

# Comments on the proposal for a Directive on unfair trading practices in B2B relationships in the food supply chain

## Background

The European Commission presented a proposal for a directive aimed at banning unfair trade practices (UTP) in the food supply chain.

This proposal comes after more than 10 years of debates, which resulted in the following conclusions:

- Verification of the existence and imposition of UTP by companies with a dominant position in the food supply chain.
- The lack of effective instruments at Member State and EU level to control and combat these UTP in the B2B, where Member states deal on it in many divergence ways.
- That the existence of UTP has a negative impact on the functioning of the market and poses a challenge for the sustainability of the weakest links in the chain in the medium and long term, especially for producers.
- That a voluntary approach and a code of good practices among operators to resolve their differences is neither sufficient nor effective in tackling the problem of UTP.
- That all EU institutions and a large majority of Member states have considered it necessary to establish a common framework for monitoring and banning UTP within the EU.

## Directive Proposal COM (2018) 173.

the proposal consists of the following elements:

*A directive as a legal instrument.* Member States will have six months to transpose the directive into national law and one year to implement it.

*Scope of application.* It is limited to B2B relationships between a supplier that is a SME and a buyer that is a non-SME.

*Products covered.* All agricultural products listed in Annex 1 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, and perishable products.

*Public Authority of Control (APC) of the PCD.* Member States should create or assign powers to an enforcement authority (EA) to monitor and control UTP with the power to impose sanctions, to investigate ex officio and to receive complaints by ensuring the anonymity of the complainant. The Commission will ensure coordination between national EA to investigate UTP in intra-Community trade transactions, and should work together and meet at least once a year. The annual EA meeting will be hosted and facilitated by the European Commission, which will set up a website to facilitate the exchange of information.

*Minimum regulation.* Member States may provide for rules to combat UTP going beyond those set out in the Directive.

### **Prohibition of UTP:**

#### UTP prohibited.

- A buyer pays a supplier perishable product later than 30 calendar days.
- A buyer cancels orders of perishable food products with no time for the supplier to find an alternative.
- A buyer unilaterally and retroactively changes the terms of the supply agreement.
- A supplier pays for the wastage of food products that occurs on the buyer's premises and that is not caused by the negligence or fault of the supplier.

#### UTP prohibited if they are not agreed in a clear and unambiguous terms at the conclusion of the supply agreement.

- A buyer returns unsold food products to a supplier.
- A buyer changes a supplier payment as a condition for the stocking, displaying or listing food products of the supplier.
- A supplier pays for the promotion of food products sold by the buyer.
- A supplier pays for the marketing of food products by the buyer.

### **Proposals from Cooperativas Agro-alimentarias de España**

Cooperativas Agro-alimentarias de España very positively appreciates the step taken by the European Commission to control and ban UTP in the EU.

The system model selected by the Commission is based on the Spanish law, pioneer in the EU in establishing a public system of control of UTP exclusively for the agro-food value chain. However, there is room for improvement in the proposed directive:

Not to limit the scope to B2B relationships between a supplier SME and a buyer non-SME. What is relevant is the imbalance between a supplier and a buyer.

B2B relationships of dependency are not limited to the relationship of an SME with a non-SME, but to the business dependency between a supplier and a buyer regardless of its size. In this sense, Spanish law establishes that there is also a relationship of dependence between operators when the turnover of the product from one to the other is at least 30% of the turnover of the product of the first one in the previous year.

The Directive should extend its scope and introduce the criterion of economic dependence. The Member States would be responsible for establishing the threshold of dependency between operators according to its market structure, and in the case of intra-Community transactions, the European Commission would be responsible for analyzing each case, or for establishing a threshold taking advantage of the knowledge generated in its role as coordinator of the activity between EA and the knowledge of their respective national rules.

Finally, and in order to avoid sterile debates already taking place in other areas when discussing trade relations between farmers and the processing or marketing industries (compulsory contracts in the dairy sector), it should be expressly included in the directive that the relationship between a member and his cooperative does not fall within the scope of this directive, since the member is a supplier and owner of the cooperative itself, his relationship with the cooperative is corporate and goes far beyond the buy-sell relationship between independent operators.

