



9.7.2018

DRAFT OPINION

of the Committee on the Environment, Public Health and Food Safety

for the Committee on Agriculture and Rural Development

on the 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
(COM(2018)0173 – C8-0139/2018 – 2018/0082(COD))

Rapporteur for opinion: Pilar Ayuso

PA_Legam

SHORT JUSTIFICATION

Farmers in the European Union are in the weakest position in the food chain due to their very low bargaining power. The Common Agricultural Policy (CAP) has introduced in recent years certain new provisions to improve their market position, by promoting greater concentration of supply through producer organisations.

Although there has been a political shift in a more positive direction, there is still room for legislative improvement, and much remains to be done to reach an optimal balance between the different actors. A high degree of fragmentation in agri-food supply, the fact that the CAP's support tools have a market-orientated approach, and increasing price volatility are all factors that make it crucial to guarantee an appropriate level playing field between suppliers and buyers.

It is important to stress that for farmers unfair practices can lead to economic losses, offsetting the benefits they obtain from CAP subsidies, which are increasingly conditioned to environmental sustainability. There are numerous types of unfair practices, but some, such as sales at loss, are very recurrent and the victims have little margin to manoeuvre to react against them due to legal gaps and uncertainties.

It is time for the European Union to react to this situation and to try to create a legal framework, which would help achieve a better balance in the food chain. Unfair practices are damaging the profitability of many farm businesses in the European Union and Member States cannot simply close their eyes to this situation. The so-called Supply Chain Initiative adopted some years ago delivered a positive set of principles of good practices, but it is unfortunately insufficient to efficiently combat unfair practices as long as it is not accompanied by penalties for non-compliance, and there is no possibility to lodge confidential complaints.

We have to congratulate the European Commission for taking the first step by introducing EU legislation in this domain and proposing minimum provisions for all Member States. Nevertheless, the proposal should be improved in some aspects to avoid resulting in a mere political gesture.

First of all, it is very important that the EU legal text does not water down the progress already made in some Member States to tackle unfair practices. Allowing national administrations to go beyond the minimum requirements established in the Directive is a key point for the rapporteur. Some countries have put in place regulations that have considerably ameliorated the relations between all actors in the value chain.

Regarding the scope of the proposal, it is too restrictive as it only covers abusive practices by big buyers towards small and medium supply enterprises. The rapporteur is of the opinion that EU legal protection should be enlarged to cover the whole spectrum of unfair situations.

The Commission text does not tackle sales below cost, and this is precisely the main subject of the complaints expressed by farmers in relation to certain capricious promotion practices of perishable products that are undertaken by big buyers as appealing actions to attract customers.

The rapporteur strongly believes that without written contracts, EU legislation would never be effective. Although the CAP legislation does not yet provide compulsory written contracts at EU level, the new Directive should at least reflect some progress made in the framework of the agricultural Common Market Organisation, which allows Member States to make written contracts compulsory in their territory. The rapporteur encourages all Member States to introduce compulsory contracts following the example of certain countries, like Spain.

In order to guarantee a level playing field across the European Union, Member States should have uniform criteria to calculate the sanctions for unfair practices, without undermining national competences. The rapporteur proposes a formulation, which is similar to others that are already to be found in existing EU legislative texts.

Transparency in the market is also an important element that should be taken into account in EU legislation when dealing with unfair commercial practices. Following the path of certain national provisions already adopted, the rapporteur proposes that all Member States put in place national agri-food chain observatories to monitor market prices and detect irregularities. Such a tool would be very useful to assess the implementation of the legislation in view of future revisions and to exchange national data.

The possibility to protect the confidentiality of a producer who lodges a complaint is a key element of the Commission proposal which would allow complaints to be made without the “fear factor” coming into play. The rapporteur would like to reinforce the Commission’s text to make that right of confidentiality automatic.

Amongst other relevant modifications to the Commission’s proposal, the rapporteur also would like to stress the need to cover within the scope of the Directive buyers based in third countries who buy EU products to be sold on the Member States’ markets. The aim is to avoid a situation where some buyers avoid EU provisions by simply moving their place of establishment outside the EU.

