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Freshfel's input on the proposal for a Directive on unfair trading practices in business-to-business relationships in the food supply chain

Freshfel Europe, the European Fresh Produce Association, represents the fresh fruit and vegetable supply chain in the European Union and is registered in the transparency register under the reference: 1637225479-02. We incorporate more than 150 direct members and associated members, including companies and national associations of producers, shippers, exporters, importers, distributors, retailers, and their service providers. Through the membership of national associations, we have a wide, representative outreach of the EU fruit and vegetable production and trade.

The fruit and vegetable supply chain is defined by specific characteristics: there is (sometimes high) perishability and seasonality, a very short commercial cycle; a myriad of distribution channels, huge diversity across categories and within single product lines; a fragmented production base, and a consolidated retail sector and regular fluctuations across supply and demand, which can lead to price volatility. Given this fluctuation and market requirements, daily adjustments and flexibility in commercial practices are often required, alongside the overall programming of seasons which typically guides the well-established and long-term relationships between different operators across the chain.

From this integrated supply chain perspective, we would like to offer a few comments and ask for some clarifications regarding the proposed Directive.

Preamble

The proposal focusses on the relationship between suppliers that are Small and Medium-sized Enterprises (SME) and non-SME buyers. As is written in the preamble of the proposal, *'complaints by producer organisations or associations of such organisations can serve to protect the identity of individual members of the organisation who are small and medium-sized suppliers and consider themselves exposed to unfair trading practices.'* However, it is unclear whether this will still apply if the Producer Organisation (PO) does not comply with the definition of SME as set out in the Annex to Commission Recommendation 2003/361/EC. Is the PO still allowed to act on behalf of its member if the PO exceeds the definition of an SME? And, if this is not the case, does this imply that some SME growers will be able to lodge a complaint via their PO whilst others will not, merely because their PO is different in size? Does this also mean that growers will be able to lodge a complaint against their own PO if that PO is bigger than an SME?

Article two: Definitions

The proposal makes a distinction between UTPs that are applicable to 'perishable food products' and 'food products'. However, we believe that the definition given for perishable food products (*"perishable food products" means food products that will become unfit for human consumption unless they are stored, treated, packaged or otherwise conserved to prevent them from becoming unfit*) is very broad and vague, and arguable applies to all food products.

Within the fresh fruit and vegetable categories, there is an immense variation between the perishability of the products, from a couple of days for e.g. berries and lettuce, to months for e.g. kiwi and apple, which needs scale

marketing to cover the full season. Within the industry, there is debate about this distinction in the proposal and its consequences. Hence, we believe a more precise definition of what perishability entails is necessary, linking it e.g. with the product's microbiological instability when not kept at appropriate storage temperature or conditions.

Additionally, the notion of 'perishability' varies depending on the point of view. A product can be sold as fresh, but, contrary to first intention, pass through the chain to be frozen, canned, or processed. In that case, from the point of view of the seller the product is fresh and perishable, but different from the point of view of the buyer, the product might not be perishable at all.

Article 3: Prohibition of unfair trading practices

Regarding Article 3.1 (a) on the 30 days payment for perishable food products, we would like to point out that from the Report on the Implementation of the Late Payment Directive it is apparent that there are problems not only with implementing the Directive on Member State level, but also with many of the SMEs not exercising their rights, in order not to harm business relations. If this proposed Directive on UTPs wants to be effective, the same pitfalls should be avoided. Besides, a strict application of the 30 days rule must consider the different modalities of payment within the fresh fruit and vegetable supply chain (costs related to longer storage, programming based on a campaign, long-term relations, advance payments, working on commission...). Besides, in the fruit and vegetable sector, payments with shorter notice already happen for certain highly perishable products.

Regarding Article 3.1 (d), it will be a challenge for the authorities to determine the responsibility for quality issues and wastage, especially given the complexity of the fresh produce supply chain. In implementing this legislation, this reality needs to be reflected. Therefore, the onus must remain on the supplier to prove the produce was of marketable quality and adhered to agreed specifications on arrival at the buyer's premises.

