

## Regulating the role of Unfair Trading Practices in food waste generation

### **Key Messages**

- Agriculture is responsible for around 10% of EU Greenhouse Gas (GHG) emissions: with roughly one third of EU food waste occurring at primary production and in the supply chain (FAO 2011), limiting food waste provides major environmental benefits.
- While Unfair Trading Practices (UTPs) can occur independently of food waste, they have been found to be one cause of food waste in the supply chain, in particular in connection with poor demand forecasting, quality rejects, last minute order cancellations and overly strict 'minimum life on receipt criteria'.
- The presence of UTPs within the food supply chain is a background influence that can make collaborative measures to reduce whole supply chain food waste, such as Voluntary Agreements, more difficult to implement.
- Lack of robust EU food waste data at farm level may prevent understanding of the scale of food waste caused by UTPs affecting farmers and compromises Member States' abilities to implement policies to reduce food waste throughout the supply chain.
- A consistent EU approach to tackling UTPs presents is needed to prevent major food buyers shifting procurement towards Member States with the weakest response to UTPs: top-down consistency is therefore key to tackling UTPs.



# 1 How can policy help us reduce food waste?

#### Unfair Trading Practices as a main REFRESH policy research area

Through REFRESH research, Unfair Trading Practices within the scope of "integrated supply chain policies" were identified as a key policy focus because of their relevance to the market dynamics of food waste creation at various stages of the supply chain. This link was explored within a comparative analysis of Voluntary Agreements and Unfair Trading Practices in three European countries, which demonstrated that addressing Unfair Trading Practices is a necessary prerequisite to effectively tackling supply chain food waste (Piras et al 2018).

This policy brief outlines the relevance of Unfair Trading Practices to the understanding of and approaches to addressing food waste in the supply chain and makes recommendations on mitigating actions against Unfair Trading Practices.

#### **Reducing food waste in Europe through REFRESH research**

The EU project REFRESH (Resource Efficient dRink for the Entire Supply cHain) is a four-year (2015-2019) Horizon 2020 EU research project taking action towards food waste reduction. This project's goal is to support the Sustainable Development Goal 12.3¹ of halving per capita food waste at the retail and consumer level, reducing food losses along production and supply chains, reducing waste management costs, and maximizing the value from unavoidable food waste and packaging materials. Furthermore, the project promotes the consideration of the food use hierarchy which prioritises prevention, followed by redistribution for human, then animal consumption, before other forms of valorisation (composting, bio-energy etc.).

Through the policy research carried out within the first half of the project, three policy areas stood out as main focuses to further research within policy briefs: Consumer behaviour, integrated supply chain policies (Voluntary Agreements & Unfair Trading Practices), and food surplus valorisation.

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<sup>&</sup>lt;sup>1</sup>"cutting in half per capita global food waste at the retail and consumer level, and reducing food losses along production and supply chains (including post-harvest losses) by 2030"

#### **REFRESH definition of Unfair Trading Practices**

**Unfair Trading Practices (UTPs)** Unfair Trading Practices (UTPs) are broadly defined as practices that grossly deviate from good commercial conduct within trading relations between two parties, often as a result of an unequal balance of power in that relationship.

More specifically UTPs occur within four main categories suggested by the European Commission (EC 2018):

- i) where costs or risks are unfairly shifted from one party to the other;
- ii) where advantages or benefits are requested by one party without any reciprocal benefit or service being offered in relation to the benefit or advantage being asked;
- iii) where unilateral and / or retrospective changes are made to a contract (unless allowed for within the contract terms under fair conditions); and
- iv) there should be no unfair termination of contract or unjustified threat of termination

UTPs are a sub-set of competition and fair-trading policy and therefore important to discourage in all sectors of the EU economy. However, the grocery supply chain is particularly susceptible to UTPs and certain types of poor practice have an influence on the level of food waste arising from affected businesses.

#### **Target audience**

This policy brief is intended to inform audiences that include primary producers and their representative or cooperative bodies, manufacturers and retailers in the supply chain and public bodies intending to address the causes of food waste, at local, Member State (MS) and EU level.

