



EUROPEAN COMMISSION
Directorate General Internal Market and Services
SERVICES
Business-to-business services

SUMMARY REPORT

OF THE RESPONSES RECEIVED TO THE COMMISSION'S CONSULTATION ON UNFAIR BUSINESS TO BUSINESS COMMERCIAL PRACTICES

**DIRECTORATE-GENERAL FOR
THE INTERNAL MARKET AND SERVICES**

15 FEBRUARY 2012

1. EXECUTIVE SUMMARY

During the past few years, the Commission has placed a particular focus on the aspect of unfair commercial practices in business-to-business relationships. By the end of 2012, the Commission plans to adopt a Communication outlining the problem and presenting possible solutions for discussion. As part of the fact-finding process ahead of this Communication, the Commission has turned to the businesses themselves in order to learn about their experiences via the European Business Test Panel (“EBTP”).

During the three-month consultation period, the Commission received more than 700 responses from businesses operating in one or more Member States. The businesses registered in the EBTP were able to share with the Commission their experiences as regards unfair practices during all stages of a business relationship (pre-contractual negotiations, contracts and post-contractual practice).

Most of the responding companies (58%) declared that they had been affected by unfair practices within the last two years and an even higher percentage declared that they did not feel sufficiently protected by the legal instruments available in the Member State where their main activity is carried out (68%). Among the respondents who had had recent experience of unfair practices in any stage of their business relationship, 76% had been subjected to such practices (also) during the pre-contractual negotiations, 66% had had unfair contractual terms imposed on them and experienced unfair practices; 75% had (also) had such experiences after the conclusion of the contract.

The types of behaviour which the respondents experienced followed a similar pattern, under whatever jurisdiction they occurred and regardless of the business of the respondent. This enabled the Commission to identify some unfair practices which appear to be particularly problematic throughout the EU and across different sectors. In particular, the problems of unfair practices in the manufacturing and the wholesale and retail distribution sectors and in automotive retail were examined.

The responses reveal clear general trends, which will be taken into account in the upcoming Commission initiative on unfair commercial practices. It should be noted that some respondents have also explicitly called upon the EU legislators to take action in this area.

The assumption that a properly functioning enforcement mechanism is one of the key elements in the area of unfair commercial practices has been confirmed by the vast majority of respondents, who did not feel that they were sufficiently protected by the enforcement instruments available in their Member State of operation and who shared with the Commission their reasons for not turning to national authorities in order to seek protection against the unfair practices they had experienced. Many respondents were actually unaware of their legal options.

As regards transparency, almost 70% of all respondents took the view that the legal certainty and predictability of their business would be enhanced if contractual terms were provided solely in a written form.

The types of unfair behaviour identified as particularly common (see Section 6.4) will be taken up by the Commission in the work on its unfair commercial practices initiative.

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2. INTRODUCTION/BACKGROUND

1. Many European businesses claim to be affected by unfair and abusive commercial practices in business transactions. In its report of 2010 on the functioning of the retail sector (the "Retail Market Monitoring Report" or "RMMR")¹, the Commission identified unfair commercial practices in business to business relations within the supply chain as one of the major problems this sector faces. The Commission's concerns were widely echoed by the responses to the public consultation on the RMMR.
2. Given the significant contribution of the retail and wholesale sectors to growth and job creation within the European Union, the proper functioning of the Internal Market to ensure a level playing field for all actors in the supply chain is essential if the objectives of the EU2020 strategy are to be achieved.²
3. In its Communication of 13 April 2011, entitled "*Single Market Act – Twelve levers to boost growth and strengthen confidence*"³, the Commission expressed its intention to launch an initiative to combat unfair business-to-business commercial practices. On 14 July 2011, as part of this initiative, the Commission launched an on-line consultation via the European Business Test Panel ("EBTP") to seek the views of the companies on unfair commercial practices.
4. The purpose of this consultation was to identify the nature and scale of unfair commercial practices by obtaining first-hand accounts of the frequency of such practices, as well as the existence of rules and adequate redress mechanisms aimed at protecting the weaker party in business-to-business relationships.
5. However, it has to be noted that the consultation was not intended to be representative, but simply to reflect the views of interested stakeholders who signed up to the EBTP. The consultation deadline, which was extended twice, expired on 14 October 2011.
6. The consultation consisted of
 - a questionnaire requesting general information about the contributing companies; and
 - questions regarding the occurrence, nature and relevance of unfair practices experienced, existing enforcement mechanisms and transparency. Responses were requested for each Member State in which the respondent operated.

¹ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 5 July 2010, Retail market monitoring report "Towards more efficient and fairer retail services in the internal market for 2020", COM(2010) 355 final.

² Communication from the Commission of 3 March 2010, EUROPE 2020 – A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final.

³ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions of 13 April 2011, Single Market Act – Twelve levers to boost growth and strengthen confidence "Working together to create new growth", COM(2011) 206 final.

