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(Text with EEA relevance)

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GREEN PAPER

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

(Text with EEA relevance)

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1. INTRODUCTION

The business-to-business (B2B) supply chain is an important element of the European economy. It channels products and services from suppliers to consumers and has a direct impact on economic growth and employment. Retail services represent 4.3% of the EU's GDP, 18.7 million (or 8.3%) of the EU's employees and 17% of the EU's SMEs¹. They ensure the distribution to consumers of goods and services stemming from other economic sectors, such as agriculture, manufacturing, logistics and IT services.

This Green Paper addresses 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 destined mainly to 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 key to achieve the maximum economic potential of those sectors.

Over the last two decades, the B2B food and non-food supply chain has changed considerably for economic, social and demographic reasons. Increased concentration and vertical integration across the EU have led to structural changes in the B2B food and non-food supply chain. Various international retailer buying alliances have emerged seeking economies of scale in sourcing through greater buying power. The expansion of retailers' own brands has turned some merchants into direct competitors of their suppliers. A small number of relatively strong players in the supply chain appear to have considerable negotiating power.

These factors may, in some cases, lead to unfair trading practices (UTPs) in relationships along the B2B food and non-food supply chain. UTPs are practices that grossly deviate from good commercial conduct and are contrary to good faith and fair dealing. UTPs are typically imposed in a situation of imbalance by a stronger party on a weaker one and can exist from any side of the B2B relationship and at any stage in the supply chain.

At EU level, UTPs were first discussed in the EU food sector in 2009 when consumer prices rose against the background of the agricultural price spikes. The lack of market transparency, inequalities in bargaining power and anti-competitive practices were reported to lead to market distortions with potentially negative effects on the competitiveness of the food supply chain as a whole. This triggered the need to analyse the functioning of the food supply chain. The Commission considered that consumers were not offered sufficiently fair deals in terms of product range and prices and that intermediaries / food processing industrials / retailers squeezed the margins of agricultural producers². Indeed, the performance of the food supply chain affects EU citizens' daily lives, given that approximately 14% of their household expenditure is spent on food³, as well as the functioning of economic sectors such as

¹ Eurostat, 2010.

² *A better functioning food supply chain in Europe*, (COM(2009) 591, 28 October 2009)

³ Eurostat, 2012.

agriculture, food processing industry and retailers. Moreover, real food prices increased by over 3% in the year 2008⁴ alone, leading to a drop in purchasing power and consumer confidence, becoming one of the main drivers of overall price inflation. As a response, an Expert Platform on B2B Contractual Practices within the High Level Forum for a Better Functioning Food Supply Chain was set up in 2010 to work on providing a solution to this issue. In 2011, the Expert Platform has delivered a set of principles and examples of fair and unfair practices in vertical relations in the food supply chain signed by eleven organisations representing different interests across the European food supply chain⁵. In 2012, the Platform worked on an enforcement mechanism. Despite the common effort, the proposed framework failed to identify effective remedies for non-compliance and did not gain the support of representatives from across the entire supply chain by the time of the third meeting of the High Level Forum on 5 December 2012. However, eight of the eleven organisations have announced their intention to launch the implementation of the principles of fair practice on a voluntary basis in early 2013⁶. At the same time, work is on-going among all the stakeholders to find a compromise through this sector-specific approach. The Commission encourages all stakeholders to come to an agreement within the coming months. The Commission has also extended the duration of the High Level Forum mandate until 31 December 2014⁷ and will continue to monitor the specific developments in the food supply chain to follow up the achievements so far.

In parallel, the Commission will begin working on an impact assessment of the different options to address the issue of UTPs. The impact assessment will examine also to what extent this problem could be dealt with locally or whether an EU-level solution would be needed. This approach will preserve the achievements of the High Level Forum in the food sector while considering all possible solutions ranging from self-regulation to legislation. Based on this, the Commission will propose appropriate next steps in the second half of 2013.

UTPs have been the subject of a number of surveys and inquiries in several Member States⁸. A recent report by the European Competition Network (ECN) confirmed that a large number of National Competition Authorities identified the existence of UTPs⁹ as an issue in the food sector.

However, from a wider perspective, it is argued that UTPs may occur not only in the food sector but in other sectors as well. This Green Paper will help gathering information on this issue, which could be linked to a number of factors. Firstly, the evolution of the food and non-food retail sector towards a 'mixed' format, whereby the vast majority of retailers supply ranges of food, household goods and other products under the same management and under the same terms and conditions. Secondly, the fact that some of the largest manufacturers

⁴ Ibid.

⁵ AIM, CEJA, CELCAA, CLITRAVI, Copa Cogeca, ERRT, EuroCommerce, Euro Coop, FoodDrinkEurope, UEAPME and UGAL.

⁶ AIM, CELCAA, ERRT, EuroCommerce, Euro Coop, FoodDrinkEurope, UEAPME and UGAL.

⁷ Commission Decision of 19 December 2012 amending the Decision of 30 July 2010 as regards its applicability and the composition of the High Level Forum for a Better Functioning Food Supply Chain (2012/C 396/06), OJ C-396/17, 21.12.2012.

⁸ These include Bulgaria, the Czech Republic, Finland, France, Germany, Ireland, Italy, Lithuania, Poland, Portugal, Romania, Slovenia, Spain and the UK.

⁹ ECN Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector, May 2012, p. 116-120.

produce food as well as other types of goods such as detergents, cosmetics, hygiene products, etc. combined with the importance of some brands, this may also affect the supplier/retailer relationship. Practices were identified in a number of sectors, including furniture or textile¹⁰. In the clothing sector, a 2007 report on business relations in the EU clothing chain identified nine practices between manufacturers and retailers perceived as unfair. Those include, *inter alia*: automatic charge of retailer's promotional cost, charge backs, delayed payments, return of unsold goods, sudden termination of supply relationship and exploitation of innovative ideas embodied in the samples¹¹.

