



An Roinn Post, Fiontar agus Nuálaíochta
Department of Jobs, Enterprise and Innovation

**CONSUMER PROTECTION ACT 2007 (GROCERY GOODS
UNDERTAKINGS) REGULATIONS 2016
S.I. No. 35 OF 2016**

GUIDELINES

18 March 2016

1. INTRODUCTION

1. The legal basis for these regulations is contained in the Competition and Consumer Protection Act 2014, which came into force on 31 October 2014. Part 6 of that Act (which inserted a new section into the Consumer Protection Act 2007) contains enabling provisions which gives the Minister for Jobs, Enterprise and Innovation the power to introduce regulations to regulate certain practices in the grocery goods sector. They do not cover any other issues.
2. The Regulations are divided into four parts as follows:
 1. Preliminary Matters;
 2. Contracts between Suppliers and Retailer or wholesaler;
 3. Compliance Requirements for Retailer or wholesalers;
 4. Enforcement.
3. These Guidelines seek to provide information and guidance on the main provisions of the Regulations. As the operation of the Regulations will inevitably give rise to further practical issues, these Guidelines cannot be a final or definitive statement on the Regulations.
4. These Guidelines have been compiled without prejudice to other legal provisions covering contracts including the Declaration in respect of Vertical Agreements and Concerted Practices and, more generally, under Section 4 of the Competition Act 2002.
5. Public enforcement of these Regulations lies with the Competition and Consumer Protection Commission (CCPC), which is independent in the carrying out of its functions. Further information will be made available from time to time on the CCPC's website www.ccpc.ie.

2. SCOPE OF THE REGULATIONS

1. These Regulations only apply to sales of food and drink as defined in Section 63A(a) of the Consumer Protection Act 2007 and do not apply to any other type of grocery goods. In particular, they do not apply to toiletries, household cleaning products or garden plants/bulbs (as defined in Section 63A(b), (c) and (d) of the 2007 Act) nor do they apply to the supply of raw material in the agriculture sector to processors (for instance supply of milk to creameries or animals or meat to processors) or animal feed.
2. The worldwide turnover threshold of €50 million applies to sales of food and drink products generated by retailer or wholesalers operating in the State. The threshold will not apply to turnover generated by the retailer or wholesaler for products other than food and drink (as defined).
3. These Regulations only apply to direct suppliers (whether they are located within the State or not) who have a contractual relationship with a retailer or wholesaler and not to any other grocery goods undertakings as defined in Section 63A of the Consumer Protection Act 2007 (e.g. they do not apply to the sale of food and drink by wholesalers to retailers who are franchisees or part of a symbol group of that wholesaler). It should be noted that retailers (who have an annual worldwide turnover above the €50 million threshold and who are franchisees and belong to a symbol group of such a wholesaler) will, if they enter into a grocery goods contracts with direct suppliers in their own right, be subject to the application of the Regulations only in respect of such grocery goods contracts.
4. The Regulations shall apply to contracts entered into on or after 30 April 2016 as well as to contracts (which were entered into before that date) but which are renewed on or after that date.
5. Both parties should conduct their trading relationships in good faith and in a fair, open and transparent manner and to respect the terms and conditions of the agreed contracts.
6. Any term of a grocery goods contract which directly or indirectly contravenes, waives or restricts a provision of the Regulations is not binding or enforceable.
7. For the purposes of these Regulations, the terms “*payment*” and “*allowance*” are defined as follows:

“*payment*”: means any compensation, consideration, allowance or inducement in any form (monetary or otherwise) and includes more favourable contractual terms;

“allowance”: includes any discount, rebate, price concession or other advantage that is collateral to a sale or purchase of grocery goods but is not applied directly to the selling or purchasing price”.

GUIDANCE ON SPECIFIC PARTS OF THE REGULATIONS

PART 1 – PRELIMINARY MATTERS

Interpretation

For the purposes of these Regulations, “*grocery goods*” means any food or drink that is intended to be sold for human consumption, including any substance or thing sold or represented for use as food or drink for human consumption, anything sold or represented for use as an additive, ingredient or processing aid in the preparation or production of food or drink for human consumption (and that is intended to be sold by a retailer or wholesaler as such an additive, ingredient or processing aid), and intoxicating liquors.

“*Grocery goods*” does not include food or drink served or supplied on the premises of a retailer or wholesaler in the course of providing catering, restaurant or take-away services or any similar hospitality services. Intoxicating liquors served or supplied for consumption on the premises of a retailer or wholesaler are not covered either.

PART 2 – CONTRACTS BETWEEN SUPPLIERS AND RETAILER OR WHOLESALERS

Regulation 4: Grocery goods contracts.

This Regulation requires retailer or wholesalers to have agreed written contracts with their suppliers, which include all the terms and conditions of the agreed contract.