7. While most questions were framed as multiple or single choice questions, there were also some optional open-reply questions which allowed the participating companies to share their experiences and provide details of the impact of unfair practices on their businesses.⁴
8. This report presents an overview and analysis of the responses uploaded by the companies who signed up to the EBTP. It will be used as part of the on-going work in DG Internal Market and Services on unfair commercial practices.
9. The report is structured as follows: a General Overview section provides a report on the responding companies as regards their origin, sector of activity and size, while also giving an account of respondents operating in Member States outside their home countries. A section on Occurrence, Nature and Relevance of the Practices summarizes the responses to Questions 3 to 13 of the questionnaire. This section is divided into four parts dealing with general questions on the recent experience of unfair practices and the protection against such practices. It takes into account: (i) unfair practices during pre-contractual negotiations; (ii) unfair contractual terms and (iii) unfair practices after the conclusion of the contract. A section on Enforcement analyses the responses to questions 14 to 18. Finally, a section on Transparency examines the responses to Questions 19 to 22.

3. GENERAL OVERVIEW

3.1. Participation per Member State

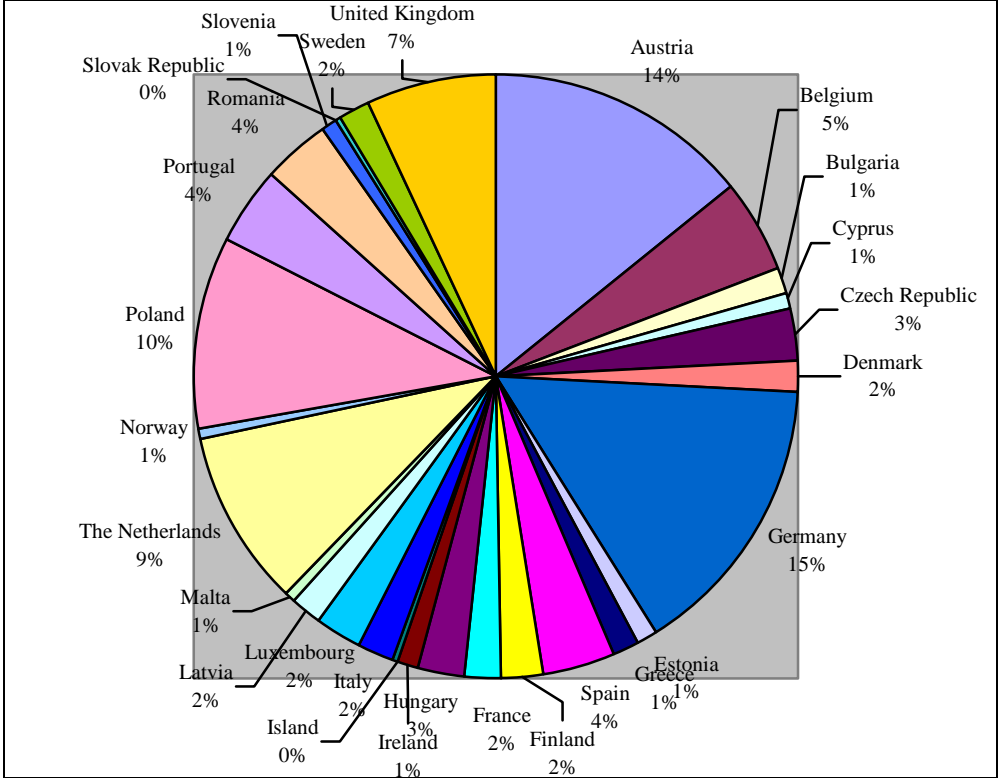
10. The Commission received **746** responses to the consultation on Unfair Commercial Practices. These **746** responses come from as many as 26 of the Member States and two States from the European Economic Area (**Norway** and **Iceland**). The Member State from which the Commission received the most answers was **Germany**, with a total of 113 participating companies. The four other Member States from which most responses were received were **Austria, the United Kingdom, the Netherlands** and **Poland**. The answers from these five Member States make up 55% of all answers received⁵.
11. 81 of the 827 companies who received the questionnaire declined to take part in the consultation owing to lack of time or interest in the topic, or for other reasons.⁶

⁴ The English language version of the questionnaire is attached to this report as an Annex.

⁵ No answers were received from businesses originating from **Lithuania**, although some of the responding companies operated in that country.

⁶ These companies have not been considered in Figure 1 on the responses per Member State and will not be considered in the General Part of the following analysis, either.

Figure 1: Responses per Member State



Source: European Commission (EBTP Survey)

Figure 2: Responses per Member State

Member State of origin	Number of responses	Percentage
AT – Austria	106	14%
BE – Belgium	36	5%
BG – Bulgaria	11	1%
CY – Cyprus	6	1%
CZ – Czech Republic	21	3%
DA – Denmark	13	2%
DE – Germany	113	15%
EE – Estonia	8	1%
EL – Greece	11	1%
ES – Spain	29	4%
FI – Finland	17	2%
FR – France	15	2%
HU – Hungary	19	3%
IE – Ireland	8	1%
IS – Island	1	0%
IT – Italy	15	2%
LU – Luxembourg	18	2%
LV – Latvia	14	2%
MT – Malta	4	1%
NL – The Netherlands	69	9%
NO – Norway	4	1%
PL – Poland	78	10%
PT – Portugal	30	4%
RO – Romania	28	4%

