

Unfair trading practices in the food supply chain

Impact assessment (SWD(2018) 92, SWD(2018) 93 (summary)) accompanying a Commission proposal on unfair trading practices in business-to-business relationships in the food supply chain (COM(2018)173)

This briefing provides an initial analysis of the strengths and weaknesses of the European Commission's [impact assessment](#) (IA) accompanying the above-mentioned [proposal](#), submitted on 12 April 2018 and referred to Parliament's Committee on Agriculture and Rural Development.

Unfair trading practices (UTPs) are broadly defined as practices which grossly deviate from good commercial conduct, and are contrary to good faith and fair dealing.¹ UTPs are unilaterally imposed by one trading partner on another (business-to-business). According to the IA, there are strong indications that UTPs occur frequently in the EU food supply chain and that they can be detrimental mainly to smaller operators such as agricultural producers and small- and medium-sized enterprise (SME) processors of food products (IA, p. 7). The existing legislative instruments are considered not to address UTPs effectively, as most UTPs do not fall under competition law rules and the legislation on unfair commercial practices is applicable only to business-to-consumer relations.² The discussion about UTP measures at the EU level dates back to 2009. Among the recent (2016) relevant documents, a European Parliament resolution,³ a European Economic and Social Committee report⁴ and Council conclusions⁵ have all called on the Commission to propose an EU-level framework concerning UTPs in the food supply chain. The proposal was included in the [2018 Commission work programme](#) (CWP) under the [new initiatives](#) aimed at a deeper and fairer internal market with a strengthened industrial base.

Problem definition

The IA identifies **two problems** (IA, pp. 11-15):

1 Occurrence of UTPs in the food supply chain

According to the IA, there is a wide-spread consensus that UTPs occur throughout the food supply chain. Consultation results show that 94 % of farmers, 95 % of agri-food cooperatives, and 96 % of manufacturers of food products report to have been subject to at least one UTP – while only 12 % of retail sector organisations agreed or partially agreed that UTPs existed in the food chain (IA, p. 13). This is confirmed, among other sources, by a voluntary [Supply Chain Initiative](#),⁶ Joint Research Centre (JRC) reports, an open public consultation, and dedicated research and surveys carried out by the Commission. UTPs may manifest themselves as: 1) one party unfairly shifting its own costs or entrepreneurial risks to the other party; 2) one party asking another party for advantages or benefits of any kind without performing a related service; 3) one party making unilateral and/or retroactive changes to a contract; and 4) unfair termination of a contractual relationship or unjustified threat thereof (IA, p.7). Smaller operators, such as agricultural producers and SME processors of food products, are particularly vulnerable to UTPs. This is because they often lack full access to market information, many of their products are perishable, which means that there is time pressure to get the goods through the supply chain, and the alternatives for getting them to consumers are limited.

2 Under-protection against UTPs

According to the IA (p. 13), treatment of UTPs differs greatly across Member States:

20 Member States⁷ have specific legislation on UTPs; 4 Member States⁸ have limited scope legislation, mainly following a consumer-type UTP approach; and 4 Member States⁹ have no UTP legislation. Under-protection is also related to the variety of enforcement measures. For example, in Germany competition authorities are entrusted with ensuring the respect of fair trading rules, while in France there are dedicated UTP authorities and in the UK there is an ombudsman-type system. In some Member States, administrative authorities other than ordinary courts have powers to enforce rules addressing certain UTPs, conduct own initiative investigations and/or receive confidential complaints.

There are **three underlying drivers** of the two problems, according to the IA (pp. 20-22):

1 Imbalance of bargaining power

The food supply chain is characterised by considerable differences in the bargaining power of its operators. Farmers, small processors, small traders or small retailers often have little bargaining power and few alternative options for selling (or buying), while large food processors and increasingly concentrated retailers are able to use considerable power to shape a commercial relationship.

2 Divergence of UTP rules

The heterogeneity of legislative and enforcement measures means that UTPs are not tackled equally in all Member States. In the absence of a common framework, there is no required minimum level of protection in Member States.

