



ASSEMBLY OF EUROPEAN REGIONS PRODUCING FRUITS, VEGETABLES AND ORNAMENTAL PLANTS

ASSEMBLÉE DES RÉGIONS EUROPÉENNES FRUITIÈRES, LEGUMIÈRES ET HORTICOLES

ASSEMBLEA DELLE REGIONI EUROPEE FRUTTICOLE ORTICOLE E FLORICOLE

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AREFLH Position Paper on the European Commission's Public Consultation on the initiative to improve the food supply chain

The **Assembly of European Regions producing Fruits, Vegetables and Ornamental Plants'** (AREFLH) main missions are:

- to represent its 20 member regions and 23 AOPs, from 7 European countries;
- to defend the economic and social interests of the fruit, vegetable and horticultural sectors in Europe;
- to foster exchanges of best practices, partnerships and joint projects between regions and professional organisations;
- to actively seek new solutions for the main issues affecting the future of the fruit and vegetables production in Europe.

This paper has been developed to put forward AREFLH's recommendations in regards to a potential proposal of an EU legislative framework or other non-legislative measures in the area of unfair trading practices by the European Commission¹.

1- Introduction

A. Unfair Trading Practices in Europe: impact on the Food Supply Chain and current challenges

In the EU, the **food supply chain** ensures the delivery of food and drink products to the general public for personal or household consumption and **encompasses all actors in the agri-food chain**, from the agricultural producers, industry processors and retailers down to the end consumers. Before a product reaches the consumer, these actors add to its value and have an impact on the final price paid by the consumer. The **Single Market has brought major benefits to operators in the food supply chain** - particularly to suppliers and retailers - which have taken advantage of the greater market opportunities deriving from it.

However, over the past few decades, developments such as the **substantial growth of large-scale retail**, the strengthening of its contractual power over upstream suppliers and the vertical integration of market participants across the EU have led to **structural changes in the food supply chain**. These developments have contributed to a situation of significantly different levels of bargaining power and **economic imbalances in individual trade relations between the actors in the chain**. While differences in bargaining power are common in commercial relationships, the abuse of such differences may lead to **unfair trading practices (UTPs)**, which are considered to be *'practices among commercial partners that grossly deviate from good commercial conduct, are contrary to principles of good faith and fair dealing and are unilaterally imposed by one trading partner on its counterpart'*².

Over the last few years, several surveys taken at both national and European level have demonstrated that **UTPs occur frequently between actors in the supply chain**³ and **cause negative effects** – particularly on small and medium enterprises (SMEs) – by increasing costs, hampering investment and innovation and by generally affecting

¹ https://ec.europa.eu/info/sites/info/files/2017_07_31_consultation_strategy_en.pdf

² <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0472&from=EN>

³ Survey on Unfair Commercial Practices in Europe, March 2011, organised on behalf of CIAA and AIM, Report on the relations between manufacturers and retailers in the food sector, Comisión Nacional de la Competencia, October 2011, Indagine conoscitiva sul settore della GDO, August 2013

an actor's capacity to operate successfully in the market. Furthermore, **UTPs also have harmful consequences on the whole EU economy** by reducing the variety of choices made available to consumers and depressing intra-EU trade, thus disrupting the proper functioning of the internal market.

In order to tackle UTPs, and in absence of a European legislative framework, Member States have developed divergent approaches, with some countries encouraging the creation of **voluntary and self-regulatory schemes** and others favouring the **adoption of national regulations** or **no action at all**: the end result displays a 'patchwork' of wide-ranging measures that guarantee a different nature and form of legal protection. Nevertheless, self-regulatory schemes - mainly promoted by the industry - present **major limitations** such as a low participation of producer organisations and the lack of concrete penalties for non-compliance while national regulations appear to be **highly fragmented** within the different Member States. Therefore, the establishment of an **EU-level framework on UTPs** aiming to complement such initiatives and harmonize the existing regulations across the different Member States could represent the **most appropriate tool to tackle unfair trading practices**.

