

Posição preliminar da APED, elaborada no âmbito do *EuroCommerce*, quanto ao Livro Verde sobre práticas comerciais desleais cadeia de abastecimento alimentar e não alimentar entre as empresas na europa

Data: 22 de Março de 2013

Questions:

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

- Unfair trading practices relate to subjective terms and are therefore difficult to define in a legal environment. It can only relate to general concepts and has different interpretations across Member States.
- 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 a negotiation process, each side is giving up something in order to reach an agreement (source: Merriam-Webster).
- There is no unfair trading practice per se. A contract is the result of a trade-off or negotiations between two parties with sometimes contradicting interests. Unfair trading practices should therefore be seen in the context of the overall contract. Individual terms may seem unfair when considered in isolation but not when considered as part of a whole package.
- Businesses should not be treated like consumers. The freedom of contracts is a founding principle in B2B relationships.
- There are wide variations in defining unfair trading practices across EU member states; the voluntary initiative provides a unique common understanding of fairness across Europe.
- The Green Paper contains several definitions of unfair trading practices, including examples. This gives evidence of difficulties in trying to define a subjective term in a legal environment. Principles of good practices agreed by food supply chain stakeholders confirm a positive move from the entire chain to promote good practice because it makes good business sense.
- The clearest definition is provided in the introduction and relates to practices that “grossly deviate from good faith and fair dealing”. This definition is not sufficient. It could be complemented by the proposal from MEP Lehne as follows: 'good faith and fair dealing' means a standard of conduct characterized 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.
- European retailers are committed to the highest standards of commercial behaviour including in relation to their suppliers. They are sophisticated and highly professional businesses that work hard to demonstrate that they are responsible and trustworthy operators who deserve the custom of consumers who always have a choice to shop elsewhere.
- There is no evidence that retailers would be profiteering from alleged unfair trading practices: they pass on any savings to consumers. This translates into relatively small margins (2-3% on average).
- Identifying positive principles in the first place and illustrating them with examples of fair or unfair practice is a better option to generate a positive culture change. This is the

approach taken by 11 organisations in the EU food supply chain as part of the work of the High Level Forum on a better functioning food supply chain.

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

- There are wide differences across member states in terms of definitions and understanding. Some member states have laws that ban specific practices; some Member States do not. Some Member States have laws banning abuse of economic dependency.
- Different laws across the EU but they seek to deliver the same results depending on national circumstances, legal environment, traditions, etc. We would expect the Commission study on B2B legal regimes to provide such information.

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?*

- There is no unfair trading practice per se. A contract is the result of negotiations between two parties with sometimes contradicting interests. Unfair trading practices should therefore be seen in the context of the overall contract. Individual terms may seem unfair when considered in isolation but not when considered as part of a whole package.
- UTPs should be assessed with regard to the implementation as well as negotiation of the contract.
- The distinction made by the Commission may be artificial and would need clarification if any measure was to be based on it. For instance, if not foreseen in the contract, a practice could be a breach of contractual arrangements or considered as part of a pre-contractual stage (if to influence negotiations on future contract). The pre-contractual phase seems to refer to the negotiation stage.

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

- Unfair trading practices may occur in any sector of the economy and a fortiori at any stage of the B2B retail supply chain. They should not be confused with tough negotiations or bargaining power, which are intrinsic to a functioning market economy and generate recognised consumer benefits.
- The concept of “B2B retail supply chain” is ill-defined. –eg. should apples be treated differently if they end up in retail stores or in staff restaurants in the public service? Any measure that the Commission may envisage based on this concept will entail discriminatory treatment and additional costs along the supply chain.

5. *What do you think of the concept of "fear factor"? Do you share the assessment made above on this issue? Please explain.*

- Overall, retailers welcome long standing relationships with their suppliers eg. One company reports that they have been working since the beginning with over 50% of their own brands suppliers. Therefore, they have an interest in rapid and cost-effective means of resolving their disputes. Anonymous complaints do not really work –cf. question 18.
- 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.
- Retailers are under pressure to react to changing consumer preferences. 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 and as a result, long term relations with suppliers are often preferred.
- the fear factor is an ill-defined concept which cannot be measured because it is too subjective. Public policy should not be developed on the basis of subjective elements or perceptions but rather objective concepts to provide legal certainty and predictability.