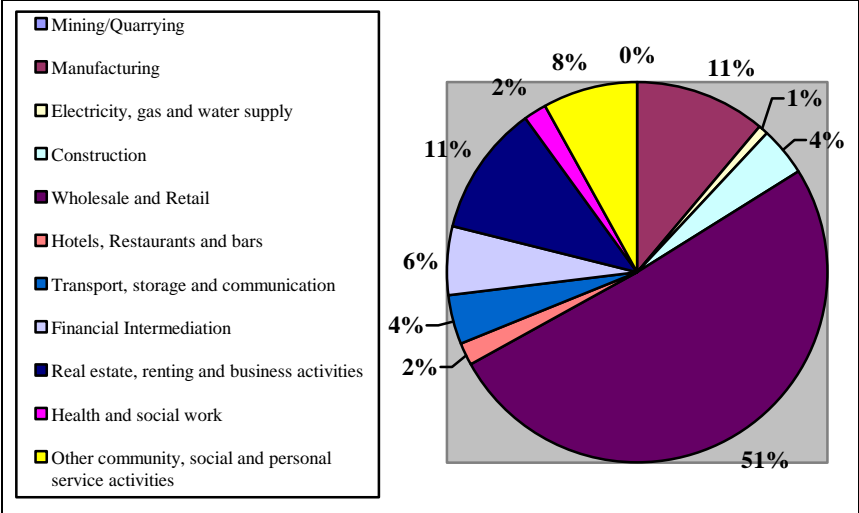
SI – Slovenia	5	1%
SK – Slovak Republic	2	0%
SV – Sweden	13	2%
UK – United Kingdom	52	7%
Overall	746	100%

Source: European Commission, DG "Internal Market and Services" (EBTP Survey)

3.2. Participation per sector

- 12. The responding companies were required to specify the sector in which they operate. The sector-specific analysis of the country-specific questions focused on the three sectors from which most responses were received. These sectors are manufacturing, the wholesale/retail distribution and the automotive retail sector, together amounting to 62% of the overall participation, as shown below.
- 13. More than half of the responses came from the wholesale and retail distribution sector, including automotive trading:

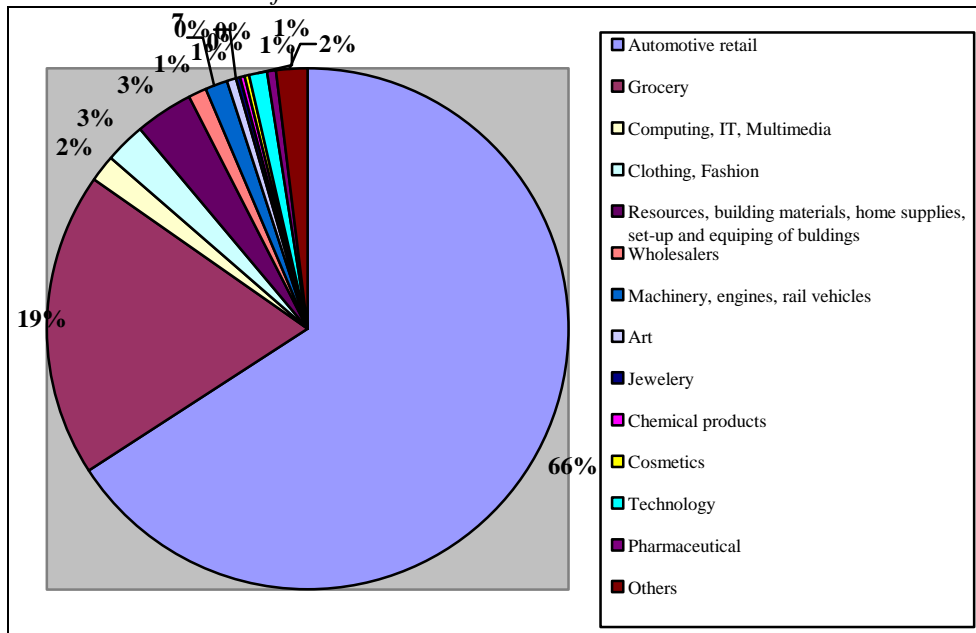
Figure 3: Overview of responses by sector



Source: European Commission (EBTP Survey)

- 14. Among the 51% of responses from the wholesale and retail distribution sector, 66%, of the responding companies, (also) operate in automotive retail (see Figure 4, below).

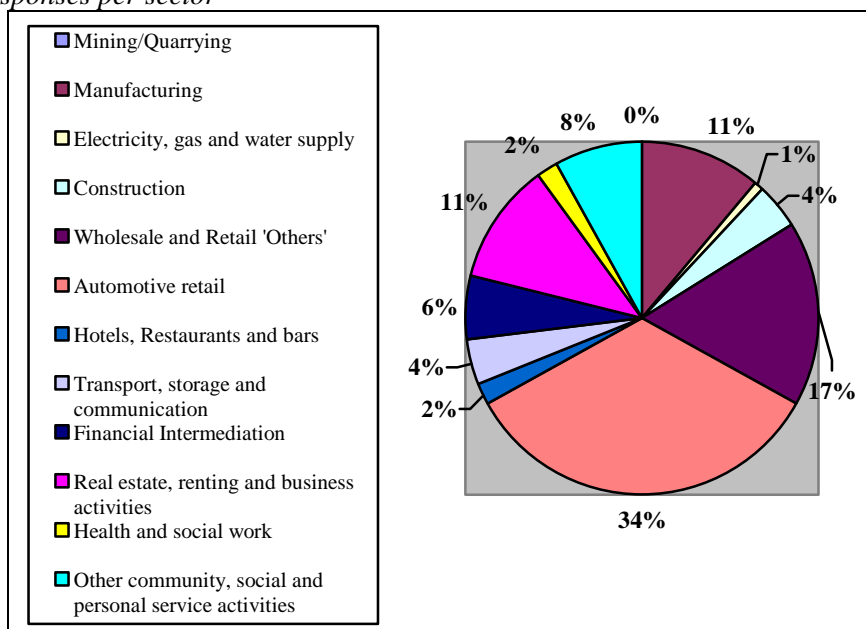
Figure 4: Further breakdown of the wholesale and retail distribution sector



