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NOTE

From:	Presidency
To:	Special Committee on Agriculture
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Subject:	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 <i>- Confirmation of the final compromise text with a view to agreement</i>

I. INTRODUCTION

1. The Commission 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 was published on 12 April 2018. The proposal aims at limiting unfair trading practices that result from unequal bargaining power in the food supply chain which is translated into the general objective of “viable food production” of the Common Agricultural Policy. The more specific objectives of the proposal are to maintain market stability, enhance agricultural producers’ income and improve agricultural competitiveness.

II. STATE OF PLAY

2. Under the Bulgarian Presidency, the proposal was presented by the Commission in the Agriculture and Fisheries Council on 16 April 2018 and a first exchange of views in the Special Committee on Agriculture (SCA) took place on 23 April 2018. Technical examination of the proposal was carried out by the Working Party on Horizontal Agricultural Questions (Unfair Trading Practices) on 30 April and 23 May 2018. The SCA had an exchange of views on 11 June 2018.
3. Under the Austrian Presidency, the Working Party further examined the proposal on 3 July and 17 July 2018. The Presidency presented its compromise texts to the SCA on 10 and 17 September 2018 and received guidance for further work. On 1 October 2018, the SCA gave to the Presidency a mandate to start negotiations with the European Parliament.¹
4. In the European Parliament, Paolo De Castro (S&D, IT) was appointed as rapporteur for the proposal on behalf of the Committee on Agriculture and Rural Development (AGRI) which is responsible for the file. In addition, three other Committees gave opinions on the proposal: IMCO (rapporteur Marc Tarabella (S&D, BE)), ENVI (rapporteur Pilar Ayuso (PPE, ES)) and DEVE (rapporteur Linda Mcavon (S&D, UK)). The report of rapporteur De Castro was adopted on 1 October 2018 and the Plenary session adopted its first reading negotiating mandate on this file on 25 October 2018.

¹ 11302/2/18 REV2 + COR 1, 12262/18.

5. The first trilogue took place on 25 October 2018 and the second one on 7 November 2018. The Presidency briefings on the outcomes of these trilogues took place respectively at the SCA meetings on 6 and 12 November 2018. Furthermore, on 12 November 2018, the SCA gave to the Presidency a revised mandate² for the third informal trilogue which took place on 21 November 2018. Delegations were briefed on the outcome of this trilogue at the SCA meeting on 26 November 2018. In preparation for the fourth trilogue on 6 December 2018, the Presidency received a revised mandate³ from the SCA on 5 December 2018. The fourth trilogue was held on 6 December 2018 and the SCA was briefed on 10 December 2018. The fifth trilogue took place on 12 December 2018 and it was followed by the briefing at the SCA on 17 December 2018.
6. The sixth trilogue was held on 19 December 2018. As a result of that trilogue, the European Parliament and the Council reached an agreement *ad referendum* on the compromise text that is set out in Annex I⁴ to this note.

III. OUTCOME OF NEGOTIATIONS

7. Explanations of the main compromises made at the trilogue on 19 December 2018 and some general assessments are presented below.

² 13657/18.

³ 14614/18.

⁴ Amendments to the Commission proposal are marked in *bold and italics*. Deletions are marked as **■** .

8. On the issue of scope of operators (Article 1), the Council mandate of 1 October 2018 maintained the restricted scope that was suggested in the Commission proposal (SME suppliers *versus* non-SME buyers). However, in Article 9 of the Council mandate, it was clarified that Member States may maintain or introduce rules which are stricter than those laid down in this Directive, and that this Directive is without prejudice to national rules aimed at combating unfair trading practices that are not within the scope of this Directive. In its written opinion⁵, the Council Legal Service (CLS) considered that if the scope should be extended to different categories of suppliers and buyers, the Directive could still be validly based on Article 43(2) TFEU provided that the legislature is able to show that such extension is necessary for the attainment of at least one of the objectives of the common agricultural policy set out in Article 39 TFEU and complies with the principle of proportionality. In its mandate, the European Parliament extended the scope to cover all operators, irrespective of their size. In order to find an agreement on the issue of scope, both co-legislators had to make steps towards each-other's positions. As a compromise, certain categories were created according to turnover of operators, thereby extending the protection of suppliers. In the view of the Presidency, the compromise found is a balanced one which is also respecting the opinion of the CLS.
9. Regarding the list of unfair trading practices (Article 3), the Council chose the minimum harmonisation approach and therefore maintained a short list of well defined eight unfair trading practices set out in the Commission proposal, with some drafting modifications. The European Parliament extended the list of unfair trading practices by adding more than 40 additional unfair trading practices. During the negotiations, it turned out that several of these practices should not be covered in this Directive for different reasons, for example they are already covered by national contract law. The Council also reminded that by means of Article 9, Member States may go beyond the rules set out in the Directive. However, in order to find an agreement, the Council could accept the inclusion of certain additional unfair trading practices, in some cases in modified wording. In the view of the Presidency, the compromise found is a balanced one.

⁵ 13604/18.

10. In general, the Council was in favour of a minimum harmonisation approach because several Member States do not have national rules on unfair trading practices. In addition, this is a first time Directive and there is no regulatory experience at the Union level in this field. The Council was of the view that it would be more appropriate to have such a Directive that all Member States are able to properly transpose, with an option for Member States to go beyond if they so wish (Article 9) and for the Commission to carry out an evaluation in future (Article 12). From its side, the European Parliament suggested a more extensive harmonisation (for example, obligations for the enforcement authorities, creation of national observatories, long list of unfair trading practices). In order to find an agreement, the Council had to show flexibility regarding some suggestions from the European Parliament (for example to cover third country buyers). However, the Presidency is of the view that in broad lines, the provisionally agreed compromise text still represents the minimum harmonisation approach.
11. During the negotiations, the Presidency and its counterpart in the European Parliament sought to bring the positions of the two institutions closer together, with the aim of achieving an outcome at the first reading which is acceptable to all negotiation partners. Even if on certain issues the Presidency had to show some flexibility regarding the concerns expressed by the European Parliament, it was able to follow the mandate given by the SCA in broad lines. The Presidency considers that this is a balanced agreement that should be acceptable for delegations. Considering that the term of office of this composition of the European Parliament will end in spring 2019, the Presidency is of the view that the adoption of this Proposal is a matter of urgency.