- An objective assessment would be a measure of disadvantages that operators would suffer from as a result of complaining. In this respect, the FoodDrinkEurope survey (mentioned in the Green Paper) also shows that those who sought action were globally satisfied with the results (18% recognised it helped them to a great extent and 57% to some extent).
 - Experience from the UK shows that nearly all complaints raised were resolved through internal mediation; experience from other countries show identical results –ie. internal mediation leads to satisfactory results
 - A core objective of the voluntary initiative launched by 8 EU level organisations in the food supply chain 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 be retaliated against. 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, rather than via imposing constraining regulation.
- 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?***
- retailers may suffer from unfair trading practices imposed by their suppliers, these include for example:
 - tariffs and volumes changes unilaterally imposed by manufactured
 - manufacturers imposing a marketing strategy
 - Breach of contract terms / unilateral suspension of contract by manufacturers
 - Exclusivity clauses by manufacturers
 - Threats to –or unilateral decision not to deliver if a retailer attempts to source identical products outside their domestic market (market fragmentation imposed by manufacturers)
 - Although not to be confused with unfair trading practices, there are practices of manufacturers that are anti-competitive and lead to higher consumer prices. The ECN report gives a full list of cases found in the food supply chain.
 - Retrospective changes may be required by both parties to adapt to new circumstances –eg. 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 of application of retrospective changes should be agreed upon in advance or on the basis of mutual agreement to ensure predictability.
 - Difficulties may also arise in a pre-contractual stage. For instance, when negotiations are by law based on manufacturers’ general selling conditions and suppliers keep their conditions silent until shortly before the end of the negotiation period. This leaves little room for negotiation and increases pressure on both parties to reach an agreement.
 - Good practice principles and examples of fair and unfair practice 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 fair/unfair practice.
 - Overall, there have been cases but there is no evidence of a systemic problem. Out of the millions of contracts negotiated every year only a few raise problems. We therefore invite the Commission to launch a proper quantitative survey based on objective criteria (not perception) to measure the extent of the problem that is alleged (eg. do we have a measure of the number of satisfactory relations as well?).

- In a highly competitive environment, to attract new customers and retain their loyalty, retailers need to rely on strong and stable supply chains. Experience shows that voluntary collaboration, including on innovation, provides benefits to both suppliers and retailers. Imposing unfair practices does not act in their interest over the long-term.
- There is also no evidence that retailers would be profiteering from alleged unfair trading practices: they pass on any savings to consumers. This translates into relatively small margins (2-3% on average).
- The voluntary initiative launched by 8 EU level organisations in the food supply chains 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.

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

- As outlined in question 4, unfair trading practices may occur throughout any contractual relationship. Most problems were raised in the food supply chain and solutions identified in that context.
- Similar cases of unfair trading practices outlined above can be found in household products.
- Although not to be confused with unfair trading practices, there are practices of manufacturers that are anti-competitive –eg. cartels, resale price maintenance- and lead to higher consumer prices. Competition rules and enforcement provide effective means to deal with them.
- 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. Sourcing may take place in the EU or fully outside the EU, confronting retailers with non-European ways of doing business. Stock levels depend on the business model and the nature of the products (eg. for fully equipped kitchen: 0 stock levels, white goods +/- 60 days, textiles: can be up to 2-3 months). Some sectors have developed their own codes of conduct.
- However, as set out in question 6, there is no evidence of a systemic problem. Out of the millions of contracts negotiated every year only a few raise problems. We therefore invite the Commission to launch a proper quantitative survey based on objective criteria (not perception) to measure the extent of the problem that is alleged.

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 requires a full understanding of the drivers and barriers to innovation. Competitive pressure forces retailers to constantly innovate and adapt to changing consumer demand. Retailers pass on this market information upstream in their supply chain.
- The alleged impact of unfair trading practices should be balanced against other factors inhibiting innovation and acting as obstacles to investment. The level of innovation in a company depends both on internal factors (the company's capacity of absorbing innovation, governance structure, etc) and external factors (policy context/incentives, sector-specific features, etc.).

