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**Internal Market and
Consumer Protection**

Unfair Trading Practices in the Business-to-Business Food Supply Chain

Study for the IMCO Committee



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

Unfair trading practices in the business-to-business food supply chain (UTPs)

Proceedings of the Workshop

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STUDY

Abstract

Unfair trade practices (UTPs) are practices imposed by a stronger party in a contractual relationship that grossly deviate from good commercial conduct and are contrary to good faith and fair dealing. UTPs are present at a national level, but they can also exert a negative impact on developing trade among Member States, which in turn may hinder the development of the internal market.

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1. EXECUTIVE SUMMARY

The aim of the workshop was to discuss the **unfair trade practices** that are used in **business-to-business relationships**, in the context of the **food supply chain and beyond**, as well as the **existing and future measures** that could be used **against such practices**.



The workshop was divided in four parts. The first panel was devoted to discussing the existing **EU legislative framework**, which could potentially be useful for combating unfair trade practices and the **economic approach** to unfair trade practices. The discussion on the legislative framework confirmed that the **existing instruments do not address the unfair trade practices effectively**, as on the one hand most unfair trade practices do not fall under competition law rules because the market players do not normally have a dominant position, and on the other – the European legislation on unfair commercial practices is applicable only to B2C relations. Unfair trade practices often simply constitute a breach of contract, though the general contract law that is enacted at an EU level cannot be used to combat them.

The key question from the economist's point of view is whether there are **economic issues with unfair trade practices**. The fact that weaker parties in negotiations often accept a certain clause does not automatically mean that such a clause is unfair. Moreover, from the point of view of economic efficiency, certain practices can be assessed as problematic not because they are unfair, but because they distort the allocation of resources, which is the key aspect when it comes to economic efficiency.

The second panel gave an opportunity to present **various perspectives** that businesses and business organisations have when it comes to unfair trade practices, the impact they have on the functioning of the market, and the possible **need for legislative intervention**. The speakers presented a broad variety of views: food and non-food sectors, retailers' associations as well as farmers.

A representative of the food industry emphasised **the need to introduce legislation** in the form of a directive on unfair trading practices at a B2B level that would have an impact on the functioning of the internal market. The optimal system should combine legislation with voluntary codes that enable different actors in the chain to engage in commercial relations, complemented with an effective enforcement mechanism. From this point of view, systems based on a voluntary approach are simply insufficient.



A representative of the non-food industry stressed that unfair trading practices **obstruct parallel trade, distorting and restraining competition**, and not only in the food industry. Ultimately, it is always the **consumer that is harmed the most** by the presence of unfair trade practices on the market. The stronger the position of the business using

unfair trading practices, the more severe the harm. Therefore, the market strength of a business that uses unfair trading practices should be a relevant factor in establishing whether unfair trading practices took place.

The retailers emphasised the need for good relations with their suppliers in order to maintain a competitive position on the market. They do not see B2B legislation as an appropriate means to deal with unfair trade practices, as it interferes with the **freedom of contract** principle. The retailers offered praise for **the Supply Chain Initiative** as a good complement to national legislation, stating that it should be given more time to grow and demonstrate its effectiveness. SMEs are the key beneficiaries of the system created by the Supply Chain Initiative: they can use the dispute resolution mechanisms in disputes with larger companies, and benefit from the wide application of the principles of good practice.

Next, a representative of the European Commission explained the **Commission's position** on unfair trade practices and gave the reasons behind the Commission's focus on the food supply chain.

Finally, there was a panel discussion on **possible solutions in the area of unfair trade practices**. The discussion dealt with various problematic aspects of the measures aimed at combating unfair trade practices: **the need for action**, the **form** it should take, whether the intervention should be executed at a **national or EU level**, and whether it should be designed **just for food or more generally**.



The experience of Estonia shows that it is probably **too early to enact legislation** at an EU level, though **recommendations** on various combinations of legislation and private regulatory regime are definitely needed. At the same time, a common definition of unfair trade practices or standard contracts could definitely prove useful. Competition law, contract law and administrative supervision should be seen as related, though the principles of competition law must be revisited.

As underlined from the Finnish perspective, **unfairness** is a normative concept that **does not easily translate into infringements of competition law**. The unfair trading practices may be best dealt with under legislation other than competition law. The existing competition law tools are effective when it comes to specific forms of behaviour. An abuse of a dominant position is a key issue, as it impedes competition and is relatively easy to track, but abuse of a dominant position as an exploitative behaviour is very rarely seen or heard of. The idea that agriculture, industry and trade will join forces to enable a more even income distribution in the food supply chain was met with strong scepticism.

The last part of the discussion was devoted to the **"fear factor"**: its **understanding**, its **impact** on the parties and the market, as well as the approach that should be adopted by legislators and market players when dealing with it. The fundamental question is whether it **is possible to eliminate the fear factor** in the case of every business, in particular, by means of a legal instrument. This raises other issues: how do you measure the fear factor

in a given situation, when it comes to its intensity and possible impact on unfair trade practices; how can you avoid the fear factor in business relationships in the supply chain; if a party has the right to terminate the contract, how can it be legally blocked; what would be the justification and the legal basis of such an action; and finally, if it is not possible to eliminate the fear factor, how can it be limited?

The general conclusion was that it is impossible to eradicate the fear factor from business relationships by using legal instruments. That being said, the fear factor should be taken into account in every case of unfair trade practices, and it should be used as a decisive feature when recognising the existence of an unfair trade practice.

Recording of the workshop is available at:

<http://www.europarl.europa.eu/ep-live/en/committees/video?event=20150324-0930-COMMITTEE-IMCO>

Photos from the workshop are available at:

<http://audiovisual.europarl.europa.eu/Package.aspx?id=21580>



2. INTRODUCTION

The chairperson, Mr Dawid Bohdan Jackiewicz (MEP), opened the workshop and welcomed the audience. He stressed the importance and complexity of the debate on unfair trade practices. He explained that unfair trade practices grossly deviate from fair commercial behaviour; they are imposed by a stronger party in a commercial relationship and reflect an imbalance between the business partners. As such, UTPs may hinder the further development of trade between Member States, and therefore also the development of the internal market. The aim of the workshop is to discuss unfair commercial practices and the legal tools that can be used for combating them.



3. MAPPING THE PROBLEM OF UNFAIR TRADE PRACTICES

3.1. The legal framework

Professor Schulte-Nölke from Osnabrück University stated that, when it comes to the legal framework, there is no specific regulation for the B2B food supply chain, with a few exceptions, in particular at Member State level. The existing legal framework that aims to find unfair trade practices is of a more general nature, which means it is applicable also to sectors other than food. Here, one should also differentiate between the EU level and the Member States level. According to the speaker, in EU law there are three relevant areas. First, competition law, and its main source – the Treaty on the Functioning of the European Union, in particular Articles 102 and 101. These provisions allow measures in two cases: an abuse of the dominant position and anticompetitive practice. The problem here, as Professor Schulte-Nölke observed, is that a good majority of reported unfair trade practices do not fall within the scope of EU competition law, as most businesses suspected of applying unfair trade practices do not have a dominant position on the market. They might have a strong position, allowing them to invent and exercise unfair trade practices, but without holding a dominant position they fall outside the scope of EU competition law.

Professor Schulte-Nölke emphasised that the EU leaves some leeway for Member States to develop their own competition law allowing the introduction of other criteria for assessing, which businesses can be tackled. This is particularly important where businesses do not have a dominant position, but only a strong position (“relative market strength”). Member States are free to maintain their own competition law for such cases, and some of them make use of this option.

The second area is the unfair commercial practices law. Although an extensive regulation exists here, the main piece of legislation – the Unfair Business to Consumer Commercial Practices Directive of 2005 – is only applicable to B2C relations. This means that UTPs are left outside its scope of application, because in supply chains businesses deal with each other. There are other pieces of EU legislation applicable to B2B relations, in particular the Misleading and Comparative Advertising Directive, but this is only a remnant after the enactment of the Unfair Commercial Practices Directive. It deals mainly with advertising, in

particular comparative advertising, which is not so much of a problem in the context of UTPs. It is therefore evident that EU legislation does not offer many solutions.

The third area of law to which the professor referred is general contract law. As he explained, unfair trade practices often simply constitute a breach of a contract. Strong market players break contracts, hoping that their strong position in the market will prevent sanctions. In terms of contract law, unfair trade practices may also take the form of, for example, dictating nasty contract terms by the stronger party. General contract law can be used as a tool to combat such behaviour, but not the general contract law that is enacted at an EU level. There is an exception: late payment is dealt with also at an EU level, but most of the practices are, in so far they are regulated at the EU level, only applicable to B2C cases, for example consumer sales or unfair terms in consumer contracts. The Commission has made a proposal for a Common European Sales Law, which at least in theory could be a useful tool, but it will be amended very soon and at the moment the final outcome is uncertain. Hence, Professor Schulte-Nölke stressed that the EU regulation falls short when it comes to providing schemes applicable to UTPs.

At the same time, the legal systems of several Member States contain interesting regulatory elements, be it competition law, unfair commercial practices law or contract law, which could help to fight unfair trade practices. Of course, the situation might be very different if one looks at an individual Member State, as only a minority of Member States have a specific regime on standard terms in B2B relations, which could be an important instrument. The real issue, as stressed by Professor Schulte-Nölke, is enforcement. Even if a Member State provides legal instruments allowing the infringed party to exercise rights and remedies against unfair trade practices, most parties are hesitant to make use of these instruments. The reasons are obvious: businesses want to maintain their business relations, and these could get seriously spoiled by, for example, invoking unfair terms regulations. This is, of course, one of the core problems in the area of fighting unfair trade practices on the market. More specifically, confidentiality clauses that prohibit businesses from disclosing the content of individual relations could also give grounds for UTPs. One should not forget about freedom of contract – namely the background freedom of unfair trade practices. A business may simply claim that it is just exercising its freedom of contract, whereas its behaviour could easily be classified as an unfair trade practice.



Professor Schulte-Nölke underlined that, when speaking about contract law, one must remember that the current EU system allows opting out of any EU law on the level of contract law in order to avoid any regulation. Therefore, when discussing UTPs, many questions are on the table. The first question is whether only judicial means, present either at an EU level or in all Member States, would be sufficient, or whether also administrative, *ex officio* enforcement is needed. The second crucial question is to what extent self-regulations, codes of conducts, etc. could prove to be helpful and efficient. The third question is whether creating parallel regulations for food and non-food sectors makes sense, considering the fact that there are hardly any food specific measures present at the moment. He concluded that his presentation raised more questions than answers, but that was exactly the idea.

3.2. The economist's view on unfair trading practices

Professor Argenton from Tilburg University stressed that the discussion that has been taking place in recent years has clarified what unfair trade practices might be. From his perspective, there are two main types of unfair trading practices. First, there are the potentially unfair practices that take place at the time of the parties negotiating the contract. These practices amount to contract terms that are highly favourable to one of the parties. Second, at the stage of executing the contract there are practices that are perceived as potentially problematic, as they lead to unilateral changes in the terms of the contract.

The key question from the economist's point of view is whether there are economic issues with UTPs. The speaker stressed that two caveats must be made here. First, it cannot be inferred whether there is a problem with a practice simply from the fact that such a clause is often accepted by weaker parties in negotiations. It might be the case that weaker parties frequently accept some seemingly unfair clauses because, on the basis of their business practice, they still think the contract is overall advantageous to them. From mere acceptance, it cannot be inferred whether a practice is good or bad from the point of view of economic efficiency. Similarly, it cannot be inferred simply from the existence of regulatory instruments aimed at dealing with UTPs, whether there is indeed a problem with UTPs, because it is entirely possible that regulations might be misguided. Therefore, as Professor Argenton underlined, in order to establish whether certain practices are problematic, an independent assessment is needed.

From the point of view of economic efficiency, certain practices can be assessed as problematic not because they are unfair, but because they distort the allocation of resources, which is the key aspect when it comes to economic efficiency. Referring to the two distinguished types of UTPs, he said that, at the contract formation stage, the risk of market power being exercised must be taken into account. From the point of view of economics, the speaker underlined, market power is generally considered a negative phenomenon, because a party (especially a buyer) that is endowed with market power will be tempted to extract better terms from the weaker party. This will often lead to a decrease in the quantities ordered by the stronger party, simply because the strong party will realise that by decreasing quantity it can obtain better terms from the weaker party. This is called monopsony power in economics and it constitutes the main source of distortion associated with the exercise of market power at the stage of contract formation.

When it comes to unfair trading practices at the stage of executing the contract, the problem lies with the possibility of having a good contracting framework in the first place. The value of contract law is that it allows parties to a transaction to establish with clarity and predictability what they are supposed to do as a part of the transaction. It allows the parties to agree on the allocation of risks associated with the transaction *ex ante*, and in particular it allows them to commit to obligations they might not otherwise be willing to undertake under different circumstances.

This function of contract law might be jeopardised if it is possible for the parties to simply go back on their commitments at the time of executing the contract. And this precisely constitutes the main problem associated with unfair trading practices at the time of contract execution.

These two problems translate into two main economic distortions. The first is that transactions that would have been socially beneficial, and should take place from the point



of view of economic efficiency, do not take place. Even if all the parties to a contract remain present on the market, this still results in a distortion. The second distortion is that not all the parties that should be present on the market will remain present. Socially, on the weaker parties' side, there is a risk of observing more exits or fewer entries than should take place, which is problematic because it further distorts the allocation of resources in the economy.

Professor Argenton stressed that there is a lot of evidence to suggest that parties who fall victim to unfair trading practices do not try to exercise their rights in the court to defend themselves, despite the fact that most of the unfair trading practices are probably illegal under applicable contract law. There are two possible economic reasons to explain this. The first is that litigation is a costly and uncertain endeavour, and it simply does not pay off to sue one's business partner. This is a legal problem that results from the costly and perhaps ineffective functioning of the judiciary system. The second problem is that, even for the weak suppliers, the value of continuing a business relationship that involves future abuses as part of the relationship might have a higher value than the short-term alternative, which consists in suing at the risk of terminating the relationship. These two possible reasons are



very different in nature and, according to Professor Argenton, call for different analyses. Regarding the first reason, it is possible to introduce a dispute resolution system that is less costly and less uncertain. Regarding the second reason, however, it is very difficult to affect the incentives of the weaker party if it willingly chooses to continue an existing business relationship that involves UTPs.

When it comes to future solutions, Professor Argenton presented possible options from the perspective of various market participants. Regarding small players, the speaker underlined that, first of all, they should be aware of how trade and contract law function, and what their rights are under the existing legal framework. This is especially important for the agricultural sector, where there are many small, sometimes uni-personal enterprises negotiating with powerful retailers. The speaker suggested that future consideration should distinguish between B2B relations that involve small and large players. The division line should be drawn between a small "b" and a capital "B", where the small "b" stands for an unsophisticated party who does not really understand what happens in the industry. Here, training could be helpful in terms of making this player a more sophisticated party, more willing to assert its rights in court. From the point of view of small players, it is also reasonable to diversify their customer base and commercial risk, since many unfair trading practices are associated with a small supplier being dependent on one particular customer. The lesser the state of dependency, the more willingness there is to refuse unfair trading practices, because the supplier in question will have other channels to pursue or sell its stock. A third possibility for small players is to get organised in order to acquire countervailing market power. However, Professor Argenton expressed scepticism when it comes to proposals to organise small suppliers in the agricultural sector. According to him, this would lead to more market power in the market, whereas the standard recommendation should be to have less market power. Monopsony is inefficient, but a bilateral monopoly is not necessarily an improvement, he stressed.

