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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**

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

- **Reasons for and objectives of the proposal**

Smaller operators in the food supply chain are vulnerable to unfair trading practices (UTPs). Farmers are particularly vulnerable to UTPs as they often lack bargaining power that would be match that of their downstream partners that buy their products. This is because their alternatives for getting their products to consumers are limited; the food supply chain is an essential conduit for them.

There is a wide-spread consensus that UTPs occur throughout the food supply chain. Three European Commission (Commission) communications since 2009 have focused on the food supply chain including UTPs. And also the EP, the Council and the EESC have invited the Commission to act.

UTPs put operators' profits and margins under pressure, which can result in a misallocation of resources and even drive otherwise viable and competitive players out of business. For illustration, being faced with a retroactive unilateral reduction of the contracted quantity for perishable goods means income foregone for an operator who may not easily find an alternative outlet for these goods. Being paid for perishable products only months after they are delivered and sold by the purchaser in a store constitutes extra financial cost for the supplier. Obliging suppliers to take back products not sold by the purchaser may constitute an undue transfer of risk to suppliers that has repercussions on their security of planning and investment. Being asked to contribute to generic in-store promotional activities of distributors without drawing a commensurate benefit can unduly reduce a supplier's margin.

In an agricultural policy environment that is distinctly more market oriented than before and which aims at harnessing free trade opportunities, the good governance of the food supply chain has become more important for operators including farmers. The proposal should ensure that these operators are able to compete on fair terms, thereby contributing to the overall efficiency of the chain. Unfair business conduct by operators wielding significant bargaining power that is not prohibited or respective redress possibilities that lack in effectiveness, are liable to undermine the economic viability of victims of UTPs as well as their trust in the overall fairness and functioning of the food supply chain.

UTPs affect weaker producers, such as farmers, even if they are not directly exposed to them, by virtue of UTP-induced costs being passed on until the weakest party is reached which often is the farmer. This is congruous with a view of the food supply chain as a continuum of vertically inter-related markets. The negative effect of a UTP that occurs downstream, for instance between a retailer and a processor, thus can cascade backward in the chain to ultimately reach farmers.

Specific UTP rules in 20 Member States bear witness to the significant concern about UTPs at the national level. However, the heterogeneity in the treatment of UTPs in Member States is significant. In certain Member States, there is no or ineffective specific protection against UTPs.

General (contract) law may prohibit certain practices and victims have the option to seek redress before a court of civil law. But general contract law, to the extent that it covers the practice at issue, may de facto be difficult to enforce: a weaker party to a commercial transaction is often unwilling to lodge a complaint for fear of compromising an existing commercial relationship with the stronger party ("fear factor").

The divergence of Member States' regulatory approaches to UTPs results furthermore in dissimilar conditions of competition for operators. Under the current piecemeal approach, the extent of protection from UTPs that operators are granted depends on the Member State. Divergence of rules is liable to lead to differences in the conditions of competition.

There is also very little coordination among enforcement authorities. Such coordination could improve the enforcement practices in Member States.

The voluntary Supply Chain Initiative (SCI) is a private industry initiative that seeks to govern UTPs. It exists alongside national mandatory measures of Member States. Since its inception, the SCI has played an important role in Member States in raising awareness about UTPs and fostering fairness of business conduct. It provides a forum for early and non-litigious dispute resolution. The SCI is, however, unlikely to develop into a comprehensive governance framework that would make public governance measures including enforcement superfluous. Participation in the SCI is voluntary and the SCI does therefore not cover all operators in the food supply chain. So far buying alliances of retailers do not participate in the SCI. Most farmer organisations do not participate in the SCI, either. They did not join the SCI since, in their view, it does not ensure sufficient confidentiality for complaining parties and does not provide for independent investigations or sanctions.

Certain limitations of a voluntary code may be structural. The SCI has no capability of imposing sanctions, nor are decisions published (no deterrent effect). One-on-one disputes are not dealt with in a manner that would ensure confidentiality of complaints, if only in the early stages of the procedure, and there is no ability to carry out own initiative investigations. The concerns about effective enforcement account for the continued low level of participation of farmers (and meat processors) in the SCI. Moreover, a voluntary initiative cannot address, in and of itself, the fragmentation of UTP rules in Member States.

The present proposal for a Directive aims at reducing the occurrence of UTPs in the food supply chain by introducing a minimum common standard of protection across the EU that consists of a short list of specific prohibited UTPs. The protection covers small and medium-sized suppliers in the food supply chain insofar as they sell food products to buyers who are not small and medium-sized. This scope aims at contributing to a fair standard of living for the agricultural community, an objective of the common agricultural policy under Article 39 TFEU.

Provisions targeting minimum enforcement requirements applying to national competent authorities add to the deterrent character of the proposed regime. Last but not least, a coordination mechanism between enforcement authorities facilitated by the Commission will enable the exchange of data concerning the number and type of infringements investigations carried out and of best practices with a view to improving the effectiveness of enforcement.

The proposed measures are complementary to measures existing in Member States and the code of conduct of the SCI (minimum harmonisation approach).

- **Consistency with existing policy provisions in the policy area**

There are, as of yet, no EU horizontal rules on UTPs between businesses. Fairness in market activities in the business-to-business context is the specific objective of Directive 2006/114/EC, which deals with misleading practices and the requirements of comparative advertising. However, the provisions set forth in that Directive do not address business-to-business trading practices as identified in this proposal.

- **Consistency with other Union policies**

Competition law has a scope different from rules on UTPs. UTPs do not normally imply an infringement of competition rules but involve unequal bargaining power and prohibit undertakings from imposing on their trading partners, or obtaining or attempting to obtain from them, terms and conditions that are unjustified, disproportionate or without consideration. UTP rules will be compatible with and complementary to the EU's competition rules.

Regulatory divergence and under-protection of kinds similar to UTPs have given rise to EU initiatives in the area of business-to-consumer protection. Some Member States have extended such rules to national business-to-business situations. The conceptual approach under the EU's business-to-consumer rules indeed shares relevant characteristics with Member States' existing UTP rules governing business-to-business transactions, namely the focus on relatively weaker parties of a commercial transaction.

Article 39 of the Treaty on the Functioning of the European Union (TFEU) specifies that the common agricultural policy (CAP) shall ensure a fair standard of living for the agricultural community. Article 40 TFEU stipulates that the common market organisation shall exclude discrimination between producers. Article 43 TFEU specifies that the common market organisation shall ensure conditions for trade within the Union similar to those existing in a national market.

The absence of a common UTP framework stands in contrast to other areas the CAP governs and which have with direct relevance for operators such as competition rules, state aid rules and marketing standards. In the said areas, the common market organisation (Regulation (EU) No 1308/2013) lays down common rules relevant to the competitive conditions of operators in the EU so as to contribute to economic and social cohesion, as well as to a level playing field in the single market.

## **2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY**

- **Legal basis**

A key objective of the CAP is to ensure a fair standard of living for the agricultural community (Article 39 TFEU). The EU's constitutional emphasis on producer welfare which co-exists with the objective of reasonable consumer prices is unique to the agricultural sector hinting at the comprehensive responsibility of the CAP for European agriculture.

The patchwork of UTPs rules or their absence, in Member States is liable to impair the objective of ensuring a fair standard of living for the agricultural community. UTPs jeopardise the profitability of farmers and lead to downward pressure on their market income. Their governance falls therefore within the CAP's principled remit.

Article 43 TFEU specifies that the common market organisation shall ensure conditions for trade within the Union "*similar to those existing in a national market*". In a national market one would expect uniform UTP rules.

According to Article 38(2) and (3) TFEU the CAP primarily covers the agricultural products listed in Annex 1 to the TFEU. However, the European Court of Justice has explicitly confirmed that food products not listed in Annex I TFEU (Annex I products are deemed "agricultural products" under the Treaty) can be covered by acts adopted under Article 43 TFEU if this contributes to the achievement of one or more of the CAP objectives and agricultural products are principally covered.

Moreover, an approach which protects farmers and their associations (cooperatives and other producer organisations) also must take into account indirect negative effects they may suffer through UTPs occurring downstream in the food supply chain but being passed through to them in terms of their negative effect, i.e. normally by operators who are not farmers but whose weak bargaining position in the downstream chain makes them vulnerable to UTPs. Protection against UTPs applying also to downstream operators furthermore prevents unintended consequences on farmers due to trade being diverted to their investor-owned competitors – e.g. at the processing stage – which would not enjoy protection (e.g. less legal risk for purchasers to be confronted with UTP accusations).

