



EUROPEAN COMMISSION
Directorate General Internal Market and Services

SERVICES
Business-to-business services

**SUMMARY OF RESPONSES
TO THE EUROPEAN COMMISSION GREEN PAPER**

**“UNFAIR TRADING PRACTICES IN THE BUSINESS-TO-BUSINESS
FOOD AND NON-FOOD SUPPLY CHAIN IN EUROPE”**

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1. INTRODUCTION

On 31 January 2013 the Commission published a Green Paper on Unfair Trading Practices (UTPs) in the Business-to-Business Food and Non-Food Supply Chain in Europe and invited all interested parties to participate in the public consultation, which ran until 30 April 2013. The purpose of this consultation was to gather the views of market participants on the occurrence of UTPs, their possible effects and the most effective remedies, if required.

This document summarises the contributions received in response to the questions raised in the Green Paper. Its objective is to present an overview of the opinions expressed and arguments presented by stakeholders in their contributions. A quantitative analysis of the responses has not been undertaken. As the information on the respondents provided below shows, quantitative analysis of the responses is difficult. Some respondents provided individual contributions and at the same time contributed to, or supported, a submission by a professional association of which they are members. Furthermore, a number of respondents have answered only a limited number of questions which they considered to be of particular relevance and did not provide a response to other questions.

The views summarised in this document do not represent the views of the Commission and do not prejudice, in any respect, the policy orientation which may be developed by the Commission in the future.

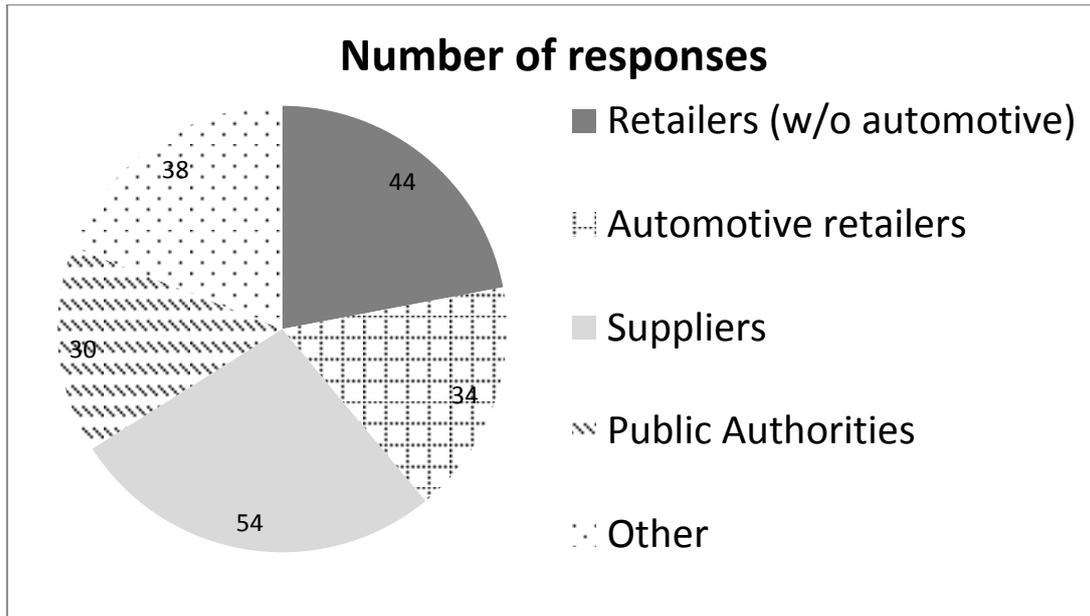
2. RESPONDENTS

Overall, 200 written responses have been received by the Commission; confidential responses are not published. Contributions came from a variety of stakeholder categories and both the suppliers and buyers in the supply chain were represented.

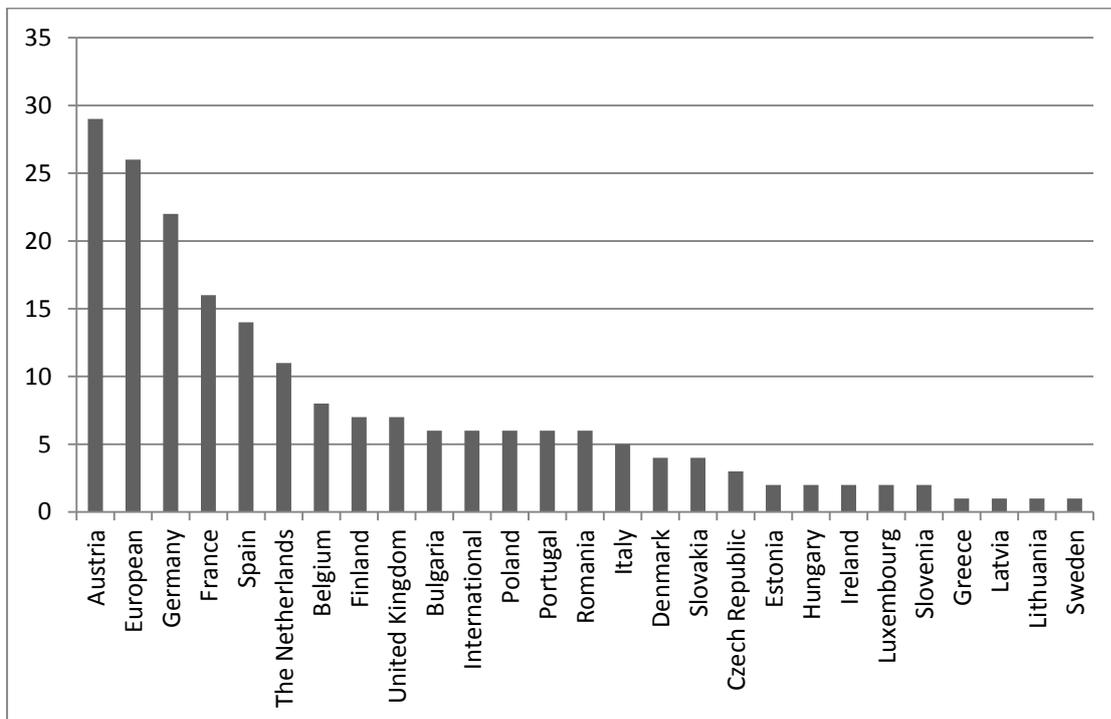
Retailers (due to similarities in the opinions expressed, Chambers of Commerce were also included in this category) represented the largest group of contributors (78 respondents or 39 % of all answers in the consultation). A large share of this group (34 respondents) consisted of - mostly Austrian - automotive retailers which are subject to somehow different market characteristics than retailers in the general food and non-food sector. The vast majority of the remaining 44 respondents in the retailer group came from the grocery retail sector.

Suppliers (Chambers of Agriculture were also included in this category) accounted for the second largest group of responding market participants (54 respondents or 27% of all answers). Again, the large majority of respondents can be broadly attributed to the grocery sector.

Contributions from public authorities (mostly national governments / ministries and national competition authorities) added up to a total of 30 replies (15% of all answers) and the remaining 38 replies (19% of all answers) came from a broad variety of stakeholder categories, including academics (6 replies), trade unions (3 replies), law firms, consultancies, citizens and a consumer organisation.



In geographical terms, there was broad coverage and contributions were sent by respondents from 25 of the 28 EU Member States. The number of responses from individual EU Member States is broadly in line with their respective populations. One notable exception is Austria which accounts for a total 29 responses, i.e. by far most of the responses received from any individual Member State. This is driven by the large number of replies from automotive retailers in Austria as mentioned above. No responses were received from stakeholders in Croatia, Cyprus and Malta. 26 responses were submitted by associations or organisations at EU level and 6 contributions were sent from outside the EU.



3. SUMMARY OF RESPONSES

The Green Paper contained 25 questions which covered a number of different aspects of Unfair Trading Practices. The summary of replies generally follows the structure of the individual questions. In some cases, groups of closely related questions were consolidated.

