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

- UGAL COMMENTS -

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EXECUTIVE SUMMARY

Please find herewith the UGAL response to the public consultation on the Green Paper on Unfair Trading Practices in the Business to Business Food and Non-food Supply Chain in Europe.

In its response to this public consultation, UGAL stresses that the following points must be taken into account by the European Commission in its discussions on business to business unfair trading practices:

➔ Unfair trading practices, where they occur, have several solutions at national level (civil/contract law, competition law, unfair trading laws etc.). These solutions have no effect on cross-border transacting. At EU level, a ready-made stakeholder solution already exists for the entire food supply chain across the EU. This stakeholder initiative should be given the Commission's full support.

➔ Trading practices cannot be viewed in isolation. When assessing whether a trading practice is fair or unfair, attention must be paid to the entire business relationship and the impact of each contractual clause therein. As a result an EU-wide blacklist approach to trading practices is not a suitable approach. Indeed, a blacklist would negatively affect freedom of contract and thus the possibility for companies to use their contracts to find innovative solutions to their daily business challenges.

➔ The Green paper contains many so-called 'leading' questions (i.e. questions which lead the reader to answer in a certain manner). This prejudices the outcome of the consultation, especially when taken together with the Green Paper's over-emphasising of the frequency of unfair trading practices in the supply chain and its heavy focus on unfair practices practised by retailers.

➔ The current volume of EU legislation affecting the economic players in the different supply chains is already extremely high and very questionable in the current economic climate, and in view of the development of a transatlantic market, given the often negative effects of such legislation on the competitiveness of the economic operators and, ultimately, on consumers. The costs of implementing such legislation have to be recouped by supply chain operators. That being said, efficiencies generated through light touch regulation, or deregulation, are also passed on to consumers in the form of lower prices. In this context, it is important to note that the cost benefits achieved through efficient negotiations with suppliers are necessarily passed on to consumers by retailers because of the very high level of retail competition in all EU countries. This helps to reduce inflationary pressures and helps consumers to maintain their living standards in difficult economic times.

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

Two approaches to the definition

The Green Paper tries to define "unfair trading practices" in two ways.

1. Through an '**objective**' definition contained in section 1 (the introduction) "*practices that grossly deviate from good commercial conduct and are contrary to good faith and fair dealing"*.
2. Through a '**subjective**' definition in section 2.1 (the concept of unfair trading practices) in a general description using the following ideas:
    i. bargaining position;
    ii. specific practices;
    iii. practical understanding of what a contractual term implies; and
    iv. switching.

An **objective** definition is preferable. However, the definition used in the Green Paper (1) is not suitable.

An improved 'objective' definition

The definition used in the Green Paper is unsuitable as it is not clear. If a definition is to be a usable tool for B2B contracting, its provisions must be objective, legally certain, and user-friendly.

The Commission's current definition creates several difficulties in its interpretation.

Good commercial conduct

Firstly, no benchmark for "good commercial conduct" exists. "Good commercial conduct" varies between jurisdictions and between supply chains. Indeed, such a concept is neither defined nor definable. While established practices may exist in very specific areas of contracting, such as the form of a contract (e.g. oral/written), there is no evidence that such conduct exists across the multiple aspects of contractual relations.

The introduction of such a concept therefore creates considerable uncertainty and subjectivity for parties in a B2B context. This would make it difficult to assess whether a specific trading practice is fair or unfair.

A more workable proposal for the purposes of legal certainty would be to replace the wording "good commercial conduct" with 'customary commercial conduct'. Customary practice is at the very least largely known by supply chain operators working together in the same fields of activity.

This issue has already been recognized, and accepted, by the European Parliament in its work on the Common European Sales Law. In its work, the European Parliament proposes the wording "customary commercial conduct" to solve this challenge to help define fair/unfair trading practices.

(1) "*practices that grossly deviate from good commercial conduct and are contrary to good faith and fair dealing*"

Good faith and fair dealing

Secondly, as recognized by the European Parliament in its draft report on the Common European Sales Law, the concept of "*good faith and fair dealing*" can be interpreted in many different ways. As such, this concept remains unclear and needs refining if it is to become usable.

Good faith and fair dealing is a very broad concept. It is a principle that exists in certain Member States; but not in others. Even in Member States where it exists, the concept is interpreted in vastly different ways.

This point is acknowledged in the Commission's own Impact Assessment to the Common European Sales Law, which conducts a comparative analysis concluding that this notion radically departs from traditional ideas of contractual freedom and creates an extensive new legal regime unknown in many legal systems.

