



**ASSEMBLY OF THE REPUBLIC
EUROPEAN AFFAIRS COMMITTEE**

OPINION

COM(2013)37

**GREEN PAPER ON UNFAIR TRADING PRACTICES IN THE BUSINESS-TO-
BUSINESS FOOD AND NON-FOOD SUPPLY CHAIN IN EUROPE**



ASSEMBLY OF THE REPUBLIC

EUROPEAN AFFAIRS COMMITTEE

PART I – INTRODUCTORY NOTE

Pursuant to Article 7 of Law No 43/2006 of 25 August 2006, as amended by Law No 21/2012 of 17 May 2012 on the monitoring, examination and issuing of opinions by the Assembly of the Portuguese Republic in the context of the process of EU integration and in accordance with the arrangements for the scrutiny of EU Initiatives approved on 20 January 2010, the European Affairs Committee received the GREEN PAPER ON UNFAIR TRADING PRACTICES IN THE BUSINESS-TO-BUSINESS FOOD AND NON-FOOD SUPPLY CHAIN IN EUROPE [COM(2013)37].

PART II - GROUNDS

1. In the framework of the European Retail Action Plan¹ the Commission proposed the creation of a permanent group on retail competitiveness – involving the Member States and all of the interested parties, particularly SMEs – to help ensure that this sector is systematically taken into account when political priorities are being defined by raising awareness of the problems and concerns facing the sector. This Group will help develop further specific objectives for the areas identified, monitor progress detected, prepare recommendations to ensure full implementation of the actions included in this Plan and, where necessary, advise the Commission on new actions that could be proposed.

2. One of the main actions is the Green Paper in question, which opens a consultation on unfair trading practices in the business-to-business food and non-food supply chain. The aim of the consultation is to enable the Commission to assess the extent of unfair trading practices and gather evidence of its effects on the economy and on cross-border activity. It will also make it possible to analyse the effectiveness of self-regulatory and legislative frameworks put in place to address those practices at national level while looking into the question of whether these divergent approaches may lead to fragmentation of the Single Market.

3. The Green Paper focuses on unfair trading practices (UTPs) and the fairness of business-to-business (B2B) relationships in the food and non-food supply chain, with implications for the distribution of goods essentially destined for the general public for personal or household consumption or utilisation.

4. In this regard, it should be noted that contractual freedom is a cornerstone of B2B relationships in a market economy. However, UTPs are present in cases where one of the contracting parties has a stronger bargaining position and may unilaterally impose terms on the weaker counterpart - thus excessively shaping the business

¹ COM(2013)36.

relationship to favour exclusively its own economic interests, resulting in an imbalance to the advantage of the stronger party. Retailers as well as suppliers can be the victims of UTPs and they can occur at any stage of the B2B retail supply chain.

5. UTPs have been the subject of numerous studies in several Member States, including Portugal, and a number of national authorities have confirmed the existence of UTPs in a range of sectors, particularly the food sector. This problem has become a political issue of ever-increasing significance for the public authorities. As a consequence, many Member States have taken actions to handle the issue of UTPs but they have done so in different ways. This has led to a high degree of divergence in terms of the level, nature and legal form of the protection afforded against UTPs at national level. This situation, namely the variety of the legal approaches taken by the Member States, could result in significant fragmentation of the Single Market.

6. At EU level, although there are various inter-sectoral instruments covering disputes in general — and thus disputes relating to UTPs² — there is currently no mechanism specifically for use in dealing with UTPs on a Europe-wide scale.

7. In this connection, and taking the view that practices of this type are harmful for the European economy, the Commission launched this Green Paper to promote public consultation of the interested parties in order to gather information and, where appropriate, identify possible measures to adopt to address this problem. In sum, the aim is thus to improve the functioning of the supply chain, contributing to greater economic integration and making good the significant Single Market deficiencies caused by UTPs and the fragmentation of the national legal instruments aimed at combating them. This will contribute to achieving the objectives of the 2020 strategy, namely to render the European economy smarter, more sustainable and more inclusive.

8. In view of its subject-matter, the proposal was sent to the Committee for Economic Affairs and Public Works, which examined it and has approved the report annexed to this Opinion, which forms an integral part thereof.

9. Lastly, in view of the significance of the matter under discussion, the European Affairs Committee will monitor the future legislative process resulting from the consultation opened by this Green Paper.

