

A close-up photograph of a pineapple, showing its characteristic diamond-shaped scales and sharp, brownish-yellow spines. The background is blurred, suggesting a natural setting.

Unfair Trading Practices in Food Supply Chains Make Fruit Fair EU Policy Briefing

10 November 2015



Background: Who we are

The Make Fruit Fair Campaign is a global consortium of 19 consumer, international development, Fair Trade and faith organisations in the European Union, Cameroon, Colombia, Ecuador and the Windward Islands. The Fair Trade Advocacy Office (FTAO) speaks out for Fair Trade and Trade Justice with the aim of improving the livelihoods of marginalised producers and workers in the South, and offering consumers responsibly sourced products.

Background: The findings of the report 'Banana Value Chains in Europe and the consequences of Unfair Trading Practices'

The new report '**Banana Value Chains in Europe and the consequences of Unfair Trading Practices**', commissioned by the Make Fruit Fair campaign, looks at the relationship between banana producers in exporting countries and European retailers and consumers. Among the key conclusions contained within the report regarding the impact of unfair trading are:

- ▶ That producers operate within a climate of fear, where concern about negative reactions from buyers prevent the banana industry from complaining about unfair treatment
- ▶ That an imbalance of power in the negotiation of contracts means that importers are able to pass risks down the supply chain
- ▶ That the smallest producers are the most vulnerable and the most negatively impacted by Unfair Trading Practices

The report can be found under: www.makefruitfair.org

Background: Window of opportunity for the European Union to stop Unfair Trading Practices occurring

Unfair Trading Practices (UTPs) are defined by the European Commission as those "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." These are in evidence in many of the groceries' supply chains that serve the EU, and have negative consequences for consumers, farmers, suppliers, small retailers and workers.

In 2007, more than 50% of MEPs supported Written Declaration 0088/2007 to register their concern about abusive trading practices. **Now the priority is for the European Parliament to recommend that the European Commission swiftly moves to establish a strong, coordinated enforcement mechanism to stop unfair trading practices occurring.** Delays to this will mean that UTPs continue to distort the single market, consumers are adversely affected and that small businesses, workers and farmers suffer.

In 2013, EU-level trade associations close to the retail end of the supply chain set up the Supply Chain Initiative (SCI). SCI's member companies, voluntarily commit to implement principles of good practice for vertical relationships in the Food Supply Chain (to not apply Unfair Trading Practices), and different options for the resolution of disputes are proposed. The SCI is an educational initiative but not fit for purpose to stop UTPs, please see Point 3 below.

In the Communication 'Tackling unfair trading practices in the business-to-business food supply chain' of July 2014 the **EC acknowledges that UTPs are quite common and may have harmful effects, especially on small and middle-size enterprises in food supply chains. The Commission also stated "that UTPs applied within the EU could have direct or indirect effects on producers and companies outside the EU, including in developing countries."**¹

A few EU Member States are well advanced in setting up robust enforcement mechanisms which are mindful of the climate of fear to stop unfair trading practices (France, Hungary, Ireland and UK).² Others (Austria, Cyprus, Greece, Latvia, Malta and Poland) have enforcement mechanisms which were considered insufficient by companies surveyed who felt exposed.³ The problem is that **"The existing legal tools that can be useful to address UTPs and their negative effects are very fragmented and not specifically designed to tackle this problem"**⁴

In this same Communication, the EC concludes "The Commission will present a report to the Council and the European Parliament at the end of 2015. In light of this report, the Commission will decide whether further action should be taken at EU level to address the described issues".

Unfair Trading Practices and how they can be tackled across the EU

1. The negative impact of Unfair Trading Practices (UTPs) on consumer choice

- ▶ UTPs are widespread throughout European food supply chains. One of the many negative impacts of unfair trading practices in the groceries' supply chain is that they result in a narrower range of poorer quality products being available to the end consumer.⁵ European and some member state competition policies currently focus on individual companies, rather than on systemic problems occurring within a market such as UTPs. Given the scale of the harm, tackling UTPs should

1 Communication from the European Commission, Tackling unfair trading practices in the business-to-business food supply chain, COM(2014) 472, 15 July 2014.
2 British Institute of International and Comparative Law (J Stefanelli and P Marsden), Models of Enforcement in Europe for Relations in the Food Supply Chain, April 2012
3 European Commission DG Internal Market European Business Test Panel Consultation on Unfair Practices 15 Feb 2012
4 Communication from the European Commission, Tackling unfair trading practices in the business-to-business food supply chain, COM(2014) 472, 15 July 2014.
5 Consumers International: The relationship between supermarkets and suppliers: What are the implications for consumers? <http://es.consumersinternational.org/media/1035307/summary,%20the%20relationship%20between%20supermarkets%20and%20suppliers.pdf>

be of much greater priority. Indeed, from survey-based evidence the costs of Unfair Trading Practices inflicted on suppliers are around €30 billion each year.⁶ UTPs inhibit suppliers from investing back in their businesses, and at the consumer end of the supply chain this will show through as lack of innovation and lack of quality improvement, and will reduce the ability of otherwise competent suppliers to survive.

- ▶ Professor Roger Clarke's 2010 report considering the establishment of the UK Groceries Code Adjudicator considers that applying UTPs "in the short run has negative effects in the longer run tending to raise prices to consumers. Regulation of anti-competitive buyer practices such as the transfer of excessive risk and unexpected cost up the supply chain will reduce risks to suppliers enabling them to invest for the longer term and provide benefits from new innovation such as better quality products and more product variety." The costs of proportionate regulation are small while failure to introduce an effective enforcement approach will result in UTPs continuing with consequent consumer detriment.⁷

Stopping UTPs is vital for enabling the single market to operate efficiently and effectively and so a Directive to address these abusive practices can be initiated under Article 114 (or alternatively, Articles 115 or 116) of the Treaty of Lisbon.