Regarding the big players, Professor Argenton stated that unfair trading practices are often driven by the short-term decisions of large retailers, sometimes taken without taking into account the value of lasting relationships. They try to squeeze additional surpluses from a business relationship, without appreciating that there is considerable commercial benefit associated with having trustworthy, long relationships with suppliers. Here, the professor

emphasised, education could be helpful. Big players should be aware of the risks and costs associated with intrusive regulations. If unfair trading practices become too prevalent, the public authorities might take the initiative in introducing legislative solutions. This should be an argument to convince the big parties that they should be willing to cooperate towards less invasive solutions to the problem.

When it comes to public authorities, the speaker suggested that they should first of all combat market power. There are several regulatory instruments at their disposal, in particular competition rules and sector-specific regulatory instruments. Market power is the source of the problem – if there were no economic actors with a very strong market position, there would be no unfair trading practices in the first place. This could be combined with educating small players to make them more aware of the risk possibilities associated with asserting their rights under contract law. Other possibilities include favouring alternative dispute resolution systems, as is done in the Supply Chain Initiative. The current problem with this is that litigation is costly and uncertain, so having a quick, cheap and binding arbitration or mediation solution within an industry might actually bring a measure of relief when it comes to UTPs. What remains is the fear factor (parties not wanting to jeopardise their existing business relationship). This, in Professor Argenton's opinion, speaks in favour of some form of public enforcement, or a system that would allow anonymous complaints to be made.

In concluding, he pointed out that it is often said that competition law cannot tackle the problems of UTPs because of the requirement of dominance, and hence it is argued that additional legal instruments are necessary. He reminded the audience that the dominance requirement in competition law exists because it is simply difficult to distinguish good practices from bad, and there is a need to avoid over-enforcement, which is precisely what the requirement achieves by weeding out cases where practices, even if abusive, are unlikely to cause much harm. Professor Argenton concluded his speech by saying that great care is, therefore, required when it comes to enforcing regulations against freely negotiated commercial contractual clauses.

3.3. Q&A Session

Ms Sehnalová asked Professor Schulte-Nölke whether the best practices of some Member States could be considered useful for implementation at an EU level. Professor Schulte-Nölke emphasised that it is rather dangerous to suggest that measures should be simply lifted from an individual state to the whole EU, because national instruments are created in a specific regulatory environmental and legal culture. This being said, he suggested that at least an extension of unfair commercial practices regulations to the B2B sector would be a step; it could fill a gap and add an important element to the EU level regulations. This would mean merging two directives: the Directive on misleading and comparative advertising, and the Directive on unfair commercial practices, as well as carefully extending some of the provisions of the Consumer Rights Directive to the B2B sector. That would follow the model of certain Member States (including – Germany).



4. BUSINESS PERSPECTIVE – ROUNDTABLE

4.1. Unfair trading practices in food supply chain

Mr Paulo GOUVEIA, Director from Copa – Cogega, began by giving a description of the modern European food supply chains. They consist of a large number of farmers (around 13 million), connected to the agri-food industry (around 300,000 companies), and retailers (roughly a handful). As he underlined, enormous differences in terms of the numbers and economic power exist between the members of the chain. This situation is a result of globalisation; the farmers are price takers rather than price setters. The recent years have brought about a huge consolidation in processing and in the retail sector. This led to ferocious competition amongst retailers and frequent price wars at the expense of those with less negotiating power. This results in unfair and abusive commercial practices.

Mr Gouveia underlined that this cost-price-squeeze is steadily gaining relevance. The farming sector is squeezed between the players up- and down-stream, which leads to negative results for the agriculture sector. A study carried out by FranceAgriMer shows that the margin that the farmers get out of 100 Euro of consumer expenditure is 8.1 Euro (much less than the industry or to the retail sector).

The consequence is a relentless downward pressure on prices. Farmers often cannot even cover their production costs and hence cannot invest in their own businesses. This leads to abandoning the sector, which might reduce choice and flexibility of supply for consumers. It might also mean distortion of competition and negative impacts on the functioning of the Internal Market.

Mr Gouveia emphasised the need to introduce legislation (a directive on unfair trading practices at a B2B level) that would have an impact on the functioning of the internal market. He stressed that competition law does not provide effective tools, because normally the market players do not have a dominant position. The optimal system should combine legislation with voluntary codes that serve the functioning of the market and that enable the different actors in the chain to engage in commercial relations between themselves. This must be complemented with an effective enforcement mechanism. Systems based on a voluntary approach are simply insufficient.



4.2. Unfair trading practices in the non-food supply chain

Fakro sp. z o.o. is a worldwide leader in the roof window market, stated Mr Kiedacz, representative of the company. The company has been active in the building industry for more than 25 years and has had the opportunity to witness a lot of unfair trading practices of various characters in this sector. The speaker underlined that he will focus only on the most harmful UTPs from the perspective of the internal market.



In Mr Kiedacz's view, the food supply chain is - of course - very important, but it constitutes only a fraction of the internal market (in terms of the work places in the EU). To omit the overwhelming non-food sector would therefore not be justified.

The speaker gave a brief overview of the functioning of the building market. He underlined that while the price of manufacturing the goods is the same, they are sold at different prices to every Member State (for example: a price for a product sold

to Germany is more than twice the price in Lithuania). This could, of course, constitute a normal trade practice. However, the drop of the prices is related to the market share of Fakro, which constitutes a pricing policy. This is also a simple competition principle: the stronger the competitors on the market, the lower the price. Prices go down as Fakro's market share goes up. Also, it could seem natural that prices go up with the wealth of the country and of consumers. However, according to the speaker, this is not the case. Mr Kiedacz presented chart showing three pairs of countries: United Kingdom and Germany, France and Belgium and Romania and Bulgaria. Each pair, as the speaker underlined, shares a similar GDP (the most objective factor for the wealth of a country). Although the wealth of each separate country is similar, prices vary and the difference in the prices is related to Fakro's market share. As stressed by the speaker, this also might seem to be a natural phenomena (distortion of prices between national markets) and it might be easily overcome through a basic instrument of the EU single market - parallel trade. Yet, as Mr Kiedacz explained, the experience of Fakro proves that parallel trade is hampered by unfair trading practices.

Next, the speaker presented examples of unfair trading practices encountered by Fakro. The first example he gave referred to refusing the supply of goods to other entrepreneurs, who are active in the field of the parallel trade. Sometimes, when refusal is not possible (due to competition rules or particular national regulations) the supply of goods is obstructed (for example, inflated prices or unreasonable delivery terms, such as fifty days). Second, he mentioned the introduction of services or promotions, which do not apply to products from parallel trade. The third example was lobbying national certification agencies to introduce new local market norms or certificates. Last but not least, the most unorthodox means of hampering parallel trade, is by introducing slight but objectively insignificant differences between products in each country: different packaging, or a different code, even though the products are identical. Consumers will not buy products, which are packaged in a different manner or labelled with a different code. When it comes to the internal market and parallel trade, each and every doubt works against parallel trade.

In concluding his speech, Mr Kiedacz stressed that ultimately it is always the consumer that is harmed the most. The reasons for this are obvious: unfair trading practices obstructing parallel trade distort competition, restraint it and, in turn, harm the consumer. Also, the stronger the position of the entrepreneur using unfair trading practices, the greater the harm. The market strength of an entrepreneur that uses unfair trading practices should be a relevant factor in establishing whether unfair trading practices took place and whether they were relevant.

4.3. Business organisations' approach to unfair trading practices

Ms Delberghe, Director from EuroCommerce, began by stressing that the retail and wholesale sector comprises 5.5 million companies, 99% of which are SMEs. With 29 million jobs in Europe, one in seven jobs, 10 % of EU added value is generated in that sector. The sector is characterised by a high degree of competition: everyday shoppers vote with their feet for their favourite shops, which means that there is no permanent contract with consumers. This translates into continuous innovation to attract consumer loyalty. The high competition leads to narrow margins in the sector – retailers play a positive role in providing choices and lower prices to consumers in Europe. Most importantly, all retailers have to rely on good relations with their suppliers: on average, a supermarket sells 20000 different items of stock-keeping units. In this highly-competitive



environment, having efficient and stable supply chains is critical for organising the efficient distribution of products to consumers. Experience of collaboration between manufacturers and retailers for example through the "Efficient Consumer Response" (ECR) proves the benefits of supply chain collaboration, when it comes to meeting consumer demands and translates in terms of increased sales and profits for both parties.

Ms Delberghe emphasised that the Commission's Communication recognises the complexity of the issue at stake. It supports the development of voluntary practices and encourages dialogue among Member States. It also anticipates a review process. EuroCommerce also calls for an informed debate based on objective facts. Retailers believe in fair dealing and freedom of contract as a basis for their commercial dealings. Companies have shown their commitment to this by introducing mechanisms to deal with issues when they arise. Fighting UTPs is not a case for a one-size-fits-all solution across Europe. As the speaker underlined, all Member States have either regulatory or private mechanisms to address unfair trading practices. International conventions and contractual good practice provide operators with the necessary tools to deal with cross-border disputes where they arise. The national level is the right level for resolving problems.

EuroCommerce opposes the extension of consumer-driven instruments such as the Unfair Commercial Practices Directive, because B2B relations differ from B2C relations. The key element here is freedom of contract. In addition, there is no strong case for an *ex officio* investigation, sanctions and confidential complaints system. Considering the hitherto experience, mediation and other out of court mechanisms have greater potential and encourage businesses to deal with the disputes in a quick, efficient and less trade disruptive manner. In France, for example, 80% of the cases going through mediation are solved within a matter of weeks to the satisfaction of both parties. To date, the official adjudicator in the UK has only launched one enquiry. In both the food and non-food supply chains, experience shows that unfair trading practices may arise at any level of any kind of supply chains. It is therefore critical that measures apply to any company at any point of the chain. This being said, Ms Delberghe stressed that a lot of work has already been done in the food supply chain within the framework of the High Level Forum on a Better Functioning Food Supply Chain. EuroCommerce will support the continuation of the work in this area, as its experience shows that non-food supply chains respond mostly globally, they operate differently and hence the key concerns relate to a corporate social responsibility agenda. There is too little evidence to support further action at this stage.

According to Ms Delberghe, the Food Supply Chain initiative and the principles of good practice offer an effective solution to promote good practice in the food supply chain. First of all, they deal with definitions. In 2011, eleven EU level organisations active in the EU food supply chains (including farmers) agreed on a common definition of what is fair and what is unfair practice. They introduced three general and seven more specific principles. The principles were supplemented with a list of examples of fair and unfair behaviour in order to create conditions that encourage fair behaviour across the market. Most importantly, these principles create a consensus view across Europe and across sector organisations.

The Supply Chain Initiative is an EU level initiative, launched by 8 organisations, 18 months ago, to implement and enforce the principles of good practice. The purpose of the initiative is to promote the principles of good practice as a standard basis for commercial dealings, and to encourage businesses to deal with disputes in a fair manner. It also aims to address the fear factor: in the case of an alleged breach of the principles, the SCI offers several means of dispute resolution. For individual bilateral disputes, the complainant can resort to a set of dispute resolution options, including commercial track, internal escalation and internal mediation (through a dispute resolution contact established as part of the SCI), external mediation, arbitration, and standard judicial rules. Sanctions and remedies apply

in accordance with national rules and regulation. The system also allows a sector organisation to raise concerns on behalf of several companies through aggregated cases. This is dealt with on a national or EU dialogue platform. Such a platform can issue guidance when it comes to the interpretation of the principles. This is to encourage organisations to speak together, to look for solutions together, through discussion rather than confrontation. The experience developed in Belgium over the past four years shows that peer pressure and dialogue work effectively.

One year on, there are a number of outcomes of the Supply Chain Initiative that have led to concrete action. The result of the first year survey was presented at a well-attended event in January. Over 500 national operating companies took part in the survey, no less than 18000 people were trained across Europe and three-quarters of the respondents expressed satisfaction with the achieved solutions. National dialogues and initiatives have been developed, five national dialogue platforms exist today, and more are expected to be set-up this year. A recent mediation initiative in France refers to the SCI and its principles. This proves that the initiative leads to concrete action in the field. However, it is still in its early days. Of the respondents, only one company had a full year experience, and half of them less than six months. There is a learning curve that needs to be properly reflected when measuring progress. Next year's survey will be more solid from that point of view.

When it comes to progressions, the Initiative started with 82 letters of intent in September 2013, and today it consists of 180 groups representing nearly 900 companies across Europe (52% are SMEs). Moreover, 51 companies have expressed their intention to join.

Ending her speech, Ms Delberghe emphasised again that retailers need good relations with their suppliers to maintain a competitive position in the market. She added that EuroCommerce supports farmer consolidation as a means to generate efficiencies on the market, and in this regard looks positively at the recent proposals on producer organisations. However, B2B legislation is not the appropriate means to deal with unfair trade practices. EuroCommerce believes the SCI is a good complement to national legislation, but it needs more time to grow and demonstrate its effectiveness. She underlined that SMEs are the key beneficiaries of the system in two ways: they can use the dispute resolution mechanisms in disputes with larger companies, but above all they can benefit from the wide application of the principles of good practice.

EuroCommerce supports an independent objective assessment of the present situation, but it needs time and legal certainty to demonstrate effectiveness and success. Ms Delberghe asked the policymakers to refrain from taking action until there is a clear outcome, and to be mindful of the better regulation principles.

4.4. Q&A session

Ms McGuinness began by stating that the agri-committee will be writing a report on the White Paper, and the sustainability of the food supply chain is seen as one of its important elements. From the point of view of the common agriculture policy, there are several problems: a shrinking budget, additional pressure on farmers from the environment and the delivery of public goods perspectives, and a market place that clearly does not transmit price signals effectively. She asked the experts their opinion on the issue of sustainability.

The second issue she raised related to imbalances – the numbers game. The reason for holding this workshop, she stressed, was that it is commonly accepted that there are difficulties in the food supply chain. The question is, said Ms McGuinness, how to solve the



problems: by legislation or voluntary codes? She said that in reality there is no incompatibility between the concerns of consumers and producers. From an internal market point of view, it seems unsustainable that different Member States take different actions to address this: some have extensive legislation, others react using different means. What is clear is that all Member States recognise the problem. Maybe there is no one-size-fits-all solution here, she emphasised, but there is certainly a need for a resolution towards one.

Ms McGuinness added that it would be interesting to hear comments on enforcement, because, according to her, this is the key issue relating to voluntary codes. The codes depend on and demand the good will of the participants. While that may come at a corporate level, she asked how that filters down to the shop floor, where people are under pressure on margins and take actions that may not be in coherence with the generally accepted policy. She asked whether peer pressure and dialogue is a sufficient answer to these.

On closing, she referred to the expression 'ferocious competition' and asked whether this is not actually a word for an unfair and abuse of commercial practices. As she said: competition is competition, but ferocious competition is a step above. In times of economic crisis and considering the situation in the food supply chain, this could actually be multiplied by two.

Answering, Ms Delberghe said that balanced and sustainable relations in the food supply chain are essential. They guarantee that consumers will find the right products in the right location. Therefore, this is a critical element for any kind of retailers factored into retailers' strategies.

Enforcement, in the eyes of Ms Delberghe, is critical. What is illegal is illegal, and has to be enforced. The studies have shown, however, that there is sufficient legislation on the market. She stressed that the SCI was trying to address behaviour, which can only be changed through a voluntary mechanism by acting on the values of the companies. It is about changing the mind-sets and helping people operate in their day-to-day job. Ms Delberghe emphasised the SCI's first year report, which unfortunately does not capture the amount of issues that are resolved informally without a formal dispute resolution mechanism. The simple information that a company is a signatory to the principles triggers a discussion at the buyer's level, which helps to find an agreement between the parties. EuroCommerce will try and to capture this element better in the second year survey.