Article 5, 6 and 8: Member State implementation, complaints, and confidentiality

Article 5.1 indicates that *a supplier shall address a complaint to the enforcement authority of the Member State in which the buyer suspected to have engaged in a prohibited trading practice is established*. We understand that this provision came about to prevent bigger buyers to source their products outside of the EU. However, buyers might simply go looking for bigger suppliers to prevent falling under the scope of this proposed Directive. It also means that the grower, the principle target of this proposal, will have to lodge a complaint in another Member State, most likely in another language. In our opinion, this goes against the spirit of this proposal, which is to come to the aid of the SME suppliers who often don't dispose of many resources.

Article 5 mentions the confidentiality of the identity of the complainant, but nowhere is it clear what happens to the identity of the buyer. Does this imply that the practise of disclosing the identity of the business found to be operating UTPs ('naming and shaming') will be included in this legislation?

In general, the legislation should consider the complexity of a complete supply chain, including traders and wholesalers, not just by focussing on the simplified producer-processor-retailer relation. Concretely, the administrative burden placed on trading companies arising from this proposal should be minimised. This could be achieved by having a consistent approach throughout the Union, by harmonising the implementation of this proposal. This will promote a more thorough understanding of the trading practices required, it will ease the administrative burden for companies operating in multiple states, and it will ensure that operators in Member States applying more lenient fines do not secure an advantage over those based in countries with more stringent laws in place.

Freshfel's Response to the Public Consultation on the Initiative to improve the food supply chain

The structure of the fresh fruit and vegetable sector

The European fruit and vegetable industry sets itself apart from other sectors due to following particularities:

- Our products are characterised by, sometimes high, perishability and seasonality. The highly perishable products have a short cycle and, in case of crisis, often do not have the capacity to be stored for a long time. Products with a longer shelf life can postpone the problem until later in the season. For those products, the logistics (storage and post-harvest treatment) and trade actors, such as Producer Organisations (PO), wholesalers, and exporters, play a bigger role to prevent or overcome market unbalances.
- The perishability implies that the fresh fruit and vegetable supply chain is tight and complex, characterised by a diversity of distribution channels: in order to avoid food waste, operators need to work via different marketing channels, such as wholesale, PO, direct marketing (farmers markets), or via contracts with retailers, with whom producers often have a longstanding relationship. Despite this diversity of distribution channels, the focus of the chain is often primarily driven by local distribution to meet the customers' expectations.
- Besides a diversity in marketing channels, there is also a high diversity between the product categories: there are, amongst others, differences between methods of production, variety, quality, size, climatic conditions, packaging, labelling, and promotional activities. This is contrary to other commodities and especially to the branding that is possible for processed foodstuffs. Conditions for fresh produce are often more complex and go beyond the safety requirements for other commodities.
- The fruit and vegetable sector is also characterised by a fragmented production, and a concentration of retail. Growers are encouraged to join a PO through the Common Market Organisation for Fruit and Vegetables (CMO), grouping the demand and enabling the growers to exercise greater marketing power through the PO.
- Due to this diverse nature of the supply chain and the products themselves, every link within the chain can be affected by a multitude of different factors, such as the strong susceptibility to adverse weather conditions, the sudden establishment of embargos, the emergence of food safety crises, exchange rate fluctuations, and negative or positive promotional campaigns. This can lead to a strong fluctuation in crop supply and demand and a high price volatility, by which a small volume variation can lead to a significant price variation. This price volatility is dependent on many factors, from adverse weather in certain producing regions to the mere imaging of fresh fruit and vegetables, and price recovery is often slow and challenging.
- Whilst the overall programming of a season is generally guiding the relationship between the different operators in the chain, daily adjustments in business are often required, given the fluctuation between offer and demand. This fluctuation can be influenced by multiple factors, such as climatic conditions. The actors are used to adjusting to this situation.

The complexity of the supply chain as sketched above does not reflect in the current, often simplified, narrative of producer-processor-retailer. With our paper, we wanted to provide some clarity on how the supply chain functions, what the different challenges and opportunities are, and where the Commission could improve the functioning. The full paper can be accessed [here](#).