Food and Agriculture Organization of the United Nations

Unfair trading practices in business-to-business relationships in agricultural supply chains: a growing concern

Key messages

- There is an increasing concern about bargaining power imbalances in business-to-business relationships and the unfair trading practices (UTPs) they can generate in agricultural supply chains.
- Surveys have shown that UTPs are widespread and affect many agricultural businesses.
- UTPs are costly. For example, in the European Union (EU), they are estimated to cost EU-based food suppliers between EUR 30 and 40 billion each year.
- While in most jurisdictions UTPs are addressed through general competition law, contract law,[1] trade law, sector-specific legislation and/or self-regulation, the European Union and the United Kingdom of Great Britain and Northern Ireland (United Kingdom) have, independently, introduced specific regulations, and Japan has provided soft law guidance on how to apply more general competition law rules to agricultural supply chains. In New Zealand, a mandatory Grocery Supply Code was introduced to address negotiating imbalances and improve transparency of trading relationships.

Introduction

The concept of unfair trading practices (UTPs) in business-to-business (B2B) relationships in the agrifood sector received greater attention in the European Union (EU) in the wake of its liberalization process and structural adjustments in agrifood supply chains (Vandevelde, Lee and Swinnen, 2020). Fairness is difficult to define, as it depends on the perceived implications of an action on the well-being of the different actors as well as on the evaluating principles, which can vary by agent and case.

Although there is no commonly agreed definition of UTPs in agricultural supply chains, a widely used reference is the one proposed by the European Commission in 2014 (European Commission, 2014) and subsequently used in the EU Directive 2019/633 (EU, 2019): *"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."*[2] However, identifying UTPs is far from straightforward, as there is a wide range of practices that may be considered UTPs, depending on the trade sector and context. Based on survey responses in the European Union, the most frequently detected unfair trading practices were late payments for perishable or non-perishable agricultural and food products, payments not related to a specific transaction, payments requested from the supplier for marketing actions as well as for stocking, displaying and listing (European Commission, 2024).[3]

[1] A contract is an agreement that specifies certain legally enforceable rights and obligations pertaining to two or more parties and may provide for the transfer of goods, services and/or money. See UNIDROIT/FAO and IFAD (2015) for a discussion of legal issues and unfair trading practices in contract farming.

[2] Falkowski (2017) and Cafaggi and Iamiceli (2018) refer to this as the European Commission definition. However, the European Commission informed the authors that it does not consider this a precise definition of UTPs, and it is important to note that unfair trading practices are not referenced to a particular definition, but defined within the context of a list of agreed principles and good practices in the European Directive 2019/633 (EU, 2019).

[3] An evaluation of the UTP Directive is currently ongoing and a report will be published by 1 November 2025.

It is important to note that B2B relationships go beyond contractual matters and are also defined by structural features that may require additional measures if imbalances in power are to be effectively addressed. Uneven distribution of power and allocation of risks, costs and benefits among agrifood supply chain actors can also be addressed through the establishment of collaborative legal structures (e.g., cooperatives and companies).[4]

Why worry about unfair trading practices?

UTPs generate substantial economic burdens. For example, as a percentage of businesses' annual turnovers, in Cyprus, their cost has been estimated from 5.7 percent for retailers to 31.9 percent for farmers (Markou *et al.*, 2020). The total costs that UTPs impose on EU-based food suppliers are estimated at between EUR 30 and 40 billion per annum (Europe Economics, 2014). When suppliers cannot shoulder the additional burden placed on them by UTPs, they are forced to leave the sector. These are more often smaller scale producers and, to survive, companies may try to erode worker conditions, for instance by using more piecework instead of hourly wages, shorter-term contracts and employing workers more willing to accept poorer conditions (BASIC, 2015). When risks and unexpected costs are excessively transferred from the buyer to the supplier, incentives to invest in new capacity and responsible business practices are undermined. In the longer term, this negatively impacts consumers who may face less choice, lower quality and higher prices.

Concern about UTPs is growing

In the past two decades, as global supply chains have developed considerably,[5] the focus of concern has shifted from the dominant position of food processors to the concentration in input and retail markets (Deconinck, 2020; Swinnen and Vandeplas, 2010). This has led to concerns, especially among farmers' associations and policymakers, that the resulting imbalance in market power between businesses in domestic and international markets may exacerbate the incidence of UTPs. The recent COVID-19 pandemic and the disruptions it caused to global supply chains, as well as the subsequent adverse economic conditions, gave further impetus to these concerns.

The available evidence shows that UTPs are widespread. For example, a survey of grocery market suppliers in the United Kingdom found that 37 – 48 percent of suppliers experienced payment delays, were required to make excessive payments for customer complaints, or were subject to unilateral changes to previously agreed prices (Davis and Reilly, 2010).

