

# Unfair trading practices in the food supply chain

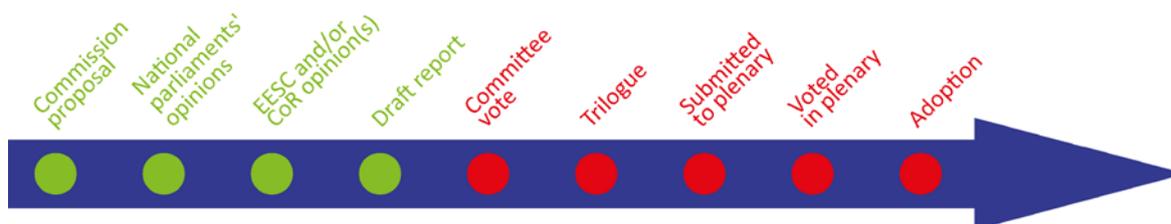
## OVERVIEW

The food supply chain ensures that food and drink products are delivered to the public. It affects all consumers in the EU. The final price paid by the consumer is impacted by the number of participants in the food supply chain. While the single market has brought benefits to operators in the supply chain through more market opportunities and a larger customer base, it has also brought challenges. Structural changes have occurred, leading to different levels of bargaining power and imbalances between actors in the chain. The abuse of such differences may lead to unfair trading practices.

To strengthen the position of smaller operators (farmers) in the food supply chain, in April 2018 the European Commission presented a proposal for a directive on unfair trading practices. In the European Parliament, a report is due to be voted on in the Committee on Agriculture and Rural Development in October, while in the Council of the EU a revised presidency text is being examined.

### **Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain.**

<i>Committee responsible:</i>	Agriculture and Rural Development (AGRI)	COM(2018) 173
<i>Rapporteur:</i>	Paolo de Castro (S&D, Italy)	12.4.2018
<i>Shadow rapporteurs:</i>	Mairead McGuinness (EPP, Ireland), Anthea McIntyre (ECR, UK), Elsi Katainen (ALDE, Finland), Matt Carthy (GUE/NGL, Ireland), Maria Heubuch (Greens/EFA, Germany), Marco Zullo (EFDD, Italy), Jacques Colombier, (ENF, France).	2018/0082(COD) Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
<i>Next steps expected:</i>	Vote in committee	



## Introduction

The European Commission adopted a legislative [proposal](#) on unfair trading practices (UTPs) in business-to-business relationships in the food supply chain on 12 April 2018. The proposal, as put forward, builds on earlier interventions, notably [three](#) Commission [communications](#) and [reports](#), a [resolution](#) of the European Parliament and the findings of a 2016 report by the [Agricultural Markets Task Force](#). The proposed directive would introduce a minimum standard of protection relating to unfair trading across Member States. The protection would only apply to small and medium-sized enterprise (SME) suppliers in the food supply chain as regards their sales to buyers who are not SMEs.

In economic terms, the successive reforms of the common agricultural policy (CAP), the greater price volatility and income risks for farmers, and the integration of EU agriculture into world markets with the resulting alignment to world market prices and participation in free trade agreements, have also contributed to the need for action.

## Context

In a 2017 technical [report](#), the Commission's Joint Research Centre (JRC) highlighted the increasing concentration, both across EU Member States and globally, of the retail and processing segments of food supply chains. A direct consequence of these changes is the imbalance that arises in the bargaining power between the various actors in the chain, with the potential for unfair trading practices (UTPs) to occur.

In its 2014 [communication](#) on tackling unfair trading practices in the business-to-business food supply chain, the Commission defined UTPs as [practices] '...that grossly deviate from good commercial conduct and are contrary to principles of good faith and fair dealing...'. Furthermore, in a related 2013 [green paper](#), the Commission identified UTPs as deviations from contract terms; excessive and unpredictable transfer of costs and risks to the counterparty; and unfair termination of or disruption of a commercial relationship. The [Agricultural Markets Task Force](#) listed unduly late payments; unfair shifting of the business risk; unilateral or retroactive changes to contracts; and unfair termination of contracts, including termination on short notice, as examples of UTPs.

The 2017 JRC report identified the incidence of UTPs as being associated with the distribution of power along the agri-food chain, or more precisely, with an imbalance in that distribution. Therefore, smaller operators (farmers) are the parties most probably affected. The occurrence of such UTPs has also been attributed to the 'fear factor': small operators being reluctant to disrupt the working relationship that already exists.

