**TRAIDCRAFT SUBMISSION INTO CONSULTATION BY THE EUROPEAN COMMISSION ON THE GREEN PAPER ON UNFAIR TRADING PRACTICES IN THE BUSINESS-TO-BUSINESS FOOD AND NON-FOOD SUPPLY CHAIN IN EUROPE**

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**Summary**

A) Traidcraft is a fair trade organisation, which works to bring about a situation where trade does contribute to international development, and the flourishing of workers, farmers and businesses who contribute their labour, skills and capital into international supply chains. Traidcraft is made up of two organisations – Traidcraft plc (a social enterprise with publically traded shares), and Traidcraft Exchange an NGO. Traidcraft plc sells through a range of channels and so is able to compare the different purchasing practices.

B) Traidcraft Exchange has worked with a number of initiatives that work with mainstream European businesses and became aware of the problematic impacts of unfair purchasing practices on workers, farmers and small businesses in developing countries.

C) Traidcraft has been involved in advocating for the establishment of a UK Supermarket Adjudicator (now called the Groceries Code Adjudicator). Experience of both 2001 SCOP code and then 2010 Grocery Supply Code of Practice is that they are largely ignored because there is no credible and appropriate enforcement of these codes on fair purchasing practices.

D) This consultation response to Green Paper On Unfair Trading Practices In The Business-To-Business Food And Non-Food Supply Chain In Europe (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52013DC0037:EN:NOT) draws not only on Traidcraft’s work but also on the work of other organisations. These organisations due to their on-going or potential future relationships with businesses who apply UTPs feel unable to make their own submissions, but are interested in the EU acting to stop UTPs.

E) The EU has authority to act under Treaty Article 115 (Approximation of Laws Affecting the Internal Market), coupled with Article 116, which allows the EU to eliminate distortions to trade within the internal market caused by divergent national rules.

F) Traidcraft wishes to see the EU operate as a market where developing country suppliers are able to sell their goods, receive a fair financial return and experience good business practices.
(including certainty) so that trade enables development of businesses, workers and farmers in developing countries.

G) Unfortunately UTPs are widely applied to suppliers in both food and non-food supply chains and Traidcraft welcomes the EU’s attention to this issue.

H) Purchasing of agricultural crops is changing. New business divisions within the retailers have been established to procure the volume needed to stock shops in several different European countries. Purchasers which were buying large volumes for one country who were already applying UTPs are now able to exert even greater power due to their larger purchasing power and so the application of UTPs can be worse.

I) Some member states have already acted to address UTPs and we would encourage the EU to build on best practice by Member states, and learn from the experiences of others where their initial approaches were ineffective.

J) We recommend that the EU introduces enforceable measures that prevent and eliminate UTPs, preferably through an EU Regulation or otherwise through a Directive (which holds the danger of different sub-standards in different member states). See answers to questions 18 & 24 for more detail.

K) We would like to stress that when EC impact assessment for regulating on this matter is being considered it should include an assessment of the social impact, the environmental impact, impact on SMEs and the impact on third countries (including developing countries who are often involved in supplying to the EU market due to their lower labour costs).

Comments on the Introduction

We welcome the reference to buying alliances, as well as to businesses purchasing only for themselves. The formation of buying alliances consolidates the customer base into fewer larger customers who have more power relative to their suppliers. This in turn removes smaller/medium scale customers who could provide alternative markets for suppliers who do not want to accept UTPs from an existing customer.

We welcome the inclusion of both food and non-food in this consultation because we are aware of UTPs occurring in other sectors, particularly in labour intensive supply chains where suppliers view employment of workers as a variable cost. In these circumstances workers experience the brunt of UTPs in the form of insecure employment arrangements, low wages, forced and under-remunerated overtime, and the avoidance of benefits (e.g. maternity, sickness pay).

We are perplexed that the EC chooses to mention the voluntary initiative proposed by trade associations close to the retail end of the food supply chain. An alternative proposal was developed by trade associations closer to the primary production end of the food supply chain. These are businesses which experience more of the UTPs, and so are better placed to develop a credible proposal for dealing with them compared to trade associations associated with the businesses who apply UTPs.

We are concerned that the voluntary approach being proposed will absorb time, resources and inappropriately divert attention away from developing more credible and effective enforcement mechanism that stops UTPs occurring.

Questions

1) Do you agree with the above definition of UTPs? [set out in 2.1]
We assume the consultation is referring to definition on page 3 of the Green Paper that: ‘UTPs are practices that grossly deviate from good commercial conduct and are contrary to good faith and fair dealing’. We do not disagree with the scoping of UTPs set out in section 2.1. This definition could be strengthened by setting out how to interpret fair dealing. The principle of fair dealing in the UK Grocery Supplies Code clause 2 includes the following which it may be useful to bear it in mind: ‘Fair and lawful dealing will be understood as requiring the retailer to conduct its trading relationships with suppliers in good faith, without distinction between formal or informal arrangements, without duress and in recognition of the suppliers’ need for certainty as regards the risks and costs of trading, particularly in relation to production, delivery and payment issues’. Such a definition can apply wider than just to the food supply chain.

We welcome the recognition that UTPs can occur due to unequal bargaining positions and would like to include these further situations which can cause an unequal bargaining situation to occur.

a) when the supplier is handling a time-sensitive product when all delays reduce the product’s value. This weakens the supplier’s position. Examples of this include perishable agricultural products, products that have a single moment use (Valentine’s day, father’s/mother’s day, Christmas, Easter, Halloween, sporting events) and to a lesser extent fashion items. Please see Appendix 1 which relates to a flower business which experienced UTPs.

b) when one business partner is not purely operating as a customer but in some circumstances as a competitor. (i.e. has a vertically integrated business operating at two or more levels of the supply chain).

c) when there are insufficient alternative customers for suppliers to be able to risk losing business with the customer they do have a relationship with.

d) when geographical distance and cultural differences exacerbate the power differential, since it is harder to resolve disputes across different cultures.

e) when a supplier has a very long lead time on producing a product, so weakening their negotiating position – for example it takes years to bring a tree crop to first crop, whilst retailers operate on a quarterly decision-making cycle.

Additional aspects of UTPs including the following:

a) When a customer requires a supplier (A) to use another supplier (B). This removes supplier A’s freedom to contract with whoever can best serve their business. It can also result in Supplier A incurring unexpected and sometimes inflated costs associated with purchasing from Supplier B. This situation occurs frequently when retailers specify for example a packaging supplier, and then the packaging supplier has a minimum order volume which is far greater than the supplier needs. Or the packaging purchased becomes obsolete when a retailer produces new branding.

b) When suppliers are forced to pay for things that they have no control over. This can include paying for damage or loss or insufficient sales which occurs once a product is at the retailer’s premises. A gross UTP is when changes to volume or specification are made after production has started – for example, when a different crop variety is specified to the crop already planted in the ground, or when manufacture of a product has already started.

Imbalance of power is a significant source of UTPs in the garment, shoe and home textile sector. This imbalance has increased during the past ten years, with demands for reduction in production lead times, and on-going requirements that factories produce more for less. Price pressures and volatility with order sizes, cancellations, sanctions etc. have grown significantly
since the financial crisis in 2008. Factory margins have been reduced across sectors, and competition has become more fierce. As a consequence, there has been an increase in factory bankruptcies e.g., among shoe, textile and garment manufacturers in several countries.

2) **Is the concept of UTPs recognised in your Member State? If yes, please explain how.**
Yes the concept is recognised. The UK now requires the ten largest food retailers in the UK to comply with Groceries Supply Code of Practice (GSCOP) to counter-act the UTPs found by the Competition Commission to be applied by these retailers. The GSCOP will be overseen by the Groceries Code Adjudicator.

The UK county courts are where suppliers have occasionally taken retailers to court for breach of contract. Both written (and in theory oral) contracts are recognised, the problem is that in some sectors there are no written contracts between buyers and sellers.

