Submission to Department of Jobs, Enterprise and Innovation on the Draft Regulations for consultation, regulating aspects of the commercial relationships between Suppliers and Relevant Grocery Goods Undertakings by the Musgrave Group – 27th February 2015

EXECUTIVE SUMMARY

Draft Regulations covering aspects of the commercial relationships between suppliers and wholesalers/retailers were issued for consultation by the Department of Jobs, Enterprise and Innovation on 22nd December 2014. The following summarises the submission from Musgrave Group in response. We are available to clarify any of the points raised, should you wish to discuss in further detail.

Musgrave is committed to long term stable relationships with suppliers which deliver sustainable benefit to both Musgrave and its suppliers. We believe in open and collaborative ways of working which are based on high levels of trust and fairness between Musgrave and our suppliers.

Reflecting the presence of our retail partners in every community throughout Ireland, Musgrave has a strong commitment to Irish suppliers and we actively support the development and progression of new suppliers.

Since consultations on a Code of Practice for the grocery retail sector began, Musgrave has engaged openly and honestly with relevant stakeholders and has made a positive contribution to the debate. In all of our engagements with suppliers, we operate in a fair and balanced way, with a view to minimising cost and complexity. We are supportive of the European Voluntary Code of Practice and have no issue in principle with regulations which impose a similar regulatory framework in Ireland.

However we do have some serious concerns with the draft Regulations as published. These are elaborated upon in further detail in our full submission in schedules 1 and 2 but they can be summarised as follows:

SCOPE AND IMPACT

- "Relevant Grocery Goods Undertakings" are defined in the Regulations as retailers and wholesalers engaged in business in the State with a worldwide turnover of more than €50m. This should be clarified to ensure that relationships between a wholesaler and its retailers in a franchise arrangement are not covered.

- The Regulations should not apply to our individual retailers in a franchise arrangement, who have businesses with an annual turnover of more than €50m

who purchase the vast majority of their product from Musgrave and therefore only deal with small suppliers at a local level.

The Regulations will not apply to purchases of grocery goods made by multinational retailers based in the State who take supply from their Group companies based outside the State. This may incentivise them to increase their supply of grocery goods from this unregulated channel. This may have a negative impact on Irish suppliers and Irish jobs.

BALANCE AND FAIRNESS

- Almost all of the Regulations create obligations for Relevant Grocery Goods Undertakings only, meaning there are no obligations on suppliers in these Regulations. This imbalance must be addressed as the reality is that some suppliers are actually much larger than the retailer/wholesaler and should be required to comply with the Regulations, with suggested amendments, in full. There also needs to be a mechanism to reduce the regulatory burden between wholesalers/retailers and smaller suppliers, such that smaller suppliers have the option to opt out.

COMPLIANCE REGIME

- We believe that compliance reporting serves no purpose and there seems to be no rationale for an annual compliance report. However, if this is required, then it should apply to both parties.

- We believe the criminal sanctions set out in these draft Regulations are unnecessary and if included, should be limited to severe and deliberate breaches.
- A dispute resolution mechanism which was included in earlier drafts of the Voluntary Code should be introduced in relation to compliance with contracts and terms.

DRIVING COMPLEXITY AND COST

- Our understanding was that these Regulations were to be aimed at preventing retailers/wholesalers from abusing their market power by compelling suppliers to make payments without agreement. However, the proposed Regulations as currently drafted seem to go significantly farther than that, adding complexity and cost.

- While joint forecasting on promotions is standard practice and adds value, the requirement in the Regulations for retailers/wholesalers to solely produce forecasts for both standard and promotional demand at the request of suppliers, will drive significant complexity and cost without benefitting any party in the supply chain.

- The Regulations as currently drafted, seek to limit parties from agreeing how investment for marketing and agreed payments for advertising and retention, allocation or better positioning of shelf space can be made. We believe that parties should be free to agree the nature of this activity and the amounts of related payments between themselves. However, activity and payments need to be agreed in advance and, once agreed, neither party should be able to unilaterally change the agreement.

- Musgrave estimates that the annual costs of implementing the Code are in the region of €5-7 million annually. This represents the cost across our ROI divisions and covers supplier contracting and associated legal advice, buyer training, additional forecasting and compliance reporting. These are the costs that apply to Musgrave and it should be noted that the supply base would need to take on the cost of contracting, legal advice, training and forecasting with wholesalers and retailers, so the total cost in the supply chain would be a multiple of this amount on an annual basis.

Summary Conclusions

The Regulations as drafted will mean significant change to current ways of working adding cost and complexity to the supply chain. Our main concern relates to the obligations placed solely on the retailer/wholesaler, and the potential application of the draft Regulations to the wholesaler/retailer relationship, and that the Regulations do not take into account the fact that many suppliers in the grocery retail market are larger companies than the retailer/wholesaler.

The regulatory and administrative burden of compliance reporting, the criminal sanctions that apply to breaches of the Regulations and the lack of a dispute regulation mechanism will create significant additional cost and complexity for the supply chain, which may impact consumer prices and competitiveness in the sector.

We set out our detailed comments on the Regulations in schedule 1 and the text of the Regulations with our suggested amendments shown as revisions in schedule 2. We believe, if implemented, these revisions will help to ensure that the Regulations are effective, reflective of the realities of the grocery retail market in Ireland and will maintain the utmost fairness in the supplier, retailer/wholesaler relationship as well as value for the consumer.