- As set out in the Innovation Union competitiveness report of 2011¹, 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).
- 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.
- Consumers are at the heart of the supply chain; they drive innovation. Retailers are at the forefront of introducing innovative products to consumers. Successful innovation will meet consumer demand “no matter how innovative a change, without sales, the product is worthless”.
 “New introductions to the shelves are almost always linked to the discontinuation of another product. Of the 500/1000 new products introduced by supermarkets each year, less than 1% will be on the shelves in 5 years-time”². In Germany, 120,000 new articles introduced yearly. 90-95% of newly introduced products fail within first one-two years. On average 40,000 products in supermarkets, 20% new products introduced every year.
- 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 –eg. braille labelling, fair trade, organic, reformulated products, etc.). Own brands are often produced by SMEs. Retailers accept that their own brand products can also be copied by others. The LEI study of own brands concluded that own brands did not undermine the profitability or the capacity to invest by SMEs in the food supply chain
- 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 results of the study and expert group in their impact assessment before rushing into hasty judgement.

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 pass on their savings to consumers and their average net margins are just 2-3%.
- Strong competition has led retailers to innovate and generate efficiencies to the benefit of consumers. 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. There is also increasing pressure on consumers’ disposable incomes towards non-food expenditure such as housing, communications, health, insurance, etc. (FoodDrink Europe Competitiveness Report 2011 (p. 11)).
- 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 a highly competitive environment, to attract new customers and

¹ Add exact reference

² FAO report on food product innovation –add exact references.

retain their loyalty, retailers need to rely on strong and stable supply chains. Imposing unfair practices does not act in their interest over the long-term; on the contrary, it would undermine their competitiveness.

- UTPs imposed on retailers:
 - limit choice (eg. impact of tying, supplier boycott, non-delivery),
 - affect prices (eg. impact of territorial supply restrictions, resale price maintenance cases, etc.),
 - affect available quantities (eg. quotas of delivered products per retailers, suppliers withholding deliveries)
- Unfair trading practices may be imposed by suppliers of all sizes –eg. in the case of “must-stock” products. In those cases, even large retailers, are unable to negotiate conditions upon suppliers irrespective of their size.

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.

- Retailers and ultimately consumers can suffer from unjustified fragmentation of the single market imposed by manufacturers. In fact, what should be condemned is retaliatory measures for sourcing outside the domestic market (eg. threats to- or stopping deliveries). This could be dealt with through the principles of good trading practice.
- Fragmentation of the single market should be dealt with through appropriate means under competition rules and single market rules as appropriate.

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

- 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. Indeed they seem to lead to the same outcomes but through different methods appropriate to the Member State concerned.
- These different regimes reflect the different understanding of what is fair/unfair practice and foresee different means of dealing with them –eg. (statutory) codes of conduct, competition enforcement, ex-officio investigation, etc.
- Examples of the variety of regulatory regimes
 - UK: GSCOP only applies to 10 retailers –what about suppliers?
 - Belgium has a multistakeholder code that satisfies all parties, including farmers
 - France: has a general provision applicable to retailer-suppliers relations across all sectors (food and non-foods).
 - Spain: the government introduced recently a draft regulation, which the competition authority condemned because it could lead to legal certainty and predictability, would add unnecessary additional burdens and would ban certain practices that they recognise have a pro-competitive effect.

National frameworks sometimes go beyond what is necessary to address unfair trading practices. These often seek hidden protectionist purposes and lead to market fragmentation. (cf. question 14) Those cases where Member States have introduced discriminatory regulation should be dealt with through enforcement of the Single Market rules rather than additional unnecessary regulation. This is a better suited mean to deal with market fragmentation.

- 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. It is a balanced system as all sectors are represented (as opposed to unilateral codes of conducts). Experience from Belgium shows that it is appreciated by all operators involved and therefore is a more effective tool rather than to try and harmonise a wide variety of national schemes. Commercial disputes arise locally and therefore should be handled locally (subsidiarity).

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

- 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. Indeed they seem to lead to the same outcomes but through different methods appropriate to the Member State concerned.
- 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). Experience from Belgium shows that it is appreciated by all operators involved and therefore 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.
- 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. Indeed they seem to lead to the same outcomes but through different methods appropriate to the Member State concerned.
- 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.
- Those cases where Member States have introduced discriminatory regulation should be dealt with through enforcement of the Single Market rules rather than additional unnecessary regulation. This is a better suited mean to deal with market fragmentation.
- The common principles of good practice and framework provide a common understanding and therefore a useful answer for the cross border provision of services.
- There are many other barriers to the cross border trade of services due to labelling requirements or taxes; these may play a bigger role and should be addressed as a matter of priority as part of the retail action plan or any other means.
- Regulatory burden: cost of legislation (in terms of adoption)