3) **In your view, should the concept of UTPs be limited to contractual negotiations or should they include the pre- and/or the post-contractual phase as well?**
The concept of UTPs should include pre, during and post-contractual stages. When retailers don’t use contracts it is difficult to define the start and end of a contract. Some retailers give an “indication” that they will purchase a certain volume and product from a supplier, which could be considered to be pre-contract. But when it comes to specifying the actual volume (normally within contract stage) it is at this point sometimes the retailer may significantly change the volume wanted, significantly changing the economics of producing that product, or in the worse cases deciding that no product is wanted.

4) **At what stage in the B2B retail supply chain can UTPs occur?**
It is possible for UTP practices to occur at any point in the supply chain and as a buyer or seller. The effect is worse when it is applied by the buyer, because they can withhold payment or pay less than expected. A supplier is only able to withhold product, which has less transferrable value than money.

When gross UTPs are applied this is evidence that a supplier is unable to walk away from a business deal, and for some reason needs to maintain business with a particular customer. UTPs can therefore be seen as a symptom of significant power imbalance in the supply chain. It is therefore possible for UTPs to be applied wherever there is a significant power imbalance between a buyer and a seller within a supply chain. The publication Food Inc\(^1\) provides bottleneck diagrams for different sectors which indicate at which point in the supply chain power is most concentrated and therefore who the most influential players are in those supply chain. In a market where supply exceeds demand, when a few influential businesses are purchasing from a large number of suppliers this provides the conditions for UTPs to be applied.

Power has increasingly been accumulating at the retail end of the supply chain, as some retail chains open or acquire shops in new countries and mergers and acquisitions have been allowed within European member states. Power does not accumulate downstream of the retail stage in a supply chain. Millions of consumers to do not collectively decide where to prioritise

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\(^1\) [http://www.ukfg.org.uk/docs/UKFG-Foodinc-Nov03.pdf](http://www.ukfg.org.uk/docs/UKFG-Foodinc-Nov03.pdf)
or withhold their purchasing. This means that retailers are therefore able to act in a manner that delivers on their priorities rather than feel under specific consumer pressure.

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

Yes there is a very significant climate of fear amongst suppliers. Suppliers are very reluctant to come out publically and criticise a major or important customer, which they are unwilling to lose. Even when businesses chose to no longer sell to a particular customer because they experienced UTPs they will not criticise them publically a) in case circumstances change and they need to sell through that customer again, or b) they do not want to be perceived as a trouble-maker, and so lose business from other customers. When contacting organisations to discuss UTPs unsurprisingly suppliers were reluctant to come forwards. What was surprising was that even trade associations expressed fear that if they were found to be participating in conversations about UTPs that their region/product might get a bad reputation and then find reduced orders.

In the garment, textile and hard good sectors business is volatile and sourcing teams and buying teams change factories easily. Producers are reluctant to complain to their clients, not to mention file official complaints, because they fear consequences to their business. Several organizations have made unsuccessful attempts to obtain official testimonies from producers, while UTPs are being discussed openly in more casual conversations. During its 2006-2008 Groceries market enquiry the UK’s Competition Commission was forced to place legal orders on suppliers and others to require those organisations to give them more precise information, which was then kept confidential.

Traidcraft with the Commonwealth secretariat facilitated an Agricultural symposium which included a discussion on unfair commercial practices in 2010 and the participants required that the discussion was under Chatham House rules.²

Academic reports that highlight that UTPs and other business practices undermined labour rights codes of conduct only present generalised information at the request of their sources to keep information confidential. The Ethical Trading Initiative impact study which covered garments and agricultural products³ and Race to the Top’s final report cites climate of fear identified as far back as 2000 in the UK amongst supermarket suppliers.⁴

**Questions relating to examples of UTPs and potential effects of UTPs -**

6) **In your experience, to what extent and how often do UTPs occur in the food sector? At which stage of the commercial relationship do they mainly occur and in what way?**

Yes UTPs occur in the food sector. As an international development organisation, we are concerned about the conditions of workers and farmers in supply chains serving the EU market. We are aware of UTPs being applied to the exporters within these supply chains, who in turn apply UTPs onto small-scale farmers and workers within developing countries. In perishable supply chains, which are short supply chains it is clear that many UTPs are related

³ http://www.ethicaltrade.org/resources/key-eti-resources/eti-impact-assessment-part-1-main-findings
to discounts or promotions proposed by the retailer. So in these circumstances we understand the source of the UTP to have started at the retail end of the supply chain.

7) Are UTPs present in non-food retail sectors as well? If so, please provide concrete examples.
Yes UTPs are present in non-food sectors, especially where there is a significant imbalance of power within the supply chain and in labour intensive sectors, where there is often an abundant supply of a product, weakening the position of suppliers.

Initiatives in the electronics sector have identified existence of UTPs.

UTPs have been in applied in both flower and cotton sector. Please see Appendix 1 of this submission and Summary of Commonwealth’s Agricultural Symposium for more details of UTPs.

One estimate is that UTPs occur in as much as 80% of garments, fabrics and home furnishing business transactions. Examples of UTPs in garment and textile and leather sector include the following:

- Retailers requiring suppliers to air-freight 25% of the product at the supplier’s cost (which cancels out the supplier’s profit) due to a delay caused by a retailer.
- A retailer tripling order volume at short notice for a factory which was required exclusively to sell to that retailer. This was higher volume than the factory was able to produce itself and the retailer found another supplier to produce 2/3 of their new total order. The retailer then fined the supplier for lost sales by reducing the price paid per piece by 20%. The supplier did not make a profit on that product, in addition its exclusivity arrangement meant it was unable to sell product to other retailers. The factory later closed down.
- An EU company reduced their order volume to 2/3rds of a large original order after fabric and accessories supplies had already been ordered and production had started. The full production volume was produced but the EU company continued to refuse to pay for all of the garments produced, and demanded that 1/3 of the garments be destroyed. Incomplete payment by the EU company resulted in the factory requesting credit from its suppliers causing reputational and financial problems. In the year of this event the factory made a loss, and it took the factory two years to recover the losses caused by this EU company.

The Material Concerns’ publication which is based on interviews with garment factories in Cambodia, Bangladesh, and China sets out “pinch points” which can result in labour rights violations at the “Cut, Make, Trim” stage of garment production. Some of these ‘pinch points’ are UTPs and are applied by garment retailers or brands onto their supply chains. This publication provides a starting point for identifying if there are UTPs which are specific to garment sector.

http://www.traidcraft.co.uk/Resources/Traidcraft/Documents/PDF/tx/policy_reports_Material_Concerns_3_page_view.pdf
http://www.traidcraft.co.uk/international_development/policy_work/purchasing_practices/purchasing_practices_reports.htm)
More recently a mainstream UK newspaper reported that UK clothing retailer, Laura Ashley, applied UTPs to their suppliers.  

8) Do UTPs have an adverse impact in particular as regards the ability of your company to invest and innovate? Please provide concrete examples and quantify to the extent possible.

Yes.

We are aware of experiences where suppliers have invested and then because of UTPs, specifically late notice changes to the retailer’s order, the supplier has not been able to sell products at the price anticipated or in the worst case a supplier has gone bankrupt. Clearly these business practices undermine the ability of a supplier to innovate and invest for future product innovation.

Prices in the garment sector have come down by an average of 30-40% during the past 15 years. Order quantities are fluctuating, and have been declining in general since the financial crisis. Unfair competition and UTPs have become the norm in the garment industry, and that has had a direct impact on factories and companies’ ability to invest and innovate. See answers to question 7 for some garment and textile examples.

In one case £1.3million was lost when a supplier scaled up ready to produce a significant volume of flowers for a promised order. This cost was associated with running production trials, hiring staff, hiring and setting up cold storage in the UK. See Appendix for more details.

In another case a UK retailer asked a supplier to sell a significant volume of soft fruit to them at the time when the fruit was in season. The supplier allocated a significant part of the crop for sale to this UK retailer. Shortly before the delivery was due the retailer reduced to one fifth the volume of product which they wanted which resulted in supplier having to sell the majority of their perishable crop as a “distress” sale. In this case the supplier earned significantly less than was expected from that year’s crop.

