



**British Institute of
International and
Comparative Law**

**Models of Enforcement in Europe
for Relations in the Food Supply Chain**

**Justine Stefanelli
Philip Marsden**

19 April 2012



This Briefing Paper was produced with the support of the European Union. The views expressed in it are exclusively those of the participating organisations and can under no circumstances be regarded as reflecting the position of the European Union.

EXECUTIVE SUMMARY

1. This report identifies and evaluates existing national enforcement mechanisms in the European Union in relation to the food supply chain, and other relevant sectors, with a view toward examining the feasibility of and possibilities for a European Union-wide enforcement mechanism to improve trading relationships. Existing soft law and hard law mechanisms are considered, as well as plans for regulation in several European Union Member States.
2. The report was prepared through a combination of desk-based research and detailed discussions with representatives from national competition authorities, academics and practitioners who are experts in this field, or who have had first-hand experience with the enforcement mechanisms.
3. The study confirms that the issue of unfair commercial practices and unequal bargaining power between retailers and suppliers in the food supply chain is an area of concern for a large number of Member States.
4. The report is not a comprehensive survey of all European Union Member States. Fifteen Member States are considered in this report. Ten Member States have taken steps to regulate these issues.¹ Six of the Member States have done so within the framework of competition law, including the UK's legally binding code of conduct and the French structural injunction remedy. It appears that employing competition law to manage these issues is overall, ineffective, with the notable exception of Germany.
5. Three Member States have chosen a variety of soft law mechanisms to regulate retailer/supplier relations: a voluntary code of conduct only; the combination of a voluntary code of conduct with a duty to mediate or arbitrate; and the creation of a forum for discussion where non-binding decisions and opinions are produced. While these mechanisms are viewed as generally positive, there is little possibility for enforcement through the imposition of sanctions, e.g., fines. One of these Member States has specifically indicated its intention to support its soft law mechanism with the possibility to impose financial penalties in the future.
6. Five Member States are currently making plans to regulate these issues. The most popular choice of mechanism is a code of conduct accompanied by a dedicated enforcement body that is competent to issue sanctions for violation of the code.
7. Other sectors have experienced problems similar to those associated with retailer/supplier relationships in the food supply chain sector. A variety of enforcement mechanisms have been adopted to deal with the issues, such as: the creation of a special adjudication system; the development of a voluntary code of practice with an associated certification of compliance scheme; and the enforcement, in the courts, of a contractual 'equity principle' which attempts to ensure that the balance between parties is equal.
8. At present, no Member State employs a single method of enforcement that is fully effective. This is, to a large extent, because the majority of mechanisms are based on competition law, but also because it is difficult to create a model that adequately takes into account the unique nature of the food retailer/supplier relationship.
9. A number of alternatives for regulation could also be considered:
 - the imposition of structural competition law remedies;
 - enforcement through private law alone (i.e. based on bilateral contractual rights);
 - introduction of the principle of fair dealing into business-to-business contractual relations; or

¹ European provisions on competition law and unfair commercial practices that are applicable in all 27 EU Member States are not included in the scope of this study for the reasons explained in Part II.

- regulation via the use of compliance drivers alone, e.g., financial penalties, corporate benchmarking, etc.
10. There is scope for the European Union to regulate these issues in order to protect the functioning of the internal market. In particular, this may be done by recourse to Articles 115 or 116 of the Treaty on the Functioning of the European Union, which grants the Council and the Commission legislative powers to approximate national law that affects the functioning of the internal market, or distorts the conditions of competition in the internal market.
 11. The European Union is also well-placed because there is a large amount of confusion regarding the appropriate method of enforcement, and can provide some clarity and consistency. In this regard, the report demonstrates that the European Union has a number of soft law and hard law tools at its disposal through which to develop an effective mechanism.
 12. In deciding whether and how to regulate retailer/supplier relations, the European Union should take into consideration those characteristics of enforcement that this study identifies as being favourable, namely:
 - Standards based on the principle that a retailer must deal with its suppliers fairly, lawfully and in good faith, without duress and in recognition of its suppliers' need for certainty (i.e., a fundamental principle of fair dealing);
 - A binding instrument that regulates conduct through, e.g., the imposition of obligations to change business structures;
 - A soft law dispute resolution framework that provides parties with a clear procedure in which to resolve their issues;
 - A framework to adequately address imbalances of bargaining power;
 - The creation of a dedicated adjudicator or ombudsman that can build up sector-specific expertise;
 - A framework that can be accessed by all suppliers in the food supply chain, whatever their geographical origin;
 - Routine publication of reports in the food sector to identify good and bad practice;
 - The possibility for *ex officio* investigations;
 - A mechanism to allow anonymous complaints;
 - The availability of commitment procedures; and
 - The possibility to impose enforcement measures with 'teeth', e.g., financial penalties.
 13. Our study indicates that a mix of hard law and soft law solutions may be the most effective. In that regard, the European Union could also take into account the possible difficulties of producing only hard law mechanisms to regulate these issues and, at least in the short term, give serious thought to the creation of European Union-level standards or a code of practice that can be enforced either at the EU level or at the national level. In the longer term, the Commission could pursue two strands: the first would involve a solution that addresses the very concept of unfair practices in business-to-business trading relations, converting the standards or code into a statutory requirement via a Directive or Regulation; the second strand would involve applying competition law in a way that creates precedents for behaviour by retailers on which suppliers are dependent. This might include pursuing dominance cases, where unfair practices are imposed by a retailer which has market power over suppliers through, for example, controlling access to its shelves which in turn are the only conduit to a cohort of consumers who cannot be accessed by suppliers in any other way. Local and regional 'dominance' has already been addressed by the Commission (and national competition authorities) in retail merger cases, and by the French authority in the Casino case (see Part II.A.2 below). Structural remedies could extend to restricting vertical integration of wholesaling by retailers, which adversely affects the ability of suppliers to reach a range of retailers and the ability of smaller retailers to obtain grocery products at competitive prices from a range of competing wholesalers.

I. INTRODUCTION

This report identifies and evaluates existing enforcement mechanisms applied in European Union (EU) Member States, in relation to the grocery supply chain and other relevant sectors, with a view toward examining the feasibility of developing an EU-wide mechanism to improve trading relationships within food supply chains that serve the EU market.

In the context of the grocery supply chain, unequal bargaining positions between some retailers and their suppliers have, arguably, resulted in imbalances in market power on the part of retailers.² The main consequences of buyer power include the ability of retailers to shift costs onto suppliers, and to change contractual terms retrospectively. Because suppliers are often economically dependent on these large retailers, they are often in a very weak bargaining position and therefore unable to challenge these practices or recover any resultant losses. This situation has contributed to what has become known as a climate of fear among suppliers, particularly smaller ones but also in some cases multinationals that prevents suppliers from invoking their rights privately before courts or complaining to the relevant authorities.³

There is some debate over the most effective method for addressing these issues. One option is to regulate them nationally through contract law. However, this has been viewed as inadequate,⁴ largely because it only provides a basis for private enforcement through courts and does not, therefore, resolve the culture of fear phenomenon experienced by the suppliers, but also because regulation through a dictation of contractual terms and trading practices may often be seen as an interference with the freedom to contract. Moreover, a contract law approach is inappropriate in situations where the power imbalance between retailers and suppliers has resulted in the elimination of comprehensive paper contracts discussing not only the intention to do business with each other, but also details regarding the manner of pricing and volumes. The norm in some Member States, e.g., the UK, is for intentions or 'programmes' to be agreed in advance, but final volume, price and delivery details are communicated verbally or electronically at short notice.

Because of the problems associated with regulation through contract law, the usual result is that the behaviour of large food and drink retailers toward their suppliers is regulated under competition law. However, many competition authorities are reluctant to intervene against many of the practices at issue without evidence that they result in consumer harm through higher prices. In fact, the exertion of buyer power can result in long-term consumer harm through reduction in choice in the short to medium term and higher prices in the longer term, and some authorities may not be factoring that effect into their analysis. Competition law is also relatively permissive with respect to vertical relations along a supply chain and tends only to intervene where there are disproportionate indications of market power. For example, Article 102 of the Treaty on the Functioning of the European Union (TFEU) creates the offence of abuse of a dominant position but is perceived by some⁵ as failing to cover conduct affecting trading relations between undertakings in this context because it only applies to dominant firms.⁶ In many cases within the grocery sector,

² This subject matter has been discussed extensively by experts in the field. See, e.g., A. Pera and V. Bonfitto, 'Buyer Power in Anti-trust Investigations: A Review' [2011] ECLR 8; P. Dobson and M. Waterson, 'Retailers power: recent developments and policy implications', *Economic Policy* (April 1999); E.A. Kaditi, 'Market Dynamics in Supply Chains: The Impact of Globalization and Consolidation on Food Companies' Mark-Ups', LICOS Discussion Paper 283/2011; G. König, 'The Impact of Investment and Concentration Among Food Suppliers and Retailers in Various OECD Countries', paper from Global Forum VIII on International Investment, 7-8 December 2009; M. Vander Stichele and B. Young (on behalf of Agribusiness Accountability Initiative, 'The Abuse of Supermarket Buyer Power in the EU Food Retail Sector' (March 2009); L. Bukeviciute, A. Dierx and F. Ilzkovitz, (European Commission DG Economic and Financial Affairs) 'The functioning of the food supply chain and its effect on food prices in the European Union' (2009) available at <http://ec.europa.eu/economy_finance/publications/publication15234_en.pdf> (accessed 5 March 2012).

³ See, e.g., Vander Stichele and Young, supra note 2, p. 5.

⁴ M. Hesselijnk, 'Unfair Terms in Contracts between Businesses', Amsterdam Law School Legal Studies Research Paper No. 2011-11 and Centre for the Study of European Contract Law Working Paper No. 2011-07, available at <<http://ssrn.com/abstract=1871130>> (accessed 20 February 2012).

⁵ I. Kokkoris, *A Gap in the Enforcement of Article 82* (BIICL 2009).

⁶ For a general discussion of how competition law applies to the food sector see, F. Stancke, 'Competition law in the food sector' in B. van der Meulen (ed.) *Private Food Law: Governing food chains through contract law, self-regulation, private standards, audits and certification schemes*, (Netherlands: Wageningen Academic Publishers, 2011) pp. 353-80.

the undertakings are not dominant in the classical sense, although the degree to which many food and grocery suppliers are dependent on large retailers indicates that the latter have market power, even if they are not dominant in the classical sense. Where retailers are selling their own brand products⁷ these are, of course, also competing with suppliers, and horizontal anti-competitive activity may be of more interest to competition authorities; but again, evidence will be required of some form of distortion or restriction of competition, through, for example, exclusionary or discriminatory conduct.⁸ Despite these limitations, several Member States have attempted to regulate retailer/supplier relations through competition law. However, because competition law has not been applied in most jurisdictions to address dominance or market power as it is exhibited in the food supply chain, enforcement based on competition law has, in general, not always been very effective.

Discussion of these issues is not limited to the food supply chain. Other sectors have regulatory and enforcement mechanisms in place to ensure that businesses conduct themselves fairly towards each other.⁹ Relevant examples are discussed below in Part III.

The problems outlined above are widespread. Many EU Member States, in an attempt to address these matters, are either currently engaged in investigations into retailer/supplier power, or implementing mechanisms that have been in place for some time.¹⁰ As a result, the EU Commission has taken an interest in these matters. In 2008 the European Commission established a High Level Group on Competitiveness of Agri-Food Industry. In March 2009 members of the High Level Group endorsed 30 Recommendations (the Roadmap) as contained in the Final Report of the High Level Group. To oversee the implementation of the Roadmap the Commission established a new high-level stakeholder Forum to replace the 2008-2009 High Level Group. The new Forum (called EU High Level Forum for a Better Functioning Food Supply Chain) includes an expert group focused on business-to-business (B2B) contractual relationships. Within the expert group, the trade and business associations representing each stage of the supply chain formed their own working group which produced, in November 2011, 'Vertical Relationships in the Food Supply Chain: Principles of Good Practice.' These principles indicate topics for potential coverage in a Code of Conduct or a standard to be applied to companies within food supply chains selling into the EU. That same month, representatives of civil society organisations concerned about the international development impacts of food supply chains issued "Recommendations to the EU High Level Forum for a Better Functioning Food Supply Chain in Relation to Business to Business Contractual Practices Expert Platform's Forthcoming Work Exploring 'Code' Implementation Options" (Civil Society Recommendations) (see Annex III). The manner in which the EU will choose to regulate these issues is still uncertain, though there may be room for regulation based on the preservation and functioning of the internal market.

⁷ See, e.g., V. Daskalova, 'Private Labels (Own Brands) in the Grocery Sector: Competition Concerns and Treatment in EU Competition Law', TILEC Discussion Paper DP 2012-002 (9 January 2012), available at <<http://ssrn.com/abstract=1981958>> (accessed 20 February 2012).

⁸ Kokkoris, *supra* note 5.

⁹ The authors considered several other sectors in the study, including the financial services sector. While the financial sector also has a significant imbalance in power between large financial service providers and customers, we concluded that the example of financial services did not provide an adequate analogy to the situation in the food supply sector. (The presentation of Adrian Dally, Head of Policy at the UK Financial Ombudsman Service on 'Fair Play: Retailers and the Food Supply Chain' given at European Parliament on 6 December 2011 provides useful pointers in thinking through common points and differences). There are significant differences when drawing an analogy with the financial sector due to the fact that the financial services ombudsman is a business-to-consumer mechanism. In addition, what is missing from the comparison is something akin to the climate of fear experienced by suppliers in the food sector. The 'David v Goliath' scenario in the financial sector (,which requires an ombudsman) differs since the 'David' in the finance situation is typically the consumer/user of financial services that generally can complain or switch provider without fear of retribution, unlike a grocery supplier. Government initiatives to stimulate bank lending to small businesses in the UK (the Merlin project) are a recognition that banks on which SMEs are dependent may need to apply a 'must-deal' policy as if they were dominant..

¹⁰ For brief updates regarding food and retail news in the EU, see European Competition Network, 'ECN Brief – Extended Issue', No 05/2011, pp. 5-6.

Methodology

Our study was prepared through a combination of desk-based research and detailed discussions with representatives from national competition authorities, academics and practitioners who are experts in this field, or who have first-hand experience with the enforcement mechanisms. We are also grateful for advice and input from the Tilburg University. This report consists of five parts, including this introduction. Part II considers methods of enforcement (mandatory and voluntary) in place in a selection of EU Member States, and makes conclusions regarding their successes and failures. Part III examines whether adequate enforcement mechanisms exist within other sectors that could be used as a basis for comparison or recommendation for an EU-wide enforcement mechanism in the food supply chain. Part IV discusses the issues surrounding the successful creation of an EU-wide enforcement mechanism, and the possible role for other methods of enforcement. Part V concludes the study.

II. EXAMPLES OF ENFORCEMENT MECHANISMS IN THE MEMBER STATES

The relevant legal mechanisms covered by this report include:

- Articles 101 and 102 TFEU (the EU competition rules – see Annex I) which apply directly in all 27 member states;
- National competition regimes;
- Some national unfair competition laws (which have a different legal basis and focus than competition laws;¹¹
- Other national laws dealing with unfair B2B trading practices. The Unfair Commercial Practices Directive¹² (and its national law manifestations) largely only applies to business-to-consumer (B2C) behaviour and is therefore not relevant to the subject of this report.¹³

Those Member States that have chosen to address buyer power directly and regulate conduct between food retailers and suppliers have chosen tools ranging from hard law, e.g., regulation and legislation, to soft law, e.g., voluntary codes of practice or good conduct.¹⁴ Other Member States have only recently begun to take action in this field. This divide is reflected in the discussion below. Where we were able to speak directly with someone knowledgeable in the Member States considered, we elaborate specifically on the practical operation of the standards in place (i.e., legislation or code) and the success or failure of enforcing the standards. An overview of these practices is represented in a table in Annex II.

A. Regulation through Hard Law (Legislation)

1. Czech Republic

The Act on Significant Market Power in the Sale of Agricultural and Food Products and Abuse thereof¹⁵ (the Market Power Act) has been in force in the Czech Republic since February 2010. It provides a definition for ‘significant market power’ which relies on whether the supplier is

¹¹ Competition law is classically designed to ensure free and fair competition between businesses at all levels of the supply chain, with consumer welfare as the ultimate goal. ‘Unfair’ competition law (a concept that does not exist in English law and in some other legal systems) is designed to protect businesses from unfair competitive practices by their competitors. It covers, for example, misleading comparative advertising, denigration of a competitor’s products, passing-off etc. It is founded originally on Article 1382 of the Code Napoleon (enshrined in the French Code Civil), and the most often cited statute is the German law on unfair competition, first enacted in 1896.

¹² Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

¹³ However, more detail regarding this Directive is discussed in Part IV.3 of this report.

¹⁴ Relevant legislation is set out in the text throughout this section, and also at the end of the Report, according to country.

¹⁵ Act No. 395/2009 of 9 September 2009.

dependent on the buyer, in view of the relevant market structure.¹⁶ In particular, a buyer is deemed to have significant market power if its turnover exceeds CZK 5 billion (approximately €200 million).¹⁷ The Market Power Act prohibits the abuse of significant market power in several forms, including:

- infringement of obligations resulting from a supplier agreement, e.g., that the agreement be in writing and cannot be changed without consent of both parties in writing;¹⁸
- engaging in practices such as threat of total or partial delisting; or
- subjecting the supplier to unfair penalties and sanctions,¹⁹ and various other practices.²⁰

The Office for the Protection of Competition (Competition Office) supervises compliance with the Market Power Act. It may initiate investigations on its own (*ex officio*) or upon the complaint of another party.²¹ Complaints may be made to the Competition Office directly by suppliers or by representative trade organisations. Interviewees opined that the process is considered to adequately protect the confidentiality of the complainant suppliers. Where a violation has been found, the Competition Office may impose financial penalties.²² Alternatively, if the abuse of power at issue is not found to substantially distort competition the parties may agree to joint commitments in order to avoid a finding of a violation.²³ The commitments must be aimed at eliminating the harmful situation, and must be considered sufficient by the Competition Office. Where the latter condition is not fulfilled, the Competition Office will continue with the proceedings.