Source: European Commission (EBTP Survey)

- This means that, taking an overview by sector, with the wholesale and retail distribution sector further divided in 'Automotive retail' and 'Others', the participation of respondents from the automotive sector accounts for the largest proportion of answers. This is illustrated in Figure 5 below. Therefore, for the purpose of the following analysis, the automotive retail sector will be analysed separately from the rest of the retail sector. This is because this activity has its own particular characteristics.

Figure 5: Responses per sector

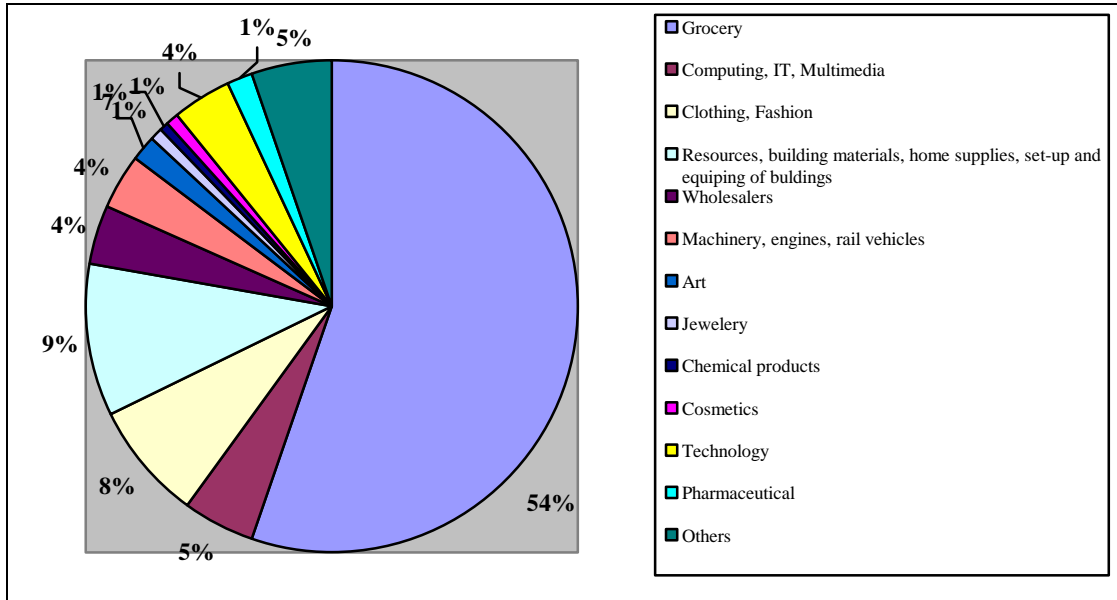


Source: European Commission (EBTP Survey)

- The Commission services received 250 responses from automotive retailers. Interestingly, the answers from the automotive sector come essentially from a few Member States (namely **Austria** – 36%, **Belgium** – 10%, **Germany** – 14%, **Poland** – 15% and **the United Kingdom** – 12%), while car dealers from other Member States only sparsely participated in the consultation.

17. Leaving aside the responses from the automotive retail sector, the remaining 130 companies in the wholesale and retail distribution sector (amounting to 17% of the overall participation) conduct their main activities in the following areas. More than 50% of the remaining responses came from grocery retailers (see Figure 6, below)⁷:

Figure 6: Further breakdown of the wholesale and retail distribution sector, except automotive retail

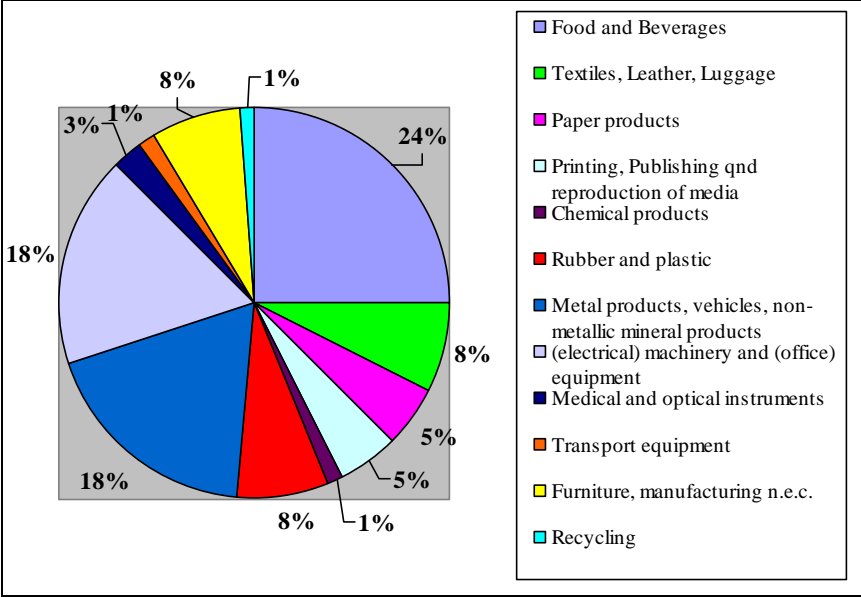


Source: European Commission (EBTP Survey)

18. Compared to the breakdown of the wholesale and retail distribution sector, a breakdown of the 82 responses from the companies active in the manufacturing sector reveals a much greater balance and variety. The largest proportion of responses in this sector, namely 24%, came from the manufacturers of food and beverages (see Figure 7, below).

