



The Directive on **UNFAIR TRADING PRACTICES** in the agricultural and food supply chain

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The Directive on unfair trading practices in the agricultural and food supply chain

The protection of farmers is at the heart of the Common Agricultural Policy. Each day, our farmers produce high-quality and safe food for 500 million European citizens. Farmers should be treated fairly and get a fair share of the price which the European citizens pay for food. In order to produce food of the high quality standards European consumers expect, farmers need to be able to rely on conditions of fair and effective competition.

The agri-food supply chain is structurally different from other industries. 11 million farms in the European Union deal with much fewer and often more powerful processors, distributors, and retailers. The majority of EU farmers work on small holdings and do not necessarily have the legal and financial means or courage to litigate against trading practices used against them which are unfair.

The European Union therefore decided to improve the protection of farmers - as well as of small and medium and mid-range sized suppliers - and provide mandatory rules that outlaw certain unfair trading practices. These rules will complement existing Member States rules as well as voluntary initiatives of the industry.

The European Commission made a proposal for a Directive to that effect in April 2018. The Council and the European Parliament reached an agreement on the Directive in December 2018. The Directive on unfair trading practices in the agricultural and food supply chain is scheduled to be adopted in April 2019.

The Directive is short, concise and based on a few key principles. Member States will transpose the Directive into national law by April 2021 and apply it 6 months later.

The UTP Directive forms an integral part of a wider governance agenda of the Commission to countervail occurrences of unfair and ineffective competition. Other examples are increased possibilities of producer cooperation in the Omnibus initiative that entered into force on 1 January 2018 as well as measures undertaken by the Commission to enhance market transparency.

KEY PRINCIPLES OF THE DIRECTIVE

- Protect farmers, farmers organisations and other weaker suppliers of agricultural and food products against stronger buyers
- Prohibit 16 unfair trading practices
- Enforcement of the unfair trading practices by authorities in each Member State and coordination among the authorities
- Minimum harmonisation: Member States can provide for stricter rules than the Directive

1/ AGRICULTURAL AND FOOD PRODUCTS

The Directive aims to afford protection along the entire agri-food supply chain. Based on the agricultural legal basis, the Directive thus protects suppliers that sell agricultural products as listed in Annex I to the Treaty on the Functioning as well as products, which are processed from these products for the use of food.



WHAT IS AN AGRICULTURAL AND FOOD PRODUCT?

A product listed in Annex I TFEU, e.g.

- ▶ Tomatoes or apples
- ▶ Cereals
- ▶ Live animals
- ▶ Fish or a shrimp
- ▶ Ham
- ▶ Milk
- ▶ Cheese
- ▶ Cut flowers
- ▶ Animal feed

and products processed from Annex I TFEU products for the use as food, e.g.

- ▶ Chocolate
- ▶ Prepared meals or sauces
- ▶ Processed dairy products, e.g dairy spreads or yoghurts



2/ PROTECTION OF WEAKER SUPPLIERS AGAINST STRONGER BUYERS

Asymmetry in bargaining power may lead to the imposition of unfair trading practices on suppliers. Due to their weaker position, suppliers are often de facto forced to accept unfair practices in order to continue to sell their products and maintain commercial relations with buyers in the supply chain.

The 'suppliers' protected under the Directive are primarily farmers, including their organisations (e.g cooperatives). But also suppliers of agri-food products which are further downstream, such as small and medium or certain mid-range enterprises, such as manufacturers or distributors, fall within the Directive's scope of protection. The Directive also protects farmers and suppliers of agri-food products which are located outside the Union.

The Directive constrains possible unfair behaviour engaged in by buyers, or groups of buyers, whether registered in the same State as the supplier or in another State including in non-EU States. This includes public authorities buying food. The constraining effect also applies to producer organisations (e.g cooperatives) when they buy products from their farmer members.

The Directive does not apply in the relation to end consumers. The EU has a special set of rules that apply in such business-to-consumer relationships.

