Independent Retail Europe

COMMISSION PROPOSAL FOR THE STRENGTHENING OF THE POSITION OF FARMERS IN THE FOOD SUPPLY CHAIN

POSITION OF INDEPENDENT RETAIL EUROPE

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POSITION OF INDEPENDENT RETAIL EUROPE – PROPOSAL FOR A REGULATION ON STRENGTHENING OF THE POSITION OF FARMERS IN THE FOOD SUPPLY CHAIN

Independent Retail Europe generally views positively measures to strengthen the position of farmers since groups of independent retailers are dependent on a competitive and resilient agricultural sector for a sustainable and resilient food supply chain.

That being said, we consider it highly problematic that the European Commission did not carry out a comprehensive impact assessment for the preparation of its proposal. The absence of any ex-ante assessment, and lack of consultation of stakeholders along the chain, leads to a situation where several aspects of the Commission proposal lack clarity and may actually run counter to the goal of strengthening farmers and ensuring the resilience of the food supply chain.

1. The proposed regulation of the use of certain terminology (article 88) is vague and legally uncertain

Article 88(1) proposes to regulate the use of the words 'fair' and 'equitable' in labelling or advertising materials. **Unfortunately, the conditions for their use provided for in Article 88a(1) are extremely vague and not sufficiently defined.**

For instance, it is unclear how the 'stability and transparency' criterion (art 88a(1)(a)), or the 'equitable' condition (art 88a(1)(b)), are to be interpreted, measured or assessed (and by who?). Leaving the assessment of fair payment solely to farmers is not based on any objectively measurable basis and does not provide any legal certainty for operators wishing to use this terminology. In view of the many different supply chains and the great diversity of producer formats, it is unlikely that an "equitable price" can objectively be defined. Moreover, the reference to one or more SDGs is imprecise and cannot be established in all cases, and does not necessarily mean that the conditions for "*fair*" and "*equitable*" are met in every circumstance. Similarly, it is totally unclear what is meant by "*terms equivalent to these terms*" given the absence of clear definition of the terms referred to..

Clearer definitions, and objective and comprehensible criteria, are an absolute must, as otherwise there is no legal certainty for the use of these terms. We are therefore extremely sceptical about the regulation of these terms as provided by article 88a(1).

The 'optional' possibility of adopting EU implementing acts mentioned in 88a(3) to further specify the conditions in paragraphs 1 and 2 is only of limited help: legally certain and objective criteria, parameters, time criteria for the assessment, regularity of the assessment are essential to consider any regulation of the use of these terms.

However, we fully support the clarification in Article 88a(5) that any national laws on additional conditions may not prohibit, restrict or hinder the use of the EU terms regulated in 88a(1) and (2). **Article 88a(5) is an essential provision to ensure the application of the mutual recognition principle, and therefore to prevent any fragmentation of the single market for agricultural products**.

Key aspects :

➔ **The formulation of Article 88a(1) is too vague and creates major legal certainty around the use of the terminology. In its current form, it should be rejected. Clear, precise and legally objective criteria are needed in the regulation itself if the co-legislator wishes to standardise the use of**

the terms 'fair' and 'equitable'. At the very least Article 88a(3) should oblige the Commission to adopt an implementing act.

➔ **Support Article 88a(5), which is essential to preserve the integrity of the single market through the application of the mutual recognition principle.**

2. New rules on contracts for the supply of agricultural products – article 148 and 168

- **Mandatory written contracts are welcomed if kept flexible and strictly limited to the first purchase of the agricultural products. The Single Market should also be preserved.**

The independent retail sector views positively the proposal to generalise written contracts, provided that contractual freedom is preserved and that some reasonable conditions are set. Written contracts are a useful tool to provide primary producers with contractual certainty regarding the most important framework conditions such as price, quantity, quality, contract duration, payment terms and delivery. However, for such an obligation to be truly beneficial to farmers it is essential that the terms 'written' are understood broadly to make it easy and efficient for them, that it does not lead to a weakening of contractual freedom and that the scope is limited to strengthening predictability for primary producers.

It is therefore **essential that the notion of written contracts in articles 148(1) and 168(1) include electronic formats** commonly used in commercial transactions (e.g. email confirmation).

Moreover, it must be clear that the principle of written contracts under articles 148(1) and 168(1) solely applies to the relationship between farmers, or their producer organizations, or producer organization associations, and the first purchaser. **This obligation shall not apply to relations between downstream operators**. Indeed, it is not the goal of the CMO Regulation to intervene in the relation between downstream operators, while the processing stage is dominated by very large international companies with extremely high market power that do not need to be strengthened.

