Green Paper unfair trading practices in the business-to-business food and non-food supply chain in Europe - COM/2013/037 final

POSITION PAPER

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Key messages

- As Europe’s largest private sector employer and closest link to consumers, commerce has the potential to help Europe out of the crisis. Commerce is a dynamic sector, constantly innovating and guaranteeing through strong competition that consumers will benefit from choice, quality and good prices. EuroCommerce strongly encourages the Commission to live up to its better regulation principles, to avoid unnecessary regulation and to focus on delivering growth and jobs.

- In that context, the commerce sector expresses its disappointment that the Green Paper unnecessarily puts retail on trial without providing evidence of any systemic problem; it focuses on a specific issue irrespective of the broader context, including the drivers of competitiveness; and fails to consider the consumer interest.

- Trading relations are very complex; there are huge differences across Member States. This means how they are regulated needs to be different; the perceptions of what is fair and unfair may be different; and indeed the rules need to be related to these different trading patterns, perceptions and priorities. One size fits all is inappropriate at a legal level. Subsidiarity must be the norm here leaving the voluntary framework to fill in any gaps. Bargaining power is misunderstood, not least its role in delivering consumer benefits.

- Most issues were raised in the food sector. An EU-level Voluntary Initiative is in place to foster good practice and provide a mechanism to deal with complaints for alleged breaches of principles. The Commission should commend this initiative.

Introductory comments outline

- In the past few years, the retail sector and the food supply chain have been subject to intense scrutiny both at EU, and national level. Any analysis of the responses to this green paper needs to take into account the conclusions of other studies which the Green Paper has tended to ignore, including the Commission communication on a Better Functioning Food Supply Chain in Europe, the Retail Market Monitoring Report and their respective supporting staff working documents\(^1\), national competition authorities (e.g. Swedish competition authority report) or government studies\(^2\). Also the wider circumstances underlying the functioning of modern supply chains need to provide the context for an understanding of trading practices.

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• The Green Paper is based on a number of ill-defined concepts such as “retail supply chain” or “fairness/unfairness”. In our perspective, a practice can only be deemed unfair after building a complete understanding of the circumstances of the commercial relations. As a result, when referring to “Unfair Trading Practices” (UTPs), our response relates to practices that fall below standard, taking into account the entire commercial relationship. Furthermore, the concept of “retail supply chain” is confusing as operators deal with “product” supply chains. In this response, we focus on trading practices between the different links in the supply chain, i.e. between suppliers and retailers.

• The efforts undertaken by food supply chain stakeholders to promote the uptake of principles of good practice in their relations through a common Voluntary Initiative should have been more strongly endorsed, not least because the threat of regulation could undermine the willingness of businesses to subscribe to the Initiative.

• EuroCommerce strongly encourages an informed debate based on objective facts and scientific evidence rather than subjective perceptions. We ask the Commission to take full account of the two forthcoming studies (B2B legal regimes; and the impact of retail developments on choice and innovation) and to give the Voluntary Initiative a sensible period before its implementation is judged.

The food and non-food supply chains

• In 2009, the Commission in its Communication on a Better Functioning Food Supply Chain recognised that “on several dimensions, the chain performs well: it delivers high-quality food products at affordable prices to European consumers; it ensures the safety and traceability of food products; and it can pride itself on the ample supply of highly competitive, innovative and traditional products, both within and outside the EU”. Since then and in spite of the crisis, profitability in the food industry has been maintained, while retailer margins have remained under strong pressure. In spite of efficiency gains made by retailers over the years, manufacturers still outperform retailers in terms of profitability.

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3 European Commission, Internal Market and Services DG (2012), Call for tenders n° MARKT/2012/049/E, Study on the legal framework covering business-to-business unfair trading practices in the retail supply chain, Brussels
4 European Commission, Competition DG (2012), Call for tenders n° COMP/2012/015, Study on “The economic impact of modern retail on choice and innovation in the EU food sector”, Brussels
5 “Vertical relationships in the Food Supply Chain: Principles of Good Practice”, agreed by 11 EU level organisations (http://ec.europa.eu/enterprise/sectors/food/files/competitiveness/good_practices_en.pdf). These principles were warmly welcomed by the High Level Forum on a better functioning food supply chain (High Level Forum for a better functioning food supply chain (2011), Mid-term report (p. 4)); The Voluntary Initiative refers to the initiative by 8 EU-level organisations to implement and enforce those principles through a common framework.
6 Corstjens, M., Steele, R. (2008), An international empirical analysis of the performance of manufacturers and retailers (p. 228), ScienceDirect – Journal of Retailing and Consumer Services 15, 224-236,
On the wider scale, the non-food supply chain responds to different conditions as compared to the food supply chain, often with a greater share of products being sourced directly outside the EU.

The Green Paper looks at the retail food and non-food supply chains; however, regrettably without providing a clear definition of both. In particular, it is not clear whether in this context the intention is to refer to ‘household goods’ (as has been suggested by the Commission orally with the proposal to define consumer goods as those ‘found in a supermarket’ or for daily consumption or whether there is a desire to extend the definition more widely to all consumer products.

Consumers are at the heart of the supply chain:

Every day retailers compete hard to deliver consumers with choice - the right product at the right place at the right time and at the best price at each value level. Strong competition results in continuous innovation (assortment, service, formats, etc.), efficiency gains and relatively low margins.

Strong competition and limited shelf space also means that to attract consumers, retailers make a choice in terms of products availability and innovate various distribution formats and channels (e-commerce, supermarkets, proximity shopping, etc.). To provide choice, they handle a vast number of supplier relationships. As an illustration, for instance, the German market is reported to count more than one million products, while on average, a typical supermarket would provide about 50,000 products and bigger hypermarkets up to 80,000.

In mass markets, retailers rely on relationships that can sometimes be complex. They compete hard to attract consumers and retain their loyalty. As a result, they need strong and sustainable supply chains. The reality is that both suppliers and retailers need each other and the boundaries between the two are increasingly blurred as a result of greater integration to achieve further efficiency gains. Evidence shows that voluntary collaboration between retailers and manufacturers generates efficiency gains which translate into higher sales and profits.

As a result of changing consumption patterns over the past decades (e.g. increasing number of single households, changing eating habits, changing demographics, changed allocation of consumer expenditures), supply chains have become more complex and sophisticated. Although increasing, direct relationships between farmers and retailers are far from being the norm. In between, there are a number of steps, which include processing, packaging, logistics, grading, etc. All these stages add a certain degree of value, which is built into the final cost / price of the product. Other aspects in determining the final price is competition between retailers as well as the intensity of competition.

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7 Source: AC Nielsen, 2011
8 See “ECR 2022 – setting the stage for the next generation”, Results from the joint survey on the status of collaboration, McKinsey & Company, ECR Europe Annual Conference 2012
9 Annex 1 - Eurostat data shows that over the past 15 years, consumers spend on average less on foods and beverages and more on housing.
upstream in the supply chain. Evidence from national price observatories show that retailers’ net profits remain very limited.\(^{10}\)

**Retailers and wholesalers as service providers**

- Although the Green Paper is presented together with a European Retail Action Plan, it overlooks the importance of supporting a strong and competitive retail sector in Europe. Overall, the commerce sector represents 6 million companies, many of which are small companies, providing a job to over 33 million people across Europe from all ranges of society.

- Overall, the commerce sector fulfils a key function as an intermediary between producers and consumers and therefore makes an important contribution to the economic efficiency of the market. Commerce is also the conveyor of customer needs and expectations to others in the chain who do not have a direct relationship with consumers.

- The commerce sector includes both wholesalers (supplying retailers and processors) and retailers who market products to consumers. Wholesalers operate on the basis of continuous relationships and technical expertise. Retailers provide a service to both producers and consumers and contribute to reducing transaction costs.\(^{11}\) As stated by CPB, an independent research body for the Dutch government, “Distribution services comprise transport, storage and warehousing and the marketing of products (...). The price a consumer pays for a certain product at a retail outlet is lower than the sum of the purchase price of this product bought directly from the producer and the (implicit) costs from obtaining it such as research costs, costs of travel and the opportunity cost of time. Consumers and producers outsource transport, distribution and storage to a third party as a result of economies of scale.”\(^{12}\) Unlike other operators in the chain, retailers are under constant pressure from consumers who at all times vote with their feet for their favourite shops and delegate their bargaining power to retailers. As a result, efficiency gains made by retailers are usually directly passed on to consumers. This translates into relatively small profit margins as compared to other operators in the supply chain (2-3% on average).

- In a highly competitive environment and because shelf space is limited, consumers drive the assortment policy – i.e. what is on shelf or not. However, other distribution channels are available for suppliers for their products. Restaurants and caterers, direct sales, wholesale, online sales and exports are other sales markets which are of growing importance to the industry. IFH, a German research institute reports that for instance, only 22 per cent of the total production of meat in Germany is sold through supermarkets.\(^{13}\)

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\(^{10}\) Annex 2 – Compared margins of retailers and manufacturers

\(^{11}\) “In many market segments, transaction costs are considerable. They may represent as much as 50 per cent of total costs. The retail sector enables cost savings by realising the potential for rationalisation. By bundling ranges of products, it reduces distribution costs for the producer. For their part, consumers benefit from this process by being able to procure many products in one place and shop at advantageous prices.” HDE Handelsverband Deutschland (2009), Some facts about the bargaining power of commerce and industry, p.3, Berlin


\(^{13}\) HDE Handelsverband Deutschland (2009), *Some facts about the bargaining power of commerce and industry*, p.3, Berlin
The Portuguese competition authority also reports that “even if some suppliers only sell to one LRG [large retail groups] there is no evidence that there are not equivalent alternatives”\textsuperscript{14}.

**What problem is the Commission trying to solve?**

- The Green Paper focuses on alleged unfair trading practices without considering the global circumstances and factors underlying the competitiveness of supply chains. The commerce sector invites the Commission to develop a holistic picture of the functioning of supply chains and fully address the actual factors underlying their competitiveness. Such a perspective would for example emphasise the need to support a more market oriented agriculture sector\textsuperscript{15}, and to act upon real factors inhibiting innovation or the proper functioning of the single market.

- In focusing on unfair trading practices, the Green Paper tends to single out the retail sector without considering the underlying causes of alleged unfair trading practices or providing an accurate picture of the scale of the alleged problem. In practice, out of the millions of transactions taking place every year across Europe, only a few raise problems and increasingly retailers have put in place systems to deal with them.

- The Green Paper is based on perceptions that are too subjective to provide a sound basis for further action. Evidence and anecdote are not the same. EuroCommerce therefore proposes an informed debate based on objective facts and data. We hope the DG Competition study\textsuperscript{16} might be able to provide such facts and data on an objective basis.