In light of the foregoing, Article 43 TFEU, which entrusts the Union legislator with the legal powers to establish a common organisation of agricultural markets in the EU, can in principle serve as the legal basis for measures covering UTPs occurring in the food supply chain in relation to the trade of food products which originate with farmers.

- **Subsidiarity (for non-exclusive competence)**

No common EU rules exist that would provide for a minimum European standard of protection by approximating or harmonising Member States' diverging UTP measures. Short of EU measures, Member States lack coordinative mechanisms to bring about such approximation, nor do they have obvious incentives to self-align. A minimum standard of protection against UTPs in Member States does still not exist, despite the Commission's recommendations in its communications.

Certain Member States have no specific rules at all that would protect against UTPs. Others do not address important aspects of effective UTP enforcement. This leads to under-protection of vulnerable operators, in particular farmers, against UTPs in the EU. Moreover, in spite of its positive effects in the area of private governance of UTPs, the voluntary codes including the SCI – to the extent it applies in Member States – is not able to effectively replace public governance measures.

From this follows the necessity of EU measures that target the problem of under-protection against UTPs by providing for a common minimum standard of protection in the EU. After years of discussion, analysis and recommendations, which have improved the situation on the ground only to a certain extent, EU legislation is a means that can ensure bringing about such a minimum protection throughout the EU, including enforcement and coordination aspects.

The effectiveness of EU rules consists in a minimum standard that is common in Member States and that would introduce protection in those Member States which currently lack rules protecting against UTPs. The approach chosen is proportionate in relation to the problem encountered and in relation to the measures existing in Member States. It does not set out to lay down a comprehensive EU framework governing UTPs in Member States. Rather, in line with a minimum harmonisation approach, it tackles a short list of manifestly unfair trading practices but leaves Member States otherwise room to keep or provide for further-reaching measures; further reaching national UTP rules and voluntary codes like the SCI would not be replaced but complemented. An EU minimum standard is therefore expected to lead to synergies rather than the cancelling out of the advantages of these regimes. Second, effective enforcement powers that have proven effective in tackling the fear factor are laid down, which enhances the deterrent effect and improves redress possibilities in Member States. Again, the approach followed is that of a minimum harmonisation and relies on Member States enforcement authorities rather than suggesting centralised enforcement. Third, a coordination network of enforcement authorities to be set up and to be facilitated by the Commission will enable the exchange of best enforcement practices and a platform on which to discuss and improve the application of the UTP rules. Experience from the enforcement of UTPs by the

UK Grocery Code Adjudicator shows that an effective protection regime can reduce the occurrence of UTPs and improve effective redress against them.

Measures at the EU level, complementary to Member States regimes and the SCI, could consist in common UTP rules that would aim at improving the governance of the food supply chain and pursue the objective of ensuring fair living standards of the agricultural community (Article 39 TFEU). A circumspect approach takes the form of partial (minimum) harmonisation to introduce a minimum protection and takes the positive effects of market driven contractual arrangements between parties into account. As UTPs occur along the food supply chain and have repercussions that are likely to be passed through to farmers, it makes sense to address them in a comprehensive manner, that is to conceive of measures that apply along the chain.

- **Proportionality**

The option packages discussed in the impact assessment differ according to their ambition. As regards their suitability to effectively address the issue, all are in principle suitable to contribute to achieving the stated objectives, which are to reduce the occurrence of UTPs and address the situation of under-protection. Having said this, recommendations by the EU can only do so much in relation to the objectives pursued. Recommendations in 2014 and 2016 by the Commission to Member States and the SCI have not been given full effect, partly because certain outcomes may depend on a common mandatory approach, even if this takes the form of a minimum harmonisation of UTP rules in the EU. It would seem that what could have been achieved with recommendations has been achieved by now. The approach chosen in the present Directive is more effective in ensuring the goal of a common minimum level of protection in Member States and can, as has been shown by the example of certain Member States, address some of the identified problems relating to UTPs, including the enforcement shortcomings. By the same token, it would seem that less intrusive means are not likely to achieve the objective in an equally effective manner. Discussions about UTPs in the food supply chain since 2009, including the issuing of recommendations, have so shown a certain progress, but not to all the results that were intended have been achieved, that is the introduction of certain measures conducive to improving the protection against UTPs and the enforcement of UTP rules.

The approach taken is circumspect in different ways and is therefore proportionate to the objective pursued. Partial harmonisation is proposed, not full harmonisation. Member States will continue to be able to have rules on UTPs above and beyond the minimum standard of protection this Directive intends to introduce (subject to applicable EU law). What is more, the Directive suggests an approach that is based on decentralised enforcement by Member States. The Directive is complementary to existing rules, including those established by voluntary initiatives such as the SCI. Accordingly, the Directive does not aim to define all practices that could be UTPs but establishes a short list of prohibited UTPs. The scope of protection is limited to SME operators in the food supply chain thereby not interfering with the commercial relationships of large players who are less likely to become victims of UTPs or who can be expected to counter-balance undue pressure to “suffer” UTPs, and who would not be subject to the fear factor discussed in the impact assessment report in the same way as SME operators.

Sections 3.2 and 3.3 of the impact assessment address proportionality. The characteristics of the preferred option, which make the proposal proportional within the above meaning, are discussed in sections 5 and 6 and eventually in section 8, which presents the preferred option.

- **Choice of the instrument**

The instrument chosen is a Directive, as a soft law approach risks being ineffective in ensuring the desired minimum level-playing field. The endorsement of a Directive as the relevant instrument for UTP measures is also mindful of subsidiarity: a Directive enables Member States to integrate the minimum protection into their national legal orders in a way that is compatible with their choices of laws, regulations and administrative provisions.

### **3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS**

- **Ex-post evaluations/fitness checks of existing legislation**

As there is no EU legislative framework to address UTPs yet, it is not possible at this stage to present an evidence-based evaluation on how EU measures perform. However, some Member States have performed ex ante or ex post evaluations with respect to the effectiveness and efficiency of their UTP policies.

- **Stakeholder consultations**

The consultation process included consultations on the inception impact assessment, an open public consultation, targeted food supply chain stakeholder consultations (undertakings in the food supply chain and consumer organisations), a consultation of Member States, an academic workshop on UTPs in the food supply chain (organised by the Joint Research Centre), ad hoc meetings with food supply chain stakeholders, and engagements with CAP Civil Society Dialogue groups. The consultation process was primarily aimed at the collection of evidence to inform the impact assessment report.

Stakeholders were invited to offer comments and evidence on problem definition, policy objectives, the need for EU action, policy options, on the likely impact of the policy options, and on implementation issues, including monitoring and enforcement.

Stakeholders largely state that frequent and damaging UTPs are occurring in the food supply chain, and they support legal action at the EU level (with the exception of the retail sector), including minimum enforcement standards. (Large) retailers disagree that UTPs occur widely and are opposed to EU measures. Consumer organisations had limited participation in the consultation process but expressed an interest to be involved at the legislative stage.

90% of respondents to the open public consultation agreed or partially agreed that there were practices in the food supply chain that could be considered to be UTPs. These results were broadly similar for all stakeholder groups (producers, processors, traders, researchers, etc.), with the exception of the retail sector (12% agreed or partially agreed that UTPs exist in the food supply). The most damaging practices that were identified in the consultation broadly aligned with those identified by the SCI in its Principles of Good Practice. Overall, 87% of respondents believed action should be taken by the European Union (in combination with Member States, 58%; or the EU acting alone, 29%). In terms of the effectiveness of enforcement, the most important features named by respondents were: transparency of investigations and results (94%), possibility of fines in the case of violations to the rules (93%), possibility to file collective complaints (92%), ability to receive and treat confidential complaints (89%), designation of a competent authority (89%), and ability to conduct own initiative investigations (73%).

Stakeholders' input was incorporated in the impact assessment analysis throughout the text and taken into account in the proposal for the Directive. While most stakeholders called for extensive regulation of several types of UTPs in the food supply chain, the Commission's

proposal comes forward with a restricted approach to cover only a few types of particularly damaging UTPs. The Commission largely agrees with the majority of stakeholders on the importance of robust enforcement capability of Member State authorities and coordination of enforcement at EU level.

