

# *What's in Store for Food Retail?*

*@mhclawyers*

*Wednesday, 13 January 2016*



# *Welcome*

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*Partner*  
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# *Grocery Goods Regulations: What does this mean for suppliers?*

*Peter Bolger*

*Partner*

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## *Grocery Goods Regulations- Background*

- Competition (Amendment) Act 2006
- 2009 consultation on a voluntary code
- 2010 Report of the Joint Oireachtas Committee on Enterprise Trade and Employment
- Competition and Consumer Protection Act 2014
- 2014/2015 consultation on draft regulations
- **Freedom of contract v “rebalancing the commercial relationship”**

## *Grocery Goods Regulations - Scope*

- Consumer Protection Act 2007 (Grocery Goods Undertakings) Regulations 2016
- Department of Jobs, Enterprise and Innovation Guidelines
- Came into effect on 30 April 2016
- The Regulations apply to “**grocery goods contracts**” namely a contract for the sale or supply of **grocery goods** by a supplier to a **relevant grocery goods undertaking** (“**retailer**”) entered into or renewed after 30 April 2016

## *Grocery Goods Regulations - Definitions*

- **Grocery Goods:** any food and drink that is intended to be sold for human consumption
- This includes:
  - Any substance or thing sold or represented for use as food or drink for human consumption
  - 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
  - Intoxicating liquors
- This does not include:
  - Food or drink served or supplied on the premises of a retailer in the course of providing catering, restaurant or take-away services or any similar hospitality services or intoxicating liquor served or supplied for consumption on the premises of a retailer

## *Grocery Goods Regulations - Definitions*

- **Retailer:** a grocery goods undertaking engaged in the retail or wholesale of grocery goods in the State that has, or its group of companies has, an **annual worldwide turnover** of more than **€50 million**.
- In calculating the turnover of a retailer account is taken only of sales of food and drink products as defined in the Regulations

## *Grocery Goods Regulations- Different requirements*

- There are several buckets of obligations on Retailers under the Regulations
- Compliance, training and reporting
- Mandatory obligations
- Prohibited acts subject to specific exemptions
- Prohibited acts subject to contract



# *Grocery Goods Regulations - Mandatory Obligations (1/2)*

- **Regulation 4: Grocery Goods Contracts**
  - A retailer **must** ensure that all of the terms and conditions of a grocery goods contract are expressed in **clear understandable language** and in **writing**
  - Both parties must **sign and retain a copy** of the contract
- **Regulation 8: Forecasts of supply of grocery goods**
  - A retailer **must** at the request of a supplier and following consultation as to the basis for its preparation, prepare **in good faith and with due skill, care and diligence** a **forecast** of grocery goods required by the retailer in respect of a specified period.
  - The retailer must forward a copy of the forecast together with confirmation in writing of the basis on which it was prepared.

## *Grocery Goods Regulations - Mandatory Obligations (2/2)*

- **Regulation 14: Payment for advertising or display of goods**
  - A retailer must **not** directly or indirectly compel a supplier to make a payment or grant any allowance for the advertising or display of grocery goods in the retailer's premises

## *Grocery Goods Regulations - Prohibited subject to specific exemptions (1/3)*

- **Regulation 6: Third party goods or services**
- A retailer must **not** require a supplier to obtain goods or services from a third party from whom the retailer receives payment for the arrangement **except**:
  - Where the supplier's source of the goods or services fails to meet reasonable quality standards specified by the retailer, or
  - The supplier's source of the goods and services charges more than is charged by the retailer's third party for an equivalent quantity or quality of goods or services.

## *Grocery Goods Regulations Prohibited subject to specific exemptions (2/3)*

- **Regulation 7: Force majeure**
- A party to a grocery goods contract is **not** liable for a delay or failure to perform the contract resulting from circumstances beyond the reasonable control of that party.
- **Each party** must notify the other party in accordance with the contract of:
  - The specific circumstances
  - When the circumstances arose
  - Where applicable, when the circumstances ceased
- A breach by either party may be an **offence**.

