

**Responses to the European Commission's Questions contained in the Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe**

In response to the challenges and questions posed in the European Commission (EC) Green Paper of 31 January 2013 On Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe, taking into consideration the importance of the issues raised therein for the Polish economy, the Centre for Anti-monopoly and Regulatory Studies (CARS) of the University of Warsaw (UW) established a Working Group on Unfair Trade Practices in Supply Chain. This Working Group is headed by UW Professor dr. hab. Tadeusz Skoczny.

Composition of the Working Group:

1. Prof. UW dr hab. T. Skoczny (lawyer)– Head of the Working Group
2. Doc. dr Ewa Krakowińska (economist) – Member of CARS, University of Warsaw (UW)
3. Dr Maciej Bernatt (lawyer) – Member of CARS, UW
4. Dr Dominik Wolski (lawyer)– Legal councillor, member/co-worker CARS, UW, Director of the Legal Department of Jeronimo Martins Polska S.A. (the owner of the largest retail chain in Poland)
5. Maciej Radwański (lawyer) – co-worker CARS, UW, Assistant Trade Director of Medium Size Suppliers.
6. Grzegorz Kaniecki (lawyer)– Legal councillor, co-worker CARS, UW, Project Coordinator and Representative of Large Suppliers

As a result of the work and activities of the Working Group, the within set of responses to the questions posed in the Green Paper has been compiled. These responses have been submitted to the Commission within the framework of public consultations.

The basic assumption underlying the work of the CARS Working Group was to formulate conclusions in the public interest, both in the interest of undertakings as well as consumers. The Working Group was guided by the principle of balancing the interests of those undertakings engaged in supply chain at its various levels with respect to good commercial practices. In any case where the Working Group was not able to find common conclusion, both retailers and supplier conclusions were presented separately.

Respectfully,

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Warsaw, April 22<sup>nd</sup>, 2013

## Responses to the European Commission's Questions contained in the Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe

### 1) Do you agree with the above definition of UTPs?<sup>1</sup>

#### Common standpoint of members of the Working Group:

Yes, with the reservation that trade practices cannot in any instance be treated as unfair *per se*. Each and every individual case of trade practices (activities) must be analysed in the economic context and in light of the prevailing conditions and circumstances surrounding the economic activities of both parties.

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

#### Common standpoint of members of the Working Group:

The concept of unfair trading practices *per se* does not work in the Polish legal system.

Polish legislators use the term '**unfair competition act(ivity)**' (contained in the 1993 Act on Combating Unfair Competition (hereinafter 'UCA'). In accordance with Art. 3 par. 1 of the UCA an unfair competition act is considered as an activity contrary to the law or in contravention of *contra bonos mores* conduct, if such activity threatens or infringes upon the interest of another undertaking or client. As a result of the foregoing, an *unfair trading practice*, if it encompasses an activity prohibited in Art. 3 par. 1 of the UCA, can be considered as synonym with the concept of an unfair competition act(ivity). Unfair trading practices may also fall within the examples of unfair competition act(ivities) included in the UCA (for example, an activity "restricting access to markets", specified in Art. 15 clause 1 UCA).

To date the decisions and rulings of Polish courts based on Art. 3 of the UCA have not led to the creation of the concept of unfair trading practices.

In addition, unfair trading practices are prohibited in relationships between businesses and consumers (B2C) according to the Polish Act of 2007 Prohibiting Unfair Commercial practices, passed as an implementing measure of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the Single market.

### 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?

#### Common standpoint of members of the Working Group:

The concept of unfair trading practices in certain situations can be applied to all phases of contractual activity:

- commercial negotiations,
- conclusion of a contract (contents of a contract)
- execution/performance of a contract

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<sup>1</sup>See Green Paper, pp. 6-8.

In practice, when we are dealing with the abuse of a superior bargaining (market power) position towards an economically dependent undertaking, a number of infringements of fair trade practices may occur, in particular:

- in the negotiation phase:

- demands to reduce prices (by the application of a retroactive rebate) concerning transactions which took place in a previous year (or any previous accounting period during which time the contract was in force), as a preceding condition for the approaching to negotiations for the next contractual period;
- suspension, in whole or in part, of trade relationships carried out within the context of a binding contract as an element to apply pressure in negotiations for the next contractual period;

- in the execution/performance phase:

- intentional not-fulfilment by one of the parties of its binding contractual obligations;
- demands for rendering additional services, beyond those provided for in the contract.