⁷ It should be noted that 61% of the responses from grocery retailers were from companies in the Netherlands.

Figure 7: Breakdown of participation from the manufacturing sector

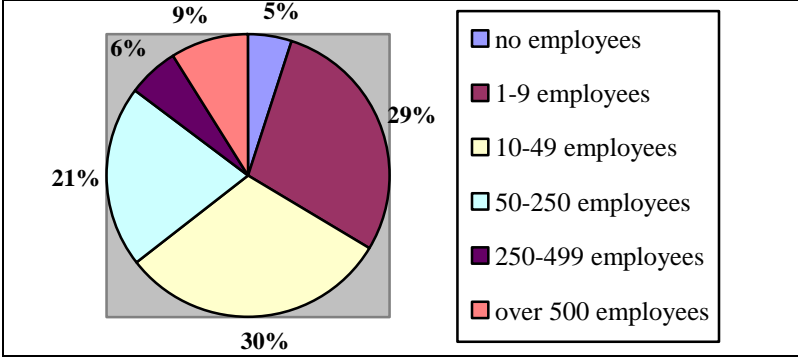


Source: European Commission (EBTP Survey)

3.3. Participation by company size

19. A substantial proportion (34%) of the responding companies were micro enterprises with up to nine employees. Small companies with between 10 and 50 employees accounted for 30% of participating companies, whereas medium-sized enterprises with fewer than 250 employees made up 21% of respondents. Therefore, the vast majority – 85% of responding companies – were micro enterprises and SMEs (see Figure 8, below).⁸

Figure 8: Participating companies by number of employees per company



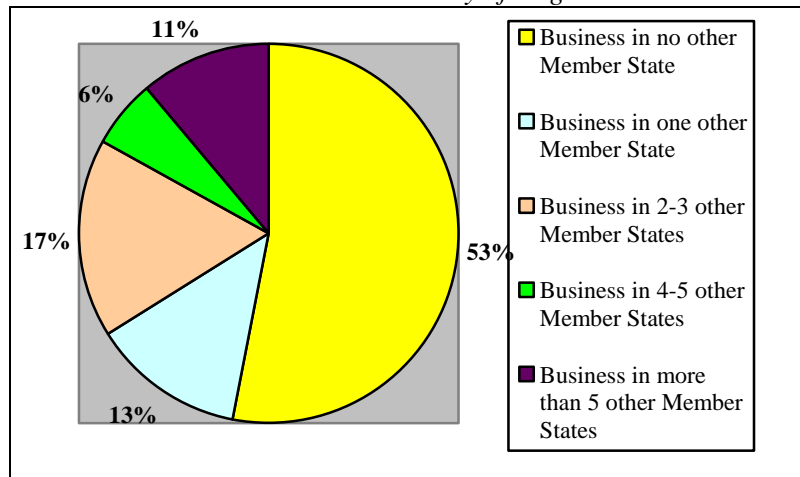
Source: European Commission (EBTP Survey)

3.4. Companies operating outside their country of origin

20. The majority of all responding companies (53%) did not conduct business in any Member State other than their country of origin (see Figure 9, below).

⁸ The definition of micro, small and medium-sized enterprises used here applies only the criterion of staff numbers, which was identified as the main criterion in the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ 2003 L 124/39, but does not take regards to the financial ceilings in Art 2 of the Annex of this Recommendation.

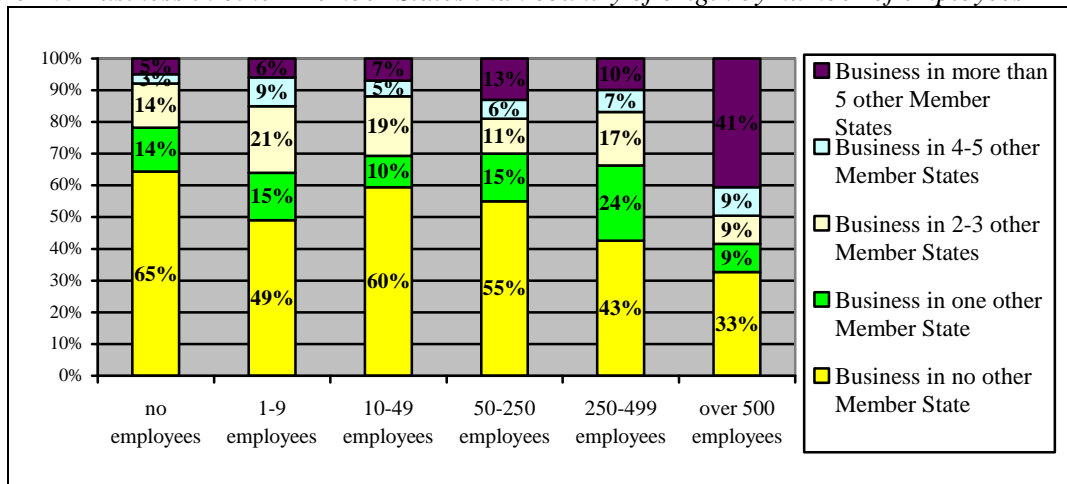
Figure 9: Business in other Member States than country of origin



Source: European Commission (EBTP Survey)

21. Taking a closer look at which companies also operate in other Member States, we find that the companies with over 500 employees are by far the ones operating most frequently in more than five Member States outside their home country and that, on the contrary, individual companies (with no employees) are unlikely to operate in any Member State outside their home country (see Figure 10, below).

