

LAW SOCIETY SUBMISSION



GUIDELINES ON THE CONSUMER PROTECTION ACT 2007 (GROCERY GOODS UNDERTAKINGS) REGULATIONS 2016 S.I. NO.35 OF 2016

DEPARTMENT OF JOBS, ENTERPRISE AND INNOVATION

MARCH 2016

1. Background

- 1.1 The Law Society of Ireland (the 'Law Society') welcomes the opportunity to comment on the draft guidelines on the *Consumer Protection Act 2007 (Grocery Goods Undertakings) Regulations 2016 (S.I. No. 35 of 2016)* (respectively, the 'Draft Guidelines' and the 'Grocery Goods Regulations').
- 1.2 In 2015, the Law Society provided its views on the then draft Grocery Goods Regulations and commends the Department of Jobs, Enterprise and Innovation (the 'Department') for the clarity introduced by many of the amendments leading to the present Grocery Goods Regulations.
- 1.3 The Law Society notes that the Grocery Goods Regulations have been enacted under section 63B(1) of the Consumer Protection Act 2007 (as amended) (the '2007 Act'), and were enacted to implement a commitment in the Programme for Government 2011-2016 "to ban a number of unfair trading practices in the retail sector, such as 'hello money' from food suppliers".
- 1.4 The Regulatory Impact Statement to the Grocery Goods Regulations, published on 27 January 2016¹, identified potential benefits of the Grocery Goods Regulations, including introducing a "greater balance in the commercial relationships between retailers/wholesalers and their direct suppliers" and "possible higher prices for primary producers (including some vulnerable groups like small farmers)". The Regulatory Impact Statement reported that stakeholders estimated that the costs of compliance with and implementation of the Regulations could "run from hundreds of thousands to an estimate of over €10 million per annum for all retailers/wholesalers", "possible increase in costs to consumers" and "possible job losses due to switching to non-Irish suppliers".
- 1.5 For context, the Law Society notes that a regime created in 2006 via the Competition (Amendment) Act 2006 for Regulation of grocery goods undertakings has remained largely, if not wholly, unenforced. Attempts in 2009 to introduce a voluntary code of practice for the grocery goods sector were unsuccessful.
- 1.6 At the same time, the grocery sector has been subject to detailed review by the Competition Authority, now the Competition and Consumer Protection Commission (the 'CCPC'), on a number of recent occasions, including in particular in 2008 (following adoption of the Grocery Monitoring Project), and by the Joint Committee on Agriculture, Food and the Marine in 2013. The Law Society notes finally that the European Commission has established a *High Level Forum for a Better Functioning Food Supply Chain* and adopted a Communication and Green Paper on Europe's grocery retail sector.
- 1.7 From the foregoing, the grocery sector clearly raises important domestic and European policy issues across all levels of the supply chain, from farm-gate to retail

¹ <https://www.djei.ie/en/Legislation/Legislation-Files/RIA-Grocery-Goods-Regulations-January-2016.pdf>

shelf. Whilst the Law Society welcomes the opportunity to comment on the Draft Guidelines, the comments we make are confined to legal and not policy issues. As a general comment, the Law Society notes that the Draft Guidelines are clear, easily understood and informative.

2. Draft Guideline 2.2: The Turnover Threshold

- 2.1 Guideline 2.2 states: “The worldwide turnover threshold applies to sales of food and drink products generated by the retailer[s] or wholesalers operating in the State. The threshold will not apply to non-grocery turnover generated by the retailer or wholesaler.” A ‘grocery goods undertaking’ is defined in section 63A of the 2007 Act as “an undertaking that is engaged for gain in the production, supply, distribution, wholesale or retail of grocery goods, whether or not the undertaking is engaged in the direct sale of those goods to the public”.² Regulation 3 of the Grocery Goods Regulations prescribes “a relevant grocery goods undertaking to which these Regulations apply” as being “a grocery goods undertaking engaged in the retail or wholesale of grocery goods in the State that has, or is a member of a group of related undertakings that has an annual worldwide turnover of more than €50 million”.

