



HM Government

**UK Government response to the  
European Commission's Green  
Paper on unfair trading practices  
in the business to business food  
and non-food supply chain**

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

**UK Government response to the consultation**

**(A) Summary**

The UK regime for combating business to business unfair trading practices (UTPs) (where there is no abuse of a dominant position under competition law) broadly consists of two main elements:

- Common law of contract and statutory unfair contract terms law in the UK ensures that there is a framework of fairness within which business should operate - companies which are misled into agreements may not be bound by them, blanket exclusions of liability are generally not valid and unilateral changes may not be given legal effect, for example. But contract law by itself cannot solve the problem of economic dependency when a business is forced to accept unfair terms because it cannot afford to challenge its sole/main customer or supplier.
- UTPs which result in markets not working properly may be investigated by the competition authorities or by sectoral regulators (using their 'markets' powers rather than competition powers) and remedies introduced in order to make markets work better - e.g. Competition Commission report advocating the creation of the Groceries Code Adjudicator. There is no requirement for there to be a potential breach of European or European-inspired competition law for such investigations to be launched or for remedies to be imposed.

In those sectors where supply side competition, by itself, is not felt likely to deliver optimal market results, Government may intervene to create a framework of greater protection for small businesses. In sectors such as financial services and energy there are therefore additional rules designed to protect micro and small business purchasers of such services.

Compulsory independent dispute resolution mechanisms (usually ombudsmen) may also help in these cases. These exist in the UK, for example, in the energy and financial services sectors and are being established in the groceries sector in the form of the Groceries Code Adjudicator to back up the Groceries Supply Code of practice (GSCOP).

On an *exceptional* basis, even where the UK relevant authorities determine that competition appears to be working well in a particular market, Government may nevertheless decide to act against perceived unfair practices on grounds other than competition. An example of this is the proposed action to establish a statutory code of practice and independent adjudicator for disputes between companies owning large numbers of pubs and the individual operators of these pubs. However, any such action always has to be very cautious and carefully calibrated, in particular to ensure that it does not cut across the enforcement of competition law and policy or distort competition in the particular market to the detriment of consumers.

Our approach towards European intervention in this area would depend on what was proposed but:

- We would be extremely sceptical of any attempts to solve UTPs through European harmonisation of contract law. This could require the UK to import concepts such as "good faith" or "fair dealing" into UK contract law. There is, as far as we know, no evidence of need for this and not only would this be likely to be very costly and introduce massive legal uncertainty in a UK legal context, it would also not solve the main problem as contract law will not assist economically dependent businesses, who cannot afford to assert existing contractual rights. This is specifically where we think UTPs are most likely to be a problem.
- Interfering in business to business freedom of contract is inherently very risky. Protecting the weak against the strong can result in ossifying existing market structures, inhibiting new market entry and potentially valuable concentration in diffuse markets which would tend to remedy any market imbalances naturally. Intervention must therefore be targeted at market failures and carefully weighted so that it has a beneficial or at least neutral impact, in both the short and long term.
- It follows, therefore, that a key principle of any action is that UTPs should only be addressed on a sector by sector basis, following detailed market analysis by an expert, independent body.
- If the Commission determines after robust analysis that specific market failures have a cross-border element and wishes to integrate Member State responses to market failures with a European dimension, the UK would be willing to engage and discuss. In the Groceries sector, for example, the UK would welcome discussion with other Member States about the possible setting up of similar mechanisms to our GCA and would be willing to share our experience and/or discuss mechanisms for cross-border co-operation.
- As also shown by the recent, parallel EU work on the issue of UTPs in vertical relations in the food supply chain (i.e. the Expert Platform on B2B contractual practices within High Level Forum for Better Functioning Food Supply Chain and ECN Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector), the best way to secure any such cross border cooperation would be through a coordinated effort between the various relevant Commission Directorates-Generals involved, their experts and the ECN or some variation of the ECN. Attempting to remedy UTPs through European legislation instead runs the risk of highly damaging political interference in markets, which may be more damaging than the UTPs it is designed to address.
- If the Commission would seek to intervene beyond the recommendations of the UK competition authorities or in markets which the latter have not considered, the UK would need to be convinced that the market investigation it had conducted was of similar weight and took full account of UK market conditions and that any proposed intervention was solidly evidence-based and carefully balanced before it could be supported. Realistically it would expect the relevant UK competition or sectoral authorities to have been involved in such investigations and to support the proposed intervention.

## **(B) Current UK Regime for combating unfair trade practices**

### **(1) Contract law**

There is no general fair dealing or good faith principle applicable to B2B transactions in the UK. However, there are several common law principles and statutory provisions which give some protection against unfair contractual terms or dealings. These provisions are limited and piecemeal; generally freedom of contract prevails in commercial transactions. The relevant common law principles and statutory provisions fall under four heads:

- (1) Contract law rules;
- (2) Other common law rules such as: mistake, misrepresentation, undue influence, unconscionable bargains, and economic duress;
- (3) The Unfair Contract Terms Act 1977 (UCTA); and
- (4) The Business Protection from Misleading Marketing Regulations 2008 (BPRs), which relate to misleading advertising and comparative advertising.

