



Partnership

ARTHUR COX

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Competition Law Update

Irish and UK developments in the grocery sector: codes of conduct

Almost simultaneous Irish and UK announcements were made in January 2010 in relation to codes of conduct that will operate in the grocery retail sector in Ireland and the UK.

The UK's Groceries Supply Code of Practice ("GSCOP") will come into force on 4 February 2010. The terms of the Irish code have yet to be finalised but it is likely that the code will be influenced by the content of the UK code. Retailers and suppliers operating in the island of Ireland will need to familiarise themselves with the codes, and, in the case of grocery retailing in Northern Ireland, will have to comply with the GSCOP very shortly.

Ireland

The Irish government intends to introduce a code for the grocery sector in Ireland (the "Irish Code"). This was revealed by the Minister for Agriculture at a conference in January but it will come as no surprise to those operating in the sector as the Department of Enterprise Trade and Employment undertook a consultation process on this issue last summer. It is likely that the Irish Code would initially operate on a voluntary basis but would eventually be put on a statutory footing for larger retailers. It has also been reported that any legislation making the Irish Code mandatory will coincide with the merger of the National Consumer Agency and the Competition Authority and that this new body would then act as the relevant ombudsman.

The current competition legislation in Ireland relevant to the grocery sector are the Competition Act, 2002 and the Competition Amendment Act, 2006 which specifically applies to the sale and resale of "grocery goods" by "grocery goods undertakings".

Northern Ireland

The code currently operating in Northern Ireland is the Supermarkets Code of Practice, which will be replaced by the GSCOP on the 4 February 2010. The Department for Business, Innovation and Science (BIS) announced in January that the GSCOP will be policed by an ombudsman to ensure compliance.

This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

In August 2009 the Competition Commission made the Groceries (Supply Chain Practices) Market Investigation Order 2009, which created the final GSCOP. This order also made it mandatory for so-called “designated retailers” (that is, those retailers selling £1bn or more of groceries each year) to incorporate the GSCOP into contracts with their suppliers. One of the guiding principles of the GSCOP is that of “fair dealing”, which obliges a retailer to act “fairly and lawfully” in good faith with their suppliers.

The role of the ombudsman will be to monitor compliance with, investigate breaches of, and arbitrate disputes under the GSCOP and the only major uncertainty now is whether the ombudsman will be a separate body or whether it will be a new role given to a current body.

Comparative review of the consultation code in Ireland and the GSCOP in Northern Ireland

As many retailers and suppliers operate in the two jurisdictions on the island of Ireland they will need to be familiar with both the Irish Code and the GSCOP. In order to facilitate a comparison, we have summarised in this table the principal features of the consultation code and the GSCOP.

Ireland The Consultation Code	Northern Ireland The GSCOP
<p>“Grocery goods means any food or drink for human consumption that is intended to be sold as groceries, and includes:</p> <ul style="list-style-type: none"> » Any substance or thing sold or represented for use as food or drink for human consumption, » Any substance or thing sold or represented for us as an additive, ingredient or processing aid in the preparation or production of food or drink for human consumption, » Intoxicating liquors <p>Grocery goods do not include food or drink served or supplied on a grocery goods undertaking’s premises in the course of providing catering, restaurant or take-away services or intoxicating liquor served or supplied for consumption on a grocery goods undertaking’s premises or any similar hospitality services.”</p>	<p>“Groceries means food (other than that sold for consumption in the store), pet food, drinks (alcoholic and non-alcoholic other than that sold for consumption in the store), cleaning products, toiletries and household goods, but excludes petrol, clothing, DIY products, financial services, pharmaceuticals, newspapers, magazines, greetings cards, CDs, DVDs, videos and audio tapes, toys, plants, flowers, perfumes, cosmetics, electrical appliances, kitchen hardware, gardening equipment, books, tobacco and tobacco products.”</p>
<p>All relevant terms and conditions to be recorded in writing.</p>	<p>All relevant terms to be recorded in writing.</p>
<p>Unless the Business Agreement expressly provides so, the following are prohibited:</p> <ul style="list-style-type: none"> » Retrospective variations of the terms of a Business Agreement » Payments by suppliers toward general marketing costs » Shrinkage payments » Wastage Payments » Payments for shelf space/better positioning unless relating to promotional activity » Payment for promotional advertising or display of grocery goods. Cannot require participation in promotional activity that entails payment from a supplier where this entails retrospective variation of the terms of the Business Agreement. » Payment for consumer complaints not attributable to a specific undertaking 	<p>Unless the Supply Agreement expressly provides so, a retailer can not “Require” (as defined in the GSCOP):</p> <ul style="list-style-type: none"> » Retrospective variations of the terms of a Supply Agreement » Payment by supplier toward specific marketing costs » Shrinkage payments (absolute prohibition irrespective of Agreement) » Wastage Payments » Payments for shelf space/better positioning, unless they relate to promotional activity » A supplier predominately to fund the costs of a promotion or to participate in promotional activity that entails payment from a supplier where this entails retrospective variation of the terms of the Supply Agreement. » Payment for consumer complaints that can be resolved in store