- **Collection and use of expertise**

In addition to the stakeholder consultations described above, the analysis for the impact assessment relied on a wide range of scientific, legal and applied knowledge. For the definition of the baseline, information was collected from Member States and processed and analysed by external legal experts; additional information pertaining to the possible impacts of the options was also collected from Member States, as well as from publicly available information. More generally, the evidence base of the impact assessment includes data and information obtained through the above-mentioned consultations, through an academic workshop and a technical report, through independent literature reviews, and through exchanges with Member States and third countries with experience in regulating UTPs. For instance, in its report “The supply of groceries in the UK market investigation” from 2008, the UK’s Competition Commission found that UTPs do have a negative effect on competition and consumer welfare. In a study for DG GROW in 2016, Areté discussed the limits of the SCI in addressing UTPs. And in a report about UTPs in 2013, SEO confirmed the role the fear of retaliation plays in UTP cases.

In addition, the in-house expertise of both the researchers at the JRC, in particular its Unit on Economics of Agriculture, and the economic and legal experts within DG AGRI were used in the impact assessment.

*Academic workshop on UTPs in the food supply chain*

Together with DG AGRI, the Joint Research Centre (JRC) organised a workshop on “Unfair trading practices in the food supply chain” in July 2017. More than a dozen participants at this workshop came from universities across the EU as well as from the US.

Based on the outcomes of the workshop, and with the support of the workshop’s academic rapporteurs, the JRC produced a technical report that confirmed the existence of UTPs in the food supply chain and referenced the extensive regulatory and analytical work on this topic.

*Study on national UTP rules in Member States*

Using a questionnaire-based approach, the Commission elicited feedback from Member States on their experiences with UTP rules and on the data and information they could share in this context. In particular, Member States were asked to (i) update information on the existence, implementation, and enforcement of national UTP legislation that had been collected in an earlier study in 2015, (ii) share information from impact assessments they may have carried out for decision-making on national UTP rules, and (iii) provide data and information on the administrative costs to public administrations from the introduction of national UTP rules.

The replies from Member States were used as input for an overview of the “Specific regulations on unfair trading practices in Member States in the business-to-business retail supply chain” (Cafaggi, F. and P. Iamiceli, Annex F to the impact assessment). In addition, DG AGRI used Member States’ estimates of their administrative costs related to the introduction and enforcement of their national UTP rules when drafting the impact assessment and designing the different options.

- **Impact assessment**

The different policy options are presented and discussed in section 5 of the impact assessment. These options are then evaluated and combined into several plausible



differentiated option packages (section 6.4). A preferred option package is presented in Section 8. The methodology used and the assessment of the effectiveness and efficiency of the packages and of their underlying elements is described in Annex E.

As to the option elements, the following considerations are important. A detailed harmonisation of UTP rules in the EU food supply chain does on the basis of the evidence available, not seem warranted. A partial harmonisation approach with substantive UTP rules can accommodate Member States' stricter UTP rules while at the same time introducing a common minimum standard of protection in the EU that supports the objective of reducing the occurrence of UTPs.

A general clause prohibiting UTPs would provide a common standard of protection against UTPs in Member States. While it would be interpreted by authorities in Member States on a case-by-case basis it would entail expectations about a uniform application. A general clause could thus come to de facto imply a degree of harmonisation that could give rise to tension in relation to Member States' existing regimes which often rely in their own right on general national prohibitions. Prohibitions of specific UTPs - the approach taken in this proposal for a Directive - do not have this broad de facto harmonising effect. Concretely formulated prohibitions targeting specific UTPs will also reduce legal uncertainty for commercial transactions that may derive from a more general prohibition. Due to their specificity the rules aim to be predictable for operators and to be workable for authorities entrusted with their enforcement.

Contractual arrangements by parties may entitle parties to have recourse to certain (later) practices at a later stage and may thus create efficiencies (win-win situations). The definition of certain UTPs in this proposal therefore accommodates such agreements unless they cannot reasonably be seen as creating efficiencies, for instance if they give vague and unspecified powers to the stronger party to unilaterally decide on such practices at point in time after the transaction has started (unpredictability).

The proposed UTP rules focus on products listed in Annex I TFEU and being for food use as well as processed agricultural products traded along the food supply chain, thus covering all traded food products. Sales of such products in the chain will have to respect the EU's UTP rules. This comprehensive scope is consistent with the SCI's approach and with UTP measures in Member States. Only covering agricultural products as listed in Annex I would not be in line with market reality.

A targeted protection of small and medium operators in the food supply chain is justified because they are often the ones who cannot defend themselves against UTPs due to their lack of bargaining power. Therefore, even though in the impact assessment UTPs are defined in terms of absolute fairness considerations, a targeted protection is more proportionate at this stage. By the same token, the rules are to apply to non-small and medium-sized buyers in the food supply chain, those being the ones who may be able to use their bargaining power against smaller operators in a way that enables the use of UTPs.

Certain procedural powers for authorities that are competent to monitor UTP rules – and the existence of such an authority in the first place – have proven important for the perception of operators that effective enforcement exists and is apt to address the root causes for victims of UTPs not to seek redress (fear factor). Member States are therefore required to designate a competent authority for UTP enforcement that is given certain minimum enforcement powers inspired by best practices in Member States' existing regimes.

A coordination mechanism between competent authorities should accompany the EU rules and ensure their coordinated application, and it should facilitate an exchange of best practices.

Importantly, it should also collect data through Member State reporting that can inform a future review of the measures. The Commission would facilitate the network by hosting annual meetings based on annual application reports submitted by Member States' competent authorities.

As regards the impacts of UTP rules, a precise quantitative estimate of the benefits that will accrue to operators is difficult to give. However, each of the targeted UTPs has a clear negative impact on its victims' bottom line through the transfer of risk and undue generation of uncertainty, i.e. through costs that in competitive markets would not be part of their entrepreneurial agency. Respondents in the numerous surveys that were cited in this impact assessment almost all converge in their concern about the occurrence of UTPs and their harm, as well as in their expectations of positive effects from public (EU) UTP rules and their effective enforcement. For instance in the UK the Grocery Code Adjudicator has proven effective in reducing UTPs.

Estimates about the harm which UTPs cause are given in sections 2.5 and 6.2.1 of the impact assessment. According to a 2013 survey of farmers and agricultural cooperatives, the estimated damage from UTPs amounted to over EUR 10 billion per year. Manufacturers of food products participating in a survey in 2011 reported that their UTP-related costs amounted to 0.5% of their turnover, which would be equivalent to EUR 4.4 billion if extrapolated to the overall food industry turnover in that year.

The expected benefits of UTP rules for victims of UTPs could on the flipside be considered costs for the stronger operators that can no longer apply UTPs. However, the key consideration is that due to societal conventions of fairness such that benefits which result from subjecting the supplier to UTP should not accrue in the first place. It follows that benefits resulting from the prohibition of UTPs outweighs this specific form of harm.

The main costs for operators that are subjected to UTP rules will be compliance costs. In this context, compliance costs are generally costs that relate strictly to training and adherence to the rules. The proposed UTP rules do not require operators to carry out certain activities, they only prohibit certain behaviour that is deemed unfair. Moreover, at least the signatories of the SCI already incurred compliance costs to respect the SCI's voluntary code. One large retailer, for example, has spent EUR 200,000 on one-off training measures of staff in relation to the SCI code of conduct.

A partial harmonisation of UTP rules at EU level is expected to have limited effects on consumers. In the open public consultation, operators do in general not claim that UTPs (e.g. by the SCI) lead to advantages for consumers, for example through lower consumer prices that become possible through margins that were extracted from upstream suppliers through UTPs. It is sometimes argued that consumer prices are negatively affected by below-cost-sales prohibitions, but these are not covered by the impact assessment. On balance, consumer organisations encourage public UTP rules because they expect a longer-term negative effect of UTPs on consumer prices.

Member States will have to transpose the UTP rules into national law. The choice of a Directive leaves Member States a discretionary margin how to implement this transposition. UTPs have been subject to a variety of heterogeneous legislative measures in Member States over the years. Accordingly, the majority of Member States already provide for a governance framework for UTPs. The impact of EU UTP rules on Member State legislation will depend on the (scope of the) existing national rules. In cases where there is no framework at all, the Member State would have to implement the new measures, including designating an enforcement authority. Having said this and as shown by some Member States, the mandate of an existing authority (e.g. a national competition authority) can be expanded. Therefore,

such implementation costs can be absorbed to some extent by current structures in Member States and therefore these costs would be limited. By way of illustration, the running costs of the UK Grocery Code Adjudicator stood at GBP 1,786,000 in the 2015/2016 financial year, and at GBP 622,000 in the 2016/2017 financial year. Most of the difference is due to a large-scale investigation into one retailer in 2015/2016.

