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The Rt Hon Lord Boswell
Chairman
Select Committee on the European Union
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h. Tin,

EM 7809/18: PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON UNFAIR TRADING PRACTICES IN BUSINESS-TO-BUSINESS RELATIONSHIPS IN THE FOOD SUPPLY CHAIN

Thank you for your letter of 16 January. I am writing with a brief update on the progress of the Directive and I have also responded to your specific queries below.

At the Special Committee on Agriculture meeting on 14 January, Member States were asked for comments on the compromise text, with the Presidency hopeful of securing an indicative final agreement. The UK lodged our scrutiny reserve in the discussion, with other Member States demonstrating near unanimous support. The Presidency were satisfied that they had a sufficient majority to confirm to the Parliament that agreement had been reached.

The Commission have subsequently initiated the jurists linguists process, which indicates no further substantive changes to the Directive text are expected.

The European Parliament Committee on Agriculture voted to agree the Directive on 23 January. The Directive is scheduled to be submitted to the Parliament for approval in the plenary session on 19 March.

The anticipated Council vote on 28 January was not held. It remains unclear when the new Romanian Presidency intends to include the Directive on an AgriFish Council agenda. Given the expectation that the Directive will be voted on in the March Parliamentary plenary, it is likely that the Directive will be included for approval on the agenda of the March AgriFish Council.

We note that the upper threshold for the application of the Directive has been agreed at €350 million, which is significantly below the €1 billion figure that you previously stated would stop you voting in favour of the measure. As per our previous correspondence, please set out the impact this threshold – and the intermediary sub-category thresholds – would have on the UK, for example in terms of the number of businesses affected, and the costs vs benefits to the Government and UK businesses, given that food retail trading protections are already in place in the UK. In addition, has any consideration been given to whether the imposition of sub-categories may affect trading behaviour as companies seek to stay within a certain classification?

As a useful indicator of the general impact of the increased upper limit, the Commission published an assessment of the extension of the Directive to the €350million threshold, largely created by extrapolating data from France. This concluded that the €350million cap would capture 98% of undertakings in the agri-food sector.

Quantifying the impact for the UK is difficult, as accurate statistics for the UK (specifically in relation to a threshold of €350million) do not exist. We do not currently have the resources available to undertake the kind of detailed economic analysis required to produce reliable results. It is possible, however, to arrive at some provisional estimates using available information, but the accuracy and robustness of these estimates will be limited and they should only be considered indicative.

BEIS statistics state that 250 of the UK's food and drink manufacturers (3.4% of the 7,290 total) are large businesses (defined as having more than 250 employees i.e. 'non-SMEs' by the Commission's definition).¹ In terms of the large UK food retailers, an estimated number is harder to establish, but we estimate there to be around 110 large food retailers operating in the UK.² This suggests that under the Directive's original SME/non-SME division, there would be around 360 UK businesses subject to the provisions of the Directive in their relations with suppliers.

Under the new proposal, where any supplier in the food chain is protected from a buyer in a larger category, it becomes even more difficult to arrive at reliable numbers. We are not aware of any available statistics which break down the UK food sector along the lines of the newly created classification system. In 2018, there were 126,000 farm businesses in the UK³. BEIS and ONS statistics reveal the number of food manufacturing businesses in the UK to be 7,290, and food retailers number around 55,193 (see footnote 2). So this gives an indicative estimate of supply-chain actors of around 188,483.

¹ Business Population Estimates 2018, Food and Beverage manufacturers

² According to ONS Annual Business Survey data, we know that in 2017 there were 30,808 enterprises in SIC code 47.11 (Retail sale in non-specialised stores with food, beverage or tobacco predominating) and 24,385 enterprises in SIC code 47.2 (Retail sale of food, beverages and tobacco in specialised stores). In BEIS Business Population Estimates we know that 0.2% of businesses in SIC code 47.2 are large businesses. Extending this proportion over the combined number of enterprises in 47.11 and 47.2, we estimate there to be 110 large retailers in the UK.

³ <https://www.statista.com/statistics/319325/number-of-farmers-in-the-uk/>

Beyond identifying this number, it is not possible to estimate how many relationships could be covered if the UK were to implement the Directive, because the pattern of trade between the various sub-groupings is unknown. Currently, the Groceries Code Adjudicator regulates the relationships between the UK's 12 largest retailers and approximately 10,000 of their direct suppliers. Comparing these two figures suggest that the number of businesses who would need to be compliant with the Directive would be far greater than those currently covered under existing domestic legislation.

In terms of the effect the introduction of sub-categories may have on trading behaviour, this is not possible to predict.

We also note that the Directive has been extended to apply to third country buyers, which means that, post-Brexit, some larger UK retailers could face duplicate and / or contradictory rules. To what extent are any differences between the existing UK regime and the proposed Directive material, and what degree of regulatory burden would this present to those retailers?

As mentioned in my previous letter, quite how the extra-territorial enforcement is envisioned to work is not made clear in the Directive. Resultantly, the regulatory burden is difficult to estimate. The legal text suggests that the enforcement agency in the country of the complainant would be responsible for investigating, and potentially issuing fines to, businesses based in the UK. There remain some questions regarding the operational feasibility of this approach.

With respect to the regulatory burden on UK retailers, an in-depth analysis of the impact of the Directive on UK retailers has not been undertaken. In general (notwithstanding the questions around practical application) any duplication will only affect the twelve retailers currently regulated under the Groceries Supply Code of Practice (GSCOP). Whilst the prohibitions contained in the GSCOP and the Directive are broadly similar, there are some notable differences. The GSCOP contains an obligation for a buyer to pay for goods on time, meaning the payment period terms agreed to in the contract must be abided by. The Directive adopts a different approach and introduces a statutory 30-day deadline for payment for perishable goods and 60-day deadline for non-perishable goods. The Directive also includes a series of UTPs that are only permissible if agreed in clear terms in a contract, and this list of UTPs includes activities that UK retailers and their suppliers may engage in, such as returning unsold produce which can be used for further processing.

I am copying this letter to Sir William Cash MP, Chairman of the European Scrutiny Committee. I am also copying this letter to the Clerks of the Commons and Lords Committees, Lynn Gardner and Chris Johnson respectively; Les Saunders, Department for Exiting the European Union; and Tess Hanneman, Defra Scrutiny Co-ordinator.

With best wishes,



DAVID RUTLEY MP