



Department of Business, Enterprise and  
Innovation  
Competition and Consumer Policy Section  
Earlsfort Centre  
Lower Hatch Street  
Dublin 2

25 May, 2018

*By Registered Post*

**Re: Draft EU Directive on Unfair Trading Practices in Business to Business Relationships in the Food Supply Chain (COM (2018) 173 Final — 2018/0082 (COD)) (the 'Draft Directive')**

Dear Mr Grace,

We refer to your letter dated 25<sup>th</sup> April 2018 seeking our views in relation to the above.

We note the commentary in the explanatory memorandum of the Draft Directive relating to membership of the voluntary Supply Chain Initiative and would like to highlight that Lidl Ireland GmbH ('Lidl') has been a member of this initiative since 2014. Furthermore we have supported the introduction of measures introduced in recent years to give further support to the supply chain, such as the introduction of the Consumer Protection Act 2007 (Grocery Goods Undertakings) Regulations 2016, in April 2016.

In this regard, it is evident that we do not have any issue with the content and the spirit of the Draft Directive, however having reviewed the proposed wording, a number of points arise which we would ask for further consideration or clarification thereon. Our comments are listed numerically hereunder:

1. Although your letter, the explanatory memorandum, and the preliminary recitals make it clear that the Draft Directive is intended to apply to unfair trading practices towards suppliers who are small and medium-sized enterprises by a buyer who is not an enterprise of such a size, we would submit that the actual legislative text is unclear on this point. While it is true that Section 2 of Article 1 indicates that the Draft Directive applies to such situations, Article 2 then goes on to define "buyer" and "supplier" in addition to "small and medium-sized enterprise." The wording then adopted in Article 3, which is the primary section responsible for dictating what unfair trading practices will be, make no mention of "small and medium-sized enterprise" and instead use the more general terms "buyer" and "supplier" which

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are very widely defined in Article 2. As a result, Article 3 could be interpreted as being substantially wider in application—potentially applying to any buyer and / or any supplier and not just small and medium-sized enterprises, which per Article 1, the recitals and the explanatory memorandum is not the intention of the Draft Directive.

2. With respect to Article 2 of the Draft Directive, we would submit that further clarification is warranted in respect of the definitions of “buyer” and “supplier” in that it is unclear in what circumstances, for example, a group of buyers would fall into the scope of the Draft Directive and how this could be determined in circumstances of a multi-jurisdictional corporate structure.
3. Again with respect to Article 2, the definition of “food products” appears overly-broad in scope in that it is proposed to include not only products listed in Annex I to the Draft Directive, but also “products not listed in that Annex, but processed from those products for use as food.”
4. It is also submitted that the definition of “perishable food products,” as defined in Article 2 of the Draft Directive is too broad in scope for operational application. All food products ultimately become unfit for human consumption after varying amounts of time. The only food products that seem to be excluded from the relevant definition are those which have already undergone a process of preservation to extend the shelf-life (i.e. canned foods). Paradoxically, the definition appears to include frozen foods in the perishable category, which require sub-zero storage in order to “prevent them from becoming unfit,” but which would not be normally be regarded as “perishable” due to the fact that they may be kept for extended periods provided that cold chain is maintained. It is our submission that frozen foods should be excluded from this definition, however their apparent inclusion within the scope of the present definition is evidence that greater specificity is generally needed.
5. The categorisation in Article 3(1)(a) of a buyer’s payment to a seller as an unfair trading practice if same occurs later than 30 days after receipt of a supplier’s invoice or 30 days after the supply of perishable food products is operationally unworkable in practice. In this regard, the Draft Directive is overly simplistic in its approach and takes no account of real-world factors such as differences in quantities delivered, issues with quality, or issues with damaged stock. These matters must remain capable of being accounted for and a blanket requirement for payment to be issued within such a timeframe, regardless of operational realities, jeopardises processes which are designed to maintain premium quality for the ultimate consumer.

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7. The terms “short notice” as contained in Article 3(1)(b) should be defined as it is currently too vague and leaves a high degree of uncertainty in application. While this may be a fault remedied in national transposition, the Draft Directive should offer certainty on the issue, especially given the above shortcomings with the present definition of “perishable food products.”
8. The proposed characterisation of unilateral or retroactive changes to the terms of supply agreements as unfair trading practices per Article 3(1)(c) poses particular risk, especially in the area of quality standards. If issues became apparent with regard to the quality standards of a product over the course of a supply agreement, it may be necessary, and in the ultimate consumers’ interests, that such issues were rectified, which may be necessary to do so by way of unilateral change to a prior agreement.
9. It is submitted that the provisions of Article 3(2)(a) do not take into account issues of quality. In the event that issues with quality have become apparent, it should not be unlawful to return unsold food products to a supplier. While in all cases it is desirable to have a contract in place taking account of such circumstances, it would not be equitable to remove such a remedy for the provision of sub-par products. In addition, no timeframe is specified for when a product becomes “unsold” and the lack of a definition creates unnecessary ambiguity.
10. Article 5 of the Draft Directive fails to define “producer organisations” or “associations of producer organisations” and is unclear as to which organisations in the supply chain will be encompassed.
11. Article 6 of the Draft Directive provides that an enforcement authority may fine and publish decisions regarding infringements of Article 3, however given the requirements to confidentiality as set out in Article 5, our concern relates to principles of justice and the right to respond to complaints raised.

Lidl are committed to complying with best practice and all relevant legislation and promote adherence to this through our code of conduct, our dedicated anonymised whistleblowing channels and our comprehensive internal compliance programme which has been in effect for over five years. However, it is our view that the Draft Directive in its current form is vague and unclear regarding the abovementioned points and is therefore not conducive to ensure appropriate compliance of same.

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We trust that the above comments are beneficial in the consideration of the Draft Directive and we appreciate the opportunity to put forward our input.

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**Ashling Holden**  
Head of Legal  
Legal & Compliance Dept.

A handwritten signature in black ink, appearing to read "H. Murphy", is written over a horizontal line.

**Hugh Murphy**  
In-house Counsel  
Legal & Compliance Dept.

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