INTRODUCTION

About Musgrave

Musgrave and its retail partners in Ireland employ over 30,000 people, in more than 807 stores nationwide. These include SuperValu, Centra and Daybreak stores in every county as well as a network of Cash and Carry outlets across the island of Ireland. Musgrave, together with its retail partners, is the largest private sector employer in the country. These retail businesses are operated by local, independent entrepreneurs, in cities, towns and villages nationwide. Musgrave is committed to supporting the agrifood sector in Ireland with 100% of our beef, pork, chicken and lamb and 75% of goods on the shelves of SuperValu and Centra sourced or produced in Ireland, contributing over €1.6 billion to the Irish economy annually.

Recommendations

Following our participation in a Retail Ireland meeting with officials from the Department of Jobs, Enterprise and Innovation on 1st July 2014, our understanding of the purpose of the Regulations was first, to ensure that the important commercial terms agreed between suppliers, retailers and wholesalers are recorded in writing to give all parties certainty as to their contractual position and second to prevent retailers and wholesalers from taking advantage of their buying power such that suppliers may be required to make unjustified payments or payments that had not been previously agreed. Based on this understanding, we felt that Regulations that achieved this aim would be workable and would broadly reflect the way the market operates, while at the same time allowing action to be taken against companies that abused their market power or which acted in an arbitrary manner.

However we do have some serious concerns with the draft Regulations as published. We have suggested ways in which the Regulations can be amended so that they will be workable, balanced and proportionate. It is important that the interests of consumers are kept to the forefront of any regulation in this area and that the normal operation of a competitive market is not compromised.

The Regulations as currently drafted do not accurately reflect the practicalities and realities of the operation of the grocery retail market in Ireland and in their current form will add significant complexity and cost to the supply chain which we estimate for our business will be in the region of €5m-€7m annually. There will also be considerable corresponding compliance costs for suppliers.

We make a number of recommendations in relation to the draft Regulations which we believe are crucial to ensure fairness and efficacy, minimise cost and complexity and accurately and practically reflect the operation of the grocery retail market in Ireland.

1 Scope and Impact

"Relevant Grocery Goods Undertakings" are defined in the Regulations as retailers and wholesalers who carry out business in the State and who have a worldwide turnover of more than €50m. In contrast the 2014 Act defines Relevant Grocery Goods Undertakings as all participants in the grocery supply chain with a turnover of more than €50m. This is significant as almost all of the Regulations create obligations for Relevant Grocery Goods Undertakings only and this means that there are no obligations on suppliers at all in these Regulations. We believe that if this is not dealt with, then the Regulations are likely to be significantly and unjustly unbalanced.

Suppliers are defined as suppliers to wholesalers or retailers. Therefore all wholesalers are automatically included both in the definition of suppliers and in the definition of wholesaler/retailers, as all wholesalers sell directly to retailers. We had been assured by DJEI at the Retail Ireland meeting on 1st July 2014 that these Regulations were not going to apply to the relationship between Musgrave and its retailers, however they do apply to that relationship as currently drafted. They also apply to some of our retailers who themselves have an annual turnover of more than €50m and we had understood that this was not the intention of the Regulations. These independent retailers take the vast majority of their supply from Musgrave, but they do engage with local suppliers as well, for a fraction of their turnover. These Regulations should not apply to such retailers as if they were large scale retailers with a specialist buying function, as so doing will create a clear disincentive to local sourcing.

We believe it would be simpler and more workable if the approach taken in the UK were adopted where the retail undertakings to which GSCOP applies are named by Ministerial Order and limited to a specific number of named entities. The initial Regulations could then list the relevant wholesalers and retailers with a turnover of more than €50m to which the Regulations apply and this could be amended by the Minister or even by the Commission on an on-going basis. The specified companies could then be referred to as "Specified Undertakings". This would deal with the issues raised in the previous two paragraphs and would also deal with the issue of defining relevant turnover, as some companies in this sector do not publish accounts and some companies may have a small turnover in Grocery Goods, but will find themselves covered by these Regulations if they are part of a group with a turnover of more than €50m.

2 Balance and Fairness

The draft Regulations in their current form impose few, if any, obligations on suppliers and we believe this needs to be addressed to introduce greater balance. There is no recognition of the fact that many suppliers are larger than the retailers to whom they are selling. We believe that the Regulations need to redress this imbalance and we would hope that more of the specific Regulations will be applied to suppliers as well. We would suggest the following provisions as basic requirements which suppliers should be expected to comply with:

Agreements

(i) Suppliers should be obliged to comply with the terms of their agreements with wholesalers/retailers and in particular should be compelled to meet agreed obligations to make delivery of all products ordered on time, in full and on the terms agreed and to invoice Retailers/Wholesalers promptly.

(ii) There should be no adjustments by suppliers to the prices of products without giving Retailers/Wholesalers reasonable notice and without those adjustments being agreed.

(iii) There should be no alterations to agreed promotional strategies and plans without giving Retailers/Wholesalers reasonable notice and without those adjustments being agreed.

Product issues

(i) Suppliers must deal with all customer complaints relating to products supplied by them, and give appropriate indemnities to Retailers or Wholesalers relating to any defective product supplied.

(ii) Suppliers must supply quantities of products agreed for promotions in accordance with joint forecasting.

(iii) Suppliers must carry insurance for product liability and will bear the full cost of any product recall.

Records

Suppliers should be subject to similar obligations as Wholesalers/Retailers under the Regulations and in particular should be required to maintain records that relate to the Regulations. They should also be required to co-operate fully in any investigation and identify to Wholesalers/Retailers the nature and the reasons for any complaint made to the Commission.

