

**CCPC Response to the Public Consultation on
the functions to be assigned to a new office
(National Food Ombudsman / Regulator or
Equivalent Office)**

Department of Agriculture, Food and the Marine

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Coimisiún um
Iomaíocht agus
Cosaint Tomhaltóirí

Competition and
Consumer Protection
Commission

Introduction

The Competition and Consumer Protection Commission (CCPC) welcomes the opportunity to respond to the Department of Agriculture, Food and the Marine (DAFM)'s public consultation on the functions to be assigned to a new office of the National Food Ombudsman/Regulator or Equivalent Office ('the new Office').

The CCPC notes that the supply chain in the agriculture and food sector is often characterised by uneven bargaining and negotiating power between primary producers on the one hand and distributors and retailers on the other. Farmers in particular can be limited in their ability to negotiate prices and other conditions for the supply of their products. The Unfair Trading Practices (UTP) Directive is part of a suite of EU rules and regulations which aim to improve the bargaining position of farmers and agricultural producers in the food chain.

The CCPC welcomes the establishment of a new Office in part dedicated to the enforcement of the UTP Directive, which will be a key asset in achieving the aims of the Directive. Based on its experience ensuring compliance with the Grocery Goods Undertakings Regulations 2016 ('the Grocery Goods Regulations'¹), the CCPC will provide its views concerning the functions and powers which may be assigned to the new Office in the proposed legislation. The CCPC will also provide an overview of the areas of overlap between the Grocery Goods Regulations and the UTP Directive. Finally, the CCPC will provide its views regarding the possible introduction of a ban on below cost selling which has been recommended by several interested parties.

In summary, the CCPC makes three main recommendations in this submission:

- The CCPC recommends that the new Office be assigned a number of functions to include the enforcement of the UTP Directive, the facilitation of alternative dispute resolution, and a range of market monitoring functions.
- The CCPC recommends that new Office should be assigned full responsibility for legislation relating to UTPs and the Grocery Goods Regulations with any overlaps

¹ S.I. No. 35/2016 - Consumer Protection Act 2007 (Grocery Goods Undertakings) Regulations 2016.

and inconsistencies between the UTP Directive and the Grocery Goods Regulations resolved and the functions of the CCPC revoked.

- The CCPC is not in favour of the introduction of a ban on below-cost selling as a distinct UTP in Ireland.

Role and remit of the National Food Ombudsman/Regulator or Equivalent Office

The CCPC offers its views on the potential role and remit of the new Office based on its experience of monitoring and supervising the obligations on Relevant Grocery Goods Undertakings as provided for by the Grocery Goods Regulations. Under the primary legislation to be brought forward, the new Office will be the designated enforcement authority for the purposes of the UTP Directive and will also have a role in analysing and reporting on price and market data in Ireland.

Having effective enabling provisions contained within the implementing legislation will be key to the operation of the new Office. To that end, the new Office should be able to take a broad, cross-market view including for the gathering of data necessary for reporting on price formation mechanisms along the food supply chain². This would enable the new Office to track market trends as they develop and to gain an in-depth understanding of market dynamics over time. It would also complement the enforcement role of the new Office by providing it with up-to-date information on the market. Other EU Member States have introduced initiatives for both pricing and market monitoring such as the Spanish Food Information and Control Agency³. The primary tasks of the Spanish agency include:

- the analysis of the price structure in the food chain and relevant influencing factors;
- the initiation of studies to explain the imbalance of power in the market;
- the promotion of dialogue and cooperation along the chain as well as the development of policy proposals and recommendations.

² As set out in Commission Implementing Regulation (EU) 2019/1746 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019R1746>

³ See European Commission Joint Research Centre Technical Report on *Monitoring of Prices and Margins in EU Food Supply Chains* (2019).

It has been reported internationally that the studies by the observatory have to a significant extent contributed towards the establishment of trust between actors in the chain⁴.

The CCPC believes that the new Office should be empowered to address both hard-core UTPs through enforcement activity, as well as providing the means for dealing with UTPs that are amenable to alternative dispute resolution (ADR), as provided for in Article 7 of the UTP Directive. In order to enable effective enforcement activity, the new Office should provide information and education for the entire agri-food sector.