Finally, UTP rules are not expected to have a significant direct impact on the environment, although operators that are not subject to UTPs may be left with more economic margin to invest in producing in environmentally sustainable and climate-friendly ways and to prevent food waste, or they may feel less pressured to compensate for the lost margin by cutting corners when it comes to environmental and food safety legislation.

- **Regulatory fitness and simplification**

SMEs are expected to benefit from the proposal. While SMEs may also face compliance costs, this was not an issue raised in the answers to the consultation. Moreover, voluntary rules like those of the SCI already apply regardless of size.

- **Fundamental rights**

Implementation plans and monitoring, evaluation and reporting arrangements The EU is committed to high standards of fundamental rights. A fair and effective system of protection against UTPs will contribute to stakeholders' ability to conduct a business (see Article 16 Charter of Fundamental Rights of the European Union (CFR)). Union legislation must respect the rights enshrined in the Charter (Articles 51, 52 CFR). Enforcement powers therefore have to be shaped in a manner compatible with the rights of defence (Article 48 CFR), e.g. by providing an effective remedy against the decision of an enforcement authority that is imposing penalties. In particular for the confidential treatment of complaints, a balance must be struck in relation to the rights of defence.

#### **4. BUDGETARY IMPLICATIONS**

The proposal would have a limited impact on the EU budget. It would entail one annual coordination meeting of Member States' enforcement authorities in Brussels and the creation and management of a basic website for the information exchange by the Commission.

#### **5. OTHER ELEMENTS**

- **Implementation plans and monitoring, evaluation and reporting arrangements**

There are no relevant statistics available at EU level in the Eurostat database that could serve as primary sources of data for the monitoring and evaluation of this Directive. Statistics on producer, processor and consumer prices, collected either through Eurostat or directly in the framework of the Common Organisation of the Markets, will be used by the Commission as a basis for econometric work in support of the monitoring and evaluation of the Directive.

Monitoring and evaluation will therefore rely on data collected in the framework of the present Directive, mainly by means of annual reports of the national competent authorities. Such reports will detail the activity of authorities on the application and enforcement of the rules under this Directive, e.g. in terms of the number of complaints received (confidentially or not), the number of investigations launched (under own initiative or upon request) or the share of cases resulting in findings of an infringement. The annual reports will also cover concrete practices and experiences, with a view to facilitating the adoption of best practices. This will be further complemented by surveys of undertakings in the EU (from farmers to retailers) examining perceptions, as already carried out by some Member States and voluntary

initiatives. Both experiences and perceptions are important factors influencing the behaviour of businesses in the Single Market. Finally, the Commission will also directly carry out or commission economic studies aiming at measuring the impact of the different practices concerned by national rules and voluntary initiatives at the micro- and macroeconomic level.

According to the indicators identified in the Impact Assessment, the Commission will evaluate the effectiveness, efficiency, relevance, coherence and EU added value of this intervention, as well as possibly other relevant evaluation criteria such as utility, equity and acceptability or coordination (with Member State rules and voluntary self-regulation initiatives). These indicators can serve as the basis for the review that should be presented no sooner than 4 years after the entry into force of the Directive, to ensure that a sufficient data-set is available.

An implementation plan is not required for this Directive, which has a limited scope, does not propose full harmonisation, and does not entail particular technical, compliance or timing challenges. In addition, several support actions are provided for by the Directive itself, which lays down a cooperation mechanism between enforcement authorities and the setting-up of a website for this purpose.

- **Explanatory documents (for Directives)**

For the reasons given above in the section on implementation plans, the Commission will not request explanatory documents concerning the transposition from Member States.

- **Detailed explanation of the specific provisions of the proposal**

The proposed Directive consists of 14 Articles.

**Article 1** defines the subject matter of the Directive, which follows a partial (minimum) harmonisation approach to introduce a minimum standard of protection relating to UTPs across Member States. The protection applies only to SME suppliers in the food supply chain as regards their sales to buyers which are not SMEs.

**Article 2** provides definitions of terms recurrently used in the provisions of the Directive: “buyer”, “supplier”, “small and medium sized enterprise”, “food products”, and “activity in the food supply chain”. These definitions contribute to defining the scope of the application of the Directive.

In terms of products covered, the Directive covers 'food products', that is to say agricultural products as listed Annex I TFEU for the use as food, including fish and aquaculture and processed agricultural products for food use – i.e. such processed agricultural products which are not already covered in Annex I TFEU.

The relation between suppliers and buyers in combination with the product coverage results in a scope of the measures that applies along the food supply chain and that covers UTPs that can cascade backwards to eventually put farmers under pressure, whether directly or indirectly. The protection covers small and medium-sized farmers (including their producer organisations such as cooperatives) and other SME suppliers in the chain, while the UTP rules constrain the behaviour of buyers which are not SMEs.

The proposal takes into account that UTPs are not necessarily always laid down in a written contract and might, in principle, occur at any stage of the commercial transaction between the buyer and the supplier of the food supply chain, including ex post when the commercial transaction has already been finalised.

As the food supply chain consists of inter-linked vertical supply relationships, and UTPs that occur at subsequent chain levels may have a negative impact on farmers, the proposal does

not limit the notion of “supplier” to farmers and farmers groups, but covers any supplier, i.e. including manufacturers and distributors, along the food supply chain as long as they are small and medium sized undertakings.

The manufacturing sector, in particular, has a fair share of SMEs. The coverage of the proposal takes into account that small and medium sized intermediaries which might not be able to resist UTPs used by non-SME buyers, can pass on any costs resulting from these practices to their suppliers, namely the farmers. In addition, foreign suppliers established outside the Union can invoke the prohibition if they sell to buyers established in the Union.

**Article 3** lists prohibited UTPs. While paragraph 2 makes this subject to the contractual freedom of parties, in other words it makes the UTP qualification subject to the parties’ discretion to decide otherwise by virtue of an agreement, the UTPs listed in paragraph 1 are not subject to parties’ contractual discretion due to their “as such” unfair nature.

The group of practices in paragraph 1 covers the prohibition for buyers to pay their suppliers after 30 days, when the supply concerns perishable products. This provision will constitute a *lex specialis* for the food sector in relation to the Late Payments Directive that is applicable to all sectors of the economy. This group also covers short notice order cancellation for perishable products and unilateral and retroactive changes in the terms of a supply agreement: these practices are expressions of disproportionate allocation of risk in favour of the buyer, are manifestly unfair, and should be prohibited.

Other practices that are unfair when applied without agreement may be acceptable and even lead to mutually beneficial efficiency if covered by an agreement between the parties.

The terms of such an agreement have to be clear and not ambiguous. A vague agreement that would authorise one party to later determine the conditions concerning these practices would be unpredictable and cannot therefore be seen as redeeming such later determination or practice and shield the practice concerned from being qualified as a UTP.

This second group of UTPs includes the return of unsold or wasted products. Payments for securing or maintaining a supply contract may yield efficiencies in favour of both contract partners and thus lead to win-win situations. They are acceptable if agreed by the parties and if objective and reasonable costs estimates are at the basis of the payment for stocking and listing products. Suppliers’ contributions to the promotion of products or the buyers’ marketing costs can also be efficient if agreed by the parties. However, also here payments should be based on objective and reasonable costs estimates.

**Article 4** requires Member States to designate a competent enforcement authority for the prohibited UTPs. Existing enforcement authorities, for example, in the area of competition law (national competition authorities) could be chosen as the competent authority to realise economies of scope.

**Article 5** deals with complaints and stipulates that the enforcement authority shall be able to deal with confidential complaints and to protect, where requested, the identity of the complainant. Also producer organisations and associations of producer organisations should be able to file a complaint with the enforcement authority, not only in their own right as a contract partner, but representing their members’ (or their members’ members) interest if these members are SMEs. The organisations should be able to protect their identity.

Under **Article 6**, enforcement authorities are vested with the necessary powers to start an investigation on their own initiative or based on a complaint, to gather information, terminate an infringement and to impose fines and publish the decisions taken to achieve a deterrent effect.

Coordination and cooperation between enforcement authorities is foreseen in **Article 7**. This covers annual meetings facilitated by the Commission and annual reports that the enforcement authorities will submit. To the extent possible, Member States' enforcement authorities should provide each other mutual assistance in their investigations.

**Article 8** of the proposal clarifies that Member States may provide for additional rules designed to combat UTPs going above and beyond this minimum Union standard as long as those rules respect the rules pertaining to the internal market.