#### **Contract law rules**

The UK has three common law jurisdictions (Northern Ireland, Scotland, England and Wales). Instead of setting out the position for each jurisdiction, we refer below mainly to English common law of contract. There are differences in terminology and can be differences in the substantive law across the three jurisdictions.

**Incorporation:** terms must be incorporated as terms of the contract. That means that they must be part of the contract and both parties must have agreed to them. Reasonable steps must be taken to bring terms to the notice of the other party, particularly if they are onerous conditions.<sup>1</sup>

**Rules of interpretation:** Ambiguous terms will be construed against the person who imposed them.<sup>2</sup> An exclusion clause will be construed strictly against the party who seeks to rely on it.

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<sup>1</sup>Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1987] EWCA Civ 6.

<sup>2</sup> This is the *contra proferentum* doctrine. See for example *Burton v English* (1883) 12 QBD 218.

**Consideration:** If a contract is subsequently varied there must be adequate consideration (money or something else of value) for that variation. This means that a promise to perform an existing contractual duty is not good consideration for an agreement to pay an additional sum or to perform an additional act. For example, in a contract between a supermarket and a supplier, a promise by the supermarket to pay money already due under the original contract is not adequate consideration for a further promise by the supplier to supply additional goods. Furthermore, if A threatens to break a contract unless B agrees to the variation of a contract, the variation may be unenforceable for lack of consideration. It should be noted that “consideration” is one of the areas where the law is somewhat different in Scotland.

#### **Other common law rules**

**Mistake:** in some cases where A is aware of B’s mistake as to the terms of a contract, A may not be able to rely on it.<sup>3</sup>

**Misrepresentation:** broadly speaking, a misrepresentation which induces a party to enter into a contract can give that party the right to get out of the contract, whether the misrepresentation is negligent, fraudulent or innocent. The law of misrepresentation is a complex combination of common law and statute law.

**Undue influence:** this is a doctrine based upon constructive fraud, to prevent people from being able to retain the benefit of a wrongful act where a transaction is found to have been entered into against the other’s free will. Undue influence is a limited doctrine, and rarely applied in B2B cases. It is more relevant to cases where there is a fiduciary or familial relationship.

**Unconscionable bargains:** in certain limited circumstances, courts will set transactions aside where they have been based upon unconscionable conduct by the stronger party, but relief will not be granted solely on the grounds that the transaction was unfair or improvident. This doctrine is not routinely applied in B2B transactions. Cases generally involve private individuals who, acting without independent legal advice, enter into contracts on terms which are very unfair or transfer property for grossly inadequate consideration, when their bargaining power is grievously impaired by their lack of knowledge or infirmity.

**Economic duress:** economic pressure may amount to duress if the pressure is deemed to be “illegitimate” and has induced the claimant to enter into the contract. However, courts have found it difficult to make the necessary distinction between agreements which are the result of commercial pressure (normal robust negotiating) and those which are the consequence of illegitimate and unfair exploitation. As a result the case law is not clear cut, and it may be difficult for claimants to prove their case. The doctrine is not routinely applied, and the outcome will turn on the specific facts of the case.

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<sup>3</sup>Hartog v Colin and Shields [1939] 3 All ER 566 and Smith v Hughes (1871) LR 6QB 597.

For example, economic duress has been established in cases where A said that he would not erect stands ordered by B less than a week before the event was due to open; and where A refused, at short notice, to supply a component essential to B's manufacturing process. However, it was not established where B had impliedly affirmed the contract, where B had a reasonable alternative, or where B was found to have acceded to legitimate commercial pressure.

### **Unfair Contract Terms Act**

S2 (1) – provides that traders cannot exclude or restrict liability for death and personal injury caused by negligence.

S2(2) – provides that traders can only exclude or restrict liability for other loss or damage caused by negligence if it is "reasonable".

S3 – provides that where a business contracts on another business's written standard terms, terms can only exclude liability for breach of contract, claim to allow no performance of the whole or any part of a contractual obligation, or permit contractual performance substantially different to what is expected, if it is "reasonable".

S6(1) – provides that the seller's implied obligations as to title (under the Sale of Goods Act(SOGA) 1979 and the Supply of Goods (Implied Terms) Act (SoGITA) 1973) cannot be excluded or restricted.

S6(2) - the implied obligations as to conformity of goods with description or sample, quality and fitness for purpose (under SoGA 1979 and SoGITA 1973) can only be excluded or restricted if reasonable.