3 Lack of coordination among the Member States' enforcement authorities

[The High-Level Forum on the Better Functioning of the Food Supply Chain](#) facilitates the exchange of views on regulatory approaches and enables the gathering and comparing of data, providing a perspective which transcends national boundaries. However, according to the IA, it cannot replace a coordination mechanism of technically competent authorities such as, for example, in the field of competition. The voluntary supply chain initiative has promoted cultural change concerning UTPs in the food supply chain and offers amicable dispute resolution options, but it cannot replace enforcement.

The IA provides a schematic overview of the problems, their drivers and consequences (p. 11). However, this overview does not clarify the link between its main elements. Moreover, the discussion of general problem 2 in the IA seems to overlap with problem drivers 2 and 3. The consequences of the problems, according to the IA, are threefold: 1) the transfer of excessive risk and costs to weaker parties; 2) diminished part of added value in the food supply chain for weaker parties; and 3) dissimilar business conditions for operators in the EU. The IA does not elaborate upon the problem consequences; instead, it contains a section discussing the 'harm caused by UTPs'. Here, the IA reports that smaller operators are particularly prone to being victims of UTPs, but there is little empirical data going beyond a few case studies, making it difficult to establish the overall harm (p. 15). Evidence concerning the net impact of UTPs on consumers and innovation is inconclusive (p. 19) and the evidence about the effects of concentration of suppliers and retailers is mixed (p. 20). The discussion of the problems and their drivers is supported by JRC reports, OECD data, Member State sources, open public consultation results and literature sources.

Objectives of the initiative

The three **general objectives** of the Commission proposal are defined as follows (IA, p. 34):

- 1 Contribute to the Common Agricultural Policy (CAP) goals of fair standard of living for people engaged in agriculture and providing for similar conditions for trade;
- 2 Strengthen the resilience of weaker operators in the food supply chain, in particular farmers;
- 3 Improve the functioning of the food supply chain.

To achieve the general objectives, the following **specific objectives** have been developed (IA, p. 35):

- 1 Reduce the occurrence of UTPs;
- 2 Contribute to a level playing field;
- 3 Enable effective redress.

The specific objectives align with the problems identified, although this is unclear due to the overlap between the first problem and several problem drivers. The CAP is not presented as part of the problem definition, so general objective 1 seems disconnected from the other objectives. According to the IA, all specific objectives relate to the general objective 3, while specific objectives 1 and 3 would contribute to general objective 2. The presentation of the problems, the general and specific objectives is rather confusing. The IA provides monitoring indicators for the specific objectives and the data sources for the indicators (p. 70). However, it does not set operational objectives under the preferred option, nor does it set time-bound (SMART) objectives, as the Better Regulation (BR) Toolbox ([Tool #16](#)) requires.

Range of options considered

The IA starts by considering plausible alternatives to address the following issues (IA, p. 37):

- Whether UTPs should be addressed at the EU level and if so, to what extent (baseline; partial or detailed harmonisation; detailed harmonisation discarded - see page 5 of this briefing);
- Scope of UTP prohibition (principle-based or specific UTP prohibition);
- Coverage of products (agricultural and/or processed agricultural products);
- Coverage of operators (small operators, all operators, benefiting third country suppliers or EU suppliers);
- Enforcement (minimum enforcement or minimum enforcement 'plus');
- Coordination (network of competent authorities);
- Instrument (recommendation, regulation or directive).

It refers to the above alternatives as '**options**' and assembles them into four '**policy packages**':

	Package 1	Package 2	Package 3	Package 4
Scope of UTP rules	Principle-based	Specific UTPs	Specific UTPs	Specific UTPs
Coverage of products	Agricultural and processed agricultural	Agricultural and processed agricultural	Agricultural and processed agricultural	Agricultural
Coverage of operators	All operators	All operators	SMEs across the chain	SMEs across the chain
Enforcement	Minimum 'plus'	Minimum 'plus'	Minimum 'plus'	Minimum
Coordination	Network of competent authorities	Network of competent authorities	Network of competent authorities	Baseline (High-Level Forum)
Instrument	Regulation	Directive	Directive	Recommendation

Source: IA, p. 67.