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

- 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, with distinctive features which vary from one Member State to another but lead to the same outcomes.
- Private international law 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 role of the EU is to enforce the Single Market rules to do away with market fragmentation 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 and to ensure that any potential legislation does not create more fragmentation than is the case.
- The Commission should wait for the outcome of the study of national legal systems applicable to B2B commercial relationships to identify whether or not there is a gap, whether or not action is needed and what types of action would be most appropriate to undertake at European level or, on the contrary, whether national solutions would be most appropriate.
- 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, encourage its development and take up to make it credible and attractive. Companies cannot be expected to make those significant investments if they know that legislation is coming. The Commission should also ensure that no sectors refusing to co-operate is doing so because they hope that legislation is introduced.
- In conclusion, any possible EU level initiative should
 - Be necessary and proportionate to the objectives sought in line with the better regulation principles and assess the added value of legislation over self-regulation;
 - build upon the results of the voluntary initiative developed at EU level,
 - be applicable to operators throughout the entire (food) supply chain
 - offer legal certainty and predictability
 - avoid to impose an additional burden on companies
 - support the freedom of entrepreneurship, of negotiation and competitiveness of the supply chain.

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 aims. In certain countries, the law goes beyond what is necessary. In others, it does not capture all players.
- Legislation restricts freedom of contract; therefore due care should be given when working on legislation. It would also be interesting to assess whether what has been achieved through legislation could have led to the same results through self-regulation.
- Some regulations have had a clear negative impact on the development of the retail sector, investment decisions, and 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 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 any more. 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, supported transfers of technologies and innovation.

Examples from other countries include:

- In France, bringing payment terms down to 60 days (non-foods) has cost retailers €7 bn. Of those, €4bn accrued to large manufacturers³
- Italy: Problems incurred with the implementation of the new regulation
- Spain: competition authority requested the government to review their proposal because it creates uncertainty and prohibits practices which have a pro-competitive effect
- On the other hand, a number of rapidly expanding third country retail markets are being opened up to international investors (e.g. Korea), and are presenting credible alternatives for international retailers looking to expand their operations. Cfr. OECD study on the globalization of trade in retail services
- The voluntary EU level initiative can also 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 instead of 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). Retailers operate essentially on a national level.
- Enforcement is a responsibility of Member States (subsidiarity). Differences in enforcement mechanisms and enforcement levels exist across member states. Enforcement depends on legal traditions and culture as well as on the maturity of the market. Different enforcement mechanisms do not create per se a barrier to cross border trade as long as they do not discriminate operators according to their origin.

³ Source : FCD

- We invite the Commission to focus on essential barriers to the single market including access to markets for products and services.
- Cf response to question 15 on the costs of some regulatory frameworks.

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

- 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 operators according to their origin.
- Private international law 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.
- 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 to introduce ex-officio investigations, impose sanctions and accept anonymous complaints at EU level.
- Anonymous complaints fail to provide adequate right of defence and act contrary to the convention on Human Rights (article 6-1° of the European Human Rights Convention requires equality of arms in the dispute resolution process, the right to a public procedure, rights of defence).
- Furthermore, anonymous complaints do not provide the protection that may be sought by certain. Indeed, retailers work with certain sets of suppliers for a given product category. Given the circumstances of the case, they find out which supplier would have lodged an anonymous complaint. This will only result in retailers working with a reduced number of suppliers whom they trust; which 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. Overall, the respondents to the FoodDrinkEurope survey (dedicated research) shows that the use of enforcement mechanisms has helped to at least to some extent (cf. response to Question #5). Additional costs of administration will impact on the competitiveness of businesses and final consumer prices.
- 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?

- Our response to question # 1 highlights the difficulties in defining fairness in a legal environment. There is no per se unfair trading practice. A contract is the result of a negotiation between partners. This relation includes a balance of compensations coming

from both parties. Therefore it is crucial to look at practices in a broader context (balance of contracts).

- In a spirit to promote good practice, 11 EU level organisations representing all links in the supply chain –farming, processing, brands, wholesale, large, small and retail- have agreed on a set of principles of good practice that should conduct commercial relationships. These principles are 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 than through 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 question #19 and 1, unfair trading practices remain an ill-defined concept to base EU level action. 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 wide variations in terms of understanding fairness across member states and as a result, there are practices that are legal or illegal across Member States.
- Regularly updating lists of practices through regulation creates uncertainty and therefore has a cost for businesses that have to permanently comply with changes. Retailers need to be able to rely on a predictable environment to continue to invest and remain competitive. Changing rules creates uncertainty, which undermines company's 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 the analysis of the Commission. If applicable, provide additional information.