**Fairness and unfairness**

- Freedom of contract is a key principle in business-to-business transactions and a contract is the result of a negotiation process in which both parties seek a reasonable balance of advantage and some compensation for those areas where the other party may be given an advantage. In a properly functioning market economy, tough bargaining generates efficiencies and consumer benefits. This should not be confused with alleged unfair trading practices.

- The Green Paper fails to provide a convincing definition of “fairness / unfairness”. In reality, there are only practices that are legal or illegal. In a legal framework it is indeed difficult to provide a black and white definition. It can be understood as a principle against

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\textsuperscript{14} It goes on saying that “Despite the importance of the LRGs for the distribution of certain categories of products, those suppliers can reach consumers by switching between LRGs or going through the hotel, restaurant and café sector, or directly to traditional shops and/or their own outlets. There is also, in certain cases, the possibility of exporting their products abroad. There is thus no evidence of economic dependence of suppliers vis-à-vis LRGs” - Portuguese Competition Authority (2010), Final report on commercial relations between large retail groups and their suppliers (abridged English version) (§ 42, p. 20), Lisboa, Portugal

\textsuperscript{15} “the EU’s Common Agricultural Policy still has elements that disadvantage consumers. [...] The agriculture policy has a price: it distorts competition in the market for agricultural goods, and EU citizens pay for this through higher prices and higher taxes”. Konkurrensverket : Swedish Competition Authority (2011:3), Mat och merknad - fran bonde till bord (p. 26), Stockholm, E-print AB

\textsuperscript{16} European Commission, Competition DG (2012), Call for tenders n° COMP/2012/015, Study on “The economic impact of modern retail on choice and innovation in the EU food sector”, Brussels
which specific actions can be judged – basically the approach taken in the B2C Unfair Commercial Practices Directive and in the Voluntary Initiative\(^{17}\). Indeed fairness can only be reasonably understood in the specific context of the whole relationship and contract and in relation to a specific action.

- EuroCommerce therefore asks the Commission to support the Principles of good practice in the food supply chain and to give the Voluntary Initiative a fair chance of success as a way of bringing about culture change. This Voluntary Initiative also provides a cost effective framework through which commercial partners can handle disputes. This can be adapted to – and exist alongside - different legal systems. As it is in the process of practical launch, it can furthermore produce results within a relatively short period of time.

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\(^{17}\) The term Voluntary Initiative refers to the initiative of 8 EU level organisations, members of the High Level Forum on a better functioning food supply chain who signed up to a framework to implement and enforce principles of good practice in vertical relationships in the food supply chain. See footnote #5.
EuroCommerce response to the detailed questions.

1. **Do you agree with the above definition of UTPs?**

   - The approach developed in the Green Paper overall assumes that there is a direct link of causality between the exercise of bargaining power and unfair trading practices without providing a clear definition of what constitutes an unfair trading practice. This approach is misleading and ignores the positive impact of improved bargaining power on consumers (higher choice and lower prices) recognised by the Commission and many competition authorities.

   - Overall, responsible European retailers are committed to the highest standards of commercial behaviour. This applies to relationships across the board – to consumers and suppliers. They are sophisticated and highly professional – and work hard to demonstrate that they are responsible and trustworthy operators who deserve the long-term loyalty of their customers - recognising they always have a choice to shop elsewhere.

   - In its Retail Market Monitoring report, the Commission recognises that the modernisation of the retail sector since the 1960s has “contributed significantly to combating inflation” and generated consumer benefits through “greater choice at competitive prices allowing them to reallocate a growing share of their income, traditionally used for satisfying basic daily needs, to the consumption of an ever broader range of goods and services, which, in turn, has stimulated innovation and economic growth”\(^\text{18}\).

   - Whether a single trading practice is fair or unfair tends to be a subjective judgement. It is for this reason that such practices are difficult to define in a legal environment and why there are different interpretations across Member States, leading to a number of practices having been defined as legal or illegal. Some national regulatory bodies indeed prohibit certain practices defined as unfair (e.g. France, UK); others do not (e.g. Denmark or Germany). It is also the case that some practices that the law maker has identified as possibly “unfair” could be seen as “pro-competitive” by certain competition authorities under certain circumstances\(^\text{19}\).

   - The fact that the Green Paper itself contains several definitions of unfair trading practices provides evidence of the difficulty in trying to define a subjective term in a legal environment. The clearest possible legal definition is provided in the introduction and relates to practices that “grossly deviate from good faith and fair dealing”. It would be

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\(^{18}\) European Commission (2010), *COM (2010) 355 final - Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Retail Market Monitoring Report “Towards more efficient and fairer retail services in the internal market for 2020”* (p. 3-4)

\(^{19}\) Report of the Spanish Competition Authority Report on Competition and the agrifood sector, « *Informe sobre la competencia en el servicio de mercados centrales mayoristas de abastecimiento de productos alimentarios perecederos en destino*” (2013); Another example, the Norwegian competition authority concludes that the use of slotting allowances “may yield efficiency gains in the relationship between the supplier and the retailer” but that under certain circumstances it can generate positive or negative effects and concludes that “the use of slotting allowances should be assessed on a case by case basis”. Nordic Food Markets (2005) – *A taste for competition* (p. 85)
more comprehensive if it were complemented by the proposal for the Common European Sales Law from MEP Lehne20. “'good faith and fair dealing' means a standard of conduct characterised by honesty and openness with regard to the other party to the transaction or relationship in question and excludes an intention the only purpose of which is to harm”.

- Basing legislation on an ill-defined and subjective concept such as “fairness” or “unfairness” entails a risk to generate legal uncertainty, which goes against better regulation principles and would risk undermining companies’ ability to invest and innovate.

- It is because it is so difficult to define fairness and unfair practices in the context of a legal framework that we believe the voluntary approach is preferable. In that approach a legalistic definition is not required. The Voluntary Initiative provides a unique common understanding of fairness across Europe and confirms a positive approach from the entire chain to promoting good practice because it makes good business sense. In that initiative, fair dealing is defined as “contracting parties dealing with each other responsibly, in good faith and with professional diligence”. Identifying positive principles and illustrating them with examples of fair or unfair practices is a better option for generating a positive culture change. We ask the Commission to support this definition.

- Business-to-business relationships are different from business-to-consumer relationships. The regulator's role is not to interfere in the functioning of markets without clear evidence of market failure but to ensure that the rules of competition are being observed so that the market can work freely. It is not appropriate for governments or the EU to interfere in business-to-business competitive or commercial relations and try to influence the result in favour of one or the other player in the market. EuroCommerce strongly defends the freedom of contract between businesses. To interfere here means to interfere in a commercial process with a potential detrimental impact on consumer welfare through higher prices and/or lower choice.

- A contract is the result of a trade-off in a negotiation between two parties with mostly contradicting interests. In a negotiation process, each partner may make concessions in order to reach an agreement. Single practices that may be perceived to be unfair should therefore be seen in the context of the overall contract because the parties evaluate the outcome of the overall contract and not of its individual contract terms. Individual terms may seem to be unfair when considered in isolation but be seen rather differently when considered in the context of the whole package. The Norwegian Competition Authority, for example, concluded that slotting allowances should be assessed on a case by case basis because they could have in some circumstances a positive effect and in others a negative effect21. For this reason, there is no unfair trading practice per se – there can be principles of fair trade but specific practices that flow from these principles must be considered within a context.

21 Nordic Food Markets (2005) – *A taste for competition* (p. 85)
There may however be practices that fall below standards. These can occur anywhere in the supply chain. On the other hand, there are legitimate practices sometimes perceived wrongly as unfair but which correspond to the outcome of a negotiation and to a specific service. Negotiations do not focus only on price but also on services and conditions. For example, remuneration for the services retailers provide can take different forms and should not be considered as unfair where they compensate a service actually provided. Shelf space is limited and the positioning of products on shelves and within a store is directly connected to the potential to make sales. Because competition takes place not only across a single product category but across the entire assortment and market conditions, several factors determine contract negotiations including for instance, breadth and depth of assortment, store format, product substitutability, cost structures of retailers, etc. Retailers will ask for payment for these services in different ways: negotiating the lowest possible prices, negotiating a price that may be reviewed in consideration of the volume of sales of a given product, etc.

The Green Paper refers to some specific issues relating to the weakness of one party to the contract and an imbalance in bargaining power. Unfair trading practices should not be confused with tough negotiations or bargaining power, which are intrinsic to a functioning market economy and generate recognised consumer benefits in terms of lower prices and greater choice. Several competition investigations in EU countries have looked at the functioning of the food supply chain and the possible impact of increased retailer buyer power on manufacturers and consumers. The ECN report states that the asymmetry in bargaining power is not in itself an unfair trading practice even though it may be a prerequisite for an unfair practice. Competition authorities also highlight that increased bargaining power may have resulted in further efficiency gains and lower prices and some have recommended the need to increase competition at retail level by addressing barriers to entry.\textsuperscript{22}

It is clear that it does not matter what is or is not banned – there will always be a stronger and weaker party. In particular, there is no evidence that increased retailer buyer power has led to retailers outperforming manufacturers. In reality, retailers are faced with intense competition imposed upon them by consumers who vote every day with their feet for their favourite shop. As a result, retail margins are usually very small compared with other sectors (on average 2-3\% in retail\textsuperscript{23}). In fact, because of intensive competition, retailers pass on a high proportion of their savings and efficiency gains to consumers through reduced prices. Therefore, while retailer buyer power may have increased, there is no evidence that retailer performance is better than that of a number of large manufacturers\textsuperscript{24} 25 26.

\textsuperscript{22} European Competition Network (2012), \textit{ECN activities in the food sector – Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector}

\textsuperscript{23} Annex 4 – Comparison of operational margins of industry and retail

\textsuperscript{24} For a more detailed analysis of the compared performance of retailers and manufacturers: Corstjens, M., Steele, R. (2008), \textit{An international empirical analysis of the performance of manufacturers and retailers}. ScienceDirect – Journal of Retailing and Consumer Services 15, p. 224-236

\textsuperscript{25} The Swedish competition authority concludes for example (p. 23): "It is apparent that the profits made by food manufacturers will decline if there is an increase in the buyer power of retail chains for daily consumer goods. However, it is unlikely that an increased buyer power makes groceries more expensive
- Bargaining power is intrinsic to a well-functioning open market economy and in practice both large and small players exert bargaining power in all supply chains. The division of bargaining power between manufacturers and retailers varies from product to product and is a dynamic phenomenon which changes over time:

- Manufacturer concentration in certain consumer goods markets is still very high.\(^{27}\)

- No retailer, even the largest, truly negotiates with manufacturers of “must have” products. A survey conducted by a retail research institute in Germany shows that consumers expect the retailers’ assortment to be composed of up to 50% must-stock or must-have products. \(^{28}\) Retailers, big or small, have no negotiating power with the manufacturers of “must-have” products. Even a relatively small supplier can have significant bargaining power depending on its power on local markets.\(^{29}\) The size of the supplier and the buyer may not always be the most important issue to evaluate buyer power. Retailers simply cannot afford to lose the availability of these sought-after brands from their shelves by imposing unfair conditions on suppliers.

