

Joint Committee on Agriculture, Food & the Marine Competition and Consumer Protection Commission (CCPC)

Opening Statement by Isolde Goggin

I would like to thank the Committee for the opportunity to speak to you today about the proposed Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain. I am joined by Fergal O’Leary, Member of the Commission, and Seán Murphy, Director of Consumer Protection and Chief Legal Advisor.

I plan to focus in particular on two areas in my opening statement: the content of the proposed Directive and the designation of an enforcement authority.

The CCPC was established in 2014 to enforce competition and consumer protection legislation across the economy. Our vision is for open markets, where consumers are protected and businesses actively compete. Each year we help over 40,000 consumers via our helpline and over 1.7 million via our website. We are currently active in the following areas across the economy: motor insurance, household waste collection, mortgages, nursing homes, PCP car finance, vehicle crime, bid-rigging in the public transport sector and ticketing to name but a few. I think you will agree that these are all areas which are of importance to consumers. We also have ongoing work across the economy in fulfilling our mergers and product safety remit.

Over the years, the CCPC and its predecessor organisations (the Competition Authority and the National Consumer Agency) have been active in the food sector, in the enforcement of competition and consumer protection law, the publication of grocery surveys, product pricing inspections, in assessing a number of mergers and in the fulfilment of one of our most recent areas of responsibility; the Grocery Goods Regulations, which I will speak about in more detail shortly.

We understand that the European Commission’s proposed Directive seeks to address imbalances of power in the food supply chain and its goal, as part of number of current initiatives, is ultimately, (*as per Recital 7*); “to contribute to ensuring a fair standard of living for agricultural producers”. This goal has relevance for all of us as consumers and as citizens. We also note that the proposed Directive is based in Article 43 of the Treaty.

It is within the context of our work in this sector, particularly our work with the Grocery Goods Regulations and the experience it has afforded us to date, that we would like to share our views which we hope will be of assistance to the Committee in its deliberations.

Current Grocery Goods Regulations

As the Committee may be aware, while the CCPC's mandate is economy wide, we do have one sector specific remit, which is in relation to grocery goods. These Regulations were introduced in 2016, to address certain practices in the grocery goods sector with the goal of bringing transparency and certainty into trade relationships (*see details below for background*). It is important to highlight that price or price levels are not within the scope of the current Regulations. When introducing the Regulations the Minister, stated that "relationships will continue to be based on commerce and prices will continue to be set by hard negotiations – this is in the interests of consumers." The focus of the Regulations is on the relationship between suppliers of food and drink and grocery businesses, both wholesalers and retailers, which have a worldwide turnover in excess of €50 million.

To date, 22 grocery undertakings are within the scope of the Regulations. These 22 traders are required to have a written contract for all relevant suppliers, in which the terms and conditions must be expressed in clear, understandable language and signed by both parties. Contracts must be retained for 6 years. If certain practices are to apply, they must be pre-agreed and in the written contract. We have found through our work to date that the contracting models used by traders are different with varying complexity. We would be happy to discuss this aspect in more detail later but I won't dwell on it further here.

Since their introduction the CCPC has adopted a phased approach by firstly promoting awareness of the new requirements under the Regulations and allowing the traders involved to bring their practices into compliance where necessary. Following an assessment of annual compliance reports received from 22 operators earlier this year, officers from our Consumer Protection Division have been conducting on-site inspections and meetings with relevant industry players.

Given our experience to date we can see substantial differences between the existing Regulations and the proposed Directive. Of particular significance is the aim of the Directive, which is to "ensure a fair standard of living". This is a significant departure from the aim of the current Regulations. Also of equal relevance is the proposed scope; the Commission's model would apply throughout the supply chain and to buyers not currently covered by the existing Regulations, including those within the food processing and food service sector (*I will come back to this point below*).

Although the CCPC is currently the enforcement body for the existing Regulations, given the aim and scope of the proposed Directive, we believe that a dedicated and focused sectoral regulator should be established to carry out this work. The reasons for this are primarily concerned with our dual mandate, to promote competition and protect the interests and welfare of consumers. In addition, our existing and future operational commitments in enforcing competition and consumer protection measures at a national and international level are significant challenges in themselves. The CCPC would have grave concerns that our ability to fulfil our current mandate would be irrevocably diminished if we were given this task. The proposal is extensive and will require considerable resource

investment. To give full effect to what is proposed would in our opinion be better secured by the creation of a sectoral regulator.

