

UNFAIR TRADING PRACTICES:

Why EU level legislation is not the right solution to tackling potential problems.

Unfair Trading Practices (UTPs) have been categorized by the European Commission as practices that deviate grossly from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on another. Assessment of their occurrence within the food supply chain has been ongoing since 2009, with little objective evidence whether they are indeed a widespread phenomenon found to date. To mitigate the potential for UTPs to arise, ERRT, along with other retail associations, manufacturers, cooperatives and agricultural traders established, in 2013, the Supply Chain Initiative (SCI).

In 2015, the Commission conducted a further assessment of UTPs and particularly the performance of the SCI as a solution to tackling UTPs, with the outcome that they do not see the need for EU-level legislation at present¹. Whilst ERRT appreciates this outcome, we wish to stress the efforts of our members towards drastically reducing the potential for UTPs to arise in their commercial relationships.

Competition between retailers to attract consumers is extremely high

The retail sector is in a unique position in the European economy. More than the players in any other sector, retailers are in constant contact with hundreds of millions of consumers across Europe. Retail companies depend on consumers' daily decisions on where to shop. Competition between retailers to attract consumers is extremely high, explaining retailers' constant attention to range, quality, price, convenience and other factors that are important for customers. This competition delivers constant value improvements and continuously improves consumer purchasing power.

Innovation is at the core of retailing

Consumers demand new, innovative products and services all the time. Retailers who fail to react to consumer trends will cease to remain attractive to their existing and prospective consumer base, and risk losing out to their competitors. In a highly competitive market like retail, the ability to offer innovative products and services is a way for retailers to gain a competitive edge over their competitors by offering customers ever greater quality, value and sustainability. As a result, innovation is at the core of retailing and retailers therefore play a key role in enabling the EU's innovation system to deliver growth and jobs.

To achieve this, every retailer needs to work closely with thousands of suppliers to cultivate long-standing relationships and therefore have a vested interest in not allowing UTPs to affect



Retailers have a vested interest in preventing UTPs from disrupting their commercial relationships

commercial relationships with their suppliers. Many retailer-supplier relationships have grown into successful partnerships over many years, benefiting consumers, producers and retailers.

Therefore, UTPs have no effect on this central role of retailers as innovators. Insofar as suppliers are concerned, if a particular contract reduced a supplier's ability to innovate, this would also be to the detriment of the retailer who relies on the innovation of its suppliers to keep its competitive edge in the consumer market.

The special nature of the food supply chain and the numerous actors contained within it must be taken into account

There are a vast number of food supply chains, each of which has its individual specificities. There is a potential for UTPs to occur at any point in the food supply chain and a number of small market operators do not in fact deal directly with retailers.

For example, when agricultural products are scarce, some farmers can become selective about who they supply and at what price, even if a contract exists. Given the unpredictability of primary food production, in practice there is usually an unforeseen circumstance to contend with, with potential feed-through effects throughout the food supply chain. Thus, climatic conditions and fluctuating commodity prices could affect the ability of contracting parties to supply,ⁱⁱ unforeseen transport impediments (e.g. strikes, technical breakdowns) can lead to unexpected supply shortages which have to be dealt with effectively to ensure continued security of food supply. Yet in addition to unforeseen circumstances, some suppliers attempt to deliberately overcharge retailers in order to create a basis to negotiate additional 'services' from the retailer that aim to advance that supplier's exposure in store. Therefore, the special nature of the entire food supply chain must be taken into account when assessing UTPs.

A fundamental challenge of addressing UTPs is to objectivise the definition of 'unfair'

Whether a situation leads to an outcome that can be considered "unfair" depends significantly on the personal perception from those involved in contractual negotiations of what is fair and what is not. Thus, it is easy – and human – to classify a situation as unfair. This does not, however, mean that this classification withstands objective scrutiny; neither does it mean that the blame for such perceived unfairness is justly apportioned to another actor in the food supply chain. Therefore, large proportions of market actors feel that they are subject to unfair practices and this should be checked against objective criteria that assess whether the reported "unfairness" is a justified classification in the first place. It follows that the fundamental challenge of addressing UTPs is to objectivise the definition of "unfair".

The debate surrounding UTPs is emotional, unsubstantiated and is related to other equally pressing, but not wholly relevant, policy issues

Fear of compromising commercial relationships can come from any actor in the food supply chain

Analysis of UTPs has found that parties in a commercial relationship may experience a "fear factor" whereby a party fears compromising its commercial relationship when complaining openly to authorities about UTPs. Retailers are

The fear of retaliation can best be addressed through self-regulation, and notably through the participation of producers, to foster an atmosphere of mutual trust

sympathetic to the fear factor suppliers may feel they face in regards to reporting UTPs but wish to stress that fear of compromising commercial relationships can come from any actor in the food supply chain, not purely small market operators.