However, it was indicated that despite the relatively positive inclusion of the possibility to offer joint commitments, overall, the Market Power Act is unworkable in the context of competition law. This is largely due to the ambiguity of certain provisions. For example, it is unclear whether the definition of 'significant market power' is based on the competition law concept of dominance, or whether it focuses more on the concept of dependence, e.g., whether a single supplier is dependant on a single retailer.²⁴ The Competition Office has indicated that the key concept is dominance, but this leaves out situations where a retailer with a small market share is caught by the Market Power Act even where its supplier has a relatively large market share. This results in the de facto special treatment of suppliers.

In fact, after growing discontent with the Act, it was proposed that it be abolished and replaced by an amendment to the Competition Act.²⁵ Such an amendment was drafted in spring 2011, but was quashed by the Legislative Council due to its poor quality. Further discussion of the draft has, as a consequence, been postponed. Indeed, the appropriateness of regulating these issues through the Competition Law is debated. One commentator indicated that competition law is currently insufficient to regulate such issues which are, essentially, contractual in nature. Because no amendment has been adopted, the Act continues to be in force.

2. France

In France, there are two methods to deal with unfair commercial practices between businesses in the retail sector. The first is through the power given to the Minister for the Economy to raise a claim before a court; the second is through competition law and the relatively new device of the structural injunction.

¹⁶ *ibid.*, Art. 3(1) and (2).

¹⁷ *ibid.*, Art. 3(3). The buyer then has to demonstrate that it is not, in fact, in a position of significant market power over the supplier.

¹⁸ *ibid.*, Art. 4(c) and Attachment No. 3.

¹⁹ *ibid.*, Art. 4(e) and Attachment No. 5.

²⁰ *ibid.*, Art. 4(e) and Attachment No. 6.

²¹ *ibid.*, Art. 6(1)

²² *ibid.*, Art. 8.

²³ *ibid.*, Art. 6(2).

²⁴ European Competition Network, *supra* note 10, 'Czech Republic: Act on Significant Market Power in Sale of Agricultural Products – Impact Assessment', available at

http://ec.europa.eu/competition/ecn/brief/05_2011/cz_food.pdf (accessed 10 February 2012).

²⁵ *ibid.*

Most decisions in the retail area come from actions initiated by the Minister for the Economy (the Minister). The French Commercial Code empowers the Minister for the Economy to enforce that portion of the Code which deals with harm caused by producers, traders or anyone registered in the trades.²⁶ Such harm includes: submitting a trading partner to obligations which create a significant imbalance in the rights and obligations of the parties; attempting to obtain grossly unfair conditions by threat of a full or partial break in commercial relations; and breaking off a commercial relationship without written notice.²⁷ Such a possibility has existed for a decade, but in the early days it was rarely employed because the power was not sufficiently clear. The Minister may engage in two methods of investigation. The first method is supplier-driven, i.e., a supplier that does not want to make a private claim before court against the retailer itself will go to the Minister to request an investigation, which can lead to a formal claim by the Minister (at which the supplier may intervene, but this rarely occurs). Alternatively, the Minister is empowered to investigate on his own initiative based on his routine market monitoring obligations. An interviewee indicated that in either case, the Minister has the discretion to investigate harm to suppliers whether they are within or outside of France, although the latter case would be quite rare. The Ministry for the Economy regularly publishes reports covering various sectors in France, including monthly observations in the agricultural and consumer products sectors.²⁸ The benefit from using this method (as opposed to going to the soft law method, discussed below in section B) is that Ministry actions result in binding decisions that can make effective change and produce useful precedent. The Minister is entitled to seek damages, in addition to any injunction or fine up to €2 million on behalf of a supplier who is not party to the proceedings. The calculation of damages can complicate these actions, especially because the Minister is not generally in possession of the best evidence in support of the calculation of damages. For some time, it was unclear whether the Minister should be given the power to claim damages, but it is now unambiguously clear that the power is there. An example of how important the calculation of damages in this context can be lies in a case decided two years ago against a retail chain that was ordered not only to pay a fine of €2 million, but also to reimburse the suppliers a total amount of €70 million.

It is also worth mentioning an additional remedy employed by the Competition Authority in abuse of dominance or abuse of economic dependence cases. Where traditional remedies such as fines or injunctions fail to put an end to the abusive practices, the Competition Authority may order a structural injunction, such as, the selling off of floor space to competitors.²⁹ However, this power is subject to strict conditions: first, there must be a finding of abuse of a dominant position or a state of economic dependence, and second, the abuse must have continued despite a warning by the Competition Authority. In January 2012, the Competition Authority recommended use of the structural injunction to address the fact that the Casino group has a market share of more than 60% in Paris. The Competition Authority was of the view that Casino group's market position constitutes a barrier to competition that can only be effectively reversed through use of the structural injunction.³⁰

3. Germany

In Germany, there are currently no specific laws regulating B2B relationships in the food sector. However, the German Competition Authority (Bundeskartellamt) employs competition law specifically to protect suppliers from anticompetitive measures by retailers (and vice versa,

²⁶ French Commercial Code, Art. L-442-6, Part III.

²⁷ *ibid*, Parts I and II.

²⁸ Information on these observations, and others, is available at <<http://www.economie.gouv.fr/observatoire-sur-les-prix-et-les-marges>> (accessed 20 February 2012).

²⁹ French Commercial Code, Art. L-752-26. The exact language is: 'Elle peut, dans les mêmes conditions, lui enjoindre de procéder à la cession de surfaces, si cette cession constitue le seul moyen permettant de garantir une concurrence effective dans la zone de chalandise considérée.'

³⁰ Opinion NR 12-A-01 of 11 January 2012 concerning the competitive environment in the food retail sector in Paris, available at <<http://www.autoritedelaconurrence.fr/user/avisdec.php?numero=12a01>> [in French] (accessed 29 March 2012). The power to order divestiture, commonly used in merger decisions, is rare in non-merger cases. Another example is the UK Competition Commission's report on Ice Cream in 2000 ('The Supply of Impulse Ice Cream: A report on the supply in the UK of ice cream purchased for immediate consumption', January 2000), which required Walls/Unilever to close down and/or divest its wholesaling division Walls Direct, as this prevented other suppliers gaining competitive access to the market and prevented small retailers having a competitive choice of wholesaler suppliers.

depending on who is in the weaker bargaining position). The Act Against Restraints on Competition (ARC)³¹ specifically prohibits undertakings with superior market power from using their market position directly or indirectly to unfairly hinder small and medium-sized competitors.³² Where it appears that a violation has occurred, the burden of proof lies with the undertaking that must disprove the evidence against it, and offer proper justification for its actions.³³ The ARC is enforced by the Bundeskartellamt on its own initiative or at the request of others. In the event of a violation, fines may be levied.

In addition to the ARC, the Act Against Unfair Competition prohibits unfair trade practices that are liable to substantially impact competition to the detriment of competitors.³⁴ This act is also applicable to B2C relationships and, as such, consumer protection is a strong theme throughout. Examples of unfair practices under the Act Against Unfair Competition include impairing the freedom of decision through the application of pressure or other unfair influence, discrediting or degradation of trademark or the assertion or dissemination of facts about competitors' goods or services intended to harm the competitor.³⁵ It is important to note that the Act Against Unfair Competition is not enforced by the Bundeskartellamt; rather, it only provides a legal basis for private enforcement.

A commentator from the Bundeskartellamt considers that the above-mentioned Acts are sufficient to protect the interests of suppliers (or whoever occupies the weaker market position). One commentator indicated that, in reality, it is impossible to legislate in order to keep up with the ever-evolving nature of business practices, and so competition law is considered the best method of regulating these matters.

It is also worth noting that, when implementing the EU Unfair Commercial Practices Directive, Germany chose to expand the scope of the Directive to B2B relationships.³⁶ Serious consideration could be given to adopting a similar approach throughout the EU, via a B2B version of the Unfair Commercial Practices Directive.

4. Hungary

The relationship between retailers and suppliers is regulated in Hungary through the Trade Act of 2005.³⁷ The Act regulates abuses by retailers with significant market power. It was adopted to protect suppliers and was based on several ideals, including the protection of free trade and free enterprise, the protection of SMEs and the promotion of self-regulation. The Act can be applied to suppliers outside of Hungary that trade in Hungary. A retailer will have significant market power in one of two ways: (1) if its net turnover is more than HUF 100 billion (or approximately €323 million); (2) where the undertaking has acquired "a one-sidedly favourable bargaining position vis-à-vis its suppliers", in light of several factors.³⁸ An abuse is defined as consisting of several examples, including: unjustifiable discrimination against suppliers; imposing unfair conditions on suppliers which result in an unfair distribution of risk; unjustifiably altering terms of the contract after conclusion of the agreement; and threatening delisting to enforce unfair terms.³⁹ Where undertakings have significant market power according to net turnover, the Trade Act requires them to use fair commercial practices in their relations with suppliers, including preparing a self-regulating code of ethics setting out those practices and creating mechanism to resolve any

³¹ Act against Restraints of Competition, published 15 July 2005 (Federal Law Gazette I p 2114; 2009 I, p 3850), last amended by Article 2, paragraph 62 of the Act of 22 December 2011 (Federal Law Gazette I page 3044), entry into force 1 January 1999 (ARC) §20.

³² ARC §20(4).

³³ *ibid* §20(5).

³⁴ Act Against Unfair Competition, published 3 March 2010 (Federal Law Gazette I p. 254) §3, entry into force 4 July 2004.

³⁵ *ibid* §4.

³⁶ B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law* (Hart 2011) pp. 147, in discussing the German *Gesetz gegen unlauteren Wettbewerb* 2004.

³⁷ Act CLXIV of 2005 on Trade, entry into force 1 June 2006.

³⁸ *ibid*, §7(3) and (4). In determining the latter, factors such as the structure of the market, the existence of entry barriers, market share and size of trading network should be taken into account.

³⁹ *ibid*, §7(2).

infringements.⁴⁰ The code must be approved by the Hungarian Competition Authority, which is tasked with monitoring the Trade Act.⁴¹ The deadline for drawing up such codes was six months after the entry into force of the act.

Several authorities are responsible for enforcement of the Act, including the National Consumer Protection Authority and the Hungarian Competition Authority. Investigations can be *ex officio* or they can be triggered by a complaint. Fines may be imposed for violations of the Act.⁴² Furthermore, a retailer may avoid an official finding of wrongdoing if it offers to make a commitment to bring its conduct into conformity with the law.⁴³

When asked whether a climate of fear existed in Hungary among suppliers, and whether the Act addressed such fear, an interviewee indicated that, in the last two years, there was a visible increase in the number of cases under the Act, which have mostly been complaint based. However, due to supplier concerns about losing business, the numbers of complaints are still low and there is still hesitancy to complain. Whether the Act addresses the culture of fear in Hungary depends on which authority is investigating the case. Where the Competition Authority is the investigator, anonymity is more easily protected. However, even with anonymity there is still a general problem with the efficacy of the Act due to the small market in Hungary than the Act itself or any technical protections it offers. Because the Hungarian market is small, suppliers and retailers know each other. Where a retailer sees certain facts during an investigation, it can reasonably guess the identity of the complainant. The interviewee noted that it is not really possible to address this issue with more protection; rather, an increase in *ex officio* enforcement would better address the situation.

The interviewee also provided insight into that part of the Act which requires large retailers to develop a code of ethics. Because this part of the Act is not accompanied by the possibility to impose sanctions for non-compliance, this provision is viewed to be effectively insignificant. Consequently, there have been no real significant advances in this regard, apart from indications that a code was developed by the Ministry for Agriculture and Rural Development, and another by the National Association of Trade.⁴⁴

In addition to the Trade Act, The Act on Prohibition of Unfair trading Practices in relation to Agricultural and Food Products 2010 (the 2010 Act)⁴⁵ recently entered into force. The 2010 Act is very similar to the Trade Act of 2005 described above, except that the Central Agricultural Office is competent for its enforcement. According to the European Competition Network, the main difference between the 2010 Act and its predecessor is that the 2010 Act does not include the significant market power test.⁴⁶

5. Latvia

In 2008 Latvia adopted amendments to its Competition Law which introduced the concept of abuse of dominance in the retail trade.⁴⁷ This provision, section 13(2), provides that a market participant is deemed to have a dominant position in the retail trade “if, considering their buying power for a sufficient period of time and the suppliers’ dependency in the relevant market, they have the capacity of directly or indirectly applying or imposing unfair and unjustified provisions, conditions or payments upon suppliers and may hinder, restrict or distort competition in any relevant market in the territory of Latvia.” Section 13(2) applies to any market participant that is dominant in Latvia,

⁴⁰ *ibid*, §7(5).

⁴¹ *ibid*, §9(2).

⁴² *ibid*. See also Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition, entry into force 1 January 1997, §§21, 43G, 43H, 67(1), 70(1), 78.

⁴³ *ibid*, §75.

⁴⁴ We were unable to obtain an English language version of the code and so cannot comment regarding its content.

⁴⁵ Act XCV of 2009, entry into force 1 January 2010.

⁴⁶ European Competition Network, *supra* note 10, ‘Hungary: Dual Shield to protect Food Suppliers’, available at: <http://ec.europa.eu/competition/ecn/brief/05_2011/hu_food.pdf> (accessed 22 February 2012).

⁴⁷ LV, 98 (4084), entry into force 01 September 2009. The amendment added §13(2) to the Latvian Competition Act, LV, 151 (2538), entry into force on 01 January 2002 (as amended).

whether or not it is registered there. There will be a presumption of dominance if it is established that the retailer is capable of imposing unfair or unjustified terms on suppliers.⁴⁸ The new provision also provides an exhaustive list of six examples in relation to abuse of dominance: unfair and unjustified application of provisions concerning the return or delivery of products; unfair and unjustified payments or discounts; payments for entering into a contract; payments for delivery of products to a new retail outlet; the imposition of unjustifiably lengthy settlement periods for delivered products; and unjustified fines for violating provisions of a transaction.⁴⁹

The Competition Council alone bears the responsibility for enforcement of Section 13(2) since there is no option for private enforcement through litigation. The Competition Council may commence investigations under 13(2) on the recommendation or complaint of others, or on its own initiative. In practice, an anonymous complaint can serve as a basis for investigation by the Competition Council, and thus anonymity would be guaranteed. Although the Competition Council is not obliged to initiate an investigation upon every complaint where a violation has been found, the Competition Council is empowered to impose a legal obligation and a fine on the retailer.⁵⁰

Our research revealed that since the law entered into force in 2008, suppliers have become more brave and have routinely threatened retailers with the invocation of section 13(2) in order to avoid unlawful practices. However, this appears to happen only with regard to larger suppliers. It seems that the problem has not disappeared for smaller suppliers. Indeed, this problem was recently confirmed in an update by the European Competition Network.⁵¹

Overall, the mechanism in its current state seems inadequate. Our research demonstrated that specific problems regarding the broad definition of 'dominance in retail' makes it hard for parties to understand how exactly to prove that a retailer is dominant so as to be caught under the legislation. For example, in the only two cases that have led to a finding of an infringement, neither retailer was dominant in the classical sense (i.e., each only possessed a 30% share of the relevant market). Other studies have pointed out that the lack of a clearly defined threshold for dominance in the retail trade means that each case requires an in-depth economic and legal examination of the relationship of dependence between the supplier and the retailer.⁵² It appears that the provision is being used mainly against foreign retailers present in Latvia. Section 13(2) does not appear to have been applied to situations where a smaller (nationally-owned) retailer is dominant in a restricted geographical area.

In view of these challenges, the Latvian Competition Law is being amended once again to introduce changes to section 13(2).⁵³ Relevant here is the attempt by the amendments to address the situation where an infringing retailer fails to comply with any imposed legal obligations issued against it, such as the requirement to issue a public apology to its suppliers. In such cases, the amendments will allow the Competition Council to increase the fine imposed from 0.05 percent to 2 percent of the retailer's net turnover in the previous financial year. However, it is the opinion of some that the repeated attempts to adjust the Competition Law demonstrate the incapacity of competition law alone to address these areas adequately.⁵⁴ An interviewee noted that competition is aimed at protecting the interests of consumers, and not protecting one group of undertakings against another. Instead, it was suggested, it would be better to apply some sort of trade law (*lex specialis* contract law) and use the courts as the dispute resolution forum.

⁴⁸ D. Pavila, 'Guidelines: Dominance in retail' (Varul Publications 2008) available at: <http://www.varul.com/files/dominance-in-retail_eng_debora.pdf> (accessed 8 February 2012).

⁴⁹ LV, 98 (4084), supra note 47, §13(2)(1) to (6).

⁵⁰ Latvian Competition Act, supra note 47 §14.

⁵¹ European Competition Network, supra note 10, 'Latvia: State of Play following Introduction of specific Provision on Retail Trade in Competition Law, available at: <http://ec.europa.eu/competition/ecn/brief/05_2011/lv_food.pdf> (accessed 8 February 2012).

⁵² *ibid.*

⁵³ D. Pavila, 'Competition Law v Retailers' (Varul Publications 2011) <<http://www.varul.com/publications/8953>> (accessed 8 February 2012).

