

## **EXPLANATORY MEMORANDUM FOR EUROPEAN UNION LEGISLATION**

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**COM(2018) 173 final**

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**SWD(2018) 92 final**

**SWD(2018) 93 final**

**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**

**COMMISSION STAFF WORKING DOCUMENT STAKEHOLDER CONSULTATION - SYNOPSIS REPORT ACCOMPANYING THE DOCUMENT PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND THE COUNCIL ON UNFAIR TRADING PRACTICES IN BUSINESS-TO-BUSINESS RELATIONSHIPS IN THE FOOD SUPPLY CHAIN**

**COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT INITIATIVE TO IMPROVE THE FOOD SUPPLY CHAIN (UNFAIR TRADING PRACTICES) ACCOMPANYING THE 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**

**COMMISSION STAFF WORKING DOCUMENT EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT INITIATIVE TO IMPROVE THE FOOD SUPPLY CHAIN (UNFAIR TRADING PRACTICES) ACCOMPANYING THE 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**

Submitted by the Department for Environment, Food and Rural Affairs

*3rd*

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May 2018

### **SUBJECT MATTER**

1. This document sets out proposals to prohibit Unfair Trading Practices (UTPs) between certain actors in food supply chains.

2. The proposed directive prescribes a definitive list of prohibited UTPs, defines the actors in the food supply chain to which the prohibitions are applicable, mandates the appointment of a national enforcement authority, and details the scope of enforcement powers.
3. The directive covers small and medium sized enterprises (SMEs) (including producer organisations such as cooperatives) involved in any stage of production, processing, marketing, distribution and retail, and which sell food products to buyers which are not SMEs. The Commission uses the definitions laid down in 2003/361/EC which considers an SME to “employ fewer than 250 persons and have an annual turnover not exceeding €50 million and/or an annual balance sheet total not exceeding €43 million”.
4. ‘Food products’ are defined in the directive as the products listed in Annex 1 to the Treaty on the Functioning of the EU (TFEU), but limited to those products which are intended for use as food. The definition also includes products which are processed from the Annex 1 products for use as food.
5. It is stipulated that suppliers protected by the directive may be established either inside or outside the EU, as long as they sell to buyers established in the EU.
6. The directive lays out two categories of prohibited UTPs. The following are not subject to parties’ contractual discretion (this is to say that these practices are not permitted in any form):
  - (1) 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;
  - (2) 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;
  - (3) 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; and
  - (4) 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.
7. A further group of UTPs is identified which are prohibited, unless they are agreed in clear and unambiguous terms at the conclusion of the supply agreement:
  - (1) A buyer returns unsold food products to a supplier;
  - (2) a buyer charges a supplier payment as a condition for the stocking, displaying or listing of food products of the supplier;
  - (3) A supplier pays for the promotion of food products sold by the buyer. Prior to a promotion and if that promotion is initiated by the buyer, the buyer shall specify

the period of the promotion and the expected quantity of the food products to be ordered; and

(4) A supplier pays for the marketing of food products by the buyer.

8. In addition, where payment is requested by the buyer for any of the second group of UTPs, the draft directive provides that the buyer must provide the supplier with an estimate of the payments and the basis for that estimate, at the supplier's request.

9. Member States are required to appoint a competent public enforcement authority to monitor the trading practices of buyers in their territories. Member States are to ensure the designated authority would have the powers to:

- (1) Carry out investigations in response to a complaint by a supplier or on its own initiative;
- (2) Receive and treat complaints confidentially if so requested by the complainant;
- (3) Receive complaints by producer organisations and associations of producer organisations;
- (4) Require buyers and suppliers to provide information to support their investigations;
- (5) Require buyers to terminate trading practices which breach the directive;
- (6) Impose fines;
- (7) Publish results of its activities and investigations; and
- (8) Publish annual reports of its activities.

10. The enforcement authority would also be mandated to provide mutual assistance to enforcement authorities in other Member States in cases with a transnational dimension.

11. The directive allows Member States to provide for additional anti-UTP rules which go above and beyond the minimum laid out therein, on condition that these rules are compatible with the rules on the functioning of the internal market.

12. Reporting obligations for Member States are set out, detailing that each year a report containing data on the application and enforcement of rules will be sent to the Commission. These reporting obligations may be subject to further implementing legislation by the Commission.

## **SCRUTINY HISTORY**

13. The Parliamentary scrutiny history relevant to this proposal is contained in the attached Annex A.

## **MINISTERIAL RESPONSIBILITY**

14. The Secretary of State for Environment, Food and Rural Affairs has primary responsibility for this matter.

15. The Secretary of State for Business, Energy and Industrial Strategy (BEIS) has an interest in this matter, as he is responsible for competition policy and has an interest in supply chain issues.