As the bulk of responses came from the food sector, the terms “supplier” and “retailer” generally used in the summaries of responses cover suppliers and retailers exclusively or partially active in this sector. Given the relatively high number of responses from automotive retailers and the different nature of the market, those replies have been analysed in a dedicated annex to this document. The views of responding suppliers and retailers from outside the food and automotive sectors (e.g. book publishing, DIY, aromatics and perfumes) are mostly analysed under the summary of question 7. If market participants from those sectors are mentioned in other questions, they are clearly indicated as respondents outside the food industry.

Question 1 - Do you agree with the above definition of UTPs?

Overall, the definition of UTPs in the Green Paper receives more support than criticism from respondents. Retailers is the only stakeholder group where a majority is not supporting the definition in the Green Paper. Moreover, the definition is, at least partially, confirmed by a majority of responding public authorities and suppliers. Still, each specific element of the definition is subject to diverse opinions, often along the demarcation line between suppliers and retailers.

Several suppliers and public authorities request a broad definition or more examples than provided. They argue that new UTPs will continue to emerge and that these should be covered by the definition. Some respondents from various categories argue that a list of UTPs would be helpful for the application of the definition. A few public authorities argue that the definition is too general to be the basis of efficient litigation.

Clarity of the definition

The definition – or its elements, especially the term “unfair” – being subjective is a major concern of several retailers. Some stakeholders, especially retailers, argue that individual practices cannot be by definition unfair, thus, contracts as a whole should be examined on a case-by-case basis. A few other respondents from various categories generally find the definition not clear enough. A number of retailers propose that instead of a definition on UTPs, good practices should be determined. Some others, however, find the phrase “good practices” unclear as well; they recommend replacing it with “customary conduct” or “standard practices”.

A few retailers and a supplier argue that the definition has a negative effect on contractual freedom; some of them also argue that such a definition may harm trading relationships.

Economic imbalance as a pre-requisite of UTPs

Academics, associations representing third-country suppliers and a few other respondents find it important to include the concept of economic imbalances in the definition. A number of retailers emphasise that economic imbalances are not problematic per se or that concentration at EU level should even be supported. It is also mentioned that economic imbalance is not necessarily related to the size of the parties.

Other elements

In the responses to this question, some comments were made on other aspects of the problem. Some suppliers and the only responding consumer association argue that other drivers behind UTPs, especially the competition bottleneck at the level of retailers and the perishability of food products, should be taken into consideration. Trade unions recommend that the social aspects of UTPs and structural problems in the supply chain should also be recognized. They call for the protection of SMEs as well, but a few retailers specifically mention that such bias should be avoided. A few retailers argue that only intentional abuses should be included in the definition of UTPs.

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

For this question, the descriptions and assessments of national rules as provided by public authorities from the relevant Member States are summarised.

Austria (Federal Ministry of Economy, Family and Youth)

National law against unfair competition applies to B2B relationships. Competition and contract law also apply in specific cases. However, it is acknowledged that trading parties may refrain from legal proceedings because of the 'fear factor', especially in the case of SMEs.

Czech Republic (Ministry of Justice)

The Act on significant market power in the sale of agricultural and food products is relevant in this context. The Act prohibits the abuse of significant market power in relation to suppliers. It specifies what actions are considered to constitute such abuse and sets out the administrative offences and penalties applicable to them. Compliance with the Act is overseen by the Office for the Protection of Competition. Under the Commercial Code, as a general rule the exercise of a right contrary to the principles of fair commercial practice does not enjoy legal protection.

Denmark (Competition Authority)

In Denmark, no specific regulatory framework for UTPs exists. The current legal provisions in the Danish competition law are considered sufficient to address UTPs.

Estonia (Ministry of Economic Affairs and Communications)

The law does not contain a direct definition of UTPs, but Estonian civil law includes certain standards and enforcement mechanisms that can be used if UTPs are identified. Relevant provisions regulate, for example, issues related to ambiguous contract terms, the interpretation of contracts, the contract form and possibilities for contractual changes, the transfer of commercial risks (regulation of standard terms), unfair use of information and the termination of a contract.

Finland (Ministry of Employment and Economy)

In Finland the unfair trading practices are mainly dealt by Unfair Business Practices Act. The government recently amended the Competition Act to make competition of the retail trade in Finland more effective. The retail group will be deemed to have a dominant market position if its national market share is 30 % or more. The amendment seeks to deal with problematic practices on the basis of two strong operators having considerable negotiating power. The aim of the amendment is partly similar to the aim of the Green Paper.

France (French government)

The French framework against UTPs is structured around three axes:

- 1) Legislation: The Commercial Code provides a list of prohibited UTPs. It was modified in 2008 to regulate the significant imbalance in the rights and obligations of trading parties.
- 2) “Soft law”: The Commission for the review of commercial practices created in 2001 is a forum for discussion between suppliers, retailers and public administrations. In addition, the Commercial Code opens the possibility of derogations for inter-professional agreements to take into account sectorial specificities.
- 3) Dedicated Administrative powers: The Directorate for Competition, Consumer Affairs and Fraud Control (DGCCRF), attached to the Ministry of Economy has the power to conduct investigations in the sector of food and non-food retail. Sanctions can also be imposed on the initiative of the Minister of Economy. If investigations identify breaches of the Code of Commerce, the Ministry of Economy has the right to take legal action against the practice, without having to collect consent of the victim of the practice which is only in some cases informed of this action.

Germany (Federal Ministry of Economics and Technology)

Existing legislation in Germany does not provide for a specific definition of UTPs. Situations of economic imbalance are addressed in the Act against restraints of competition; for example with provisions that are based on the concept of relative market power and allow an effective approach on a case-by-case basis due to their construction as a sweeping clause (section 19, 20). The concept of UTPs is also recognised and addressed by existing legislation through contractual law (in particular provisions on the invalidity of provisions contrary to public policy (Section 138 German Civil Code), of provisions contrary to good faith (Section 242 German Civil Code) or of unfair general terms and conditions).

Ireland (Department of Jobs, Enterprise and Innovation)

Whilst the transposition of the Unfair Commercial Practices Directive and the Unfair Terms in Consumer Contracts Regulations have protected Irish consumers against UTPs by traders, there are no similar general protections afforded businesses in their commercial relationships with other businesses. The Irish Government has, however, committed to enact legislation to regulate certain unfair practices in the grocery goods sector.

Latvia (Competition Authority)

The concept of UTPs has been enshrined in the Competition Law as the ‘abuse of a dominant position in the retail trade’. A draft Law on the prohibition of unfair retail practices has been drawn, which proposes to abolish the concept of a ‘dominant position in the retail trade’ and apply regulation to all food retailers. However, the debate is still on-going whether to exempt smaller retailers having no significant buyer power, by replacing existing ‘dominant position in the retail trade’ with that of ‘a retailer with a significant impact’ on the basis of a quantitative criterion.

The current legal framework and the draft Law contain an exhaustive list of prohibited activities. Draft Law foresees separate exhaustive lists of prohibited activities in the food, as well as in the non-food retail trade. Unlike the prohibited activities in the food retail trade, the list of prohibited activities in the non-food retail sector will refer only to non-food retailers with a significant impact defined in the same way based on qualitative criteria as the existing ‘dominant position in the retail trade’.

Lithuania (Ministry of Economy)

Lithuanian law is intended to ensure a balance between the interests of retail companies and suppliers. Under the law, retail companies with significant market power are prohibited from engaging in practices contrary to fair commercial practice, as specified therein, which transfer their operational risk to suppliers or impose additional obligations on them or restrict their ability to operate on the market.

The Netherlands (Ministry of Economic Affairs)

Companies which consider themselves disadvantaged by unfair trading practices are able to seek redress through the courts according to the Netherlands Code of Civil Law. Those provisions provide cause for action in cases of non-performance, breach of contract or wrongful action, and such action can be brought by the aggrieved party. In addition, the National Competition Law prohibits the abuse of a dominant position. The Authority for Consumers and Markets acts as the regulatory body and can take action based on its own findings or on information received. Nevertheless, research reveals that, in practice, Civil law is ineffective to address UTPs because of the 'fear factor'. In addition, enforcement by the Authority for Consumers and Markets has not been fully effective because companies abusing their position do not always fall under the definition of a dominant position in the meaning of the relevant legislation.

