

Cross-border enforcement of Unfair Trading Practices in the agri-food supply chain – EuroCommerce views

Key messages

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The current patchwork approach to cross-border enforcement of EU rules is inefficient, risks leading to multiple different procedures and undermines legal certainty. The Commission should examine and, if necessary, propose a common approach or single procedure (e.g. through a set of general rules or a single package of proposals) to facilitate cross-border enforcement across all existing EU legislation that may require coordination between enforcement authorities. Such rules should then apply to any future legislation that would require cross-border enforcement thereafter.

The Commission should be more transparent on what the problems experienced with cross-border enforcement of the Directive on unfair trading practices in the food supply chain (UTP Directive) are and how often they are encountered, so it can be understood how legislation can tackle them and whether this is sufficient, practical and preserves fundamental rights.

Any proposal to facilitate cross-border enforcement of rules on unfair trading practices (UTPs) must be limited only to enforcing the practices and scope of application of the UTP Directive. Member states must not be permitted to fragment the Single Market and enforce their national rules that go beyond the UTP Directive outside their territory, especially given that a number of these violate the EU fundamental freedoms.

The Directive on Unfair Trading Practices in the Food Supply Chain and its cross-border enforcement

1. As part of a [package of measures](#) in March 2024 to address farmers' concerns following a series of protests, the Commission **announced it would propose a Regulation** in Q4 2024 to tackle difficulties in cross-border enforcement of rules against unfair trading practices in the agrifood chain. In April 2024, the Commission's [Report on the implementation of the Directive on unfair trading practices in the food supply chain \(UTP Directive\)](#) offered some further clarification.
2. In the absence of a call for evidence, we understand the Commission is proposing to address the need to:

- **Strengthen cooperation** between authorities **in investigating buyers** established in another Member State.
 - **Facilitate coordination** as buyers may source products in multiple Member States.
 - **Facilitate the reallocation of jurisdiction for cases** across the network of enforcement authorities.
 - Enable the **exchange of confidential information**.
 - **Facilitate enforcement** against a buyer established in another Member State.
 - Address **issues related to languages** used in the exchanges.
 - Enable better enforcement and the **collection of penalties**.
3. We understand these new rules are being proposed because the Commission believes that the obligation in Article 8 of the UTP Directive (on mutual assistance in cross-border cooperation) does not provide a sufficient legal basis for efficient cross-border enforcement.
 4. Furthermore, national enforcers have highlighted issues with buying alliances. As noted in the above-mentioned report, this concerns, *'challenges related to their location, in some cases outside of the EU and the pressure exerted on the resources of the enforcement authority.'*
 5. **We call on the Commission to follow the better regulation guidelines¹ and publish a Call for Evidence.** The principle enshrined in the guidelines notes that *'better regulation is not about regulating or deregulating. It is a way of working that allows political decisions to be prepared in an open and transparent manner, informed by the best available evidence, including via the comprehensive involvement of stakeholders.'* As set out in this position paper, there are questions on coherence that confirm the need to have a participatory, evidence-based and transparent process.

EuroCommerce views on cross-border enforcement

A patchwork approach to fixing problems is incoherent and inefficient.

6. The problems the Commission is proposing to address (described above) are not sector specific but exist in any EU legislation that foresees national enforcement authorities.
7. **We call on the Commission to stop its patchwork approach to fixing problems around cross-border enforcement. We suggest the Commission prepares one approach or procedure, such as one single package of proposals or common general rules, to facilitate cooperation and coordination between national enforcement authorities in a proportionate and necessary manner and ensure future EU legislation does not create the same problem.**
8. To date, rules exist in consumer law for [cross-border cooperation for consumer protection authorities](#) and the EU co-legislators are discussing a [proposal](#) on cross-border enforcement of the General Data Protection Regulation (GDPR) to address cross-border complaints and the translation of documents.
9. In our response to the call for evidence on the GDPR rules, we also articulated additional problems that were encountered.² These problems were based on our experience but there is no such comparable level of experience with UTP Directive due to the little time passed since the transposed laws came into force or enforcement authorities have been operating.

¹ [d0bbd77f-bee5-4ee5-b5c4-6110c7605476_en \(europa.eu\)](#).

² [Feedback from: EuroCommerce \(europa.eu\)](#).