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

##### Common standpoint of members of the Working Group:

Unfair trading practices can take place at any stage of the retail supply chain. However, in order for such practices to be of permanent character and have significant effects on the economy or on a significant group of entities, they must occur in a market characterized by superior and inferior market positions of the contracting parties. Such conditions may be created by the following factors (among others):

- a significant level of concentration on the one side of the market (however it is not required that such concentration is on the level defined as dominant position in the anti-monopoly law);
- a lack of alternative options by one of the parties to obtain supply (delivery), together with the possibility for the other party to effectively switch supplies (deliveries) while cutting out the first party;
- inequalities can result with respect to phases in the supply chain which may not be easily eliminated or avoided;
- in order to commercial practices to be characterised as unfair trading practices, they must last for a some longer period of time.

Examples of such a market structure may concern relations between:

- small suppliers of electrical energy (small wind turbine or water-powered electric plants) and large-scale industrial suppliers of electricity;
- small farms and large companies processing farm products (for example dairy companies)

In the opinion of suppliers, unfair trading practices are also present at the level of suppliers - retailers relationshipschains.

Representatives of regulated market sectors indicated that, in the context of such regulation, small market players who are the subjects of the protection of public supervisory organs designed to prevent unfair trade practices often abuse their right to commence proceedings or to notify public organs of alleged unfair trade practices committed by large players on the market, with the aim of achieving a tactical negotiating advantage.

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

The Working Group was unable to achieve a consensus as to the existence of the 'fear factor' as it was elaborated in Part 2.1. of the Green Paper.

Some members of the Group indicated that the 'fear factor', as used in the Green Paper, only takes place in a situation where a particular retailer has a de facto dominating position in a particular economic configuration. In situations where the retailer does not have a dominating position, within the understanding of the anti-monopoly law, the alleged existence of a 'fear factor' would appear to be unsubstantiated.

Taking into consideration strong competition existing on the market among retail chains, suppliers with attractive market offers will always have the opportunity to change recipients (retailers). Attractive supply offers will always find recipients at the level of retail chains, which are looking for products attractive for their consumers.

Similarly some suppliers don't agree that something which could be called a 'fear factor' exists in relations between suppliers and recipients/retailers.

However, some suppliers claimed that the 'fear factor' will always exist in situations where it is crucial for the supplier to continue a long-term commercial relationship with a particular retailer.

*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?*

Data is unavailable to confirm or affirm to what extent and how often UTPs occur in particular sectors.

In the opinion of suppliers to retail chains, unfair trade practices exist at the supplier/retailer level.

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

Data is unavailable to confirm or affirm to what extent and how often UTPs occur in particular sectors.

In the opinion of suppliers to retail chains, unfair trade practices existing at the level of supplier/retailer are not limited to the food sector and can occur at the same level and in the same way in other markets as well.

*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.*

Common standpoint of members of the Working Group:

Competition takes place between retail chains with respect to the range of products offered, servicing clients, promotional activities, as well as in the search for attractive supply sources, including with respect to pricing.

A fundamental tool for competing is promotion, broadly defined, including marketing and advertising. Large retail chains have a competitive advantage in this regard, using mass media such as the press, radio, internet, billboards, as well as cheap media such as advertising supplements. Competition also

takes place by offering samples of foodstuffs, organizing displays or demonstrations of products, and offering the possibility to return goods for their purchase price or in exchange for other goods.

In retail chains the most centralized sphere of decision-making concerns promotional activities, localization of outlets, interior design, and choices of suppliers.

The above-mentioned elements concerning competition for consumers, which in the context of the EC Green paper could be viewed as unfair trading practices, bring about rather more positive effects for consumers than negative. In general they broaden both the range and quality of goods which particular players on the market can offer consumers. However, it's true that in certain situations they may give rise to unfair trade practices.