A prepared fruit own label supplier sourcing in third countries emailed the following to input into this submission. “Given that suppliers’ margins have been gradually eroded at the expense of retail margins, it may be timely to check this trend. There is some evidence to suggest that in some sectors of the food industry suppliers are preferring to undercut competitors even when they’re breaking even so as to keep employees in work and businesses alive. The danger here is that cash is often denied for capital items and refurbishment of assets. In other words, the supply base may gradually be deteriorating.”

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

6 http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/9950501/Laura-Ashley-accused-of-bullying-over-price-cut-demand-to-suppliers.html
Yes. There are a number of different impacts.

Suppliers which have fixed costs, sell product at a higher unit cost to a smaller, less powerful customer, to compensate for reduced income earned from more powerful customers as a result of UTPs applied.

In some categories as much as 60% is sold on promotion by some UK retailers. Some suppliers have revised their charging structure so enable them not to make a loss when a significant volume of product is sold on promotion. These suppliers have increased the “normal” price of their products which they sell to a wide range of retail customers so that there is a differential between “normal” and “promotion” prices.

The effect of both of these approaches is that smaller retailers are unable to purchase the same product at the same price as a larger retailer, and this results in a polarisation of prices for the consumer. Ultimately this situation also contributes to the decline of smaller shops as they are unable to price competitively with the larger retailers, and so consumers go elsewhere.

Yes – we are aware of instances where consumer safety was put at risk, due to the endemic low levels of trust which exist within some perishable supply chains. Farmers in compliance with EU’s food safety standards (e.g. relating to Maximum Residue Levels), took the opportunity when domestic prices quadrupled not to supply their regular customers who export to the EU. These farmers were fed up with receiving less income than expected because of exporters not buying the product that they contracted the farmers to grow, and because of spurious quality rejects. The exporting company then sourced product from other farmers which did not meet the standards usually required for selling into the EU. These products were later found to have residue levels above the EU standard.

This example has two links to UTPs:
   1. The exporters experience shortfall of income, because of European retailers’ decisions to make late notice changes to their orders, ask for “contributions” from suppliers and require suppliers to fund promotions. In turn these exporters find reasons not to pay the farmers – which cause the farmers to be fed up.
   2. Exporters turn to other farmers because retailers fine their suppliers significantly when produce is not available.

10) Do UTPs have an impact on EU cross-border trade? Do UTPs result in a fragmentation of the Single Market? If yes, please explain to what extent UTPs impact the ability of your company to trade cross-border.

Yes – we are aware of some agricultural suppliers based in Africa deciding to no longer sell to different UK retailers because they no longer wished to experience UTPs. The suppliers changed to supplying continental European food retailers.

- 3 Legal framework –

11) Do the national regulatory/self-regulatory frameworks in place sufficiently address UTPs in some Member States? If not, why?
a) A recent British Institute of International and Comparative Law report “Models of Enforcement in Europe for Relations in the Food Supply Chain” indicates that some member states have taken approaches to address UTPs via varying frameworks, whilst other countries have not developed frameworks.

b) For the countries which do have frameworks these are not adequate if they are not perceived as accessible/useful to the ‘victim,’ usually the supplier. The AIM/FoodDrinkEurope survey shared at the High Level Forum’s Business to Business Unfair Commercial Practices expert group indicated that food suppliers in all EU countries did experience UTPs from more than one retailer, and were not confident that the public authorities could help in their situation. Suppliers are afraid of losing their customers if it is found out that they have complained about a customer to an enforcer. Organisations which have experienced UTPs need to be able to complain anonymously to a regulatory body which is able to initiate investigations and then apply dissuasive penalties to the company applying UTPs.

c) One of the reasons why UTPs are insufficiently addressed, may be that due to the climate of fear, victims do not speak out and so the frequency and severity of the UTPs are unknown or underestimated. Another reason might be that UTPs are a symptom of unequal bargaining/power positions, and so the powerful companies which apply UTPs are probably also effective in their lobbying against enforcement of this lucrative practice.

12) Is the lack of specific national regulatory/self-regulatory frameworks addressing UTPs a problem in jurisdictions where they do not exist?
Yes – since there are no options to stop, remedy and dissuade perpetrators of UTPs from these practices. The EU market is becoming increasingly interlinked with suppliers selling to retailers in a number of countries, and the same retailers now operating in a number of countries. In this context if a country does not have adequate provision to stop UTPs there is the possibility that companies perpetrating these UTPs locate their business operations in the non/weak-enforcing countries to avoid enforcement that stops the application of UTPs.

13) Do measures that seek to address UTPs have effects only on domestic markets or also on cross-border trade/provision of services? If so, please explain the impact on the ability of your company to trade cross-border. Do the differences between national regulatory/self-regulatory frameworks in place result in fragmentation of the Single Market?

a) Measures that effectively address UTPs within a country, improve the culture and operation of business within that country and make those customers more attractive business partners than customers who perpetrate UTPs in a country where there is no mechanism to stop these practices. Traidcraft is aware of some businesses (that supply food and other agricultural products from non-EU countries) who are seeking alternative customers which have better business practices, so that they can reduce their exposure to companies that apply UTPs. It is difficult for suppliers to find other large volume markets in the food sector because the retail end of the supply chain is very concentrated. Some food and accessories companies have already switched to supply an increasing volume to Latin America, Middle East and Russian markets to avoid trading with businesses in the Europe which apply UTPs, whilst some suppliers particularly avoid certain customers who are known for applying UTPs.

b) These experiences indicate that the EU can not operate as a single market when suppliers avoid supplying certain countries where UTPs can be applied with impunity. If these UTPs

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Retailers operate shops in a number of different European countries. These retailers are increasingly setting up group purchasing departments which purchase products to be sold in a retailer’s shops in different EU countries. The consolidation of their purchasing further increases their power relative to suppliers, and increases their ability to apply UTPs. Because there is evidence that this is a problem that is affecting several EU Member States (See the British Institute study, cited above) and each Member State is attempting to regulate these matters in a different manner, it is essential that the EU intervene to provide uniform guidance not only to protect suppliers, but also to ensure legal certainty for those doing business within the EU.

15) Where it exists, does UTP regulation have a positive impact? Are there possible drawbacks/concerns linked to introducing UTP regulation, for example by imposing unjustified restrictions to contractual freedom? Please explain.

a) Cardiff’s Business School’s Professor Clarke’s research, “Impact of Groceries Ombudsman on Consumers’ Best Interests” outlines a range of different benefits which can and do occur when there is enforcement to stop the application of UTPs. This briefing can be found http://www.rogerclarke.org.uk/sitebuildercontent/sitebuilderfiles/finaldraftpdf.

b) Regulation and enforcement to stop application of UTPs has positive impacts on businesses which are weaker than the UTP perpetrating business. The application of UTPs makes suppliers more risk-averse and potentially stops some excellent products being produced by these weaker suppliers both reaching the market, and being a sustained offering in the market.

c) When UTPs are applied excessive risks are passed onto weaker parts of the supply chain, ultimately adding cost to the chain. With enforcement that stops application of UTPs there will be a more appropriate distribution of risk, where each party bears the risks for activities they have some control over. This would result in more efficient supply chains. This is particularly evident in the over-procurement of product by retailers. Retailers then find reasons not to buy 100% of the order volume resulting in a certain percentage of the product being regularly wasted. This waste has associated embedded costs involved with producing it, which results in a loss for the supplier.

d) Hungarian food public authority NEBIH enforces a code to address UTPs, which has led to improved practices by the retailers. NEBIH publishes on their website the general terms and conditions of all retailers operating in Hungary. This provides a document for suppliers to refer to if they have a problem. The instances of below cost-selling (which is banned by the Hungarian code) have significantly reduced due to high level of fines, which has a deterrent effect. A pdf shows which fines have been applied to which retailers can also be found on NEBIH’s website.

e) UTPs restrict the contractual freedom of suppliers and other weaker businesses. UTPs such as when a supplier is forced into an exclusivity arrangement, or when suppliers are tied to a third party’s product/service limit the contractual freedom of a supplier. Regulation and enforcement to prevent UTPs being applied rectifies the imbalance between powerful and

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9 http://www.nebih.gov.hu/aktualitasok/tisztesszegtelen/tisztesszegtelen_forg_magatarta
weaker companies. Extra measures should be put in place to provide support to those businesses who may be in a weaker bargaining position.

f) The French system includes the possibility for the Minister of the Economy to start or intervene in a legal action on the ground of article L.442-6 of the French commercial code. As a result the courts may:
   - condemn the company to pay a maximum fine amounting to 2,000,000 Euro or to the triple amount of the unjustified amounts invoiced;
   - hold void specific unfair contractual clauses;
   - condemn the company to reimburse the unjustified amounts invoiced to their counterparts.