Figure 10: Business in other Member States than country of origin by number of employees



Source: European Commission (EBTP Survey)

4. OCCURRENCE, NATURE AND RELEVANCE OF THE PRACTICES

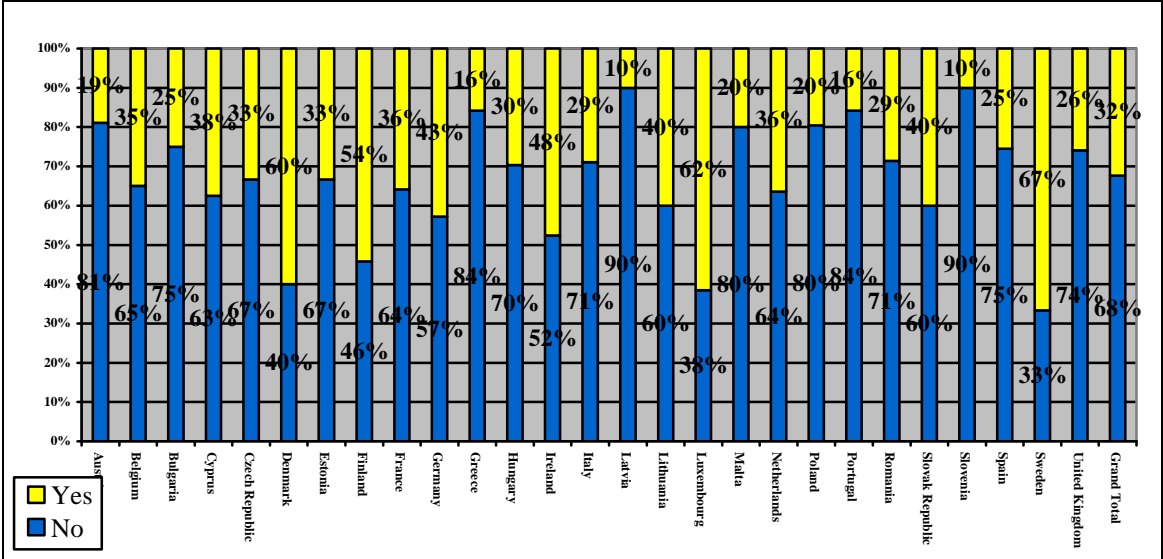
22. In this section, the questions on the occurrence, nature and relevance of the unfair practices experienced by the respondents will be analysed, starting with the general questions before focusing on specific practices in the different stages of a business relationship (pre-contractual negotiations, contract terms and post-contractual conduct).

4.1. General questions

4.1.1. Sufficient protection against unfair practices⁹

- 23. When asked about their experiences in their Member States of operation, **68% of the responding companies**, *i.e.* more than two thirds, felt that they were insufficiently protected against unfair practices in at least one of these Member States.
- 24. A breakdown by Member State of operation (irrespective of the respondents' country of origin), shows that this figure varies across the different Member States (see Figure 11, below).

Figure 11: Sufficient protection against unfair practices by Member State of operation

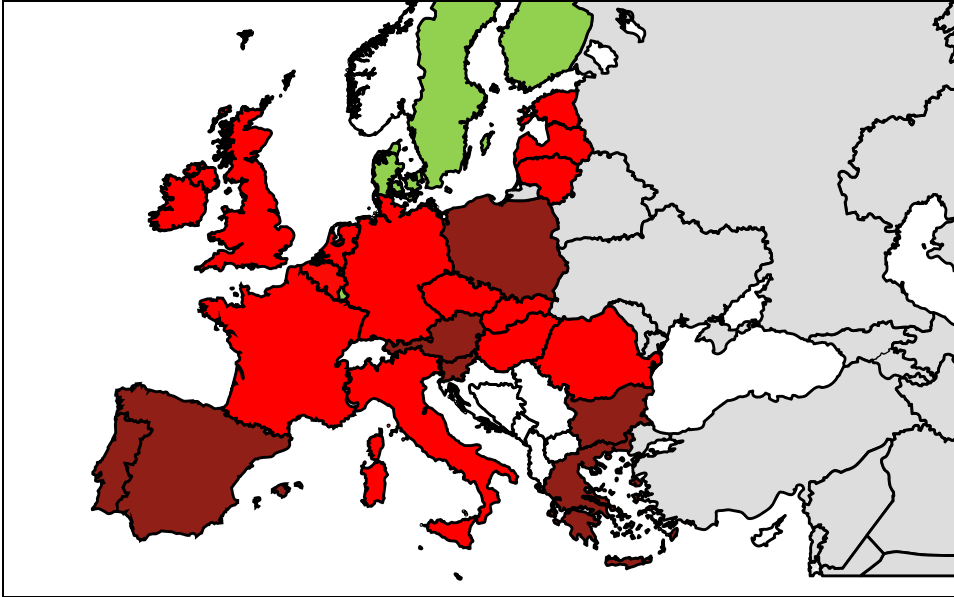


Source: European Commission (EBTP Survey)