It should be underscored that these types of activities are aimed at generating consumer demand, hence they should be viewed as good for the economy and good for consumer welfare. Any assessment of them should be performed taking into account both their economic aspects and the economic activities characteristic of all parties involved. One might assess one set of activities negatively, for example the conduct of a promotional campaign not agreed upon by the parties and not bringing about any economic effect in the form of sales and orders, and another set of activities positively, for example a promotional campaign agreed-upon in the contract binding on the parties and being part of a nationwide marketing campaign carried out by a retail network on behalf of a supplier. It seems unwise to make any generalization based solely on the name assigned to an activity or the source of funding therefore.

Suppliers to retail chains point out the following disadvantageous effects of unfair trading practices:

More than 40% of suppliers claim that retail sales prices are forced on them by the retail chains, and one-third claim that their products are sold at prices below costs. These types of activities would confirm the existence of undue pressure by retailers on suppliers. However, as was pointed out above, to the extent that strong competition exists among retail chains themselves, such pressures can have a positive outcome for the final end-users, i.e. consumers (so long as such activities are not connected with the lowering of product quality). Nearly all retail chains require suppliers to take part in a minimum number of promotions, which are stipulated in the contracts (40% of suppliers confirmed this). During the course of our research, circa 28% of suppliers claimed that they were burdened with the costs of promotional activities which were not agreed upon, but taken up by the retail network on its own initiative.

Furthermore, suppliers were saddled with additional costs by retailers such as: indexing charges, in other words for an individual product, charges for shelving products, as well as charges as a percentage of sales (1-2%), in exchange for which the supplier or producer could receive free advertising space in retail network brochures.

In the case of copycats, the retail chains are the free riders on the producer's/supplier's investments in advertising and marketing, or innovation. In the long term such activities weaken the willingness to engage in investments into marketing and innovation in the consumer products market. (For more on brand imitation (copycats) as an unfair trading practice, see points 19 and 25).

In the opinion of retail networks (and some suppliers, in particular medium size suppliers), in many instances collaboration between retail chains and suppliers serves the interest of innovation and investment, for example in the form of creating new products (previously not existing on the market). Requirements concerning quality also serve innovation and investment, particularly in the case of medium suppliers, by improving their technologies and production techniques.

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

Common standpoint of the Working Group: Cooperation between suppliers and retailers generally has

a positive effect on consumer welfare, in particular by leading to lower prices, which is advantageous so long as the proper relation between price and quality is maintained.

Medium-size suppliers expressed the fear that legislative interference, in particular on the low level of local administration, could bring about ‘more harm than good’, and fear administrative interference by public organs much more than the activities of retailers.

Both suppliers and retailers point out the danger of placing too much focus on unfair trading practices, which in their opinion operate only on the fringes of cooperation arrangements between retailers and suppliers.

*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.*

In the opinion of suppliers – unfair trading practices will always concern to a greater extent foreign suppliers, who a) have a weaker market position on foreign markets; and b) do not know the local laws (and their interpretation) nor the local trade customs to the same extent as local players. This hampers their ability to avoid unfair trade practices and/or mitigate their effects. For this reason unfair trading practices can constitute a factor limiting the ability of a company to trade cross-border at the supplier/retailer level.

In the opinion of retailers - the differences existing in the legal systems of the EU Member States do not constitute a barrier to cross-border trade. Actual practice shows that a large number of retail chains and many suppliers already engage in trans-border trade, despite the divergences in legal systems. This problem has, in their opinion, already been considered during work on the proposal of the Common European Sales Law (CESL) Regulation.

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

Common standpoint of the Working Group: The judicial decisions and rulings of Polish courts, based on the Act on Combating Unfair Competition (UCA), has not led to the creation of a concept of unfair trading practices.