S5 – in a guarantee relating to consumer goods, loss or damage caused by negligence of the manufacturer or distributor cannot be excluded.

It should be noted that all the above references are from Part I of UCTA. Part I only applies to England, Wales and Northern Ireland. Part II applies to Scotland.

### **Business Protection from Misleading Marketing Regulations**

The Business Protection from Misleading Marketing Regulations 2008 (BPRs) prohibit businesses from advertising products in a way that misleads traders and set out conditions under which comparative advertising, to consumers and business, is permitted.

The BPRs operate in the realm of public law and are enforceable by public authorities against those that infringe them.

They do not give rise to private rights for small businesses that are the victims of improper marketing. However misleading marketing will normally constitute a misrepresentation and under the law on misrepresentation, the victim of such a practice may not be bound by the contracts that result (see above).

## Conclusion

In relation to the examples of unfair trading practices given in the Green Paper (pages 17-20), contract law in the UK would appear to offer some limited protection. For example, in England and Wales:

- a. **Ambiguous contract terms** will be construed against the party seeking to rely upon them;
- b. Where there is a **lack of written terms**, the weaker party could seek to argue that they do not form part of the contract due to lack of incorporation;
- c. **Retroactive contract changes** may not be incorporated into the contract, and in addition there may be a lack of consideration. They may also have resulted from economic duress;
- d. **Terms which unfairly transfer risk** need to be brought to the attention of the other party if they are onerous. If they exclude or restrict liability, they may also be caught by UCTA; and
- e. **Unfair termination of a commercial relationship**, in particular a threat to terminate, may constitute economic duress; and a threat by A to break a contract unless B agrees to the variation of a contract, may be unenforceable for lack of consideration;
- f. **Victims of misleading marketing** may not be bound by contracts which they are induced to enter into under false pretences.

There is some uncertainty around how the law would be applied in individual circumstances, but this is probably inevitable because the courts are trying to reconcile the principle of freedom of contract with a general desire to ensure a fair outcome and much will depend on the circumstances of each case.

### Sectoral rules to protect small businesses

Some of the UK sector rules designed to protect consumers also apply to small businesses. For instance, certain of the Financial Conduct Authority's rules, such as those on the fair treatment of customers do not apply solely to dealings with consumers. Equally, certain provisions of EU law, such as in the Markets in Financial Instruments Directive (MiFID), apply to dealings with certain non-consumer customers (e.g. rules on suitability, the provision of information that is "fair, clear and not misleading" and on acting honestly, fairly and professionally in accordance with the best interests of a client). The Financial Ombudsman Service is able to treat complaints from micro-enterprises.

Sector regulators may also specifically seek to protect small businesses from certain types of unfair trade practice. For example, in January 2010, OFGEM set out new protections for micro-business customers when purchasing energy.

- Before entering into a contract an energy supplier must explain the key terms and conditions to the customer, and make it clear that the contract is binding. This applies equally to contracts agreed by telephone or in person.
- Within ten days of a contract being agreed, or an existing contract being extended, (or as soon as reasonably practicable) the customer should receive written copies in plain language

of the full terms and conditions and a statement of renewal terms (if the contract is of a fixed length).

- Approximately 60 calendar days (but no longer than 120 calendar days) before the end of the fixed-term period, suppliers must send customers a statement of renewal terms and details of the key terms and conditions which apply if:
  - the customer takes no action and the contract is rolled over, and
  - the customer prevents their contract from being rolled over.
- After receiving the statement of renewal terms the customer will have a notification window of approximately 30 calendar days to contact the supplier if they wish to switch or negotiate a new deal. If a supplier pitches new offers to a customer at least one of those must be in writing and valid until the end of the notice period.
- Where customers do not contact their supplier in writing during the notification window their contract can be automatically rolled over for a maximum length of 12 months (provided the supplier has already given the customer certain information such as a statement of renewal terms).
- Customers who wish to avoid being automatically rolled over for a further fixed term period can now prevent this from happening by writing to their supplier at any point from when they agreed a fixed term contract until the end of the notification window. However, if a customer wishes to terminate or cancel the contract they must do so in accordance with the terms of the contract.

On 22 March 2013 OFGEM published a further consultation on proposed reforms of the non-domestic retail energy market.

The proposals would extend existing protections to a further 160,000 small businesses. In addition all bills and statements sent to micro businesses would have to clearly display the contract end date. This would make sure that fewer businesses are caught out and moved to more expensive deals when their contracts expire.

The full proposals include measures to address a number of concerns raised by small businesses regarding the market. Examples include:

- Close monitoring of suppliers to guard against them blocking a small business from switching
- Developing an industry-wide code of practice for energy brokers to combat high pressure sales tactics and the provision of misleading information
- New standards of conduct on billing, switching and contracting with small businesses, with fines if suppliers break the rules

OFGEM plans to introduce the new measures in summer 2013.