IV. CONCLUSION

12. The Special Committee on Agriculture is therefore invited:

- to confirm the final compromise text, as contained in Annex I to this note;
- to authorise the Presidency to send a letter to the Chair of the European Parliament's AGRI committee, confirming that, should the European Parliament adopt its position at first reading, in accordance with Article 294(3) of the TFEU, in the form set out in the final compromise text contained in Annex I to this note (subject to revision by the legal linguists of both institutions), the Council would, in accordance with Article 294(4) of that Treaty, approve the European Parliament's position and the act shall be adopted in the wording which corresponds to the European Parliament's position;
- to agree to suggest to the Council to make the joint statement by the European Parliament, the Council and the Commission set out in Annex II to this note;
- to take note of the statement by the European Parliament set out in Annex III to this note.

PE-CONS No/YY - 2018/0082 (COD)

**DIRECTIVE
OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

of

**on unfair trading practices in business-to-business relationships in the *agricultural and food*
supply chain**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 43(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee⁶,

Having regard to the opinion of the Committee of the Regions⁷,

Acting in accordance with the ordinary legislative procedure,

⁶ OJ C , , p. .

⁷ OJ C , , p. .

Whereas:

- (1) *Within the agricultural and food supply chain, significant imbalances in bargaining power between suppliers and buyers of agricultural and food products are a common occurrence. This asymmetry in bargaining power is likely to lead to unfair trading practices, when larger and more powerful trading partners seek to impose certain practices or contractual arrangements in relation to a sales transaction which are to their advantage. Such practices may e.g. (i) grossly deviate from good commercial conduct, be contrary to good faith and fair dealing and be unilaterally imposed by one trading partner on the other, or (ii) impose an unjustified and disproportionate transfer of economic risk from one trading partner to another; or (iii) impose a significant imbalance of rights and obligations on one trading partner. Certain practices might be manifestly unfair even when both parties agree to them. A minimum Union standard of protection against unfair trading practices should be introduced to reduce the occurrence of such practices which are likely to have a negative impact on the living standards of the agricultural community. The minimum harmonisation approach in this Directive allows Member States to adopt or maintain national rules which go beyond the unfair trading practices listed in the Directive.*

- (2) Three Commission communications since 2009⁸ have focused on the working of the food supply chain, including the occurrence of unfair trading practices. ■ The Commission suggested desirable features for national and voluntary governance frameworks of unfair trading practices in the food supply chain. Not all of those features have become part of the legal framework and voluntary governance regimes in Member States, leaving the occurrence of such practices still in the focus of the political debate in the Union.
- (3) In June 2016, a European Parliament resolution⁹ invited the Commission to submit a proposal for a Union legal framework concerning unfair trading practices. In December 2016, the Council invited the Commission to undertake, in a timely manner, an impact assessment with a view to proposing a Union legal framework or non-legislative measures to address unfair trading practices¹⁰. An impact assessment has been prepared by the Commission which was preceded by an open public consultation as well as targeted consultations. ***In addition, during the legislative process the Commission has provided information, demonstrating that comparatively few of the largest operators represent a considerable share of the overall value of production.***

⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A better functioning of the food supply chain, COM(2009) 591.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling unfair trading practices in the business-to-business food supply chain, COM(2014)472 final. Report from the Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain, COM(2016)032 final.

⁹ European Parliament resolution of 7 June 2016 on unfair trading practices in the food supply chain (2015/2065(INI)).

¹⁰ Council Conclusions of 12 December 2016, Strengthening farmers' position in the food supply chain and tackling unfair trading practices.

- (4) *In 2011, the Commission-led High Level Forum for a Better Functioning Food Supply Chain endorsed a set of principles of good practice in vertical relations in the food supply chain agreed by organisations representing a majority of the operators in the food supply chain. Those principles became the basis for the Supply Chain Initiative launched in 2013.*
- (5) Different operators are active in the **agricultural and** food supply chain at the stages of production, processing, marketing, distribution and retail of **agricultural and** food products. The chain is by far the most important channel for bringing **agricultural and** food products from “farm to fork”. Those operators trade **agricultural and** food products, that is to say primary agricultural products, including fishery and aquaculture products, as listed in Annex I to the Treaty ■, and ■ products not listed in that Annex but processed *for use as food using* products *listed in that Annex.*
- (6) While business risk is inherent in all economic activity, agricultural production is particularly fraught with uncertainty due to its reliance on biological processes, *and in addition, as regards agricultural production, the exposure to weather conditions. This uncertainty is compounded* since **agricultural and food** products are to a greater or lesser extent perishable and seasonable ■. In an agricultural policy environment that is distinctly more market-oriented than in the past, protection against unfair trading practices has become more important for operators active in the **agricultural and** food supply chain ■.