Currently, in the agro-food sector and in the fashion, textiles and footwear sector, pilot projects have been prepared. The pilot project in the agro-food sector consists of the implementation of the European 'Principles of Good Practice in Vertical Relation in the Food Supply Chain' (the 'Principles') and the 'Framework for the implementation and enforcement of the principles of good practice in vertical relations in the food supply chain' (the 'Framework'). A steering committee of sector representatives gives guidance to the pilot and liaises with the Governance Group at the European level. This pilot project has started at September 16, 2013. For the pilot in the fashion, textiles and footwear sector the 'Principles' and the 'Framework' are the starting point, but a national system of dispute resolution has been introduced. If an individual dispute cannot be solved by consultation, it can be submitted to the Dutch Arbitrage Institute for binding advice. This is also possible in the case of aggregated complaints. A steering committee of sector representatives gives guidance to the pilot project. This pilot project will start November 1 2013 at the latest.

Poland (Government)

The concept of UTPs is recognized by the Law on Combating Unfair Competition. An act of unfair competition is described as activity contrary to law or good practice which at the same time threatens or violates the interests of another business or a client.

Portugal (Ministry of Economy and Employment)

The concept of UTPs is recognised in the Competition Act in case there is an abuse of a dominant position or an abuse of economic dependence and in the regime applicable to individual practices that restrict trade (unfair competition). The Competition Law was revised in 2012, and the individual commercial restrictive practices decree-law is currently being modified: the draft bill expands the concept of abusive business practices and clarifies the concept of selling at a loss.

Romania (Senate)

The concept of UTPs is recognized in Romania by the Law on the marketing of foods. The Law prohibits traders:

- to charge the supplier services that are not directly related to the procurement,

- to request and collect payments from the supplier in order to extend the distribution network of the trader or to promote the work and image of the trader,
- to require the supplier not to sell the same product at a lower price to other retailers.

Slovakia (Ministry of Agriculture and Rural Development)

The amendment to the Trade Law No. 9/2013 has introduced the concept of “unfair contractual condition” and “unfair trade practice”. With regard to relations between suppliers and purchasers in the food sector, the Act No. 362/2012 on unreasonable conditions in trade relations subject of which are foodstuffs defines 44 unreasonable conditions for which any contractual party benefiting from such unreasonable conditions may be sanctioned. The Ministry of Agriculture and Rural Development is responsible for enforcement.

Spain (Competition Authority)

Abusing unfair trading practices in the retail sector are addressed in the Code of Commerce, in the Retail Trading Act, in the Unfair Competition Act and in the Competition Act. In August 2013, the Spanish Congress approved a new law on UTPs in the Spanish food supply chain, which will enter into force in January 2014.

Sweden (Parliament)

Some unfair practices are regulated by provisions of the Contracts Act, the Competition Act and the Marketing Act. Contractual conditions may be modified or disregarded if they are unreasonable in relation to the content of the contract or the circumstances of the contractual relationship. Particular consideration should be given to the need to protect the party who, as a consumer or otherwise, occupies a weaker position in the contractual relationship. The substantive provisions of the Competition Act focus on tackling four types of actions which may impair the effectiveness of competition: anti-competitive agreements, abuse of a dominant position and mergers as well as anti-competitive behaviour by public entities when acting on competitive markets. The Marketing Act contains a specific provision on aggressive marketing, which is designed as a general clause. Aggressive marketing is considered unfair if it noticeably affects, or is likely to affect, the recipient's ability to make an informed decision. The provisions relating to aggressive marketing also apply when the marketing is directed at business operators.

United Kingdom (Government)

The concept of UTPs is not generally recognised as such. However, UK contract law grants some recourse to companies which are the victims of unfair practices and action has been taken in a number of sectors to constrain business to business behaviour, especially in sectors where unfair practices result in markets delivering poor outcomes for consumers. In relation to the examples of unfair trading practices given in the Green Paper, contract law would appear to offer some limited protection. Market investigations under competition law can also be undertaken in response to patterns of unfair trade practices if these may result in anti-competitive effects and cause the market to function poorly, to the detriment of consumers in the short or longer term.

In the groceries sector the Groceries Code Adjudicator Act provides for the establishment of an independent Groceries Code Adjudicator, to enforce the Groceries Supply Code of Practice. The Adjudicator is able to: arbitrate disputes between designated retailers and their direct suppliers, investigate confidential complaints from direct and indirect suppliers, and impose sanctions on retailers found to have breached the Groceries Supply Code of Practice.

Question 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?

On this question there was broad agreement between stakeholders. A large majority of all responses confirmed that the concept of UTPs should include the pre- and the post-contractual phase as well.

A few respondents explained that UTPs during the pre- and the post-contractual phases are actually more typical than those during the contractual phase.

Some respondents stated that UTPs can often not be assigned to a specific stage of the contractual relationship and therefore contractual relationships should be covered as a whole when defining UTPs.

Only a few respondents expressed an opposing view. It was mentioned that only the post-contractual phase should be covered by the concept of UTPs, because problems in the pre-contractual and contractual phases are already covered by the law.

Due to the converging opinions, it is difficult to differentiate between the views of stakeholder categories in the case of this question. However, retailers are somewhat more represented among the few respondents who think UTPs should be limited to a specific contractual phase.

Question 4 - At what stage in the B2B retail supply chain can UTPs occur?

Similarly to the previous question, the majority of each stakeholder category agrees that UTPs can appear in any or all stages of the B2B retail supply chain. Nevertheless, there are important differences in the emphasis. Some suppliers highlight that UTPs are typically applied by retailers towards suppliers in a weaker economic position. A few suppliers mention food processors as companies imposing UTPs on primary producers.

On the other hand, some retailers underline that UTPs are not primarily applied by retailers but rather by large branded good suppliers towards retailers. A few retailers insist that retailers do not impose UTPs at all. Similarly, a number of retailers stress that strong bargaining power and tough negotiations should not be confused with UTPs.

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

The majority of stakeholders in each category recognise the existence of a 'fear factor'. Stakeholders with the exception of retailers almost unanimously support the analysis of the Green Paper.

Stakeholders (apart from retailers) mention different underlying reasons for the 'fear factor'. The most notable factors are the market structure, economic imbalance or dependency between the contracting parties, the lack of alternatives for the suppliers and the perishability of products in the food sector.

Some suppliers explain that the 'fear factor' is the main driver for the lack of complaints in spite of the frequency of UTPs (or even a driver for this frequency itself). To overcome the 'fear factor', suppliers suggest public enforcement based on confidential complaints. Giving the possibility for representative associations to complain on behalf of members is also mentioned as suitable.

Retailers refer to the good functioning of trading relationships in general and provide various arguments for why the ‘fear factor’ should not be included in the assessment of the problem and not be reflected in a possible legislative proposal. In their view the ‘fear factor’ is a subjective concept (based on an emotional assessment of the situation, rather than a fact-based business decision), and it cannot therefore serve as the basis for legislation. Procedures based on confidential complaints would make it difficult to resolve the conflict itself and would undermine the right of defence for the party accused of UTPs. Consequently, it could encourage suppliers to threaten retailers with the launch of a complaint. Other retailers emphasize that contractual relationships are based on contractual freedom, and that tough negotiations are part of a normal business relationship. Actions based on the concept of ‘fear factor’ would be detrimental to market efficiency. According to some, the ‘fear factor’ could be an incentive for the weaker party to optimise its operations.

Many retailers however accept that the ‘fear factor’ could contribute to the existence of UTPs, but most of them argue that the development of sustainable long term relationships and mutual trust in the food supply chain is crucial and more productive than legislation.

Question 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?

There is no consensus among the responses on the frequency of UTPs in the food sector, mostly due to a lack of data covering both sides of the market. The problem of collecting robust and neutral evidence on UTPs in the food sector is also mentioned in the responses of some Member State authorities.