With regard to the European Commission's 2018 Directive on UTPs in the food supply chain (agreed 19 December 2018), this brief provides a valuable background in the food waste issues attendant on UTPs, which may be useful to MS Competition Authorities considering the relevance of the Directive for food waste prevention and how best to implement the Directive in their national context, as well as other national government bodies with an interest in the food supply chain and preventing food waste.

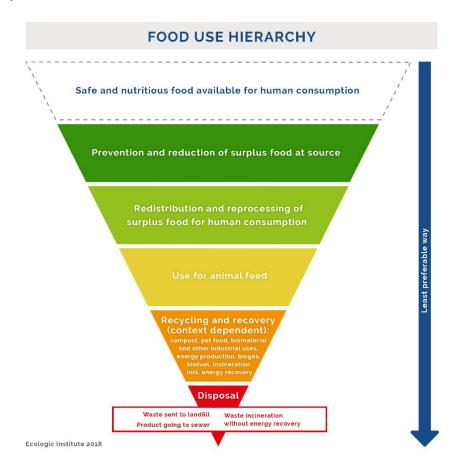
In addition, this brief will provide an important perspective on supply chain issues for members of a Voluntary Agreement committed to reducing food waste.

# The role of UTPs in driving food waste

## 2.1 Relevance of UTPs for food waste in the EU food supply chain

Primary food production in the EU has seen its share of added value in the supply chain fall over the last two decades whereas the manufacturing and grocery retail sectors have seen their share increase. Part of this trend relates to the increased market concentration of retailers across the EU and price competition between them, squeezing prices at the farm and supplier stages. As there are few retailer organisations in relation to the number of suppliers in the grocery supply chain, and producers tend to be more fragmented (unless represented through strong cooperatives and producer trade bodies), the market structure is more susceptible to Unfair Trading Practices (UTPs) than other supply chains.

Although not previously identified as a 'front line' issue in relation to EU food waste, research by REFRESH identified a number of food waste drivers linked to supply change practices and potential UTPs (Wunder *et al.,* 2018). Addressing UTPs is an important element of the policy mix in responding to food waste and prioritising prevention, in accordance with the food use hierarchy.



The following key UTPs behaviours have been found to have a causal link to food waste generation:

- Lack of formal contracts: informal contracts between buyers and producers can lead to buyers altering orders at the last minute without accountability.
- Use of Quality Assessment specifications to reject product and flex supply along the supply chain: in particular, inconsistent application of products with a high degree of natural variability, such as fresh produce, as a means to manage over-supply and reject product.
- Data sharing and demand forecasting failures: for example, failure to draw up or share with producers accurate demand forecasts, potentially resulting in overproduction and waste.
- Due to the limited number of retail buyers for many producers, overreliance on single buyers leads to overproduction in order that suppliers reduce the risk of failing to meet required order quantities and subsequently being 'de-listed' by the retailer (Feedback 2017; Feedback 2018).

In addition to having a direct impact on levels of food waste occuring, particularly at the level of primary production, UTPs affect the level of trust between players in the supply chain. This can undermine producer participation in Voluntary Agreements (VAs), a non-regulatory approach to reducing food waste in the supply chain that relies on trust between trading partners. VAs are considered as a tool for food waste reduction in REFRESH, specifically seen within the policy brief 'Voluntary agreements as a collaborative solution for food waste reduction' (Burgos et al 2018). The lack of trust caused by UTPs may partly explain the poor representation of the primary production sector within VAs such as the EU-wide Supply Chain Initiative (Wunder et al., 2018). Producers at any point in the supply chain are vulnerable to UTPs, including those in countries outside the EU (Feedback 2017).

Actions taken so far to address UTPs in EU food supply chains vary across a spectrum ranging from no action, Voluntary Agreements, to formal regulatory approaches. In April 2018, after a European Parliament resolution calling for a Union-wide legal framework concerning UTPs, a public consultation and impact assessment, the Directorate-General for Agriculture and Rural Development, brought forward a draft Directive on Unfair Trading Practices in business-to-business relationships in the food supply chain (EC 2018b). The Directive was agreed in December 2018, and will protect food suppliers wherever they are based against buyers based in the EU and food suppliers based in the EU against all buyers, wherever they are based. It will also require all Member States to set up a public authority to undertake enforcement activities to prevent UTPs in the food supply chain (EC forthcoming). This indicates the seriousness with which EU bodies have regarded UTPs, in particular as they impact on farmer livelihoods.

