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**A8-0173/2016**

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# REPORT

on unfair trading practices in the food supply chain  
(2015/2065(INI))

Committee on the Internal Market and Consumer Protection

Rapporteur: Edward Czesak

Rapporteur for the opinion (\*):  
Mairead McGuinness, Committee on Agriculture and Rural Development

(\* ) Associated committees – Rule 54 of the Rules of Procedure

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(\*) Associated committee – Rule 54 of the Rules of Procedure

## MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

### on unfair trading practices in the food supply chain (2015/2065(INI))

*The European Parliament,*

- having regard to the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 15 July 2014 entitled ‘Tackling unfair trading practices in the business-to-business food supply chain’ (COM(2014)0472),
- having regard to the report from the Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain (COM(2016)0032),
- having regard to the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 28 October 2009 entitled ‘A better functioning food supply chain in Europe’ (COM(2009)0591),
- having regard to the Commission’s Green Paper of 31 January 2013 on ‘Unfair trading practices in the business-to-business food and non-food supply chain in Europe’ (COM(2013)0037),
- having regard to its Written Declaration 0088/2007 ‘Investigating and remedying the abuse of power by large supermarkets operating in the European Union’,
- having regard to its resolution of 7 September 2010 on fair revenues for farmers: a better functioning food supply chain in Europe<sup>1</sup>,
- having regard to its resolution of 19 January 2012 on imbalances in the food supply chain<sup>2</sup>,
- having regard to the European Economic and Social Committee’s opinion of 12 November 2013 on the Commission’s Green Paper on ‘Unfair trading practices in the business-to-business food and non-food supply chain in Europe’,
- having regard to the opinion of the European Economic and Social Committee on the large retail sector – trends and impacts on farmers and consumers<sup>3</sup>,
- having regard to its resolution of 19 January 2016 on the annual report on EU Competition Policy<sup>4</sup>, particularly paragraph 104 thereof,
- having regard to the Commission Decision of 30 July 2010 establishing the High Level

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<sup>1</sup> Texts adopted, P7\_TA(2010)0302.

<sup>2</sup> Texts adopted, P7\_TA(2012)0012.

<sup>3</sup> OJ C 255, 14.10.2005, p. 44.

<sup>4</sup> Texts adopted, P8\_TA(2016)0004.

Forum for a Better Functioning Food Supply Chain<sup>1</sup>,

- having regard to its resolution of 5 July 2011 on a more efficient and fairer retail market<sup>2</sup>,
- having regard to the study "Monitoring the implementation of principles of good practice in vertical relationships in the food supply chain", produced by Areté srl for the Commission (January 2016),
- having regard to its resolution of 11 December 2013 on the European Retail Action Plan for the benefit of all actors<sup>3</sup>,
- having regard to Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising<sup>4</sup>,
- having regard to Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions<sup>5</sup>,
- having regard to Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market<sup>6</sup>,
- having regard to the UK Groceries Code Adjudicator Investigation into Tesco plc of 26 January 2016,
- having regard to Council Directive 93/13/EEC on unfair terms in consumer contracts<sup>7</sup>,
- having regard to Regulation (EU) No 261/2012 of the European Parliament and of the Council amending Council Regulation (EC) No 1234/2007 as regards contractual relations in the milk and milk products sector<sup>8</sup>,
- having regard to the Supply Chain Initiative progress report of July 2015,
- having regard to the 2012 report from Consumers International entitled ‘The relationship between supermarkets and suppliers: what are the implications for consumers?’,
- having regard to the universal framework for Sustainability Assessment of Food and Agriculture systems (SAFA) developed by the FAO,
- having regard to the extremely critical situation faced by farmers and agricultural cooperatives, especially in the dairy, pig meat, beef, fruit and vegetables, and cereals sectors,

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<sup>1</sup> OJ C 210, 3.8.2010, p. 4.

<sup>2</sup> Texts adopted, P7\_TA(2011)0307.

<sup>3</sup> Texts adopted, P7\_TA(2013)0580.

<sup>4</sup> OJ L 376, 27.12.2006, p. 21.

<sup>5</sup> OJ L 48, 23.2.2011, p. 1.

<sup>6</sup> OJ L 149, 11.6.2005, p. 22.

<sup>7</sup> OJ L 95, 21.4.1993, p. 29.

<sup>8</sup> OJ L 94, 30.3.2012, p. 38.

- having regard to Rule 52 of its Rules of Procedure,
  - having regard to the report of the Committee on the Internal Market and Consumer Protection and the opinion of the Committee on Agriculture and Rural Development (A8-0173/2016),
- A. whereas unfair trading practices (UTPs) are a serious problem, occurring in many sectors of the economy; whereas the Commission's report of 29 January 2016 on unfair business-to-business trading practices in the food supply chain (COM(2016)0032) confirms that those practices can occur at every stage of the food supply chain; whereas the problem is particularly evident in the food supply chain, having adverse effects on the weakest link in the chain; whereas the problem is attested to by all entities in the food supply chain and by many national competition authorities; whereas the Commission, Parliament and the European Economic and Social Committee have repeatedly drawn attention to the problem of UTPs;
- B. whereas ‘unfairness’ in the food supply chain is difficult to translate into infringement of current competition law, as its existing tools are only effective on some forms of anti-competitive behaviour;
- C. having regard to the size and strategic importance of the food supply chain for the European Union; whereas the sector employs over 47 million people in the EU and accounts for around 7 % of gross value added at EU level, and whereas the total value of the EU market for products connected with the retail food trade is estimated at EUR 1.05 billion; whereas the retail services sector accounts for 4.3 % of the EU’s GDP and 17 % of the EU’s SMEs<sup>1</sup>; whereas 99.1 % of undertakings in the food and drink sector are SMEs and microenterprises;
- D. whereas the single market has brought major benefits to operators in the food supply chain, and the food trade has an increasingly significant cross-border dimension and is of particular importance for the functioning of the internal market; whereas cross-border trade between EU Member States accounts for 20 % of the EU’s total food and drink production; whereas 70 % of all Member States’ food exports are to other Member States;
- E. whereas significant structural changes have taken place in the business-to-business (B2B) food supply chain in recent years, involving a high level of concentration and vertical and cross-border integration of entities operating in the production sector, and especially in the processing and retail sectors, as well as upstream to production;
- F. whereas entities involved in the food products supply chain have reported UTPs principally consisting of:
- payment delays;
  - restricted access to the market;
  - unilateral or retroactive changes to contract terms;