3 Compliance regime

The compliance regime that is proposed by these Regulations is onerous. We believe that it will provide a disincentive to dealing with smaller suppliers who are unable to assist or meet the demands required by the compliance regime. It seems excessive that a breach of these Regulations will mean contracts which have been agreed may be unenforceable and can lead to fines and even imprisonment in some cases and yet there are no details as to how complaints will be dealt with or adjudicated. If a compliance report has to be produced by Wholesalers/Retailers, then we believe suppliers with annual turnover of more than €50m should also be compelled to produce such a report.

Penal nature of the Regulations

The Regulations do not deal with bipartisan disputes. They create a regulatory regime where if the Regulations are breached, there are penal consequences with fines and/or prison sentences applying to breaches of the Regulations.

We would recommend limiting the criminal nature of the Regulations to severe breaches. These breaches could be detailed in an annual report issued by the Commission in the same way that the Commissioner for Data Protection operates. Less severe breaches should be dealt with by naming and shaming the culpable parties. Equally we do not believe that contracts should be invalidated unless, and only to the extent they are specifically contrary to what is set out in the Regulations, and this needs to be stated more clearly. The Regulations propose that we go from a legal framework where there is freedom of contract, to a regulated situation where minor breaches of Regulations lead to contracts being unenforceable and where fines can be levied on Wholesalers/Retailers, yet there are almost no obligations imposed on suppliers.

Compliance Report

We do not understand the purpose of creating compliance reports and question why only wholesalers and retailers and not suppliers are required to issue compliance reports. In addition, there is no reference to the level of materiality of detail that needs to go into the compliance report.

Dispute mechanism

The previous draft Voluntary Code suggested that there would be a dispute mechanism to deal with issues that arise between parties to agreements. Given that any issues that may arise under the Regulations are likely to be bilateral contractual disputes where there are two different versions of the same events, we believe that there should be a requirement for complaints under the Code to be set out in detail so that Wholesalers/Retailers have the opportunity to defend themselves from any claims made and to enable them to rebut any allegations made by suppliers. It would be helpful if the Regulations provided for an initial investigation by the Commission which then facilitated mediation with a named expert from a panel, with the costs to be borne by the party found to be in default or at the discretion of the mediator. This would result in a more effective resolution of issues and would be a lower cost regulatory solution for the Commission, rather than requiring the Commission to police a regime under threat of criminal sanctions.

4 Driving Cost and Complexity

Working with suppliers

The Draft Regulations do not reflect how business is done in the grocery market in Ireland. The Irish grocery supply base comprises thousands of suppliers, varying from very large multinationals, to large Irish suppliers and to local producers who supply a small number of

stores in their particular region. Industry ways of working with suppliers vary by supplier type, reflecting the scale of the supplier and the nature of the product range they supply.

The proposals in the draft Regulations relating to promotions, forecasting and marketing investment will require a change to the way the market operates for all suppliers, retailers and wholesalers and will create a burden of regulation on all parts of the supply chain. The Regulations as drafted would mean that major changes would have to be made to the way grocery goods are ordered and supplied and would lead to uncertainty as to whether agreed terms are enforceable or not. The criminal sanctions that attach to any breach of the Regulations mean that companies will have no choice but to change their practices to fit these Regulations, without adding value to any party in the supply chain. We believe that this will involve significant cost.

CONCLUSION

We believe the Regulations as drafted are too broad in scope and require amendment particularly in the areas of forecasting, promotions and agreed payments between suppliers and retailers/wholesalers. If the Regulations aim to achieve the purposes set out in the introduction above, this would lead to tangible benefits for all participants in the supply chain. This could be done relatively easily using the proposed draft Regulations as their basis with the amendments we have proposed. There are a number of issues identified above and we have gone into more detail in schedule 1 to this submission as to how these can be addressed. Schedule 2 sets out our suggested amendments to the wording of the Regulations. We believe that without such amendments, the Regulations as drafted will create significant cost for the supply chain in Ireland in general, without adding any real benefits to the supply chain or consumers. These costs will end up being passed on to consumers in some way and they may impact the long term competitiveness of Irish suppliers.

Schedule 1

Detailed Comments on the Regulations

Regulation 2(1) Definitions

"*Relevant Grocery Goods Undertaking*"

The definition of Relevant Grocery Goods Undertakings is set out in the regulations as retailers and wholesalers with a turnover of more than €50m. The new Section 63A of the Consumer Protection Act inserted by the 2014 act defines Relevant Grocery Goods Undertakings as all participants in the grocery supply chain with a turnover of more than €50m. This gives rise to a number of issues which are set out below.

It would be helpful if a different term could be used for retailers and wholesalers under the regulations and we believe there are a number of issues with how this definition might work in practice that could be dealt with by adopting the approach used in the UK, where the retailers to whom GSCOP applies are listed by Ministerial Order and if the application of the regulations was limited to a specific number of named entities who are referred to as "Specified Undertakings". Albeit in the UK we note the guideline for the Minister is turnover of £1Bn rather than €50m and GSCOP does not apply to wholesalers at all. This would create clarity for all participants in the market as it would be clear where the regulations apply and where they do not.

Scope of definition is over inclusive

The definition of Relevant Grocery Goods undertaking assumes Wholesalers/Retailers and suppliers are mutually exclusive. However, all wholesalers of grocery goods sell to retailers and therefore come within the definition of "supplier" under the regulations as well as coming within the definition of "Relevant Grocery Goods Undertaking". This means the supply of grocery goods between Musgrave and its independent retailers is covered by these regulations and we were assured by DJEI at the Retail Ireland meeting in July 2014 that this was not the intention. The explanatory note to this regulation goes on to say that the defined term "relevant grocery goods undertaking" only includes companies involved in the wholesale or retail of grocery goods and excludes undertakings involved in the production, supply or distribution of grocery goods. We would point out that the main business of wholesale companies is the distribution of grocery goods and further, that all of the major retailers and Musgrave engage third parties to produce 'own brand' goods on their behalf and are therefore involved in the production of grocery goods. This is to illustrate some of the difficulties with these definitions, as there is substantial overlap.

