulated. However, ICMSA notes that supply contracts between a supplier and wholesaler/retailer which has a turnover of less than €50 million annually is not covered by the proposed Regulations

PART 1

Regulation 3

- Regulation 3 sets out clearly the application of the Regulations as covering “commercial relationships and contracts between suppliers and relevant grocery goods undertakings engaged in the wholesale or retail of grocery goods”. However in Regulation 4(1) the term “*Grocery goods undertakings*” is used. While this may be an issue of technical drafting, the Department may wish to consider whether or not it needs to be more explicit and that grocery goods undertakings in this context are in fact relevant grocery goods undertaking as defined in the Regulations.

PART 2

Regulation 4

- Regulation 4 deals with the issue or concept of “good faith and transparency”. While this is to be welcomed it is rather a novel approach and provision in legislation. These terms are also used in British legislation of a similar nature. However, it remains to be seen how a Court may eventually interpret what is meant by each of these phrases namely good faith, openness and transparency. It would be useful if the Department in its guidelines could expand on these terms and outline what is in conformity with these obligations or what clearly is not or contra to the obligations placed on a retailer under this Regulation. ICMSA clearly understand that the guidelines to be published would not be a legal interpretation of the Act.

Regulation 5

- ICMSA agree on the need for all contracts to be in writing and signed by both supplier and the relevant grocery goods undertaking as provided for in Regulation 5.

Regulation 7

- Regulation 7, paragraph 2. It may be more definite if the text ended after “from a third party”. There is no need for the text to continue with “from whom the undertaking receives payment for this arrangement”. Unless there is a strong argument for retention of this text, it should be deleted because as it stands it could actually allow an undertaking to compel a supplier to deal with a third-party from whom it received no payment.

Regulation 10

- Regulation 10 does not prohibit so-called “hello money” but sets about to restrict and regulate same. The Act provides that the Minister in making Regulations may:
[63 B (2) (g)] -*specify the circumstances in which a relevant grocery goods undertaking may, or may not, seek payment from a grocery goods undertaking for the purchase of grocery goods for resale by the relevant grocery goods undertaking from the grocery goods undertaking,*

The Minister has quite wide latitude with regard to specifying the circumstances for such payment. However, ICMSA believe the Regulation is far too generous and accommodating to retailers and believe there is a need of greater protection for a supplier. While the Regulation will place a requirement on the retailer to provide an objective and reasonable estimate of the cost to the undertaking of stocking, displaying or listing these grocery goods - there is no mention about the ‘sharing of this cost’ as between the supplier and the retailer. ICMSA suggest an additional proviso to the effect that in no case shall the supplier be liable for more than half of this objectively determined cost and that it is borne by the supplier on one occasion and one occasion only with respect to any given retailer.

Having regard to the public policy purpose of this legislation which is basically to strengthen the position of the supplier vis-a-vis a powerful retailer, we believe that the sub-clause in paragraph (2) of this Regulation namely - *on request from the supplier* -

which places an onus on the retailer to supply the supplier with an estimate of cost but only where it is requested by the supplier should be deleted. There is a risk that a new supplier who seeks such information may not as a result secure a supply contract. By deleting this sub-clauses it would place an obligation on all retailers covered by this Regulation to provide the information on the cost of stocking, displaying etc to a supplier whether the supplier seeks same or not.

Regulation 13,14,15,& 16

- Regulations 13, 14, 15 and 16 deal with promotions, marketing costs, shelf space payment and payment for advertising. These Regulations are based entirely on the Act. There is considerable overlap between these four issues and may be useful if the Department in its Guidelines was to expand the explanation of these various issues.

PART 3

Regulation 20

- Regulation 20 deals with the compliance requirements for relevant grocery goods undertakings. ICMSA welcome the thrust of the Regulation on this matter and particularly the requirement for the submission of an annual compliance report to the Commission. This should ensure ongoing compliance with the Regulations.

PART 4

Regulation 23

- Regulation 23 is to be welcomed and is similar to provisions in consumer protection legislation whereby the weaker party cannot waiver their protection under the legislation and that any provision of a contract which directly or indirectly purports to set aside to the provisions the legislation shall not be binding or enforceable against the supplier in this case.

Related Questions

Guidelines

- We have already referred above on a number of occasions to certain issues or topics for possible inclusion in the Guidelines which will be published by the Department. In addition, ICMSA believe it would be very useful for the guidelines to set out in clear terms the rights and obligations of a supplier and the rights and obligations of a retailer/wholesaler under these Regulations.

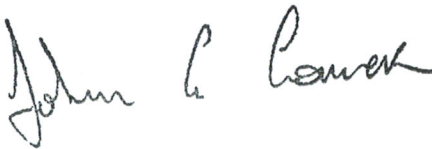
It must be borne in mind that suppliers particularly of fruit and vegetable and other fresh or unprocessed food products or specialists local food producers may be very small scale undertakings and operating as sole traders where the cost of professional legal advice with respect to these Regulations could be prohibitive. Therefore, a clear expose in the guidelines of their rights in entering into a contract of supply would be useful and valuable.

Large suppliers which supply smaller retailers

- In relation to large suppliers which supply smaller retailers, ICMSA believe that the current Draft Regulations, suitably modified, can be readily applied to cover contractual relations between these large suppliers and small-scale food retailers.

ICMSA would appreciate you taking our comments into consideration.

Yours sincerely,

A handwritten signature in cursive script that reads "John Comer".

John Comer,
President.