
Position paper

on the evaluation of Directive (EU) 2019/633 regarding Unfair Trading Practices in business-to-business relationships in the agricultural and food supply chain

Coalition against Unfair Trading Practices

Contents

Executive summary	3
Introduction	5
Prohibition of unfair trading practices	6
Ensure better enforcement	13
Signatories	16

Executive summary

Prohibition of unfair trading practices

- 1. Add a general ban on unfair trading practices.** Based on the definition provided in Article 1.1, we recommend the European Commission include a comprehensive or "blanket" ban on all unfair trading practices. This would help prevent the spread of other unfair practices while ensuring effective deterrence and respect for human and workers' rights.
- 2. Ban the purchasing below the cost of sustainable production of primary products.** We urge the European Commission to ban buyers from purchasing primary agricultural and food products from the supplier at a price lower than the supplier's sustainable cost of production. This ban should be under the list of blacklisted practices. Some Member States have already taken similar measures to protect farmers' income, such as France, Spain, Hungary, Italy, and recently, Belgium. We recommend that this ban apply to first buyers from farmers, their cooperatives or organisations, including those located outside the EU.
- 3. Ensure a correct price transmission system throughout the chain.** To ensure a correct price transmission and an equitable distribution of value throughout the value chain, we urge the European Commission to ban the selling of agricultural products (including processed) to intermediaries or end-consumers below the purchase price of said product or composite products. This ban should be under the list of blacklisted practices to ensure price transmission is correct and no cascading effect is at play.
- 4. Besides the above UTPs, the following practices should be added to the list of banned practices:**
 - Retaliatory de-listing of products by buyers;
 - Ban the use of 'double-race auctions', mechanisms that drive suppliers to compete in last-minute online auctions, pushing prices to the lowest possible level;
 - Blacklist grey unfair trading practices that arise due to economic dependence, regardless of the content of a supply agreement;
 - Prohibit imposing compensations and fines automatically and without justification;
 - Ban the refusal to renegotiate a contract when the supplier of agricultural products or their cooperative is the victim of unforeseeable circumstances, such as natural disasters.

Ensure better enforcement

- 5. Strengthen the role of the EU Agriculture and Food Chain Observatory (AFCO)**
 - The AFCO must be provided with the necessary means, budgetary or others.
 - Price data should be collected based on real contract data. The AFCO must therefore establish a database to which contracts on the selling and purchasing of agricultural and food products must be uploaded under certain conditions.
 - The role of the AFCO should extend beyond monitoring prices, margins, and production costs to include issuing reports, studies, and indexes. It should be granted investigatory powers and collaborate with the European Competition Network (ECN) and national competition authorities to monitor market power.
 - The scope of the AFCO should not be limited to agricultural products produced in the EU but must also observe prices and production costs of key agricultural products imported into the EU.
 - The review of the UTP Directive should require Member States to set up national or regional price observatories.

-
- 6. Improve access to the complaints procedure.** To improve the awareness of the UTP legislation the European Commission should improve communication (including translation to sufficient languages) and awareness-raising activities, collaborate with food supply chain regulators in third countries, make a reference to the legislation obligatory in relevant contracts and instruct enforcement authorities to publish segregated data on the country of residence of the complainant. To counteract the fear factor in the complaints procedure, the AFCO and enforcement authorities should enhance collaboration on ex officio investigations. Member states should be obligated to provide accessible online complaints forms.

 - 7. Strengthen the deterrence effect.** The European Commission should ensure that the Directive has a deterrence effect towards perpetrators. This can be achieved through effective, proportionate and dissuasive fines. Member States should set minimum fines for banned UTPs, calculate penalties based on companies' global turnover to deter large offenders, allow alternative penalties like warnings, and implement compensatory measures for victims.

Introduction

The farmers' protests of late 2023 and 2024 were a serious signal that farmers are at their last straw. Their grievances about rising production costs, powerful and domineering retailers, debt and climate change must have been heard by EU decision makers. Actions taken in the last years, such as the Unfair Trading Practices Directive, while very welcome, are insufficient to address the uncertainty farmers face with regard to their livelihoods. Farmers are requesting fair prices and protection mechanisms against their fragile position within the food chain.