The definition "Relevant Grocery Goods Undertaking" includes all grocery goods undertakings which have a turnover of more than €50m or companies which are members

of a group of companies which has a turnover of more than €50m. Some of our independent franchised retailers who take supply of grocery goods from Musgrave have a turnover of more than €50m in their total company group. This means that these retailers would have to comply with the regulations in the same way as Musgrave, Tesco, Dunnes Stores, Lidl or Aldi. These retailers take the vast majority of their supply of grocery goods from Musgrave, but they also purchase small amounts of other products which are mostly products local to the supermarket in question; we believe these purchases (which are far less than €50m per annum) should not be covered by these regulations. These retailers are smaller supermarket groups and they do not have an independent buying function as Musgrave carries out the purchasing of most of the products in their stores from suppliers on their behalf.

Equally there are customers of our cash & carry business who have a turnover of more than €50m and they may resell grocery goods which they purchase from Musgrave's cash & carry division in their fuel forecourts for example, or they may use these grocery goods in their canteens for sale to customers and/or staff. We do not believe the regulations were intended to include these customers as retailers for the purposes of the regulations.

Relevant turnover

We note that turnover is not limited to turnover in grocery goods and it is not limited to turnover in the State. It will be difficult in some cases to ascertain exactly the turnover of a group of companies where the group does not issue accounts in the State or where turnover from grocery operations is reported after being aggregated with other turnover.

It would be simpler if the approach taken in the UK were adopted where the retailing undertakings to which GSCOP applies are named by Ministerial Order as suggested above. In the event this approach is not taken, then it would be preferable to use a term such as "wholesalers/retailers" or "Resellers" rather than using the term "relevant grocery goods undertakings" in a different way in the Regulations and in the Act.

Use of the definition

The definition of "Relevant Grocery Goods Undertaking" is significant as almost all of the Regulations create obligations for Relevant Grocery Goods Undertakings only. This means that there are few obligations on suppliers at all in these Regulations and we believe this represents a significant imbalance in the regulations. If the term Relevant Grocery Goods Undertaking had the same meaning in the Regulations as it has in the Act then some of this imbalance would be addressed. We have suggested in our mark-up of the Regulations in Schedule 2 below that this should be resolved, by referring to retailers and wholesalers as Specified Retailers or Wholesalers and that most of the Regulations should be extended to apply to suppliers as well to reflect the way the market operates at the moment.

Issues for wholesale and food-service channel

The Regulations would also apply to cash & carry outlets and their customers, a lot of which are retailers. However the Regulations would not apply between cash & carry outlets and their non-retail customers. So Musgrave's cash & carry division will have to comply with these Regulations, but companies who operate solely in the food services sector selling grocery goods to bars, restaurants and canteens may not as some of these outlets may not be considered to be "retailers". We believe that the large food-service companies based in the State and outside the State, which have sales in the State should be included in the group of specified or designated wholesalers and retailers.

Primary producers not impacted at all

We note also that many of the Regulations create obligations only for Relevant Grocery Goods Undertakings i.e. wholesalers and retailers. This means the draft Regulations do not impose obligations on suppliers not to take advantage of primary producers such as farmers, many of whom have no choice as to which supplier they deal with due to logistical and geographical constraints.

"*Suppliers*"

Suppliers are defined as any grocery goods undertaking that supplies grocery goods for resale to a wholesaler or a retailer. This means that all wholesalers are also by definition suppliers as they supply grocery goods to retailers for resale in the state. As set out above, it means that Musgrave's supply of grocery goods to its retailers and its sale of goods to its cash & carry customers would be regulated by these Regulations. We believe this should be clarified. If the recommendation of specifying a named list of wholesalers/retailers is accepted then that would deal with our concerns. If this is not accepted then there should be a specific exemption to the Regulations that clarifies that they do not apply to multiple links of the supply chain in respect of the same goods. This could be achieved by stating that the Regulations should not apply in relation to goods purchased from a wholesaler who has already complied with the regulations in respect of those goods. If this is not implemented, the draft Regulations may discriminate in favour of vertically integrated grocery operations which own their own retail stores and would not have to comply with Regulations at that level of the supply chain.

We believe that the Regulations as drafted will involve increased administration for suppliers. However, smaller suppliers should be exempted from some of these obligations and on this basis we have suggested including a new definition of "Large Supplier" so that certain obligations would only relate to Large Suppliers with an annual turnover of more than €50m.

The Regulations are deemed to apply to the supply of grocery goods to Relevant Grocery Goods Undertakings (who have a business in the State) by "suppliers" which implies supply by a third party to the Relevant Grocery Goods Undertaking. The Regulations will not cover the supply of large quantities of grocery goods from companies within the same company group as a Relevant Grocery Goods Undertaking who are located outside the State. Therefore multinational retailers will be able to make purchases of grocery goods outside of the State and then transfer these grocery goods into the State under an inter-company supply arrangement. The Regulations will not apply to this transaction. This may provide an incentive to such groups to make purchases of grocery goods outside of the State. This could have a negative impact on Irish based suppliers and Irish jobs.