The approaches taken by Member States are not homogenous, with different Member States providing more protection for operators than others, which gives rise to a playing field that is not level. This difference in business conditions can also have an impact on cross-border trade, thereby disrupting the workings of the single market.

The effects of UTPs are manifest both with operators and consumers. Operators are affected due to their weak bargaining power, while consumers are affected indirectly, in the form of poorer product quality and choice, resulting from the inability of operators to invest and innovate within their businesses. It bears stating that the evidence concerning the overall net impact on consumers and innovation is inconclusive, but a figure of between €30 billion and €40 billion has been estimated as the cost of UTPs to food sector suppliers across the EU. A [survey](#) of agricultural producers and cooperatives conducted in 2013 and using a wide definition of UTPs, estimated the damage to these entities in financial terms at over €10 billion per year.

The present arrangement, where UTP rules exist in some Member States and not in others, is liable to impair the objective of ensuring a fair standard of living for the agricultural community. UTPs affect the profitability of agricultural producers and lead to downward pressure on market income.

This absence of a common framework is in contrast to other areas that are governed by the CAP and have a direct impact on operators, such as competition rules.

## Existing situation

In a 2016 [report](#) on unfair business-to-business trading practices in the food supply chain, the Commission sets out the different ways in which Member States have undertaken action to combat UTPs. It makes a distinction between three categories of Member States: those without any UTP legislation; those with a voluntary platform only; and those with dedicated legislation in place.

In April 2018, the Commission published an [impact assessment](#) (IA) related to the initiative to improve the food supply chain, where it describes the occurrence of UTPs at length. The IA identifies the main drivers of the problem as being i) imbalance of bargaining power; ii) divergence of rules at the national level; and iii) lack of coordination among enforcement authorities. Imbalance in bargaining power transfers the business risk to the weaker parties in the transactions. It concludes that presently, there are no common rules to provide a minimum standard of protection against UTPs in the food supply chain.

According to data from the Commission's 2018 IA, 20 Member States have specific legislation on UTPs, four Member States have legislation of a limited scope (based on a consumer-type approach), and four Member States have no UTP legislation at all.<sup>1</sup> Member States also have different rules as regards UTP enforcement. This shows the varying level of concern ascribed to the issue across the EU. The Commission document also states that 12 out of the 20 Member States with specific rules have adopted legislative instruments that apply specifically to the food supply chain.

Legislation in the Member States ranges from being principle-based to more detailed, with the latter type employing the use of negative lists to focus on prohibited practices. Many legislations combine general clauses with lists of practices. This may lead to less discretion for those enforcing the provisions and can result in the risk of insufficient deterrence particularly when new forms of UTPs arise. There is the possibility of more discretion with a principle-based legislative approach, which can also deal with new forms of UTP if and when they arise.

Member States vary in how they deal with the issues. In some countries consumer-protection legislation has been extended to protect consumers and producers. Other Member States have taken the approach of enacting specific business-to-business legislation, according to the type of practices in question and the need for specific supply-chain remedies.

## Parliament's starting position

The Parliament has sought to bring attention to the issue for a number of years. It had previously highlighted imbalances in the supply chain in its 2012 [resolution](#). In that resolution, the Parliament called on the Commission to propose robust legislation. It also called on both the Commission and Member States to continue to urgently address unequal distribution of profits within the food chain, especially with regard to adequate incomes for farmers. On another occasion, the Parliament [called](#), among other things, for the introduction of better means to ensure that payment deadlines were complied with, taking into account the provisions of the Late Payment Directive. In a June 2016 [resolution](#), Parliament stated that UTPs 'are a serious problem'. It further invited the Commission to submit a proposal for an EU-level framework to tackle UTPs, and set out its belief that framework legislation was necessary, while also warning that such legislation must not lower the level of protection in countries that had already adopted legislation to combat business-to-business UTPs. Parliament also acknowledged the Commission's above-mentioned 2016 [report](#).

In June 2017, the Parliament's Committee on Agriculture and Rural Development (AGRI) was told of the Commission's intention to table draft legislation to combat UTPs. The MEPs [urged](#) the Commission to proceed quickly. AGRI members also asked that more attention be paid to excessive concentration in some parts of the supply chain; that farmers' bargaining power be strengthened

via the Omnibus proposal; and that efforts be made to ensure competition rules worked for farmers too.