The Commission retail market monitoring exercise¹² mentioned the presence of UTPs in various retail sectors. The European Parliament has also acknowledged the need to go beyond the agro-food industry and urged the Commission to take action in this regard¹³. In the Single Market Act I¹⁴, the Commission expressed its intention to launch an initiative to combat UTPs in business relations. Moreover, a number of recent consultations with businesses have confirmed the existence of this issue¹⁵.

UTPs may have detrimental effects on the EU economy and for the B2B food and non-food supply chain in particular. Such practices may affect companies', including SMEs', capacity to invest and innovate. Moreover, the existence of fragmented national rules may constitute an additional obstacle to engaging in cross-border sourcing and distribution in the Single Market.

This Green Paper contains a preliminary assessment and seeks further evidence and views relating to the possible issues stemming from UTPs in relationships along the B2B food and non-food supply chain and related to the issue of efficient enforcement of existing national rules aimed at combatting 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 possible next steps in addressing this issue.

Improving the functioning of the supply chain would encourage greater economic integration and address significant Single Market deficiencies caused by UTPs and the fragmentation of the national rules aimed at combating them. This would contribute to the broader goal of the EU to become a smarter, more sustainable and more inclusive economy by 2020.

¹⁰ *Business relations in the EU clothing chain: from industry to retail and distribution*. Bocconi University. ESSEC Business School. Baker & McKenzie. 2007, p.124.

¹¹ *Business relations in the EU clothing chain: from industry to retail and distribution*, p.126.

¹² Retail market monitoring report 'Towards more efficient and fairer retail services in the internal market for 2020' (COM(2010) 355, 5 July 2010).

¹³ European Parliament Resolution on a more efficient and fairer retail market (2010/2109(INI)) 5 July 2011.

¹⁴ Single Market Act. *Twelve levers to boost growth and strengthen confidence "Working together to create new growth"* (COM(2011) 206, 13 April 2011).

¹⁵ Member States' survey on UTP; ECN Report on competition-law enforcement and market-monitoring activities by European competition authorities in the food sector, May 2012, p. 117); European Business Test Panel; Consultation on Directive 2006/114/EC concerning misleading and comparative advertising and on unfair commercial practices affecting businesses.

2. DEFINITION OF UNFAIR TRADING PRACTICES

2.1. The Concept of Unfair Trading Practices

Freedom of contract is a cornerstone of any B2B relationship in the market economy and parties should be able to design contracts that best suit their needs. This concerns especially UTPs in pre-contractual negotiations that are subsequently embedded in contract terms. In order to derive mutual benefits from this freedom to contract, parties must be in a position to actually negotiate contract terms. However, in some cases where one of the contracting parties has a stronger bargaining position, it may unilaterally impose terms on the weaker counterpart - thus excessively shaping the business relationship to favour exclusively its own economic interests. In particular, the contracting party may use significantly unbalanced terms and conditions and due to its bargaining power will not negotiate them individually. In such situations, the weaker party may not be in a position to reject such unilaterally imposed unfavourable conditions due to fear of not concluding the contract or even of being driven out of business. Such unequal bargaining positions can be due to various factors, e.g., a significant difference in the relative size/turnover of the parties, economic dependency or significant sunk costs already incurred by one of the parties (e.g., high upfront investments).

UTPs are typically imposed in a situation of imbalance by a stronger party on a weaker one - which is often not in a position to abandon the unfair relationship and switch to another business partner due to the costs implied by such change or to the lack of alternatives to the contractant. It is important to note that the situation of imbalance can exist from any side of the B2B relationship: retailers as well as suppliers can be the victims of UTPs and they can occur at any stage of the B2B retail supply chain. Such situations may arise, for instance, for agricultural producers, which often have a limited choice of business partners for the take-up of their production and which, due to the intrinsic characteristics of many goods, could be unable to store production for a longer period of time in order to obtain better buying terms.

Such practices include failure to provide sufficient information about contract terms, demanding payments for goods or services that are of no value to the contractant, unilateral or retroactive changes of contract terms, as well as payments for fictitious services, preventing contractants from sourcing from other Member States — leading to territorial partitioning of the Single Market.

UTPs can occur at any stage of the B2B relationship. They can be employed when negotiating a contract, can be part of the contract itself or can be imposed in the post-contractual phase (e.g., retro-active contractual changes).

After a contract is concluded, UTPs can merely consist in executing the unfair terms. However, even where the terms of a contract appear to be acceptable for both parties, potential issues may still emerge. Generally, contracts do not cover all aspects of the parties' behaviour in the phase of the execution of the contract or are so complex that the parties do not fully understand what the terms imply in practice. Moreover, parties might not have the same level of information about the transaction, which may lead to unfair conduct by the stronger party towards a weaker counterpart. In this regard, SMEs are generally in a weaker position compared to larger counterparts, as they may lack the specialist knowledge required to appreciate all the implications of the terms agreed.

In a market which functions optimally, the lack of trust between parties would result in switching to another business partner. High switching costs or the very lack of such a possibility concretely translates into a favourable bargaining position which may encourage the stronger party to behave unfairly.

The inability to switch to another business partner and to terminate the existing relationship is a key factor in the development of UTPs. In addition, the weaker party often fears that the commercial relationship could be terminated in the event of a complaint on its part. This ‘fear factor’ makes such complaints significantly less likely to occur and is therefore one of the most important issues to be examined when assessing the appropriateness of an enforcement mechanism. For instance, it seems that 87% of suppliers take no action beyond a discussion with their customer. Almost two thirds (65%) of these take no action due to fear of retaliation and 50% doubt the effectiveness of public remedies¹⁶. Recently, nearly all of the suppliers and producers invited to appear before the Irish Parliamentary Committee on supplier-retailer relationships in the Irish Grocery Market to discuss their links with retailers declined to do so¹⁷. In order to gather the relevant information, the Committee opted for direct contacts, on a confidential basis.