We believe the existing definition of Relevant Grocery Goods Undertaking should be replaced by a list of wholesalers and retailers specified by Ministerial Order and there should be a new definition to define larger suppliers.

Regulation 3 – Application

In addition to the points made above, we believe Regulation 3 should confirm that the Regulations are intended to apply to the relationships between suppliers and wholesalers who sell direct to restaurants, bars and canteens in the food service channel (i.e. not just to retailers).

We would point out that the GSCOP in the UK does not apply to wholesalers at all. We assume wholesalers were included in these draft Regulations in order to ensure they apply to the Musgrave wholesale business, but if the regulations are to apply to some wholesalers, then they should apply equally to all companies who operate in the same competitive space and who meet the turnover threshold.

We have suggested amendments to this regulation in the mark-up in Schedule 2 to reflect the comments raised in relation to Scope made in relation to regulations 2 and 3 above.

Regulation 4 Good Faith and Transparency

We believe that the purpose of the Regulations was to ensure that (a) all material terms of contract between wholesalers/retailers and suppliers were recorded in writing and (b) to ensure that retailers/wholesalers could not unilaterally change those terms and demand payments from suppliers which had not been agreed or provided for in principle in the written terms. We believe this purpose should be outlined in the Regulations instead of the general obligations relating to fairness set out in Regulation 4. We would submit that the proposed drafting below would be more meaningful in the context of the grocery market in the Republic of Ireland.

Regulation 4(1) of the draft regulations requires Grocery Goods Undertakings to conduct their trading relationships in good faith and in a fair open and transparent manner. We believe the words "open and transparent" may create issues, as the terms of the commercial agreements being regulated are highly confidential and we are required by competition law not to disclose terms or share information relating to our contractual dealings. We believe this duty should be deleted from this Regulation.

We believe this could be achieved by replacing Regulation 4 with the following:

4(1) [Designated Retailers/Wholesalers] and [Large] Suppliers (subject to paragraph 5(3) below) should be required to record the principal commercial terms agreed between them in writing as set out in Regulation 5(1) below.

4(2) Parties to agreements referred to in section 4(1) above shall not directly or indirectly compel or coerce [1]the other party to make payments other than those agreed in advance without the agreement of the other party.

4(3) All parties to agreements referred to in section 4(1) above should act in good faith in negotiations and should always agree to act in the overall interests of consumers.

4(4) In assessing the compliance of parties to an agreement referred to in section 4(1) above, the Commission and a court may take into account the undertaking's compliance with the obligations of Sections 4(2) and 4(3) above.

We believe the current duty of good faith and transparency is inappropriate and should be replaced by the recommended wording set out above which we think comes closer to setting out the purpose of the regulations as this has been explained to us.

Regulation 5 – Grocery Goods Contracts to be in writing

Regulation 5(1) requires wholesalers/retailers to require that (a) **All** of the terms and conditions of a grocery goods contract to which it is a party are to be recorded in writing and (2) any subsequent contractual agreements or arrangements made under or pursuant or in relation to that contract; are expressed in plain intelligible language and are recorded in writing. Regulation 5(2) goes on to require that the contract is signed by both parties.

Practical issues:

The Regulation as drafted creates two main issues. Firstly it assumes that all contractual terms are set out in a contract and secondly, the Regulations state that any contract that contravenes the Regulations is unenforceable. This creates uncertainty as to the enforceability of terms that may be agreed throughout the year and which are not part of an annual contract.

[1] This wording follows the Competition (Amendment) Act 2006 which was also aimed at the grocery market

We believe that (1) parties to grocery goods contracts should record the terms relating to activities and payments which have been agreed between them in writing, which allow parties the flexibility to agree changes throughout the year to reflect issues relating to supply and consumer demand and (2) these agreements and agreed variations should be enforceable between the parties.

All terms to be in writing - flexibility

We submit that this Regulation can only be workable if the terms that must be recorded in writing are specified. There are certain terms that are material and certain terms that are less material and we would submit that only matters that relate to payment need to be in writing, but can be subject to agreed variations to reflect market conditions. Other terms should be left to the discretion of the parties or should be the subject of standard terms. Parties need flexibility to be able to agree matters relating to products ordered, promotional activity and cost price throughout the year. This reflects the competitive nature of the market. If, for example, a supplier cannot supply a product in the quantity or quality required and at a competitive price, the wholesaler/retailer will purchase the goods from an alternative supplier to satisfy consumer demand. This results in the market becoming more efficient and consumers getting best price and quality. Wholesalers and retailers should not be constrained by these regulations from seeking the best products at the best price.

All terms to be in writing – different types of agreement

Musgrave has different types of contractual relationship with our different types of suppliers and we believe that these Regulations should be broad enough to cover all of the varying types of agreement. We have annual agreements with our larger suppliers and ongoing engagement with those suppliers. There are other transactional suppliers who may supply commoditised or seasonal products where there is not the same ongoing interaction to drive sales. There is also the important central billing channel of supply where suppliers deliver directly to our stores, under orders made by those stores from suppliers who are listed by us and we make payment to the supplier for goods ordered from them by a retailer. In this case, the relationship is between the supplier and the independent retailer. The legal "contract" is between Musgrave and the Supplier but third party retailers are making orders which constitute the binding contract that creates an obligation to supply and to pay.

Sometimes the terms as to delivery or quantity of product ordered may not be written down and may be made face to face or over the phone. We believe these arrangements should not be made unlawful by these regulations.

We believe that flexibility is required in the market and current arrangements should be allowed to continue and should not be rendered unenforceable by operation of these

regulations. It is possible that this regulation will drive change and complexity into the market.