Concerning the revision clause for contracts with a duration longer than 6 months (article 148(4)(c)(iii) & 168 (4)(c)(iii): we welcome the introduction of such clauses that will protect contractual partners from major unexpected changes in market conditions, **however, clear criteria to justifiably trigger the revision clause are missing, undermining legal and business certainty, and potentially hindering the conclusion of long-term contracts in future,** which would be highly detrimental to farmers**. Moreover, buyers should also be able to trigger the revision clause** (again based on clear and precise criteria).

We also warn that **recital 20 is highly problematic as it risks to undermine the conclusion of long-term contracts** (which offer farmers predictability), as it creates in practice a right of unilateral termination (without precise grounds and without notice) that leads to extremely high uncertainty for potential buyers.

Furthermore, we welcome the exceptions in paragraphs 5 and 6 and the catch-all clause on freedom of contract in paragraph 8 of art. 148 and 168.

Finally, we see several practical issues with the reference in article 148(4)(c)/168(4)(c) to "objective indicators, indices or methods of calculation of the final price". First of all, the fact that Member States may develop national indicators raise a major risk of fragmentation of the single market, due to wide divergences in approach (which are also the result of major differences in production costs

between sectors and between countries). Secondly, there is no reason why Member States' indicators should be favoured over other indicators developed by the private sector or by the contracting parties themselves. Moreover, experience in countries which have tried to follow that path (e.g. France) showed that indicators and indices can rapidly become obsolete or incomplete or inadequate for specific situations/sectors/types of contracts.

Key aspects :

- **Provisions on mandatory written contracts should preserve contractual freedom and flexibility to address very different situations and sectors.**
- **Ensure that the notion of written contracts includes simple electronic formats (e.g. email confirmation)**
- **Ensure that art. 148/168 solely apply to the first purchase of agricultural products and not to downstream contracts**
- **Art 148(4)(c)(iii) & 168 (4)(c)(iii)) on the revision clauses risk to undermine the conclusion of long-term contracts, which is detrimental to farmers. Revision clauses should include clearer criteria justifying their triggering and should not lead to unilateral termination without clearly defined objective grounds and a reasonable notice period. Importantly, revision possibilities should be bilateral.**
- **Art 148(4)(c)/168(4)(c): provisions on indicators/indices in case of fluctuating price lack clarity. Encouragement for Member States to develop national indicators risks to seriously undermine the single market, while indicators/indices may often become obsolete/incomplete. Contractual freedom should be preserved as long as the goal of protecting farmers is respected.**

- **Provisions on mediation are vague (art. 148(3)/168(3))**

Mediation can in principle contribute to an amicable and simple resolution of disputes. However, the provisions on mediation mechanisms to be established in the Member States lack clarity. In addition to clarifying the exact remit of such a mechanism, it is also necessary to clarify the resulting obligations for economic operators. Economic operators should not be responsible for financing a mandatory state mediation mechanism.

Key aspects :

- **Clarify the provision on the national mediation mechanism: remit, conditions for use, etc.**
- **Clarify that mandatory mediation mechanisms must be solely funded by public resources**

- **Registration of contracts is not effective, leads to massive bureaucracy and discourage contracting with small farmers**

We oppose strongly the suggestion in article 148(9)/168(9) that Member States may require the registration of written contracts. There are literally millions of contracts concluded every year for the purchase of agricultural products. **Mandatory registration brings no added value for the protection of farmers but only creates massive amounts of red tape**.

It will also discourage buyers from contracting with smaller farmers due to the multiplication of contracts involved when a larger buyer negotiates with many small farmers – each requiring separate registration - instead of with one large one. In addition, it will discourage small local independent retailers from contracting with small local farmers due to the bureaucracy involved, therefore increasing intermediation which is detrimental to the existence and competitiveness of local supply chains.

Key aspects :

➔ **Delete article 148(9)/168(9) allowing Member States to require the registration of contracts**

3. New rules on producers organisations (article 152/153)

First of all, we are positive about the idea to strengthen producer organisations. Cooperation at farmer level can help to overcome competitiveness barriers, similarly to the cooperative business model of groups of independent retailers, which allows SME retailers to thrive on the market and compete with large international operators (without benefitting from any derogation from competition rules).

We therefore fully support art. 152(1)(a) and art 153(2)(c) which clearly state that producer organisations must be controlled by farmers, and that member farmers shall scrutinize democratically key actions of their organisations. It is essential that individual farmers have a direct say in their organisations (like in groups of independent retailers where member retailers exert control on their group activities). Too often, commercial decisions taken by some producer organisations were not subject to timely information and scrutiny by their member farmers. We therefore very much welcome these two articles.