The benefits of the French regulation concerning UTP have important positive impacts:

I) It offers to the suppliers (or more generally to the weakest companies) in the course of contractual negotiations and/or in the course of established relationships, a legal ground to refuse (or at least attempt to refuse) specific requests of the counterparts that could be deemed to be UTP;

II) The Minister of the Economy has started several legal actions against important retailers which have led to their condemnation to pay fines, to stop specific practices, to modify their contracts and to reimburse unjustified amounts paid by their suppliers (for instance, in 2006 Système U has been condemned to reimburse 76 million Euros to several of its supplier). In fact, the Minister of the Economy should be seen like a “policeman of the B-to-B relationships” by compensating for the absence of initiative of the suppliers that are reluctant to start legal action against their retailers.

III) Enforcement to stop UTPs contributes to “stabilising” the B-to-B relationships and more particularly the suppliers / retailers relationships that are often biased by the retailers’ buying power. This was an intended desire of how the French law has evolved.

- 4. Enforcement rules –

16) Are there significant discrepancies in the legal treatment of UTPs between Member States?

“Models of Enforcement in Europe for Relations in the Food Supply Chain” report by British Institute of International and Comparative Law10 (BIICL) highlights that there is a range of approaches towards enforcement of fair business practices within the food sector, from voluntary approaches to legally binding enforcement where strong penalties are applied. Part II, Annex II and IV of the report compares the different characteristics of enforcement of the food sector which currently exist within some EU member states. Czech Republic, France, Germany, Latvia, Romania and the UK already have hard law provisions to address unfair commercial practices in the food sector. Ireland, Italy, Netherlands, Portugal and Spain are planning to address these unfair commercial practices. The legal approaches used are based on competition, contract or other laws.

Some countries, for example Belgium and Slovenia, have taken a “soft law” approach of a code of practice but without any enforcement or unsuitable (i.e. non-binding) enforcement. In both of these situations these codes can be ignored because they are not legally binding and because it is more profitable to continue to apply UTPs. Suitable enforcement needs to be

10 http://www.biicl.org/research/european_law/b2b_enforcement_report/
designed in a manner that recognises the climate of fear amongst the supplier/weaker businesses and provides them and others with knowledge of UTPs occurring to be able to make confidential or anonymous submissions to the enforcer. The applicable framework must impose binding obligations and allow the enforcer the power to apply penalties which command the respect of the perpetrators of UTPs to dissuade them of continuing to apply UTPs.

The experience of the UK is that retailers have continued to apply unfair commercial practices despite being required legally to abide by Grocery Supply Code of Practice, because enforcement is not yet operational. One retailer which had previously had a poor track record of UTPs as evidenced by county court judgements against them, was continuing to apply UTPs. In the 18 months up to October 2012 it had 43 County Court judgments registered against it, with a total value of £227,000\textsuperscript{11}. This highlights the need for the enforcement penalties to be sufficiently tough.

**If this is the case, are these discrepancies hindering cross-border trade?**

As stated earlier in answers to question 13 suppliers seek customers which operate better business practices, which will mean that some national markets may not have access to certain products. As retail is increasingly concentrated it is difficult for suppliers to find alternative customers and outlets. The concentration at the retail level also means that there are many suppliers all competing to access markets through few retailers.

**Please provide concrete examples and quantify the impact to the extent possible.**

We are aware of the uneven application of the European Late Payments Directive which exhibits the disadvantage of legislating by directive since it results in divergent rules in different member states. In some cases some member states allow much longer payment periods than others. The late payments directive is significant for retailers who are either paid in cash or by credit card, and so receive payment within a week of any product leaving their shops. Forcing suppliers to wait for a long period of time to be paid, enables retailers to earn interest on the substantial sums of money received from their consumers at the cash tills, before needing to pay their suppliers. In effect suppliers who are paid late provide finance to their retailer customers. When suppliers experience delayed and incomplete payments for products this stretches their cash-flow and in the worst cases result in suppliers with good products going bankrupt. Some UK high street retailers are making “payments 90 days after the end of the month” (ie ~4months) after a supplier has invoiced. One UK food retailer lengthened their standard payment terms to 90 days and when they were criticised they responded by saying that they were bringing themselves in “line with competitors.” The trend is to continue to pass more risk onto suppliers, for example by paying later, even though there is extensive public opinion against this. This occurs because there is no enforcement and such practices increase the margin of the business passing on the risk.

Graydon’s a UK credit risk company included the information in its recent March 2013 newsletter\textsuperscript{12} to highlight differences of payment terms by public authorities across the EU. This is information that companies may use to decide in countries they want to do business.

\textsuperscript{11} http://www.graydon.co.uk/blog/2012/10/19/supermarket-suppliers---have-new-payment-laws-made-a-difference.aspx

\textsuperscript{12} http://www.graydon.co.uk/blog.aspx?filterby=Late%20payment – information sourced from Euro Chambers’ http://www.30max.eu/map-of-debtors/
In case of such negative impacts to what extent should a common EU approach to enforcement address the issue?

A common EU approach to regulation of UTPs would result in a level playing field. The example of the late payment directive highlights the benefits of taking a regulatory approach towards enforcement of UTPs.

The BIICL report “Enforcing Good Practice in Vertical Relationships in the Food Supply Chain” highlights the following “Positive Characteristics of Enforcement”:

- Dedicated enforcing authority that can initiate its own investigations, receive complaints anonymously, impose financial penalties and build up sector-specific expertise;
- Application of a rule that does not rely on whether the retailer possesses significant market power;
- Possibility for the parties to make joint commitments to avoid an official finding of wrongdoing;
- Creation of a forum where suppliers and retailers can resolve issues in order to prevent future crises;
- A dispute resolution mechanism which makes clear in what manner parties may attempt to resolve issues;
- The possibility for stakeholders to be represented by business organisations to further ensure anonymity;
- Imposition of obligations on retailers to comply with a standard or code through changes to their business structures through, e.g., the appointment of an in-house compliance officer, and requirements to issue periodic reports on compliance.”

The EU needs to set out a minimum standard and then member states which have already acted to stop unfair trading practices can either demonstrate how their existing mechanism meets the EU minimum, or they can update their current mechanism. EU-wide regulation would enable a clear and consistent method of enforcement.

To effectively address UTPs it would be appropriate for national administrative authorities to receive complaints and then initiate investigations and legal proceedings. Existing dispute resolution mechanisms could be used, and complemented if it was felt they weren’t sufficiently accessible or user friendly. For example the Unfair Commercial Practices Directive requires that individual Member States provide an effective legal framework to combat unfair commercial practices in order to comply with the EU directive. This has resulted in a network of enforcement options being established in different member states. A similar network could be set up for enforcing B2B UTPs under a regulation.

There is an urgent need for EU level enforcement. In 2011, the retailer, Tesco was operating outlets in 14 countries, many of these in the EU. Carrefour and Metro are also major retailers operating in several EU countries. An independent, dedicated enforcement body, or a unit within a DG should be set up with adequate resources and powers to coordinate cases and address situations of UTPs occurring across borders in a consistent way.
18) Should the relevant enforcement bodies be granted investigative powers, including the right to launch ex officio actions, impose sanctions and to accept anonymous complaints?