Almost all food suppliers responded to this question and agreed, with only a few exceptions, that UTPs occur frequently in the food sector. Some suppliers even consider them standard practices. A significant number of suppliers highlight that UTPs mostly occur between large retail companies and smaller suppliers. Some suppliers also explain that UTPs applied by retailers have repercussions throughout the whole supply chain. In the same vein, organisations representing third country suppliers say that UTPs against food companies that import or export to Europe harm small primary producers in developing countries. Several examples of practices applied in the food sector are presented by stakeholders some of which are not mentioned in the Green Paper (non-negotiable contracts, sales below costs). Various suppliers expressed that UTPs in the food sector happen mostly in the pre- or post-contractual phase of the relationship.

A majority of retailers criticize the analysis of the Green Paper on UTPs in the food sector. Typically retailers acknowledge the existence of UTPs in the food sector but claim that an overwhelming majority of transactions are unproblematic and UTPs are not pervasive. They support this assessment by different arguments: the low level of profit margins in the retail industry in comparison to higher margins on the supply side, the strong and vested interest of retailers to have sustainable long term relationships with suppliers and the existing effective problem resolving mechanisms provided by the Voluntary Initiative. A few of the retailers conclude that the lack of quantifiable evidence shows that there is no real problem.

Some retailers added that there are no specificities in the food sector that justify treating it differently from other industries. Some others highlight that UTPs indeed exist, and that they create a problem in the supplier - retailer relationship, but that they are mostly applied by large suppliers of must-have brands.

The assessment of Member States authorities generally lies between the positions of retailers and supplier, but on average somewhat closer to the one of the suppliers. Responding governments and competition authorities agree that UTPs exist in the food sector, but there are differing opinions as to which degree they constitute a general problem. Some authorities specified that UTPs are mostly applied by major retailers.

The detailed analysis provided in the response of the French government shows that the majority of on-going court cases concerning UTPs relates to the food sector (26 out of 38 current cases). Also out of 211 fiches alerting about possible UTPs after the annual investigations by the French enforcement authority in 2012, 74 concerned the food sector. High concentration in the retail market, product perishability and fluctuating prices of commodities make French suppliers particularly vulnerable to UTPs. The problem of perishability in the food sector is mentioned by several other authorities. Other authorities emphasised that a robust quantitative assessment of UTPs is impossible.

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

It was not possible in all cases to clearly identify the sector that certain respondents belonged to, but most of the replying market players and associations are active partly or completely in the food sector. Thus, many of these respondents did not answer this question. However, some respondents active partly or completely in the groceries sector shared the opinion that UTPs exist in other sectors as well, including, non-food groceries, textile, electronics, horticulture, construction materials and pharmaceuticals.

Some respondents belong to industries outside of the grocery sector. The largest group of them consists of automotive retailers and their responses are summarised in the attached annex. Other sectors represented among responding suppliers and retailers are: books, publishing, textile and clothing, DIY, perfumes / aromatics, lubricants, travel, banking, horticulture, electronics and windows.

The small number of respondents from each of these sectors mainly provides anecdotal evidence. Generally speaking, companies from all the sectors mentioned above say that UTPs exist in their sector. A majority of these respondents consider that UTPs have a negative impact on investments and innovation. They mention a reduction in choice for consumers as a negative effect of UTPs. Other negative effects are higher prices and decreased product quality. The DIY sector is an exception, with the only respondent from this sector (a retailer) claiming that UTPs do not exist in this sector at all. Retailers from the electronics sector were divided on the question of the occurrence of UTPs in their sector.

Public authorities are cautious about giving a strong opinion on this question. The vast majority gives no answer or only indicates the possible existence of UTPs in sectors such as non-food groceries, or the construction material sector. The French government refers to UTP related cases in other sectors than food such as in electronics and DIY.

Question 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.

The responses to this question strongly varied according to the category of respondents. The majority of all categories except retailers consider that UTPs can have a negative impact on a company's ability to invest and innovate. A vast majority of suppliers consider that UTPs

have a negative impact in this respect. Most suppliers refer to UTPs affecting the profit margin which directly reduces a company's funds available for investment. Other disincentives for investments and innovation mentioned by suppliers are linked to the uncertainty of possibly being subject to UTPs in the future. Also the risk of copy-cat private label products based on the misuse of previously acquired confidential information is mentioned.

The vast majority of retailers state that UTPs have no negative impact on innovation and investment except in cases where they are imposed by suppliers. One example of UTPs applied by suppliers is the listing pressure exercised by must-have brand suppliers on SME retailers.

Academics generally consider UTPs to have an adverse impact on the ability of companies to invest and innovate. In addition, reference is made to the adverse social impacts due to the fact that UTPs are pushed down to the weakest party in the supply chain, which are usually micro-enterprises and farmers.

The majority of public authorities also consider UTPs to have an adverse impact on investments and innovation. Reference is made to reduced profit margins, abuse by retailers of the reduced flexibility of suppliers (which is a result of the reduced investments). The problem of copy-cat private label products on the basis of misused confidential information is also mentioned.

A trade union considers that UTPs reduce considerably workplaces conducive of innovation, skill development and lifelong employability. UTPs therefore can contribute to jeopardising social inclusion and employment.

A majority of respondents not falling in one of the categories above also agree that UTPs have a negative impact on investments and innovation.

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

The opinions among stakeholders are divided. Retailers consider there to be no problems except those resulting from UTPs from the supplier side. The other categories of stakeholders consider that consumers are negatively affected by UTPs.

Almost all suppliers consider UTPs to have negative effects on consumers. The most frequently mentioned effect is less choice (or decreased product range) for consumers. Higher (long term) prices are also repeatedly mentioned. While UTPs might in the short term result in lower prices for consumers they risk reducing competition and pushing prices to unsustainable levels, resulting in supplies drying up. This could also lead to a reduction in product quality (high quality ingredients are replaced by cheaper substitutes to offset price pressure) or negative side effects regarding the environment, labour standards, local producers and animal welfare.

Retailers have an opposing view. A large part considers there to be no negative effects on consumers due to the high degree of competition in retail which results in a broad choice of products and low prices. A comparable number of retailers consider there to be indeed negative effects on price and choice on consumers but notably resulting from UTPs applied by suppliers, such as unjustified price increases, mergers and territorial supply constraints.

The majority of academic respondents consider UTPs to affect consumers negatively. Effects mentioned by academics stem from different areas: (1) a decrease in choice if small and

specialised shops come under pressure and (2) health and environmental consequences as producers and suppliers reduce quality standards in order to compensate lower prices resulting from UTPs. However, some academic respondents have diverging views.

The majority of public authorities consider UTPs to have negative effects on consumers, in particular regarding choice, prices (in the long term), quality and innovation. In this context, some public authorities emphasise the need to look at the long term effects that lower competition could have on choice and prices.

Certain public authorities have a diverging view and consider UTPs to have positive effects for consumers as they increase pressure for efficiency improvements or to have positive and negative effects offsetting each other.

Some trade unions consider there to be less choice for consumers as a consequence of UTPs. In addition, the consumer expectation that food products must be available cheaply fuels UTPs and entails social and environmental implications of which consumers should be informed.

The only consumer association respondent considers that UTPs have negative impacts on consumers and that price decreases in the value chain are not passed on to the consumers.

A majority of respondents not falling under the above categories consider that UTPs have negative effects on consumers through decreased choice, higher prices and lower quality. Some however consider consumers to benefit from UTPs or even to cause UTPs with their continuing demand for lower prices. Reference is also made to the negative effects on working conditions.

Question 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.

Question 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?

Question 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?

These related questions are summarized together.

The responses received to these questions generally confirm that cross-border effects of UTPs are difficult to identify and gauge precisely.

According to some suppliers financial pressure from UTPs results in a reduced commercial ability to invest in foreign markets. Also it is underlined that the presence of UTPs might contribute to a reduced level of cross-border trade due to increased risk, higher costs and the business uncertainty they bring about.

