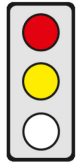


KEY ISSUES

Objective of the Directive: Minimum standards will protect micro, small and medium-sized enterprises (SMEs) against unfair trading practices in the food supply chain.

Affected parties: Farmers, all companies in the food supply chain.



Pro: The ability to treat complaints confidentially counteracts the risk that, due to fear, suppliers will do nothing.

Contra: (1) Instead of being geared generally towards SMEs, the Directive should apply if, and only if, a supplier is dependent on a buyer.

(2) The proposed Directive lacks any provision permitting an overall assessment in the individual case.

(3) The presumption of the existence of banned or conditionally permitted practices should at least be rebuttable.

The most important passages in the text are indicated by a line in the margin.

CONTENT

Title

Proposal COM(2018) 173 of 12 April 2018 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**

Brief Summary

Note: Article and page numbers refer to the Proposal for a Directive COM(2018) 173.

► Context and objectives

- In the food supply chain, companies that do not have a lot of bargaining power are often vulnerable to “unfair trading practices” (Explanatory Memorandum, p. 1).
 - Unfair trading practices are practices between companies that (Recital 1)
 - are unilaterally imposed by one trading partner on another,
 - “grossly” deviate from good commercial conduct and
 - are contrary to good faith and the principles of “fair dealing”.
 - This includes, in particular [Report on unfair trading practices COM(2016) 032, p. 5 et seq.]:
 - imposing own costs and entrepreneurial risk onto the other party and
 - demanding advantages or benefits without providing consideration.
- Unfair trading practices in the food supply chain can jeopardise the existence and competitiveness of otherwise profitable agricultural producers [SWD(2018) 92, p. 10-11, 16], because the latter
 - are often subject to unfair practices, or
 - suffer indirectly from such practices where companies that are affected by unfair practices further down the supply chain pass their costs on to the agricultural producers.
- Voluntary commitment initiatives set up by business, particularly the European Supply Chain Initiative (SCI), are unable to enforce fair trading practices effectively and confidentially (Explanatory Memorandum p. 2).
- Diverging provisions in the Member States, such as differences in the effectiveness of enforcement practices, may result in dissimilar conditions of competition in the internal market (Explanatory Memorandum p. 2).
- The Commission wants to adopt a Directive which provides an EU-wide minimum standard of protection for companies in the food supply chain against manifestly unfair trading practices (Recital 7). For this purpose it wants (Recitals 12 and 13)
 - to ban certain trading practices that are particularly “harmful” and do not result in gains in efficiency,
 - to allow certain trade practices only where they have been agreed between the parties in advance in “clear and unambiguous” terms and
 - to call on the Member States to establish an authority to enforce these rules.

► Scope of the Directive

- The Directive applies to practices between buyers and suppliers in the food supply chain where [Art. 1 (1)]
 - foods are traded,
 - the supplier is a micro, small or medium-sized enterprise (SME) [see Recommendation 2003/361/EC] and
 - the buyer is not an SME.

- The Directive also applies to suppliers based in non-EU states (Recital 8, Art. 2).
- The provisions of the Directive apply to practices before, during and after conclusion of the contract.

► **Prohibited trading practices**

- The following trading practices are prohibited:
 - Late payments for “perishable” food products: A buyer is not allowed to pay a supplier later than 30 calendar days after receipt of the supplier’s invoice or delivery of the food products, whichever is the later (Art. 3 (1) (a)). Perishable food products are food products that have to be specially stored, packaged or treated to keep them fit for human consumption (Art. 2 (e)).
 - Cancellation of orders at short notice for “perishable” food products: a buyer is not allowed to cancel an order at such short notice that a supplier cannot reasonably be expected to find an alternative use (Art. 3 (1) (b)).
 - Unilateral, retroactive changes to the terms of the supply agreement: A buyer is not allowed to make unilateral, retroactive changes to agreements, e.g. on timing, volume, quality or price (Art. 3 (1) (c)).
 - Payments by the supplier for “wastage” of food products: A supplier is not allowed to pay for the subsequent non-marketability or non-saleability of food products (Art. 3 (1) (d))
 - which occurs on the buyer’s premises and
 - is not caused by the negligence or fault of the supplier.