As noted by the European Parliament (2016), UTPs are important to address for several reasons. Firstly, because of their commercial impact on food

businesses. The EC *Impact Assessment - Initiative to improve the food supply chain (Unfair Trading Practices)* (EC 2018a) predicts that actions to address UTPs could increase disposable farm income, make farming (particularly smaller operators) more attractive to investment, attract more newcomers to the farming profession, and boost rural employment and inclusive growth in rural areas (EC 2018a).

Secondly, UTPs in the food supply chain have been linked to the generation of food waste, often through mechanisms that are largely invisible to policymakers and the public (Wunder et al. 2018, Feedback 2017, Feedback 2018). For example, although food waste drivers in the supply chain may often be recorded as due to technical or operational reasons, the underlying cause may relate to UTPs. This is a difficult area in which to gather evidence as suppliers are very reluctant to come forward, for fear of being delisted by their customers (Feedback 2018), a situation referred to by the Commission's impact assessment as the 'fear-factor' (EC 2018a). The draft EU Directive put forward by the Directorate General of Agriculture states: "Where reliance on contract law or self-regulatory initiatives is possible, fear of retaliation against a complainant limits the practical value of these forms of redress." (EC 2018b). Due to this propensity of the food supply chain towards an imbalance of power between suppliers and buyers, a regulatory approach provides an important complement to any self-regulatory or voluntary food waste initiatives. In the UK, a 2017 review of the Groceries Code Adjudicator, the UK ombudsman for fairness in the groceries supply chain, found on-going concerns with "a climate of fear preventing reporting of retailers' abuses of power" (UK Government 2017).

The impacts of UTPs are difficult to quantify, in part because impact data is not collected, either at MS or EU level. This relates to the commercial fear of reprisals of disclosing poor commercial practices felt by the victims, but also to the involved nature of collecting evidence to establish whether or not an UTP has occurred, which involves business-sensitive evidence gathering within food businesses. In addition, a lack of data collection or publication of food waste arising in the supply chain has hampered insight into the impact of UTPs on food waste, for example, at primary production level.

## 2.2 Market conditions and practices relevant for UTPs and waste

The main types of UTPs which may drive food waste include:

- The absence of a written contract, or unilateral imposition or modification of terms and conditions of a contract, can result in food waste where the buyer makes last minute changes or cancellations to volumes previously ordered. In the case of highly perishable produce, such as soft fruits or vegetables – which must be processed within 24-48 hours of harvesting – it is particularly challenging, as suppliers have only a very limited window of time in which to find an alternative buyer.
- Overproduction due to lack of risk sharing between suppliers and retailers: Even without unfair breaches or impositions of

contracts, imbalanced bargaining power may result in food waste where suppliers aim for very high product availability (overproduction), in order not to run the risk of losing retail contracts through undersupply which may lead to them being 'de-listed' by their buyer. Where they cannot then find a market for surplus product, it may go to waste (Feedback 2017, 2018).

- Plough-back / unharvested crop may not count as food waste: In cases where a planted crop is surplus to requirement, and is not harvested, it is not currently considered to be 'food waste' under the EU Waste Framework Directive (EU 2008). The risk here is that where a UTP makes it uneconomic for a farmer to harvest part or all of his crop, this loss is not considered as food waste, despite the fact that the same environmental resources have gone into planting and growing it. Champions 12.3 recommends that it is best practice for nation states to interpret Sustainable Development Goal 12.3 as a target to halve all food waste by 2030 not just at retail and consumer level, but from from the point when food products are ready for harvest (or slaughter) through to the consumer level and to measure and report on this goal (Hanson 2017). The EU has committed to achieving the SDGs including 12.3.
- The role of quality specifications in UTPs: In their research with primary producers, exporters, importers and other supply chain intermediaries, Colbert (2017) and Colbert and Stuart (2015) found that cosmetic specifications were being used to restrict market access when demand is lower than supply: when pre-agreed supply to retailers exceeds consumer demand, retailers may increase the stringency with which cosmetic standards are applied to produce, in order to reduce excess supply and shift responsibility for excess onto producers.
- Minimum life on receipt (MLoR) criteria have been used in a similar way to quality specifications, as an excuse to reject produce that the buyer has decided cannot be sold because of falling demand or inaccurate forecasting. Retail distribution and stock managers report applying MLoR criteria arbitrarily to respond to commercial drivers and bonus incentives when managing stock (GSC survey 2017).
- Since many commercial intermediators or agri-food processors do not take part in the production process, and are thus not aware of what is happening upstream, there is a greater risk that they will implement UTPs. For example, in Italy, UTPs are generating waste that account for between 5 and 10% of the production (Burgos, 2017).