- Therefore, bargaining power can only be judged on a product or product group basis, food or non-food.

- In relation to contracts involving SMEs, parties should aim to have contracts that are fit for purpose, and as clear and simple as possible. Also, training and support programmes for SMEs should ensure that SMEs and entrepreneurs are better equipped to deal with the complexity of contractual negotiations.

- Modern retailing relies on a continuous relationship between retailers and their suppliers and increasingly the boundaries between suppliers and retailers are being blurred. The key drivers for this are the need to build efficiency gains and avoid disruption in the chain and thus to deliver consumers the products that they expect at the right location, at the right

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\(^{26}\) The CPB Netherlands Bureau for Economic Policy Analysis, an independent Dutch government agency, states that while profits of both supermarkets and retailers during the period 1993 to 2005 have declined, there is “no significant empirical indication that supermarkets were able to use their buyer power to shift profits from manufacturers to supermarkets after 1993” and that “all else being equal, in terms of welfare, consumers have benefited from fiercer competition in terms of lower prices”: Creusen, H., Meijer, A., van der Wiel, H., & Zwart, G. (2008). Static efficiency in Dutch supermarket chain (p. 3), The Hague, Netherlands, CPB Netherlands Bureau for Economic Policy Analysis

\(^{27}\) Annex 5 - Concentration per product category in France

\(^{28}\) HDE Handelsverband Deutschland (2009), Some facts about the bargaining power of commerce and industry, p. 9, Berlin

\(^{29}\) Heimeshoff, U. & Klein, G.J. (2013), Discussion Paper – Bargaining power and local heroes, Düsseldorf, Germany, Düsseldorf Institute for Competition Economics (DICE), n° 87. This study considers in particular the case after two regional beer breweries stopped delivering a specific full-assortment retailer within a short notice due to failed negotiations for further supply of beer. These strategies of local suppliers clearly have significant negative effects on retailers’ revenues.
time and at the best price for all possible quality ranges. This results in greater collaboration between retailers and their suppliers. Collaboration requires dialogue.

2. **Is the concept of UTPs recognised in your Member State? If yes, please explain how.**

- The structure of the supply chain varies widely across EU Member States. Those differences may have an impact on the relationships along the supply chain. The way the chain is regulated also differs at national level and there are differences across Member States in terms of definitions of – and approaches to - what constitutes a fair or unfair trading practice. We would expect the Commission study on B2B legal regimes to provide more detailed information and would hope it would focus not only on the actual laws but also the outcomes to see whether they are similar or not. If the different processes lead to similar results on national markets, there should be no concern about fragmentation.

- Some Member States have indeed laws that ban specific practices; some Member States do not. Some Member States have laws in the competition field banning abuse of economic dependency. Some Member States have laws that allegedly tackle unfair trading practices but in practice seek protectionist purposes and run counter to founding principles of the Single Market.

- As outlined in question 1, the regulator's role is not to interfere in the functioning of markets without clear evidence of market failure but to ensure that the rules of competition are being observed so that the market can work freely.

- Although there are different laws across the EU, those that genuinely deal with trading practices reflect national circumstances, national legal environments, and national traditions of regulation and enforcement. They do not hinder the proper functioning of the supply chain.

- Enforcement is a key aspect to be considered. Some Member States have adopted laws which in practice are difficult to enforce. Consistent and effective enforcement of existing legal requirements creates a level-playing field and protects consumers and competitive firms against anti-competitive illegal practices. It is absolutely key to a properly functioning market (national or EU level). Adding another regulatory layer without proper enforcement will therefore not help.

3. **In your view, should the concept of UTPs be limited to contractual negotiations or should they include the pre- and/or the post-contractual phase as well?**

- Good commercial practice should apply to all stages of the commercial relationship including contract execution. As we have stated in our answer to question 1 above, in our view there is no unfair trading practice per se – i.e. outside the context of the whole relationship and the specific circumstances of the case. A contract, containing a bundle of terms and conditions, is the result of negotiations between two parties resulting in a mutually beneficial outcome to the benefit of consumers. Unfair trading practices must therefore be seen in the context of the overall contract. Individual terms may seem unfair when considered in isolation but rather differently when considered as part of the whole package.
• The distinction made by the Commission is therefore artificial and does not reflect the complexity of modern and efficient supply chains. Retailers and wholesalers work on the basis of continuous relationships with their trading partners. There is the potential for poor behaviour at any stage. The process is complex and on-going and all stages influence each other. UTPs should be assessed in relation to the implementation of the contract in practice as well as the negotiation of the contract.

• Certain countries do not recognise this artificial distinction and operators are bound by contract rules and obligations throughout contract negotiations (e.g. rules on confidentiality, etc.) and execution. Further clarification would therefore be necessary if any regulatory measure were to incorporate these concepts.

• We therefore believe that it is better to understand UTPs in the business relationship as a whole, rather than at any particular stage of the contract. Fair trading standards should apply throughout the entire relationship. Freedom of contract should form the basis for the contract itself.

• At the end of the day, freedom of contract also means that any party is free to enter into a contract or not. No party can be held responsible for the other party taking irrational decisions. As stated in the introduction, suppliers have a choice of several distribution channels apart from the retail sector, including direct sales, catering, exports, etc.

4. **At what stage in the B2B retail supply chain can UTPs occur?**

• The question should address all supply chains as in practice, UTPs may occur in any sector of the economy (see Question 1) and therefore at any stage of any supply chain. The principles of good practice developed by 11 EU level organisations in the food supply chain apply to the entire food supply chain. They form a common understanding of fairness, propose standards of good practice and provide cases of good and bad behaviour linked to practices occurring throughout the entire chain. In practice, all operators throughout the supply chain can potentially exert market power and there is always tension between buyers and suppliers. Unfair Trading Practices should not be confused with tough negotiations or bargaining power, which are intrinsic to a functioning market economy and generate recognised consumer benefits.

• As set out in the introduction, the concept of a “B2B retail supply chain” is ill-defined and can only be assessed ex-post facto. In food supply chains, one might ask whether, for example, apples should be treated differently if they end up in retail stores or in staff restaurants in the public service. In non-food the chains are not only different from one sector to another but involve raw materials and products that could easily end up outside the retail chain – and products often sourced from outside the EU. The only way to know if they were part of the retail chain would be ex post facto.
5. **What do you think of the concept of "fear factor"? Do you share the assessment made above on this issue? Please explain.**

- EuroCommerce regrets the credit granted to the fear factor, an ill-defined concept which cannot be measured because it is too subjective. “Fear” can lead to rational or irrational judgements and can only be overcome by encouraging trust and better cooperation. Public policy should not be developed on the basis of subjective elements or perceptions but rather on objective facts or evidence which alone can provide the basis of an objective judgement.

- On the other hand, EuroCommerce calls on the Commission to support the Voluntary Initiative, the purpose of which is to trigger a culture change through a commitment to fair trading practice and by enabling the parties to deal with their disputes in a way that reassures the complainant that he will not suffer retaliation.

- Indeed, to fulfil their mission, retailers need efficient, transparent and effective relationships. In this context, the best way to overcome the fear factor is to establish a culture of trust where partners to a contract have sufficient trust in each other that they can raise issues of concern without fear of the consequences. The Voluntary Initiative foresees in particular that the choice of most of the dispute resolution options is for the complainant, who in most cases is assumed to be in a weaker position. Furthermore, where they have been established, internal mediation systems through a ‘neutral’ party (in-house or external) have proven their efficiency for both parties. No buyer likes to be faced with an internal compliance officer. The culture change that is sought will be more efficiently achieved via a voluntary and common understanding of principles of good practice, rather than via imposing constraining regulation.

- In the business of fast moving consumer goods, in order to avoid costly business disruption (costs of exit and listing new suppliers), retailers have an interest in rapid and cost-effective means of resolving any concerns or disputes. As indicated above, to meet consumer demand and remain competitive, retailers rely on continuous relationships with their suppliers. In order to offer their full range, they welcome long term, sustainable relationships. For example, one company reports that they have been working since the beginning with over 50% of their own brands suppliers. In order to provide a more attractive assortment (in terms of both breadth and depth), retailers rely on high numbers of SME suppliers (both through own brands and others) and are even fostering their business development (including for instance by giving them access to export markets). Furthermore, retailers rely on their networks of SME suppliers as a counterweight in their negotiations with large suppliers.

- The fear factor relates to a person’s perception and behaviour towards risk. There could be two suppliers with the same products, each having a totally different perception of the risk and thus their levels of fear would also diverge. As outlined above, there is always a tension in contract negotiations. Tough bargaining, which is intrinsic to a well-functioning market economy, should not be confused with unfair trading practices. Sometimes suppliers are in a stronger position while entering into new negotiations because they know the prices other retailers are willing to accept to pay for their products.
• Retailers supply up to 50,000 products (and even more in the larger formats), resulting in large numbers of transactions taking place. In practice, out of the millions of contracts negotiated in the sector, only very few raise concerns. Both parties have an interest in a well-functioning and efficient business relationship. One company reports that they are faced with issues arising with their suppliers in less than 1% of contractual relations. Experience from the UK shows that nearly all complaints raised in the initial phases of GSCOP30 were resolved through internal mediation; experience from other countries, such as Belgium for instance, or companies having set up such mechanisms, shows similar results – i.e. internal mediation leads to satisfactory results. Data from France shows a general trend towards out-of-court settlement of disputes31.

• Fear is a concept used in the Green Paper to justify that action would be needed given the low levels of complaints. However, there is also no evidence that there would be more legitimate complaints whether there is fear or not. An objective assessment of the existence of a fear factor could be based on the outcome of making a complaint. This could be based on measuring the disadvantages that operators suffer as a result of lodging a complaint and a survey of satisfaction of those who did lodge complaints. In this respect, the FoodDrinkEurope survey (mentioned in the Green Paper) shows that those who sought action were globally satisfied with the results (75% recognised it helped them to some or to a great extent)32.