In practice the most frequent issue which resembles unfair trade practices has been the review, based on Art. 15 clause 1 of the UCA, of the “prohibitions against impeding on access to market”. The art.15 clause 1 point 4 of UCA specifies that any fee for the acceptance of goods for sale, other than a trade margin, constitutes an impediment on access to market. The very broad judicial interpretation of this provision in practice, has not been correct, and it led to an improper (formalistic) interpretation in Poland of unfair trading practices. The courts’ interpretation may lead to situations where honest and fair behaviour by enterprises which does not restrict other enterprises’ access to markets will be prohibited by the courts solely based on the fact that a fee (rather than a trade margin / rebate/) was charged. The courts reduce the analyses to establishing whether the fee was demanded by the retailers from the suppliers. The court very seldom check whether such a fee– from an economic point of view – lead to actual and real restriction to an access to the market. The courts also do not analyse whether the enterprise paying such a fee might in fact have received sufficient and equivalent consideration for such payment.

Some suppliers (particularly medium size suppliers) hope that public authorities will reduce their interference into B2B market practices. Such suppliers express the view that such interference is

ineffective and only leads to increased costs for the carrying out of economic activities.

In the view of some suppliers the current regulatory/self-regulatory framework and court decisions and rulings are insufficient to resolve the problems arising from unfair trading practices, and additional legal regulations are needed.

In the opinion of retailers the fundamental question is whether it is possible to introduce regulations which would respect the principle of freedom of contract and properly reflect the economic realities and real relationships between contracting parties, while at the same time effectively eliminating unfair trading practices. The experience in Poland in application of Art. 15 clause 1 point 4 of the UCA demonstrates that incorrect legal regulation (incorrect interpretation) leads to market failures, which has the consequence of harming consumers' economic interests (decrease consumers' welfare).

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

In the opinion of some suppliers the lack of comprehensive regulatory/self-regulatory frameworks addressing UTPs is a problem in Poland.

Articles 3 and 15 of the Polish UCA may be considered as a skeletal framework, but it is not a comprehensive one and their application in practice indicates significant gaps in the concept of unfair trading practices in Polish law (defined in Polish law as acts of unfair competition).

*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?*

In the opinion of suppliers, differing legal regulations in, for example, the Central and Eastern European Countries (CEE) make it impossible to carry out uniform trade policies and practices in the region, which has the effect of increasing transaction costs. An example may be the different approaches taken in the various CEE to issues such as rebates, bonuses, or marketing/advertising fees. In some countries these are considered to be ordinary business practices, while in other countries such practices are, to differing extents, illegal. This leads to a situation whereby suppliers realizing supply contracts to different countries have to conduct an analysis of the laws, regulations, and court decisions with respect to unfair trade practices for each given market. This above all significantly increases transaction costs in the short term, and in the long term limits the range of offers for consumers, and restricts investments and engagement in the direct supply. This in particular affects smaller countries/markets, where the reduced potential for trade turnover do not justify undertaking additional costs and legal risks.

In the opinion of retailers, there is no significant connection between the differences in national regulations concerning unfair trading practices and cross-border trade. Despite the existence of different regulatory regimes, existing practice demonstrates that both suppliers and retail distribution chains carry out cross-border trade on a wide scale. Such trade takes place not only within EU, where a similar legal culture and similar regulatory regimes exist, but also in territories outside the EU. This constitutes another argument, in addition to those put forth in response to question 10, demonstrating that the existing differences in applicable legal regimes with respect to unfair trading practices have only a marginal effect on cross-border trade, and certainly cannot be considered as a factor capable of becoming a barrier to such trade. It's also difficult to see such divergences as a factor leading to fragmentation of the Single market. The decisive factors are the offer (range and price), quality, and accessibility of goods, if these are kept at sufficient levels, the differences in

various countries' legal regulations do not constitute a significant factor influencing cross-border trade.

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

Common standpoint of the members of the Working Group: Priority should be given to shaping public interference into the market in such a way that aims toward the establishment of self-regulating frameworks in national markets by encouraging undertakings to create codes of conduct based on fair practices and establish self-regulatory organs and institutions (arbitration bodies, mediation commissions, etc).

Only if such efforts turn out to be impossible to implement should instruments such as soft law and harmonization directives be used. The joint opinion of both retailers and suppliers is that there is no need issue binding regulations at the EU level.