Yes enforcement bodies should be able to receive anonymous complaints, launch investigations, impose sanctions. The following member states already have these provisions.

i) Anonymous complaints:
   a) Currently Czech Republic, Hungary, Latvia, Slovenia, and UK\(^{13}\) are able to receive anonymous complaints.
   b) In addition to receiving anonymous complaints, and keeping information confidential – several countries also undertake monitoring to check unfair commercial practices are not applied.

ii) Launch investigations
   a. Currently Czech Republic, France, Germany, Hungary, Latvia, Slovenia and UK\(^{13}\) are able to independently initiate an investigation if there is sufficient suspicion of their definition of UTPs being applied,

iii) Sanctions:
   a. Currently Czech Republic, France, Germany, Hungary, Latvia, Romania and UK\(^{13}\) have enforcement bodies which are able to apply remedies/sanctions that could change the behaviour of companies.
   b. Financial sanctions can be complemented by other measures. In the UK the Groceries Code Adjudicator is able to “Name and Shame” a retailer by requiring that retailer to publish its wrong practice in a media outlet. It is recognised that some retailers may respond to reputation damage, whilst all will respond to strong financial sanctions. In the UK the Financial Ombudsman is able to apply sanctions in that sector that are wider (and could be different) compared to those available through the courts.

Based on a review of what has been effective so far the regulation to address unfair business to business trading practices should require Member States to ensure that their national administrative authority has sufficient powers, including:

I. Monitor the functioning of the instrument (i.e., its national implementing legislation);
II. Initiate investigations;
III. Receive anonymous complaints (including from third parties with knowledge of breaches) and maintain confidentiality;
IV. Act to address Unfair Business to Business practices with any organisation trading with a European company;
V. Order cessation of any unfair trading practices even without proof of actual loss or damage, or of intention or negligence on the part of the retailer, or a large company purchasing;
VI. Require publication of any decision against a retailer, and possibly also a corrective statement;
VII. Enforce observance of its decisions effectively; and
VIII. Impose financial penalties for infringements that are effective, proportionate and dissuasive.
IX. To act when a finding by another public authority determines that there is an imbalance in the relationship between two parties.
X. Operate with prompt timings to ensure that grievances are heard and acted upon quickly.

\(^{13}\) http://www.biicl.org/files/5941_biicl_b2b_report_finalversion.pdf provides examples of member states who have acted to address UTPs and is not a comprehensive analysis of all European countries.
The Commission could follow up Member state activities, or for multi-country cases the Commission could also have the explicit power to investigate and enforce breaches of the instrument in a manner similar to DG Competition.

- **5 Types of UTP** –
  5.1. Ambiguous Contract Terms
  5.2. Lack of Written Contracts
  5.3. Retroactive Contract Changes
  5.4. Unfair Transfer of Commercial Risk
  5.5. Unfair Use of Information
  5.6. Unfair Termination of a Commercial Relationship
  5.7. Territorial Supply Constraints
  5.8. Common Characteristics of UTPs

19) Does the above list detail the most significant UTPs? Are there other types of UTPs?
The above list highlights significant UTPs. The missing UTP from the list is “unilateral changes to an arrangement.” Fair practice occurs when both parties agree with the business deal and both can see mutual advantage in participating. As can be seen from the answers given above to previous questions it is unilateral changes which cause problems.

Further comments to make:
- Unfair Use of Information (5.5) could be expanded to “unfair use of samples” which is a problem in garment sector. Fair practice would occur when the bulk order is given to the supplier who provided the sample or that the supplier of the sample is significantly financially rewarded for developing the design that then goes into production.
- It would be better if 5.8 was set out more clearly that “a transfer of costs incurred and the shift of entrepreneurial risk to the weaker party in the relationship” will be regarded as an indicator that a UTP has been applied. It is not clear why the word “entrepreneurial” is used. All risks caused by decisions within the supply chain should be included under 5.8. In relation to the other types of risk which occur there should be a requirement that this risk is fairly shared. Observing which company bears the risk in a supply chain when an unpredictable “act of God” (e.g. volcano ash) or a no-fault event occurs (e.g. national strikes) gives a good indication of where UTPs are likely to be applied.
- It isn’t always clear when an agreement is made. Some companies give ‘indications’ that they will want a certain volume at a certain price at a certain date. But closer to the time they dramatically reduce the volume of product wanted. This jeopardises the supplier’s business. Selling a smaller volume at the same price will not adequately cover set-up costs. Or could result in perishable product that could have been sold to another customer being sold as a low-price “distress” sale. Clarity is needed as to when an agreement is made and therefore protected by UTP regulation.

20) Could setting up a list of prohibited UTPs be an effective means to address the issue?
Enforcement based on a set of principles would be better.

There are pros and cons to a list of prohibited practices.

Pros:

- Suppliers/complainants can easily recognise when they have experienced a prohibited practice
- Suppliers or complainants might need to present less evidence to prove a breach and so initiating enforcement action maybe easier.

Cons

- Publishing a list of prohibited practices but without sufficient enforcement led to some companies choosing to apply UTPs that they previously had not, since they saw new ways to improve their margin. In the UK both companies who were legally required to abide by the 2001 Supply Code of Practice (SCOP) and competitors outside of the SCOP’s remit applied UTPs.\(^\text{14}\)
- Such a list would need regularly updating, as powerful companies find new ways to apply UTPs and so extract a greater proportion of the margin in the supply chain for their company.

Would such a list have to be regularly updated?

Yes, see above.

Are there possible alternative solutions?

Yes – an approach based on principles could be an alternative to listing banned practices. The following principles could be used as a basis:

i) Fair dealing as set out in the UK GSCOP\(^\text{15}\) could be used in a UTP regulation as the good/fair practice desired. “Principle of fair dealing: A Retailer must at all times deal with its Suppliers fairly and lawfully. Fair and lawful dealing will be understood as requiring the Retailer to conduct its trading relationships with Suppliers in good faith, without distinction between formal or informal arrangements, without duress and in recognition of the Suppliers’ need for certainty as regards the risks and costs of trading, particularly in relation to production, delivery and payment issues.” (this is partially covered by 5.4 Unfair Transfer of Commercial Risk & 5.8 Common Characteristics of UTPs in the Green Paper). Fair Dealing is a continental European concept and could be used well in a UTP regulation.

ii) Agreements need to be clear (i.e. un-ambiguous contract terms – as proposed in 5.1 Ambiguous contract terms & 5.2 Written Contracts of the Green Paper) and need to cover as a minimum

I. price,
II. volume to be delivered and when and where to,
III. specifications of the product,
IV. when the supplier will be paid,
V. a fair process for agreeing changes and recompense for those changes,
VI. a fair process, including notice for terminating an agreement

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\(^\text{15}\) http://www.oft.gov.uk/shared_ofi/monopolies/GSCOP-Order.pdf - the UK Groceries Supply Code of Practice
iii) No unilateral changes – i.e. all changes to an agreement have to have the consent of both parties (this is partially covered by 5.4 Unfair Transfer Of Commercial Risk in the Green Paper)

iv) No retrospective changes (this equates to 5.3 Retroactive Contract Changes of the Green Paper)
### 21) For each of the UTPs and corresponding possible fair practices identified above, please:

<table>
<thead>
<tr>
<th>Types Of Unfair Trading Practices</th>
<th>a) Indicate whether or not you agree the analysis of the Commission. If applicable, provide additional information.</th>
<th>b) Explain whether the UTP is relevant for the sector in which you are active.</th>
<th>c) Explain if the corresponding possible fair practice could be applied across the board in different sectors?</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.1. Ambiguous Contract Terms</td>
<td>We agree with the assessment. Companies required to comply with a UTP regulation could be required to publish their general Terms and Conditions, and provide them to the regulator to publish on their website. (This is the practice required by NEBIH, Hungarian Food Authority(^{16}).)</td>
<td>Between some food retailers and their suppliers there are rarely contracts.</td>
<td>General Terms and Conditions which set out i) payment periods, the process for ii) how changes (both human decisions and unforeseen risks) and iii) termination will occur is applicable across a wide number of sectors.</td>
</tr>
<tr>
<td>5.2. Lack of Written Contracts</td>
<td>This should be listed as the first type of UTP. Then it is possible to assess if the terms are ambiguous. This UTP can be improved by adding the following concept. Unless a business has gained agreement in writing to a change – then that business is not able to rely on that change. I.e. a business which want to make the change needs to discuss to get an agreement which the supplier is happy with (and meets concept of fair dealing).</td>
<td>Yes – this is relevant for food. Fewer contracts are occurring in garment, textile and leather sector.</td>
<td>Having written contracts as a record of what is agreed is essential.</td>
</tr>
<tr>
<td>5.3. Retroactive Contract</td>
<td>We agree with Analysis. Clarity is needed as to when a contract is made, to These UTPs occur both in food sector, and in non-food sectors. These changes</td>
<td></td>
<td>Yes – this is relevant to other sectors</td>
</tr>
</tbody>
</table>

\(^{16}\) [http://www.nebih.gov.hu](http://www.nebih.gov.hu)
<table>
<thead>
<tr>
<th>Types Of Unfair Trading Practices</th>
<th>5.4. Unfair Transfer of Commercial Risk</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) Indicate whether or not you agree the analysis of the Commission. If applicable, provide additional information.</td>
<td>We agree with the analysis and think it could be expanded.</td>
</tr>
<tr>
<td>b) Explain whether the UTP is relevant for the sector in which you are active.</td>
<td>I) This UTP could be broadened to cover all risks – including those unforeseen. Good practice would involve setting out a process for agreeing/resolving who bears the risk.</td>
</tr>
<tr>
<td></td>
<td>II) This UTP should set out more clearly that companies should not be expected to bear risks for activities that they have no control over or have not caused. This is implied in description of “shrinkage” but not spelt out. The wording of this UTP should also stop retailers requiring suppliers to pay for customer complaints, irrespective of where, how or what damage was caused to the product. Where retailers require suppliers to pay fixed fee per customer complaint irrespective of the product’s value or damage to the product this is also inappropriate and unfair.</td>
</tr>
<tr>
<td>c) Explain if the corresponding possible fair practice could be applied across the board in different sectors?</td>
<td>Yes - this is a principle which should be respected in business dealings. Different sectors have different risks and what is a fair sharing of risk may need to be set out. One area which causes concern to developing country farmers is that the payments they receive for their crops may be determined by futures market thousands of miles away. For business to business transactions it may not be fair for the price to fluctuate with no minimum price guaranteed to the supplier.</td>
</tr>
<tr>
<td>Changes</td>
<td>then be able to assess what is a retroactive change.</td>
</tr>
<tr>
<td>Types Of Unfair Trading Practices</td>
<td>a) Indicate whether or not you agree the analysis of the Commission. If applicable, provide additional information.</td>
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<tr>
<td>5.5. Unfair Use of Information</td>
<td>Yes. I) An additional element to add to the “fair practice” might be to require those companies which are both customers and competitors to guarantee a minimum sales period to the supplier which innovated. II) In the garment sector, some customers do not place the final order with the supplier that submitted the design sample which they then take to mass production. This UTP could be expanded to include samples.</td>
</tr>
<tr>
<td>5.6. Unfair Termination of a Commercial Relationship</td>
<td>Yes. Sometimes the customer reduces the order so much that it become unviable for the supplier to make deliveries at that price. The effect is termination. Fair termination of a business relationship should be done with consideration to the notice period and</td>
</tr>
<tr>
<td>Types Of Unfair Trading Practices</td>
<td>a) Indicate whether or not you agree the analysis of the Commission. If applicable, provide additional information.</td>
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<td></td>
<td>payment which needs to be made to the workers, if it is likely that termination will result in factory/plantation closure. This might be the case for example if a supplier exclusively sold to one EU customer or had specialised product area only of interest to a handful of buyers. French commercial code prohibits the sudden termination of a business relationship and companies have had to pay damages to their counterpart for having abruptly terminated their business relationships, i.e. having terminated their business relationships without providing a “sufficient notice period”. From French case-law the “sufficient notice period” might last up to 2 years.</td>
</tr>
<tr>
<td>5.7. Territorial Supply Constraints</td>
<td>n/a</td>
</tr>
<tr>
<td>5.8. Common Characteristics of UTPs</td>
<td>Yes the transfer to risk onto the weaker business is an indicator of an UTP being applied.</td>
</tr>
<tr>
<td>Types Of Unfair Trading Practices</td>
<td>a) Indicate whether or not you agree the analysis of the Commission. If applicable, provide additional information.</td>
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<td></td>
<td>terms. Page 8 &amp; 9 of Race to the Top’s final report(^{17}) sets out clearly that standards results “in a disproportional allocation of costs and benefits between standards ‘makers’ and standards ‘takers’.” “An interesting example of the interplay between ethical trade [a private standard] and retailer power over suppliers occurred (May 2003), when in a letter to The Grocer, Tesco was anonymously accused of demanding a payment of £278 per year per site from all primary suppliers to cover the costs of its [Tesco] compliance with the Ethical Trading Initiative code.” Tesco choses to adopt a private standard, and not only do the suppliers have to cover the costs of paying for audits which demonstrate compliance to a standard, but they were requested to contribute to cover Tesco’s own internal costs.</td>
</tr>
</tbody>
</table>

\(^{17}\) http://www.racetothetop.org/documents/RTTT_final_report_full.pdf
22) As regards specifically Territorial Supply Constraints, please explain:
   a) What would you consider to be objective efficiency grounds justifying a supplier not to supply a particular customer? Why?
   b) What would be the advantages and disadvantages of prohibiting territorial supply constraints (as described above)? What practical effects would such a prohibition have on how companies set up their distribution systems in Europe?

23) Should the above possible fair practices be embodied in a framework at EU level?
Yes. An improved version of the UTPs listed in chapter 5 should be enforced through regulation which is applied across the EU. There is a need for the EU to take a coordinated approach, particularly due to the nature of some food and garment retailers operating in several member states, but coordinating their buying and perhaps application of UTPs from one central location. The EU needs to take a consistent approach to stop retailers moving their buying hubs so that they avoid enforcement that addresses UTPs. Careful wording of legislation is needed to ensure that products which are sold within the EU should require those businesses in the supply chains serving the EU market to cease applying UTPs.

Would there be any disadvantages to such an approach?
Pursing a regulation takes time, during which the unfair trading practices continue. So a prompt start down the route of regulation would be advantageous.

24) If you consider further action should be taken at EU level, should this be a binding legislative instrument? A non-binding? A self-regulatory initiative? A binding regulation is the best way to ensure a harmonised approach and avoid disparity between practices in the member states regarding minimum standards. Countries which already have enforcement can demonstrate how their approach meets the minimum standard set out by the EU’s regulation, and make adjustments if necessary to demonstrate proper implementation of the regulation. If the EU passes a directive this may result in different business practices being applied across the member states and this can act as a barrier to imports contrary to Article 30 and a barrier to intra-European trade contrary to Article 34.

Pursing a self regulatory (voluntary) approach will be ineffective for the following reasons;
- UTPs increase margins for the powerful companies in a supply chain. They will not stop these practices voluntarily.
- If some companies preferred to comply voluntarily they will not be able to sustain compliance because competitive pressures will lead them to pursue strategies to keep them competitive with their non-compliant competitors.