Peer pressure and dialogue, as Ms Delberghe stated, do help. For example, in Belgium the Belgian Code of Conduct initiated a process that led to talks on standard requirements and products to the benefits of all the players: farmers, manufacturers and retailers.

As competition is the life-blood of the retail sector, she refrained from commenting on the last point.

Professor Argenton reacted on the point on the sustainability of the agricultural sector. He stressed that it is important to remember about the impact of unfair trading practices on conditions for a sustainable profitable supply on the farming side. This being said, the issue should not be blown out of proportions, he emphasised. This is a question associated with the general agricultural policy: how sustainable can we make



farming in Europe. The economic impact of UTPs is real, but it may not be the real trigger of the conditions of sustainability of the farming sector in Europe.

Mr Gouveia began by stressing that sustainability is highly relevant for farmers, and therefore also for CopaCogega. When talking about sustainability, one must balance three pillars: economic, social and environmental. Taking a broader view of the problem is necessary here. He mentioned two initiatives in this area in which CopaCogega took part: European Food Sustainable Consumption and Production Roundtable and a declaration to the High Level Forum for a Better Functioning of the Food Supply Chain on the sustainability of the food systems.

Mr Gouveia pointed out that when it comes to unfair trading practices, only a small fraction can be seen, because the fear factor prevents those who are suffering from them, from coming forward. The Supply Chain Initiative is useful, but it is not enough. CopaCogega agreed on the principles of fair practice, however, it was unable to agree on the presented model of implementation, as it was based only on a purely voluntary approach. Such an approach is not sufficient to address unfair trading practices.

Professor Schulte-Nölke added comments on two points. First, with regard to sustainability, he said that it might be better to approach the issue not from the perspective of fighting unfair practices but rather encouraging fair practices. He gave an example of initiatives where retailers and producers have joined "fair milk campaign", which promised customers (usually consumers), that out of the price, the slightly higher than the average, a certain portion is given directly to the farmers, sometimes regional farmers. This, in his opinion, is another component of sustainability. The legal environment should not only enable and encourage, but also prevent abuses of such initiatives.

The second point he raised regarded self-organised dispute resolution schemes in the Supply Chain Initiative. Professor Schulte-Nölke stressed that the experience from other sectors shows that alternative dispute resolution scheme develop better if there is a threat that if the dispute resolution scheme does not work, the dispute will be solved and enforced by a public authority. This creates enormous pressure on a system - the pure existence of an initiative such as the Supply Chain Initiative is not an argument against a background regulation. If the initiative works well, the background enforcement system will hardly ever be used and that would be a real success.

5. VIEW FROM THE EUROPEAN COMMISSION

Mr Heinen's (Policy Officer, European Commission) presentation on the background of the Commission's Communication of 2014 focused on two elements: the rationale that led to adopting the Communication, and the actions it suggests.

First, the speaker explained why the Commission has decided to narrow the scope of the Communication to the food supply chain. The Commission adopted a Green Paper on UTPs in the food and non-food supply chain in 2013. The Green Paper served as a basis for a public consultation. In response, the Commission received around 200 stakeholder replies, a large majority of which were from the food supply chain. That was the first indication to the Commission that UTPs seem to be particularly problematic in the food supply chain.



Mr Heinen explained that the food supply chain could be more conducive to UTPs than other sectors because there is input cost pressure on the supply chain caused by a very volatile commodity market. In addition, there is increasing price pressure from consumers. This means that there is pressure from both ends of the supply chain, which contributes to a climate where UTPs can appear. Moreover, many products in the food supply chain are perishable, which means that there is a time pressure to get the goods through the supply chain. For these reasons, the Commission decided to tackle the problem of UTPs in a focused way – in the food supply chain. This is also confirmed by developments at EU (the Supply Chain Initiative) and national levels, both in self-regulatory terms and in the policy-making. Currently, 14 of the 28 Member States have UTP specific legislation, often in the food / grocery sector specifically. In four Member States, competition law is extended beyond EU competition law to capture relative market power rather than absolute market power (Germany, Austria, Cyprus and Finland). This means that there are 18 countries where publicly enforced B2B specific legislation exists. Only 10 Member States have not acted in terms of legislation and public enforcement. That being said, Mr Heinen added that Belgium and the Netherlands have voluntary schemes in the food supply chain, but no public enforcement mechanisms.

Next he turned to the reasons that led the Commission to the conclusion that there is a need for policy action at the EU level. First of all, EU competition law is insufficient to tackle UTPs because it can only address trading parties that have a position of absolute market dominance, while in reality trading parties are frequently very strong, but without absolute market power. Secondly, Mr Heinen emphasised that the Supply Chain Initiative is a very important achievement on the side of market players and the Commission Communication calls on all stakeholders in the food supply chain to join the initiative. However, the Communication stresses that the Supply Chain Initiative alone is not sufficient in addressing the fear factor when it comes to enforcement. Therefore, the Communication calls on Member States to assess the effectiveness of their enforcement frameworks at a national level. Thirdly, the Communication points out that it would be very beneficial to have a common understanding of best practices between trading parties in the food supply chain across the EU. According to the Commission, the principles that laid the foundation for the Supply Chain Initiative could be very helpful in this respect, in particular as they were endorsed by all stakeholders, including farming organisations. In conclusion, the Communication builds on a combination of a voluntary scheme that would promote good

practices complemented by national enforcement models. The national enforcement should work not only as an instrument to address UTPs, but perhaps more importantly as an effective deterrent to prevent the emergence of UTPs.

Next, Mr Heinen explained why the Commission chose the instrument of a Communication over EU legislation. Firstly, the vast majority of UTPs reported to the Commission via public consultations took place at a domestic level. Secondly, many Member States have either already addressed UTPs, or are considering doing so. Thirdly, it is difficult to define a one-size-fits-all solution for the effective enforcement of rules against UTPs. Lastly, the SCI framework should have a proper chance to develop, and it had been operating for less than a year when the Communication was adopted. There was a risk that EU legislation might undermine the voluntary framework, therefore the Communication seemed to be better suited. Finally, Mr Heinen referred to the potential benefits of harmonisation. The legal traditions in the 28 Member States are an important element when assessing the benefits of harmonisation. On this point, the Communication states that national enforcement systems should meet three key criteria: (1) the possibility to accept confidential complaints; (2) the possibility to conduct *ex officio* investigations; and (3) the possibility to impose sanctions. If these criteria are met, then, in principle, the enforcement framework could be effective against UTPs. There might be different ways to implement a framework meeting these criteria in practice – at a domestic level enforcers and policy makers may know best how to do it in their own country.

It is argued that the problems when it comes to UTPs stem from fragmentation (different approaches in tackling UTPs at national levels). There is anecdotal evidence for regulatory arbitrage, or cases of forum shopping. This is, however, rather a problem of those Member States that have not introduced any framework against UTPs at all. According to the Commission, if every Member State addresses UTPs effectively at a national level, this will automatically reduce the possibilities for regulatory arbitrage and forum shopping.

When it comes to the content of the Communication, Mr Heinen said that it is based on three building blocks. The first block is support for the Supply Chain Initiative. The Communication calls on the market operators to join the initiative and on the present members to promote it. This is particularly important for SMEs. The second pillar is an EU-wide standard for principles of best practice. Such principles should build on those agreed by all stakeholders before the implementation of the SCI. The third crucial pillar is effective enforcement against UTPs at a national level.

In concluding, Mr Heinen presented information about the further plans of the Commission regarding UTPs. First, in 2015 there will be an independent assessment of the voluntary Supply Chain Initiative. The assessment will be the subject of a study undertaken by a contractor. Second, there will be an analysis of existing national frameworks, both in terms of their effectiveness and proportionality. At the end of January, the Commission organised a workshop with all 18 existing enforcement authorities. The conclusion of those present was that voluntary initiatives alone are not sufficient to address UTPs and that public enforcement is also needed as a deterrent, and that finding evidence is one of the important challenges in enforcing UTPs. The Commission is planning another workshop in 2015 with legislators and ministries responsible for UTPs. On that basis, the Commission will prepare its assessment of national frameworks. The Commission will report on these findings to the Parliament and to the Council. That will be the moment to decide whether further action at EU level is needed, and what form that action should take.

6. UNFAIR TRADE PRACTICES –POSSIBLE SOLUTIONS

6.1. Introduction

Professor Schulte-Nölke gave an introduction to the panel discussion on the possible solutions in the area of preventing or fighting unfair trade practices. He emphasised that it is rather clear that self-regulatory schemes such as the Supply Chain Initiative should be developed further. The real question is whether this should be the only measure. If the answer is no, then further possible measures come into mind. The most intrusive hard law could be introduced at an EU or national



level. There are three fields for such intervention. First, the extension of competition law beyond dominant market power. At an EU level, changing regulation 1/2003 is theoretically possible – especially as some Member States have already undertaken some measures in this respect. The second option would be to broaden the Unfair Commercial Practices Directive to B2B relations, with a slightly softer approach, that would consider the business character of relations. This has already been done by some Member States. In the third field – contract law – Member States could improve their contract law in order to better fight unfair commercial practices, since it is rather unlikely that the EU will propose changes here.

Soft law could also be further developed at an EU level, and common principles on good practices are already on the way, emphasised Professor Schulte-Nölke. One could also consider sets of contracts terms for the supply chain, which would be considered good practice. The key issue, however, is enforcement. There are a variety of interesting proposals: ombudsman or ex officio enforcement authority, creating a possibility for filing anonymous complaints, and - in any case - effective sanctions. All this measures are situated on the Member States level – the EU aspect will surface with improving and facilitating cross-border enforcements.

6.2. What is the best way to address the UTP? A need for action? Which measures?

Professor Kull's (Tartu University) presentation focused on Estonian law as an example of a legal system that has not introduced specific legislative solutions addressing unfair trading practices (UTPs).

Estonia, as underlined by prof. Kull, is a very small country with 1.3 million inhabitants and quite a high concentration of food retailers. The top 5 retailers hold 82% of the market share. From 1992 the commercial space per capita has grown more than six times. The share of the local products in the retail chain is also very high, ranging from 81% to 96%. Given the wide range of products offered and satisfied consumers the situation on the market seemed to be positive.

However, a study conducted in Estonia in 2014 (published in March 2015) revealed hidden issues, especially concerning UTPs. The study showed that the use of unfair trading

practices is a problem for producers of food products: of the 161 food industry businesses which took part in the survey, 59 had experienced unfair trading practices during the last three years. Interestingly, the survey showed that larger companies with a turnover of more than five million are more exposed to such practices. Only a half of smaller companies under the survey were reported as subject to the use of UTPs in the retail supply chain. At the same time, as compared with the previous year, 80% of the companies felt more pressure from the retailers to use unfair trade practices. The Estonian trade association reacted critically to the survey, expressing the opinion that the negotiating position of food retailers in comparison to producers does not influence the variety of products, so there is no direct relationship between negotiation positions on the market and the situation in the shops. Also, such practices are not an obstacle to innovation and do not harm the consumers' interests. Yet, the survey showed that half of the companies felt the impact of UTPs on their sales revenue and sales volume.

As Professor Kull emphasised, UTPs in the food retail supply chain are not directly addressed in legislation in Estonian law. They are tackled first of all by private regulation – the Estonian Trade Association adopted measures on fair trade practices as far back as in 2008. Yet, there are only three food retailers who adopted such practices. At the same time, Estonian contract law offers a variety of tools: the Law of Obligations Act contains provisions on unfair contract terms presumed to be unfair in B2B contracts and special rules on pre-contractual obligations, which cover the refusal to negotiate and the unfair use of confidential information. There is also a general obligation to act in good faith. Estonian competition law is of no use, because there is rarely a dominant position on the Estonian food retailer market. To complete the picture – there is no administrative body invested with powers to investigate, enforce or solve complaints outside of the civil courts. As the Estonian study shows 77% of the businesses conducted private negotiations and 17% did not react when subject to UTPs. Most of the businesses seek to mediate and use umbrella organisations; finally they chose another retailer. There is almost no litigation, even though contract law tools are available. The main obstacle appears to be the “fear factor”: fear of sanctions, fear of losing sales volume and turnover, and finally limited possibilities to sell on other markets. To conclude: the public regulation has a limited impact on unfair trading practices, mainly because of the lack of effective enforcement mechanisms. At the same time, however, the effectiveness of private regulation is also questionable.

In conclusion, the speaker underlined two issues. First, there are no competition law rules capable of tackling unfair trading practices. In that regard, Professor Kull raised the question of who actually needs to be protected? She stressed that small businesses are not necessarily concerned, especially in Estonia where the exposure to unfair trading practices is less intensive or even absent for micro and small businesses, which have their own niche in the market. The growing importance of unique production may further diminish the use of unfair trading practices.

Second, the Estonian experience does not provide a very convincing argument in favour of private regulation alone as the best solution. Professor Kull emphasised that business representatives have expressed a strong opinion that it is too early to introduce regulation at EU level and that private regulation and the acceptance of principles of good practices by members of the food retail supply chain would be the best solution. Whilst the speaker agreed that this is partly true, she nevertheless underlined that it clearly follows from the Estonian study that there is a need for legal regulation and an efficient administrative enforcement mechanism to protect the anonymity of complaints. Also, there is a need for an administrative body, which would have a power to solve complaints and approve standard terms, for example between retailers and producers. Such a solution would help in overcoming the fear factor. Limiting the freedom of contract at the level of substantive law may in her opinion only result in modified forms of UTPs. The real problem is the lack of effective enforcement.

In closing her speech Professor Kull agreed with business associations that it is probably too early to enact legislation at EU level, but at the same time recommendations on different combinations of legislation and private regulatory regime are definitely needed. Also, a common definition of unfair trade practices, or going one step further - standard contracts could definitely be useful. She underlined that it is necessary to understand that competition law, contract law and administrative supervision are related and last, but not least - the principles of competition law must be revisited.



6.3. Just food or horizontal? Domestic or cross-border?

Mr Björkroth from Finnish Competition and Consumer Authority focused on the Finnish experience of the food supply chain from the perspective of competition and consumers. First, he presented the structure of a food supply chain in very concentrated Nordic markets, which he described as a bottleneck including for example meat producers and the retail sector. In the food retailing sector meat producing industry, for example, two largest retailers control more than 80% of the market (four of the biggest control more than 90%). At the same time, at the level of farming there have been huge productivity increases in recent times.

As stated by Mr Björkroth, the Finnish Competition and Consumer Authority has recently conducted several studies of the Finnish market: in 2012 a report on the effects of the retail sector's purchasing power in the direction of upstream suppliers; in 2013, a study on factors influencing competitiveness in primary production (with responses from more than 1000 Finnish farmers) and a study on planning practices in the retail industry (how to improve competition in the retail industry and create a level playing-field between the actors). In 2015, a study was published on factors that affect consumer purchasing behaviour in the retailer trade (whether loyalty programmes in the highly concentrated retail industry are in line with competition law). The last is still a work in progress.

The major finding regarding unfair trading practices (UTPs), stemming from the surveys, is that private labels reinforce the retailers' role as a gatekeeper in the food supply chain, especially in combination with phenomena such as category management, slotting allowances and the alleged pricing of private labels and branded products. As stressed by the speaker, these practices are located in a grey area, which means that it is impossible to say whether they are good or bad per se. They must be properly analysed before definite conclusions can be reached. The Finnish Competition Office focuses on the efficient allocation and use of resources, and tries not to tamper with the functioning of the market economy. Moreover, private labels yield cost information to retailers from the suppliers, strengthening their bargaining position against manufacturers. One interesting feature is also the auction mechanism with which the production of private labels is allocated. The Finnish Competition and Consumer Authority is not certain that these mechanisms are audited in such a way as to ensure that the auction is always fairly conducted, which could raise potential competition concerns.