10. Member States had to transpose the UTP Directive into national law by May 2021. Considering the [delays](#) and transition periods, rules in many countries only entered into force in 2022. Hence, experience with enforcement as of mid-2024 may be limited. This is also confirmed by the [Report on the implementation of the UTP Directive](#), that notes that by 15 March 2024, only 18 Member States had sent their annual report to the Commission.³ At the meeting of the EU Agri-Food Chain Observatory on 17 July, Ireland advised that they only set up the enforcement authority to collect cases on UTPs in December 2023. The German enforcer only published one decision to date and 5 short case reports for investigations which were settled.
11. The accompanying [Staff Working Document](#) highlights that 133 complaints were received across the EU in 2022 (178 complaints, where 45 complaints were rejected, closed or withdrawn) and 179 complaints in 2023⁴ (271 complaints, with 92 rejected, closed or withdrawn). These are very few complaints given the large number of contracts that are signed with suppliers across the EU. In some countries, such as Denmark which has had an enforcement authority from the start, no complaints have been received despite it being possible for the competition authority to protect/keep confidential the identity of the company complaining where identification of the complainant may jeopardise their interests. We query whether enough experience exists that merits a specific proposal for a Regulation.
- 12. We call on the Commission to examine where similar problems in cross-border enforcement already exist in the EU acquis and where they could arise in existing proposals to stop the same regulatory gap arising again and again.**
13. For example, the [Platform to Business Regulation](#) provides for each Member State to ensure adequate and effective enforcement⁵. The [Report on the Implementation of the Platform to Business Regulation](#) notes that a P2B Wiki was set up to support the exchange of information and coordinate enforcement activities and organise joint monitoring and enforcement actions.
14. The [Commission proposal for a Regulation on combatting late payment](#) also proposes that Member States set up enforcement authorities. It does not contain detailed provisions on cooperation and enforcement⁶ and is vague on coordination.⁷
15. Whereas some legislation contains provision for cross-border enforcement and coordination in greater detail, others do not. For example, the [Digital Services Act](#) sets up a Digital Services Coordinator, and the [Market Surveillance of Products Regulation](#) provides for systematic cooperation and exchange of information between market surveillance and other bodies designated as authorities in charge of the control on products entering the EU in. In addition, the Regulation prohibiting products made with forced labour on the EU market creates the Union Network against Forced Labour Products.
16. More coordination among national enforcement authorities will also be necessary against unlawful products coming into the EU from non-EU-countries under product law, consumer law, the Digital Services Act and customs rules against non-compliant companies. This will require cooperation for example between enforcement authorities appointed under the [Market Surveillance of Products Regulation](#), the General Product Safety Regulation, the Consumer Protection Cooperation

³ Footnote 38.

⁴ Excluding EE, EL, FR, MT, SK, FI.

⁵ Article 15; also see page 24, in the [Staff Working Document](#) accompanying the report on the first implementation report of the Platform to Business Regulation.

⁶ Article 13(3) of the proposal is similarly worded to Article 8 of the UTP Directive. Article 13 states: 'Enforcement authorities shall cooperate effectively with each other and with the Commission and shall provide each other with mutual assistance in investigations that have a cross-border dimension'. Article 8 of the UTP Directive states, 'Member States shall ensure that enforcement authorities cooperate effectively with each other and with the Commission, and that they provide each other with mutual assistance in investigations that have a cross-border dimension.'

⁷ Article 13(4) of the proposal only provides, 'Enforcement authorities shall coordinate their activities with other authorities responsible for enforcing other Union or national legislation including through exchange of information obligations.'

Regulation, the [Digital Services Act , and other relevant rules \(Customs Union\)](#), sustainability and corporate responsibility requirements.

17. If the trend of setting up national enforcement authorities in multiple legal instruments continues, the Commission should prevent the same regulatory gap from arising again and again and draft detailed provisions in the relevant proposal or, if necessary, propose general provisions on cross-border cooperation in a horizontal piece of legislation that applies between national EU agencies⁸ or a single package of proposals that adopts a common approach.
18. **A piecemeal approach to common problems, which will each individually need to be negotiated by the co-legislators, will result in different rules to deal with the same problem - adding complexity, uncertainty and confusion.** President Von der Leyen reiterated the importance of better enforcement in her speech to the European Parliament ahead of her re-election on 18 July 2024. If the proposal intends to deal with a practical problem, it needs an approach that is coherent and consistent, and which minimises complexity, uncertainty and confusion.