Efforts to date to regulate these types of activities have shown that Polish courts of general jurisdiction do not possess enough experience and expertise in the fields of economy and business practices to interpret such laws in an effective and efficient way so as to positively stimulate the economic processes.

*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.*

Common standpoint of the members of the Working Group: Polish experience to date with respect to the application, by the courts, of Art. 15 clause 1 point 4 of the UCA must be assessed negatively. The prevailing line of court jurisprudence has not taken into account economic realities and the economic context, which has led to a situation of legal uncertainty and a series of failures in the supplier-retailer supply chain.

The problem of regulation of this sphere of activities must be analysed giving primacy to the principle of freedom of contract as one of the fundamental principles of free trade, which in turn is implicated in free markets and economic freedom. In practice regulations addressing the issue of UTPs inevitably lead to placing restrictions on freedom of contract, a situation currently taking place in many countries (including Poland, based on Art. 15 clause 1 point 4 of the UCA). The key to a proper treatment of the issue is to define unfair trade practices in such a way that, on the one hand, would eliminate egregious practices while, on the other hand, not unreasonably or unjustifiably restricting freedom of contract, nor limiting the opportunities for suppliers and retail distributors/recipients to enter into business relations. Over-restriction would lead not to a strengthening of the Single Market, but to its restriction, which would also be damaging to consumers. If enterprises had less opportunities to establish trade relations, the end result would be less offers for consumers. So long as the definition of unfair trade practices deviates from market practices with respect to supplier-retailer relations, it will place unjustifiable restrictions on the principle of freedom of contract.

In the view of suppliers, interference by the public authorities, in particular the European Commission, is justified. Further work should be aimed at establishing an effective statutory framework of self-regulation, operating under a clear catalogue of unfair trade practices, but failure to take into account the economic context and business practices could easily lead to negative market effects (as has been demonstrated in Poland with respect to the application of Art. 15 clause 1 point 4).

In the view of retail chains, the approach to the problem of unfair trade practices expressed in the EC



documentation, including pre-defining such practices as a one-sided practices occurring solely on the side of retailers and associated exclusively with inconveniences and losses by suppliers, constitutes proof that the economic practices currently functioning on the market have not been properly assessed by the Commission. This faulty assessment could lead to the implementation of regulations which would significantly restrict freedom of contract, and as a consequence limit the development of the Single 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.*

No response given.

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

Common standpoint of the Working Group: Regulation of the problem of unfair trading practices at the EU level, similar to the proposal for the Common European Sales Law (CESL) Regulation, raises serious doubts about the competence of EU institutions to implement and enforce such a regulation. In particular questions arise about their conformity with the subsidiarity and proportionality principles (Articles 114 and 115 of the TFEU).

In the opinion of suppliers, various approaches to the problem of unfair trade practices in various countries pose similar problems as with non-tariff barriers, and this justifies interference at the EU level. Such interference however should aim for establishment of an effective statutory framework of self-regulation.

In the opinion of retail chains, taking into account their earlier assertion that UTPs exert no significant influence on cross-border trade, it's difficult to assert that their regulation would have a significant effect in terms of eliminating trade barriers in the Single Market. As a consequence, EU institutions should not be vested with the authority to implement or enforce these types of regulations. This problem is of particular significance in the case of those countries where the regulation of unfair commercial practices is in the domain of private law (such as Poland). In these instances it seems difficult to claim that such significant interference into the private law systems of such countries does not violate the above-mentioned principles of subsidiarity and proportionality. This issue should be dealt with already at this phase of the study and work on the problem.

*18) Should the relevant enforcement bodies be granted investigative powers, including the right to launch ex officio actions, impose sanctions and to accept anonymous complaints?*

Common standpoint of the Working Group: Granting administrative organs (enforcement bodies) such powers would be too far-reaching. In our opinion the sphere of interference by public authorities into relations between private entities in this area should concentrate on:

- creation of an institutional and incentive-based framework for effective sectoral self-regulation and the elaboration of codes of conduct containing fair practice standards by the interested private entities;
- creation of an effective civil law framework for processing claims (introduction of a definition of

unfair trade practices together with a catalogue of specific examples, black clauses/white clauses, allocation of the burden of proof, etc.)

