

Implementation of Unfair Trading Practices Directive and impact

The Unfair Trading Practices Directive aims at supporting farmers and small agri-food suppliers by regulating a number of practices when dealing with a larger buyer and requiring Member States to appoint a national authority overseeing enforcement. The deadline for the transposition of the directive (including the designation of the relevant enforcement authorities in each member states) was 1 May 2021. The Commission will present an interim report on the state of the transposition by 1 November 2021. EuroCommerce notes that, despite some delays, member states are progressing with the transposition of the Unfair Trading Practices Directive.

As a minimum harmonization directive, Member States are able to introduce or maintain existing provisions that go beyond the protection granted in the directive. Feedback from the national transposition process shows that the vast majority of member states have sought to broaden the provisions of the directive by extending the scope and the list of practices, meaning that the directive will fail to provide the common standard it sought to establish. We are concerned with the disproportionate and unnecessarily restrictive approach adopted in some member states and would ask the Commission to closely monitor the impact on the market, in particular with regard to farmers and smaller agri-food suppliers.

We invite the Commission to ensure that member states notify all national measures transposing the UTP Directive, including technical national requirements which need to be notified under other instruments such as TRIS, the Service Directive or any other piece of EU legislation having such an obligation.

Key messages

- member states are progressing with the implementation of the directive with various degrees of goldplating; we believe that diverging provisions on scope and interpretation fail to ensure a level playing field at EU level;
- goldplating by member states and the diverging scopes also fragment the single market; some provisions e.g. on local sourcing are infringements of the single market rules and should not be allowed;
- several of the proposed national rules implementing the directive negatively affect the principle of freedom of contract, which ensures that retailers are able to deliver consumers with a wide choice of products at a competitive price;
- some national governments have introduced provisions that are discriminatory, disproportionate, protectionist and unnecessarily restrictive.
- EuroCommerce believes that cooperation among food chain operators is more useful than legislation and bureaucracy for the development the agri-food sector to give consumers the products they want and support farmers' sustainability.

1. Scope

EuroCommerce expresses concern over the following issues which arose in relation to the implementation of the UTP Directive.

Unilateral application of the provisions

The directive regulates relationships between smaller sellers of agricultural and food products and larger buyers and is skewed against the buyer. Through the process of implementation, member states are reported to be under pressure to implement provisions unilaterally against the buyer in quasi all countries. In Finland, Sweden and the Czech Republic, for instance, the directive will apply only to buyers with the aim of protecting suppliers. This poses a major risk in countries where existing legislation provided reciprocal protection for both buyers and sellers against UTPs. We note that, as of today, countries like Italy and Spain intend to confirm and maintain the reciprocity in their national approaches.

The unilateral approach in the directive is justified by the chosen agriculture legal basis. Therefore, any extension in the scope should demonstrate a benefit to farmers. Extending the scope to unilaterally protect large suppliers dealing with large retailers is unlikely to benefit farmers as it further strengthens the position of large suppliers (see below on thresholds).

Turnover thresholds

The directive establishes 6 turnover categories triggering application of its provisions. The vast majority of member states (including for instance Denmark, France, Spain, Italy, and Sweden) are removing the turnover thresholds altogether as a simplification measure and extending the provisions to relations between large sellers and large buyers.¹ This would mean that, in those member states, major sellers would be protected against both large and small buyers. We further note the proposal in Germany to extend the scope to sellers with a national turnover up to EUR 4 billion in certain product categories.

An extension of the scope of application raises serious economic concerns and would significantly increase the already existing risk of serious market disruption.² During the EU legislative process, the threshold values for the scope were already raised from the original EUR 50 million to EUR 350 million compared to the draft of the EU Commission without a corresponding impact assessment. In his contribution to the Commission Impact Assessment, the then DG COMP Chief Economist Tommaso Valletti warned against interfering in negotiations between large sellers and large buyers.³ A further expansion of the scope would lead to improved earnings for multinational companies in the food industry who are already achieving margins that are well above those of the food retail sector.⁴ Concentration tendencies among manufacturers would also intensify.

