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From:	General Secretariat of the Council
To:	Delegations
Subject:	Unfair trading practices in the food supply chain - Opinion of the European Committee of the Regions

Delegations will find attached the above-mentioned opinion.

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**European Committee
of the Regions**

NAT-VI/030

130th plenary session, 4 and 5 July 2018

OPINION

Unfair trading practices in the food supply chain

THE EUROPEAN COMMITTEE OF THE REGIONS

- welcomes the Commission's initiative of establishing European legislation designed to combat unfair trading practices
- believes that this proposal provides a good foundation but that it is necessary to go further to protect farmers more effectively
- considers it necessary to include in this proposal for a directive a prohibition in principle of unfair trading practices
- considers it necessary to broaden the scope of the proposal to cover all products and all operators
- considers it necessary to extend the list of prohibited unfair practices to include resale at a loss, and to punish purchases below production costs
- believes that this directive will not be enough to improve the situation of farmers unless the overall framework in which they operate is changed
- considers that, alongside this directive, it will also be necessary to make contractualisation attractive for producers, to introduce additional measures on price transparency, to tackle over-concentration of the distribution, agri-food and agri-supply sectors, and to develop fairer international trade relations in agriculture

Rapporteur

Jacques Blanc (FR/EPP), Mayor of La Canourgue

Reference document

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

Opinion of the European Committee of the Regions – Unfair trading practices in the food supply chain

I. RECOMMENDATIONS FOR AMENDMENTS

Amendment 1

Article 1

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<i>Subject matter and scope</i>	<i>Subject matter and scope</i>
<ol style="list-style-type: none"> 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 and 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 the date of applicability of the provisions transposing this Directive referred to in the second subparagraph of Article 12(1). 	<ol style="list-style-type: none"> 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 unfair trading practices which occur in relation to the sales of food products by a supplier to a buyer that is not a small or medium-sized enterprise. 3. This Directive shall apply to supply agreements concluded after the date of applicability of the provisions transposing this Directive referred to in the second subparagraph of Article 12(1).
<i>Reason</i>	
<p>Restricting the scope of the directive would have a negative impact on large cooperatives and producer organisations which do not meet the SME criteria, leaving them unprotected against unfair trading practices. These OPs and cooperatives certainly do not have the same bargaining power as their buyers given the downstream concentration of the supply chain. Moreover, this approach would contrast sharply with the Commission's long-term efforts to concentrate supply through the application of the CMO by indirectly penalising OPs that do not satisfy the definition of an SME. Finally, the unfair trading practices that an industrial supplier, such as a medium-sized firm selling products with a strong agricultural component, would suffer at the hands of a distributor, would also not be affected by the prohibition of unfair trading practices. This does not make economic sense vis-à-vis the protection required by the most vulnerable actors.</p>	

Amendment 2

Article 2

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p style="text-align: center;"><i>Definitions</i></p> <p>For the purposes of this Directive, the following definitions apply:</p> <p>"buyer" means any natural or legal person established in the Union who buys food products by way of trade. The term "buyer" may include a group of such natural and legal persons; [...]</p>	<p style="text-align: center;"><i>Definitions</i></p> <p>For the purposes of this Directive, the following definitions apply:</p> <p>a) "buyer" means any natural or legal person, regardless of where they are established, who buys food products by way of trade. The term "buyer" may include a group of such natural and legal persons;</p> <p>b) "unfair trading practice": the action of subjecting or endeavouring to subject a trading partner to obligations which would create an imbalance between the rights and obligations of the parties; [...]</p>
<i>Reason</i>	
<p>a) The aim of the directive is also to prevent the relocation of buyers without any rules being enforced. It therefore makes sense to take into account both buyers based in the EU and those based outside the EU.</p> <p>b) It is important to define in the directive what constitutes an unfair trading practice in a sufficiently open way.</p>	

Amendment 3

Article 3(1)

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p style="text-align: center;"><i>Prohibition of unfair trading practices</i></p> <p>1. Member States shall ensure that the following trading practices are prohibited:</p> <p>a) a buyer pays 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 shall be without prejudice:</p> <ul style="list-style-type: none"> – to the consequences of late payments and remedies as laid down in Directive 2011/7/EU; – to the option of a buyer and a supplier to agree on a value sharing clause within the meaning of Article 172 a) 	<p style="text-align: center;">Prohibition of unfair trading practices</p> <p>1) Member States shall ensure that the following trading practices, at the very least, are prohibited:</p> <p>a) a buyer pays a supplier for 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 food products, whichever is the later. This prohibition shall be without prejudice:</p> <ul style="list-style-type: none"> – to the consequences of late payments and remedies as laid down in Directive 2011/7/EU; – to the option of a buyer and a supplier