In the case of Poland vesting such powers in public organs would constitute a complete change in its legal system and complete change from a civil law system to an administrative law system. This type of change could bring about significant dysfunctions on the market. The current situation does not justify such radical changes to the legal system, which in addition would be connected with additional cost burdens on the national budget.

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

Common standpoint of the Working Group: As was indicated at the beginning of this document, none of the trade practices listed can be defined as unfair *per se*. Their legal categorisation depends on the proper assessment of the concrete conditions and circumstances accompanying the collaboration and cooperation between trade partners and appearing in their practices, taking into full account respect for the freedom of contract.

In the opinion of suppliers: a significant problem in the relations between retail chains and suppliers is the imitation of suppliers' brands (copycats, parasitic copying) by retail chains, which leads to frequent mistaken identification by consumers with respect to the origin (source) and quality of products, destroys the marketing investments of producers, leads to loss of customer loyalty, and in consequence weakens the position of suppliers vis-à-vis retail chains. The copying of independent suppliers' products is all the more deleterious because it is the retailer which decides on product placement on shelves. In the case of copycats the retailer can position them beside the original products of independent producers and place the copycats in a more advantageous position, taking advantage of consumers' known habits and inattention. An even greater problem arises when the products are intermingled, for example sales of ice cream bars from store refrigerators. Retail chains also decide on sales prices, and hence can juggle the prices of independent suppliers' products and their own in such a way as to direct consumer demand toward their own products.

Retailers are informed of suppliers' trade plans in advance, and know the characteristics accompanying sales and consumer preferences. Specific obstacles in combating imitation products include:

- inadequate legal causes of action and remedies for redress;
- the impracticality of commencing legal proceedings in court against an economic trade partner, in particular where such practices are common, albeit in differing degrees, among all retail chains.

*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?*

Common standpoint of the Working Group: In terms of unfair trading practices it is best to avoid a general qualification, particularly the creation of a closed catalogue of unfair trade practices. Each economic relation needs to be individually assessed in light of the concrete conditions and circumstances. Rigid legal categories can only lead to unjustified restrictions on the freedom of contract and freedom to conduct economic activities (freedom of establishment), to the detriment of the development of the Single Market.

Further work should be aimed at the establishment of an effective self-regulatory regimes. Only as a result of the work of self-regulatory organs can concrete criteria and examples of unfair trading practices be crystallized.

The Polish experience with creation of a public list of abuses based on the provisions of the 2007 Act

Combating Unfair Commercial Practices (implementing Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market) has been negative. The register of abusive practices are excessively casuistic, difficult to analyse, and contain a great deal of repetition of clauses which are understandable only in the context of a specific factual situation, which situation is not described or published. Modifications are required, aimed at systemization and ordering of the clauses detailing abusive practices. Such systemization and ordering process should be a permanent element of the legal regime. Doubts also arise as to the legal nature of the type of register used and its application to concrete cases and factual situations. In light of the abbreviated editing applied to specific clauses they are often misinterpreted and / or misused.

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<sup>2</sup>.

Common standpoint of the Working Group:

**Practice outlined in 5.1 – Ambiguous Contract Terms** – taking into account the generality of the practices described, they cannot be considered as unfair trading practices *per se*.

Sanctions (liquidated damages or penalties provided for in a contract) which are disproportional to the actual damage suffered may, in certain circumstances, be considered an unfair trading practices.

As regards to the lack of ‘clauses setting out the circumstances and conditions under which subsequent changes in the cost or price of products or services may be permitted’ – once again this formulation is too general to constitute a basis for considering such a lack as an unfair trading practice *per se*.

**Practice outlined in 5.2 – Lack of Written Contracts** – this should not be considered as an unfair trading practice.

**Practice outlined in 5.3 – Retroactive changes in prices, deductions from the invoiced amount to cover promotion fees, unilateral discounts based on quantities sold, etc.** – These practices can be considered as UTPs only in instances where they are not established in the initial contract or were not introduced on the basis of a voluntary agreement to modify the contract. Unilateral actions on the part of either party, without the consent of the other, can constitute an unfair trading practice.