Complaints are an important source of information and intelligence for any enforcement body. Engagement with farmers and primary producers as well as buyers will be a key enabler if relationships are to be built and to facilitate effective communication channels where issues of concern, including complaints can be brought to the attention of the new Office. It would also allow market participants to be aware of their obligations under the UTP Directive. The CCPC is cognisant that a lack of actionable complaints can be an ongoing issue for effective enforcement. The CCPC is aware that, understandably, complainants can have a fear of repercussions if they make a complaint. Therefore, it will be important for the new Office to be seen as wholly impartial in order for the UTP Directive to have the desired impact. The new Office must comply with the confidentiality requirements set out in Regulation 8(3)(a) of the European Union (Unfair Trading Practices in the agricultural and food supply chain) Regulations 2021. In the United Kingdom, the Groceries Code Adjudicator (GCA) has established a confidential reporting platform for reporting breaches of the Groceries Supply Code of Practice. Robust data security systems will also be necessary and as part of that, an exemption from Freedom of Information/data access requests that would disclose the identity of a complainant should be introduced.

By empowering the new Office to take a broad sector-wide view, it can identify issues arising in the agri-food sector, including any presence of systemic UTPs with wider impacts throughout the supply chain. Over time, the new Office could propose measures to

⁴ Oosterkamp, Logatcheva, van Galen and Georgiev (2012) *Food price monitoring and observatories: an exploration of costs and effects; Summary and Executive Summary*
<https://research.wur.nl/en/publications/food-price-monitoring-and-observatories-an-exploration-of-costs-a>

address issues arising in the supply chain in the form of recommendations or policy proposals.

Additional functions for the new Office could include providing information on commercial and economic developments for the sector and overseeing the implementation of new legislation relating to the agri-food sector. For example, ensuring compliance with the Regulation⁵ on market transparency could be a function of the new Office. It could also play a role in the provision of information within the supply chain with a view to supplying farmers and Producer Organisations with accurate and timely market data. It is important that the new Office has the capacity to provide guidance on sector wide issues and trends, which could be of particular benefit for suppliers. The new Office should be explicitly empowered and required to co-operate with other bodies and engage with suppliers and buyers as well as other relevant stakeholders where this will assist in meeting common objectives.

The suggestions for the role and remit of the new Office set out above would be broader than that of an Ombudsman. As such it would be important that the name for the new Office reflects a wider remit.

The UTP Directive and the Grocery Goods Regulations

The CCPC is the organisation currently responsible⁶ for the enforcement of the Grocery Goods Regulations, which were introduced in 2016 and that set out rules around the relationship between suppliers of food and drink and grocery businesses, wholesalers and retailers, which have a worldwide turnover in excess of €50 million. The rules aim to bring transparency and certainty into trade relationships in the sector.

The sectors covered by the UTP Directive and the Grocery Goods Regulations are similar, and some of the measures contained in both can sometimes overlap or are inconsistent with each other. However, the scope of the UTP Directive is much wider than that of the current Regulations in that it covers certain unfair trading practices which occur in relation to sales of agricultural and food products across all agri-food sectors as well as

⁵ 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

⁶ The CCPC's role and responsibility in the grocery sector stems from Chapter 5 of the Consumer Protection Act 2007 which was inserted through Part 6 of the Competition and Consumer Protection Act 2014

intermediate products, and encompasses the entirety of the food supply chain from primary producers to processors and retailers. The UTP Directive's measures also applies to sales where either supplier or the buyer, or both, are established in the Union while the Grocery Goods Regulations only apply to parties established in Ireland.

Although the scope of both instruments are different, they overlap in certain places, particularly around the unconditionally and conditionally prohibited practices (i.e. the so-called 'Black list' and 'Grey list' of UTPs) as set out in the UTP Directive. Further detail relating to inconsistencies between the requirements of the UTP Directive and the Grocery Goods Regulations can be found in Appendix 1 below.

As noted, the UTP Directive and the Grocery Goods Regulations overlap in many areas, but also vary in certain aspects. As the Grocery Goods Regulations do not apply as broadly to undertakings and suppliers as the UTP Directive, many such businesses may still be required to comply with both instruments in Ireland. To ensure a cohesive application of the UTP Directive and to avoid any unnecessary obstacles to its full and effective implementation, the CCPC recommends that new Office should be assigned full responsibility for legislation relating to UTPs and the Grocery Goods Regulations with any overlaps and inconsistencies between the UTP Directive and the Grocery Goods Regulations resolved and the functions of the CCPC revoked.