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<sup>1</sup> Eurostat, 2010.

- failure to provide either sufficiently detailed or unambiguously formulated information on contract terms;
  - refusal to conclude a written contract;
  - sudden and unjustified cancellation of a contract;
  - unfair transfer of commercial risk;
  - demanding payment for goods or services that are of no value to one party to the contract;
  - charges for fictitious services;
  - transferring transport and storage costs to suppliers;
  - forced involvement in promotions, charging to place goods in prominent positions in shops and other additional fees;
  - transferring to suppliers the costs of promoting goods in sales areas;
  - imposing unconditional return of unsold merchandise;
  - exerting pressure to cut prices;
  - preventing trading partners from sourcing from other Member States (territorial supply constraints);
- G. whereas, given the impossibility of stopping an agricultural production process once it has begun, and the perishable nature of its products, farmers are particularly susceptible to UTPs in the food supply chain;
- H. whereas producers sometimes work at a loss following negotiations with other actors in the food supply chain that put them at a disadvantage, e.g. through supermarket markdowns and reductions;
- I. whereas UTPs occur where there are inequalities in trading relations between partners in the food supply chain, resulting from bargaining power disparities in business relations, which are the result of the growing concentration of market power among a small number of multinational groups, and whereas these disparities tend to harm small and medium-sized producers;
- J. whereas UTPs can have harmful consequences for the individual entities in the food supply chain, particularly in the case of farmers and SMEs, which in turn can have an impact on the entire EU economy, as well as on final consumers by limiting their choice of products and access to new and innovative goods; whereas UTPs may have an impact on price negotiations between enterprises, discourage cross-border trade in the EU and hinder the proper functioning of the internal market; whereas, in particular, unfair practices can result in enterprises cutting back on investment and innovation, including in the fields of environmental protection, working conditions and animal welfare, owing to a reduction in income and a lack of certainty, and may lead them to abandon

production, processing or trading activities;

- K. whereas UTPs are an obstacle to the development and smooth functioning of the internal market, and can seriously disrupt the proper functioning of the market;
- L. whereas UTPs can result in excessive costs, or lower-than-expected revenues for businesses with weaker bargaining power, as well as in overproduction and food waste;
- M. whereas consumers potentially face a loss in product diversity, cultural heritage and retail outlets as a result of UTPs;
- N. whereas SMEs and microenterprises, which make up over 90 % of the EU's economic fabric, are particularly vulnerable to UTPs, and are more affected than large enterprises by the impact of UTPs, which makes it harder for them to survive on the market, to undertake new investments in products and technology and to innovate, and makes it more difficult for SMEs to expand their activities, including across borders within the single market; whereas SMEs are discouraged from engaging in commercial relationships by the risk of UTPs being imposed on them;
- O. whereas UTPs do not only take place in the food supply chain, but just as often in non-food supply chains such as those of the garment industry and the automotive industry;
- P. whereas many Member States have introduced various ways of countering UTPs, in some cases by means of voluntary and self-regulatory schemes and in others through relevant national regulations; whereas this has led to a high degree of divergence and diversification between countries in terms of the level, nature and form of legal protection; whereas some countries have not taken any action in this area;
- Q. whereas some Member States that had initially chosen to counter UTPs by means of voluntary schemes have subsequently decided to address them through legislation;
- R. whereas UTPs are covered only in part by competition law;
- S. whereas European competition law should permit consumers to benefit from a wide range of quality products at competitive prices, while ensuring that undertakings have an incentive to invest and innovate by giving them a fair chance to promote the advantages of their products without being unduly forced out of the market by UTPs;
- T. whereas European competition law should enable the final consumer to purchase goods at a competitive price, but must also ensure free and fair competition between undertakings, notably in order to encourage them to innovate;
- U. whereas the 'fear factor' comes into play in commercial relationships, with the weaker party being unable to make effective use of their rights and unwilling to lodge a complaint about UTPs imposed by the stronger party, for fear of compromising their commercial relationship;
- V. whereas the performance of the food supply chain affects EU citizens' daily lives, given that approximately 14 % of their household expenditure is spent on food;
- W. whereas many actors operate in the food supply chain, including manufacturers,

retailers, intermediaries and producers, and UTPs may occur at different levels of the chain;

