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From:	General Secretariat of the Council
To:	Delegations
Subject:	Proposal for a directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain - Opinion of the European Economic and Social Committee

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*European Economic and Social Committee*

**NAT/734**  
**Improving the food supply chain**

## **OPINION**

European Economic and Social Committee

**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**

[COM(2018) 173 final]

Rapporteur: **Peter SCHMIDT**

Consultation	Council of the European Union, 30/04/2018
Legal basis	Article 304 of the Treaty on the Functioning of the European Union
Bureau decision	22/05/2018
Section responsible	Section for Agriculture, Rural Development and the Environment
Adopted in section	05/09/2018
Date of adoption in plenary	19/09/2018
Plenary session No	537
Outcome of vote (for/against/abstentions)	170/1/3

## 1. **Conclusions and recommendations**

- 1.1 Unfair Trading Practices (UTPs) in the food supply chain originate in imbalances of power between operators across the chain and lead to negative economic, social and environmental effects. The EESC welcomes the Commission proposal to reduce the occurrence of UTPs as a necessary first step to protecting weaker operators, in particular farmers, workers and certain operators, and to improving governance in the food supply chain. A regulatory approach and a legislative framework with effective and robust enforcement mechanisms is the way UTPs can be effectively addressed at EU level.
- 1.2 The EESC regrets, however, that the Commission has only introduced a minimum common standard of protection across the EU by prohibiting just a specific number of UTPs. A ban on all abusive practices is necessary.
- 1.3 Regarding limitation of the protection against UTPs to only SME suppliers as regards their sales to buyers which are not SMEs, the EESC believes that this is not sufficient to effectively address the problem of imbalances of power and that this will not have any meaningful impact. Protection should be extended to all operators, large and small, within and outside the EU. Even when large operators are victims of UTPs, the economic effect is frequently passed on to the weakest actors in the chain.
- 1.4 On enforcement, the EESC welcomes the Commission proposal to create an EU harmonised framework of enforcement authorities. However, the enforcement mechanisms should also be strengthened, for example with a specific ombudsman procedure, class action and law enforcement by the authorities, to protect the anonymity of the complainant. Such mechanisms should also be accompanied by the possibility of introducing sanctions. To facilitate the complaint process, written contracts should be mandatory and would bring more fairness in the negotiations.
- 1.5 In addition to tackling UTPs, the EESC recommends that the Commission encourage and support business models that play a role in making the supply chain sustainable (e.g. shortening it, increasing transparency, etc.), rebalancing it and improving efficiency, in order to strengthen the balance of power.
- 1.6 Last but not least, the EESC reiterates that promoting fairer trading practices should be part of a comprehensive EU food policy, ensuring that the food supply chain is more economically, socially and environmentally sustainable, with a view to implementing the UN Sustainable Development Goals.

## 2. **Introduction**

- 2.1 Unfair Trading Practices (UTPs) are defined as "business-to-business practices that deviate from good commercial conduct and are contrary to good faith and fair dealing and are unilaterally

imposed by one trading partner on another"<sup>1</sup>. The food supply chain is particularly vulnerable to UTPs, due to strong imbalances between small and large operators. UTPs can occur at all stages of the supply chain, and UTPs originating at one level of the chain may have effects on other parts of the chain, depending on the market power of the actors involved<sup>2</sup>.