• The fear factor should not be confused with a legitimate need to change suppliers. Retailers are under pressure in a highly competitive market to react to changing consumer preferences; their role is not to maintain on the market products that are not or no longer attractive to consumers. As a result of this and other factors, there may be a legitimate need for a retailer (or manufacturer) to change suppliers. However, switching suppliers has a cost especially in terms of sourcing, assessment and certification of the supplier, analysis of products, and assessment of packaging, logistic impacts regarding stocks, depreciation and devaluation of obsolete stocks, management of the phase out of stocks, managing after sales costs (warranties), and disruption at the point of sale. It includes administrative costs, handling stock disruption (costs of exit of a product and introduction of a new product), repackaging, etc. Sometimes delisting is not possible because the presence of some brands in the stores is an absolute necessity. One company reports that the costs of changing suppliers would amount to on average about €100,000. Therefore, retailers tend to have a preference for long-term relations with suppliers in order to meet consumer needs.

• Anonymous complaints are sometimes put forward as the only way to overcome any reluctance to complain. However, as we argue below in our answer to question 18, they do not really work because if the complaint is to be resolved, it is necessary to identify the

30 Groceries Supply Code of Practice (GSCOP) in the UK (http://www.of.t.gov.uk/shared_of.t/monopolies/GSCOP-Order.pdf)
31 Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes (DGCCRF) (2011), Bilan de l’action contentieuse civile et pénale de la DGCCRF en 2010 (p. 2-3), Paris, France
complainant. The only way around this is anonymous complaints about a practice followed by a business that is part of a business approach rather than a one-off issue. The Voluntary Initiative foresees a mechanism to deal with anonymous complaints for an issue that would affect several operators in a given sector.

6. **In your experience, to what extent and how often do UTPs occur in the food sector? At which stage of the commercial relationship do they mainly occur and in what way?**

- In a highly competitive environment, to attract new customers and retain their loyalty, retailers need to rely on efficient and innovative supply chains. Experience shows that voluntary collaboration, including on innovation, provides benefits to both suppliers and retailers. Imposing unfair practices is not in their interest over the long-term.

- There have been cases of UTPs but overall, there is no evidence of a systemic problem. Out of the millions of contracts negotiated every year, only a few raise problems. One company reports that less than 1% of contracts even require a further discussion on issues arising.

- Good practice principles and examples of fair and unfair practices were defined by organisations in the food supply chain and warmly welcomed by the High Level Forum on a Better Functioning Food Supply Chain. These form a common understanding of what is a fair/unfair practice in specific circumstances, measured against some common principles. The Voluntary Initiative launched by 8 EU level organisations in the food supply chain aims to promote a culture of fair trading practice. By voluntarily signing up to the framework, companies agree to make the principles part of their company values and to report on their application.

- As with others in the supply chain, retailers sometimes suffer from unfair trading practices imposed by certain suppliers; nevertheless, they have put in place systems to try and deal with them; such practices include for example:
  - tariffs and volume changes unilaterally imposed by manufacturers;
  - manufacturers imposing a marketing strategy or seeking direct control over the store level even though they are supposed to be dealing with the purchasing entity;
  - breach of contract terms / unilateral suspension of contract by manufacturers;
  - exclusivity clauses by manufacturers;
  - threats - or unilateral decision - not to deliver if a retailer attempts to source identical products outside their domestic market (market fragmentation imposed by manufacturers);
  - late communication of general selling conditions, where by law, negotiations are based on manufacturers’ general selling conditions - this leaves little room for negotiations and increases pressure on both parties to reach an agreement.

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33 See footnote #8
• Although not to be confused with unfair trading practices, there are also practices of manufacturers that are anti-competitive, such as horizontal cartels, and lead to higher consumer prices. The ECN report\textsuperscript{34} gives a full list of cases found in the food supply chain with, in cases, a relatively high impact on consumer prices. Competition rules and their proper enforcement provide effective means to deal with them and guarantee consumer welfare.

• Retrospective changes are sometimes seen as unfair – but it depends on the circumstances. They may be required by both parties to adapt to new circumstances – e.g. weather conditions, price fluctuations, variations in consumer demand at a specific time, etc. They can be required by manufacturers and/or retailers. Suppliers most commonly change agreed prices. The conditions under which retrospective changes may be made should be agreed upon in advance or on the basis of mutual agreement to ensure predictability. In this event they are not unfair. This is covered as part of the principles of good practice in the food supply chain.

• Delisting may be necessary when a product is not up to standard or where a supplier supplies unsafe products. But it should be recognised that the cost of switching suppliers is high\textsuperscript{35} – especially in terms of sourcing, assessment and certification of supplier, analysis of products, assessment of packaging, logistic impacts regarding stocks, depreciation and devaluation of obsolete stocks, management of the phase out of stocks, managing after sales costs (warranties), disruption at the sale point. In some cases, switching suppliers is simply impossible since the presence of some brands in the stores is an absolute necessity. Delisting suppliers is therefore not an easy option.

• As set out in our response to question 1, because of competitive pressure, retailers pass on the benefits of tough bargaining to consumers through lower prices and/or better choice. This results in relatively low profit margins.

7. Are UTPs present in non-food retail sectors as well? If so, please provide concrete examples.

• As outlined in our response to question 4, unfair trading practices may occur throughout any contractual relationship. However, as set out in our response to question 6, there is no evidence of a systemic problem. Out of the millions of contracts negotiated every year, only a few raise problems. As in the food supply chain, the commerce sector remains open to dialogue in case evidence might arise.

• We invite the Commission to clarify its concept of non-food retail sectors. In reality, retailers offer a whole range of other products, either through mixed formats (e.g. hypermarkets also sell textiles, white goods, electronics, etc.) or specialised distribution channels (e.g. electronics, DIY, textiles, sports, etc.). However, it is understood that what is meant in the Green Paper is household products for daily consumption, though this is not stated. Although the Voluntary Initiative only covers food, retailers report that they are

\textsuperscript{34} European Competition Network (2012), \textit{ECN activities in the food sector – Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector}

\textsuperscript{35} One company estimates the cost to amount to € 100,000.
unlikely to operate different practices for food compared with household products of this sort unless the product itself leads down that track by its nature.

- Cases of unfair trading practices outlined in our response to question 6 can be found in household products and other supply chains. Examples of such practices include quantitative restrictions, exclusivity clauses, etc. However, overall, in non-foods, retailers depend even more on long-term relationships with their suppliers. Non-food supply chains operate differently according to products/sectors and can raise issues such as seasonality, consumer demand and the like. Sourcing may take place in the EU or fully outside the EU, confronting retailers with non-European ways of doing business. In the non-food sector, manufacturers’ position may be stronger when they have direct distribution channels towards consumers (e.g. on-line stores, single brand stores and authorised distributors) or are leading brands (see response to question 1).

- Although not to be confused with unfair trading practices, there are practices of manufacturers that are anti-competitive – e.g. price fixing agreements, or resale price maintenance - and lead to higher consumer prices. Competition rules and their proper enforcement provide effective means to deal with them and guarantee consumer welfare.

8. Do UTPs have an adverse impact in particular as regards the ability of your company to invest and innovate? Please provide concrete examples and quantify to the extent possible.

- This question wrongly assumes that unfair trading practices could be a key barrier to innovation and investment. There is no scientific or economic evidence that support this assumption. EuroCommerce requests that a full understanding of the actual drivers and barriers to innovation is built into the discussion. As part of this, we invite the Commission to ask what are the factors characterising a successful company that has sufficient means to invest and innovate (i.e. responding to market). This applies to all stages in the supply chain throughout the economy.

- As set out in the Innovation Union competitiveness report of 2011\(^\text{36}\), major barriers to investment include access to finance (such as venture capital) (which has been made more difficult as a result of the crisis), the cost of patenting in Europe, in particular for SMEs, and the framework conditions required to enhance knowledge intensive entrepreneurial activities (including education). The report does not mention UTPs as being a barrier to investment and innovation.

- In practice, the level of innovation in a company depends both on internal factors (the company’s capacity to absorb innovation, governance structure, etc.) and external factors (policy context/incentives, sector-specific features, etc.). The Commission is carrying out a study to measure this (DG COMP study) and an expert group to identify the drivers of retail innovation (DG RTD). We invite the Commission to take full account of the final results of the study and expert group in their impact assessment.

Investment decisions are also dependent upon a stable and predictable environment. Retrospective changes to contracts could have a disruptive effect if their conditions have not been agreed in advance. Equally discriminatory regulation has an impact on ability to invest in certain countries and choice of suppliers. However, innovation is about a mind-set and ability to respond to competitive pressure. Innovation is usually not financed through profit margins. Even with low margins, retailers constantly innovate in new products, formats or services.

Competitive pressure forces retailers to constantly innovate and adapt to changing consumer demand. Retailers pass on this market information upstream in their supply chain. Retailers compete on the basis of price, assortment, format or service, not only on specific product categories. The presence non-food products in supermarkets, also has a huge impact on the overall food assortment policy.

Consumers are at the heart of the supply chain; they drive innovation. In spite of relatively small margins, retailers are constantly innovating (products, service, format). Successful innovation will meet consumer demand: "no matter how innovative a change, without sales, the product is worthless". Because shelf-space is limited, new product introductions are almost always linked to the discontinuation of another product. In a study, FAO reports that of the 500/1000 new products introduced by supermarkets each year, less than 1% will be on the shelves in 5 years-time. In Germany, out of 1 million products on the market, about 120,000 new articles are introduced yearly. 90-95% of newly introduced products are changed within the first one-two years to refresh the assortment. One company reports 20% of products are newly introduced every year (out of on average 40,000 products in supermarkets). This should be compared with the fact that a single consumer only buys between 400 to 600 different products per year. Typically, only 20% of the assortment will generate 80% of the supermarket’s turnover. This illustrates the service provided by retailers (assortment, format, service).

Introducing a new product entails a risk that is usually shared by the supplier and the retailer who both have an interest in a successful launch. In practice, the yearly rotation rate for new products varies according to product category and product lifecycle. (i.e. more dynamic categories with quarterly lifecycles (computers, etc.), dynamic categories with annual lifecycles (TVs, photo, etc.), static categories with multiannual lifecycles (appliances, accessories, etc.)).

Own brands are a way for retailers to introduce new products on the market. At the forefront of consumer relations, retailers understand their needs and through own brands introduce products that meet their demand –e.g. braille labelling, fair trade, organic, reformulated products, etc.). Own brands are often produced by SMEs. Retailers accept

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that their own brand products can also be copied by others. The LEI study of own brands conducted for the European Commission concluded that own brands do not undermine the profitability or the capacity to innovate by SMEs in the food supply chain.

9. **Do UTPs affect consumers (e.g., through influencing prices, product choice or innovation)? Please provide concrete examples and quantify to the extent possible.**

- Consumers are at the heart of the supply chain. The supply chain exists to supply consumers with the goods they demand, at prices they are willing and able to pay and which provide value for money across the entire range of products. Retailers are the direct link in the chain to consumers and as such negotiate on their behalf with suppliers to provide value for money. Strong retail competition means retailers constantly innovate and generate efficiencies through efficiency gains, optimisation and cost savings to the benefit of consumers. Because consumers are highly price sensitive and easily change shopping habits, retailers pass on their savings to consumers and their average net margins are just 2-3% (see question 1).

