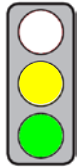


## KEY ISSUES

**Objective of the Communication:** The Commission wants to combat unfair trading practices in the food supply chain by way of voluntary initiatives and national provisions.

**Affected parties:** All companies in the food supply chain.



**Pro:** (1) Keeping complaints confidential, as recommended, lowers the barriers to reporting unfair trading practices and thus promotes the implementation of the Member States' legislation to combat unfair trading practices.

(2) Effective dispute resolution procedures can reduce the burden on the courts and lower the cost of dispute resolution.

**Contra:** The Commission fails to establish an applicable definition of unfair trading practices which is important for an effective internal market.

## CONTENT

### Title

**Communication COM(2014) 472** of 15 July 2014: Tackling **unfair trading practices** in the business-to-business food supply chain

### Brief Summary

#### ► Context and objectives

- The food supply chain supplies private households with food and drink. It covers inter alia producers, processors and retailers. In the EU cross-border trade now accounts for about 20 % of total food production. (p. 2)
- According to the Commission, companies in the food supply chain have an unfair share of market power. This results in "differences in bargaining power" which can result in unfair trading practices. (p. 2)
- Member States have different definitions of unfair trading practices (p. 10). The Commission understands them to be practices which (p. 2, 7)
  - "grossly" deviate from "good commercial conduct" and
  - are contrary to "good faith" and
  - are contrary to "fair dealing" and
  - are imposed upon the "weaker" trading party unilaterally by the "stronger" trading party.
- Member States have chosen different approaches and some have not taken any action at all to combat unfair trading practices (p. 10).
- The Commission wants Member States and stakeholders to tackle unfair trading practices in an "appropriate" and "proportionate" manner in order to bring about "fair" and "sustainable" commercial relationships. Small and medium-sized enterprises (SMEs), in particular, will be protected against unfair trading practices. (p. 2, 9).

#### ► Possible consequences of unfair trading practices

- Unfair trading practices are "particularly problematic" in the food supply chain but it is difficult to fully assess their overall effect. (p. 3, 5)
- According to the Commission, unfair trading practices may (p. 3-6, 12-13)
  - be detrimental to domestic and cross-border competition,
  - reduce the revenue of affected companies, in particular by way of unpredictable changes to contract terms,
  - restrict investment in products and technology,
  - dissuade companies from entering the market,
  - lead to overproduction and result in unnecessary food waste, e.g. where due to unpredictable changes to contract terms, the continued sale of perishable foodstuffs is no longer possible, and
  - restrict choice, availability and quality of consumer products.

► **Difficulties in combating unfair trading practices**

- Diverse national legislation to combat unfair trading practices can result in the "stronger" trading partner stipulating which national regulatory framework is to govern the contract in order to avoid stricter measures against unfair trading practices ("forum shopping") (p. 6-7).
- The "weaker" trading partner may refrain from seeking civil redress against unfair trading practices. Reasons for this are (p. 7),
  - the costs of litigation and
  - the fear that the "stronger" trading partner may unilaterally terminate the commercial relationship ("fear factor").

► **Measures for combating unfair trading practices in the Member States**

- In some Member States, stakeholder associations offer out-of-court dispute resolution procedures (p. 7).
- Existing national legislation to combat unfair trading practices differs according to the nature, level and legal form of protection (p. 4, 6).
  - In some Member States, authorities may take action based on confidential complaints.
  - In Member States in which no such authorities exist, farmers and SMEs, in particular, are calling for them to be created. The Commission also advocates this (p. 9).
- Member States will examine whether (p. 11–12)
  - "appropriate" national regulatory frameworks exist to address unfair trading practices,
  - this legislation can be "effectively" and "credibly" enforced and
  - where necessary, additional "enforcement mechanisms" could be of use, e.g. to ensure the confidentiality of complaints.
- The Member States will "encourage" companies to comply with "voluntary codes of conduct" at national and EU level (p. 11).