- (7) *In particular, such unfair trading practices are likely to have a negative impact on the living standards of the agricultural community. This impact is understood to be either direct as it concerns agricultural producers and their organisations as suppliers or indirect, through a “cascading” of the consequences of the unfair trading practices in a manner that negatively effects the primary producers in the agricultural and food supply chain.*
- (8) The number and size of operators vary across the different stages of the *agricultural and food supply chain*. Differences in bargaining power, *which are also commensurate with the economic dependence of the supplier on the buyer, are likely to lead to larger operators imposing unfair trading practices on smaller operators. A dynamic approach in which the relative size of the supplier and the buyer is taken as the basis should provide better protection against unfair trading practices for those operators who need it most.* Unfair trading practices are in particular harmful for small and medium-sized operators in the *agricultural and food supply chain*. *As regards mid-range enterprises, such enterprises should also be protected against unfair trading practices in the interest of avoiding the cost of such practices being passed on to smaller operators. The cascading effect on farmers appears to be particularly significant for undertakings with a turnover of up to EUR 350 million.*

- (9) A majority of █ Member States, but not all of them, have specific national rules that protect suppliers against unfair trading practices occurring in business-to-business relationships in the *agricultural and* food supply chain. Where reliance on contract law or self-regulatory initiatives is possible, fear of retaliation against a complainant *as well as financial risks involved, limit* the practical value of these forms of redress. Certain Member States, which have specific rules on unfair trading practices █, therefore entrust administrative authorities with their enforcement. However, Member States' unfair trading practices rules - to the extent they exist - are characterised by significant divergence.

- (10) *The protection provided by this Directive should benefit agricultural producers and natural or legal persons that supply agricultural and food products, including producer organisations, whether recognised or not, and associations of producer organisations, whether recognised or not, including cooperatives, subject to their relative bargaining power. Those suppliers are particularly vulnerable to unfair trading practices and least able to weather them without negative effects on their economic viability. As regards the categories of producers that should be protected under this Directive, it is noteworthy that a large part of farmer-constituted cooperatives fall into its so-called mid-range tier. 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 such as manufacturers and distributors of agricultural and agricultural processed products can also serve to avoid trade diversion away from agricultural producers and their associations, which produce processed products, to non-protected suppliers.*

- (11) *This Directive should cover commercial transactions irrespective of whether they are carried out between undertakings or between undertakings and public authorities, given that public authorities, when buying agricultural and food products, should be held to the same standards. The Directive should apply to public authority buyers regardless of turnover related considerations.*
- (12) *Certain services ancillary to the sale of agricultural and food products should be included in the scope of this Directive.*
- (13) *Suppliers in the Union should be protected against unfair trading practices engaged by buyers in the same Member State, by buyers in another Member State but also by buyers established outside the Union. This can avoid possible unintended consequences of protection that would only apply to buyers inside the Union, such as forum shifting. Suppliers established outside the Union should also enjoy protection against unfair trading practices when they sell agricultural and food products into the Union. Not only are they liable to be equally vulnerable to such practices but such coverage will also countervail unintended trade diversion towards non-protected suppliers that would undercut the desired positive effects of protection of suppliers in the Union.*

- (14) The relevant rules should apply to business conduct by larger *operators against operators who have less bargaining power. A suitable approximation for relative bargaining power is operators' turnover. While being an approximation, such a criterion enables predictability for operators concerning their legal rights and obligations under this Directive. An upper limit concerning protection should prevent that protection is afforded to operators who are not or significantly less vulnerable than their smaller partners or competitors. Therefore, this Directive establishes scales according to which protection is afforded in a step-approach according to turnover-based categories of operators in the agricultural and food supply chain.*
- (15) 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 *enable* cohesive *regimes*. Member States should not be precluded from *maintaining* and *introducing* on their territory stricter national *rules providing for a higher standard of protection* against unfair trading practices occurring in business-to-business relationships in the *agricultural and* food supply chain, subject to the limits of Union law applicable to the functioning of the internal market *and if they are proportionate.*

- (16) *Member States should also be able to maintain or introduce national rules designed to combat unfair trading practices that are not within the scope of this Directive, subject to the limits of Union law applicable to the functioning of the internal market and if such rules are proportionate. Such national rules could go beyond this Directive, for example as regards the size of the buyers and suppliers, protection of buyers, the scope of products and the scope of services. Such national rules could also go beyond the number and type of prohibited unfair trading practices listed in the Directive.*
- (17) *Such national rules would apply alongside voluntary governance measures, such as national codes of conduct or the Supply Chain Initiative. The use of such voluntary measures of alternative dispute resolution between suppliers and buyers is explicitly encouraged, without prejudice to the right of the supplier to submit a complaint or turn to civil law courts.*
- (18) As unfair trading practices may occur at any stage of the sale of *an agricultural and* food product, ■ before, during or after a sales transaction, Member States should ensure that the provisions of this Directive should apply to such practices whenever they occur.

- (19) When deciding whether an individual trading practice is considered unfair it is important to reduce the risk of limiting the use of fair and efficiency-creating agreements agreed between parties. As a result, it is appropriate to distinguish practices that are foreseen in clear and unambiguous terms in supply agreements *or subsequend agreements* between parties from practices that occur after the transaction has started without *having been* agreed *beforehand*, so that only unilateral and retrospective changes to those relevant terms of the supply agreement are prohibited. However, certain trading practices are considered as unfair by their very nature and should not be subject to the parties' contractual freedom ■ .
- (20) *Late payments for agricultural and food products, which also include perishable products, and short notice cancellations of orders of such perishable products impact negatively on the economic viability of the supplier without off-setting benefits. Such practices should therefore be prohibited. In this context, it is appropriate to provide for a definition of perishable agricultural and food products for the purposes of this Directive. Definitions used in food law related acts of the Union aim at different objectives, such as health and food safety, and are therefore not appropriate for the purposes of this Directive. A product should be considered perishable if it can be expected to become unfit for sale within 30 days from the last act of harvesting, production or processing by the supplier, regardless of whether the product is further processed after sale, and regardless of whether after sale the product is handled in accordance with other applicable rules, in particular food safety rules.*

Perishable products are normally used or sold quickly. Payments for perishable products that are made later than 30 calendar days after delivery, or the end of an agreed delivery period where products are delivered on a regular basis, or the date of establishment of the amount payable, are not compatible with fair trading. In order to provide increased protection to farmers and their liquidity, suppliers of other agricultural and food products should not have to wait for payment longer than 60 calendar days after delivery, or the end of an agreed delivery period where products are delivered on a regular basis, or the date of establishment of the amount payable. These limitations should only apply to payments related to the sale of agricultural and food products, and not to other payments such as supplementary payments from a cooperative to its members.