- Over the past decades, consumers have benefited from lower prices; this has enabled them to spend a lower share of their total income on foods and household goods. The development of own brands, constant innovation and efficiency gains throughout the supply chain have largely contributed to this. This is referenced in the Commission Retail Market Monitoring Report (see question 1). There is also increasing pressure on consumers’ disposable incomes towards non-food expenditure such as housing, communications, health, insurance, etc.\(^{41}\)

- Some alleged UTPs may actually be perfectly rational practices that benefit the consumer: “Suppliers’ rebates are an important and often positive part of the pricing practices. The use of for example cost-based rebates, or fixed slotting allowances, may create efficiency gains. Different kinds of rebates, bonuses and slotting allowances may also help the chains to make the most of their buying power, thereby shifting the profit from the suppliers to the retail chains. Provided that there is sufficient price competition between the retail chains, this will lead to lower consumer prices”\(^{42}\). The Swedish competition authority also states “it is unlikely that increased buyer power makes groceries more expensive for consumers”\(^{43}\). The Portuguese competition authorities also shows that “earlier studies have shown that centralised purchasing and vertical integration in some LRGs [large retail groups] have led to lower prices in a range of goods purchased by these groups, and consumers have tended to feel the benefits with the pass-through of the results of their buyer power, even though the pass-through may only be partial.”\(^{44}\)

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\(^{40}\) Bunte, F., Bolhuis, J., de Bont, C., Jukema G. & Kuiper, E. (2009), *Pricing of food products*, The Hague, Netherlands, LEI Wageningen UR

\(^{41}\) Annex 2 - Eurostat data shows that over the past 15 years, consumers spend on average less on foods and beverages and more on housing.

\(^{42}\) Nordic Food Markets (2005) – *A taste for competition* (p. 91)

\(^{43}\) Konkurrensverket : Swedish Competition Authority (2011:3), *Mat och merknad - fran bonde till bord* (p. 23). Stockholm, E-print AB

\(^{44}\) Autoridade da concorrência: Portuguese Competition Authority (2010), *Final report on commercial relations between large retail groups and their suppliers (abridged English version)* (p. 17). Lisboa
• In a highly competitive environment, to attract new customers and retain their loyalty, retailers need to rely on strong and stable supply chains. Imposing unfair practices would not act in their interest over the long term; on the contrary, it would undermine their competitiveness and in that way have an impact on choice and prices for consumers.

• Furthermore, as stated in our response to questions 6 and 7, there are practices of manufacturers that are anti-competitive – e.g. price fixing agreements, or resale price maintenance - and lead to higher consumer prices\(^\text{45}\).

• Where they do occur, unfair trading practices experienced by retailers can limit choice (e.g. impact of tying, supplier boycott, non-delivery), affect prices (e.g. resale price maintenance cases, etc.) and / or available quantities (e.g. quotas of delivered products per retailers, suppliers withholding deliveries).

10. Do UTPs have an impact on EU cross-border trade? Do UTPs result in a fragmentation of the Single Market? If yes, please explain to what extent UTPs impact the ability of your company to trade cross border.

• Even if UTP regulation differs across countries, there are mechanisms to deal with Business-to-Business issues even for cross-border relationships. Indeed, private international law\(^\text{46}\) and contract law enable the parties to define by common agreement the choice of applicable law to their contract. Redress mechanisms are available at national level and they have proven to function very efficiently to solve disputes.

• Retailers and ultimately consumers can suffer from unjustified fragmentation of the single market imposed by manufacturers such as retaliatory measures for sourcing outside the domestic market (e.g. threats to - or stopping - deliveries). Fragmentation of the single market should be dealt with through appropriate means under competition rules and single market rules as appropriate because it is essentially a matter of breaches of single market rules and competition rules.

• However, fear of being a victim of unfair trading practices is not exactly the key disincentive to cross-border trade. Language, logistics, tax costs, traditions, cultural requirements, product differentiation, labelling and technical standards all need to be dealt with first – and there are occasions when the Commission could do more to deal with the bigger issues but has failed to do so. Furthermore, high (and increasing) export rates in the food manufacturing sector highlights that cross-border trade does occur\(^\text{47}\).

\(^{45}\) The ECN report documents the outcome of national competition authorities enquiries into the food supply chain and provides a measure of the impact of certain anti-competitive practices on consumer prices. European Competition Network (2012), *ECN activities in the food sector – Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector*.


\(^{47}\) FoodDrinkEurope (2011), *Data & Trends of the European Food and Drink Industry 2011*, p. 10
We would also remind the Commission of its commitment in the Communication on the better functioning food supply chain to ‘assess MEASURES to’ (recommendation #6) deal with Territorial Supply Constraints. That assessment of the possible MEASURES is still awaited.

11. **Do the national regulatory/self-regulatory frameworks in place sufficiently address UTPs in some Member States? If not, why?**

- There are different forms of national legislation and approaches relevant to the market concerned. These reflect the interpretation of a common understanding of fairness in those Member States and the state of the market. There is no evidence they lead to market fragmentation. The impact of fragmentation on the functioning of the single market has not been established as private law and contract law provide sufficient redress mechanisms (see question 10).

- These different regimes reflect the different approaches to fair/unfair practice and foresee different means of dealing with them – e.g. (statutory) codes of conduct, competition enforcement, ex-officio investigation, etc. (see question 2).

- Examples of the variety of regulatory regimes include:
  - In the UK, the GSCOP only applies to 10 food retailers and is a regulatory system; it imposes a duty to trade fairly and prohibits certain practices. Under GSCOP, retailers have put in place a structure to handle supplier complaints for alleged breaches of the code through the establishment of an in-house compliance officer. Retailers have been reporting to the Office of Fair Trading annually. An adjudicator was recently established with powers of investigation; therefore no experience can be drawn from the establishment of the adjudicator.
  
  - Belgium has a multistakeholder code that satisfies all parties, including farmers. It promotes a dialogue through a multistakeholder platform in which associations from all links in the chain are represented. A formal dialogue exists with public authorities (reporting). Individual complaints for alleged breaches of the codes are handled through mediation.
  
  - In France, contract law prohibits certain practices and organises supplier-retailer negotiations in both food and non-food sectors. Furthermore, a self-regulatory initiative is in place through the “Commission d’Examen des Pratiques Commerciales”

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which can issue guidance on certain issues\textsuperscript{51}. Stakeholders and government representatives are represented.

- In Spain, the government introduced recently a draft regulation, which the competition authority condemned because it could lead to legal uncertainty and lack of predictability, would add unnecessary additional burdens and would ban certain practices that they recognise have a pro-competitive effect\textsuperscript{52}.

- In Italy, UTPs are regulated by civil code, antitrust law and article 62 (D.L. 1/2012). Article 62 strictly regulates payment terms, negatively affecting the contractual freedom. The law does not consider European regulation on payments, which leaves the possibility to exceed 60 days for payments, if expressly agreed in the contract and provided it is not grossly unfair to the creditor. Article 62 is an invasion of the State in private negotiation between commercial partners and it demonstrates that a too strict regulation entails costs, administrative and managing complexities for companies and negative impacts on consumers who will pay the costs.

Furthermore, the introduction of certain rules on commercial relationships have proved ineffective, did not achieve the expected results and generate unnecessary administrative burdens. As part of this, the introduction of a compulsory written form is a major obstacle that does not reflect business needs in certain cases. Article 62 (D.L. 1/2012) directly affects contractual freedom between parties intervening on their negotiation autonomy.

- In The Netherlands, a multistakeholder group consisting on farmers and growers (LTO Nederland), manufacturers (FNLI) and retail/foodservice (CBL) is working on a self-regulatory system for business-to-business conflict resolution. The multistakeholder group is fully supported and facilitated by the Ministry of Economic Affairs. The group takes the Principles of Good Practice agreed upon at EU-level as the basis. The implementation of the Principles should be as close as possible to the EU-level framework. There is also political interest for an efficient and effective working self-regulatory conflict resolution system. Parties, including government, have agreed upon having this system in operation in Q3-2013. The agri-food chain is one of the 2 pilot projects, next to the fashion and textiles chain.

- In Portugal, in November 2011, the Ministry for Agriculture and the Ministry for Economy and Employment set up a “Monitoring Platform of the Relations in the Food Chain” (PARCA - Plataforma de Acompanhamento das Relações na Cadeia Alimentar), in order to facilitate the dialogue between the various stakeholders. Its members include in particular the Government, the Portuguese Retail Association (APED), the Portuguese Confederation of Industry (CIP), and the Portuguese Confederation of Farmers (CAP). PARCA’s initial objectives include the promotion of the production of Portuguese food products, improving transparency, more equity and fairness in the distribution of value along the food chain; the creation of an observatory to assess the

\textsuperscript{51} Commission d’Examen des Pratiques Commerciales ; \url{http://www.economie.gouv.fr/cepc}
\textsuperscript{52} Report of the Spanish Competition Authority Report on Competition and the agrifood sector (see footnote #19)
fairness of the price formation from farm to fork; to debate trading practices, namely late payments and own brands; to create effective and fair mechanisms to manage conflicts between operators and to promote the importance of the agro-food sector for the economy in terms of employment creation and internationalization of Portuguese products. In the past months, the Portuguese Government has therefore chaired a positive debate among all the actors in the food supply chain.

Furthermore, the Portuguese Retail Association (APED) and the Portuguese Confederation of Farmers (CAP) are in the process of finalizing a Code of Conduct, based on the principles of good practice agreed at European level.

- The application of the Voluntary Initiative links to existing national provisions. It offers a complement to existing regulations and solutions where no other mechanism exists or is a complement to other mechanisms including cross-border cases. It means there is a mechanism for dealing with cross-border cases without the need to agree on a common legal definition. It is a balanced system as all sectors are represented (as opposed to unilateral codes of conduct). Experience from Belgium shows that a voluntary approach is appreciated by all operators involved. Therefore we believe it is a more effective tool than to try and harmonise a wide variety of national schemes. Though retailers always try to make full use of the single market, commercial disputes often arise locally and therefore should be handled locally (subsidiarity). As a result, the Voluntary Initiative encourages the setting up of national platforms.

12. Is the lack of specific national regulatory/self-regulatory frameworks addressing UTPs a problem in jurisdictions where they do not exist?

- Overall, there is a well-developed body of EU competition rules in place, which has delivered recognised benefits to consumers.

- There are various forms of national legislation and approaches relevant to the market concerned. These reflect the interpretation of a common understanding of fairness in those Member States and the state of the market. There is no evidence they lead to market fragmentation.