From the CCPC's experience gained through direct engagement with the largest traders in the state, the regulatory challenges in implementing the UTP Directive should not be underestimated. The CCPC expects that the enforcement of the UTP Directive will be challenging and will require a complex regulatory model. The CCPC has successfully monitored and supervised traders' compliance with the Grocery Goods Regulations. This however has not been without its challenges. Such challenges include gaining an appreciation and understanding of the various sourcing, procurement and supplier relationship processes that are in place for traders who are subject to the Grocery Goods Regulations. In addition traders are likely to use different systems to administer transactional activity related to their various procurement activities. Therefore, it should be acknowledged that to effectively monitor, supervise and enforce the UTP Directive an adaptive regulatory model is needed. Furthermore, the complexity and scope of the Directive will also add to the difficulty in bringing about compliance. This will be exacerbated by differences in compliance experience, resourcing and trading models

along the supply chain. The very large number of relevant entities is also very significant. If stricter rules were to be implemented this would add further complexity to the regulatory model and this should be carefully considered.

Going beyond the UTP Directive – ‘below-cost selling’

Some stakeholders in the agricultural sector have called for a ban on ‘below-cost selling’ to be introduced as part of the legislation transposing the UTP Directive. Farmer representative bodies and others argue that the practice of selling produce below cost by retailers lead to negative impacts for the agricultural market and to the reduction of the number of producers of certain products, loss of competitiveness compared to imported produce, drops in prices and income for farmers, and a strong contribution to food waste⁷.

The CCPC maintains the view that it is important for consumers that businesses act independently and compete with each other when setting prices. Studies have found that similar laws banning below-cost selling often fail to safeguard the parties they aim to protect from declining market shares and often lead to higher prices for consumers⁸.

This was the case for the Restrictive Practices (Groceries) Order, 1987 (the Order) in Ireland, which prohibited the selling of about 50 retail products below net invoice price⁹. The Order had the effect that a supplier determined the minimum retail price for the product by the very act of putting a price on an invoice. The immediate impact of the 1987 Order was to subject the industry to a vertical restraint that allowed manufacturers and suppliers to determine minimum resale prices¹⁰ and thus restrict price competition. Retailers had to rely more heavily on other forms of expenditure such as loyalty schemes, advertising, or improving the store environment, as a means of attracting customers, which is more difficult to do when entering the market or as a small independent grocer¹¹. Market concentration in the sector was further exacerbated by the fact that large retail groups operated a delivery wholesale service and therefore supplied to retailers outside

⁷ <https://www.agriland.ie/farming-news/5-ways-cost-selling-impacts-badly-vegetable-producers/>

⁸ <https://www.oecd.org/daf/competition/abuse/36162664.pdf>

⁹ <https://www.enterprise.gov.ie/en/Publications/Publication-files/Chapter-Fifteen-Summary-of-Conclusions-and-Recommendations.pdf>

¹⁰ Minimum resale pricing is a form of resale price maintenance, a practice whereby a manufacturer and its distributors agree that the distributors will sell the manufacturer's product at certain prices (resale price maintenance), at or above a price floor (minimum resale price maintenance) or at or below a price ceiling (maximum resale price maintenance). Resale price maintenance is illegal under the provision of Article 4 of the Competition Act 2002.

¹¹ G, Donnelly (2006) *The Impact Of The Restrictive Practices (Groceries) Order On Competition In The Irish Grocery Trade* - Journal of the Statistical and Social Inquiry Society of Ireland Vol. XXXV

their group, such as independent retailers. This meant that large retail groups could dictate the minimum retail price for the products being supplied thus making it very difficult for a truly independent store owner to compete aggressively with a store within their supplier's retail group. Additionally, the fact that prices were fixed by the supplier also meant that store owners were not free to cater and adapt prices to local market conditions, which amounted to severe restriction on the freedom of individual storeowners to trade. Consequently, the direct result of the Order on the sector was to cause market concentration and reduce competition, and it contributed to higher rates of food price inflation. Furthermore, the Order failed to achieve its aims of creating a fair trading environment or protecting vulnerable suppliers, manufacturers and producers from the buying power of the largest retailers¹². Therefore, many stakeholders such as trade representatives, consumer associations, as well as the Competition Authority (the predecessor of the CCPC) and many more, advocated against the Order for many years. It was finally repealed in its entirety in March 2006. Reports published by the Competition Authority in 2008 showed that the repeal resulted in prices falling for the goods previously covered by the Order¹³.