In accordance with Directive 2011/7/EU of the European Parliament and of the Council¹¹, the date of establishment of the amount payable for an agreed delivery period may be considered, for the purposes of this Directive, as the date of the issuance of the invoice, or the date of its receipt by the buyer.

¹¹ *Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions Text with EEA relevance (OJ L 48, 23.2.2011, p. 1).*

(21) *The late payment provisions laid down in this Directive constitute specific rules for the agricultural and food sector in relation to the provisions on the payment periods set out in Directive 2011/7/EU. They should not affect agreements concerning value sharing clauses within the meaning of Article 172a of Regulation (EU) No 1308/2013 of the European Parliament and of the Council¹². In order to safeguard the even running of the school scheme pursuant to Article 23 of Regulation (EU) No 1308/2013, the late payment provisions laid down in this Directive should not apply to payments made by a buyer (aid applicant) to a supplier in the framework of the school scheme. Taking into account the challenge for public entities providing healthcare to prioritise healthcare in a way that balances the needs of individual patients with the financial resources, these provisions should also not apply to public entities providing healthcare in the meaning of Article 4(4)(b) of Directive 2011/7/EU.*

¹² *Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ L 347, 20.12.2013, p. 671).*

(22) *Grapes and must for wine production have special characteristics in that the grapes are harvested only during a very limited period during the year, but used for the production of wine which will in some cases only be sold many years later. In order to cater for this special situation, producer organisations or interbranch organisations have traditionally developed standard contracts for the supply of these products which provide for specific payment deadlines with instalments. As these standard contracts are used by suppliers and buyers for multiannual arrangements, they provide agricultural producers not only with the security of long standing sales relations, but also contribute to the stability of the supply chain. Where such standard contracts, as drawn up in agreements by recognised producer organisations, interbranch organisations or associations of producer organisations, have been made binding by the Member States under Article 164 of Regulation 1308/2013 before 1 January 2019, or where this extension of the standard contracts is renewed by Member States without any significant changes of the payment terms to the disadvantage of suppliers of grapes and must, the late payment provisions laid down in this Directive should not apply to contracts between suppliers of grapes and must for wine production and their direct buyers. Member States are obliged to communicate the respective agreements of recognised producer organisations, interbranch organisations and associations of producer organisations according to Article 164 (6) of Regulation (EU) 1308/2013 to the Commission.*

- (23) *Notices of cancellation for perishable products of less than 30 days are considered unfair as the supplier would not be in a position to find an alternative outlet. However, for products in certain sectors even shorter cancellation periods might still leave sufficient time for suppliers to sell the products elsewhere or use them themselves. Member States therefore should be allowed to provide for shorter cancellation periods in duly justified cases for such sectors.*
- (24) *Stronger buyers should not change agreed contract terms unilaterally, e.g. de-list products covered by a supply agreement. However, this should not cover situations in which there is an agreement between a supplier and a buyer that specifically stipulates that the buyer can specify at a later stage a concrete element of the transaction in respect of future orders. This could for instance concern the quantities ordered. An agreement is not necessarily concluded at one point in time for all aspects of the transaction between the supplier and the buyer.*
- (25) *A supplier and a buyer of agricultural and food products can freely negotiate a sales transaction, including the price. These negotiations can also include payments for services rendered by the buyer to the supplier, such as listing, marketing and promotion. However, where a buyer charges a supplier payments which are not related to a specific sales transaction, this should be considered unfair and should be prohibited under the Directive.*

- (26) *While there should be no obligation to use written contracts, the use of written contracts in the agricultural and food supply chain may help to avoid certain unfair commercial practices. Therefore, in order to protect suppliers from such unfair practices, where the terms of a supply agreement have already been agreed, suppliers or their associations should have the right to request a written confirmation. In such cases, the refusal by a buyer to confirm in writing the terms of the supply agreement should be considered as an unfair trading practice and be prohibited. In addition, Member States may identify, share and promote best practices concerning long-term contractualisation, aimed at strengthening the bargaining position of producers within the agricultural and food supply chain.*
- (27) *This Directive does not harmonise the rules on the burden of proof to be applied in the proceedings before the national enforcement authorities, nor does it harmonise the definition of supply agreements. Therefore, the rules on the burden of proof and the definition of supply agreements are those laid down by national law of Member States.*

- (28) *Under this Directive suppliers can file complaints against certain unfair trading practices. Commercial retaliation by a buyer or the threat thereof, e.g. by delisting products, reducing the quantities of products ordered or stopping certain services which he provides to the supplier such as marketing or promotions on the suppliers' products, against a supplier's exercise of his rights should be prohibited and treated as an unfair trading practice.*
- (29) *The costs of making available on the market, stocking, displaying or listing agricultural and food products are normally borne by the buyer. As a consequence, it should be prohibited under this Directive that a supplier is charged payment, to be made either to the buyer or to a third party, for those services, unless such a payment has been agreed in clear and unambiguous terms at the conclusion of the supply agreement or in any subsequent agreement between the buyer and the supplier. Where such a payment is agreed, it should be based on objective and reasonable estimates.*
- (30) *For contributions by a supplier to the costs of product promotion, marketing or advertising, including promotional displays in stores and sales campaigns to be considered fair, they should be agreed in clear and unambiguous terms at the conclusion of the supply agreement or in any subsequent agreement between the buyer and the supplier, otherwise they should be prohibited under this Directive. Where such a contribution is agreed, it should be based on objective and reasonable estimates.*

