



Submission to Department of Agriculture, Food and the Marine

Public consultation on Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain

December 2019

Key points

- National transposition must ensure that there is no roll-back on current protections in the Grocery Goods Undertakings Regulations 2016.
- National transposition must address the issue of scope by ensuring the full food chain is protected and not just suppliers with global turnover up to €350m.
- National transposition must fully address buyer power in the grocery retail sector and in particular the transfer of excessive risks or unexpected costs from grocery retailers to suppliers.
- National transposition must ensure effective and efficient enforcement by an independent grocery regulator. The extent of proactivity by the enforcement authority in ensuring compliance with the Regulations will be a defining issue.

Introduction and opening comments

Food Drink Ireland (FDI) welcomes the EU Directive and [the opportunity to submit our views](#) to the Department of Agriculture, Food and the Marine on its transposition into national legislation. The Directive has the potential to improve relations in the food chain and to address complaints between major grocery retailers and suppliers in Ireland. Unfair trading practices (UTPs) faced by a number of food and drink companies include a failure to respect contractual terms, de-listing threats and unilateral deductions off-invoice without sound business reasons. In the short-term these demands impact on individual suppliers, their margins and levels of investment, but ultimately, they are also bad for consumers.

Consumers are best served by a food chain and grocery market that is both fair and competitive, one that offers choice and convenience, and provides an outlet for new products and suppliers. The new rules have the potential to help to address some of the unfair pressures currently put on suppliers by major retailers provided their scope continues to reflect the provisions in the Grocery Goods Undertakings Regulations 2016¹. Transposition of the Directive must ensure that there is no rollback on the current protections from UTPs for grocery suppliers and all grocery suppliers continue to receive the same level of protection from UTPs as they currently do

The Irish food and drink sector play a central role in Irish society. It generates economic growth, is the mainstay of the rural economy providing hundreds of thousands of jobs and provides a market for over 90% of agricultural output.

The imbalance of buying power between a larger retailer and their suppliers can manifest itself as unfair practices such as a failure to respect contractual terms, delisting threats to obtain unjustified advantages and unilateral deductions off invoices without sound or mutually agreed business

¹ The regulations deal with certain practices in the commercial relationship between suppliers and grocery retailers/wholesalers relating to the supply of food and drink. The regulations set out the compliance requirements on retailers/wholesalers in that regard. The key provisions are written contracts; variations and terminations – consent of both parties required; no obligations re third party services; forecast requirements; prohibitions on payments (listing, marketing, positioning, advertising, wastage, shrinkage) except for specified circumstances and where both sides agree etc; 30 day payment period; compliance measures apply to retailers / wholesalers; enforcement by CCPC. The regulations cover grocery goods (food and drink for human consumption, household cleaning products, toiletries and garden plants/bulbs).

reasons. These unfair practices undermine the economic viability of food companies, leading to difficulties with business planning and cash management, an inability to reinvest in plant, equipment and innovation and costly inefficiencies along the supply chain. They impact on the returns achievable for suppliers up the chain. Left unchecked, this will have profoundly negative long-term consequences for both the food chain and consumers.

This was acknowledged in the Regulatory Impact Analysis of the Competition and Consumer Protection Bill 2014 which identified “*Greater transparency in the operation of the grocery goods sector*”² as a high-level outcome of the introduction of Grocery Regulations and by 2016’s A Programme for a Partnership Government which made the following commitment “*Implementation of regulations to tackle unfair practices in the grocery trade and support for further action at an EU level to deliver greater transparency and fairness in the food supply chain*”³

Effective transposition of the UTP Directive can prevent retailers transferring excessive risks and costs of doing business onto suppliers without placing undue burdens on retailers or impinging the passing on of lower prices to consumers. Rather, it should ensure that the risks and costs of responding to changing consumer demands are shared equitably between supplier and retailer, allowing both to grow sustainable businesses. FDI has consistently supported grocery sector legislation. FDI retains its belief that only legislation that (i) covers the full grocery supply chain; (ii) outlaw’s retrospective demands for arbitrary payments; (iii) insists on principles of fair dealing between retailer and supplier and (iv) is enforced effectively and proactively by an independent grocery regulator focused exclusively on relationships in the sector, will result in the best outcome for the consumer. The legislation should have no remit in assessing the genuine commercial negotiations of suppliers and retailers. Such a level of intervention would negatively affect the dynamic in the sector to deliver on consumer demands for value, quality and convenience.

