

Joint Committee on Agriculture, Food & the Marine: CCPC

Opening Statement by Isolde Goggin May 2019

I would like to thank the Committee for the opportunity to speak to you today. I am joined by Fergal O'Leary, Member of the Commission, who has responsibility for the CCPC's Consumer Protection Division and our advocacy and consumer information functions.

Since we appeared before you in October of last year, we have closely followed the progress of the Unfair Trading Practices Directive (*the Directive*) through the European legislative process. We have also followed the Committee's debates and we are aware of the wide range of issues, particularly in relation to the beef sector, that have been raised by stakeholders.

My intention in addressing you today on both these topics is to put forward some lessons from our own experience and some positive suggestions to assist the Committee in its work. The Directive is vastly different to the existing Grocery Regulations and we estimate that it could apply to about 10,000+ businesses in Ireland. I would like to offer our considered views as to how the Directive may be transposed in Ireland, in such a manner as to address some of the issues raised by stakeholders in this sector.

Before discussing the matters in further detail, I would like to highlight the extensive nature of the CCPC's current legislative mandate. The CCPC has an extensive remit across the economy to promote consumer welfare. This involves promoting compliance with over 40 competition and consumer protection legislative instruments.

Concerns Expressed

We are aware that there have been questions around competition law and the Twenty20 Beef Club and concerns about potential anti-competitive behaviour in the beef sector more generally. These two areas are within our remit and I think it is important that I address them first.

In terms of the Twenty20 Beef Club, the CCPC has received a small number of complaints in relation to this arrangement and we are examining them carefully. However, these types of agreements are generally permissible under Irish and European competition law (specifically the vertical block exemption). Although we would never give an unlimited clean bill of health to an agreement such as this and our enquiries will continue, at this point we do not have grounds to be concerned that a breach of competition law has occurred. We will, however, continue to monitor its impact and if at any future stage we have concerns, we will take action.

I would now like to address allegations of the existence of a cartel in the beef processing sector. In Irish law a cartel is an agreement between competitors to fix prices, limit output or share markets to their own benefit. It is an extremely serious breach of the law, so much so that it carries a criminal burden of proof – similar to that of other crimes such as theft or murder. Anyone who is convicted of such a crime can face up to a maximum sentence of 10 years imprisonment.

The serious nature of this type of crime frames how the CCPC must investigate allegations of a cartel. The existence of an allegation does not provide sufficient basis for us to open an investigation or obtain a warrant from a judge so that we can search the premises of suspected businesses. We have a team of experienced senior investigators, including both serving and former Gardaí, whose roles are to examine evidence and establish lines of enquiry relating to potential cartels. We also have a dedicated Cartel Immunity phone number for anyone who has been part of a cartel to come forward with evidence in return

for immunity from prosecution. The CCPC's criminal investigations team has, to date, examined a number of complaints and followed various lines of enquiry in the meat processing sector. So far, we have not uncovered evidence of a cartel, however, as with all sectors we will continue to examine every complaint we receive and we welcome information or evidence of this nature from anyone. A member of our investigations team is available to meet anyone in any location at any time. We do not take allegations lightly but it is important to stress the need for tangible evidence when it comes to dealing with such a serious crime.

We are also aware of broader concerns about sustainability and viability in farming that are currently being widely discussed and debated in the sector. These include:

- Concerns regarding farm income levels
- Farmers' lack of power and their limited ability to negotiate the price they get for their products
- A lack of transparency in terms of who is profiting in the food chain

Although these do not fall within our remit, these are all interrelated issues and I would like to now offer our considered views as to how some of these issues could be addressed in the transposition of the Directive.

What would make things better?

In considering the issues before the Committee, regarding the agriculture sector generally and the Directive in particular, it is important to consider the context. The characteristics of the agricultural sector, including vulnerability to extreme weather, imbalances between supply and demand and price/income fluctuations, mean that market instability is a common feature and a concern for all farmers. There are also viability and sustainability issues in this sector.

The Committee, and the majority of those that have appeared before it, have pointed to low relative bargaining power as one of the major issues in this sector and this has often been cited as a competition problem. We understand the desire to address an imbalance of power against farmers, but in our view the way to redress this imbalance is not through competition law. Attempts have been made to use exemptions from competition law to rebalance bargaining power in this sector, such as allowing vertical agreements and the development of producer organisations – however, the issues remain. The Directive has also been put forward as a solution to the issue but if the aim is to address farmer's imbalance in market power then it is our considered view that the Directive, as it stands is, unlikely to succeed. I think many of the people you have spoken to have also expressed this view.