AMENDMENTS

The Committee on the Environment, Public Health and Food Safety calls on the Committee on Agriculture and Rural Development, as the committee responsible, to take into account the following amendments:

Amendment 1

Proposal for a directive

Recital 5

Text proposed by the Commission

(5) The number and size of operators vary across the different stages of the **food** supply chain. Differences in bargaining power relate to the different levels of concentration of operators and can enable the unfair exercise of bargaining power by

Amendment

(5) The number and size of operators vary across the different stages of the **agri-food** supply chain. Differences in bargaining power relate to the different levels of concentration of operators and can enable the unfair exercise of

using unfair trading practices. Unfair trading practices are in particular harmful for small and medium-sized operators in the *food* supply chain. Agricultural producers, who supply primary agricultural products, are largely small and medium-sized.

bargaining power by using unfair trading practices. Unfair trading practices are in particular harmful for small and medium-sized operators in the *agri-food* supply chain. Agricultural producers, who supply primary agricultural products, are largely small and medium-sized. ***Nevertheless, all operators, regardless of their economic dimension are vulnerable to unfair trading practices.***

(The change from "food supply chain" to "agri-food supply chain" applies throughout the text.)

Or. en

Justification

For the first part of the amendment: see justification under amendment 7. The second part prepares the ground for enlarging the scope to all operators regardless of the economic dimension.

Amendment 2

Proposal for a directive

Recital 7

Text proposed by the Commission

(7) A minimum Union standard of protection against certain manifestly unfair trading practices should be introduced to reduce the occurrence of such practices and to contribute to ensuring a fair standard of living for agricultural producers. It should benefit all agricultural producers or any natural or legal person that supplies food products, including producer organisations and associations of producer organisations, ***provided that all those persons meet the definition of micro, small and medium-sized enterprises set out in the Annex to Commission Recommendation 2003/361/EC¹². Those micro, small or medium suppliers are particularly vulnerable to unfair trading practices and least able to weather them without***

Amendment

(7) A minimum Union standard of protection against certain manifestly unfair trading practices should be introduced to reduce the occurrence of such practices and to contribute to ensuring a fair standard of living for agricultural producers. It should benefit all agricultural producers or any natural or legal person that supplies food products, including producer organisations and associations of producer organisations. As the financial pressure on enterprises caused by unfair trading practices often passes through the chain and reaches agricultural producers, rules on unfair trading practices should also protect intermediary suppliers at the stages downstream of primary production. Protection of intermediary suppliers should

negative effects on their economic viability. As the financial pressure on ***small and medium-sized*** enterprises caused by unfair trading practices often passes through the chain and reaches agricultural producers, rules on unfair trading practices should also protect ***small and medium-sized*** intermediary suppliers at the stages downstream of primary production. Protection of intermediary suppliers should also avoid unintended consequences (notably in terms of unduly raising prices) of trade diversion away from agricultural producers and their associations, who produce processed products, to non-protected suppliers.

¹² OJ L 124, 20.5.2003, p. 36.

also avoid unintended consequences (notably in terms of unduly raising prices) of trade diversion away from agricultural producers and their associations, who produce processed products, to non-protected suppliers.

¹² OJ L 124, 20.5.2003, p. 36.

Or. en

Justification

This amendment prepares the ground for enlarging the scope to all operators regardless of the economic dimension.

Amendment 3

Proposal for a directive

Recital 8

Text proposed by the Commission

(8) Suppliers established outside the Union should be able to rely on the Union minimum standard when they sell food products to buyers established in the Union to avoid unintended distorting effects resulting from the protection of suppliers in the Union.

Amendment

deleted

Or. en

Justification

Only suppliers established in the EU should be protected by Member States, as European

suppliers are not protected in third countries.