## Council starting position

The Council of the EU has previously addressed the matter in its [conclusions](#) of 12 December 2016, where it expressed concern about the vulnerability of farmers in the food supply chain, despite efforts to improve their situation. The aim should be to ensure that risks were shared more equally along the supply chain, and that there would be improved contractual arrangements with better market transparency and risk management. The Council suggested solutions that could be put in place and invited the Commission to undertake, in a timely manner, an impact assessment with a view to proposing an EU legal framework or non-legislative measures to address unfair trading practices.

## Preparation of the proposal

In its 2017 [consultation strategy](#) – Initiative to improve the food supply chain – the Commission sought the views of interested parties. In this process, stakeholders were encouraged to offer their comments and evidence on defining the problem; the policy objectives and options and their likely impact; the need for EU action; and the implementation issues, including monitoring and enforcement. An inception impact assessment was carried out, which drew 66 contributions from a range of stakeholders. One-third came from farmers or their representative organisations, 17 % from Member State authorities, 15 % from non-governmental organisations, 11 % from processors and their organisations, 8 % from retailers and their organisations, and 17 % from a spectrum of other respondents, including academics and trade unions.

The findings showed a majority of respondents believed that UTPs did exist in the food supply chain, causing a significant problem. A small number (5 %) stated that UTPs indeed existed, but that they had an overall positive effect on the food supply chain in efficiency terms. There was support for the EU to act on the issue, ranging from 82 % (farmers) and 73 % of Member States; in contrast, 100 % of retailers believed the EU should not act.

The consultation also found that only 5 % of respondents commented on the inclusion or the exclusion of food products in the scope of the initiative, being broadly in favour of inclusion. Some 41 % commented on the extent to which food-supply-chain operators should be included, with 82 % in favour of covering the full supply chain. Some 57 % of respondents from the processor sector were also in favour of covering the full supply chain.

The fear factor was mentioned by 20 % of respondents, who believed that it existed and was a significant factor. Over 60 % favoured the possibility of making anonymous complaints, and while over 90 % believed sanctions should exist for those practising UTPs, 8 % believed they should not. Some 17 % of those responding mentioned cooperation between Member State authorities, with most being supportive of cooperation.

The Commission proposal is a response to repeated requests by Parliament, its AGRI committee in particular, to address imbalances in the food supply chain so as to ensure fair earnings for farmers; wider choice for consumers; and more transparency in the trade relations among food producers, suppliers and distributors. While there are currently no specific EU-level rules governing UTPs, much work has been done over a number of years. In 2009, the Commission highlighted the issue in its [communication](#) on a better functioning food supply chain. UTPs were also mentioned in 2010 when [the High Level Forum on the Better Functioning of the Food Supply Chain](#) was established. This led in turn to the [principles of good practice](#) (2011) and to the creation of the voluntary [Supply Chain Initiative](#) (2013).

In deciding upon a preferred policy option, the Commission considered the impact of various such options. In its [impact assessment](#) (IA) accompanying the proposal, the Commission presented a

number of policy options and provided some clarity on the consequences of the choices for the food supply chain and, in particular for the occurrence of UTPs; for ensuring a level playing field; and for the possibility of effective redress being more available. The options considered examined the approach to be taken from a number of standpoints. These included the effect of bargaining power; applicability to all operators; and benefit to third country- as well as EU suppliers. The questions analysed were: first, should UTPs be addressed at the EU-level at all and, if so, to what extent. Second, should they be based on general principles or focus on specific practices? Third, if introduced on an EU-wide basis, should they cover only agricultural products or all food products? Finally, should UTP rules only apply to situations where there is an imbalance of bargaining power, or be applicable to all operators?

An initial [appraisal](#) of the Commission's IA was carried out by the Ex-Ante Impact Assessment Unit at the European Parliamentary Research Service. It provided an initial analysis of the strengths and weaknesses of the Commission document. The conclusions drawn from that appraisal point up issues with a limited evidence base, with the authors finding that data on the problem seem limited and that the definition of the problem is rather incoherent.

Four policy packages were assembled on the basis of the options set out in the Commission document. The baseline situation was where no action would be taken at EU level. Member States would remain free as regards the scope of UTP rules and their enforcement (if any). The four considered options were as follows:

- Option 1 envisaged the introduction of a regulation that would have general coverage and would be applicable to all operators.
- Option 2 saw the use of a directive affecting all operators but having targeted coverage. This option would prohibit specific, relatively concretely formulated and well-defined practices as unfair.
- Option 3 proposed targeted coverage and protection of SMEs by way of a directive. It would be similar to option 2, but would only apply to SME operators with less than 250 staff headcounts and either a turnover below €50 million or a balance sheet total below €43 million.
- Option 4 involved the introduction of a recommendation, which would provide comprehensive guidance or act as a framework recommendation establishing a baseline set of rules. Targeting specific UTPs, it would be applicable to agricultural products and introduce minimum enforcement requirements.