The IA does not set out the content of the option packages in a clear manner, but refers the reader back to the options section, which discusses the plausible alternatives. The reader has therefore to deduce the content of the options by going back and forth between the sections. This was done for the summary of the option packages presented below (IA, pp. 37-51).

➤ **Baseline – no action at EU level**

Under the baseline option, common measures would not be introduced at the EU level. Member States would remain free as regards their choices concerning the scope of UTP rules and their enforcement, if any. The High-Level Forum on the Better Functioning of the Food Supply Chain would continue to provide a platform for discussing UTP (governance) developments, including the Supply Chain Initiative (its mandate extends through to 2019). According to the IA (pp. 22-23), the incentives for operators with significant bargaining power to apply UTPs are not likely to abate and the degree of concentration of business in retail, processing and manufacturing will continue to increase, subject to competition law constraints. By the same token, consolidation of agricultural production will remain very limited, due to social, geographical and economic constraints.

➤ **Option package 1 - general coverage, all operators (regulation)**

In this option package, UTP rules would operate via a generally formulated prohibition of unfair conduct in business-to-business relations in the food supply chain. Such a general prohibition could be based on the general principle of 'fair dealing' and paired with indicative examples of UTPs. The IA estimates that such general prohibition could have a strong harmonising effect thanks to a common definition at EU level that would cover UTPs in general and not only those specifically enumerated in the list. UTP rules would cover all food products traded in the food supply chain, both agricultural products and processed agricultural products. UTP rules would protect all operators in the chain regardless of their size. Minimum enforcement 'plus' would comprise the following requirements: 1) designation of a competent authority; 2) ability to carry out own initiative investigations; 3) ability to receive and treat complaints confidentially; 4) ability to receive complaints by associations of operators; 5) ability to impose fines; 6) ability to publish results of an investigation; 7) mutual assistance in transnational cases. A coordination mechanism between competent authorities would enable the creation of a network of competent authorities that could usefully accompany the EU rules and their coordinated application, facilitate an exchange of best practices and collect data through Member State reporting that would inform an evaluation and possible adjustment of the measures. A similar mechanism exists in the area of competition law (the European Competition Network). A regulation, according to the IA, can adopt a minimum harmonisation approach while leaving Member States room to act beyond the minimum harmonisation it lays down (IA, p. 51).

➤ **Option package 2 - targeted coverage, all operators (directive)**

Option package 2 would be the same as option package 1, except it would prohibit specific, relatively concretely formulated and well-defined unfair practices, by means of a directive. Inspired by the Supply Chain Initiative and the results of the open public consultation, the IA proposes the following six practices to be defined as UTPs: 1) unilateral changes of contracts; 2) last minute order cancellations; 3) claims for wasted or unsold products; 4) payments for perishable products later than 30 days; 5) claims for contribution to marketing campaigns of retailers; and 6) upfront payments to secure contacts. According to the study quoted in the IA, a significant number of Member States cover these practices already (IA, p. 41), and a directive could leave leeway for Member States to act beyond the minimum results it stipulated (IA, p. 51).

➤ **Option package 3 - targeted coverage, protection of SMEs (directive)**

Option package 3 would be the same as option package 2, but would apply only to SME operators, i.e. micro, small and medium-sized enterprises with less than 250 staff and either a turnover below €50 million or a balance sheet total below €43 million. Commercial relationships between large operators would not be covered under this approach. Sales of food products by an SME supplier to a non-SME buyer would be covered (IA, p. 46).

➤ **Option package 4 - targeted coverage, protection of SMEs (recommendation)**

The recommendation foreseen under this option package could provide comprehensive guidance or act as a framework recommendation establishing a baseline of rules. Such guidance or framework would target specific UTPs, apply to agricultural products (not to processed agricultural products) and

SMEs, and introduce minimum enforcement requirements such as: 1) designation of a competent authority; 2) ability to carry out own initiative investigations; and 3) ability to receive and treat complaints confidentially. The coordination mechanism would remain as in the baseline, i.e. the High-Level Forum and the Supply Chain Initiative.