Amendment 4

Proposal for a directive

Recital 9

Text proposed by the Commission

(9) The relevant rules should apply to business ***conduct by larger, that is to say non-small and medium-sized***, operators in the ***food*** supply chain ***as they are the ones who normally possess stronger relative bargaining power when trading with small and medium-sized suppliers.***

Amendment

(9) The relevant rules should apply to ***all*** business operators in the ***agri-food*** supply chain.

Or. en

Justification

This amendment prepares the ground for enlarging the scope to all operators regardless of the economic dimension.

Amendment 5

Proposal for a directive

Recital 10

Text proposed by the Commission

(10) As a majority of Member States already have national rules on unfair trading practices, albeit diverging, it is appropriate to use the tool of a Directive to introduce a minimum protection standard under Union law. This should enable Member States to integrate the relevant rules into their national legal order in such a way as to bring about a cohesive regime. Member States should not be precluded from adopting and applying on their territory stricter national laws protecting ***small and medium-sized*** suppliers and buyers against unfair trading practices occurring in business-to-business

Amendment

(10) As a majority of Member States already have national rules on unfair trading practices, albeit diverging, it is appropriate to use the tool of a Directive to introduce a minimum protection standard under Union law. This should enable Member States to integrate the relevant rules into their national legal order in such a way as to bring about a cohesive regime. Member States should not be precluded from adopting and applying on their territory stricter national laws protecting ***all*** suppliers and buyers ***regardless of their economic dimension*** against unfair trading practices occurring in business-to-business

relationships in the *food* supply chain, subject to the limits of Union law applicable to the functioning of the internal market.

relationships in the *agri-food* supply chain, subject to the limits of Union law applicable to the functioning of the internal market.

Or. en

Justification

This amendment prepares the ground for enlarging the scope to all operators regardless of the economic dimension.

Amendment 6

Proposal for a directive Recital 13

Text proposed by the Commission

(13) In order to ensure an effective enforcement of the prohibitions laid down in this Directive, Member States should designate an authority that is entrusted with their enforcement. The authority should be able to act either on its own initiative or by way of complaints by parties affected by unfair trading practices in the *food* supply chain. ***Where a complainant requests that his identity remain confidential because of fear of retaliation, the enforcement authorities of the Member States should honour such a request.***

Amendment

(13) In order to ensure an effective enforcement of the prohibitions laid down in this Directive, Member States should designate an authority that is entrusted with their enforcement. The authority should be able to act either on its own initiative or by way of complaints by parties affected by unfair trading practices in the *agri-food* supply chain. ***Whenever a complaint is logged the enforcement authority of the Member States should guarantee that the complainant's identity remains anonymous.***

Or. en

Justification

This amendment guarantees anonymity of complaints.

Amendment 7

Proposal for a directive Article 1 – paragraph 1

Text proposed by the Commission

1. This Directive establishes a minimum list of prohibited unfair trading practices between buyers and suppliers in the **food** supply chain and lays down minimum rules concerning their enforcement and arrangements for the coordination between enforcement authorities.

Amendment

1. This Directive establishes a minimum list of prohibited unfair trading practices between buyers and suppliers in the **agri-food** supply chain and lays down minimum rules concerning their enforcement and arrangements for the coordination between enforcement authorities.

Or. en

Justification

This amendment aims at protecting any farmer, as UTPs can also affect those producers that sell agricultural products not intended for human consumption (e.g. cut flowers, feed and others).

Amendment 8

Proposal for a directive Article 1 – paragraph 2

Text proposed by the Commission

2. This Directive applies to certain unfair trading practices which occur in relation to the sales of food products by a supplier **that is a small and medium-sized enterprise** to a buyer **that is not a small and medium-sized enterprise**.

Amendment

2. This Directive applies to certain unfair trading practices which occur in relation to the sales of **agricultural and food products as well as the services related to those products**, by a supplier to a buyer.

The provisions of this Directive do not cover agri-food supply to cooperatives or other associated entities by their members.

(The change from "food products" to "agricultural and food products" applies throughout the text.)