In this context:

- This Regulation does not prescribe which party should draw up a contract or the format or structure of any contract: this is a matter for both parties to agree.
- This Regulation provides that both sides to the contract must sign and retain copies of the contract (including electronically if appropriate).
- This Regulation requires that clear understandable language is used in the contract, so that there is no ambiguity around the terms of the contract for both parties and enforcement bodies.
- Both parties to the contract should have an opportunity to carefully examine the terms and conditions of any contract drawn up before entering into an agreement.
- Parties should also consider the option of taking legal advice where they have any doubts concerning a contract or its contents.

- The term “*in writing*” includes e-mails, electronic format, etc. and refers to any information kept in a non-legible form, whether stored electronically or otherwise, which is capable by any means of being reproduced in a legible form. In this context, the terms of the Electronic Commerce Act 2010 and section 5 (4) of the Interpretation Act 2005 are relevant.

Regulation 5: Variation, etc. of grocery goods contracts.

This Regulation prohibits a retailer or wholesaler from varying, terminating or renewing a contract with a supplier unless the contract expressly provides for such variation, termination or renewal or agreed circumstances when such variation, termination or renewal can occur. Thus, unilateral retrospective variations are not permitted. In addition, the agreed contract must specify the period of written notice that must be given prior to any such variation, termination or renewal. The period of such notice will be reasonable and have regards to all the circumstances of the contract, including:

- the duration of the contract;
- the frequency with which orders are placed by the retailer or wholesaler for the grocery goods concerned;
- the characteristics of the grocery goods concerned including the durability, seasonality and external factors affecting their production; and
- the value of any order relative to the annual turnover of the supplier in question.

The term “variation” includes variation in the frequency, timing or volume of the supply or delivery of the grocery goods.

All such variations, etc. should be recorded in writing in the contract in accordance with Regulation 4.

Regulation 6: Goods or services from a third party.

This Regulation prohibits a retailer or wholesaler from compelling (either directly or indirectly) a supplier to obtain goods or services from a third party from whom the retailer or wholesaler receives payment for this arrangement. This prohibition does not apply where the supplier’s source for those goods or services:

- fails to meet the reasonable quality standards laid down by that retailer or wholesaler for the supply of such goods or services; or
- charges more than is charged for the supply of an equivalent quality and quantity of goods or services by the third party proposed by the retailer or wholesaler.

Regulation 7: Non-performance due to factors beyond reasonable control of party to contract.

This Regulation deals with “*force majeure*” situations. While no single legal definition of “*force majeure*” exists, the Regulation provides that neither party to a contract should have any liability under or be deemed to be in breach of the contract as a result of any delays or failures in performance which result from circumstances beyond the party’s reasonable control. This Regulation provides that the contract contains provisions setting out how the party affected by the specific circumstances should promptly notify the other party in writing what those circumstances are, when such circumstances cause a delay or failure in performance and when they cease to do so. If the issue persists, the Regulations provide for the circumstances whereby the contract may be terminated, including a requirement for written notice to be given in accordance with the terms of the contract.

Parties are encouraged to agree in advance, for inclusion in the agreed written contract, details of the “*specified continuous period*” and the “*written notice*” period foreseen by Regulation 7(3).

Regulation 8: Forecast of supply of grocery goods.

This Regulation obliges a retailer or wholesaler, if requested to do so by a supplier, a forecast of the goods required by the retailer or wholesaler from the supplier: in preparing this forecast, the Regulation provides that the retailer or wholesaler must, at the request of the supplier:

- consult with the supplier as to the basis on which the forecast will be prepared;
- prepare the forecast in good faith and with due skill, care and diligence; and
- forward to the supplier a copy of the forecast together with confirmation in writing of the basis on which it has been prepared.

Regulation 9: Payment from a supplier.

This Regulation provides that a retailer or wholesaler shall not seek payment from a supplier as a condition of stocking, displaying or listing the supplier’s grocery goods unless the payment is based on an objective and reasonable estimate of the cost of stocking, displaying or listing those grocery goods, including different considerations when dealing with an individual store or a multiple of stores in the retailer or wholesaler’s chain of stores. If any such payment is requested by the retailer or wholesaler, then the retailer or wholesaler is obliged, if requested by the supplier, to provide the supplier with an estimate of the cost of stocking, displaying or listing the supplier’s grocery goods and the basis for that estimate.

This Regulation also provides that these provisions do not apply to promotions (which are covered in Regulation 11).

Regulation 10: Payment terms and conditions.

This Regulation provides that the retailer or wholesaler shall pay the supplier within 30 days of the receipt of the supplier's invoice or within 30 days of the date of delivery of the goods (whichever is the later) unless the parties make express provision for a different timeframe for payments in their grocery goods contract.

