

Statutory Guidance for
The Fair Dealing Obligations (Milk)
Regulations 2024

Version 1.0

Published 8th July 2024

Contents

Introduction	3
Background	3
Enforcement of FDOM24	4
Matters that will be taken into account when calculating the amount of civil penalty or compensation payable	5
Part A - Civil Penalties.....	5
Part B – Compensation.....	7
The ability to make representations	8
The right to appeal a decision	11

Introduction

1. This guidance is provided by the Secretary of State for Environment, Food and Rural Affairs under Regulation 22 of The Fair Dealing Obligations (Milk) Regulations 2024 (FDOM24).
2. The guidance covers the imposition by the Agricultural Supply Chain Adjudicator (ASCA), acting on behalf of the Secretary of State, of a civil penalty and/or compensation under Regulation 21(1) of FDOM24 in the circumstances that there has been a failure to comply with a requirement under FDOM24.
3. The ASCA must have regard to this guidance when exercising powers under Regulation 21(1) of FDOM24.
4. Accordingly, under Regulation 22, this guidance sets out:
5. The matters to be taken into account in determining the amount of the civil penalty and/or compensation payable for infringements of FDOM24 where the ASCA decides to impose a penalty and/or award compensation under Regulation 21(1) of the FDOM24.
6. The rights of the purchaser and producer to make representations under Regulation 24 of the FDOM24.
7. The purchaser's and producer's right to file an appeal with the First-tier Tribunal under FDOM24 Regulation 26 against a decision by the ASCA to impose a requirement under FDOM24 Regulation 21(1).

Background

8. The Agriculture Act 2020 introduced powers to allow the creation of regulations that protect UK producers from unfair treatment within the supply chain. FDOM24 imposes obligations on purchasers in relation to contracts they make with milk producers for the purchase of milk. FDOM24 will have effect in the UK from 9 July 2024, at which point they will apply to all new contracts made for the purchase of milk from a producer. A transition period of 12 months will apply for existing contracts, after which all such contracts will need to be compliant with FDOM24 by 9 July 2025.
9. The Agricultural Supply Chain Adjudicator (ASCA), acting on behalf of the Secretary of State, will carry out the enforcement functions under FDOM24.
10. The ASCA has the power to investigate relevant complaints under FDOM24 that are referred by producers in relation to milk purchase contracts. The ASCA may require parties to the milk purchase contract to submit evidence relating to the relevant complaint and, should either party fail to provide the requested information, it may lead to civil proceedings being brought to obtain the evidence. If either party do not provide the requested evidence, a negative inference may also be drawn by the ASCA in terms of this failure. Where the ASCA finds that a purchaser has failed to comply with a requirement under FDOM24, the ASCA may require the purchaser to pay either, or both, a civil penalty and compensation.

11. It is important to ensure that penalties imposed are fair, proportionate, reasonable and not excessive. In assessing the appropriateness and proportionality of the penalty, the ASCA will have regard to the facts and circumstances of the individual case. While the ASCA is not bound by previous decisions, it will seek to ensure there is consistency in its approach.

Enforcement of FDOM24

12. Under Regulation 21 of the FDOM24, where the ASCA, on behalf of the Secretary of State, finds that a purchaser has failed to comply with a requirement under FDOM24, he may require the purchaser to pay either or both a civil penalty and compensation payment.
13. Under Regulation 24 of the FDOM24 the purchaser has 28 days from the date they receive the notice of intent from the ASCA to make written representations in relation to the proposed requirement to impose a civil penalty and/or compensation. Where the ASCA intends to impose a requirement to pay compensation on a purchaser, the producer can make representations relating to the amount, within 28 days of receipt of notice of intent.
14. Under Regulation 26 of the FDOM24, a purchaser on whom a requirement to pay a civil penalty and/or compensation has been imposed can appeal against the decision to require a civil penalty and/or compensation to be paid; or the amount of the civil penalty and/or compensation they have been ordered to pay. A producer who referred the complaint to the ASCA that resulted in the decision to impose a civil penalty and/or compensation can appeal against a decision not to require the purchaser to pay either a civil penalty and/or compensation or the amount the purchaser has been ordered to pay the producer.
15. Regulation 22 of the FDOM24 requires the ASCA to prepare and publish guidance as to the appropriate amount of a penalty. The ASCA must have regard to the guidance when exercising the powers to impose a civil penalty and/or compensation.
16. As set out in Regulation 21, the civil penalty may not exceed 1% of the purchaser's turnover.
17. There is no upper limit set by the FDOM24 on the amount of compensation that may be imposed under Regulation 21.
18. A civil penalty and/or compensation may be imposed in respect of each and every failure to comply with FDOM24.
19. This guidance will continue to be reviewed and updated as required by Regulation 22(3).

