# Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain

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on unfair trading practices in business-to-business relationships in the agricultural and food supply chain

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 43(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[(1)],

Having regard to the opinion of the Committee of the Regions[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) Within the agricultural and food supply chain, significant imbalances in bargaining power between suppliers and buyers of agricultural and food products are a common occurrence. Those imbalances in bargaining power are likely to lead to unfair trading practices when larger and more powerful trading partners seek to impose certain practices or contractual arrangements which are to their advantage in relation to a sales transaction. Such practices may, for example: grossly deviate from good commercial conduct, be contrary to good faith and fair dealing and be unilaterally imposed by one trading partner on the other; impose an unjustified and disproportionate transfer of economic risk from one trading partner to another; or impose a significant imbalance of rights and obligations on one trading partner. Certain practices might be manifestly unfair even when both parties agree to them. A minimum Union standard of protection against unfair trading practices should be introduced to reduce the occurrence of such practices which are likely to have a negative impact on the living standards of the agricultural community. The minimum harmonisation approach in this Directive allows Member States to adopt or maintain national rules which go beyond the unfair trading practices listed in this Directive.

(2) Three Commission publications since 2009 (the communication of the Commission of 28 October 2009 on a better functioning of the food supply chain in Europe, the communication of the Commission of 15 July 2014 on tackling unfair trading practices in the business-to-business food supply chain, and the report of the Commission of

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29 January 2016 on unfair business-to-business trading practices in the food supply chain) have focused on the working of the food supply chain, including the occurrence of unfair trading practices. The Commission suggested desirable features for national and voluntary governance frameworks for dealing with unfair trading practices in the food supply chain. Not all of those features have become part of the legal framework or voluntary governance regimes in Member States, leaving the occurrence of such practices still the focus of the political debate in the Union.

(3) In 2011, the Commission-led High Level Forum for a Better Functioning Food Supply Chain endorsed a set of principles of good practice in vertical relations in the food supply chain, which was agreed by organisations representing a majority of the operators in the food supply chain. Those principles became the basis for the Supply Chain Initiative launched in 2013.

(4) The European Parliament, in its resolution of 7 June 2016 on unfair trading practices in the food supply chain[(4)], invited the Commission to submit a proposal for a Union legal framework concerning unfair trading practices. The Council, in its conclusions of 12 December 2016 on Strengthening farmers' position in the food supply chain and tackling unfair trading practices, invited the Commission to undertake, in a timely manner, an impact assessment with a view to proposing a Union legislative framework or non-legislative measures to address unfair trading practices. An impact assessment was prepared by the Commission, which was preceded by an open public consultation as well as targeted consultations. In addition, during the legislative process the Commission provided information demonstrating that large operators represent a considerable share of the overall value of production.

(5) Different operators are active in the agricultural and food supply chain at different stages of the production, processing, marketing, distribution and retail of agricultural and food products. That chain is by far the most important channel for bringing agricultural and food products from ‘farm to fork’. Those operators trade agricultural and food products, that is to say primary agricultural products, including fishery and aquaculture products, as listed in Annex I to the Treaty on the Functioning of the European Union (TFEU), and products not listed in that Annex but processed for use as food using products listed in that Annex.

(6) While business risk is inherent in all economic activity, agricultural production is particularly fraught with uncertainty due to its reliance on biological processes and its exposure to weather conditions. That uncertainty is compounded by the fact that agricultural and food products are to a greater or lesser extent perishable and seasonal. In an agricultural policy environment that is distinctly more market-oriented than in the past, protection against unfair trading practices has become more important for operators active in the agricultural and food supply chain.

(7) In particular, such unfair trading practices are likely to have a negative impact on the living standards of the agricultural community. That impact is understood to be either direct, as it concerns agricultural producers and their organisations as suppliers, or indirect, through a cascading of the consequences of the unfair trading practices

occurring in the agricultural and food supply chain in a manner that negatively affects the primary producers in that chain.