Urgent reform is thus necessary. We urge the European Commission, the European Parliament and the Council to undertake an urgent revision of the UTP Directive and **take immediate action to ban the purchasing of agricultural production under the cost of sustainable production and selling at a loss throughout the supply chain.** The blacklist of Unfair Trading Practices of the Directive offers an excellent framework to do so. After all: "It is vital that farmers have a fair and sufficient income. They should not be forced to systematically sell their products below production costs." (Europe's choice. Political Guidelines for the next European Commission 2024-2029)¹.

Box 1. Unfair trading practices

In 2019, The European Commission decided to prohibit outright (blacklist) or ban unless agreed upon beforehand (greylist) a set of sixteen unfair trading practices (UTPs) in the agricultural and food supply chain. The Directive defines UTPs as: "practices that grossly deviate from good commercial conduct, that are contrary to good faith and fair dealing and that are unilaterally imposed by one trading partner on another".

In the European Union, the average family farm income remains well below average incomes in the rest of the EU, standing at around 64% of the average EU wage in 2022.² This is a structural violation of Article 16 of the *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas* (UNDROP)³, which states the right for food producers to an adequate standard of living. Low incomes are a major reason that between 2005 and 2020, around 5 million farms closed down across the EU, a large majority of which were considered small farms.

The situation is even more difficult for farmers in the Global South supplying the EU market. In Côte d'Ivoire and Ghana, which produce most of the EU's cocoa, up to 58% of cocoa farmers live below the World Bank's extreme poverty line, and up to 90% do not make a living income.⁴ During the COVID-19 crisis, these farmers' net income decreased even further by 16% on average. This trend was even more pronounced for women farmers, with a decrease of 21%.⁵ In coffee, similar figures show that across the globe farmers tend to earn far less than 50% of a living income.⁶

Food holds a unique position in our economy and wider society. Food should not be treated just as a commodity: availability and access to adequate food is recognised by the

1 Von Der Leyen (2024, July 18). Europe's choice. Political Guidelines for the next European Commission 2024-2029. https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en?filename=Political%20Guidelines%202024-2029_EN.pdf

2 European Commission, Income support explained Overview of direct payments for farmers. https://agriculture.ec.europa.eu/common-agricultural-policy/income-support/income-support-explained_en#:~:text=The%20average%20farm%20income%20remains,and%20climate%20than%20other%20sectors

3 UN. Human Rights Council (2018). UN Declaration on the Rights of Peasants and Other People Working in Rural Areas. [United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas](https://www.unhcr.org/refugees-and-returnees/2018/12/18/45171414/undrop)

4 van Vliet, Jiska; Slingerland, Maja, A.; Waarts, Yuca R.; Giller, Ken E. (2021) *A Living Income for Cocoa Producers in Côte d'Ivoire and Ghana?* <https://www.frontiersin.org/articles/10.3389/fsufs.2021.732831/full>

5 Oxfam (2023). *Towards a Living Income for Cocoa Farmers in Ghana.* <https://oxfam-belgium.be/LivingIncomeRapport>

6 Kaitlin Y. Cordes, Margaret Sagan & Solina Kennedy, *Responsible Coffee Sourcing: Towards a Living Income for Producers*, (2021). Available at: https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/199 p.17-18

International Covenant on Economic, Social and Cultural Rights as a fundamental human right (Art. 11, §1), signed by all EU Member States.

Furthermore, Article 7 of the same covenant states that everyone has the right to the enjoyment of just conditions of work, in particular remuneration which provides as a minimum a decent living for themselves and their families. An adequate standard of living is defined by Article 11 as adequate food, clothing and housing, and continuous improvement of living conditions. **However, many farmers worldwide are not able to exercise this right.**

Box 2. Living income definition according to the Living Income Community of Practice:

"The net annual income required for a household in a particular place to afford a decent standard of living for all members of that household."

"Elements of a decent standard of living include: food, water, housing, education, healthcare, transport, clothing, and other essential needs including provision for unexpected events".