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.

- The proposed principles in the Green Paper are overall based on the principles agreed upon by stakeholders in the food supply. We therefore 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 fair practice. Those principles are illustrated by a set of examples of fair or unfair practice.
- We believe it will be more effective to promote good practice rather than focus on unfair practice.
- The Commission intention with the proposed list is also unclear: is it aimed at banning certain practices or at bringing standards up in line with best practice?
- With regard to the detailed practices:

- Ambiguous contract terms: this is covered by the principles agreed by stakeholders. Part of the problem may also arise from entrepreneurs not being fully trained and engaging in contracts without a full understanding of their contractual rights and obligations. We would invite the Commission and the member states to provide support to entrepreneurial skills (eg. as part of the entrepreneurship action plan).
- Lack of written contracts: some markets are characterised by oral contracts. 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.
- Retroactive contract changes: in fast moving markets such as retailing, changes may be needed as market conditions changes. 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.

The proposed text regrettably confuses services provided by retailers with retroactive contract changes. With listing fees, suppliers pay for the service of being able to reach masses of end consumers. In practice, listing fees serve several purposes, including compensation for product flop risk, administrative work, product selection effort, positioning in-store, etc.

- Unfair transfers of commercial risks: this is 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.

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 is national understanding of what is fair or unfair and as a result a practice that looks unfair in certain countries may be very well accepted in others.

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: USE material on copy catting and own brands
Need to ensure that confidential information is really confidential (cases of manufacturers requesting confidentiality on public data).
An unfair practice is the withholding of essential information relevant to the other party in contractual negotiations and which the party could legitimately expect to receive. This is missing from the GP.
- Unfair termination of a commercial relationship: 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).

- Territorial supply constraints: this refers to the practice of manufacturers who impose on retailers to purchase on domestic level products that are commonly available across countries. This artificial fragmentation makes it impossible for retailers to purchase from the cheapest source in Europe or even to purchase centrally for those who operate on several markets. If suppliers find out that a retailer has purchased outside the domestic market, they threaten to stop deliveries; something that retailers cannot afford especially in the case of must-have products.

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?

- We do not object to product adaptation and different distribution schemes based on objective criteria (consumption habits, composition of the product, etc.).
- The issue arises when the same products are sold under different terms depending on countries or cannot be purchased centrally.
- 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.

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 practice. We fail to understand why the Commission has developed another list based on those but not fully.
- The examples agreed upon are there to illustrate principles; they are not exhaustive, complementary and cannot be made the basis of any follow up measure. For instance, the drafting on responsibility for risks contains a contradiction. This flows from the fact that the list of principles agreed by stakeholders contains several types of options.
- Unfair termination of contracts: in this case, the unfair trading practice is the use of threats to obtain unjustified advantages not to terminate a contract. In a market economy, there is always a commercial risk when launching a new product and sometimes products fail⁴. Should the law foresee that the supplier has to recoup the investment? This would mean that unsuccessful product may have to remain on shelves as long as the supplier has recouped its investment and negatively impact on the process of new product introduction and innovation.

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 freedom of contract is playing 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.

⁴It has been proven that only a very small proportion of new products are real commercial successes over the long run. Almost 75% of product introductions are failures. Cfr. FAO report

- 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).
- 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 in terms of costs savings and additional sales opportunities and amount to several bn € for companies involved). There is added value in dialogue.
- Better regulation: we ask the Commission to take stock of progress with the Voluntary Initiative, and to take account of the full reports of the two studies under way on legal regimes and on impact of retail developments on consumer choice and innovation before rushing into hasty regulation.

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?

We regret that the Green Paper focuses on a single aspect irrespective of the more global context on the role of commerce in supply chains, the real barriers to the single market or 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 their relations with suppliers would put their competitive position at stake.

The Green Paper totally overlooks the importance of retail and wholesale in the European economy and their role in creating growth, jobs and bringing innovation. Those companies are at the heart of the single market to the benefits of consumers. Creating the conditions for their better use of the single market would be a higher priority.