Option 3, which focused on the protection of SMEs and enhanced coordination and enforcement, was selected as the preferred option. It was deemed to be the more effective avenue available to address the defined problem and achieve the objectives set out in the Commission proposal. It was considered to have broader coverage in terms of operators and products, and to possess more extensive enforcement arrangements in addition to its mandatory character.

## The changes the proposal would bring

While the majority of EU Member States already have legislation on UTPs there is little coordination between them. The choice of a directive rather than a regulation aims at leaving the necessary leeway for Member States, while providing an EU-wide framework and ensuring a level playing field. The enforcement authorities of Member States would have to cooperate with each other and the Commission would facilitate this cooperation and manage a website for the exchange of information.

The proposal – which is expected to enter into force in 2020 – allows for a partial harmonisation approach to introduce a minimum standard of protection relating to UTPs across Member States. It provides a list of prohibited UTPs, but classifies them into two groups. The first group are practices that are simply unfair 'as such'; the second – practices that may be acceptable if clearly agreed by the parties, and would become unfair only when applied without agreement.

Four trading practices that fall into the first group would be prohibited:

- a buyer pays a supplier for perishable food products later than 30 calendar days;
- a buyer cancels orders of perishable food products at short notice;
- a buyer unilaterally and retroactively changes the terms of the supply agreement;
- a supplier has to pay for the wastage of food products on the buyer's premises not caused by the negligence or fault of the supplier.

A further four trading practices would be prohibited unless agreed in clear and unambiguous terms in the supply agreement:

- returning unsold food products to the supplier;
- charging the supplier for stocking, displaying or listing their products by the buyer;
- charging the supplier for the promotion of products sold by the buyer;
- charging the supplier for the marketing of products by the buyer.

There will be a requirement on Member States to designate a competent enforcement authority for the prohibited UTPs. The Member States shall confer on this authority the powers, among other things, to pursue investigations; seek relevant information from the parties; decide whether infringements have taken place; and require a buyer to cease the prohibited trading practice. The competent authority will also have powers to impose fines; publish annual reports; and be able to work collaboratively with similar bodies in other Member States.

The proposed directive will also facilitate complainants in addressing their concerns to this competent authority on a confidential basis.

According to the Commission, the proposed directive will bring both costs and benefits. It will facilitate the regulation of cross-border implications, leading to a more complete single market. It will lead to economies of scale in administration and savings in transaction costs, i.e., the costs of doing business across different Member States. However, there will be associated costs that may arise, including those of deviating from each country's social optimum with regard to an acceptable level of regulation; those of switching regimes; and those related to the potential for over-regulation.

## Advisory committees

Consultation with both the European Economic and Social Committee (EESC) and the European Committee of the Regions (CoR) is part of the process. The CoR adopted its [opinion](#) (rapporteur Jacques Blanc, France, EPP) on 4 July 2018. While it welcomes the initiative to combat unfair trading practices, it believes that the proposed directive will not sufficiently improve the situation of farmers. It recommends in particular to broaden the scope of the directive to include all actors in the food chain and to extend the list of prohibited practices, also introducing a prohibition in principle in order to be able to respond to possible new unfair practices in future.

The EESC has appointed Peter Schmidt (Workers' – Group II, Germany) as rapporteur, with work on the opinion now well advanced.

## National parliaments

National parliaments can raise objections to legislative proposals. The deadline for [responses](#) was 15 June 2018. The Swedish Parliament submitted a [reasoned opinion](#), in which it considered that the directive conflicted with the principle of subsidiarity. Responses were also received from three other national parliaments (Germany, Romania and Portugal), which were broadly supportive of the approach taken.

## Stakeholders' views<sup>2</sup>

Upon the proposal being announced, the EU's largest farm lobby, [Copa-Cogeca](#), welcomed the proposal as a 'step in the right direction' that still needed to go further. In previous commentaries, they noted that farmers [receive](#) on average just over 20 % of the share of the value of agricultural products, with 28 % going to processors and 51 % to retailers. CEJA – the Young Farmers body – also lent [support](#), but urged legislators to adopt the proposals in a timely manner.

