

**Opinion of the European Economic and Social Committee on the 'Green Paper on unfair trading practices in the business to business food and non-food supply chain in Europe'**

COM(2013) 37 final

(2013/C 327/06)

Rapporteur: **Mr ŠARMÍR**

On 18 March 2013, the European Commission decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, on the

*Green Paper on unfair trading practices in the business to business food and non-food supply chain in Europe*

COM(2013) 37 final.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 27 June 2013.

At its 491st plenary session, held on 10 and 11 July 2013 (meeting of 11 July), the European Economic and Social Committee adopted the following opinion by 140 votes to one with nine abstentions.

## 1. Conclusions and recommendations

1.1 The EESC takes note of the European Commission's publication of this Green Paper and thinks that it reflects a positive and marked shift in the Commission's approach to unfair trading practices (UTPs).

1.2 The EESC considers the use of unfair trading practices as not only "unfair" or "unethical", but also as contrary to fundamental legal principles and to the interests of the supply and demand sides. Since it amounts in fact to the abuse of a significantly stronger market position, we recommend using the term "abusive trade practices", which is routinely used in French and English, for example.

1.3 The Committee sees the present breadth and depth of unfair trading practices as being mostly the result of the mergers and acquisitions that have occurred over recent decades.

1.4 In the Committee's view, the results so far of the High Level Forum for a Better Functioning Food Supply Chain are unclear and the approaches proposed are insufficient to solve the problem of unfair practices. It would therefore urge the European Commission to come up with further initiatives.

1.5 While the EESC has no doubt that unfair practices may be employed in any kind of contractual relationship, it is convinced that matters are particularly grave when it comes to dealings between supermarkets on the one hand and

farming and food SMEs on the other. There are forms and degrees of abuse here that do not occur elsewhere.

1.6 The EESC is particularly pleased that the Commission explicitly casts doubt in the Green Paper on the existence of true contractual freedom where relationships are very unequal, thus concurring with the EESC view.

1.7 The Committee finds that the Commission's Green Paper captures very well the essence and main types of unfair trading practices. However, it firmly believes that the Commission should provide a uniform definition of UTPs similar to that already set out in Directive 2005/29/EC, since the practices referred to in the Green Paper bear some resemblance to "misleading marketing practices" <sup>(1)</sup>.

1.8 UTPs are all the more important within a "climate of fear" in which the weaker contracting party is frightened of losing the custom of the stronger party. This is especially true when large retailers put unfair pressure on their suppliers and/or they pass on excessively high prices to the retailers and consequently to the consumers.

1.9 In the EESC's view, the consequences of unfair trading practices are not restricted to business-to-business dealings; nor do they affect only weaker contracting parties. Consumers are also victims, as are national economic interests – a fact insufficiently highlighted in the Green Paper.

<sup>(1)</sup> EESC opinion on misleading marketing practices (OJ C 271, 19.9.2013, p. 61-65).

1.10 The EESC thinks that the laws to curb unfair trading practices adopted in several Member States reflect the fact that the current state of affairs is unacceptable. Although these laws have for various reasons not produced satisfactory results, it would be wrong to say that nothing has been achieved. One success is the greater transparency in the sharing of benefits and the cessation of the most outrageously extortionate practices.

1.11 Although the EESC has no reason to believe that the adoption of these laws by Member States is detrimental to the free movement of goods in the EU, some restrictions may occur. However, none of these laws is protectionist in nature and they apply equally to domestic businesses and to those from other Member States.

1.12 The EESC recommends that any further consideration of how to address the problem of UTPs should start with the absence of contractual freedom in some relations.

1.13 The EESC recommends that any proposals in future to regulate unequal commercial relations take the "fear factor" into account. The essential balance between contracting parties must be secured so that their relationship is a fair one. For this reason, the prime aim of UTP regulation cannot be to protect the weaker contracting party exclusively, but also the national economic interest. This would mean, for example, that food suppliers affected would not have to take an active part in administrative and legal proceedings.

1.14 The EESC calls on the European Commission to propose legislation banning UTPs. This should be based on an indicative list of the most typical such practices employed by the stronger contracting party and designed to transfer its own normal costs and risks to the weaker party.

