

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

1 June 2018

Dear Sirs

EU Directive on UTPs in the Food Supply Chain

Matheson welcomes the opportunity to comment on the new draft EU Directive intended to deal with unfair trading practices, as published by the EU Commission on 12 April 2018 (the “**Draft Directive**”).

Matheson is responding in the context of its considerable experience of advising on the Regulations and unfair trading concerns in general. We have focused on the differences between the Draft Directive and the Regulations and how the Draft Directive defines unfair trading practices more narrowly in general.

Following enactment of the Draft Directive, it will need to be incorporated into Irish law and the key question is what this should mean for the future of the existing Consumer Protection Act 2007 (Grocery Goods Undertakings) Regulations 2016 (the “**Regulations**”).

The importance of having a regulatory framework that is simple and coherent, and reflects international best practice cannot be over-emphasised. Two pieces of Irish legislation have already been enacted in this area (the Regulations and the Competition (Amendment) Act 2006) and having multiple legislative sources can create confusion and difficulties for regulated entities, those who are intended to be protected by regulation and the regulator alike. Therefore, our overarching observation would be that the incorporation process will present a valuable opportunity for Ireland to create a single legislative source for Groceries rules and to re-examine the necessity of the elements of the Regulations which go beyond the requirements of EU law / the Draft Directive.¹ Particularly close consideration should be given to the benefits of harmonising the basic scope of regulation under Irish law to mirror EU law.

Our more detailed comments are outlined under subject-matter headings below.

1. We note that certain rules in the Draft Directive are new / not covered by the Regulations (eg, short notice cancellation and return of unsold food products) and we have not focused on those provisions.

Interaction Between the Draft Directive and the Regulations: Some Comments

1. Scope of Regulation

(a) Regulated contracts

It is important that the Irish law regime makes absolutely clear what contracts are regulated. We note that the Regulations make clear that they apply to rolling contracts renewed after the date when the Regulations became effective, while the Draft Directive is silent in relation to rolling contracts. It will be important for the Draft Directive to be incorporated into Irish law in a manner which ensures clarity as well as consistency with any EU Commission or court guidance which may clarify what the wording in the Draft Directive means for rolling contracts.

(b) Regulated entities

- (i) The Regulations impose obligations on relevant grocery goods undertakings (“**RGGUs**”)² in respect of their relationships with suppliers, regardless of the supplier’s size / bargaining power and notwithstanding that many suppliers are large multinational entities.

The Draft Directive on the other hand only applies to SME suppliers.³

The decision to limit the protections in the Draft Directive to SMEs arose out of the [findings](#) of the [Agricultural Markets Task Force](#), an expert group set up by the Commission in 2016; the Supply Chain Initiative’s [Principles of Good Practice](#) and the feedback the Commission received in response to various stakeholder consultations. The Commission recognises that larger suppliers (including multinationals) are likely to have significant bargaining power vis a vis both retailers and smaller suppliers on whom they themselves rely.

As set out in the accompanying explanatory memorandum (Brussels, 12.4.2018, COM(2018) 173 final, 2018/0082(COD) “*Smaller operators in the food supply chain are more prone to face unfair trading practices (UTPs) due to their, in general, weak bargaining power in comparison to the large operators in the chain*”. The Commission further states “*A targeted protection of small and medium suppliers in the food supply chain is justified because they are often the ones who cannot defend themselves against UTPs due to their lack of bargaining power. There also is a risk of negative unintended consequences concerning measures affecting the contractual relationships between larger operators. Therefore, even though in the impact assessment UTPs are defined in terms of absolute fairness considerations, a targeted protection is more proportionate at this stage. By the same token, the rules are to apply to non-small and medium-sized buyers in the food supply chain, those being the ones who may be able to use their bargaining power against smaller operators in a way that enables the use of UTPs.*”

It is notable that the Commission considered and then dismissed the possibility of including non-SMEs in the Draft Directive but elected not to do so (in part because of the ‘negative unintended consequences’ of doing so, with regard to non-SME and retailer relationships).

2. That is, any retailer or wholesaler who, either alone or as part of a group, have an annual worldwide turnover in excess of €50 million.