Impact on a European level playing field and the Single Market

The UTP Directive allows Member States to regulate further than the provisions of the directive or maintain existing rules, **provided that such rules are compatible with the rules covering the functioning of the internal market.**

We are concerned that the directive will not create the level playing field that was intended to create and ask the Commission to closely monitor and take action against possible infringements of the single market rules on free of movement of goods and of establishment.

At the time of adoption, over 20 Member States already had legislation on trading practices, with significant differences e.g., concerning the definition of the practices covered, scope and enforcement practice (e.g. France, Czechia, Slovakia, Spain and Italy), while others had to draft new legislation (e.g., Denmark, Estonia, Sweden, Germany).

The directive may seek to create a common basis but diverging transposition and goldplating by member states are likely to create further market fragmentation. Some member states intend to

¹ Other countries, such as Croatia, are proposing to lower the minimum thresholds; in Germany, suppliers of certain products with a turnover of up to €4bn will be covered.

² The German Bundeskartellamt and the Commission have warned against expanding the scope of the directive.

³ Commission Impact Assessment accompanying the draft Unfair Trading Practices Directive.

⁴ See Annex - key facts and figures.

introduce provisions with a protectionist dimension, e.g., on local sourcing requirements or on specific services provided by foreign-based operators.⁵ The impact of these provisions on the free movement of goods, services and the freedom of establishment will need to be assessed.

2. Practices

EuroCommerce expresses concern over the following issues which arose in relation to the implementation of the UTP Directive.

Wide extensions to the list of regulated practices

The UTP Directive outright prohibits ten practices (blacklist) and outlaws a set of six further practices unless they have been mutually agreed by the parties (grey list). These prohibitions are considered overriding mandatory provisions, meaning that they will apply irrespective of the law that would otherwise be applicable to the supply agreement between the parties.

Very few member states are suggesting limiting transposition to the list of practices in the UTP Directive. Most member states already had laws in place before transposition which often go beyond the provisions of the directive. Transposition in these cases has only meant additions to an already highly regulated domain. As an example, Slovakia's food law already prohibited over 40 practices before transposition.

Some member states⁶ are moving a number of grey practices to the blacklist: Germany is proposing to extend the blacklist with three more measures from the grey list.

We believe this may lead to overregulation, impinges on freedom of contract, and endangers the integrity of the single market (see paragraph above). The Commission Impact Assessment's legal analysis cautioned against the risk of regulatory escalation leading to overregulation.⁷ A recent analysis by the OECD shows that long-term structural challenges facing the agriculture sector could be misinterpreted as competition issues, but absent evidence of systematic and large abuses of market power by other players at the expense of farmers, it recommends a case-by-case approach.⁸

Prohibitions on (re)sales below cost

Some members states (such as Italy, Spain, Croatia) are considering including or further restricting prohibitions of resale below costs (e.g., by imposing a minimum threshold) or prohibitions to buy below the sellers' production costs. These measures create huge legal uncertainty as buyers cannot have full disclosure of suppliers' costs of production. They also disproportionately restrict efficiency-oriented contract designs and have inflationary effects.

The Impact Assessment for the UTP Directive (based on the stakeholder consultation) did not identify (re)sales below costs as a priority. Sales at a loss are usually made under specific circumstances - e.g., to increase sales, particularly when there is too much volume available on the market. The Commission Impact Assessment on the UTP Directive⁹ and studies in countries applying a ban on sales below cost (most notably France) point to inflationary effects on consumer prices of these measures, show that they have been beneficial to branded product manufacturers and not led to higher incomes for farmers.^{10 11}

Payment terms

The directive prohibits payment terms beyond 30 days for perishable foods and beyond 60 days for

⁵ For instance Romania and Slovakia.

⁶ For instance Bulgaria, Poland and Slovakia.

⁷ SWD(2018) 92 final page 75.