Matters that will be taken into account when calculating the amount of civil penalty or compensation payable

20. Where the ASCA finds that a purchaser has failed to comply with FDOM24, the ASCA may require the purchaser to pay either a civil penalty into the Government's consolidated fund and/or pay compensation to the producer.
21. This section sets out the matters that the ASCA will take into consideration when deciding the amount of civil penalty and compensation.

Part A - Civil Penalties

22. When deciding the amount of any civil penalty, the ASCA will consider the nature and circumstances of the breach on a case-by-case basis, taking into account:

- a) The seriousness of the breach including:
 - the loss caused to the producer.
 - the duration of the breach.
 - The number of breaches relating to the milk purchase contract complained about that have been found
 - Any potential gain that the ASCA estimates was made by the purchaser, or potential loss which the ASCA estimates was avoided by the purchaser, as a result of the breach.
 - Whether the breach was intentional or whether the purchaser failed to take reasonable steps to avoid or prevent the breach.
 - Whether the purchaser's ownership and/or senior management were aware (or should have been aware) of the breach.
 - Any previous breaches of FDOM24 by the purchaser.
- b) Any mitigating circumstances that could reduce the penalty, including:
 - Remedial steps taken by the purchaser to rectify the breach, as well as to avoid future breaches, including when these steps were taken and whether they were taken on the purchaser's own initiative.
 - The purchaser's cooperation with the investigation.
 - The purchaser's track record of compliance with FDOM24.
- c) Any other relevant factors deemed appropriate to the case.

23. The ASCA will endeavour to ensure that any penalty imposed is proportionate so that a fair balance is struck between the seriousness of the breach and the harm caused alongside the impact of any penalty on the purchaser and other relevant parties. This would include consideration of the impact that the imposition of the penalty would have on the financial viability and sustainability of the purchaser, particularly where this may impact their employees or other producers, they have contracts with.

24. The ASCA will also consider the need to deter the purchaser who committed the breach, or others, from committing further breaches going forward by ensuring that the value of the penalty is not outweighed by the financial gains made by the purchaser. The ASCA will also look at the effect of any previous action taken in respect of similar breaches, and the extent to which this has improved compliance with FDOM24.
25. As set out in regulation 21(3) of FDOM24, the maximum amount of any civil penalty is 1% of the purchaser's turnover. This would be based on the purchaser's applicable turnover for the business year preceding the date of the decision to impose a penalty.
26. A business year is a period of more than six months in respect of which the purchaser published accounts or prepared accounts. Where the business year preceding the date of the decision notice did not equal twelve months, the applicable turnover for that business year will be divided by the number of months in that business year and then multiplied by 12.
27. If there was no preceding period of more than 6 months in respect of which the purchaser published or prepared accounts, the purchaser's turnover would be the applicable turnover for the 12 months preceding the month in which the notice of the decision to impose a penalty was given. If the purchaser only has turnover for a period of less than twelve months, the applicable turnover in that period would be divided by the number of months in that period and multiplied by 12.
28. The applicable turnover is the sum of:
 - (a) all amounts derived by the purchaser from the provision of goods and services falling within the purchaser's ordinary activities in the United Kingdom; and
 - (b) all other amounts received by the purchaser in the course of the purchaser's ordinary activities in the United Kingdom by way of gift, grant, subsidy or membership fee, after deduction of trade discounts, value added tax and other taxes based on the amounts so derived or received.

Part B – Compensation

29. When calculating any compensation payable, the ASCA will look to put the producer back in the position they would have been in had the purchaser not breached the relevant provision of FDOM24.
30. Compensation will be decided on a case-by-case basis and will normally be determined based on the amount of financial loss suffered due to the breach.
31. The ASCA will assess the amount of compensation sought by the producer, using all available evidence of their financial loss provided during the investigation process. The ASCA can also determine compensation in cases where it has not been raised by the producer, using evidence compiled through the investigation process.
32. The producer should set out the basis on which they have calculated the amount of compensation sought in their complaint and, where this includes any interest, the rate of interest they have used.
33. Please note: Tax may be payable on any ordered compensation payments and interest accrued on this. HMRC provides detailed guidance on the taxation of various types of compensation payments. For further information, you may want to consider seeking professional tax advice.

The ability to make representations

34. If the ASCA intends to impose a requirement on the purchaser to pay a civil penalty and/or compensation a written notice (“notice of intent”) will be sent to both parties setting out the breach which the ASCA considers has been committed, the evidence being relied upon and the civil penalty and/or compensation the ASCA intends to impose, along with details on how to make representations.