UTPs were identified as underlying food waste drivers in the ground-up approach carried out within the REFRESH Systems maps and analytical framework. Within this report, possible instances of food waste drivers relating to retailer/producer UTPs were identified within the following supply chains studied: meat, fresh produce, dairy, pre-prepared meals and bakery supply chains (Burgos *et al.*, 2017). Some examples are listed below:

- **Bread:** Retailers require bread producers to adhere to very strict 'minimum life on receipt' criteria in supplying them and these criteria are much stricter in the UK than in France and Germany.
- **Potatoes:** Retailers 'flexing' quality specifications governing size and shape of produce in order to manage surplus supply; farmers not receving agreed price for all product that meets specification.
- **Prepared meals/sandwiches:** Late cancellation or changes to orders may result in the loss of ingredients already prepared to meet the original order.
- Processed meat: information asymetries between processors and retailers may result in 'demand amplification' in advance of predicted peak demand periods (such as barbeque cuts in summer), without firm forecasts and orders waste may result.

#### 2.2.1 Perishability, UTPs and waste

Overall it was found that perishable products were more often wasted within the supply chain, because of supply and demand imbalances and poor information sharing. The limited scope for finding alternate markets as a consequence of perishability and short life also was found to be problematic. Indeed, the mapping exercise confirmed that the supply and demand imbalance is an important driver of waste in the food supply chain. However, the factors behind these imbalances were complex, and included forecasting errors, over-optimistic projections for increased product demand, associated with retail promotional offers. With poor information sharing and erratic peaks and troughs in demand, and many suppliers competing to supply few retailers, a small increase in predicted demand at the retail stage can result in 'demand amplification' further back in the supply chain as competing suppliers of the same product amplify the real demand. Demand amplification results in rapid food surplus and waste and is symptomatic of poor process integration and information across supply chain members, with each step in the chain making adjustments that accumulate within the upstream food chain, thus causing food surplus and waste.

#### 2.2.2 UTPs and market concentration

The concentration of the grocery retail sector varies across the EU. Where retail markets are highly concentrated, the power imbalance between retailers and their suppliers can result in the imposition of unfair conditions on players with low levels of power. The lack of an inhibiting, trans-national regulatory framework, or of an adequate system of implementation and investigative powers and redress at the MS level, allows these drivers to result in continual and high levels of UTPs across multiple different areas of the supply chain. It is hoped that the proposed EU Directive on UTPs will help address these issues, however, there will still be much scope for MS interpretation and implementation.

## 3 EU response to UTPs

One challenge with regulating and preventing UTPs is that, as the European Parliament's 2016 resolution states, "unfairness' in the food supply chain is difficult to translate into infringement of current competition law" (European Parliament 2016, B). One of the causes of UTPs is, thus, the absence of effective legislative control, stemming in part from differences in definition and responses at national level, and in part from the unique nature of the food supply chain (Stefanelli and Marsden 2012, p. 1). It is to be hoped that this 'gap' is addressed by MS implementation of the 2018 EU Directive on UTPs.

#### Country case study - UK

One approach to regulating and adjudicating unfairness in the groceries supply chain is provided by the case of the United Kingdom, who in 2013 passed an Act to proactively implement the existing Groceries Supply Code of Practice ('the Code') (UK Government 2009). The Groceries Code Adjudicator (GCA) monitors, encourages compliance with and enforces the Code, and has powers to carry out investigations into individual retailers, to impose fines for breaches of the Code, and to mediate disputes. The Adjudicator takes a 'collaborative, business-focused approach' (GCA 2018).