1.15 The EESC calls on the European Commission to work with national competition authorities in drawing up, on the basis of practical experience over recent decades, a radical revision of current – and evidently obsolete – competition rules so as to promote fair competition based on the fair exchange of relevant information in this sector and take all existing dominant positions into account.

## 2. Introduction

2.1 The Green Paper draws a distinction between food and non-food supplier/distribution chains, which is entirely justified, since the former has its own distinct features compared with others.

2.2 Substantial consolidation has taken place among companies belonging to supply/distribution chains in the last two decades, leading to the creation of what are in reality oligopolies. As far as food supply/distribution chains are concerned, this is particularly true in the retail sector, somewhat less in the processing industry and least of all in the primary production of agricultural products. This has resulted in large imbalances in the food supply chain, since the oligopolies have enormous bargaining power vis-à-vis their commercial partners, who are far more fragmented.

2.3 The EESC is convinced that the structural imbalances that have emerged lead to UTPs being used in some cases and that these practices are often not only inimical to fairness, honesty and ethics, but also contravene fundamental principles of law.

2.4 The Green Paper is wrong in stating that UTPs were first discussed at EU level only in 2009. This is the year in which they first appeared on the European Commission's official agenda. As early as 2005, however, the European Economic and Social Committee issued an important opinion<sup>(2)</sup> which – at a time when the question of UTPs was still taboo – highlighted and criticised a number of negative aspects of the behaviour of retail chains. Mention should also be made of the important role played by the 2007 *Written declaration on investigating and remedying the abuse of power by large supermarkets operating in the European Union*<sup>(3)</sup>, in which the European Commission was directly called upon to take the steps needed to remedy the situation.

2.5 In the EESC's view, the results so far of the High Level Forum for a Better Functioning Food Supply Chain are somewhat uncertain, since the proposed good practice implementation framework has brought no agreement on tackling UTPs, a matter on which three European Commissioners, among others, have expressed regret<sup>(4)</sup>.

2.6 The European Competition Network (ECN) report confirms that the use of UTPs is a reality, especially in the food sector. This accords with the EESC's conviction that the abuse of a stronger economic position by supermarkets vis-à-vis SME food producers and processors is orders of magnitude more serious than in other contractual relations. The fact that for years it is only these suppliers of food to large retail chains that have been complaining, and no one else, is further proof of this.

<sup>(2)</sup> OJ C 255, 14.10.2005, p. 44.

<sup>(3)</sup> 0088/2007. Written declaration on investigating and remedying the abuse of power by large supermarkets operating in the European Union.

<sup>(4)</sup> European Commission, Press release, Brussels, 5 December 2012, Improving the functioning of the food supply chain.

2.7 The EESC notes the Commission's statement that UTPs are harmful to the EU economy as such and not only to contractual relations between two businesses.

### 3. Definition of unfair trading practices

#### 3.1 *The concept of unfair trading practices*

3.1.1 So far, no doubt has officially been cast upon the existence of contractual freedom in commercial relations – not even between supermarkets and SME food producers. Until recently, this freedom was one of the main arguments not only of the supermarkets, but also public authorities, against the regulation of UTPs, which would allegedly have curtailed such freedom. The EESC finds it very significant that the Green Paper has abandoned this position and that it explicitly acknowledges that there is no true contractual freedom where there is marked inequality of economic muscle between the two contracting partners.

3.1.2 For the European Economic and Social Committee this recognition of the lack of contractual freedom is the fundamental prerequisite for effectively seeking comprehensive solutions to problems arising from existing imbalances in the supply/distribution network, above all in the case of food.

3.1.3 In this section of the Green Paper, the European Commission captures very well the essence and main types of UTPs. In relations between supermarkets and food suppliers, in particular, the weaker party has no real alternative, since there are very few major customers in the market and, more importantly, they all treat suppliers in a very similar way.

3.1.4 Several examples of UTPs mentioned in the Green Paper reveal that some buyers do not hesitate to use any means whatsoever to secure extra and totally unwarranted benefits to the detriment of the other party. One particular form is payment for fictitious services or unsolicited services that have no value for the other party.