Questions:

- 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.*

2.2. Examples of Unfair Trading Practices

UTPs have been the subject of a number of surveys and inquiries which have often focused on the food sector.

The 2008 UK Competition Commission’s investigation of the supply of groceries in the UK¹⁸ identified 52 practices, 26 of which had ‘*the potential to create uncertainty for suppliers regarding their revenues or costs as a result of the transfer of excessive risks or unexpected costs to suppliers*’. These included retrospective price adjustments, retrospective financing of

¹⁶ Dedicated Research, AIM-CIAA Survey on Unfair Commercial Practices in Europe, March 2011, available at: <http://www.dlf.no/filestore/CIAAIMSurveyonUCP-Europe.pdf>

¹⁷ Parliamentary report on the Supplier-Retailer relationship in the Irish Grocery Market, Committee on Enterprise, Trade and Employment, March 2010, p. 19.

¹⁸ Competition Commission, Final Report of the supply of groceries in the UK market investigation, 30 April 2008.

promotions, or other practices that effectively led to retrospective adjustment of previously agreed supply arrangements.

The Spanish Competition Authority's report on relationships between suppliers and retailers in the food sector¹⁹ identified 18 practices between manufacturers and retailers and divided them into three categories: (i) commercial payments (e.g., fees for carrying and placing of products); (ii) contributions to ancillary activities carried out by the retailer (e.g., promotion fees); (iii) atypical payments (e.g., those considered by manufacturers to fall under the retailer's responsibility).

The Irish Parliamentary Committee Report draws attention to assertions that some retailers engage in 'serious misconduct', 'bullying and intimidation' and even 'illegal practices' against suppliers and goes on to state that many suppliers had been subjected to practices by retailers that included unreasonable demands for financial 'contributions' if they refused to comply with retailers' demands²⁰.

2.3. Potential Effects of Unfair Trading Practices

The imposition of UTPs along the B2B food and non-food supply chain may affect businesses which can, in turn, result in economy-wide detrimental effects.

The impact of UTPs on the B2B food and non-food supply chain is difficult to quantify, primarily due to the nature of the issue but also because of measurement difficulties. However, it is alleged that the potential detrimental impacts of UTPs in both the short and long term may include effects on investment and innovation²¹. The Commission has recently launched a study on the evolution of choice and innovation in food retail with a view to quantifying whether these have changed over recent years following the modernisation and concentration of the retail sector in the European Union.

The Commission Staff Working document accompanying the Retail Market Monitoring Report quoted as an example the case of UHT milk in France, where according to the *Observatoire des prix et des marges* administered by *FranceAgrimer*, the share of producers' price (not margin) in the final consumer price of UHT milk had declined from 32.2% to 25.9% in the period 2005 - 2009 - thus, clearly damaging producers' ability to invest. Additionally, the accompanying document "Analysis on price transmission along the food chain in the EU" of the Commission Communication "A better Functioning Food Chain in Europe"²² identifies for the period 2007 - 2009 a rather low and asymmetric transmission of prices from agricultural producers to consumers in the analysed markets (e.g., pork and dairy), which could be due, in part, to possible imbalances in bargaining power and/or anti-competitive practices in the food chain.

¹⁹ Comisión Nacional de la Competencia, Report on the relations between manufacturers and retailers in the food sector, October 2011.

²⁰ See note 15, above.

²¹ This is in line with the findings of the survey by Dedicated Research about suppliers' perceptions, which shows that UTPs had a negative effect on costs, sales and innovation (for 83%, 77% and 40% of respondents, respectively). See note 15, above.

²² SEC(2009) 1450.

Many UTPs can be related to payment issues that are directly linked to the way prices between suppliers, intermediaries and retailers are structured. For example, the recent Finnish competition authority study on daily consumer goods trade shows that 90% of the respondent companies had paid so-called 'marketing allowances' linked to unclear benefits. Sometimes, such payments were a precondition for trading without any 'real' compensation²³.

UTPs may adversely affect investment and innovation due to reduced revenues and uncertainty. Retrospectively imposed unfair terms, in particular, may give rise to uncertainty in terms of business planning and may result in reduced investment. Calculations on return on investment include the assessment of potential risks. Retrospective changes or the 'unfair' use of information may reduce companies' ability to invest, innovate, expand capacity or develop new product lines. This would be the case where unsold goods returned to suppliers are not paid for even if the contractual arrangements were stating the opposite (e.g., seasonal household products or products with a limited shelf life). This forces suppliers to incur unnecessary costs, may create uncertainty and have knock-on effects on investment. UTPs' possible detrimental effects apply to all players along the B2B food and non-food supply chain but may have disproportionate effects on SMEs, which often lack specialist knowledge about complex contracts, have higher switching costs and fewer trading relationships, are less willing to use formal enforcement mechanisms and have less countervailing power against powerful trading partners.

In addition, it is argued that UTPs may have a negative impact on cross-border trade and hinder the proper functioning of the Single Market. For example, suppliers can be reluctant to deal with foreign retailers for fear of being victims of UTPs in an unfamiliar national legal context. This is of course not the only obstacle: the degree of cross-border contracting within the EU supply chain varies from one Member State to another, depending on the presence of large vertically integrated retailers, the share of on-line sellers, the retail sub-segment and the role of wholesalers²⁴. Irrespective of these factors, however, UTPs may hinder the development of cross-border relationships, mainly because of the difficulty to enforce rules addressing them in a cross-border context.

Questions:

- 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.*

²³ Kilpailuviraston Päivittäistavara kauppaa koskeva selvityksiä I/2012, page 119.