As emphasised by the speaker, the Competition Office has reacted strongly on gratuitous “marketing fees” (where the supplier is actually paying for nothing) and unfair transfers of risk (where one party forces the risk on the other, and the risk allocation is not the result of negotiation), whilst bearing in mind that taking risk in a market economy is one of the most essential elements of well-functioning competition and it should not be interfered with lightly. The speaker strongly underlined that the Competition Office does not wish to interfere with the invisible hand of the market economy.

As for the study on primary production, Mr Björkroth said that it was multifaceted, requiring the application of principles of good practice. In that regard, he referred to: oral agreements that are not always respected; liability for spoilage or loss of items where it is not always clear who should bear the risk; and exclusive supply arrangements between meat producers and the meat processing industry (selling products without proper price information).

As stressed by the speaker, unfairness is a normative concept, which does not easily translate into infringements of competition law, yet it is better suited to dealing with UTPs than competition law, as the latter is based on cost-benefit analysis. UTPs may be best dealt with under other legislation than competition law. Seeking justice is an active deed, where each undertaking has to weigh the costs and benefits of such a process. The existing competition law tools are effective when it comes to some forms of behaviour. Abuse of a dominant position is, of course, a key issue as it impedes competition and is relatively easy to track, but abuse of a dominant position as exploitative behaviour, at least in Finnish competition law, is very rarely seen or heard of.

Mr Björkroth spoke of the fact that in parallel to markets studies a policy process intended to stifle the market power of the increasing concentration of the retail industry takes place in Finland. This has already resulted in an amendment of the Competition Act, which took effect from 2014, according to which a retailer with a market share in excess of 30% has a dominant position. Such a market share is not forbidden, however, entails a special responsibility not to hinder competition, competitors, harm suppliers, or abuse that dominant position. Mr Björkroth stressed that the Finnish Competition Authority was extremely critical of this amendment to Finnish competition law, partly due to the fact that it means bringing sectorial regulation within the framework of general law.

As for the way forward, the Finnish Competition Office considered some of the aforementioned problems on *ex officio* grounds, but did not tackle other practices, such as unfair trading practices, exploitative clauses or private labels, with regard to which it decided to wait for complaints from the parties. The amendment of the Competition Act together with the market studies have resulted in a very fruitful dialogue with the retail industry. The Finnish Competition Office has managed to resolve many misunderstandings and problems identified on the basis of anecdotal evidence and - to some extent - contributed to a culture change in the supply chain.

The Competition Office welcomed the response to the supply chain initiative - the creation of a board of good trading practices within the Central Chamber of Commerce. As stressed by the speaker, this will deal with issues that would otherwise result in fruitless complaints to the competition authority. Also, the Modern Retail Study provided by DG COMP was very useful: it was performed for moderately concentrated markets, but could also be applied to the most concentrated European markets.

In closing his speech, Mr Björkroth expressed his strong scepticism regarding the possibilities created by joining the forces of agriculture, industry and trade to enable a more even income distribution in the food supply chain. He paraphrased Confucius and called for making fair agreements and sticking to them.

6.4. The greatest challenge – the fear factor? Assuring effectiveness of the future measures.

Dr. Wolski from Polish Confederation Lewiatan began by underlining that the “fear factor” constitutes one of the key elements of unfair trading practices and therefore should not be discussed as a separate issue. It must be treated in same way as unfair trading practices (UTPs).

The first question he posed related to establishing where the problem really lies when it comes to UTPs. As he pointed out, despite the fact that the European Commission has devoted a lot of time to the issue, a final conclusion has not been reached. In his opinion, the reason for this state of affairs is the complexity of the issue at stake.

The complexity stems from the fact that in the case of UTPs a number of interfering elements converge. Both market practices and legal frameworks in the Member States vary from country to country. Other elements include the economics of the market, understood as the profitability of cooperation between the parties (is it profitable for both parties or just for one?) and consumer welfare (how and to what extent do unfair trading practices and the fear factor affect consumer welfare in terms of price, offers and limiting access to the market).



When defining the fear factor, Dr. Wolski referred to the Commission Green Paper on unfair trading practices and the Communication of July 2014. He agreed with the definition contained therein according to which the fear factor is a situation where the weaker party is afraid of going to court because of the possibility that any current or future cooperation will be brought to an end. Furthermore, he listed fear factor generators, i.e. circumstances that trigger the fear factor. These, according to the speaker, include: the market position of the stronger party (particularly a dominant position or significant market share, as it can influence smaller suppliers or producers), the scale of the business (as the scale of the business brings with it market power which translates into bargaining power) and the value of current or expected cooperation. An element that has often been raised by the Commission is dependency. According to Dr. Wolski, this lies at the crux of the fear factor. If one company, especially if weaker, is fully dependent on another (the entirety of the produce is bought by one recipient) then the fear factor is quite obvious, as it means that the supplier has no alternative. A lack of production diversity (one type of product in the whole offer addressed directly to one supplier) creates a similar situation. It brings about a lack of alternative offers, but also a lack of innovation or lack of progress in terms of development of products.

The fundamental question, however, according to Dr. Wolski, is whether it is possible to eliminate the fear factor in the case of every business, in particular, by means of a legal instrument. This raises other issues: how to measure the fear factor in a given situation, when it comes to its intensity and possible impact on UTPs; how to avoid the fear factor in business relationships in the supply chain; if a party has the right to terminate the contract, how to block it in a legal way; what would be the justification and the legal basis of such action; finally, if it is not possible to eliminate the fear factor, how to limit it.

Dr. Wolski underlined that according to his opinion there is no simple, universal and effective measure for eliminating the fear factor from business relationships. If the circumstances mentioned earlier do arise, the fear factor is a matter of fact and cannot be avoided. At the same time the fear factor should not be ignored. It should be taken into consideration by the courts and other competent authorities, when analysing UTPs in business relationships together with fear factor generators.

The speaker pointed out other elements that are important for the debate on the fear factor. First of all, the size of undertakings involved in cooperation (whether the size of the companies is proportional – in the case of a big company against a small company there is greater potential for the fear factor to take hold); second, the value of cooperation between the parties – the value of cooperation is more apparent to the smaller undertaking; third, the duration of cooperation and how close the business relationship is. The last element the speaker mentioned was the economics of the market. He underlined that if a Polish court, when dealing with cases based on the Unfair Competition Act, comes to the conclusion that the business cooperation between the parties is profitable for both parties, it is less likely that the court will find the trade practices at issue to have been unfair.

In concluding, Dr. Wolski underlined the fact that, in his opinion, it is impossible to eradicate the fear factor from business relationships by means of legal instruments, if the circumstances referred to above occur. At the same time, he stressed that an ineffective law should not be produced, because it brings the law into disrepute. This does not, however, mean that the fear factor should be ignored – on the contrary it should be taken into account together with the abovementioned circumstances in every case of UTPs and finally, it should be used as a decisive feature when recognising the existence of UTPs.

6.5. Discussion

Ms Sehnalová commented on Mr Heinen's speech. She raised three issues. First she asked whether the Commission has any data or another assumptions, besides public consultation, in relation to the non-food supply chain sector? Second, concerning the price pressure from consumers she inquired whether the Commission has any hard data on the structure of price and on the margins? She stressed that this very much affects consumers and constitutes a part of the problem. The third remark concerned why did the Commission choose communication instead of EU legislation. She pointed out that the same reasons could apply to consumers and yet EU decided to introduce legislation protecting the consumers that is enforced by national authorities. She stressed that Mr Heinen did not mention the internal market context, which in her opinion should be taken in account. She asked Mr Heinen for more details concerning the Commissions decision on whether further EU action is required, he mentioned during his speech.



Mr Heinen answered that the Commission does not have data from other sectors when it comes to the scope. The Commission has data from the agri-sector based on similar surveys as the surveys performed in Estonia. He stressed that variety of other sectors with individual responses were present in the framework of public consultations, but the received data seemed anecdotal. The only other sector with a larger number of responses was the automotive sector, where independent car

traders complained about the vertical relationships with car manufacturers. At the same time, all the individual market operators that replied to the Green Paper were all from Austria, so it seemed to be a rather a national problem. There may nevertheless be a problem of imbalances in the automotive sector but the nature of UTPs is different than in the food supply chain. As he explained in the presentation the responses to the Green Paper were one of the leading reasons for the Commission to narrow down the scope. At the same time, there are other reasons in terms of why the food supply chain has specific characteristics that may be more conducive to UTPs than other sectors. This is proved also by the number of initiatives dedicated to the food supply chain on the national and EU levels.

When it comes to the price pressure and margins, Mr Heinen stated that indeed this is subject of a very intense and important discussion also in the agricultural committee. As far as he knows colleagues in DG Agri are working on an analysis to on prices and margins (he would have to check the details with them).

On the third point, Mr Heinen emphasised that the overarching objective is, of course, to create an internal market, and the Commission is particularly concerned if UTPs create a potential obstacle for the internal market. In order to establish this, the Green Paper posed target questions: what the effects of UTPs on the internal market could be. After analysing the stakeholder feedback and meeting many stakeholder representatives and operators, the Commission concluded that the application of UTPs seems to happen mostly at a domestic level. There is only anecdotal evidence of UTPs being applied cross-border. As he already stressed in his presentation, there is also a risk of regulatory fragmentation and regulatory arbitrage. Therefore the Commission will carefully look into this when analysing the national enforcement systems. He added that in this respect cooperation of the national enforcement bodies tackling possible cross-border UTPs is very important. It is of course true that on B2C relations there are at least two pieces of European legislation, however, one has to see that B2C and B2B relations are still two different types of relation. At this stage, he can only say that the Commission does not have a preconceived solution, Mr Heinen said, answering the last question. It is crucial now to see how the Supply Chain Initiative works. The Commission said in the Communication that the Initiative alone is not sufficient and therefore it is crucial to assess the second element, which is the national enforcement systems. Only then will it be fair to make a decision whether something more should happen at EU level, and which form such an action should take. This is not something that can be decided before making proper analysis.

Next, MEP Róza Thun und Hohenstein spoke in the name of MEP Corazza Bildt - the shadow speaker on the report of Mr Jackiewicz on unfair trading practices in the B2B food supply chain, as Ms Bildt was unable to attend the meeting. She welcomed keeping retailers high on the political agenda as pillar of the single market and a driver for growth and jobs and stressed the needed to work in continuity and built on results achieved so far with her report towards a more efficient and fair retail market and the report on the European Retail Action Plan and the Green Paper on B2B. The unfair commercial practices in B2B relations should remain tin spotlight and the on-going self-regulatory process should be monitored. She stressed the results achieved so far and stressed that the workshop is a very clear sign of it. According to her, the best results will be achieved in public private partnership. The Supply Chain Initiative has been running for over a year and progress has been made, however all stakeholders should be encouraged to participate in the initiative, and national platforms should be created.

In concluding the discussion Professor Schulte-Nölke stressed the impact of the fear factor. This makes it unlikely for victims of unfair trade practices to go to court, to refer (at least openly) to an administrative authority, or to make use of any self-regulatory scheme. He posed the question as to whether entitling associations of farmers and other suppliers to bring, in their own name, and without disclosing their sources of knowledge – law suits, administrative proceedings or even ADR proceedings, could be an element of fighting the fear factor. This would follow a model very well-known from consumer law, where in the Enforcement Directive there is a list of qualified entities that are entitled to bring such proceedings, even cross-border.

A participant in the room presented Spanish experience with unfair trade practices. He said that initially there had been a voluntary code in Spain, but because this was largely ineffective, Spain decided to introduce legislation. However, since Spain exports 80% of food products, and because most large businesses are located in other countries, national legislation is not enough. The large Spanish operators are located in France, Germany, or Italy, which makes unfair trade practices a European problem. He stressed that two things must be understood. First, commercial practices are not a national question – they have a European character. Second, the fragmentation of national laws will cause the fragmentation of the internal market.



7. CONCLUDING REMARKS



MEP Jackiewicz concluded the workshop by saying that, despite the fact that EU law offers a number of legal instruments concerning unfair trade practices, there is no single legal instrument that would directly address unfair trade practices in the food supply chain. The methods of preventing unfair trade practices are greatly differentiated. This is rather problematic, as the IMCO Committee would like to propose a report that would suggest new effective solutions for tackling unfair trade practices. Competition law does not provide help here, as it does not even contain a common definition of unfair trade practices. Mr Jackiewicz asked all interested parties to send him, or the IMCO Committee, any suggestions or information regarding future actions on UTPs.

Annex 1: PROGRAMME



PARLAMENTO EUROPEO EVROPSKÝ PARLAMENT EUROPA-PARLAMENTET
EUROPÄISCHES PARLAMENT EUROOPA PARLAMENT ΕΥΡΩΠΑΪΚΟ ΚΟΙΝΟΒΟΥΛΙΟ EUROPEAN PARLIAMENT
PARLEMENT EUROPÉEN PARLAMENTO EUROPEO ΕΙΡΟΠΑΣ ΠΑΡΛΑΜΕΝΤΣ
EUROPOS PARLAMENTAS EURÓPAI PARLAMENT IL-PARLAMENT EWROPEW EUROPEES PARLEMENT
PARLAMENT EUROPEJSKI PARLAMENTO EUROPEU EURÓPSKY PARLAMENT
EVROPSKI PARLAMENT EUROOPAN PARLAMENTTI EUROPAPARLAMENTET

WORKSHOP

Organised by the Policy Department A: Economic and Scientific Policy
for
the Committee on Internal Market and Consumer Protection (IMCO)

Unfair trading practices in the business-to-business food supply chain (UTP)

Tuesday, 24 March 2015 from 9:30 to 12:30
European Parliament, Room: Altiero Spinelli 3G3, Brussels

PROGRAMME

9:30 – 9:35 **Opening remarks:** Dawid Bohdan JACKIEWICZ (MEP)

PANEL I - MAPPING THE PROBLEM OF UNFAIR TRADING PRACTICES

9:35 – 9:50 **The legal framework**
Prof. Hans SCHULTE - NÖLKE (Osnabrück University)

9:50 – 10:05 **The economist's view on unfair trading practices**
Prof. Cedric ARGENTON (Tilburg University)

10:05 – 10:20 **Q&A session**

PANEL II - BUSINESS PERSPECTIVE - ROUNDTABLE

10:20 – 10:30 **Unfair trading practices in food supply chain**
Paulo GOUVEIA (Director, Copa-Cogeca)

10:30 – 10:40 **Unfair trading practices in non-food supply chain**
Zbigniew KIEDACZ (Fakro)

10:40 – 10:50 **Business organisations' approach to unfair trading practices**
Christel DELBERGHE (Director, EuroCommerce)

10:50 – 11:05 **Q&A session**

VIEW FROM THE EUROPEAN COMMISSION

11:05 -11:20 Gerd HEINEN (Policy Officer, European Commission)

PANEL III - UNFAIR TRADE PRACTICES – POSSIBLE SOLUTIONS

11:20 – 11:25 **Introduction**
Prof. Hans SCHULTE - NÖLKE (Osnabrück University)

11:25 – 11:40 **What is the best way to address the UTP? A need for action? Which measures?**
Prof. Irene KULL (Tartu University)

- 11:40 – 11:55 **Just food or horizontal? Domestic or cross-border?**
Tom BJÖRKROTH (Finnish Competition and Consumer Authority)
- 11:55 – 12:10 **The biggest challenges – the fear factor? Assuring effectiveness of the future measures**
Dr. Dominik WOLSKI (Polish Confederation Lewiatan)
- 12:10 – 12:25 **Discussion**
- 12:25 – 12:30 **Closing remarks by** Dawid Bohdan JACKIEWICZ (MEP)
-

To contact the Policy Department or to subscribe to its monthly newsletter,
please write to: Poldep-Economy-Science@ep.europa.eu

Annex 2: SHORT BIOGRAPHIES OF EXPERTS

SHORT BIOGRAPHIES OF EXPERTS



Prof. Hans SCHULTE - NÖLKE (Osnabrück University)

Prof. Dr. Hans Schulte-Nölke is Chair of Civil Law, European Private and Commercial Law, Comparative Law and European Legal History, Director of the European Legal Studies Institute – Department for European Legal History and European Union Private Law at the Osnabrück University. Prof. Schulte-Nölke was a co-ordinator and co-founder of the European Research Group on Existing EC Private Law (Acquis Group) and a co-ordinator of the „Common Principle of European Contract Law (CoPECL)“ Network. He specializes in European and international commercial law, European harmonisation, European Union private law, comparative law, contract law in practice, sales and consumer law.



