

## UEAPME<sup>1</sup> position

# on the EU draft directive on unfair trading practices between companies in the food supply chain COM(2018) 173 final

### 1- EXECUTIVE SUMMARY

UEAPME welcomes the European initiative to combat unfair trading practices in the food supply chain.

UEAPME is in general in favour of a global approach to unfair trading practices for all sectors and for all products/services, recognising that it is a frequent habit intimidating smaller suppliers with unfair contracts and practices. In this particular case, we would like the current directive on food to be adopted and the next Commission to focus on combating UTPs on a larger scale.

UEAPME underlines the fact that SMEs will only register the unfair trading condition when this can be done anonymously, because of the fear factor to lose the client / buyer and contract. The registration should be free of charge for SMEs.

### 2-INTRODUCTION

On April, 12<sup>th</sup>, 2018, the European Commission presented a draft directive on the fight against unfair trading practices<sup>2</sup> in the food supply chain. The aim of this directive is to limit the supremacy of certain participants in the value chain and, above all, to strengthen the position of small and medium-sized suppliers.

The directive applies to contractual relationships between small and medium-sized enterprises as “suppliers” and non-SME “buyers”. For these contracts, the proposed directive identifies eight different unfair trading practices, of which four are generally to be banned. Four other trading practices are only allowed if they have been clear and clearly stated in the terms of delivery prior to the conclusion of a contract.

In case of breach of unfair trading practices, those concerned should be able to lodge a complaint with an enforcement authority, which each Member State should designate at national level.

<sup>1</sup> UEAPME subscribes to the European Commission’s Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is [55820581197-35](#).

<sup>2</sup> Working definition: "practices that grossly deviate from good commercial conduct and are contrary to principles of good faith and fair dealing".\* • Transfer of excessive risks & cost to weaker operators • Negative impact on overall efficiency of market arrangements & operators' profitability \* European Commission Communication, Tackling unfair trading practices in the business-to-business food supply chain, 15 July 2014

### 3- SPECIFIC COMMENTS

#### Article 1 Scope

The current directive limits the scope of the sale of food products to “suppliers” which are small and medium-sized enterprises, to “purchasers”, which are non-small and medium-sized enterprises. To limit the scope of application to SMEs could be harmful to SMEs, because of regulation it could be more problematic to do business with SMEs. In addition, it makes it difficult for small suppliers to enforce their interests, for instance, if the buyer is an independent business who has a commercial license with a large company or group of companies, it is likely to fall under the SME rule although they are part of a group. For that reason the scope should not be limited to contracts between SME suppliers and non-SME buyers.

As a minimum, the scope of “suppliers” should include SMEs which are part of a so called associated group. Here, we suggest the wording of the Article 2 (3) of the regulation establishing mitigation measures and benchmark levels for the reduction of the presence of acrylamide in food (EU) 2017/2158.

#### Article 2 (2) mitigation measures

*Food business operators (...) which operate in facilities under direct control and that are operating under one trademark or commercial license, as a part of, or franchise of, a larger, interconnected operation and under the instructions of the food business operator that centrally supplies the foodstuffs (...).*

#### Article 3 Prohibition of unfair trading practices

3.1 (a) It should be made clear that payment terms longer than 30 calendar days are no longer allowed and will be considered void.

3.1 (b) It should be added that cancellation of orders of perishable food products shall not be allowed.

The list of 8 unfair trading practices could be amended with two additional issues:

*The buyer expresses threats (regardless of whether explicit or hidden) regarding deletion of listed food products unless the demand for discounts is met.*

*The buyer makes provisions to the supplier who sells perishable food products on the buyer's premises to third parties for his own account that he must stock perishable food products until a certain point in time, even though it is not to be expected to sell them off.*

#### Article 4 Designated enforcement authority

The strength of this directive is in the provision of the public authority. This takes away the hassle that a SME would have to go through by prosecuting one of their main customers and so damaging their trading relationship. It should be made clear that the Member States designate the enforcement authority within twelve month after the entry into force of the directive.

The competencies and functioning of the authority will be clarified by the authorities themselves. In addition, there should be specific requirements regarding minimal resources.

#### Article 5 Complaints and confidentiality

A complaint shall be introduced in confidentiality and the authority shall evaluate whether the complaint is justified. The confidentiality rule is crucial in this case as the complainant is already in a weaker position and could risk losing commercial transactions and contracts.

UEAPME remarks that it'll be difficult to preserve anonymity for a company which has a contract unilaterally changed. In most cases, the supplier will never deal with the buyer again.

Suppliers need to address their complaint to the enforcement authority of the Member State in which the buyer suspected to have engaged in a prohibition trading practice is established. In the case the statutory seat is outside of the EU this could create complications. Therefore, the complaint should be filed with the authority of the statutory seat of the SME.

The directive is not clear on the subject of possible costs for filing a complaint. SMEs registering a complaint should not be charged in order to avoid another potential complication to file a complaint.

#### Article 6 Powers of the enforcement authority

Member States shall facilitate the designation and functioning of enforcement authorities. The executive authority should actually check company's behavior and adopt discouraging measures, in order to avoid unfair practices and, at the same time, punish with fines the company's unfair and incorrect conduct.

There should be clear guidelines regarding pecuniary penalties and the procedure in general to avoid considerable differences between Member States.

#### Article 11 Evaluation

Evaluation of the system is valuable and applicable procedure. As this kind of evaluation is rarely done in time, it has to be made certain that it is done in the time frame foreseen. "No sooner than" has to be changed to "at the latest".

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