

**IFA Views on
Draft EU Directive on Unfair Trading Practices in Business to Business
Relationships in the Food Supply Chain (COM (2018) 173 Final –
2018/0082 (COD))**

June 2018

Introduction

IFA has lobbied for many years on the need for regulation of the retail sector, a rebalancing of power in the food supply chain and greater transparency on prices and margins for all actors in the supply chain.

IFA has acknowledged the initiative by the EU Commissioner for Agriculture and Rural Development Phil Hogan in prioritising the imbalance in the food supply chain and recognising the vulnerability of producers.

While the introduction of a minimum common standard of protection across Member States is welcomed, the IFA highlights that this should form part of a wider effort in recognising powerful actors in the supply chain, which contribute to the imbalance between downstream and upstream players in the food supply chain.

Currently, upstream actors continue to make a margin, while farmers are faced with increasing demands and remain the most vulnerable in the chain.

Existing legislation in 20 Member States highlights a recognition of the scale of Unfair Trading Practices (UTPs) in the sector. The proposed EU wide framework must be integrated to ensure a level playing field for all. This framework should also address transnational UTPs that could otherwise be left unchallenged.

Scope of the EU Directive

IFA believes that the proposed Directive represents a step in the right direction, but it is important not to limit the scope of it.

The EU Directive should apply to the full food supply chain and not just to “sales of food products by a supplier that is a small or medium-sized enterprise to a buyer that is not a small and medium-sized enterprise”

All businesses in the food supply chain must be better protected against UTPs. The European Commission proposal¹ acknowledges that “there is wide-spread consensus that UTPs occur throughout the food supply chain”.

The Irish Grocery Goods Regulations 2016² provide for “Regulated Grocery Goods Undertakings” and suppliers regardless of their size.

Unfair Trading Practices

The proposed Directive under Article 3 1(a)–(d), sets out for Member States to prohibit the following four UTPs:

- Buyer paying a supplier for perishable food products later than 30 days;
- Buyer cancelling orders of perishable food products at short notice;
- Buyer changing unilaterally and retroactively the terms of the supply agreement on frequency, timing, or volume of the supply or delivery, the quality standards or the prices of the food products;
- Supplier paying for the wastage of food products incurred on the buyer’s premises and that is not caused by the negligence or fault of the supplier

¹ COM (2018) 173 final

² Consumer Protection Act 2007 (Grocery Goods Undertakings) Regulations 2016

Under Article 3 2(a)-(d), it provides for Member States to ensure that the four UTPs below are prohibited, if not agreed in a supply / contractual agreement.

- A buyer returns unsold food products to a supplier
- A buyer charges a supplier payment as a condition for the stocking, displaying or listing food products of the supplier
- A buyer pays for the promotion of food products sold by the buyer.
- A supplier pays for the marketing of food products by the buyer

Grocery Goods Regulations 2016

IFA welcomes the above proposals on UTPs by the European Commission, but believes that they must be extended to reflect the provisions of the Irish Grocery Goods Undertakings Regulations 20016. These provide for:

- 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 stock, 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

While understanding the legal considerations around the freedom to contract, IFA is concerned about the “freedom” involved in contract negotiations where food suppliers / farmers are often in a position of considerably less power than retailers. IFA fears this could result in UTPs being “agreed” to under duress, and that this should be addressed within the limits of the law.

Other UTPs

IFA has been making the case that other UTPs need to be provided for under the Irish Regulations and now under the EU Directive on UTPs. These are:

- **Tendering** - annual (or more frequent), or e-tendering

Tendering is a process used by retailers, often to the detriment of suppliers in terms of production planning. In the Irish context, tendering primarily affects two cohorts of producers, liquid milk suppliers and fresh produce growers.

In the supply of liquid milk, it encourages suppliers to bid lower prices which leads to unsustainable price levels and threatens their and competitors’ economic viability, pushing them out of business, and reducing the choice of suppliers for consumers.

Annual or shorter length tenders can be dramatically out of sync with natural production cycles. For example - a farmer preparing to supply a fresh liquid milk contract requires two years to bring heifer calves to the stage where they can be milked. A tender which is shorter than that with the said farmer's milk purchaser, may endanger the sustainability of the contract between the dairy and the farmer, if the dairy loses its contract with the retailer in the tender process.

On fresh produce, retailers tender for produce over different time periods i.e. 24m 18m, 12m and 6m. Due to the nature of the fresh produce sector, producers cannot predict the exact yield / quality of a crop at the time of planting, this is due to dynamic conditions primary producers are faced with as they are restricted in terms of the nature of the goods supplied. There are considerable resources required to change production capacity.

For fresh produce, production capacity relates to machinery and land leasing by and large, medium term planning may take 3-5 years, such is the level of investment required. For example, in instances where retailers tender annually, producers are placed in a position of considerable uncertainty, making planning and investment decisions difficult to evaluate.

- **Unustainable Discounting**

IFA contends that the practice of unsustainable discounting of own-label products is a UTP.

Own labels – retail own labels give retailers increasing levels of power in the supply chain. Retailers can use significant volume contracts as leverage on suppliers of both own label and manufacturing branded goods. The discounting of own label offerings by retailers is frequently used as loss leaders, which entice consumers into the stores.

Fresh produce growers regularly experience unsustainable discounting by retailers and in some cases below the cost of production selling, not just on own labels, but on all products, which is also a UTP.

Enforcement

IFA notes that the Directive provides for the designation of 'a public authority' for the purpose of enforcement.

IFA's experience is that an Independent Retail Regulator with a specific remit is required, similar to the UK Groceries Code Adjudicator³ which has proved to be a game-changer in terms of rebalancing power and protecting producers.

In Ireland's case, this function is being subsumed in the Competition and Consumer Protection Commission (CCPC), where its effectiveness is lost as their current remit is cross-sectoral.

The proposed EU Directive holds up the UK model as best practice, and this is the model that IFA has been proposing to the Irish Government for some time.

The single biggest issue for farmers is that there is no dedicated Ombudsman to oversee unfair activities in the food supply chain and farmers have no confidence in the CCPC to enforce the regulations.

³ The Groceries Code Adjudicator Act 2013

The establishment by the Government of a visible and active Independent Retail Regulator would give confidence to suppliers that their complaints would be taken seriously and pursued.

Concerns particularly surround the historical and contextual imbalance of power existing among up and downstream food supply chain actors must also be considered.

IFA welcomes the proposal that the European Commission will establish a network of enforcement authorities, to allow for the exchange of best enforcement practices and a platform to discuss and improve the application of UTP rules.