PART III – OPINION

² Council Directive 2002/8/EC on legal aid (creating a framework for obtaining legal aid in cross-border disputes); Directive 2008/52 on mediation (ensuring the smooth coordination of mediation and court proceedings); Regulation 44/2001 on jurisdiction of the courts and recognition and enforcement of judgments in civil and commercial matters (determining which courts in the EU have jurisdiction to deal with a given dispute and how judgments given in one Member State shall be recognised and enforced in other Member States – note that this Regulation was recast by Regulation 1215/2012 which will abolish the entire intermediary procedure for recognition and enforcement); Regulations 1896/2006 and 861/2007 (establishing uniform European court procedures for respectively uncontested and small claims), as well as the Regulations 593/2008 and 864/2008 mentioned above, creating legal certainty as to the outcome of disputes in Europe.

In the light of the information set out above and the report of the relevant committee, the European Affairs Committee's opinion is as follows:

1. The principle of subsidiarity does not apply to this initiative in so far as it is non-legislative;
2. This concludes the scrutiny of this initiative. However, given the significance of the matter under discussion, the European Affairs Committee will continue to monitor the legislative process associated with this initiative, primarily by exchanging information with the Government.

Palácio de São Bento, 30 April 2013

The Rapporteur

Antonio Serrano

The Chair of the Committee

Paulo Mota Pinto



ASSEMBLY OF THE REPUBLIC

EUROPEAN AFFAIRS COMMITTEE

PART IV - ANNEX

Report issued by the Committee for Economic Affairs and Public Works

ASSEMBLY OF THE PORTUGUESE REPUBLIC

Committee for Economic Affairs and Public Works

Opinion of the Committee for Economic Affairs and Public Works

GREEN PAPER ON UNFAIR TRADING PRACTICES IN THE BUSINESS-TO-BUSINESS FOOD AND NON-FOOD SUPPLY CHAIN IN EUROPE

COM(2013)37

Author: Nuno Serra

ASSEMBLY OF THE PORTUGUESE REPUBLIC

Committee for Economic Affairs and Public Works

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ASSEMBLY OF THE PORTUGUESE REPUBLIC

Committee for Economic Affairs and Public Works

PART I – INTRODUCTORY NOTE

Pursuant to Article 7 of Law No 43/2006 of 25 August 2006 on the monitoring, examination and issuing of opinions by the Assembly of the Portuguese Republic in the context of the process of EU integration, the initiative GREEN PAPER ON UNFAIR TRADING PRACTICES IN THE BUSINESS-TO-BUSINESS FOOD AND NON-FOOD SUPPLY CHAIN IN EUROPE [COM (2013)37] was, in view of its subject matter, sent to the Committee for Economic Affairs and Public Works and distributed on 1 March 2013 so that the Committee could examine the document and issue this Opinion.

PART II - GROUNDS

1. General

This initiative centres on the B2B food and non-food supply chain, which is the chain of transactions between undertakings or between undertakings and public authorities that leads to the delivery of goods essentially destined for the general public for personal or household consumption or utilisation. The supply chain is composed of a number of actors (producers/processors/distributors) which all have an impact on the final price paid by the consumer. This impact varies according to the food and non-food sub-sector concerned. A well-functioning B2B food and non-food supply chain is the key to achieving the maximum economic potential of those sectors.

The Green Paper contains a preliminary assessment and seeks further evidence and views relating to the possible issues stemming from unfair trading practices (UTPs) in relationships along the business to business (B2B) food and non-food supply chain and related to the issue of efficient enforcement of existing national rules aimed at combating UTPs, as well as the resulting impact on the Single Market. The objective of the Green Paper is to launch a consultation with stakeholders on this analysis, to gather information and, where appropriate, to identify the possible measures to adopt in response to this issue.

The consultation stemming from the Green Paper takes the form of 25 questions reflecting the chapters into which the document is divided, as follows:

“The Concept of Unfair Trading Practices

- 1) Do you agree with the above definition of UTPs?
- 2) Is the concept of UTPs recognised in your Member State? If yes, please explain how.
- 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?

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

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

Potential Effects of Unfair Trading Practices

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?

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

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.

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

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.

Protection against Unfair Trading Practices at EU Level

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

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

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?

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

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 your response.

Enforcement Mechanisms at EU Level

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 to the extent possible.

17) In case of such negative impacts to what extent should a common EU approach

to enforcement address the issue?

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?

Common Characteristics of UTPs

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

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?

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

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

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.

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? Please explain your reasons.

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?

