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Mr Kieran Grace  
Competition & Consumer Policy Unit  
Department of Jobs, Enterprise and Innovation  
1 Earlsfort Centre  
Lower Hatch Street  
Dublin 2

30 May 2018

**Re: EU Directive on UTPs in the Food Supply Chain**

Dear Mr Grace,

Further to your correspondence of 25 April 2018, inviting stakeholder observations in respect of draft EU Directive on unfair trading practices in business to business relationships in the food supply chain, please find below Retail Ireland's formal response.

Retail Ireland is the representative body for the entire retail sector in Ireland and its membership includes major supermarket groups, symbol groups and Independent retailers. Retail is Ireland's largest industry and largest employer, with a presence in every city, town and village, right across the country. The sector employs over 280,000 people while contributing over €5 billion in taxes to the exchequer. There are close to 44,000 retail and wholesale businesses in Ireland with 90% of these Irish-owned and Irish-operated.

Retail Ireland and its members have some concerns regarding the effect certain aspects of the current draft EU Directive on UTPs may have on the grocery trade in Ireland in the longer term. We believe certain aspects within the Directive may have the potential for market distortion should some or all of them be introduced.

Retailers in Ireland have been working closely and effectively with the Competition and Consumer Protection Commission and their suppliers to embed the Grocery Goods Regulations introduced in 2016. This has been a complex, administratively burdensome and costly process. It is widely accepted, however, that this process is thus far functioning well and the commitment from all parties has been fulsome. Given how recently this process was completed, a further layer of legislation in the form of an EU Directive governing this area, at this time, is unhelpful and potentially confusing for all parties to the regulations. We must also consider the potential for the scope of this

Directive to grow over time and supersede domestic regulations. National legislation is the most appropriate place to deal with the sensitivities and intricacies of the Irish retail grocery market and it should remain the primary route for addressing any concerns around how it functions.

Retailers consider farmers as key partners in the food supply chain and support measures which can directly address the problems farmers face. At an EU level, a critical mass of retailers are already applying principles of good practice in B2B relationships under the Supply Chain Initiative. Legislation at EU level will not create a level playing field and risks undermining the principles of freedom of contract and a free market economy which are founding principles in the EU. The EU institutions should apply the principles of subsidiarity and proportionality, so as to preserve national schemes that work well.

Furthermore, Retail Ireland wishes to make the following specific observations on the Draft Directive:

- **Prohibited practices should be clearly defined to provide legal certainty:** the Directive provides for strict enforcement and sanctions, and it is key that it provides legal certainty to operators so as to avoid the risk of unjustified interpretation by member states, making reputable operators potentially vulnerable to disproportionate sanctions. In this regard, we would request clear definitions for terms such as 'perishable goods'.
- **The scope of the Directive should not be extended beyond small farmers and processors:** the Directive is based on the agricultural Treaty provisions and should focus on the benefits accruing to farmers. By extending the scope to all food products and SME processors, the Commission is already stretching its powers under Art. 43 TFEU. Any attempt to extend the scope of the Directive would run against the Commission's Impact Assessment and thus need a further Impact Assessment. Regulating trading practices between large processors, including global brands, and large retailers -as suggested by a coalition of farmers, processors, brands, trade unions and NGOs- would affect parts of the supply chain fundamentally outside the scope of Article 43. More importantly, it will skew the relationship towards these large processors, with no guarantee that the benefits will accrue to farmers.
- **Flexibility and subsidiarity must be preserved, while not undermining the single market:** all EU countries have legislative frameworks in place and most have specific enforcement provisions. The overwhelming majority of supply contracts is national and subject to national law. We ask Parliament and Council to keep provisions to a strict minimum common denominator and allow for a degree of flexibility so as to

allow schemes to continue that have proven to work well. These have arisen out of a national context and relate to national structures. Member States should be allowed to extend the powers of an existing authority and not have to set up a dedicated one for the purposes of the Directive.

- **The list of prohibited and restricted practices must be kept to a minimum and focus on contractual relationships between farmers and their first buyers:** freedom of contract and of negotiation are important in ensuring that retailers are able to deliver the best products to consumers at a reasonable price, thus contributing to objectives of Article 39 of the Treaty. This freedom must be preserved, and legislation must allow trading partners to engage in agreements that deliver a benefit to both parties. The list of prohibited practices must therefore be strictly limited to clearly defined practices, such as unilateral ex-post modifications of contracts, where the conditions were not previously agreed upon by the parties. As per the remit of the Directive, the focus should be on contractual relationships between small farmers and their first buyer. Lawmakers should resist adding a series of unnecessary and intrusive provisions which will undermine usual and perfectly legitimate commercial dealings and will simply create additional costs and benefit neither farmers nor consumers.
- **Complaints mechanisms:** the Directive establishes a right to complain for small suppliers in relation to large buyers; a significant number of large operators have joined the Supply Chain Initiative and therefore are able to use its dispute resolution mechanism. Article 48 of the EU Charter of Fundamental Rights requires that enforcement powers include a right of defence, including access to facts relating to a complaint, and appeal. These need to be fully reflected in the Directive: at present they are not. Provisions on name and shame are not necessary and should be deleted. Such provisions can undermine a company's most important asset, its reputation and publication of enforcement decisions by courts is today only foreseen in a very limited number of countries.
- **Mediation, and other alternative dispute resolution mechanisms should be promoted as an efficient means of solving disputes:** public enforcement can be costly and adversarial, with a risk of termination of any business relationship between the parties. Dialogue and mediation have proven to offer quick and efficient means of solving disputes in ways that allow business to continue. In the context of limited government resources, public enforcement should only be sought as a last resort. Provisions on the role of mediation should be introduced, voluntary approaches, such as the Supply Chain Initiative, and other alternative dispute resolution mechanisms, as an efficient means of resolving disputes before they resort to other, more adversarial means of redress. Farmers should also be

encouraged to join the Supply Chain Initiative.

- **Transposition:** as most contracts are negotiated annually, we ask that the Directive foresees a reasonable transposition period of two years and continues to allow for its provisions to apply to new contracts negotiated after transposition. Retailers manage contracts with thousands of suppliers to provide consumers with a wide choice of products that meet their expectations and serve their needs; renegotiating contracts half way through their execution can simply not be put in practice.

On behalf of all Retail Ireland member companies, I would like to thank you for affording us this opportunity to submit our views.

I look forward to ongoing interactions with you and your office on this matter and please do not hesitate to contact me at any time should you require further information or clarification.

Sincerely,

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THOMAS BURKE

Director

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