It is for these reasons that a binding regulatory approach with sanctions is needed.
- The positive effects of enforcement will result in more efficient supply chains, as excessive risks/costs are reduced.
- The EU should chose a legal instrument that will have the most impact in terms of uniform application of law/principles. A regulation would be best.
- A series of principles and offences should be established within the legal instrument (including definitions of key terms, such as ‘unfair trading practices’).
- Creating an instrument that is flexible enough to take into account existing systems in the Member States that are already working
Based on a review of what has been effective so far any regulation to address unfair business to business trading practices should require Member States to ensure that their national administrative authority has sufficient powers, including to:

I. Monitor the functioning of the instrument (i.e., its national implementing legislation);
II. Initiate investigations;
III. Receive anonymous complaints (including from third parties with knowledge of breaches) and maintain confidentiality;
IV. Act to address Unfair Business to Business practices with any organisation trading with a European company;
V. Order cessation of any unfair trading practices even without proof of actual loss or damage, or of intention or negligence on the part of the retailer, or a large company purchasing;
VI. Require publication of any decision against a retailer, and possibly also a corrective statement;
VII. Enforce observance of its decisions effectively; Impose financial penalties for infringements that are effective, proportionate and dissuasive.
VIII. Act when a finding by another public authority determines that there is an imbalance in the relationship between two parties.
IX. Operate with prompt timings to ensure that grievances are heard and acted upon quickly.

- 6. General remarks –

25) This Green Paper addresses UTPs and fairness of B2B relationships in the B2B food and non-food supply chain. Do you think that any important issues have been omitted or under-represented in it?
UTPs are caused by an imbalance of power. Whilst a single company is able to approach 40% market share before competition authorities intervene. An association of suppliers are not allowed to have more than 15% market share collectively. The EC needs to revisit competition policy thresholds that allow companies to become so powerful that they are able to apply UTPs. The 2000 UK Competition Commission found that as little as 8% market share enabled a retailer to apply abusive purchasing practices.

The Green Paper fails to acknowledge the significant range of products which are imported into the EU which are then sold in retail shops. Suppliers in non-EU countries currently experiencing UTPs applied by EU businesses would welcome measures which improved the practices of EU purchasing companies. Non-EU suppliers would welcome a mechanism which they can access to stop the application of UTPs, and provide them with an avenue for redress when they experienced UTPs.
Appendix 1:
Case Study on the Impact of Retailer Purchasing Practices in the Liquidation of a Developing World Flower Supplier

Introduction
The purchasing practices of buyers from large retailers can have significant impacts on suppliers and all parties in the supply chain, particularly in the developing world. This case study shows how there are inherent risks involved when small entities sell direct to retailers exposing them to significant and unpredictable fluctuations in price, quantity of orders and delays in the actual orders being placed.

The Better Flower Company
The Better Flower Company (TBFC) was established in 2008 to bridge the gap between international retailers and agricultural producers in developing countries, and facilitate trade in a “better” and more transparent way, linking producers directly to the market. TBFC sourced unique African flowers for UK retailers and subsequently Indian flowers. They first identified products needed by the market and then provided technical, agricultural and marketing support to the developing world producers. In addition they acted as an import agent to ensure a direct relationship with the retailer and provide a better service and information flow to farmers.

TBFC were initially supported by a grant from Shell Foundation of $300,000, who saw a need for specialist enterprises, or “supply chain connectors” in retail supply chains in order to create jobs in the developing world and improve the social and environmental impact. This was followed by a further $1 million grant over 3 years.

Critical Success Factors
From the commercial perspective the critical success factors for TBFC included breaking into new markets quickly in order to reach the volume of flowers required to break even given high fixed costs of a UK import facility. Also, they needed to successfully compete in a highly competitive market against existing import agents with deep pockets.

New Indian Flower Supply to Large UK Retailer
In 2008 TBFC had successfully entered into a direct agreement with leading UK retailer Waitrose to supply bouquets from the Western Cape, creating jobs in an area of high unemployment. This was a positive relationship, with a collaborative approach to planning volumes and orders and a strong commitment from Waitrose to the suppliers. At this time, there were also positive indications from other retailers that they wanted a more direct and transparent relationship with developing world growers, fitting well with the purpose of TBFC.

In 2009 TBFC then began negotiations with a large UK Retailer to also supply African flowers. The retailer requested instead they consider sourcing from India initially prior to being granted any African business which TBFC agreed to. Sourcing from India was a new step for both TBFC and the retailer alike. They asked TBFC to enter into a trial, which if successful, would then lead to ongoing business. This was all agreed verbally as is standard practice within the retail industry in the UK not to issue written contracts.
A successful Valentine’s Day trial with the retailer of a substantial volume of red roses in February 2010 led to a significant future commitment from them.

**Preparation for Expansion**

TBFC needed to prepare practically for this and invest in additional staff and the infrastructure to process a high volume of flowers over both the trial period and expected expansion. This included expanded cold storage facilities and machinery in the UK in addition to preparation and trials required for taking on a new supplier from a new region, India. A new staff member was also recruited in India to support the new suppliers to achieve the required standards.

Given the expected commerciality of the expansion, Shell Foundation and TBFC decided that a further charitable grant was not appropriate and it was time for TBFC to progress to debt finance. Banks generally will not provide loans to enterprises without sufficient collateral and track record so Shell Foundation provided a partial guarantee of US$480,000 to Charity Bank against a US$700,000 loan to enable TBFC to access a loan to enable scale-up.

TBFC used the loan to invest in the high fixed costs of a UK import facility and associated staff. Unfortunately after the Valentine’s Day trial the next order was repeatedly delayed and actually came through 8 months later and was smaller than was originally indicated. This resulted in losses accumulating during this period. This combined with challenges with taking on a new unproven supply base on a new continent, intense competition with existing suppliers led to cashflow difficulties and sadly, finally, liquidation in January 2011.

**Implications of the Liquidation**

The Shell Foundation guarantee of $480,000 was called upon and paid in full to Charity Bank. Other losses were also incurred by TBFC suppliers in both Africa and India. In addition $1.3 million of charitable grant had been lost.

Every attempt was made by TBFC to minimise job losses with some suppliers transferring to other import agents. At one end of the supply chain the developing world producers no longer had access to the additional services which TBFC had provided to enable them to successfully enter the UK market and build strong direct relationships with the retailers and at the other end consumer choice had been reduced. As a specialist intermediary, or “supply chain connector” TBFC increased transparency in the supply chain, also enabling consumers to purchase a product with a story of origin.

**Purchasing Practices which contributed to the Liquidation**

There are inherent risks involved when small entities sell direct to multinational retailers – exposing them to significant and unpredictable fluctuations in price, quantity of orders and delays.

The lack of written contracts with commitment to dates, volumes and prices contribute to delays in orders and retailers switching suppliers to gain the lowest possible price. This is particularly difficult for small enterprises who do not have the financial means of larger more established competitors. It is also difficult with agricultural products where growing decisions and associated investment have to be made in advance.
Whilst social and environmental impacts in the developing world may be included in high level retailer targets, in our experience buyers targets often focus on price/margin and hence drive the final purchasing decision.
Appendix 2

Experience of UTPs in the food sector

1) Supermarket makes deductions in 2007 from remittances relating to short delivery charge (£507.88) which occurred 3 years earlier in relation to a different product to the product currently being sold. The deductions were made despite the supplier already sending a cheque which had been cashed at the time. The result is the supplier earns less than anticipated, and in this case paid twice. Other observations:
   a. Deductions made many years after the product was sold are difficult to investigate and resolve
   b. Deductions are made even though they are disputed
   c. Deductions are made from trading account currently active in relation to beverage sales, but the deductions related to a snack bar product.
   d. Once a deduction is made it is difficult to reverse

2) Retailer continues to buy a product at promotional price (£4.63) when the promotion has ended, and the product should have been bought for £6.35, the pre-promotional price. This results in the supplier not earning approximately £800 which it would have earned if the retailer had purchased at the correct price.

3) Retailer purchases product at promotion price, but independent research indicates the promotion never occurred. Supplier loses approximately £3000 of income which it would have earned if the retailer had purchased at the correct price.

4) Retailer makes mistake and swaps around the product variety ordered so that product A is being sold in 60 shops and product B being sold in 270 shops, when the original plan was the other way around. Product A should have been in the larger number of stores and more of Product A was manufactured. When Product A’s best before date is too close in the retailer’s dedicated storage warehouse cases of Product A are returned to the supplier. The following are some of the financial impacts in 2006 caused by the retailer’s mistake.
   a. The retailer charges the supplier for non-order fulfilment because the best before date is too close on Product A.

