CEJA Position

Improving the Functioning of the Food Supply Chain

Introduction

Following the European Commission’s Communication on “Tackling unfair trading practices (UTPs) in the business-to-business food supply chain” published on 15 July 2014, this CEJA position paper attempts to respond to the latest EU developments on the subject by suggesting improvements to the already existing measures and those proposed by the Commission’s new Communication, in order to set out a number of measures which CEJA believes would help the situation and improve the functioning of the food supply chain for both producers and consumers. It is also important to improve the functioning of the structures currently at work at EU level on these issues, as, today, they do not include any producer representatives – these are the actors who are hit the hardest by UTPs, and therefore must be central to any discussion on the food supply chain.

This paper will begin with outlining UTPs, the current Supply Chain Initiative (SCI) and recommended solutions which go beyond what is currently in place or proposed. Although the SCI has been somewhat constructive by creating a ‘fairer’ environment for trade governed by good principles – there are clear limitations to what self-regulation can achieve in this context.

Unfair Trading Practices (UTPs)

UTPs are defined as those practices which are unilaterally imposed by one trading partner on another, deviating from acceptable commercial conduct and running opposite to good faith.1 These are particularly rife in supply chains with high levels of inequality between the links – the food supply chain is often very long, but also incorporates huge processors or retailers alongside individual small-scale farmers, who are carrying considerably more risk than their sometimes gargantuan counterparts. These economic imbalances can – and, according to the statistics, often do – lead to UTPs which have serious consequences for producers and consumers alike.

CEJA believes that EU-wide regulation must be implemented in order to address these problems and avoid them in future with the imposition of an EU-wide regulatory framework.

Current Measures

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1 You can find examples of UTPs and fair practices from the document “Vertical relationships in the Food Supply Chain: Principles of Good Practice” in Annex, a document produced by the Supply Chain Initiative in 2011 and supported by CEJA.
Today, there is a wide divergence in the way UTPs are addressed in the food supply chains across the EU, resulting in an un-level playing field for many European SMEs, particularly producers. This breeds discrimination against suppliers in well-regulated Member States while simultaneously undermining the regulation and the weakest parties in the chain. There is already a self-regulatory framework in place at EU-level called the Supply Chain Initiative, but because it is not representative of the food chain, in CEJA’s opinion, it is not even adequate in its self-regulatory capacity – which in itself has too many limitations to be genuinely effective because of the lack of self-sanction/punishment.

*Supply Chain Initiative*

A voluntary framework for implementing a number of principles of good practice in the food supply chain, entitled the Supply Chain Initiative, was then launched in 2013 inviting individual companies to join once they had assessed their compliance with the principles. Dispute resolution mechanisms, mediation and arbitration are supposedly in place in this framework to be used to address individual disputes, committing its members to ensure that weaker parties using the mechanism are not subject to commercial retaliation. Unfortunately, there are a number of reasons for why this has not proven effective, most importantly the lack of producer representation because of the absence of authority to provide for investigations, sanctions or confidentiality for UTPs either.

*EU-level Independent Regulatory Body*

Considering there are no investigation, sanction or confidentiality measures in place in the Supply Chain Initiative, it is essential that these are implemented alongside the voluntary framework in a mandatory manner in order to protect suppliers and producers. In order to ensure the use of these additional measures, they must be governed by an independent body. The Commission’s Communication suggests a mixed response, combining the voluntary Supply Chain Initiative framework complemented on credible and effective enforcement. CEJA can accept this as a temporary solution with a view to becoming entirely mandatory, but only if it is imposed at EU-level and includes the most essential requirements in order to protect suppliers in the food chain in future. There must also be a strict and achievable yet ambitious deadline for the implementation of a fully regulatory system, which must be abided by.

CEJA calls on an EU-level independent regulatory body to be established with the following capabilities:

- **Supervision and Investigation**
  - Independent authorities must be in place in order to supervise and investigate UTPs when they have been brought to their attention by vulnerable suppliers, such as producers
    - These authorities should have the resources to investigate, identify and rule on the companies at fault
- **Confidentiality**
  - Confidentiality for complainants is crucial to an effective solution to UTPs
- If SMEs cannot complain confidentially, they are much less likely to complain through fear of losing their contractual relation due to economic dependency on the other party. This is called the ‘fear factor’.
- Absolute confidentiality must therefore be provided by an independent authority which can preserve and protect this confidentiality.
  - Sanctions
    - The entire regulatory process is mostly redundant without the use of firm and effectively enforced sanctions.
    - These sanctions must be a credible threat to those companies practicing UTPs, however big or powerful they are, in order for them to constitute a genuine deterrence.
  - Transparent and public
    - Although confidentiality is key for complainants at the time of complaint, transparency in terms of the processes at work is crucial.

**Conclusion**

Although it is essential that these measures are taken in order to police ongoing UTPs – the practice of these is so rife in the food supply chain that additional measures must be taken with an aim to prevent the situation where UTPs are able to arise, thereby increasing producers’ bargaining power in the face of retail and processing giants.

**Bigger and Better Bargaining Power: Preventing UTPs in Future**

Measures need to go beyond UTPs, to the crux of the problems which allow them to occur.

- **Cooperation**
  - They should join together team up on processing, marketing, branding and even distribution wherever possible in order to shorten the gap between producers and consumers as much as possible, therefore benefiting both groups.
  - This should be actively facilitated and encouraged by public policy.
    - Including young farmer producer organisations
    - The new CAP does cater for this, but does not go far enough.
- **Communication**
  - These producer organisations must also invest in communication tools in order to get even closer to the consumer.
    - To educate and inform but also to advocate a fair price for their produce and encourage consumers to buy directly from farmers and the benefits of doing so at a young age, within a structured educational framework in schools.
    - Such education efforts could be part of wider communication on farming, nutrition, food waste, the functioning of the food supply chain, and other related subjects.
This should be actively encouraged by public policy, but also through labelling, quality policy and effective public information campaigns.

