

Subject: Contractual relations in the Food Supply Chain

1. DESCRIPTION OF ISSUE

A well-functioning food supply chain and price transmission mechanism is key for an economically sustainable farming. Criticism from representatives of farmers have been voiced over the years that the added value of the food production is not transmitted throughout the chain down to the farmer but stops with the retailers and/or processors. The recent difficulties on the dairy- and pigmeat markets have shown that prices of agricultural commodities have dropped considerably while retail prices have followed downwards only to a limited extent.

The processing and retail part of the food chain is often characterised by a high degree of concentration while the primary producers mainly consist of micro- or SMEs. Within the CAP there are several measures in place in order to facilitate for farmers to set up Producer Organisations or to allow certain types of collective bargaining. The current legislation also provides for Member States to make contracts between farmers and processors compulsory. In the milk sector, this possibility has only been used by some Member States. The purpose of the measures is to strengthen the role of the farmers, balance the power between different actors, and contribute to the overall efficiency of the food chain.

The existence of Unfair Trading Practices (UTPs) disrupts the functioning of the food chain. UTPs can occur between all types of operators along the entire food chain in both pre- and post-contractual situations. UTPs are practises that deviate grossly from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner to another. Examples of such practises are: unduly late payments, unfairly shift of entrepreneurial risk to the other party, unilateral and/or retroactive changes to contracts, unfair termination of contractual relationship.

2. EU ON UNFAIR TRADING PRACTISES

In July 2014 the Commission adopted a Communication on tackling UTPs. The Commission communication explained why the market structure of the food supply chain makes it particularly vulnerable to UTPs and it described the damage that UTPs can do to operators with low bargaining power.

In January 2016 the Commission adopted a report on unfair business-to-business trading practises in the food supply chain. The report recognizes that UTPs do exist but with the voluntary and regulatory measures taken over the last years the situation has improved. The experience gained from the voluntary schemes is mixed. In some countries the schemes have managed to considerable improve the situation in the chain while this is not the case in some other countries and they have therefore opted for regulatory measures/public enforcement instead. Since the development of voluntary and regulatory measures has a relatively recent history, the report states that the Commission does not see the added value of a specific harmonised regulatory approach at EU level at this stage. Further the report states that the Commission will continue to closely monitor the

results and has committed to, before the end of its mandate, to re-assess the potential added value of EU action to address UTPs in the light of new developments, or lack thereof.

Following the 2014 Communication on UTPs the European Parliament is currently negotiating an Own Initiative Report on the functioning of the food chain. The committee for the Internal Market is the lead committee and the Committee for Agriculture and Rural Development will give its opinion. At this stage both committees have voted their drafts. The adoption of the report is expected to be made (by the EP-plenary) in beginning of June 2016. The outcome of the vote on the draft opinions implies a willingness from the committees to move beyond the current situation.

3. HISTORY OF EU REGULATION/LEGISLATION

Food chain actors interact through a number of business-to-business relationships which are essentially governed by a "freedom to contract" approach. The general level of common legislation is low and there is no specific EU-legislation targeting UTPs. Farmers associations have over a longer time period called for legislative measures to address unfair trading practices while the rest of the food chain has traditionally been more reluctant. With its objective of protecting competition in the market, competition rules will not be able to capture all types of UTPs and typically focus measures on representing an abuse of dominant position. The retailers and the processing industry have been arguing against further legislative measures meaning that they would lead to an increased administrative burden, hamper adaptation and development in the food chain and lead to complex legal situations in those Member States where national legislation already exists.

4. SUPPLY CHAIN INITIATIVE

The existence of UTPs in business to business relations is seen as problem by the actors in the food chain although over the last years significant progress has been made. The voluntary Supply Chain Initiative (SCI) has gained significant participation and more than 1300 enterprises have signed up. A major shortcoming is that farmers and the meat processing industry have opted out from participating in the SCI. Criticism voiced against the SCI relates to awareness of the initiative, confidentiality of complaints (fear factor) and that there are no direct sanctions linked to breaches of rules (the SCI foresees only a negative publicity for the part concerned (name and shame)). The Commission has welcomed the initiative and since its start encouraged all operators in the food chain to participate in the SCI. The Commission has concluded in the report from January 2016 that the SCI has accomplished achievements but the initiative can be developed further. A discussion with the relevant stakeholders on how to improve the functioning of the SCI will be held in the High Level Forum for a better functioning food supply chain.