► **Measures for combating unfair trading practices at EU level: Supply Chain Initiative**

- A group of seven European stakeholder organisations from the food supply chain launched a voluntary obligation initiative to combat unfair trading practices ["Supply Chain Initiative" (SCI)] in September 2013. Members of the SCI undertake to comply with "principles of good practice" in their commercial relationships (p. 8).
  - The "principles of good practice" were established by the High Level Forum for a Better Functioning Food Supply Chain, which was set up by the Commission in 2010 (Decision 2010/C 210/03) (p. 4, 8).
  - "Principles of good practice" refers in particular to (p. 10-11)
    - making written agreements,
    - avoiding "unilateral changes to contract terms"
    - taking responsibility for entrepreneurial risks and
    - making only "justifiable" requests, i.e. a contracting party must not use threats to obtain an advantage or to pass on unjustified costs.
- The SCI sets "organisational requirements" for its members such as the training of staff to comply with "principles of good practice" (p. 8).
- Members may be excluded from the SCI where they breach the principles. No other sanctions are specified. The Commission calls on the SCI to extend the possibility of sanctions. (p. 8-10)
- The SCI provides for formalised dispute resolution procedures, in particular (p. 8)
  - internal dispute resolution bodies within SCI members and
  - decisions by independent third parties in the form of
    - non-binding mediation or
    - binding arbitration.
- SCI companies cannot initiate "commercial retaliation" against "weaker" parties who use the dispute resolution procedures. The Commission calls on members of the SCI to "reinforce" dispute resolution procedures in order to increase the effectiveness and attractiveness of the SCI. (p. 8-10)
- The Commission criticises the fact that producers, namely farmers and companies in the meat processing industry, whilst they have, to some extent, joined national initiatives, have so far largely failed to join the SCI (p. 4). The Commission calls on companies and organisations (p. 9)
  - to join the SCI and
  - "actively" encourage their trading partners to join the SCI, e.g. by informing them of their own membership.
- A "governance group" has been established, made up of the representatives of various stakeholder organisations, which aims to implement and coordinate the SCI (p. 4, 8). The governance group will (p. 9-10)
  - "enhance" its efforts to inform SMEs about the SCI and find more "efficient" ways for them to join the initiative,
  - drive the creation of national platforms, under the SCI, to facilitate the exchange of information on the implementation of the "principles of good practice" at national level, and
  - work "closely" with the Commission.
- The Commission wants to "closely monitor" the development of the SCI and will assess the effectiveness of the SCI and the national platforms (p. 10, 13).

► **Additional measures for combating unfair trading practices at EU level**

- The Commission wants to support the exchange of information between the Member States about "best practices" used in national legislation and procedures (p. 11).
- The authorities responsible for implementing national legislation to combat unfair trading practices will "effectively" cooperate at EU level to (p. 12)
  - facilitate the exchange of information,
  - combat cross-border unfair trading practices and
  - to prevent "forum shopping".
- The Commission will assess the progress of national implementation measures to combat unfair trading practices (p. 13-14).
- The Commission will present a report at the end of 2015 in light of which it will decide on further action (p. 14).

**Statement on Subsidiarity by the Commission**

According to the Commission, unfair trading practices can only be addressed "effectively" cross-border where there is a "common understanding" of the "necessary rules" (p. 10).

**Policy Context**

In its Communication on improving the functioning of the food supply chain in Europe [COM(2009) 591; see [cepPolicyBrief](#)], the Commission already referred to the connection between an unequal bargaining position between companies and the incidence of unfair trading practices. The effect of unfair trading practices and unfair contractual terms on SMEs was discussed in the Communication to review the Small Business Act for Europe [COM(2011) 78]. The Proposal for a Directive on the protection of trade secrets [COM(2013) 813; see [cepPolicyBrief](#)] targets inter alia unfair trading practices aimed at the unlawful appropriation and use of trade secrets. In 2013, the Commission published a Green Paper on unfair trading practices [COM(2013) 37; see [cepPolicyBrief](#)] in which it called for requirements to be laid down on the content of contracts between companies in the supply chain. In parallel to the Green Paper, the Commission carried out a public consultation, the results of which have been incorporated into this Communication. In January 2015, the Supply Chain Initiative announced, in its first annual report, that it had so far received 39 complaints about unfair trading practices.

