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NOTE

From: General Secretariat of the Council
To: Delegations

Subject: Better functioning of the Food Supply Chain: addressing unfair trade practices (UTPs) and improving the position of farmers
- Information from the Bulgarian, Czech, Hungarian, Latvian, Lithuanian, Slovak and Slovenian delegations

In view of the "Agriculture and Fisheries" Council of 6 March 2017, delegations will find attached a non-paper provided by the Bulgarian, Czech, Hungarian, Latvian, Lithuanian, Slovak and Slovenian delegations on the above-mentioned subject, that will be presented under the agenda point "Any other business".

„NON PAPER”

Better functioning of the Food Supply Chain:

addressing unfair trade practices (UTPs) and improving the position of farmers

presented by Bulgaria, the Czech Republic, Hungary, Latvia, Lithuania, Slovakia and Slovenia.

Introduction:

Significant imbalances in bargaining power exist among the partners in the food supply chain. Such imbalances stimulate certain activities on the part of the stronger party within the business relationship. The problem of UTP's has been noticed by all stakeholders involved in the food supply chain and particularly by suppliers. Various surveys show that UTPs occur relatively frequently. However, the scope of the UTP's occurrence differs among Member States, sectors and within the food supply chain itself.

A transparent, well-functioning and efficient food supply chain is vital for a sustainable farming sector. By fact, UTS's lead to inefficient operations of commercially viable operators. They create uncertainty, lack of innovations and contribute to underinvestment of the operators involved. National business culture plays an important role in commercial customs, habits and practices. The definition of UTP's may differ with regard to the national business culture.

The present document aims at contributing to the establishment of an EU legislative framework to regulate UTP's and to define additional tools needed for strengthening the position of farmers in the food supply chain.

It takes into account the provisions of Articles 39 and 42 of the Treaty on the Functioning of the EU and is based on the Council conclusions on strengthening the position of farmers in the food chain and the fight against UTP's, adopted on 12 December 2016, the Agricultural Markets Task Force Report of November 2016 and the inputs of the High Level Forum for Food Chain of 15 December 2016.

The EU regulatory framework would serve as a baseline or minimum requirements that could be agreed among Member States. Specific national rules would be complementary to the agreed basic rules. Member States would be free to choose and in accordance with the principle of subsidiarity to apply more restrictive approaches related to the specific national market.

1. EU regulatory framework for UTPs

1.1 Prohibition of unfair trade practices

A list of UTP's, including the definitions of unfair trade practices shall be defined and the use of which shall be prohibited, such as those listed in the annex 1 to this document.

Within the regulatory framework the UTP's should be generally defined as following: "UTPs are practices that deviate grossly from a good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on another"¹.

1.2 Payment periods

For payment deadlines an EU regime, under which Member States may prescribe a maximum payment period for all agri-food products as well as for other foods shall be established. Member States shall impose appropriate penalties for infringements respectively².

¹ Definition of UTPs from the Commission report from January 2016.

² Payment periods may not be longer that stated in Directive 2011/7/EU, i.e. within 60 days (unless expressly agreed otherwise and provided it is not grossly unfair) and Member States must impose appropriate penalties for infringements. Directive 2011/7/EU on combating late payment in commercial transactions was adopted on 16 February 2011 and was due to be integrated into national law by EU countries by 16 March 2013 at the latest (info about this Directive: https://ec.europa.eu/growth/smes/support/late-payment_en) Possible solution is to set up maximal period for payment to 30 days by changing the Directive.

2. Additional tools needed for enhancing the position of farmers in the food supply chain

2.1 Monitoring system of prices and volumes in EU countries with objective of higher transparency in the food supply chain

In order to increase transparency in the food supply chain at EU level, a common methodology for monitoring prices along the food supply chain is of significant importance. We propose to adjust a food prices and volumes collection system, along the entire food supply chain, for the main markets/products/sectors, taking duly into account the need to protect trade secrets and confidential information for actors within the chain. The information on prices for food chain monitoring must be collected in accordance with clearly defined quantitative and qualitative requirements to track price transmission in food supply chain.

2.2 Exemptions from competition law

In accordance with EU legislation milk producers are allowed to unite in producer organizations or producer groups or other forms of association (for example, cooperatives). Those associations can negotiate on behalf of milk producers on the terms of purchasing of milk including the purchase price. The amount of milk, which they can negotiate, is limited to 33% of national milk production.

A system similar to milk is also suggested for other markets in order to strengthen the position of farmers in the food supply chain. It should be implemented in parallel to the regulatory framework on UTPs.

2.3 Relevant institutions within food supply chain

Each Member State should appoint a competent authority, with the possibility of sanctioning unfair trade practices. We suggest setting up or upgrading the already functioning supervisory authorities, e.g the ombudsmen in the food supply chain or comparable authority in EU Member States that would supervise and penalize UTP's.

Annex 1 List of most significant detected UTPs

1. Documentation:

- unilateral and/or retroactive changes to a contract, unless the contract specifically allows for it under fair conditions
- signing or prolonging the contract under certain conditions imposed by one of the contracting party that are not directly linked with the subject of the agreement (e.g. additional payments or discounts, promotions or other services)
- unjustified cancelation, termination if not under conditions mentioned in contract or threat of termination of the contract
- unfair termination of a contractual relationship or unjustified threat of termination of a contractual relationship
- changes in key supply procedures or product specifications without notifying the supplier according to the contractual terms

2. Bearing operational risks:

- unduly or unfairly shift of costs or entrepreneurial risks to the other party
- demanding advantages or benefits of any kind from the other party without performing a service related to the advantage or benefit asked
- returning foodstuffs by one of the contracting party without payment before the expiration date of minimum durability or use by date
- obligatory retake or re-purchase by the supplier

- listing fee
- passing on the operational costs
- use of fix bonus
- over-ordering of a product intended for promotion and imposing payment for not reaching certain sales levels or extra discount for sales above a certain level
- debiting other parties with the costs which are not imputable to them
- unfair terms of delivery (e.g. very short terms)
- requirement of the buyer for control of the production areas of the supplier and the control of products carried out at the supplier's expense.
- prioritizing the results of controls of products according to buyer's choice before the results of controls of state authorities and at the supplier's expense
- delegation of fines from the state supervisory authorities, which received a buyer, to the supplier without a reason
- buyer's requirement to the supplier to purchase products, services or property from the buyer and (or) from the specified operators
- buyers' refusal to accept all of the pre-ordered perishable products order or parts of it, without compensation of losses incurred to the supplier except in cases where the goods are returned because of suppliers fault

3. Risk related to financial settlements

- registration fees for the use of the sales network of buyer
- late payments

- advance payment for accessing negotiation
 - listing fees
 - entry fees
 - shelf space pricing
 - compulsory contributions to promote supplier products in the network of buyer
 - most favoured client clause
 - the requirement of the buyer at guaranteed prices for a period of 1 year
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