- 25. When looking at these figures it has to be taken into account that the Commission services received only a very small number of responses from some Member States and that, in some other Member States, certain industries (automotive retail, groceries) are actually over-represented, which might distort the picture to some extent. However, it seems noteworthy that for only four Member States – **Denmark, Finland, Luxembourg and Sweden** – the number of companies stating that they felt sufficiently protected against unfair practices was greater than the number of those who did not feel sufficiently protected.
- 26. For all other Member States, more than 50% of the responding companies – whether they had previously experienced unfair practices in that country or not – did not believe that they were sufficiently protected against such practices. For as many as seven Member States, the percentage of respondents who did not feel sufficiently protected against unfair practices in these Member States is greater than or equal to 75%. These Member States are **Austria, Bulgaria, Greece, Poland, Portugal, Spain and Slovenia**.

⁹ Cf. question 3 of the questionnaire.

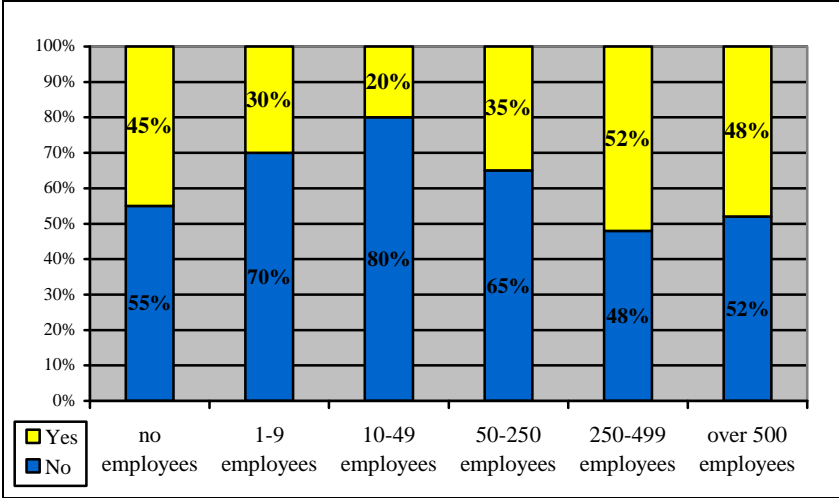
Figure 12: Protection against unfair practices [Countries in which more than or equal to 75% [dark red] / 50% [red] of respondents do not feel sufficiently protected and countries where more than 50% feel sufficiently protected [green]]



Source: European Commission (EBTP Survey)

27. Looking at the correlation between companies that feel protected against unfair practices and the size of these companies, the responses to the EBTP survey show that micro-enterprises and small businesses with between one and 49 employees feel least protected (see Figure 13, below).

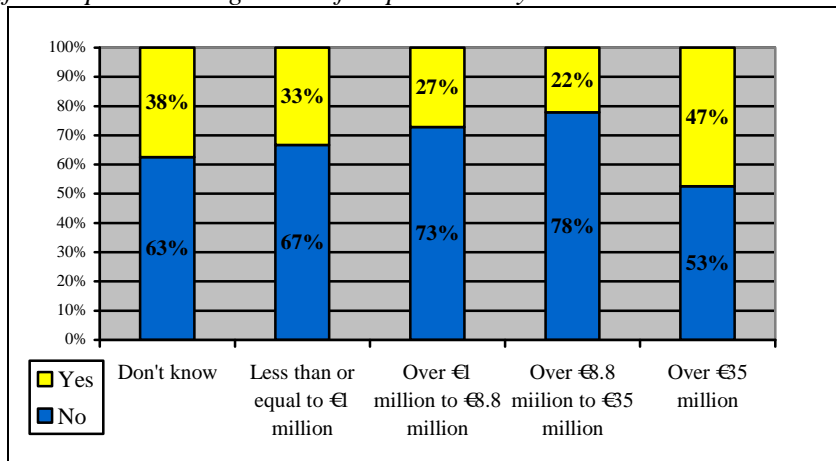
Figure 13: Sufficient protection against unfair practices by company size



Source: European Commission (EBTP Survey)

28. Surprisingly, when looking at the correlation with the responding companies' annual turnover, the group of respondents feeling the least protected against unfair practices are financially relatively small companies with an annual turnover in the range between €8.8 million and €35 million (see Figure 14, below).