► **Conditionally permitted trading practices**

- The following trading practices are only permitted where they have been agreed in advance, in the supply agreement, in “clear and unambiguous” terms (Art. 3 (2) (a) - (d)):
 - A buyer returns unsold food products to a supplier.
 - A buyer requires payment from the supplier as a condition for
 - including the food products in its range (listing),
 - stocking food products or
 - displaying the food products on its sales floor.
 - A buyer requires a payment or price reduction from the supplier for a promotion planned by the buyer. In this case, the buyer must also inform the supplier in advance about:
 - the period of the planned promotion and
 - the expected quantity of food products to be ordered.
 - A buyer requires payment from the supplier for marketing carried out by the buyer.

► **Enforcement authority**

- Every Member State must appoint an authority to enforce the Directive vis à vis buyers based in the Member State (hereinafter “enforcement authority”; Article 4 and 5 (1)).
- The enforcement authority acts (Art. 6 (a))
 - on its own initiative and/or
 - based on a complaint
 - from a supplier (Art. 5 (1)) or
 - from a producer organisation or association of producer organisations where one of its members is affected by an unfair trading practice (Art. 5 (2)).
- At the request of the complainant, the complaint will be treated confidentially (Art. 5 (3)) as without this possibility the victim’s “fear of retaliation” would limit the “value of these forms of redress” (Recitals 6 and 13).
- The enforcement authority may (Recital 15),
 - require “all necessary information” from the supplier and the buyer for an investigation (Art. 6 (b)),
 - order cessation of the prohibited trading practice, but may abstain from this if it could reveal the identity of the buyer (Art. 6 (c)),
 - impose proportionate and dissuasive pecuniary fines (Art. 6 (d)) and
 - publish the results of its investigations (Art. 6 (e)).
- The authority publishes an annual report about its activities describing inter alia the complaints which it has received and dealt with (Art. 6 (f)).

► **Additional provisions in the Member States**

- Member States may adopt legislation to combat unfair trading practices going beyond the Directive provided it is compatible with the internal market (Art. 8).

Main Changes to the Status Quo

- ▶ Until now there have been no EU-wide rules to deal with unfair trading practices.

Statement on Subsidiarity by the Commission

Some member states either have no rules on unfair trading practices or their legislation fails to address important aspects adequately. The voluntary initiatives, such as the SCI, have so far been no substitute for effective government action to combat unfair trading practices (Explanatory Memorandum, p. 5-6).

Policy Context

The Commission published Communications on unfair trading practices in the food supply chain in 2009 and 2014 (see [cepPolicyBrief 2015-6](#)). In 2010, it convened a “High-level Forum on the Food Supply Chain” which, in 2013, established the voluntary “Supply Chain Initiative”, made up of several business associations, in order to stem unfair trading practices. The proposed Directive complements the code of conduct of this initiative. In 2016, a group of experts set up by the Commission submitted a report which recommended legislation. Finally, in 2017, the EU Commission held consultations to [Improve the Food Supply Chain](#).

Legislative Procedure

12 April 2018	Adoption by the Commission
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Directorates General:	DG Agriculture and Rural Development
Committees of the European Parliament:	Agriculture and Rural Development (leading), Rapporteur: Paolo de Castro (S&D Group)
Federal Ministries:	Food and Agriculture (leading)
Committees of the German Bundestag:	Food and Agriculture (leading); Economic Affairs; Legal Affairs; EU
Decision-making mode in the Council:	Qualified majority (acceptance by 55% of Member States which make up 65% of the EU population)

Formalities:

Competence:	Art. 43 (2) TFEU (Agriculture)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

The proposed Directive to combat unfair trading practices, on the one hand, encroaches upon the freedom of contract because companies will no longer be allowed to agree on certain practices. On the other hand, for SMEs that are victims of unfair trading practices, the negative freedom of contract, i.e. the ability not to have to accept certain practices, may increase.

Even if unfair trading practices in the food supply chain are common, it is questionable whether a special law for the food trade sector is necessary because general rules exist in all Member States banning such practices, in Germany for example cartel and antitrust law as well as contract law. If these rules fail to take effect because, for fear of retaliation, victims do not report such practices, EU-wide legislation should only provide for the possibility of a confidential complaint to an enforcement authority. In addition, the authority should be able to act on its own initiative.

Impact on Efficiency and Individual Freedom of Choice

Restricting the area of protection to suppliers that are SMEs, makes it inaccurately targeted. Larger suppliers can also be affected by unfair practices. There is also a risk that buyers will change to suppliers that are not SMEs. As a result of this sort of evasive action, the Directive may prove harmful to SMEs. **Instead of being geared generally towards SMEs, the Directive should apply if, and only if, a supplier is dependent on a buyer** such as where a supplier has no other “sufficient and reasonable” sales possibilities (cf. Section 20 (1) Act against Restraints of Competition (GWB)).