In **Article 9** the reporting obligations of Member States are laid down. The provision foresees the possibility for the Commission to adopt an implementing act in this area of reporting that may specify useful modalities.

**Article 10** provides for the committee procedure that will assist the Commission in this respect.

**Article 11** provides for a report of the Commission to be submitted to the legislator concerning the application of the Directive.

Provisions concerning the transposition of the Directive are contained in **Article 12**. The provisions are standard procedure for Directives.

**Article 13** is about the entry into force of the Directive. Finally, **Article 14** stipulates that the Directive is addressed to Member States.

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**

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 Committee<sup>1</sup>,

Having regard to the opinion of the Committee of the Regions<sup>2</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Three Commission communications since 2009<sup>3</sup> have focused on the working of the food supply chain, including the occurrence of unfair trading practices. The two recent ones 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 phenomenon of those practices still in the focus of the political debate in the Union.
- (2) In June 2016, a European Parliament resolution<sup>4</sup> 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 practices.<sup>5</sup> An impact assessment has been prepared by the Commission which included an open public consultation as well as targeted consultations.

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<sup>1</sup> OJ C [...], [...], p. [...].

<sup>2</sup> OJ C [...], [...], p. [...].

<sup>3</sup> 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.

<sup>4</sup> European Parliament resolution of 7 June 2016 on unfair trading practices in the food supply chain (2015/2065(INI)).

<sup>5</sup> Council Conclusions of 12 December 2016, Strengthening farmers' position in the food supply chain and tackling unfair trading practices.

- (3) Different operators are active in the food supply chain at the stages of production, processing, marketing, distribution and retail of food products. The chain is by far the most important channel for bringing food products from “farm to fork”. Those operators trade food products, that is to say primary agricultural products, including fish and aquaculture, and processed agricultural products as listed in Annex I to the Treaty for use as food and products not listed in that Annex but processed from agricultural products for use as food.
- (4) While business risk is inherent in all economic activity, agricultural production is particularly fraught with uncertainty due to its reliance on biological processes, since agricultural products are to a greater or lesser extent perishable and seasonable, and its exposure to weather conditions. 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 food supply chain and in particular for farmers and their organisations.
- (5) The number and size of operators vary across the different stages of the food supply chain. The different levels of concentration imply differences in bargaining power between operators and can enable the unfair exercise of bargaining power thus leading to unfair trading practices. Such trading practices are in particular harmful for the economic situation of small and medium-sized operators in the food supply chain. Farmers, who supply primary agricultural products, are largely small and medium-sized.
- (6) Not all Member States have specific rules that protect suppliers against unfair trading practices occurring in business-to-business relationships in the food supply chain. Where reliance on contract law or self-regulatory initiatives is possible, fear of retaliation against a complainant limits the practical value of these forms of redress. Certain Member States, which have specific rules on unfair trading practices in place, therefore entrust administrative authorities with their enforcement. However, Member States’ unfair trading practices rules - to the extent they exist - are characterised by significant divergence.
- (7) A minimum Union standard of protection against unfair trading practices should help reduce those practices and contribute to ensuring a fair standard of living for the agricultural community. A Union minimum standard should protect against a number of specific trading practices which are manifestly unfair. It should benefit small or medium-sized suppliers in the food supply chain as they are vulnerable to unfair trading practices and least able to weather them without negative effects on their economic viability. The relevant rules should apply to business conduct by larger, that is to say non-small or medium-sized, operators in the food supply chain as they are the ones who normally have stronger relative bargaining power.
- (8) As the financial pressure on small and medium-sized enterprises caused by unfair trading practices often passes through the chain and reaches farmers, rules on unfair trading practices should also protect small and medium-sized intermediary suppliers at the stages downstream of primary production. This scope supplements the farmers’ protection. Protection of intermediary suppliers should also avoid unintended consequences of trade diversion away from farmers and their associations, who produce processed products, to non-protected suppliers. So as to avoid unintended distorting effects resulting from the protection of farmers and their organisations in the Union, occurring when buyers purchase food products from suppliers established



outside the Union, the latter should also be able to rely on Union rules if they sell to buyers established in the Union.

- (9) As a majority of Member States already have rules on unfair trading practices, albeit diverging, it is appropriate to use the tool of a Directive to introduce a minimum protection standard under Union law. This should enable Member States to integrate the relevant rules into their national legal order in such a way as to bring about a cohesive regime.
- (10) As unfair trading practices may occur at any stage of the sale of a food product, i.e. before, during or after a sales transaction, this Directive should cover such practices whenever they occur.
- (11) When deciding whether an individual trading practice is considered unfair, it is necessary to differentiate between a practice that is covered by the contractual agreement of the parties in clear and unambiguous terms before the sales transaction takes place and a practice that occurs later without being agreed. However, certain practices are considered as unfair by their very nature and should not be subject to the parties' contractual freedom to dispose differently.
- (12) In order to ensure an effective enforcement of the prohibitions laid down in this Directive, Member States should designate an authority that is entrusted with enforcement. The authority should be able to act either on its own initiative or by way of complaints by parties affected by unfair trading practices. Where a complainant requests that his identity remain confidential because of fear of retaliation, the enforcement authority should honour this request.
- (13) Complaints by producer organisations or associations of such organisations can serve to protect the identity of individual members of the organisation who consider themselves victims of unfair trading practices. Enforcement authorities should therefore be able to accept and act upon complaints by such entities while protecting the procedural rights of the defendant.
- (14) The enforcement authority should have powers that enable it to effectively gather factual information by way of information requests. It should have the power to order the termination of a prohibited practice, where applicable. The existence of a deterrent, such as the power to impose fines and the publication of investigation results, can encourage behavioural change and pre-litigation solutions between the parties and should therefore be part of the powers of the enforcement authorities. The enforcement authorities should cooperate 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 in investigations which have a cross-border dimension.
- (15) To facilitate the general cooperation of enforcement authorities, the Commission should help organise an annual meeting where best practices can be exchanged and relevant information can be shared. The Commission should establish and manage a website to facilitate those exchanges.
- (16) The rules laid down in this Directive should not impair the possibility for the Member States to maintain existing rules that are further-reaching or to adopt such rules in the future, subject to the limits of Union law applicable to the functioning of the internal market.
- (17) The Commission should have an overview of the implementation of this Directive in the Member States. For that purpose, Member States should send annual reports.

Those reports should also help the Commission to analyse the effects of this Directive. 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 Council<sup>6</sup>. The Committee for the Common Organisation of the Agricultural Markets should assist the Commission in this procedure.

- (18) In the interest of an effective implementation of the policy in respect of unfair trading practices in business-to-business relationships in the food supply chain, the Commission should review the application of this Directive and submit a report to the European Parliament and the Council,

HAVE ADOPTED THIS DIRECTIVE:

#### *Article 1*

##### *Subject matter and scope*

1. This Directive establishes a minimum list of prohibited unfair trading practices between buyers and suppliers in the food supply chain and lays down minimum rules concerning their enforcement and arrangements for the coordination between enforcement authorities.
2. This Directive applies to certain unfair trading practices which occur in relation to the sales of food products by a supplier that is a small or medium-sized enterprise to a buyer that is not a small and medium-sized enterprise.
3. This Directive shall apply to supply agreements concluded after [xxx.]

#### *Article 2*

##### *Definitions*

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

- (a) "buyer" means any natural or legal person established in the Union, who or which carries out or actively seeks to carry out an activity in the food supply chain and buys food products by way of trade. The term "buyer" may include a group of such natural and legal persons;
- (b) "supplier" means any farmer or any natural or legal person, irrespective of their place of establishment, who or which carries out or actively seeks to carry out an activity in the food supply chain and sells food products. The term "supplier" may include a group of such farmers or such natural and legal persons, including producer organisations and associations of producer organisations;

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<sup>6</sup> 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).

- (c) "small and medium-sized enterprise" means an enterprise within the meaning of the definition of micro, small and medium-sized enterprises set out in the Annex to Commission Recommendation 2003/361/EC<sup>7</sup>;
- (d) "food products" means products listed in Annex I to the Treaty intended for use as food as well as products not listed in that Annex, but processed from those products for use as food;
- (e) "activity in the food supply chain" means any activity related to any stage of production, processing, marketing, distribution and retail of food products.