- In practice, in countries in which Unfair Trading Practices are not specifically defined, there are usually contract law or competition law provisions that set down standards of normal business practice. Operators in those countries, such as Germany, Denmark, Belgium, feel this is working well; they do not feel the need to develop specific legislation on B2B contractual practices.

- The Voluntary Initiative could act as a useful complement where no other mechanism exists. It is a balanced system as all sectors are represented (as opposed to unilateral codes of conducts). It is a more effective tool rather than to try and harmonise a wide variety of national schemes.
13. *Do measures that seek to address UTPs have effects only on domestic markets or also on cross-border trade/provision of services? If so, please explain the impact on the ability of your company to trade cross-border. Do the differences between national regulatory/self-regulatory frameworks in place result in fragmentation of the Single Market?*

- Consumers are at the heart of the supply chain. In order to meet consumer demand for local products, retailers negotiate and operate on a national level. Indeed most food (about 80%) is still supplied nationally.

- There are various forms of national legislation and approaches relevant to the market concerned. These reflect the interpretation of a common understanding of fairness in those Member States and the state of the market. There is no evidence they lead to market fragmentation. The Commission study of B2B legal regimes\(^53\) should examine the extent to which the outcomes are similar regardless of processes. For example, in criminal law, processes vary considerably from one Member State to another but the outcomes for those found guilty are very much the same.

- However, national frameworks that go beyond what is necessary to address unfair trading practices, seeking hidden protectionist purposes, may lead to market fragmentation. These rules and other measures generating legal uncertainty restrict cross-border trade of services and have a clear negative impact on investment levels in those countries. They also have a negative impact on product assortment because of their impracticality, therefore affecting consumer choice. For example, Romania imposes a requirement on retailers to sell only (food) products purchased domestically, Slovakia requests a certain amount of national sourcing, Portugal imposes a percentage of home grown and of Portuguese produce. In Italy, operators fear that too restrictive requirements could be an obstacle to foreign investments and consequently it could cause negative impacts on cross-border trade/provision of services.

- Those cases where Member States have introduced discriminatory regulation should be dealt with through enforcement of the Single Market rules rather than additional unnecessary and potentially costly regulation. This is a better suited means to deal with market fragmentation.

- There are many other barriers to cross-border trade due to labelling requirements or taxes; these play a bigger role and should be addressed as a matter of priority as part of the European Retail Action Plan\(^54\) or any other means. At times of economic crisis, the EU should establish legal certainty and predictability as key principles for law making and avoid placing additional unnecessary administrative burdens on companies.

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\(^{53}\) European Commission, Internal Market and Services DG (2012), *Call for tenders n° MARKT/2012/049/E, Study on the legal framework covering business-to-business unfair trading practices in the retail supply chain*, Brussels

\(^{54}\) European Commission (2013), *COM/2013/036 final - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions setting up a European Retail Action Plan*
The common principles of good practice and framework provide a common understanding and therefore a useful answer for cross border transactions.

14. Do you consider further action should be taken at EU level?

- No. The only action that should be taken at EU-level is that the Commission should positively recognise the Voluntary Initiative and support it – and refrain from actions that might undermine its adoption. This vision is reflected in the EP report on fairer and more efficient retail markets (point7) : “the primary focus must be on the effective enforcement of Treaty principles, existing internal market rules and instruments, and self-regulation, before considering a regulatory approach, if appropriate”\(^{55}\).

- The role of the EU is to enforce the Single Market rules, not to introduce legislation where subsidiarity has prevailed and where outcomes are not causing fragmentation. It is for the EU to provide evidence that legislation is necessary.

- Retail markets, by nature, tend for the most part to be national with differing legal, economic, political and cultural characteristics. Contractual relationships between retailers and suppliers are governed by national legislation of any country they choose, with distinctive features which vary from one Member State to another.

- Private international law\(^{56}\) and contract law enable the parties to define by common agreement the choice of applicable law to their contract. Redress mechanisms are available at national level and they have proven to function very efficiently to solve disputes. There is therefore no need for interference by the EU in this matter.

- The Voluntary Initiative already provides an adequate solution. Designed by all actors involved, it is better tailored to their needs and business realities. It seeks to achieve a culture change. It should be given the means to develop, produce results and be assessed against its objectives. The Commission should recognise the significant investment required to sign up to the framework, and encourage its development and take-up to make it credible and attractive. Companies cannot be expected to make those significant investments if they suspect that legislation could be coming. The Commission should also ensure that no sector refusing to co-operate is doing so because they are in the hope that legislation is introduced.

15. Where it exists, does UTP regulation have a positive impact? Are there possible drawbacks/concerns linked to introducing UTP regulation, for example by imposing unjustified restrictions to contractual freedom? Please explain.

- The impact of national legislation depends on the nature of the legislation and its purpose. In certain countries, the law and its enforcement go beyond what is necessary and/or intended by the law maker. In others, it does not capture all players.

\(^{55}\)European Parliament (2011), A7-0217/2011 REPORT on a more efficient and fairer retail market (2010/2109(INI))

• Legislation may restrict freedom of contract and thus affect competitiveness; therefore due care should be taken when working on legislation. It would also be interesting to assess whether self-regulation could have produced the same, or better results than legislation. As stated in our response to question 1, the regulator’s role is not to interfere in the functioning of markets without clear evidence of market failure, but to ensure that the rules of competition are being observed so that the market can work freely. It is not appropriate for governments or the EU to interfere in business-to-business relations and try to influence the result in favour of one or another player in the market.

• Some regulations that claim to address UTPs but which actually have other motives have had a clear negative impact on the development of the retail sector, investment decisions, employment creation and consumer choice. For example, the measures taken over the last few years by a number of Central and East European countries impact mainly upon international retailers. The costs arising from such legislation can be assessed as follows: weakening of wealth creation (lower GDP), increase in consumer prices (and inflation), increase in cheap imported products and decrease in domestic production, reduced product quality and damage to the image within the investor community. Individual companies faced compliance costs linked to the adaptation of countless contracts to new legislation at very short notice. Law firms had to check hundreds of supply contracts and amend the provisions accordingly. Certain services (logistics, marketing) could not be offered anymore. Many companies faced a sudden and severe lack of financial liquidity due to changes to payment terms at very short notice.

• National measures that formally restrict certain types of investment (e.g. Plaza Stop in Hungary) clearly have an impact upon investment levels in these countries. Other national measures that regulate the supply chain (e.g. national sourcing requirements), although they do not present absolute barriers to investment, nevertheless create legal uncertainty, restrict cross-border trade and have a chilling effect on investment decisions. They also impact on the assortment available (because of their impracticability), therefore affecting consumer choice.

• These laws directly affect foreign traders who have created thousands of new jobs in the modern commerce sector within just a few years. Food retailing was completely re-organised in line with Western safety, quality and service standards. Furthermore modern retail helped combating inflation, and supported transfers of technologies and innovation.

• Examples from other countries include:
  - France: bringing payment terms down to 60 days (non-foods) has cost retailers €7bn. Of those, €4bn accrued to large manufacturers⁵⁷;
  - Italy: operators incur a series of operational difficulties with the implementation of the new regulation, especially with regard to payment delays, which could discourage foreign commercial operators to invest in Italy; in practice, the new regulation (art.62 D.L. 1/2012) does not achieve its purpose to protect the weaker party; on the

⁵⁷ Fédération des Entreprises du Commerce et de la Distribution (2008), Délais de paiement : La réforme et ses impacts pour les entreprises de la distribution (p. 6)
contrary, bigger companies could take advantage of it and gain market share over SMEs;

- Spain: The competition authority requested the government to review their proposal because it creates uncertainty and prohibits practices which have a pro-competitive effect\(^{58}\).

- On the other hand, a number of rapidly expanding third country retail markets are being opened up to international investors, and are presenting credible alternatives for international retailers looking to expand their operations\(^{59}\).

- The voluntary EU-level initiative can produce a culture change with implications for reputation and corporate values. The Voluntary Initiative should be given a fair chance to deliver; the Commission should properly assess results and avoid rushing into a hasty regulatory agenda.

16. **Are there significant discrepancies in the legal treatment of UTPs between Member States? If this is the case, are these discrepancies hindering cross-border trade? Please provide concrete examples and quantify the impact to the extent possible.**

- Retailers need to be able to rely on efficient supply chains that meet consumer demand. They compete for suppliers that will provide the products that consumers want on each relevant market (local, national, international).

- Enforcement is a responsibility of Member States (subsidiarity). Enforcement depends on legal traditions and culture as well as on the maturity of the market and the issues that arise. Different enforcement mechanisms do not create per se a barrier to cross-border trade as long as they do not discriminate against operators according to their origin.

- We invite the Commission to focus on essential barriers to the Single Market including (discriminatory) access to markets for products and services (e.g. issues mentioned in the European Retail Action Plan like for example labelling, establishment, payments, etc.).

17. **In case of such negative impacts to what extent should a common EU approach to enforcement address the issue?**

- Consistent and effective enforcement of existing national and European legal requirements, creates a level-playing field and protects consumers and competitive firms against anti-competitive illegal practices. It is absolutely key to a properly functioning market. Enforcement mechanisms are national in nature to enforce national laws whether or not derived from EU law in ways appropriate to national culture, tradition and legal norms. It is not appropriate to provide enforcement at EU-level without EU-level rules to enforce. However, adding another layer of legislation, without **real evidence of need at EU level** would be costly to consumers and business.

\(^{58}\) Report of the Spanish Competition Authority Report on Competition and the agrifood sector (see footnote #19)

\(^{59}\) For more details, see OECD study on the globalization of trade in retail services; Wrigley, N. & Lowe, M. (2010), *The Globalization of Trade in Retail Services*, Paris, France, OECD
• A too restrictive regime which is costly to administer could result in a reduction in the number of enterprises working in the whole supply chain.

• Enforcement should be left to Member States (subsidiarity principle); there is no real obstacle to cross-border trade from enforcement as long as enforcement does not discriminate against operators according to their origin. Certain differences, on the other hand, should be addressed by a common application of single market rules.

• Private international law and contract law enable the parties to define by common agreement the choice of applicable law to their contract. Were the law chosen does not refer to an EU regime it would be difficult for an EU enforcement regime to mediate. Redress mechanisms are available at national level and they have proven to function very efficiently to solve disputes. There is therefore no need for interference by the EU in this matter.

• Furthermore, the Voluntary Initiative will act as a complement to some national schemes. It foresees provisions in case of cross border disputes and links to national enforcement mechanisms for the settling of disputes for alleged breaches of principles.