Obligation to agree terms in writing does not apply to suppliers

We believe that it is also unreasonable that the obligation to contract in writing falls only on wholesalers and retailers and not on suppliers.

Smaller suppliers should be able to elect for less comprehensive regulation

The requirement to have all terms in writing will impact suppliers as well as retailer/wholesalers and we are recommending that suppliers with a turnover of less than €50m per annum should (a) be allowed to agree to contract with retailers/wholesalers on the basis of standard terms of agreement (b) the parties should be allowed to agree ad hoc terms throughout the year and (c) orders of grocery goods should be allowed to be verbal or in writing. This would only apply if the smaller supplier consented to this in writing.

Plain intelligible language

There is a requirement for plain intelligible language to be used. Again there is no objective standard in relation to this and a lot of industry personnel use shorthand, abbreviations and terms used in the industry that may not be intelligible to people outside the industry. Examples include BOGOF (Buy one get one free), PA (promotional activity), LTA (long term agreement – which may also refer to annual rebates).

Requirement for agreements to be signed

We would also point out that the law of contract does not require signatures for a contract to be binding and yet this is required in 5(2). A large number of communications are electronic and ad hoc terms agreed throughout the year are frequently agreed without signatures. As referred to above, orders can be made over the phone, particularly in central billing arrangements, or in some cases deliveries are made by suppliers without an order being made at all, but these deliveries are accepted and paid for. We believe it is not reasonable for these agreements to be deemed to be unenforceable if there is no signature on the agreement and we would recommend that the requirement for signatures is removed in the interests of practicality and recognising existing ways of working.

We believe that parties to grocery goods contracts need flexibility and certainty and the regulations should be amended to reflect this.

Regulation 6 – Unilateral Variation etc. of grocery goods contract

The law of contract requires that contracts cannot be varied by one party without the consent of the other. As far as wholesalers and retailers are concerned, this Regulation does not change that legal position. However, by remaining silent on suppliers there seems to be an implication that Suppliers can unilaterally refuse to supply products which they contracted to supply or change the price which they are charging for those products without agreement. We believe this is unreasonable and may have a negative impact on our consumer offer.

This Regulation also applies to a termination or a renewal of a grocery goods contract. Almost any termination of a contract will be unilateral if one party has breached the terms of the contract and we believe that parties should be free to renew their contracts if they so wish.

We do not understand why this Regulation is only directed at relevant grocery goods undertakings or retailers/wholesalers and it should be extended to suppliers.

Regulation 7 – Goods or Services from third party

This provision proposes that where wholesalers/retailers require suppliers to purchase goods or services from a specified third party or third parties in a contract and those third parties in turn make a payment to the wholesaler/retailer, then the Regulations state the supplier must be allowed to source this service itself except if the supplier's source for those goods or services (a) fails to meet reasonable quality standards laid down for those goods or services by the relevant grocery goods undertaking or (b) where the supplier's source charges more for an equivalent quantity and quality of such goods or services.

We would recommend that the exceptions in 7(1)(a) and (b) be replaced by one general exception "where such requirement is objectively and reasonably justified by the Relevant Grocery Goods Undertaking for the purposes of its business".

This Regulation is likely to apply in relation to packaging and branding where it is important that our trade-marks and branding are consistently and properly used by suppliers and there should be no discretion to source such materials from alternative sources. We are also very sensitive about the quality of materials used in our own-brand goods to maintain the value and integrity of our brands.

The Regulation is drafted broadly and may also include situations where we require suppliers to comply with certain technical requirements so that they can interoperate with our IT systems in relation to the order and supply of goods, or in relation to transportation of goods to our licensed retailers and we believe these are areas to which this Regulation should not apply. If the amendment above can be adopted then this would deal with our concerns regarding the potentially broad impact of this Regulation.

Regulation 8 Non-performance due to factors beyond the reasonable control of party to a contract (Force majeure)

We have standard force majeure provisions in our standard terms and conditions; however this proposed clause sets a very low hurdle for what constitutes force majeure. We believe that the Regulations should specify the circumstances when parties are relieved from their obligations under a contract.

This Regulation should clarify the actual circumstances that are beyond the reasonable control of the parties such as fire, flood, act of God, war, natural disaster for example. It should not apply to normal commercial occurrences that should be anticipated and provided for.

We would also suggest that the use of the words "beyond the reasonable control of the party" are too subjective, because what is reasonable for a supplier may not be reasonable for a wholesaler/ retailer. In addition, where this Regulation is relied upon, suppliers should be required to show how they have mitigated any loss or likely loss that has occurred. For example, this Regulation should not operate to release suppliers from their contractual obligations where their input costs have risen.

We also believe there needs to be a stated obligation on suppliers to have both mitigation and contingency plans in place to protect supply first, to ensure that failures to supply do not occur and when they do, plans need to be in place to keep disruption to a minimum. In addition every supplier should have complete and robust Business Continuity Plans in place when such events take place and Disaster Recovery plans for their IT system, to ensure that data relating to orders and agreements with wholesalers or retailers is backed up and available for use in the event of an unforeseen IT systems failure.

Regulation 9 Forecasts

This Regulation requires wholesalers and retailers to prepare any forecasts in good faith using due skill, care and diligence, and they must then communicate the basis of a forecast to the supplier and the basis upon which the forecast has been prepared and on request from a supplier, must consult with the supplier on the forecast and its basis.