National transposition must address the scope of the Regulations

FDI believes that the scope should apply to all grocery suppliers and not just suppliers with a turnover of up to €350 million. Unfair trading practices by retailers do not discriminate by size of supplier. **The scope of the Directive must be applicable to all grocery suppliers and not just farmers and suppliers up to €350m turnover as currently proposed.** Such an extension would align with the scope of the Irish Grocery Goods Regulations 2016 which covers the relationship between Regulated Grocery Goods Undertakings and suppliers regardless of size. Ireland has comprehensive protections in place for grocery suppliers and is at the forefront of EU Members States in this regard. Transposition of the UTP Directive provides an opportunity to continue this leadership, rather than falling back to lowest common denominator positions.

² Page 19 of Regulatory Impact Analysis of the Competition and Consumer Protection Bill 2014 <https://dbei.gov.ie/en/Legislation/Legislation-Files/Competition-and-Consumer-Protection-Bill-2014-RIA.pdf>

³ Page 109 of A Programme for Partnership Government [https://www.merrionstreet.ie/MerrionStreet/en/ImageLibrary/Programme for Partnership Government.pdf](https://www.merrionstreet.ie/MerrionStreet/en/ImageLibrary/Programme%20for%20Partnership%20Government.pdf)

The European Commission acknowledged that suppliers of all sizes are affected by UTPs in the proposal for legislation COM (2018) 173 – but decided to exclude many players in the supply chain by focusing only on SMEs and farmers despite the integrated nature of the supply chain. This was done in favour of speed of agreement rather than on solid logic for exclusion. It acknowledged the cost to manufacturers in the proposal, and quotes evidence regarding the negative impact of UTPs (pg. 10, explanatory memorandum) - *In 2011, “UTP-related costs amounted to 0.5% of turnover [...] would be the equivalent of EUR 4.4 billion per year of overall food industry turnover”*. There is national legislation in 20 Member States in the EU (EC Impact Assessment, April 2018) – none focus on SME-only legislation. Whilst the final agreed Directive extended the scope to suppliers with a turnover of up to €350 million, it excludes larger companies. This exclusion is contrary to the evidence that exists through the sanctions laid down by the Courts across Europe which prove larger players are subject to UTPs.

An extended scope to all suppliers will avoid discrimination between operators, buyers being tempted to do business with larger suppliers (not protected by the Directive) at the expense of smaller ones and ensure a level playing field for all suppliers in Ireland.

The UTP Directive only protects suppliers with an annual global turnover of up to €350 million, doesn't cover all grocery products and addresses only a limited number of unfair practices. Therefore:

- The full scope of **grocery goods undertakings** covered by the existing Grocery Goods Undertakings Regulations needs to be maintained i.e. all grocery suppliers regardless of size and including relevant non-food grocery (household cleaning products, toiletries and garden plants/bulbs).
- The full scope of the **regulated practices** covered by the existing Grocery Goods Undertakings Regulations needs to be maintained in particular all aspects of the provision covering variation, termination or renewal of grocery goods contracts.
- If the existing Grocery Regulations are repealed and the UTP Directive transposed ‘as is’, larger food and drink companies (turnover above €350m) would be left unprotected in their commercial relationships with large grocery multiples and left exposed to the imbalance that naturally occurs in these relationships. This would include a significant number of indigenous and international companies across all the major sectors – meat, dairy, prepared consumer foods and alcohol.
- The solutions could include:
 - Retain existing grocery regulations alongside new regulations transposing the UTP Directive.
 - To avoid overlap limit the transposition of the UTP Directive (on the basis that parts of the food chain are already regulated in Ireland)
 - Use article 8⁴ in the UTP Directive to extend scope to ensure the same coverage as the existing grocery regulations.
 - Use the enabling provisions in [Section 83](#) of the Competition and Consumer Protection Act 2014 to revise the grocery regulations so that they only cover the parts of the food chain not covered by the UTP Directive (plus non-food grocery).

⁴ Article 8: National rules - *Member States may provide for rules designed to combat unfair trading practices going beyond those set out in Articles 3, 5, 6 and 7, provided that such national rules are compatible with the rules on the functioning of the internal market.*

National transposition must fully address buyer power and delisting threats

High levels of concentration in the grocery retail sector have resulted in cases of an abuse of power between suppliers (food suppliers) and their customers (retailers). This imbalance in bargaining power has led to many manifestly unfair commercial practices such as:

- retrospective unilateral changes to contracts
- delisting threats to obtain unjustified advantages
- late payments / undue delays over minor queries
- demands for unexpected and undue contributions;
- cancellation of promotions at short notice and a lack of willingness to deal with resultant stocks in place.