   The impact of not selling 1022 excess cases of Product A through the retailer comprises of the following:
   b. cost of delivering product A to warehouse at £25/pallet
   c. warehouse costs for handling, storing product A and the handling fee of returning Product A. (The storage cost per week is £1.31 per pallet of 120 cases. The warehouse charge £2.95/pallet to handle each pallet’s arrival.)
   d. the delivery cost £243 of returning Product A to the supplier.
   e. The majority of the excess stock of Product A, once returned to the supplier, was sold at £1.20/case. The supplier made a loss on the sale of this excess stock because it cost £4.53/case to make.
5) Retailer makes human error in pricing of product, which results in the product being sold at approximately 1/4 of its normal price. This results in more sales than anticipated. The automated ordering system requires the supplier to source around 3,000 cases at short notice (double the expected rate of sales). The supplier is fined more than £2,000 for non-fulfilment of order. Additional stock is ordered and the product storage cost goes up to pay for higher volume of product being stored. Once the mistake was discovered the supplier ended up funding the promotion to clear the stock, and so lost money. The supplier dropped their gross margin to 2% whilst the retailer increased their margin up to 47% during the promotion, despite 2001 UK code stating that suppliers should not predominantly fund promotions.

6) A UK retailer decided not to launch two products at short notice. The following indicates the loss incurred by the supplier associated with these two new product launches.

   a. Packaging costs comprise of
      i. Artwork costs £6,100
      ii. Photography costs £2,857
      iii. Repro £4,480
      iv. Plates £4,000
         Sub-total £17,437
   b. Lost Sales
      i. Product C £81,004
      ii. Product D £54,003
         Sub-total £135,007

7) In 2006 UK retailer writes to all its food suppliers stating that it will unilaterally deduct 0.5% from all invoices. The reason given was to pay for the advertising costs associated with a new store format. This action went against 2001 SCOP which states that suppliers should not be required to pay for supermarket’s costs associated with new or refurbishment of stores.
Appendix 3

Observation of UTPs in Moroccan perishable fruit sector.

Intermon Oxfam has created a development programme in Morocco: The Gender Justice Programme. The objective of this programme is the improvement of labour rights and conditions of women working in the strawberry fields in the North of Morocco. The Programme is composed of various projects, each one working in collaboration with the major stakeholders involved from the production chain to the consumption chain. Notably, women pickers and conditioners of strawberries, the Moroccan governmental agencies, the owner of the land, the Moroccan and European consumers of strawberries and civil society.

The strawberry sector of Morocco has increased its importance in the economy of the country. In the last 15 years the production as well as the surface farmed has increased by ten-fold.

Statistics of Moroccan strawberries

<table>
<thead>
<tr>
<th>Production</th>
<th>Land area/Surface</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990 ~7,000 tons</td>
<td>~260 ha</td>
</tr>
<tr>
<td>2011 ~105,000 tons</td>
<td>~2,600 ha</td>
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</tbody>
</table>

~70% of whole production is exported which is: ~70,000 tons. All exports of strawberries (fresh and frozen) go to countries of the European Union. One third of exports of strawberries are fresh strawberries which in 2010/2011 year was 23,400 tons exported to the following countries. Two thirds of exports are frozen which in 2010/2011 year was 43,400 tons.

<table>
<thead>
<tr>
<th>Main countries of export of fresh strawberries</th>
<th>Main countries of export of frozen strawberries</th>
</tr>
</thead>
<tbody>
<tr>
<td>France 40%</td>
<td>Spain ~33%</td>
</tr>
<tr>
<td>UK 25%</td>
<td>France ~33%</td>
</tr>
<tr>
<td>Spain 15%</td>
<td>Holland 20%</td>
</tr>
<tr>
<td>Germany 15%</td>
<td>Belgium 15%</td>
</tr>
</tbody>
</table>

Typology of producers and size of strawberry farms

<table>
<thead>
<tr>
<th>Surface</th>
<th>Size of farm</th>
<th>Number producers</th>
</tr>
</thead>
<tbody>
<tr>
<td>60%</td>
<td>&gt;20 ha</td>
<td>30 producers</td>
</tr>
<tr>
<td>15%</td>
<td>10-20 ha</td>
<td>8 producers</td>
</tr>
<tr>
<td>10%</td>
<td>5-10 ha</td>
<td>11 producers</td>
</tr>
</tbody>
</table>
Comments on UTPs

The unfair trade practices we have seen throughout our work in the Morocco is totally in line with the definition and the examples mentioned in the Green Paper.

These occur before, during and after the contract is settled, as is described below.

There are evident financial impacts of these practices on a business, for example when a product is exported and the European buyer offers a price 25% lower on the basis of quality or other reason.

The impact of these practices on European consumers can be a lack of product because either the Moroccan producers have gone out of business, or have changed destination of their product to countries applying less UTPs.

Unfair trade practices we have witnessed during the work of our Program:

- All contracts are oral contracts, never written.
- Return of merchandise on the basis of bad quality. (Farmers have tested the rejected products on the grounds of the return and have seen were not true. They have concluded the EU rejects when it finds a lower-priced product elsewhere).
- Forced acceptance of any return because of fear of losing the client.
- Implementation of the fear factor of the termination of the supplying relationship.
- Threats from buyers to buy from another country.
- Changes in prices after having concluded in words a higher price.
- Given that the cost of storage is high, and buyers know it, farmers have to accept any price.
- Tight deadlines
- Unexpected last-minute changes in deadlines
- No support from the buyers to help the farmers with the higher costs incurred by operating with a better working environment, (to comply with a standard which the retailer has requested).
- A variety of strawberry that has always had demand, suddenly it is not wanted on the grounds that after February the taste is not good, it is too acid. However, when they are lacking of strawberries this argument is not posed. This variety is important for Morocco because they can produce higher volumes.
- Some of the importers/retailers that work within our international strategy on the one hand have elaborated an action plan, and on the other hand present unfair trade practices of which the most flagrant is buying from farmers which are not part of their
own Action Plan, and who therefore are not requested by the company to comply with the standards of respect of labor rights (like payment of social security or minimum wage).

Effects on farmers:
- No new investments or innovation (for example new varieties of strawberries), which translates in less diversity of products in the EU.
- Ending of the production of the specific product and doing another activity, therefore no more of this product is sold in the EU.
- Changing the country of sale to new destinations of the product, which provokes the same effect in the EU as mentioned in the point above.
- The fact that European buyers that work with the Program, themselves buy from farmers that do not respect the minimum labor conditions and labor rights provokes an un-leveled field among farmers between those working towards the improvement of working conditions and labor rights of women with respect to the farmers and that do not respect these. The EU consumer is buying strawberries that do not respect the minimum rights of workers in the production chain.

Effects on workers:
- The non-existence of contracts between producers and European buyers provokes the impossibility of producers to give working contracts to the women.
- Tight deadlines provokes excessive working hours for women, which commonly are not paid because the payment is paid per day worked.
- The lower prices translate for example to lower wages or non-payment of social security.
- No support for training of farmers or help in the technical development of new varieties.

Possible responses to tackle the problem:

There are various ways to tackle such problems. However, we think that the option of European buyers voluntarily ending such practices is not realistic. Changing such practices implies a cost for the supermarkets/importers therefore unlikely to change.

If a type of regulation or directive could be elaborated, and a way of enforcing it, a change would be feasible.

Some interesting features would be:
- To accept anonymous complaints containing proof of the unfair practice to proceed with an investigation of the unfair trade practice;
• To accept *ex-officio* initiation of an investigation;

• If the unfair practice is proven, a fine could be a type of sanction;

• The initiation of an investigation, that is made public, would be a strong deterrent also;

• To impose sanctions if there are changes in the evolution of exports at the start of the investigation (proof of trade diversion once an investigation is initiated).