



The Irish Farmers' Association

Submission to Public Consultation on the Transposition of the *EU Directive on UTPs in the Food Supply Chain¹*

Introduction

The Irish Farmers' Association is the largest national representative organisation in the country, with over 72,000 members. We represent farmers in all sectors through our democratic structure of 29 County Executives and our ruling body the National Council, on which each county and each commodity is represented. IFA represents farmers with Government, agri-business and retailers. Through our Brussels office and affiliation with COPA²-COGECA³, we maintain a full-time presence at EU level on behalf of Irish farmers.

Retail Regulation

IFA has campaigned for many years both at home with Governments and in Europe, for a rebalancing of power in the food supply chain, to deliver a viable price for farmers, and a return on their work and investment.

IFA acknowledges the initiative by Phil Hogan EU Commissioner for Agriculture and Rural Development in prioritising the imbalance in the food supply chain and recognising the vulnerability of producers in it. Under his stewardship, the EU Directive on Unfair Trading Practices (UTPs) was adopted in April of this year, and Ireland as a Member State has now to transpose the Directive into Irish law by May of 2021.

In November 2016, the Agricultural Markets Task Force (AMTF) made recommendations on how to improve the position of farmers in the agri-food supply chain, including, that the European Commission:

- would take steps to introduce a harmonised baseline of prohibited UTPs in Member States. This aims to reduce the occurrence of UTPs in the food chain by introducing a minimum common standard of protection across Member States;
- would foresee effective enforcement of UTPs, by an independent public body, to be set up by Member States; and
- would further increase market transparency of processors and retailers' prices especially in the meat, dairy, fruit and vegetable sectors by collecting and reporting such data in the chain.

¹ Directive of the European Parliament and the Council, COM(2018)173, on unfair trading practices in business-to-business relationships in the food supply chain

² European Farmers' Organisation

³ European Agri-cooperatives' Organisation

The 2017 CAP Consultation⁴ showed that 97% of EU consumers are in favour of the farmer getting a better share of the retail price.

To quantify the economic impact of UTPs in the agri-food sector, COPA and COGECA commissioned an independent study⁵ which showed that 94% of farmers and 95% of agri-cooperatives had been exposed at least once to UTPs. But the most striking finding of this study is that UTPs have cost farmers and agri-cooperatives €10.9 bn annually in the EU.

In recent years, we have had an intensive lobby campaign to curb this activity, targeting members of the European Parliament, the College of Commissioners and a number of Directorate Generals in Brussels, primarily Agriculture and Competition.

Dominance of Power in the Retail Sector

Across Member States, there is recurring evidence of large retailers dominating the market with excessive buying power and dictating price levels back to farmers, often driving prices to uneconomic levels and even below the cost of production.

For example,

- In Ireland, the three biggest retailers - Tesco, Supervalu / Centra and Dunnes control over 70%⁶ market share, while five retailers, adding Aldi and Lidl, bringing this to over 94%.
- and in Finland two retailers control 85% market share, and
- in France, the top three retailers have 56% market share, with the top five holding 79%.

IFA's message has been clear, we need unequivocal and immediate action to curb UTPs at EU level and to this end we welcome the Commission's publication of this EU Directive, whose approach is to target the problem of under-protection against UTPs.

Grocery Goods Regulations

In 2016, the Government introduced the Grocery Goods Regulations⁷ which provide for the control of certain UTPs between large supermarkets and wholesalers and their direct suppliers of food and drink products in the grocery goods sector in Ireland. It is the remit of the Competition and Consumer protection Commission (CCPC), to enforce these Regulations.

Specifically, the Irish regulations relate to the direct business relationship between suppliers, and wholesalers and retailers of food and drink operating in the country, who have, a worldwide turnover in excess of €50m.

As IFA understands it, the EU Directive, is not compatible with the Irish Grocery Goods Regulations 2016, primarily because of the scope of the EU legislation and in all likelihood, these regulations would be repealed on transposition of the Directive.

Scope of EU Directive

The scope of the EU Directive will apply to certain UTPs which occur in relation to the sales of food products by a supplier, based on different turnover figures. This is welcome as it aims to address the different bargaining powers of suppliers and buyers. It has always been IFA's position that the EU Directive would apply to the full food supply chain.