It summarises that from a business perspective, the creation of such a new and far-reaching standard of behaviour would require considerable re-adjustment in how purchasers construct and manage their contracts, directly creating increased legal costs, promoting legal uncertainty and reducing contractual flexibility (2).

In order to address this concern of "good faith and fair dealing", the European Parliament has recently proposed a definition of "good faith and fair dealing" as "*a standard of conduct characterised by honesty and openness with regard to the other party, to the transaction or relationship in question and excludes an intention the only purpose of which is to harm*."

For the sake of consistency, this revised Parliamentary definition should be utilised if the Commission insists on using the concept of "good faith and fair dealing".

➔ UGAL supports an objective, legally certain and user-friendly definition for unfair trading practices. The current definition in the Green Paper does not match these criteria.

➔ The definition in the Green Paper can be given legal uniformity and add to legal certainty by replacing the concept of "*good commercial conduct*" with "*customary commercial conduct*" and by defining the principle of "*good faith and fair dealing*" as "*a standard of conduct characterised by honesty and openness with regard to the other party to the transaction or relationship in question and excludes an intention the only purpose of which is to harm*".

The challenges of a subjective definition

UGAL does not support the broad and subjective definition of unfair trading practices contained in section 2.1 of the Green Paper.

(2) *European Commission Staff Working Paper Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law SEC(2011)1165 final.* See also Antoniollo, L. and Fiorentini, F. (2009), p. 21

The elements listed below correspond to the various aspects of the subjective definition of unfair trading practices explained in 2.1 of the Green Paper.

Bargaining position

Our member companies responsibly carry out millions of business to business transactions each year. It would be completely unworkable to have to assess market power for each of these transactions, in order to assess whether a business relationship can be excessively shaped due to the respective bargaining position of the transacting parties.

In this context it should be noted that a stronger bargaining position does not necessarily depend on size. A small market player can have a stronger bargaining position than a larger counterpart to the transaction, for instance where a party supplies an exclusive or popular product, particularly where the supplier, because of his limited production capacity, has a difficulty in meeting demand.

Specific practices

Regarding the specific practices listed in section 2.1, these cannot be seen in isolation; rather they must be seen in the light of i) the immediate circumstances and ii) the entire business relationship between the two parties, including in relation to other contracts that have been concluded. It must be recalled that contracts are influenced by numerous factors such as consumer expectations as to the assortment, the cost structures of producers and retailers, the interchangeability of products etc.

As accepted by all stakeholders when developing the principles of good practice in vertical relationships in the food supply chain, a trading practice is in itself not *per se* unfair. It can be judged as fair or unfair, depending on the precise circumstances surrounding it, including an analysis of the entire business relationship. Hence it is neither practical nor possible to include specific trading practices as part of a definition of unfair trading practices.

Furthermore it should be noted that supply chain operators very often perceive as ‘unfair’, practices that are not. For instance, if a buyer requires a certain quality standard, or a certain volume, and the supplier’s product does not correspond to this standard, or he cannot produce the required volume, this is often perceived by the supplier as ‘unfair’. This is an incorrect assessment. It is the buyer’s right to require such a standard or volume. These requirements are a result of consumer demand.

➔ The fact that fair behaviour is often erroneously perceived as unfair conduct is likely to adversely affect the outcome of this consultation.

Practical understanding of what a contractual term implies

A business should not be treated in the same way as a consumer. In B2C transactions, potential information asymmetries and differing levels of knowledge between enterprises and consumers may exist. Consequently, consumer protection laws often act to shield consumers from complex terms or clauses that they may not fully understand.

In B2B transactions, this level of protection is not necessary. Businesses have the capacity to understand, or seek advice on, contractual terms. Businesses are able to minimize information asymmetries by conducting due diligence on the transactions in question. Robust due diligence and a detail-oriented approach to assessing contractual terms will help any company, and notably SMEs, to gain a competitive advantage in the market place. Hence UGAL rejects the notion that SMEs are generally in a weaker position compared to larger counterparts to a transaction in terms of appreciating the implications of terms agreed in a contract.

➔ Each business has to remain free to take on the level of risk acceptable to it, to choose the diversity of its business partners, to develop/modernise its production tools, to change its commercial or industrial strategy etc. Very protective laws such as those designed for business to consumer relations would have an inverse effect and lead to unintended consequences by potentially harming efficiency and creating obstacles to a businesses' development.

Switching

At the retail level of the supply chain, competition between retailers is very intense.