²⁴ See "The functioning of the food supply chain and its effect on food prices in the European Union", *European Economy*, Occasional Papers 47, May 2009

- 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.

3. LEGAL FRAMEWORKS ON UNFAIR TRADING PRACTICES

3.1. Fragmented Legal Frameworks at National Level

Over the years, unfair practices in relationships between suppliers and buyers have increasingly been seen by public authorities as an important political issue. As a result, 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 protection provided against UTPs at national level.

The starting point has often been the analysis carried out by national competition authorities in order to assess competition in the retail sector and the role of commercial practices in the retailer-supplier relationship²⁵.

Relationship of competition law and laws on unfair trading practices

In this context, one needs to distinguish competition law and laws aimed at preventing unfair practices. Unfair trading rules pursue predominantly a different objective from competition law as they regulate contractual relationships between companies by stipulating the terms and conditions that, for instance, suppliers must offer to distributors, irrespective of the actual or presumed effects on competition on the market. This is particularly the case of legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration²⁶.

Competition law may capture certain UTPs in relations along the B2B food and non-food supply chain. However, it would not cover all such practices as it pursues the objective of protecting competition on the market and typically addresses situations of market power²⁷. A

²⁵ See, *inter alia*, for Portugal, Autoridade da Concorrência, Report on Commercial Relations between the Large Retail Groups and their Suppliers, October 2010; for the UK Competition Commission, The supply of groceries in the UK market investigation, 30 April 2008, for Sweden, Konkurrensverket, Mat och marknad — från bonde till bord, April 2011; for Spain, Comisión Nacional de la Competencia, of 5 October 2011, Informe sobre el código de buenas prácticas de distribución del automóvil and Informe sobre el anteproyecto de ley de contratos de distribución; for Finland, Kilpailuviraston Päivittäistavara kauppaa koskeva selvityksiä. Other studies are mentioned in the ECN Report quoted in note 8.

²⁶ Recital 9 of Regulation 1/2003 expressly draws a demarcation between competition law (which includes national rules on unilateral conduct which are stricter than Article 102) and laws on unfair trading practices.

²⁷ Ibid.

number of Member States have competition rules on unilateral conduct which, for example, prohibit or impose sanctions on abusive behaviour towards economically dependent undertakings and/or abuse of superior bargaining position.

The recent report by the European Competition Network, which is composed of the national competition authorities and the European Commission, concluded that *certain trading practices which are considered unfair by many stakeholders 'do not fall within the scope of competition rules at the EU level or in most of the Member States'*²⁸.

Civil and commercial law and unfair trading practices

As far as fairness in individual business relations is concerned, the basic principles of civil and/or commercial law may offer some level of protection against UTPs. A general notion of duty of fairness exists in most Member States. It usually concerns concepts such as *contra bonos mores* conduct, performance/negotiations in accordance with the principles of good faith, good morals, fairness or loyalty. Failure to comply with these principles typically renders contracts null and void or unenforceable before the courts.

Specific national frameworks on unfair trading practices

Some Member States have extended the protection afforded under civil law to address the increasing number of UTP cases²⁹. In doing so, varying national instruments have been used. While the preferred option of some Member States was to adopt specific legislation on the matter³⁰, others put into place or promoted codes of conduct or are considering doing so³¹.

Similarly, there are substantial differences in Member States' approaches to the scope of the relevant statutory or self-regulatory instruments. While in some Member States they provide protection against UTPs in the retail supply chain or in a given retail sector, in others, the rules apply across the board. For example, in Portugal,³² Slovenia,³³ Spain,³⁴ Belgium³⁵ and the United Kingdom³⁶ there are codes of conduct focused on the grocery supply chain³⁷, while in the Netherlands and Ireland there are plans to adopt such codes. Czech Republic, Hungary and Italy adopted laws that cover UTPs in the agro-food sector. Similarly, in the motor retail sector, self-regulation has been a preferred means to addressing UTPs. On the contrary, the

²⁸ See ECN Report, para 26, note 8 above.

²⁹ This was done either within the scope of civil law, for example by adopting specific commercial-law provisions (e.g., France), or under administrative law.

³⁰ E.g., France, Belgium, Italy and Spain.

³¹ E.g., the Netherlands, Portugal, Slovenia and Spain.

³² Code of good business practice (1997), drawn up by the Association of Distributors and the Conference of Industry.

³³ Code of good business practice.

³⁴ Code of good commercial practices in the motor distribution sector signed by ANFAC, ANIACAM, FACONAUTO y GANVAM on 10.06.2011, agreement of 1.08.2007 between FIAB and ASEDAS on the recommendation of good commercial practices to improve the management through the chain of value and to foster business cooperation and agreement of 29.07.2011 on the commercial code of conduct along the food chain in Catalonia.

³⁵ Code of Conduct for fair relationships between suppliers and purchasers in the Agro-Food Chain of 20 May 2010.

³⁶ Groceries Supply Code of Practices (GSCOP).

³⁷ European Competition Network, Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector, May 2012, p. 118.

French commercial law provisions addressing UTPs apply across the board to all B2B relations.

In addition, problems within the Single Market resulting from divergent laws can be expected to increase over time in the light of the greater use of e-commerce and globalisation more generally.

The resulting divergence in protection against UTPs may discourage companies from taking up activities outside their Member State of origin. The situation is further aggravated as national legal frameworks are subject to frequent changes, indicating that measures to combat UTPs are not always successful as they have to follow the development of new UTPs. Accordingly, companies affected by UTPs allege it is difficult and costly to keep track of their legal rights available in the different Member States, especially when they are SMEs.