## *Grocery Goods Regulations - Prohibited subject to specific exemptions (3/3)*

- **Regulation 9: Payment for stocking, displaying or listing**
- A retailer may **not** seek payment for stocking, displaying or listing grocery goods **unless**:
  - The payment is based on an objective and reasonable estimate of the cost **and**
  - If it is a supply to an individual store, the relevant grocery goods have not been stocked, displayed or listed in the previous year **or**
  - If it is a supply to multiple stores, payment is sought only in respect of grocery goods that have not been stocked, displayed or listed in at least 25% of those stores in the previous year
- A supplier can request the cost and the basis upon which the cost is prepared

# *Grocery Goods Regulations Prohibited subject to contract (1/6)*

- **Regulation 5: Variation, termination or renewal of contracts**
- A retailer must **not** vary, terminate or renew a contract **except where the contract:**
  - Has express provision for variation, termination or renewal
  - Specifies the period of prior written notice of the variation, termination or renewal
- The period of notice must be **reasonable** and take account of:
  - The duration of the contract
  - The frequency of orders
  - The characteristics of the goods including durability, seasonality and external factors affecting production
  - For significant variations for supply or delivery, the value of any order affected relative to the annual turnover of the supplier

## *Grocery Goods Regulations Prohibited subject to contract (2/6)*

- **Regulation 10: Payment terms and conditions**
- A retailer **must** pay a supplier by the later of:
  - 30 days of the date of receipt of the invoice or
  - 30 days of the date of delivery.
- **However**, the contract may provide for a different period.

## *Grocery Goods Regulations Prohibited subject to contract (3/6)*

- **Regulation 11: Promotions**
- A retailer may **not** directly or indirectly compel a supplier to make a payment or grant any allowance in respect of a promotion **except** where provided in the contract
- However a retailer must give written notice in line with the contract of:
  - The duration and frequency of a promotion
  - The quantity of grocery goods needed for the promotion
- A retailer must also on request provide an estimate of the cost of the promotion and the basis on which it was prepared



## *Grocery Goods Regulations Prohibited subject to contract (4/6)*

- **Regulation 13: Payment for retention, increased allocation or better positioning of shelf space**
- A retailer must **not** directly or indirectly compel a supplier to make a payment or grant any allowance for the retention, increased allocation or better positioning of shelf space **except** where provided in the contract

## *Grocery Goods Regulations Prohibited subject to contract (5/6)*

- **Regulation 15: Payment for Wastage**
- A retailer may **not** seek payment for wastage **except** where:
  - The contract provides for it
  - The contract has an agreed average wastage cost
  - The contract provides if a supplier must pay for wastage arising from the negligence or fault of the supplier
  - The payment is based on an objective and reasonable estimate of the cost of wastage
- A retailer **must** on request provide an estimate of the cost of wastage and the basis upon which it was prepared

## *Grocery Goods Regulations Prohibited subject to contract (6/6)*

- **Regulation 16: Payment for Shrinkage**
- A retailer may **not** seek payment for shrinkage **except** where :
  - The contract provides for it
  - The payment is based on an objective and reasonable estimate of the cost of wastage
- A retailer **must** on request provide an estimate of the cost of shrinkage and the basis upon which it was prepared

## *Grocery Goods Regulations - Enforcement*

- Competition and Consumer Protection Commission (CCPC)
- May **investigate** itself or on foot of a complaint
- Will not investigate a complaint if the complaint is (1) frivolous or vexatious (2) not made in good faith (3) trivial (4) delayed or if another remedy is/was available
- If there is a contravention of a criminal provision then the CCPC may issue a **contravention notice**
- Breach of a criminal provision of the Regulation or an enforcement notice:
  - On summary conviction: €3,000 or on indictment: €60,000/18 months imprisonment
- Any person aggrieved by a breach of the Regulations or a contravention notice may sue in the Circuit Court

## *Grocery Goods Regulations - Action Points*

- Check your contracts with retailers – are they written down and can you put your hands on them? Are they purchase orders or similar?
- Check have you received any new contracts for retailers and if so:
  - What do they say?
  - Do they mention things like what was discussed today?
  - Have them checked if any doubt.