The fourth survey of the Joint Research Centre and DG AGRI on Unfair Trading Practices in the food chain -with mostly EU respondents- showed that 77% of agricultural producers experienced at least one UTP in the last year, while almost half experienced more than one.⁷ Since farmers from the Global South often face even harsher imbalances of power with less regulatory oversight, it is reasonable to assume these numbers are higher for this category. However, due to an increased fear factor, they may not be reported as such. The EU must therefore strengthen its efforts to address UTPs.

This position paper outlines proposed improvements in the UTP Directive and covers the following areas:

Prohibition of unfair trading practices

Although the UTP Directive lays down important bans on certain unfair trading practices, more must be done to combat all practices that constitute unfair treatment of farmers and producers. The annual survey of the Joint Research Centre shows unfair trading practices are still widely present, even after 5 years of the approval of the Directive. Only a meaningful legislative tool can ensure functioning food markets that are able to counteract the ground causes of poverty in global agricultural supply chains.

1. Introduce a general ban on unfair trading practices

Position

To complement the current list of 16 UTPs, we recommend the European Commission to include a comprehensive or "blanket" ban on all unfair trading practices based on the definition provided in Article 1.1 of the Directive: "practices that grossly deviate from good commercial conduct, that are contrary to good faith and fair dealing and that are unilaterally imposed by one trading partner on another". Such a general prohibition on unfair trading practices can be found in many jurisdictions.

The European Commission should publish guidelines to counteract any legal uncertainty that might follow from such a ban.

⁷ Joint Research Centre & European Commission (2024). *Food Chain - UTP - survey results*. <https://datam.jrc.ec.europa.eu/datam/topic/UTP/index.html>

Box 3. Examples of comprehensive bans on unfair trading practices in Europe

In Belgian law, inspiration for such a comprehensive ban can be found in the Law of 4 April 2019 on the abuse of economic dependency.

In British law [2009 Groceries Supply Code of Practice], 'fair and lawful dealing' is mandated. Examples of the kinds of practices that will be judged illegal under this definition are included.

In German law [Section §19(2) no. 5 of the Act against Restraints of Competition], a general ban on the abuse of a dominant market position applies to companies with relative or superior market power.

In Italian law [Article 62 of the Cresci Italia Decree], the adoption of unfair practices is banned when there exists an asymmetry between parties due to their differences in bargaining power.

Arguments

- **Future-proofing legislation.** Firstly, unfair trading practices are omnipresent in our agricultural supply chains and present themselves in a myriad of forms. Applying a ban on a selection of UTPs will unavoidably spill over to the proliferation of other and newer forms of unfair behaviour (the so-called "waterbed effect"). As traders, the processing industry and retailers will still be inclined to increase profit margins at the detriment of their upstream suppliers, it is likely that, while they shift away from those currently listed in the Directive, they will move to other Unfair Trading Practices. This will lead to a cat-and-mouse game between companies' actual behaviour and legislation trying to regulate it. Prohibiting all UTPs from the start will circumvent this ultimately avoidable process.
- **Efficiency through deterrence.** Secondly, following its spirit, the goal of this Directive is to provide a fair balance between farmers and buyers. To do this efficiently, we need companies to change their business behaviour without suppliers having to challenge their behaviour before a court. To that end, the deterrence effect of the legislation should be proportional but effective. Besides installing credible fines this can be done through establishing a blanket ban. Companies will be inclined to avoid such behaviour if the possibility of being challenged in court increases, thus avoiding actual administrative and judicial procedures.
- **Respect for human and workers' rights.** Thirdly, unfair trading practices have a profound impact on farmers and workers globally. Shrinking profit margins of players upstream in the supply chain leads to an increase in abuse of economic power and human rights breaches. From experience, we know that child labour, ecosystem destruction (for example deforestation), modern slavery and bonded labour find their source in these very unfair trading practices. Moreover, a recent report showed that millions of migrant workers are exploited in Europe's fields, facing violence, long working hours, and routine underpayment.⁸ Putting a general ban in place is thus not only economically desirable but also an ethical imperative.

⁸ Oxfam (2024). *Millions of migrant farm workers exploited in Europe's fields, says Oxfam*. <https://www.oxfam.org/en/press-releases/millions-migrant-farm-workers-exploited-europes-fields-says-oxfam> (See particularly page 43).