In Member States where no specific frameworks on UTPs exist, the reasoning usually provided is that general competition law is sufficiently effective to address the issue (Czech Republic) or that there is a certain reluctance to interfere with the contractual freedom of the parties (UK), especially in the absence of a breach of competition rules³⁸. A more general argument is also sometimes made concerning the effectiveness and need for legislation on UTPs and its potential impact, including on prices.

3.2. Protection against Unfair Trading Practices at EU Level

Even though the issue of UTPs has been raised in the context of a number of recent initiatives³⁹, for the moment, there is no specific EU regulatory framework on the issue of UTPs in the B2B food and non-food supply chain.

EU competition law aims at contributing to the construction and preservation of the Single Market and enhancing consumer welfare⁴⁰. It seeks to establish conditions under which the market can function properly and is not *per se* concerned with fairness in individual business relations, unless those entail malfunctioning of the market due to existence of market power. As a result, EU competition law could deal with some but not all UTPs.

Other cross-sectoral EU instruments also aim at addressing unfair practices in trading relationships. The Unfair Commercial Practices Directive⁴¹ covers only the business-to-consumer aspect of the issue, while recognising the need for careful examination of the need for EU-level action in the B2B area⁴². This legislation fully harmonises the protection of

³⁸ See ICN Special Program for Kyoto Annual Conference. Report on Abuse of Superior Bargaining Position 2008.

³⁹ *A better functioning food supply chain in Europe*, (COM(2009) 591, 28 October 2009); *A Single Market for 21st century Europe*, COM(2007) 725, 20 November 2007), Retail Market Monitoring Report (see note 11 above), Single Market Act (see note 13 above).

⁴⁰ See Report on Competition Policy 2010, COM(2011) 328 final, para. 9.

⁴¹ Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the Single market.

⁴² *Ibid.*, Recital 8 that ‘*directly protects consumer economic interests from unfair business-to-consumer commercial practices. [...] There are other commercial practices which, although not harming consumers, may hurt competitors and business customers. The Commission should carefully examine the need for Community action in the field of unfair competition beyond the remit of this Directive and, if necessary, make a legislative proposal to cover these other aspects of unfair competition*’.

consumers before, during and after a commercial transactions against practices that are contrary to requirements of professional diligence and can affect their economic behaviour. Member States are free to extend those rules to business-to-business practices, which some of them have done. The Directive is without prejudice to contract law, in particular, to the rules on the validity, formation or effect of a contract. In the field of marketing, the Misleading and Comparative Advertising Directive⁴³ already provides minimum protection rules across Europe and protects traders, both customers and competitors, against misleading advertising. Recently, the Commission outlined future actions in the field of business-to-business misleading marketing practices⁴⁴ that will include strengthening of the enforcement and substantive rules protecting businesses against misleading schemes in Europe. In particular, the Commission intends to present a legislative revision of the Misleading and Comparative Advertising Directive.

Additionally, the Late Payments Directive⁴⁵ concerns the specific issue of payment terms. Regulations 593/2008 and 864/2007 on the law applicable to, respectively, contractual and non-contractual obligations, on the other hand, provide a comprehensive set of rules to determine which law applies to disputes involving unfair trading practices insofar as these involve contractual or non-contractual obligations between the parties.

In terms of sectors, principles of fairness in contractual relations have been introduced in the milk/dairy sector⁴⁶. These include, *inter alia*, compulsory written contracts between farmers and processors and an obligation for purchasers to offer farmers minimum contract duration. Some self-regulatory sectoral solutions have also been explored at EU level. It should be noted that only consumers are protected against unfair terms in contracts by the Unfair Terms Directive⁴⁷. According to this legislation a contractual term which has not been negotiated individually will be regarded as unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. In the context of the legislative proposals of the reform of the Common Fisheries Policies, the Commission has also taken a series of sectorial initiatives to promote a fair dealing in B2B relationships in the fishery and aquaculture area⁴⁸.

Some legal provisions at EU level may partially address UTPs in business relations. However, this may create a patchwork of rules which may come into play depending on the specific practices concerned or where the company using the practices possesses market power. Still, on the whole, a company confronted with UTPs by a business partner is not able to benefit from consistent protection across the EU. This legal fragmentation throughout the Single Market may discourage or prevent companies from taking up activities outside their Member State of origin.

⁴³ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising.

⁴⁴ *Protecting businesses against misleading marketing practices and ensuring effective enforcement. Review of Directive 2006/114/EC concerning misleading and comparative advertising* (COM(2012) 702).

⁴⁵ Directive 2011/7/EU on combating late payment in commercial transactions.

⁴⁶ Regulation (EU) No 261/2012 as regards contractual relations in the milk and milk-products sector.

⁴⁷ Directive 93/13/EEC on unfair terms in consumer contracts.

⁴⁸ COM (2011) 416 final of 13 July 2011.

In 2011, the European Commission proposed a uniform set of sales law rules which can be used for cross-border sales of tangible movable goods and of digital content⁴⁹. This Common European Sales Law (CESL) will be optional: Parties to a contract may choose to use it, but will not be obliged to do so. In order to be applicable in B2B relations, at least one party will have to be an SME. It particularly addresses SMEs in order to protect them against unilaterally imposed unfavourable conditions. Some rules will be default rules: for example, the CESL states that if the price has not been explicitly agreed upon, the price normally charged in comparable situations is payable or that a contract of indeterminate duration may be terminated by either party only by giving a reasonable period of notice. Some provisions guaranteeing a fair balance between the interests of both sides are so important that they will be mandatory:

- Each party has a duty to act in accordance with good faith and fair dealing.
- Not individually negotiated contract terms in B2B contracts are considered to be unfair if their use grossly deviates from good commercial practice, contrary to good faith and fair dealing. They may only be invoked against the other party if the other party knew them or if the party took reasonable steps to draw the other's party attention to them.
- Where one party is entitled to unilaterally determine the price and this party's determination is grossly unreasonable the price normally charged is payable.
- A contract can be avoided if a party was unfairly exploited, for example, is inexperienced and the other party knew or could be expected to have known this and exploited the first party's situation by taking excessive benefit or unfair advantage of it. The parties may not shorten the prescription period based on the actual or presumed knowledge of the facts to less than one year and not extend it to more than ten years.

