

## European Commission Proposal for a Directive on unfair trading practices in the food supply chain

### Position of the contract catering industry

FoodServiceEurope believes that fostering fair contractual relations amongst all actors in the supply chain is essential to provide high-quality, safe, and affordable food to consumers. Therefore, the contract catering sector supports balanced initiatives to strengthen the position of farmers and SMEs in the food supply chain. However, any initiative at EU level has to be justified and proportionate in order to achieve this stated objective.

The Commission's proposal for a Directive to address unfair trading practices in the food supply chain **does not sufficiently consider the specificities of the contract catering sector and its unique position in the food supply chain.** In particular:

- (i) The prohibition for buyers to agree with their suppliers on payment terms of more than 30 days for perishable products would be disproportionately burdensome for contract catering operators, who do not enjoy equivalent protection in respect of their clients. Clients, especially public-sector entities, often operate on much longer payment terms and rarely on 30 days. This means operators in the contract catering sector would be unfairly squeezed between their buyers, often public authorities outsourcing catering services, and their suppliers. **Operators in the food supply chain should thus be able to retain the possibility to agree on longer payment terms, adapting contracts to the concrete realities of the market.**
- (ii) **In addition, for the proposal to reflect the legislator's intent, the definition of "perishable food products" should be limited to fresh food products and food products with a short shelf-life.**
- (iii) The proposal does not expressly cover public authorities that buy food products to provide services equivalent to those performed by private sector contract catering operators. This would potentially create an additional distortion to competition in the market. This needs to be addressed, **either through the unambiguous inclusion of public authorities within the scope of the Directive or through the exclusion of contract catering services overall from the entire scope of the proposal.**
- (iv) If contract catering companies are to be covered by the scope of the directive when they act as buyers, this should also be the case when they are suppliers in order for the directive to cover the food supply chain in its entirety. **We thus call to extend the scope of the proposal to cover also the provision of food services in business-to-business relations.**

Please find more details below:

## Operators in the food supply chain should retain the possibility to agree on longer payment terms for perishable products

Our sector is concerned about the unconditional prohibition of payments longer than 30 days for perishable products (Art 3). It is in fact of crucial importance to understand that contract catering companies are uniquely positioned in the food supply chain and that this provision affects our sector in a disproportionate and unfair way.

***Contract catering has a unique place in the food supply chain, different from commercial restaurants, hotels and retailers in general.***

- Contract catering encompasses food and ancillary services provided to people working or living in communities – private and public undertakings, schools, universities, hospitals, retirement homes, prisons – under the terms of a contract with the client communities. It is therefore characterised by a three-party relationship between the contract catering operator, the client organisation that outsources the service and agrees the contractual terms and the final consumer to which the service is provided.
- The terms in which the services are provided will depend on different types of contracts. In most cases meals are delivered to the end consumer at a subsidised social price. For example, meals provided to students in schools are often subsidized by the public authorities and the final consumer does not pay the price in full. Payment of the full price will thus be made by the client organisations under the terms of the agreed contract and at a moment that is delayed vis-à-vis the moment where the service is provided.
- It is important to note that contractual relationships between contract caterers and their business partners, including farmers and SMEs, have never been considered problematic in the longstanding debate on unfair trading practices in the food supply chain at EU level. The report of the Agricultural Markets Taskforce, the public consultation and the impact assessment accompanying the proposal, do not provide any evidence that unfair trading practices occur between contract catering companies and their suppliers.
- In addition, several national legislations considered as best practice such as in the UK, Spain and Portugal either exclude or provide specific exceptions for our sector.

***Contract catering operators already face significant cash flow challenges that would be exacerbated by payment provisions in the draft Directive***

- Notwithstanding the requirements of Directive 2011/7/EU on combating late payments in commercial transactions, contract catering companies continue to be subjected to late payments in particular by national and local public authorities. The Commission's report, published in 2016, on the implementation of the late payment directive highlighted that public entities in more than half of all Member States do not respect the deadline imposed by law, while most companies refrain from exercising their rights for fear of damaging their commercial relationships.
- In some Member States, payment terms from public authorities can reach up to 200 days, creating serious burdens in terms of cash flow for catering companies which must pay suppliers in time. In addition, this needs to be done without compromising the quality of the service and the meals provided to the final users, who often belong to vulnerable groups, such as children in schools, the elderly in retirement homes, patients' in hospitals and people in prisons. The option of terminating a service provision for undue late payments is thus in many cases not even available to the companies that may be bound by public service obligations.