- (31) *Member States should designate enforcement authorities so to ensure an effective enforcement of the prohibitions laid down in this Directive **1**. Those authorities should be able to act either on **their** own initiative or by way of complaints by parties affected by unfair trading practices in the **agricultural and food supply chain or whistle blower or anonymous complaints**. An enforcement authority might find that there are not sufficient grounds to act on a complaint. Administrative priorities may also lead to such insufficient grounds. If the authority finds that it will not be able to give priority to acting on a complaint, it should inform the complainant and give reasons.* Where a complainant requests that his identity remain confidential because of fear of retaliation, the enforcement authorities of the Member States should *take the appropriate measures*.
- (32) *If a Member State has more than one enforcement authority, it should designate one single contact point with a view to facilitating effective cooperation with the enforcement authorities of other Member States and with the Commission.*
- (33) *In order to ensure an effective enforcement of the prohibition of unfair trading practices, the designated enforcement authorities should have all necessary resources, staff and expertise.*
- (34) *Suppliers might find it easier to lodge a complaint with the enforcement authority of their own Member State e.g. for linguistic reasons. In terms of enforcement, filing a complaint with the enforcement authority of the Member State in which the buyer is located might however be more effective. The supplier should be given a choice to which authority he wants to address the complaint.*

- (35) Complaints by producer organisations, *other organisations of suppliers and* associations of such organisations, *including representative organisations*, can serve to protect the identity of individual members of the organisation who **█** consider themselves exposed to unfair trading practices. *Other organisations with a legitimate interest in representing suppliers should have the possibility to submit a complaint, at the request and in the interest of a supplier, provided that such organisations are independent non-profit-making legal persons.* Enforcement authorities of the Member States should therefore be able to accept and act upon complaints by such entities while protecting the procedural rights of the *buyer*.
- (36) The enforcement authorities of the Member States should have the necessary powers *and expertise to carry out investigations. The empowerment of the authorities does not mean that the authorities are obliged to use these powers in each individual investigation they carry out. The powers of the enforcement authorities should for example* enable them to effectively gather any factual information *and they* should have the power to order the termination of a prohibited practice, where applicable.
- (37) *The exercise of the powers conferred by this Directive on enforcement authorities should be subject to appropriate safeguards which meet the standards of general principles of Union law and the Charter of Fundamental Rights of the European Union, in accordance with the case law of the Court of Justice of the European Union, including the respect of the buyer's rights of defence.*

- (38) The existence of a deterrent, such as the power to impose *or initiate fines, e.g. with courts, and other appropriate penalties* and the publication of investigation results, *including information about the buyer having committed the infringement*, can encourage behavioural change and pre-litigation solutions between the parties and should therefore be part of the powers of the enforcement authorities. *Fines may be particularly effective and dissuasive. However, it should be the decision of the enforcement authority in individual investigations which of its powers it will exercise and whether it will impose or initiate a fine or another appropriate penalty.*
- (39) The Commission and the enforcement authorities of the Member States should cooperate closely so as to ensure a common approach with respect to the application of the rules set out in this Directive. In particular, the enforcement authorities should provide each other mutual assistance, for example by sharing information and assisting in investigations which have a cross-border dimension.
- (40) To facilitate effective enforcement, the Commission should help organise *regular* meetings between the enforcement authorities of the Member States where ■ relevant information, *best practices, new developments, enforcement practices and recommendations with regard to the application of the provisions laid down in this Directive* can be shared. ■

(41) *To facilitate those exchanges, the Commission should establish and manage a website which contains references to the national enforcement authorities including information on the national acts of transposition.*

█

(42) The Commission should have an overview of the implementation of this Directive in the Member States. In addition, the Commission should be able to assess the effectiveness of this Directive. To this end, the enforcement authorities of the Member States should submit annual reports to the Commission. *These reports should, where applicable, provide quantitative and qualitative information on complaints, investigations and decisions taken.* In order to ensure uniform conditions for the implementation of the reporting obligation, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council¹³. The Committee for the Common Organisation of the Agricultural Markets should assist the Commission in this procedure.

¹³ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

- (43) In the interest of an effective implementation of the policy in respect of unfair trading practices in business-to-business relationships in the *agricultural and* food supply chain, the Commission should review the application of this Directive and submit a report to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *The review should assess, in particular, the effectiveness of national measures aimed at combating unfair trading practices in the agricultural and food supply chain and the effectiveness of cooperation between enforcement authorities.* The review should also pay particular attention to whether protection of ■ buyers of *agricultural and* food products in the supply chain – in addition to the protection of ■ suppliers – in the future would be justified. *The report can be accompanied by relevant legislative proposals, if appropriate.*

(44) *Since the objectives of this Directive, namely laying down a minimum Union standard of protection by harmonising Member States' diverging measures relating to unfair trading practices, cannot be sufficiently achieved by the Member States, but can rather, by reason of their scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TFEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives,*

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter and scope

1. ***With a view to combatting 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 another, this Directive establishes a minimum list of prohibited unfair trading practices between buyers and suppliers in the **agricultural and** food supply chain and lays down minimum rules concerning their enforcement and arrangements for the coordination between enforcement authorities.***

2. This Directive applies to certain unfair trading practices which occur in relation to the sales of **agricultural and food products by a:**
 - (a) ***supplier which has a turnover not exceeding EUR 2 million to a buyer which has a turnover of more than EUR 2 million;***

 - (b) ***supplier which has a turnover of more than EUR 2 and not exceeding EUR 10 million to a buyer which has a turnover of more than EUR 10 million;***

 - (c) ***supplier which has a turnover of more than EUR 10 and not exceeding EUR 50 million to a buyer which has a turnover of more than EUR 50 million;***

 - (d) ***supplier which has a turnover of more than EUR 50 and not exceeding EUR 150 million to a buyer which has a turnover of more than EUR 150 million;***

 - (e) ***supplier which has a turnover of more than EUR 150 and not exceeding EUR 350 million to a buyer which has a turnover of more than EUR 350 million.***

The turnover of suppliers and buyers referred to above is determined in conformity with Commission Recommendation 2003/361/EC¹⁴ and in particular Article 3 of the Annex thereto. In case of a public authority the turnover conditions in paragraph 2 do not apply.