A more efficient and effective way to correct the perceived problem may exist by a means other than a proposal for a Regulation

19. Despite the Commission's assessment that Article 8 of the UTP Directive may not constitute a sufficient legal basis, cross-border cooperation was possible in Germany in a case against Arla in 2022.
20. A supplier to Arla complained to the German authority about a unilateral change of contract. In that case, the German enforcement authority exchanged with the European Commission and the enforcement authorities of other countries where Arla has cooperative suppliers (Belgium, Denmark, the Netherlands, Luxembourg and Sweden).
21. The legal basis for such cooperation was identified in Article 8 of the Directive and Section 30(1) AgrarOLkG (the German UTP implementation law).⁹
22. We have no indication that major issues arose during this instance of cross-border cooperation. We would hence invite the Commission to reflect on this case and use section 30 of the German UTP law as a possible blueprint for discussions with the enforcement authorities as a solution if a gap exists in their national implementation of the UTP Directive. This could form part of the exchange between enforcement authorities on implementing measures (Article 8(2) of the UTP Directive).

⁸ For example, this could be considered in the evaluation of the Brussels and Rome Regulations.

⁹ Section 30: Mutual assistance between enforcement authorities

(1) *The enforcement authority shall provide information and administrative assistance to the enforcement authorities of the other Member States and the European Commission insofar as this is necessary for the harmonised implementation and application of Directive (EU) 2019/633. The administrative assistance relates in particular to requests for information and investigations of purchasers established in Germany.*

(2) *The enforcement authority shall take all appropriate measures to comply with requests for assistance without delay and at the latest within six weeks of receipt. If the requesting enforcement authority of the other Member State has indicated that a request for confidentiality has been made, Section 26 shall apply accordingly.*

(3) *The enforcement authority may only refuse requests for mutual assistance if:*

1. *it is not competent for the subject matter of the request or for the measures it is to carry out, or*
2. *compliance with the request would be contrary to law.*

(4) *The enforcing authority shall inform the requesting enforcing authority of the other Member State of the results or, where appropriate, of the progress of the measures taken to comply with the request for assistance. In the case of paragraph 3, it shall explain the reasons for refusing the request.*

(5) *A request for assistance from the enforcement authority shall contain all necessary information; this shall include in particular the purpose and justification of the request and, where applicable, a request for confidentiality pursuant to Section 26 (1). The information provided in response to the request may only be used for the purpose for which it was requested.*

23. Alternatively, as the Commission is still completing its conformity check, the absence of a similar provision could be taken as non-compliance with the second part of Article 8(1), *'and that they provide each other with mutual assistance in investigations that have a cross-border dimension'* and Member States encouraged to include a similar provision in their national laws.
24. Similarly, inspiration could also be taken from the manner in which enforcement authorities cooperate as described in the [Report on the Implementation of the Platform to Business Regulation](#). The Report notes that *'a group of Member State authorities responsible for enforcing the P2B Regulation decided to set up an informal P2B network (the 'steering group'). To support the exchange of information and coordinate enforcement activities (e.g. sweeps) a P2B Wiki was set up, with almost all Member States represented. During the meetings (and via the Wiki space), enforcement authorities or Member State authorities responsible for P2B Regulation implementation and awareness raising organise calls for information, share information about relevant court rulings and guidelines adopted by the enforcement authorities, or organise joint monitoring and enforcement actions such as sweeps. These exchanges are important not just for the authorities taking part in enforcement but also for other authorities who can learn from the exercise and become incentivised to participate more actively in the future.'*
25. In the annual report of the Italian enforcement authority,¹⁰ the authority appears to be developing an alternative approach. Italy and France are drafting a protocol for cross-border cooperation to agree to exchange experiences on the management methods, define and structure the main aspects related to the management of these cases and begin to define the modalities of cooperation for future transnational cases.

It is unclear how a proposal for a Regulation on cross-border enforcement can address insufficient resources or challenges relating to the location of a company under investigation, particularly those outside the EU.

26. The Commission has identified issues in the Implementation Report¹¹ relating to buying alliances, namely:
- *'pressure exerted on resources'* in investigating buying alliances; and
 - *'challenges related to their location, in some cases outside the EU.'*
27. It is unclear how rules on cross-border enforcement could improve financial or other resources of enforcement authorities allegedly under pressure from investigating buying alliances.
28. We also do not see how a Regulation on cross-border enforcement within the EU could address challenges related to the location of a buying alliance outside the EU.
29. The March 2024 package also linked the upcoming proposal to the need for *'coordinated action against large multinational food and retail companies acting as buyers or providers of certain-retail related services'*. We do not understand what rule in the UTP Directive (i.e. the legal basis) permits joint investigations – especially because of the differences in national rules that go beyond the minimum harmonisation in the UTP Directive.