In France, a law which includes a form of below-cost selling in the agriculture sector, known as 'Egalim', was introduced in 2018. 'Egalim' includes a variety of provisions aimed at promoting better nutrition and improving commercial relations within the agriculture and food sector. One of its key provisions is the setting of a threshold for re-sale at a loss on the food market. The law also sets out a methodology for price-setting for food products based on production costs and market prices. After a year of being in place, key stakeholders such as representative bodies for consumers and agriculture producers reported a significant price increase in all types of brands and products and increased price margins of retailers and distributors since the implementation of the law. It was also reported that price-setting in line with the legislation is not taken into account by the industry and that selling-below cost still takes place. The representative body for consumers 'UFC-Que Choisir' and the French 'farmer confederation' have both called for the Government to remove the ban on below-cost selling. Instead, they argue for measures which establish the transparency of price margins of retailers and distributors,

¹² G, Donnelly (2006) *'The Impact Of The Restrictive Practices (Groceries) Order On Competition In The Irish Grocery Trade'* -Journal of the Statistical and Social Inquiry Society of Ireland Vol. XXXV

¹³ https://www.ccp.ie/business/wp-content/uploads/sites/3/2017/02/grocery_monitor_report_2.pdf

which balance bargaining powers and which set a fair system of remuneration for agricultural producers¹⁴.

The CCPC further notes the judgment of the Court of Justice of the European Union (CJEU) in Case C-295/16 *Europamur Alimentación SA v Dirección General de Comercio y Protección del Consumidor de la Comunidad Autónoma de la Región de Murcia*¹⁵. That case centred on a ban on below-cost selling in Spanish law. The CJEU found that the Spanish law contravened EU law, and specifically the terms of the Unfair Commercial Practices Directive (UCPD), on the grounds that the UCPD “fully harmonises the rules relating to unfair business-to-consumer commercial practices and that the Member States may therefore not adopt stricter measures than those provided for in the directive”¹⁶. The CJEU further stated that given that “selling at a loss is not included among the practices referred to in Annex I to the Unfair Commercial Practices Directive, the imposition of a penalty for infringement of the prohibition of such selling at a loss must be preceded by an analysis, undertaken having regard to the facts of each particular case, of whether that selling is ‘unfair’ in the light of the criteria set out in Articles 5 to 9 of that directive, and cannot be based on a presumption which the trader is required to rebut”¹⁷. This decision appears to have had the effect of significantly circumscribing the rules regarding below-cost selling in Spain to the effect that it is now required that the regulator find that such sales are objectively ‘unfair’ in a number of limited circumstances.

Overall, the CCPC considers that any policy that might increase food prices is likely to have a regressive impact on consumers as it impacts on a higher proportion of expenditure among the poorest and most vulnerable groups in society. Furthermore, it would appear that the implementation of a ban on selling below-cost in France has failed to produce the outcome it aimed to achieve and may have in fact had the opposite effect.

The CCPC suggests that, instead of price-setting measures, the Department could:

- a. Promote greater market transparency and provision of information within the supply chain;

¹⁴ https://www.francetvinfo.fr/economie/emploi/metiers/agriculture/la-loi-alimentation-est-un-echec-denoncent-l-ufc-que-choisir-et-la-confederation-paysanne_3654215.html

¹⁵ <https://curia.europa.eu/juris/document/document.jsf?jsessionid=B3C92EB145141D42C0B6AE542B0D70CD?text=&docid=195744&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1402425>

¹⁶ Paragraph 39

¹⁷ Paragraph 42.

- b. Promote greater bargaining powers for agriculture producers through the utilisation of the Producer Organisation model;
- c. Establish effective market intervention measures and supports which address farm incomes.

The CCPC considers that the aims of strengthening the bargaining power of primary producers could be achieved effectively by the new Office, if given the appropriate remit and functions as suggested in this submission. As previously mentioned, over time, the new Office could propose measures to address any issues it identifies in the supply chain in the form of recommendations or policy proposals. Furthermore, it is the CCPC's view that it would be important to address the overlap and variance between the Grocery Goods Regulations and the UTP Directive by revoking the overlapping rules and incorporating the remaining rules in the new Office's primary legislation.