3.1.5 These are the EESC's answers to the questions posed in this section of the Green Paper:

— Question 1: The EESC thinks that the Green Paper should offer a definition of UTPs similar to that already given in Directive 2005/29/EC. It agrees, however, with the elements and parameters that, according to the Green Paper, epitomise UTP situations.

— Question 3: The UTP concept should not be limited to contractual negotiations, but should cover the entire duration of the commercial relationship.

— Question 4: In theory, UTPs can occur at any stage of the supply/distribution chain, but they only occur in the form under discussion in relations between supermarkets and SME food producers and processors. There is no indication, for example, that multinational food companies, which are also oligopolies, ask their suppliers for listing fees or payments for fictitious services. However, cases should also be mentioned in which multinational food companies make the supply of their (desired) products conditional on similar goods not being sourced from their competitors.

— Question 5: The fear factor is a familiar reality, particularly in relations between retail chains and SME food producers. Its source is the explicit or implicit threat of ceasing to trade with the supplier and the consequent serious economic difficulties for the latter. Any attempt to regulate UTPs must take on board this fear factor, because it thwarts any expectation that the supplier will provide any complaint, or even evidence, in the event of administrative or legal proceedings.

#### 3.2 *Examples of unfair trading practices*

3.2.1 The EESC welcomes the fact that the European Commission draws here on information from a number of national competition authorities. In addition to those mentioned, we particularly recommend collaboration with the French and Czech authorities, which have direct experience with implementing their national UTP laws. In conducting their inspections, anti-monopoly authorities have the right to examine accounting documents (contracts, invoices, bank statements, etc.) that can directly prove the use of UTPs.

3.2.2 These examples furnished by the UK, Spanish and Irish competition authorities show that it is misplaced to refer to many of the practices deployed as merely "unethical", since they are patently beyond the bounds of legality (especially where "bullying and intimidation" are involved).

#### 3.3 *Potential effects of unfair trading practices*

3.3.1 The adverse impact of the stronger party's use of UTPs against the weaker party is beyond doubt and the stifling of investment and innovation in production is their logical consequence. However, the impact on consumers is, in the EESC's view, inadequately signalled, since it translates into far more than just impeding innovation. Yet, this section completely ignores the threat to national economic interests, which does get some mention earlier in the Green Paper. This threat is most in evidence in the countries of Central and Eastern Europe, where supermarkets are entirely in the hands of businesses from other Member States. Given that domestic producers – the vast majority of them SMEs – are unable to meet what often amount to extortionate terms, the whole agri-food sector in this region is collapsing and countries that were traditionally self-sufficient in the production of food staples

have to a large extent lost their food security. Domestic production is thus replaced by imports of often very dubious quality.

3.3.2 These are the EESC's answers to the questions posed in this section of the Green Paper:

— Question 6: UTPs are routinely used in the food sector, especially by supermarkets, in day-to-day commercial dealings.

— Question 7: Suppliers of commodities other than foodstuffs are evidently victims of UTPs by retail chains to a far lesser degree. This is probably because of their lesser dependence on large retail networks, since suppliers of toys, sports goods or clothes, for example, have a far greater range of potential buyers than food producers. Unfair trading practices occur in franchise relations, both in the food and non-food retail sectors. The same problems in food supply chains described in the opinion apply here too, with an imbalanced relation between stronger parties (franchisers/chains) and significantly weaker ones (franchisees). As a result, we see the same lack of freedom in negotiating contracts. Franchisees sign initial contracts with conditions imposed by franchisers and have no other choice if they want to secure the contract. The same comments about the fear factor and costs inherent in distribution (the franchiser) being transferred to suppliers (franchisees) without compensation/added value for the franchisee also apply here. Often during execution of a contract, franchisers extra-contractually impose unilateral changes by means of instructions.

— Question 8: UTPs have a big impact on the ability of farming and food SMEs to invest and innovate. Investment to protect aspects of public interest – such as the environment, working conditions, animal welfare and climate – is lower because of dependence on a small number of purchasers and the uncertainty this situation engenders.