2. Ban the purchasing below the cost of sustainable production of primary products

Position

Quote. Statement at the European Parliament Plenary by President Ursula von der Leyen on the 18th of July⁹

"I will make sure that farmers receive a fair income. No one should be forced to sell good food below production costs."

Quote. Europe's choice. Political Guidelines for the next European Commission 2024-2029¹⁰

"It is vital that farmers have a fair and sufficient income. They should not be forced to systematically sell their products below production costs."

Quote. Mission Letter of Commissioner for Agriculture and Food Christophe Hansen on the 17th of September¹¹

"You will engage to strengthen farmer's position within the food value chain and protect farmers against unfair trading practices, notably to ensure they are not forced to systematically sell their products below the production costs."

We urge the European Commission to ban buyers from purchasing primary agricultural and food products from the supplier at a price lower than the supplier's sustainable cost of production.

- **Calculation of cost of sustainable production.** The production cost includes all costs incurred in relation to the production of the primary product. Production costs shall be calculated using an adapted version of the methodology of the Farm Sustainability Data Network (FSDN).¹²
 - In all cases, the production costs should include costs for bought-in feed, fodder, crop cultivation (seeds, fertilisers, plant protection products), animal husbandry, maintenance of machinery and buildings, contract work, paid wages and social security as well as remuneration for farm managers and other farm workers (including family workers), overheads, rent, depreciation, interest and taxes. Only production support measures must be deducted from costs as subsidies.
 - In relation to the 'sustainable production' aspects, at least the following elements should be taken into account: (1) paid wages and social security, as well as remuneration for farm managers and other farm workers (including family workers), should be calculated based on existing collective agreements in countries, actual wages, the applicable minimum wages or living wage benchmarks, whichever is highest; (2) costs incurred following sustainable farming practices that generate ecosystem services (for example organic farming, agro-ecological practices, biodiversity protection or restoration, or carbon capture) should be taken up accordingly; and (3) costs related to certification of sustainable and fair farming practices as well as costs associated with meeting environmental requirements.
 - Cost calculation should be based on averages of data points of pre-determined time frames per product type and production systems, to average out cost fluctuations throughout production cycles.

9 Von Der Leyen (2024, July 18). Statement at the European Parliament Plenary by President Ursula von der Leyen. https://neighbourhood-enlargement.ec.europa.eu/news/statement-european-parliament-plenary-president-ursula-von-der-leyen-candidate-second-mandate-2024-2024-07-18_en

10 Von Der Leyen (2024, July 18). Europe's choice. Political Guidelines for the next European Commission 2024-2029. https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en?filename=Political%20Guidelines%202024-2029_EN.pdf

11 Von Der Leyen (2024, September 17). Mission Letter of Commissioner for Agriculture and Food Christophe Hansen. https://commission.europa.eu/document/2c64e540-c07a-4376-a1da-368d289f4afe_en

12 As determined by delegated acts of the Commission as per Article 1 of the Regulation (EU) 2023/2675. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L_202302674

-
- An accompanying UTP should be added that allows farmers and cooperatives to renegotiate contracts in cases of input shocks that significantly alter the cost of sustainable production (see below page 12).
 - Given that cost structures in low-income countries in the Global South are different to those within the European Union and might be more difficult to calculate, the FSDN should provide simplified and contextualised methodologies -potentially relying on existing living income benchmarks- for key imported products from the Global South as applicable.
 - **Burden of proof.** The burden of proving the cost of sustainable production lies with the supplier of primary agricultural and food products. The operator has (1) the option to rely on averages calculated and provided by the Agriculture and Food Chain Observatory (see below on the role of the AFCO page 13); or (2) the option to rely on calculations of the farmer's or the producer's individual costs and to be supported in such an exercise through an online application provided by the FSDN (for example RICA-1, which should be extended to more farm types).
 - Given that the calculation of costs might be more challenging in the Global South, besides providing contextualised methodologies, the AFCO should support farmers in calculating their individual costs through accessible and easy procedures.
 - **Enforcement.** We recommend the ban on purchasing below the cost of sustainable production be added to the list of blacklisted practices (forbidden in all cases) to ensure full protection against market pressure. Such protection could be compromised if this ban were instead included in the list of grey-listed practices (forbidden unless otherwise agreed upon).
 - The legislation should foresee an exhaustive list of exceptions under which cases of purchasing below the cost of sustainable production would be allowed, including but not necessarily limited to goods that are close to their expiration date.
 - In such cases (or in case the practice is added to the grey list), any deviation from the general ban must be taken up in a written contract and registered with the national enforcement authority by the buyer. The enforcement authority confirms the registration with the supplier. This way, enforcement authorities can track and trace specific companies, or bottlenecks in a specific supply chain that are applying one-sided pressure to accept grey-listed UTPs.
 - **Application.** We recommend that this specific ban apply to first buyers from farmers, their cooperatives or organisations, including those located outside the EU, as is already the case for the UTP Directive.