# *GSCOP in the UK*

*Craig Hodgson*  
*Partner*  
*Mills & Reeve*



# GSCOP in the UK

22 June 2016

Craig Hodgson partner and head  
of Food and Agribusiness

MILLS & REEVE



# This talk ...

- **GSCOP:**
- **Tesco ruling**
- **GSCOP in practice**



# The Groceries (Supply Chain Practices) Market Investigation Order 2009

- Governs the relationship between the 10 major multiples (“Designated Retailers”) and their direct suppliers of “Groceries”
- Fines of up to 1% of turnover for post 6 April 2015 breaches

## Designated Retailers

- Asda
- Co-op Group
- Marks & Spencer
- Morrisons
- Sainsbury's
- Tesco
- Waitrose
- Aldi
- Iceland
- Lidl

# Groceries

## ○ ARE:

- food (other than for in-store consumption )
- pet food
- drinks (other than for in-store consumption)
- cleaning product
- toiletries
- household goods

## ○ ARE NOT:

- pharmaceuticals
- newspapers, magazines and stationery, books,dvd,cd
- plants and flowers
- perfumes and cosmetics
- tobacco and tobacco products
- clothing

## Principle of Fair Dealing

- Retailer at all time must deal fairly and lawfully
- Retailer's "Requirements" must be no more than "*ordinary commercial pressures*" which are:
  - not "*duress*";
  - but which are:
    - "*justifiable*",
    - "*transparent*" and
    - Consistent as supplier needs certainty in production, delivery and payment.

# Supply Agreements

- **All terms must be in writing including any variations or additions**
  - any oral variations or additions must be confirmed in writing within 3 working days
- **Must incorporate the Code (the “GSCOP”)**
- **Must be preceded by a separate “Supplier Notice”:**
  - that retailer must comply with the Code
  - identifying retailer’s Senior Buyer and Code Compliance Officer (“CCO”)
  - supplier’s right to escalate Primary Buyers’ decisions
  - procedures for de-listing under the Code
  - dispute resolution procedures and the Ombudsman

# Groceries Supply Code of Practice

- **Must be incorporated into every supply agreement**
- **Principle of “fair dealing”, e.g:**
  - No distinction between formal and unwritten agreements
  - Certainty in production, delivery and payment
  - Payment within “a reasonable time”
  - No retrospective variation of a supply contract unless agreed
  - Reasonable notice of variations that retailer is entitled to make
  - Forecasting for promotions must be transparent and with “due care”

# Groceries Supply Code of Practice

<b><u>Prohibited</u></b>	<b><u>Restricted</u></b>	<b><u>If permitted by agreement</u></b>
Charges for better positioning except promotions	Charges for customer complaints	Contributions to marketing costs
No charges for stocking or listing except for promotions and products new to retailer	Any charges only to be for promotions on reasonable notice	Charges for wastage
Charges to “predominantly” fund promotions		Less than full compensation for forecasting error
No tying of goods or services of a third party who is paying the retailer (unless supplier’s alternative is unsuitable)		
Charges for shrinkage		

# Groceries Supply Code of Practice

## ○ De-listing

- Only for “*genuine commercial reasons*”
- Retailer must
  - Provide reasonable notice and written reasons
  - On supplier’s request, review decision by Senior Buyer
  - Allow supplier a meeting with Code Compliance Officer
- GCA Guidance
  - “*significantly to reduce the volume of purchases made*” in the definition of “*De-listing*”
  - “*reasonable notice*” means time for review and meeting



# Dispute Resolution

- Retailer must negotiate “*in good faith*” with supplier to resolve disputes
- If not resolved within 21 days, retailer must submit to binding arbitration by Ombudsman (or an arbitrator)

# Reasonable Notice

- Duration of contract and frequency of orders
- Characteristic of product e.g. durability, seasonality
- Value of order relative to turnover of supplier
- Impact of notice on supplier so far as reasonably foreseeable.