- The proposal for a Directive would no longer allow for longer payment terms to be expressly agreed through fair contractual arrangements, thus preventing operators in the supply chain from addressing the concrete circumstances of each contract. In addition, it creates an asymmetry in terms of rights and obligations for our sector as the proposal does not cover the relationships between contract catering operators and their client organizations, even if the suppliers are SMEs. This is the case because the scope of the proposal is limited to the sale of food products and does not cover food services.
- Contract catering operators would therefore be increasingly squeezed between the terms of payment imposed on them by their clients and the terms of payment they would be bound to respect towards their suppliers.
- **Furthermore, in light of the widespread and documented lack of enforcement in some Member States, the possibility of longer payment terms if “expressly agreed in the contract and provided it is not grossly unfair to the creditor” within the meaning of article 7 of the Late Payment Directive, should be maintained.**

### The definition of perishable food products needs to be limited to fresh food products and food products with a short shelf-life

- The Commission’s rationale underlying the provision on payment terms is that EU legislation on late payments is considered not to be appropriate for the sale of fresh products which are sold shortly after delivery and for which consumers pay immediately in the shops. This has been acknowledged in the impact assessment accompanying the proposal as well as in the report of the Agricultural Markets Taskforce, and this is why Article 3 (1)(a) only applies to perishable food products.
- The definition that is included in the proposal, however, is inadequate as it does not effectively limit in any way the food products to which it applies. The definition currently mentions that it applies to any food products (which are defined as also including processed foods) that become unfit if not properly stored, packaged or otherwise conserved. However, any food product will eventually perish if not properly stored or treated, even a highly processed product, with a long shelf life.
- **FoodServiceEurope thus believes the definition should be changed to better reflect the intent of the legislator. We thus propose the wording below:**

**“perishable food products” means food products intended to be supplied fresh to the consumer or food products with a shelf-life not exceeding 30 days.**

### Public authorities that purchase food products should be expressly covered or, alternatively, contract catering overall should be excluded

- Public authorities often need to ensure food services for example in schools, hospitals and prisons either by outsourcing these services to private operators or providing the service directly themselves through “in house” catering entities, thus effectively competing with private companies in the provision of such services. In these circumstances, public authorities are also purchasers of food and engage in commercial relationships with other actors in the food supply chain, such as farmers, manufacturers, wholesalers or importers.
- However, from **the text of the proposal and the accompanying impact assessment it is unclear whether the definition of buyer may encompass also public bodies that directly procure food products** using in-house resources.

- Usually under EU law, when public bodies are covered by a specific legislative act, that is expressly mentioned. Given this is not the case in the Commission’s proposal this may suggest public authorities are not covered, despite the broad scope of the directives’ wording. The lack of legal certainty should thus be addressed, not least to avoid different interpretations by Member States.
- Of particular concern to our members is that if public bodies providing similar services to end consumers are not bound by the same requirements in their relations with suppliers, this would give public entities an additional competitive advantage compounding other imbalances deriving from the exemption of public authorities from VAT rules and from public procurement requirements when providing the services in-house.
- In order to avoid further distortions to competition in the internal market, we thus call for the explicit inclusion of public bodies engaging in the purchase of food products under the scope of the directive.
- Alternatively, if public authorities are not to be covered when they buy food products to provide food services, then private operators providing equivalent food services should not be covered either. In this case, FoodServiceEurope calls for an exclusions of contract catering services from the scope of the directive overall, independently of the nature of the legal entity that provides the service. As mentioned above, this is already the case in some jurisdictions that have served as best practice examples for the European Commission in drafting its proposal.

### **The scope of the directive should be extended to cover also the provision of food services in B2B relations**

- As already mentioned, contract catering companies occupy a unique role in the food supply chain as they are both “buyers” of food products and “suppliers” of food services to their client organizations under the terms of a contract. If contract catering companies are to be covered by the scope of the directive in their relationships with SME suppliers, then it would be unfair and unjustified that the same level of protection would not be available to contract catering companies, particularly SMEs, when dealing with public or private clients. Otherwise, the proposal would effectively be creating a situation of asymmetry in terms of rights and obligations of actors in the food supply chain.
- Therefore, we believe that the scope of the proposal should be expanded to also cover the provision of food services in business-to-business relations. This would be in line with the underlying objective of the proposal, that is, to avoid that unfair trading practices along the supply chain are passed back to other suppliers in the supply chain, including farmers and SMEs.