Arguments

- **Cross-border implementation.** Firstly, some EU Member States have already taken far-reaching measures to protect farmers' income, such as France, Spain, Hungary, Italy, and recently, Belgium. The discrepancy with other Member States might lead to 'jurisdictional arbitrage' at the detriment of the farmers located in frontrunner Member States. In addition, the inclusion of farmers from third countries is essential to establish region-based food systems and avoid European farmers -who comply with environmental norms- being undermined by imports that do not internalise environmental and social impacts in their pricing.

- **Human rights and environmental breaches.** Secondly, low agricultural prices are an important driver of poor working conditions, low income, child labour and forced labour in food supply chains¹³. Such a situation also often leads to unsustainable farming practices, including deforestation for the creation of additional agricultural land. Tackling these problems requires a broad set of legislation and interventions where tackling low agricultural prices is a key element.
- **Devaluation through price signalling.** Thirdly, selling products below the cost of sustainable production leads to a devaluing of products by consumers who through faulty price signalling (externalities not included in the cost) lose touch with the real cost of food. The strategy of 'cheap food' as an anti-poverty strategy should be replaced by robust social protection schemes by Member States.
- **Supporting the transition to sustainable farming practices.** Fourthly, many farmers are currently unable to switch to more sustainable farming practices (such as organic farming or other agroecological practices or even comply with various environmental regulations) as the current market logic requires high volumes sold at a low margin to make a profit. This incentive stimulates models of farming that produce goods as cheaply as possible, but at a high cost to farmers, to the environment, biodiversity, and to the future viability of farming itself. Ensuring cost coverage for sustainable farming practices will enable farmers to make a decent living and cover their costs while undertaking a transition to more sustainable practices and less industrialised production.
- **Enabling generational renewal.** Currently, potential young farmers and new entrants are often not willing to start in the agricultural sector, discouraged by the perspective of never being able to be reimbursed for their investment. Ensuring decent prices would make it financially safer for new farmers to start an activity. A system that ensures that the costs of production are covered allows farmers to plan and make investments for the future. Additionally, this would also increase access to loans, as the cost coverage guarantees better that farmers are able to repay the loan.

3. Ensure an effective price transmission system throughout the value chain

Position

To ensure a correct price transmission and an equitable distribution of value throughout the value chain, we urge the European Commission to ban the selling of agricultural products, including processed, to intermediaries or end-consumers below the purchase price of said product or composite products.

- **Calculation of purchase price.** The purchase price includes the actual incurred costs of the purchase of the material product (in case of resale) or the sum of the actual incurred costs of the composite material products (in case of processing), including packaging but excluding non-material inputs.
- **Burden of proof.** The burden of proving the purchase price of a product lies with the buyer of said product or its composite products.
- **Enforcement.** We recommend this ban be added to the list of blacklisted practices (forbidden in all cases) to ensure price transmission is correct and no cascading effect is at play.
 - The legislation should foresee a limited exhaustive list of exceptions under which cases selling below purchase price is allowed, including but not necessarily limited to goods that are close to their expiration date.

¹³ Oxfam (2024). *Millions of migrant farm workers exploited in Europe's fields, says Oxfam*. <https://www.oxfam.org/en/press-releases/millions-migrant-farm-workers-exploited-europes-fields-says-oxfam>

-
- The Agriculture and Food Chain Observatory should be charged with monitoring prices of agricultural products and margins along the food and agricultural value chain, to ensure that breaches of this ban can be spotted early.
 - **Application.** We recommend that this specific ban apply to all sellers of agricultural and food products in agricultural and food supply chains, whether they are intermediaries or end-sellers.

