

# Kluwer Competition Law Blog

## The proposal for a Directive on unfair trading practices in food: an end to a fragmented regulatory landscape?

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### A fragmented legal landscape

In April 2018, the European Commission revealed a [proposal for a directive on unfair trading practices in business-to-business relationships in the food supply chain](#). The proposal comes in response to concerns about power imbalances in the food supply chain – an issue which has been in the eyes of competition authorities for decades already. In the EU, the issue has become increasingly topical throughout the 2000s, when a number of Member States conducted investigations on contractual relations and buyer power in the food sector. Different Commission services have also been active by sponsoring [studies, for instance on the competitiveness of various food sub-sectors and various issues in retail such as private labels and the impact of modern retail on choice and innovation](#).

Concerns with buyer power were reflected in the 2010 Block Exemption Regulation reform, resulting in a 30% market share threshold on the buying side for the purpose of exempting vertical restraints. Pressure to address the issue of unfair trading practices (UTPs) led to a [Green Paper in 2013](#), which marked the beginning of a process of consultation, data gathering and investigation.

Most of the ‘action’ so far, however, has been at the Member State level. According to the Commission, 20 out of 28 Member States in 2018 have stricter laws on UTPs and/or competition law. These regulations come in different shapes and forms: sector-specific rules for the food sector or the retail sector, generally applicable provisions on business-to-business unfair trading practices or stricter competition rules such as provisions on economic dependency and superior bargaining power laws. Readers of this blog surely remember posts about [Edeka’s wedding rebates case in Germany](#), the [Kaufland cases in Bulgaria and the Czech Republic](#), and the [Tesco investigation in the UK](#) which all involve the enforcement of such national laws.

### Self-regulation no more

In addition to public law measures, private initiatives have also sprung up with the aim to regulate relations in the food supply chain. The most prominent of these is the [Supply Chain Initiative](#), a pan-European self-regulatory scheme in place since 2013.

Although the European Commission originally expressed optimism about the potential of the

Supply Chain Initiative, it has changed its opinion. According to the Explanatory Memorandum of the proposed directive on UTPs, private initiatives such as the Supply Chain Initiative are not sufficient to address the issue of UTPs. The Commission stressed that the Supply Chain Initiative is voluntary, it does not cover important actors in the food supply chain (such as buying alliances and organizations of agricultural producers), fails to provide confidentiality for complaints, and lacks powers to impose sanctions and carry out investigations.

### **Scope of the proposed directive**

The proposed Directive specifically targets buyer-supplier relationships where there is an imbalance of power. The relevant criterion is whether the supplier is an SME and whether the buyer is a non-SME. (According to the EU rules, a small enterprise has up to 50 employees and an annual turnover or balance sheet of no more than EUR 10 million; a medium-sized enterprise is one which has up to 250 employees and annual turnover of no more than EUR 50 million, and/or an annual balance sheet of no more than EUR 43 million (as defined in [the Annex to Commission Recommendation 2003/361/EC](#)). )This approach differs from the approach of some Member States, whose legislation relies on the concepts of economic dependence or superior bargaining power.

Divergences with national rules will also likely arise with respect to the definition of ‘food’. Only trade in primary agricultural products (those listed in Annex I to the EU Treaties) and products derived from primary agricultural products which are meant for use as food is covered in the proposed Directive. However, existing national provisions sometimes extend to groceries (as in the [UK Grocery Supplier Code of Practice](#) which also covers pet food, drinks, cleaning products, toiletries and household goods) or apply more broadly to the behavior of retailers (such as retailer-specific UTP laws in Latvia).

### **Minimum harmonization**

With respect to the practices, the Directive aims at minimum harmonization. It distinguishes two types of practices: some are considered unfair ‘as such’ and are categorically prohibited; other practices are only prohibited when introduced retroactively or when vaguely or unclearly described at the time of conclusion of the contract.

### **Prohibited practices**

The practices described in Article 3 (1) of the proposed Directive, are considered unfair ‘as such’. They include unilateral and retroactive changes to the following terms of the supply agreement: frequency, timing, volume, delivery, quality standards or prices, and payments for wastage on the buyer’s premises which is not caused by supplier fault or negligence.