- 2.2 As described in detail in the EESC opinion on "A fairer agro-food supply chain" adopted in October 2016<sup>3</sup>, concentration of bargaining power has led to the abuse of positions of dominance, causing weaker operators to become increasingly vulnerable to UTPs. This transfers economic risk from the market up the supply chain and has a particularly negative impact on consumers and some operators, e.g. farmers, workers and SMEs. The problem of UTPs has been acknowledged by all stakeholders in the food supply chain, and it has been reported that the majority of operators have experienced UTPs<sup>4</sup>.
- 2.3 In particular, the impact on consumers should be highlighted. Price pressures force processors of food to produce as cheaply as possible – which can affect the quality of food available for consumers, as well as food safety. To reduce costs, in some cases companies use cheaper raw materials, which affect the quality and value of foodstuffs – for example, the use of trans fats in many products, replacing healthier oils and fats from Europe<sup>5</sup>.
- 2.4 Pressure on the weakest operators in the food supply chain is increasing. According to recent Eurostat data, the share of gross value added of retailers is still growing. This results from a higher concentration of the retail and processing sector in the food supply chain, due to a misconstruction in the cartel law. Therefore, the functioning of the food supply chain needs to be improved to ensure a fair share of revenue across the supply chain. However, the value of retailers cannot be underestimated, considering their role in supplying daily goods.
- 2.5 Tackling UTPs is one of the key components for ensuring a better functioning of the food supply chain, along with reducing price volatility in the markets and strengthening the role of producers' organisations. In June 2016, a European Parliament resolution<sup>6</sup> called on the Commission to propose a legal framework concerning UTPs – a call which was echoed in October 2016 by the EESC and in November 2016 by the Agricultural Markets Task Force.
- 2.6 In 20 Member States, various legislative initiatives already exist for addressing UTPs. Together with the existing Supply Chain Initiative (SCI), this has raised awareness on the unequal balance of power in the food supply chain. However, very few of the existing national or voluntary approaches have so far solved the issue of UTPs. The Commission decided to come

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1 European Commission, 2014.

2 Report by the Agri-Market Task Force, November 2016: [https://ec.europa.eu/agriculture/sites/agriculture/files/agri-markets-task-force/improving-markets-outcomes\\_en.pdf](https://ec.europa.eu/agriculture/sites/agriculture/files/agri-markets-task-force/improving-markets-outcomes_en.pdf).

3 [OJ C 34, 2.2.2017, p. 130](#).

4 European Commission Communication, 15 July 2014, Tackling unfair trading practices in the business-to-business food supply chain.

5 [OJ C 34, 2.2.2017, p. 130](#).

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

forward with a specific legislative proposal in April 2018, recognising that the patchwork of UTP rules in Member States or the absence thereof is liable to impair the Treaty's objective of ensuring a fair standard of living for the agricultural community<sup>7</sup>.

### 3. **Commission proposal**

- 3.1 With the proposed directive, the Commission aims at reducing the occurrence of UTPs in the food supply chain by introducing a minimum common standard of protection across the EU, consisting of a list of specific prohibited UTPs, namely: late payments for perishable food products, last-minute order cancellations, unilateral or retroactive changes to contracts and suppliers being forced to pay for wasted products. Other practices will only be permitted if subject to a clear and unambiguous upfront agreement between the parties: a buyer returning unsold food products to a supplier; a buyer charging a supplier payment to secure or maintain a supply agreement on food products; a supplier paying for the promotion or the marketing of food products sold by the buyer.
- 3.2 The protection against UTPs only applies to the sales of food products by a supplier that is a small and medium-sized enterprise (SME) to a buyer that is not an SME<sup>8</sup>.
- 3.3 In addition, the Commission's proposal requires Member States to designate a public authority in charge of enforcing the new rules. In the case of a proven infringement, the body responsible will be competent to impose a proportionate and dissuasive sanction. This enforcement authority will be able to initiate investigations on its own initiative or based on a complaint. In this case, parties filing a complaint will be allowed to request confidentiality and anonymity to protect their position vis-à-vis their trading partner. A coordination mechanism between enforcement authorities will also be set up and facilitated by the Commission to enable the exchange of best practice.

### 4. **General comments**

- 4.1 The EESC welcomes the Commission's proposal as a crucial first step in starting a legislative process to regulate UTPs across the EU, as it strongly recommended in its 2016 opinion. This is a necessary development to protect weaker operators in the food supply chain, namely farmers and workers, and to make their income less volatile and more stable. In particular, the proposal helps address their lack of bargaining power, thus improving governance of the food supply chain.
- 4.2 In its document, the Commission acknowledges that the EU-wide Supply Chain Initiative (SCI) is unlikely to develop into a comprehensive governance framework that would make legislative measures, including enforcement, superfluous<sup>9</sup>. In this context, the EESC reiterates that the SCI

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<sup>7</sup> COM(2018) 173 final.