ENDS

Appendix 1

Overview of the inconsistencies between Statutory Instrument No. 198/2021 and Statutory Instrument No. 35/2016 - Consumer Protection Act 2007 (Grocery Goods Undertakings) Regulations 2016

An important difference between S.I. No 198/2021 and the Grocery Goods Regulations relates to the contract or 'supply agreement' between the supplier and the buyer. S.I. No 198/2021 allows for supply agreements, whether made orally or in writing¹⁸, as defined in its Part 1. However, the Grocery Goods Regulations requires that a grocery goods undertaking's contract terms and conditions should be recorded in writing and expressed in clear understandable language, as set out in Regulation 4 of Part 2¹⁹. This contract should be signed and retained by the supplier.

There is some inconsistency between the rules contained in the two Statutory Instruments outlining the timeliness of payments from the buyer to the supplier. The UTP Directive's rules outlined in Regulation 6(1) of Part 2 S.I. No 198/2021 set out different time limits for payments depending on whether the supply agreement provides or does not provide for

¹⁸ Paragraph 6(5) of Part 2 of S.I. No. 198/2021 transposing the UTP Directive does unconditionally prohibit that a buyer refuse to confirm in writing the terms of a supply agreement between itself and the supplier.

¹⁹ S.I. No 35/2016 - Consumer Protection Act 2007 (Grocery Goods Undertakings) Regulations 2016

the delivery of products regularly, and whether the product supplied is perishable or not perishable. S.I. No 198/2021 sets out that a buyer shall not pay a supplier after 30 days after the end of an agreed delivery period/date of delivery or after the date on which the amount payable for that delivery period is set for perishable products and 60 days for non-perishable products. The Grocery Goods Regulations stipulates in Regulation 10 of Part 2 that a relevant grocery goods undertaking shall pay a supplier for any grocery good supplied to that undertaking within 30 days of the date of receipt of the invoice for the grocery goods or within 30 days of the date of delivery of the grocery goods. However, this does not apply where the contract provides for a different timeframe for the payments

Another area of inconsistency can be found in Regulation 6(7) of Part 2 of S.I. No 198/2021 which states that a buyer, unconditionally, shall not unilaterally change the terms of a supply agreement for the agricultural and food products that concern the frequency, method, place, timing or volume of the supply or delivery of the products. In Regulation 5 of Part 2 of the Grocery Goods Regulations, a relevant grocery goods undertaking shall not vary (defined in the paragraph as variation in frequency, timing or volume of the supply of the delivery), terminate or renew a grocery goods contract unless the contract between the buyer and supplier makes express provision for such variation and the contract specifically stipulates the period of written notice to be given prior to the variation. The paragraph also sets out that the notice period for variation shall be reasonable and sets out criteria around reasonability.

In addition, an unconditional prohibition in the Directive can be found as a conditional measure in the Grocery Goods Regulations. Regulation 6(9) of S.I. No 198/2021 sets out that a buyer shall not require a supplier to pay for the deterioration and/or loss of agricultural and food products that occurs on the buyer's premises if not caused by the negligence or fault of the supplier. In Regulation 15 of Part 2 of the Grocery Goods Regulations, a grocery goods undertaking shall not seek payment from a supplier for wastage occurring at the premises of the undertaking unless the grocery goods contract makes express provision for such payment.

Several conditionally prohibited practices in Regulation 7 of S.I. No 198/2021 are similar to rules in Part 2 of the Grocery Goods Regulations. In both instruments, buyers shall not seek payment from the supplier for the stocking, displaying or listing of the products

supplied, for the promotion, advertising or marketing of the products supplied or for the fitting-out or set-up of the premises for the display of the supplied products, unless certain conditions are met, in particular if the payment was previously agreed and clearly set out in a supply agreement or contract.

Certain rules do not appear in both instruments. For example, Regulation 7 of Part 2 of the Grocery Goods Regulations stipulates that a party to a grocery goods contract shall not be liable for a delay or failure to perform the contract concerned resulting from circumstances beyond the reasonable control of the party concerned. In addition, Regulation 8 of Part 2 of the Grocery Goods Regulations also sets out that a grocery goods undertaking shall, at the request of a supplier and following consultation with the supplier as to the basis of its preparation, prepare in good faith and with due skill, care and diligence, a forecast of grocery goods required by the relevant grocery goods undertaking in respect of a specified period.