Art. 1.2

Subject matter and scope

<p>2. This Directive applies to certain unfair trading practices which occur in relation to the sales of food products by a supplier <del>that is a small and medium-sized enterprise to a buyer that is not a small and medium-sized enterprise.</del></p>	<p>2. This Directive applies to certain unfair trading practices which occur in relation to the sales of food products by a supplier that <b>has a proven dependent business relationship.</b></p> <p><b>Member States shall define the economic threshold by which a commercial relationship of dependence is deemed to exist.</b></p> <p><b>It is understood that there will be a commercial dependency relationship between a SME and a non-SME; or when it is between a primary producer or a group of primary producers and the other party it is not.</b></p> <p><b>The Commission will be responsible for establishing the specific conditions where unfair trade practices are observed in intra-Community transactions.</b></p>
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Justification

Trade dependence between operators exists in areas that go beyond the SME dimension. It is therefore also necessary to prevent PCDs in a food supply chain dependency relationship between companies that go beyond the SME dimension, as their effects move down the chain in the form of lower prices and low transparency in the functioning of the market.

Include Sales below costs as a prohibited UTP

Selling below production costs is one of the most damaging practices in the chain's commercial relations in the B2B field. The sale at a loss as an abusive practice generates unfair competition and gives the wrong signals to the market, reducing transparency, the proper functioning of the market and affecting especially the sustainability of the farming sector, which already suffers from a position of structural weakness in the market due to its small size and business fragmentation.

It is therefore necessary to expressly introduce a ban on the sales below costs the B2B relations of the chain at Community level, and for EA and the Commission to study and identify those actions that define it as a prohibited UTP.

Art. 3

Prohibition on unfair trading practices

...	.... <b>(d) When a buyer sells food or food</b>
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	<p><b>products bellow costs. This practice exists when the price applied to a food product is lower than the purchase price as per invoice, less the proportional part of the discounts included in the invoice, or the actual cost of production if the good was produced by the seller himself, plus the indirect taxes charged on the transaction. Modifications contained in amending invoices issued after the deadlines indicated shall not be taken into account, nor shall any remuneration or bonus of any kind involving compensation for services rendered be taken into account for the purpose of deducting purchase prices. Under no circumstances may joint offers or gifts to purchasers be used to avoid the application of the prohibition of sales bellow costs. The enforcement and control authority shall ensure that each sale of foodstuffs does not result in a sale at a loss and shall verify the traceability of the products, requiring a correspondence between the volumes of products sold and purchased in each of the sales.</b></p>
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*Justification*

*It is necessary to expressly introduce a prohibition on the sale bellow costs as one of the most common unfair and abusive trading practices affecting the farming sector. Given that the difficulty of identifying and proving under cost selling as an unfair food supply chain practice requires clear and unambiguous criteria, it is necessary that both the European Commission and the EA set up by the Member States identify and reach a consensus on its definition.*

*The European Commission as the control body for PCD in intra-Community transactions*

To address UTP in the single market, there is a need for intra-Community control and an intermediation for the differences that are likely to arise between the national legislations that will develop the minimum framework established by the directive. The European Commission should therefore be the guarantor of the implementation of the *acquis communautaire* and of the effective application of the directive, and it should play a role that goes beyond the mere coordination provided for in the directive. It should also be able to receive anonymous complaints of UTP at intra-Community level, which it will pass on to the EA concerned where appropriate and may, where necessary, issue binding decisions if EA do not reach an agreement, ensuring that the principles laid down by the directive are effectively complied with and drawing on the national legislation concerned.

Art7.

Cooperación entre las autoridades nacionales de control

<p>1. Member States shall ensure that enforcement authorities cooperate effectively with each other and provide each other mutual assistance in investigations that have a cross-border dimension.</p>	<p>1. Member States shall ensure that enforcement authorities cooperate effectively with each other and provide each other mutual assistance in investigations that have a cross-border dimension.</p> <p><b><i>Notwithstanding the foregoing, the Commission may also receive anonymous complaints about possible unfair commercial practices at intra-Community level, by consulting the enforcement authorities responsible for resolving the case, and by having the power to issue a binding decision in the event of no agreement between those authorities, ensuring that the principles of the Directive are applied and taking the national rules involved as a reference.</i></b></p>
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*Justification*

*The Commission, as the guarantor of the application of the *acquis communautaire* and of this directive, must take on a role that goes beyond the simple coordination of the enforcement authorities, playing the role of arbitrator and second instance to ensure that the directive is applied in all cases in an effective manner and despite the diversity of national regulations.*

*Development of national rules*

Article 8 of the proposed directive states that Member States could combat UTP by going beyond the provisions of Articles 3 (defines prohibited DAPs), 5 (complaints and confidentiality), 6 (powers of the NA) and 7 (cooperation of national authorities).