It has also promised to review in future whether automatic rollover of small business energy contracts should be banned.

The energy ombudsman also handles complaints from micro-businesses about energy suppliers at no cost to the micro-business.



## **(2) Competition Law**

UK competition law, just like EU competition law, prohibits abuse of a dominant market position and some agreements between companies, whether vertical or horizontal, which restrict competition. Some unfair trade practices would constitute a breach of UK and EU competition law, but the Commission has indicated that its reflections are solely concerned with UTPs which are **NOT** a breach of EU competition law, so these cases are not considered any further here.

The UK competition regime, however, goes beyond EU competition law, notably when it comes to market investigations. Sectoral regulators may also act to improve the functioning of markets and the Office of Fair Trading may also seek to persuade business to tackle unfair trade practices, if it thinks that these are giving rise to anti-competitive effects, even where there is no illegality.

### **Market Investigations**

Market investigations allow the UK competition authorities to investigate markets where particular features of the market may give rise to anti-competitive effects which might not be captured by the prohibition-based rules on anti-competitive agreements and abuse of dominance. There may be no unlawful conduct by any companies operating on the relevant market, but there may still be adverse effects on competition which give rise to significant consumer harm. The real distinction of the UK system is that the competition authorities can not only investigate markets in which there is no breach of competition law prohibitions, but also apply remedies.

The features of a market which may give rise to a market investigation may include<sup>4</sup>

- any conduct (whether or not in the market concerned) of one or more persons who supply or acquire goods or services in the market concerned; or
- any conduct relating to the market concerned of customers or any person who supplies or acquires goods or services.

Market investigations can therefore be undertaken in response to patterns of unfair trade practices if these may result in anti-competitive effects and cause the market to function poorly, to the detriment of consumers in the short or longer term.

The Competition Commission (CC) is the body responsible for performing market investigations. If it decides that there is an adverse effect on competition, it must then decide whether action should be taken to remedy the effects identified, and if so, what action.

The CC has order-making powers of its own, but it can also accept undertakings from relevant parties, if they volunteer to remedy any identified failings themselves. It can also recommend (but not require) that remedial action should be taken by other public bodies.

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<sup>4</sup>Section 131(2) of the Enterprise Act 2002

The CC may opt for a structural remedy, as it did for example when ordering the divestiture of certain airports by British Airports Authority, or price controls, such as those imposed on Yell as part of the review of classified directory advertising services. In other cases the CC has opted for information-type remedies for consumers to make switching easier (e.g. when selling extended warranties on electrical goods). In a number of cases (including its review of the retailing of groceries) the CC has recommended a change to government policy.

Government is not required to follow a CC recommendation, but there is a strong presumption that it should do so. The CC will have identified a failing in the market which is causing consumer detriment and Ministers face considerable political pressure to respond to recommendations designed to remedy the failings identified. Government has recently reiterated its commitment to respond promptly to competition authority recommendations; the important point being that if it does not follow the recommendation it needs to explain publicly why not.

### **Groceries Code Adjudicator**

Following a market investigation into the groceries sector launched in 2006, the CC concluded in a report published on 30 April 2008 that while the UK groceries market was generally very competitive for consumers, there were instances of large supermarkets transferring unexpected costs and excessive risks to their direct suppliers. This would potentially lead to a loss of innovation and investment in the sector, leading to consumer detriment in the long term.

Peter Freeman, Chairman of the CC and Inquiry Group Chairman, said in relation to supply chain practices:

Some aspects of the way retailers deal with their suppliers could, if left unchecked, also harm consumers. The changes to the existing Code of Practice, along with the recommendation of an independent Ombudsman to police the code, aim to improve the existing system by making it more robust and proactive in tackling those practices which can damage investment by suppliers. We think that it would be in everyone's interest that a code governing retailers and suppliers enjoys the confidence of all those involved. Retailers with good practices and relationships should have nothing to fear.

The CC recommended the establishment of the Groceries Supply Code of Practice (GSCOP), and the establishment of an independent ombudsman to enforce it. Based on the earlier Supermarkets Code of Practice, the new Groceries Supply Code of Practice was set out within in the CC's wider Groceries (Supply Chain Practices) Market Investigation Order 2009. The Code covers interactions between large supermarkets and their direct suppliers – indirect suppliers are out of scope. Key provisions of the Code are as follows:

- All retailers controlled by corporate groups with UK retail groceries turnover in excess of £1 billion a year are included within its scope, termed 'designated retailers'
- An overarching fair dealing provision is included.
- Retailers are prohibited from making retrospective adjustments to terms of supply.
- Retailers are prohibited from requiring suppliers to change their supply chain procedures without reasonable notice
- Retailers are required to pay for goods as agreed in the supply agreement, and within a reasonable time.