Comments:

- 2.1.1 The Law Society understands the reference in the Draft Guidelines to the “worldwide turnover threshold of €50 million” as a reference to the prescribed class of grocery goods undertakings under Regulation 3.
- 2.1.2 The Grocery Goods Regulations prescription does not limit the relevant turnover to turnover generated from the sale of ‘grocery goods’ (as defined by the 2007 Act and/or as prescribed for the purposes of the Grocery Goods Regulations). The definition of ‘grocery goods undertaking’ includes any undertaking “that is engaged for gain in the ... wholesale or retail of grocery goods”. It is not defined as an entity exclusively engaged in such activity or as the part of an entity engaged in such activity. It is not defined by reference to how much of the entity is engaged in grocery sales. Once an undertaking is engaged in the sale etc. of grocery goods it is a ‘grocery goods undertaking’.
- 2.1.3 The prescription of “relevant grocery goods undertaking to which these Regulations apply” in Regulation 3 clearly refers to the defined term ‘grocery goods undertakings’ (being undertakings engaged for gain in, *inter alia*, the wholesale or retail of grocery goods) with “an annual worldwide turnover of more than €50 million”. The prescription does not designate the type of

² A ‘relevant grocery goods undertaking’ is defined in section 63A of the 2007 Act as “a grocery goods undertaking engaged in the production, supply, distribution, wholesale or retail of grocery goods in the State, that has, or is a member of a group of related undertakings that has, an annual worldwide turnover of more than €50 million”.

<http://www.irishstatutebook.ie/eli/2014/act/29/section/83/enacted/en/html#part6>

turnover or the type of sales involved. A plain reading of the prescription would therefore apply the turnover threshold to the entire turnover of any undertaking that is a 'grocery goods undertaking'.

- 2.1.4 Therefore, the Law Society recommends that Draft Guideline 2.2 be deleted or, in the alternative, be substituted with the following: "The worldwide turnover threshold of €50 million applies to turnover generated by retailers or wholesalers operating in the State and their related group entities. The threshold will apply to all turnover (*i.e.*, grocery and non-grocery) generated by a retailer or wholesaler and by any of its related undertakings worldwide."

3. Draft Guideline 3 – Regulation 4:

- 3.1 Draft Guideline 3 for Regulation 4 helpfully sets out the procedure for the execution of contracts. Regulation 4(1) also states: "A relevant grocery goods undertaking shall ensure that all of the terms and conditions of a grocery goods contract to which it is a party, are [...] recorded in writing." Draft Guideline 3 for Regulation 4 states: "This Regulation requires retailer[s] or wholesalers to have agreed written contracts with their suppliers". It is clear from the wording of Regulation 4 that, not only must grocery goods contracts be in writing; the written contracts must also include "all of the terms and conditions".

Comments:

- 3.1.1 The Law Society suggests that it would be helpful to suppliers, retailers and wholesalers to draw specific attention to the obligation that all terms and conditions must be recorded in writing. This could make it clear to all parties that there can be no terms agreed orally and may avoid confusion in that regard in the future.

4. Draft Guideline 3 – Regulation 7:

- 4.1 Draft Guideline 3 for Regulation 7 gives a clear explanation of the *force majeure* scenario for which Regulation 7 has been enacted. Regulation 7(3) states: "Where the circumstances referred to in paragraph (1) continue for a specified continuous period as provided for in the grocery goods contract, either party may terminate the grocery goods contract by written notice in accordance with the terms specified in the contract" (emphasis added).

Comments:

- 4.1.1 The Law Society suggests that it would be of assistance to suppliers, wholesalers and retailers to draw attention in the Draft Guidelines to the need to specify in their contract the relevant continuous period of *force majeure* after which it is possible to terminate the grocery goods contract by written notice. Otherwise, it is not clear what period of continuous *force majeure*

circumstances would permit a party to terminate the relevant grocery goods contract.

- 4.1.2 By drawing attention to this issue in its guidelines, the Department could assist the parties by prompting them to specify the relevant time period and to avoid related disputes, should a continuous *force majeure* scenario arise.

5. Draft Guideline 3 – Regulation 10:

- 5.1 Draft Guideline 3 for Regulation 10 provides helpful guidance on the Regulation of payment terms and conditions and sets out the Department’s position that, where a query arises in respect of one or more invoices, other amounts invoiced should be paid in the ordinary course pending resolution of the query. Draft Guideline 3 for Regulation 10 also identifies that Regulation 10 is subject to the European Communities (Late Payment in Commercial Transactions) Regulations 2012 (S.I. No. 580 of 2012) (the ‘Late Payment Regulations’).

