



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

**Marked up version of the
National Milk Agency**

February 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. Further guidance may also be provided from time to time by the Competition and Consumer Protection Commission (CCPC) and parties affected by these Regulations are advised to refer to the CCPC's website (www.ccpc.ie) from time to time.

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 the other classes of grocery goods as defined in Section 63A(b), (c) and (d) of the 2007 Act. They do not currently apply to toiletries, household cleaning products or garden plants/bulbs.
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 non-grocery turnover generated by the retailer or wholesaler.
3. These Regulations only apply to direct suppliers 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.
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.

3. 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 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 or intoxicating liquors served or supplied for consumption on the premises of a retailer 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.

In this context:

- This Regulation does not prescribe which party should draw up a contract.
- This Regulation provides that both sides to the contract must sign and retain copies of the contract.
- This Regulation requires that clear understandable language is used in the contract.
- Both parties to the contract should have an opportunity to carefully scrutinise 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 exist concerning a contract or its contents.

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. In addition, the 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

We suggest that the words “length of the production cycle” be inserted after “seasonality” above as this is another relevant factor.

- 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.

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.

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).

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.

We suggest the guidelines should recommend that the estimate should be provided whether or not the supplier requests this.

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).

We suggest the guidelines should recommend that the estimate should be provided whether or not the supplier requests this.

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; and
- the payment is based on an objective and reasonable estimates of the costs of the wastage to the retailer or wholesaler.

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.

The retailer or wholesaler should, however, provide the estimate irrespective of whether it is requested by the supplier.

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.

Guideline re Regulation 15 may go slightly outside the actual terms of the regulation in treating the various conditions as being cumulative; the word "and" is missing from the regulations and this might be remedied in any amendment of the regulations. In the absence of any such amendment this guideline might perhaps be useful if it could be referred to by the Court in determining the intention of the Minister.

The guidelines for regulation 15 also reflect and include reference to provision for wastage arising *from negligence or fault of the supplier* but should clarify (if that is the case) that it is the intention of the regulation to make liability for wastage conditional upon any such negligence or fault (whether that was the intention or not is not clear).

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.

The estimate should be provided by the retailer whether or not requested by the supplier.

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.

It would seem to be reasonable for regulations to provide that in respect of both wastage and shrinkage liability should not arise save on the basis of negligence or fault of the supplier – the current regulations do not do this in relation to shrinkage and are somewhat unclear in relation to wastage. We suggest the guideline should be not provided for liability in the absence or negligence or fault of the supplier.

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 be independent of the purchasing role within the retailer’s or wholesaler’s business (viz. not directly involved in purchasing). In that context, the person should 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 reasons. The retailer or wholesaler must inform the CCPC of the name, etc. of this person as soon as practicable after the nomination but no later than 3 months after the entry into force of the Regulations for the first such nominated person.

Regulation 18: Annual compliance report.

This Regulation obliges retailer 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.

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.

The guidelines concerning Regulation 19 can do nothing to improve what appears to be a weakness both in the regulations and in the enabling Act in relation to records; these must be maintained and on balance it would appear that they can be inspected (under the general inspection provision of undertakings) but there appears to be no provision re the furnishing of copies of these in a way which would assist prosecution.

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. A 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.