**Practice outlined in 5.4 – Unfair Transfer of Commercial Risk**

Burdening the supplier with the risk of stolen or disappeared goods following their delivery to the retail network can, unless agreed upon in the initial contract, constitute an unfair trade practice.

Demanding a supplier to finance the proprietary business activities of a retailer (i.e. investment into new outlets) can constitute an unfair trade practice, unless such demands are based on appropriate agreements in the initial contract or on subsequent modifications with respect thereto voluntarily agreed upon by the parties. In instances where the supplier voluntarily agrees to such practices, they

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<sup>2</sup>See Green Paper, pp. 19-23.

cannot be considered as unfair trade practices on the part of the retailer.

“Reverse margins” are in principle fair, being advantageous to both suppliers and consumers, so long as they are agreed upon in the initial contract or a subsequent modification and are a result of voluntary ‘arms length dealing’. We would also call attention to the difficulty in determining the ‘real / arm’s length value of services supplied on the basis of such agreements.

Requests for payment for services not rendered or goods not delivered will always constitute an unfair trading practice.

#### **Practice outlined in 5.5. – Unfair Use of Information.**

This issue is regulated by a separate branch of law, and a special category at the supplier/retailer level is not necessary.

#### **Practice outlined in 5.6. – Unfair Termination of a Commercial Relationship.**

A sudden and unjustified termination of a commercial relationship in a manner not in accordance with the provisions of any agreement(s) between the parties can constitute an unfair trade practice.

#### **Practice 5.7 – Territorial Supply Constraints**

No data is available with respect to this practice.

#### **5.8 Common characteristics of unfair trading practices.**

We call attention to the need to analyse specific practices in their economic context and to take into account existing business practices. The same activity may constitute, in one context, a fair practice in accordance with the applicable law, and in other circumstances and conditions constitute an egregious activity.

The best way to elaborate a catalogue of types of unfair trade practices would be through self-regulatory organisations.

*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?<sup>3</sup>*

Insufficient data to give a response.

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

Response as in Question 24 below.

*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?*

Common standpoint of the Working Group: A priority should be to model actions taken by public authorities in such a way that they aim at establishing an efficient statutory framework for self-regulation on national markets by offering incentives for the creation of Codes of Conduct which include good practices and the establishment of self-regulatory dispute resolution organs (arbitration

<sup>3</sup>See Green Paper, p. 22.

boards, mediation commissions, etc).

Only in the event the above becomes impossible to realize should use be made of soft law instruments and harmonisation directives. The common position of both retailers and suppliers is that it is not necessary to issue of regulations at the EU level.

*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?*

Common standpoint of the Working Group: Too heavy a focus on the concept of UTPs runs the risk of overlooking the most important issue: what are the advantages arising from good cooperation and collaboration between suppliers and retailers (retail chains)? These advantages are not only for the good of the parties, but above all work to the advantage of consumers (consumers' welfare). They include, among others, a wide range of product offers and their availability, innovation arising from cooperation, and adjusting offers (both in terms of price and quality) to the needs of consumers. There are many examples of small supplier enterprises which, by collaborating and cooperating with retail chains, built up solid operations over the years and enhanced their market and financial positions. These elements should not be overlooked in any analysis of possible problems in the relationship between suppliers and retail chains.

Suppliers' additional comments: Unfair trading practices are a symptom of the deepening significance and growing strength of big retail chains in the market. Their strong market position is based on objective factors arising from long-term economic trends and the progressive consolidation of the retail market. As a result of a complex mix of socio-economic factors, suppliers' product brands are declining in significance to the advantage of retail network brands. Brands such as ALDI (in Germany), Biedronka (in Poland) and Lidl (in a number of CEE countries) are becoming perceived by consumers as a guaranty of quality and at the same level as the main brands of European suppliers of consumer branded goods.

The appearance of unfair trading practices may be the result of inequalities in the market power of parties at a given trade level. Legislative efforts to regulate only the symptoms may be ineffective in the case of large disproportions in the market power.