- Retailers are prohibited from compelling direct suppliers to contribute to marketing costs
- Supply agreements may not include provisions whereby suppliers are held liable for losses due to shrinkage.
- Retailers may not require suppliers to pay for wastage, except in limited circumstances.
- Limiting the circumstances under which payment can be required as a condition of being a supplier
- Retailers are required to compensate for costs incurred by forecasting errors, under certain circumstances
- Retailers are prohibited from tying of third party goods and services for payment, except in limited circumstances
- Retailers are prohibited from certain practices around the conduct of promotions.
- Retailers are prohibited from demanding unjustified payments for consumer complaints.
- Retailers are required to provide notice of and reasons for de-listing suppliers or significantly reducing suppliers' business.
- A retailer's Senior Buyer will review decisions made by the Retailer in relation to the Code or Order, on receipt of a written request from the supplier.

The GSCOP is contained within the wider Market Investigation Order 2009, enforced by the Office for Fair Trading. The Order contains wider requirements on retailers, following on from the CC's recommendations. Such provisions include:

- requirements on retailers to provide written supply agreements to their suppliers, which must incorporate the Code;
- to supply such information as is reasonably required to the OFT and Groceries Code Adjudicator;
- a duty to train staff with respect to the Code;
- a duty to appoint an in-house Code compliance officer with a direct reporting line to the audit committee (or non-executive director); and their role and duties in ensuring compliance with the Code;
- Retailers are required to enter into binding arbitration to resolve any dispute with a supplier under the GSCOP

In addition to the above remedies, the CC announced that it would seek undertakings from grocery retailers to establish a GSCOP Ombudsman to monitor and enforce compliance with the GSCOP, and its functions. The CC recommended to Government that if the CC did not secure satisfactory undertakings from the retailers creating the GSCOP Ombudsman within a reasonable period, Government should take such steps as are necessary to establish the Ombudsman. The CC further recommended that, if this were necessary, Government should take steps to give the Ombudsman the power to levy significant financial penalties on the retailers for non-compliance.

The CC's terms of reference did not permit it to make a finding with respect to relations between primary producers and intermediaries, and it was therefore unable to make any formal recommendations in this regard. However, the CC did suggest that if it subsequently appeared that, despite the operation of the GSCOP (and the Ombudsman) intermediaries continued to transfer excessive risks and unexpected costs further up the supply chain, Government should consider the introduction of appropriate measures, including the extension of the GSCOP and the role of the Ombudsman or the introduction of a similar, complementary code and arrangements to cover the intermediaries and primary producers, such as farmers.

The sector did not make satisfactory progress in establishing their own regulator so the Government opted for legislation, introducing the Groceries Code Adjudicator Act, which gained Royal Assent on 25 April 2013. The Act provides for the establishment of an independent Groceries Code Adjudicator, to enforce the Groceries Supply Code of Practice. Enforcement of the wider Order remains the responsibility of the independent competition authorities.

The Adjudicator will be able to:

- arbitrate disputes between designated retailers and their direct suppliers
- investigate confidential complaints from direct and indirect suppliers, whether in the UK or overseas, and from third parties
- impose sanctions on retailers found to have breached the Groceries Supply Code of Practice, by making non-binding recommendations, requiring the retailer to publish details of their breach, or, in the most severe or repeated breaches, imposing a financial penalty.

The Act will come into force in June 2013. The Adjudicator will hold a consultation shortly after this, setting out draft guidance on the exercise of her powers: specifically, around the criteria for initiating investigations; investigation procedures; criteria for determining the application and choice of sanctions and methods for determining the maximum level of any financial penalties levied.

### **The Office of Fair Trading (OFT)**

OFT market studies are examinations into the causes of why particular markets are not working well for consumers, leading to proposals as to how they might be made to work better. They take an overview of regulatory and other economic drivers in a market and patterns of consumer and business behaviour.

As well as taking a look at particular markets, market studies can relate to practices across a range of goods and services, for example, doorstep selling to consumers, but potentially also business to business trade practices. The term 'market studies' is therefore not limited to markets in the economic sense. The OFT may also conduct market studies to improve its knowledge of markets or practices, or to look at developing markets, for example where the potential risks to consumers may be high, or where there may be potential barriers to entry.

If The OFT considers that unfair trade practices (which are not actually illegal) are causing markets not to work well for consumers, it can make recommendations to persuade the businesses

concerned to change behaviour. Alternatively, or if the businesses concerned do not change behaviour, it can refer the relevant market for a full market investigation by the CC or make recommendations to Government for regulatory change.

### **UK sector regulators and ombudsmen**

UK sector Regulators such as OFGEM (energy), OFCOM (telecoms and media) and the Financial Conduct Authority (FCA) (formerly the Financial Services Authority (FSA)), also typically have market study or market review roles and a commitment to competitive markets that deliver a fair deal for consumers. In the case of OFGEM and OFCOM, they have strong influence over company behaviours because of their licensing and other powers and they also have an ability to refer markets to the CC for a full market investigation. The FCA has extensive rule-making powers of its own as did the FSA before it, and a priority of making retail markets for financial services work effectively for consumers as well as promoting effective competition in the interests of consumers.