Intense competition is partly due to the fact that there is great diversity in the retail sector. This includes UGAL members such as groups of independent retailers and buying alliances that have been created to pool their expertise as well as to benefit from economies of scale so as to be able to i) compete with larger integrated chains and ii) counter strong manufacturer concentration.

In competitive and diverse marketplaces, UGAL does not accept that there is an “inability to switch to another business partner”, where it concerns switching retailers.

Switching is possible for all supply chain operators supplying to retailers. It is the diversity, and competition in the retail sector that makes it possible for suppliers to switch retailers should they wish to do so.

Retailers on the other hand do suffer from difficulties in switching suppliers. This is because of the intense concentration at manufacturing level of the supply chain, not only in the food sector, where a very high percentage of ‘must have’ A brands are produced by a handful of producers, but also in the non-food sector, for instance, in electronics and textiles.

➔ As a result of the above-mentioned explanations UGAL rejects a subjective definition of unfair trading practices as described in section 2.1 of the Green Paper.

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

Not applicable.

We anticipate that the DG MARKT study on national legal frameworks will provide a comprehensive overview of the legal frameworks that exist at national level.

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?

As previously mentioned, trading practices cannot be seen in isolation. They must be seen in the context of the entire business relationship to properly assess their implications.

➔ As trading practices should be assessed in light of the totality of the business relationship, this question is redundant. It is always insufficient to assess a specific practice at a single contractual phase.

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

It is not appropriate to label a supply chain as the "retail supply chain". It encourages prejudice and unsubstantiated allegations against the retail sector. It also misleads the recipients of the Green Paper as to its scope.

In theory, unfair trading practices can potentially occur across the entire supply chain. As a case in point, retailers can be subject to damaging behaviour, such as territorial supply constraints, which are used to artificially partition the Single Market.

When damaging behaviour does occur, groups of independent retailers can be subject to it to a greater extent than other chains due to the independent and local character of their stores. Independent retail stores can be less well known than those of integrated chains, where the group is rather small or the group image is not entirely adopted. As groups of independent retailers can face the disadvantage of not operating with a clearly distinguished, established retail brand, this can necessitate a greater reliance on branded goods in-store to attract customers. This can expose groups of independent retailers to a refusal to supply from brand manufacturers where manufacturers refuse to supply to smaller retailers, giving preference to delivering first to large integrated chains and only later, when the item has lost most of its attractiveness as a novelty, to smaller groups. However, **this should be regarded as a question for competition law to resolve** (in the field of exclusive distribution), rather than a trading practice.

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

UGAL rejects the assessment of the European Commission on the "*fear factor*".

The "*fear factor*" is extremely subjective and should not be taken into consideration when defining the concept of UTP. All trading practices would suffer from legal uncertainty if a company could later judge the behaviour of its business partner, that it freely chose to work with, as unfair because it now feels fearful.
Only a global and objective assessment of the rights and obligations of each contracting party in view of their economic environment can be used to identify a breach of fairness.

Moreover, the "*fear factor*" does not reflect commercial reality of business to business transactions. This is particularly the case for the UGAL membership.

Groups of independent retailers put a lot of emphasis on long-term, sustainable relationships with their suppliers. With long-term relationships, mutual trust is developed between transacting parties, product quality remains constant, contractual terms are clear, disputes are easily resolved and transaction costs are reduced.

This militates against the existence of the scenario described in the Green Paper whereby the "fear factor" seemingly is a dominant sentiment.

Complaints

As previously mentioned, millions of contracts are concluded each year by UGAL member companies. According to anecdotal evidence from our membership, almost all contracts are trouble free. Of the tiny minority that may be problematic, the vast majority of the issues are solved informally.

It is not in the interest of either transacting party to ignore a complaint, have a transacting party paralysed by fear, or economically damage a transacting party. On the contrary, both parties stand to gain when both parties are healthy, competitive and efficient. Complaints are dealt with rapidly, transparently and with the objective of finding a mutually acceptable solution that maintains the business relationship.

With this in mind, we do not believe in the existence of a "fear factor" as an explanation for the low level of complaints.

➔ It should be considered that the absence of complaints is a result of a well-functioning, consumer focused and efficient market. This market results in millions of safe, innovative products on store shelves across Europe in clean, pleasant and modern surroundings that are available for immediate purchase. Thousands of new products are added to the assortment each year.

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?