Prof. Cedric ARGENTON (Tilburg University)

Cédric Argenton is Associate Professor of Economics at the Tilburg School of Economics and Management and Co-Director of TILEC (the Tilburg Law and Economics Center) at Tilburg University in the Netherlands. A graduate of Sciences Po Paris and the University of Paris I—Panthéon-Sorbonne, he was trained as an academic economist at Boston University and the Stockholm School of Economics, where he defended his doctoral dissertation. He specializes in industrial organization, the branch of economics which studies market outcomes. He has an interest in competition policy, especially exclusionary practices associated to predatory pricing or the use of vertical restraints, quality regulation, innovation, and law and economics. His work has been published in a variety of scientific outlets including the *Journal of Industrial Economics*, the *International Journal of Industrial Organization*, the *Oxford Journal of Competition Law and Economics*, and *Games and Economic Behavior*.



Paulo GOUVEIA (Director, Copa-Cogeca)

Paulo Gouveia is Director for General Affairs in Copa-Cogeca, responsible for the coordination of horizontal policies, in particular, of cooperatives, agribusinesses and food chain. He has more than 25 years' experience working for farmer and cooperative organisations in Portugal and other EU Member States. He is an agronomist (agro-economist) graduate of the Instituto Superior de Agronomia (University of Lisbon) in Portugal. Of Portuguese nationality he is married with two children.



Zbigniew KIEDACZ (Fakro)

Zbigniew Kiedacz is attorney-at-law with LAWBERRY Radkowiak-Macuda, Pietrzyk. For a number of years he has been collaborating with Polish roof windows manufacturer FAKRO, as well as with Pomyśl o Przyszłości (Think About The Future) Foundation. He specializes mainly in the field of competition law and unfair practices law.



Christel DELBERGHE (Director, EuroCommerce)

Christel Delberghe is Director of Policy, Competitiveness & Food, at EuroCommerce. In that capacity, Christel leads EuroCommerce policy and advocacy work related to supply chain relations and trading practices, including the retail input into the Supply Chain Initiative. She represents EuroCommerce in the Sherpa group of the High-Level Forum on a better functioning food supply chain. She joined EuroCommerce in 2001. Prior to that, she worked as a European affairs consultant (2000-2001), and as European affairs officer at Marks and Spencer (1996-2000). Christel holds a master degree in European economics from the University of Brussels (ULB).



Gerd HEINEN (Policy Officer, European Commission)

Gerd Heinen joined the European Commission in 2005. He works as a policy officer on retail services since 2013. Prior to joining the Commission, Gerd worked for a consumer goods company in different financial management positions. He holds a degree in applied mathematics from the University of Trier (Germany) and an MBA from KU Leuven (Belgium) and the Kellogg Graduate School of Management (USA).

Business-to-Business Services, DG [GROW](#), Mr Heinen contribute to the development of a new Internal Market policy for services. Providing political analysis of Internal Market barriers and the appropriate follow-up. Contribute to drawing-up new legislative instrument(s) aiming to ensure the freedom of establishment and the freedom to provide services.



Prof. Irene KULL (Tartu University)

Irene Kull is a professor of civil law and holds the position of the head of the Chair of Commercial and Intellectual Property law at the University of Tartu. She participated in the Study Group of a European Civil Code (SGCCE) as an advisor on the Working Teams on Draft Common Frame of Reference (DCFR) from 2004-2009. She has been a member of drafting commission on Estonian Law of Obligations Act and one of the editors and leading authors of comments on Estonian Law of Obligations Act, General Part of Civil Code Act. From 2010 - 2015 she has been a member of the Expert Group on a Common Frame of Reference in the area of European Contract Law (CESL). Prof. I. Kull lectures on contract law, law of obligations and European contract and commercial law. Her main interests include the general principles of contract and tort law, harmonization of European private law and comparative contract law. She is working as an advisor of the civil chamber of the Estonian Supreme Court and has been a member of the Supervisory Board of the Bank of Estonia from 2009-2014.



Tom BJÖRKROTH (Finnish Competition and Consumer Authority)

Tom works as a Senior Adviser in Finnish Competition and Consumer Authority (FCCA). Before joining the FCCA in 2007 he worked as a senior researcher in Turku school of Economics and as an assistant professor in Economics at Åbo Akademi University. He is a Doctor of Political Science (Economics) and also holds a MA degree in EU Competition Law from King's College. He has authored articles and book chapters in a range of subjects in Economics and Competition Law.



Dr. Dominik WOLSKI (Polish Confederation Lewiatan)

Dominik Wolski is Polish Qualified Lawyer (Legal Adviser), Doctor of Laws and Lecturer at Katowice School of Economics. He is also Director of Legal Department in the biggest Polish retailer. Mr. Wolski was graduated and post-graduated at Silesian University in Katowice and still cooperates with several research centers. He is active in many organizations and is involved in many international projects. Dominik Wolski is the author of many publications on civil law, conflict of laws, project of Common European Sales Law, competition law, combating unfair practices, consumer law as well as law in sport and tourism. Member of Center of Antitrust and Regulatory Studies of Management Department at Warsaw University. Speaker at many conferences and seminars.

WORKSHOP "UNFAIR TRADING PRACTICES IN THE BUSINESS-TO-BUSINESS FOOD SUPPLY CHAIN"

Organised by the Policy Department A: Economic and Scientific Policy for the Committee on Internal Market and Consumer Protection (IMCO)

To contact the Policy Department or to subscribe to its monthly newsletter
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Annex 3: PRESENTATIONS

Presentation by H. Schulte-Nölke - Osnabrück University



Unfair Trading Practices in the B2B Food Supply Chain - The legal framework -

Workshop prepared for Internal Market
and Consumer Protection Committee



DIRECTORATE-GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT
ECONOMIC AND SCIENTIFIC POLICY **A**

Brussels, 24 March 2014

Prof. Dr. Hans Schulte-Nölke
European Legal Studies Institute Osnabrück



Unfair trading practices in the B2B supply chain

Background:

- Green Paper on unfair trading practices in the business-to-business **food and non-food** supply chain in Europe (COM (2013) 37)
- Communication on unfair trading practices (UTPs) in the business-to-business **food** supply chain (COM (2014) 472)

=>Commission focuses on UTP in the food supply chain

Prof. Dr. Hans Schulte-Nölke, European Legal Studies Institute Osnabrück



Mapping the problem

- Examples of UTP in the B2B (food) supply chain
- Effects of UTP
 - Internal market
 - Consumer welfare
- The legal framework

Prof. Dr. Hans Schulte-Nölke, European Legal Studies Institute Osnabrück



The legal framework

- No specific regulation for the B2B food supply chain
- General regulation of UTP in the B2B supply chain
 - EU level
 - Member State level

Prof. Dr. Hans Schulte-Nölke, European Legal Studies Institute Osnabrück



EU level

- **Competition law (art. 102, 101 TFEU)**
 - Abuse of a dominant position
 - Anticompetitive practices
 - “Relative market strength” left to Member States (cf. art. 3 II 2 Reg. 1/2003)
- **Unfair commercial practices law**
 - Misleading and comparative advertising (Dir. 2006/114/EC)
 - Unfair business-to-consumer commercial practices (Dir. 2005/29/EC): just B2C! – B2B left to Member States
- **General contract law: B2B (mainly) left to Member States**

Prof. Dr. Hans Schulte-Nölke, European Legal Studies Institute Osnabrück



Member State level

- **Competition law** (e.g. provisions on “relative market strength”)
 - Discrimination within the supply chain
 - Obstruction of competitors
- **Unfair commercial practices law**
 - Specific regulation also applicable to B2B relations
 - Tort law
- **Contract law**
 - Good faith
 - Regulation of standard terms in B2B relations

Prof. Dr. Hans Schulte-Nölke, European Legal Studies Institute Osnabrück



Enforcement issues

- Weaker party may not enforce its rights on own initiative
- Confidentiality clauses
- Freedom of contract / choice of the law of a non Member State
- Not only judicial, but also administrative enforcement?
- Role of self-regulation?
- No food-specific regulatory environment

Prof. Dr. Hans Schulte-Nölke, European Legal Studies Institute Osnabrück



Prof. Dr. Hans Schulte-Nölke
European Legal Studies Institute Osnabrück
schulte-noelke@uni-osnabrueck.de

Prof. Dr. Hans Schulte-Nölke, European Legal Studies Institute Osnabrück

Unfair trade practices: An economist's point of view

Cédric Argenton
CentER & TILEC, Tilburg University



1

What are UTPs?

- Used to be unclear, but now clarified after Green Paper, 2014 Study, 2014 Communication
- Two types:
 - At the contract formation stage: for the most part, contract terms that are highly favorable to one party
 - At the contract execution stage: for the most part, unilateral changes to contract terms



2

Is there an economic issue with UTPs?

- Caveat 1: Acceptance/prevalence not informative
- Caveat 2: Public interventions/regulation not informative
- UTPs can be bad for economic efficiency, not because they are “unfair” but because they distort the allocation of resources



3

Is there an economic issue with UFPs? (2)

- First problem: *ex ante* exploitation/market power
 - Market power is bad in general and should be avoided: it is the *source* of the problem
- Second problem: *ex post* exploitation/weak contracting framework
 - Clarity/Predictability
 - Risk allocation
 - Commitment power
- Two economic distortions:
 - Socially beneficial transactions that should take place don't
 - Less entry/more exit than desirable on the “weak” side



4

The “fear factor”

- For the most part, if really unilateral, a lot of UTPs are illegal under contract law
- Why don't suppliers assert their rights under contract law?
- Two possible reasons:
 - Litigation is a costly and uncertain endeavor (legal problem)
 - Continuation value of the business relationship (including future UTPs) is higher than short-term alternative (“lock-in”) (economic problem)

What to do?

- Small players:
 - Know the trade (and contract law): from B2b to B2B
 - Diversify customer base/commercial risk
 - Get organized to acquire countervailing market power?
- Big players
 - Realize the value of lasting relationships
 - Be aware of risk and costs of intrusive regulation
- Public authorities
 - Fight market power
 - Train small players
 - Favor alternative dispute resolution fora
 - Public enforcement through anonymous complaints?

A word of caution

- Courts (and competition authorities) have always been very cautious when it comes to interfering with negotiated contract terms
 - Major exception = consumer protection laws
- Competition law everywhere relies on dominance threshold
 - Concern for over-deterrence
- Similar issues at play with UTPs



Presentation by P. Gouveia - COPA-COGECA



Unfair trading practices in food supply chain

EP IMCO Workshop: Unfair Trading Practices in the B2B food supply chain (UTP)

Paulo Gouveia, 24th March 2015



Structure of the Presentation:

- 1. The importance of the Food Chain*
- 2. An unbalanced food supply chain*
- 3. Actions needed*

1. The Importance of the Food Chain

- ✓ The combined agricultural and food sector accounts today for 30 million jobs (13.4% of total employment) and for 3.5% of total GVA in the EU-28
- ✓ Agriculture and agri-food industry's turnover exceeds 1420 billion euro/year
- ✓ The biggest EU manufacturing sector

2. An unbalanced food supply chain



2. An unbalanced food supply chain

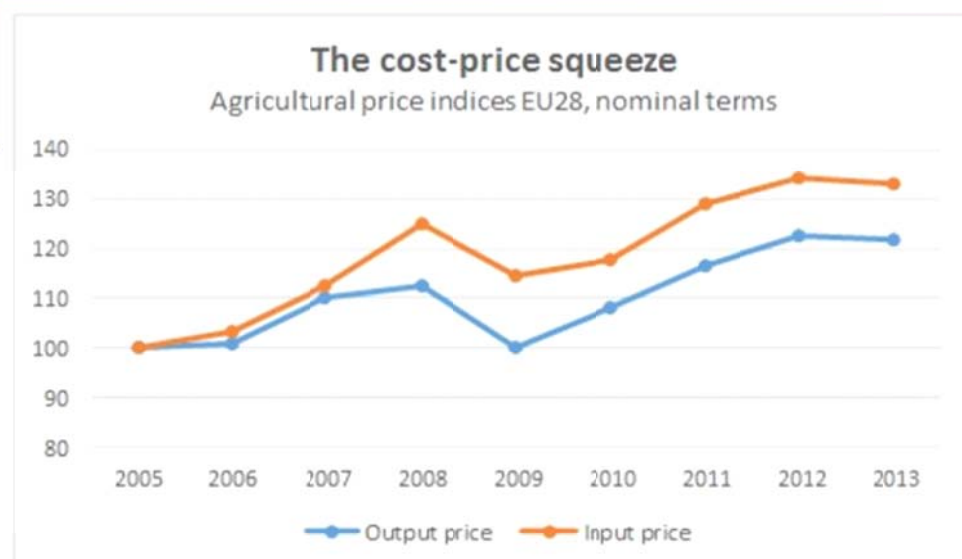
The causes:

- Increasing globalisation;
- Farmers are weak sellers;
- Processing Consolidation;
- Retail consolidation;
- Ferocious competition amongst retailers;
- Unfair and abusive commercial practices.