⁵⁴ *ibid.*

6. Romania

There is a problem in Romania specifically regarding the fact that small suppliers (especially milk producers) are generally not even offered contracts by retailers and therefore suffer by having no possibility to set terms for deadlines for payment. The original method chosen to tackle these problems was the development of a Code of Practice. The Code was negotiated between large retailers and suppliers, but its lack of binding force, coupled with the fact that only a few retailers and suppliers signed the Code, led it to be transformed into Law 321.⁵⁵ Law 321 applies to all individuals and legal entities carrying out commercial relationships with food.⁵⁶ Law 321 attempts to strictly regulate the relationship between retailers and suppliers in the food industry through a variety of methods including: the prohibition of fees not directly connected to the sale and not included in the purchase price;⁵⁷ the prohibition of restrictive clauses relating to sale of products to other retailers for the same or a lower price,⁵⁸ and the prohibition of practices such as delisting.⁵⁹ Moreover, it imposes certain conditions relating to payment time limits, dependent upon the type of food at issue.⁶⁰ Violation of any of these provisions can result in the imposition of financial penalties. Depending on which aspects of the law are violated, either the Ministry of Finance or the National Authority for Consumer Protection may impose the sanctions.⁶¹ Law 321 is silent as to investigatory procedures. Law 321 was amended in 2010 and the payment deadlines of 12, 20 and 35 days (depending on the nature of the product) were removed.⁶²

It is the opinion of one commentator that Law 321 is essentially ineffective, due in large part to the removal of specific deadlines for payment, but also due to the lack of specific policy objectives included in the law's provision.⁶³ As Law 321 seeks to protect against anti-competitive practices that can best be described as fair trading and/or unfair competition law (i.e. areas not traditionally within the scope of competition law), the ability for the Competition Commission to effectively investigate these matters is somewhat stunted.⁶⁴ Moreover, although it provides what are generally perceived by a commentator to be good definitions of fundamental terms such as 'trader', 'operator' and 'provider', these definitions are not viewed as contributing to the successful practical application of Law 321.

7. United Kingdom

The Groceries (Supply Chain Practices) Market Investigation Order 2009 entered into force in the United Kingdom (UK) in February 2010.⁶⁵ The Order is monitored by the UK Office of Fair Trading (OFT), which also enforces UK competition law and consumer protection law. It is the UK's second attempt to regulate conduct between retailers and suppliers in the grocery supply chain.⁶⁶ The

⁵⁵ Law No. 321/2009, entry into force 20 November 2009.

⁵⁶ One commentator interprets this as not making a distinction according to the geographical origin of retailers or suppliers.

⁵⁷ *ibid.*, Art. 4(1).

⁵⁸ *ibid.*, Art. 6.

⁵⁹ *ibid.*, Art. 7.

⁶⁰ *ibid.*, Art. 8.

⁶¹ *ibid.*, Art. 11.

⁶² Law No. 247/2010, entry into force 18 December 2010. Deadlines were removed except with respect to meat, milk, eggs, fruits vegetables and fresh mushrooms, for which the payment deadline cannot exceed 30 days. Other changes include a requirement that deadlines for the latest date for payment be stipulated by contract and amended definition of certain terms.

⁶³ According to a commentator, a predecessor to Law 321, Governmental Ordinance 99/2000 on the commercialization of goods and market services, sought to tackle issues of special sales at liquidation and the sale of goods below cost in *all* sectors. Article 2 makes it clear that this Ordinance was based on competition law principles and consumer welfare. See also Competition Council, Romanian Academic Society & CEROPE, 'The Challenges of the Single Market and the Competition in Sensitive Sectors' (2010), available at

<http://www.consilulconcurentei.ro/uploads/docs/items/id6479/the_challenges_of_the_single_market_and.pdf> (accessed 16 February 2012).

⁶⁴ A.D. Chirita, *The German and Romanian Abuse of Market Dominance in the Light of Article 102 TFEU*, Nomos, Baden-Baden, 2011, pp. 154-155.

⁶⁵ It is applicable in the whole of the UK, i.e., England and Wales, Scotland and Northern Ireland.

⁶⁶ The earlier Supply Chain Code of Practice (2001) was abandoned essentially due to the fact that it covered too few retailers, it was difficult to interpret and it lacked a binding mechanism to resolve disputes. Moreover, it did not present

Order applies to any retailer with a turnover exceeding £1 billion with respect to the retail supply of groceries in the UK.⁶⁷ It also explicitly applies to dealings with suppliers “established anywhere in the world”.⁶⁸

The Order contains a number of obligations for retailers, including: the requirement to incorporate the new Groceries Supply Code of Practice (GSCOP) in all their supply agreements;⁶⁹ to provide information to suppliers, such as requiring that all the terms of any supply agreement are made in writing;⁷⁰ to supply information to the OFT that would enable the OFT to adequately monitor and review the operation of the Order;⁷¹ to train staff in the GSCOP;⁷² to appoint an in-house compliance officer;⁷³ and to submit to arbitration by the Ombudsman (if created) in case of dispute that cannot be resolved through negotiations⁷⁴.

Schedule 1 of the Order is the GSCOP. The GSCOP is based on the principle of fair dealing, i.e., that a retailer must deal with its suppliers fairly, lawfully and in good faith, without duress and in recognition of its suppliers’ need for certainty.⁷⁵ The Code intends to achieve improved retailer accountability and certainty for suppliers. One of its practical means of achieving this is by prohibiting retrospective changes to supplier contracts.⁷⁶ The GSCOP also prohibits: changes to supply chain procedures without reasonable notice in writing and without full compensation to the supplier;⁷⁷ delayed payments;⁷⁸ obliging suppliers to contribute to marketing costs;⁷⁹ payments for shrinkage and wastage;⁸⁰ certain practices regarding promotions;⁸¹ and unfair and unjustifiable delisting of suppliers.⁸²

The OFT is responsible for overall monitoring and review of the GSCOP Order but not for enforcement of its detailed provisions. This means that it is responsible for overseeing the requirements to incorporate the GSCOP into contracts, to share information with the OFT, to train staff, to appoint an in-house compliance officer and the duty to arbitrate. The operation of the GSCOP itself will be overseen by a separate, dedicated body. The UK is currently debating the appropriate method of regulation of the GSCOP itself; a draft Groceries Code Adjudicator Bill (GCA Bill) was submitted for pre-legislative scrutiny by Parliament select committees last year. The GCA Bill extends to the whole of the UK.⁸³

As currently proposed, the Groceries Code Adjudicator (the Adjudicator) would be enabled to investigate suspected breaches of the GSCOP provided he or she has reasonable grounds to suspect that a retailer has violated the GSCOP. In making the decision whether to investigate, the Adjudicator would only rely on information provided by the supplier or information that is publicly available.⁸⁴ However, once an investigation commences, the Adjudicator would no longer be restricted to those sources of information, and can then also receive anonymous complaints. The GCA Bill includes a provision aimed at preserving confidentiality of the complainant.⁸⁵

suppliers with a method by which they could raise concerns to prompt an investigation while maintaining the confidentiality of their identity.

⁶⁷ GSCOP Order § 4(1)(a).

⁶⁸ *ibid*, §2.

⁶⁹ *ibid*, §5.

⁷⁰ *ibid*, §6.

⁷¹ *ibid*, §7.

⁷² *ibid*, §8.

⁷³ *ibid*, §9.

⁷⁴ *ibid*, §11.

⁷⁵ GSCOP, Part 2.

⁷⁶ *ibid*, Part 3.

⁷⁷ *ibid*, §4.

⁷⁸ *ibid*, §5.

⁷⁹ *ibid*, §6.

⁸⁰ *ibid*, §§7, 8.

⁸¹ *ibid*, Part 5.

⁸² *ibid*, §16.

⁸³ Groceries Code Adjudicator Bill (GCA Bill) clause 25.

⁸⁴ *ibid*, clause 4.

⁸⁵ *ibid*, clause 19.

The draft GCA Bill currently provides that the Adjudicator could have the power to enforce the GSCOP through, for example, the imposition of financial penalties, but this power would not take effect until the Secretary of State adopts the necessary secondary legislation.⁸⁶

In the mean time, it is thought that the most effective aspect of GSCOP and the Adjudicator will be the public disclosure of GSCOP breaches. The Adjudicator is to be funded by the large retailers through a levy towards the Adjudicator's expenses. The Adjudicator will decide whether to impose a levy and for how much, but this decision must be approved by the Secretary of State and an explanation must be provided.⁸⁷ It is envisaged that at first, the levy will be distributed equally (or proportional to turnover) among large retailers, but that eventually large retailers who breach the GSCOP should contribute more.

Our research indicates that, in general, the GSCOP is a positive move forward. One commentator thought that its soft measures and structural obligations (e.g., compliance officer, incorporation of GSCOP into supplier agreements) present subtle pressure to act in a compliant manner. There is also evidence that the GSCOP is already having an effect insofar as it is being referred to by suppliers in some cases where they feel they are being subjected to unfair practices. A 2011 report by the British Brands Group demonstrates that there have been a few disputes since the entry into force of the GSCOP, but for the most part, they have been resolved.⁸⁸ The report also notes, however, that not all retailers complied with the obligation to report on compliance, and also that the reports that were provided by the retailers do not always include alleged breaches. It has also been reported that some retailers are not interpreting their agreements with supplier according to a spirit of the principle of fair dealing, i.e., they are inhibiting the suppliers' ability to adequately plan.

Finally, there is some concern surrounding the role of the Adjudicator. For example, some consider it vital that the Adjudicator is given the power to impose financial penalties from day one. Others place a great emphasis on the Adjudicator's ability to initiate an investigation based on information from credible third parties, rather than purely information supplied by direct or indirect suppliers. Moreover, there is a clear problem regarding supplier fear of retaliation that may not be addressed by the planned operation of the Adjudicator, if the Adjudicator is only able to consider publicly-available information, or information provided by suppliers.

B. Regulation through Soft Law

1. Belgium

Food industry operators in Belgium signed, on 20 May 2010, a Code of Conduct for Fair Relationships between Suppliers and Purchasers in the Agro-Food Chain.⁸⁹ Since signature, 221 organisations in the food supply chain have signed the Code (which represents 75-80% of the market). The Code places a great emphasis on a soft approach, i.e., strong partnerships and collaboration within the food chain. A hard law approach, e.g., the creation of an ombudsman, is, at this time, considered inappropriate for the Belgian market. One of the main reasons for this is that, in Belgium, there is not such an aggressive relationship between retailers and suppliers.

The Code applies to all links and to all operators in the food chain doing business in Belgium, and it governs the relationship between purchasers and suppliers. It is intended as a guide for use in relations between farmers and their purchasers and/or suppliers. The Code is voluntary. Parties who wish to sign up to the Code do so by making a public "declaration of fair relationships between suppliers and buyers". The Code consists of nine (9) recommendations relating to things such as: information exchange between purchaser and suppliers; purchasers/suppliers partnership in support of the sustainable development of the agro-food chain via a three-pronged approach that

⁸⁶ *ibid*, clause 10 (explanatory note, para 39).

⁸⁷ *ibid*, clause 20 (explanatory note, paras 60-62).

⁸⁸ British Brands Group, 'Retailers' GSCOP reports 2011' (12 December 2011), available at <<http://www.britishbrandsgroup.org.uk/upload/File/GSCOP%20retailer%20compliance%20report%202011.pdf>> (accessed 22 February 2012).

⁸⁹ The Code is available at <http://www.comeos.be/files/docs/corporate/7707_3_fr.pdf> (accessed 22 March 2012).

encompasses societal, environmental and economical considerations; obligations for careful food handling; sourcing local products; compliance with contractually-agreed terms; establishing written agreements with clear conditions; no unilateral changes; recognition of the role of mediation in the event of dispute; and dedication to the consultation model as a strategy to resolve disputes. The Code operates according to a 'comply or explain' principle, which means that signatories may provide for derogations from the Code in their declaration, but derogations must be justified.

The Code is managed and monitored by a Committee of representatives appointed by the organisations involved in the agro-food chain. The chairman of the Committee is informed of disputes either directly by the company or indirectly by a professional association which is partner to agro-food chain platform. Once it is informed of a dispute, the Committee applies the comply or explain principle. The Committee is charged with writing annual reports which comment on the functioning of the Code, but without explicitly naming organisations which are the subject of complaint or that have not adequately adhered to the Code. Although the Committee is charged with keeping an overview of disputes, it does not itself deal with individual complaints. According to the Committee's Annual Report 2010-11, four incidents relating to the adaptation of unilateral conditions of contract occurred, but were resolved in accordance with the Code. In two of those cases, the retailer admitted wrongdoing and changed its behaviour.

Currently, the Code does not have any associated costs. Members of the Committee are funded by their respective organisations. Nor can the Committee impose sanctions. However, it is envisaged that eventually the Code will be enforced through a more formal mechanism in which fines may be imposed. One commentator indicated that, in the current situation, suppliers can threaten public exposure of bad practices through trade organisations' publications.

It is also of interest that a dispute resolution procedure in the sugar industry has been in place for 12 years. This mechanism is monitored by a committee composed of two representatives of the sugar producers association and two representatives from the beet farmers association. The mechanism consists of four phases: (1) direct negotiation between farmer and factory associations (at no cost); (2) if no resolution, the parties appoint a neutral third party expert who is a civil servant to act as a sort of mediator between the parties; (3) if no resolution, then external arbitration will occur; and (4) if still not agreement, then the parties will go to court. This method of dispute resolution was detailed in trade agreements negotiated between sugar processors and sugar beet farmers. The success of this mechanism is, in large part, why a particular emphasis has been placed on dispute resolution in the context of the agri-food chain.

2. France

In addition to France's hard law mechanisms discussed in Part II.A above, retailers and suppliers may engage the Commission d'Examen des Pratiques Commerciales (CEPC). The CEPC is under the control of the Ministry of Finance. The CEPC is not a court or tribunal; rather, it is a body that produces decisions and opinions that are not legally binding. It was set up nearly ten years ago to provide a forum where retailers and suppliers could speak to each other without fear of retaliation and without any formal consequences.⁹⁰ This is, for the most part, why the decisions coming out of the CEPC have only the status of soft law. The CEPC process is usually supplier-driven, but it can also be initiated by retailers who have questions concerning the interpretation of law. It can also be accessed by any supplier, whatever their geographical origin, as long as the point at issue relates to compliance with French law. These questions need not necessarily be in the frame of an actual dispute. The CEPC helps to interpret law mainly through individualised advice, or the publication of its annual report, which reflects the general policy of the CEPC. Parties at court typically use CEPC interpretations as persuasive evidence for the court, although it is not binding. CEPC soft law is also used by lawyers as an additional tool with which to advise their clients. One commentator indicated that although it may not be enough of a solution, the CEPC has had an overall positive impact on retailer/supplier issues. Although it is not a formal court, the CEPC is a specialised body made up of experts in the field, including representatives from government,

⁹⁰ The Commission was established by Act No. 2001-420 of 15 May 2001 on new economic regulations (1). Its mission is described at <<http://www.pratiques-commerciales.bercy.gouv.fr/>> [in French] (accessed 16 February 2012).

parliament, the judiciary, academia and the retail and supply sector. The CEPC recently issued a recommendation to establish a code of good practice in the retail sector;⁹¹ however it is unclear whether the recommendation will be acted upon. Key principles proposed include the fair access to information, respect of intellectual property (IP) rights and innovation, and rules regarding form of contracts.

When viewing the CEPC in light of the Ministry actions described above in Section A, one can see that the CEPC is typically engaged for minor issues (i.e., situations that are not in crisis) and where there is agreement that a point for discussion exists, and CEPC clarification would be beneficial. Private actions are virtually non-existent due to supplier fear of retaliation.

3. Slovenia

In August 2011, the Code of Good Business Practices of the Stakeholders in the Agri-food Chain (the Code) was signed by five representatives from the Cooperatives' Association, the Chamber of Trade Crafts and Small Business, the Chamber of Commerce, the Chamber of Agricultural and Food Enterprises and the Chamber of Agriculture and Forestry. It entered into force at the end of September 2011.⁹² The Code is a voluntary commitment aimed at improving business relations and preventing abuses among suppliers and retailers. According to its terms, the Code is an aspirational document, which offers recommendations for stakeholders in the agri-food chain.⁹³ The Code emphasises partnership among stakeholders and, as such, is based on seven principles which may be considered to represent ideals of fair dealing, as described in the section above on the UK GSCOP.⁹⁴ Such principles include: equality of contractual partners, freedom to determine pricing and sales policies, the voluntary nature of sales activities and setting reasonable supply deadlines. Moreover, the Code includes a number of commitments for stakeholders in the agri-food chain, such as respecting agreed supply conditions and payment deadlines, which must be in writing,⁹⁵ not imposing unilateral, retrospective changes to contractual terms,⁹⁶ and keeping details regarding supply and other business conditions of co-operation confidential.⁹⁷

The Code is not limited in its application to those suppliers and retailers based in Slovenia. Rather, it defines 'stakeholders in the agri-food chain' as any companies, sole traders or any other persons legally involved in any stage of agricultural production, processing or the distribution or sale of food.⁹⁸ However, as the Code is voluntary, it would only be applicable to those who have chosen to sign up to it. There is nothing in the text of the Code that would prevent suppliers from outside of Slovenia from becoming signatories.

The Code itself does not envisage a formal legal enforcement mechanism. Rather, the Code provides a basis for the creation of a Committee to monitor its implementation, encourage good business practices and propose any changes or amendments.⁹⁹ When monitoring the implementation of the Code, the Committee is free to consider information derived from the opinions, studies and recommendations of relevant institutions and the EU on the operation of the agri-food chain. It appears, therefore, that the Committee can monitor implementation by its own initiative. The Code does not, however, include provisions for sanctions for violation of the Code. Instead, it is hoped that the stakeholders will resolve their disputes amicably, or, failing that, through mediation.¹⁰⁰

⁹¹ Recommendation No. 11-01 on a Code of Good Practice, available at <<http://www.economie.gouv.fr/cepc/les-travaux-de-la-commission/recommandations/recommandation-n%C2%B0-11-01>> [in French] (accessed 16 February 2012).

⁹² The Code was signed at the 49th annual Food and Agriculture Fair on 24 August 2011. As per Article 10, the Code entered into force 30 days after its signature.

⁹³ Slovenian Code, Art. 1, para 2.

⁹⁴ *ibid.*, Art. 4.

⁹⁵ *ibid.*, Art. 6, para 2.

⁹⁶ *ibid.*, Art. 6, para 3.

⁹⁷ *ibid.*, Art. 6, para 4.

⁹⁸ *ibid.*, Art. 3, para 1.

⁹⁹ *ibid.*, Art. 8, para 1.

¹⁰⁰ *ibid.*, Art. 9.