<p>of Regulation (EU) No 1308/2013 of the European Parliament and of the Council.</p> <p>b) a buyer cancels orders of perishable food products at such short notice that a supplier cannot reasonably be expected to find an alternative to commercialise or use these products;</p> <p>c) a buyer unilaterally and retroactively changes 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;</p> <p>d) a supplier pays for the wastage of food products that occurs on the buyer's premises and that is not caused by the negligence or fault of the supplier.</p>	<p>to agree on 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.</p> <p>– <i>agreements reached by interbranch organisations recognised under Article 157 of Regulation (EU) No 1308/2013 of the European Parliament and of the Council;</i></p> <p>b) a buyer cancels orders of perishable food products at such short notice that a supplier cannot reasonably be expected to find an alternative to commercialise or use these products;</p> <p>c) a buyer unilaterally and retroactively changes 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;</p> <p>d) a supplier pays for the wastage of food products that occurs on the buyer's premises and that is not caused by the negligence or fault of the supplier;</p> <p>e) <i>a buyer sells on an undamaged product at a price lower than the purchase price, including taxes and transport costs;</i></p> <p>f) <i>a buyer offers prices for the purchase of foodstuffs that are unreasonably low given the supplier's production costs;</i></p> <p>g) <i>a buyer charges for a service that does not correspond to any service actually provided or whose cost is manifestly disproportionate to the value of the service provided;</i></p> <p>h) <i>one of the parties to the contract imposes price criteria and methods whereby the price is not and cannot be determined.</i></p>
<i>Reason</i>	
<p>Unfair practices concern and handicap not only suppliers of perishable foodstuffs but also suppliers of non-perishable foodstuffs. The scope of the directive must therefore be broadened.</p> <p>The interbranch agreements, adopted unanimously by the members, may potentially provide for different rules from those included in the draft directive, in particular with regard to payment</p>	

deadlines.

- e) It is appropriate to prohibit resale at a loss in order to halt the destruction of value at every stage in the food supply chain. Indeed, this serves to avoid the phenomenon of price wars whereby the supermarket achieves excessive margins on certain products, particularly agricultural products, to offset struggles with regard to certain flagship products.
- f) In the same spirit, the price paid to producers must not be unreasonably low in relation to the cost of production. It is unacceptable that farmers are unable to make a living and are forced to sell at a loss. It is therefore important to punish buyers who buy at a price that is unreasonably low or who force their suppliers to buy their agricultural raw materials at unreasonably low prices. A precise definition of an incorrectly low selling price must be determined based on the relevant sectors and regions.
- g) The aim is to sanction any payment that has no counterpart in terms of service rendered to the supplier or that is disproportionate to the service rendered. Specifically, the challenge is to ensure that a payment to a European purchasing centre is justified.
- h) The price indicated in a contract must be determinable or determined, in other words both parties should be in a position to know the price at which it will be paid throughout the duration of the contract.

Amendment 4

Article 3(3)

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
If a payment is requested by the buyer for the situations described in points (b), (c) and (d) of paragraph 2, the buyer shall, <i>if requested by the supplier</i> , provide the supplier with an estimate of the payments per unit or overall, whichever is appropriate, and insofar as the situations described in points (b) and (d) of paragraph 2 are concerned also an estimate of the costs and the basis for such estimate.	If a payment <i>that is definitely linked to the service provided</i> is requested by the buyer for the situations described in points (b), (c) and (d) of paragraph 2, the buyer shall provide the supplier with an estimate of the payments per unit or overall, whichever is appropriate, and insofar as the situations described in points (b) and (d) of paragraph 2 are concerned also an estimate of the costs and the basis for such estimate.
<i>Reason</i>	
The payments requested from suppliers must be strictly supervised and systematically justified.	