In 2006 the FSA launched a Retail Distribution Review to look into whether consumers were being well-served by business in the retail investment services sector. The Review concluded that business to business trade practices between investment services providers and financial intermediaries were one of the causes of the market not working as competitively as it might for end consumers, causing significant consumer detriment. The FSA introduced a range of measures to make the market work better, which took effect in December 2012. Prominent amongst these was a ban on commission payments for sales to consumers by financial intermediaries.

On the other hand, demonstrating the need to consider the specificities of individual markets, the FSA in its Mortgage Market Review did not find evidence of commission bias.

### **(3) Government action against specific Unfair Trade Practices**

The UK position is that where competition in a market is working well and consumers are being offered a fair deal, any intervention always has to be very cautious and carefully calibrated, in particular to ensure that it does not cut across the enforcement of competition law and policy or distort competition in the particular market to the detriment of consumers.

Protecting weak companies against strong ones may appear to be “fair” and even to improve business diversity in the short term but it can damage market dynamics, deter new market entry and in the long run make the market less efficient, raising prices for consumers. Intervention risks ossifying existing market structures, inhibiting potentially valuable concentration in diffuse markets which would tend to remedy any market imbalances naturally. Intervention must therefore be targeted at market failures and carefully weighted so that it has a beneficial or at least neutral impact, in both the short and long term.

It is the UK’s position that this should remain the case for all but exceptional circumstances. One such exceptional case is the proposed Government action to support pub tenants.

In October 2010, the OFT issued its final decision following an examination of the Pubs market in response to a super-complaint by the Campaign for Real Ale (CAMRA). A key issue in CAMRA's complaint had been the impact of the 'beer tie', which requires pub lessees (operators) to purchase beer solely through their pub-owning company landlord. Some pub operators had complained that

the Pub companies which owned the Pubs imposed unfair conditions upon them, in particular onerous charges, which made it impossible to make a decent living.

The OFT found that competition in the Pubs sector was working well and that there was no significant consumer detriment. However, the Parliamentary Business, Innovation and Skills Committee remained concerned that the relationship between pub companies and tenants was unhealthy and unbalanced.

On 22 April 2013 Government therefore launched a consultation setting out its plans to address unfair trade practices in this sector. Ministers want to make sure that pub tenants are treated fairly by pub companies and hope that the new proposals will save tenants £100 million per year.

The Government proposes to introduce a Code of Practice and an independent adjudicator to resolve any disputes arising out of the Code. The Code would contain mandatory rules for those pub companies with the greatest market power, namely those pub companies which have more than 500 pubs. In particular it would stop these pub companies abusing the beer tie, which restricts tenants' ability to purchase beer from other sources.

Under the proposals a new Adjudicator would have the power to:

- enforce the Code
- investigate any breaches, and
- deal with disputes through possible sanctions and fines

It should be made clear that the proposed intervention in the pubs sector is to support the continuation of pubs as valuable community assets and safeguard the long term stability and sustainability of the industry, through proportionate and targeted interventions where needed.

### **(C) Responses to the Specific Questions posed by the European Commission**

#### **1) Do you agree with the above definition of UTPs?**

The UK agrees that the sorts of practices identified in the Commission Green Paper may be seen as unfair in certain circumstances, but they will not always be unfair across all sectors and types of business relations and certainly should not always be prohibited. Some trade practices may be seen in some circumstances as unfair by some observers and market participants, but may simply reflect the exercise of buyer power, which may actually deliver positive results for consumers in an otherwise competitive market

The Green Paper definition is useful for illustrative purposes and to set the terms for a discussion around Europe on when unfair business to business trade practices are problematic and when action should be taken against them.

But beyond establishing a broad framework of fair contract law to govern business to business relations, the UK prefers to tackle unfair trade practices on a sector by sector basis, in those cases where they impinge on competitive markets delivering best results for consumers. So the question of what is unfair will vary from case to case. An overarching, cross-sectoral legal definition is therefore not needed for legal purposes and would not be helpful.

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

No, the concept of business to business UTPs is not generally recognised as such in the UK. However, UK contract law grants some recourse to companies which are the victims of unfair practices and action has been taken in a number of sectors to constrain business to business behaviour, especially in sectors where unfair practices result in markets delivering poor outcomes for consumers.

**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 UK sees no reason to limit the definition of UTPs to those arising in contractual negotiations.

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

In theory UTPs could occur at any stage in any supply chain. What matters is the effect which such practices may have.