Parties are, of course, free to pay or receive payments for invoices in batches once this is incorporated into the contract once the provisions of the Regulation are respected. Where a query emerges on an invoice relating to an individual grocery good or a set of grocery goods, it is expected that other invoices that are not subject to such queries would be paid in accordance with these Regulations without awaiting resolution of the queries.

This Regulation is subject to the provisions of the European Communities (Late Payment in Commercial Transactions) Regulations 2012 (S.I. No. 580 of 2012) which should be carefully examined by all parties. In this context, any agreed payment to a retailer or wholesaler by a supplier will also be subject to the provisions of S.I. No. 580 of 2012.

Regulation 11: Promotions.

This Regulation prohibits a retailer or wholesaler from compelling (either directly or indirectly) a supplier to make any payment in respect of the promotion of the supplier's grocery goods in the retailer's or wholesaler's premises. This prohibition does not apply where the agreed contract between the two parties makes express provision for such payments. The Regulations further provide that prior to a promotion the retailer or wholesaler must give written notice (provided for in the contract) to the supplier specifying certain features of the promotions as follows:

- the duration of the promotion;
- the frequency of the promotion;
- the quantity of grocery goods to be ordered for the promotion; and
- the basis for the aforementioned quantity.

If any such payment is requested by the retailer or wholesaler, then the retailer or wholesaler is obliged, if requested by the supplier, to provide the supplier with an estimate of the cost of the promotion and the basis for that estimate.

Regulation 12: Payment for marketing costs

This Regulation provides that a retailer or wholesaler shall not seek payment from a supplier for marketing costs. This prohibition does not apply where the agreed contract between the two parties:

- makes express provision for such payments;
- the payment is based on an objective and reasonable estimates of the marketing costs; and
- any payment sought is in accordance with the agreed contract.

If any such payment is requested by the retailer or wholesaler, then the retailer or wholesaler is obliged, if requested by the supplier, to provide the supplier with an estimate of marketing costs and the basis for that estimate. This Regulation also provides that these provisions do not apply to promotions (which are covered in Regulation 11).

For the purposes of this Regulation, marketing costs include costs relating to:

- visits by a retailer or wholesaler or their staff or representatives directly involved in the purchase of grocery goods to a supplier;
- artwork or packaging design;
- consumer or marketing research;
- marketing in relation to the opening or refurbishment of a retail or wholesale premises, and
- hospitality for the staff or representatives of a retailer or wholesaler.

Regulation 13: Payment for retention, increased allocation or better positioning of shelf space.

This Regulation prohibits a retailer or wholesaler from compelling (either directly or indirectly) a supplier to make any payment for the retention, increased allocation or better positioning of shelf space for the supplier's grocery goods. This prohibition does not apply where the agreed contract between the two parties:

- makes express provision for such payments; and
- any payment sought is in accordance with the agreed contract.

This Regulation also provides that these provisions do not apply to promotions (which are covered in Regulation 11).

Regulation 14: Payment for advertising or display of grocery goods.

This Regulation prohibits a retailer or wholesaler from compelling (either directly or indirectly) a supplier to make any payment for the advertising or display of grocery goods of the supplier in the retailer's or wholesaler's premises.

This Regulation also provides that these provisions do not apply to promotions (which are covered in Regulation 11).

Regulation 15: Payment for wastage.

This Regulation provides that a retailer or wholesaler shall not seek payment from a supplier for wastage. This prohibition does not apply where:

- the agreed contract between the two parties makes express provision for such payments;
- the agreed contract makes express provision for an agreed average wastage cost;
- the grocery goods contract makes express provision for the circumstances, where wastage arises from the negligence or fault of the supplier, in which the supplier will be required to make a payment to cover wastage at the retailer's or wholesaler's premises;
- any payment sought is in accordance with the agreed contract;
- the payment is based on an objective and reasonable estimates of the costs of the wastage to the retailer or wholesaler.

These conditions are not cumulative.

If any such payment is requested by the retailer or wholesaler, then the retailer or wholesaler is obliged, if requested by the supplier, to provide the supplier with an estimate of the cost of the wastage and the basis for that estimate.

For the purpose of this Regulation, "wastage" is taken to refer to grocery goods that become unfit for sale after their delivery by a supplier to a retailer or wholesaler. Thus, wastage that occurs before delivery by a supplier to a retailer or wholesaler is not covered by these Regulations.

Regulation 16: Payment for shrinkage

This Regulation provides that a retailer shall not seek payment from a supplier for shrinkage. This prohibition does not apply where:

- the agreed contract between the two parties makes express provision for such payments;

- any payment sought is in accordance with the agreed contract; and
- the payment is based on an objective and reasonable estimate of the costs of the shrinkage to the retailer.