Bearing in mind that the directive is a basic framework and that there are already Member States, such as Spain, which have legislation that broadens its scope of action in relation to the proposal, it is necessary to clarify certain specific aspects so that it does not create an unnecessary conflict of incompatibility between national and Community rules. It will therefore be necessary to include Article 1 within the possibilities for Member States to extend the scope of the Directive to combat UTP, since Spanish legislation goes beyond B2B trade relations between SMEs and non-SMEs.

This amendment would lapse if the proposed amendment to Article 1(2) were to be adopted. Otherwise, the continuity of national legislation already in force and more guaranteeing than the directive should be allowed.

## Art. 8 National rules

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.	Member States may provide for rules designed to combat unfair trading practices going beyond those set out in Articles <b>1</b> , 3, 5, 6 and 7, provided that such national rules are compatible with the rules on the functioning of the internal market.
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### *Justification*

*In order to avoid collisions between Member States' existing legislation, which go beyond the scope of the Directive, it is necessary to include Article 1 on object and scope in the list by which Member States can go further in the combat against UTP in the food supply chain.*

### **Arguments regarding the opposition to establishing a European framework to ban UTP**

#### *The implementation of the directive will lead to an increase in consumer prices*

- The proposal for a directive does not prejudge the price level agreed between the parties, but the use of UTP in commercial relations which are already prohibited by law.
- This statement would imply to the contrary that these UTP would be acceptable as long as they maintain low prices to the consumer. This statement not only implies giving margin to those who do not respect the law, but it would also imply an unsustainable and non-transparent functioning of the market, and a medium and long-term harm to the consumer due to the reduction of competition in the market.

#### *It will mean more bureaucracy and paperwork for businesses*

- The proposal does not imply new obligations for the companies to comply with the obligations established by law, to comply with the payment deadlines and with the contracts signed between the parties. A company that does not use UTP should not not fear sanctions, nor a possible inspection if it has its accounts and ordinary documentation in order.

#### *The means already exist in the countries to combat these measures, there is no need for a Community approach*

- The directive, and other laws of the Member States, are the result of the inability of existing instruments to combat UTP, as well as the lack of a European framework for a single market such as the EU, since UTP at intra-Community level did not have an adequate framework.
- Until now, and except in Spain, the only possible way to enforce UTP was through a slow judicial process, which did not eliminate the fear element on the part of the operator dependent on the chain.
- Initiatives based on purely voluntary approaches have not worked and have proved ineffective.
- The directive seeks to provide a European framework for monitoring practices that are anti-competitive and prohibited by law, the only novelty being the creation of a public enforcement authority with the power to sanction, investigate and receive anonymous complaints.

*It will not solve the structural problem of the production sector*

- This is a reality and not the aim of the directive. The problem of the imbalance in the food chain will continue to exist because of the difference in size and bargaining power between operators. But controlling UTP means reducing the scope for unfair action of those who already have a dominant operator, preventing them from abusing their position to a greater extent.

*It goes against competition policy and is unbalanced because it does not provide for the use of PCDs by the seller over the buyer.*

- It is not against competitiveness or competition policy. It is precisely what it proposes is to control practices that are already banned and to bring transparency to the market in the face of abuse of position by certain actors in the food supply chain.
- Indeed, the proposed Directive has a very limited approach to action which only covers one type of relationship, that of the selling SME with the purchasing non-SMEs. What is relevant is the dependency relationship between operators, and this can go from top to bottom or vice versa. This is an aspect of the Directive that could be improved and we propose the Spanish model, which includes both cases.
- The Spanish AICA (Food Information and Control Agency) is the only agency in a Member State that complies with the conditions of the Directive and has been operational since 2014. In 2017 there were 573 penalties of 1,882 inspections for a total amount of € 9.2 million (44% due to late payments) divided equally between the distribution and the agri-food industry. The economic impact of sanctions cannot be alarming and, on the other hand, is changing the culture of commercial relations in the chain. The best law in the chain is the one that does not have to be activated and where there are no sanctions because the operators act with diligence and loyalty to what has been agreed.