Given that the food supply chain functions so well (see above) and supply chain players are interdependent, UGAL believes that the scale of the problem as expressed in Brussels policy-making is highly exaggerated. It would be impossible to have so many trouble free transactions each year if unfair trading practices were as widespread as it is suggested in the Green Paper.

Many accusations of unfair trading practices against retail come from the farming sector. This is highly surprising given that direct contact between the farming sector and the retail sector is minimal.

Within our membership, it has been observed that UGAL member companies generally conclude between only 0 and 2 percent of their business with farmers, usually on the basis of long-term sustainable and mutually rewarding relationships. The level of unfounded allegations made in Brussels, in the food supply chain, does not represent the reality on the ground.

Practices (see also response to question 21 & 22)

The Commission is well aware of the voluntary initiative aimed at reducing the already small numbers of unfair trading practices in the food supply chain. Part of this initiative was a list of principles of good practice as well as a non-exhaustive list of trading practices. **These example practices can either be fair or unfair dependent upon the way they are used.**

UGAL is a signatory to this document and hence endorses that approach and document (3).

Report of the European Competition Network

Given the proven effects of anti-competitive behaviour for market players and consumers alike, a more relevant question would be the existence of such anti-competitive behaviour in the market. The Report of the European Competition Network on competition law enforcement and market monitoring activities by national competition authorities in the food sector raises important issues in this regard.

Major issues were raised in this report regarding horizontal agreements among competitors (i.e. price fixing and "market & consumer sharing" – the latter covering situations where competitors demarcate/allocate the market between them) at the agricultural and manufacturing levels of the food supply chain.

Vertical anti-competitive agreements and abusive conduct by dominant operators (i.e. exclusivity obligations, minimum purchasing obligations, tying and refusals to supply) were also raised with regard to the agricultural and manufacturing levels of the food supply chain.

- ➔ The Report of the European Competition Network demonstrates that anti-competitive conduct occurs most frequently on the agricultural and manufacturing levels of the food supply chain, particularly cartel behaviour by operators on those levels. It is this anti-competitive behaviour that poses a far greater risk to the integrity and the efficiency of the food supply chain than alleged unfair trading practices, also in terms of consumer welfare, and should therefore be focused on. The same applies to the non-food sector (see response to question 7 below).

- ➔ Alleged unfair trading practices across the supply chain are significantly less widespread than competition violations at the agricultural and manufacturing levels of the (food) supply chain.

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

The UGAL membership covers all forms of food and non-food commerce including textiles, sports equipment, electronics and automotive distribution. We have no significant data of unfair trading practices in those sectors.

(3) *Vertical relationships in the Food Supply Chain: Principles of Food Practice & the related Framework for its implementation*

That said, anecdotal evidence exists that groups of independent retailers in these sectors suffer from the behaviour of large multi-national manufacturers in terms of product availability, refusal to supply, quantity forcing of unsellable products and artificial obstacles to stocking the latest products e.g. latest mobile devices. We note that this behaviour can be solved through a competition rule analysis and separate legislation is not required.

With regard to what is said under 6) about anti-competitive behaviour between manufacturers in the food supply chain, recent cases confirm that this is also the case on manufacturer level in many non-food chains. Given the extent to which this occurs and the risk to consumer welfare, this should be focused on more than sporadic unfair trading practices.

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.

As explained above, in reality, unfair trading practices are not a significant or systemic issue in the supply chain. As such, **they do not affect our members' ability to invest and innovate**.

According to the report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the State of the Innovation Union 2011, barriers to innovation include:

- access to finance;
- protecting and enhancing the value of intellectual property;
- standard setting; and
- public financing.

Unfair trading practices have not been mentioned in studies regarding innovation as concrete evidence has never been found that unfair trading practices have any negative impact on investment and innovation at any level of the supply chain.

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

Commercial negotiation, including price negotiations aimed at getting the best deal for your company, has several consumer benefits, both from a macro-economic perspective and a practical perspective.

In public debate, unfair trading practices are often confused with commercial negotiation. Joint purchasing is one issue, of clear benefit to consumers, subject to such confusion. Joint purchasing has previously been labelled as an unfair trading practice in statements coming from the farming sector (4).

(4) *Non-exhaustive listing of (potential) unfair and abusive commercial practices and contractual conditions", HLF platform B2B contractual practices meeting on 9 March 2011*, Marc Rosiers, Copa-Cogeca, Brussels (available here)

Joint purchasing is not an unfair trading practice

Negotiations, usually in the form of joint purchasing for the companies represented by UGAL, create significant cost-savings for independent retailers. The independent retailers belonging to a 'group' structure profit from considerably more favourable trading terms by obtaining volume discounts. These cost savings result from economies of scale in ordering, logistics, marketing and a better negotiating position through bundled purchases.