B. Unfair Trading Practices: different typologies

As previously stated, UTPs can be defined as '*practices among commercial partners that grossly deviate from good commercial conduct, are contrary to principles of good faith and fair dealing and are unilaterally imposed by one trading partner on its counterpart*'. **UTPs can be practised under different forms** in the supply chain and can include⁴:

- payments made up to 120 days late, well over the 60-day limit ('pay you later'),
- unilateral and retroactive changes to contracts,
- Imposing contributions to promotional or marketing costs and claims for wasted or unsold products
- compelling suppliers to use certain third-party packaging producers who pay supermarkets a fee for the business they receive
- flat charges that companies levy on suppliers as a requirement for inclusion in a supplier list ('pay to stay'),
- last-minute order cancellations concerning perishable products
- requests for upfront payments to secure or retain contracts ("hello money")
- arbitrary discounts that large firms give themselves for paying early or on time,
- retrospective discounting on outstanding money owed to a supplier,

This **non-exhaustive list of unfair trading practices** that producers encounter clearly illustrates the pressure exerted on them by the large retail chains and represents the main hurdles that hinder producers from earning a fair income, a precondition for guaranteeing stability for farmers.

2- Background Information

Impact of Unfair Trade Practices (UTPs) on Europe's Fruit and Vegetable sector

The **fruit and vegetable sector** is of **strategic importance for EU agriculture** and for its 500 million European citizens. It currently accounts for 21% of the total value of agricultural production in the EU and is worth more than EUR 50 billion. The sector also contributes, both directly and indirectly, to several EU objectives in different areas: economic growth, food safety/security, environmental conservation as well as job creation, with the sector accounting for close to 35% of agricultural employment.

Despite its significance in Europe's agricultural landscape, the **F&V sector constantly faces persisting economic and social challenges** such as the fall of agricultural prices, a decline in consumption and export volumes of F&V as well as repeated market crises (e.g. Russian embargo) to name a few. Amongst these challenges, the sector has also shown to be highly impacted by its **structurally weak bargaining position vis-à-vis large-scale retail** and processing trade. This asymmetry in bargaining power, considerably reinforced by the perishable nature of fresh F&V, puts producers under the risk of unfair trading practices when facing larger and more powerful actors who require contractual arrangements to their advantage, either through better prices, late payments or through improved terms and conditions⁵.

⁴ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2016-0173+0+DOC+XML+V0//EN>

⁵ http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/460043/IPOL-AGRI_ET%282011%29460043_EN.pdf

The majority of F&V in Europe are grown by **small farmers**, which often **struggle to meet the standards required by retailers** in terms of volume, quality and delivery schedules. In order to meet their needs, producers should be able to face strict product safety and quality standards, offer a wide variety of products with high added value and make the necessary investments in equipment and logistics to ensure the timely production and delivery of the product.

Producer organisations (POs) and inter-branch organisations (IBOs) have played a key role in **improving farmer's position** vis-à-vis large-scale retail through their role as **aggregators of production** which allow the planning and enhancement of the supply, thus enabling producers to regain strategic leverage (such as differentiation and recognisability of products) and enter the market in a more competitive position. The collective action deriving from these structures **allows farmers to acquire an economic strength in the market** that would not be likely if acting individually. Similarly, the establishment of collective contracts has revealed itself to be an important coordination tool in the supply chain, allowing actors to agree to a common system of rules.

POs and IBOs therefore constitute an **effective counterbalance to large-scale retail** by taking up a strategic role in restoring balance to the producer-processor/distributor relationships and acting as a successful contractual power and efficient redistributor of added value. Nevertheless, the process of aggregating farmers within POs and IBOs and concentrating the offer has proved to be lengthy and fluctuating. The consequence of this is that **producers still find themselves in a position of weakness** when facing distributors: let's recall that only circa 45% of F&V farmers are regrouped in POs, while the large-scale retail is structured at over 70%.⁶

These factors highly **impact the sector's income and sustainability** and require a renewed approach in order to be successfully addressed. Under these premises, AREFLH highly welcomes the European Commission's initiative to consult stakeholders to identify ways to improve the food supply chain and is pleased to share its opinion and recommendations.