The IA **discarded** two policy options. These are summarised below, together with the reasons why they were discarded:

- Detailed harmonisation of substantive UTP rules: this would encounter resistance from Member States and raise subsidiarity concerns, since there is too little overall convergence of national rules to justify detailed harmonisation (IA, pp. 37-38);
- Centralised enforcement via an enforcement body at EU level, for instance the Commission: this would not seem appropriate in that differences of substantive rules in Member States would remain (IA, p. 47).

The content of the option packages is not outlined in depth. Moreover, the IA states that "other combinations [of options] would have been possible, but some choices have to be made in order to carry out the comparative exercise. In any case, the European Commission can decide on any different 'mix and match" (IA, p. 66). This gives the impression that not all reasonable 'option packages' were identified, or they were identified only for the sake of a comparative exercise. **The preferred option package is package 3.**

Scope of the impact assessment

The IA provides a general discussion of the economic, social and environmental impacts (pp. 52-61). Economic impacts are discussed for operators, consumers (including innovation) and Member States. Quantification of economic impacts was not feasible due to the lack of robust empirical and quantitative data, so only general estimates were provided. For instance, the magnitude of possible costs of UTPs and hence the benefits of the proposed action would range between a total of €2.5 and €8 billion for both agriculture and food processing SMEs (p. 53). Based on the general discussion of impacts, the IA makes a qualitative assessment of the effectiveness and efficiency of the alternatives or options (pp. 61-66 and Annex E). Then, it compares the effectiveness and efficiency of each option package and concludes that option package 3 has the best scores. The options are not compared in terms of coherence and proportionality as required in the [BR Guidelines](#).

Subsidiarity / proportionality

According to the IA, Article 43 TFEU, which entrusts the Union legislator with the legal powers to establish a common organisation of agricultural markets in the EU, can serve as the legal basis for measures covering UTPs occurring in the food supply chain in relation to the trade of food products originating from agricultural producers (IA, p. 28). The IA contains an assessment of the added value of EU action to address UTPs (pp. 28-33). The starting point of the assessment is the recommendations of the [2016 Commission report](#), which concluded that given the positive developments regarding UTPs in parts of the food supply chain, there was no need to act at the EU level at that time.¹⁰ However, most of the 2016 Commission recommendations were not followed up, except for the exchange of information and best practices between the Member States. Similarly, the Supply Chain Initiative has only partially followed up on the recommendations. The EU added value assessment provided in the IA covered a rather short period of two years (2016-2018).

The IA does not examine the regulatory option packages in the light of the principles of proportionality and subsidiarity. For the preferred option package, it mentions that, as regards proportionality, the UTP approach would take into account mutually beneficial efficiency gains deriving from ex-ante arrangements between parties in specific situations. The choice of a directive under the preferred option package is also mindful of subsidiarity (IA, p. 69). The Swedish Riksdag has submitted a reasoned opinion on this proposal stating that it conflicted with the principle of subsidiarity. The deadline for submissions by national parliaments was 15 June 2018.¹¹

Budgetary or public finance implications

According to the proposal's explanatory memorandum, it would have a limited impact on the EU budget (one annual coordination meeting of Member State enforcement authorities in Brussels and the website for information exchange with the Commission). As for the impacts on national budgets and administrations, administrative costs would be limited for the Member States that already have some form of UTP rules in place. For other Member States costs would be somewhat higher, but the experience from the Member States that already have UTP competent authorities shows that implementation costs are generally low and can be absorbed by existing structures, according to the IA (pp. 60-61). The IA estimates the set-up costs to vary between €32 000 and €3 million and the annual operation costs between €10 000 and €2.9 million depending on the size of the country and the level of ambition of the current UTP legislation of the Member State concerned (IA, p. 60).