Who can be a supplier?	Who can be a buyer?
<ul style="list-style-type: none"> ✔ Farmer 	<ul style="list-style-type: none"> ✔ Producer organisation, including cooperatives when they buy from their farmer members
<ul style="list-style-type: none"> ✔ Processors (food industry) 	<ul style="list-style-type: none"> ✔ Processor
<ul style="list-style-type: none"> ✔ Distributor, e.g wholesaler 	<ul style="list-style-type: none"> ✔ Distributor, e.g. wholesaler
<ul style="list-style-type: none"> ✔ Producer organisation, including cooperatives 	<ul style="list-style-type: none"> ✔ A retailer or retail association
<ul style="list-style-type: none"> ✔ Also suppliers located outside the Union 	<ul style="list-style-type: none"> ✔ Public authorities ✔ Also buyers outside the Union.



The Directive only applies if at least either the supplier or the buyer are located within the Union.



3/ SIZE

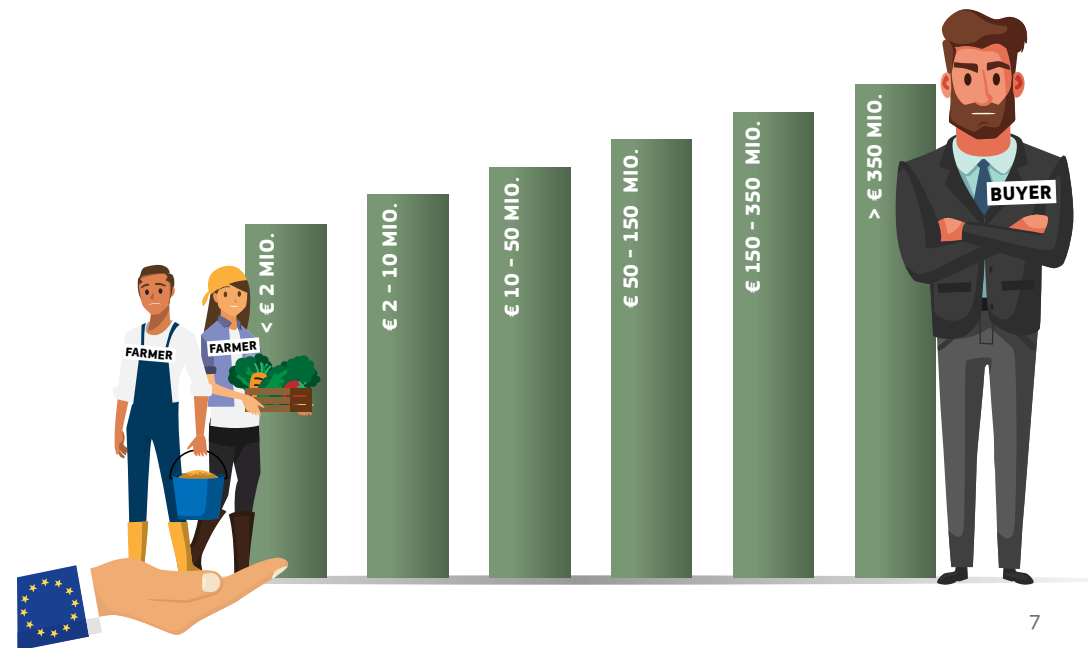
The Directive offers protection along the agri-food supply chain depending on the relative size of operators. It uses a “step approach” based on turnover figures as a proxy that reflects the different bargaining powers of suppliers and buyers. The step approach protects a supplier from unfair trading practices engaged in by an economically stronger buyer. E.g. a micro farmer with less than € 2 million turnover is protected against buyers with a turnover exceeding € 2 million. Smaller suppliers above € 2 million and not exceeding € 10 million are protected against buyers which have a turnover higher than € 10 million. The protective effect covers suppliers having turnovers of up to € 350 million.

The Directive aims to protect only those suppliers, which due to a weak bargaining position need such protection.