- X. whereas the 'fear factor' means that small suppliers will not be able to make effective use of their right, if created, to go to court, and that other, cheap and accessible mechanisms, such as mediation by an independent adjudicator, will better serve their interests;
  - Y. whereas the Supply Chain Initiative (SCI) has major limitations – e.g. there are no penalties for non-compliance and there is no option of lodging confidential complaints – meaning that it cannot be used as an effective tool to combat UTPs;
1. Welcomes the steps taken to date by the Commission to combat UTPs with a view to securing a more balanced market and to overcoming the current fragmented situation resulting from the different national approaches to addressing UTPs in the EU, but points out that these steps are not sufficient to combat UTPs; welcomes the above-mentioned Commission report of 29 January 2016, as well as the long-expected accompanying study on the monitoring of the implementation of principles of good practice in vertical relationships in the food supply chain, but notes its conclusions, which do not pave the way for an EU-level framework to tackle unfair trading practices at EU level;
  2. Welcomes the action taken by the High Level Forum for a Better Functioning of the Food Supply Chain and the setting up of the expert platform on B2B practices, which has drawn up a list, a description and an assessment of trading practices that may be regarded as grossly unfair;
  3. Acknowledges the setting up and development of the SCI, which plays an important role in promoting cultural change and improving business ethics, and which has resulted in the adoption of a set of principles of good practice for vertical relationships in the food supply chain and a voluntary framework for the implementation of those principles which only in the second year of its operation already numbers over one thousand participating companies from across the entire EU, and those mainly SMEs; welcomes the progress made so far, and believes that efforts to promote fair trading practices in the food supply chain should make a real impact but cannot currently be considered sufficient to tackle the problem of UTPs in the food supply chain; stresses, however, that the effectiveness of the SCI, as recognised by both the recent Commission report and external evaluation, is undermined by a broad range of shortcomings, such as weaknesses in governance, limitations in transparency, no enforcement measures or penalties, a lack of effective deterrents against UTPs, and not allowing for individual anonymous complaints by potential victims of UTPs or own-initiative investigations by an independent body, which consequently leads to under-representation of SMEs and farmers, in particular, who may find the SCI inadequate for its purpose; recommends the setting up of similar supply chain initiatives in other relevant non-food sectors;
  4. Regrets, however, that some of the dispute resolution options promoted by the SCI have not yet been used in practice, meaning that the assessment of their effectiveness is based on theoretical judgments; is concerned that no concrete case has been examined to assess the SCI's role in tackling UTPs, and that a more detailed analysis has not been carried out as regards the collection of data relating to complaints received and



resolved; believes that the failure to carry out such an in-depth assessment undermines the overall judgment of the initiative; is disappointed by the statement, as recognised by the aforementioned Areté study evaluating the effectiveness of the SCI, that 'the actual achievements of the SCI may seem very modest if measured against the actual or perceived magnitude and seriousness of the issue of UTPs';

5. Notes the setting up of SCI national platforms of organisations and businesses in the food supply chain to encourage dialogue between the parties, promote the introduction and exchange of fair trading practices and seek to put an end to UTPs, but wonders whether they are really effective; points out, however, that some national platforms have not delivered on these objectives and that, as in the case of Finland, farmers have abandoned the platform; proposes that Member States be encouraged and given incentives to take further action, using suitable instruments, on any complaints or non-conformities reported by these national platforms;
6. Takes the view that the principles of good practice, and the list of examples of fair and unfair practices in vertical relations in the food supply chain, should be extended and enforced in an effective manner;
7. Welcomes the Commission`s currently on-going study on choice and innovation in the retail sector; believes that this exercise would be instrumental in clarifying the evolution and drivers for choice and innovation at overall market level;
8. Welcomes the development of alternative and informal mechanisms for dispute settlement and redress, in particular through mediation and amicable arrangements;
9. Notes that where UTPs exist in the food supply chain, they are contrary to basic principles of law;
10. Condemns practices that exploit imbalances in bargaining power between economic operators and that have an adverse effect on freedom to contract;
11. Points out that UTPs, when imposed by parties in a stronger bargaining position, have a negative impact throughout the food supply chain, including on employment, to the detriment of consumer choice and of the quality, variety and innovativeness of the products made available; stresses that UTPs can hamper business competitiveness and investment, and push companies to make savings at the expense of salaries, working conditions or the quality of raw materials;
12. Reaffirms that free and fair competition, balanced relations among all actors, freedom to contract, and strong and effective enforcement of the relevant legislation – making it possible to protect all economic actors in the food supply chain, irrespective of geographical location – are of key importance in ensuring the proper functioning of the food supply chain and in guaranteeing food security;
13. Points out the need to build mutual trust between supply chain partners, on the basis of the principles of freedom to contract and a mutual beneficial relationship; underlines the corporate social responsibility of the larger contracting party to limit its advantage during negotiations and to work with the weaker party towards a solution that is positive for both parties;

14. Welcomes the Commission's acknowledgement, in its Green Paper of 31 January 2013, that there is no true contractual freedom where there is marked inequality between parties;
15. Recognises that UTPs result primarily from income and power imbalances in the food supply chain, and stresses that these must urgently be addressed in order to ameliorate the situation for farmers in the food sector; notes that selling below the cost of production, and the serious misuse of basic agricultural foods such as dairy, fruit and vegetables as 'loss leaders' by large-scale retailers, threaten the long-term sustainability of EU production of such items; welcomes efforts, such as the Tierwohl Initiative in Germany, aimed at helping farmers to compete on the basis of their products' merits;
16. Points out that UTPs have serious negative consequences for farmers, such as lower profits, higher-than-estimated costs, food overproduction and wastage, and financial planning difficulties; emphasises that such negative consequences ultimately reduce consumer choice;
17. Questions the unwavering support expressed in the Commission's report for the SCI, given its limitations; reiterates farmers' reluctance to participate on account of the lack of trust, the restrictions on anonymous complaints, the lack of statutory power, the inability to apply meaningful sanctions, the absence of adequate mechanisms to combat well-documented UTPs, and concerns about imbalances in the nature of enforcement mechanisms that have not been taken adequately into account; regrets the Commission's reluctance to ensure anonymity and appropriate sanctions;
18. Believes that the SCI and other national and EU voluntary systems (codes of good practice, voluntary dispute settlement mechanisms) should be developed further and promoted as an addition to effective and robust enforcement mechanisms at Member State level, ensuring that complaints can be lodged anonymously and establishing dissuasive penalties, together with EU-level coordination; encourages producers and traders, including farmers' organisations, to become involved in such initiatives; takes the view that these initiatives should be available to all suppliers who are not concerned about their anonymity, and that they may usefully evolve as platforms for education and the sharing of best practices; notes that the Commission, in its recent report, states that the SCI needs to be improved, in particular to take account of confidential complaints and as regards the granting of investigatory and sanctioning powers to independent bodies;
19. Asks the Commission to take steps to ensure effective enforcement mechanisms, such as the development and coordination of a network of mutually recognised national authorities at EU level; emphasises, in this context, the UK Groceries Code Adjudicator as a possible model to follow at EU level, which could create a real deterrent against UTPs and help to eliminate the 'fear factor';
20. Welcomes the recent step taken by the SCI to enable SMEs and micro-enterprises to join under a simplified procedure; notes that the number of registered SMEs has increased; points out, however, that the SCI needs to be further strengthened through a number of actions, identified by the Commission in its report of 29 January 2016, in relation to which progress should be monitored by the Commission with a view to