Comments:

- 5.1.1 The Department has helpful guidelines for SMEs in respect of the Late Payment Regulations on its website³. Interested parties may not be aware of what the Late Payment Regulations entail and could benefit from being made aware of the Department’s guidelines.
- 5.1.2 Therefore, the Law Society suggests that the Draft Guidelines should be amended to include the text of, or a link to, the relevant Late Payment Regulations guidelines.

6. Draft Guideline 3 – Regulation 15:

- 6.1 Draft Guideline 3 for Regulation 15 explains when a retailer or wholesaler may seek payment for wastage. Five requirements are listed.

Comments:

- 6.1.1 Regulation 15(2)(b) requires that, in order for payment for wastage to be permitted, there must be “express provision for an agreed average wastage cost”. Regulation 15(2)(e) similarly requires that, in order for payment for wastage to be permitted, payment must be “based on an objective and reasonable estimate of the cost of the wastage to the undertaking”. The Law Society submits that it would be of great assistance to grocery goods undertakings for the Department to provide guidance in the Draft Guidelines on the interaction between the “agreed average wastage cost” and the

³ <https://www.djei.ie/en/What-We-Do/Supports-for-SMEs/Late-Payments/Late-Payment-in-Commercial-Transactions/>

“objective and reasonable estimate of the costs of the wastage”.

- 6.1.2 The Law Society notes that the list in Regulation 15 of the Grocery Goods Regulations does not include the word “and” between Regulation 15(2) sub-provisions (d) and (e). It is therefore not clear whether the requirements under sub-provisions (a) to (e) are cumulative or alternative. The corresponding bullet points in Draft Guideline 3 for Regulation 15 do contain the word “and”. Therefore, there seems to be some confusion around the requirements for the payment for wastage.

7. Draft Guideline 3 – Regulation 17:

- 7.1 Draft Guideline 3 for Regulation 17 provides guidance on the designation and training of staff. The Draft Guideline states that the designated liaison officer should be “independent of the purchasing role”. There is no requirement in section 63B(2)(r) of the 2007 Act or in Regulation 17 for the liaison officer to be independent of the purchasing role. The Draft Guideline further states that a retailer/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 30 April 2016. Regulation 17(3) states: “A relevant grocery goods undertaking shall, as soon as practicable after the nomination of a liaison officer (and any replacement liaison officer), confirm his or her name, position and contact details to the Commission”. Regulation 17(1) states that a “relevant grocery goods undertaking shall, as soon as practicable after the commencement of these Regulations (but not later than 3 months after such commencement), designate and train appropriate members of its staff for compliance and information purposes.

Comments:

- 7.1.1 It is not clear from Draft Guideline 3 for Regulation 7 that the independence of the liaison officer is a recommendation of the Department, rather than an explanation of a legal obligation imposed by Regulation 17. Should the reference be retained, the Law Society suggests that the Draft Guideline should make clear that this is the Department’s best practice recommendation and not a strict legal obligation.
- 7.1.2 The requirement to train and designate staff (in Regulation 17(1)) is related to but separate from the requirements to designate (under Regulation 17(2)) and to confirm to the CCPC (under Regulation 17(3)) the identity etc. of the liaison officer. The obligation to train and designate staff is “as soon as practicable [...] (but not later than 3 months after such commencement)”. However, the obligation to confirm the identity of the initial and all subsequent liaison officers is “as soon as practicable”, without any specific hard deadline. The Law Society therefore recommends amending the Draft Guideline for Regulation 17 to reflect this distinction between the timelines for compliance.

8. Draft Guideline 3 – Requesting Costs Estimates

- 8.1 The Draft Guidelines for Regulations 9 (payment for stocking), 11 (promotions), 12 (payment for marketing costs), 15 (payment for wastage) and 16 (payment for shrinkage) identify the right of a supplier to seek an estimate of the costs of the stocking/promotion/marketing/wastage/shrinkage involved and the basis of that estimation. Regulations 13 (payment for shelf space) and 14 (payment for advertising) do not include a relevant right for the supplier to seek costs estimates and their basis.

Comments:

- 8.1.1 The Law Society suggests that it would be worthwhile for the Draft Guidelines to make reference to this distinction. While it can be gleaned from comparing the relevant guidelines, the Law Society suggests that specifically drawing attention to it would provide greater clarity for all parties.