It is helpful to consider the general status of codes in Slovenia. Although they are not legally binding, they are an autonomous source of law typically employed by chambers of commerce or similar bodies in Slovenia. Their legal status is somewhere between a simple code of ethics and formal legislation. Depending on the adopting body(ies), codes are intended as recommendations, and are usually perceived as a complementary source of law. Sanctions associated with codes are usually disciplinary, rather than prohibitive, in nature. That is, it is more likely that the Code's monitoring committee will discipline a non-complying party through, for example, reduced membership rights in a trade association, rather than through the imposition of a fine. If the audience to which it is addressed is actively aware of the subject matter covered by the code, the code is likely to have a strong impact. Given the high level of awareness of imbalances in the food chain in Europe, this is likely to be the case. One commentator indicated to us that codes are generally well-respected and would not be entered into lightly. However, it is important to note that, although this may be the case within Slovenia, stakeholders in the agri-food supply chain from outside Slovenia may not view codes in the same way, and hence, may be unaware of the applicability and importance of the Slovenian Code.

Given the recent adoption of the Code, it is too early to tell whether it has had a positive impact on supplier-retailer relations in Slovenia. Given the general nature of codes in Slovenia, it is likely that the Code described above will have some impact. However, it should be stressed that it is unclear whether all the actors in the Slovenian supply chain are represented by the signing parties, so the Code may not provide comprehensive coverage.

4. Non-EU Example - Argentina

Although it is not an EU Member State, the experience in Argentina with soft law provides a particularly good example for the EU. In 2000, a Code of Good Business Practices was adopted by leading actors in the private sector, with the support of the Argentine government.¹⁰¹ In deciding whether to restore the balance between retailers and suppliers, the government considered regulation through legislation and strong sanctions; however, this approach was rejected because of concerns that the imposition of fines would not be proportionate to the damage caused, and that, consequently, the sanctions imposed might be so high as to be abusive (i.e. in the millions).¹⁰² Moreover, while it was acknowledged that a law would bring with it the clear benefit of mandatory compliance, it was felt that the relationship between retailers and suppliers would be better understood and managed by people involved in the process, rather than the judiciary or competition officials.¹⁰³ Most trade associations (supplier and retailer) preferred that a private method of conflict resolution be implemented instead. The result was a Code of Good Practice, which was written and agreed to by the two main trade associations, CAS (Argentine Supermarkets Chamber of Commerce) and COPAL (food and beverages manufacturers association which includes perishable goods). Although the Code is voluntary, its entry into force was conditional on it being signed by all supermarket chains with annual revenues exceeding USD 100 million.¹⁰⁴ In fact, at the time when Carrefour sought to merge with Promodes, the Argentine Office of Fair Trade made the merger conditional on agreement to be subject to the Code. The overarching purpose of the Code is to ensure free and fair trade for current market participants and newcomers. The Code has ten sections which enumerate commitments such as: agreeing to written contracts; the establishment of a firm procedure for debits, credits and rejection of goods; the maintenance of current trading conditions (with respect to usages and customs); brands image protection; and conditions for unjustified interruption of business relations. CAS and COPAL are charged with promoting the Code and establishing a commission to monitor the code and to update it as and when necessary.¹⁰⁵

¹⁰¹ 'Codigo de Buenas Practicas Comerciales', signed 30 July 2000, entry into force 39 days later, available at <<http://www.centromarca.pt/docs/codbpcarg.pdf>> [in Spanish] (accessed 29 February 2012).

¹⁰² F.J. Brom, 'Regoverning Markets: Best Commercial Practices Code (Argentina 200-2007) as an efficient policy innovation to prevent conflict and solve controversies between suppliers, processors and supermarkets' (2006), pp. 4-5, available at <http://www.rimisp.org/proyectos/codigo.php?documento=best_commercial_practice.pdf> (accessed 29 February 2012).

¹⁰³ *ibid.*, p. 5.

¹⁰⁴ *ibid.*, p. 8.

¹⁰⁵ Code, *supra* note 101, §9.2.

The Code also establishes a mediation and arbitration authority. Signatories to the Code undertake to submit their disputes first to mediation (which is a voluntary undertaking), and where the dispute cannot be resolved in that manner, then to arbitration (which is a mandatory obligation).¹⁰⁶ Mediation is for disputes that have not resulted in significant economic or financial damage (unlike arbitration). The mediator is a member of one of the two main trade associations (COPAL or CAS), and will change on a monthly basis.¹⁰⁷ The mediator is charged with making a recommendation regarding the resolution of the dispute. This recommendation is not, however, binding. Where a party disagrees with the recommendation, it can request arbitration. The arbitrator is an expert lawyer selected from a shortlist created by COPAL and CAS, who will receive a daily rate and work for a maximum of five hours. The maximum amount that the successful party can recover through arbitration is USD 50,000.¹⁰⁸ It was thought that any loss exceeding this amount should instead be actionable before the civil courts through a claim for damages. Although the Office of Fair Trade does not play a primary role in the protection of retailer/supplier relationships, it is depository of the Code and the last instance of appeal if mediation and arbitration fail.¹⁰⁹ In addition to the Code, a number of 'complementary rules' have been created by the monitoring commission in order to deal with specific situations arising since the development of the Code.¹¹⁰

An evaluation of the Code after seven years demonstrates that it has been successful in changing the retailer/supplier culture and in greatly reducing the number of cases submitted for mediation or arbitration.¹¹¹ Since 2000, 153 cases were submitted for arbitration, the highest of which was 63 in 2002, and the lowest at zero in 2006.¹¹² The Code has been largely successful in protecting against predatory pricing and unpredictable payment terms, and establishing a practice of entering into yearly written agreements.¹¹³ One of the main reasons for this is the fact that information relating to disputes is kept completely confidential until issue is resolved. Because of this, signatories have more confidence in the Code.¹¹⁴

D. Plans for Regulation

1. Ireland

There are currently plans in Ireland to adopt a code similar to the UK GSCOP, with some variations.¹¹⁵ The Irish Code is also based on the principle of fair dealing.¹¹⁶ The Irish Code will be limited to grocery goods intended for human consumption.¹¹⁷ It will apply to suppliers and retailers with an annual turnover of more than €50 million,¹¹⁸ including suppliers located anywhere in the world.¹¹⁹ When initial plans were made for the Code, it was thought that initially it would be voluntary in nature, but would then evolve to a statutory instrument applicable to larger retailers.¹²⁰

¹⁰⁶ *ibid.*, §§7, 8.

¹⁰⁷ *ibid.*, §8.

¹⁰⁸ *ibid.*, §8.2.

¹⁰⁹ Brom, *supra* note 102, p.6.

¹¹⁰ *ibid.*, p. 9.

¹¹¹ *ibid.*, p. 10.

¹¹² *ibid.*

¹¹³ *ibid.*

¹¹⁴ *ibid.*, p. 12.

¹¹⁵ The Draft Code of Practice for Designated Grocery Goods Undertakings is available at <<http://www.djei.ie/publications/commerce/2011/draftgrocerycodemay11.pdf>> (accessed 22 February 2012) [as of May 2011].

¹¹⁶ *ibid.*, Art. 3(2).

¹¹⁷ *ibid.*, Art. 2.

¹¹⁸ *ibid.*, Art. 4(2).

¹¹⁹ *ibid.*, Art. 2.

¹²⁰ F. McKeever (for Arthur Cox), 'Irish and UK developments in the grocery sector: codes of conduct' (January 2010), available at <http://www.arthurcox.com/uploadedFiles/Publications/Publication_List/Competition%20Law%20Update%20-%20Irish%20and%20UK%20developments%20in%20the%20grocery%20sector%20codes%20of%20conduct.%20Jan%202010.pdf> (accessed 22 February 2012); see also Department of Enterprise, Trade and Employment, 'Code of Practice for Grocery Goods Undertakings: Consultation Paper' (August 2009), available at <<http://www.djei.ie/publications/commerce/2009/consultdocgroceryundertakingsaug09.pdf>> (accessed 22 February 2012).

The exact character of enforcement is yet to be determined. The Draft Code envisions that the enforcement body will be tasked with “proactively” investigating complaints (that can be confidential in nature), publishing guidance on compliance and advising and reporting to the Minister for Enterprise, Trade and Innovation on the Code’s operation.¹²¹ Interestingly, the Draft Code does not foresee the possibility of the enforcer to impose financial penalties. The Irish Competition Authority does not support the creation of the Code.¹²² The Competition Authority believes that imposing contractual requirements will not protect smaller suppliers who fear losing business because of dispute. Because it is effectively possible to contract out of the obligations in the Code as long as both parties agree, the Competition Authority feels that smaller suppliers would likely sign the contract in order to maintain business relationships. For that reason, the Code favours larger suppliers and does little to resolve small supplier fear.

2. Italy

The Italian Government introduced, in early 2012, Article 62 on ‘Commercial relationships in the sales of agricultural and agro-food products’ into a new Legislative Decree on Liberalizations. Article 62 introduces a mandatory contractual form, i.e., the contract must be in writing, and must indicate the duration, quantities and characteristics of the product sold, price, delivery and payment terms.¹²³ It also imposes a maximum payment deadline of 30 days from delivery or collection, for perishable products.¹²⁴ Article 62 also prohibits unfair practices such: as imposing unjustifiably burdensome costs; obtaining undue and unjustifiable unilateral performance of obligations; and subjecting continued business relationships to performance obligations that have no connection with the objective of the contracts or relationships.¹²⁵ Violators are subject to a fine ranging between €516 to 20,000, or €500 to 500,000, depending on the type of non-compliance.¹²⁶ The Italian Antitrust Authority is tasked with enforcement of these provisions.

Article 62 is very controversial. One commentator indicated concern that the frequency at which retailer/supplier contracts are negotiated may prove impossible to satisfy the Article’s drafting requirements. Moreover, the Italian Antitrust Authority is concerned that it lacks the resources necessary to enforce Article 62, although it has considered the possibility of introducing guidelines on the applicability of the Legislative Decree, once it is converted to law. It should be noted that before the Decree can enter into force, it must be converted into a Law within 60 days of its introduction. Over 2000 amendments to the law as a whole are expected to be discussed at the Senate and Deputies’ commissions. However, it is felt that Article 62 will eventually be converted into law.

3. Netherlands

Approaches to these issues in the Netherlands are in the early stages. A report by the Ministry of Economic Affairs in 2009 identified the existence of problems in the food retail and fashion/shoe retail chains,¹²⁷ despite conflicting claims by retailers and suppliers. The Ministry prefers retailers and suppliers to develop a code on their own, rather than having a mandatory code imposed by the government or competition authorities. According to one commentator, the latter have also explicitly indicated that they are unwilling to take the lead in this context. As a next step, the Ministry of Economic Affairs asked the University of Tilburg to engage in an interactive process in order to explore whether there is any sign of commitment among retailers and suppliers to the development of a code of conduct for fair business practices. The result of that process was a

¹²¹ Draft Irish Code, supra note 115, Part 10: Enforcement.

¹²² The Competition Authority, ‘Code of Practice for Grocery Goods Undertakings: Submission by the Competition Authority to the Department of Jobs, Enterprise and Innovation’s Consultation’ (September 2011), Part 4, available at: <<http://www.djei.ie/commerce/competition/submissions/CompetitionAuthority.pdf>> (accessed 22 February 2012).

¹²³ Art. 62(1).

¹²⁴ Art. 62(3).

¹²⁵ Art. 62(2).

¹²⁶ Art. 62(5) to (7).

¹²⁷ Ministry of Economic Affairs, ‘De aard en omvang van inkoopmacht: Onderzoek naar de perceptie van leveranciers’ 25 November 2009.

report of the University of Tilburg in early 2012.¹²⁸ It investigated common grounds between retailers and suppliers, and identified gaps in the relationships. Retailers and suppliers differed in several ways, e.g., retailers felt it was entirely possible for suppliers to take them to court to resolve their grievances, whereas suppliers clearly referenced a climate of fear in the Netherlands. After the interactive consultation with retailers and suppliers, the Tilburg report made recommendations of how to design a dispute mechanism if a code of conduct could not be drafted. In particular, the report addressed three main concerns. The first was cost: the report recommended the creation of a simple dispute resolution procedure that is focused on finding solutions to the specific dispute at hand, rather than focussing on particular legal issues. In that connection, it was suggested not to set up a special organisation, but to ensure that a number of dispute resolution experts are available to be called in when necessary. The second issue was in relation to suppliers' wish to be able to complain without losing their contracts. The report focused here on ways to negotiate without escalation to confrontational conflict. It suggested that the first step to resolution of the problems should be for the supplier to speak directly with the person with which he or she is dealing. If this discussion is unsuccessful, the next step would be to speak with a superior officer, and so on up until an external expert is required. The third recommendation focused on the inability for trade organisations to access Dutch collective redress mechanisms in a way so as to be able to claim compensation. Under current Dutch competition law, this is not possible. The report recommends that the reasons for this limitation should be investigated further.

One commentator reiterated that because retailers and suppliers cannot even agree that a problem does, in fact, exist, it will be nearly impossible to get their commitment toward the development of a code without some external force (e.g., the Ministry) putting pressure on the process. The Ministry for Economic Affairs is due to discuss the Tilburg report in Parliament in April. The Ministry is also planning to speak to a number of executive officers in the retail sector to gauge their willingness to work on some kind of agreement or dispute resolution system, as recommended in the report.

4. Portugal

In October 2010, the Portuguese Competition Authority (PCA) published a report on 'Commercial Relations Between the Large Retail Groups and their Suppliers'.¹²⁹ The report examined the markets for production, supply and large distribution of food products in Portugal and concluded with a series of recommendations. Among other things, the report suggested the adoption of a code of conduct¹³⁰ on fair trade practices that would replace an unsuccessful code developed, in 1997, by the Confederation of Portuguese Industry and the Portuguese Large Retailers' Association.¹³¹ Acknowledging that such a code of conduct would be non-binding, the report also suggests the creation of a dispute resolution mechanism to issue binding decisions on parties,¹³² and a possible ombudsman to supervise the code.¹³³ The report also draws up guidelines for standard supply contracts,¹³⁴ restricting retroactive penalties,¹³⁵ rules regarding self-space,¹³⁶

¹²⁸ J.M. Barendrecht, C.J.M. van Doorn, M.W. de Hoon en C.M.C. van Zeeland, m.m.v. J. Liauw-A-Joe and M. Menting (Tilburg University), 'Eerlijk, Scherp and Betrouwbaar: Een Interactieve Verkenning Naar Ijkkpunten Voor Eerlijk Zaken Doen en Effectieve Conflictoplossing' [in Dutch] (January 2012).

¹²⁹ Autoridade de Concorrência, available at <http://www.concorrenca.pt/SiteCollectionDocuments/Estudos_e_Publicacoes/Outros/AdC_Relatorio_Final_Distribuicao_Fornecedores_Outubro_2010_en.pdf> (accessed 14 February 2012).

¹³⁰ *ibid.*, §2.1.

¹³¹ Código de Boas Práticas Comercias (17 July 1997), available at <<http://www.aped.pt/Detail.aspx?contentId=154&areald=12>> [in Portuguese] (accessed 14 February 2012). Alternatively, the Report suggested that the 1997 code be 'reinstated' (§2.1).

¹³² Autoridade de Concorrência, *supra* note 129, §2.1.1.

¹³³ *ibid.*, §2.1.2.

¹³⁴ *ibid.*, §2.1.3.

¹³⁵ *ibid.*, §2.1.4.

¹³⁶ *ibid.*, §2.1.5.

coming to an agreed definition of the rules for payment terms¹³⁷ and better application of existing legislation¹³⁸ on unfair trade practices.¹³⁹

Since publication of the report in 2010, a number of developments have occurred. First, a new Decree-Law¹⁴⁰ was published which establishes time limits for the payment of suppliers of food products for human consumption where the supplier is a micro or small enterprise. In such cases, the Decree-Law provides compulsory deadlines for payment, the length of which depends on whether the food is perishable or non-perishable.¹⁴¹ In order for suppliers to take advantage of the legislation, they must prove that they are micro or small enterprises by obtaining certification from the Institute of Support to Small and Medium Enterprises and Innovation.¹⁴² Retailers who do not pay within the deadline will owe interest to the supplier, and may be required to pay a fine between €500 and €44,891.81.¹⁴³ The Food Safety and Economic Authority is tasked with monitoring compliance with the new Decree-Law, including the publication of annual reports on mechanisms designed to verify the timeliness of payments under the Decree-Law.¹⁴⁴

In addition to the new Decree-Law, the Portuguese Ministries for Economics and for Agriculture and Environmental Affairs created the Plataforma de Acompanhamento das Relações na Cadeia Alimentar (PARCA), which is tasked, among other things, with creating a new code of good practices to replace the 1997 code, encouraging dialogue between entities along the vertical food chain and creating better tools for the collection, analysis and publication of relevant information. One commentator remarked that although there is a will to rely on self-regulation, there is a recognised need for some sort of official regulatory structure to resolve larger divergences between parties, such as the determination of bargaining power possessed by the parties in dispute. PARCA will meet several times throughout 2012. Most recently, PARCA announced that from May 2012 onwards, quarterly reports of prices paid by retailers to producers will be published online on the website of the Office of Planning and Policy.¹⁴⁵

5. Spain

The issue of vertical relationships in the food chain is currently in a state of flux in Spain. In October 2011, the National Competition Commission (CNC) published a 'Report on Manufacturer-Retailer Relationships in the Food Sector' detailing the problem of increased bargaining power in the retail industry, which was resulting in abusive commercial practices against suppliers.¹⁴⁶ The report issued a series of recommendations,¹⁴⁷ which included the creation of a mechanism to allow reporting of unfair commercial practices with minimal reprisal against the reporting party, and to minimize negative impacts on efficiency and consumer welfare through the introduction of rules relating to, for example, rules on commercial payments, changes, revisions or retroactive contract modifications and retailer demands for information pertaining to suppliers' products.

Also, the new Minister for Agriculture announced its intention to move forward with a law on vertical relationships, which would cover the whole chain. At this stage, only preliminary meetings

¹³⁷ Ibid, §2.1.6.

¹³⁸ Decree-Law No. 370/93, of 29 October 1993 regulates discriminatory prices or conditions of sale (Art. 1), price listings and conditions of sale (Art. 2), sale below costs (Art. 3), refusals to sell goods or render services (Art. 4) and abusive business practices (Art. 5) and entered into force on 1 January 1994.