Arguments

- **Devaluation through price signalling.** Firstly, the argument of devaluation through price signalling described above (see page 9) is applicable here too.
- **Administrative simplicity.** Secondly, this approach has the advantage of administrative simplicity. It ensures that price transmission is controlled but with a limited burden to operators in supply chains. Price and margin checks by the AFCO should allow for an early alert system, after which enforcement authorities can investigate.
- **Cascade effect.** Thirdly, the cascade effect described above is especially at play when it comes to prices. Whenever one party is structurally obliged to sell below the purchase price (for example in cases of quasi-monopsony), that party will be more inclined to impose the same UTPs to their suppliers, or otherwise risk being competed out of the market.

4. Other unfair trading practices to be added to the list

- **Protect suppliers against retaliatory de-listing.** Suppliers in the agricultural sector are typically reluctant to complain of unfair or illegal treatment by a buyer owing to concerns that they might be delisted. While Article 3.1h) protects suppliers from '*acts of commercial retaliation*', it may be difficult to objectively define what this might entail. The vulnerable position of many suppliers would be strengthened by a provision requiring a buyer to communicate all delisting decisions with reasonable notice and to motivate such decisions with genuine commercial reasons.
- **Ban the use of 'double-race auctions'.** 'Double-race auctions' are mechanisms used by buyers to place suppliers against each other in short-notice online auctions, in which they are incentivised to offer their produce at the lowest possible price. Suppliers will often offer at a price below the cost of production, with inevitably negative effects on the farmers and workers in the grocery supply chain. The use of these auctions has been linked to widespread human rights abuses in the Italian tomato sector.¹⁴ Although suppliers are not technically obliged to take part in such auctions when it is their only way of securing a market for their produce they are left with little choice.
- **Blacklist grey unfair trading practices that arise due to economic dependence, regardless of the content of a supply agreement.** The Directive includes grey UTPs that are banned '*unless they have been previously agreed in clear and unambiguous terms in the supply agreement or in a subsequent agreement between the supplier and the buyer*'. However, a comparatively weaker supplier might feel compelled to sign an agreement with a more powerful buyer, regardless of whether that agreement is truly in the supplier's interest. Therefore, these grey UTPs should be banned outright if any supply agreement is struck where a supplier is economically dependent on a buyer.

¹⁴ Oxfam (2018). *Human Suffering in Italy's Agricultural Value Chain*.
<https://policy-practice.oxfam.org.uk/publications/human-suffering-in-italys-agricultural-value-chain-620479>

Box 4. The concept of economic dependence

The concept of economic dependence is used in multiple EU Member States within economic law to complement the concept of '(abusive conduct by) dominant undertakings' (cf. Art. 102 TFEU). While abusive conduct by dominant undertakings refers to actions by companies holding a dominant position in a specific market that exploit or harm competition, the notion of economic dependence focuses on situations where a company is in a position of strength relative to a specific counterparty in a transaction. Unlike market dominance, the key factor in economic dependence is the imbalance in bargaining power, which can lead to the abuse of this position to exploit the weaker party, even if the company is not dominant in the relevant market.¹⁵ Some examples below.

In Belgian law, economic dependence is defined as "a position of subjection of an undertaking to one or more other undertakings characterised by the absence of a reasonable and equivalent alternative, available within a reasonable time and on reasonable terms and at a reasonable cost, which would allow it or any such undertaking to impose conditions which could not be obtained under normal market conditions."

In German law (Act against Restraints of Competition), economic dependence is defined as a situation in which 20% of a supplier's sales go to a single buyer.

In France (Commercial Code, Art. L. 420-2), abuse of a situation of economic dependence is prohibited as long as it is likely to affect the function or structure of competition.¹⁶ This could be for example a refusal to sell, tie-in sales or other discriminatory practices.

