

IFOAM EU's Position Paper on the Commission's Proposal for a Directive on Unfair Trading Practices

September 2018

Executive Summary

IFOAM EU generally welcomes this Commission's proposal as a first step towards ensuring fair prices for EU and non-EU producers and fairness in the supply chain. However, IFOAM EU is concerned with the following three main points:

- The narrow scope of application in terms of actors covered under this proposal. Indeed, the directive should apply to all actors, regardless of size, without increasing the administrative burden.
- The restricted list of UTPs which are explicitly prohibited. This restricted list does not allow for other UTPs to be covered under this legislation.
- The mechanism of cooperation between competent authorities should be strengthened, especially when it comes to cross-border UTPs.

Background

On the 12th of April 2018, the European Commission published a proposal for a [Directive on Unfair Trading Practices](#) (UTPs) in business-to-business relations in the food supply chain. This proposal followed both a Commission impact assessment and a public consultation – to which IFOAM EU provided input – concerning the initiative to improve the food supply chain. Unfair trading practices are in this context defined as practices that grossly deviate from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on another¹.

A welcomed move...

Fairness is a key principle of organic agriculture, and IFOAM EU welcomes this Commission's proposal as a first step towards ensuring fair prices for producers inside and outside the EU, as well as towards improving the position of the weakest actors within the supply chain. The organic sector is already active in this respect, through many initiatives at national, regional or company levels, which consist for instance in committing to contracts of at least 3 years to promote long-term cooperation, ensuring a fair income to producers through regular dialogue and price adjustments, or by putting

¹ Recital 1 of the legislative proposal

forward labels which clearly show how much of the revenue of a certain food product goes to the farmer, the retailer and other food chain actors.

With regards to the Commission's legislative proposal, IFOAM EU particularly welcomes the fact that certain unfair trading practices are explicitly banned therein; although the list is currently short, it is a good starting basis. IFOAM EU also welcomes that the Commission's proposal will create a level-playing field with regards to the divergent regulatory approaches to UTPs in different Member States, and that it will at the same time be compatible with existing and future national laws that go beyond this legislative proposal. Last but certainly not least, IFOAM EU agrees with the European Commission's decision to include in the scope of the proposal suppliers that are established outside the Union, which should indeed have the same rights as suppliers operating from within the EU.

In light of the positive aspects listed above, IFOAM EU also suggests improving and strengthening the current legislative proposal by incorporating the aspects highlighted below.

...that must be strengthened

1. Scope

The scope of this proposal is limited in two ways, i.e. in terms of food chain actors covered, as well as in terms of UTPs covered by the proposal.

1.1. Limited actors in the food chain

Article 1(2) of this proposal stipulates that *"this Directive applies to certain unfair trading practices which occur in relation to the sales of food products by a supplier that is a small and medium-sized enterprise to a buyer that is not a small and medium-sized enterprise"*. To guarantee the fairness of the supply chain the distinction between SME and non-SME buyers and suppliers should not be made and this proposal should cover all actors, regardless of their size.

Specifically, recital 19 of this Directive stipulates that the Commission should review the application of this Directive, especially with regards to evaluating whether the protection of small and medium-sized buyers is justified. IFOAM EU suggests that SME buyers should already be covered by this Directive, but that this should not result in more administrative burden.

Furthermore, Article 2(a) of the proposal defines that a buyer *"buys food products by way of trade"* and that *"the term buyer may include a group of (...) natural and legal persons"*. IFOAM EU would like for this definition to be clarified, particularly as to whether it also includes large farmers' co-operatives.

1.2. Limited types of UTPs

IFOAM EU welcomes that Article 3(1) of this proposal outright bans certain types of UTPs, including late payments (later than 30 calendar days) and cancelling orders of perishable food products at short notice. Other types of UTPs are banned in Article 3(2) if they are not *"agreed in clear and unambiguous terms at the conclusion of the supply agreement"*.

However, as it stands, article 3 only bans 8 UTPs and does not foresee the prohibition of other UTPs. This list of UTPs is short and therefore fails to ban certain UTPs that are imposed on more vulnerable actors of the food chain. Given that new types of UTPs may emerge following the entrance into force of this proposal, IFOAM EU suggests that Article 3 should include a more general statement or a definition of UTPs allowing for the addition of other UTPs once this proposal has been made into law. IFOAM EU also suggests that examples of best practices, numerous in the organic sector, could be included in the recitals of this proposal for a more concrete visualisation of why addressing UTPs is crucial in order to achieve a better functioning and fairer supply chain.

Specifically, IFOAM EU considers that information asymmetry, i.e. withholding by one party of essential information to both parties regarding e.g. prices, weather, production, trade, consumption

and stocks², should be considered an unfair trading practice. IFOAM EU understands that this issue will be addressed in an upcoming Commission proposal on market transparency but believes that reference to information asymmetry as a UTP should already be made in this proposal. Furthermore, other UTPs should be more explicitly banned in this proposal, e.g. loss leader³.