¹³⁹ Autoridade de Concorrência, supra note 129, §2.4(i).

¹⁴⁰ Decree-Law 118/2010 of 25 October 2010, entry into force 23 January 2011. It applies only to contracts entered into after this date.

¹⁴¹ Ibid, Art. 3(1) and (2).

¹⁴² Ibid, Art. 2(1) and (3).

¹⁴³ Ibid, Art. 5, 6.

¹⁴⁴ Ibid, Art. 7.

¹⁴⁵ Further details about this initiative are available at

<http://www.jornaldenegocios.pt/home.php?template=SHOWNEWS_V2&id=545393> [in Portuguese] (accessed 22 March 2012) and at <http://www.jornaldenegocios.pt/home.php?template=SHOWNEWS_V2&id=545393> [in Portuguese] (accessed 22 March 2012).

¹⁴⁶ Comisión Nacional de la Competencia, available at

http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=122260&Command=Core_Download&Method=attachment (accessed 14 February 2012).

¹⁴⁷ Ibid, pp. 140-41.

have occurred. However, one observer indicated that there is an intention to create a law on vertical relationships that is separate from competition law, although the legal basis for such a law is yet to be determined. Moreover, it is envisaged that the law will be accompanied by an institutionalised regulatory body to oversee it and to act as a sort of adjudicator or ombudsman. It was also indicated to the authors that such a mechanism would necessarily have to include the possibility for *ex officio* investigations and anonymous complaints.

Our research indicates that there has been a move among certain retail associations to submit to an informal system of dispute settlement with suppliers. It is purely informal – it operates directly between businesses and is not managed by any sort of regulatory administrator. The research team was unable to obtain information beyond the above due to issues of confidentiality.

6. Non-EU Example – Norway

In February 2010, the Norwegian Government set up an Inquiry Commission for the Power Relations in the Food Supply Chain. The Inquiry Commission published a report in April 2011 on ‘The powerful and the powerless in the food supply chain’.¹⁴⁸ The report first examines the status of, and trends in, the food supply chain in Norway. In particular, the report notes that concentration in the retail grocery market is heavier in Scandinavia than elsewhere in Europe; within Norway itself, four umbrella retail chains control the market.¹⁴⁹ Moreover, the report evaluates the appropriateness of a competition policy approach to these issues and recognizes that where buyer power is being used unreasonably to influence business conduct but does not necessarily contravene the Norwegian Competition Act, there is a need to consider alternative methods for regulating retailer/supplier conduct.¹⁵⁰ In particular, the report recommends the development of a code of conduct for negotiations between actors in the food supply chain using the UK GSCOP as a model.¹⁵¹

The report suggests that any regulation of negotiation mechanisms should be based on the principle of ‘fair trading practices’ which has, at its core, the notion that negotiations should be conducted fairly and that the stronger party should not exploit its position in order to obtain unreasonable advantages from the weaker party. It suggests the following text:

*The actors in the food supply value chain must at all times treat each other in accordance with the principle of fair trading practices. The principle of fair [sic] trading practices involves companies conducting themselves in a fair manner, basing business relationships on reciprocity, avoiding unreasonable business terms, striving to achieve a reasonable division of risk, and respecting the other parties’ intangible rights.*¹⁵²

A necessary corollary of such a principle is that agreements between parties must be clear and in writing. Practices considered in contravention of the principle of fair trading include making payments for shelf space, delisting, abusing the access to information about costs, and making retroactive changes to an agreement.

It is envisaged that such a code will be accompanied by an ombudsman for the grocery sector who will actively monitor the implementation of the code and report on compliance.¹⁵³ The ombudsman, who would be part of the consumer and food authorities, should be capable of conducting investigations on his/her own initiative, and should be capable of requiring parties to remedy any

¹⁴⁸ The full report is available at <<http://www.regjeringen.no/nb/dep/lmd/aktuelt/nyheter/2011/april-11/mat-makt-og-avmakt.html?id=640277>> [in Norwegian] (accessed 13 February 2012). An English summary and direct translations of Chapters 6 and 7 are also available there. The report and reasons for it seem to be largely consumer-driven. See also ‘Nordic Food Markets – a taste for competition’ (November 2005) by the Nordic Competition Authorities, available at <<http://www.kfst.dk/en/service-menu/publications/publication-file/publikationer-2005/nordic-food-markets-a-taste-for-competition/>> (accessed 13 February 2012).

¹⁴⁹ Inquiry Commission Report [English Summary], *ibid.*, p. 10.

¹⁵⁰ *ibid.*, p. 29

¹⁵¹ *ibid.*, p. 44-46.

¹⁵² *ibid.*, p. 44. ‘Intangible rights’ refers to protections regarding the imitation or copying of brands.

¹⁵³ *ibid.*, p. 46-47.

breach of the code, and to impose penalties where necessary. A minority of the members of the Commission described above argued in the report that the existence of the Marketing Control Act,¹⁵⁴ and general rules relating to contract law, render unnecessary the development of a special statutory regulation for negotiations in the grocery trade.¹⁵⁵

Since the publication of the report in April 2011, a hearing was held in which suppliers, retailers, trade organisations and different official bodies were invited to comment on the report. A representative of the Norwegian Competition Authority is of the opinion that the Inquiry Commission's proposals to introduce a specific act relating to negotiations and fair trading practices in the sector are unnecessary. It believes that the subject matter is, at least in part, covered by existing laws and regulations. It also feels that the report establishes a sufficient foundation on which to claim that specific sectoral rules are unnecessary. Finally, the Competition Authority is concerned that some of the recommendations, if put forward as they currently stand, may potentially lessen the ability for retail chains to use buyer power against suppliers with substantial market power.

7. Conclusions about Member State Examples

When considering the above Member States as a whole, it is clear that there is not one single model of enforcement that can be considered as being completely successful in terms of protecting suppliers from unfair commercial practices by large retailers. Each Member State has chosen its method based on what it believes suits its legal system the most. Some have changed their choices based on previous attempts to deal with the issues using other mechanisms, sometimes within the same basis in law (i.e. competition) and sometimes through contract law. Some Member States favour soft law approaches, such as the creation of a dispute resolution mechanism, and others first attempted regulation through soft law, but eventually opted for hard law in the hope that it would be more effective. Given that it is difficult to choose one perfect method, it may instead be useful to consider which of the above aspects seem to work, and which seem to be problematic.

What we can infer from the above is that certain aspects of the Member State models seem to be favoured or viewed as a positive way of dealing with retailer/supplier issues. This includes characteristics such as:

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

However, there are some drawbacks associated with what was just described, including basing application of the law on whether a retailer has a certain market share. As demonstrated by the situation in Latvia, proving 'dominance in retail' may not address situations where a smaller retailer is dominant in a restricted geographical area and in which larger retailers are not present. By way

¹⁵⁴ Act No. 2 of 9 January 2009 relating to the Control of Marketing and Contract Terms and Conditions, etc. This Act regulates conduct contrary to good business practice, e.g., the practice of making misleading representations likely to influence demand for or supply of goods, services or other products, and the exploitation of trade secrets.

¹⁵⁵ Inquiry Commission Report, supra note 148, p. 47.

of contrast, the 2005 Trade Act in Hungary provided that significant market power can be determined according to net turnover, but also according to whether one undertaking has a favourable bargaining position in relation to its suppliers. Subsequently, the 2010 Trade Act removed the dominance approach completely by removing the part of the definition of 'significant market power' that was based on net turnover. However, despite these differences in approach, it seems that regulation through competition law alone has proven insufficient to address the realities of the food sector. Some commentators have condemned reliance on competition as being the main reason why regulation in this area is failing to address the issues properly.

It is interesting to note what is lacking. First, only two of the Member States evaluated in this study currently regulate these matters with a voluntary soft law instrument. Moreover, it is those two countries that have adopted an approach which includes companies as direct signatories to the soft law instrument. It is also rare for Member States to specifically cite the principle of fair dealing as the motivation behind trying to regulate these issues. This is largely due to the fact that most of the mechanisms described above are based within competition law. Fair dealing as a concept for use in the food sector is only expressly referenced by the UK, and is alluded to by Slovenia's soft law code of conduct. Basis in competition law also explains the overall lack of a separate officer or ombudsman to regulate these matters. Moreover, cost is an issue that was not greatly discussed, particularly because most of the Member States regulate these issues under a pre-existing framework of competition law.

It is also telling that those Member States that are currently considering the creation of new mechanisms are largely moving away from competition law and opting instead for codes of conduct that will be regulated by a separate office or dispute resolution mechanism that can investigate *ex officio* and impose fines. Other plans include mechanisms which emphasise dispute resolution with or without a code.

Therefore, it appears that, although no one mechanism provides a perfect model, working aspects can be distilled from the Member States evaluated in this study and perhaps combined to inform an entirely new mechanism. In order to do so, it may also be helpful to consider those mechanisms which are employed in other contexts to regulate B2B business relationships.

III. EXAMPLES FROM OTHER SECTORS

1. UK ITV Adjudicator and Contract Rights Renewal Mechanism (dedicated rights scheme and adjudicator)

The 2003 merger of television broadcasting giants Granada and Carlton was made conditional on their acceptance of the creation of a new regulatory mechanism called the contracts Rights Renewal (CRR) remedy and an ITV Adjudicator.¹⁵⁶ Because of the large amount of market power in the newly-created ITV plc, the mechanism was created to protect existing advertisers and agencies from unfair or discriminatory practices. The CRR imposed three main conditions: (1) the right to renew contracts with Carlton and Granada with no increase in the share of advertisers' and agencies' spend, and no reduction in discounts received by advertisers and agencies; (2) prices charged to existing advertisers will be reduced if the merged ITV plc's audiences shrink; and (3) the creation of an adjudicator to ensure and promote fair competition post-merger.¹⁵⁷ Any eligible party who wishes to enter into a dispute with ITV plc must use the CRR Adjudicator scheme.¹⁵⁸

¹⁵⁶ Undertakings given by Carlton Communications plc and Granada plc to the Secretary of State for Trade and Industry pursuant to section 88(2) of the Fair Trading Act 1973, available at <<http://www.adjudicator-crr.org.uk/pdfs/undertakings.pdf>> (accessed 13 February 2012).

¹⁵⁷ *Ibid* paras 2-11.

¹⁵⁸ Undertakings, *supra* note 156. This is essentially a dispute resolution scheme where the ITV Adjudicator acts as a sort of first-instance court who can issue a decision as to whether the terms at issue offered by ITV plc are fair and reasonable. In cases where the complainant claim is unsuccessful, they may appeal to Ofcom. Conversely, where ITV plc is unsuccessful, it must make a new offer to the complainant which consists of fair and reasonable terms. If the complainant is not satisfied, the process will begin again.

Although it is the task of the ITV Adjudicator to monitor the situation, he or she does not have the right to carry out free-standing investigations. Rather, the ITV Adjudicator is required to notify the Competition authority of any suspected breach. However, in practice, and due to the relatively small size of the industry at issue, what frequently occurs is that the advertising community will call the ITV Adjudicator and make guidance enquiries in order to deal with potential disputes at an earlier stage. Given the one-sided nature of these conversations, the Office of the ITV Adjudicator most often refers enquiries to the applicable provision of the CRR or the technical guide,¹⁵⁹ as developed by Ofcom. In conjunction with its monitoring activities, the ITV Adjudicator receives information on the relationships between ITV plc and advertisers (including all copies of contracts) from several sources, the main one being ITV plc. A Memorandum of Understanding sets out details regarding the information required and the frequency with which it is provided to the ITV Adjudicator.¹⁶⁰ Moreover, the ITV Adjudicator has regular meetings with senior ITV personnel to discuss any issues that may affect ITV's approach to negotiations with advertisers, and the assistant adjudicator meets with lower-level ITV personnel to ensure that they understand the information that has been provided. The ITV Adjudicator also receives information such as industry-wide data provided by the leading industry private data supplier, and the Adjudicator meets with Ofcom and industry stakeholders to stay up-to-date with market developments.

One of the most important aspects of the ITV Adjudicator system is the rapidity with which it resolves disputes.¹⁶¹ Within two working days of receipt of a complaint, the ITV Adjudicator will confirm whether it will take action.¹⁶² If the Adjudicator decides to act, ITV plc must respond to the complaint within five working days of the receipt by the Adjudicator of the complaint.¹⁶³ Decisions must be rendered no later than 15 working days from the date on which the Adjudicator gave notice of its intention to take action.¹⁶⁴ A commentator indicated that having a great amount of information already before it, enables the ITV Adjudicator to meet these deadlines and resolve disputes quickly.

The issue of confidentiality was debated when the CRR remedy was created. There was concern that advertisers and media buyers would suffer from retaliation by ITV plc if they made a complaint under the CRR scheme. At one stage, the text of some of the adjudications included a clause stating that it would be a breach of the undertakings to penalize media buyers and advertisers because of their winning under the dispute mechanism. Despite this, a commentator noted that ITV plc has always been aware of who is making the complaints against them. It is not deemed to be such a problem, as it is likely that by the time the CRR remedy is engaged, the parties will have gone through a number of face-to-face negotiations that have not ended particularly well.

The Competition Commission published a report in 2010 reviewing the CRR mechanism in light of changes in the market position of ITV and concluded that the CRR mechanism was still necessary.¹⁶⁵ Moreover, letters from ISBA and the Institute of Practitioners in Advertising attached to the October 2011 Periodic Report from the Office of the Adjudicator indicate that although recently the number of complaints under the Adjudication scheme has decreased, it remains vital

¹⁵⁹ Ofcom, 'Technical background guide to advertisers and buyers' rights under the CRR remedy', available at <http://www.adjudicator-crr.org.uk/crr_technical_guide.pdf> accessed 14 February 2012.

¹⁶⁰ The Memorandum of Understanding is not publicly available.

¹⁶¹ 'Process for resolution of disputes', available at <<http://www.adjudicator-crr.org.uk/disputes.htm#3>> (accessed 8 March 2012).

¹⁶² *ibid*, Step 4.

¹⁶³ *ibid*, Step 5.

¹⁶⁴ *ibid*, Step 6. An extension to 20 days is possible if the complainant accepts; longer if all parties agree.

¹⁶⁵ Competition Commission, 'Review of ITV's Contracts Rights Renewal Undertakings – Final Report' (12 May 2010).

Less than one year later, the House of Lords recommended that the CRR scheme be repealed, but that some sort of adjudication scheme remains in place. House of Lords Select Committee on Communications, 1st Report of 2010-11, 'Regulation of Television Advertising', HL Paper 99, 17 February 2011, Chapter 3. In response, the Department for Culture, Media and Sport said that it did not feel that the CRR should be abolished without comprehensive changes being made to the way in which TV advertising is sold. See 'Government Response to the House of Lords Select Committee on Communications Report Into Regulation of Television Advertising', Cm 8057, April 2011. Following the Government's response, Ofcom considered referring the matter to the Competition Commission, but then declined. See Ofcom, 'Ofcom decides not to refer advertising trading market to Competition Commission' 15 December 2011, available at <<http://media.ofcom.org.uk/2011/12/15/ofcom-decides-not-to-refer-advertising-trading-market-to-competition-commission/>> (accessed 14 February 2012).

as long as ITV plc is dominant in the market.¹⁶⁶ One commentator indicated that although the number of disputes has decreased, the advertising industry still considers the CRR remedy to be helpful, especially to advertisers and media buyers who can make reference to the Adjudicator in its negotiations with ITV.

Although it is envisaged that the CRR scheme will eventually be dismantled, ITV plc remains an inevitable trading partner, i.e., creating a situation of economic dependency, due to the fact that it is the only channel that has 'mass audience programmes', i.e., it has viewers in the millions. If advertisers want to advertise to hit various audience types (as would be the case with media buyers with varied client lists) they will need to advertise on ITV plc. Therefore, although ITV plc currently has only a 35% market share, it still possesses a huge amount of negotiating strength in this context.

2. Reform of the UK Patents County Court (small claims court for SMEs)

The Patents County Court of England and Wales (PCC), established in 1990, deals with claims relating to IP. Due to a change in the law by which the Civil Procedure Rules replaced the County Court Rules, proceedings before the PCC no longer differ from those brought before the High Court and, as a result, were quite lengthy, complex and expensive. Because of this, small- and medium-sized enterprises became discouraged from litigating claims before the PCC. In response to this, several methods of reform were proposed, including the reform of procedures at the PCC that would encourage brevity of trial and reduce costs more generally.¹⁶⁷ Subsequently, the UK Government legislated on some of the key proposals, which included changing the Civil Procedure Rules to provide more streamlined procedures and costs regimes, and limiting the value of claims that can be heard in the PCC.¹⁶⁸ The most recent initiative has been to create a small-claims track within the PCC to provide better access to justice for SMEs. The Government announced its intention to introduce the small-claims track in November 2011, and the consultation and implementation process has begun.¹⁶⁹

3. UK Oil and Gas Supply Chain Code of Practice (example code of practice and peer review scheme)

In 2002, the oil and gas taskforce, PILOT, launched the Supply Chain Code of Practice (SCCoP) for the UK Continental Shelf and oil and gas industry.¹⁷⁰ Signatories include major purchasers and suppliers. The SCCoP is aspirational and is designed to help its signatories reach high standards of business ethics, health, safety and environmental operations. Key principles contained in the SCCoP include an undertaking to use standard model contracts which embody fair contracting principles, payment of invoices within 30 days, and aligning corporate social responsibility and good business principles and ethics. In 2008, the 'Changing Gear Initiative' was introduced to enable suppliers to rate their clients in terms of compliance with various aspects of the SCCoP. Ratings result in one of three scores (bronze, silver or gold), apply for two years and are displayed on the website of FPAL, one of the leading supplier management services. PILOT publishes yearly compliance reports. The most recent, in 2010, found that there had been overall improvement of compliance with the SCCoP.¹⁷¹ Compliance depends on three main factors: (1) filling out a

¹⁶⁶ The Office of the Adjudicator, 'Periodic Report' (October 2011), available at <<http://www.adjudicator-crr.org.uk/pdfs/OAPERIODICREPORTOCT2011.pdf>> (accessed 14 February 2012).