Trading partners with larger bargaining power (> € 350 mio. turnover) can often address issues in their contractual negotiations without need for regulatory intervention. If Member States wanted to provide protection for larger suppliers, they could do so under their national laws (due the minimum harmonisation approach chosen).

The relevant turnover is established according to the criteria of the SME recommendation 2003/361/EC. This means that in order to establish the turnover of a supplier or a buyer, also the turnover of the group, of which they are possibly members, will be taken into account. A supplier who sells to a public authority can rely on the protection against unfair behaviour of the public authority regardless of turnover considerations.

SIZE OF ENTREPRISE BY TURNOVER IN MIO.



4/ THE PROHIBITED UNFAIR TRADING PRACTICES

The Directive prohibits **16 specific unfair trading practices**. In doing so it distinguishes between “**black**” and “**grey**” practices. Whereas black unfair trading practices are prohibited, whatever the circumstances, grey practices are allowed if the supplier and the buyer agree on them beforehand in a clear and unambiguous manner. The obligation to agree clearly and unambiguously aims to provide transparency and predictability: both parties know what they signed up to and what their rights and obligations are.

The Directive does not prohibit unfair trading practices in general, but targets those practices which were identified as the most damaging.

BLACK PRACTICES

The rules on the “black” unfair trading practices ensure e.g that farmers are paid on time, do not have their orders cancelled at short notice, and do not have to pay for wasted food. Short order cancellations by the buyer for orders of perishable products are no longer possible. Suppliers can ask for written contract and the buyer cannot threaten them with commercial retaliation when they file complaints. The below list summarises the 10 black practices:

TEN BLACK UNFAIR TRADING PRACTICES

1. Payments later than 30 days for perishable agricultural and food products
2. Payment later than 60 days for other agri-food products
3. Short-notice cancellations of perishable agri-food products
4. Unilateral contract changes by the buyer
5. Payments not related to a specific transaction
6. Risk of loss and deterioration transferred to the supplier
7. Refusal of a written confirmation of a supply agreement by the buyer, despite request of the supplier
8. Misuse of trade secrets by the buyer
9. Commercial retaliation by the buyer
10. Transferring the costs of examining customer complaints to the supplier



EXAMPLES OF UNFAIR TRADING PRACTICES



“ In anticipation of a hot spell, a medium sized wholesaler ordered a large charge of melons from a small agricultural producer organisation, part of which he stores outside the cold storage as it is too small for such a delivery. However, the weather turns out to be much cooler than anticipated and the wholesaler sells fewer melons – which are degrading rapidly. The wholesaler has to discard a part of the delivery.

When paying the producer organisation, the wholesaler then deducts the discarded melons as wastage, leaving the producer organisation with a loss that is no fault of their own but the result of poor planning and storage by the wholesaler. ”

“ Fish farmer A sells fresh fish the local fish factory (turnover EUR 40 million) for the production of tinned fish filets. He is paid only 40 days after delivering the fish. As he cannot get the fish factory to change its payment practice, he complains to the enforcement authority. The fish factory hears about that and threatens to stop dealing with him if he does not withdraw the complaint. The fish factory commits two unfair trading practices prohibited, first for not paying within 30 days for a perishable product, secondly for commercial retaliation. ”



GREY PRACTICES

Grey practices concern e.g activities of promotion, marketing and advertising for which the buyer offers certain services to the supplier to better promote his product, but expects the supplier to contribute to the costs.

SIX GREY UNFAIR TRADING PRACTICES, ALLOWED SUBJECT TO CLEAR AND UNAMBIGUOUS AGREEMENT BEFOREHAND

1. Return of unsold products
2. Payment of the supplier for stocking, display and listing
3. Payment of the supplier for promotion
4. Payment of the supplier for marketing
5. Payment of the supplier for advertising
6. Payment of the supplier for staff of the buyer, fitting out premises