18. **Should the relevant enforcement bodies be granted investigative powers, including the right to launch ex officio actions, impose sanctions and to accept anonymous complaints?**

• There is no EU-level legal basis in this field to introduce ex-officio investigations, impose sanctions and accept anonymous complaints in the same vein as there is no basis for defining a list of unfair trading practices. As we have stated in the absence of EU-level legislation there would be no justification for an EU-level enforcement regime superimposed on national procedures. Anonymous complaints fail to rapidly help operators remedy an issue and to provide an adequate right of defence. They do not provide the protection that may be sought. They contribute to a climate of suspicion, which will affect the quality and effectiveness of the relationship or is symptomatic of a relationship that does not work well and therefore is contrary to the objectives sought. This does not improve the nature of the relation between commercial partners, but rather tends to add tension.

• The costs of a system based on anonymous complaints may be disproportionate to the objectives sought. Additional costs of administration will have an impact on the competitiveness of businesses and final consumer prices. Furthermore, and as set out in question 5, the FoodDrinkEurope survey (mentioned in the Green Paper) shows that operators faced with an unfair practice and who sought action were globally satisfied with the results (75% recognised it helped them to some or to a great extent). There is therefore no need to create another layer.

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Overall in a highly competitive environment, businesses have an interest in building efficient working relationships and therefore in solving their disputes swiftly and rapidly. To this end, the Voluntary Initiative encourages the parties to resolve their disputes for alleged breaches of principles through a set of dispute resolution options and by giving the choice of the dispute resolution option to the complainant, taking into account the nature of the case (proportionality). The Voluntary Initiative should be given the means to deliver results before rushing into hasty legislation on the basis of ill-defined criteria.

19. Does the above list detail the most significant UTPs? Are there other types of UTPs?

- The Green Paper puts forward a set of unfair trading practices. As a signatory to the EU-level principles of good practice, which form a common understanding of fair practice in the food supply chain, we fail to understand the Commission rationale for proposing a new list without building a proper understanding of how supply chains work in practice.

- Our response to question 1 highlights the difficulties in defining an unfair or fair practice in a legal environment. There is no unfair trading practice per se. A contract is the result of a negotiation between partners. This relationship includes a balance for both parties. Therefore it is crucial to look at practices in a broader context and not isolation.

- In question 1, we also emphasised that there are legitimate practices sometimes wrongly perceived as unfair but which correspond to the outcome of a negotiation and to a specific service. Furthermore, services also reflect the need for retailers to make profits in highly competitive markets (retailers’ net margins are usually very low, especially as compared to food manufacturers). The view that the full risk should be borne by retailers no longer reflects reality. There is a legitimate rationale for suppliers and retailers to share the risk of product introduction as both parties have a clear interest in the success of a specific product or even a product category. This includes advertising, marketing, brand positioning costs as well as more administrative or logistics costs linked to the listing of a new product. Producers have an in-depth knowledge about product characteristics, which retailers may not know about, given the number of products that retailers deal with (about 50,000 in a typical supermarket).

- For operators in certain countries, defining a list of unfair trading practices would generate more legal uncertainty and lead to sub-optimal contracts, which do not meet the needs of the parties. Some also see a risk that regulating unfair trading practices would enable a party to a contract, to have remorse and go back on a deal to obtain better conditions with another partner.

- In a spirit to promote good practice, 11-EU level organisations representing all links in the supply chain - farming, processing, brands, wholesale, retail, large and small - have agreed on a set of principles of good practice that should guide commercial relationships. These principles provide the context for a common understanding of fair and unfair practice defined by operators themselves.

- Through the Voluntary Initiative, companies signing up to the framework agree to integrate those principles as part of their company values and to report on their
application. By creating ownership, the Voluntary Initiative will generate faster and better results than any legislative proposals.

- The Voluntary Initiative is based on the participation of all sectors involved. It is therefore in a better place to generate a balanced outcome that meets the needs of the sectors involved – and is agreed by all the sectors involved - than any legislative procedure.

20. Could setting up a list of prohibited UTPs be an effective means to address the issue? Would such a list have to be regularly updated? Are there possible alternative solutions?

- As set out in our response to questions 1 and 19, UTPs remain an ill-defined concept on which to base EU-level action. We have argued that individual practices (as opposed to principles of fairness) are unlikely to be fair or unfair in themselves outside the context in which they occur. Basing any regulatory measure on ill-defined concepts is contrary to principles of better regulation adopted by the EU Commission.

- On the other hand, there is a wide variation in terms of understanding of fairness across Member States and as a result, there are practices that are legal or illegal across Member States. Furthermore, in its guidelines on the application of vertical restraints62, the Commission defines the circumstances under which certain practices are acceptable or not. This is the case for example of upfront access payment, tying, category management or resale price maintenance. With regard to listing fees, the Commission outlines that “The use of upfront payments may in many cases contribute to an efficient allocation of shelf space for new products. Distributors often have less information than suppliers on the potential for success of new products to be introduced on the market and, as a result, the amount of products to be stocked may be sub-optimal. Upfront access payments may be used to reduce this asymmetry in information between suppliers and distributors by explicitly allowing suppliers to compete for shelf space”. There is therefore no need to build up an additional layer with a risk of overlap and as a result legal uncertainty.

- Retailers need to be able to rely on an environment that provides a sufficient degree of legal certainty to continue to invest and remain competitive. Regularly updating lists of practices through regulation creates uncertainty and therefore has a cost for businesses that have to consistently comply with changes. For example, certain regulatory frameworks foresee that purchase contracts between suppliers and retailers are negotiated on an annual basis. A process of regular updates of the list would need to factor this in as changing rules creates uncertainty, which undermines companies’ capacity to invest and create jobs.

- The Voluntary Initiative creates the necessary mechanisms to adapt principles and provide interpretation when the need arises. It should be given a chance to deliver and succeed.

21. For each of the UTPs and corresponding possible fair practices identified above, please:
   a) Indicate whether or not you agree with the analysis of the Commission. If applicable, provide additional information.

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b) Explain whether the UTP is relevant for the sector in which you are active.
c) Explain if the corresponding possible fair practice could be applied across the board in different sectors?
d) Explain if the UTP should be prohibited per se or if its assessment should be made on a case by-case basis.

- We fail to understand the need to provide another set of practices without referring to those principles which are already the result of a negotiation process and are a common understanding of the basis for assessing whether a practice is fair or unfair. We further fail to understand the Commission intention with the proposed list: is it aimed at banning certain practices or at bringing standards up to best practice? The principles of good practice are indeed illustrated by a set of examples of fair or unfair behaviour. As set out in our response to question 5, there are different perceptions and attitudes towards risk in a business environment. There could be no limit as to what should be included in such a list.

- As set out throughout this document, any contract is the result of a negotiation process and therefore, no practice should be considered in isolation from the overall contract negotiation. Furthermore there are national variances in understanding what is fair or unfair and as a result a practice that looks unfair in certain countries may be very well accepted in others depending on the overall context. Furthermore, the proposed list seems to lack neutrality and reflects a misunderstanding of the functioning of modern retail as a service provided to suppliers. In line with our general view, the practices proposed by the Commission are neither fair nor unfair. Certain behaviours could fall below standard.

- We therefore believe it will be more effective to promote good practice rather than focus on the proposed list of unfair practices. The principles and examples of fair and unfair practices agreed by stakeholders throughout the food supply chain should be adopted without amendment.

- With regard to the detailed practices:

  - **Ambiguous contract terms**: this is covered by the principles agreed by stakeholders. Contracts can be complicated but should not be purposely ambiguous.

  - **Lack of written contracts**: legal requirements may differ from country to country e.g. some markets are characterised by oral contracts. German law places emphasis on efficient business relations and only requires the existence of a written contract under exceptional circumstances. Other countries see things differently. This is why an EU level approach that does not respect differing national, legal and commercial traditions would not be satisfactory. Retailers encourage the use of written contracts where this is common practice but will not go against commercial customs in certain markets. The principles agreed by food supply chain operators contain a clear encouragement to at least written confirmation of agreement where practical.

  - **Retroactive contract changes**: in fast moving markets such as retailing, changes may be needed as market conditions change. In order to provide the necessary predictability for all parties, contracts should foresee as a good practice the conditions
applicable to retroactive changes to contract terms. This is foreseen in the principles of
good practice.

- **Unfair transfers of commercial risks**: Unfair transfers are by definition unfair; this is
however an ill-defined concept; the Commission does not provide any further clarity
(only examples). Any potential measure should be based on objective grounds and
proper definitions. They should also factor in the fact that modern retailing is based on
shared risk e.g. marketing fees where retailers and suppliers seek a common objective.

Listing fees: the Nordic enquiry states that “New products, food and non-food, enter
the market constantly. It is, of course, impossible for the chains to stock all available
products. Thus there will always be competition for shelf space^63.” As stated
previously, listing fees typically serve to the risk of new product introduction,
compensation for administrative work, product selection effort, and for the service of
being able to reach masses of end consumers.

Reverse margins were initially the result of ill-defined regulation prohibiting sales
below costs and increasingly have become a tool for suppliers to reward retailers with
a retrospective discount linked to services provided by the retailer. They have over
time become a widely accepted practice and useful instrument for instance when
entering new markets or when negotiating with certain suppliers. Some national
regulatory frameworks already provide restrictions to the application of reverse
margins.

- **Payment delays** are covered by the EU Directive on payment delays. In certain
countries, the drastic reduction of payment delays has generated immense problems
throughout the supply chain (transfers of cash flow).

- **Unfair use of information**: unfair use is by definition unfair! The principles of good
practice define the conditions relative to information flows and confidentiality. They
also define examples of fair and unfair behaviour attached to this (e.g. withholding of
essential information relevant to the other party in contractual negotiations and which
the party could legitimately expect to receive. This dimension is missing from the
Green Paper).

- **Unfair termination of a commercial relationship**: Again, unfair is by definition unfair!
Remedies usually exist at national level. Through the principles of good practice, the
stakeholders have agreed on the conditions for termination of a contract
(predictability) and the illustration of an unfair practice (threatening business
disruption to obtain unjustified advantages). Why should the retailer bear the risk of
the manufacturer? (the Commission suggests that the termination should allow the
manufacturer to recoup its investment). In this case unfair trading practice is the
use of threats to obtain unjustified advantages. In a market economy there is always a
commercial risk when launching a new product and sometimes products fail. In these
cases there is no reason why the supplier should recoup his investment for an
unsuccessful product.

^63 Nordic Food Markets (2005) – *A taste for competition* (p. 84)
22. As regards specifically Territorial Supply Constraints, please explain:
   a) What would you consider to be objective efficiency grounds justifying a supplier not to supply a particular customer? Why?
   b) What would be the advantages and disadvantages of prohibiting Territorial Supply Constraints (as described above)? What practical effects would such a prohibition have on how companies set up their distribution systems in Europe?