¹⁶⁷ Intellectual Property Court Users' Committee, 'Working Group's Final Report on Proposals for Reform of the Patents County Court' (31 July 2009), available at <<http://www.judiciary.gov.uk/JCO/Core/CrawlerResourceServer.aspx?resource=24e06162-8f8f-4117-92d2-3446cd75eca1>> (accessed 15 February 2012).

¹⁶⁸ The latter piece of legislation is The Patents County Court (Financial Limits) (No. 2) Order 2011 No. 2222.

¹⁶⁹ The progress of the small-claims track can be followed at <<http://www.ipo.gov.uk/types/hargreaves.htm>>.

¹⁷⁰ The SCCoP is available at <<http://www.decc.gov.uk/assets/decc/11/meeting-energy-demand/oil-gas/pilot/2819-pilot-supply-chain-code-of-practice-sccop.pdf>> (accessed 15 February 2012).

¹⁷¹ PILOT, 'Supply Chain Code of Practice Compliance 2010 Survey Report', available at <<http://www.decc.gov.uk/assets/decc/11/meeting-energy-demand/oil-gas/pilot/3560-sccop-compliance-2010-survey-report.pdf>> (accessed 15 February 2012).

compliance survey; (2) participating in Share Fair (a large industry event);¹⁷² and completing the required number. However, it should be reiterated that, as this is a voluntary code, there are no sanctions associated with failure to comply. It is not the intention to subject signatories to any formal consequences of non-compliance.

4. UK Advertising Standards (example code of practice and dedicated investigatory authority)

The Advertising Standards Authority (ASA) advocates the use of two codes, both of which were compiled by the advertising industry through a system of self-regulation.¹⁷³ These codes are 'The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing' regulated by the Committee of Advertising Practice (CAP)¹⁷⁴ and 'The UK Code of Broadcast Advertising, regulated by the (Broadcast) Committee of Advertising Practice (BCAP)'.¹⁷⁵ Both of these codes are designed to inform advertisers of the standards they are expected to achieve in the content they produce. Neither code regulates, specifically, business to business relations.

The ASA is responsible for both the investigation of complaints from consumers and businesses, and the proactive monitoring of compliance with the CAP Code or the BCAP Code.¹⁷⁶ In doing so, the ASA will produce adjudications, in which guidance is provided on how the codes may be interpreted.¹⁷⁷ To address non-compliance with the codes, the ASA has at its disposal a range of sanctions which can be employed, depending on whether the advertising is broadcast or non-broadcast. The majority of the sanctions at the ASA's disposal in the case of non-broadcast advertising are coordinated through the Compliance Team of the CAP and include: issuing ad alerts to CAP members; withdrawing trading privileges; pre-vetting the marketing material of persistent or serious offenders before publication; and imposing sanctions in 'the digital space' to ensure that claims made on offender's websites comply with the Codes. In the case of broadcast advertising, however, the ASA's actions are more limited. Since the responsibility to withdraw, change or reschedule a commercial rests with the broadcasters, if the broadcaster fails consistently to enforce either ASA adjudications or the Codes, the ASA can refer the broadcaster to Ofcom. It is then for Ofcom either to impose a fine or to withdraw the licence to broadcast. Also, for broadcast advertising, the ASA works on the idea that the desire to maintain a broadcaster or advertiser's credibility can be helpful in ensuring their compliance. This is because failure to comply may lead to bad publicity and disqualification from industry awards, thus denying them the opportunity to showcase their work.¹⁷⁸

Alternatively, in the case of advertisers who consistently produce misleading or unfair advertising, the ASA may refer cases to the OFT, which can act under the Business Protection from Misleading Marketing Regulations 2008.¹⁷⁹ These Regulations govern how businesses advertise to each other, and prohibits the use of both misleading and comparative advertising.

¹⁷² More information on Share Fair is available at <http://www.oilandgasuk.co.uk/events/pilot_share_fair.cfm> (accessed 22 March 2012).

¹⁷³ Advertising Standards Agency, 'Self-Regulation', <<http://www.asa.org.uk/Regulation-Explained/Control-of-ads/Self-regulation-non-broadcast.aspx>>, (accessed 23 February 2012).

¹⁷⁴ The Committee of Advertising Practice, 'The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (CAP)', (2009) <http://www.cap.org.uk/The-Codes/CAP-Code/CAP-Code-Item.aspx?q=CAP%20Code%20new_General%20Sections_01%20Compliance#c31> (accessed 23 February 2012).

¹⁷⁵ Committee of Advertising Practice, 'The UK Code of Broadcast Advertising (BCAP)', (2010), <<http://www.cap.org.uk/The-Codes/BCAP-Code.aspx>>, (accessed 23 February 2012).

¹⁷⁶ Advertising Standards Association, 'Monitoring Compliance', <<http://www.asa.org.uk/ASA-action/Monitoring-compliance.aspx>> (accessed 23 February).

¹⁷⁷ Advertising Standards Association, 'Adjudications', <<http://www.asa.org.uk/ASA-action/Adjudications.aspx>>, (accessed 23 February).

¹⁷⁸ Advertising Standards Association, 'Sanctions' <http://www.asa.org.uk/ASA-action/Sanctions.aspx>, accessed 13 March.

¹⁷⁹ UK Government, '2008 No. 1276, Trade Descriptions: Business Protection from Misleading Marketing Regulations 2008', <http://www.legislation.gov.uk/uksi/2008/1276/pdfs/uksi_20081276_en.pdf>, (accessed 23 February 2012); this legislation entered into force on the 26 May 2008.

Furthermore, Part 3 of the 2008 Regulations provides for their enforcement by the OFT. The OFT may either bring proceedings for an injunction against, or accept an undertaking from, the business in breach.

Moreover, in February 2012, the UK Institute for Promotional Marketing (IPM) published The Experiential Marketing Code of Conduct.¹⁸⁰ Although the Code is primarily aimed at the protection of consumers through the development of marketing standards, it does offer some helpful suggestions for enforcement. The Code is intended for adoption by trade organisations and, consequently, will be enforced through the trade associations. It is envisaged that a failure to comply with the Code obligations could result in expulsion from membership in a trade organisation.¹⁸¹ Enforcement of the Code through a complaints procedure and a regulatory body like the ASA is not currently contemplated. Moreover, compliance can also be promoted through contractual provisions that require the parties to abide by the all relevant UK law, including codes of practice. It is thought that advertisers can use non-compliance with the Code as a basis for threatening termination of contracts with advertising agencies, or for a damages suit.¹⁸²

5. German Regulation of Access to Energy Networks (contractual regulation of unequal bargaining power)

Germany has chosen to regulate access to electricity and gas networks through two main methods. The first is through procedures typically employed in the energy industry;¹⁸³ the second is a more unique approach to regulation through contract law, as a substitute for sector-specific regulation. Under Section 315 of the German Civil Code,¹⁸⁴ where a party requires performance of an obligation by another party, the latter party is bound only if the obligation is equitable. If this is not the case, a judicial authority is required to render an equitable obligation. This is also the case if the specified performance is delayed. This portion of the Civil Code has often been used to prevent actors in the energy sector from exploiting their market power.¹⁸⁵ This 'equity principle' is aimed at assessing the balance of the relationship between the parties at issue. Although the behaviour might be legal under sector-specific regulation or competition law, it may still be deemed illegal under Section 315. One commentator indicated that judicial intervention is mandatory in all cases falling under Section 315. Neither consumers nor businesses can rely on alternative dispute resolution procedures in the energy sector.

6. Marine Stewardship Council (example code of practice and certification scheme)

The Marine Stewardship Council (MSC)¹⁸⁶ developed two sets of standards for sustainable fishing and seafood traceability that are based on global best practice guidelines for certification and eco-labelling. Fisheries and seafood businesses can apply for certification that their processes meet these standards.¹⁸⁷ Successful applicants are given a certificate and can prominently display the MSC eco-label on their products to demonstrate that they comply with the relevant standards. The MSC certification scheme is available to fishers and seafood business world-wide and is conducted by an independent body. There are currently 139 certified fisheries, and a total of 411

¹⁸⁰ The Code is available at http://www.theipm.org.uk/pdfs/guides/Experiential_Marketing_Code_of_Conduct_1st_edition.pdf (accessed 2 March 2012).

¹⁸¹ J. Farmer, 'Experiential Marketing gets all grown up, with its own Code of Practice' (1 March 2012), available at http://www.lewissilkin.com/our_knowledge/knowledge_articles/Pages/ExperientialMarketinggetsallgrownupwithitsownCodeofPractice.aspx (accessed 2 March 2012).

¹⁸² *ibid.*

¹⁸³ This is regulation by the Federal Network Agency under the Energy Industry Act of 2005 (Energiewirtschaftsgesetz vom 7. Juli 2005 (BGBl. I S. 1970, 3621), last amended by Article 2 of the Act of 16th January 2012 (Federal Law Gazette I, p 74).

¹⁸⁴ Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002 (BGBl. I S. 42, 2909; 2003 I S. 738), last amended by statute of 28 September 2009 I 3161.

¹⁸⁵ G. Bellantuono, 'The Limits of Contract Law in the Regulatory State'. Vol. 6(2) European Review of Contract Law 115-142 (2010).

¹⁸⁶ Full information about the MSC and its certification standards is available at <http://www.msc.org/about-us>.

¹⁸⁷ Full details of the certification procedures are available at <http://www.msc.org/get-certified/fisheries> (accessed 22 March 2012).

fisheries either already engaged in the programme or in the assessment stage. This certification scheme encourages fisheries and seafood businesses to comply with relevant standards through a public display of compliance that is visible to consumers. Once certified, there annual surveillance audits are undertaken by independent certification bodies to verify that certified businesses and fisheries continue to meet the respective standard.

7. European Defence Agency Code of Best Practice in the Supply Chain (example code of practice applicable across the EU)

The European Defence Agency (EDA) adopted in 2006 a Code of Best Practice in the Supply Chain, intended to complement the EDA Code of Conduct in Defence Procurement.¹⁸⁸ It applies to EU Member States participating in the European Defence Agency.¹⁸⁹ Broadly speaking, the Code is aimed at promoting transparency and fair competition, as well as encouraging fair methods of supplier evaluation and selection, and a positive approach to setting the terms for the supply of goods and services. It promotes transparency and fair competition by seeking to ensure that similar standards for procurement procedures are being applied in all signatory States. Key principles include: the fair performance of obligations, the unambiguous and balanced statement of terms and performance requirements, and the need to take the relationship between buyers and their suppliers into account in the implementation of the Code. The Code is monitored by the EDA which considers information provided by Prime Contractors (through the advertising of sub-contract opportunities in the participating Member States) and from information provided by participating Member States regarding unresolved supply chain issues in relation to the Code.¹⁹⁰ The voluntary nature of this Code means that sanctions are not applicable for non-compliance. Although compliance is monitored, it is nearly impossible to determine its rate of success due to the fact that some of the data on the attribution of procurement contracts is confidential. However, the inclusion of the Code in this report is intended as evidence that the EU has already, in at least one other sector, implemented a supply chain code of conduct that has European-wide application.

8. Conclusions about Other Sectors

It is clear from the above discussion that the issues encountered by actors in the food supply chain are being experienced in other sectors that typically have varying degrees of regulation and intervention, depending on the sector at issue. Each sector has responded differently to suit its own needs, ranging from the development of sector-wide **voluntary codes** of practice, as in the context of the oil and gas industry, or **smaller, more focussed solutions**, such as the small-claims track in the PCC or the development of the ITV Adjudicator. In view of the fact that in most cases, the sectors considered chose to go via the route of a **voluntary mechanism**, one may conclude that perhaps it may not be possible to enact anything sector-wide that is binding in nature without interrupting the relevant actors' freedom of contract and choice of business partners. However, considering once again the lack of information relating to compliance with voluntary codes, one may also conclude that a solution that has no binding force and no possibility for sanctions for non-compliance may not be an adequate method of protecting or improving the retailer/supplier relationship. Where it is not possible to implement a legally binding regime, one could consider the potential for success of **certification schemes**, where compliance with standards is rewarded with some kind of publicly-visible 'kitemark'. Such a scheme might appeal to businesses as a positive aspect with which to further advertise their products or the credibility of the business as a whole.

¹⁸⁸ The EDA Supply Chain Code is available at <http://eda.eu.int/Libraries/Documents/CoBPSC_final.sflb.ashx> (accessed 15 February 2012). The EDA Code of Conduct on Defence Procurement of 2005 is available at <http://eda.eu.int/Libraries/Documents/CoC_1.sflb.ashx> (accessed 15 February 2012).

¹⁸⁹ The EDA currently consists of 26 EU Member States (Denmark does not take part).

¹⁹⁰ EDA Note for PREPCOM No 2006/02, para 7.

IV. FINDINGS

This study has confirmed that the issue of unfair commercial practices between retailers and suppliers is an area of concern in a large number of Member States which are, in turn, seeking to regulate the issues through a variety of mechanisms. However, it has also demonstrated that there is currently not one single mechanism that can serve as a perfect model of enforcement with respect to the criteria set forth in the Civil Society Recommendations.

Of the Member States that currently regulate these issues, it would appear that the UK's chosen mechanism most closely reflects the considerations in the Civil Society Recommendations. A Member State 'Score Sheet' in this regard can be found in Annex IV. The UK's GSCOP is applicable by law to the named retailers in the Order. They therefore must comply by law, although real enforcement may be ineffective unless and until financial penalties can be imposed.

Imposing requirements to report and to have an in-house compliance officer may help create a culture of compliance to counteract any incentive to unfairly exercise their powerful position to the disadvantage of suppliers. Moreover, the GSCOP is based on the principle of fair dealing, which is a theme that runs throughout the measures required to be taken by retailers. An independent body (the Adjudicator) is intended to proactively monitor and enforce the GSCOP. However, two things are of concern here: first, under the proposed GCA Bill, the Adjudicator can only impose fines as a last resort and with the permission of the Secretary of State; second, appointment of an in-house compliance officer alone must be reinforced with sufficient enforcement and monitoring of the officer's actions in order to determine whether the officer is acting according to a spirit of fair dealing. It is interesting to note that those Member States currently planning to regulate (or discussing the possibility of regulating) these issues through the development of a code, plus an enforcement mechanism, seem to consider more fully the considerations in the Civil Society Recommendations, and specifically the need to have an enforcement mechanism that is independent, non-voluntary, protects anonymity, includes *ex officio* investigatory powers and can impose effective sanctions.

The lack of other Member States that fulfill the ideals of the Civil Society Recommendations can largely be attributed to the fact that many existing mechanisms are simply part of pre-existing competition law which are not intended to achieve such ideals. Moreover, only a few of the mechanisms are definitively capable of applying to suppliers located outside the national territory.¹⁹¹ This should not be considered strange, however, given that the mechanisms we considered are national in character and largely seek to protect suppliers within the national territory. In addition, because most of the mechanisms are grounded in competition law, the competition policies are limited to anticompetitive conduct in the territory where the competition authority has competence, i.e., national competition authorities are concerned with problems, wherever their origin, that have anticompetitive effects in their jurisdiction.

Considering the foregoing, it is important to consider the obstacles to the creation of a completely successful mechanism, the alternatives and the feasibility of adopting a European-wide mechanism.

1. Difficulties

This study and others¹⁹² have demonstrated that suppliers' fear of retaliation and the need to protect their anonymity are issues that all of these legal systems struggle with. Each Member State must balance the need for anonymity against the right of the retailer to have a fair hearing of the issues, since without such a fair hearing, it cannot properly confront the accusations made against it. Associated with this is the need to consider the nature of the relationships in the food supply chain. The retailer/supplier relationship is ongoing; negotiations are frequent and contracts cover

¹⁹¹ Those that explicitly discuss application outside the State, or where commentators have indicated the possibility for such application are: the 2005 Hungarian Trade Act, the Slovenian Code, the UK GSCOP and the two French mechanisms.

¹⁹² Vander Stichele and Young, *supra* note 2, p. 5.

short periods of time. Therefore, because suppliers do not have the inherent stability that comes with a regular one or two-year contract, they often do not complain because they do not want to risk losing future business. At the same time, the rapidity of negotiations can sometimes occasionally motivate retailers to bargain hard. That is the nature of the relationship and should not automatically be viewed as wrongdoing or unfair. Nor does it indicate that it is not possible to undertake enforcement in this sector; however, it does demonstrate the need for a dedicated enforcement mechanism with the power to respond to complaints or problems quickly.

The pervasive reliance upon competition law has also demonstrated faults in the enforcement models evaluated. Basing enforcement on competition law presents problems relating to definitions of dominance and market share that do not necessarily apply in the context of retailer/supplier relationships. Competition law does not always catch those retailers who are not dominant in the classical sense; this does not of course rule out the possibility of applying competition law in the future to retailers that abuse their market power by imposing unfair terms on their (dependent) suppliers. Furthermore, competition authorities may lack the requisite power to launch *ex officio* investigations,¹⁹³ or to investigate at the urging of an anonymous complaint. Competition authorities are motivated by a different set of principles typically aimed at the efficient operation of markets and low prices for consumers; they are not tasked directly with protecting smaller businesses from the abusive actions of large retailers. Having a separate body tasked with monitoring and enforcing these issues, and with the specific objective of preserving the principle of fair dealing may be preferable.

2. Alternatives

While changes in behaviour may come about through more creative and rigorous application of competition law, or by means of a specific piece of legislation aimed at retailer/supplier relations, it is necessary to consider possible alternatives.

One alternative is that of the French method of imposing structural remedies where a large retailer is forced to sell off some of its assets. However, this solution is based on competition law and therefore focuses on issues of market power and dominance. It is unlikely that the retailer would lose enough of its assets to address adequately the imbalance in the relationship between retailers and suppliers. These problems are not necessarily derived from a retailer's dominance; they are the result of unfair conduct that may arise from retailers gaining unequal bargaining power from multiple sources (retailer as purchaser, retailer as competitor (own brand) and retailer as seller of shelf space (product visibility – access to consumers)). In limited circumstances, structural remedies can be appropriate in cases where markets have become too concentrated by a number of retailers and where the situation is leading to clear harm; however, they are a blunt instrument and are thus used rarely. There is a role for competition authorities to consider policy development in this area where a number of buyers control a market and act in a coordinated manner vis-à-vis the supplier community (if such is proven).