**Time to take Action**

In conclusion, for all the reasons listed in this paper, it is quite clear that for the sake of fairness and the sustainability of European farming, CEJA’s recommendations should be taken on board by the EU institutions in terms of creating an EU-level framework – at first a mix of self-regulatory and mandatory measures with the aim of later ensuring the entire structure is mandatory for participants of the food supply chains within the EU – in order to ensure a level playing field for all companies in the 28 Member States. This framework must feature an independent body with the authority to supervise, investigate and implement effective sanctions in all 28 Member States while protecting the identity of all complainants in order to truly deter the largest companies from carrying out UTPs.

CEJA thereby calls on the European Commission following its July Communication to revise accordingly its legal proposals in order to include a more robust response to widespread UTPs.
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<th>Practice</th>
<th>Examples of unfairpractices</th>
<th>Examples of fairpractices</th>
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<tr>
<td>Agreements – written / unwritten</td>
<td>• Refusing or avoiding to put essential terms in writing. This makes it more difficult to establish the intent of the parties and to identify their rights and obligations under the contract.</td>
<td>• Contracting parties ensure that the agreement is in writing, unless impracticable or where oral agreements are mutually acceptable and convenient. The agreement contains precise circumstances and detailed rules under which the parties can jointly modify the terms of the agreement, in a timely and informed way, including the process for setting the necessary compensation for any costs resulting for either party.</td>
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<td>• The provisions of the written contract are clear and transparent.</td>
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<td>• When contracts are not written, one of the parties sends a written confirmation afterwards.</td>
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<td>General terms and conditions</td>
<td>• Imposing general terms and conditions that contain unfair clauses.</td>
<td>• Using general terms and conditions that facilitate business activity and that contain fair clauses.</td>
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<td>Termination</td>
<td>• Unilaterally terminating a commercial relationship without notice, or subject to an unreasonably short notice period and without an objectively justified reason, for example on the grounds that unilateral sales targets are not reached.</td>
<td>• The unilateral termination of the agreement respects the agreement and due process and is in accordance with applicable law.</td>
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<td>Contractual Sanctions</td>
<td>• Contractual sanctions are applied in a non-transparent manner and are disproportionate to damages suffered.</td>
<td>• If a party fails to meet its obligations, contractual sanctions are applied in a transparent way, in respect of the agreement and proportional to the damages.</td>
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<td>• Sanctions are imposed without any justification in the agreement or the applicable law.</td>
<td>• Contractual sanctions are agreed in advance, are proportionate for both sides and are applied in order to compensate damages.</td>
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<td>Unilateral actions</td>
<td>• Non-contractual retroactive unilateral changes in the cost or price of products or services.</td>
<td>• A contract contains legitimate circumstances and conditions under which subsequent unilateral action may be permitted.</td>
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| Information | • Withholding essential information relevant to the other party in contractual negotiations and which the other party could legitimately expect to receive.  
• A contracting party uses or shares with a third party, sensitive information provided confidentially by the other contracting party, without the latter's authorization, in a way that enables it to obtain a competitive advantage. | • Providing relevant essential information to the other party in contractual negotiations and ensuring that information is not misused. |
| --- | --- | --- |
| Entrepreneurial risk allocation | • Transfer of unjustified or disproportionate risk to a contracting party, for example imposing a guarantee of margin via payment for no performance.  
• Imposing a requirement to fund a contracting party’s proprietary business activities.  
• Imposing a requirement to fund the cost of a promotion.  
• Preventing a contracting party from making legitimate marketing and promotional claims on their products. | • Different operators face specific risks at each stage of the supply chain – linked to the potential rewards for conducting business in that field. All operators take responsibility for their own risks and do not unduly attempt to transfer their risks to other parties.  
• Transfer of risk which is negotiated and agreed by the parties to obtain a win-win situation.  
• Contracting parties agree the terms and conditions corresponding to their contribution to either parties’ proprietary activities and/or promotional activities. |
| Listing Fees (upfront access payments) | • Imposing listing fees that are disproportionate to the risk incurred in stocking a new product. | • When listing fees - used to mitigate the risk incurred in stocking a new product - are agreed between both parties, and they are proportionate to the risk incurred. |
| Threatening business disruption | • Threatening business disruption or the termination of the business relationship to obtain an advantage without objective justification, for example by punishing a contracting party for exercising its rights.  
• Demanding payment for services not rendered or goods not delivered, or demanding payments manifestly not corresponding to the value/cost of the service rendered. | |
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<th>Tying</th>
<th>• Implying on a contracting party the purchase or supply of a set of products or services tied to another set of products or services - either from one of the contracting parties or from a designated third party.</th>
<th>• The contracting parties agree to tie products or services that increase the overall efficiency and/or sustainability of the supply chain and bring benefits to consumers and both contracting parties.</th>
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<tr>
<td>Delivery and reception of goods</td>
<td>• Deliberately disrupting delivery or reception schedule to obtain unjustified advantage.</td>
<td>• Deliveries which arrive at the agreed time allow suppliers to plan, well in advance, their production and manufacturing processes and delivery timetables, and allow buyers to plan the reception, storage and display of the goods delivered.</td>
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<td>• If a party needs to deliver or receive early / late / partially, they forewarn the other party as early as possible and in line with the written agreement.</td>
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**Vertical relationships in the Food Supply Chain:**
**Principles of Good Practice**
*Proposed by the b2b platform, 29 November 2011*
*(Of which CEJA was a member at the time)*