At the moment we normally carry out joint forecasts with our suppliers in relation to promotions, however this Regulation deals with forecasting of standard demand for products. Forecasting is not an exact science and it is not something that can be done by the wholesaler/retailer alone. Forecasting is not carried out on standard demand as envisaged by this Regulation. Where forecasts are made, a supplier's input is necessary as they are the experts in levels of demand for the products they supply and have data relating to historic sales across the entire market and not just with one particular wholesaler or

retailer. There are also certain products where forecasting is almost impossible such as standard demand for products supplied through the central billing supply chain where all data rests with the supplier and the individual stores.

We believe this regulation should require joint forecasting and this should only take place where both parties have agreed to conduct a joint forecast. This would reflect best practice in the industry. We should point out that this regulation has the potential to create substantial costs for wholesalers/retailers in its current form.

Regulation 10 - Payment for purchase of grocery goods

The drafting of this Regulation is not clear. It appears to be aimed at listing fees for new products, however the wording of the Regulation refers to all payments made in relation to the supply of grocery products. There are many payments that may be agreed between suppliers and wholesalers/retailers that relate to the purchase of goods. The most obvious example would be rebates or volume discounts that may be paid retrospectively. Where products are being launched or even re-launched there may be a promotional campaign which involves payments for marketing, advertising, positioning of products. These payments are dealt with in later Regulations, but normally a supplier will look for extensive marketing and promotion of a new product and these payments (if agreed) should not be prohibited by this Regulation. It is not clear how estimates of cost could be prepared as envisaged by Regulation 10(2). Our position is that this Regulation should not apply to payments which are agreed freely between suppliers and wholesalers or retailers.

We submit that this regulation should be clarified so it relates to payments requested for listing new products only, and not for any other activity.

Regulation 11 – Payment terms and conditions

We note that this follows existing legislation which is cited in the Regulation and have no comment other than to say that there is no need to reproduce existing law in these Regulations.

Regulation 12(1) – variation of supply or delivery arrangements

This requires wholesalers and retailers to notify suppliers in advance where previously agreed arrangements in relation to supply are varied significantly. In principle we have no issue with notifying suppliers where we are changing our supply chain. Suppliers should also have an obligation to notify wholesalers and retailers of any planned changes to supply arrangements.

The drafting of this Regulation uses the words "varies significantly"; the problem is that what is significant for a wholesaler or retailer may not be significant for a supplier and vice versa.

If there are major supply chain changes that need to be made, it is in our interest to communicate these changes to our suppliers in a timely fashion so that there is no interference to the supply chain. In order to maintain a modern, effective and responsive supply chain, we may need to make changes that impact suppliers and it is not always practical in all circumstances to ensure that all parties agree to these changes.

This regulation should require us to give notice where practicable but should recognise that if efficiencies are created that bring benefits to consumers then that should be the most important consideration.

Regulation 13 - Promotions

We believe that this Regulation does not reflect how promotional activity is carried out in the grocery market in Ireland. At the moment, we normally carry out joint forecasts with our suppliers in relation to promotions and this allows us to assess the amount of product that may be required to fulfil consumer demand, the consumer offer, the duration of the promotion and the products to which it will apply. Forecasting is not an exact science and while both parties always seek to agree the terms of a promotion in advance, any of these aspects of a promotion may need to change up to the last moment. This is done by agreement with suppliers and both parties require flexibility in relation to promotions, in order to ensure the promotion is a success.

The Regulation requires that Wholesaler/Retailers must ensure that where there is any promotional activity with a supplier that the contract provides the following detail:

> The period of written notice given before a promotion;
> The notice must specify (i) the duration of the promotion and (ii) the quantity of goods to be ordered for the promotion

Musgrave's process for promotions is that we have a promotional calendar for each year and we ask Suppliers for submissions for promotional activity on their product ranges. We then work out which promotions we believe will work best for our retailers and their customers and we engage with the supplier to agree the terms of the promotion. Normally promotions are proposed by suppliers to stimulate the sales of their products and the terms of promotions are negotiated and agreed and are not dictated by one party or the other. To the extent that change is required we would submit there should be tangible benefits that justify the change.

While the parties to a grocery goods contract normally forecast the demand for a promotion in advance, if consumer demand is greater or less than anticipated then both parties need flexibility to adjust the terms agreed. As we mentioned in our comments to Regulation 9 above, very often it is impossible to forecast required quantities without the input of the

suppler who is the expert in relation to the sales of their own products and who have a more extensive data set to rely upon. We also need to be sure that where a promotion is advertised, that those products are available for consumers to purchase and would point out that this is a requirement of the Consumer Protection Act, the enforcement of which is also overseen by the Commission.

We believe that suppliers and purchasers should be free to agree whatever provisions they see fit relating to promotions provided that (a) once agreed the terms of the promotion cannot be changed unilaterally and (b) that one party cannot require the other to accept changes on threat of delisting or a refusal to supply.

Regulation 14 – 16 payment for marketing costs, shelf space and advertising

These three Regulations are similar in that they overlap and any payments made for advertising a product in-store or on a pamphlet distributed to customers, or the inclusion of a product on a media campaign could all be called marketing costs. However the Regulations are expressed slightly differently for each of these areas. We do not see the need to have different rules for what is essentially the same activity. We believe this could be dealt with by either (a) defining exactly what is meant by marketing costs, payments for shelf space and payments for advertising in mutually exclusive terms or (b) modifying the wording of these three regulations so they all have the same net effect.

