



ByrneWallace LLP, one of Ireland's leading law firms with unrivalled experience advising the retail sector, highlights key legal issues which retailers should be aware of during 2021.

Must Know Legal Facts for Retailers

Commercial Rates

Many "non-essential" retailers are struggling to keep their businesses afloat, having been required to close their physical doors for the third time since March 2020. Government supports include a waiver of commercial rates for the first quarter of 2021, available to businesses most seriously affected by the restrictions.

Many businesses benefited from a rates waiver for much of 2020. The initial three-month waiver of commercial rates (from March to June 2020) was for businesses that had been forced to close due to public health requirements. This waiver was subsequently extended to the end of 2020. To support ratepayers whose premises remained open, but who suffered significant reductions in turnover, from July 2020 the waiver was applied to all businesses with the exception of a small number of categories, such as banks, utilities and large supermarkets.

The Local Government Rates and Other Matters Act 2019 was enacted to modernise the law governing commercial rates. Commencement of this legislation was postponed due to concerns that it inadvertently requires landlords and banks (selling as mortgagee) to discharge arrears of commercial rates accrued by tenants before a commercial property can be sold. Amending legislation is likely to be published once the Covid-19 crisis has passed.

Code of Conduct

The Irish Government has urged commercial landlords and tenants to work together to ensure the survival of viable businesses and tenancies. The voluntary Code of



Conduct between Landlords and Tenants for Commercial Rents is intended to provide a framework for landlord and tenant negotiations on commercial tenancies that have been seriously, negatively impacted by Covid-19.

The Code requires parties to act in good faith and in an open, honest and transparent manner to identify and implement mutually beneficial solutions. Tenants seeking concessions should provide sufficient and accurate financial information about their business and be clear why assistance is needed. Landlords should provide concessions where they reasonably can, having regard for their own obligations. Where a concession is refused, the landlord should set out a reasonable explanation for their decision.



Possible concessions include rent free periods, rent deferrals, splitting the cost of rent for the period(s) that premises were closed and rent variations to market rent or turnover rent. Rent reductions may be agreed across a portfolio of units occupied by the same tenant. Compromise solutions include extending the term of the lease to cover period(s) of closure, and allowing landlords to draw from rent deposits on the understanding that the tenant will not be required to "top up" the deposit until it is reasonable to do so. Landlords may want to trade other benefits for concessions. Landlords and tenants are encouraged to use third party mediation to facilitate negotiations, where necessary.

Before using the Code, legal advice should be sought on how to structure and document any concessions, to ensure that there are no unintended effects. The Code is due to expire on 31 July 2021, but may be extended or replaced.

Wearing of Face Coverings

By reason of Covid-19, it is unlawful for a person to enter or remain in a premises where goods are sold directly to the public without wearing a face covering, unless that person has a "reasonable excuse". In a retail setting, it is the responsibility of the manager to engage with customers entering or in the premises to inform them of this requirement. The manager has the right to refuse entry if there is a failure to comply. If the refusal persists, the Gardaí can be called "as a last resort". Those exempt from wearing face coverings include children below 13 years and individuals with breathing difficulties or special needs. The requirement to wear face coverings is currently scheduled to remain in place until 8 June 2021.

Minimum Wage Increase

With effect from 1 January 2021, the minimum wage has been increased to €10.20 per hour.

Suspension of Employee Redundancy Entitlement

Ordinarily, an employee who has been laid off or kept on short-time for four or more consecutive weeks (or six or more weeks of which not more than three were consecutive within a period of thirteen weeks) is entitled to claim a redundancy payment from his/her employer. That entitlement was suspended for an "emergency period" on 13 March 2020 in respect of employees who have been laid off or kept on short-time due to Covid-19. Initially, that "emergency period" ran until 31 May 2020 but it has since been extended on a number of occasions, most recently to 31 March 2021.