This Directive applies to sales where either the supplier or the buyer, or both, are established in the Union.

This Directive applies also to services, insofar as explicitly referred to in Article 3, provided by a buyer to the supplier in the cases referred to in this paragraph.

This Directive does not apply to agreements between suppliers and consumers.

3. This Directive *applies* to supply agreements concluded after the date of applicability of the provisions transposing this Directive referred to in the second subparagraph of Article 13(1).
4. *By way of transition, supply agreements concluded before the date referred to in the first subparagraph of Article 13(1) shall be brought into compliance with the provisions set out therein within 12 months after that date.*

¹⁴ *Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).*

Article 2
Definitions

For the purposes of this Directive, the following definitions apply:

- (1) “buyer” means any natural or legal person *irrespective of their place of establishment, or any public authority* in the Union, who buys *agricultural and* food products **■**. The term “buyer” may include a group of such natural and legal persons;
- (2) “*public authority*” means *the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law*;
- (3) “supplier” means any agricultural producer or any natural or legal person, irrespective of their place of establishment, who sells *agricultural and* food products. The term “supplier” may include a group of such agricultural producers or such natural and legal persons, including producer organisations, *organisations of suppliers* and associations of *such* organisations;
■
- (4) “*agricultural and* food products” means products listed in Annex I to the Treaty **■** as well as products not listed in that Annex, but processed *for use as food using* products *listed in that Annex*;
- (5) “perishable *agricultural and* food products” means *agricultural and* food products that *by their nature or at their stage of processing are liable to become unfit for sale within 30 days from harvest, production or processing*.

Article 3

Prohibition of unfair trading practices

1. Member States shall ensure that *at least all* the following *unfair* trading practices are prohibited:

(a) a buyer pays a supplier **■**,

(i) *where products are delivered on a regular basis under a supply agreement:*

- *for perishable agricultural and food products, later than 30 calendar days after the end of an agreed delivery period in which deliveries have been made, or later than 30 days after the date of establishment of the amount payable for that delivery period, whichever of those two dates is the later;*
- *for other agricultural and food products, later than 60 calendar days after the end of an agreed delivery period in which deliveries have been made, or later than 60 days after the date of establishment of the amount payable for that delivery period, whichever of those two dates is the later.*

For the purposes of the payment periods in this point, the agreed delivery periods shall in any case be considered to not exceed one month;

(ii) where products are not delivered on a regular basis under a supply agreement:

- *for perishable agricultural and food products, later than 30 calendar days after the date of delivery or after the date of establishment of the amount payable, whichever of those two dates is the later;*
- *for other agricultural and food products, later than 60 calendar days after the date of delivery or after the date of establishment of the amount payable, whichever of those two dates is the later.*

(iii) Notwithstanding points (i) and (ii), where the buyer establishes the amount payable:

- *the payment periods referred to in point (i) shall start to run from the end of an agreed delivery period in which the deliveries have been made;*
- *the payment periods referred to in point (ii) shall start to run from the date of delivery;*

(b) a buyer cancels orders of perishable **agricultural and** food products at such short notice that a supplier cannot reasonably be expected to find an alternative to commercialise or use these products; **a notice of less than 30 days shall always be considered as such short notice. Member States may in duly justified cases and for specific sectors set shorter periods than the 30 days;**

- (c) a buyer unilaterally **■** changes the terms of the supply agreement *for agricultural and food products* concerning the frequency, *method, place*, timing or volume of the supply or delivery, the quality standards, *the terms of payment* or the prices *or as regards the provision of services insofar as these are explicitly referred to in paragraph 2*;
- (d) *a buyer requires payments from a supplier that are not related to the sale of agricultural and food products of the supplier*;
- (e) a *buyer requires a supplier to pay* for the *deterioration or loss, or both, of agricultural and food products* that occurs on the buyer's premises *or when they are in the buyer's ownership* and that is not caused by the negligence or fault of the supplier;
- (f) *a buyer refuses to confirm in writing the terms of a supply agreement which were agreed between the buyer and the supplier and for which the supplier has asked for a written confirmation. This shall not apply where the supply agreement concerns products to be delivered by a member of a cooperative to the cooperative of which the supplier is a member, if the statutes of that cooperative or the rules and decisions provided for in, or derived from, these statutes contain provisions having a similar effect to the terms of the supply agreement*;

- (g) *a buyer acquires, uses or discloses trade secrets of the supplier unlawfully within the meaning of Directive (EU) 2016/943;*
- (h) *a buyer threatens to carry out or carries out acts of commercial retaliation against a supplier when the supplier exercises its contractual or legal rights, including by filing a complaint or by cooperating with enforcement authorities during an investigation;*
- (e) *a buyer requires compensation from a supplier for the cost of examining customer complaints related to the sale of the supplier's products although there is no negligence or fault on the part of the supplier.*

The prohibition referred to in point (a) shall be without prejudice:

- *to the consequences of late payments and remedies as laid down in Directive 2011/7/EU, which shall apply, by derogation from the payment periods set out in that Directive, on the basis of the payment periods set out in this Directive;*
- *to the option of a buyer and a supplier to agree on a value sharing clause within the meaning of Article 172a of Regulation (EU) No 1308/2013 of the European Parliament and of the Council¹⁵.*

¹⁵ *Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ L 347, 20.12.2013, p. 671).*

The prohibition referred to in point (a) shall not apply to payments:

- *made by a buyer to suppliers where these payments are made in the framework of the school scheme pursuant to Article 23 of Regulation (EU) No 1308/2013;*
- *made by public entities providing healthcare in the meaning of Article 4(4)(b) of Directive 2011/7;*
- *in contracts between suppliers of grapes and must for wine production and their direct buyers, provided that:*
 - a) *the specific terms of payment for sales transactions are included in standard contracts which have been made binding by the Member State pursuant to Article 164 of Regulation (EU) No 1308/2013 before 1 January 2019, and that this extension of the standard contracts is renewed by the Member States from that date without any significant changes of the terms of payment to the disadvantage of suppliers of grapes and must*
 - b) *and that the contracts between suppliers of grapes and must for wine production and their direct buyers are multiannual or become multi-annual.*

2. Member States shall ensure that the following trading practices are prohibited, *unless they have been previously* agreed in clear and unambiguous terms *in the* ■ *supply agreement or in any subsequent agreement between the supplier and the buyer:*
- (a) a buyer returns unsold *agricultural and* food products to a supplier *without paying for those unsold products or for the disposal of those products, or both;*
 - (b) a ■ supplier *is charged* payment as a condition for *making available on the market,* the stocking, displaying or listing *its agricultural and* food products ■ ;
 - (c) a *buyer requires a* supplier *to bear all or part of the cost of discounts of agricultural and* food products sold by the buyer *by way of promotion.* Prior to a promotion and if that promotion is initiated by the buyer, the buyer shall specify the period of the promotion and the expected quantity of the *agricultural and* food products to be ordered *at the discounted price;*
 - (d) *a buyer requires a supplier to pay for the advertising of agricultural and food products by the buyer;*
 - (e) a *buyer requires a* supplier *to pay* for the marketing of *agricultural and* food products by the buyer;
 - (f) *a buyer charges a supplier for staff for fitting-out premises used for the sale of the supplier's products.*

3. **Where** a payment is requested by the buyer for the situations described in points (b), (c), (d), **(e) and (f)** of paragraph 2, **■** if requested by the supplier, **the buyer shall** provide the supplier with an estimate **in writing** of the payments per unit or **the overall payments**, whichever is appropriate, and insofar as the situations described in points (b), (d), **(e) and (f)** of paragraph 2 are concerned, **shall also provide** an estimate of the costs and the basis for **that estimate in writing**.
4. Member States shall ensure that the prohibitions laid down in paragraphs 1 and 2 constitute overriding mandatory provisions which are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the supply agreement between the parties.

Article 4

Designated enforcement **authorities**

1. Each Member State shall designate **one or more authorities** to enforce the prohibitions laid down in Article 3 at national level ("enforcement authority"), **and inform the Commission of the designation**.
2. **If a Member State designates more than one enforcement authority on its territory, it shall designate one single contact point for cooperation among enforcement authorities and for cooperation with the Commission**.

Article 5

Complaints and confidentiality

1. A supplier *may* address a complaint *either to the enforcement authority of the Member State in which the supplier is established or* to the enforcement authority of the Member State in which the buyer suspected to have engaged in a prohibited trading practice is established. *The enforcement authority to which the complaint was addressed shall be competent to enforce the prohibitions laid down in Article 3.*

2. Producer organisations, *other organisations of suppliers and* associations of *such* organisations, whose member(s) or member(s) of their members consider(s) that they are affected by a prohibited trading practice, shall have the right to submit a complaint *at the request of their members or, where appropriate, at the request of members of their members.*

Other organisations with a legitimate interest in representing suppliers shall have the right to submit a complaint at the request and in the interest of a supplier provided that such organisations are independent non-profit-making legal persons.

3. *Member States* shall ensure *that, where* the complainant *so requests, the enforcement authority is to take the necessary measures for the appropriate protection of* the confidentiality of the identity of the complainant *or the members referred to in paragraph 2* and any other information █ in respect of which the complainant considers *that* disclosure *would be* harmful to *its* interests. The complainant shall identify *any* information █ for *which the complainant requests* confidentiality.

4. *Member States shall ensure that the enforcement authority informs the complainant how it intends to follow up on the complaint within a reasonable period of time after the receipt of the complaint.*

5. Where the enforcement authority considers that there are insufficient grounds for acting on a complaint, it shall inform the complainant about the reasons. ***It shall do so within a reasonable period of time after the receipt of the complaint.***
6. ***Where the enforcement authority considers that there are sufficient grounds for acting on a complaint, it shall initiate, conduct and conclude an investigation within a reasonable period of time.***
7. ***Member States shall ensure that where the enforcement authority finds that a buyer has infringed the prohibitions referred to in Article 3, it shall require the buyer to terminate the prohibited trading practice.***

Article 6

Powers of the enforcement authority

1. Member States shall ensure that ***each of their enforcement authorities has the necessary resources and expertise to perform its duties*** and shall confer on it the following powers:
 - (a) ***the power*** to initiate and conduct investigations on its own initiative or based on a complaint;
 - (b) ***the power*** to require buyers and suppliers to provide all necessary information in order to carry out investigations on the prohibited trading practices;
 - (c) ***the power to carry out unannounced on-site inspections within the framework of its investigations, in accordance with national rules and procedures;***

- (d) ***the power*** to take a decision ***finding*** an infringement of the prohibitions laid down in Article 3 and ***requiring*** the buyer to terminate the prohibited trading practice. The authority may abstain from taking any such decision, if such decision would risk revealing the identity of a complainant or disclosing any other information in respect of which the complainant considers disclosure harmful to his interests, provided that the complainant has identified that information in accordance with Article 5(3);
- (e) ***the power to impose or initiate proceedings, including as regards interim relief, for the imposition of fines and other equally effective penalties*** on the author of the infringement, ***in accordance with national rules and procedures***;
- (f) ***the power to regularly publish its decisions relating to points (d) and (e)***.

The ***penalties referred to in point (e)*** shall be effective, proportionate and dissuasive taking into account the nature, duration, ***recurrence*** and gravity of the infringement.