EXAMPLES OF A FAIR MARKETING AGREEMENT



“ It is barbecue season and lamb chops are on offer. Retailer A wishes to promote the sales of lamb chops and other barbecue material and plans a complete marketing strategy, involving local radio ads and advertising lamb chops in his retail brochure. He wants local farmer B to participate in this marketing action by delivering a larger quantity of lamb chops, but at a reduced price and farmer B should also help financing the marketing campaign. Retailer A will also provide a special ‘barbecue’ area in his shop with a fridge dedicated to the lamb chops and will employ his staff to set this up. Farmer B thinks that the strategy is a good idea to promote sales of his products. Retailer A and local farmer B discuss the length and scope of the promotion campaign, agree clearly at what price the lamb chops should be delivered and discuss expected payments and costs for the marketing measures. ”

5/ ENFORCEMENT

The enforcement provisions constitute an important component of the Directive. Member States will have to designate an authority (either a new or an existing authority) which enforces the prohibitions laid down in the Directive. To that end, Member States should vest enforcement authorities with a number of certain minimum powers. It is for the enforcement authorities to decide how they will use these powers in the individual cases that they investigate.

The power of the authority to be able to fine buyers that carry out unfair trading practices is an important one as is the power to publish decisions. Both elements have a dissuasive effect. A further crucial enforcement power

POWERS OF THE ENFORCEMENT AUTHORITIES

- ▶ Power to act upon a complaint or act ex officio
- ▶ Power to investigate
- ▶ Power to terminate an infringement
- ▶ Power to levy fines and impose other penalties
- ▶ Power to publish decisions

concerns the ability to act as an enforcement authority ex officio and upon receipt of a complaint.

6/ COMPLAINTS

Weaker suppliers too often reckon that they cannot afford exercising their rights before a court of civil or commercial law because of fear of commercial retaliation and the financial risks litigation usually entails. Therefore, the Directive emphasises measures that can address these obstacles.

DEALING WITH THE FEAR FACTOR AND FINANCIAL RISK

- ✓ A supplier can submit a complaint to the national enforcement authority
- ✓ A supplier can choose to which authority it wants to file a complaint: the authority of its Member State or the authority of the Member State, where the buyer is located
- ✓ The complainant can request his identity to be protected
- ✓ A supplier may turn to a producer organisation (e.g. cooperative) or other organisations with legitimate interest in representing him to file the complaint on his behalf
- ✓ The authority may open investigations on its own initiative (e.g. on the basis of some anonymous hints)

7/ COOPERATION

The Directive introduces a cooperation regime between national enforcement authorities facilitated by the European Commission. The authorities will meet regularly and – with the assistance of the European Commission – exchange information and discuss best practices in terms of enforcement and new developments concerning unfair trading practices. They will also provide each other mutual assistance in cross-border cases.

MEASURES ON COOPERATION

- ✓ Regular meetings of the authorities and with the Commission
- ✓ Information exchange among authorities and with the Commission via a website
- ✓ Member States will draw up annual reports about their enforcement which will be discussed in the meetings
- ✓ Creation of a public website by the Commission with information on Member States laws



8/ MEMBER STATES CAN GO BEYOND THE DIRECTIVE

Respecting the principle of subsidiarity and in view of existing laws in many Member States, the Directive provides a minimum layer of protection which will be uniform across the EU Member States.

Member States, when transposing the Directive into their national law, can choose to be stricter than the Directive and go beyond its scope. However, they cannot offer less protection than foreseen by the Directive.

MEASURES ON COOPERATION

- ✓ E.g. Member States may provide for even shorter payment deadlines for perishable products (e.g. 20 rather than 30 days foreseen in the Directive).
- ✓ Member States can also go beyond the Directive and e.g. provide for a longer list of unfair trading practices that are prohibited or protect a larger number of suppliers or also protect buyers from certain unfair behaviour of suppliers.

9/ TIME LINE

The Directive should still be adopted under the mandate of the current European Parliament. It will then be published in the Official Journal and enter into force.

24 MONTHS

after entry into force:
Member States have to transpose the Directive into national law

30 MONTHS

after entry into force:
Member States must apply the Directive

36 MONTHS

after entry into force:
Existing contracts must be brought into compliance





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