As mentioned, retailers' commercial relationships with suppliers are critical in maintaining their competitiveness. Therefore, the fear when complaining to authorities can likewise exist for retailers as well as small market operators. It should

also be noted that it has not yet been explained how any "fear factor" would limit the choices of suppliers to switch to another business partner. The emergence of outsourced manufacturing means that more options to supply others are available today than ever before. In addition, the Single Market and increasing globalisation now mean that even smaller suppliers can be successful in finding the most suitable business strategy and business partners.

Retailers have introduced a number of positive principles through the Supply Chain Initiative

To address the potential for such practices to occur, retailers have introduced a number of positive principles through the Supply Chain Initiative (SCI). These include stimulating cultural change through staff training and participation in dispute resolution mechanisms, as detailed by the principles of good practiceⁱⁱⁱ, to develop increased fairness in commercial relations. In response to a survey 64% of retailers have found that implementing these principles has allowed them to improve their daily communication with trading partners.^{iv}

Furthermore, the EU Commission has found that national platforms where producer and farmers organisations participate are the most effective at overcoming the potential "fear factor" experienced by suppliers.^v The presence of such organisations allows an atmosphere of mutual trust to develop where the potential for a fear factor is alleviated. Therefore, we also encourage these organisations to partake in such platforms to ensure an atmosphere of mutual trust is established to foster the courage to counter the fear of speaking up.

Recent activity within the European Parliament has merged the understandably emotional issue of prices received by producers with UTPs^{vi}. However, this has the negative effect of solely targeting retailers as the actor within the food supply chain who may be guilty of UTPs. As highlighted, UTPs can be used by all actors along the food supply chain for a variety of reasons. Given the European Commission's recent assessment of UTPs, whereby retailers' proactive efforts through the SCI were strongly recognized, we believe the debate should shift from an emotional nature to an objective analysis. This would have the effect of focusing efforts towards a solution to UTPs rather than attempting to negatively merge separate policy issues for political gain.

There is no need for EU-level legislation

A recent analysis of UTPs in Europe by the European Commission has found that there is at this moment no need for EU-level legislation.^{vii} We welcome this assessment and strongly believe that the SCI is a viable, and more effective, alternative to burdensome legislation which will fracture, rather than maintain and enhance relationships across the food supply chain. We therefore appreciate the solution for tackling UTPs put forward by the Commission, which more

The SCI supports the continuation of commercial relationships and avoids supply chain disruption

specifically is to strengthen awareness of voluntary mechanisms, such as the SCI, among all actors in the food supply chain and to establish national voluntary platforms or schemes in all member states of the European Union.

Establishing national platforms across all EU Member States is the solution to tackling UTPs

At present there are a number of national platforms and other initiatives inspired by or implementing the SCI in no less than 15 European countries.

Via our role within the Governance Group of the SCI we will continue to actively promote and raise awareness to facilitate the uptake of

these platforms/schemes in the remaining EU Member States to provide solutions for all European market operators.

Creating an atmosphere of mutual trust is vitally important

As mentioned, creating an atmosphere of mutual trust is vitally important to address the fear factor that many small, but also big, market operators may feel.

68% of the 1202 national operating companies registered to the SCI are SMEs (status: January 2016)^{viii}. We will strive to increase this number to

facilitate the necessary environment required for market operators to address their issues. Moreover, the involvement of all market operators and their representatives within national platforms and within the SCI demonstrate the most efficient means of addressing and solving UTPs at the present time. In particular the presence of farming organisations in such platforms has the benefit of allowing the members they represent to feel confident enough to raise the potential unfairness they may feel they have experienced and address it.

To conclude, we believe that when analysing the nature and scope of UTPs, the special nature of the food supply chain needs to be taken into account and the debate should focus on objective analysis rather than merge with other equally pressing policy issues.

Solving the prevalence of UTPs in the supply chain can be fostered by objectivising the definition of “unfair”, strengthening current, and establishing new, national platforms across all EU Member States.

The participation of all actors within the food supply chain, including farmers and producers, in the SCI and national platforms, will help create the atmosphere of mutual trust required to address and solve such practices.

ⁱ www.supplychaininitiative.eu

ⁱⁱ [Drivers and uncertainties: their relevance for the 2025 Outlook](#), Dec. 2015, Tassos Haniotis, DG Agriculture

ⁱⁱⁱ [Principles of Good Practice in vertical relationships in the Food Supply Chain](#), Nov. 2011

^{iv} [The Supply Chain Initiative: 2nd Annual Report](#), Jan. 2016, p. 31

^v As demonstrated in the Belgian and Dutch national platforms and the subsequent withdrawal of farmers

from the Finnish platform which the Commission described as a “setback” that will not help deliver tangible results in the near future

^{vi} *OPINION of the Committee on Agriculture and Rural Development for the Committee on the Internal Market and Consumer Protection on unfair trading practices in the food supply chain [2015/2065(INI)]*

^{vii} *Final EU Commission report on unfair business-to-business trading practices in the food supply chain [COM(2016) 32]*

^{viii} [The Supply Chain Initiative: 2nd Annual Report](#), Jan. 2016, p. 5