<sup>8</sup> SME definition according to Regulation (EU) No 1308/2013.

<sup>9</sup> COM(2018) 173 final.

and other national voluntary schemes can indeed be useful only as an addition – not to replace – effective and robust legal enforcement mechanisms at Member State level<sup>10</sup>.

- 4.3 The EESC also welcomes the promotion of an EU harmonised network of enforcement authorities, as recommended in its previous opinion. Ensuring effective cooperation between enforcement authorities is crucial for addressing transnational UTPs that could otherwise be left unchallenged.
- 4.4 However, the EESC regrets that the Commission has adopted a minimum harmonisation approach, which is not sufficient to address all of the abusive practices occurring across the food supply chain. In particular, the Committee greatly regrets that buyers are the only ones who can commit abusive practices and only a limited number of UTPs are prohibited in this framework, as further explained in chapter 5.
- 4.5 The EESC also questions the Commission's proposal to limit protection against UTPs solely to SME suppliers as regards their sales to buyers that are not SMEs. To be effective and successful, protection against UTPs should be applicable to all players in the supply chain, regardless of their size, so as to impact all commercial relations. However, the EESC acknowledges the vulnerability of SMEs. The proposal also fails to address the issue of unequal bargaining power and economic dependence, which does not necessarily coincide with the economic dimension of operators.
- 4.6 The scope of the proposal is not broad enough and should also cover agricultural non-food products, such as horticultural products, as well as feed.
- 4.7 Addressing UTPs is an essential component (along with reducing market volatility and strengthening the role of producers' organisations) of making the food supply chain more economically, socially and environmentally sustainable. The EESC reiterates that promoting fairer trading practices should be part of a comprehensive EU food policy with a view to implementing the UN Sustainable Development Goals (SDGs). In particular, such a comprehensive policy should ensure fair prices for producers so that farming remains viable<sup>11</sup>.
- 4.8 Although this goes beyond the scope of the Commission's proposal, the EESC again highlights the need to promote a greater appreciation of food by society as a whole and would support the launch of a Europe-wide information and awareness-raising campaign on "the value of food"<sup>12</sup> and on limiting food waste in collaboration with concerned organisations.

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<sup>10</sup> [OJ C 34, 2.2.2017, p. 130.](#)

<sup>11</sup> [OJ C 129, 11.4.2018, p. 18.](#)

<sup>12</sup> [OJ C 34, 2.2.2017, p. 130.](#)

## 5. Specific comments

### *List of prohibited UTPs*

- 5.1 UTPs can broadly be defined as practices that significantly deviate from good commercial conduct and are contrary to good faith and fair dealing<sup>13</sup>. This also includes all practices where an unjustified or disproportionate transfer of risk to a contracting party occurs.
- 5.2 The Commission has only prohibited a specific number of UTPs. The EESC reiterates that a ban on all unfair practices is needed, for example (but not exclusively) the following, as already recommended in its previous opinion:
- unfair transfer of commercial risk;
  - unclear or unspecified contractual terms;
  - unilateral and retroactive changes to contracts, including price;
  - lower product quality or consumer information without any communication to, consultation of or agreement with the buyers;
  - contributions to promotional or marketing costs;
  - delayed payments;
  - listing or loyalty fees;
  - charges for shelf-positioning;
  - claims for wasted or unsold products;
  - use of cosmetic specifications to reject consignments of food or reduce the price paid;
  - pressure to cut prices;
  - charges for fictitious services;
  - last-minute order cancellations and forecast-volume deductions;
  - threats of delistings;
  - flat-rate charges that companies levy on suppliers as a requirement for inclusion in a list of suppliers ("pay to stay").

Member States should have the opportunity to extend the list in line with the specific situation in their country.

- 5.3 The EESC calls for an effective ban on food retailers selling below cost-price<sup>14</sup>. In particular, the EESC recommends that suppliers, such as farmers, be paid a fair and just price that allows suppliers to receive an income that is adequate for investment, innovation and sustainable production.
- 5.4 The UTPs explicitly prohibited in the Commission proposal all relate to situations where there is a pre-existing contract. It is much more frequent, however, for cases such as pressure on operators to occur before a contract is entered into. The examples should, therefore, be expanded to include the case of an undertaking (with market power) requiring another

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<sup>13</sup> COM(2014) 472 final.