### *Article 3*

#### *Prohibition of unfair trading practices*

1. Member States shall ensure that the following trading practices are prohibited:
  - (a) a buyer paying a supplier for perishable food products later than 30 calendar days after the receipt of the supplier's invoice or later than 30 calendar days after the date of delivery of the perishable food products, whichever is the later. This prohibition is without prejudice to the option of a buyer and a supplier to agree a value sharing clause within the meaning of Article 172 a) of Regulation (EU) No 1308/2013 of the European Parliament and of the Council<sup>8</sup>;
  - (b) a buyer cancelling orders of perishable food products at such short notice that a supplier cannot reasonably be expected to find an alternative commercial outlet for these products;
  - (c) a buyer changing unilaterally and retroactively the terms of the supply agreement concerning the frequency, timing or volume of the supply or delivery, the quality standards or the prices of the food products;
  - (d) a supplier paying for the wastage of food products incurred on the buyer's premises and that is not caused by the negligence or default of the supplier.
2. Member States shall ensure that the following trading practices are prohibited, when they were not provided for in clear and unambiguous terms at the conclusion of the supply agreement:
  - (a) A buyer returning unsold food products to a supplier
  - (b) A buyer charging a supplier payment to secure or maintain a supply agreement on food products.
  - (c) A supplier paying for the promotion of food products sold by the buyer. Prior to a promotion the buyer should specify the duration and frequency of the promotion and the quantity of the food products to be ordered.
  - (d) A supplier paying for the marketing of food products by the buyer.

<sup>7</sup> Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5/2003, p. 36).

<sup>8</sup> 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).

3. If a payment is requested by the buyer for the situations described in the second paragraph points (b), (c) and (d), the buyer shall, if requested by the supplier, provide the supplier with an estimate of the cost and the basis for that estimate.
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 authority*

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

#### *Article 5*

##### *Complaints and confidentiality*

1. Suppliers shall address their complaint to the enforcement authority of the Member State in which the buyer suspected to have engaged in a prohibited trading practice is established.
2. Producer organisations or associations of producer 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. In doing so, they may protect the identity of the individual member or members affected. The right of submitting a complaint shall only exist in relation to such members which are small or medium-sized suppliers covered by the scope of this Directive as laid down in Article 1(2).
3. The enforcement authority shall ensure, if so requested by the complainant, the confidentiality of the identity of the complainant and any other information, in respect of which the complainant considers disclosure harmful to his interests. The complainant shall identify such information in a possible request for confidentiality.
4. Where the enforcement authority considers that there are insufficient grounds for acting on a complaint, it shall inform the complainant about the reasons.

#### *Article 6*

##### *Powers of the enforcement authority*

Member States shall ensure that the enforcement authority is properly equipped and shall confer on it the following powers:

- (a) to initiate and conduct investigations on its own initiative or based on a complaint;
- (b) to require buyers and suppliers to provide all necessary information in order to carry out investigations on the prohibited trading practices;
- (c) to take a decision establishing an infringement of the prohibitions laid down in Article 3 and require 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);

- (d) to impose a pecuniary fine on the author of the infringement. The fine shall be effective, proportionate and dissuasive;
- (e) to publish its decisions relating to points (c) and (d);
- (f) to inform buyers and suppliers about its activities, by way of annual reports, which shall *inter alia* describe the number of complaints received and the investigations initiated and closed by it. For each investigation, the report shall contain a summary description of the matter and the outcome of the investigation.

#### *Article 7*

##### *Cooperation between enforcement authorities*

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.
2. The enforcement authorities shall meet once per year to discuss the application of this Directive on the basis of the annual reports referred to in Article 9(1) and best practices in the area it covers. The Commission shall facilitate those meetings.
3. The Commission shall establish and manage a website, which provides for the possibility of information exchange between the enforcement authorities and the Commission, in particular for the regular meetings.

#### *Article 8*

##### *National rules*

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

#### *Article 9*

##### *Reporting obligations of Member States*

1. 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 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.  
  
That report shall be sent by means of an information technology-based system made available by the Commission.
2. The Commission may adopt implementing acts laying down:
  - (a) rules on the information necessary for the application of paragraph 1;

- (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 farmers 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 10(2).

#### *Article 10*

##### *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 of the European Parliament and of the Council. 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 11*

##### *Review*

By [...] the Commission shall submit to the European Parliament and the Council a report on the application of this Directive.

#### *Article 12*

##### *Transposition*

1. Member States shall adopt and publish, by [...] [The time limit for transposition will be as short as possible and, generally, will not exceed two years] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.  
They shall apply those provisions from [...].  
When Member States adopt those provisions, 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 13*

*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 14*

*Addressees*

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*

## LEGISLATIVE FINANCIAL STATEMENT

### **1. FRAMEWORK OF THE PROPOSAL/INITIATIVE**

- 1.1. Title of the proposal/initiative
- 1.2. Policy area(s) concerned
- 1.3. Nature of the proposal/initiative
- 1.4. Objective(s)
- 1.5. Grounds for the proposal/initiative
- 1.6. Duration and financial impact
- 1.7. Management mode(s) planned

### **2. MANAGEMENT MEASURES**

- 2.1. Monitoring and reporting rules
- 2.2. Management and control system
- 2.3. Measures to prevent fraud and irregularities

### **3. ESTIMATED FINANCIAL IMPACT OF THE PROPOSAL/INITIATIVE**

- 3.1. Heading(s) of the multiannual financial framework and expenditure budget line(s) affected
- 3.2. Estimated impact on expenditure
  - 3.2.1. *Summary of estimated impact on expenditure*
  - 3.2.2. *Estimated impact on operational appropriations*
  - 3.2.3. *Estimated impact on appropriations of an administrative nature*
  - 3.2.4. *Compatibility with the current multiannual financial framework*
  - 3.2.5. *Third-party contributions*
- 3.3. Estimated impact on revenue



## LEGISLATIVE FINANCIAL STATEMENT

### 1. FRAMEWORK OF THE PROPOSAL/INITIATIVE

#### 1.1. Title of the proposal/initiative

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL concerning unfair trading practices (UTPs) in business-to-business relationships in the food supply chain.

#### 1.2. Policy area(s) concerned

Agricultural Policy  
Competition Policy

#### 1.3. Nature of the proposal/initiative

The proposal/initiative relates to **a new action**

The proposal/initiative relates to **a new action following a pilot project/preparatory action**<sup>9</sup>

The proposal/initiative relates to **the extension of an existing action**

The proposal/initiative relates to **an action redirected towards a new action**

#### 1.4. Objective(s)

##### 1.4.1. *The Commission's multiannual strategic objective(s) targeted by the proposal/initiative*

The proposal aims at limiting unfair trading practices that result from unequal bargaining power in the food supply chain how, in order to contribute to the 4<sup>th</sup> Juncker priority for “a deeper and fairer internal market with a strengthened industrial base” which is translated into the general objective of “viable food production” of the Common Agricultural Policy.

##### 1.4.2. *Specific objective(s)*

Specific objective No  
Maintain market stability  
Enhance farmers' income  
Improve agricultural competitiveness

<sup>9</sup> As referred to in Article 54(2)(a) or (b) of the Financial Regulation.

### 1.4.3. *Expected result(s) and impact*

*Specify the effects which the proposal/initiative should have on the beneficiaries/groups targeted.*

1. Reduce occurrence of UTPs

2. Contribute to level playing field

3. Enable effective redress

Impact: a better position of the farmers in the food chain having a positive effect on the income of farmers.

### 1.4.4. *Indicators of results and impact*

*Specify the indicators for monitoring implementation of the proposal/initiative.*

Ad 1. Declared occurrences of each UTP concerned by undertakings (share of firms declaring and frequency declared, perceived costs of UTP's)

Ad 1. Compliance costs for firms

Ad 1. Potential effects of trade diversion to the detriment of protected parties

Ad 2. Alignment of application of UTP rules (e.g. number of changes to national rules with a view to approximate practices)

Ad 2. Number of best practices recommendations adopted

Ad 2. Declared administrative costs for Member States

Ad 2. Relative production and consumer price changes

Ad 3. Number of complaints received (anonymously or not)

Ad 3. Number of mediation meetings, if applicable

Ad 3. Number of investigations launched (own initiative or upon request)

Ad 3. Share of cases resulting in findings of an infringement

## 1.5. **Grounds for the proposal/initiative**

### 1.5.1. *Requirement(s) to be met in the short or long term*

This proposal aims at limiting UTPs in the food supply chain by ensuring a minimum level of protection across the EU through a framework that outlaws the most egregious UTPs and provides possibilities for redress. By removing an impediment to efficiency, the proposal would also improve the functioning of the food supply chain in general.