Implications of the Proposed Directive

Specifically with regard to the proposals in more detail: we welcome the Committee's scrutiny of the proposed Directive and we would like to highlight some concerns from the perspective of our statutory mandate. The aim of the proposed Directive "is to address unfair trading practices in the food supply chain". We are concerned about the impact of the current proposals on consumers and also what might be added at an EU or Irish level.

We note the proposed Directive is a minimum harmonisation instrument, meaning that Member States can go further if they believe it is necessary. In this regard, we are aware that further additions to the proposed Directive are being advocated. These include further broadening of the scope to include more traders as well as a ban on below cost selling. Competition law works in the interest of consumers by requiring that businesses act independently and compete with each other when setting prices. That is why we, and our previous organisations, have spoken strongly against the introduction of bans on below cost selling. Any legislative requirements relating to pricing or pricing models may provide an incentive for businesses to co-ordinate prices.

Overall we believe that consumers could end up paying more for food for two reasons, 1) because some grocery markets could become less competitive and 2) that the not insignificant cost of this proposed Directive will inevitably be passed onto consumers.

Enforcement

Effective enforcement is essential in ensuring that any regulations have the intended outcomes and that the costs incurred deliver benefits for those who are paying. I would like to take this last couple of minutes to talk through some of our enforcement experience, which again I hope will benefit the Committee.

An ongoing matter of debate and commentary in this sector is the lack of actionable complaints. Complaints are an essential source of information and intelligence for any organisation involved in enforcement. We know that, understandably, complainants live with the real fear of repercussions if they make a complaint and allowing anonymous complaints can help with this. However, the ability to determine that the law has been broken or take enforcement action based on an anonymous complaint is challenging in terms of implementation, particularly in relation to levying fines. This is an issue that will have to be overcome for the proposals to have a real impact.

Another area of note in the proposed Directive is the issue of fines. Ireland is an outlier with the rest of Europe's regulatory bodies in that our constitution raises issues around the administration of fines by bodies other than the courts. In our current work we have found this to be a particular difficulty. We share the view that financial sanctions are essential as a deterrent but the issue of administrative fines is one that needs to be considered and overcome.

I have come this far in my remarks without mentioning Brexit but I must do so before I conclude. It is clear that uncertainty is the main issue at present for Irish food producers selling into the UK or to UK retailers who operate here. We do not know what will happen in weeks or months' time but we would urge the Committee to ensure that the Irish food industry is not put at a disadvantage to their UK counterparts, who will most likely not be the subject of the proposed directive. Competitive balance could be a significant issue in the future. This is an area that we would also be happy to discuss further.

Conclusion

Chairman, Committee Members, if I may sum up: what has become apparent from our work to date in the sector is that the relationships, contracts and issues experienced by those involved in the food chain are complex and evolving. I hope I have usefully highlighted to the Committee that the proposals present some significant practical challenges in terms of oversight and enforceability.

We recognise the importance of a sustainable agri-food industry but it is our considered view that given the complexity, scope and goal of the proposals that the role of competent authority for the proposed Directive should be given to a sector specific regulator, whose sole remit and focus would be overseeing this market and working with farmers, producer groups, wholesalers, retailers and other players to ensure that their competing interest can be fairly balanced.

We are happy to take any questions and explain further our views in more detail.

Grocery Goods Regulations Background

What are the Grocery Goods Regulations?

On 30 April 2016, the Consumer Protection Act 2007 (Grocery Goods Undertakings) Regulations 2016, known as the Grocery Goods Regulations took effect placing obligations on grocery businesses.

What is the purpose of the Grocery Goods Regulations?

The Minister for Jobs, Enterprise and Innovation introduced the Regulations to bring more predictability and certainty into the trade relationships between suppliers of food and drink and grocery businesses operating in Ireland. The Regulations follow a commitment made in the Programme for Government 2011-2016 to deal with a number of unfair trading practices.

Who do the Grocery Goods Regulations apply to?

The Regulations apply to “Relevant Grocery Goods Undertakings” (“RGGUs”) i.e. retailers and wholesalers of food and drink operating in Ireland who have, or are part of a group of related companies that has, a worldwide turnover in excess of €50 million.

What do the Grocery Goods Regulations mean?

From 30 April 2016, all contracts entered into or renewed between RGGUs and suppliers of food and drink must be in writing and expressed in clear, understandable language. Contracts entered into prior to this date are not covered by the Regulations until such time as they are renewed, if that is the case. The Regulations specifically relate to the direct business relationship between a supplier and a RGGU, which can be either a wholesaler or a retailer. However, the wholesaler – retailer relationship is not within the remit of the Regulations.