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

The UK agrees that UTPs are most likely to be problematic in those cases where businesses are dependent on other businesses and cannot, in practice, easily switch to another supplier or another customer. In those cases the dependent businesses will be afraid of alienating the businesses on which they depend.

But that does not mean that such situations should be banned or always give rise to special rights for the dependent businesses. Tough negotiating by strong companies can stimulate efficiency which may prompt a weaker, dependent businesses to innovate and perhaps diversify, ultimately making the supply chain more resilient and generating growth. Government intervention to prevent such tough negotiating would, in such a case, tend to ossify market structures, restrict new market entry, and reduce competition, innovation and eventually growth.

The stronger company in such a situation must also have regard to its own long-term success which will depend on a robust, diverse supply base and on investment and innovation within the supply base.

There may be cases where UTPs have negative overall effects and should therefore be regulated, but this depends on the nature of the market concerned and the way in which competition works in that market. Any intervention should be cautious and evidence-based, designed to make the market work better, rather than just to protect weaker businesses against stronger ones.

**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?**

The UK Government has nothing to add to the reports of its competition authorities which have examined the grocery sector in considerable detail.

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

The UK would distinguish between unfair trade practices which are problematic, and trade practices which might be seen by some as unfair but which have no negative market effects. The presence of either type of trade practice and the ability to distinguish between them depends on a robust investigation of the relevant market.

The UK has intervened recently or is planning to intervene in relation to sales of some financial services products to businesses, sales of energy, grocery retail supply contracts and relations between pub owners and pub tenants.

**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.**

Not applicable

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

As set out above, the UK view is that UTPs may in certain circumstances impinge negatively on consumers and it is generally only where this is the case, that the public interest in intervention is likely to outweigh the risks of intervention.

It is important to point out that tough negotiating by large companies may also deliver consumer benefits, even if this is seen as unfair at the time by some suppliers. Such consumer benefits may be long-term as well as short term if they drive market efficiency, innovation and competitiveness. For example, the demands which Japanese car manufacturers placed on component suppliers were some years ago perceived by some as unfair, but they have probably helped stimulate a massive improvement in the competitiveness and efficiency of the European automotive supply chain.

The sharing of commercial risk by retailers, for example, may appear unfair in some circumstances, but in others it may spark innovation and consumer benefits if a supplier gains thereby more awareness of consumer preferences and factors affecting retail success, prompting investment in design or packaging or reformulation of product, for example.

**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.**

Any trade practice will have an impact on cross-border trade wherever there is cross-border supply of goods or services. Whether this is a positive or negative or neutral effect will depend on the market concerned.

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

The UK cannot comment on the adequacy of the regimes in place in other countries. It is content with the existing UK framework of law and institutions, though this does not prevent a constant searching for ways to deliver an even better system.

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



It is desirable for all countries to have in place a fair framework of contract law. This must balance legal certainty and freedom of contract with the need for basic standards of fairness and the prevention of abuse.

All countries should ideally also have in place a mechanism to make sure that markets are fully competitive. Competition drives efficiency and innovation and therefore economic growth and delivers the best results for citizens as consumers.

**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?**

Measures to address UTPs will generally have the potential to affect intra-community trade, although they will primarily take effect on the domestic market.

The GSCOP, for example will affect all relevant grocery supply contracts, even if the supplier is located in a different EU Member State. However, the vast majority of UK grocery supply contracts are framed under UK law between UK-based retailers and UK-based suppliers.

Many UK-based suppliers of energy and financial services have foreign ownership but they trade in the UK. Most owners of pubs and tenants of Pubs are UK businesses, but ownership outside the UK is not inhibited in any way.

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

It is primarily for Member States to ensure that their markets are working properly, but the EU has an interest in competitive markets as a driver of growth and a vital element of the Single Market.

If Member States take action which has the effect of restricting intra-community trade, the Commission should first take action using its existing powers in order to preserve the Single Market.

If national systems are all compatible with the Single Market but just different and the relevant markets have significant cross-border elements, then it becomes important to assess how costly such diversity is and perhaps to take steps to persuade cross border businesses to agree to a Europe-wide voluntary mechanism. If necessary, the Commission could attempt to persuade Member States to align their systems.

Any European action should be based on detailed and comprehensive evidence that the status quo is failing and imposing significant costs on businesses. Any action should be the minimum necessary to reduce those costs and should not be at the expense of introduction of new costs elsewhere.

The best way of ensuring that the various national systems work together would be for the Commission to facilitate dialogue between Member States and national enforcement bodies, to highlight best practice and to ensure that the systems are transparent and capable of interaction. The ECN provides a model for this sort of cross-border cooperation.

The UK would generally not favour action on a cross-sectoral basis. Action which might be appropriate in one sector could be deeply damaging in another, for the reasons set out above.