<sup>14</sup> [OJ C 34, 2.2.2017, p. 130.](#)



undertaking to grant it advantages without any objectively justified reason (see also paragraph 19(2), point 5 of the German Law on Restrictions of Competition (GWB)). This provision in German anti-trust law has proved an appropriate means of combating the abuse of buying power. The decision of the German Federal Court of Justice (BGH) in the "Hochzeitsrabatte" (wedding rebates) case gives an impressive illustration of this in the context of the relationship between a powerful German food retailer and its suppliers<sup>15</sup>.

#### *SME definition*

- 5.5 The limitation of the protection against UTPs solely to SME suppliers is not sufficient to effectively address the problem of imbalances across the food supply chain. The EESC highlights the "domino effect" that may be created when large operators are victims of UTPs. UTPs have a clear negative effect independently of who is responsible. Inevitably, the economic effect is passed on to the weakest actors in the food supply chain, i.e. farmers, workers, certain operators and also to consumers.
- 5.6 Another argument for extending protection is that large operators in particular may discriminate against SMEs and exclude them from the supply chain, due to the risk of receiving complaints. In this context, the EESC acknowledges again the vulnerability of SMEs.

#### *Enforcement*

- 5.7 With a view to effective law enforcement, a distinction has to be made between private-law enforcement (not yet provided for in the Commission proposal) and law enforcement by the authorities. It should be stressed from the outset that sufficient account needs to be taken of the right of the party concerned to anonymity, as many undertakings would hesitate to take action against abuses for fear of reprisals such as delisting (the "fear factor").

##### 5.7.1 Private-law enforcement

In relation to private-law enforcement, the party concerned should have access to prohibitory and eliminatory injunctions and claims for damages. But because of the "fear factor", such remedies are of rather minor importance. Moreover, all associations concerned should be able to apply for prohibitory and eliminatory injunctions. This would guarantee special protection of the party concerned with regard to anonymity, in the event that the unfair trade practice is directed at several undertakings (e.g. a food operator requiring all its suppliers/buyers to contribute to any additional cost).

The party or association concerned should be given the option of bringing these claims either before a court or an ombudsman. The ombudsman procedure would have the advantage that the dispute would not have to be conducted in public. A specific ombudsman procedure should be established. The ombudsman should also receive specific decision-making powers. Voluntary proceedings would in many cases not be effective or provide real remedies.

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<sup>15</sup> See: Bundesgerichtshof (BGH), 23.01.2018, KVR 3/17, Wirtschaft und Wettbewerb (WuW) 2018, 209 – Hochzeitsrabatte.

In addition to that, the EESC encourages the operators to develop initiatives in order to promote a cultural change and to improve fairness in the supply chain.

#### 5.7.2 Law enforcement by the authorities

Because of the "fear factor", enforcement by the authorities plays a particularly important role in this area, thus requiring regulation. Authorities such as the Commission and the national competition authorities should therefore be given extensive powers of investigation and enforcement. The competition rules laid down in Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 (now 101) and 82 (now 102) of the Treaty could serve as an example here. (Article 6 of the proposal for a directive is by comparison much weaker.) Article 17 of the regulation in particular provides for investigations into sectors of the economy and into types of agreements. If the authorities were to have the power to carry out levies on profits, this could have a further deterrent effect.

#### *Alternative food supply chains*

- 5.8 The EESC reiterates that alternative business models that play a role in shortening the supply chain between producers of food and the end-consumer, including digital platforms, should be encouraged and supported and that the role and position of cooperatives and producer organisations should be strengthened in order to restore the balance of power<sup>16</sup>. This should be the subject of a future EESC opinion.

Brussels, 19 September 2018

Luca Jahier  
The president of the European Economic and Social Committee

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<sup>16</sup> [OJ C 34, 2.2.2017, p. 130](#)