5. LEGISLATION IN THE MEMBER STATES

Since the experience from the voluntary schemes is mixed some 20 Member States have introduced various level/ambition of legislation to tackle UTPs. Out of the MS with legislation 14 MS have adopted their legislation during the last five years. In most cases the national legislation broadly covers UTPs like: unfair shift of entrepreneurial risks to the other party, requests for advantages or benefits without performing a service related

to the benefit asked, unilateral or retroactive changes to contracts unless the contracts allows for this, unfair termination of contracts.

The approaches in the national legislation differ between MS which have opted for legal provisions requiring a case-by-case assessment if there is a significant economic imbalance between operators and where the stronger operator can abuse its position to impose UTPs. Other MS have opted for an approach of more detailed legislation with lists of practises considered as unfair (black lists). The legislation in most MS has introduced fines for breaches of legislation and is often linked to the turnover of the enterprise penalised. Experience gained from the different models with a general legislation based on assessment of cases versus i.e. a detailed list of prohibited UTPs is still limited partly due to that legislation is relatively recent in many MS. A general legislation can make the practical applicability and enforcement difficult and a case-by-case approach requires substantial administrative resources for investigations etc. A specialised approach is per definition less flexible to take into account business developments and new contract practices and new types of UTPs.

The enforcement of legislation tackling UTPs is done in different ways dependent of the type of legislation but also dependent on the organisation of the national administration. Some MS have selected dedicated public bodies for enforcement while others use already existing bodies like the national competition authority. The different enforcement system allows for confidential complaints and can carry out own initiative investigations. Regardless of type of legislation and enforcement system applied the number of cases investigated has been low. Only a few MS have investigated more than ten cases of UTPs. The low number can partly be explained by the fact that the enforcement system in some MS focus on resolving disputes between operators before a case has been launched.

6. RELEVANT POLICY QUESTIONS

1. Distribution of value added: Is the value added fairly distributed between the different operators along the food chain and have these shares changed significantly over recent years? Is the price transmission from the producer to the consumer satisfactory?

2. Unfair Trading Practices: Do Unfair Trading Practises exist in the food chain and is it a common problem? If yes:

- a) to what extent?
- b) are UTPs concentrated at certain stages of the chain?
- c) are UTPs concentrated at certain product categories?
- d) are UTPs limited to certain Member States?

3. Functioning of the food supply chain: Can the functioning of the chain be improved by addressing UTPs?

If yes:

- a) via a continuation of the development of the existing voluntary initiatives (SCI and its national platforms)?
- b) via a targeted approach where the Member States adopt- and enforce measures adapted to national/regional challenges (i.e. national legislation, national enforcement)?
- c) via an EU approach with framework legislation and national enforcement?
- d) via EU legislation, targeting the whole chain and enforcement at EU level?

4. Is the CAP an appropriate tool to address UTPs?

7. READING LIST

Communication from the Commission - A better functioning food supply chain in Europe (July 2014)

<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52009DC0591>

Report from the Commission on unfair business-to-business trading practises in the food supply chain (Jan 2016)

<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1454403412848&uri=COM:2016:32:FIN>

European Parliament: draft opinion from the Committee for Agriculture and Rural Development

[http://www.emeeeting.europarl.europa.eu/committees/agenda/201604/IMCO/IMCO\(2016\)0420_1/sitt-2201447](http://www.emeeeting.europarl.europa.eu/committees/agenda/201604/IMCO/IMCO(2016)0420_1/sitt-2201447)

European Parliament: research for Comagri food value chain in the EU – how to improve it and strengthen the bargaining power of farmers? (from page 199 and onwards)

[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/573428/IPOL_STU\(2016\)573428_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/573428/IPOL_STU(2016)573428_EN.pdf)

Homepage of Forum for Better Functioning Food Supply Chain

http://ec.europa.eu/growth/sectors/food/competitiveness/supply-chain-forum/index_en.htm

Homepage of the Supply Chain Initiative

<http://www.supplychaininitiative.eu/>

UK Groceries Code Adjudicator

<https://www.gov.uk/government/organisations/groceries-code-adjudicator>

UK Groceries Code Adjudicator – Tesco breached the code

<https://www.gov.uk/government/news/tesco-breached-code>