In general, this bundling results in savings of between 5 and 10 %. These purchasing agreements, made possible through keen commercial negotiations, have **positive effects on the security of supply** as independent retailers are guaranteed to have products on the shelves for consumers to purchase as they like.

These negotiations also are necessary in order to enable independent retailers to compete with large integrated chains and to maintain competition on the selling market. This aspect **clearly benefits consumers**.

On the upstream procurement market, competition is also promoted as buying in large volumes allows local, regional, national and international suppliers to enter negotiations. This can have a positive impact on procurement prices. This price benefit is passed-on to consumers. If joint purchasing is not used, often independent retailers do not have the scale to deal with national or international suppliers.

Joint purchasing also creates supply chain efficiencies which benefit innovation. Supply chain efficiencies result from reduced transaction costs (both for the supply side and the procurement side) and increased productivity efficiencies and provide a framework for long-term investment, often in innovations for the benefit of the consumer.

Unfortunately in the food sector, at the top of the supply chain, the farming sector remains highly fragmented and inefficient in comparison to other levels in the supply chain. This makes it difficult to match supply and demand and reduces the optimal functioning of the supply chain, in that it requires the involvement of more interim actors, leading to longer, more expensive supply chains.

➔ Economic theory suggests (5) that where joint purchasing leads to efficiencies which expand demand, or provide the appropriate framework for investments, such efficiencies would be expected to benefit end customers through increasing output downstream. In practice, this claim is substantiated as cost savings and other efficiency gains listed above, as a result of joint purchasing, are indeed passed onto consumers in the form of lower prices, increased choice of products on the market, as well as investment in innovative facilities. Due to the intense competition on the retail market, groups of independent retailers, all of whom use joint purchasing, have no choice but to pass these cost savings on to consumers.

➔ Such efficiencies are particular important in the agricultural sector. This point is highlighted by the fact that *Bundeskartellamt*, the German Competition Authority, in the Final Report of its inquiry into the German milk sector, pointed out positive effects of cooperations between

(5) OFT economic discussion paper, The competitive effects of buyer power, OFT 863 Jan 2007 para 4.7

dairies, thereby calling, in an indirect manner, for structural changes in the agricultural sector. Such cooperations, according to the Report, can generate efficiency gains and considerably improve the competitiveness of small dairies in particular (6).

➔ Highly relevant in this context is also the Resolution of the European Competition Network of 21 December 2012, arguing against unilateral exclusions of groups of agricultural producers from competition rules (anti-trust law). Such exclusions, it points out, would actually jeopardise the much-needed rationalisation and efficiency gains in the agricultural sector. This rejection by the European Competition Authorities of one-sided legal measures in favour of the agricultural sector points clearly to the fact that interferences with contractual freedom along the food supply chain, leading as they would to preferential treatment of one specific sector, cannot be the right approach to take (7).

Risk sharing and innovation

The Green Paper casts the transfer of commercial risk in a negative light. This should not be the case as commercial risk is shared in all commercial relationships across all sectors and supply chains.

In a retail context, if a manufacturer would not share the commercial risk, consumer choice would be greatly reduced. For example, retailers would be reluctant to stock new products if they could not share the risk of this transaction with the producer of the product.

➔ **If risk sharing were to be blacklisted**, a retailer would have to make arrangements to store a large volume of products that ultimately failed to sell. Sales and storage areas are expensive and retailers have limited space. With this in mind, rather than risk incurring the potential losses of trying to sell a new product, retailers would likely be forced into only selling proven successful products. This would greatly reduce the numbers of new products introduced on their shelves and reduce the rate of product innovation, ultimately reducing consumer choice.

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.

Unfair trading practices are **not** a systemic problem in the supply chain. They have **no impact** on EU cross-border trade. They have **no impact** on the functioning of the Single Market. They **do not impact** the ability of UGAL members to trade cross border.

This is because choice of law clauses explicitly determine what contract law regime applies.

➔ Companies can easily contract cross-border as the legal regime for EU and even international contracting is fully developed through private international law, the hierarchy of legal norms, Rome 1 and the Brussels Regime. Given this well regulated context, there is

(6) www.bundeskartellamt.de/wEnglisch/download/pdf/2012-Milk_Sector_Inquiry_Final_Report.pdf
(7) http://ec.europa.eu/competition/sectors/agriculture/resolution_nca_en.pdf

no impact on cross-border trade as transacting parties are fully informed of the jurisdictional rules regulating a given contract. The Single Market is not fragmented as the existing rules enable simple cross-border contracting.