2. Unfair trading practices have a directly negative impact on weaker parts of the supply chain

UTPs typically involve the transfer of unexpected costs and excessive risks by large retailers onto their suppliers which in turn is passed onto weaker parts of their supply chain, with severe consequences for small businesses, farmers, workers, and the environment both in developed and developing countries. Many producers and suppliers are stuck in unequal and uncertain trading relationships that make running a business, or even a small farm, a challenge due to the unpredictable but frequent application of Unfair Trading Practices. Savings frequently have to be made in workers' pay, safety considerations, ingredient quality, payments made to suppliers, and business investment.

3. Voluntary systems are inherently unable to dissuade Unfair Trading Practices being applied onto weaker businesses

The Supply Chain Initiative (SCI) is a good mechanism for sharing best practice and raising awareness of UTPs. However, as a means for tackling the existence of UTPs it is ineffective. It is a voluntary system which doesn't have the ability to apply dissuasive sanctions to deter the profitable application of UTPs, nor is it able to

6 Bob Young, Special Advisor at Europe Economics, estimate based on scaling up to 28 member states the 2013 survey results of 434 enterprises by Dedicated research for COPA-COGECA which found UTPs cost suppliers €10.9 billion per annum. <http://www.europe-economics.com>
7 Professor Roger Clarke, Professor of Economics at Cardiff University Business School http://ec.europa.eu/internal_market/consultations/2013/unfair-trading-practices/docs/contributions/registered-org/traidcraft-15a_en.pdf

keep information confidential if a breach of a UTP is brought to it which needs further investigation.

- ▶ Tesco and Ahold, two of the largest retailers in Europe who were early supporters of the SCI have imposed UTPs systematically onto their suppliers.
 - ▶ Ahold/Albert Heijn were exposed in 2012 for uniformly deducting 2% from the invoices sent by suppliers.⁸
 - ▶ Tesco 2014 accounting scandal exposed inflated profits based on the retailer systematically underpaying suppliers.⁹
- ▶ Associations representing weaker businesses in the supply chain have not joined. In fact, submitting a complaint to the SCI could be detrimental. A Finnish farmers organisation has withdrawn from the SCI on the basis that their members would be “risk[ing] their business” by putting forward a complaint.¹⁰
- ▶ The 2008 UK Competition Commission’s Groceries market investigation proposed the setting up of the Groceries Code Adjudicator after the four largest UK retailers failed to abide by 2001 statutory Supermarket Code of Practice, which banned abusive purchasing practices. The enforcement of this code was poorly designed, and meant that suppliers were unable to complain confidentially. Retailers judged that they could continue applying UTPs since they were unlikely to be investigated.¹¹

4. We need a level playing field provided by co-ordinated enforcement that stops UTPs across Europe to enable the single market to function efficiently

There is a patchwork of measures, laws and institutions in place across EU member states which are intended to tackle UTPs, and some member states have no suitable mechanism. To enable the single market to operate without Unfair Trading Practices distorting its efficient operation each national-level enforcement mechanism should be underpinned by a shared set of minimum standards in relation to the following.

- ▶ It must be able to guarantee that any complaints are kept anonymous. Otherwise weaker businesses in supply chains will not report abuses for fear of being sanctioned by powerful retailers.
- ▶ It should initiate investigations to rectify abusive practices in groceries’ supply chains if it has reasonable suspicion that UTPs are occurring, from information in the public domain, anonymous complaints or other sources of information

8 <http://www.zlto.nl/blog/122/AH-vertraagt-verduurzaming> 12 September 2012

9 <http://blogs.ft.com/lex-live/liveblogs/2014-09-22-2/> and Cantor Fitzgerald Europe Research – Morning Equity note 23 September 2014

10 In 2015, Finland’s farmers’ union withdrew from the national Supply Chain Initiative <https://www.agra-net.com/agra-europe/policy-and-legislation/eu/finnish-farmer-union-quits-national-supply-chain-platform-493311.htm>

11 P169, table 9.3: Suppliers reporting various practices carried out by grocery retailers in past five years. http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2008/fulltext/538.pdf

- ▶ One of the enforcement tools which either the national authority or EC must be able to apply are dissuasive proportionate financial penalties for serious or repeated breaches. UTPs continue because passing risks and costs onto weaker businesses in the supply chain is profitable.

Where national enforcement bodies operate to at least the same set of minimum standards then this will prevent ‘forum shopping’, a practice where multi-national businesses can move their sourcing operations to whichever country has the loosest regulatory framework, thereby side-stepping the EC’s efforts to stop UTPs. The EC needs to play a role in coordinating or setting procedures for the network of Member States to agree case allocation and joint investigations.

5. UTPs beyond the EU: Ensuring that trade benefits developing countries

Farmers, exporters, processors and other suppliers in the EU groceries’ supply chains should be able to reach an enforcement body to report when UTPs occur regardless of where they are located around the globe. Otherwise there is the possibility that where UTPs can be applied they will be, because this enables stronger businesses to pass risk and costs onto weaker suppliers, to their advantage. Enforcement bodies operated by member states should be able to stop UTPs being applied in any business transaction which could be covered by European contract law, including third country businesses exporting into the EU. Making progress to stopping UTPs being applied onto third country exporters is vital in European Year of Development.

In addition international cooperation with non-EU enforcement authorities should be encouraged to address UTPs that have an impact both within and outside of the EU.

For more information, contact Sergi Corbalán (corbalan@fairtrade-advocacy.org)
Tel: +32 (0) 2 543 19 23 or brussels@fairtrade-advocacy.org

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