(See Appendix 1 for more detail)

The key issue the transposition must address is the transfer of excessive risks or unexpected costs from grocery retailers to suppliers. These practices include a failure to respect contractual terms, delisting threats to obtain unjustified advantages and unilateral deductions off invoices without sound business reasons. All aspects of the provision covering variation, termination or renewal of grocery goods contracts in the existing regulations need to be maintained. There is buying concentration at the grocery end of the supply chain. Across Europe even the largest food companies account for only 1-2 % of a retailer's business at national level, while conversely a retailer may represent 20 – 30% of those company's business⁵. Accordingly, retailers are the gatekeepers to the consumer and can use that buying concentration in grossly unfair trading practices e.g. through de-listing/products removal from shelves. If the retailer delists products, manufacturers lose access to consumers – and likewise, consumers lose on choice.

Unfair Trading Practices

In 2011 AIM and FoodDrinkEurope published the findings of a survey of 686 manufacturers (a mix of SMEs and larger players) in 15 European countries on retailers UTPs. The survey found that practically all companies (96.4%) had been exposed to on average six UTPs in 2009. The six most frequent UTPs imposed on producers were:

- Non-respect of contractual terms (84%).
- De-listing threat to obtain unjustified advantages (77%).
- Unilateral deduction on invoices without sound business reasons (63%).
- Paying for no reason (60%).
- Providing payments clearly in no relation to the level of service provided (60%).
- Paying retrospectively for items not foreseen in the contract (55%).

This trend has not changed. A 2017 survey reveals that 97% of brand manufacturers were exposed to UTPs in Europe in 2016, confirming the 2011 report as well as the Commission own surveys.

⁵ CIAA Competitiveness Report 2010

The UK Grocery Code Adjudicator following her 2019 annual survey of grocery suppliers⁶ identified the following as the top priority issues:

- No compensation for forecasting errors
- Delays in payments
- Not meeting duties in relation to de-listing
- Obligation to contribute to marketing costs

Therefore, the legislation must continue to reflect the provisions in the Grocery Foods Undertakings Regulations 2016 namely:

- Variation, termination or renewal of grocery goods contracts
- Goods or services from third party
- Non-performance due to factors beyond reasonable control of party to contract
- Forecasts of supply of grocery goods
- Payment from supplier as a condition of stocking, displaying or listing
- Payment terms and conditions
- Promotions
- Payment for marketing costs
- Payment for retention, increased allocation or better positioning of shelf space
- Payment for advertising or display of grocery goods
- Payment for wastage
- Payment for shrinkage

The transposition must also reflect that the existing Irish regulations and the UTP Directive address trading practices not price.

National transposition must ensure effective and efficient enforcement

Member states are required to designate an enforcement authority or enforcement authorities to enforce the prohibitions laid down in the Directive. A fair-trading environment requires effective and efficient enforcement of the rules. Strong enforcement by the enforcement authority is key to success and this includes the ability to proactively investigate compliance e.g. to conduct general supervision of the supply chain, including random requests of information to buyers and suppliers, without it being necessary to open infringement proceedings. This is essential to the effectiveness of enforcement as is a complaints process for suppliers that ensures anonymity.

The enforcing authority must be a strong voice on these issues and the activity of the UK Grocery Code Adjudicator (GCA) is a best practice model. For example:

- The GCA holds quarterly meetings with the compliance officers for the Top 12 designated retailers. This gives a good snapshot of the issues in the grocery sector and how they are communicated to retailers.
- The GCA holds an annual conference
- The GCA hold public consultations on relevant issues i.e. a consultation on payments for better positioning of goods

⁶ Slide 12 of GCA Annual Survey 2019 presentation

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/810373/Presentation_2_-_YouGov.pptx

- The GCA undertakes annual supplier surveys (see previous section) which measure awareness of the code, experience of code related issues, assessment of code compliance
- Even the very current issue of Brexit is addressed by the GCA and her September 2016 quarterly meetings addressed the issue of Brexit and treatment of currency fluctuations.

The extent of proactivity in ensuring compliance with the Regulations will be a defining issue. An independent grocery regulator is needed in Ireland to ensure effective and efficient enforcement.

Appendix 1 – Buyer power

High levels of concentration in the grocery retail sector have resulted in an imbalance of power between suppliers (food suppliers) and their customers (retailers). The picture is relatively similar across Europe. The three largest retailers have more than 50% of the market share in the majority of EU member states and up to 80% market share in some countries. Therefore, across Europe even the largest food companies account for only 1 -2 % of a retailer's business at national level, while conversely a retailer may represent 20 – 30% of those company's business⁷.