Certain practices are only prohibited with respect to perishable food products. These include late payments and cancellations on short notice. For these perishable food products, payments after 30 calendar days or more following receipt of the supplier’s invoice or payments after 30 calendar days following the delivery date, whichever is later, are prohibited. The provision is envisaged as *lex specialis* with respect to [Directive 2011/7/EU on late payments](#) and is without prejudice to agreements on value sharing clauses provided in [Regulation 1308/2013 on the common](#)

organisation of markets in agricultural products.

### **Practices which are prohibited unless clearly agreed in advance**

According to the proposal, the following will be prohibited unless agreed in clear and unambiguous terms at the time of conclusion of the supply agreement:

- Returns of unsold food products
- Payments for stocking, displaying or listing
- Payments for promotion
- Payments for marketing

These terms of trade, outlined in Article 3 (2) of the proposed Directive, are not considered unfair 'as such'. In fact, the drafters of the legislation accept that they may be 'mutually beneficial' and 'efficiency-enhancing'. However, they could be unfair when they are left vague or invoked retroactively. Hence, the requirement that they be agreed upon in advance and in a clear language. According to the Explanatory Memorandum, a clause which defers the determination of the amount of the marketing fee to a later moment in time would not be considered sufficiently clear and would therefore be prohibited.

Additionally, suppliers have the right to request information regarding the payments for stocking, displaying or listing, the payments for promotion and the payments for marketing. For payments related to stocking, displaying or listing, promotion payments, and marketing payments, the buyer should be prepared to provide estimates of the payments (per unit or overall). Specifically in the case of promotion and marketing payments, the buyer should additionally be able to provide an estimate of the costs related to promotion and marketing and the basis for the estimate.

### **Enforcement and remedies**

To address the issue of the fear factor, the Directive requires that each Member State designate a public authority responsible for enforcing the prohibitions introduced in the Directive. The authority should have powers to initiate and conduct investigations not only upon complaint but also on its own initiative. It should have the option of preserving the confidentiality of the complainant upon request of the complainant (Article 5). However, doing so may constitute a reason not to take a decision on infringement (Article 6).

Fining powers are also envisaged in the Directive. Such fines should be 'effective, proportionate and dissuasive taking into account the nature, duration and gravity of the infringement'. However, the meaning of this provision might be interpreted differently depending on Member State given the differences in national law.

An innovative element concerns Producer organizations and Associations of Producer Organizations (most likely within the meaning of Regulation 1308/2013). These will be empowered to submit complaints on behalf of their members. This is an innovative element of the Directive and it remains to be seen to what extent it will be utilized.

Authorities are required to submit annual reports detailing the number of complaints and investigations. Cooperation between enforcement authorities with annual meetings, facilitated by

the Commission and exchange of best practices is also introduced (Article 7).

### Towards a level playing field?

The proposed Directive is the EU-level response to ongoing concerns about buyer-supplier relations in the food supply chain. In an integrated market with actors operating across borders, a complex and fragmented legal landscape can lead to forum shopping and increase the cost of doing business, a topic which I explore in more detail [here](#). Given the scope of the Directive, and its preference for minimum harmonization approach as well as the wide variety of rules at the Member State level, it does not seem likely that the proposed Directive will obliterate the differences between Member States. Retailers operating across border will probably continue to be subject to a number of different regimes also in the years to come.

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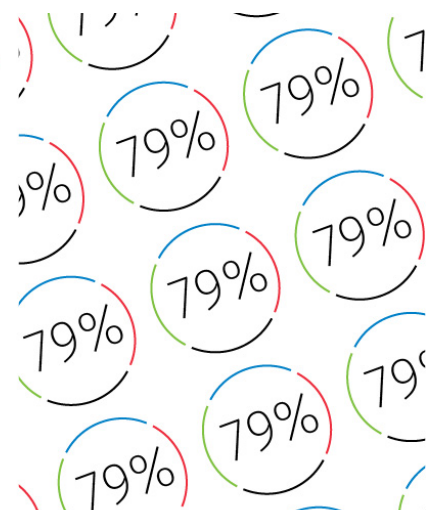
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