Increase in Parent's Leave and Extension of Adoptive Leave Entitlements

With effect from April 2021, each parent of a child born on or after 1 November 2019 is entitled to five weeks' paid Parent's Leave. The period during which the leave can be taken will extend to the first two years after the birth or adoptive placement of a child. The remit of those able to avail of adoptive leave will also extend to male same-sex married couples. Unlike before, all adopting couples will also be able to choose which parent takes the adoptive leave where previously only an adopting mother or a sole

male adopting father was entitled to do so.

Comparative Advertising

Comparative advertising is an effective marketing strategy. Key points to consider when conducting comparative advertisement include; advertising must not mislead the audience, using false claims to denigrate competitors can be grounds for defamation and using a competitor's trade mark is acceptable provided the advertisement complies with the regulations.¹

All claims made in the advertisement must be verifiable. Failure to provide sufficient supporting evidence may breach the regulations; potentially resulting in a claim.



International Personal Data Transfers

In July 2020 the Court of Justice of the European Union issued a decision in the case of *Data Protection Commissioner v Facebook Ireland Limited, Maximillian Schrems (Schrems II)* which will impact all organisations seeking to make international personal data transfers.

The GDPR provides for the free flow of personal data within the European Economic Area (EEA). Transfers of personal data from within the EEA to a third country outside the EEA are restricted unless an EU Commission adequacy decision exists in relation to that country or other specific safeguards are put in place. The safeguards are set out in the GDPR and the most frequently used safeguard is a contract with the third country organisation containing the EU Commission's Standard Contractual Clauses (SCC's).²

The *Schrems II* decision has placed more onerous obligations on organisations by requiring that those who seek to rely on SCC's must also assess the law of the country in which the data importer is located to ensure that an equivalent level of data protection to that found in the EU exists. The decision also invalidated the EU-US Privacy Shield as a transfer mechanism.

In response to the decision, the Data Protection Commission and the European Data Protection Board have issued various recommendations and guidelines and

retailers should become familiar with these documents.

It is important to note that the UK is not yet considered a third country. Transfers of personal data to the UK can continue as normal for up to 6 months from 1 January 2021, during which time it is expected that the EU Commission will make an adequacy decision in relation to the UK. The impact of an adequacy decision is that personal data can be transferred to that country without the need for any safeguards.

The next step for retailers is to carry out a data mapping exercise to determine exactly where personal data is being processed and/or stored. This will involve engaging with third parties who process customer or employee personal data such as IT service providers, email marketing providers, external payroll providers or external HR providers.

Retailers should review contracts with these third parties to ensure that the correct transfer mechanisms are in place in light of the *Schrems II* decision.

This is an evolving area and retailers should keep up to date with the regulatory guidance and review their data transfers on a regular basis.

Green Loans

A net zero emissions climate target by 2050 is set to be incorporated into Irish law on the enactment of the Climate Action and Low Carbon Development (Amendment) Bill 2020.

Green Loans, which direct capital into environmentally sustainable economic activities by financing eligible Green Projects, are becoming increasingly common in the loan market, with most loans aligned with the Green Loan Principles published by the Loan Market Association.

At present there is no universal standard as to what constitutes a Green Project. Examples may include new or retrofitted buildings incorporating the use of solar PV panels, LED lighting, heat recovery technology or dedicated biodiversity habitat areas. Various external green standards and certification systems are also available, which may evidence the green character of a project.

From a retailer borrower perspective the benefits of opting for a Green Loan over a more conventional loan product include more attractive margins on loans, access to additional credit sources, improved business reputation and contributing to a low-carbon, climate-resilient and resource-efficient economy.

ABOUT THE FIRM

ByrneWallace LLP is one of Ireland's largest full service law firms. A forward thinking firm, they focus on securing the best possible outcomes for their clients and are dedicated to the provision of expert legal services. Offering a diversity of expertise that covers all areas of Irish law, they advise a range of businesses and industry sectors including retail. Retail services include advising on:

- Advertising, branding and promotional requirements
- Handling official customer complaints
- Defamation
- Online retailing
- Consumer law
- Licensing law
- Health and safety
- Property issues (commercial lease negotiation, landlord and tenant issues)
- Employment
- IP (trademarks and copyrights)
- Data protection
- Crisis management
- Sustainable finance
- Corporate compliance & commercial contracts

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