I**t is essential to ensure that Article 153(2a)) preserves the possibility for buyers to purchase directly with a local farmer/producer who is member of a producer organisation**. Direct bilateral contracts between farmers and buyers in the retail sector contribute to more trustful relations, and support the establishment of local supply chains. Groups of independent retailers in particular are extremely supportive of local supply chains and facilitate the possibility for their individual retailers to partner directly at local level with local farmers. We are therefore critical of the proposal to add the wording "*the objectives pursued by the producer organisation*" in article 153(2a), which is open to interpretation and will therefore allow some producer organisations to disproportionately restrain their individual farmers' ability to contract locally. Further restrictions would inevitably raise the number of intermediaries in food supply chain, which would be detrimental to farmers' revenues. Moreover, in case of direct purchases from a farmer who is a member of a producer organisation, **buyers must always be able to clearly identify the actual contractual partner** (the producer organization) and whether it is a recognised or non-recognized association.

On the other hand, we are wondering whether the proposal to extend derogations from competition law to non-recognised producer organisations (art. 152(a)) is strictly necessary, given the absence of impact assessment.

Key aspects :

➔ **Strong support to art. 152(1)(a) and art 153(2)(c) which reinforces farmers' control and democratic scrutiny of their producer organisations**

➔ **Article 153(2a)): preserve the possibility for buyers to contact directly with farmers/producers part of a producer organisation to support short supply chains and avoid unnecessary intermediation. Do not restrain such possibility though additional conditions.**

➔ **Article 153(2a)): ensure that, when purchasing from a member of a producer organisation, the buyer can systematically identify the actual contractual partner and its type (recognised or non-recognised P.O)**

4. The extension of article 210a (sustainability agreements) to social aspects raises major concerns

We are concerned by the proposed extension of the scope of article 210a to allow a derogation from competition rules for social objectives. First of all, the principle of extending further derogations from competition rules inevitably risk to create major unintended economic consequences which were not assessed at all, due to the absence of any impact assessment for this proposal. The existing derogation of article 210a for sustainability agreements that aim to reach higher environmental standards is already quite broad. **Further extension to social aspects raises a major risk of undermining significantly the economic objectives of EU competition law, decrease overall productivity in the long run and opens widely the door to social washing**. Moreover, such an exemption is not at all necessary to create wealth for small farmers : the success of the cooperative model of groups of independent retailers (which allow SME retailers to thrive and compete against much bigger competitors) which do not benefit from any derogation from competition law is proof thereof.

Furthermore, **the conditions for application of this derogation foreseen by paragraph (d), (e) and (f) of article 210a(3) are extremely vague**. For instance, what does legally mean "*small farms predominantly relying on family labour*" or "*young producers*" or "*improving working and safety conditions*"?

Moreover, paragraph (d) and (e) of the Commission proposal (i.e. economic viability / attracting and supporting young farmers) create major legal uncertainty. To benefit from the derogation, article 210a(1) requires the agreement to be indispensable to achieve a sustainability standard higher than mandatory EU/national standards. However, by opposition to environmental standards explicitly referred to in existing article 210a(3), there is no applicable legal standard against which one can measure if the agreement is indispensable to achieve higher 'viability' or 'attracting young farmers' (as proposed in paragraph (d) and (e) of the Commission). **This creates a huge opportunity for social washing and make the task of enforcement authorities impossible in practice. It also makes it near impossible to create legally secure agreements.**

Lastly, the reference of paragraph (f) to "processing activities" is completely unrelated to any strengthening of farmers' position and highly risk to, on the contrary, strengthen "processors". We would like to recall that the processing sector is dominated by very large international manufacturers who enjoy high market power, very high net margins and are the biggest buyers of food products. They do not need any relaxation of competition rules.

Key aspects :

- **Conditions set in paragraph (d), (e) and (f) of article 210a(3) are extremely vague and legally uncertain. This creates huge risks of social washing and makes it impossible for enforcement authorities to control the legality of agreements with a social objective.**
- **The inexistence of any legal standard on "economic viability" and "attractiveness/support for young farmers" (paragraph (d) and (e)) make it impossible to fulfil article 210a(1) 's obligation for any agreement to be indispensable to attain a higher standard. <u>This obligation stemming from article 210a(1) requires the use of an objectively measurable benchmark against which the social agreement must be measured</u>.**
- **We therefore call to either delete the proposed extension of article 210a(3), or at least delete its paragraph (d) and (e) and further define paragraph (f).**
- **Delete from 210a(3)(f) any reference to the processing sector.**

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