- The commerce sector has always been a strong supporter and beneficiary of the Single Market. In turn, consumers benefit from an increased choice of products at better prices. In practice however, suppliers of branded goods have largely managed to prevent the creation of an EU wide internal market for their products by forcing retailers to purchase from their national distribution organisations. Retailers are unable to negotiate on identical products on a cross-border basis (rather than on a national basis). They are also unable to benefit from the possibility of resorting to “parallel importing” (i.e. the possibility to buy from an existing third party such as a wholesaler established in another member state), a key principle of the Single Market.

- As a consequence, purchase prices invoiced to retailers for the same products differ substantially from country to country, and suppliers manage to push through higher purchase prices. The table below shows cases of price differences applied by manufacturers of branded products across various countries. These figures explain a large portion of the consumer price differences between markets for the same branded product. However, other factors will include salaries and social charges, cost of energy, taxes, logistics, etc.

<table>
<thead>
<tr>
<th>Products</th>
<th>Most expensive country</th>
<th>Cheapest country</th>
<th>Price difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Light fresh cheese</td>
<td>Italy</td>
<td>Spain</td>
<td>49 %</td>
</tr>
<tr>
<td>Cleaning liquid</td>
<td>Belgium</td>
<td>France</td>
<td>41 %</td>
</tr>
<tr>
<td>Chocolate kids’ cereals</td>
<td>Belgium</td>
<td>Spain</td>
<td>41 %</td>
</tr>
<tr>
<td>Regular kids’ cereals</td>
<td>Italy</td>
<td>Spain</td>
<td>38 %</td>
</tr>
<tr>
<td>Chips</td>
<td>France / Belgium</td>
<td>Italy</td>
<td>12 %</td>
</tr>
<tr>
<td>Chocolate spread 400g</td>
<td>France</td>
<td>Belgium</td>
<td>11 %</td>
</tr>
<tr>
<td>Chocolate candy</td>
<td>Spain</td>
<td>Italy</td>
<td>10 %</td>
</tr>
</tbody>
</table>

Source: FCD, 2009

- EuroCommerce does not object to product adaptation and different distribution schemes based on objective criteria (consumption habits, composition of the product, existence of a national deposit scheme, etc.). Other justifications are more artificial and questionable. These include for example different packaging sizes. Labelling can be used as a

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64 See Footnote 18 - European Commission (2010), COM (2010) 355 final – Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Retail Market Monitoring Report “Towards more efficient and fairer retail services in the internal market for 2020” (p. 3-4)
justification, although in most cases, strongest concerns arise from the existence of diverging national requirements and interpretation of EU level regulation. We have asked the Commission to address this as a matter of priority as part of the Retail Action Plan.

- The issue arises when the same products are sold under different terms depending on countries or cannot be purchased centrally. If suppliers find out that a retailer has purchased outside the domestic market, they may take retaliatory action such as restrictions on deliveries or business disruption for unjustified reasons; something that retailers cannot afford especially in the case of must-have products. This practice undermines the possibility for retailers to fully exploit the benefits of the Single Market. They should be dealt with as part of an abuse of the Single Market where they cannot be objectively justified. As such, they would not be an unfair trading practice per se. The unfair practice is the refusal to supply.

- A prohibition of Territorial Supply Constraints would make it possible for retailers to centralise their purchasing for products that are commonly sold on different markets. This would allow economies of scale and lower prices. However, as we have stated, we believe that these should be dealt with, as abuses of the Single Market and that they are not unfair trading practices per se.

23. Should the above possible fair practices be embodied in a framework at EU level? Would there be any disadvantages to such an approach?

- Good practice is already embodied in the Voluntary Initiative with a set of clear good practice principles and examples of what could constitute a fair or an unfair practice. We fail to understand why the Commission has developed another list based on those but not fully taking them into account and ask the Commission to commend and support the Voluntary Initiative.

- The examples agreed upon are there to illustrate principles; they are not exhaustive, are complementary to the principles and cannot be made the basis of any follow-up measure.

24. If you consider further action should be taken at EU level, should this be a binding legislative instrument? A non-binding? A self-regulatory initiative?

- The only action the EU should contemplate is a Communication to Member States asking them to support the Voluntary Framework and principles. The freedom of contract plays a major role in a free market economy; it should not be regulated through any kind of harmonisation.

- Introducing new legislation would generate additional compliance costs, which in turn would result in less efficient contracts and business relations, higher prices, lower quality of service and lower consumer choice.

- Enforcement and the lack of enforcement in some Member States would remain a key concern. There is indeed no use in developing another regulatory layer if it is not properly and consistently enforced across all EU Member States.
- On the other hand, a Voluntary Initiative would aim to achieve a culture change. Given the billions of transactions taking place on a daily basis across Europe, only a culture change will make a difference (legislation is about imposing a certain conduct, voluntary is about creating company ownership of a practice).

- Businesses joining the scheme could see a benefit in terms of image / reputation. The initiative would be based on a culture change towards better collaboration and greater efficiency. To ensure that the principles are applied, the proposal includes a procedure for the speedy and cost-efficient handling of disputes through in-house mechanisms or national alternative dispute resolution schemes.

- Experience within ECR (Efficient Consumer Response) shows that the benefits of voluntary collaboration (within the respect of competition law) outweigh by far those of conflicts. Benefits of collaboration through ECR have been estimated to generate substantial increases in terms of sales and profits for both manufacturers and retailers. There is added value in dialogue.

- We therefore ask the Commission to take stock of progress with the Voluntary Initiative, and to take account of the full and final reports of the two studies under way, on legal regimes for B2B relations and on the impact of retail developments on consumer choice and innovation, instead of rushing into hasty judgement.

25. **This Green Paper addresses UTPs and fairness of B2B relationships in the B2B food and non-food supply chain. Do you think that any important issues have been omitted or under-represented in it?**

- The commerce sector is deeply disappointed with the publication of the Green Paper; it lacks objectivity and neutrality and fails to properly build upon previous work undertaken by the Commission on the retail sector or the food supply chain.

- We particularly regret that the Green Paper focuses on a single aspect irrespective of the more global context of the role and constraints of commerce in supply chains, the role of consumers, the real barriers to the single market and obstacles to innovation and entrepreneurship in Europe. In practice, retailers compete hard to meet consumer demand. To ensure that they deliver the right product at the right place at the right time and at the right price, retailers rely on sometimes complex supply chains. Undermining relations between all operators in the supply chain would put their competitive position at stake, especially in a global economy.

- By isolating unfair trading practices from the global context, the Green Paper fails to provide a clear picture of the need to address the competitiveness of the supply chain – starting from the production stage down to distribution through the various processing stages. It totally overlooks the importance of retail and wholesale in the European economy and their role in creating growth, jobs and bringing innovation (6 million businesses generating over 10% of EU added value and providing jobs to 33 million Europeans). Those companies are at the heart of the Single Market to the benefits of

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65 See footnote #8 “ECR 2022 – setting the stage for the next generation”, Results from the joint survey on the status of collaboration, McKinsey & Company, ECR Europe Annual Conference 2012
consumers. Creating the conditions for their better use of the Single Market deserves to be a higher priority and in this regard, we invite the Commission to give the European Retail Action Plan the necessary impetus that the sector deserves.

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**EuroCommerce and the commerce sector**

EuroCommerce represents the retail, wholesale and international trade sectors in Europe. Its membership includes commerce federations and companies in 31 European countries.

Commerce plays a unique role in the European economy, acting as the link between manufacturers and the nearly 500 million consumers across Europe over a billion times a day. It is a dynamic and labour-intensive sector, generating 11% of the EU’s GDP. One company out of three in Europe is active in the commerce sector. Over 95% of the 6 million companies in commerce are small and medium-sized enterprises. It also includes some of Europe’s most successful companies. The sector is a major source of employment creation: 33 million Europeans work in commerce, which is one of the few remaining job-creating activities in Europe. It also supports millions of dependent jobs throughout the supply chain from small local suppliers to international businesses.
Annex 1: Household expenditure - Shares of different types of expenditure between 1995 and 2011

**Shares of different types of expenditure between 1995 and 2011**

- Food and non-alcoholic beverages
- Non-alcoholic beverages
- Housing, water, electricity, gas and other fuels
- Furnishings, household equipment and routine maintenance of the house
- Health
- Transport
- Communications
- Education

**Source:** Eurostat
Annex 2: Compared margins in manufacturing and retail; breakdown of retailer’ costs

Comparison of operational margins of industry and retail (EBIT in % of turnover before tax)

Source: Thomson Reuters

Top 10 global retailers sales and net margins

Source: Deloitte (2012), Global Powers of Retailing (p. 19)
Retailers’ cost structure


### Breakdown of retailers’ costs per product category, example from France

<table>
<thead>
<tr>
<th>Category turnover</th>
<th>Dairy</th>
<th>Meat</th>
<th>Poultry</th>
<th>Fruits and vegetables</th>
<th>Delicatessen*</th>
</tr>
</thead>
<tbody>
<tr>
<td>-purchasing cost</td>
<td>100€</td>
<td>100€</td>
<td>100€</td>
<td>100€</td>
<td>100€</td>
</tr>
<tr>
<td>= gross margin</td>
<td>76,6€</td>
<td>75,9€</td>
<td>73,8€</td>
<td>72,6€</td>
<td>69,4€</td>
</tr>
<tr>
<td>-staff costs of the category</td>
<td>23,4€</td>
<td>24,1€</td>
<td>26,2€</td>
<td>27,4€</td>
<td>30,6€</td>
</tr>
<tr>
<td>= semi-net margin</td>
<td>19,4€</td>
<td>13,6€</td>
<td>3,6€</td>
<td>8,0€</td>
<td>6,7€</td>
</tr>
<tr>
<td>-other expenses</td>
<td>17,5€</td>
<td>15,5€</td>
<td>16,6€</td>
<td>18,9€</td>
<td>18,7€</td>
</tr>
<tr>
<td>= net margin</td>
<td>1,9€</td>
<td>-1,9€</td>
<td>5,9€</td>
<td>0,6€</td>
<td>5,1€</td>
</tr>
</tbody>
</table>

* in French: “charcuterie”

Annex 3 - Concentration per product category in France

- **Soft drinks**
  -Market share of Coca Cola, Orange Schwepp, and Private labels.

- **Tea**
  -Market share of Unilever (Lipt), ABF (Twin), and Private labels.

- **Breakfast cereals**
  -Market share of Kelloggs, Nestle, and Private labels.

- **Waters**
  -Market share of Nestle, Danone, Alma, MDD, and others.

- **Beers**
  -Market share of Heineken, Carlsberg, Inbev, and MDD.

- **Pet Food**
  -Market share of Nestle, Mars, and MDD.
Source: IRI, 2011
Concentration in food categories 2010

Concentration in hygiene products 2010

Source: Nielsen