This being said, **territorial supply constraints (a Single Market Barrier; not a trading practice) do have a negative impact on the Single Market (see question 22).**

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

UGAL believes that national mechanisms should sufficiently address the issues faced in each Member State. However, this is not always done in the most appropriate way (see response to question 15 below).

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

National mechanisms have developed as a result of specific issues in a given country. Where no national mechanism exists, it is because there is no concrete evidence that a national problem exists.

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?

See answer to question 10 above.

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

No further action is needed at EU level.

For the reasons mentioned earlier on in this response (notably in the UGAL response to question 10), existing national frameworks do not impinge upon the ability to transact cross-border. This would appear to make any EU legislative action unjustified.

The case for further action will, in any case, depend upon the results of the Impact Assessment currently in progress. To be valid, this assessment must fully consider all relevant aspects, including the impact of further action on i) consumers in terms of prices and ii) the use of the retail sector as an inflationary buffer.

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.

Given the differences in supply chains even within the food and non-food sectors it is unlikely that there can be a 'one size fits all' solution. A 'one size fits all' solution is very likely to impose unjustified restrictions to contractual freedom.

Drawbacks from UTP regulation are that it is likely to reduce the efficiency of supply chains, which will have repercussions on prices as well as margins and thus investments and innovation. This will ultimately reduce consumer benefit and choice (for more detail see question 25).

Furthermore it will create competitive imbalances, particularly when it does not apply in the same manner to all market players and all goods.

National regulatory problems

France
In France, trading practices are subjected to two types of rules: the transparency rules (L. 441-1 to L. 441-7, Commercial Code) imposing the forms of the trading negotiations in order to guarantee loyal transaction, whereas some practices are considered as restrictive (L. 442-1 to 442-10, Commercial Code).

Among those practices, Article L. 442-6, I, 2e of the relatively new Commercial Code, takes up, for B2B trading practices, the wording of the text sanctioning the abusive clauses in B2C contracts (art. L. 132-1, Consumer Code): "*Engage la responsabilité de son auteur et l'oblige à réparer le préjudice causé le fait, par tout producteur, commerçant, industriel ou personne immatriculée au répertoire des métiers (…) de soumettre ou de tenter de soumettre un partenaire commercial à des obligations créant un déséquilibre significatif dans les droits et obligations des parties*" (approximate translation: subjecting or attempting to subject a trading partner to obligations creating a significant imbalance in the rights and obligations of the parties (…) incurs the liability of the perpetrator and obliges him to seek redress for the harm caused – be it a producer, a retailer, an industrial or any person registered at the Répertoire des Métiers (…).

Germany
In Germany, a large number of restrictions to contractual freedom already exist, for example in the context of German laws on general terms and conditions of businesses, anti-trust law as well as the enforcement practices of *Bundeskartellamt*, the German Competition Authority.

Some of these restrictions even go beyond what legislators originally intended. This is the case, for instance, with the ban on companies with a dominant market position – or companies, on whom another company is dependent – demanding unjustified special advantages. Public authorities, in applying this ban, seem to interpret it to the effect that each particular element of a set of terms and conditions (i.e. specific items to be deducted from the price of a transaction) requires a *quid pro quo* that is transparent to the other party, while an appreciation of the terms and conditions as a whole – essential from a commercial perspective –, is evidently not considered admissible. This results in a lack of flexibility when it comes to contractual negotiations and the design of contracts.

To remain on the side of caution, contracting parties frequently find themselves compelled to enter into contractual setups that they consider far from ideal in relation to their own commercial interests. This practice of the German Competition Authority when it comes to assessing a *quid pro quo* of value to the other party – faulty, as it does to take into account the commercial interests of the contracting parties, or focuses exclusively on the interests of the producer – deserves to be singled out for particular criticism.

Italy
Italy has recently adopted a law that requires retailers entering into sale and purchase contracts of agricultural and food products to respect a number of obligations. If these are breached, fines can be imposed. The adoption of this law has led to a number of problems throughout the supply chain, notably regarding the ability of SMEs to finance the capital needed to comply with the strict rules on late payments. The Italian law is a good example of a national framework not reaching its objective. Its objective was to protect SMEs but its effects have been harmful to exactly those companies. Moreover, as it applies only to retailers, it causes new imbalances in the supply chain and negatively affects competition neutrality in the market.