- stepping up efforts to publicise and improve awareness of the SCI, especially among SMEs;
  - ensuring the impartiality of the governance structure, e.g. by establishing an independent chair who is not affiliated to specific stakeholder groups;
  - allowing alleged victims of UTPs to complain confidentially;
  - enhancing internal procedures to check that individual operators comply with their process commitments and to monitor the occurrence and outcome of bilateral disputes in a confidential manner;
21. Notes the Commission's observation that farmers' representatives have decided not to join the SCI as, in their view, it does not ensure sufficient confidentiality for complainants and lacks statutory powers for independent investigations and meaningful sanctions, as well as mechanisms to combat well-documented UTPs, and as their concerns about imbalances in the nature of enforcement mechanisms have not been properly taken into account; believes that farmer participation is crucial, and that decreased participation does not reflect a lack of awareness, but rather a lack of faith in current SCI procedures and governance; proposes, therefore, that improving the functioning of the SCI via, inter alia, independent governance, confidentiality and anonymity, and effective enforcement and deterrence, could, as a first step, increase farmer interest, support, and, thereby, participation;
  22. Calls on the Commission and the Member States to facilitate and encourage producers to join producer organisations (POs) and associations of producer organisations (APOs) in order to increase their bargaining power and position in the food supply chain;
  23. Acknowledges, nonetheless, that voluntary and self-regulatory schemes can offer a cost-effective means to ensure fair conduct in the market, resolve disputes and put an end to UTPs, if coupled with independent and effective enforcement mechanisms; underlines, however, that, so far, such schemes have shown limited results owing to a lack of proper enforcement, under-representation of farmers, impartial governance structures, conflicts of interest between the parties concerned, dispute settlement mechanisms that fail to reflect supplier 'fear factor' and the fact that they do not apply to the whole supply chain; calls on the Commission to continue supporting the exchange of best practices among Member States;
  24. Notes that there is EU legislation already in place to combat unfair business-to-consumer commercial practices (Directive 2005/29/EC), but points out that there is no EU legislation to combat unfair practices between different operators in the agri-food chain;
  25. Points out that any serious analysis of UTPs must take as its starting point the new economic paradigm that has emerged over the last few years: large-scale retail in which access to sales outlets has become the subject of fierce competition under the control of the supermarkets; points out that some competition authorities have identified specific practices involving the transfer of excessive risk to suppliers which could render them less competitive; points out that those authorities have also concluded that own brands bring in an element of horizontal competition vis-à-vis industry brands that has not been

given sufficient consideration;

26. Stresses that action to combat UTPs will help to ensure the proper functioning of the internal market and to develop cross-border trading within the EU and with third countries; points out that the fragmented nature of the markets, and disparities between national laws on UTPs, expose supply chain operators to a range of diverse market conditions and can lead to the practice known as 'forum shopping', which, in turn, could lead to regulatory uncertainty;
27. Calls on the Commission and the Member States fully and consistently to enforce competition law, rules on unfair competition and anti-trust rules, and, in particular, to impose firm penalties for abuse of a dominant position in the food supply chain;
28. Considers it essential to ensure that EU competition law takes into account the specific features of agriculture and serves the welfare of producers as well as consumers, who play an important role in the supply chain; believes that EU competition law must create the conditions for a more efficient market that enables consumers to benefit from a wide range of quality products at competitive prices, while ensuring that primary producers have an incentive to invest and innovate without being forced out of the market by UTPs;
29. Points out that while private, own-brand labelled products can bring increased value, choice and 'fair trade' products to consumers, they also represent a strategic issue in the medium- and long-term, as they introduce a horizontal dimension to competition in respect of industrial brands that had never previously been a factor and that can give an unfair and anti-competitive position to retailers, who become both customer and competitor; draws attention to the existence of a 'risk threshold' beyond which the market penetration of own brands in a given category of product could turn the current positive effects of own brands into negative effects, and provide a disincentive as regards the innovative efforts of many companies; insists, therefore, that the issue of private own-brands requires particular attention from the Commission and competition authorities, specifically with regard to the need to assess the potential long-term consequences for the supply chain and the position of farmers within it, while bearing in mind that consumer habits in Member States vary;
30. Calls on the Commission and the Member States to fully and consistently enforce Directive 2011/7/EU on combating late payments in commercial transactions, in order that creditors be paid within 60 days by businesses, or otherwise face interest payments and payment of reasonable recovery costs of the creditor;
31. Invites the Commission to submit a proposal, or proposals, for an EU-level framework laying down general principles and taking proper account of national circumstances and best practices to tackle UTPs in the entire food supply chain in order to ensure a level playing-field across Member States that will enable markets to operate as they should and fair and transparent relations to be maintained between food producers, suppliers and distributors;
32. Believes strongly that the definition of UTPs outlined by the Commission and relevant stakeholders in the document "Vertical relationships in the Food Supply Chain:

Principles of Good Practice", dated 29 November 2011<sup>1</sup>, should be taken into account, along with an open list of UTPs, when submitting a proposal for an EU-level framework;

33. Suggests, furthermore, that anonymity and confidentiality be incorporated into any future legislative initiative, or initiatives, in this area;
34. Considers that Member States should, when not already the case, establish or recognise public agencies or dedicated bodies like an adjudicator, at national level with responsibility for enforcing action to combat unfair practices in the food supply chain; takes the view that public agencies of this kind can facilitate enforcement, e.g. by being empowered to open and conduct investigations on their own initiative and on the basis of informal information or complaints dealt with on a confidential basis (thus overcoming the 'fear factor'), and can act as a mediator between the parties involved; stresses the need for mutual recognition and effective cooperation at EU level between national authorities to ensure sharing of relevant information, particularly on good practice, and expertise concerning new types of UTPs, acting in full respect for the principle of subsidiarity;
35. Calls on the Commission, the Member States and other relevant stakeholders, in follow-up to the Commission's report, to facilitate the incorporation of farmers' organisations (including POs and APOs) within the scope of national enforcement bodies governing the food supply chain, primarily by securing the anonymity of complaints and an effective sanctions regime;
36. Calls on Member States without a competent enforcement authority to consider establishing such an authority and to provide it with power to supervise and enforce measures necessary to tackle UTPs;
37. Stresses that the enforcement authorities should have a range of different enforcement measures and sanctions at their disposal, in order to allow, in accordance with the gravity of the specific circumstance, a flexibility of response; believes that such measures and sanctions should have a deterrent effect with a view to changing behaviour;
38. Recalls that all Member States already have regulatory frameworks addressing UTPs; notes the recent regulatory action taken by some Member States, whereby they have introduced provisions supplementing national competition law, broadened the scope of application of the directives on UTPs by extending their provisions to cover B2B relations, and set up independent enforcement agencies; notes, however, that the different approaches taken in this regard by the Member States concerned has resulted in various degrees and types of protection against UTPs;
39. Notes that, in adopting measures to counter UTPs within the food supply chain, due account must be taken of the specific features of each market and the legal requirements that apply to it, the different situations and approaches in individual Member States, the

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<https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/discussions/Vertical%20relationships%20in%20the%20Food%20Supply%20Chain%20-%20Principles%20of%20Good%20Practice.pdf>.

degree of consolidation or fragmentation of individual markets, and other significant factors, while also capitalising on measures already taken in some Member States that are proving to be effective; takes the view that any proposed regulatory efforts in this area should ensure that there is relatively broad discretion to tailor the measures to be taken to the specific features of each market, in order to avoid adopting a 'one-size-fits-all' approach, and should be based on the general principle of improving enforcement by involving the relevant public bodies alongside the concept of private enforcement, thus also contributing to improving the fragmented and low level of cooperation that exists within different national enforcement bodies and to addressing cross-border challenges regarding UTPs;

40. Points out that the existing fragmented and low level of cooperation within different national enforcement bodies is not sufficient to address cross-border challenges regarding UTPs;
41. Calls on the Commission to assess the effectiveness and impact of regulatory and non-regulatory measures, with due account taken of all the possible implications for the various stakeholders and for consumer welfare, and of the policy mix indicated by respondents to the aforementioned Areté study, being a combination of voluntary initiatives and public enforcement (33 % of total answers) and specific legislation at EU level (32 %);
42. Is convinced that consumer awareness about agricultural products is fundamental to addressing the problems resulting from imbalances in the food supply chain, including UTPs; calls on all stakeholders involved in food supply chain management to step up transparency in the overall food supply chain and to increase consumer information through more appropriate product labelling and certification schemes, in order to enable consumers to make fully-informed choices about available products, and to act accordingly;
43. Calls on the Commission, in close cooperation with the Member States, to promote initiatives whereby consumers can be alerted to the risks of price dumping for primary producers, and expressly supports awareness-raising campaigns to that end in schools and training establishments;
44. Notes that, since 2009, it has adopted five resolutions on problems in the EU retail chain, including three specifically on imbalances and abuses within the food supply chain; further notes that during the same period the Commission has produced three communications and a Green Paper, and has commissioned two final reports on similar subjects; declares, therefore, that yet more analysis on the state of the food supply chain will merely delay the pressing need for action to help farmers fight unfair trading practices;
45. Urges all parties in the food supply chain to consider standard contracts, and also new-generation contracts, whereby risks and benefits are shared;
46. Recognises that the reform of the common agricultural policy (CAP) and the new single common market organisation have introduced a number of measures aimed at addressing the bargaining power gap among farmers, the retail trade, the wholesale trade and SMEs in the food supply chain by supporting, in particular, the establishment

and expansion of POs; stresses the importance of this supply-side cooperation;