⁸ "Concentration and market power in the food chain", Koen Deconinck, OECD food, agriculture and fisheries papers N°151 (2021).

⁹ SWD(2018) 92 final p. 58.

¹⁰ [Autorite de la concurrence, Avis sur la situation concurrentielle en Corse](#) : the French competition authority is suggesting relaxing the restrictions on sales below costs due to the low purchasing power of the population in this region.

¹¹ [French Senate report from October 2019](#) evaluating the effect of the EGAlim law; [Bilan des EGA etats generaux d'alimentation](#), November 2020 by several French consumer associations.

non-perishable foods. Several member states are proposing to impose even stricter terms, or even remove the distinction between perishable and non-perishable foods as a simplification measure (for instance Estonia and Sweden, where all foodstuffs will have a payment deadline of 30 days, including non-perishable food such as spirits, crackers and canned food).¹²

Retailers and wholesalers operate on the basis of high costs and low margins. Overly restricting payment terms may have unintended consequences, including increasing in the frequency of orders to reduce the numbers of days in stock and restricting assortment especially for products with a slow rotation.¹³ We would recommend the Commission to monitor the impact and effectiveness of such practices on farmers.

Listing fees or contributions to promotions and marketing costs, bans of advertising low prices for certain products

These practices are almost unknown in retailers' dealings with farmers but indispensable in dealing with large suppliers. They benefit both retailers and brand manufacturers and give incentives to both parties to continue to innovate and adapt to consumer demand. They should continue to be allowed.

3. Enforcement

In relation to the implementation of the enforcement provisions of the directive, EuroCommerce notes the following:

- **enforcement:** in most member states, national competition authorities will be the UTP legislation enforcers, while others are appointing their ministries of agriculture and related agencies and thus not fully independent. The proposed level of sanctions varies considerably, with some member states suggesting fines of up to 10% of the buyer's annual turnover.
- **Rights of defence:** enforcement authorities must provide, in line with Art. 48 of the EU Charter of Fundamental Rights, proper rights of defence, including access to facts relating to a complaint and right to appeal.

¹² Other member states, such as Lithuania, are expanding the list of products with a maximum of a 30-day payment term to some non-perishable food.

¹³ EuroCommerce position on "Setting up an observatory of late payments in the EU".

Annex - key facts and figures

- **JRC study on the state of play with the UTP Directive prior to transposition**

The Joint Research Centre conducted a perception survey of the prevalence and awareness of the UTP Directive among sellers in the runup to its transposition (available [here](#)). Key findings show a higher awareness of the directive among processors than farmers and a low awareness of existing redress mechanisms at national level:

- respondents: 40% are processors, 34% are farmers; 20% respondents to the survey are large players (with turnovers beyond €350m) and 15% have a turnover below €100,000;
 - Awareness of the directive is lower among farmers (60%), and higher in wholesale and secondary processing and others (more than 75%); awareness of prohibited UTPs is fairly low (68% of farmers respond “I do not know” and 13% farmers state there are no UTP prohibitions);
 - A large majority of respondents do not perceive they are protected from national legislation or do not know: up to 50% of sellers with a turnover below €500,000 state “no protection” and 27% stating “I do not know”;
 - The frequency on experienced practices is also mixed; the most prevalent ones are payment terms for perishable products; others are commercial retaliation, unilateral contract changes, short-notice order cancellation; in most cases they affect less than 20% of transactions;
 - low use of remedies: 55% of respondents state the main reason for not raising the issue is because they do not know what the right authority is; only in 15% they invoke fear of retaliation from the buyer;
 - Sellers are most likely to raise issues with the buyer when they arise – 26% respondents say they raise this in more than 80% of cases (30% respondents raise with their buyers in over 60% of cases);
 - In relation to COVID-19, 75% of respondents said they were not affected; 20% respondents said they were exposed to more UTPs with COVID-19.
- Retailers’ profit margins are low (on average between 1 to 3%). Global manufacturers’ profit margins, on the other hand, tend to be between 15–30% and their market capitalisation is much higher. In addition, the margins of large brand suppliers have further increased over the past few years.¹⁴ Nevertheless, large manufacturers’ investments are not significantly higher than those in retail. Retailers are significant contributors to employment as compared to global manufacturers.
 - Regulating trading practices between large processors, including global brands, and large retailers would further skew the relationship towards large processors, with no guarantee of benefits going to farmers. Global brands dominate an extensive number of product categories and many of them are under strong shareholder pressure to increase their profits. What incentive do they have to pass on additional profits to farmers when shareholders are expecting a return on their investment? The resulting higher prices will have to be passed on to consumers, with no benefit to farmers.
 - Compared performance of large suppliers and large retailers: the tables below show that large retailers generate low margins and contribute significantly to employment as compared to large suppliers. Investment (measure as Capex/revenue) is not significantly different between manufacturers and retailers meaning that additional revenues generated by suppliers do not necessarily translate into stronger investment in innovation.