- Buyer power
 - “Retailer A has buyer power over Supplier B if a decision to delist B’s product could cause A’s profit to decline by 0.1 per cent and B’s to decline by 10 per cent” (OECD, 1998)⁸
- Economic Dependence
 - A supplier is deemed to be “economically dependent” on one buyer if the latter accounted for more than 22% of the supplier’s total revenues (European Commission - DG COMP, 2000)⁹
 - This imbalance of power should be viewed considering the concentration of the retail market, which further demonstrates just how powerful this position is. This was acknowledged by the German Bundeskartellamt¹⁰ in its Food Sector enquiry published in December 2014 - *“Purchasing volumes have a decisive impact on the negotiated conditions, which is why the structural advantages of large retail companies are also reflected in the purchasing conditions granted to them”* and *“In negotiations with the food industry the leading retailers are largely able to use their strong market positions to their advantage. Consequently, they are in a stronger bargaining position than the manufacturers”*.
 - The UK Competition Commission's presented similar findings in its Supermarket Enquiry (2000)¹¹. Grocery retailers' buyer power is linked to relative economic dependence, which has nothing to do with the size of a supplier. It concluded that **even the largest suppliers were economically dependent on large retailers**. In his article on the enquiry, "Exploiting buyer power: lessons from the British grocery trade" (link)¹², Mr. Dobson states that ***“Even the very largest suppliers usually account for only 1–3 percent of a major grocery retailer’s sales, while losing a single contract with one of the top four grocery retailers in the UK would likely mean a loss of sales for the supplier of around ten times this level (i.e., of between 10 and 30 percent) if it cannot find alternative routes to market.”*** (p. 534 and footnote 17)
 - A French government enquiry from 31 March 2015 stated: *“The data collected, ... are indicative of an imbalance in the forces in this sector: the share of the main*

⁷ CIAA Competitiveness Report 2010

⁸ Buying Power of Multiproduct Retailers, OECD Competition Committee, 1998

⁹ Case No COMP/M.1684, Carrefour/Promodès Art. 6 & Art. 9 Decisions (Jan. 2000). The threshold was chosen as survey evidence indicated that this was the most suppliers could afford to lose without risking bankruptcy.

¹⁰ Summary of the Final Report of the Sector Inquiry into the food retail sector, 24/09/2014:

https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Sector%20Inquiries/Summary_Sector_Inquiry_food_retail_sector.pdf?__blob=publicationFile&v=3

¹¹ <http://researchbriefings.files.parliament.uk/documents/SN03653/SN03653.pdf>

¹² <http://www.antitrustinstitute.org/files/384.pdf>

retailers, or retail alliances, in the turnover of the suppliers interviewed would be on average in the order of 20% ... In comparison, in several product markets, even the most important suppliers represent only a small share of the overall turnover of retailers.”

- Unfair Trading Practices
 - “practices which distort the relationship between suppliers and retailers should be discouraged. This is for example the case for late payments, unjustified or excessive fees paid by suppliers for services provided by retailers or tempting consumers with misleading offers. In this context, the introduction of Codes of conduct would be welcome as an expression of retailers' social responsibility and national Codes of conduct should be reviewed.” (European Commission, 2008)¹³
 - “One of the features that adversely affected competition in the market was the exercise of buyer power by certain grocery retailers with respect to their suppliers of groceries, through the adoption of supply chain practices that transfer excessive risks and unexpected costs to those suppliers.” (UK Competition Commission)¹⁴
 - Significant imbalances in bargaining power between contracting parties are a common occurrence.....this asymmetry in bargaining power may lead to unfair trading practices.....for example, late payments, unilateral changes in contracts, ad-hoc changes to contractual terms, upfront payments as entry fees to negotiations...” (European Commission, 2009)¹⁵

This imbalance in bargaining power has led to the proliferation of many manifestly unfair commercial practices such as retrospective changes to contracts, late payments and demands for unexpected and undue contributions.

At the EU Council of Agriculture Ministers in May 2009, Minister for Agriculture, Fisheries and Food, Brendan Smith T.D. and other EU Ministers for Agriculture highlighted the difficulties caused in the food sector by the control multiples had on the food supply chain. Minister Smith said¹⁶ “Underlying this recent European debate is the increasing concentration of retail power in the hands of a few large supermarket chains. This is an international phenomenon that fundamentally changes the balance of market negotiating power in the food chain. And this is one factor, although not the only one, behind the declining share of retail prices which is passed back to producers. While fully recognising that retailers must strike a reasonable balance between granting price reductions to consumers and giving a fair return to suppliers and producers, this should not be done at the expense of a viable European agri-food sector”.

¹³ COM (2008) 821 Food Prices in Europe

¹⁴ The Groceries (Supply Chain Practices) Market Investigation Order 2009

¹⁵ COM (2009) 591 A better functioning food supply chain in Europe

¹⁶ Press Release, Department of Agriculture, Fisheries and Food, May 27th, 2009