Differences in national law are also mentioned as a barrier to cross-border trade. Nevertheless, suppliers generally seem to prefer that national laws deal with UTPs compared to UTPs not being regulated at all. The main difficulty would be regulatory and enforcement gaps

regarding UTPs in some Member State and increased difficulty to ensure defence against UTPs in cross-border situations. It is also underlined that Member States need to adapt their legislation to their national specificities and market conditions.

Not all suppliers reported that cross-border trade is affected by UTPs directly or by regulatory fragmentation. The view was expressed that most sales in the food sector take place at national level. Some respondents also explained that the issues for cross-border trade are more pressing in the case of non-food activities.

Some responses from third country suppliers indicated that companies refrain from exporting to certain countries where UTPs can be applied with impunity which leads to a fragmentation of the EU market in terms of third country supply.

Many retailers, who in general consider that UTPs are not a systemic problem in the supply chain, also explain that these practices as well as the legislative frameworks for addressing them have no impact on cross-border trade. In their view, private international law and contract law enable the parties to define by common agreement the choice of the law applicable to their contract and to solve cross-border issues.

In the view of many retailers, the Voluntary Initiative at EU level will help to address cross-border issues in those rare cases where they exist. By stipulating a common set of principles of good practice, and offering a defined set of dispute resolution options, as well as an EU-wide governance process, this framework would provide, according to these respondents, full EU-wide coherence and thus remove any remaining uncertainties from cross-border transactions.

Some retailers admit however that there are cross-border impacts of UTPs and regulatory fragmentation. One French retailer argues that the French legislation is a limitation to cross-border trade, as contracts concluded in other countries are not valid in France where the rules are stricter. For some others, the existence of different national rules was not seen as creating per se a barrier to cross-border trade, as long as they do not discriminate against operators according to their origin. However, it is also mentioned that national measures can have negative effects if they are disproportionate or have the aim of protecting national markets. Such rules and other measures generate a state of legal uncertainty that leads to a reduction in cross-border trade of services. Restrictions in contractual freedom resulting from some national regulations could also be a barrier.

Territorial supply constraints, which imply that retailers have to source from national subsidiaries of brand manufacturers, are often mentioned as a very serious obstacle to cross-border trade. It is underlined that they undermine the possibility for retailers to fully exploit the benefits of the single market. (More details at Question 22)

Public authorities did not always express a clear opinion on this question. It was mentioned that there are cases of domestic retailers in some countries discriminating food suppliers from other Member States or of international retail chains discriminating local suppliers.

Respondents from other categories were divided on this question: some believe that UTPs contribute to a weakening and fragmentation of the Single Market. This fragmentation could be detrimental to businesses in general, as well as creating hurdles that prevent companies, in particular SMEs, from expanding into other Member States. Others mentioned that it was not proven that fragmentation would lead to significant obstacles.

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

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

These related questions are summarized together.

Many suppliers stressed the negative effect of the absence of a national framework to address UTPs, especially for weaker parties. Some suppliers made positive mention of existing legislative frameworks even if they emphasise that the enforcement of these frameworks is still an issue in many cases. It is also mentioned that many Member States have realised that their national law is not adequate to solve the problem of UTPs and have recently amended their frameworks, are planning to do so in the short term or are having a debate about possible solutions for future.

In the same vein, suppliers consistently argue that self-regulation alone is not sufficient because of the 'fear factor', as has been proven by the failure of the self-regulatory frameworks in some Member States such as UK or Spain. Belgium and its self-regulatory framework are mentioned as a positive exception even if some responding suppliers see room for improvement concerning enforcement in this case as well.

In contrast, many retailers believe that national mechanisms are fully adequate to address the issues faced in each Member State. Some retailers criticise some existing national frameworks for being too burdensome and the enforcement powers of being too far-reaching. A complete lack of a framework in some Member States is not seen as a major issue by some retailers.

For any remaining issues caused by UTPs retailers are generally optimistic that they can be improved by the recently established Voluntary Initiative at EU level.

Some respondents from other categories mention the difficulty to assess the effectiveness of the existing national frameworks.

Some public authorities consider that uneven regulation in different countries could hinder the development of the internal market and cause fragmentation or lead to forum shopping.

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

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

Question 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?

These related questions are summarized together.

The opinion of stakeholders on the necessity of further EU action against UTPs is strongly determined by their position in the supply chain.

Nearly all retailer respondents are against EU action. There is a variety of reasons supporting this opinion, amongst them the most important are: UTPs are generally not problematic; UTPs have no cross-border effect; contractual freedom should always prevail; current mechanisms (e.g. competition law) sufficiently address the problem; more regulation would decrease the

competitiveness and efficiency of the sector; and there is no legal basis for action at the EU level.

Many retailers, however, support voluntary mechanisms and self-regulation at a European level. Some of them highlight that the new Voluntary Initiative to address UTPs by the industry itself at a pan-European level should be given a fair chance before further legislation is introduced. Some respondents stressed that the Commission should express stronger support for the Voluntary Initiative, since this could increase the breadth and speed of its implementation.

Some suppliers are also critical towards EU action and support the voluntary mechanism. The majority of suppliers, however, believe that further action is needed at EU level. In this respect, most of the suppliers responding to this question specifically favour a binding legal instrument. The main arguments these suppliers use to support their position is that the 'fear factor' in combination with a lack of trust in the supply chain makes voluntary initiatives less effective. Nevertheless, many suppliers acknowledge that the voluntary scheme has a role in combatting UTPs if supported by binding EU legislation. It is worth to note that some suppliers (especially from France) are concerned about future EU legislation that could be less protective than existing national regulations. Other suppliers emphasise that possible EU action should leave enough flexibility for Member States to adapt their own legislation to national specificities.

Enforcement and sanctions are often mentioned as the crucial elements that should be incorporated in future binding legislation. Some stakeholders also mention a concrete (black) list of UTPs as a basis for legislation. Several suppliers explain that the current problem of UTPs from a public policy perspective is not the lack of regulation but the lack of effective enforcement. Almost all respondents propose that enforcement should take place at the Member States level.

Not all public authorities have taken a position as regards further action at EU level. However, some authorities explicitly called for binding legislation. Some other public authorities see the potential benefits of a legislative intervention or would welcome a legislative initiative provided that it would leave enough flexibility for Member States. Some show a more cautious approach and see additional legislation a last resort which would have to be based on compelling evidence. Other public authorities prefer self-regulatory initiatives to tackle the problem of UTPs.

Some alternative solutions are mentioned by stakeholders, such as creating a European network of enforcement authorities; legislation limited to cross-border issues; stimulating the voluntary scheme through additional actions; revising the Unfair Commercial Practices Directive; and European regulatory oversight to complement the voluntary framework.

The majority of third party respondents (academics, trade unions, etc.) are in favour of binding legislation. The responding consumer association also supports legislation.

Question 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.

As in many of the previous questions, there is a clear demarcation line between respondents from the retail and supply side of the market.

A large majority of suppliers emphasises the potential benefits or even the absolute necessity of regulating UTPs. Many respondents in this stakeholder group explain that existing UTP legislation in numerous Member States is ineffective, or at least only partially effective, mostly due to a lack of proper enforcement. Furthermore, many suppliers state that UTP regulation is not a limitation but a complement of contractual freedom and some stress that addressing UTPs is actually a fundamental pre-requisite of establishing genuine contractual freedom. A smaller number of suppliers say that UTP regulation needs to be carefully designed in order not to restrict commercial flexibility. A few respondents from this stakeholder category say that they prefer a voluntary over a regulatory approach.

Retailers generally have a very different point of view. While some retailers state that UTP regulation is beneficial to ensure the proper functioning of the market, the vast majority of respondents highlight the potential risks of UTP regulation in terms of restricting contractual freedom and commercial flexibility as well as increasing the administrative burden for companies. A number of retailers say that the resulting inefficiencies could lead to higher prices and less choice for consumers. Some retailers emphasise the general difficulty to define 'unfairness' in legal terms and the ensuing legal uncertainty this could entail.