## **INTEREST OF THE DEVOLVED ADMINISTRATIONS**

16. Scottish Government Ministers, Welsh Government Ministers and Northern Ireland Executive Ministers have an interest and the devolved administrations have been consulted in the preparation of this Explanatory Memorandum.

17. In particular, Northern Ireland farming stakeholders have welcomed the Commission proposals as a useful basis upon which to build and they will be monitoring progress of the draft directive closely.

## **LEGAL AND PROCEDURAL ISSUES**

18.

i. **Legal Basis**

This proposal is made under TFEU Article 43(1) (Commission proposals for the replacement of national market organisations by the common market organisation, where such an organisation ensures conditions for trade within the Union similar to those existing in a national market). The draft legislation cites as its legal base TFEU Article 43(2) (establishing the common organisation of the markets and the other provisions necessary for the pursuit of the objectives of the Common Agricultural Policy (CAP)).

ii. **European Parliament Procedure**

Ordinary legislative procedure.

iii. **Voting Procedure**

Qualified majority voting.

iv. **Impact on United Kingdom Law**

The present proposal (if adopted) will require legislative action to implement its provisions in the UK, whether through creating a new national enforcement authority or extending the role or remit of existing bodies.

It is anticipated that this would be done by secondary legislation, either under s.2(2) of the European Communities Act 1972 or under powers in other relevant primary legislation.

v. **Application to Gibraltar**

As a CAP measure, the directive will not be applicable to Gibraltar.

vi. **Fundamental Rights Analysis**

The Commission proposal states that a fair and effective system against UTPs as set out in the draft directive will strengthen Article 16 of the Charter of Fundamental Rights (freedom to conduct a business).

It also states that the Article 48 right (presumption of innocence and right of defence) is protected with respect to the enforcement of the draft directive. This is stated to be through the rules for the confidential treatment of complainants and by the proper design of the enforcement powers and rights of defence and appeal.

## **APPLICATION TO THE EUROPEAN ECONOMIC AREA**

19. It is intended that the proposal (if adopted) would not be applicable within the European Economic Area.

## **SUBSIDIARITY**

20. The Commission believes that the EU proposal in question complies with the principle of subsidiarity as set out in Article 5 of the TEU. The Commission considers that Community action is justified as the proposed directive seeks to provide for a minimum European standard of protection by approximating or harmonising Member States' diverging UTP measures.

## **POLICY IMPLICATIONS (including Exit implications where appropriate)**

21. Parliament voted to trigger Article 50 and leave the EU. Until we leave the EU, all the rights and obligations of EU membership remain in force. The outcome of our negotiations with the EU on a future partnership will determine what arrangements apply in future.

22. The issue of UTPs in the agri-food supply chain is widely acknowledged, and remains a concern for the majority of Member States. The Government recently published the results of a public consultation on the case to extend the remit of the Groceries Code Adjudicator, and the evidence gathered revealed instances of unfair behaviour among operators in the UK food supply chain.

23. The UK broadly supports initiatives designed to promote a fairer, more transparent food supply chain. However, the UK Government believes these initiatives are best delivered by national legislation. The Groceries Code Adjudicator was created under the Groceries Code Adjudicator Act 2013 to oversee and enforce the pre-existing Groceries Supply Code of Practice (the Code). The Code is set out in Schedule 1 to

the Groceries (Supply Chain Practices) Market Investigation Order 2009. The 2009 Order applies to ten 'designated retailers', as set out in Schedule 2 to the Order<sup>1</sup>, with the power for the Competition and Markets Authority to designate in writing as a 'designated retailer' any groceries retailer with a turnover exceeding £1 billion in the UK. It governs their commercial relationships with their direct suppliers who supply groceries for resale in the UK. There are also a number of measures the Government is taking to tackle the late payment culture across all sectors, including the appointment of the Small Business Commissioner in October 2017 to help small businesses prevent or resolve payment issues.

24. This directive was prompted by the conclusions of the Agricultural Markets Task Force. It was stated in the outcomes of this task force that any measures proposed by the Commission were to avoid anything which would cut across the operations of existing domestic regulators functioning in this space.
25. If this directive is required to be transposed before the end of the EU exit transition period then we will be required to create an enforcement authority. The body would regulate any business relationship between an SME and a non-SME operating in the food supply chain, and subject to further analysis would likely demand a significant resource burden.
26. If the directive was transposed as drafted, the new UTP rules would enable third country suppliers to rely on them if confronted with UTPs by buyers situated in the EU. This would have implications for UK producers who sell into the EU once we have left, as they would have recourse to these laws should they encounter UTPs in their dealings with EU based buyers.