Or. en

Justification

All operators must be protected against UTPs; therefore, the scope must be enlarged to all operators regardless their position in the agri-food supply chain or their economic dimension. Unfair trading practices are not unidirectional. Cooperatives and other

associated entities have their own rules which are agreed by their members and should be respected.

Amendment 9

Proposal for a directive

Article 2 – paragraph 1 – point a

Text proposed by the Commission

(a) “buyer” means any natural or legal person ***established in the Union*** who buys food products by way of trade. ***The*** term “buyer” may include a group of such natural and legal persons;

Amendment

(a) “buyer” means any natural or legal person, ***irrespective of that person’s place of establishment***, who buys ***agricultural and*** food products by way of trade, ***for processing, distribution or retail, and/or provides services related to those products, in the Union***; the term “buyer” may include a group of such natural and legal persons;

Or. en

Justification

This amendment aims at including within the scope of the Directive those operators that, though established outside the EU, buy and sell products in the EU market. This would avoid that a buyer could escape form the scope of this Directive by simply moving its place of establishment outside the EU.

Amendment 10

Proposal for a directive

Article 2 – paragraph 1 – point b

Text proposed by the Commission

(b) “supplier” means any agricultural producer or any natural or legal person, ***irrespective of their place of establishment***, who sells food products. ***The*** term “supplier” may include a group of such agricultural producers or such natural and legal persons, including producer organisations ***and*** associations of producer organisations;

Amendment

(b) “supplier” means any agricultural producer or any natural or legal person, ***established in the Union***, who sells food products; ***the*** term “supplier” may include a group of such agricultural producers or such natural and legal persons, including producer organisations, associations of producer organisations ***or agricultural cooperatives***;

Justification

Only suppliers established in the EU should be protected by Member States as European suppliers do not find any equal treatment in third countries. Cooperatives have their own legal identity and should be covered by this article.

Amendment 11**Proposal for a directive****Article 2 – paragraph 1 – point c**

Text proposed by the Commission

Amendment

(c) *“small and medium-sized enterprise” means an enterprise within the meaning of the definition of micro, small and medium-sized enterprises set out in the Annex to Commission Recommendation 2003/361/EC¹⁴ ;*

deleted

¹⁴ *Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5/2003, p. 36).*

Justification

In accordance with the amendments enlarging the scope of the Directive, it is not necessary to define what an SME is.

Amendment 12**Proposal for a directive****Article 2 – paragraph 1 – point c a (new)**

Text proposed by the Commission

Amendment

(ca) "economic dependence" means a relationship in which the buyer accounts for at least 30 per cent of the supplier's

turnover;

Or. en

Amendment 13

Proposal for a directive Article 2 – paragraph 1 – point d

Text proposed by the Commission

(d) “food products” means products listed in Annex I to the Treaty ***intended for use as food*** as well as products not listed in that Annex, but processed from those products for use as food;

Amendment

(d) "***agricultural and*** food products" means products listed in Annex I to the Treaty as well as products not listed in that Annex, but processed from those products for use as food;

Or. en

Justification

This amendment aims at protecting any farmer, as UTPs can also affect those producers that sell agricultural products not intended for human consumption (e.g. cut flowers, feed and others).

Amendment 14

Proposal for a directive Article 2 – paragraph 1 – point e

Text proposed by the Commission

(e) “perishable food products” means food products ***that will become unfit for human consumption unless they are stored, treated, packaged or otherwise conserved to prevent them from becoming unfit.***

Amendment

(e) “perishable food products” means ***agricultural and*** food products ***which are naturally suitable for commercialisation and*** consumption ***for a period of up to thirty days or that require regulated temperature or packaging conditions for storage, and / or commercialisation and / or transportation;***

Or. en

Justification

The aim of this amendment is to provide clarification

Amendment 15

Proposal for a directive

Article 2 – paragraph 1 – point e a (new)

Text proposed by the Commission

Amendment

(ea) “non-perishable products” means products other than those indicated in point e.