47. Notes that Regulation (EU) No 1308/2013, which provides for the establishment of POs, is backed by financial incentives under the second pillar of the CAP; points out that the legal framework extends the scope for collective bargaining (in some sectors) and delivery contracts (in all sectors) to POs, associations of POs (APOs) and inter-branch organisations, and also introduces temporary exemptions from certain competition rules in periods of severe market imbalance, subject to safeguards;
48. Urges the Commission to strongly promote this approach in order to increase the bargaining power of the primary producer and to encourage producers to join POs and APOs; underlines, in particular, the vulnerability of small and family farmers, who have the potential to create and support employment in isolated, remote and mountain regions;
49. Takes the view that strengthening and establishing producer organisations must go hand in hand with strengthening farmers' bargaining power in the food chain, in particular by giving them the right to have their contracts collectively bargained;
50. Calls for increased transparency and provision of information within the supply chain and for the strengthening of bodies and market information tools such as the European Food Price Monitoring Tool and the Milk Market Observatory, with a view to supplying farmers and POs with accurate and timely market data;
51. Is of the opinion that prices throughout the food supply chain should better reflect the value added by primary producers; calls, accordingly, for the retail price formation process to be as transparent as possible;
52. Points out that farmers in a number of Member States have secured a strong position in the food supply chain by establishing cooperatives which ensure that value added at the processing stage is channelled back to farmers, and considers it crucial that these cooperatives are not burdened with extra costs as a result of compulsory and costly red tape;
53. Urges producers and processors to work together to invest in innovation and increase the added value of their products;
54. Reminds the Commission that in December 2013 Parliament adopted an own-initiative report calling on the Commission to examine the possibility of independent enforcement with a view to addressing the 'fear factor' among primary producers; urges the Commission to consider this in its own report;
55. Takes the view that professional organisations could act as a platform for primary producers, allowing them to lodge complaints with a competent authority about alleged UTPs without fear;
56. Instructs its President to forward this resolution to the Council, the Commission and the governments and parliaments of the Member States.

## EXPLANATORY STATEMENT

In July 2014 the Commission published a communication urging Member States to look for ways of giving small food producers and retailers more protection against unfair trading practices (UTPS), which often occur in business relationships in which one of the two parties is in a stronger position than the other.

Broadly speaking, UTPs may be defined as practices that grossly deviate from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on another. In this report, the rapporteur gives examples of unfair practices that food supply chain participants have told him are common in this sector.

UTPs arise where there are imbalances in financial resources, and thereby bargaining power, between trading parties in commercial relationships in both the food and non-food supply chains, and can have a detrimental effect on the EU economy as a whole because they can result in firms – in particular SMEs – losing their ability to invest and innovate and deciding not to seek to expand their businesses in the single market. Attention also needs to be drawn to the ‘fear factor’, which can result in weaker trading partners not taking legal action when that option is open to them and simply accepting UTPs, however harmful they may be, because they are worried that the stronger partner would otherwise put an end to their commercial relationship. Although such imbalances in bargaining power are part and parcel of the way in which the market operates and are entirely legitimate, any abuse of a stronger position can skew relations between businesses and often result in UTPs.

The issue of UTPs in B2B relations has increasingly come to the fore over recent years, and although it is difficult to gauge the full extent of the problem, there is substantial statistical and market-based evidence to suggest that UTPs are relatively common, in particular in certain parts of the supply chain. In a survey carried out in March 2011, 96% of respondents in the food supply chain said that they had been exposed to at least one form of UTP<sup>1</sup>.

A large number of Member States have recognised the harm that UTPs can cause and have taken regulatory action to combat them; others are planning to do so. However, the rules in this area differ greatly from Member State to Member State, as does the scale of the problem. In parallel to this, market operators have also sought to address the problem by drawing up principles of good practice in vertical relations and self-regulatory frameworks for their implementation, one example of which is the Supply Chain Initiative.

However, the fact that UTPs are a widespread and growing problem begs the question of just how effective self-regulatory schemes can be in restoring market balance. Voluntary schemes encouraging businesses not to use UTPs are intended to alleviate the problem, but they will never be enough to solve it.

The rapporteur therefore believes that firm, consistent action needs to be taken to get rid of UTPs in the EU’s food supply chain once and for all. The scale of the problem calls for the

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<sup>1</sup> Survey commissioned by the CIAA (Confederation of the Food and Drink Industries of the EU) and the AIM (European Brands Association).



adoption of EU rules that will ensure that markets operate as they should and that there are fair and transparent relations between all the parties involved in the food supply chain. UTPs should be clearly defined and clear penalties should be laid down for anyone engaging in them. Furthermore, national agencies should be given responsibility for enforcing the rules and should be empowered to initiate investigations and to deal with complaints on an anonymous basis.

The purpose of this report is to draw attention to the issue of UTPs and, while acknowledging the action already taken at national and EU level in the form of both national laws and self-regulatory schemes, to look at ways of going further and putting an end to the problem of unfair trading practices in the internal market.

17.11.2015

## **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))

Rapporteur (\*): Mairead McGuinness

(\*) Associated committee – Rule 54 of the Rules of Procedure

### **SUGGESTIONS**

The Committee on Agriculture and Rural Development calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following suggestions into its motion for a resolution:

1. Considers it essential to ensure that European competition law takes into account the specific features of agriculture and serves the welfare of producers as well as consumers, who play an important role in the supply chain; believes that European competition law must create the conditions for a more efficient market that enables consumers to benefit from a wide range of quality products at competitive prices, while ensuring that primary producers have an incentive to invest and innovate without being forced out of the market by unfair trading practices (UTPs);
2. Calls on the Commission to apply European competition law rigorously in cases where UTPs can be penalised; takes the view, however, that existing statutory provisions and rules are not applicable in most cases involving UTPs; considers, moreover, that antitrust law alone is inadequate for resolving UTPs, as the technical requirements for a ‘dominant position’ are rarely met, even though retailers may, in practice, hold a dominant position in a specific market situation;
3. Notes that UTPs in the food supply chain come in a number of forms, including:
  - unilateral and retroactive changes to contracts,
  - flat charges that companies levy on suppliers as a requirement for inclusion in a supplier list (‘pay to stay’),
  - payments made up to 120 days late, well over the 60-day limit (‘pay you later’),
  - arbitrary discounts that large firms give themselves for paying early or on time,