Other surveys similarly found evidence of the widespread use of UTPs in the processing and retail sectors (CIAA-AIM, 2011; Copa-Cogeca, 2013a; Copa-Cogeca, 2013b; BASIC, 2015; DiMarcantonio, Ciaian and Castellanos, 2018). Some of the most common UTPs found were: imposing general terms and conditions that contain unfair clauses; refusing or avoiding to mention essential terms in writing; non-respect of contractual terms by some customers; and threats of de-listing to obtain unjustified advantages (DiMarcantonio, Ciaian and Castellanos, 2018).

More recently, a 2022 survey of the grocery sector in the United Kingdom found that inflation has weakened the relationships between retailers and their suppliers (GCA, 2022). For example, 26 percent of suppliers said they had experienced either a refusal by a retailer to consider a request for a cost price increase (CPI), or an unreasonable delay in agreeing or in implementing an already agreed CPI.

Policy makers and legislators are responding

Power imbalances and abuses in B2B relationships have commonly been addressed by competition and contract laws as well as through co- and self- regulation.[6] However, the processes of enforcing fairness are often cumbersome, costly and might lead to exclusion from the market or other forms of retaliation (Piszcz and Jasser, 2019). In response,

[4] See also the ongoing UNIDROIT/FAO/IFAD project to develop a legal guide on "Collaborative Legal Structures for Agricultural Enterprises:" https://www.unidroit.org/work-in-progress/legal-structure-of-agri-enterprise/.

[5] Data for 2013 show that the largest 132 fast-moving consumer goods retailers generated 23.2 percent of their retail revenue from foreign operations. 58.3 percent of retailers in this group operated in more than one country, with the group's average being 4.9 countries (Deloitte, 2015).

[6] For an overview of European Union Member States legislation and enforcement mechanisms see Cafaggi and Iamiceli (2018).

regulatory initiatives addressing UTPs specifically in the agricultural supply chains have been launched, mainly in the European Union, although also Japan, New Zealand and the United Kingdom have initiatives in place, and other countries are developing legal frameworks to address UTPs. In general, these initiatives improve the process of enforcing fairness through ensuring the introduction of recommended or minimum measures, as in the case of contract farming (UNIDROIT/FAO and IFAD, 2015; Viinikainen and Bullon, 2018), confidentiality and establishing dedicated authorities that provide facilitated enforcement procedures.

The United Kingdom does not have statutory rules on UTPs, but it has put in place a system to tackle these practices in the grocery sector, a reflection of its flexible, sectoral approach. This followed in-depth investigations into the grocery sector by the Office of Fair Trading and the Competition Commission,[7] which identified concerns regarding imbalances in bargaining power and the transfer of excessive risk and unexpected costs by grocery retailers to their suppliers. As a result, the Groceries Supply Code of Practice (GSCOP) was adopted in 2010 to ensure fair and lawful treatment of direct suppliers by the United Kingdom's ten largest supermarkets. Compliance with the GSCOP is monitored and enforced by the Groceries Code Adjudicator (GCA),[8] an independent regulator established in 2013 (Verdonk, 2018; BIS, 2013)

In Japan, the Antimonopoly Act and Subcontract Act play an important role in regulating the unjust use of superior bargaining positions. Building on these Acts, the Ministry of Agriculture, Forestry and Fisheries (MAFF) published a set of 'Guidelines for Promoting Fair Trade between Food Manufacturers and Retailers' in 2022, aimed at promoting fair transactions in this sector. The Guidelines address, inter alia, unilateral changes to prices and other terms of supply agreements, and leaving the producer with ordered but not purchased products (Neo, 2022).

In the European Union, the Directive 2019/633 aims to protect farmers and other suppliers within agricultural and food supply chains from UTPs (EU, 2019).[9] The focus on agriculture and food is due to the particular nature of this sector. There are millions of farmers who face doing business with only a few, much more powerful customers, such as processors, distributors and retailers, while at the same time lacking the legal and financial means to fight UTPs. The Directive provides for a minimum level of harmonization by establishing a list of prohibited UTPs between buyers and suppliers in the agricultural and food supply chain. It also lays down minimum rules on the enforcement of those prohibitions and on cooperation between the enforcement authorities. Member States may adopt or maintain national rules that go beyond the UTPs listed in the Directive provided that these are compatible with the rules on the functioning of the internal market. It also protects trading parties outside the European Union, when either the supplier or the buyer is established in the European Union.