Questions:

- 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?*

⁴⁹ Proposal for a Regulation on a Common European Sales Law COM (2011) 635.

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.*

4. ENFORCEMENT OF RULES AGAINST UNFAIR TRADING PRACTICES

4.1. Enforcement Mechanisms at National Level

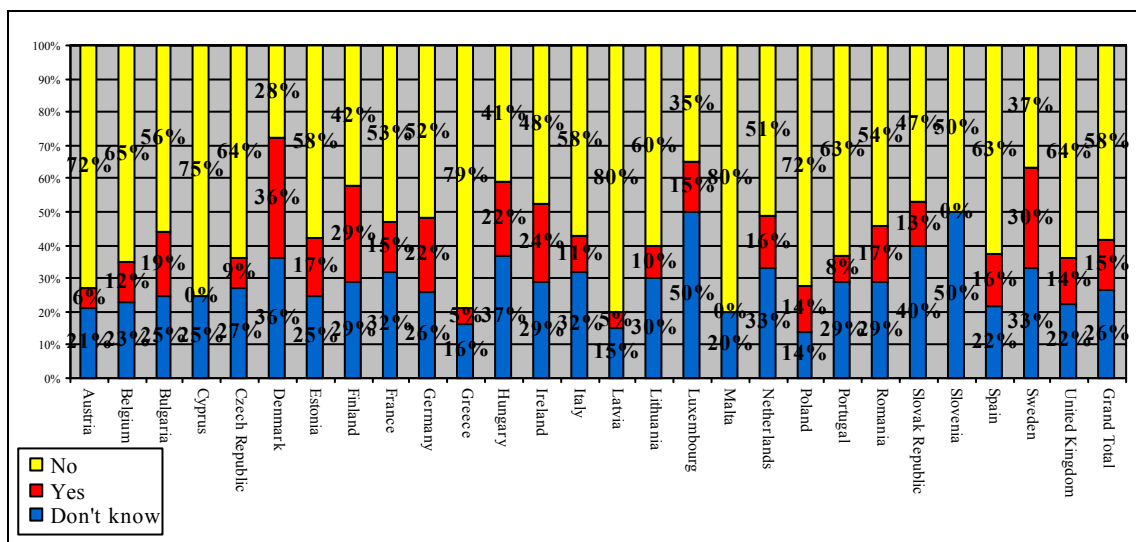
The level of protection of the weaker contracting party in a B2B relationship varies across Member States. Various enforcement mechanisms are used at national level to address UTPs. These include, inter alia, judicial redress (in most Member States), possible actions by competition authorities under national rules on unilateral conduct (e.g., Spain), administrative redress (e.g., France) and ombudsmen (e.g., the UK).

Empowerment of enforcement authorities varies depending on the enforcement instrument used by each Member State. Some bodies are unable to accept anonymous complaints (e.g., courts), others cannot protect the anonymity of complainants throughout the full proceedings (e.g., competition authorities in certain Member States), while a third category are allowed to launch investigations only on the basis of credible evidence (e.g., the UK adjudicator under the Groceries Supply Code of Practice or the French Ministry of Economy).

The variety of approaches adopted by Member States to address the issue of UTPs may result in a significant Single Market fragmentation. Companies, in particular SMEs, find it difficult to identify remedies available in the different Member States.

Finally, in addition to the divergent approaches employed by Member States, a recent consultation of business shows that the existing enforcement mechanisms are considered to be insufficient (see [Figure 1, below](#)).

Figure 1: Perceived sufficiency of existing enforcement mechanisms by Member State of operation (EBTP, 2012)



According to the respondents of the EBTP survey, the prevalent lack of adequate enforcement mechanisms protecting weaker parties from UTPs hinders the development of business and trade, in particular in cross-border situations. This has a significant impact on SMEs, which are least likely to have at their disposal the necessary means to cover the potentially high costs of legal representation, given the complexity of such processes and the lack of knowledge on how to enforce their rights in view of available remedies.

4.2. Enforcement Mechanisms at EU Level

As explained in Section 3.2 above, at this stage, no specific enforcement mechanism against UTPs exists at EU level. However, several cross-sectoral instruments exist that cover litigation generally and therefore also litigation regarding UTPs⁵⁰.

With regard to B2B misleading marketing practices, the Commission has announced in its 2012 review of Directive 2006/114/EC that it will create an enforcement cooperation mechanism⁵¹ to strengthen the cross-border cooperation and ensure better protection against the most harmful misleading marketing schemes.

As mentioned above, representatives of food chain actors within the High Level Forum for a Better Functioning Food Supply Chain have also been looking at various dispute resolution

⁵⁰ Directive 2002/8 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 has been 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.

⁵¹ COM(2012) 702 final.

options for the enforcement of the identified principles of good practice. This approach is sector-specific, whereas this Green Paper discusses the issue of UTPs in relationships along the B2B food and non-food supply chain with a cross-sectoral approach. The Commission will, in parallel to the consultation launched by this Green Paper, monitor the specific developments of the food supply chain and begin work on an impact assessment of different options to deliver a fair and effective solution to the issue of UTPs.