Italian law (Law no 192 of 18 June 1998, Art. 9) states that a state of economic dependence is in place when a business is in a situation where it can bring about excessive imbalances in the rights and obligations pertaining to its commercial relations with another business.¹⁷

- **Prohibit imposing compensations and fines automatically and without justification.** To prevent a player from incurring automatic penalties without an opportunity to justify or defend itself, all compensatory costs or fines should not be applied automatically or without justification.
- **Ban the refusal to renegotiate a contract when the supplier of agricultural products or their cooperative is the victim of unforeseeable circumstances which are unattributable to the parties and were unforeseeable at the time the contract was concluded and which makes execution of the contract excessively onerous.** This measure will provide better protection for farmers who are victims of unforeseen events such as natural disasters. In such cases, production costs could increase dramatically and would require a new negotiation to ensure the ban on purchasing below the cost of sustainable production is upheld.

¹⁵ Vassili Moussis, Atsushi Yamada, Abuse of Economic Dependence, Global Dictionary of Competition Law, Concurrences, Art. N° 86372. <https://www.concurrences.com/en/dictionary/abuse-of-economic-dependence#:~:text=The%20law%20provides%20that%20a,any%20real%20possibility%20for%20the>

¹⁶ Ibid.

¹⁷ Ibid.

Ensure better enforcement

5. The role of observatories

The EU Coalition against Unfair Trading Practices welcomes the decision of the European Commission to strengthen the current price observatory into an EU Agriculture and Food Chain Observatory (AFCO)¹⁸. This is a first step towards more transparency in pricing for consumers and decision-makers on the one hand, and more equitable remuneration of farmers and farm workers on the other hand. We believe the success of the AFCO is dependent on the following conditions:

- The AFCO must be provided with the necessary means, budgetary or other, to fulfil the tasks that it has been trusted upon. At current levels, it means substantially expanding the available human and financial resources.
- Price data should be collected based on contract data. Therefore, the AFCO must establish a database to which contracts on the selling and purchasing of agricultural and food products must be uploaded. To ensure administrative attainability the legislator could choose to put a price threshold for it to be compulsory to be uploaded. However, contracts that include a deviation on the ban of purchasing below the cost of production should be uploaded in all cases. Other prices (e.g. prices paid by cooperatives to producers) that are not paid via a contract should also be included in the database. This allows for the AFCO to monitor power imbalances in supply chains and take specific action. The Spanish law already foresees such a mechanism.
- The role of the AFCO should not be limited to observing prices, margins and costs of production but also to issue reports, studies and indexes. It should therefore be given investigative powers and be instructed to collaborate with the European Competition Network (ECN) and national competition authorities to monitor market power. Next to investigative powers, prudential powers, which are related to foreseeing and mitigating potential future problems, are necessary in the form of advisory reports on abusive practices that should be added to the list of UTPs.
- The scope of the AFCO should not be limited to agricultural products produced in the EU but must also observe prices and production costs of key agricultural products imported into the EU, including but not limited to bananas, cocoa, coffee, sugar cane, tea, rice, wine, herbs and spices, nuts, and other fruits. For this purpose, the AFCO could rely on data provided by national institutions of third countries, data of international organisations, United Nations organisations, or non-governmental organisations such as Fairtrade International.

The review of the UTP Directive should require EU Member States to not only set up enforcement authorities, as is already the case, but also national or regional price observatories. This way, the European Commission ensures that the AFCO will be able to compile the necessary data on an EU level, based on the data provided by the national price observatories. The AFCO should therefore also develop guidelines and methodology on how to calculate and acquire certain data to ensure coherence.

¹⁸ European Commission (2024). *The EU agri-food chain Observatory starts working to restore trust and improve transparency in the food chain*. https://agriculture.ec.europa.eu/news/eu-agri-food-chain-observatory-starts-working-restore-trust-and-improve-transparency-food-chain-2024-07-17_en

6. Improving access to the complaints procedure

According to the fourth survey round of the Joint Research Centre (JRC) on UTPs, more than 40% of respondents were not aware of the existence of the Directive¹⁹. This number has increased compared with the second wave (2021/2022) and the third wave (2022-2023). The awareness of the UTP Directive among the population of suppliers is likely to be even lower, given the selection bias of the survey (self-selection). For suppliers in third countries, it is reasonable to assume this awareness is even lower.