If any such payment is requested by the retailer, then the retailer is obliged, if requested by the supplier, to provide the supplier with an estimate of the cost of the shrinkage and the basis for that estimate.

For the purpose of this Regulation, “shrinkage” is taken to refer to losses that occur as a result of theft, loss or accounting error, after goods are delivered by a supplier to a retailer’s premises.

This Regulation only applies to retailers, given the definition of “*shrinkage*” in the Consumer Protection Act 2007.

PART 3 – COMPLIANCE REQUIREMENTS FOR RETAILER OR WHOLESALERS

Regulation 17: Designation and training of staff.

This Regulation sets out the requirements that must be undertaken by a retailer or wholesaler in the area of designating and training staff to be responsible for complying with the Regulations and for the dissemination of information to other staff in relation to the implementation of the Regulations. It also obliges the retailer or wholesaler to nominate a suitably qualified person to liaise with the Competition and Consumer Protection Commission (CCPC) in relation to the Regulations. In this context, this suitable qualified person should preferably be, from the angle of good business practice, independent of the purchasing role within the retailer’s or wholesaler’s business (viz. not directly involved in purchasing) and should also preferably be someone who holds a more general compliance role within the business. Engagement of a new additional staff member for this role is not required under the Regulation unless the retailer or wholesaler deems it appropriate for its own internal reasons. The Regulations do not preclude a retailer or wholesaler from appointing one person to be responsible for both the training of staff and to be the nominated liaison person for the CCPC: it is also not precluded that such a person can be based at the location of a parent company. In fulfilling their roles in training staff, retailers and wholesalers are not precluded from engaging external third party assistance or appointing a suitable third party provider of such training, provided that the relevant records are retained to ensure that the provisions of Regulations 18 and 19 are respected. The retailer or wholesaler must inform the CCPC of the name, etc. of this person as soon as practicable after their nomination after the entry into force of the Regulations for the first such nominated person.

Regulation 18: Annual compliance report.

This Regulation obliges retailers or wholesalers to submit annual compliance reports to the CCPC by the end of March each year in a format and manner specified in advance by the CCPC. This report has to be signed by a director of the retailer or wholesaler or secretary to the retailer or wholesaler. The Regulation also sets out the specific information that must be included in the report. The first such report will cover the period 30 April – 31 December 2016: thereafter, the reports will cover the relevant calendar year (e.g. for 2017, the period to be covered will be 1 January – 31 December 2017).

Regulation 19: Maintenance of records.

This Regulation specifies the documents and records which a retailer or wholesaler must retain for a period of 6 years after the end of the financial year to which they relate.

While there is no legal obligation on suppliers to maintain such records, it would appear prudent for suppliers to maintain a similar suite of records in the event that disputes or concerns arise.

PART 4 - ENFORCEMENT

Regulation 20: Penal provisions.

This Regulation sets out the provisions of the overall Regulations that will be treated as penal provisions for enforcement purposes. Breach of the cited provisions (including failure to comply with any contravention notice issued by the CCPC under the Consumer Protection Act 2007) may result in prosecution, either by summary or indictment with potential penalties as follows:

(1) A person guilty of an offence is liable on summary conviction to the following fines and penalties:

(a) on a first summary conviction for any such offence, to a fine not exceeding €3,000 or imprisonment for a term not exceeding 6 months or both;

(b) on any subsequent summary conviction for the same offence to a fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months or both.

(2) If, after being convicted of an offence, the person referred to in *subsection (1)* continues to contravene the requirement or prohibition to which the offence relates, the person is guilty of a further offence on each day that the contravention continues and for each such offence is liable on summary conviction to a fine not exceeding €500.

(3) A person guilty of an offence is liable on conviction on indictment to the following fines and penalties:

(a) on a first conviction on indictment for any such offence, to a fine not exceeding €60,000 or imprisonment for a term not exceeding 18 months or both;

(b) on any subsequent conviction on indictment for the same offence to a fine not exceeding €100,000 or imprisonment for a term not exceeding 24 months or both.

The Act also provides anyone who is aggrieved by the failure of a retailer or wholesaler to comply with any regulations or with any compliance notice issued under the relevant Section of the Act, shall have the right of action for relief against that retailer or wholesaler in the Circuit Court (any such relief, including exemplary damages, not being in excess of the limits of the jurisdiction of the Circuit Court in an action founded on tort).

Finally, the Act also provides that, where a Court has made a final finding in a particular case under these Regulations, that finding is *res judicata* for the purpose of subsequent proceedings whether or not the parties to those subsequent proceedings are the same as the parties to the first mentioned proceedings. Private litigant, relying on this legal doctrine, will not be required to prove the contravention of the relevant provisions afresh in a follow-on action in respect of the same contravention. Rather he or she will be able to rely on that earlier finding for the purpose of an action for damages.