— Question 9: The impact of UTPs in business-to-business relations on consumers is examined in detail in a specific study<sup>(5)</sup>. The current system is detrimental to consumers

particularly over the long term, since investment is lacking for sustainable production and innovation. In the long run, again, they also lose out as a result of market failure in areas such as the environment, climate, working conditions and animal welfare. In the interests of counteracting this, it seems to us more acceptable for consumers to pay a little more for food now, since competition between retail chains is currently based solely on the lowest possible consumer price, with everything else sacrificed to this.

— Question 10: There is no doubt that UTPs have an adverse effect on the functioning of the single market, since they significantly restrict the opportunities for small and medium-sized operators to make their mark. In effect, large retailers decide what is sold where and in many cases the criterion is not the best value for money, but often the greater "willingness" or "ability" to accept UTPs.

#### 4. Legal frameworks on unfair trading practices

4.1 Two facts emerge from analysis of current legal frameworks at Member State and EU level. Firstly, the use of UTPs by some strong economic players is now a matter of common knowledge and an indisputable fact, with the appropriate authorities in several Member States having concluded that the current situation calls for regulation.

4.2 The current extent of UTPs, especially in dealings between large retail chains and food producers, reveals above all the obsolescence of competition legislation. Some forms of UTP highlight the severe distortion of the competitive environment and the existence of real dominant positions that current monopolies legislation fails to address.

4.3 In addition to revision of competition legislation, the EESC thinks it entirely legitimate to ban at EU level the use of certain defined UTPs and so create the necessary harmonisation of a disparate legal environment. However, there must be a logical link between regulation of UTPs and revised monopolies legislation to make sure that it is only the logical initiators of contracts with UTPs – i.e., parties with the dominant position – that are sanctioned.

4.4 To be effective, this harmonised regulation must take account of the "threat of delisting" and hence the inability of weaker contracting parties, especially SME suppliers to supermarkets, to complain; it must be conceived to do more than merely tackle problems in B2B relations.

<sup>(5)</sup> Consumers International, *The relationship between supermarkets and suppliers: What are the implications for consumers?*, 2012.

4.5 These are the EESC's answers to the questions in this section of the Green Paper not yet answered:

- Question 11: UTP regulation that has been adopted in some Member States has so far not delivered satisfactory results. The reason for this, in the EESC's view, is partly because most of this regulation has been adopted only relatively recently (in Italy, Slovakia, the Czech Republic, Hungary and Romania), but also because the legal premise behind it did not rest explicitly on the absence of contractual freedom, although the very acknowledgment that UTPs are being used implies that all is not well where contractual freedom is concerned. It would be wrong, however, to say that these laws have achieved nothing. In countries where they have been adopted, the more outrageous contractual terms are no longer imposed and supermarkets have to use more sophisticated methods if they wish to secure advantages to which they are not entitled. The greatest progress has been achieved in France, where the pressure of legislation and enforcement action has reduced supplier rebates to an acceptable level (10 to 15 % instead of the 50 to 60 % of the past) <sup>(6)</sup>. The result is far greater transparency in the distribution of benefits in the food supply chain.
- Question 12: How urgent it is to adopt a dedicated law depends, among other things, on the scale of UTP use, but this varies from country to country. There are different situations in the south of Europe, in the countries of Central and Eastern Europe, and then again in the north of Europe. Each region also has a slightly different legal culture and tradition. This is why some countries already have a regulatory (or self-regulatory) framework and others do not.
- Question 14: The EESC is convinced that new harmonisation measures should be adopted at EU level (see points 4.2, 4.3 and 4.4).
- Question 15: A certain positive effect of regulation is already apparent (see above). There are some concerns about introducing regulation in this area, but these involve the assumption of contractual freedom. Since this is in effect non-existent in the contractual relations under discussion, these concerns are groundless.

## 5. Enforcement of rules against unfair trading practices

### 5.1 Enforcement mechanisms at national level

5.1.1 The EESC endorses the European Commission's view that current mechanisms implemented at national level against UTPs are generally inadequate. This is mainly because they fail to take into account a certain climate of fear arising from the absence of true contractual freedom and the threat of delisting. These problems have so far been best tackled by France, where the supervisory authority can act on the basis of unofficial

information and on its own initiative. Suppression of UTPs is also based on the protection of the national economic interest and not on protecting the weaker contracting party.

