

Fit For Future Opinion on the ongoing evaluation of the Unfair Trading Practices Directive – EuroCommerce views

Introduction

In October 2024, the Fit for Future Platform¹ adopted Opinion 2024/4 on the ongoing evaluation of Directive 2019/633 on unfair trading practices in B2B relationships in the agricultural and food supply chain ('the UTP Directive').

EU retailers and wholesalers are not directly present in the Fit for Future Platform. They are a key sector but were not consulted on their views on the Directive as part of the Platform's evaluation or recommendations. For these reasons, EuroCommerce would like to provide its views in relation to the Opinion.

The Opinion

Suggestion 1

The Opinion suggests assessing how effective the Directive was in enabling operators, especially SMEs to fully benefit from the rules.

We strongly support this suggestion for the following reasons:

- As a measure based on the agriculture provisions of the Treaty, **the Directive's effectiveness needs to examine whether it achieves the intended effect to improve farmers'** - and especially small farmers and SME processors- position in the food supply chain. This must be done before further action is taken at the EU level.
- Several member states have extended the scope of the Directive to protect larger suppliers with considerable market power, including global multinational suppliers. This seems to have little relationship to the objectives of protecting farmers and the Commission should assess via an economic study whether these measures have had a 'trickle down' effect on farmers.

¹ https://commission.europa.eu/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-less-costly-and-future-proof/fit-future-platform-f4f-2021-2024_en.

- This would be in line with the Commission’s Impact Assessment ahead of the proposal for the 2019 Directive, where the Commission promised to ‘*carry out or commission economic studies aiming at measuring the impact of the different practices concerned by national rules and voluntary initiatives at micro- and macro-economic level.*’

Suggestion 2

Suggestion 2 centres around the scope of the Directive, noting the turnover-based scope of protection of the directive.

The Opinion explains that this has been subject to criticism, citing difficulties in interpreting the rules and the higher costs for stakeholders to search for such information and questions whether increased harmonisation may better fulfill the goal of combating unfair trading practices.

We would warn against abandoning the turnover-based approach:

- The experience in those member states who have abandoned the turnover-based approach shows that this has largely benefitted large suppliers, with no proven benefits to farmers. As an example, the reduction of payment terms vis-à-vis large suppliers has led to a huge cashflow transfer (in the millions of euros) from retailers to large suppliers.
- This approach does not create any benefit to farmers but further strengthens the position of large suppliers and risks increasing consumer prices. In 2019, the Chief Economist of the Commission competition services warned against this approach, claiming that ‘*regulating commercial transactions between such large players could reduce the pressure that large customers can exert on large manufacturers to reduce their margins and imply significant market disturbance because of their broad impact on the market and, ultimately, on consumer prices. Besides, it is not obvious that farmers or other parties higher up in the supply chain would benefit from a regulation of UTPs that would give large processors or manufacturers greater margins.*’²
- The Directive only protects suppliers and never buyers: this means that, if thresholds are removed, large sellers - including global food multinationals or seeds, fertilisers and equipment (farming machinery) suppliers - enjoy protection against all buyers even SMEs.
- We have set out our sector’s experience when thresholds have been removed in our response to the Call for Evidence on the evaluation of the Directive.³

We agree with the Opinion in calling on the Commission to take ‘a holistic view’ in the evaluation of the directive, including on the impact that removing turnover thresholds has on farmers, processors, retailers and wholesalers and consumers – and whether the benefits of affording protection to all suppliers outweigh the cost of this approach for instance on consumer prices.

However, we are concerned about misunderstandings. The Opinion explains that smaller buyers are not in scope for simplification reasons. EuroCommerce would like to clarify that this is not the case. As explained above, small buyers are not in scope because the Directive only protects suppliers and not