Attempting to remedy UTPs through European legislation runs the risk of highly damaging political interference in markets, which may be more damaging than the UTPs it is designed to address. Legislation would have to be a last resort and be based on compelling evidence of need in order to have UK support. If the Commission would seek to intervene beyond the recommendations of the UK competition authorities or in markets which the latter had not considered, the UK would need to be convinced that the market investigation it had conducted was of similar weight and took full account of UK market conditions and that any proposed intervention was solidly evidence-based and carefully balanced before it could be supported. Realistically it would expect the relevant UK competition or sectoral authorities to have been involved in such investigations and to support the proposed intervention.

**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.**

The risks associated with regulation of UTPs are considerable, as set out above. It is too early to judge the impact of recent UK measures to combat UTPs, for example in the groceries sector.

**16) Are there significant discrepancies in the legal treatment of UTPs between Member States? If this is the case, are these discrepancies hindering cross-border trade? Please provide concrete examples and quantify the impact to the extent possible.**

The UK cannot comment on the laws of other Member States and how they work.

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

If the costs are high, the Commission should look at a voluntary solution, highlighting best practice and, if necessary persuading Member States to make sure that their systems interact better. Only if such attempts fail and costs remain unacceptably high should further European action be contemplated (see above).

**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?**

This would depend on the nature of the unfair trade practices that the Government in question was trying to address and on the negative effects which such practices were causing. The UK would not exclude the awarding of such powers, if the evidence suggested that they were needed.

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

Most of the unfair trade practices which the UK authorities have come across could probably fall under one or more of the categories set out in the Green Paper but they are different sector by sector. The practices highlighted in the Green Paper seem informed mainly by retail supply environments.

In the energy sector, for example, OFGEM has been concerned to regulate rolling over of contracts and automatic transfer of business customers onto higher tariff contracts following expiry of fixed term contracts.

**20) Could setting up a list of prohibited UTPs be an effective means to address the issue? Would such a list have to be regularly updated? Are there possible alternative solutions?**

The UK would **not** support the setting up of a list of prohibited UTPs on a cross-sectoral basis for the reasons set out above. What is unfair depends on the sector, the business environment and the context. Action should be taken, if at all, on a sector by sector basis following careful investigation and analysis of the market. Otherwise intervention risks being extremely damaging to the dynamism of European markets and may interfere with the role of the Member State competition authorities.

**21) For each of the UTPs and corresponding possible fair practices identified above, please:**

- a) Indicate whether or not you agree the analysis of the Commission. If applicable, provide additional information.**
- b) Explain whether the UTP is relevant for the sector in which you are active.**
- c) Explain if the corresponding possible fair practice could be applied across the board in different sectors?**
- d) Explain if the UTP should be prohibited per se or if its assessment should be made on a case by-case basis.**

As stated above, the UK does not accept that all of the potentially unfair practices listed in the Green Paper should be considered unfair in all cases.

Ambiguous or oral contracts, for example, may or may not be unfair in different situations and will often be construed against the company seeking to rely on them by the UK courts anyway, though this may not benefit a dependent company that cannot afford to assert its rights. The risk of unfairness in the latter case arises out of the disparity in commercial strength of the two parties and forcing contracts to be written down or couched in clear language would do nothing to remedy the underlying dynamics. The strong company would simply find another way to dictate terms.

Whether or not any such terms are unfair should be determined on a case by case basis following detailed market analysis. The justification for taking action must be more than that a strong company has an opportunity to dominate a weak one, it must be that such practices are affecting the market itself and damaging the short or long term interests of consumers, thereby inhibiting competition and growth.

The UK does not believe that harmonised contract law provides any kind of solution to unfair trade practices. Such practices are most likely to flourish where dependent companies are not in a position to assert the existing contract rights that they have, let alone any new ones. Where UTPs are a problem, a better solution is to agree a specific code of practice for all the market players adapted to the needs of the sector concerned. The code of practice may then require independent enforcement, if the UTPs are significant enough to warrant such costs being incurred.

**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?**

The UK cannot comment on the commercial efficiency reasons that businesses may have for their commercial practices.

The UK has some sympathy for the Commission's wish to see an end to the artificial partitioning of EU markets, but might have some concerns about excessive interference with commercial freedoms. It is not easy to see how any new rule seeking to outlaw territorial supply constraints could be framed or practically enforced, except where companies which impose territorial resale limitations on their customers risk being in breach of competition law.

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

See answers above.

**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?**

See answers above

**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?**

The Green Paper seems to take for granted at times the principle that some business behaviours are universally deplorable and should be prohibited because of their effects on other businesses.

The UK does not see the protection of some businesses against others as an objective in itself.

It sees the role of Government as being first to set an overarching legal framework within which businesses transact with each other, and second to only then intervene in such transactions when the markets are not fully competitive or not working properly, not delivering consumer welfare and thereby driving efficiency and growth.

It is therefore the **effects** of alleged UTPs which are of primary concern, not the existence of such practices in the first place.

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