(8) A majority of Member States, but not all of them, have specific national rules that protect suppliers against unfair trading practices occurring in business-to-business relationships in the agricultural and food supply chain. Where reliance on contract law or self-regulatory initiatives is possible, fear of commercial retaliation against a complainant, as well as financial risks involved in challenging such practices, limit the practical value of those forms of redress. Certain Member States which have specific rules on unfair trading practices therefore entrust the enforcement of such rules to administrative authorities. However, Member States' unfair trading practices rules — to the extent they exist — are characterised by significant divergence.

(9) The number and size of operators vary across the different stages of the agricultural and food supply chain. Differences in bargaining power, which correspond to the economic dependence of the supplier on the buyer, are likely to lead to larger operators imposing unfair trading practices on smaller operators. A dynamic approach, which is based on the relative size of the supplier and the buyer in terms of annual turnover, should provide better protection against unfair trading practices for those operators who need it most. Unfair trading practices are particularly harmful for small and medium-sized enterprises (SMEs) in the agricultural and food supply chain. Enterprises larger than SMEs but with an annual turnover not exceeding EUR 350 000 000 should also be protected against unfair trading practices to avoid the costs of such practices being passed on to agricultural producers. The cascading effect on agricultural producers appears to be particularly significant for enterprises with an annual turnover of up to EUR 350 000 000. The protection of intermediary suppliers of agricultural and food products, including processed products, can also serve to avoid the diversion of trade away from agricultural producers and their associations which produce processed products to non-protected suppliers.

(10) The protection provided by this Directive should benefit agricultural producers and natural or legal persons that supply agricultural and food products, including producer organisations, whether recognised or not, and associations of producer organisations, whether recognised or not, subject to their relative bargaining power. Those producer organisations and associations of producer organisations include cooperatives. Those producers and persons are particularly vulnerable to unfair trading practices and least able to weather them without negative effects on their economic viability. As regards the categories of suppliers that should be protected under this Directive, it is noteworthy that a significant proportion of farmer-constituted cooperatives are enterprises larger than SMEs but with an annual turnover not exceeding EUR 350 000 000.

(11) This Directive should cover commercial transactions irrespective of whether they are carried out between enterprises or between enterprises and public authorities, given that public authorities, when buying agricultural and food products, should be held to the same standards. This Directive should apply to all public authorities acting as buyers.

(12) Suppliers in the Union should be protected not only against unfair trading practices by buyers that are established in the same Member State as the supplier or in a

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different Member State than the supplier, but also against unfair trading practices by buyers established outside the Union. Such protection would avoid possible unintended consequences, such as choosing the place of establishment on the basis of applicable rules. Suppliers established outside the Union should also enjoy protection against unfair trading practices when they sell agricultural and food products into the Union. Not only are such suppliers liable to be equally vulnerable to unfair trading practices, but a broader scope could also avoid the unintended diversion of trade towards non-protected suppliers, which would undermine the protection of suppliers in the Union.

(13) Certain services that are ancillary to the sale of agricultural and food products should be included in the scope of this Directive.

(14) This Directive should apply to the business conduct of larger operators towards operators who have less bargaining power. A suitable approximation for relative bargaining power is the annual turnover of the different operators. While being an approximation, this criterion gives operators predictability concerning their rights and obligations under this Directive. An upper limit should prevent protection from being afforded to operators who are not vulnerable or are significantly less vulnerable than their smaller partners or competitors. Therefore, this Directive establishes turnover-based categories of operators according to which protection is afforded.

(15) As unfair trading practices may occur at any stage of the sale of an agricultural or food product, before, during or after a sales transaction, Member States should ensure that this Directive applies to such practices whenever they occur.