The GCA has conducted annual supplier surveys since its inception; the latest, in 2018, found that since 2014 the percentage of suppliers surveyed who experienced an issue with a code breach dropped from 79% to 43%, and willingness to report an issue to the GCA rose from 38% to 52%. However, the survey also found that of those suppliers who would not consider raising an issue with the GCA, 42% cited fear of retribution from their retail buyer as the reason for their reticence (YouGov 2018). From this survey data it can be seen that while the GCA has had a strong impact over a relatively short period of time, the power imbalances between retailers and suppliers require prolonged engagement with both parties, and training in the relevant legislation to encourage confidence in reporting misconduct.

## 3.1 Potential benefits of national and international action to address UTPs for food waste reduction

Although the main impacts of UTPs are commercial in nature, such as loss of revenue within food businesses affected by UTPs, MS that develop and implement a more effective deterrence against UTPs (see case study in section 2.5) are likely to ease the implementation of a range of whole supply chain measures to reduce food waste.

Reducing the food waste caused by UTPs would result in significant environmental benefits, mainly through reducing overproduction and the waste of non-renewable inputs into agriculture (including Greenhouse Gas Emissions, fertiliser, water and soil fertility). Currently agriculture contributes 10% of the EU's GHG emissions, and indirect emissions from food imports are also rising (European Environment Agency 2017).

Addressing UTPs may also have a knock-on effect on the effectiveness of other measures to tackle food waste. One solution to curbing food waste as

result of interactions between parties in the food supply chain are Voluntary Agreements (VAs). VAs have been adopted in a number of MS, as well as at EU-level in the form of the Supply Chain Initiative. However, VAs, which do not address power imbalances in the supply chain, can find their effectiveness at food waste reduction undermined by lack of trust between suppliers and buyers. Policies that reduce UTPs are likely to have a secondary impact in benefiting the establishment of more effective grocery sector VAs, where representation of primary producers is not incumbered by a lack of trust with other supply chain VA signatories, particularly in relation to retailers. More effective VAs that work well from farm to retail stages are likely to have a larger food waste reduction impact than VAs that only encompass large retailers and big brand manufacturers of food and drink products.

Mechanisms for reporting and addressing UTPs will also increase transparency within the supply chain and create an environment where there is greater accountability, which could also create a culture where measurement and publication of food waste data is expected and welcomed.

The approach taken in different MS will vary by the starting circumstances (for example, market concentration), the actions already taken and the balance between local food production and imports from other EU countries and outside the EU. Reducing Unfair Trading Practices would reduce the amount of risk for suppliers, potentially making their businesses more attractive investment opportunities and allowing them to build secondary markets for produce, especially in developing countries.

### 4 Recommendations

A first step towards an integrated EU-level response to UTPs in the food supply chain has been taken. A strong approach to UTPs, both at EU- and MS-level is an important step towards a more holistic approach to food waste reduction. Indeed, without addressing UTPs, the effectiveness of other approaches to reducing food waste along the supply chain, such as VAs, may be reduced. The form in which the EU Directive is passed, and the action taken by individual MS to implement it, will have considerable implications for the status of food waste reduction in the EU in years to come. While the primary outcome of effective regulation will be more secure livelihoods for primary producers, a secondary and important outcome will be a reduction in the environmental and Greenhouse Gas Emission impacts of the EU's food supply chain.

The recommended elements contributing to an effective response to UTPs include the steps necessary to establish an effective grocery supply code of practice are:

- Having a clear and easily followed code of practice that governs behaviour relating to fair trading within the supply chain.
- Providing sufficient resource to implement measures to investigate and prevent infringements of that code.

- Providing sufficient deterrence to those that are found to breach the code through public disclosure of the results of investigations and a level of fine that is significant in relation to a food business' turnover.
- The financial support for the organisation acting as an adjudicator to the code of practice should be on the basis of an industry levy rather than dependent on income from fines.
- A mechanism to protect the anonymity of food businesses that make a
  case for a breach of the code of practice, to reduce the climate of fear
  and encourage more victims of UTPs to come forward, as well as a
  mechanism to accept evidence from civil society.
- Ensuring that the code covers international and indirect suppliers, both within and beyond EU Member States and that those covered by the code are aware of their rights.
- Measuring food waste, at Member State and business level, from the point food is mature enough to be ready to harvest through to the consumer, and the causes of this food waste, in order to get a clear sense of the scale of food waste caused by UTPs, and to understand opportunities for intervention.

## 5 Recommended reads on Unfair Trading Practices

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