Or. en

Amendment 16

Proposal for a directive

Article 3 – paragraph 1 – point a a (new)

Text proposed by the Commission

Amendment

(aa) a buyer pays a supplier for non-perishable products later than 60 calendar days after the receipt of the supplier’s invoice or later than 60 calendar days after the date of delivery of the perishable food products, whichever is the later. This prohibition is without prejudice:

- to the consequences of late payments and remedies as laid down in Directive 2011/7/EU;

- to the option of a buyer and a supplier to agree on a value sharing clause within the meaning of Article 172 a) of Regulation (EU) No1308/2013.

Or. en

Justification

This amendment enlarges the Directive’s coverage to non-perishable products without prejudice of Directive 2011/7/EU on late payments and the "value sharing" clause introduced

in the CMO Regulation.

Amendment 17

Proposal for a directive

Article 3 – paragraph 1 – point c a (new)

Text proposed by the Commission

Amendment

(ca) a buyer sells agriculture or food products below cost;

Or. en

Justification

It is the most repeated vindication of the agricultural sector, which should be covered by this Directive.

Amendment 18

Proposal for a directive

Article 3 – paragraph 2 – introductory part

Text proposed by the Commission

Amendment

2. Member States shall ensure that the following trading practices are prohibited, if they are not agreed in clear and unambiguous terms at the conclusion of the supply agreement:

2. Member States shall ensure that the following trading practices are prohibited, if they are not agreed in clear and unambiguous terms at the conclusion of the supply agreement ***or if they are the result of economic dependence of the supplier on the buyer, which enables the buyer to impose those terms:***

Or. en

Justification

The amendment aims at clarifying that the practices listed in Art. 3(2) should also be prohibited in the case the agreement between the two parties results from the economic dependence of the supplier.

Amendment 19

Proposal for a directive

Article 3 – paragraph 2 – point b a (new)

Text proposed by the Commission

Amendment

(ba) a buyer shares with third parties, or misuses, intentionally or by negligence, confidential information related to the supply contract, including trade secrets shared with the buyer by the supplier;

Or. en

Justification

This practice was in the Commission's Green paper on UTPs.

Amendment 20

Proposal for a directive

Article 3 – paragraph 2 – point b b (new)

Text proposed by the Commission

Amendment

(bb) a buyer retaliates or threatens to retaliate commercially against the supplier, by means of practices such as delisting of products, stopping data sharing services, excessive promotions, delayed payments, unilateral deductions and/or blocking of promotions, in order to obtain better conditions under existing contracts or when negotiating a new contract;

Or. en

Amendment 21

Proposal for a directive

Article 3 – paragraph 2 – point b c (new)

Text proposed by the Commission

Amendment

(bc) a buyer imposes or attempts to impose an unjustified or disproportionate transfer of its economic risks to the supplier;

Or. en

Amendment 22

Proposal for a directive Article 3 a (new)

Text proposed by the Commission

Amendment

Article 3a

Contractual relations

1. Member States may decide that product deliveries should be covered by a written contract between the parties, in accordance with Article 168 of Regulation (EU) No 1308/2013.

2. In accordance with Article 168 of Regulation (EU) No 1308/2013, when Member States do not make use of the possibilities provided for in paragraph 1, a producer, a producer organisation or an association of producer organisations, may require that any delivery of their products be the subject of a written contract.

Or. en

Justification

Contracts are crucial to guarantee fair relations between operators. The absence of written contracts would make this directive inefficient. The rapporteur encourages Member States to follow the example of countries, like Spain, in which contracts are compulsory.

Amendment 23

Proposal for a directive

Article 4 – paragraph 1

Text proposed by the Commission

Each Member State shall designate a public authority to enforce the prohibitions laid down in Article 3 at national level ("enforcement authority").

Amendment

Each Member State shall designate a ***single*** public authority to enforce the prohibitions laid down in Article 3 at national level ("enforcement authority").

Or. en

Justification

It is necessary to establish a single public control authority as the multiplication of enforcement authorities in Member States could cause a lack of homogeneity and reduce the effectiveness of controls.