5.1.2 While some Member States have laws to combat the use of unfair contractual practices, others do not. Moreover, there are rather significant differences between individual laws. There is no doubt that these two facts constitute a certain hurdle to crossborder trade (question 16).

5.1.3 In the view of the EESC, the only sensible common approach to tackling the adverse impact of differences in the applicable legislation would be to adopt harmonising legislation targeting the use of UTPs (question 17).

### 5.2 Enforcement mechanisms at EU level

5.2.1 The EESC agrees with the Commission's claim that there is currently no specific mechanism at EU level to combat UTPs. It is also convinced of the necessity – if the fear factor is to be overcome – of giving national authorities for this area the powers to act on their own initiative, to receive anonymous or unofficial complaints and to impose sanctions (question 18).

## 6. Types of unfair trading practices

6.1 The EESC agrees that UTPs occur throughout the food and non-food supply chain, but is convinced – in keeping with what has been said above – that the situation is at its worst in dealings between supermarkets and SME producers.

6.2 Where listing is concerned, it is not at all clear what the consideration is for the fee that the would-be supplier has to pay. In the vast majority of cases, even payment of this fee – which is a preliminary and necessary condition of any form of commercial dealings – does not give the supplier any guarantee that the purchaser will actually take the goods in question and will not, for no reason, delist him.

6.3 Supplier rebates are a routine part of the current practice of large retail chains. The EESC believes their general benefit to be doubtful, to say the least. On the one hand, supplier rebates are a symbol of the abuse of an actual dominant position, since they often conceal unsolicited and fictitious services; on the other, they create a significant lack of transparency regarding the distribution of benefits. The existence of supplier rebates means that suppliers (and outside observers) find it very difficult to ascertain how much they have really been paid for the goods supplied. In reality, the order to supply goods is conditional upon acceptance of services offered by the buyer. In the view of the EESC, fees for real and justified services provided by the buyer to the supplier should be included in the purchase price of food.

<sup>(6)</sup> Information from France's General Directorate for Competition Policy, Consumer Affairs and Fraud Control.

6.4 These are the EESC's answers to the questions in this section of the Green Paper not yet answered:

- Question 19: We would add to the list of UTPs the payment for fictitious and unsolicited services, unduly high payments for services actually provided and the transfer to the supplier of business risk and marketing costs.
- Question 20: A list of UTPs is the prerequisite for combating these practices. It should, of course, be regularly updated. But lists alone are not enough. A broad enough definition of UTPs must be proposed that covers any cases that fail to meet the broad definition of "good business practice" in terms of "good faith", "contractual balance" and the common rules of businesses in the relevant sectors of the economy.
- Question 21: The EESC thinks that every link in the entire supply chain should bear its natural costs and risks and so arrive at a just share in the overall margin. In other words, the producer should bear the costs and risks involved in production and the retailer those involved in selling.
- Question 23: The EESC thinks that fair practices should be embodied in a framework at EU level.
- Question 24: The EESC is convinced that a binding legislative instrument such as a regulation should be adopted at EU level.
- Question 25: In the view of the EESC, the Green Paper does not pay sufficient attention to assessing the impact of UTP use in B2B on consumers and the national economic interest.

Brussels, 11 July 2013.

*The President*  
*of the European Economic and Social Committee*  
Henri MALOSSE

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## APPENDIX

**to the opinion of the European Economic and Social Committee**

The following amendment, which received at least a quarter of the votes cast was rejected during the plenary session (Rule 54(3) of the Rules of Procedure):

**Point 1.10**

Amend as follows:

1.10 *The EESC thinks that the laws to curb unfair trading practices adopted in several Member States reflect the fact that the current state of affairs is unacceptable. Although these laws have for various reasons not produced satisfactory results, it would be wrong to say that nothing has been achieved. ~~One success is~~ However, the greater transparency in the sharing of benefits price setting has still a long way to go and the cessation of the most outrageously extortionate practices is still far from being a reality.*

**Reason**

To be given orally.

**Outcome of the vote:**

Votes in favour: 54  
Votes against: 63  
Abstentions: 27

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