### 1.5.2. *Added value of Union involvement (it may result from different factors, e.g. coordination gains, legal certainty, greater effectiveness or complementarities). For the purposes of this point 'added value of Union involvement' is the value resulting from Union intervention which is additional to the value that would have been otherwise created by Member States alone.*

Reasons for action at European level (ex-ante)

Article 39 of the Treaty on the Functioning of the European Union (TFEU) specifies that the common agricultural policy shall ensure a fair standard of living for the agricultural community. Article 40 TFEU stipulates that the common market

organisation shall exclude discrimination between agricultural producers. Article 43 TFEU specifies that the common market organisation shall ensure conditions for trade within the Union similar to those existing in a national market.

Most Member States put in place UTP rules, but took diverging approaches towards the problem and related measures are not harmonised; MS lack coordination mechanisms, nor do they have incentives to self-align. To achieve only a minimum level of protection against UTPs throughout the EU and ensure a level playing field for all producers, EU measures are needed

Expected generated Union added value (ex-post)

Level playing field for farmers' protection against UTPs in the food supply chain across Member States and hence a better functioning and more efficient food supply chain.

#### 1.5.3. *Lessons learned from similar experiences in the past*

Buyers and suppliers can have unequal bargaining powers that may lead to UTPs that put profits of affected suppliers under pressure and can result in a misallocation of resources, which reduces the efficiency of the food supply chain

Agricultural suppliers are particularly vulnerable because they are often dependent on bigger downstream partners to get their products to consumers and long production lags and the perishability of many of their products limits their room for manoeuvre.

The current proposal is the outcome of a longer discussion. In 2013, the Commission had carried out a public consultation on the topic, and in 2016 the European Parliament, the Council, and the European Economic and Social Committee all called for action on UTPs.

#### 1.5.4. *Compatibility and possible synergy with other appropriate instruments*

The proposal complements existing EU rules on unfair commercial practices in business-to-consumer relationships; so far, there are no horizontal EU rules on UTPs between businesses. The proposal also complements other areas with relevance for operators that are already subject to common rules, such as competition, state aid, and marketing standards.

**1.6. Duration and financial impact**

Proposal/initiative of **limited duration**

–  Proposal/initiative in effect from [DD/MM]YYYY to [DD/MM]YYYY

–  Financial impact from YYYY to YYYY

X Proposal/initiative of **unlimited duration**

– Implementation with a start-up period from YYYY to YYYY,

– followed by full-scale operation.

**1.7. Management mode(s) planned<sup>10</sup>**

X **Direct management** by the Commission

– X by its departments, including by its staff in the Union delegations;

–  by the executive agencies

**Shared management** with the Member States

**Indirect management** by entrusting budget implementation tasks to:

–  third countries or the bodies they have designated;

–  international organisations and their agencies (to be specified);

–  the EIB and the European Investment Fund;

–  bodies referred to in Articles 208 and 209 of the Financial Regulation;

–  public law bodies;

–  bodies governed by private law with a public service mission to the extent that they provide adequate financial guarantees;

–  bodies governed by the private law of a Member State that are entrusted with the implementation of a public-private partnership and that provide adequate financial guarantees;

–  persons entrusted with the implementation of specific actions in the CFSP pursuant to Title V of the TEU, and identified in the relevant basic act.

– *If more than one management mode is indicated, please provide details in the 'Comments' section.*

Comments

[...]

<sup>10</sup>

Details of management modes and references to the Financial Regulation may be found on the BudgWeb site:  
<https://myintracomm.ec.europa.eu/budgweb/EN/man/budgmanag/Pages/budgmanag.aspx>

## 2. MANAGEMENT MEASURES

### 2.1. Monitoring and reporting rules

*Specify frequency and conditions.*

Once per year:

Member States shall send by 15 March of each year to the European Commission annual reports by means of an information technology based system. Reports shall contain in particular all relevant data on the application and enforcement of the rules under this Directive.

### 2.2. Management and control system(s)

#### 2.2.1. *Justification of the management mode(s), the funding implementation mechanism(s), the payment modalities and the control strategy proposed*

The general risks as regards to the rules in the proposal that can be identified relate to the effectiveness of the proposal, and not as regards to the EU expenditure given the relatively insignificant amounts which are involved.

Risks may be linked to shortcomings in the administrative enforcement authority, including handling of complaints and confidentiality, reporting by the Member States and supervision by the Commission.

The annual reports, annual meeting and dedicated website should ensure proper follow up as to the implementation of the Directive in the EU member States.

#### 2.2.2. *Information concerning the risks identified and the internal control system(s) set up to mitigate them*

Expenditure entailed by this proposal shall be implemented by the Commission under direct management, in accordance with the principles set out in article 32 of Regulation (EU, Euratom) No 966/2012 on the financial rules applicable to the general budget of the Union – the Financial Regulation.

As required by the Financial Regulation, the Director General for Agriculture and Rural Development has put in place the organisational structure and the internal control processes suited to the achievement of the policy and control objectives, in accordance with the internal control standards adopted by the Commission and having regard to the risks associated with the environment in which the policy operates.

#### 2.2.3. *Estimation and justification of the cost-effectiveness of the controls (ratio of "control costs ÷ value of the related funds managed"), and assessment of the expected levels of risk of error (at payment & at closure)*

The controls of the legality and regularity of payments following the new directive will be covered by the existing provisions for direct management in the Commission.

Expenditure entailed by this proposal will not lead to an increase in the error rate for the European Agricultural Guarantee Fund, taking into account the insignificant amounts involved and the implementation mode (direct management).

### 2.3. Measures to prevent fraud and irregularities

*Specify existing or envisaged prevention and protection measures, e.g. from the Anti-Fraud Strategy.*

The Commission shall take appropriate measures ensuring that, when actions financed under this Regulation are implemented, the financial interests of the Union are protected by the application of preventive measures against fraud, corruption and any other illegal activities, by the performance of effective checks and, if irregularities are detected, by the recovery of the amounts wrongly paid as well as, where appropriate, by effective, proportional and deterrent penalties, in accordance with Article 325 of the Treaty on the Functioning of the European Union, with Council Regulation (EC) No 2988/95 on the protection of the European Communities' financial interests, and with title IV of the Financial Regulation applicable to the general budget of the Union.

The Commission or its representatives and the Court of Auditors shall have the power of audit, on the basis of documents and on-the-spot, over all contractors and subcontractors who have received Union funds. OLAF shall be authorised to carry out on-the spot checks and inspections on economic operators concerned directly or indirectly by such funding in accordance with the procedures laid down in Council Regulation (EC) No 2185/96 of 11 November 1996 with a view to establishing that there has been fraud. Decisions, agreements and contracts resulting from the implementation of the Regulation shall expressly entitle the Commission, including OLAF, and the Court of Auditors to conduct such audits, on-the-spot checks and inspections.

### 3. ESTIMATED FINANCIAL IMPACT OF THE PROPOSAL/INITIATIVE

#### 3.1. Heading(s) of the multiannual financial framework and expenditure budget line(s) affected

- Existing budget lines

In order of multiannual financial framework headings and budget lines.

Heading of multiannual financial framework	Budget line	Type of expenditure	Contribution			
			from EFTA countries <sup>12</sup>	from candidate countries <sup>13</sup>	from third countries	within the meaning of Article 21(2)(b) of the Financial Regulation
	Heading 2: Sustainable growth natural resources Heading 5: Administration	Diff./Non-diff. <sup>11</sup>				
	05 01 02 11 – External personnel and other management expenditure in support of the 'Agricultural and Rural Development' policy area – Other management expenditure 05 08 09 – European Agricultural Guarantee Fund (EAGF) — Operational technical assistance	Non-diff.	NO	NO	NO	NO

<sup>11</sup> Diff. = Differentiated appropriations / Non-diff. = Non-differentiated appropriations.

<sup>12</sup> EFTA: European Free Trade Association.

<sup>13</sup> Candidate countries and, where applicable, potential candidates from the Western Balkans.