Amendment 24

Proposal for a directive

Article 5 – paragraph 1 – subparagraph 1 a (new)

Text proposed by the Commission

Amendment

A supplier may submit a complaint to the enforcement authority of the Member State in which the supplier is established. The enforcement authority of that Member State shall forward the complaint to the enforcement authority of the Member State in which the buyer suspected to have engaged in a prohibited trading practice is established.

Or. en

Justification

Some SMEs could not have the capacity to address their complaints in countries different from the one in which they are established. Therefore, they should have the possibility to ask for the intervention of the enforcement authority of their own country, as interlocutor in the procurement process.

Amendment 25

Proposal for a directive Article 5 – paragraph 3

Text proposed by the Commission

3. The enforcement authority shall ensure, ***if so requested by the complainant***, the confidentiality of the identity of the complainant ***and any*** other information, in respect of which the complainant considers disclosure harmful to his interests. The complainant shall identify such information ***in a possible request for confidentiality***.

Amendment

3. The enforcement authority shall ensure the confidentiality of the identity of the complainant, ***as well as*** other information in respect of which the complainant considers disclosure harmful to his interests. The complainant shall identify such information.

Or. en

Justification

This amendment ensures that complaints are anonymous in order to eliminate the "fear factor".

Amendment 26

Proposal for a directive Article 5 – paragraph 4 a (new)

Text proposed by the Commission

Amendment

4a. The enforcement authority shall establish a reasonable time period to initiate and conduct investigations and, upon completion, take a reasoned decision and inform the parties of its decision.

Or. en

Justification

This amendment ensures a timely period for initiating, conducting, completing investigations and communicating the parties about the decision taken by the enforcement authority.

Amendment 27

Proposal for a directive

Article 6 a (new)

Text proposed by the Commission

Amendment

Article 6a

Penalties

- 1. Member States shall impose penalties for the infringements of this Directive. The minimum amount of the penalty imposed shall be at least 2% of the global buyer's turnover according to their last financial statement report.**
- 2. In case a buyer repeats the same unfair trading practice, the amount of the penalty imposed shall be equivalent to the one referred to in paragraph 1 increased by 20% for every repeated infringement.**

Or. en

Justification

The aim of this new article is the standardization of the criteria to define penalties at the EU level, following the example of other EU provisions, without prejudice of national prerogatives regarding the decision of the value of the sanction.

Amendment 28

Proposal for a directive

Article 7 a (new)

Text proposed by the Commission

Amendment

Article 7a

National Observatories

- 1. Member States shall create national observatories for the monitoring of the functioning of the agri-food chain.**
- 2. National observatories shall at least:**
 - (a) monitor and evaluate unfair commercial practices, through the realisation of surveys and market**

analysis;

(b) report any infringement detected to the enforcement authority;

(c) elaborate reports and recommendations; and

(d) assist the enforcement authorities in providing information in order to comply with Articles 7 and 9.

Or. en

Justification

Market transparency is a key element to guarantee a good functioning of the value chain. This tool would also be very useful to assess the implementation of the legislation in view of future revisions of the EU legislation and to facilitate the exchange of national data.

Amendment 29

Proposal for a directive Article 8 – paragraph 1

Text proposed by the Commission

Member States may provide for rules designed to combat unfair trading practices going beyond *those set out in Articles 3, 5, 6 and 7*, provided that *such* national rules are compatible with the rules on the functioning of the internal market.

Amendment

Member States may provide for rules designed to combat unfair trading practices going beyond *this Directive* provided that national rules are compatible with the rules on the functioning of the internal market.

Or. en

Justification

This amendment clarifies the possibility for Member States to maintain or introduce national rules designed to combat unfair trading practices which are stricter than those laid down by this Directive.

Amendment 30

Proposal for a directive Article 11 – paragraph 1

Text proposed by the Commission

1. No **sooner** than three years after the date of application of this Directive, the Commission shall carry out an evaluation of this Directive and present a report on the main findings to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions.

Amendment

1. No **later** than three years after the date of application of this Directive, the Commission shall carry out an evaluation of this Directive and present a report on the main findings to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions.

Or. en