Ireland The Consultation Code	Northern Ireland The GSCOP
A grocery goods undertaking cannot make a change to supply chain procedures without provision of reasonable notice or compensation for costs incurred by failure to notify.	No change to supply chain procedures without provision of reasonable notice or compensation for cost incurred by failure to notify.
Retailer must compensate supplier for erroneous forecasting unless retailer can show forecasts were prepared in good faith or the Business Agreement expressly prohibits such compensation.	Retailer must compensate supplier for erroneous forecasting unless retailer can show forecasts were prepared in good faith or the Supply Agreement expressly prohibits such compensation.
Retailer to take reasonable care when ordering promotional goods. Retailer to compensate supplier for any over order of such goods bought at a promotional wholesale price where such goods are subsequently sold at a higher non-promotional price.	Retailer to compensate supplier for any over order of promotional goods bought at a promotional wholesale price where such goods are subsequently sold at a higher non-promotional price. Such compensation will be the differential between promotional wholesale price and non-promotional wholesale price.
Continuation, renewal and termination of Business Agreements can only be done subject to the specific terms of the Business Agreement.	Subject to reasonable notice and review by a retailers senior buyer, a retailer may only de-list a supplier for genuine commercial reasons.
Establishing a Grocery Ombudsman to investigate complaints, arbitrate disputes and make recommendations as to compliance with the Draft Code.	Retailers and suppliers to negotiate any dispute in good faith. Failing a resolution the dispute will be submitted to an arbitration by the Ombudsman.

Other Noteworthy Issues

The GSCOP will require Designated Retailers to train buying teams in compliance with the code, appoint an in-house compliance officer and to produce an annual compliance report. Designated Retailers will also be under an obligation to negotiate in good faith to resolve any disputes that might arise under the GSCOP. Specific Dispute provisions were not included in the Irish Consultation Code but may well be found in the final version of the Irish Code.

Although the principal features of the Consultation Code and the GSCOP are similar, there are likely to be some significant differences between the operation of two Codes. The definition of “groceries” and “grocery goods” is not the same for both jurisdictions. Compliance requirements and dispute resolutions are currently more onerous for the retail sector in Northern Ireland than in Ireland, although this might not remain the position once the Irish Code is finalised. Staff in the buying and merchandising terms of retailers and suppliers will therefore need to be aware of both regimes operating in the island of Ireland.

Contact

If you require advice on these developments, or on training your in-house teams, please contact Fiona McKeever:



Fiona McKeever Partner

tel: +353 (0)1 618 0574

mobile: +353 (0)87 979 5138

email: fiona.mckeever@arthurcox.com

Dublin

Earlsfort Centre, Earlsfort Terrace, Dublin 2, Ireland
tel: +353 (0)1 618 0000 | **fax:** +353 (0)1 618 0618
email: dublin@arthurcox.com

London

12 Gough Square, London EC4A 3DW, England
tel: +44 (0)20 7832 0200 | **fax:** +44 (0)20 7832 0201
email: london@arthurcox.com

Belfast

Capital House, 3 Upper Queen Street, Belfast BT1 6PU, Northern Ireland
tel: +44 (0)28 9023 0007 | **fax:** +44 (0)28 9023 3464
email: belfast@arthurcox.com

New York

300 Park Avenue, 17th Floor, New York NY 10022, USA
tel: +1 (1)212 705 4288 | **fax:** +1 (1)212 572 6499
email: newyork@arthurcox.com