Copa-Cogeca | The voice of European farmers and their cooperatives | 5

copa*cogeca
european farmers european agri-cooperatives

Evolução de preços na cadeia alimentar, EU-28; preços nominais (2005=100)



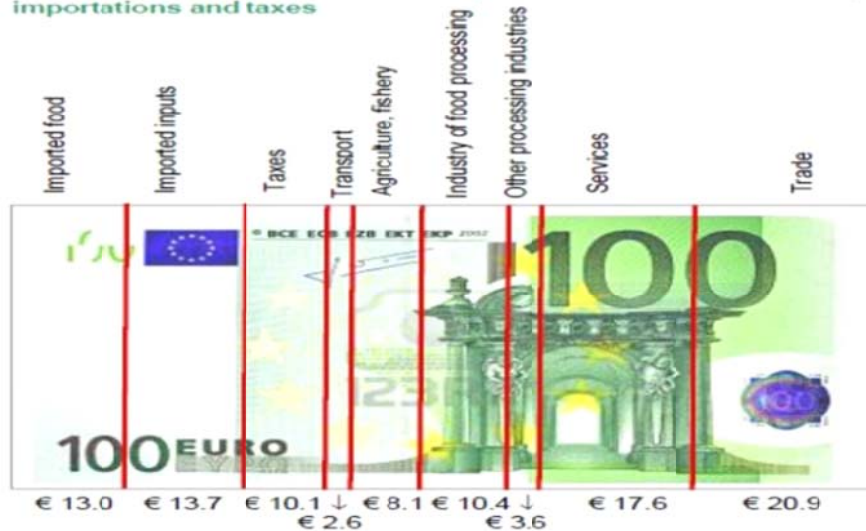
Fonte: Eurostat, Contas Económicas da Agricultura

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2. An unbalanced food supply chain

Figure 3
The 2010 "food Euro" decomposed into values added, importations and taxes



Source : INSEE, Eurostat, calculation FranceAgriMer – OFPM from INRA

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2. An unbalanced food supply chain

The consequences:

- Relentless downward pressure on prices;
- Farmers, in many cases, do not cover production costs;
- Insufficient investment in farm business;
- Farmers abandoning sector and activity;
- Risk for the consumer of a reduced choice and flexibility of supply.
- Distortion of competition and impacts on the functioning of the Internal Market

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3. Actions Needed

At European level:

- ✓ Develop and review legislation impacting on the functioning of the Internal Market and Competition Law
- ✓ Develop a Directive on B2B unfair trading practices (UTPs)
- ✓ Ensure the enforcement of legislation through an independent third party (e.g. Ombudsman)

3. Actions Needed

At European level:

- ✓ Legislation to work alongside self-regulatory (voluntary) agreements
- ✓ Coordinate and harmonise the approach and actions of National Competition Authorities (NCAs)

Need to achieve a Fair, functional and transparent food chain



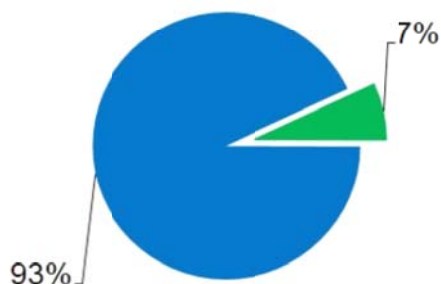
UTPs in non-food supply chain

business perspective

1

Food supply chain vs non-food supply businesses

EU employment breakdown

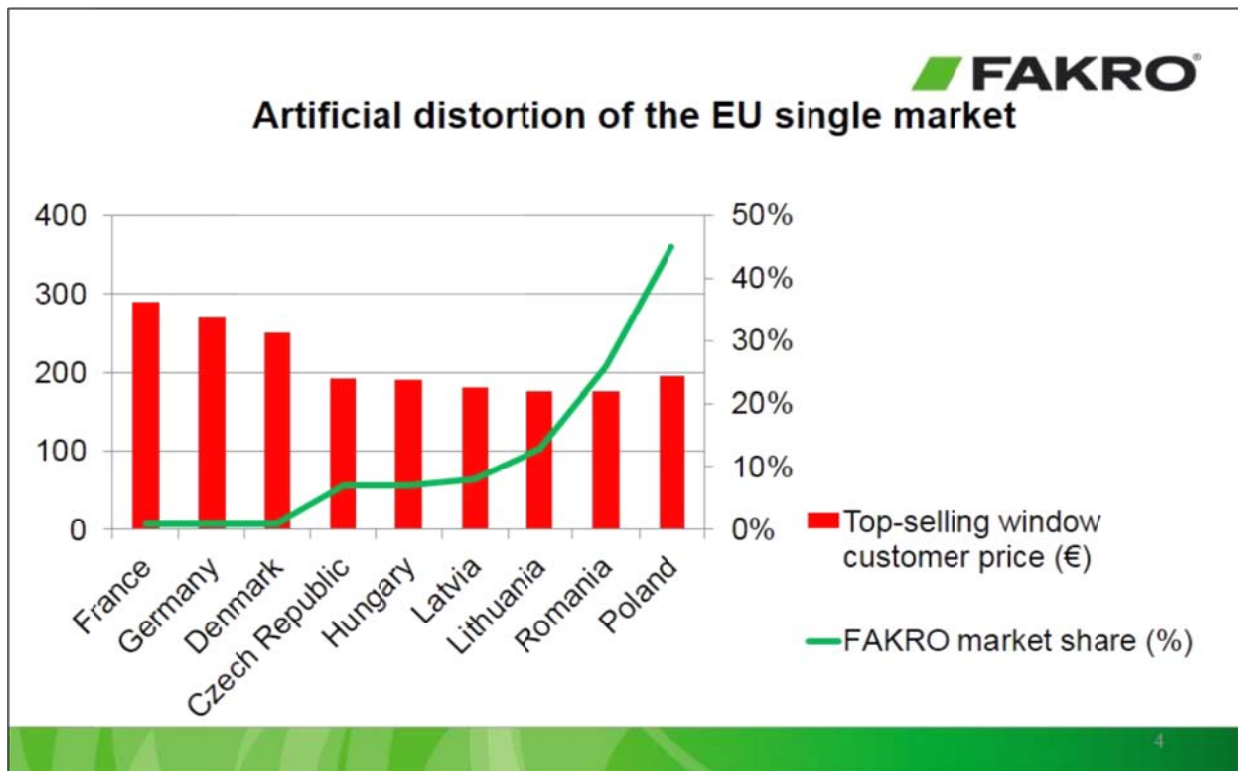
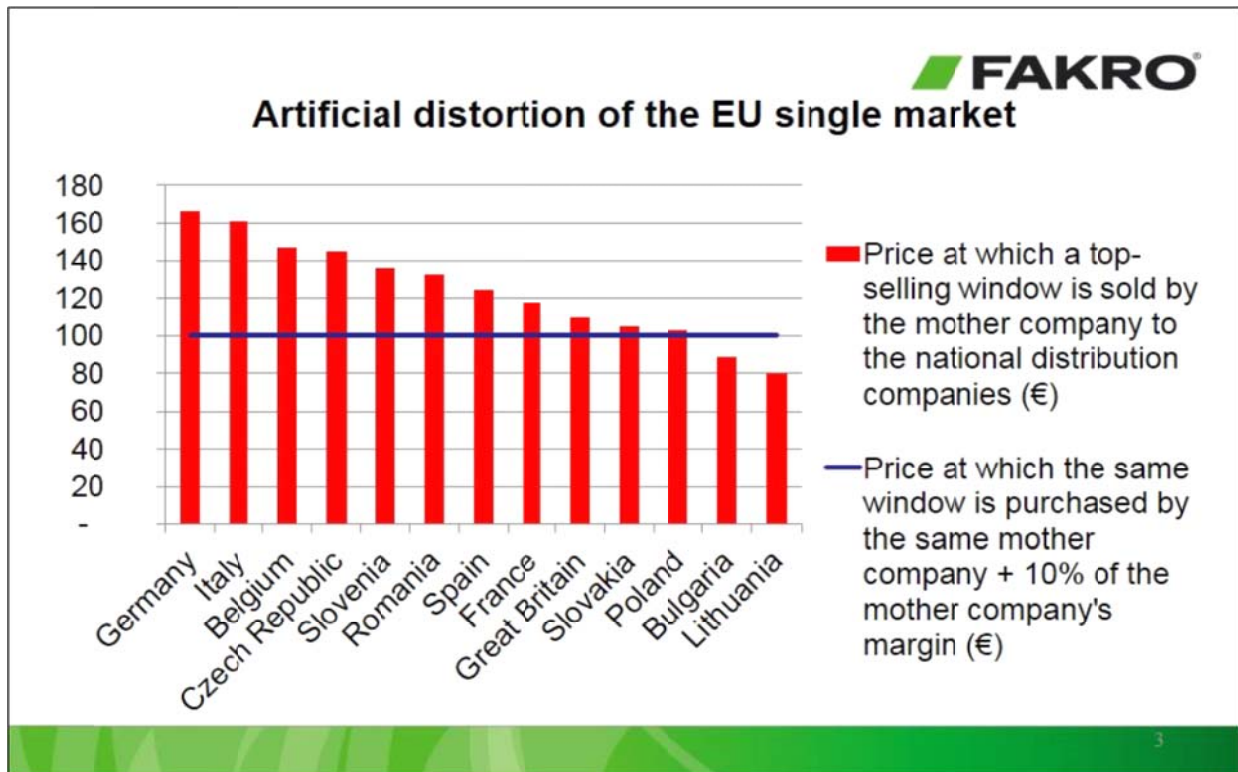


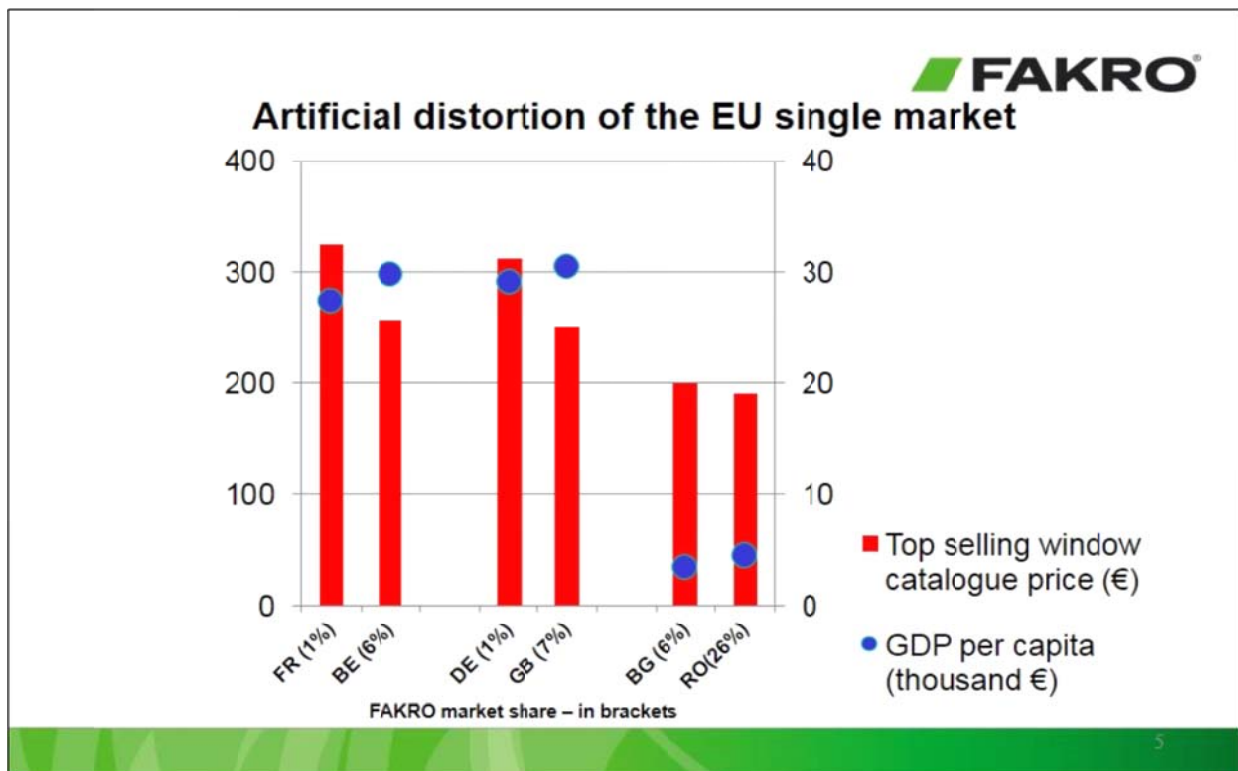
Average EU household expenditure breakdown



■ Food supply chain
■ Non-food supply chain businesses

2





FAKRO®

A remedy to artificial distortion of the EU single market?

Parallel trade!

6



Unfair trading practices - a method to hamper parallel trade

- refusal to deliver goods to entrepreneurs active on the field of parallel trade
- obstruction of delivery of goods to entrepreneurs active on the field of parallel trade
- introduction of services working only if the product does not originate from parallel trade (i.e. only if the product is installed in the country in which it had been originally bought from the manufacturer):
 - warranted services;
 - additional promotions
- applying pressure on local certification agencies to introduce new, local norms or certificates
- creating objectively insignificant but confusing differences between products on separate national markets

13



Unfair trading practices - consumer harm

- higher prices
- lack of innovation
- lower quality of products and services
- narrow scope of products and services

**The stronger the position of the entrepreneur using UTPs,
the bigger the harm!**

15



**Thank you
for your attention**

16

Presentation by C. Delberghe - EuroCommerce



UNFAIR TRADING PRACTICES IN THE B2B FOOD SUPPLY CHAIN

EP workshop
24 March 2015



EuroCommerce
THE RETAIL, WHOLESALE
AND INTERNATIONAL
TRADE REPRESENTATION
TO THE EU

Key points

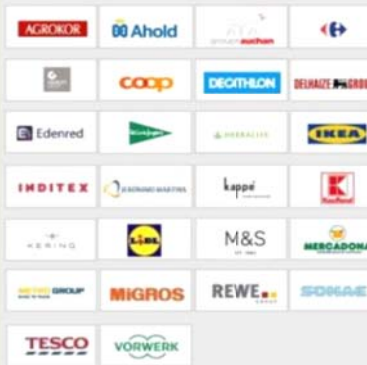
- EuroCommerce and the commerce sector
- Defining the issue
- The Supply Chain Initiative
- Conclusion

We represent

National Associations



Companies



Affiliated Federations



Retail & wholesale is...



5.4 MILLION
COMPANIES



1 OF EVERY 7 WORKERS
IN THE EU



10.6%
OF GDP



INNOVATION
• Processes
• Products
• Experiences

AND IT PROVIDES...



Choice



Clear Product
Information



Convenience



Affordability



Jobs



Tax Revenue

UTPs: defining the issue

- **A complex issue**
 - > Fair dealing and freedom of contract
 - > No one-size-fits all
 - > Subsidiarity
- **Focus on the food supply chain**
- **Support the Supply Chain Initiative**
 - > Commonly agreed good practice principles
 - > EU wide initiative supported by 8 EU level organisations

5



Common Principles of Good Practice

3 General Principles

1. Consumer Interests and sustainability
2. Freedom of Contract
3. Fair Dealing



7 Specific Principles

1. Written agreements
2. Predictability
3. Compliance with agreements
4. Information exchange
5. Confidentiality
6. Responsibility for risk
7. Justifiable request

Compliance with applicable laws including competition law

Agreed by: AIM, CEJA, CELCAA, CLITRAVI, COPA-COGECA, ERRT, EUROCOMMERCE, EURO COOP, FOODDRINKEUROPE, UEAPME, INDEPENDENT RETAIL EUROPE

6





Together for good trading practices

- An EU level initiative supported by 8 EU level organisations to
 - > promote fair practice as a basis for commercial dealings
 - > ensure companies address disputes in a fair and transparent manner
- Voluntary registration on a web site with a set of commitments
- Alledged breaches of principles
 - > Individual dispute => sanctions and remedies depend on the applicable law
 - > Aggregated dispute => national or EU level dialogue platform issues guidance and interpretation



The SCI one year on



150
Participants:
Commission,
MEPs,
Stakeholders

Nearly
500
companies
surveyed

18,000
staff trained

74%
satisfied,
35%
highly
satisfied

National
platforms in
5
countries

50%
SME
participation
rate

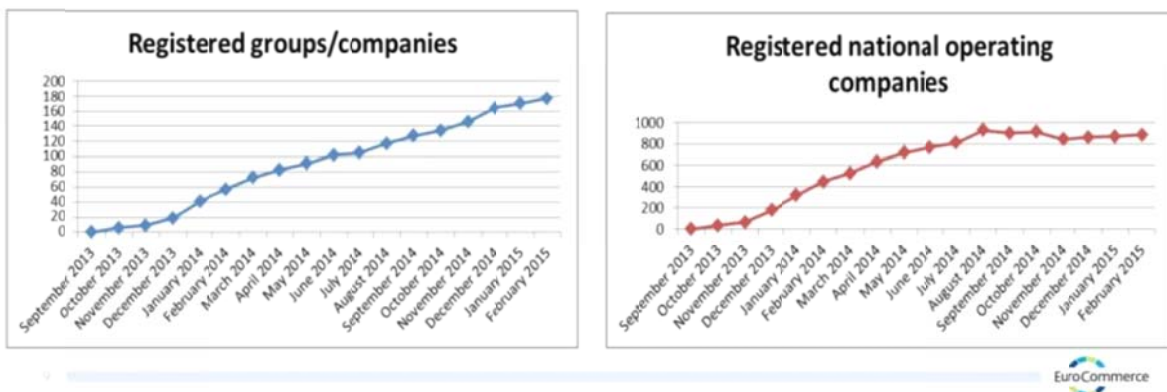
More info:

<http://www.supplychaininitiative.eu/>



SCI: progress achieved

- Launch: September 2013 with 82 letters of intent
- To date: 180 groups/companies representing 894 national operating entities
- 52% are SMEs
- 51 letters of intent



Conclusion

- The SCI has already achieved a lot; give it more time to show effectiveness:
 - > Transparent, voluntary, tailored to business needs, supporting tools
 - > Complementary to national legislation
- SMEs are key beneficiaries
- Review process
 - > Objective evaluation
 - > Review progress in due time
- Better regulation principles must apply!