SME test / Competitiveness

According to the IA Annex C (p. 106), SMEs represent 49 % of the turnover and 63 % of total employment in the food supply chain at EU level. Agricultural production is largely comprised of small units and the food processing sector is also characterised by a significant share of SMEs (IA, p. 21), but the IA does not provide more specific information on the share of SMEs in the food supply chain. According to Annex 3 (IA, p. 89), the coverage of SMEs could result in compliance costs for SMEs, although they would not normally be in a position to resort to UTPs. Therefore, the IA finds it safe to assume that compliance costs would be outweighed by the benefits SMEs would enjoy if afforded minimum protection against UTPs in the EU.

Simplification and other regulatory implications

The IA briefly discusses the consistency of the proposed initiative with other EU policies, such as the CAP and competition policy, a recent directive empowering the competition authorities of the Member States, a directive on misleading practices and the requirements of comparative advertising, initiatives in the area of business-to-consumer protection and the Charter of Fundamental Rights of the EU (IA, p. 35). The coherence with the [Late Payment Directive](#) is discussed in more detail on pages 42-43 and Annex D, and coherence with the CAP on pages 9-10 of the IA.

Quality of data, research and analysis

Among the main sources of information are the JRC study on UTPs at Member State level (Annex F of the IA), a contribution of the chief economist of DG Competition (Annex H of the IA) and information collected through stakeholder consultation. In addition, the IA draws on the experiences of the [Supply Chain Initiative](#). The analysis in the IA is predominantly qualitative. The lack of analytical tools in the literature on UTPs is explained, in part at least, by difficulties in assessing data on such practices, due to concerns of operators about disclosing commercially sensitive information (IA, p. 93). The evidence base of the IA is limited, but use has been made of the evidence that does exist. Precise quantification of costs and benefits was not feasible.

Stakeholder consultation

The IA identifies the stakeholders affected by the problem and the proposed initiative as being (business) operators in the food supply chain, public administrations and consumers (IA, pp. 88-92). The following consultation activities were conducted (IA, pp. 82-87):

- 1 Feedback on the inception IA (4 weeks, 66 responses);
- 2 Open public consultation (12 weeks, 1 432 responses);
- 3 Targeted questionnaire to undertakings (5 weeks, 122 responses);
- 4 Targeted questionnaire to consumer organisations (3 responses);
- 5 Questionnaire to Member State public authorities (1 month, 28 Member States);
- 6 JRC academic workshop on UTPs in the food supply chain;

- 7 Ad hoc meetings with food supply chain stakeholders;
- 8 Civil society group dialogues.

The consultation activities appear to have covered a wide range of stakeholders. The open public consultation covered the problem definition, the need for EU action and enforcement. The options do not seem to have been covered. The responses to the open public consultation were broken down by the sector of activity and highlighted the views of the agricultural producers, agro-food sector, trade sector, civil society organisations and retail sector. In the IA report, the stakeholders' views were mainly used to define the problem and the specific UTP practices. A synopsis of the stakeholder consultations is included in the IA (pp. 82-87), in line with the [BR Guidelines](#). Furthermore, the responses to the open public consultation and the targeted questionnaires were published on-line.¹²

Monitoring and evaluation

The IA states that the impact of EU action should be assessed four years after entry into force and provides a non-exhaustive list of possible monitoring indicators (p. 70). The proposal contains annual reporting obligations for the Member States (article 9) and an evaluation requirement for the Commission three years after the date of application of the directive (article 11).

Commission Regulatory Scrutiny Board

The Regulatory Scrutiny Board (RSB) issued a negative [opinion](#) on 23 February 2018. Its main criticisms were that the draft IA report 1) did not explain the reasons for changing the course of action following the [2016 Commission report](#), which deemed that there was no need to act at the EU level at the time; 2) did not sufficiently motivate the use of the CAP legal basis; 3) did not assess the effectiveness of national legislation on UTPs in the food supply chain; 4) did not provide sufficiently detailed options; 5) did not fully test the proportionality of the preferred option; and 6) did not quantify the costs and benefits associated with the preferred option.