The Directive;

⁴ Modernising and Simplifying the CAP - European Commission DG AGRI 2017

⁵ Impact of Unfair Trading Practices in the European agri-food sector - 2013

⁶ Kantar Worldpanel Grocery Market Share - 12 weeks ending 3 November 2019

⁷ S.I. No. 35/2016 - Consumer Protection Act 2017 (Grocery Goods Undertakings) Regulations 2016

- Aims to reduce the occurrence of UTPs in the chain by introducing a minimum common standard of protection across the EU, that consists of a short list of specific prohibited UTPs and leaves Member States room to keep or provide for further-reaching measures.
- Sets down provisions targeting minimum enforcement requirements applying to national competent authorities.
- Sets down a coordination mechanism between enforcement authorities facilitated by the Commission, to enable the exchange of data concerning the number and type of infringement investigations carried out and of best practices with a view to improving the effectiveness of enforcement.
- Supports the subsidiarity route, to complement existing arrangements in Member States, who now have to transpose the UTP rules into national law. 20 Member States, including Ireland, already have some legislation in this area.
- Applies to supplying agricultural and food products to public authorities i.e. public procurement.

The Directive prohibits the following “black” UTPs:

1. Payments later than 30 days for *perishable* agricultural and food products
2. Payment later than 60 days for other agri-food products
3. Short-notice cancellations of perishable agri-food products
4. Unilateral contract changes by the buyer
5. Money not related to a specific transaction
6. Risk of loss and deterioration transferred to the supplier
7. Refusal of a written confirmation of a supply agreement by the buyer, despite request of the supplier
8. Misuse of trade secrets by the buyer
9. Commercial retaliation by the buyer
10. Transferring the costs of examining customer complaints to the supplier

The above “black” list of UTPs are prohibited at all times including whether or not there is a written contract / supply agreement. IFA supports the above list of “black” UTPs, which must be included in the transposition of the EU Directive into Irish law.

The Directive prohibits the following “grey” UTPs:

11. The buyer returns unsold products to the supplier without paying for those unsold products
12. Payment by the supplier for stocking, display and listing
13. Payment by the supplier for promotion
14. Payment by the supplier for marketing
15. Payment by the supplier for advertising
16. Payment by the supplier for staff of the buyer, fitting out premises

The above “grey” list of UTPs are prohibited unless they are agreed in a contract / supply contract.

IFA believes there are times when some of these UTPs are imposed on farmers by retailers / wholesalers and consequently cost them money. Farmers have not always agreed to participate / enter into a contract that provides for these, but are left with no choice if they want the retailer to buy their product.

Enforcement Authority

The EU Directive provides for the designation of an enforcement authority which IFA welcomes. This can be an existing or a new authority. IFA’s experience is that an Independent Retail Regulator with a specific remit is required, similar to the UK Grocery Code Adjudicator⁸.

⁸ <https://www.gov.uk/government/organisations/groceries-code-adjudicator>

Here in Ireland, this function is currently being subsumed in the Competition and Consumer Protection Commission (CCPC), where its effectiveness is lost.

The purpose of the 2016 Grocery Goods Regulations was to rebalance relationships in the food supply chain and to prohibit UTPs. Yet, most farmers either supplying the retailers directly or indirectly through a wholesaler, have no contracts. This is a blatant breach of these Regulations and the CCPC has been invisible in the policing and enforcing of them.

When it comes to dealing with UTPs, the single biggest issue for farmers selling produce into the food supply chain, is that they have no confidence in the CCPC to enforce the Grocery Goods Regulations 2016.

In October 2018, CCPC Chair Isolde Goggin told a hearing of the Joint Oireachtas Committee on Agriculture, Food and the Marine⁹ “that a dedicated and focused sectoral regulator should be established” to carry out the work of the new EU Directive given its aim and scope.

These sentiments were repeated by the CCPC at a meeting of the Joint Oireachtas Committee on Business, Enterprise and Innovation¹⁰ in October 2019.

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.

Discretionary elements of the Directive

As provided for in the EU Directive, Member States can choose to go beyond the scope of the Directive.

IFA calls on the Government to legislate to tackle other areas of unfairness by retailers, including:

- unsustainable discounting / below-cost selling by retailers, and
- annual tendering by retailers

Market Transparency & Price Reporting

On October 1 2019, the EU Commission published a regulation¹¹ which addresses market transparency and provides for mandatory price reporting by Member States.

IFA has long called for greater market transparency at all levels in the food chain, so that margins and profitability of processors and retailers are clearly visible. This move by the Commission is welcomed and must be implemented in Member States.

IFA proposes that the role of a food sector Regulator, appointed under the EU Directive on UTPs could be expanded to provide the European Commission with the mandatory price reporting required to comply with the transparency legislation.

13th December 2019

⁹ https://www.oireachtas.ie/en/debates/debate/joint_committee_on_agriculture_food_and_the_marine/2018-10-16/4/

¹⁰ https://www.oireachtas.ie/en/debates/debate/joint_committee_on_business_enterprise_and_innovation/2019-10-01/3/

¹¹ Commission Implementing Regulation (EU) 2019/1746 of 1 October 2019 amending Implementing Regulation (EU) 2017/1185 laying down rules for the application of Regulations (EU) No 1307/2013 and (EU) No 1308/2013 of the European Parliament and of the Council as regards notifications to the Commission of information and documents