### 3.2. Estimated impact on expenditure

#### 3.2.1. Summary of estimated impact on expenditure

EUR million (to three decimal places)

Heading of multiannual financial framework		2	Sustainable growth natural resources				TOTAL
DG AGRI		Year 2020 <sup>14</sup>	Year 2021	Year 2022	Year 2023	Enter as many years as necessary to show the duration of the impact (see point 1.6)	
• Operational appropriations							
05 08 09 – European Agricultural Guarantee Fund (EAGF) — Operational technical assistance.	Commitments	(1)	0,05	0,05	0,05	0,05	As long as directive is in place To be indexed
	Payments	(2)	0,05	0,05	0,05	0,05	As long as directive is in place To be indexed
Appropriations of an administrative nature financed from the envelope of specific programmes <sup>15</sup>							
		(3)	-	-	-	-	
<b>TOTAL appropriations for DG AGRI</b>	Commitments	=1+3	0,05	0,05	0,05	0,05	As long as directive is in place To be indexed
	Payments	=2+3	0,05	0,05	0,05	0,05	As long as directive is in place To be indexed

<sup>14</sup>

Year 2020 is the year in which implementation of the proposal/initiative starts.

<sup>15</sup>

Technical and/or administrative assistance and expenditure in support of the implementation of EU programmes and/or actions (former 'BA' lines), indirect research, direct research.



• TOTAL operational appropriations	Commitments	(4)	0,05	0,05	0,05	0,05	0,05	As long as directive is in place	To be indexed
	Payments	(5)	0,05	0,05	0,05	0,05	0,05	As long as directive is in place	To be indexed
• TOTAL appropriations of an administrative nature financed from the envelope for specific programmes	Commitments	(6)	-	-	-	-	-		
	Payments								
<b>TOTAL appropriations under HEADING 2</b> of the multiannual financial framework	Commitments	=4+6	0,05	0,05	0,05	0,05	0,05	As long as directive is in place	To be indexed
	Payments	=5+6	0,05	0,05	0,05	0,05	0,05	As long as directive is in place	to be indexed

<b>Heading of multiannual financial framework</b>	<b>5</b>	<b>'Administrative expenditure'</b>
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EUR million (to three decimal places)

	Year 2020	Year 2021	Year 2022	Year 2023	Enter as many years as necessary to show the duration of the impact (see point 1.6)	TOTAL
DG: AGRI						
• Human resources	0.215	0.215	0.215	0.215	As long as directive is in place	To be indexed
• Other administrative expenditure (1 meeting per year with experts from enforcement authorities)	0.017	0.017	0.017	0.017	As long as directive is in place	To be indexed
<b>TOTAL DG AGRI</b>	0.232	0.232	0.232	0.232	0.232	To be indexed

<b>TOTAL appropriations under HEADING 5</b> of the multiannual financial framework	(Total commitments = Total payments)	0.232	0.232	0.232	0.232	To be indexed
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EUR million (to three decimal places)

	Year 2020 <sup>16</sup>	Year 2021	Year 2022	Year 2023	Enter as many years as necessary to show the duration of the impact (see point 1.6)	TOTAL
<b>TOTAL appropriations under HEADINGS 1 to 5</b> of the multiannual financial framework	0,282	0,282	0,282	0,282	As long as directive is in place	To be indexed
	0,282	0,282	0,282	0,282	As long as directive is in place	To be indexed

<sup>16</sup>

Year 2020 is the year in which implementation of the proposal/initiative starts.

### 3.2.2. Estimated impact on operational appropriations

- The proposal/initiative does not require the use of operational appropriations
- The proposal/initiative requires the use of operational appropriations, as explained below:

Commitment appropriations in EUR million (to three decimal places)

Indicate objectives and outputs ↓	Year 2020	Year 2021	Year 2022	Year 2023	Enter as many years as necessary to show the duration of the impact (see point 1.6)					TOTAL	
					Cost	No	Cost	No	Cost		No
<b>OUTPUTS</b>											
	Average cost	Cost	No	Cost	No	Cost	No	Cost	No	Cost	No
For all three SPECIFIC OBJECTIVE's <sup>18</sup>											
Construction and maintenance of website	0.05	1	0.05	1	0.05	1	0.05	1	0.05	1	0.05
Subtotal for specific objectives	1	0.05	1	0.05	1	0.05	1	0.05	1	0.05	0.05
<b>TOTAL COST</b>	1	0.05	1	0.05	1	0.05	1	0.05	1	0.05	0.05

<sup>17</sup>

<sup>18</sup>

Outputs are products and services to be supplied (e.g.: number of student exchanges financed, number of km of roads built, etc.). As described in point 1.4.2. 'Specific objective(s)...' The website is dedicated to exchange information between MS authorities and the Commission services and as such contributes to improving the farmers position in the food chain across the EU, improving their competitiveness, enhancing their income and maintain market stability.

### 3.2.3. Estimated impact on appropriations of an administrative nature

#### 3.2.3.1. Summary

- The proposal/initiative does not require the use of appropriations of an administrative nature
- The proposal/initiative requires the use of appropriations of an administrative nature, as explained below:

EUR million (to three decimal places)

	Year 2020 <sup>19</sup>	Year 2021	Year 2022	Year 2023	Enter as many years as necessary to show the duration of the impact (see point 1.6)	TOTAL
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<b>HEADING 5 of the multiannual financial framework</b>							
Human resources	0,215	0,215	0,215	0,215	As long as directive is in place		To be indexed
Other administrative expenditure	0,017	0,017	0,017	0,017	As long as directive is in place		To be indexed
<b>Subtotal HEADING 5 of the multiannual financial framework</b>	0,232	0,232	0,232	0,232	0,232		To be indexed

<b>Outside HEADING 5<sup>20</sup> of the multiannual financial framework</b>							
Human resources							
Other expenditure of an administrative nature							
<b>Subtotal outside HEADING 5 of the multiannual financial framework</b>							

<b>TOTAL</b>	<b>0,232</b>	<b>0,232</b>	<b>0,232</b>	<b>0,232</b>		<b>0,232</b>	<b>To be indexed</b>
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The appropriations required for human resources and other expenditure of an administrative nature will be met by appropriations from the DG that are already assigned to management of the action and/or have been redeployed within the DG, together if necessary with any additional allocation which may be granted to the managing DG under the annual allocation procedure and in the light of budgetary constraints

<sup>19</sup> Year 2020 is the year in which implementation of the proposal/initiative starts.

<sup>20</sup> Technical and/or administrative assistance and expenditure in support of the implementation of EU programmes and/or actions (former 'BA' lines), indirect research, direct research.

### 3.2.3.2. Estimated requirements of human resources

- The proposal/initiative does not require the use of human resources.
- The proposal/initiative requires the use of human resources, as explained below:

*Estimate to be expressed in full time equivalent units*

	Year 2020	Year 2021	Year 2022	Year 2023	Enter as many years as necessary to show the duration of the impact (see point 1.6)		
<b>• Establishment plan posts (officials and temporary staff)</b>							
05 01 01 01 (Headquarters and Commission's Representation Offices)	1,5	1,5	1,5	1,5	As long as directive is in place		
XX 01 01 02 (Delegations)							
XX 01 05 01 (Indirect research)							
10 01 05 01 (Direct research)							
<b>• External staff (in Full Time Equivalent unit: FTE)<sup>21</sup></b>							
XX 01 02 01 (AC, END, INT from the 'global envelope')							
XX 01 02 02 (AC, AL, END, INT and JED in the delegations)							
XX 01 04 yy <sup>22</sup>	- at Headquarters						
	- in Delegations						
XX 01 05 02 (AC, END, INT - Indirect research)							
10 01 05 02 (AC, END, INT - Direct research)							
Other budget lines (specify)							
<b>TOTAL</b>	<b>1,5</b>	<b>1,5</b>	<b>1,5</b>	<b>1,5</b>	<b>As long as directive is in place</b>		

XX is the policy area or budget title concerned.

The human resources required will be met by staff from the DG who are already assigned to management of the action and/or have been redeployed within the DG, together if necessary with any additional allocation which may be granted to the managing DG under the annual allocation procedure and in the light of budgetary constraints.

Description of tasks to be carried out:

Officials and temporary staff	3 AD officials part time 50 %
External staff	

### 3.2.4. Compatibility with the current multiannual financial framework

- The proposal/initiative is compatible the current multiannual financial framework.
- The proposal/initiative will entail reprogramming of the relevant heading in the multiannual financial framework.

<sup>21</sup> AC= Contract Staff; AL = Local Staff; END= Seconded National Expert; INT = agency staff; JED= Junior Experts in Delegations.

<sup>22</sup> Sub-ceiling for external staff covered by operational appropriations (former 'BA' lines).

- The proposal/initiative requires application of the flexibility instrument or revision of the multiannual financial framework.

3.2.5. *Third-party contributions*

- The proposal/initiative does not provide for co-financing by third parties.

**3.3. Estimated impact on revenue**

- The proposal/initiative has no financial impact on revenue.