Presentation by G. Heinen - European Commission



Unfair Trading Practices (UTPs) in the food supply chain

**IMCO workshop
Brussels, 24 March 2015**

Gerd Heinen, Policy officer retail services

Internal market,
Industry,
Entrepreneurship
and SMEs



Features of the food supply chain

**Increasing imbalances of bargaining power,
i.e. a few large and many small players on
both sides of the market**

Tense commodity markets

Price pressure from consumers

Under such conditions, increased risk for UTPs

Internal market,
Industry,
Entrepreneurship
and SMEs



Existing approaches to tackle UTPs

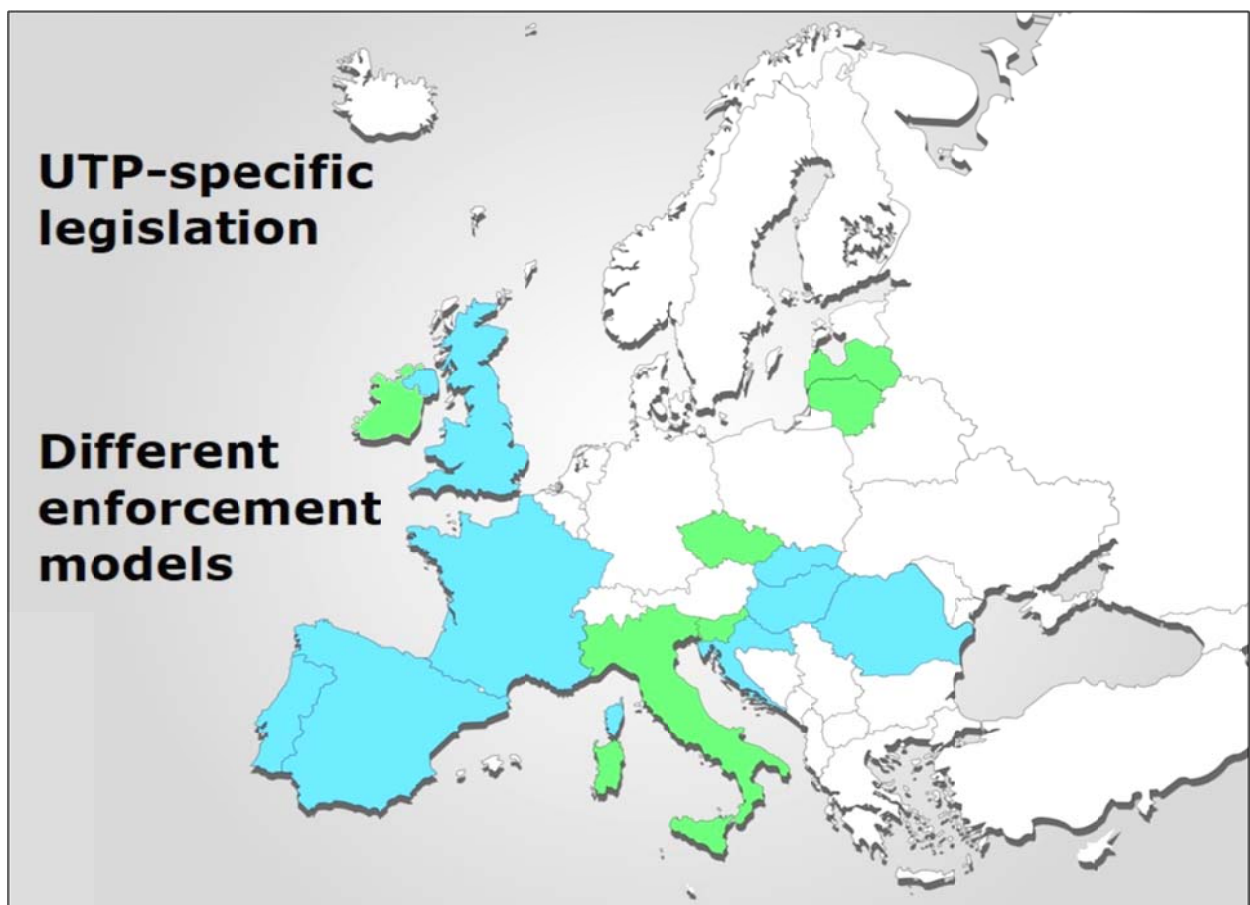
At EU level:

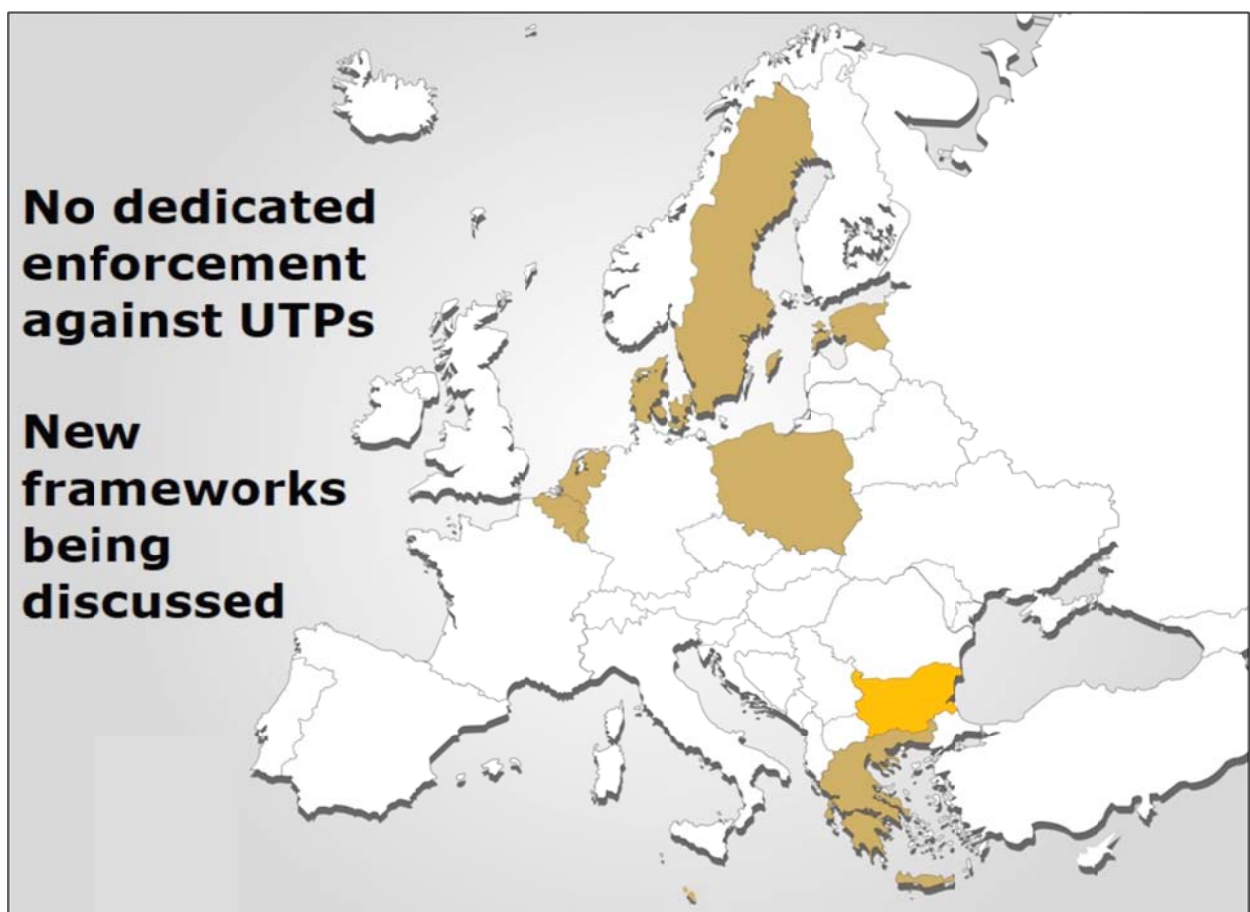
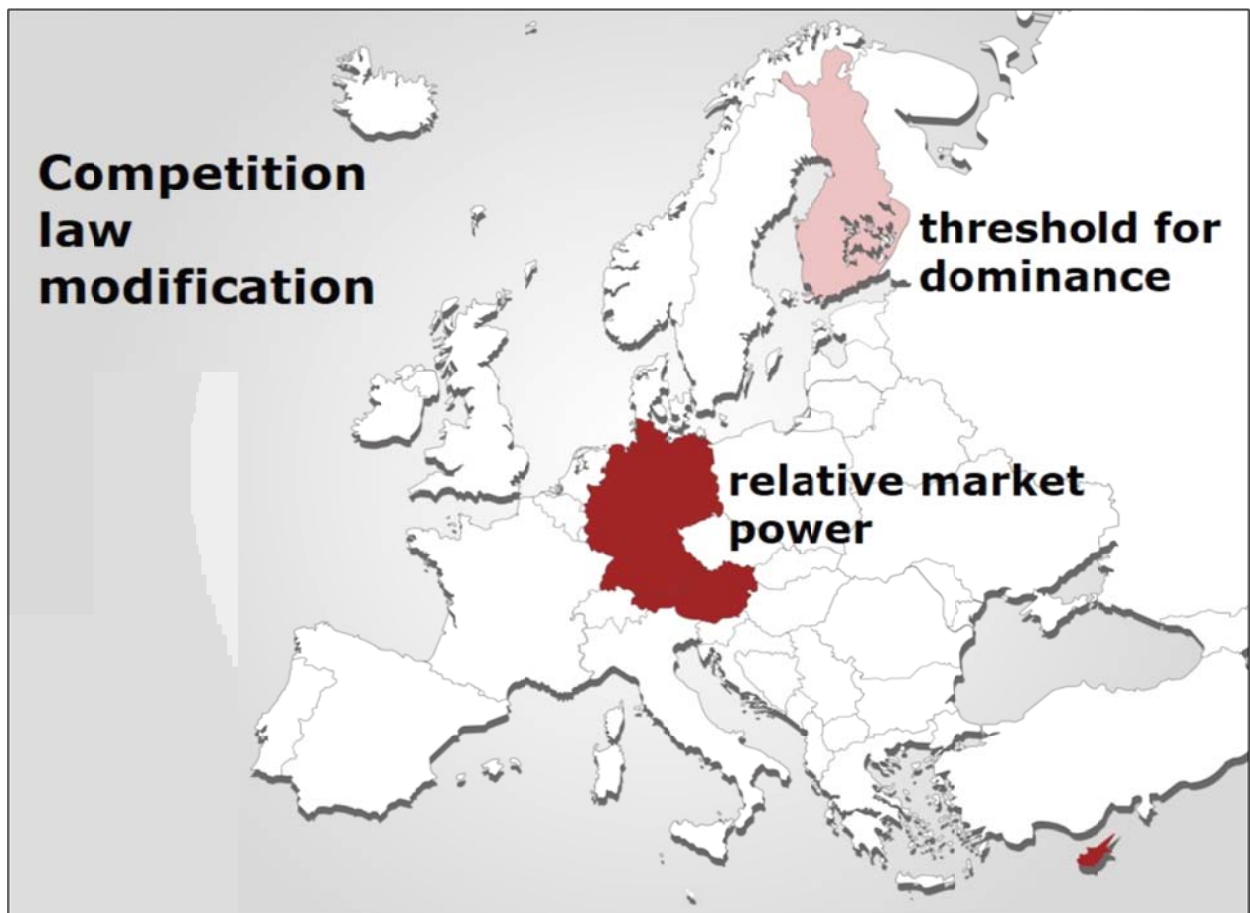
- Voluntary Supply Chain Initiative

At Member State level:

- UTP-specific legislation
- Modifications of competition law
 - Voluntary schemes
 - No dedicated action

Internal market,
Industry,
Entrepreneurship
and SMEs







Conclusions leading to EU policy action

- EU competition law insufficient to tackle UTPs
- SCI framework very important achievement but some inherent shortfalls
- Common understanding of best practices across EU beneficial
- Effective enforcement at national level crucial

Internal market,
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Why Communication instead of EU legislation?

- UTPs mostly applied at domestic level
- Many Member States already addressing UTPs or planning to do so
- Enforcement is key but difficult to define "one-size-fits-all" solution
- SCI framework should have proper chance to prove its value

Internal market,
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Entrepreneurship
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Communication

Addressed to market participants, Member States and Commission

Built on three pillars:

- Support of SCI
- EU-wide standard for principles of best practice
- Effective enforcement at national level

Internal market,
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Entrepreneurship
and SMEs



Next steps

- Independent assessment of SCI and national platforms in 2015
- Analysis of national frameworks;
- Meetings with Member States to exchange best practices and facilitate coordination
- Report findings back to EP and Council
- Decision whether further EU action required

Internal market,
Industry,
Entrepreneurship
and SMEs



Thank you for your attention!

Gerd Heinen

Policy officer retail services

Directorate-General

Internal Market, Industry, Entrepreneurship and SMEs

Internal market,
Industry,
Entrepreneurship
and SMEs

Presentation by I. Kull - Tartu University

Unfair practices in the business-to-business food supply chain (UTP).
Workshop. Brussels, European Parliament, 24.03.2015

What is the best way to
address the UTP? A need for
action? Which measures?