- retrospective discounting on outstanding money owed to a supplier,
  - retailers forcing suppliers to use certain third-party packaging producers who pay supermarkets a fee for the business they receive;
4. Recognises that UTPs result primarily from income and power imbalances in the food supply chain and must be urgently addressed in order to ameliorate the situation for farmers in the food sector; notes that selling below the cost of production and the serious misuse of basic agricultural foods such as dairy, fruit and vegetables as ‘loss leaders’ by large-scale retailers threaten the long-term sustainability of European production of such items; recognises that there is a particularly pronounced market concentration in the food trade in a number of Member States; welcomes efforts, such as the Tierwohl Initiative in Germany, aimed at helping farmers to compete on the basis of their products’ merits;
  5. Points out that UTPs have serious negative consequences for farmers, such as lower profits, higher-than-estimated costs, food overproduction and wastage, and financial planning difficulties; stresses that these practices also have damaging effects on the functioning of the single market and may stifle investment and lead to less product innovation and reduced product quality and variety; emphasises that such negative consequences ultimately reduce consumer choice;
  6. Notes that since 2009 it has adopted five resolutions on problems in the EU retail chain, including three specifically on imbalances and abuses within the food supply chain; further notes that during the same period the Commission has produced three communications and a Green Paper and has commissioned two final reports on similar subjects; declares, therefore, that yet more analysis on the state of the food supply chain will merely delay the pressing need for action to help farmers fight unfair trading practices;
  7. Believes that a common understanding of UTPs would be beneficial, and therefore urges the Commission to draw up an open list of UTPs that are prohibited at EU level; stresses the absence of EU rules to combat UTPs between operators in the food chain;
  8. Urges all parties in the food supply chain to consider standard contracts and also new-generation contracts whereby risks and benefits are shared;
  9. Notes that while private own-brand labelled products can bring increased value, choice and ‘fair trade’ products to consumers, they can give retailers an unfair and anti-competitive position whereby they become both customer and competitor; insists that the issue of private own-brands requires particular attention from the Commission and competition authorities, and highlights the need to address the potential long-term consequences for the food supply chain and the position of farmers within it;
  10. Recognises that the reform of the common agricultural policy (CAP) and the new single common market organisation have introduced a number of measures aimed at addressing the bargaining power gap among farmers, the retail trade, the wholesale trade and SMEs in the food supply chain by supporting, in particular, the establishment and expansion of producer organisations (POs); stresses the importance of this supply-side cooperation;
  11. Notes that Regulation (EU) No 1308/2013, which provides for the establishment of POs, is backed by financial incentives under the second pillar of the CAP; points out that the

legal framework extends the scope for collective bargaining (in some sectors) and delivery contracts (in all sectors) to POs, associations of POs (APOs) and inter-branch organisations, and also introduces temporary exemptions from certain competition rules in periods of severe market imbalance, subject to safeguards;

12. Urges the Commission to strongly promote this approach in order to increase the bargaining power of the primary producer and to encourage producers to join POs and APOs; underlines, in particular, the vulnerability of small and family farmers, who have the potential to create and support employment in isolated, remote and mountain regions;
13. Takes the view that strengthening and establishing producer organisations must go hand in hand with strengthening farmers' bargaining power in the food chain, in particular by giving them the right to have their contracts collectively bargained;
14. Calls for increased transparency and provision of information within the supply chain and for the strengthening of bodies and market information tools such as the European Food Price Monitoring Tool and the Milk Market Observatory, with a view to supplying farmers and POs with accurate and timely market data;
15. Is of the opinion that prices throughout the food supply chain should better reflect the value added by primary producers; calls, accordingly, for the retail price formation process to be as transparent as possible;
16. Points out that farmers in a number of Member States have secured a strong position in the food supply chain by establishing cooperatives which ensure that value added at the processing stage is channelled back to farmers, and considers it crucial that these cooperatives are not burdened with extra costs as a result of compulsory and costly red tape;
17. Urges producers and processors to work together to invest in innovation and increase the added value of their products;
18. Is convinced that consumer awareness about agricultural products is fundamental to addressing the problems resulting from imbalances in the food supply chain, including UTPs; calls on all stakeholders involved in food supply chain management to step up transparency in the overall food supply chain and to increase consumer information through more appropriate product labelling and certification schemes, in order to enable consumers to make fully informed choices about available products and act accordingly;
19. Calls on the Commission, in close cooperation with the Member States, to promote initiatives whereby consumers can be alerted to the risks of price dumping for primary producers, and expressly supports awareness-raising campaigns to that end in schools and training establishments;
20. Acknowledges that while purely voluntary initiatives are very important and helpful in identifying issues of concern, they are inadequate to eliminate the 'fear factor' from the supply chain, as they have major drawbacks such as the broad scope for non-participation, conflicts of interest, dispute settlement mechanisms that fail to reflect supplier 'fear factor', the lack of genuine penalties for non-compliance, and scant or non-participation by the competent authorities;