Despite these cross-sectoral instruments which already apply to UTPs, in order to address the different types of UTPs mentioned in Section 5 below, it may be necessary to ensure the existence in all Member States of a common set of enforcement principles. The issues covered could include a proper remedy to the 'fear factor' described above by, for example, granting powers to the competent national authorities to launch *ex-officio* actions and to accept anonymous complaints. Moreover, such a common set of enforcement principles could also foresee that the competent authorities should have the right to impose appropriate sanctions. These could include, for example, the possibility to order compliance with fair practices, recover damages, impose fines with deterring effect, and report publicly on their findings. Existing national rules could provide examples of most efficient enforcement mechanisms to be included in such a common set of enforcement principles.

Questions:

- 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.*
- 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?*

5. TYPES OF UNFAIR TRADING PRACTICES

The results of the surveys and inquiries described above show that UTPs are perceived as a common phenomenon present along the B2B food and non-food supply chain in many EU Member States. Moreover, different types of UTPs or related issues have been identified and are described below. Based on the principles and examples of fair and unfair practices in vertical relations in the food supply chain of the High Level Forum for a Better Functioning Food Supply Chain and on work carried out by the Commission in the B2B food and non-food supply chain, seven types of UTPs have been identified. These UTPs are detailed below, along with possible fair practices which could help address them.

5.1. Ambiguous Contract Terms

The most common form of UTPs (recognised in the surveys and inquiries mentioned above) results from ambiguous contract terms that make it possible to impose additional obligations on weaker contracting parties.

Elements of a fair practice could be that contracting parties should ensure that rights and obligations, including sanctions in contracts are provided for in a clear, transparent and unambiguous manner. Contracting parties should provide precise and comprehensive information regarding their commercial relationships. It could also include that contractual sanctions should be proportionate to the damage suffered. Contracts should contain clauses setting out the circumstances and conditions under which subsequent changes in the cost or price of products or services are permitted.

5.2. Lack of Written Contracts

The circumstances under which UTPs may emerge have to be taken into account. UTPs are more easily imposed where contracts are not set out in written form as the parties have no lasting proof of the terms agreed upon.

Elements of a fair practice could be that contracting parties should ensure that agreements are put in writing, unless this is impracticable for one or both parties. The content of oral contracts should be confirmed in writing by at least one contracting party after their conclusion.

5.3. Retroactive Contract Changes

Retroactive changes, such as deductions from the invoiced amount to cover promotion fees, unilateral discounts based on quantities sold, listing fees, etc. could at first sight seem legitimate but they could be unfair if they have not previously been agreed upon in a sufficiently precise manner.

Elements of a fair practice could be that terms and conditions should be fair for both parties. Any agreement should contain precise circumstances and detailed rules under which the parties can jointly modify its terms, in a timely and informed fashion, including the process for setting the necessary compensation for any costs resulting from such a contractual modification instigated by one of the contracting party.

5.4. Unfair Transfer of Commercial Risk

Some practices should be examined irrespective of whether they have been agreed in advance or not.

A significant category of such practices is the transfer of risk to the other party, for example, by placing the responsibility for stolen goods entirely on the supplier (shrinkage fees), whereas the retailer is typically best placed to control theft or disappearance of goods at its premises. However, once the risk of theft is transferred to the supplier, the retailer's incentive to take appropriate preventive measures significantly declines. Other practices in this category include financing proprietary business activities of the other party (such as demanding

investment in new outlets), obligations to compensate for losses incurred by the trading partner, or long payment delays.

Another type of UTP that merits attention is the abusive use of the so-called ‘reverse margin’ practices. This model is part of many modern retailers’ business models and consists in bundling the purchase of goods with some additional services which retailers offer to suppliers for a charge (e.g., promotion and transport fees, services linked to use of shelf space, etc.). Such practices are legitimate under most circumstances. However, in some cases, they can also be excessive and unfair: in some EU jurisdictions (e.g., France), courts state that listing fees should be considered legitimate only if they are linked to real services, are proportionate and are being charged for in a transparent manner.

Elements of a fair practice could be that contracting parties should agree that each operator takes responsibility for its own risks and does not unduly attempt to transfer its risks to other parties. Contracting parties should agree on the terms and conditions for their contribution to either party’s proprietary and/or promotional activities. Fees for legitimate services should correspond to their value. It could also include that, when listing fees are agreed between both parties, they should be proportionate to the risk incurred. Contracting parties should never ask for payment for services not rendered or goods not delivered and should never demand payments manifestly not corresponding to the value/cost of the service rendered.

5.5. Unfair Use of Information

‘Unfair’ use of information by a party can characterise a number of UTPs. While it is legitimate for a party to request some information on the products proposed, the details received should not be used, for example, to develop its own competing product, which would deprive the weaker party of the results of its innovation. The Commission has published a study on the economic and legal aspects linked with the use, misappropriation and litigation on confidential business information and trade secrets⁵². Other practices in this category may include refusals to sign a confidentiality agreements or failure to respect confidentiality.

Elements of a fair practice could be that information provided to a contracting party within a commercial relationship must be used fairly (notably in situations where the business partners are also partially competitors). It could also include that each party to an agreement should take reasonable care to ensure that the information supplied to the other parties is correct and not misleading.

5.6. Unfair Termination of a Commercial Relationship

Sudden and unjustified termination of a commercial relationship or termination without a reasonable period of notice may also be a major type of UTPs. While ending a relationship is part of business life, it should not be used as a means to bully a contracting party by refusing to justify this decision or by not complying with a reasonable notice period.