The views of Member States generally correspond to the approach chosen with regards to UTPs in those countries. Hence, Member States where UTP legislation exists perceive their framework as effective (and sufficient) while a few Member States without dedicated UTP regulation emphasise their preference for a market-driven or self-regulatory approach. However, some authorities acknowledge the need to improve their current national framework and refer to planned and forthcoming regulatory amendments.

Other stakeholder categories, including academics, think tanks, consultancies and law offices mostly see a positive impact of existing UTP legislation.

Two observations made across stakeholder categories should be mentioned. First, some respondents said that UTP regulation was relatively new in some Member States (e.g. Italy, UK) and therefore its effect could not yet be clearly assessed. Second, a number of stakeholders said that the impact of existing frameworks was in some cases hard to evaluate because of the preventive nature of some of the introduced regulatory measures.

Question 17 - In case of such negative impacts [discrepancies hindering cross-border trade], to what extent should a common EU approach to enforcement address the issue?

Suppliers and retailers are again divided in responses to this question, with most suppliers believing that a common EU regulatory framework is necessary and useful, while most retailers insist that action at EU level should only be of a voluntary nature.

For most suppliers, a uniform enforcement approach at EU level is necessary. EU action would be justified as UTPs are affecting producers and consumers at European level, as well as, the proper functioning of the internal market.

In the view of those suppliers, a common or converging approach would improve the functioning of the internal market by creating common standards and similar mechanisms in

the different Member States. It would facilitate cross-border trade and reinforce legal certainty for market participants. Some suppliers therefore consider that it is crucial to establish common criteria for the enforcement of measures against UTPs across the EU. This would include provisions for confidential complaints and ex-officio action, as well as the right for enforcement bodies to impose sanctions.

A few suppliers see the need for enforcement at EU level and say that an independent European authority should be created for this purpose.

Some suppliers, however, including large associations, do not favour a common enforcement approach at the EU level. They believe that self-regulation is the most appropriate mean to address UTPs.

Most retailers take the view that self-regulation at EU level is the most proportionate and promising way forward.

Since these respondents do not consider the existence of different national frameworks to have a negative impact, they see no need for a common EU approach to enforcement. They also state that enforcement at EU level would require specifically defined rules or laws at EU level as a basis for enforcement. Adding another layer of legislation without evidence for its need or benefits would be costly to both businesses and consumers.

However, one response from a retailer suggested that trading conditions could be improved in case of an EU action. Another retailer stated that, in principle, an EU-wide framework would be beneficial as long as it respected contractual freedom. Finally, one retailer said there was a need for a maximum harmonization EU instrument strictly limiting the parties benefitting from measures against UTPs to SMEs.

There was no consensus on this question between respondents from other categories.

One academic research group evoked serious doubts regarding the competence of EU institutions to implement and enforce a regulation on UTPs, in particular in light of the subsidiarity and proportionality principles.

Another academic response suggested that a Regulation rather than a Directive would be more effective in creating a level playing field and a Single Market. Finally, a response suggested that common EU approach would effectively address the issue of UTPs and would also be justified from a subsidiary point of view.

Trade unions responded that the issue of UTPs cannot be dealt with at a national level and with voluntary guidelines only and that regulatory action at the EU level would be the best way to address the severe consequences of UTPs.

Question 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?

The responses to this question varied according to the category of the respondent, with a majority of suppliers being in favour of enforcement bodies with investigative powers, while almost all the retailers being against establishment of such bodies.

A majority of responding suppliers consider that effective enforcement is crucial to ensure the success of any regulation addressing UTPs. The powers specifically mentioned in question 18 (i.e. ex officio actions, sanctions and the possibility to accept anonymous or confidential complaints) are considered essential by many of these respondents. Some suppliers also

propose that enforcement bodies should have the power to issue interpretative guidelines, settle and arbitrate bilateral disputes, publish reports and recommendations, and, where necessary, refer cases to courts.

Given the likely limits on resources available to enforcement bodies, it was mentioned that ex officio investigations should be launched after a preliminary assessment only and that enforcement should focus on UTPs applied toward market players in a situation of economic dependency.

In line with their views on EU action, a minority of responding suppliers, including some large associations, recommends that the Voluntary Initiative should be given a chance to prove itself before envisioning strengthened enforcement. Some suppliers pointed to the success of the national self-regulation mechanism in Belgium as a possible model, pointing to the differences between mediation and sanctions-based approaches. One response from a Belgian supplier, however, did acknowledge that granting ex officio investigative powers to a third-party enforcement body could improve compliance with the self-regulatory framework. More generally, a number of suppliers argue that the Voluntary Initiative at EU level should be strengthened by external and independent enforcement bodies.

Almost all retailers prefer to address UTPs through the Voluntary Initiative and hence do not see a need for public enforcement powers. They see no compelling reason to grant investigative powers to enforcement bodies, and some of them argue that there is actually no legal basis for granting such powers at EU level. These retailers underline that the existing regulatory frameworks at national level are fully sufficient to address the problem.

Retailers also had severe objections against confidential complaints, including:

- significant costs could be incurred on the basis of unsubstantiated complaints, impacting both business competitiveness and consumer end prices;
- an undermining of the accused party's right of defence; and
- a resulting climate of suspicion, which would lead to deteriorating relations between commercial partners and thus put the success of the Voluntary Initiative at risk.

One retailer response recognised that ex-officio investigatory powers, if limited to relationships with SMEs, would be helpful. Another retailer stated that it would be preferable to separate the powers of investigations and sanctions.

Responses from public authorities vary widely. Most national competition authorities shared a cautious attitude towards strengthened enforcements, stressing that many competition authorities already have the power to implement the remedies proposed. Other authorities were split and either argued against additional rules or emphasised the need for enforcement authorities with strong powers. It was underlined that, in any case, possible provisions at EU level should be sufficiently flexible to allow for the incorporation of existing national enforcement bodies and structures. Single points of contact were proposed for directing complaints to the relevant bodies. The possible misuse of confidential complaints should also be addressed. It was generally underlined that any intervention at EU level must be clearly justified.

Academics were divided as to whether an administrative enforcement body should be granted powers as those suggested in the question. It was argued that the anonymity of complainants was incompatible, as a matter of principle, with the power to impose sanctions. Furthermore only courts that can guarantee the principle of a fair trial should be able to impose sanctions. The need to improve the cooperation between national authorities was also underlined.

Responses from other categories were also rather diverse. A consumer association and a trade union were strongly in favour of establishing enforcement bodies with the powers mentioned in the question.

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

Responses from retailers to this question can be categorized in three groups of rather similar size. The first group strongly opposes any listing of UTPs, because they generally disagree with the line of the Green Paper or because they think that such practices should always be analysed on a case-by-case basis. A second group has the opinion that only a list of good practices can be established and that this is achieved by the voluntary mechanism. The third category of retailers generally agrees with the Commission's list of UTP categories in the Green Paper, and some add other examples. In a few responses, retailers indicate that UTPs are mostly applied by suppliers against retailers.

Responding suppliers generally agree with the UTP categories indicated in the Green Paper and confirm that they include the most common UTPs in business relationships. Retroactive unilateral changes in contracts and unjustified shifts of risk (e.g. for stolen or unsold goods) are mentioned as the most prominent UTPs. Many suppliers also agree with the other types of UTPs in the Green Paper sometimes including additional examples: unfair payment terms, disproportionate penalties, fees to access shelves, misuse of confidential information leading to the development of copy-cat private labels, blind auctions, selling below cost and threats of delisting are some of the UTPs mentioned. Some suppliers refer to the European Parliament Resolution of 19 January 2012 on the imbalances in the food supply chain which includes more examples of UTPs.

Some suppliers deny that the territorial supply constraints constitute UTPs. While such constraints are criticised by a number of responding retailers, many of these retailers agree that they do not necessarily constitute unfair trading practices, but should be addressed as they seriously hinder the development of the Single Market.

Member States authorities are generally supportive of the Green Paper's list. Around half of the authorities mention other practices (with a significant overlap with the additional UTPs raised by suppliers).