21. Reminds the Commission that in December 2013 Parliament adopted an own-initiative report calling on the Commission to examine the possibility of independent enforcement with a view to addressing the ‘fear factor’ among primary producers; urges the Commission to consider this in its own report;
22. Takes the view that professional organisations could act as a platform for primary producers, allowing them to lodge complaints with a competent authority about alleged UTPs without fear;
23. Calls for procedures within enforcement bodies to enable primary producers to complain confidentially, while also allowing enforcement bodies to conduct investigations at their own initiative; insists that such enforcement bodies should be able to impose an appropriate range of sanctions for violations of UTP regulations;
24. Questions the Commission’s unwavering support for the Supply Chain Initiative (SCI), given its limitations; reiterates farmers’ reluctance to participate on account of a lack of trust, restrictions on anonymous complaints, a lack of statutory power, an inability to apply meaningful sanctions, the absence of mechanisms adequate to combat well-documented UPTs, and concerns about imbalances in the nature of enforcement mechanisms, which have not been adequately taken into account; regrets the Commission’s reluctance to negotiate on the issues of anonymity and sanctions;
25. Calls on the Commission to assess the SCI in terms of effectiveness, taking into account the concerns cited by the farming community; urges the Commission to avoid assessing the voluntary initiative solely on the basis of the number of registered participants;
26. Calls on the relevant stakeholders to facilitate the incorporation of farmers’ organisations (including POs and APOs) within the scope of national enforcement bodies governing the food supply chain, primarily by securing the anonymity of complaints and an effective sanctions regime;
27. Recalls the Commission’s acknowledgement that ‘forum shopping’ poses a threat to the functioning of the single market and is detrimental to the interests of primary producers; believes that a common interpretation of the rules of good practice adopted in 2011 is a vital factor in overcoming this problem, together with the uniform application of those rules and greater cooperation between Member State enforcement authorities;
28. Notes that several Member States have introduced voluntary codes and legislative measures aimed at improving the functioning of the supply chain; notes the existence of the Groceries Code Adjudicator in the UK, the case of Portugal, the Food Supply Chain Commissioner in France, Spanish law and the current initiative involving consultation between parties in Belgium; stresses the importance of cooperation between national authorities and the exchange of best practice at EU level; calls on the Member States to enforce the measures taken in their national legislation;
29. Takes the view that independent national regulators for the food sector could be an effective measure to combat unfair trade practices, as they create greater transparency along the value chain and enable ex-ante checks to be carried out in order to protect against abuses of dominant market position; calls on the Commission, in this connection, also to consider the possibility of establishing a European regulator which could assume a

coordinating role;

30. Urges the Commission to assess these national efforts as potential models for adaptation, while taking account of the sector-specific problems encountered and of national market conditions and specificities;
31. Believes that framework legislation at EU level is necessary in order to tackle UTPs and to ensure that European farmers and consumers have the opportunity to benefit from fair selling and buying conditions;
32. Urges the Commission to submit a proposal for EU framework legislation in a timely manner, with a view to ensuring a level playing field within the single market;
33. Argues that such legislation, which would provide primary producers with the necessary legal certainty to address their concerns, together with measures that increase the bargaining power of farmers, is necessary to complement the SCI and protect those stakeholders already fully engaged with it, while ensuring that UTPs are eradicated from the food supply chain;
34. Calls for framework legislation to protect all food suppliers, wherever they are located, including in third countries;
35. Points out that that European framework legislation must not lower the level of protection in countries that have adopted national legislation to combat business-to-business UTPs.

## RESULT OF FINAL VOTE IN COMMITTEE ASKED FOR OPINION

<b>Date adopted</b>	12.11.2015
<b>Result of final vote</b>	+:               39 -:                0 0:                2
<b>Members present for the final vote</b>	Clara Eugenia Aguilera García, Eric Andrieu, Paul Brannen, Daniel Buda, Nicola Caputo, Michel Dantin, Paolo De Castro, Albert Deß, Diane Dodds, Norbert Erdős, Edouard Ferrand, Luke Ming Flanagan, Beata Gosiewska, Martin Häusling, Anja Hazekamp, Esther Herranz García, Jan Huitema, Jarosław Kalinowski, Elisabeth Köstinger, Zbigniew Kuźmiuk, Mairead McGuinness, Giulia Moi, Ulrike Müller, James Nicholson, Maria Noichl, Marijana Petir, Bronis Ropé, Jordi Sebastià, Jasenko Selimovic, Lidia Senra Rodríguez, Czesław Adam Siekierski, Marc Tarabella, Janusz Wojciechowski, Marco Zullo
<b>Substitutes present for the final vote</b>	Maria Heubuch, Momchil Nekov, Sofia Ribeiro, Annie Schreijer-Pierik, Alyn Smith, Estefanía Torres Martínez
<b>Substitutes under Rule 200(2) present for the final vote</b>	Daniel Dalton, Nils Torvalds

## RESULT OF FINAL VOTE IN COMMITTEE RESPONSIBLE

<b>Date adopted</b>	21.4.2016
<b>Result of final vote</b>	+: 34 -: 0 0: 3
<b>Members present for the final vote</b>	Dita Charanzová, Carlos Coelho, Sergio Gaetano Cofferati, Lara Comi, Anna Maria Corazza Bildt, Daniel Dalton, Nicola Danti, Dennis de Jong, Vicky Ford, Ildikó Gáll-Pelcz, Evelyne Gebhardt, Antanas Guoga, Sergio Gutiérrez Prieto, Robert Jarosław Iwaszkiewicz, Liisa Jaakonsaari, Philippe Juvin, Antonio López-Istúriz White, Marlene Mizzi, Robert Rochefort, Virginie Rozière, Christel Schaldemose, Andreas Schwab, Olga Sehnalová, Igor Šoltes, Ivan Štefanec, Mylène Troszczynski, Anneleen Van Bossuyt, Marco Zullo
<b>Substitutes present for the final vote</b>	Lucy Anderson, Birgit Collin-Langen, Edward Czesak, João Pimenta Lopes, Julia Reda, Dariusz Rosati, Lambert van Nistelrooij, Sabine Verheyen, Kerstin Westphal