# Tesco Investigation

- Investigation on 5 February to 25 June 2013.
- Report published 26 January 2016 finding:
  - in breach of para 5 delays in payment to suppliers because of:
    - Data input errors resulting in suppliers being under paid;
    - Duplicate invoicing for promotional activity;
    - Tesco focussed on meeting its own margin targets by getting suppliers to agree to deferment of payment;
    - Unilateral deductions for short deliveries, service levels

# Enforcement

- No power to impose a penalty because breach occurred pre 6 April 2015;
- However costs award of circa £1m;
- Recommendations for Tesco to implement:
  - four weeks to submit a plan;
  - quarterly reporting;
  - Response to specific enquiries.

# Recommendations for Tesco

- Money owed to suppliers for goods supplied must be paid in accordance with the agreed terms;
- Tesco must not make unilateral deductions;
- Data input errors identified by suppliers must be resolved promptly;
- Tesco must provide transparency and clarity in its dealings with suppliers;
- Tesco finance teams and buyers must be trained in findings from this investigation.

# Negotiation Tips

- Point out breach of code to retailer;
- Breach of GSCOP is a breach of contract so retailer is liable for losses caused by breach;
- Adjudicator is encouraging suppliers to refer complaints;
- Suggest retailers seek guidance from Adjudicator on proposed charges to suppliers for promotions;
- If retailer threatens forensic investigation remind them to only go back 2 years;

# Negotiation Tips continued...

- Report breach to retailers Code Compliance Officer;
- Adjudicator to be asked to be arbitrator within 4 mts at cost to retailer;
- If threatened with delisting, even if genuine commercial reason and have given reasonable notice, they may still be in breach of fair dealing provision;
- Any verbal agreements confirm in writing as retailer required to confirm within 3 business days;
- Record breaches in writing and maintain records.

# thank you



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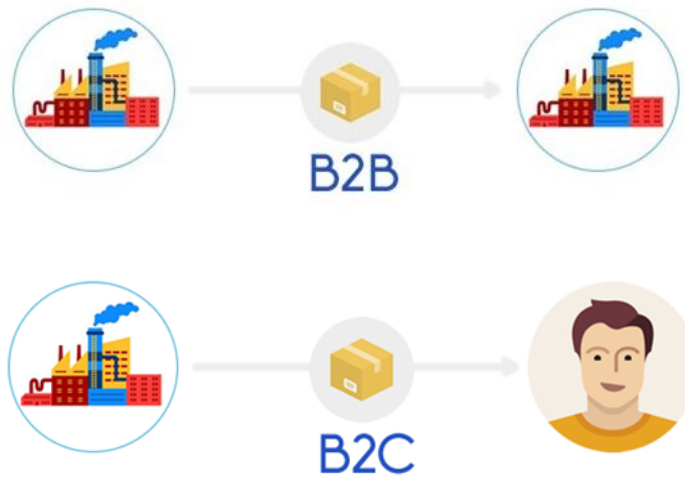
# *Promotions & Advertising: Pitfalls and opportunities*

*Wendy Hederman,  
Partner,  
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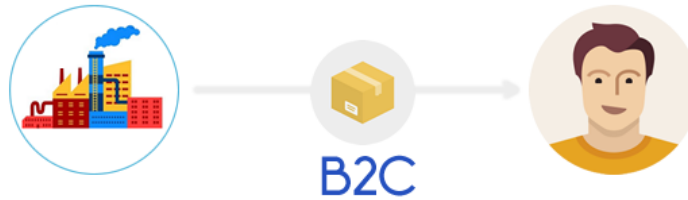


# Agenda

1. Consumer law
2. Advertising Code
3. Prize Draws and Competitions



# Consumer Law



Consumer  
Protection  
Act 2007

Unfair  
Contract  
Terms  
Regulations

Consumer  
Information  
Regulations  
2013

Price Display  
Regulations

Product  
Guarantees

## *CPA 2007 - the Black List*

### 25 Prohibited commercial practices

(d) ...the product has an approval, authorisation or endorsement...