I would now like to outline some suggestions for what would help. Power imbalances are best addressed before contracts are signed, rather than trying to address them after the fact. To be successful, a dedicated body is required to provide real support for the sector. A critical component of this will be through advice to individual farmers – they need to know what is allowed, what isn't and who they can go to when they have a problem.

Members will be aware that the Directive requires the appointment of a competent authority. Across Europe there have been a wide range of views expressed as to how this will be implemented and whether there should be a standalone body or whether various organisations should be given specific mandates – the appointment of more than one competent body is allowed for in the Directive i.e. one body may provide support with another receiving complaints. We are unaware if such an arrangement is being considered here.

In a number of sectors, such as telecoms, financial services, energy etc., a sectoral specific body is given a remit to ensure that the specific rules of the sector are adhered to. They have access to industry information, contacts and they build up expertise so that they can see market trends or issues as they develop and take preventative steps or alter the rules

so that they reflect new market dynamics. Because their legislation is industry specific, they can be both proactive and responsive. They are entirely focused on the sector and its needs. A body dedicated to this sector would develop the information structures and relationships to provide a real support for the sector. If such a sectoral regulator or office were established, part of its functions could include devising and implementing a strategy to support farmers in the context of CAP reform, advising on commercial and economic development for the sector and overseeing the implementation of future European legislation. For example, last week details of the EU 'Proposal for More Market transparency in the EU's food supply chain' were announced, which if progressed, would require a body to capture price and market data.

The nature of this industry is such that issues need to be addressed as they arise and farmers cannot wait for lengthy investigations and the uncertainty of legal challenges. The CCPC's investigations are – and will continue to be – evidence-based and mostly retrospective. This means they take time (*a competition law investigation on average takes 2.5 years*) and we do not act or secure outcomes for individual businesses or consumers – we are not an ombudsman. Under the current Grocery Regulations, we have not, to date, received sufficient information from suppliers to establish that a breach of the Regulations has occurred or is occurring. We believe that farmers, in particular, want someone who is on the ground, who is focussed on the farming sector exclusively, and who can act quickly on their behalf, including offering some form of adjudication, rather than an enforcement approach that would take action after a breach of the Directive has occurred. To do this effectively, alternative approaches such as mediation or arbitration (as included in the UK Code) should be considered. The role of competent authority for this Directive, we believe, requires a dedicated organisation on the ground, with specialised expertise, knowledge and with the ability to build confidence across the sector. In return, we believe that complaints about breaches and other issues would be more likely to be forthcoming.

The CCPC is not naive to the significance and cost of establishing a dedicated sectoral regulator and I can assure the Committee that we have not come to this conclusion lightly. However, considering the nature of this market, the issues around sustainability and viability and our experience in engaging with this sector, if the objective is to rebalance power, a substantial and more interventionist response is required.

Scope of the Directive

I would like to use the last few minutes of my time to highlight some points that we believe need to be considered in relation to the transposition of this Directive in Ireland, including the decision on the most appropriate competent authority or authorities.

The scope and scale of the Directive is vastly different to the existing Grocery Regulations. As I mentioned earlier, we would estimate that in Ireland the legislation could apply to an estimated 10,000 traders in the food supply chain and the direct relationships that they have with suppliers. This is compared to the 22 grocery undertakings and the direct relationships they have with suppliers which are within the scope of the current Grocery Regulations. This expanded scope will have significant cost implications, and consideration needs to be given to how such a regulatory regime would be funded. Our initial estimate is that to successfully achieve the aims of the Directive 40 staff at a minimum would be required. The skill sets required would include investigators, economists, legal advisors, supply chain experts and auditors. To give some form of tangible benchmark on cost, in the UK, the work of the Grocery Code Adjudicator costs £2 million a year and is funded by a levy on the 10 retailers within its scope.

The Directive applies to commercial relationships, regardless of the place of establishment of the supplier or buyer. This has particularly significant implications for Ireland, more than any Member State. Given the interconnected nature of the Irish and

UK agri-food sectors the mechanism to promote compliance with the Directive needs to be very carefully considered.

