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## NOTE

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From:	Presidency
To:	Special Committee on Agriculture
Subject:	Directive on unfair trading practices in the food supply chain <i>-Presentation of a revised text of Article 8 and corresponding recitals</i> <i>-Exchange of views</i>

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## I. INTRODUCTION

At the Council (Agricultural and Fisheries) meeting on 16 April, Commissioner Hogan presented to Ministers the proposal for a Directive on unfair trading practices in business-to-business relationships in the food supply chain adopted by the Commission on 12 April. The Special Committee on Agriculture (SCA) had a first exchange of views on it at its meeting on 23 April.

Following these debates, the Working Party on Horizontal Agricultural Questions (Unfair Trading Practices) carried out a thorough technical examination of the impact assessment as well as of all the provisions of the draft Directive.

At its meeting on 30 April, the above-mentioned Working Party focused on the impact assessment as well as articles 1, 2, 3, 8 and 12 of the proposal. The remaining articles were examined at a second Working Party meeting on 23 May.

As regards the scope of the proposal (Article 1), the Commission confirmed at the 30 April meeting that the draft Directive aims at setting minimum standards ("minimum harmonisation") both in terms of prohibited practices and enforcement, with the possibility for Member States to go beyond (paragraph 1).

As regards the scope in terms of operators (Article 1, paragraph 2), the proposal covers small and medium sized enterprises (SMEs) as suppliers in the food chain as regards their sales to buyers which are not SMEs. The Commission explained that this targeted protection resulted from the impact assessment accompanying the proposal, since SMEs are often the ones who cannot defend themselves against unfair trading practices (UTPs) due to their lack of bargaining power and, by the same token, non-SMEs buyers are those able to use their power against smaller operators.

As regards the operators covered, the vast majority of delegations expressed their wish to extend the protection granted by the Directive, either to cover suppliers and buyers of all sizes (universal coverage) or to include at least SMEs at the side of the buyer, with a view to increasing the effectiveness in combatting UTPs. They also requested clarification as to whether Member States could ensure higher protection in this regard through the adoption of national rules, and asked for Article 8 ("National rules") to be modified to this end (only Articles 3, 5, 6 and 7 are currently mentioned in Article 8).

## **II. BACKGROUND**

The proposal follows a minimum harmonisation approach aimed at providing for a common EU-wide minimum standard of protection against UTPs.

Having in mind the currently existing differences among Member States in the level of protection against UTPs granted by their national legislation, this approach means: (i) for Member States not having specific rules or not addressing important aspects of an effective minimum protection against UTPs - to introduce or to strengthen such protection; and (ii) for Member States that already have more advanced national rules on protection against UTPs – to be able to maintain and complement the minimum rules laid down at EU level.

This approach consisting of a minimum harmonised standard of protection against UTPs that is complementary to the different existing national systems is in line with the principles of subsidiarity and proportionality.

The minimum harmonisation approach is characterised by the following main elements of the Directive: scope of targeted operators (SMEs as suppliers, non-SMEs as buyer), products covered (food products as defined for the purposes of the Directive), a limited list of prohibited UTPs and concrete functions of the designated enforcement authorities. These elements are meant to be common and harmonised across the EU. Further-going national measures or voluntary practices may be maintained or introduced.

The minimum harmonisation proposed in the Directive is regarded as a first step in providing a common EU-wide standard of protection. The Directive foresees that the Commission will evaluate its application with a view to strengthening the level and the scope of the protection in cases where it would be justified.

Based on these principles and conception, and following the discussions at Working Party and SCA levels on the scope of the Directive, the Presidency considers it appropriate to revise the text of Article 8 on national rules in order to make clearer what the possibilities are for Member States to go beyond the minimum harmonised standard of protection proposed in the Directive.

### **III. DESCRIPTION OF THE PROPOSED REVISED TEXT**

The main questions on which Member States required clarification as regards the scope of the Directive referred to the possibility of maintaining or introducing national rules that:

- (i) go beyond the minimum standard provided by the Directive on all aspects regulated by the Directive; and
- (ii) aim at combating UTPs outside the scope of the Directive, including expanding the scope of operators.

The Presidency therefore considers it appropriate to clearly outline these two possibilities and distinguish between them in Article 8, and proposes a revised text of it without referring to specific provisions as it is currently the case.

In order to achieve even more clarity, the Presidency proposes to amend recitals 10 and 17 of the Directive in the light of the revised Article 8:

- i) recital 10 should clearly state that Member States should not be precluded from maintaining and introducing on their territory stricter national rules providing for a higher standard of protection within the scope of the Directive;
- ii) recital 17 should be moved right after recital 10 in order to explain and provide examples of the possibility for Member States to maintain or introduce national rules designed to combat UTPs that are not within the scope of the Directive.

The revised texts of Article 8 and the above recitals can be found in the Annex to this Note.

#### **IV. QUESTIONS FOR THE SCA**

In order to have further clarity on the positions of Member States on the scope of the Directive, and to allow the Presidency to progress more quickly and efficiently on other parts of the proposal, delegations are kindly invited to express their views on the following questions:

1. Based on the principles of subsidiarity and proportionality, do you agree that Article 8 should be extended to cover the possibility for Member States to, on the one hand, have stricter national rules granting a higher level of protection against UTPs as regards all aspects regulated by the Directive, and on the other hand, have national rules on all aspects to combat UTPs, including operators, that are not within the scope of the Directive? If so, do you agree with the Presidency revised text of Article 8 as well as of recitals 10 and 10a?

2. Having in mind the revised text of Article 8 as well as the impact assessment accompanying the proposal, do you agree that the scope of the operators could be maintained as currently defined in Article 1(2) of the Directive?

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*Recitals*

- (10) As a majority of Member States already have national rules on unfair trading practices, albeit diverging, it is appropriate to use the tool of a Directive to introduce a minimum protection standard under Union law. This should enable Member States to integrate the relevant rules into their national legal order in such a way as to bring about a cohesive regime. Member States should not be precluded from **maintaining and introducing** ~~adopting and applying~~ on their territory stricter national laws **rules providing for a higher standard of protection of** ~~protecting~~ small and medium-sized suppliers and buyers against unfair trading practices occurring in business-to-business relationships in the food supply chain, subject to the limits of Union law applicable to the functioning of the internal market.
- (10a) The rules laid down in this Directive should not impair the possibility for the Member States to maintain ~~existing rules that are further reaching or to adopt such rules in the future~~ **or introduce national rules designed to combat unfair trading practices that are not within the scope of this Directive**, subject to the limits of Union law applicable to the functioning of the internal market. **Such national rules could go beyond this Directive, for example as regards the size of the operators, protection of buyers, the scope of products and the number and type of prohibited unfair trading practices.** The **Such** national rules would apply alongside voluntary governance measures.
- (17) Moved to recital (10a).

## Article 8

### National rules

**1. With a view to ensuring a higher level of protection,** Member States may **maintain or introduce** ~~provide for~~ **national** rules designed to combat unfair trading practices **which are stricter than those laid down by this Directive** ~~going beyond those set out in Articles 3, 5, 6 and 7,~~ provided that such national rules are compatible with the rules on the functioning of the internal market.

**2. With a view to combating unfair trading practices that are not within the scope of this Directive, Member States may maintain or introduce national rules, provided that such rules are compatible with the rules on the functioning of the internal market.**

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