**Options for Influencing the Political Process**

Directorates General:	DG Internal Market and Services (leading)
Committees of the European Parliament:	Internal Market and Consumer protection (leading); Rapporteur: TBA; Environment, Public Health and Food Safety; Agriculture and Rural Development, Legal Affairs
Federal Ministries:	Economic Affairs and Energy (leading)

**ASSESSMENT**

**Economic Impact Assessment**

Although measures to combat unfair trading practices restrict entrepreneurial freedom, particularly freedom of contract, unfair trading practices can give rise to costs for companies which, in the medium term, entail a risk of insolvency or a barrier to market entry, especially for SMEs. This can reduce the choice and quality of consumer products. The Commission's desire to combat unfair trading practices is therefore justified.

**The definition of unfair trading practices used by the Commission is**, in view of the large number of ill-defined terms, **too vague** for practical use and therefore not practicable. Although a standard definition is difficult, because the Member States also have differing ideas on the definition of unfair trading practices, **it is nevertheless important for a functioning internal market to develop an uniform EU distinction between fair and unfair trading practices.**

Although the problem of "forum shopping", referred to by the Commission, plays a subordinate role for companies in the food supply chain, varying legal provisions on dealing with unfair trading practices give rise to higher costs for cross-border supply chains.

The Commission's implicit call for the Member States to introduce confidential complaints is appropriate. **Keeping complaints confidential, as recommended, lowers the barriers to reporting unfair trading practices and thus promotes the implementation of the Member States' legislation to combat unfair trading practices.** This increases the willingness of "weaker" trading partners to invest in specific longer term commercial relationships. In addition, "weaker" trading partners need not fear that their contracting partners will appropriate the proceeds of their investment.

The "principles of good practice" of the High Level Forum are suitable for combating unfair trading practices. The principle of making written contracts, whilst increasing the direct costs of concluding the contract, also strengthens legal and thus also planning certainty, not least for the "weaker" contracting partner. This promotes

contract-specific investment by the "weaker" contract partner. The same applies to the principle of avoiding "unilateral changes to contract terms".

The principle of taking responsibility for entrepreneurial risks ensures that the cost of taking risks is not passed on to the "weaker" contracting party or to third parties. This means that companies only take sensible commercial risks or alternatively insure themselves appropriately against risks. The principle, that only "justifiable" requests may be made, ensures that companies with a greater degree of market power do not pass on costs, which are unrelated to the contract, to the "weaker" contracting partner.

**The "reinforcement" of dispute resolution procedures, called for by the Commission, may reduce the burden on the courts and lower the cost of dispute resolution.** Effective dispute resolution makes the SCI more attractive to SMEs. The ban on "commercial retaliation" against contract partners who initiate dispute resolution procedures, lowers the barriers to making complaints and encourages the enforcement of "principles of good practice". This makes investment in commercial relations more attractive for the "weaker" trading partner.

Extending possible sanctions for breaches of the "principles of good practice" may increase the incentive for SCI members to comply with these principles. An additional sanction could be, for example, inclusion on a public black list ("name and shame"). This could be brought in at little cost in the form of a website.

A simplified exchange of information between the offices responsible for implementing the legislation in the Member States facilitates learning from best practice. In addition, exchange of information may contribute to achieving similar standards throughout Europe and thus effectively bring about partial harmonisation thereby strengthening the internal market.

## Legal Assessment

### Legislative Competency

Unproblematic. The Commission can propose non-binding measures (Art. 17 TEU). With regard to additional legislative follow-up measures, it depends on the actual form of such legislation.

### Subsidiarity

Unproblematic.

### Proportionality

Unproblematic. Statutory regulations are not necessary and therefore disproportionate if unfair trading practices can be suppressed using less stringent methods, e.g. effective voluntary obligation. With this Communication, the Commission first wants to assess the progress of the still young voluntary obligation initiative, SCI, and the national platforms, as well as the enforcement measures to combat unfair trading practices in the Member States, before deciding on follow-up measures. Its action is therefore proportionate.

### Compatibility with EU Law in other Respects

Not currently assessable.

### Impact on German Law

Not currently assessable.

## Conclusion

The Commission fails to establish an applicable definition of unfair trading practices which is important for an effective internal market. Keeping complaints confidential, as recommended, lowers the barriers to reporting unfair trading practices and thus promotes the implementation of the Member States' legislation to combat unfair trading practices. The "reinforcement" of dispute resolution procedures, called for by the Commission, may reduce the burden on the courts and lower the cost of dispute resolution.