2. Enforcement

Articles 4 to 7 of the proposal address the powers given to enforcement authorities, complaints, and cooperation between authorities in case of cross-border UTPs.

2.1. Dissuasive fines

Article 6(d) of the proposal foresees that the enforcement authority may “*impose a pecuniary fine on the author of the infringement*” which should be “*effective, proportionate and dissuasive*”. More detailed criteria – such as frequency and percentage of turnover – are needed in this respect in order to ensure that the fine is (1) so dissuasive that the author of the infringement will be deterred from newly engaging in the unfair trading practice in question, and (2) not too diverging between Member States in order to avoid forum shopping.

2.2. Complaints, confidentiality & fear of retaliation

As stipulated in the legislative proposal (article 5), enforcement authorities should have the power to carry out investigations on their own initiative or based on a complaint. In addition, it is important that the proposal foresees that enforcement authorities should respect a complainant’s request to remain anonymous due to fear of retaliation. Finally, the proposal foresees the possibility of carrying out redress actions but does not give more detailed measures regarding the practicalities of submitting a complaint, which suppliers and NGOs / associations protecting producers should also be able to submit. Redress actions should consider the fear factor that often refrains suppliers from submitting a complaint.

2.3. Addressing cross-border UTPs

A crucial point in order to ensure that cross-border UTPs are addressed is the effective cooperation between authorities across the EU. Currently there is little coordination among national enforcement authorities as there is no coordination mechanism at EU level in this respect. Article 7(1) stipulates that “*Member States shall ensure that enforcement authorities cooperate effectively with each other and provide each other mutual assistance in investigations that have a cross-border dimension*”. However, this article lacks clarity as to how this cooperation shall be achieved. As such, IFOAM EU would welcome for this article to be developed further with regards to the cooperation and exchange of information between Member States' enforcement authorities in UTP-related investigations that have a cross-border dimension. A coordinating role for the EU could be envisaged. In addition, in order to support the cooperation between authorities and facilitate the exchange of best practices, the European Commission foresees annual meetings with enforcement authorities (article 7(2)) as well as the establishment of a website that provides for the possibility of information exchange between the Commission and enforcement authorities (article 7(3)). IFOAM EU welcomes both initiatives but would like to suggest that these annual meetings have concrete deliverables, ideally publicly available, detailing how each authority is tackling UTPs and cross-border UTPs in particular, its best practices, and how the Directive is being enforced. In order for the website envisaged in article 7(3) to be optimised, it should also include a database of best practices, starting

² As set out in the November 2016 Agricultural Market Task Force report “improving market outcomes – enhancing the position of farmers in the supply chain” available [here](#).

³ A pricing strategy where certain products are sold below the actual market cost to stimulate sales of other products. This leads to a devaluing of products by consumers; often found for milk or bananas.

with examples from *inter alia* the United Kingdom, Slovakia and Spain who are already being praised for successfully tackling UTPs.

3. Monitoring & Reporting

Article 9 of the proposal stipulates that Member States shall send a yearly report to the Commission containing all relevant data on the application and enforcement of the rules of the proposal. IFOAM EU welcomes this reporting initiative, however:

(1) It considers that the fact that these reports should be publicly available should be explicitly mentioned in the legislative proposal;

(2) Regrets that the proposal fails to mention any monitoring activities with regards to the types of (cross-border) UTPs investigated and the enforcement of this directive;

Specifically, Article 9(2) states that the Commission may adopt implementing acts laying down *inter alia* arrangements for making documents available publicly. IFOAM EU agrees with this implementing act, understands that some information reported by Member States will have to remain confidential, and urges the Commission to foresee that these reports are made available for the sake of increasing transparency in the food supply chain. In addition, IFOAM EU is concerned that despite a legislation on UTPs being soon in place, practices will continue to occur because of a lack of enforcement of the legislation by national authorities.

As such, publicly available data on the monitoring activities regarding adequate enforcement are necessary in the context of unfair trading practices.

4. Review clause

Article 11 stipulates that the European Commission will carry out an “*evaluation of this Directive and present a report on the main findings*”. Firstly, the Directive should go into detail as to what this report should evaluate, e.g. the types of UTPs that were reported, the fines given, how cross-border UTPs were tackled.

Also, it is imperative that this report may be followed by a legislative proposal. As such, article 11 should include a review clause allowing the Commission to table a legislative proposal depending on the results of the report.

Next steps

IFOAM EU welcomes this legislative proposal and now calls on the European Parliament and the Council to strengthen the Commission’s proposal and ensure its timely adoption before the Parliament elections in May 2019. IFOAM EU also looks forward to the important proposal on measures concerning enhanced market transparency which is expected by the end of 2018. Further legislative action should indeed be taken to ensure fair prices for producers.



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