To improve the awareness of the UTP legislation, the European Commission should:

- Promote and facilitate awareness-raising activities such as being present at national and international food trade and agricultural fairs.
- Communicate to embassies, trade attachés and supplier associations of third countries about the Directive, including through organising webinars and other information sessions.
- At the national level, promote the translation of materials which are in a country's official language to international languages such as French, English, and Spanish.
- Explore ways to collaborate with public food supply chain regulators in third countries.
- Obligate buyers of agricultural and food products to include a reference to the legislation in all contracts in the agri-food sector.
- Instruct enforcement authorities through Article 9 of the Directive to publish segregated data on the country of residence of the complainant. This way, the awareness of farmers in third countries can be monitored.

The number of complaints received in 2022 and 2023 was 178 and 271 respectively. Given that 88% of respondents indicated they had experienced UTPs in 2023, we can observe a major gap between the number of cases of UTPs probably present, and the number of cases reported. Considering there were 9.1 million agricultural holdings in the EU in 2023, it means only 0.003% of them filed a complaint (*ceteris paribus* and assuming no complaints came from non-agricultural holdings). We can assume that a fear of retaliation is a major reason why complaints are not filed.

To counteract the fear factor in the complaint's procedure, the European Commission should:

- Require national enforcement authorities to carry out *ex officio* (own initiative) investigations in case the AFCO or competition authorities detect power imbalances in food supply chains.
- Add UTPs on retaliatory delisting, unjustified fines or compensatory measures (see above).
- Oblige Member States to provide online complaints forms that are accessible to all.
- Require Member States to provide low-threshold legal and advisory services to actors in the food and agricultural supply chain wishing to file a complaint, similar to the Fairness-Büro in Austria.²⁰

7. Deterrence effect

National enforcement authorities will never be able to process or detect the vast amount of UTPs present in supply chains. For that reason, the European Commission should ensure that the UTP Directive has a deterrence effect towards perpetrators. The deterrence effect is determined by the chance to get caught (which might remain low for reasons described above) and the severity of the penalty (which the European Commission and the Member States have control over).

¹⁹ Joint Research Centre (2024). *Food Chain - UTP - survey results (4th round)*. https://datam.jrc.ec.europa.eu/datam/mashup/FOODCHAIN_UTP_4/

²⁰ Fairness-Büro in Austria. <https://www.fairness-buero.gv.at/>

To that end, the European Commission should:

- Require Member States to explicitly include the principles of effective, proportionate and dissuasive penalties. Greece, Finland, Lithuania and Luxembourg already have done so (to an extent).
- Require Member States to set a minimum fine when a banned UTP takes place. Eleven Member States²¹ already do so.
- Require Member States to calculate fines on the basis of annual global turnover of companies to ensure that big actors -who are most susceptible to commit UTPs because of their market power- also are deterred by the potential punishment.
- Require all Member States to allow their enforcement authorities to apply alternative penalties to deter non-compliance with injunctions, for example, 'warnings'. Seventeen Member States²² have done so.
- Require Member States to also put in place restitutionary or compensatory measures to compensate victims of their loss. In Romania, losses suffered by suppliers following UTPs make the buyer liable to pay an amount equal to three times those losses.

21 BE, BG, ES, IT, LV, LT, LU, HU, PT, RO, SI. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52024SC0106>

22 BE, BG, CY, DE, DK, FI, FR, LT, LU, LV, MT, NL, PL, PT, RO, SE, SK. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52024SC0106>

Signatories

- Oxfam
- Arbeitsgemeinschaft bäuerliche Landwirtschaft e.V.
- Banana Link
- CNCN-11.11.11
- COLEAD
- Deutsche Umwelthilfe (DUH)
- Entraide et Fraternité
- Equo Garantito
- European Milk Board
- Fairtrade International
- Fair Trade Advocacy Office (FTAO)
- Forum Fairer Handel
- GEPA - The Fair Trade Company
- Institute for Agriculture & Trade Policy
- Nederlandse Akkerbouw Vakbond (NAV) – Dutch Arable Farmers Union
- Polish Fair Trade Association
- SOMO - Stichting Onderzoek Multinationale Ondernemingen
- World Fair Trade Organization - Europe