9. General Comments

- 9.1 Throughout the Regulations (in particular Regulations 9 and 11-16), payments or allowances from suppliers to relevant grocery goods undertakings are the subject of transparency and other obligations. Payment is defined in section 63A of the 2007 Act as “any compensation consideration, allowance or inducement in any form (monetary or otherwise) and includes more favourable contract terms”. The term ‘allowance’ (included in the definition of payment) is itself defined in section 63A of the 2007 Act as including “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 purchase price”.⁴

Comments:

- 9.1.1 The Law Society suggests that it would be helpful to stakeholders to have these definitions drawn specifically to their attention (especially as the definitions do not feature in the Regulations themselves). Helpfully, the Department has included reference to the definition of marketing costs in section 63A of the 2007 Act in the Draft Guidelines and the Law Society suggests also including a similar elaboration of the meaning of the words ‘payment’ and ‘allowance’ in the Draft Guidelines.
- 9.2 The UK Groceries Supply Code of Practice applies to specifically designated wholesalers/retailers.⁵ By contrast, the Grocery Goods Regulations apply to relevant grocery goods undertakings meeting the criteria of Regulation 3 of the Grocery Goods

⁴ Note that section 19 of the Interpretation Act 2005 states: “A word or expression used in a statutory instrument has the same meaning in the statutory instrument as it has in the enactment under which the instrument is made.”

⁵ See provision 4 of the Groceries (Supply Chain Practices) Market Investigation Order 2009 (available at http://webarchive.nationalarchives.gov.uk/20111108202701/http://competition-commission.org.uk/inquiries/ref2006/grocery/pdf/revised_gscop_order.pdf).

Regulations. Therefore, by comparison to the UK, there is less clarity in Irish grocery goods Regulation as to whom the Grocery Goods Regulations apply.

Comments:

- 9.2.1 In its submission to the Joint Committee on Agriculture, Food and the Marine, Retail Ireland “submitted that a national code would not benefit consumers or farmers and that the only organisations that would benefit from a national code would be those suppliers and processors in the middle of the supply chain”.⁶ However, it could be made clear in the Department’s Draft Guidelines that large “suppliers and processors in the middle of the supply chain” (*i.e.*, those with the requisite turnover) will also be required to deal equitably according to the Grocery Goods Regulations with their own suppliers.
- 9.2.2 The definition of ‘grocery goods undertaking’ means “an undertaking that is engaged for gain in the production, supply, distribution, wholesale or retail of grocery goods, whether or not the undertaking is engaged in the direct sale of those goods to the public” (emphasis added). The definition of ‘grocery goods’ includes “(i) any substance or thing sold or represented for use as food or drink for human consumption, [and] (ii) any substance or thing 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...” (emphasis added). This definition may be considered wide enough to include undertakings purchasing raw materials for food processing and onward sale (e.g., large creameries).
- 9.2.3 The Law Society suggests that the Draft Guidelines would provide extra clarity to the farming and food industry if an explanation of the above and examples of the kind of relationships to which the Grocery Goods Regulations can apply are included in the Draft Guidelines.

10. Enforcement

- 10.1 Two categories of violations or breaches of the Grocery Goods Regulations are effectively provided for in the 2007 Act (at section 63E). According to section 63E(2), a “relevant grocery goods undertaking” that, “without reasonable excuse, contravenes a provision of Regulations under section 63B that is declared in the Regulation to be a penal provision commits an offence” (emphasis added). Section 63E(1) provides that a “relevant grocery goods undertaking” that “contravenes a requirement in a contravention notice commits an offence.” Thus, the CCPC may elect either to serve a contravention notice or to move immediately to prosecution.

⁶ Report on the Grocery Goods Sector, October 2013, page 11 (available at <http://www.oireachtas.ie/parliament/media/Final-Report-on-Groceries-Goods-for-publishing-on-website.pdf>).

Comment:

10.1.1 For general principles of fairness, and to avoid arbitrary application, it would be important that the CCPC adopt and publish clear guidelines on the circumstances in which it will serve a contravention notice and those in which it will move immediately to criminal prosecution.

The Law Society hopes that the Department will find the above comments constructive and is happy to engage further with the Department if required.

For further information please contact:

Cormac Ó Culáin
Public Affairs Executive
Law Society of Ireland
Blackhall Place
Dublin 7
DX 79

Tel: 353 1 6724800
Email: c.oculain@lawsociety.ie