In its second opinion, the RSB acknowledged the efforts made to provide supporting analysis to substantiate the need to further address UTPs in the food supply chain, and issued a positive [opinion](#) with reservations on 12 March 2018. Its main criticisms were that the report 1) did not sufficiently clarify what has changed since the 2016 report to justify the current initiative; 2) did not explain how the preferred option will be made operational; and 3) did not show that the preferred option will add value to national schemes and did not quantify the enforcement costs for national competent authorities. Overall, the IA seems to have responded to the comments expressed in the RSB opinions, although the enforcement costs could not be estimated more precisely and operational objectives under the preferred option were not set.

Coherence between the Commission's legislative proposal and IA

The proposal appears to follow the IA's recommendations, in that it is based on the preferred option package 3. The proposal's financial statement, however, sets different specific objectives than those of the IA, listing the latter under 'expected results and impacts' (IA, pp. 26-27).

Conclusions

The overall analysis presented in the IA appears to be significantly constrained by the limited evidence base, although the evidence that does exist has been put to use. The stakeholder consultation activities have largely followed the requirements of the Better Regulation Guidelines. However, the IA report contains a number of weak points. Firstly, the data on the scale of the problem seems limited and the problem definition provided is rather incoherent. The objective of contributing to the goals of the Common Agricultural Policy seems disconnected from the rest of the objectives, as it has not been part of the problem analysis. In addition to this, the presentation of the general and specific objectives is rather confusing. Furthermore, the IA does not set operational objectives under the preferred option, nor does it set time-bound (SMART) objectives, as the Better Regulation Toolbox (Tool #16) requires. The IA does not make clear how the choices were made when comparing option

packages, and does not outline the content of the option packages in a clear manner. It makes a qualitative assessment of the effectiveness and efficiency of the option packages, but does not assess their coherence and proportionality as required in the Better Regulation Guidelines. Finally, precise quantification of costs and benefits of the option packages was not feasible.

ENDNOTES

¹ For further information, see [Unfair Trading Practices in the Business-to-Business Food Supply Chain](#), Policy Department for Economy and Scientific Policy, European Parliament, July 2015.

² [Unfair Trading Practices in the Business-to-Business Food Supply Chain](#), Policy Department for Economy and Scientific Policy, European Parliament, September 2015.

³ [Resolution](#) of 7 June 2016 on unfair trading practices in the food supply chain, European Parliament.

⁴ [Opinion](#) on the 'Report from the Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain', European Economic and Social Committee, September 2016.

⁵ [Council conclusions of 12 December 2016](#) on strengthening farmers' position in the food supply chain and tackling unfair trading practices.

⁶ The Supply Chain Initiative (SCI) is a voluntary initiative developed within the framework of [The High-Level Forum on the Better Functioning of the Food Supply Chain](#). Its members are representatives of the food and drink industry, branded goods manufacturers, the retail sector, SMEs and agricultural traders. The purpose of the SCI is to promote fair business practices in the food supply chain as a basis for commercial dealings. Since its launch in 2013, SCI has led to 1 160 national companies – nearly 70 % of which are SMEs – signing up to the Principles of Good Practice and SCI commitments (IA, p. 23).

⁷ Austria, Bulgaria, Croatia, Cyprus, Czech Republic, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, United Kingdom.

⁸ Belgium, Denmark, Finland, Sweden.

⁹ Estonia, Luxembourg, Malta, Netherlands.

¹⁰ According to the IA (p. 28), this assessment was based on the expectation that the observed positive developments would continue, and in its 2016 report the Commission identified a number of areas in Member States' UTP legislation that needed further improvement.

¹¹ See the Platform for EU Interparliamentary Exchange (IPEX).

¹² [Initiative to improve the food supply chain](#), European Commission website.

This briefing, prepared for the AGRI committee, analyses whether the principal criteria laid down in the Commission's own Better Regulation Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal.

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