The issue of extra-territoriality

30. If the Commission proceeds with a proposal focused on cross-border enforcement of the UTP Directive, we are very concerned that this will result in the extraterritorial application of national laws in the Single Market. It is of the utmost importance for the integrity of the Single Market that

¹⁰ [Masaf - ICQRF - Unfair Practices \(politicheagricole.it\)](#).

¹¹ [EUR-Lex - 52024DC0176 - EN - EUR-Lex \(europa.eu\)](#).

any such proposal only concerns the mandatory provisions and scope of the UTP Directive, and not any national provisions going beyond those.

Why do we identify this risk.

31. Since 2021, there are 10 UTP practices which are unlawful in all Member States. This is the only harmonisation that has been achieved:
 - For the 6 grey practices in the UTP Directive, certain Member States allow them if agreed upon beforehand, whereas other countries ban them outright.
 - Most Member States have changed or removed the turnover thresholds established in the Directive.
 - Several Member States have added new practices to the grey and black lists.
32. Amidst such a different landscape of national rules, a proposal to facilitate cross-border enforcement of the UTP Directive raises several questions:
 - If a practice is unlawful in one country, but not in another, could an enforcement authority ask – based on the new cross-border enforcement rules - for assistance to investigate (and potentially prosecute) conduct which is legal in the second Member State?
 - Could an enforcement authority ask a second Member State for information on contracts not subject to its jurisdiction?
 - Could an enforcement authority ask its counterpart for assistance in collecting a fine for an infringement which is not illegal across the border?
33. France already approved in 2023 rules which impose French law and give exclusive jurisdiction to French courts for all commercial negotiations that involve products destined for the French market.
34. EuroCommerce filed [a complaint](#) to the Commission against the French law, which breaches EU rules on choice of law and free movement:
 - Rome I and Brussels Bis Regulations (**choice of law**), as it deprives – without justification – the parties to a contract of the freedom to choose applicable laws and competent jurisdiction;
 - Art. 34 TFEU (**free movement of goods**) by requiring – without justification – all foreign operators distributing in France to be subject to rules that do not exist in other Member States, despite such operators being already subject to distribution rules in their own Member State(s);
 - Arts. 56-57 TFEU and the Services Directive (**free movement of services**) by preventing a service provider from offering services to recipients in other Member States without any valid (under EU law) justifications;
 - Art. 49 TFEU (**freedom of establishment**) by – without justification – discouraging foreign operators set up outside of France where they would be exposed to a system of sanctions that falls outside of the ordinary legal rules and by limiting the choice of legal form.

Why could others see it as an opportunity

35. Large suppliers and farmers (who are heavily supporting the French rules at national level) have already asked for these rules to be adopted at European level and will likely continue to do so in the legislative procedure for the upcoming Regulation.¹²

¹² [Parliamentary question | Sanctions for failure to cover the cost of wine production | E-000723/2024 | European Parliament \(europa.eu\)](#).

36. This is particularly the case as France claims that all its rules on commercial negotiations qualify as *loi de police*, which justifies, according to them, the violation of European freedoms.
37. Therefore, despite the Commission having made clear that it intends for the proposed regulation to be a procedural addition (with no substantive changes to the UTP Directive), it is very likely that the proposal will be used as a vehicle to change rules on choice of law applicable to contracts.

