

Towards a Fairer EU Food Supply Chain: Harmonising the Legal Framework

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The draft Directive on banning unfair trading practices in business-to-business relationships in the food supply chain has the potential to reduce the imbalances in bargaining power among trading partners. This asymmetry is particularly strong within trade relations involving operators from different EU member states due to discrepancies among national laws. However, the draft Directive risks being ineffective as it has a narrow scope and adopts a soft approach, which would make the current regulatory framework even more fragmented. The initiative, which was presented by Agricultural and Rural Development Commissioner Philip Hogan on 12 April 2018, aims at improving “the functioning of the food supply chain to help farmers strengthen their position in the market place”¹, in order to ultimately make the internal market deeper and fairer, a priority set by the European Commission’s 2018 Work Programme.

The Commission defines unfair trading practices as those „that grossly deviate from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on another”². While leaving each member state room for adopting stricter measures, the draft Directive would ban in particular late payments for perishable food products, last minute order cancellations, unilateral or retroactive changes to contracts and forcing the supplier to pay for wasted products. Moreover, following practices would be prohibited as well, unless a clear and unambiguous agreement is reached upfront by 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. The draft Directive also provides for sanctions to be imposed on trading operators by an already existing national authority in the respective member state if companies / economic actors do not comply with the ban.³ According to the proposal, the national authority would have the mandate to investigate on its own initiative or based on a complaint that would be allowed to remain anonymous and confidential.⁴

A History of non-binding Measures

Imbalances in bargaining power within the food supply chain have strongly increased due to the globalisation of retail and procurement markets, since sophisticated information technology, increased vertical integration and economies of scale have reduced the number of multinational retailers, i.e. trading partners for farmers, to only one or a few.⁵ According to recent data, the top three retailers have more than a 30 per cent share in food markets in all EU member states, with the exception of Romania, Bulgaria, Poland, Italy and Hungary.⁶ This has made farmers strongly dependent on a small number of retailers and therefore reluctant to submit legal complaints against alleged unfair practices to national competent authorities (the so-called ‘fear factor’), giving purchasers in turn the room for engaging in unjust practices. Currently, farmers on average receive 21 per cent of the overall value of the whole

agricultural product in the EU, while 28 per cent goes to processors and 51 per cent to retailers.⁷

Whilst ensuring the fairness in business-to-customers transactions in the food supply chain has always represented a focal point of the EU's Common Agricultural Policy, unfair practices in business-to-business relationships have been first addressed in a Communication released in 2009. In it, the Commission underlined how "the lack of market transparency, inequalities in bargaining power and anti-competitive practice have led to market distortions with negative effects on the competitiveness of the food supply chain as a whole"⁸. In 2010, the Commission established a High Level Forum on a Better Functioning of the Food Supply Chain, including national authorities responsible for the food sector and representatives of the private sector from each member state. This facilitated the launch of the Supply Chain Initiative, a voluntary code of conduct by several EU-wide associations involved at different levels in the food and drink sector, with the aim to promote fair business practices.⁹ In 2013, the Barroso Commission adopted the European Retail Action Plan which identified eleven concrete actions to be taken by the Commission in order to improve the competitiveness of the retail sector. Based on it, the Commission set up a Multi-Stakeholder Dialogue on Comparison Tools, a group of representatives from consumer organisations, national consumer authorities and regulators as well as from business associations and, as a follow-up, produced a dedicated study as well as a number of non-binding measures, including a Green Paper.¹⁰

The succeeding Juncker Commission further addressed the issue in 2014 and 2016 and consequently set up the Agricultural Markets Task Force, an independent group of twelve experts from across the EU food supply chain. The group's final report recommends the Commission to adopt EU framework legislation to improve the farmers' position and highlights other issues affecting growers.¹¹

The draft legislation comes after a call by the European Parliament and the Council upon the Commission to tackle unfair trading practices, as well as an open public consultation launched and an impact assessment produced by the Commission. Interestingly, the impact assessment underlines how B2B transactions within the food supply chain between different EU member states lack an ad hoc legal basis, although they account for 70 per cent of the total annual export of agricultural products within the EU.¹² In particular, it points out how, due to different national rules, stronger parties are able to choose the law they prefer on a case by case basis to the detriment of weaker parties. In light of this, the impact assessment recommends a common EU framework in form of either non-binding, i.e. guidelines or recommendation, or binding measures, i.e. directives or regulations. Moreover, as further areas to be addressed in order to enhance farmers' bargaining power, the impact assessment calls for the implementation of a value-sharing mechanism to be voluntarily adopted by operators involved in B2B transactions as well as for extending member states' current right to collect market information in order to enhance market transparency.

From Theory To Action: Too Little, Too Late?

By opting for a directive which sets minimum standards and does not dictate the means of accomplishing a goal to the member states as a regulation would do, the Commission intends to create a common EU framework by keeping some national legal provisions in place. A number of stakeholders associations of the food supply chain, including Copa and Cogeca, CEJA and FoodDrinkEurope, have underlined that taking the softer approach of a directive would risk fragmenting the regulatory landscape even more than it already is. Moreover, the same stakeholders have raised concerns over the fact that the task of initiating and conducting

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investigations followed by the imposition of sanctions would be allocated to an already existing body instead of an ad hoc national authority which would be more independent and could thus guarantee a strong enforcement. They have further underlined how the proposed Directive does not provide for a coordinating mechanism among the above-mentioned authorities either. Finally, they have criticised the fact that the draft Directive's scope would be too narrow as it only addresses small and medium enterprises' trading with multinational retailers¹³ and that it would fail to remedy unfair vertical integration of retailers in the food supply chain, which represents one of the main causes of farmers' weak bargaining power.¹⁴

Without jumping to premature conclusions on potential outcomes and gaps at such an early stage of legislation, there is no doubt that the draft Directive marks a turning point in the history of the Common Agricultural Policy with no way back. All relevant EU institutions have recognised the need for common legislation to make B2B relationships within the food supply chain fairer¹⁵, after they had come to the conclusion that voluntary schemes and non-binding measures have largely failed to achieve their stated goals and a long list of non-binding papers, consultation documents and reports had been produced.

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Endnotes:

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