The ban on unilateral, retrospective changes to the supply agreement is appropriate. It is questionable whether this is true of the other prohibited practices. Although each of the individual prohibited trade practices gives the impression that only the buyer profits from them, in the context of a transaction containing numerous conditions, it may be reasonable for a supplier to agree to one of these practices if he is compensated for it elsewhere. Any ban on individual practices should therefore be preceded by an overall assessment of the transaction.

The fact that certain trading practices are only allowed where they are agreed in advance in the supply agreement, is on the one hand appropriate because these practices are not necessarily a one-sided burden for the supplier. In fact it is possible for both the supplier and the buyer to profit from such an agreement. On the other hand, a buyer with substantial bargaining power can force such practices on a supplier even where they only benefit the buyer. The rule that this must be part of the supply agreement does not protect the supplier. The intended protection for the supplier could therefore be rendered useless.

The ability to treat complaints confidentially counteracts the risk that, due to fear of retaliation suppliers will do nothing. Although a confidential complaint has its limits, since affected buyers have to have access to the files, if, as a result, a supplier withdraws its complaint, the authority can still take action on its own initiative and thus protect the identity of the supplier.

Legal Assessment

Legislative Competency

The EU's competency under the common agricultural policy only covers ensuring a fair standard of living for agricultural producers (Art. 43 (2) in conjunction with Art. 39 (1) (b) TFEU). For the planned protection of intermediaries, the internal market competence (Art. 114 TFEU) must also be used as it is questionable whether they actually do pass on their costs, resulting from unfair trading practices, to farmers.

Subsidiarity.

Unproblematic. Some member states have no bans or enforcement measures to combat unfair trading practices - which may also be cross-border in nature - or these vary in scope. Convergence between the Member States to regulate this subject matter has not taken place despite earlier Communications and Reports by the Commission. The EU can therefore introduce a minimum standard more effectively and efficiently than the Member States.

Proportionality with Respect to Member States

Unproblematic. The Supply Chain Initiative cannot stem unfair trading practices as effectively as government legislation. It lacks confidential complaint, investigation and enforcement possibilities.

Compatibility with EU Law in other respects

The proposed Directive encroaches disproportionately upon the fundamental freedom of contract (Art. 16 CFR). **In view of the regulatory purpose of protecting companies with a lack of bargaining power, the blanket protection for SMEs is unsuitable and therefore in breach of the principle of proportionality.** Where a company lacks bargaining power as compared with its trading partner, it is more effective to apply the criterion of actual dependence - as under German law, for example (Section 20 (1) GWB), by asking whether the company has other "sufficient and reasonable" sales possibilities.

The proposed Directive also lacks any provision permitting an overall assessment in the individual case on whether an "unfair" clause is compensated for by other contractual agreements. **The presumption of the existence of banned or conditionally permitted practices should therefore at least be rebuttable** and supplemented by a specific unfairness factor – e.g. "force" (cf. Recital 1) – in order to do justice to sometimes complex contractual negotiations and -conditions. Instead of explicit practices corresponding to the regulatory purpose, however, **it would be more appropriate to provide a general clause with abstract regulatory examples which enable flexible examination of individual cases** and would also largely correspond to the regulatory practice of the Member States; these regulatory examples already exist in rudimentary form [Report on Unfair Trading Practices COM(2016), S. 5 et seq.].

Impact on German Law

Section 20 (1) Unfair Competition Act (GWB), which only refers to Section 19 (2) No. 5 GWB, would have to be amended to include the said practices.

Conclusion

The ability to treat complaints confidentially counteracts the risk that, due to fear, suppliers will do nothing. Instead of being geared generally towards SMEs, the Directive should apply if, and only if, a supplier is dependent on a buyer. In view of the regulatory purpose of protecting companies with a weak bargaining position, the blanket protection for SMEs is also in breach of the principle of proportionality. In addition, the proposed Directive lacks any provision permitting an overall assessment of the contractual relations in the individual case. The presumption of the existence of banned or conditionally permitted practices should at least be rebuttable. It would be more appropriate to provide a general clause with abstract regulatory examples enabling flexible examination of individual cases.