² UTP Impact Assessment, Annex H Section 2: *there can be unintended negative consequences of regulating practices in the food supply chain. This concerns notably regulating the trading relationships between (mostly brand) manufacturers holding a significant share of the market of the sales of food products in a particular product category in a given Member State (hereafter designated in a simplified way as "large manufacturers") and their "large customers" (e.g. modern retailers holding a significant share of the food retail sales in a given Member State). Regulating commercial transactions between such large players could reduce the pressure that large customers can exert on large manufacturers to reduce their margins and imply significant market disturbance because of their broad impact on the market and, ultimately, on consumer prices. Besides, it is not obvious that farmers or other parties higher up in the supply chain would benefit from a regulation of UTPs that would give large processors or manufacturers greater margins. A large manufacturer that would leverage a regulation of UTPs to pressurize the retailers to increase prices at which retailers buy from the manufacturer has no obligation or incentives and is unlikely to share with its own suppliers the extra benefits it would obtain from such regulation.*

³ [Feedback from: EuroCommerce](#)

buyers. In fact, small buyers face an administrative burden as they need to comply with the requirements but get no benefit from the protection it offers in return.

To tackle difficulties with legal certainty related to the thresholds, EuroCommerce suggests:

- Guidance and best practice exchanges between national enforcement authorities as well as among supply chain actors; and
- The use of the Your Europe portal to share information about national rules, with initiatives raising awareness of this tool and how it can help search for turnover information, including in cross-border transactions.

Suggestion 3

The third suggestion focuses on a periodic review of the grey and black-list.

We agree with the Opinion that this should not be at the expense of legal certainty but should also be based on an impact assessment.

- Constantly changing what is permitted or not permitted results in confusion. It is important that the blacklist focuses on a short list of practices that are clearly defined and based on an impact assessment and stakeholder feedback, and ultimately, improves the position of farmers.
- Similarly, over-implementation can create risks to legal certainty and burdens to companies wishing to operate cross-border in the EU – with no evidence of positive effects to farmers.
- Experience has shown that moving grey practices to the blacklist has had a negative effect for suppliers. For instance, German law provides for a general ban on returns of agricultural and food products including free replacement of perishable goods whose best-before date had run out or was close to expiry. This moved a grey practice to a blacklisted practice. However, several small suppliers built their business model on returns and attached great importance to a constantly fresh assortment to compete with larger brands. With the ban on returns, such suppliers found themselves at a permanent disadvantage in competition with larger producers not falling within the scope of the law. Such practice, passed by the German legislator with the intent of protecting suppliers, led to disadvantages in particular for financially weaker suppliers, jeopardised the entire business models of SME suppliers and was explicitly criticised by some of them.⁴
- Many Member States have gold-plated the Directive in its transposition, with questions pending on how compatible these are with the Single Market. This highlights the need to strengthen notification procedures (e.g. using TRIS) and awareness raising of the assessment that is needed of the effect on the Single Market. These are areas that the Fit for Future opinion does not consider, but which would be beneficial for legal certainty.

Suggestion 4

Suggestion 4 focuses on cross-border cooperation among enforcement authorities.

The Opinion notes that the Directive may provide an insufficient legal basis to ensure effective cross-border cooperation.

We would urge the Commission to explore whether this is really the case and consider what is the most coherent way to address cross-border cooperation in EU legislation and does not permit extra-territorial effect.

⁴ [Feedback from: EuroCommerce](#)

- Cross-border cooperation was possible in Germany in a case against Arla in 2022 on the basis of article 8 of the Directive and Section 30(1) AgrarOLkG (the German UTP implementation law). 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) with no indication of major issues. Rather than immediately concluding new rules are necessary, the Commission should first reflect on this case and consider using 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.
- **However, we are concerned about misunderstandings** as the Opinion also notes that difficulties rise due to the fact that not all member states ban the same practices. This is an issue that is inherent to minimum harmonisation directives such as the UTP Directive. When approving the Directive in 2019, member states accepted that only a limited number of practices would be illegal across the EU. Seeking now to impose their own rules beyond their borders would undermine the EU Single Market.⁵
- We also urge the Commission to consider the views expressed in our position paper on the proposed Regulation to address cross-border enforcement⁶. In particular, noting the need for a coherent rather than piecemeal approach to improving cross-border enforcement and cooperation and the dangers to the Single Market if Member States rules are permitted to have extra-territorial effect.⁷

⁵ [20240425-utp-implementation-report.pdf](#)

⁶ [eurocommerce-views-on-utps-cross-border.pdf](#)

⁷ [EuroCommerce urges European Commission to take action against French rules on B2B commercial relations - EuroCommerce](#)