

UNFAIR COMMERCIAL PRACTICES IN THE EU

The potential gaps and how to fill them

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I. Overview of Overarching Principles in EU Member States

- **Founding contractual principles:**
 1. Freedom of Contract
 2. Fair Dealing (UK GSCOP, Hungary)
 3. Good Faith (Spain)
- **Economic principles:**
 1. Balance of Rights & Obligations (Italy/France)
 2. Mutual Interest
 3. Level Playing Field

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II. Commonly Recognised B2B Unfair Commercial Practices Across Member States

- **Four Broad Categories of Unfair Commercial Practices:**
 1. Termination & Contract Variation
 2. Pricing and Payment
 3. Promotional Allowances
 4. Access to Shelf Space

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II. Commonly Recognised B2B Unfair Commercial Practices Across Member States

1. Termination & Contract Variation

A. Delisting Threats / Delisting

- Threat of or actually ceasing “to purchase groceries from a supplier or to significantly reduce volumes of purchases made from that supplier” (UK GSCOP)
- Is the delisting threat credible?

B. Disruption of Business Relationship to Gain Advantage

C. Unilateral / Retroactive Contract Variation

1. Termination & Contract Variation

Provisions	Czech Republic Legislation	France Civil/ Commercial/ Consumer Code	Germany Legislation	Hungary Legislation	Spain Legislation/ Private Code	UK Code of Practice
TERMINATION & UNILATERAL CONTRACT VARIATION						
Aimed at Delisting Problems		✓			✓	✓
No Disruption of Business Relationship	✓	✓				
No Unilateral Changes				✓		✓
No Retroactive Changes	✓	✓	✓			✓

II. Commonly Recognised B2B Unfair Commercial Practices Across Member States

2. Pricing & Payment

- A. Sales Below Cost
- B. Late Payment
 - Directive 2000/35/EC
- C. Non-Service Related Payments
 - “Hello fees”, “marriage bonuses”, listing fees & other product placement payments
- D. Risk Transfer
- E. Incomplete Payment / Invoice Deduction

2. Pricing & Payment

Provision	Czech Republic Legislation	France Civil/ Commercial/ Consumer Code	Germany Legislation/ Case Law	Hungary Legislation	Spain Legislation/ Private Code	UK Code of Practice
PRICING & PAYMENT						
No Sales Below Cost	✓				✓	
No Late Payment	✓	✓	✓	✓	✓	✓
No Non-Service Related Payments	✓	✓	✓	✓	✓	
Restrictions on Risk Transfer	✓			✓		✓
Incomplete Payment / Invoice Deductions	✓	✓				

II. Commonly Recognised B2B Unfair Commercial Practices Across Member States


3. Promotional Allowances

4. Access to Shelf Space

A. Listing Fees / Pay to Stay

- Payment to Secure Better Positioning / Increase Shelf Space
- “*May improve supply chain efficiencies, but also distort competition”*”
- Impact of Private Labels on Competiveness of the European Food Supply Chain, DG Enterprise

Provision	Czech Republic Legislation	France Civil/ Commercial/ Consumer Code	Germany Legislation	Hungary Legislation	Spain Legislation/ Private Code	UK Code of Practice
PROMOTIONAL ALLOWANCES						
Prohibitions / Restrictions on Funding of Promotions	✓	✓				✓
ACCESS TO SHELF SPACE						
Prohibition / Restrictions on “pay to stay” Fees / Payment for Better Shelf Access / Listing Fees	✓	✓	x	✓		✓
OTHER PRINCIPLES						
Contract for Supply Must Be in Writing	✓				✓	✓




UK Groceries Supply Code of Practice (“GSCOP”)

- **2008:** Competition Commission publishes its Groceries Report:
 - Highly concentrated groceries market to consumer detriment
 - Grocery retailers passing on excessive risks & unexpected costs to suppliers
 - Remedies: GSCOP with Ombudsman
- **2010, February:** GSCOP in force, replacing voluntary Supermarket Code of Practice
 - Supermarkets turnover > £ 1 billion p.a.
 - Incorporate into **all** supply agreements
 - Ombudsman to arbitrate, receive complaints, etc.

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III. Potential Gaps

1. International Retail Alliances
2. Private Labels

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III. Potential Gaps

1. International Retail Alliances

- The European Commission Communication on “Food Prices in Europe”


“The **size and number of buying alliances in the food sector has grown considerably throughout the EU**. The involvement of larger buyers in such alliances has led to increasing concerns expressed by producers of both processed and unprocessed food, as well as farmers. The impact of these kind of agreements on the functioning of the food supply chain needs to be closely followed since **such agreements may serve as a tool for foreclosing rivals' access** to essential inputs at competitive conditions and/or for competitors to engage in collusive behaviour on downstream markets (i.e. price fixing, output limitation or market allocation)...”
- Effect of Unfair Commercial Practices in context of International Retail Alliances



III. Potential Gaps

2. Private Labels

- The Impact of Private Labels on the Competitiveness of European Food Supply Chain, DG Enterprise
 - Definition: “*Products that are developed, branded and marketed by retailers rather than food manufacturers*”
 - Growth of private labels
 - Three roles:
 1. Fill gaps for products categories not served by brands
 2. Alternatives to brands (‘me too’ or ‘copycat’)
 3. Pioneer new product categories (value innovator)



III. Potential Gaps

2. Private Labels

- Perceived problems:


1. Copycatting

“Selling private label products with packaging displaying similar characteristics to... rival brand, which may as a result induce consumers to buy the private label instead, either by mistake or... by assuming that the copycat label has the same reputation...”

UK Competition Commission, 2008

2. Free-Riding

- To drive private label sales
- Case No IV/M.1221 Rewe/Meinl



III. Potential Gaps

2. Private Labels


- Perceived problems:

3. Possibility of privileged insights into competitor's business

- Retailer's relationship as customer allows it access to information that it would not normally have as a competitor of the supplier

4. Pressure on brand manufacturers

- Possibly to provide ingredients / products under threat of retaliation



IV. Filling the Gaps


1. Solutions reviewed in DG Enterprise Private Labels Study
2. Potential Tools



IV. Filling the Gaps

1. Solutions reviewed in Private Labels Study

1. Copycatting:
 - IPR (informal protection, design, trademarks)
2. Unfair Contracting
 - Contract Law (DCFR)
 - Competition Law
 - Liberalisation
 - Consumer Protection Law
 - Code of Conduct
3. Roadmap
 - Voluntary code of conduct
 - Collective action by primary sector (disapply Art.101 under CMO)
 - Code of Conduct (Regulation / Directive)
 - Public law instruments of inspection and law enforcement




IV. Filling the Gaps

2. Potential Tools

1. National Codes of Practice
 - UK GSCOP
2. EU wide Codes of Practice
3. European Standard Contracts
4. EU Sectoral Directive
5. Other Instruments
 - Private enforcement (inc. criminal sanctions)
 - Public enforcement
 - Commercial law

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Thank you for your attention!

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