## **CONSULTATION**

27. The Commission has undertaken a broad public consultation from 16 August 2017 to 17 November 2017. This revealed widespread support for legislative solutions.
28. The UK Government has not specifically carried out a consultation on this draft directive. However, in October 2016 we launched a call for evidence on the case for extending the remit of the Groceries Code Adjudicator in the UK grocery supply chain. We invited views and information on any unfair trading practices affecting the groceries supply chain, the need for further action and the form such action might take. The findings of this indicated there was insufficient evidence to justify such an extension, and instead the Government proposed a suite of targeted measures to address specific issues raised through the call for evidence. We have also committed to launch a call for evidence on how we eliminate unfair payment practices for small businesses. This will provide evidence on the need to build on the Government's existing late payment policies to drive an end to unfair payment practices experienced by small businesses.

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<sup>1</sup> These are Aldi, Asda, Co-operative, Iceland, Lidl, Marks and Spencer, Morrisons, Sainsbury's, Tesco and Waitrose.

## **IMPACT ASSESSMENT**

29. We have not conducted a formal impact assessment on these proposals. The data gathered by the Government's earlier call for evidence suggests that greater value for money is available through targeted measures aimed at specific problems.
30. The Commission's impact assessment estimates that the proposals will have overall economic benefits for small operators in the food chain who will be protected through UTP legislation. This will increase their businesses efficiency and should result in positive economic impacts on society. Social and environmental impacts are expected to be neutral or even positive. We are still analysing the details of the Commission's impact assessment.

## **FINANCIAL IMPLICATIONS**

31. The proposal would have a limited impact on the EU budget. Expenditure would be restricted to one annual coordination meeting of Member States' enforcement authorities in Brussels and the creation and management of a basic website for the information exchange by the Commission.
32. The Commission impact assessment estimates that administrative costs to Member States will be limited, although highest in Member States where there are no current anti-UTP regimes.
33. We have not conducted a formal assessment of financial implications, but are sceptical of the Commission's assertion that "where there already exists specific legislation on UTPs, already covering the UTPs identified in the preferred option, and with an existing public competent authority with effective enforcement powers, additional costs from EU action are expected to be negligible".
34. We are still considering options for potential enforcement bodies, and expect that there will be significant administrative costs.

## **TIMETABLE**

35. The timetable for adoption is unclear. This is a controversial area for a number of Member States, which means that it is likely that the draft directive will take some time to go through the ordinary legislative process. However, the draft directive has an unusually short transposition period of six months in Article 12. On the assumption that a transition period will apply to the UK until 31 December 2020, and a transposition period of six months is retained, there is a medium to high risk that the UK may have to implement the directive before the end of the transition period (although the draft directive also provides that Member States have a further six months before they have to apply their transposed laws). If there is no transition

period, and the UK leaves the EU on 29 March 2019, there is a low risk that the UK will have to transpose the directive.



**GEORGE EUSTICE MP**  
**MINISTER OF STATE FOR AGRICULTURE, FISHERIES AND FOOD**  
**DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS**



**PARLIAMENTARY SCRUTINY HISTORY RELEVANT TO A:**

**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**

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**BEIS EM 5747/16, COM(2016)032 FINAL: REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL ON UNFAIR BUSINESS-TO-BUSINESS TRADING PRACTICES IN THE FOOD SUPPLY CHAIN**

**DATE BEIS EM SIGNED: 11/02/2016**

**SCRUTINY COMMITTEES' RECOMMENDATIONS:**

<b>COMMONS</b>	<b>LORDS</b>
REPORT 25, 15/16: POLITICALLY IMPORTANT AND CLEARED (09/03/2016)	CLEARED 23/02/2016

**BEIS EM 12233/14, COM(2014)472 FINAL: COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, TACKLING UNFAIR TRADING PRACTICES IN THE BUSINESS-TO-BUSINESS FOOD SUPPLY CHAIN**

**DATE BEIS EM SIGNED: 10/08/2014**

**SCRUTINY COMMITTEES' RECOMMENDATIONS:**

<b>COMMONS</b>	<b>LORDS</b>
REPORT 9, 14/15: POLITICALLY IMPORTANT AND CLEARED (02/09/2014)	EXAMINED BY ENVIRONMENT SUB-COMMITTEE (SIFT 1556) AND CLEARED 19/11/2014

**DEFRA EM 15330/09, COM(2009) 591 FINAL: COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE OF THE REGIONS  
- A BETTER FUNCTIONING FOOD SUPPLY CHAIN IN EUROPE**

**DATE EM SIGNED 25/11/2009**

**SCRUTINY COMMITTEES' RECOMMENDATIONS:**

<b>COMMONS</b>	<b>LORDS</b>
IN COMMONS CLEARED AS PIC IN REPORT 4, 09/2010	SIFTED TO SUB COMMITTEE D ON 01/12/2009: IN LORDS CLEARED FOLLOWING LETTER OF 10 FEBRUARY 2010 FROM ROPER TO JIM FITZPATRICK