Some jurisdictions have included the possibility for resolution of these issues before the courts through private litigation between retailers and suppliers. This solution is probably the weakest of those considered in this section, as it triggers the culture of fear issue. Suppliers are almost certainly not going to sue their retailer-customers for fear of retaliation. Nonetheless there are two situations in which private litigation may provide an adequate solution. The first is if suppliers have the option of being represented by trade organisations. However, this triggers a further problem since the representation of members in court is not traditionally within the purview of these organisations. In order for this to occur, a sort of super-complaints procedure, such as that used at the OFT in the UK, would have to be created.¹⁹⁴ Under such a procedure, if enough suppliers were to complain about a systemic problem to a designated body, the body would then be required to take action on their behalf. The second way in which private litigation may be suitable is if some

¹⁹³ Note that the UK Office of Fair Trading is empowered by the UK Competition Act 1998 (c.41) to act on its own initiative under §25, provided reasonable grounds exist for suspecting infringement of the Act.

¹⁹⁴ Information about this procedure is available at <<http://www.of.gov.uk/OFTwork/markets-work/super-complaints/>> (accessed 18 February 2012).

sort of non-retaliatory clause were to be included in the judgment, akin to that initially employed by the UK's ITV Adjudicator. However, even if such a clause were included, it is alone unlikely to motivate suppliers to sue privately.

Member States (and the EU) may wish to consider basing the regulation of these issues on contractual law and the principle of fair dealing. The EU has a history of employing the principle of fair dealing, especially within its recent proposal for a regulation on Common European Sales Law.¹⁹⁵ According to the Common European Sales Law, 'good faith and fair dealing' is defined as "a standard of conduct characterised by honesty, openness and consideration for the interests of another party to the transaction or relationship in question."¹⁹⁶ Perhaps there is room for this or a similar instrument to regulate retailer/supplier relations. However, fair dealing somewhat conflicts with the principle of freedom of contract, which is inherent in many, if not all, of the EU legal systems. One commentator argued that we must acknowledge that the basis for the principle of freedom to contract has evolved into one based on consumer protection. Where suppliers can be put at a disadvantage by retailers whose freedom to contract is principally preserved, the consumer will suffer harm. Perhaps there is, or should be, a limit to the principle of freedom of contract that is the principle of fair dealing.

Of course it is also important to recognise that the existence of a regulatory framework may not be enough to motivate retailers to comply with the law. It is therefore vital to consider what other methods might be suitable for moving retailers towards compliance particularly since the sourcing and re-sale of products is their core business, and thus fair conduct (while still driving hard bargains) could be viewed as a paramount expectation of their customer base. Some of the latest thinking in this regard has emanated from the OFT itself, focussing on what are known as compliance drivers.¹⁹⁷ Common compliance drivers include financial penalties, disqualification orders for high-level officers, corporate benchmarking (i.e., ways of demonstrating that a business has a desire to be perceived as ethical) and promoting a strong culture of compliance within a business. The lattermost example can be evidenced by the GSCOP in the UK, which imposes requirements to appoint an in-house compliance officer and to formally include the GSCOP in every qualifying supplier contract. Another example is through the use of a certification scheme, such as that employed by the MSC or a peer review scheme under the UK Oil and Gas Supply Chain Code of Practice. Compliance drivers are typically employed in the context of competition law, but could easily be transplanted into the food retail chain, especially where no clear legal framework is applicable. Softer compliance drivers which seek to 'nudge' – rather than require – improvements in conduct could also be employed to motivate retailers to act ethically and fairly even though there is no legal obligation to act that way.

3. Feasibility of a European-wide Mechanism

It is also important to consider whether these issues can be regulated at EU level. The notion of whether it would be possible to regulate, at the EU level, the concept of 'unfairness' has been previously answered in the negative.¹⁹⁸ Others have commented that having EU-level standards would reduce obstacles to cross-border trade and that harmonisation is necessary.¹⁹⁹ This argument, however, is problematic, given that many of the problems experienced by suppliers are in domestic and not cross-border contracts, i.e., retailers are not disadvantaging suppliers in one Member State over suppliers in another so as to create an internal market problem. Such a lack of an effect on cross-border trade may limit the adoption of hard law solutions at the European

¹⁹⁵ COM(2011) 635 final, Art. 85.

¹⁹⁶ *ibid.*, Art. 2(d).

¹⁹⁷ See, e.g., Office of Fair Trading, 'Drivers of Compliance and Non-compliance with Competition Law: An OFT Report' (May 2010), available at <http://www.oft.gov.uk/shared_of/reports/comp_policy/oft1227.pdf> (accessed 18 February 2012).

¹⁹⁸ R.M. Hilty and F. Henning-Bodewig (Eds.), *Law Against Unfair Competition: Towards a New Paradigm in Europe?* (Springer: Berlin 2007), especially pp. 263, comments of Professor Trapele and Professor Hilty, and 266.

¹⁹⁹ *ibid.*, especially pp. 263, comments of Professor Hilty.

level.²⁰⁰ In that case, perhaps the best method would be to adopt soft law regulation at the EU level through the adoption of a Code of Conduct or guidelines that are enforced at the national level.

However, it may be possible to employ the internal market provisions of the TFEU in order to support legislation aimed at restoring imbalances in national legal frameworks that distort the internal market similar to the EU Unfair Commercial Practices Directive (UCP Directive), which applies in the B2C context.²⁰¹ The UCP Directive seeks to eliminate obstacles to the free movement of services and goods across borders and the freedom of establishment by approximating the laws of the Member States on unfair commercial practices. Chapters 3 and 4 discuss enforcement and its relationship to codes of conduct. Article 10 provides that the UCP Directive does not exclude the ability of the Member States' to regulate unfair commercial practices through the use of codes of conduct. Article 11 continues with specifics regarding enforcement. It requires the Member States to ensure that adequate and effective legal means exist to combat unfair commercial practices in order to comply with the Directive. Such legal means include allowing persons or organisations with a legitimate interest in combating unfair commercial practices to take legal action against such practices and/or bringing such practices before an administrative authority competent to decide on complaints or decide whether to initiate legal action. It then explicitly states that it is for each Member State to decide which of the facilities should be available, and whether to enable the courts or administrative authorities to require interested parties to first seek redress through other means of dealing with complaints, such as a code of conduct. Finally, the UCP Directive provides that infringements of national provisions adopted to implement the UCP Directive must be enforced by effective, proportionate and dissuasive penalties.

Should the EU decide to choose this method of regulation, it may choose to base its action on either Article 115 or Article 116 TFEU. Article 115 TFEU allows the Council of the EU to issue directives for the approximation of national laws, regulations or administrative provisions that directly affect the establishment or functioning of the internal market. In addition, the seldom-used Article 116 TFEU empowers the Commission to identify and attempt to resolve any national laws, regulations or administrative actions that are distorting the conditions of competition in the internal market. Where the distortion cannot be eliminated, the institutions can issue the necessary directives.

Article 115 TFEU:

Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.

Article 116 TFEU:

Where the Commission finds that a difference between the provisions laid down by law, regulations or administrative action in the Member States is distorting the conditions of competition in the internal market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned.

If such consultation does not result in an agreement eliminating the distortion in question, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall issue the necessary directives. Any other appropriate measures provided for in the Treaties may be adopted.

In January 2012, the European Parliament adopted a Resolution of the European Parliament on imbalances in the food distribution chain.²⁰² To justify EU action in this area, the Resolution states

²⁰⁰ Of course, where there is evidence of anti-competitive practices discriminating against local purchasers then this could be addressed by hard law solutions where available.

²⁰¹ Directive 2005/29/EC, supra note 12.

²⁰² (2011/2904 (RSP)), available at <<http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2012-0010&language=EN>> (accessed 18 February 2012).

that “the problem of imbalances in the food distribution chain has a clear European dimension, which demands a specific European solution, given the strategic importance of the agri-food chain to the European Union.”²⁰³ The Resolution focuses on national and European competition authorities and other national authorities involved in production and commerce, requiring them to take action against the abusive practices of ‘dominant wholesalers and retailers’ that puts suppliers in an ‘extremely unequal bargaining position’.²⁰⁴ It supports the creation of evaluation and monitoring frameworks in the Member States which can impose sanctions, but which are coordinated by the European Commission.²⁰⁵ It concludes by stating that imbalances can be resolved through a combination of competition law amendments, horizontal legislation, voluntary self-regulatory agreements and codes of conduct in the Member States.²⁰⁶

It may be possible for competition law to be amended in a way similar to that of Germany, expressly taking into consideration the case of small and medium-sized competitors. However, such an amendment would still have to find a way of dealing with those retailers that have superior bargaining power, but not necessarily a high market position. Moreover, given what our study has demonstrated about the limited efficacy of competition law in this area, it is unlikely that changes to existing competition law will adequately address the imbalances. The Resolution proposes a *mélange* of solutions, which, to the authors, is indicative of there being no single ‘magic bullet’ to address all of the concerns. That said, mandating a myriad of measures of varying or limited effectiveness would also be likely to be opposed by retailer and supplier groups alike, as well as the bodies entrusted with enforcement. Should the EU choose to regulate these issues through competition law, alteration of the law would be necessary to ensure that the problems surrounding the concepts of dominance and market power, discussed in this report, are adapted to take into consideration the special nature of the food supply chain.

V. CONCLUSION

This report has identified the practices in a selection of EU Member States with regard to unfair commercial practices between retailers and suppliers in both the food supply chain and other relevant sectors. The Member States have employed several mechanisms to try and tackle the issue of unfair commercial practices, which differ according to the needs and legal traditions of the Member States. Although several of the Member States have chosen to deal with these issues through competition law, it is clear that the motivation behind competition law frameworks is inapplicable in the context of the food sector. These issues are consequently creating confusion in the grocery trade as to the most appropriate method of regulation. Moreover, in several Member States, the mechanisms are new or in preparation, and so it is too early to determine which is the most effective. It seems that the EU is best placed to bring some consistency into this area, and also has the potential to introduce a mechanism that effectively addresses these unfair commercial practices. Our research indicates that competition law is unlikely to be the answer. However, the EU has a number of other tools at its disposal, ranging from soft law to hard law **options**:

1. Guidelines urging national authorities to develop and enforce codes of conduct, the UK GSCOP being a useful precedent for at least some of the practices complained of;
2. Establishing EU-level or national practices which certify compliance with a code of conduct or set of principles;
3. A voluntary code at EU level that is enforced by national authorities;
4. A voluntary code at EU level that is enforced by a dedicated EU-level body, e.g., an ombudsman;
5. Guidelines urging national authorities to create a special forum for dispute resolution, e.g., mediation or arbitration with a dedicated adjudicator;
6. An EU-level method for dispute resolution, e.g., mediation or arbitration;
7. A mandatory code at EU level with an accompanying dispute resolution mechanism;

²⁰³ *ibid*, para 1.

²⁰⁴ *ibid*, para 4.

²⁰⁵ *ibid*, para 6.

²⁰⁶ *ibid*, para 14.

8. A mandatory code at EU level with an accompanying dedicated enforcement body that can impose sanctions that have teeth, e.g., financial penalties or disqualification of high-level officers;
9. A mandatory code at EU level that imposes obligations on retailers to engage in cultural change through, e.g., the appointment of an in-house compliance officer and training and reporting requirements, plus an independent and dedicated enforcement body that can impose sanctions with teeth;
10. Encouraging a different application of competition law to take into account the particular features of supplier dependence on retailers in the grocery sector and the problem of unequal bargaining power leading to the imposition of terms that would fall within Article 102 in the case of dominant undertakings;
11. Encouraging (perhaps within the European Competition Network) the imposition of structural remedies (as in the French Casino case) by national competition authorities to limit the abuse of excessive market power in defined areas;
12. Encouraging debate about the long-term implications for farmers and small suppliers, and for smaller retailers, of the vertical integration of wholesaling by large grocery retailers; or
13. Regulation of these issues through something akin to the Unfair Commercial Practices Directive which would apply in the B2B context, possibly along the lines of the German model.

This study has demonstrated that, out of the options above, while control of quasi-abusive behaviour by quasi-dominant retailers through competition law might become more effective in the future, the adoption of codes, voluntary or mandatory, may be a more successful short term solution, particularly if accompanied by strong enforcement mechanisms, and if companies themselves can be signatories.

In making the decision of how to regulate these issues, the EU should consider the **characteristics** of enforcement identified in this study as being favourable:

1. Standards based on the principle that a retailer must deal with its suppliers fairly, lawfully and in good faith, without duress and in recognition of its suppliers' need for certainty (i.e., a foundation of fair dealing);
2. A binding instrument that regulates conduct through, e.g., the imposition of obligations to change business structures, e.g., through the appointment of an in-house compliance officer;
3. A soft law dispute resolution framework that provides parties with a clear procedure in which to resolve their issues;
4. A framework to adequately address imbalances of bargaining power;
5. The creation of a dedicated adjudicator or ombudsman that can build up sector-specific expertise;
6. A framework that can be accessed by all suppliers in the food supply chain, whatever their geographical origin;
7. Routine publication of reports on sector inquiries to identify good and bad practice;
8. The possibility for *ex officio* investigations or to initiate investigations based on information from a credible third party (as opposed to only information from suppliers);
9. A mechanism to allow anonymous complaints;
10. The possibility for retailers and suppliers to make joint commitments to resolve dispute; and
11. The possibility to impose enforcement measures with 'teeth', e.g., financial penalties.

It is important to consider that in order to achieve a truly effective mechanism, a mix of soft and hard law options might be necessary. Change is unlikely to be effected by a voluntary code that is not accompanied by a dedicated monitoring and enforcement body that can hold retailers to account and change behaviour; neither is it likely that solely appointing an in-house compliance officer will ensure a change in behaviour without someone to enforce the officer's actions. In that regard, the discussion above regarding compliance drivers has a front-line role in helping to ensure that commitments regarding conduct are followed. Moreover, there may be scope for inclusion of a scheme whereby compliance with the code or standards is a point of pride for the buyer, such as a certification scheme akin to that adopted under the MSC. The EU should also consider how to fund

whatever mechanism it chooses to enact, particularly if the mechanism is separate from competition law. One method to cover costs might be according to a sort of 'polluter pays' principle where large retailers who do not comply with the applicable framework are mostly responsible for funding it, as is the proposal in the UK Groceries Code Adjudicator Bill.

Because these issues are experienced across the EU Member States, it would arguably be helpful to regulate B2B conduct at the EU level. If that is the route ultimately chosen, it is important to be realistic about soft law versus hard law regulation at the EU level. Attempting to regulate these issues with hard law is likely to be very time-consuming and burdensome. It may therefore be preferable to regulate these issues using soft law, in particular, through the development of a code of conduct that can be enforced either at EU level, or nationally.

A. Regulation through Hard Law

Czech Republic

[Act No. 395/2009 of 9 September 2009 \[English\]](#)

France

[French Commercial Code, Art. L-442-6, Part III \[English\]](#)

[French Commercial Code, Art. L-442-6, Part III \[French\]](#)

[French Commercial Code, Art. L-752-26 \[English\]](#)

[French Commercial Code, Art. L-752-26 \[French\]](#)

Germany

[Act Against Restraints of Competition \(ARC\) \[English\]](#)

[Act Against Restraints of Competition \(ARC\) \[German\]](#)

[Act Against Unfair Competition \[English\]](#)

Hungary

[Act CLXIV of 2005 on Trade \[competition law provisions only - in English\]](#)

[Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition \[English\]](#)

[Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition \[Hungarian\]](#)

[Act XCV of 2009 \[English\]](#)

[Act XCV of 2009 \[Hungarian\]](#)

[National Association of Trade Codex \[Hungarian\]](#)

Latvia

[Competition Act LV, 151 \(2538\) \[English\] \(in entirety\)](#)

[Competition Act LV, 151 \(2538\) \[Latvian\] \(in entirety\)](#)

[Amendment §13\(2\) LV, 98 \(4084\) \(to Competition Act\) \[English\]](#)

[Amendment §13\(2\) LV, 98 \(4084\) \(to Competition Act\) \[Latvian\]](#)

Romania

[Law No. 321/2009 \[English\]](#)

[Law No. 321/2009 \[Romanian\]](#)

[Law No. 247/2010 \[English\]](#)

[Law No. 247/2010 \[Romanian\]](#)

United Kingdom

[Groceries \(Supply Chain Practices\) Market Investigation Order 2009](#)

[Groceries Code Adjudicator Bill \(GCA Bill\)](#)

B. Regulation through Soft Law

Belgium

[Belgian Code of Conduct \[English\]](#)

France

[Mission of the CEPC \[French\]](#)

[Recommendation No. 11-01 on a Code of Good Practice \[French\]](#)

Slovenia

[Code of Good Business Practices \[English\]](#)

²⁰⁷ All of these documents can also be found online at <http://www.biicl.org/european_law/b2b_food_retail/> .