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

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 final question posed by the Green Paper is intended to enable any entity from any country to complement its contribution with suggestions for improvements to the Europe-wide consultation process.

25) This Green Paper addresses UTPs and the 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?"

2. Relevant issues

Given the significance of the initiative, the Committee on Economic Affairs and Public Works decided to examine the GREEN PAPER ON UNFAIR TRADING PRACTICES IN THE BUSINESS-TO-BUSINESS FOOD AND NON-FOOD SUPPLY CHAIN IN EUROPE and organise a public hearing on the topic, coordinated by the *Grupo de Trabalho da Grande Distribuição e Produção Nacional* (working group on the national retailing, distribution and production industry).

As this is a matter of particular interest to the Committee for Economic Affairs and Public Works, which even created the working group on the national retailing, distribution and production industry, the Committee expressed an interest in an examination of this initiative that could bring together the parties interested in the matters under discussion so that the Opinion of the Assembly of the Portuguese Republic could reflect their concerns in this respect and thus prove to be an important contribution to the future European legislative process.

Accordingly, the working group on the national retailing, distribution and production industry arranged to send the Committee for Economic Affairs and Public Works the contribution from a number of bodies involved in both national production and trade, in the form of their responses to the 25 questions posed in the cited Green Paper. It also arranged for them to attend the public hearing.

The following bodies were present at the public hearing, held on 25 March 2013 in the Senate room of the Assembly of the Portuguese Republic:

- *Confederação dos Agricultores de Portugal* (CAP, Confederation of Portuguese Farmers);
- *Confederação Nacional de Agricultura* (CNA, Portuguese Agriculture Confederation);
- *Confederação Nacional das Cooperativas Agrícolas e do crédito Agrícola de Portugal*, CCRL (Portuguese National Confederation of Agricultural Cooperatives and Agricultural Credit, CONFAGRI);
- *Associação dos Armadores das Pescas Industriais* (ADAPI, Association of Industrial Fishing Vessel Operators);
- *Federação das Industrias Portuguesas Agro-Alimentares* (FIPA, Federation of Portuguese Agrifood Industries);
- *Associação Portuguesa dos Industriais de Aguas Minerais Naturais e de Nascente* (APIAM, Portuguese Association of Mineral and Spring Water Industries);
- *Associação Portuguesa das Bebidas Refrescantes não Alcoólicas* (PROBEB, Portuguese Soft Drinks Association);
- *Associação Portuguesa de Aquacultores* (APA, Portuguese Aquaculture Association);

- *Instituto Nacional de Estatística* (INE, Portuguese National Statistics Institute);
- *Confederação do Comércio e Serviços de Portugal* (CCP, Portuguese Trade and Services Confederation).
- *Associação Portuguesa de Empresas de Produtos de Marca* (CENTROMARCA, the Portuguese Association of Branded Goods Companies);
- The Directorate-General for Economic Activities;
- The Planning and Policies Office of the Ministry of Agriculture, the Sea, the Environment and Land Use Planning.

At this public hearing, all of the entities present had the opportunity to put forward their opinions, make suggestions and observations, and present in public their written contribution, as annexed to this report. The contributions made during the hearing can be consulted via the following link:

<http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalleEvento.aspx?BID=94870>

3. Principle of Subsidiarity

Not applicable.

4. Principle of proportionality

Not applicable.

PART III - CONCLUSIONS

In view of the foregoing, the Committee on Economic Affairs and Public Works would conclude as follows:

1. As this initiative is not a legislative document (*Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe*) there is no need to evaluate its compliance with the principle of subsidiarity.
2. Given the subject-matter, this initiative should be further monitored, and particularly the decisions and proposals drawn up by the European Commission in the wake of the public consultation on the Green Paper under discussion.
3. The Committee for Economic Affairs and Public Works has hereby concluded the scrutiny of this initiative and hereby submits this opinion, in accordance with Law No 43/2006 of 25 August 2006, to the European Affairs Committee.

PART IV - ANNEXES

Written contributions from the following bodies are annexed to this Opinion:

APED;

APIAM;

PROBEB;

DECO;

CNA;

CENTROMARCA.

The public hearing that took place on 25 March 2013 in the offices of the Committee on Economic Affairs and Public Works is also available via the following link:

<http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheEvento.aspx?BID=94870>

Palácio de São Bento, 10 April 2013

The Rapporteur

Nuno Serra

The Chair of the Committee

Luís Campos Ferreira