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.

Even if significant discrepancies exist, for the reasons mentioned in the response to question 10, this does not hinder cross-border trade.

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

N/A in the light of the response to question 16.

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?

UGAL **opposes** the granting of investigating powers, including the right to launch ex officio actions, impose sanctions and to accept anonymous complaints.

It is clear that inspiration for these powers has been taken from competition law and the powers of competition authorities. In competition law, the enforcement regime is based on economic studies and comprehensive understanding of the proven negative impacts of anti-competitive behaviour on market dynamics. This can justify certain procedures followed by those specific enforcement bodies.

No similar, rigorously analytical approach is taken in relation to unfair trading practices. As such, enforcement powers of this magnitude are unacceptable.

This aside, any regulation of unfair trading practices would have to be enshrined, for reasons of legal coherence, in civil law. Setting up enforcement bodies and granting them investigative powers, as described above, would therefore constitute an unwarranted interference with national codes of legal procedure.

Anonymous complaints

Anonymous complaints undermine the legal principle to the right of defence.

In practice, given the specificities of supply contracts in terms of volumes, products and prices involved, it is impossible to make an anonymous complaint. The claimant loses his anonymity as soon as the details of a complaint are made known to the company that is being complained against.

➔ Details of a complaint are required in order to i) assess its validity and ii) provide an opportunity of the party subject to a complaint to respond. This prevents anonymous complaints. Moreover, where they exist, anonymous complaints tend to create a climate of distrust and suspicion. This militates against good trading relationships, which require an element of trust.

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?

The list is inappropriate. As mentioned in the response to questions 1 and 6, all stakeholders in the (food) supply chain are in agreement that there is no such thing as a *per se* 'unfair' practice. Trading practices merely exist. They are neither unfair nor fair. The issue of fairness or unfairness does not regard a specific practice; rather it regards the way in which a practice is carried out.

The validity of this approach is confirmed by the Commission's Guidelines on Vertical Restraints (8). Like the EU association's stakeholder initiative, the vertical guidelines specify that practices merely exist e.g. upfront access payments (listing fees) and tying. However these practices are explained as positive in many circumstances but more negative (for distributors and suppliers) when used in other circumstances.

With this generally accepted approach in mind, **a blacklist approach to trading practices, as set out in the Green Paper is impossible at EU level. Indeed, at national level, where blacklists have been developed, they generally provide exceptions dependent upon the way a practice is carried out.**

➔ The only alternative solution to a black list is a broad set of principles that should be respected when transacting. Such a list should be limited to the precise wording of the principles of good practice in vertical trading relationships that was agreed by associations

(8) (2010/C 130/01)

in the food supply chain in the context of the High Level forum for a Better Functioning Food Supply Chain.

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.

Please see our response to questions 19 and 20 above where UGAL explains its rationale for opposing the development of such a list of practices.

Drafting a list of practices considered as abusive *ex ante* in order to guarantee the protection of the weaker party, like a law protecting consumers, would completely run against the requirements of daily business reality, whereby a level of flexibility is required and thus, *a fortiori,* a complete respect of the contractual liberty of each party. Overly protective EU legislation might have the harmful effect of reducing this flexibility.

22) As regards specifically Territorial Supply Constraints, please explain:
a) What would you consider to be objective efficiency grounds justifying a supplier not to supply a particular customer? Why?
b) What would be the advantages and disadvantages of prohibiting territorial supply constraints (as described above)? What practical effects would such a prohibition have on how companies set up their distribution systems in Europe?

Territorial supply constraints are not a commercial practice; rather they are Single Market barriers.

Territorial supply constraints, or any other measures by suppliers which have the effect of partitioning the Single Market or limiting parallel imports, lead to unnecessary fragmentation of the Internal Market, hinder cross border trade, lead to considerable price differences between Member States and reduce consumer choice.

In B2B relations, UGAL does not see any objective efficiency grounds that justify a supplier not to supply a customer from a different Member State, when it has the capability to do so (e.g. multinational corporations).

Anecdotal evidence concludes that such constraints even cause different quality standards in different Member States for the same branded product.

Territorial supply constraints prevent UGAL member companies from efficiently sourcing branded goods of identical quality at the best possible price in the Single Market.

➔ Prohibiting territorial supply constraints, and measures having an equivalent effect, would allow UGAL member companies to have efficient procurement programmes whereby a branded product of identical quality can be sourced for the best possible price from across the EU. Taking the economic theory (see question 9) regarding price benefits being passed onto consumers, the advantages of a prohibition are clear.