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2. ***Member States shall ensure that the exercise of those powers is subject to appropriate safeguards in respect of rights of defence, in accordance with the general principles of Union law and the Charter of Fundamental Rights of the European Union, including where the complainant requests confidential treatment of information pursuant to Article 5(3)***.

Article 7

Alternative dispute resolution

Without prejudice to the right of suppliers to submit a complaint under Article 5, and the powers of the enforcement authority under Article 6, Member States may promote the voluntary use of effective and independent alternative dispute resolution mechanisms, such as mediation, with a view to the settlement of disputes between suppliers and buyers regarding the use of unfair trading practices by the buyer.

Article 8

Cooperation between enforcement authorities

1. Member States shall ensure that enforcement authorities cooperate effectively with each other *and with the Commission* and provide each other *with* mutual assistance in investigations that have a cross-border dimension.
2. The enforcement authorities shall meet *at least* once per year to discuss the application of this Directive on the basis of the annual reports referred to in Article 10(2) **■**. *The enforcement authorities shall discuss best practices, new cases and new developments in the area of unfair trading practices in the agricultural and food supply chain as well as exchange information, in particular on the implementing measures they have adopted in accordance with this Directive and their enforcement practices. The enforcement authorities may adopt recommendations in order to encourage consistent application of the provisions laid down in this Directive and to improve enforcement actions.* The Commission shall facilitate those meetings.

3. The Commission shall establish and manage a website that provides for the possibility of information exchange between the enforcement authorities and *with* the Commission, in particular in relation to the annual meetings. ***The Commission shall establish a public website with the contact details of the designated enforcement authorities and with links to websites of the national enforcement authorities or other authorities of Member States, which shall contain information about the national acts of transposition within the meaning of Article 13(1).***

Article 9

National rules

1. ***With a view to ensuring a higher level of protection,*** Member States may ***maintain or introduce*** rules designed to combat unfair trading practices ***which are stricter than those laid down by this Directive,*** provided that such national rules are compatible with the rules on the functioning of the internal market.
2. ***This Directive is without prejudice to national rules aimed at combating unfair trading practices that are not within the scope of this Directive, provided that such rules are compatible with the rules on the functioning of the internal market.***

Article 10
Reporting ■

1. *Member States shall ensure that the enforcement authorities publish an annual report about their activities falling under the scope of this Directive, which shall inter alia describe the number of complaints received and the investigations opened or closed. For each closed investigation, the report shall contain a summary description of the matter, the outcome of the investigation and, where applicable, the decision taken, subject to the confidentiality requirements laid down in Article 5(3).*
2. By 15 March of each year, Member States shall send to the Commission a report on unfair trading practices in business-to-business relationships in the **agricultural and** food supply chain. That report shall contain, in particular, all relevant data on the application and enforcement of the rules under this Directive in the Member State concerned in the previous year.
3. The Commission may adopt implementing acts laying down:
 - (a) rules on the information necessary for the application of paragraph 2;
 - (b) arrangements for the management of the information to be sent and rules on content and form;

- (c) arrangements for transmitting, or making information and documents available, to the Member States, international organisations, the competent authorities in third countries, or the public, subject to the protection of personal data and the legitimate interest of agricultural producers and undertakings in the protection of their business secrets.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 11(2).

Article 11

Committee procedure

1. The Commission shall be assisted by the Committee for the Common Organisation of the Agricultural Markets established by Article 229 of Regulation (EU) No 1308/2013. That Committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

Article 12

Evaluation

1. *Within four years after the date of application referred to in the second subparagraph of Article 13(1), the Commission shall carry out **the first** 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, **to be accompanied, if appropriate, by relevant legislative proposals.***
2. *That evaluation shall assess, but not be limited to:*
 - (a) *the effectiveness of the measures implemented at national level aimed at combating unfair trading practices in the agricultural and food supply chain;*
 - (b) *the effectiveness of cooperation between competent enforcement authorities and, where appropriate, the identification of ways to improve this cooperation.*
3. *The Commission shall base the report, in particular, on the annual reports referred to in Article 10(2). If necessary, the Commission may request additional information from Member States, including information on the effectiveness of the measures that were implemented at national level and the effectiveness of cooperation and mutual assistance.*
4. Six months after the date of transposition of this Directive, the Commission shall present an intermediary report on the state of its transposition and implementation to the European Parliament and to the Council as well as to the European Economic and Social Committee and the Committee of the Regions.

Article 13
Transposition

1. Member States shall adopt and publish, by *twenty-four* months after the entry into force of the Directive ■, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall *immediately* communicate ■ the text of those *measures to the Commission*.

They shall apply those *measures not later than thirty* months after entry into force of this Directive.

When Member States adopt those *measures*, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication.

Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 14
Entry into force

This Directive shall enter into force on the fifth day following that of its publication in the Official Journal of the European Union.

Article 15
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

**Joint statement by the European Parliament, the Council and the Commission on
transparency of the agricultural and food markets**

The European Parliament, the Council and the Commission stress that the transparency of agricultural and food markets is a key element of a well-functioning agricultural and food supply chain, in order to better inform the choices of economic operators and public authorities as well as to facilitate the understanding of operators on market developments. The Commission is encouraged to continue its ongoing work to enhance market transparency at EU level. This may include the strengthening of the work on EU market observatories and improving the collection of statistical data necessary for the analysis of price formation mechanisms along the agricultural and food supply chain.

Statement by the European Parliament on buying alliances

The European Parliament, while acknowledging the possible role played by alliances of buyers in creating economic efficiencies in the agricultural and food supply chain, stresses that the current lack of information does not allow for an evaluation of the economic effects of such alliances of buyers on the functioning of the supply chain.

In this regard, the European Parliament calls on the Commission to launch without delay an in-depth analysis on the extent and effects of these national and international buying alliances on the economic functioning of the agricultural and food supply chain.