Prof. Irene Kull
irene.kull@ut.ee

Introduction

- ❑ **European retail sector** – increasing competition - emergence of unfair trading practices – need for new paradigm
- ❑ **Weaker parties in the chain** can be retailers, big producers, small local suppliers, etc.
- ❑ **Policy problem** – if and how to tackle with unfair practices in food supply chain

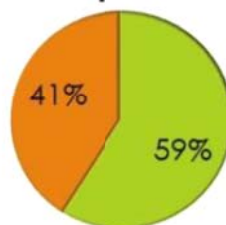
Studies:

- ❑ **“Legal Framework Study covering business-to business unfair trading practices in the retail supply chain”**. Final report. 26 February 2014. Prepared for the European Commission, DG Internal Market
- ❑ **“Changing competition in the food supply chain and unfair trading usages”**. Prepared by the Estonian Institute of the Economic Research and Ministry of Agriculture, Nov 2014

Food supply chain and UTPs in Estonia

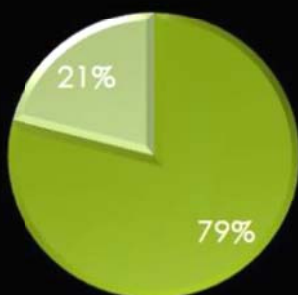
- Study on changing competition in the food supply chain and unfair trading practices, prepared by the Estonian Institute of the Economic Research and Ministry of Agriculture, January 2015:
- Top 5 retailers hold 82 % of market share which is very high in comparison with other EU Member States
- The share of local products in retail chains: 81% of dairy products, 90% of the milk, 90% of curds, 96% of bread and 92% of sausages.
- Survey studied 161 food industry businesses from a total of 324

161 food producers 2014 (Estonia)



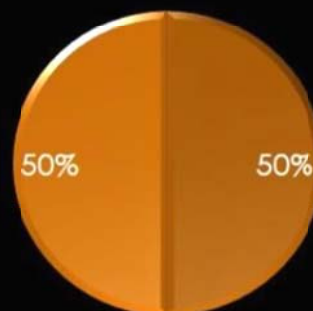
- No experience with UTPs
- Subject to UTPs

Big enterprises (turnover more than 5 million)



- No experience with UTPs
- Subject to UTPs

Enterprises with turnover less than 5 million

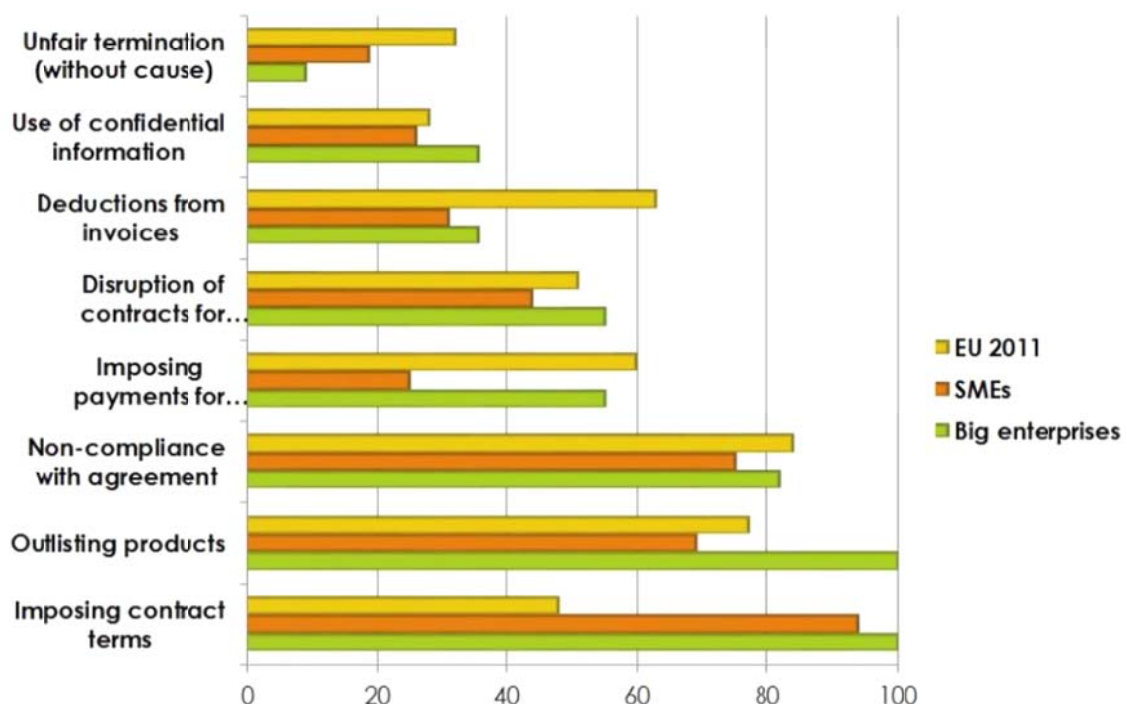


- No experience with UTPs
- Subject to UTPs

Legal framework

- ❑ UTPs are not covered by specific public legislation
- ❑ Private regulation – mainly the Fair Trade Practices adapted by Estonian Traders Association in 2008
- ❑ Law of Obligations Act (2002):
 - unfair contract terms e.g. gray list of 34 terms presumed as unfair in B2B contracts
 - general provisions on pre-contractual obligations (refusal to negotiate, unfair use of confidential information)
 - general obligation to act in good faith
- ❑ No special administrative supervisory or enforcement body (strong “fear factor” preventing complaints)
- ❑ Competition law - insufficient

Types of unfair trading practices (Estonia)



Differences in using UTPs: EU and Estonia

	Big businesses 2014	Small businesses 2014	EU 2011
Experienced UTPs	79 %	59 %	96.4%
Imposing contract terms	100 %	94 %	48 %
Outlisting products	100 %	69 %	77 %
Payment for services not used	82 %	38 %	60 %
Non-compliance with contract terms	82 %	75 %	84 %
Disruption of contracts to get better contract terms	55 %	44 %	51 %
Payment for services not connected to sold products	55 %	25 %	60 %

UTPs in food supply chain (Estonia)

▣ Differences in comparison to EU food industry

- the producers experience UTPs less than in EU in general: EU - 96.4%
- Estonia - 59% (79% for large companies).
- non-compliance with contract terms: EU - 84% , Estonia 77% (the most common in EU),
- imposing contract terms EU - 48%, Estonia - 96%.

Conclusions (1)

- Abuse of contracting power in food supply chains will damage free competition and in long terms interests of the consumers
- EU competition law is insufficient to tackle the problem
- UTPs are used more frequently on companies producing products with relatively short preservation time and in highly competitive markets
- Use of UTPs is less intensive or lacking on micro and small businesses, who have their own niche in the market.

Conclusions (2)

- Estonian practice does not convince that private regulation is the best solution to tackle with problem
- Representatives of traders and practicing lawyers are against to any intervention into contractual freedom by legislation on EU level
- Study: there is a need for legal regulation and efficient administrative enforcement mechanism
- Different strategies might be required depending on the sector, the degree of market concentration and internationalization of supply chains
- SMEs do not need special protection (weaker parties), decisive factors are economic dependence and market specific factors

Possible actions on EU level:

- ▣ Recommendations: combinations between legislation and private regulations, mechanisms for the administrative supervision and enforcement of rules
- ▣ Common definitions, standard contracts
- ▣ Clear understanding how competition, contract and tort law rules are related; changes in underlying principles of competition law

Presentation by T. Björkroth - Finnish Competition and Consumer Authority

FCCA and the Food Supply Chain

A perspective on unfair trading practices

Tom Björkroth, Senior Adviser
29.6.2015

KKV Finnish Competition
and Consumer Authority

kkv.fi

Outline

1. On the FCCA market studies on the food supply chain
2. Major findings
3. Lessons learned...
4. ...and the way forward
5. Bibliography

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1. FCCA market studies - Four years in retrospect

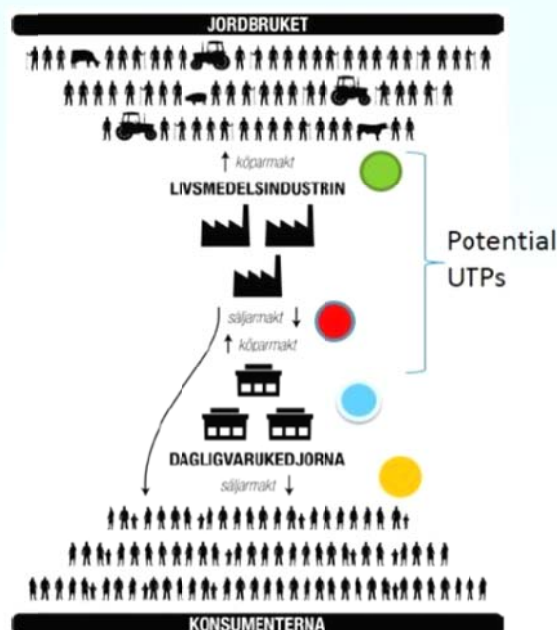


Illustration: Per Thorneus
Source: Swedish Competition Authority

- 2012 Effects of retail sector's buyer power
- 2013: Factors influencing the competitive conditions in primary production
- 2013: Planning practices regarding retail trade
- 2015 Study on factors affecting the consumer purchasing behaviour in retail trade.

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2. Major findings related to UTPs

2012 Buyer power study

- Private Labels reinforces the retailers role as a gatekeeper
 - In combination with Category management, slotting allowances, pricing of PL & brands
 - Yields cost information to retailers
 - Auction mechanism & trust
- Potential competition concerns:
 - Gratuitous "marketing fees"
 - Unfair transfer of risks
 - Forced repurchase of unsold items

2013 Study on primary production

- Oral agreements that are not always respected
- Responsibility of spoilage or loss
- Extensive terms of payment
- Exclusive supply agreements between meat producers and meat processing industry
 - Sale of livestock without price information

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3. Lessons learned...

- "Unfairness" does not easily translate into infringement of competition law
 - Existing tools in Competition Law more effective on some forms of behaviour
- Abuse of a dominance
 - foreclosure vs. exploitation
- Separate, but in parallel with the market studies:
- Amendment of Competition Act in 2013 (with effect from 1st of January 2014)
 - Paragraph 4a: a retailer with a market share exceeding 30% has a dominant position

4. ...and the way forward

- Retail trade in focus at the FCCA
 - Sales statistics and loyalty programs dealt with ex-officio
 - For other practices in await of complaints
- Positive developments
 - FCCA dialogue with the retailers
 - Board for good trading practices within the Central Chamber of Commerce (Farmers are represented)
- Modern Retail Study by DG COMP
 - Source of scientific and unbiased information
 - Platform for discussion
 - An extension to more concentrated markets clearly advisable and valuable

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Thank You for Your Attention!

Tom.Bjorkroth@kkv.fi

Presentation by D. Wolski - Polish Confederation Lewiatan

The biggest challenges – the fear factor? Assuring effectiveness of the future measures

Dr Dominik Wolski
Legal Adviser
Lecturer



The biggest challenges – the fear factor?

- **The fear factor against the background of UTPs**
 - The question - where is the problem with UTPs located?
 - The answer – **complexity!**
 - Why is this so complicated? – convergence of many factors: market practice, legal frames, economy, business relationships, consumer welfare, etc.
 - „The fear factor” – the best example as the sign of complexity



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What does the fear factor mean?

„The weaker party often fears that the commercial relationship could be terminated in the event of a complaint on its part” (EC GP on UTPs)



3



The biggest challenges – the fear factor?

➤ The main fear factor generators

- Scale of business partner – bargaining power, value of current (or potential) co-operation, etc.
- Dominant (or significant) position in the market
- The dependency – one receiver of all deliveries (lack of alternative options for supplier)
- The lack of differentiation of the offer (one type of product in the whole offer)
- The lack of attractive supplier's offer (lack of innovations, no competitive advantage)



The biggest challenges – the fear factor?

➤ Questions addressed to fear factor

- Fundamental question - is this possible to eliminate it in every business relation in supply chain?
- How to measure it as the sign of UTPs?
- How to avoid it in supply chain relationships?
- If not possible to avoid it – how to protect against it (what kind of legal measure should be used)?



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The biggest challenges – the fear factor?

➤ How to eliminate the fear factor

- There is no simple, universal, forceful legal measure leading to removal of fear factor in all supply chain relations – the fear factor is the matter of fact caused by model of business, market power and model of relations built up by business partners, but ...
- The potential consequences of pushing the fear factor must be taken into consideration in every case being analyzed



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The biggest challenges – the fear factor?

- **The consequences – when analyzing UTPs in the context of fear factor should be taken into consideration**
 - The size of undertakings involved in co-operation
 - The value of co-operation (turnovers)
 - The length of co-operation (close business linkages)
 - The economy – the benefits taken by each party involved
 - The profitability of co-operation



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The biggest challenges – the fear factor?

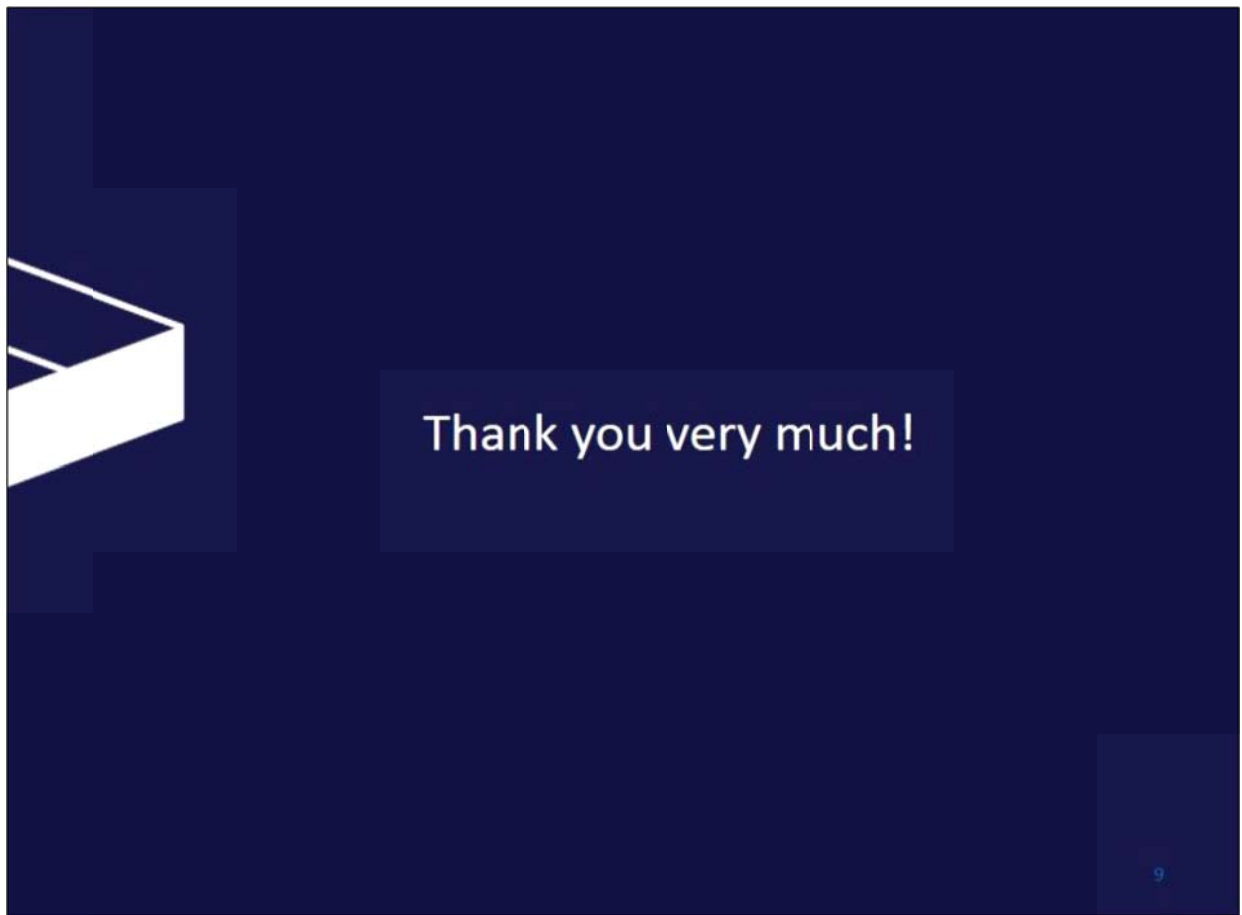
- **The final conclusion**
 - There is no possibility to remove the fear factor from business relations in a legal way
 - The law to this extent will be ineffective („just a piece of paper”), but ...
 - The fear factor should be taken into consideration case by case when every occurrence of presumed UTPs will be analyzed



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