We recommend the second course of action and believe that these three Regulations should all follow the same format. It is not clear how the provision in regulation 14 requiring wholesalers and retailers to justify the underlying costs associated with marketing would work in practice. We believe this should be removed because marketing investment is not made on the basis of the cost to produce a pamphlet. Rather, it is made to ensure that profitable sales of products are increased through effective sales and marketing campaigns. Musgrave makes significant investment in driving sales through advertising, promotion, store environment, retailer training and supports, and printing and distribution of leaflets. If costs of marketing investment were to be properly assessed all of these elements would also need to be taken account of, in addition to the upfront cost of, for example, printing a pamphlet.

We had understood from our interaction with the Department through Retail Ireland that prohibitions of this nature in the Regulations would not apply where the parties freely agreed to make such payments and execute such activities, but that they would be prohibited where there was compulsion or coercion of one party by the other. This is contemplated by Regulation 15(2) in relation to payments for shelf space and we cannot see any reason why this should not also apply to marketing investment and in-store advertising in Regulations 14 and 15. It should also be recognised that where the parties have freely agreed to make these payments and recorded them in writing that they should be enforceable.

Our recommendation is that regulations 14-16 should all provide as follows:

(a) suppliers and retailer/wholesalers should agree any payments for marketing investment, shelf space and/or advertising as they see fit,

(b) that no party to a grocery goods contract should seek to compel or coerce the other party to make a payment in relation to marketing investment, shelf space and/or advertising, and

(c) where payments have been agreed for a specific activity then evidence should be produced to show that the activity which was agreed to be paid for actually took place.

Regulations 17-19 payments for wastage, shrinkage and customer complaints.

These Regulations are similar in nature. On wastage, we would point out that the definition only applies to waste that occurs after goods are delivered to a wholesaler's or retailer's premises and it is almost impossible to say when goods were damaged if they were damaged in transit or in a depot. Regulation 17(b) states that wholesalers/retailers would have to specify the circumstances by which wastage is to be considered as due to negligence or fault on the part of the supplier. This is very prescriptive and seems to suggest that unless a wholesaler/retailer can specify the exact causes of damage to a product that the supplier has no liability and must be paid. It should be the case that where a product has been damaged when it arrives at our warehouse or where such damage occurs because of defective packaging, then it should be assumed that the wastage is the responsibility of the supplier who should have to pay for it. We do not believe wastage payments are appropriate where no damage has occurred.

On shrinkage, we would point out that the definition in the act does not make any reference to wholesalers, so we assume the reference in Regulation 18 should not apply to wholesalers as well as retailers.

On complaints, if a fee is agreed for complaints it is likely to be an up-front agreed fee per complaint agreed between the wholesaler/retailer and the supplier. We would also point out that complaints in relation to product quality are almost always down to the supplier. We would be happy to say that administering complaints should be limited to a fixed fee of not more than €50 which could be subject to a maximum limit recommended by the Commission where the complaint is logged and passed on to the Supplier so the Supplier can deal with the substantive nature of the complaint. However, where our consumer team is blocked up for days with complaints in relation to a specific product defect we should be able to charge for the administration of those complaints.

We would also add words to clarify that where there is a product recall of a supplier's products that a supplier will be liable to pay the reasonable costs of the retailer/wholesaler associated with that recall.

Part 3 Compliance requirements
Regulation 20 – Training

We have no issue in training our relevant staff in relation to these Regulations; however we believe that the Regulations do not need to become over-prescriptive in terms of the numbers of staff that have to be committed to training and compliance. We also believe it will be important for suppliers to take responsibility for training their own staff in relation to these regulations.

We also believe that suppliers need to have a nominated compliance individual as well if these Regulations are to work in practice, however we would propose that smaller suppliers should be released from this obligation. Compliance cannot be the sole responsibility of the wholesaler/retailer.

Regulation 21 – Annual Compliance Report

We do not see the need for this report or what regulatory purpose it serves. If such a report is to be required then the detail required in Regulation 21(2)(c)(i) and any information required under Regulation 21(2)(b) should be subject to an appropriate materiality threshold.

We note that Suppliers are not required to issue any equivalent report of compliance and would question the balance of this provision.

Regulation 22 – Maintenance of Records

It is not reasonable to say that all records relating to every grocery goods contract must be retained for 6 years or that Suppliers are exempt from this provision. We believe that 3 years is more than sufficient for the purposes of these regulations and that this should only apply to contracts with larger suppliers. If there is a dispute in relation to a grocery goods contract then it is likely to occur at the time of the contract rather than many years later. We note that the Commission has discretion as to what information is covered by this requirement. We believe this should only cover terms relating to payment and should insert a threshold of materiality. We would submit that it is only practicable to retain annual agreements with larger suppliers and written amendments to those agreements for this length of time.

Part 4 Enforcement

Regulation 23(1) states that any waiver by a supplier of these regulations is of no effect.

Regulation 23(2) states that any term of a grocery goods contract that does not comply with the regulations is not binding and is unenforceable. We believe the impact of this

regulation could be considerable. We recommend that this should be redrafted so that provisions of agreements that contravene the Regulations are unenforceable only insofar as they are incompatible with the Regulations.

Regulation 24 sets out that almost all of the provisions of the draft regulations are penal in nature and the sanctions set out in section 79 of the Consumer Act 2007 apply. This provides for extensive fines and imprisonment for breach of these provisions. We believe that is an excessive level of enforcement power.

We believe that criminal penalties and sanctions should only apply to material breaches of the Regulations where one party is seeking to coerce or compel the other party to make a payment which has not been agreed or where one party to a grocery goods agreement refuses to put terms in writing or where one party to a grocery goods contract refuses to submit to mediation recommended by the Commission.

We would also recommend a dispute resolution process as discussed above and have suggested wording in our mark-up of the regulations set out in schedule 2.