3. At page 9 of the Directive Proposal: “*A targeted protection of small and medium suppliers in the food supply chain is justified because they are often the ones who cannot defend themselves against UTPs due to their lack of bargaining power. There also is a risk of negative unintended consequences concerning measures affecting the contractual relationships between larger operators.*”

It is also noteworthy that the fifth recital in the Draft Directive states “*The relevant rules should apply to business conduct by larger, that is to say non-small and medium-sized, operators in the food supply chain as they are the ones who normally possess stronger relative bargaining power when trading with small and medium-sized suppliers.*” Specifically, the rules should bind, not protect, non-SME suppliers.

In light of this it is appropriate to reconsider whether the Regulations should continue to accord rights to large / non-SME suppliers.

2. Written contracts

The Draft Directive does not require terms to be agreed in writing and so it is appropriate to reconsider whether the additional requirements imposed by the Regulations are necessary (ie, terms recorded in writing, copy of contract signed and retained by both supplier and RGGU). By not requiring that all terms are recorded in writing, the Draft Directive appears to acknowledge that flexibility is sometimes needed and acceptable to both buyers and suppliers.

3. Justification for estimates

The Draft Directive requires estimates to be provided on request along with the basis for such estimates. In light of this, it is appropriate to reconsider the necessity and effectiveness of the more detailed requirement under the Regulations for estimates to be ‘objective and reasonable’.

4. Payment

The Draft Directive regulates against late payments in respect of perishable food products, while the Regulations go further in prohibiting late payments in respect of all grocery goods supplies. In light of this, it is appropriate to reconsider the wider scope of Irish regulation.

5. Unilateral and retrospective changes

The Draft Directive prohibits unilateral and retrospective changes to key contractual terms⁴ and provides that the parties may not agree otherwise by contract.⁵ This absolute prohibition offers significant protection to suppliers. In light of this, it is appropriate to reconsider whether it is necessary to maintain the prohibition in the Regulations on unilateral and retrospective changes to all contractual terms.

6. Wastage

The Draft Directive allows the buyer to seek payment for wastage of food products where caused by negligence or fault of the supplier. In light of this, it is appropriate to reconsider the provision in the Regulations which only permits supplier payments for wastage where expressly provided for in contract.

7. Charges for stocking, displaying or listing

4. Concerning the frequency, timing or volume of the supply, quality standards or pricing.

5. Page 9 of the Directive Proposal – “*The definition of certain UTPs in this proposal therefore accommodates contractual arrangement between parties **unless** they cannot reasonably be seen as creating efficiencies, for instance if they give vague and unspecified powers to the stronger party to unilaterally decide on such practices at a point in time after the transaction has started or because some practices are by their nature unfair.*”

The Draft Directive prohibits payment for stocking etc. unless agreed to in clear and unambiguous terms at the conclusion of the supply agreement, whereas the Regulations go further in only allowing a buyer to seek such payment in respect of “new” goods.⁶ The different approach taken by the Regulations should be reconsidered in light of the Draft Directive.

8. Payment for promotion

The Draft Directive prohibits payment for promotion activities unless agreed to in clear and unambiguous terms at the conclusion of the supply agreement. If the buyer initiates a promotion it must first specify the duration and expected quantity of affected supplies. The reference to “expected” quantity appears to acknowledge that this may change. The equivalent rule in the Regulations does not contemplate change in the aforementioned way and this position should be reconsidered in light of the Draft Directive.

9. Reporting obligations

As the Draft Directive requires Member States to send the European Commission an annual report, it may be efficient for the required content of reports by RGGUs under Irish law to be re-examined so that it mirrors what the European Commission requires of Ireland. This will allow for Ireland to comply with its obligations more easily and for RGGUs to bear a compliance burden which is proportionate and in line with the reporting regime at EU level.

We hope that the above is clear and helpful.

MATHESON

6. That is, goods which have not been stocked (etc) in an individual store in the previous year, or in respect of grocery goods which have not been stocked (etc) in at least 25% of a buyer's multiple stores in the previous year.