Why this would end the Single Market for sourcing

38. The rules established in the EU normally mean that commercial conflicts should be (i) brought before the court or arbitrator selected in the applicable terms and conditions, and (ii) reviewed on the basis of the law that has been rendered applicable to them.
39. Choice of law, including third country law, is covered by the Rome I and Rome II Regulations. Choice of jurisdiction, however, is covered by the Brussels bis Regulation only where an EU court has been designated. Choice of jurisdiction of third countries is covered by the international private law of the Member States.
40. The only mandatory rules are those that are contained in the UTP Directive.
41. **A Commission proposal must limit cross-border cooperation only to the practices and scope of application (turnover thresholds) in the UTP Directive.** Any additional practice and/or extension of the scope implemented at national level should not fall within the scope of the upcoming rules. If not, it will undermine the Single Market.
42. Entertaining the possibility of permitting exceptions on the basis of '*loi de police*'/mandatory rules or allowing extraterritorial application of national rules risks re-nationalising and fragmenting the Single Market. This will bring no benefits to farmers but will affect ultimately the benefits that consumers derive from the Single Market.¹³
43. Overriding a companies' choice of law and jurisdiction should only be done exceptionally, where there is a genuine and sufficiently serious threat affecting a fundamental interest of society.
44. This is for good reason, as it helps any business operate in the Single Market. Otherwise, you would expect a business looking to source or sell to other countries to know all 27 Member States rules that may be different and which may even contradict one another. Therefore, it needs to remain with the choice of parties to negotiate which rules or jurisdiction applies.
45. Where rules are harmonised – i.e. where a minimum level of protection has been agreed by the Member States – the rules for choice of law or jurisdiction should be determined by the parties and the contract honoured.
46. If Member States have gone further and legislated beyond those rules, it must be recalled that they are only permitted to do so if such national provisions are compatible with the freedoms of the Single Market.
47. Undoing this would put an end to the Single Market for agri-food products and create 27 UTP regimes, annulling any harmonising benefits the UTP Directive created.
48. It should also not be forgotten that there may be cases where it is desirable for a supplier to accept the jurisdiction or law of another EU country, for example, where access to justice is faster than in their home country.
49. Creating a sectoral exception or permitting extra-territorial effect deters doing business in the Single Market and works toward renationalising sourcing or markets.

¹³ Enrico Letta, 'Much more than a market' page 114, available here: <https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf>

50. Requiring compliance with the mandatory rules by non-EU companies already gives extra-territorial effect of the UTP Directive outside the EU (the 'Brussels effect'). Going further to permit extra-territorial effect of national rules within the EU on top of the mandatory rules undermines the principles of the Hague Convention. This can open the door to other countries asking the same of EU countries, that may be less desirable if foreign jurisdiction and rules offer less protection or give less chance of a successful resolution of disputes when things go wrong.
- 51. Freedom for parties within the EU to choose the applicable law to a contract they are party to should be preserved and the existing rules on the issue (such as the Rome I and Brussels I Regulations) should always apply.**
52. The same should apply to any '*coordinated action*' by different authorities against buyers (as suggested in the March 2024 package). This coordination should only be possible on the basis of the rules in the UTP Directive both in terms of practice and scope. No coordination should be possible on the basis of divergent national rules, which are at times incompatible with EU law

Safeguards for businesses

53. If the Commission proceeds with a proposal focused on cross-border enforcement of the UTP Directive, it must contain clear safeguards for businesses, considering that enforcement authorities of countries which are already looking at the extraterritorial application of their national rules will want to have wider powers, including on investigative steps and penalties.
54. Safeguards include respecting the parties' rights of defence and due process and the protection of commercially sensitive information and trade secrets.
55. We would expect at the least the same minimum safeguards that are included in the [proposal](#) on cross-border enforcement of the GDPR.

Procedural issues

56. We remain concerned about the timing of the upcoming proposal.
57. We do not understand why, with so few cases, the Commission deems it so urgent and necessary to make a proposal ahead of the evaluation of the UTP Directive given it is expected to conclude in November 2025.
58. We also do not understand why there is such little transparency on the problem and reasons behind the proposal. **We call on the Commission to share the minutes of the meetings of the enforcement authorities.** This would allow interested parties to submit better informed replies to the Call for Evidence we are asking the Commission to publish as per above.
59. It is also unclear how the proposal for a Regulation on cross-border enforcement will be negotiated/run in parallel to a procedure for evaluation that may result in a recommendation for a revision of the UTP Directive. This could leave the newly approved cross-border regulation redundant before it is even approved. The other outcome could leave the evaluation redundant before it is completed
60. We therefore, also **call on the Commission to advise how it will address proposals that may be put forward by the co-legislators with substantive amendments to the UTP Directive**, for example, new black list and grey list practices.
61. We understand the contractor carrying out the evaluation has not commissioned the promised economic studies measuring the impact of different practices concerned by national rules and voluntary initiatives at micro- and macro- economic levels (section 9 of the impact assessment).
62. We would expect these to be available before any discussion of substantive amendments to the UTP Directive starts.