Elements of a fair practice could be that contracting parties should ensure fair termination of contracts. Contracts should be terminated in compliance with the law applicable to the

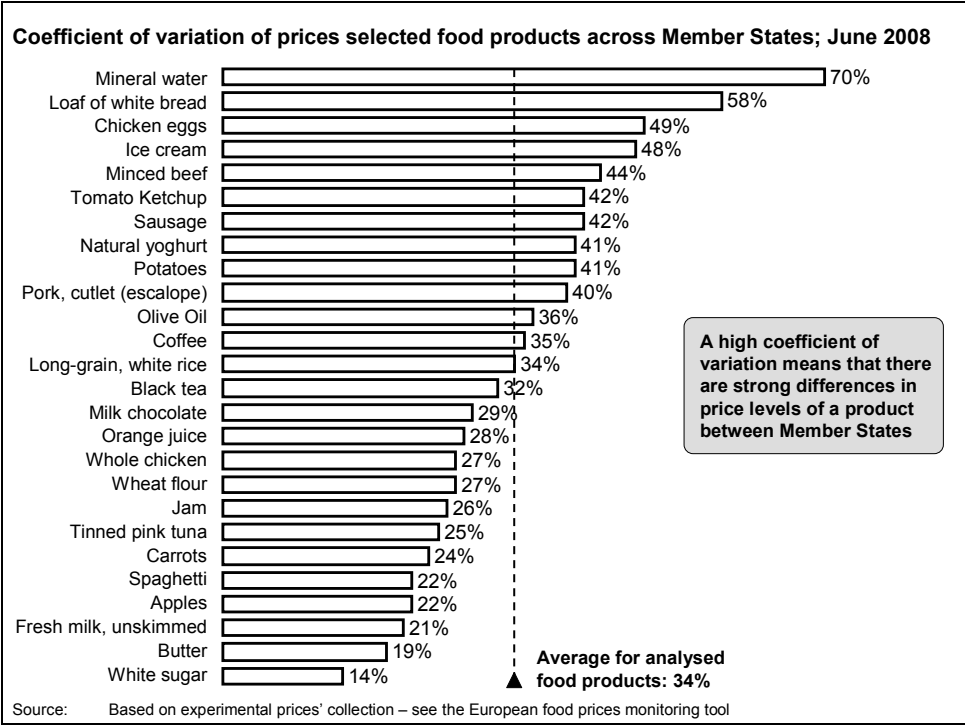
⁵² http://ec.europa.eu/internal_market/iprenforcement/trade_secrets/index_en.htm#maincontentSec1

contract, while giving sufficient notice to the party on whom termination is imposed for it to recoup its investment.

5.7. Territorial Supply Constraints

Territorial supply constraints imposed by some multi-national suppliers may impede retailers from sourcing identical goods cross-border in a central location and distributing them to other Member States⁵³. When they effectively control the logistic or wholesale level, major branded goods manufacturers may have no direct interest in reducing prices and will try to negotiate contracts at national level to maintain price differences. On the other hand, retailers seek to source from the lowest cost wholesale outlets or supplier subsidiaries and put pressure on manufacturers by contracting directly with competing suppliers to offer private label products. Retailers in small Member States suggest that when they seek to source supplies from non-domestic wholesalers or even directly from suppliers in more competitive and attractively-priced neighbouring markets, they are redirected to the subsidiary responsible of that particular geographical market or their national wholesalers who have territorial contracts with the suppliers. Such constraints allow segmenting the market and can result in significant wholesale price differences between countries.

In its 2009 Communication "A better functioning food supply chain in Europe", the Commission analysed the dispersion of price levels for selected products across Member States⁵⁴.



⁵³ Note that territorial supply constraints in this context are defined as a prohibition for suppliers to sell to resellers, which by themselves seek to source from the supplier. It is not considered to be a territorial supply constraint when, for instance, a distributor that has been given an exclusive territory in a certain geographic area is protected from active sales of other distributors into this area.

⁵⁴ COM(2009) 591 final.

For instance, in Ireland, according to information provided at a meeting of an Irish Parliamentary Committee in February 2009, the prices of products sold in Ireland and in the UK respectively can differ by up to 130%, with Irish retailers being obliged to procure on the basis of the price list applying to Ireland. While factors such as salaries and social charges, cost of energy, taxes and logistics can explain part of the consumer price differences between markets for the same branded product, territorial supply constraints may have a detrimental impact. A similar study was conducted in 2012 in Belgium⁵⁵.

If not justified on objective efficiency grounds (such as logistics), such restrictions on cross-border sourcing are likely to lead to price discrimination based on the country of establishment of the buyer. As a result, consumers are negatively affected by higher prices and a narrower product choice and do not benefit from access to better prices and the smooth functioning of the Single Market. The technical reasons put forward by suppliers such as labelling may be valid in certain cases but do not generally apply for identical goods.

5.8. Common Characteristics of UTPs

The transfer of costs incurred and the shift of entrepreneurial risk to the weaker party in the relationship represent a common denominator for most of the above UTPs. Excessive pressure, inability to carry out proper business planning and lack of clarity as to the real content of the contract all hamper optimal decision making, lead to squeezed margins potentially reducing companies' capacity to invest and innovate.

Questions:

- 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 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? Why?*
 - b) *What would be the advantages and disadvantages of prohibiting territorial*

⁵⁵ SPF Economie, Etude sur les niveaux de prix dans les supermarchés, February 2012.

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?*

6. GENERAL REMARKS

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?*

7. NEXT STEPS

The Commission is committed to continue working with all relevant stakeholders and value all the contributions they are going to provide to the Commission in order to improve the functioning and the efficiency of the B2B food and non-food supply chain.

All interested parties are invited to submit their views in response to the above questions. Contributions should be sent to the following address to reach the Commission **by 30 April 2013** at the latest: **markt-retail@ec.europa.eu**.

Contributions do not need to cover all questions raised in this Green Paper. Accordingly, please indicate clearly the questions to which your contribution relates. If possible, please give specific arguments for or against the options and approaches presented in the paper.

As a follow-up to this Green Paper and on the basis of the responses received, the Commission will announce the next steps by **mid-2013**.

Contributions will be published on the Internet. It is important to read the specific privacy statement accompanying this Green Paper for information on how your personal data and contribution will be dealt with.