¹⁴ “Ready for the storm, the FMCG Global 50 2020” OC&C strategy consultants.

	€B	€B	EBIT Margin	Thousands	%	€B
	EBIT	Revenue	EBIT / Revenue	Employees	Capex / Revenue	Market Cap
Tesco plc	€ 2,9	€ 65,0	4,5%	423	1,9%	€ 26,2
Carrefour	€ 1,1	€ 74,1	1,4%	321	2,3%	€ 11,2
REWE Group	€ 0,6	€ 53,4	1,1%	234	3,4%	n/a
Auchan Holding SA	€ 0,9	€ 46,4	1,9%	331	3,0%	n/a
Ahold Delhaize	€ 2,7	€ 66,3	4,0%	380	3,3%	€ 24,3
Mercadona	€ 0,7	€ 25,5	2,7%	90	8,6%	n/a
Jeronimo Martins	€ 0,6	€ 18,6	3,5%	115	3,6%	€ 11,0
Sainsbury	€ 0,8	€ 33,4	2,5%	180	1,9%	€ 5,1
Casino	€ 1,3	€ 34,6	3,7%	210	3,2%	€ 3,8
Metro Group	€ 0,8	€ 27,1	3,1%	102	1,8%	€ 2,7
Colruyt Group	€ 0,5	€ 9,4	5,1%	30	4,0%	€ 7,6

	€B	€B	EBIT Margin	Thousands	%	€B
	EBIT	Revenue	EBIT / Revenue	Employees	Capex / Revenue	Market Cap
Nestle	€ 13,0	€ 87,9	14,8%	291	5,9%	€ 342,5
Unilever	€ 8,7	€ 52,0	16,8%	150	2,7%	€ 138,6
Coca-Cola	€ 9,3	€ 34,3	27,1%	86	5,5%	€ 212,2
AB InBev	€ 14,8	€ 48,1	30,8%	170	9,9%	€ 81,7
Diageo	€ 4,6	€ 14,8	31,4%	28	4,0%	€ 83,4
Mondelez	€ 3,4	€ 23,9	14,2%	80	4,2%	€ 79,7
PepsiCo	€ 9,8	€ 61,8	15,8%	267	6,3%	€ 199,6
Kraft Heinz	€ 2,8	€ 23,0	12,3%	38	3,1%	€ 38,1
Danone	€ 3,2	€ 25,3	12,8%	100	3,8%	€ 49,1
Heineken	€ 4,0	€ 23,9	16,8%	86	8,0%	€ 48,2
Altria Group	€ 9,5	€ 23,1	41,1%	7	1,0%	€ 76,4
Kellogg	€ 1,3	€ 12,5	10,3%	31	4,3%	€ 24,5

Sources: EuroCommerce calculations based on company reports, year 2019

Contact:

Niccolo Ciulli - +32 2 737 05 83 - ciulli@eurocommerce.eu

Christel Delberghe - +32 2 737 05 91 - delberghe@eurocommerce.eu

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