

## EFFAT input into the public consultation on the Unfair Trading Practices Directive April 2023

The coming into force of the Directive was an important signal for the agriculture and food sectors, as it deals with the issue of market power and prohibits certain unfair trading practices.

Since the implementation of national legislation however, it can be observed that buyers did not largely change their practices yet. This is due to amongst others:

- The limited scope of the Directive
- Commercial practices being adapted to circumvent the application of the Directive

The scope of the Directive is linked to the size of the supplier and the buyer. The scope is too limited, as not enough suppliers fall under the protection of the Directive. Suppliers with a turnover above 350 Million Euros are not covered by this Directive, this leads to unfair treatment. It would be essential that it is not the size determining the protection by the Directive, but that the Directive applies to all business-to-business relationships. The scope as set out in Article 2 par. 2 should therefore be dropped.

As this Directive functions with certain unfair trading practices being banned instead of a general ban of all unfair trading practices, this leaves the possibility to buyers to circumvent the legislation and leads to the risk of regulation lacking always behind commercial practices.

But seen this concept of the Directive, prohibition of other unfair trading practices are missing, such as:

- Double-drop tenders and auctions
- Sales and purchases below production costs

Increased Human Resources to enforce this Directive would in most countries largely improve the efficiency of this piece of legislation.

As the questionnaire asks questions specifically concerning the German law. Please find below the answer from our German affiliate NGG.

The German legislator has only gone beyond the one-to-one implementation of the directive in two points: There is a four-year extension of the scope of application for some agricultural commodities (flour, cereals, milk, etc.) to farms with an annual turnover of up to 4 billion euros (instead of 750 million) and a measure from the "grey" list moved to the "black" list of prohibited trade practices.

Initial experience shows very clearly

- that the exhaustive listing of certain unfair trade practices in the German implementation law (AgrarOLkG) allows the food retail sector to circumvent far-reaching measures and that a general (prohibition) clause in the directive would be necessary instead. The reason for this is that certain unfair trade practices are not explicitly mentioned in the Directive and also not in the German law and therefore cannot be punished. Moreover, the Directive and the German law contain partly ambiguous formulations, i.e. the wording of the Act unnecessarily opens up room for interpretation to the detriment of application;

- that the scope of application to companies with an annual turnover of up to 350 million euros is far too narrow and must be dropped completely if it is not to result in competitive disadvantages for the many small and smaller farms and food producers.

The legal protection for those smaller farms and producers, through the limited scope of the Directive, actually leads to competitive disadvantages on their side:

- They are no longer allowed to make side payments. The large producers, on the other hand, who have cost advantages anyway and are better able to pass on cost increases to food retailers, can continue to make side payments.
- The risk of delisting is particularly high for the smaller ones, because they are forbidden to make side payments and at the same time they cannot achieve the price economies of scale of large-scale production.

The larger SMEs, on the other hand, which would also need the protection, can still be blackmailed because they are explicitly not covered by the protection;

- that there must be harmonised European requirements regarding the deployment of staff and the frequency of inspections across all member states, because in Germany the inspection institutions, equipped with only 10 full-time positions, are hardly able to meet the inspection requirements. Initial reports show that reported cases remain unresolved because not enough staff are available. Other implementations in Europe - such as Spain - have about 100 inspectors on duty;
- that for real protection against the market power of food retailers, a ban on purchasing below production costs is also needed, as provided for in the Spanish transposition law. This is because, in addition to trade practices that are designated as unfair, suppliers must also be protected from the fact that the food retail sector also exercises its market power through measures that are not designated as "unfair" - i.e. exerting pressure on prices as such. In particular, small and medium-sized suppliers have been forced out of the market and out of business in this way in the past up to the present.

We wish to point out that we consider the Spanish legislation prohibiting buying at loss and selling at loss in each phase of the supply chain, as well as the Italian legislation prohibiting double drop tenders and auctions as positive transposition examples, as they extend the protection.