The remaining stakeholder categories have very diverse opinions. Many of the respondents generally agree with the list but propose other practices to be added. Some say that such a list should never be considered exhaustive. Some others support the view that all possibly unfair practices should be assessed case by case.

Question 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?

Creating a list of unfair practices is supported by the majority of suppliers responding to this question, while only very few retailers are supporting such a list. The main reason of the retailers against the concept of a list is their firm belief that UTPs can only be determined on the basis of a case-by-case analysis as individual practices could be unfair in some cases while being fair and agreed between trading parties in others. Retailers also fear increased legal uncertainty due to different interpretations of UTPs defined in a list. Instead of a list of UTPs, retailers and other opponents of a list support a general definition and the adoption of

principles of good practices. Some responses from the academic sector refer to concrete negative experiences with lists of UTPs. According to them, a dangerous consequence is that such lists can be easily circumvented. Another negative effect would be that some contractual clauses, applied by the parties in agreement under normal circumstances were prohibited. Creating a black list of practices that are per se prohibited in isolation regardless of other possibly compensating contract terms would be the most problematic for retailers.

Many stakeholders emphasise that a list of UTPs should never be considered exhaustive. To overcome this difficulty, regularly updating and/or complementing the list with general provisions is necessary. Making the list only indicative is also mentioned as a solution. According to some responses, a comprehensive and robust method would be to adopt different lists (black and white, negative and positive) as well as a general definition of UTPs. Providing effective enforcement on the basis of a possible list is mentioned by many suppliers as essential.

Question 21 - For each of the UTPs and corresponding possible fair practices identified above, please ... :

[Ambiguous Contract Terms

Lack of Written Contracts

Retroactive Contract Changes

Unfair Transfer of Commercial Risk

Unfair Use of Information

Unfair Termination of a Commercial Relationship

Territorial Supply Constraints]

a) Indicate whether or not you agree with the analysis of the Commission. If applicable, provide additional information.

Majority of suppliers agree with the Commission's analysis on the different UTPs. Some retailers believe that the analysis does not cover some of the most common UTPs, in particular those that are applied by suppliers. Several public authorities agree with the analysis of the Green Paper, although not all of them think that the analysis covers all possible practices. It is mentioned that the overregulation should be avoided

b) Explain whether the UTP is relevant for the sector in which you are active.

Majority of suppliers consider that all mentioned UTPs are relevant for their sector. A slight majority of the few responding retailers confirm that UTPs exist in their sector. Some public authorities consider the listed UTPs to be relevant in the food and non-food sector.

c) Explain if the corresponding possible fair practice could be applied across the board in different sectors?

Most suppliers, including those outside the food sector, believe that the corresponding fair practice could be applied across the board in different sectors. A few suppliers consider that it could be applied only in the food sector. The responding retailers are equally divided between the affirmative and dissenting opinions.

d) Explain if the UTP should be prohibited per se or if its assessment should be made on a case by case basis.

Most suppliers believe that UTPs should be prohibited per se; a few of them consider a case by case analysis necessary. Some suppliers – and some other categories' respondents – propose to adopt a black list and a grey list in order to differentiate the UTPs to be always considered forbidden and those to be evaluated case by case. Majority of retailers believe that UTPs should always be assessed on a case by case basis. Most of the responding public authorities consider that the assessment of UTPs should be made on a case by case basis. A few others believe that UTPs should be prohibited per se or with the possibility of individual assessments by the competent authority. A tailored approach for different types of UTPs is also proposed by some respondents.

Question 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?

Positions on Territorial Supply Constraints (TSCs) vary among different categories of stakeholders. Retailers consider TSCs as justifiable only in limited cases whereas suppliers consider it a normal business practice. Public authorities and other stakeholders mention possible grounds justifying TSCs.

The majority of suppliers including those from sectors other than food consider TSCs not to fall under the definition of 'unfair'. They explain that TSCs are addressed under competition law. Some suppliers highlight that market segmentation is economically defensible. While some agree that a common set of EU contract rules on TSCs could be beneficial, they consider this mainly a Member State competence on the basis of the subsidiarity principle. Some suppliers provide specific reasons justifying TSCs: potential fiscal fraud; different levels of national taxes; different commercial and contractual practices; currency risk; different productivity levels/cost levels; and dedicated service and distribution systems. TSCs are considered as legitimate practices to match supply and demand or take into account differences in the cost of logistics. TSCs are considered to contribute to efficient investments and advertising and to allow optimal price segmentation in the case of new market entries.

Retailers consider that TSCs are a serious problem hampering the Single Market. In general, they consider TSCs only justifiable in specific cases such as strictly necessary product-, safety- or labelling requirements. However, they add that in many instances such requirements are practically identical (e.g. product specifications) so that a justification would only apply to a small percentage of the goods concerned. Some retailers do not see any reasons to justify TSCs.

Responding academics say that the only ground for prohibiting TSCs is when they lead to sales below cost in one market through cross-subsidisation from other markets. However, other academics consider that the issue of TSCs should be addressed at Member State level through competition law.

Public authorities quote a number of grounds that could justify TSCs, including: (1) to secure local supply, (2) to avoid parasitism where one distributor would benefit from the marketing efforts of other distributors, (3) to protect investments of distributors for entering new markets, (4) to create economies of scale in distribution based on a limited number of distributors with a view to lowering consumer prices and (5) to impose quality standards on

distributors, for example with a view to avoiding public health issues. Some authorities explain that TSCs are covered by the European regulation and guidelines on vertical constraints.

Other stakeholders also explain that TSCs are generally subject to competition law. Some justifications for TSCs mentioned are differences in labelling rules and in case of the supply of fresh fruit and vegetables. One stakeholder agrees that the proximity of distribution points could be a valid argument for TSCs but says suppliers often undermine this point by obliging retailers to purchase from a distributor other than the nearest (e.g. in Luxembourg, see part b).

b) What would be the advantages and disadvantages of prohibiting territorial supply constraints (as described above)? What practical effects would such prohibition have on how companies set up their distribution systems in Europe?

All retailers generally see the same benefits in prohibiting TSCs, namely a strengthening of the internal market through an increase of cross-border trade, resulting in increased competition and thus lower consumer prices. A prohibition of TSCs would also allow retailers to realise economies of scale through central purchasing.

In particular, the problems retailers face in small Member States, such as Luxembourg, where not all suppliers have a direct presence but determine from which intermediaries retailers have to purchase their goods is highlighted by an association representing retailers. In an example, retailers in Luxembourg are obliged to purchase from Belgian distributors even though a) French and German distributors are geographically closer and b) considerably lower retail prices in Germany make it difficult for retailers in Luxembourg to compete with German retailers in border regions. The respondent also reports cases where goods purchased from a Belgian intermediary were delivered directly from France but at the higher Belgian prices. Given the size of Luxembourg, cross-border competition is fierce. Prohibiting TSCs would thus level the playing field between retailers from Luxembourg and Germany in the view of the respondent.

Some suppliers consider that prohibiting TSCs could result in lower consumer prices through increased product availability and increased competition but warn that regional price differences will remain. They explain that local producers could suffer from a prohibition of TSCs and poor regions could be faced with higher unemployment. Other risks would be the creation of oligopolies, increased transport costs and potential supply problems if demand would exceed supply.

The positions of public authorities are diverse. Some authorities support a prohibition of TSCs as this would improve the functioning of the internal market. Other public authorities oppose prohibiting TSCs as this would compromise contractual freedom.

Other stakeholders mention different advantages and disadvantages of prohibiting TSCs. Some refer to lower prices as a consequence of prohibiting TSCs but also see the risk of lower product quality.

Question 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?

Overall, stakeholders for the most part believe that the Green Paper analysis of UTPs is appropriate but indicate some further issues to be explored in addition to those already

examined. Retailers were more critical about the Green Paper, in particular in what they perceive as an unjustified negative bias towards their sector.

Many suppliers believe that some issues have not been exhaustively treated in the Green Paper because of the great complexity of the matter. An aspect particularly relevant concerns competition policy. A possible remedy to UTPs mentioned would be a review of competition rules. In particular, stakeholders believe that there is a need to understand how large companies, supermarkets and multinationals are able to become powerful enough to impose UTPs.