3- Proposals for successfully tackling UTPs

In order to address the above-mentioned challenges and obstacles, AREFLH is pleased to share some recommendations, concrete proposals and innovative ideas to successfully tackle UTPs across Europe:

- 1. Establishing a framework legislation at EU level to tackle UTPs:** AREFLH considers that a **comprehensive EU legislative act is the best way forward** to successfully tackle UTPs across the EU. This legislation should build upon the achievements deriving from voluntary schemes (i.e. Supply Chain Initiative) and national legislative measures (Groceries Code Adjudicator in the UK, Food Supply Chain Commissioner in France) that have proved to improve the functioning of the supply chain. This legislative framework should also **promote cooperation between national authorities and the dissemination of best practices** as well as avoid lowering the protective measures against UTPs that already exist in some Member States. To achieve this, the Commission should also analyse the latter and develop potential models for adaptation while taking into account **national and regional specificities**.
- 2. Creating an open list of UTPs to be prohibited at EU level:** AREFLH believes that an **exhaustive list of forbidden unfair trading practices** should be established and embedded in the future EU legislation on UTPs. This open list should be revised periodically in order to allow the integration of new typologies of UTPs that might arise in the future.
- 3. Designing competent authorities and enforcement bodies to deal with UTPs at national/regional level:** each Member State should **designate an independent competent authority** (if non-existent) that would be able to receive and treat collective/confidential complaints as well as run its own initiative investigations. These authorities, whose actions must be governed by the principles of transparency and independence, should also be granted the power to impose appropriate sanctions when UTPs regulations are violated. AREFLH would also consider a **mediation and support role** in producers/retailers relations for these authorities, to further help parties **build framework contracts** involving most supply chain actors and that would be agreed upon by POs and industry representatives. This framework contracts could establish mutually agreed provisions such as production programming and procedures, delivery dates, sanitary and qualitative parameters, payment methods and deadlines etc...

⁶ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2015-0170+0+DOC+XML+V0//FR>

4. **Facilitate the adoption of compulsory contracts and value-sharing clauses:** AREFLH highly welcomes the new provisions included in the Omnibus proposal which grants farmers the possibility to obtain compulsory written contracts as well as to agree to value-sharing clauses where risks and benefits are shared with the purchasers. However, the Commission should monitor that such tools are effectively implemented and ensure the **accessibility of a mechanism for filing complaints and implementing sanctions**.
5. **Strengthening the role of Producer Organisations and Interbranch Organisations:** POs and IBOs constitute an **effective counterbalance to large-scale retail** by taking up a strategic role in restoring balance to the producer-processor/distributor relationships and acting as a successful contractual power and efficient redistributor of added value. Therefore, their role should be reinforced by facilitating collective bargaining practices - such as the possibility to **establish framework contracts** with large-scale retail through POs operational programmes - as well as developing measures to further encourage **direct marketing of POs products** and the **development of local markets** for the distribution of F&V.
6. **Clarify competition rules for POs and IBOs:** to successfully perform its role as a contractual power able to counterbalance large-scale retail, **POs and IBOs shall be granted the possibility to collectively bargain contracts without violating competition law**, particularly as the latter have been designed in accordance to CAP's objectives (Art. 39 TFEU) and fulfil its provisions by definition. In this regard, whilst welcoming the clarifications present in the Omnibus legislative proposal concerning the derogations from competition rules and the establishment of the 'opinion' mechanism that would allow producers to request an opinion from the Commission on the compatibility of their agreements, decisions and concerted practices with EU competition provisions, AREFLH would like to stress the necessity to **further clarify the provisions related to the exemptions for POs and IBOs from certain competition rules** on joint production, selling or processing agreements (Art. 209 1308/2013) and during periods of severe market imbalances.
7. **Increasing market transparency and provision of information within the agri-food supply chain:** AREFLH believes that **price transmission along the food chain should reflect the value added by producers** and that the price formation for retailers should be as transparent as possible. We therefore welcome the Commission's efforts to improve market transparency and provide actors with accurate information on prices, production, weather etc. through a series of tools such as the EU Market Observatories, the Agricultural Markets Dashboards and the EU Food Price Monitoring Tool. However, the availability, accuracy and timeliness of the data deriving from the latter has been rather limited. In order to improve market transparency, the Commission could introduce the **obligation for all supply chain operators to report a particular set of data**. Additionally, the important role of shared and preventive programming by supply-chain actors could be better supported by the establishment of a **European registry of agricultural land** and by the sharing of information concerning **medium to long-term purchasing forecasts**.