Incompatibility with the CCPC's existing remit

The legal basis for the Directive lies in Article 43(2) TFEU which relates to CAP and its objectives, including to safeguard farmers to make a reasonable living. While we recognise and acknowledge the importance of such objectives, they can and will conflict with consumers' interests and welfare. It should also be said that the original proposal was significantly expanded in the final Directive, extending it to all actors in the food chain. We note that large processors and manufacturers are requesting that the regime be further expanded upwards to address their issues with buyer power. In contrast, others believe that the Directive doesn't go far enough and have stated that a ban on below cost selling is required. This last point is a measure which the CCPC would strongly oppose. In our view banning below cost selling doesn't guarantee better prices for food producers, it instead guarantees higher profits for retailers and higher prices for consumers.

Conclusion

Our role is focussed on the welfare of consumers. We believe that this is an important job. We are aware that there is a body of work ahead in the transposition of this legislation and while fully respecting that our role can and is changed by the Oireachtas, we believe in the work we are doing and we wish to be allowed to continue it. If the CCPC was to be given the role of competent authority for this Directive, there is little doubt that it would drain resources and focus from across the organisation and our ability to work on consumers' behalf would be seriously compromised.

For all of the reasons detailed above, we would strongly ask you to consider the CCPC's view that a dedicated sectoral body is required. In our view it should be empowered to

not only enforce the Directive but to also deliver ongoing regulatory interventions to improve the welfare of Irish farmers. Given the transposition deadline, a decision on this would need to be made as a matter of urgency. The alternative is unlikely to achieve the desired change in the sector.

We will, of course, continue to do our part in this sector and all others. This includes continuing our work to ensure compliance with the existing Grocery Regulations. We would also be happy to work with anybody designated with a role in the sector. We have previously worked closely with other bodies (for example the Legal Services Regulatory Authority) in the setting up of new regulatory systems and we are ready to provide assistance in any way that we can.

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

End

Background information

CCPC's Remit

- The CCPC enforces Irish and European competition law. We conduct investigations and can take civil or criminal enforcement action if we find evidence of breaches of competition law.
 - Currently, the CCPC has active investigations in the areas of: motor insurance, ticketing, bid-rigging and bagged cement.
 - Recently we secured Ireland's first conviction for bid-rigging. An individual received a three month suspended sentence and €45,000 fine.
- The CCPC enforces a wide range of consumer protection legislation. The laws cover transactions between businesses and consumers across all sectors of the economy.

- Most recently, the CCPC published consumer protection guidelines for contracts of care in nursing homes. Along with sending a copy to every registered nursing home in Ireland, the CCPC created a consumer information booklet to help residents who are concerned about unfair terms in their contracts.
 - Last year we secured the first custodial sentence against a trader for misleading a consumer when selling them a 'clocked' car.
- The CCPC must be notified about proposed mergers, acquisitions and takeovers which reach a certain financial threshold, and all media mergers. We assess whether they are likely to result in a substantial lessening of competition.
 - Last year we received 98 merger notifications (an approx. 36% increase on 2017) and we issued 95 Determinations – a 40% increase compared to 2017.
 - Earlier this year following a CCPC investigation the DPP secured Ireland's first 'gun jumping' conviction – this is a criminal conviction for failing to notify and implementing a merger.
- The CCPC enforces product safety regulations – we work to ensure that product safety standards are being complied with through the General Product Safety Directive and other relevant regulations. We share information about dangerous goods and enforcement measures across the EU through the RAPEX system.
 - Last year, following our investigations, we determined that 30 consignments, containing approximately 33,688 products, did not meet the requirements of relevant product safety legislation and could not be placed on the Irish market.
- We have a role in promoting competition and enhancing consumer welfare by influencing public debate and policy development. We highlight to Government and other policymakers the possible impact of proposed legislation or regulations on competition and/or consumer welfare. We also study markets and recommend ways in which competition or the experience of consumers can be improved.
 - Last year we published detailed reports into the operation of the household waste collection market and published the first report on PCP car finance.

- We inform and educate consumers through our helpline and website about their rights and help them resolve issues when they buy products or services. We also run public awareness campaigns.
 - Each year we help 40,000+ consumers through our helpline and 1.6 million consumers visit our website.
- We also have roles in relation to:
- Grocery Goods Regulations (detailed below)
 - Personal finance information and education
 - Credit Intermediary Authorisation
 - Alternative Dispute Resolution

Grocery Goods Regulations

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.