C. Non-EU Example - Argentina

[Codigo de Buenas Practicas Comerciales, signed 30 July 2000 \[Spanish\]](#)

D. Plans for Regulation

Ireland

[Draft Code of Practice for Designated Grocery Goods Undertakings](#)

Italy

[Article 62 on 'Commercial relationships in the sales of agricultural and agro-food products' \[Italian\]](#)

Netherlands

University of Tilburg, ['Eerlijk, Scherp and Betrouwbaar: Een Interactieve Verkenning Naar Ijkkunten Voor Eerlijk Zaken Doen en Effectieve Conflictoplossing'](#) (January 2012) [Dutch]

Portugal

Autoridade de Concorrência, ['Commercial Relations Between the Large Retail Groups and their Suppliers' \(October 2010\) \[Abridged English Version\]](#)

Autoridade de Concorrência, ['Commercial Relations Between the Large Retail Groups and their Suppliers' \(October 2010\) \[Full Portuguese Version\]](#)

[Código de Boas Práticas Comercias \(17 July 1997\) \[Portuguese\]](#)

[Decree-Law No. 370/93, of 29 October 1 \[English\]](#)

[Decree-Law 118/2010 of 25 October 2010 \[Portuguese\]](#)

Spain

[National Competition Commission, 'Report on Manufacturing-Retailer Relationships in the Food Sector' \(October 2011\) \[English\]](#)

Non-EU Example – Norway

Inquiry Commission, ['The powerful and the powerless in the food supply chain' \[English summary\]](#)

Annex I

Article 101 TFEU:

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 102 TFEU:

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Annex II: Member State options for Enforcement

| | SOFT LAW | | HARD LAW | | | | | |
|----------------------|--|---|---|--|---|---|--|--|
| |  | | | | | | | |
| | Voluntary Code (for Whole Sector) | Dispute resolution mechanism | Voluntary Code with dispute resolution | Mandatory Code and dispute resolution/enforcer | Specific Legislation (non-competition law) | Specific Legislation (based on competition law) | Contract law/Private enforcement | Competition Law |
| | Slovenia | France (CEPC) Spain (indications that retail associations using informal dispute resolution mechanism) | Belgium Norway (plans) Portugal (plans) | Hungary (first Act requires Codes to be approved) UK Ireland (plans) Argentina (technically voluntary but dependent on signature) | France – Ministry action Hungary (second act from 2010) Romania Portugal (decree-law on payment deadlines in food sector) Spain (plans) | Czech Republic France (injunction) Hungary (first act mentioned) Latvia (actual amendment to competition involving retail) | Italy (drafted 2012) | Germany |
| Trigger | - Complaint | - Complaint - Interpretation of law | - Complaint | - Complaint - Active monitoring by dedicated body (ex officio) | - Complaint - Active monitoring by dedicated body (ex officio) | - Complaint - Active monitoring by competition authorities | - Complaint | - Complaint - Active monitoring by competition authorities |
| Enforcer | - Dedicated monitoring committee - Scope for role of mediation | - Mediator or arbitrator | - Dedicated monitoring committee - Mediator or arbitrator - Ombudsman | - Ombudsman - Special Adjudicator | - Government Minister - Competition authority | - Competition authorities - Consumer agencies | - Judiciary | - Competition authorities |
| Applicability | - Signatories only | - Anyone doing business in State | - Signatories | - Large retailers - Net turnover | - Large retailers - Net turnover - Any actor behaving as to cause harm to suppliers | - Retailers and suppliers within the jurisdiction of the competition authorities | - Anyone doing business under the national law in question | - Retailers and suppliers within the jurisdiction of the competition authorities |

| | | | | | | | | |
|------------------------|---|---|---|---|---|---|--|---|
| Confidentiality | - Can keep details of dispute confidential | - Can keep details of dispute confidential | - Can keep details of dispute confidential | - Details of complainant can be confidential | - Details of complainant can be confidential | - Details of complainant can be confidential | - No | |
| Sanctions | - none | - Damages | - Damages | - Damages - Fine | - Damages - Fine | - Fines - Structural injunction | - Damages - Specific performance | - Fines - Structural injunction |
| Binding force | - Code binding on all signatories | - Code binding on signatories - Dispute resolution binding on parties to dispute | - Code binding on signatories - Dispute resolution binding on parties to dispute | - Code and any judgments legally binding | - Decisions regarding damages and/or fine are legally binding | - Determination of fine is binding - Injunction legally binding | - Legal obligations re contract form binding - Determinations in civil suit legally binding | - Determination of fine is binding |
| Accessibility | - Stakeholders in the agri-food chain | - Anyone doing business in the Member State | - Anyone doing business in the Member State | - Anyone doing business in the Member State | - Anyone doing business in the Member State | - Anyone providing harm in national market demonstrated | - Parties to contract | - Anyone providing harm in national market demonstrated |
| Pros | - Possibility for explicit base in fair trade and fair dealing | - Efficient method of resolving disputes | - Possibility for explicit base in fair trade and fair dealing - Formal dispute resolution provides more certainty | - Dedicated monitoring body with ex officio investigatory power helps with culture of fear issue - Legally binding = real enforcement powers | - Dedicated monitoring body with ex officio investigatory power helps with culture of fear issue - Binding nature of decisions means real enforceability | - Possibility for joint commitments | - Mandatory contractual form may prevent abuses | - Could include specific regulation of hindrance of SMEs |
| Cons | - Voluntary - No real binding legal force without corresponding enforcement body | - Voluntary - No real change in 'culture'; bad behaviour not resolved in a lasting way | - Voluntary | - Basis in net turnover may not reach all retailers with superior bargaining power | - Not adequately tested to determine if successful | - Investigatory power limited in geographical scope - Emphasis on market share/dominance | - Private enforcement only - Mandatory contractual form may not prevent weaker party from contracting out of rights | - Investigatory power limited in geographical scope - Emphasis on market share/dominance |



RECOMMENDATIONS TO THE EU HIGH LEVEL FORUM FOR A BETTER FUNCTIONING FOOD SUPPLY CHAIN IN RELATION TO THE BUSINESS TO BUSINESS CONTRACTUAL PRACTICES EXPERT PLATFORMS FORTHCOMING WORK EXPLORING 'CODE' IMPLEMENTATION OPTIONS.

ANNEX III

I) Background

- i. We welcome the High Level Forum's focus on business to business trading relationships.
- ii. As organisations concerned about the international development impacts of food sourcing on the human rights of workers and farmers in developing countries it has come to our attention that the purchasing practices of some companies in the food supply chain undermine suppliers ability to implement good working conditions, operate in an environmentally responsible manner and plan for the future.
- iii. The collaboration of the trade associations within the Business to Business Platform is commended, because it is the behaviour change of businesses within the food supply chain that is desired.
- iv. We regret that the trade associations' did not incorporate improvements proposed by the Fair Trade Advocacy Office in September 2011 to the "Vertical relationships in the Food Supply Chain: Principles of Good Practice" paper. This paper provides the basis for a code, and we would welcome the European Commission undertaking analysis to clarify how this 'code' compares to other codes and laws that apply to the food supply chain in member states.

II) Summary

- v. We propose that the High Level Forum directs the B2B expert platform to consider the following points so that a credible 'code' enforcement mechanism is developed, and swift progress can be made.

| Nature of sector or current practices | Recommendations for credible 'code' enforcement |
|--|--|
| WHAT is the problem? The code aims to address the behaviour of companies towards their suppliers which is a symptom of the cause which is the power imbalance in supply chains. | 1. Enforcement powers need to be sufficiently strong to counteract a food company's rational approach to maximising the opportunities that their powerful position gives them relative to their suppliers. |
| WHO is impacted by the problem? The EU food sector is supplied by farms and companies based all over the world. These food suppliers consider their position to be weak, and want ongoing access the EU market. So many are not willing to complain publicly (or to the buying company) when faced with unfair commercial practices. | 2. All parts of the supply chain wherever their geographic location need to be able to access the enforcement organisation. 3. This organisation needs to proactively make itself accessible to 'weaker' companies within the food sector. Specifically it needs to: <ol style="list-style-type: none"> a keep information confidential b receive anonymous complaints c gather relevant information that may indicate a breach d independently initiate an investigation if there is sufficient suspicion of a breach of the code, to avoid complainants being sought and targeted |
| WHOSE practices need to change? Companies selling in the EU may be making the purchasing decision at their headquarters, a regional hub or in each member state. | 4. Investigation activities and enforcement needs to involve coordination across countries. |

Characteristics of Enforcement in the EU Food Supply Chain to stop unfair Commercial practices

The Business to Business Contractual Practices Expert Platform of the HLF is about to look at appropriate implementation options for the 'code' which has been developed. It is not clear at first sight what the most appropriate mechanism might be to enforce the code across the EU.

We have arranged our analysis in the form of a table below. The left-hand column describes various problems exhibited by the nature of the EU food sector. The right hand column of the table below sets out recommendations to address each problem. Taken together, the points in the right-hand column form a list of characteristics that a credible enforcement mechanism would have.

To take this analysis further, learning could be gathered from enforcement activities in different sectors which meet some of the characteristics below. For example the UK ITV Contracts Rights Renewal Adjudicator meets the following characteristics listed in the right hand column: 1, 2, 6, 7, 8, 9a), 12, 13, and 14.

| Nature of sector or current practices | Implementing the following characteristics of how code implementation, monitoring and enforcement needs to occur |
|---|--|
| CAUSE OF PROBLEM & RESULTANT CLIMATE OF FEAR | |
| <p>The code aims to address the behaviour of companies towards their suppliers which is a symptom of the cause - which is the power imbalance in supply chains.</p> <p>Companies which purchase significant volumes and/or have large market share limit access to a market and have more power relative to a frequently disparate and large number of suppliers. Suppliers who want their products to reach the market either have to sell to fewer large companies, or sell to other companies who have to follow the behaviour of the larger purchasing companies (to be able to survive in the market).</p> <p>Buyers within companies are incentivised to achieve a set of commercial objectives. The pressure to achieve these goals combined with power imbalance between buyers and sellers is what has enabled the development of unfair commercial practices to evolve unchecked.</p> | <p>1) Enforcement powers need to be sufficiently strong to counteract a company's rational approach to maximising the opportunities that their powerful position gives them relative to their suppliers.</p> <p>2) The source of power imbalance needs to be understood to develop an effective enforcement mechanism. The imbalance of power in the supply chain is structural so competition policy solutions are likely to be an appropriate set of remedies to consider.</p> <p>3) The principles of fair contractual practices set out in the proposed code will be ignored if there is no compelling reason for a purchasing company to abide by these principles. The reform, implementation of the 'code' will need to be monitored proactively. Analysis from this monitoring needs to be shared with public authorities and made public.</p> <p>4) Claims that companies will voluntarily abide by this code will not work for the above reasons. This was verified by the failure of the 2001 UK Supplier Code of Practice (SCOP).</p> <p>5) Companies need to be named signatories of the code, and the enforcement organisation needs to have direct access to senior management of the signatory food companies.</p> |

| Nature of sector or current practices | Implying the following characteristics of how code implementation, monitoring and enforcement needs to occur |
|---|---|
| <p>to be a) aware of the code, and b) desire that their staff abide by the code, so that there are no breaches of the code and trade is undertaken in a fair manner. The latter might be evidenced according to how buyers were incentivised.</p> | <p>6) The enforcement organisation needs to apply remedies/sanctions in a manner that changes the behaviour of companies. For example if a purchaser within a company breaches the code, and is found guilty – the enforcement organisation would need to act in a manner that addresses that company's specific trading practice but also sends a signal to the sector that unfair trading practices will not be tolerated. Therefore enforcement actions should not only remedy a specific situation but also act as a deterrent to further breaches.</p> |
| <p>There is a climate of fear amongst the supplier community, because they have an on-going need to be able to access the market, and are not willing to complain publicly (or sometimes to the buying company) when faced with unfair contractual practices.</p> | <p>7) The funding mechanism of the enforcement organisation could be partially funded according to 'polluter pays principle' where those companies found to be most in breach then paid a higher amount to the enforcement organisation.</p> <p>8) An organisation independent of purchasing companies needs to enforce the code. This organisation needs to proactively make itself available/accessible to 'weaker' companies within the food sector.</p> <p>9) This organisation needs to be able to:</p> <ul style="list-style-type: none"> a) keep information confidential; b) receive anonymous complaints; c) assess all information on whether there has been a breach of the code since it is in the interests of the EU market to stop this transfer of risks down the supply chain. Whether there is evidence of a breach of the code is the relevant information rather than the source of the information; d) independently initiate an investigation if there is sufficient suspicion of a breach of the code, to avoid the complainant being sought and targeted. This independent investigation can make recommendations to address situations it discovers. |

| WHERE FOOD IS SOURCED FROM & DECISIONS MADE | |
|--|--|
| Food Companies selling to EU consumers purchase from suppliers based both in EU member states as well as from third countries. | 10) All parts of the supply chain wherever their geographic location need to be able to have access to the enforcement organisation. |
| Companies selling across the EU may be making the purchasing decision at their headquarters, a regional hub or within member states. | 11) Investigation activities and enforcement needs to involve coordination across countries. |
| DYNAMICS OF SECTOR NEED TO BE UNDERSTOOD FOR ENFORCEMENT TO ACT ON LIVE SUPPLY CHAIN RELATIONSHIPS | |
| Breaches of the code will occur whilst suppliers want to have an ongoing relationship with their purchasing company. The need for quick judgement will be particularly vital on perishable products. | 12) The enforcement organisation will need to develop ways of working to be able to act swiftly; when investigating and providing recommendations on a live supply chain. |
| An understanding of the dynamics of food supply chains will need to be developed to judge fair/unfair practices. | 13) The enforcement organisation should be dedicated to this sector, so that they are able to accrue more knowledge about how the sector operates and the dynamics that occur between trading partners, so that they can form a view about fair/unfair practices, and if necessary build up relationships to be able to act swiftly. |
| Some parts of the code are ambiguous. (For example see current text on Predictability, Justifiable Request, 'fair clauses' within General Terms and Conditions, Information which would be expected to be shared.) The practical examples may need to be expanded upon or explained to clarify ambiguous parts. | 14) The enforcement organisation needs to be able to form a judgement about whether specific practices are fair/unfair, based on a set of principles. As new unfair commercial practices occur then the code will need to be updated or clarified following on from new or ambiguous practices occurring. |
| DESIGN OF PAN-EU ENFORCEMENT CONSIDERING DIFFERENT MEMBER STATES | |
| Member States are at different stages of addressing the unfair business to business practices. Some Member States have already passed legislation, to set up enforcement organisations, some are in the process of setting up enforcement processes, whilst others are looking to the EU for a solution since they see this problem as pan-European. | 15) The enforcement mechanism at pan-European level needs to be : a) compatible with the approaches already taken by member states to address this problem; b) coordinated in a similar manner across the EU, so that there is an equal base of enforcement (so that companies don't change headquarters/purchasing hubs). |

Finally, we note that, if an approach is adopted in 2012 with inadequate enforcement, public authorities will then return to the subject again. This would be a waste of public money and allow further years of harm to fair and efficient functioning of EU market.



This Briefing Paper was produced with the support of the European Union. The views expressed in it are exclusively those of the participating organisations and can under no circumstances be regarded as reflecting the position of the European Union.

Annex IV: Member State comparison to Civil Society Recommendations – Score Sheet

| CIVIL SOCIETY RECOMMENDATIONS | Belgium | Czech Republic | France (Ministry) | France (CEPC) | Germany | Hungary | Latvia | Romania | Slovenia | United Kingdom |
|---|---------|----------------|-------------------|---------------|---------|---------|--------|---------|----------|----------------|
| 1) Enforcement powers need to be sufficiently strong to counteract a company's rational approach to maximising the opportunities that their powerful position gives them relative to their suppliers. | | | X | | X | | | | | X |
| 2) The source of power imbalance needs to be understood to develop an effective enforcement mechanism. | X | X | X | X | X | X | X | X | X | X |
| 3) The principles of fair contractual practices set out in the proposed code will be ignored if there is no compelling reason for a purchasing company to abide by these principles. Therefore, implementation of the 'code' will need to be monitored proactively. Analysis from this monitoring needs to be shared with public authorities and made public. | X | X | X | | | X | X | | X | X |
| 4) Claims that companies will voluntarily abide by this code will not work for the above reasons. This was verified by the failure of the 2001 UK Supplier Code of Practice (SCOP). [i.e., if it is not purely voluntary, a point is awarded] | | X | X | | X | X | X | X | | X |
| 5) Companies need to be named signatories of the code, and the enforcement organisation needs to have direct access to senior management of the signatory food companies. | X | | | | | | | | X | |
| 6) The enforcement organisation needs to apply remedies/sanctions in a manner that changes the behaviour of companies. For example if a purchaser within a company breaches the code, and is found guilty – the enforcement organisation would need to act in a manner that addresses that company's specific trading practice but also sends a signal to the sector that unfair trading practices will not be tolerated. Therefore | | X | X | | X | X | X | X | | X |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|--|---|---|
| enforcement actions should not only remedy a specific situation but also act as a deterrent to further breaches. | | | | | | | | | | |
| 7) The funding mechanism of the enforcement organisation could be partially funded according to 'polluter pays principle' where those companies found to be most in breach then paid a higher amount to the enforcement organisation. | | | | | | | | | | X |
| 8) An organisation independent of purchasing companies needs to enforce the code. This organisation needs to proactively make itself available/accessible to 'weaker' companies within the food sector. | X | X | X | | | | | | X | X |
| 9) This organisation needs to be able to: | | | | | | | | | | |
| a) keep information confidential; | - | X | X | X | X | X | X | | | X |
| b) receive anonymous complaints; | - | X | | | | X | X | | X | X |
| c) assess all information on whether there has been a breach of the code since it is in the interests of the EU market to stop this transfer of risks down the supply chain. Whether there is evidence of a breach of the code is the relevant information rather than the source of the information; | X | X | X | | X | X | X | | X | |
| d) independently initiate an investigation if there is sufficient suspicion of a breach of the code, to avoid the complainant being sought and targeted. This independent investigation can make recommendations to address situations it discovers. | - | X | X | | X | X | X | | X | X |

| | | | | | | | | | | |
|--|---|----|----|---|---|---|---|---|----|----|
| 10) All parts of the supply chain wherever their geographic location need to be able to have access to the enforcement organisation. | X | | X | X | | | | | X | X |
| 11) Investigation activities and enforcement needs to involve coordination across countries. | | | | | | | | | | |
| 12) The enforcement organisation will need to develop ways of working to be able to act swiftly, when investigating and providing recommendations on a live supply chain. | | | | X | | | | | | |
| 13) The enforcement organisation should be dedicated to this sector, so that they are able to accrue more knowledge about how the sector operates and the dynamics that occur between trading partners, so that they can form a view about fair/unfair practices, and if necessary build up relationships to be able to act swiftly. | X | | | X | | | | | X | X |
| 14) The enforcement organisation needs to be able to form a judgement about whether specific practices are fair/unfair, based on a set of principles. As new unfair commercial practices occur then the code will need to be updated or clarified following on from new or ambiguous practices occurring. | X | X | X | X | X | X | X | | X | X |
| SCORE (out of 17) | 8 | 10 | 11 | 6 | 7 | 9 | 9 | 3 | 10 | 13 |