II. POLICY RECOMMENDATIONS

THE EUROPEAN COMMITTEE OF THE REGIONS

1. believes that market-based mechanisms to safeguard farmers' incomes need to be strengthened significantly to reduce the negative impact of the high volatility of agricultural product prices, in order to keep up agriculture throughout the EU, increase its competitiveness and preserve vibrant rural communities;

2. notes that there is a close link between regulating the price volatility of agricultural products and combating unfair trading practices (UTPs) in the food supply chain, because market fluctuations exacerbate power imbalances with regard to the sharing of added value within sectors, and the resulting trade-offs are usually unfavourable to producers, who have limited bargaining power due to the increasing concentration of agri-food industries and, in particular, of large-scale retail;
3. welcomes the Commission's initiative of establishing European legislation designed to combat unfair trading practices, which it called for in its opinion on regulating price volatility. This opinion recommended developing specific European rules against UTPs in the food supply chain, as proposed in the European Parliament resolution of 7 June 2016 [2015/2065 (INI)], on the grounds that: while contracts do lead to a degree of risk sharing, they do not fundamentally correct the inequality between the parties; anti-monopoly provisions are not sufficient to address UTPs and the asymmetries of power that characterise the agri-food industry; industry self-regulation mechanisms are not always effective in terms of ensuring fair conduct in the market, not least because farmers and processors are often afraid to complain lest they be excluded from the market; EU-level rules are thus needed to harmonise conditions for competition and ensure that European farmers and consumers enjoy conditions for fair selling and buying;
4. believes that this proposal provides a good foundation but that it is necessary to go further to protect farmers more effectively. Farmers' incomes are currently 40% below the average salary. The value of an agricultural product is currently shared out as follows: the farmer receives an average of 21%, the processor 28% and the distributor 51%. Action is needed to ensure more balance in commercial relationships and increase the value to agriculture of household food expenditure, as recommended in the CoR opinion on the post-2020 CAP;
5. considers it necessary to include in this proposal for a directive a prohibition in principle of unfair trading practices, as recommended in the impact assessment, which could be an answer to possible future abusive practices;
6. while agreeing with the European Commission that SMEs are most vulnerable to unfair trading practices, considers it necessary to broaden the scope of the proposal to cover not only SMEs and farmer suppliers but all actors in the food chain, irrespective of where they are established;
7. considers it necessary to extend the ban on late payments to include non-perishable products;
8. considers it necessary to extend the list of prohibited unfair practices to include resale at a loss, and to punish purchases below production costs;
9. considers it necessary to prohibit discriminatory or non-transparent electronic auctions;
10. considers it necessary to specify the criteria and methods used to set the price, which must be included in contracts signed with farmers so that they can calculate at any time the price to which they are entitled;

11. considers it necessary to provide for a European mechanism, in addition to the national control system and taking proper account of national circumstances, measures and best practices, to ensure that cross-border unfair trading practices are also covered;
12. recommends, in view of the internationalisation of companies, particularly in the agricultural sector, that transactions involving suppliers/buyers based in third countries should be included in order to avoid encouraging SMEs to buy outside the EU and to guarantee the protection of EU companies that sell to foreign buyers;
13. believes, moreover, that this directive will not be enough to improve the situation of farmers unless the overall framework in which they operate is changed;
14. believes that the directive should be flanked by the following measures:
 - a. making contractualisation attractive for producers, by ensuring that contracts take into account agricultural production costs when setting prices;
 - b. introducing additional measures on price transparency;
 - c. tackling the over-concentration of the distribution, agri-food and agri-supply sectors;
 - d. developing fairer international trade relations in agriculture, as advocated in the opinion on the post-2020 CAP.

Brussels, 4 July 2018

The President ☐
of the European Committee of the Regions ☐

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Karl-Heinz Lambertz

The Secretary-General ☐
of the European Committee of the Regions ☐

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Jiří Buriánek

III. PROCEDURE

Title	Unfair trading practices in the food supply chain
References	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
Legal basis	Article 307 of the Treaty on the Functioning of the European Union
Procedural basis	Rule 43(1) of the Rules of Procedure
Optional referral	7 May 2018
Date of president's decision	5 June 2018
Commission responsible	Commission for Natural Resources
Rapporteur-general	Jacques Blanc (FR/EPP), Mayor of La Canourgue
Analysis	28 May 2018
Date adopted in plenary	4 July 2018
Previous Committee opinions	COR-2016-03169-00-01-AC – Opinion of the European Committee of the Regions on Regulating price volatility of agricultural products – Rapporteur: Jacques Blanc (FR/EPP) – Mayor of La Canourgue ¹ .
Date of subsidiarity monitoring consultation	

¹ Opinion of the European Committee of the Regions on Regulating price volatility of agricultural products, [OJ C 185, 9.6.2017, p. 36-40](#).