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

Please see our response to questions 19 and 20 above where UGAL explains its rationale for opposing the development of a blacklist of unfair practices. The same rationale applies for having a list of fair practices.

If anything, the only framework that should be promoted at EU level is the voluntary Framework for the Implementation and Enforcement of the Principles of Good Practice in Vertical Relations in the Food Supply Chain adopted by eight EU associations, including UGAL.

This voluntary initiative already provides a very robust and credible solution to the very limited challenges caused by unfair trading practices in the food supply chain. Designed by all food supply chain representatives (from every level of the chain), it is tailored to their needs and business realities. It seeks to achieve a culture change.

➔ This voluntary initiative should be given the means to develop, produce results and be assessed against its objectives. The Commission should recognise the significant investment required to sign up to this voluntary framework, encourage its development and promote it. Companies cannot be expected to make the significant investments required by the voluntary framework if they know that legislation is inevtiable.

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?

UGAL supports self-regulation and the voluntary framework already developed by food supply chain stakeholders as described above.

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?

Consumer benefit

The most underrepresented issue is that of consumer benefit in the supply chain. Current supply chains are efficient. They are characterized by efficient bargaining and negotiating aimed at delivering the best prices to the consumer.

As such, UGAL warns against European legislation on unfair trading practices. Legislation will only complicate the current situation; not improve it.

This viewpoint has been highlighted by Prof Dr Jules Stuyck, commenting in a legal opinion given to the European Parliament on unfair commercial practices, who has stated that "*there is indeed an inherent tension, if not contradiction, between the goals of antitrust law (free and effective competition) and unfair competition law [meaning unfair trading rules] (fair competition only)*" (9).

The Commission itself, in reviewing Regulation 1/2003, remains unsure of the doctrinal compatibility of unfair trading laws and EU competition policy; in particular the potential for unfair trading laws to lead to higher prices and overall losses in consumer welfare (10).

In certain non-EU jurisdictions, competition authorities have a very strong understanding of the inherent conflict between unfair trading rules and competition law. The response of the US authorities to a 2008 study of the International Competition Network on the abuse of superior bargaining position is particularly instructive in this regard:

"*The package of terms that make up a contract between parties in a vertical relationship reflects the parties' agreement as to how to allocate rights and risks between them in an efficient manner. If a particular provision is deemed by the government to be an 'abuse of superior bargaining position' and therefore not available for use in a contract, the parties likely will adjust other terms of the contract, such as adjusting the contract price. The result may be a less efficient contract with higher contracting costs and both parties potentially worse off. Ultimately, the quality adjusted price to the ultimate consumer would tend to increase, a result antithetical to the goals of US competition policy*" (11).

A very similar conclusion has been made by the Irish Competition Authority in its recent submission on proposed Irish legislation on unfair contracting in the groceries supply chain. In particular it stresses that rules on unfair trading would create a loss of flexibility in the supply chain and an ultimate loss to consumer welfare (12).

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Established in 1963, ***UGAL*** *– the* ***Union of groups of independent retailers of Europe*** *– is the European association that acts as an umbrella organisation for the main groups of independent retailers in the food and non-food sectors.*

These groups are set up like wholesale businesses by independent retailers and craftsmen. Their aim is not only to provide their members with the best purchasing conditions. What they are also seeking is to jointly contribute technical and material resources, together with all the services and the human capacity required to guarantee the operation and development of modern commercial and distribution enterprises for retailers to effectively respond to consumer expectations.

(9) *European Parliament, IMCO Committee, Briefing Paper on addressing unfair practices in business-to-business relations in the internal market*, p. 16
(10) *European Commission, Staff Working Paper on the Report on the functioning of Regulation 1/2003, SEC(2009) 574 final,* paragraphs 178-181
(11) *International Competition Authority, Report on Abuse of Superior Bargaining Position, 7th Annual ICN Conference, Kyoto Japan,* 14-16 April 2008, p. 17
(12) *Submission by the Competition Authority to the Department of Jobs, Enterprise and Innovation's Consultation on a Code of Practice for Grocery Goods Undertakings,* September 2011

To achieve this, these groups seek economic performance through networks of points of sale – consisting of SMEs usually working under a common brand name.

UGAL represents nearly 300.000 independent retailers, who manage more than 545.000 sales outlets. This represents a total employment of more than 5.000.000 persons.

More information about UGAL under www.ugal.eu