(h) .....a product is 'free', 'gratis', without charge

(k) ...displaying a quality mark or standard...

(u) .....promoting a competition or prize promotion w/o awarding the prizes

## *CPA 2007 – Grey List*

### **Misleading Practices & Omissions**

- False information/Omits information
  - Relating to key product and sales information
  - Average Consumer
    - => Transactional Decision

## *Misleading Practices*

- Pricing Examples



Be very careful with references to previous prices and to RRP's (differences to the UK Codes)

# *Consumer Information Regulations 2013*

- Detailed information to be provided by traders:
  - On-premises contracts & off premises contracts
  - Pre-contract and post contract mandatory information
  - Cancellation right / cooling off for 14 days

(CIR Information obligations are separate to ingredients and nutritional information obligations in the Food Information Regulations).

## *Consumer Information Regulations 2013*

- Q: Do they apply to sale of food?
  - Yes, but not to sales by way of regular deliveries to home/work (such as milk rounds)
  - And with 1 exception: Right to cancel does not apply to “perishable goods” / “goods liable to deteriorate or expire rapidly”
  - Not all food products will come within the perishable goods exception.



## *CCPC Enforcement*

- CCPC powers
  - Carry out investigations
  - Compliance notice
  - Fixed payment notice
  - Prohibition orders
  - Prosecution
  - Consumer protection list
- Enforcement in 2015:
  - 29 Compliance notices (12 re right of cancellation)
  - 33 Fixed payment notices
- Proactive sweep re right of cancellation in 2015

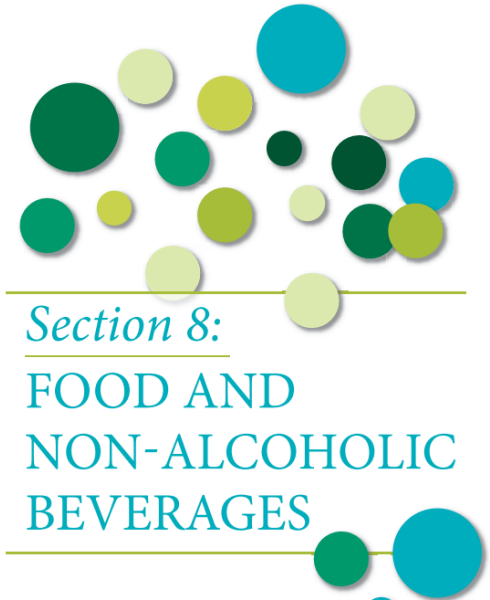
## *ASAI Code Version 7*

- Came into force March 2016
- All commercial marketing communications are 'legal, decent, honest and truthful'
- New rules relating to Food Advertising



## *ASAI Code Version 7*

- New rules relating to Food Advertising
  - Completely updated food section
  - Bringing ASAI Code into line with the EU Regulation concerning nutritional and health claims
  - EU Regulation on nutrition and health claims seeks to protect consumers from misleading or false claims



## *ASAI Code Version 7*

- New rules relating to Children's Advertising
  - Marketing communications should not encourage children to eat or drink a product
  - Product should be offered on its merits
  - Exception for advertisements concerning fresh fruit or vegetables



## ASAI Complaints

- Complaints to the ASAI related to food



## *Promotions and Prize Draws – 1*

- “Win a Holiday”
- “Buy a chocolate bar & enter our draw for Euro finals tickets”
- “Complete our customer survey for a chance to win a €500 voucher”

## *Promotions and Prize Draws – 2*

- Game of chance                      or                      Game of skill?



“Payment” required  
to enter?



Winner not picked  
randomly, then not a  
lottery, can have  
purchase to enter

**Gaming and Lotteries Act 1956**

## *Promotions and Prize Draws – 3*

- A game of chance with a payment or money's worth required to enter will be an illegal lottery in Ireland without a licence
- Payment of monies' worth = purchase of product (unlike UK)
- Example 1- restaurant customer feedback prize draw
- Example 2 – Walkers “Win 20,000 Holidays” with different conditions for UK, NI and RoI



*Thank you*

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