There was a [positive response](#) for the proposals from the International Federation of Organic Agriculture Movements (IFOAM). They stated that the proposed regulation would go towards improving fairness, but encouraged timely adoption. A joint [statement](#) by stakeholders, among them the Fair Trade Advocacy Office (FTAO), welcomed the proposal as a first step to eradicate unfair trading practices in the food supply chain.

[FoodDrink Europe](#) also commented on the proposal, welcoming the report tabled by Parliament's rapporteur and the fact that it sought to extend the scope of the original Commission document.

## Academic views

In conjunction with DG AGRI, the JRC organised a workshop on unfair trading practices in the food supply chain in July 2017. A sizeable number of participants came from universities across the EU as well as from the US. As a result of this workshop, the technical report produced and referred to in the present document confirmed the existence of UTPs in the food supply chain and referenced the extensive regulatory and analytical work on the topic.

## Legislative process

In Council, the proposal was debated at the 16 April 2018 meeting of the Agriculture and Fisheries Council. The Bulgarian Presidency welcomed the aim to strengthen the position of farmers in the supply chain and to ensure their protection against bigger and more powerful players, and declared that the Council is ready to work constructively with the Parliament to have the directive adopted as soon as possible. The [Austrian Presidency](#), while presenting its priorities to members of the AGRI committee on 10 July, confirmed that the proposal on unfair trading practices is one of these priorities.

The dossier is being dealt with by the Council's Working Party on Horizontal Agricultural Questions (Unfair Trading Practices). At its meetings so far, the working party has carried out a technical examination of the provisions of the directive and of the impact assessment. A presentation of the proposal and an exchange of views in Council's Special Committee on Agriculture (SCA) took place on 23 April 2018.

On 31 May, the Bulgarian Presidency presented a revised text of Article 8 of the proposal and of the corresponding recitals, based on the discussions in the SCA and in the working party. It proposes to clearly outline two possibilities for Member States to maintain or introduce national rules that: 1) go beyond the minimum harmonised standard of protection in the proposed directive; and 2) aim at combating UTPs outside the scope of the directive. This revised text will now be discussed by the SCA.

In the Parliament, the dossier is being dealt with by the Committee on Agriculture and Rural Development (AGRI), where Paolo De Castro (S&D, Italy) was appointed rapporteur. The Committee for Internal Market and Consumer Protection (IMCO) is an associated committee under Rule 54; the rapporteur for an [opinion](#) on behalf of IMCO is Marc Tarabella (S&D, Belgium). The Environment, Public Health and Food Safety Committee (ENVI) and the Development Committee (DEVE) should also give opinions, with Pilar Ayuso (EPP, Spain) and Linda McAvan (S&D, UK) respectively as rapporteurs. On 18 June, the AGRI [draft report](#) was published. It expresses support for the proposal as a long-expected legislative instrument to defend agricultural producers' bargaining position in the agricultural and food supply chain. A number of amendments (60) have been put forward,

including on extending the scope to suppliers in the food supply chain that are not SME's; including a definition of 'unfair trading practice'; and extending the scope to all agricultural products in order to include the horticultural sector, feed industry, and other agricultural sectors not falling under food production. The presentation of the report in the AGRI committee took place on 10 July 2018. In the exchange of views with Members and a Commission representative, the issue of extending the scope was discussed in particular. On the dossier in general, there was a general consensus that the procedure should be completed as soon as possible to reach an agreement before the end of the year.

The vote in the AGRI committee is scheduled for October 2018.

## EP SUPPORTING ANALYSIS

Vikolainen V., [Initial Appraisal of the Commission Impact Assessment](#), EPRS, European Parliament, July 2018.

[Unfair Trading Practices in the Business-to-Business Food Supply Chain](#), study by Policy Department for Economy and Scientific Policy, European Parliament, September 2015.

## OTHER SOURCES

[Unfair trading practices in business-to-business relationships in the food supply chain](#), Legislative Observatory (OEIL), European Parliament.

[Unfair trading practices in the food supply chain](#), Legislative Train Schedule, European Parliament.

## ENDNOTES

- <sup>1</sup> No UTP legislation: Estonia, Luxembourg, Malta, Netherlands. Limited scope legislation: Belgium, Denmark, Finland, Sweden. Specific legislation on UTP: Austria, Bulgaria, Croatia, Cyprus, Czech Republic, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, United Kingdom.
- <sup>2</sup> This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'EP supporting analysis'.

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