Making representations

Purchasers

35. A purchaser to whom a notice of intent is given may make written representations in relation to the proposed requirement to pay a civil penalty or pay compensation. These representations can be about the alleged breach of FDOM24 as well as the amount of the penalty and/or compensation being proposed. This could include information on the steps that have been taken to comply with FDOM24 or the impact the proposed penalty would have on the purchaser’s business.

Producers

36. Where the ASCA proposes to require the purchaser to pay compensation to the producer, the producer can make written representations in relation to the amount of the proposed compensation.

Time limit to make a representation

37. Both purchasers and producers have 28 days from the day they received the notice of intent to make written representations. If you do not make representations within this time limit, the ASCA will proceed to make decisions based on the information and evidence set out in the notice of intent.

How to make a representation

38. The representation must be made in writing. Written representations should be sent:

By email to: asca@defra.gov.uk

By post to:

The Agricultural Supply Chain Adjudicator
Department for Environment, Food and Rural Affairs
Seacole Building
2 Marsham Street
London
SW1P 4DF

Who considers the representation

39. The ASCA will consider the representations when making a final decision on whether to impose a requirement to pay a civil penalty and/or compensation.
40. Where the ASCA decides to impose a requirement to pay a civil penalty or compensation, it may be the one proposed in the notice of intent, or a different requirement, depending on the final decision of the ASCA in light of any representations made.

How will I find out about the outcome?

Purchasers

41. The ASCA will send a written notice (“notice of decision”) to the purchaser.
42. Where the decision is to impose a requirement to pay a civil penalty or compensation under regulation 21(1), the notice of decision will set out:
 - the requirement being imposed and the amount of the civil penalty and/or compensation to be paid in respect of each breach;
 - the reasons for imposing the requirement;
 - an explanation as to how the amount has been calculated;
 - how payment may be made;
 - that payment is due within 28 days of the receipt of the notice of decision;
 - information about the purchaser’s right to appeal against the imposition of a requirement under regulation 26; and
 - that where the Secretary of State decides to impose a civil penalty, that the Secretary of State is entitled to recover any unpaid civil penalty as a debt; or
43. Where the decision is not to impose a requirement to pay a civil penalty or compensation under regulation 21(1), the notice of decision will set out:—
 - that decision; and
 - the reasons for reaching the decision.

Producers

44. The ASCA will also send a copy of the notice of decision to the producer, before the expiry of 7 days beginning with the day after the day on which the ASCA gives a notice of decision to the purchaser.
45. Where the ASCA requires the purchaser to pay compensation to the producer or has decided not to impose a requirement for the business purchaser to pay a civil penalty or compensation, the written notice will also set out the producer’s right to appeal under regulation 26(2).

What happens after the notice of decision has been received?

46. If a purchaser is required to pay a civil penalty and/or pay compensation under regulation 21(1), they must do so within 28 days of receiving a notice of decision under paragraph 25(4).
47. If either the purchaser or the producer decides to appeal against the decision, the time limit for payment of the civil penalty and/or compensation is paused until the appeal is concluded. Please see the next section on the right to appeal a decision for more information.

The right to appeal a decision

48. Regulation 26(3) of FDOM24 sets out the right to appeal the decision made by the ASCA to the First-tier Tribunal in the circumstances set out below. An appeal may be determined by the First-tier Tribunal having regard to matters of which the ASCA was unaware. A notice of appeal must be sent or delivered to the Tribunal so that it is received within 28 days of the date on which the notice of decision was received.

What can I appeal about?

Purchasers

49. The purchaser on whom a requirement to pay a civil penalty or compensation has been imposed under FDOM24, can appeal against:

- the decision to require a civil penalty and/or compensation to be paid; or
- the amount of the civil penalty and/or compensation they have been ordered to pay.

Producer

50. The producer who referred the complaint to the ASCA that resulted in the decision to impose a civil penalty and/or compensation, can appeal against:

- a decision not to require the purchaser to pay either a civil penalty or compensation; or
- the amount of any compensation the purchaser has been ordered to pay to the producer.

What happens to the time limit on paying a civil penalty and/or compensation whilst I'm appealing?

51. The 28-day limit for civil penalties and/or compensation to be paid is paused until the appeal is concluded.

52. If, following an appeal, the First-tier Tribunal upholds the decision to impose a civil penalty and/or compensation, the purchaser must make the payment before the expiry of 28 days, beginning with the date of the First-tier Tribunal's judgment, minus the number of days that had passed between the date the purchaser received the notice of decision from ASCA and the date on which the appeal was filed.

Who to appeal to

53. Any appeal made under FDOM24 must be made to the First-tier Tribunal (General Regulatory Chamber).

How to ask for an appeal

54. For information on how to appeal please see the First-tier Tribunal (General Regulatory Chamber) website: [First-tier Tribunal \(General Regulatory Chamber\) - GOV.UK \(www.gov.uk\)](http://www.gov.uk)