The subject of private labels is also mentioned. Suppliers believe that the playing field between branded goods and private label products is not level because shelf access is subject to significantly different costs. In addition, some suppliers say that product imports from non-EU countries should be studied in depth.

Retailers say that the analysis in the Green Paper is not sufficiently substantiated. They complain about the lack of factual data showing the negative impact of UTPs. In their view the Green Paper is mostly based on subjective perceptions. It was also noted that collusion at horizontal level has been more frequently discovered between suppliers than between retailers. The positive aspects of the relationship between suppliers and retailers should also have been properly reflected in the Green Paper, for example in the case of new product development and productivity improvements. Some respondents stressed that high switching costs may not only apply to suppliers but also to retailers.

Some respondents stressed that the term “retail food and non-food supply chain” was not precisely defined. In addition, the issue of UTPs should be examined from a consumer point of view. Certain practices which, at first sight, may seem unfair may lead to significant benefits to consumers, including lower end prices, in the view of these respondents. Some stakeholders called on the Commission to analyse the functioning of supply chains in a holistic manner and to identify and address the key drivers for the competitiveness of supply chains. Specific policy measures in support of SME retailers should be envisioned in the view of some respondents.

A public authority believes that various forms of contracts should be allowed to accommodate specific product characteristics (e.g. perishable goods subject to weight loss).

Other stakeholders also indicate some issues that should have been examined in the Green Paper. Some say that UTPs applied by suppliers have not been sufficiently examined. Others missed an analysis of the social costs of UTPs and a comparison with the costs of a possible regulatory intervention (such as the cost of operating a central enforcement body).

Some respondents say that the Green Paper should have looked at supporting measures for SMEs. They believe that competition policy should allow small companies to cooperate more freely.

4. ANNEX: SUMMARY OF THE VIEWS OF THE RETAILERS ACTIVE IN IN THE CAR SECTOR RESPONDING TO THE GREEN PAPER

34 retailers active in the car sector responded to the Green Paper, including 15 similar replies from Austrian car dealers. Additional responses were submitted by lawyers representing car retailers. According to retailers in the car sector, the statement in the Green Paper regarding the preference of the automotive sector for self-regulation as means to address UTPs is not correct. Even though dealer representatives have endeavoured to negotiate a meaningful code of conduct with manufacturers, the latter have refused to participate in negotiations (even after being invited to do so by the Commission). Retailers in the car sector furthermore consider that the ACEA (European Automobile Manufacturers' Association) code sometimes referred to by manufacturers as the industry's code of practice was never the product of discussion or agreement. It was presented unilaterally by certain manufacturers and is entirely inadequate as a means of addressing UTPs. As a result, self-regulation is not present in the automotive sector.

Retailers in the car sector consider that UTPs are not recognised in most Member States or only to a limited extent through vague concepts not offering a clear definition. Even in Member States where legislation exists this is rather for B2C than B2B relations.

The vast majority of retailers in the car sector consider that all phases should be covered by a UTP regime: pre-contract, contract and post-contract phase. It is only when there is a dispute that contractual requirements/conditions become relevant.

Retailers in the car sector consider UTPs to occur on each stage of the retail supply chain but point out that in the car industry UTPs are imposed by the manufacturers as opposed to other sectors.

For retailers in the car sector, the 'fear factor' is the principle reason why they would not sue the car manufacturers over UTPs. Their long term commercial relationship with their suppliers is characterised by significant relationship-specific investments by retailers resulting in a fear of repercussions (including contract termination) which thus dissuade them from pursuing complaints. As a result of UTPs, retailers in the car sector will not sell cross-border against the wishes of the car manufacturers out of fear for reprisals.

Retailers in the car sector quote the summary report of the Commission's Consultation on Unfair Business to Business Commercial Practices (2011) which indicated the car sector as the sector where the highest proportion of respondents have experienced unfair practices (87% of respondents from the automotive retail sector). UTPs imposed by car manufacturers are according to retailers in the car sector still wide-spread and include e.g. unilateral post-contract changes to the contract such as change of sales targets for cars and parts, change of sales prices for cars already sold to end users, change of range of models a dealer can sell and unilateral decisions on quality standards by car manufacturers. Contracts include conditions such suppliers having the right to fix and change unilaterally the dealers profit margins during the contract (sometimes on monthly basis) and prohibition for retailers to have own web-platforms with different offers than those specified by the supplier.

Retailers in the car industry consider UTPs to have a negative effect on *effective* investments. They are reluctant to make investments as there is a low return on the investment given the lack of profitability as a result of low margins and bonuses. In addition, the uncertainty created through the (potential) use of UTPs adds to this reluctance. However, retailers in the

car sector are sometimes forced by car manufacturers to make investments which do not meet their needs or requirements but where failure to do so can result in a cancellation of the contract by the car manufacturer. According to car retailers, consumers are also affected by UTPs in the car retail sector: they pay higher prices as dealers cannot compete on prices, they are faced with a smaller range of products as dealers are sometimes faced with certain models not being offered via retailers and they receive reduced customer service from the retailers due to lower margins.

Retailers in the car industry do not consider national regulatory systems or self-regulatory frameworks to address UTPs sufficiently. Only a limited number of Member States have legislation in place, but e.g. in Belgium this is limited to protecting retailers in the car sector against cancellation of their contract but not against UTPs during the contract. In the UK, the voluntary code is considered insufficient by retailers in the car sector. Retailers in the car sector explain that the creation of a voluntary code at EU level is blocked by car manufacturers who do not wish to enter in negotiations.

Retailers in the car sector consider the lack of an UTP framework a problem as action against UTPs is very seldom due to the 'fear factor' as well as due to the high financial costs and long time span linked to such action.

Retailers in the car industry consider the EU level the only level where action can be taken as it is an EU wide issue. They consider that a UTP regulation would not block contractual freedom as it would still be possible to make a "bad bargain" if one wishes to do so or when one makes an inadequate risk-award assessment. UTP legislation would only restrain stronger parties from exploiting a power imbalance. However, any UTP regulation should not undermine the ability of the stronger parties to protect their brand, improve standards, bring under-performing trading relationships to an end or respond to market changes quickly. Retailers in the car sector do not consider these to be mutually exclusive objectives.

It is not clear whether different legal situations in Member States have an impact on cross-border trade.

Retailers in the car sector consider EU enforcement to contribute to increasing competition in the sector, make regulation more predictable and to make contract terms more straightforward and transparent. Retailers in the car sector consider active enforcement a requirement for an effective UTP regime as weaker contract parties (often SMEs) are usually not in a position to go to court. The enforcement system should protect the complainant's identity as this would reduce the 'fear factor' and encourage businesses to come forward. Commercial protection against retaliation should also be ensured. Sanctions should include penalties, direct redress (e.g. compensation payable by the offender) for the injured parties and publication of the decisions of the authority.

Car dealers consider the list of UTPs in the Green Paper as covering a large number of key UTPs but do not consider the list to be exhaustive. UTPs not covered are (specifically for the car sector) e.g. constraints place on the car dealer's right to realise his investment and sell his business especially when significant investments were required by the car manufacturer, restriction to engage in other commercial activities which do not undermine the main contractual activity and the obligation to purchase products for which the dealer has no clients. Retailers in the car sector consider a list of prohibited UTPs as a useful addition to regulatory action but not sufficient in itself. It has to be accompanied at least by an effects-based description of what practices would amount to UTPs to avoid circumvention.

Most retailers in the car sector consider the UTPs identified in the Green Paper as relevant for their sector and consider the application of fair practices applicable across different sectors. Two practices are considered not applicable to the car sector by almost all retailers in the car sector: written contracts and territorial supply constraints.

Retailers in the car sector support fair practices to be embodied in a framework at EU level but only if they would clarify rights and obligations of the different parties to avoid circumvention. It is also of key importance that the described fair practices would be enforceable. Almost all retailers in the car sector support a legally binding solution.