The bargaining power imbalance, determined by differences in turnover levels between trading partners, is the key driver of UTPs. However, bargaining power is also affected by other factors, such as information asymmetries, product perishability, or the "fear factor," i.e. the fear of exclusion from the market or other forms of retaliation. The EU Directive 2019/633 applies only if the supplying and the buying companies are in different turnover categories. Other bargaining power factors are partly addressed through the type of UTPs considered (Figure 1) and the enforcement mechanism of the Directive.

As part of the Directive, EU Member States are required to designate an authority that has the power to act upon a complaint or act ex officio, investigate, terminate an infringement, levy fines and impose other penalties, and publish decisions. Moreover, aggrieved parties must have the possibility to file a complaint confidentially. These mechanisms are key provisions to reduce the fear of retribution and to mitigate the legal and financial weaknesses of smaller trading partners.

[7] The Office of Fair Trading and the Competition Commission were dissolved in 2014 with many of their functions assumed by the Competition and Markets Authority (CMA), established in the same year. The CMA, a non-ministerial government department, is the principal competition regulator in the United Kingdom.

[8] The CMA determines which retailers fall under the GSCOP, while the GCA ensures that designated retailers treat their direct suppliers lawfully and fairly. The GCA is the main enforcing authority as regards UTP legislation. For a list of main enforcing authorities in the European Union see Cafaggi and Iamiceli (2018).

[9] The Directive refers to the definition of UTPs provided by the European Commission (2014) and given in the introduction of this brief.

Figure 1. The 16 Unfair trading practices addressed by the EU Directive 2019/633

TEN BLACK UNFAIR TRADING PRACTICES

1. Payments later than 30 days for perishable agricultural and food products
2. Payment later than 60 days for other agri-food products
3. Short-notice cancellations of perishable agri-food products
4. Unilateral contract changes by the buyer
5. Payments not related to a specific transaction
6. Risk of loss and deterioration transferred to the supplier
7. Refusal of a written confirmation of a supply agreement buy the buyer, despite request of the supplier
8. Misuse of trade secrets by the buyer
9. Commercial retaliation by the buyer
10. Transferring the costs of examining customer complaints to the supplier

SIX GREY UNFAIR TRADING PRACTICES, ALLOWED SUBJECT TO CLEAR AND UNAMBIGUOUS AGREEMENT BEFORHAND

1. Return of unsold products
2. Payment of the supplier for stocking, display and listing
3. Payment of the supplierfor promotion
4. Payment of the supplierfor marketing
5. Payment of the supplierfor advertising
6. Payment of the supplierfor staff of the buyer, fitting out premisses

European Commission. 2024. Unfair trading practices in the food chain. In: European Commission. Brussels. [Accessed on 25 April 2024]. https://agriculture.ec.europa.eu/common-agricultural-policy/agri-food-supply-chain/unfair-trading-practices_en

Another notable development is the mandatory Grocery Supply Code that the New Zealand Ministry of Business, Innovation and Employment developed following the market study of the grocery sector by the Commerce Commission. The Code came into effect on 28 September 2023. It addresses the imbalance in negotiating positions between major grocery retailers and their suppliers by constraining the ability of the major retailers to push costs and risks onto suppliers and improving the transparency of the trading relationship (Commerce Commission, 2023).[10]

Conclusions and recommendations

The available evidence shows that UTPs in agricultural supply chains are very costly. However, the evidence base is limited, and additional data and studies are needed on the cost of UTPs in other countries, including developing countries, and for various commodities and different stakeholders along the supply chain.

Currently, specific regulation of UTPs in B2B relationships in agricultural supply chains remains rare outside the European Union, New Zealand and the United Kingdom. Japan offers an example of using soft law to provide guidance on the application of more general competition legislation specifically to UTPs in agricultural supply chains. In other countries, these are addressed through competition law, contract law, trade law and other types of regulatory instruments, including self-regulation. Evidence on the cost of UTPs and how well specific regulations can protect suppliers will help countries assess the merit of implementing similar approaches.

A knowledge gap also exists on the evaluation of the different regulatory approaches with respect to their impact on market efficiency, as well as regarding how to promote and provide the appropriate regulatory environments for more balanced trade relationships in terms of bargaining power. Further research and guidance in these areas would benefit policy formulation.

Finally, flexibility and the co-design of policy and legislation between public and private actors supported by further studies on regulatory practices and the

[10] The Australian Government launched a consultation on possible reforms to the Australian Consumer Law to address currently unregulated unfair trading practices.

development and utilization of related guidance materials should be considered essential tools for the promotion of fairness and transparency, and to address UTPs.

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Responsible Global Value Chains
OECD-FAO Guidance for Responsible Agricultural Supply Chains
Responsible Business Conduct (RBC) in Agriculture

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