

THE NEED FOR AN OMBUDSMAN

Introduction

In a recent discussion with Rabobank the Dutch-based agri finance organisation, they firmly set the blame for weakening livestock prices in the UK on the purchasing strategies implemented by the retailers and processors over the past year. They cite the specification changes requiring younger lighter animals, penalties on movements and the continuing drive by the supermarkets to offer food at cheaper prices as key examples of driving farm incomes down.

The NBA believe the future for food producers is the formation of a producer focused ombudsman along the lines of the Groceries Code Adjudicator Act 2013. The Adjudicator was created to ensure that supermarkets treat their main suppliers lawfully and fairly, to investigate complaints and arbitrate in disputes. The role of the Adjudicator is to enforce the Groceries Supply Code of Practice set out in the Groceries (Supply Chain Practices) Market Investigation Order 2009, it has no remit to regulate the relationship between us the primary producer and the processor/retailer.

The Competition Commission review in 2009 found clear evidence of the excessive use of buyer power by large supermarkets. The report found that, despite the groceries sector being competitive overall, some supermarkets were transferring excessive risk to their suppliers. The Competition Commission report that recommended introducing the code of practice also recommended establishing an Adjudicator to enforce it.

EU Farm Commissioner Phil Hogan has went on record saying that he is considering the introduction of legislation to tackle the buying power of Europe's major processors. As far as the NBA are concerned this could not come quickly enough. Time after time, over recent months, the supermarkets and retailers have used their tremendous influence to disadvantage primary producers. Their campaign to push for residency constraints on cattle at the moment is a perfect example of this behavioural pattern.

The reality is that farmers are no match for the processors when it comes to them getting a fair deal within the current agri-food chain. As a consequence, the government must step in to provide a level playing pitch for farmers, the vast bulk of whom are small businesses investing their profits into their local area.

The facts are these: farm gate beef prices are under pressure, our costs continue to rise and the EU support measures available to producers will fall off significantly over the next five years, beef finishers will need a realistic increase in their returns just to stay afloat.

Why not the voluntary code?

Some say the present voluntary code for beef producers is enough, however the same was tried with the retailers. Prior to the appointment of the Grocery Code Adjudicator recognising the Government's aim of limiting regulation and looking for alternative options, the large supermarkets were given an opportunity to create an Adjudicator themselves. The industry was unable to agree a means to self-regulate and so a statutory approach has proved necessary. We as beef producers have seen our own voluntary code as weak and ineffectual. The first signatory to it was the first to break the code, therefore we need our own adjudicator.

There is a need for enforcement legislation as the existing voluntary codes are not adhered to and not all processors are signatories.

An ombudsman would provide an anonymous route for complaints for farmers, who have been reluctant to make direct complaints to processors due to the perceived risk that such a challenge may result in adverse action against the complainants.

The main issue concerns the fact that farmers feel that their weak bargaining position results in unfair trading practices (UTP's) being applied to them by their partners the processors and retailers. UTPs are practices that grossly deviate from good commercial conduct and are contrary to good faith and fair dealing. UTPs are typically imposed in a situation of imbalance by a stronger party on a weaker one and can exist from any side of the relationship and at any stage in the supply chain.

Primary to the function of an ombudsman will be agreement on what constitutes unfair trading practices and then the next step is to agree on what constitutes a robust regulatory initiative to eradicate them.

Unfair trading practices should have no place in business, no company should have anything to fear from more stringent regulation. On the contrary it should lead to a more stable and safe supply chain.

Examples of unfair trading practices

- Refusing or avoiding to put essential terms in writing. This makes it more difficult to establish the intent of the parties and to identify their rights and obligations under the contract.

(Contracting parties should ensure that the agreement is in writing, unless impracticable or where oral agreements are mutually acceptable and convenient. The agreement contains precise circumstances and detailed rules under which the parties can jointly modify the terms of the agreement, in a timely and informed way, including the process for setting the necessary compensation for any costs resulting for either party).

- Imposing general terms and conditions that contain unfair clauses ie deductions, penalties etc.
- Unilaterally terminating a commercial relationship without notice, or subject to an unreasonably short notice period and without an objectively justified reason such as changing specification without allowing time for farming businesses to adapt.
- Deductions are applied in a non-transparent manner, non-justifiable manner and are disproportionate to damages suffered.
- Withholding essential information relevant to the other party in contractual negotiations and which the other party could legitimately expect to receive.
- Imposing deductions that are disproportionate to the cost incurred, for example deductions on the breed of the cattle such as dairy bred.
- Threatening business disruption or the termination of the business relationship to obtain an advantage without objective justification, for example threatening to no longer take cattle.
- Imposing on a farmer the purchase of services either from the processor or from a designated third party, which has been the case with farm assurance.

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- Deliberately disrupting delivery to obtain an advantage, this has been seen in the beef industry when false claims of waiting lists etc are used to undermine price with the supplier also having their cash flow damaged.

Broadly, UTPs can be defined as practices that grossly deviate from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on its counter-party.

There is no legislation covering the relationship between the primary producer and the processor, although it exists for those supplying the retailers. Some UTPs could, in principle, be addressed by existing law. However, in practice, victims of a UTP often consciously refrain from legal action. For example, the victim of a UTP could, in some cases, take its counter-party to court on the basis of national contract law. However, the weaker party in a commercial relationship in the food supply chain (the farmer) often fears that taking the processor to court for applying a UTP may lead the processor to terminate the commercial relationship.

Because of this 'fear factor', the farmer often takes no action and accepts the UTPs, despite their harmful effects.

Is there a particular problem with UTPs within the farming sector?

The vast majority of farming enterprises are SMEs, at the same time, market concentration both on the processor and retail side of the market is considerable and, consequently, the food supply chain is characterised by a relatively low number of very large players and a very high number of small players on the supply side of the market.

As a result, many individual commercial relationships in the food supply chain can be described as imbalanced. Such economic imbalances and the resulting differences in bargaining power can lead to UTPs that invariably affect the weaker party in the commercial relationship – in most cases the primary producer. So primary producers would be the key beneficiaries of any policy measure helping to reduce or eliminate UTPs.

What suggestions does the NBA have to solve the problem of UTPs?

Voluntary initiatives such as the Voluntary Code could be the primary way of resolving conflicts between processors and producers while Public enforcement or court litigation by the ombudsman would be a 'last resort'.

We wish to support the principles of good practices whilst knowing that producers have a basis for independent adjudication and enforcement.

An ombudsman must be able to accept individual complaints about UTPs on a confidential basis and to conduct investigations. There needs to be EU wide agreement that bodies cooperate in cases of cross-border UTPs.

Does the way forward need legislative action?

We need a relevant enforcement authority or body to ensure the acceptance of confidential complaints by individual businesses and offer the possibility to conduct investigations.

The NBA, strongly believes that this approach could significantly help to reduce or eliminate UTPs and would, therefore, lead to substantial benefits for producers suffering because of UTPs.

A well-functioning food supply chain is key to achieve the maximum economic potential for all those involved. Over the last two decades, the food supply chain has changed considerably for economic, social and demographic reasons. Increased concentration and vertical integration across the UK have led to structural changes in the food supply chain. Various retailer and processor buying alliances have emerged seeking economies of scale in sourcing through greater buying power. A small number of relatively strong players in the supply chain appear to have considerable negotiating power and therefore the primary producer needs an ombudsman and the appropriate legislation.