(16) When deciding whether a particular trading practice is considered unfair, it is important to reduce the risk of limiting the use of fair and efficiency-creating agreements agreed between parties. Therefore, it is appropriate to distinguish between practices that are provided for in clear and unambiguous terms in supply agreements or in subsequent agreements between parties and practices that occur after the transaction has started without having been agreed beforehand, so that only unilateral and retrospective changes to those clear and unambiguous terms of the supply agreement are prohibited. However, certain trading practices are considered as unfair by their very nature and should not be subject to the parties' contractual freedom.

(17) Late payments for agricultural and food products, including late payments for perishable products, and short notice cancellations of orders of perishable products impact negatively on the economic viability of the supplier, without providing off-setting benefits. Such practices should therefore be prohibited. In that context, it is appropriate to provide for a definition of perishable agricultural and food products for the purposes of this Directive. The definitions used in Union acts relating to food law relate to different objectives, such as health and food safety, and are therefore not appropriate for the purposes of this Directive. A product should be considered perishable if it can be expected to become unfit for sale within 30 days from the last act of harvesting, production or processing by the supplier, regardless of whether the product is further processed after sale, and regardless of whether the product is handled after sale in accordance with other rules, in particular food safety rules. Perishable products are normally used or sold quickly. Payments for perishable products that are

made later than 30 days after delivery, 30 days after the end of an agreed delivery period where products are delivered on a regular basis, or 30 days after the date on which the amount payable is set, are not compatible with fair trading. In order to provide increased protection to farmers and their liquidity, suppliers of other agricultural and food products should not have to wait for payment longer than 60 days after delivery, 60 days after the end of an agreed delivery period where products are delivered on a regular basis, or 60 days after the date on which the amount payable is set.
Those limitations should only apply to payments related to the sale of agricultural and food products, and not to other payments such as supplementary payments by a cooperative to its members. In accordance with Directive 2011/7/EU of the European Parliament and of the Council[(5)], it should also be possible to consider the date on which the amount payable for an agreed delivery period is set, for the purposes of this Directive, as the date of the issuance of the invoice or the date of its receipt by the buyer.

(18) The late payment provisions laid down in this Directive constitute specific rules for the agricultural and food sector in relation to the provisions on the payment periods set out in Directive 2011/7/EU. The late payment provisions laid down in this Directive should not affect agreements concerning value-sharing clauses within the meaning of Article 172a of Regulation (EU) No 1308/2013 of the European Parliament and of the Council[(6)]. In order to safeguard the smooth functioning of the school scheme pursuant to Article 23 of Regulation (EU) No 1308/2013, the late payment provisions laid down in this Directive should not apply to payments made by a buyer (i.e. aid applicant) to a supplier in the framework of the school scheme. Taking into account the challenges for public entities providing healthcare to prioritise healthcare in a way that balances the needs of individual patients with the financial resources, these provisions should also not apply to public entities providing healthcare within the meaning of point (b) of Article 4(4) of Directive 2011/7/EU.

(19) Grapes and must for wine production have special characteristics, because grapes are harvested only during a very limited period of the year, but are used to produce wine which in some cases will only be sold many years later. In order to cater for that special situation, producer organisations and interbranch organisations have traditionally developed standard contracts for the supply of such products. Such standard contracts provide for specific payment deadlines with instalments. As those standard contracts are used by suppliers and buyers for multiannual arrangements, they not only provide agricultural producers with the security of longstanding sales relations, but also contribute to the stability of the supply chain. Where such standard contracts have been drawn up by a recognised producer organisation, interbranch organisation or association of producer organisations and been made binding by a Member State under Article 164 of Regulation (EU) No 1308/2013 (‘extension’) before 1 January 2019, or where the extension of the standard contracts is renewed by a Member State without any significant changes to the payment terms to the disadvantage of suppliers of grapes and must, the late payment provisions laid down in this Directive should not apply to such contracts between suppliers of grapes and must for wine production and their direct buyers. Member States are required to notify the respective agreements of recognised producer organisations, interbranch organisations and associations of