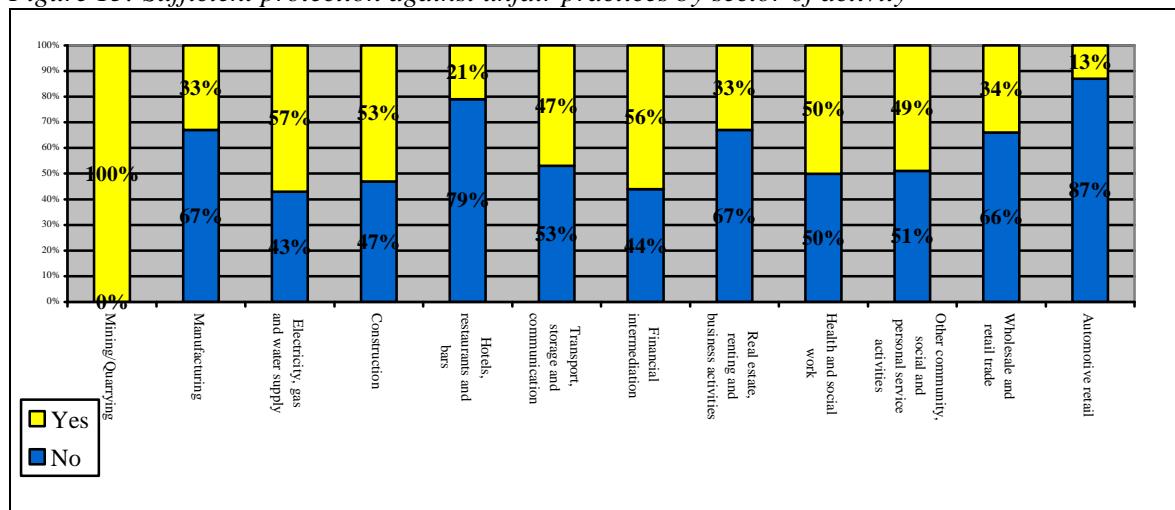
Figure 14: Sufficient protection against unfair practices by annual turnover



Source: European Commission (EBTP Survey)

29. Looking at the link with the sector in which the responding companies operate, it can be seen that the sector in which the respondents feel least protected against unfair practices is the automotive retail sector. In this sector, 87% of the respondents indicated they did not feel sufficiently protected against unfair practices (see Figure 15, below).

Figure 15: Sufficient protection against unfair practices by sector of activity



Source: European Commission (EBTP Survey)

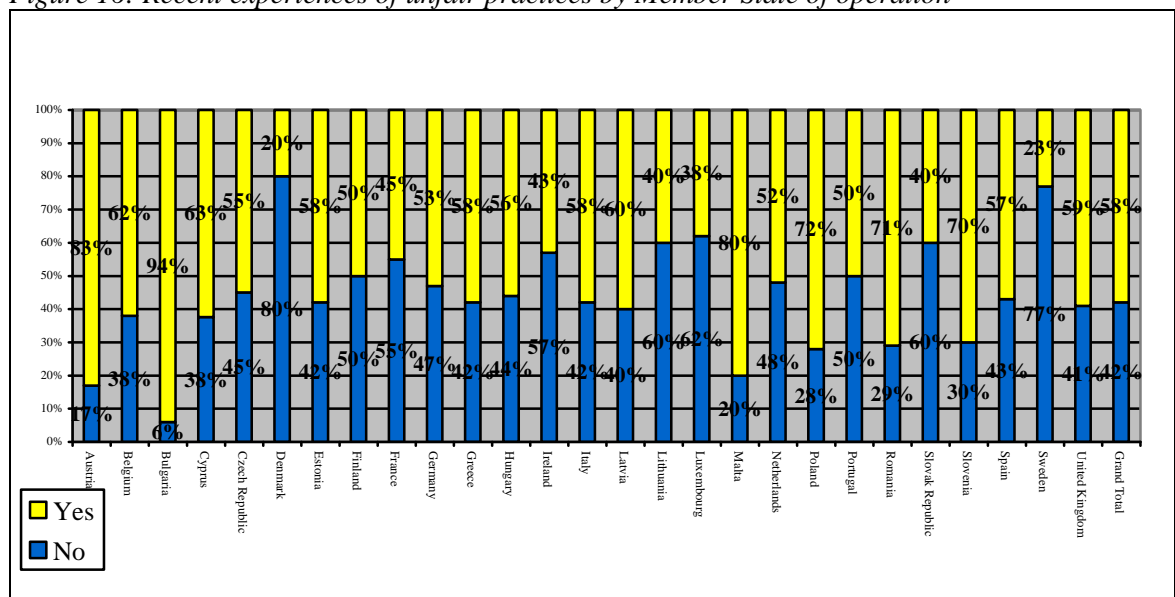
4.1.2. Recent experience of unfair practices¹⁰

30. An overview of the answers from the responding companies when asked whether they had experienced unfair practices in the Member State(s) they were operating in (irrespective of the respondents' country of origin) shows a similar, yet slightly less troubling picture. 58% of the respondents experienced unfair practices in their Member State of operation in the past two years. For **Denmark, France, Ireland, Lithuania, Luxembourg, the Slovak Republic and Sweden**, the overall balance is positive, meaning that more than 50% of respondents have not experienced unfair practices in these Member States within the last two years (see Figure 16, below).

¹⁰ Cf. question 4 of the questionnaire.

31. For **Finland** and **Portugal**, the number of companies which have experienced unfair practices is the same as the number of companies which did not have such experiences. The Member States which came off the worst in terms of recent experience of unfair practices are **Austria, Bulgaria** and **Malta** (see Figure 16, below), although it should be considered that, for **Malta** and **Bulgaria**, responses were received from only four and eleven companies respectively, which arguably makes these figures less reliable. Furthermore, it should be considered that **91 out of 106** responses coming from **Austrian**-based companies are car dealers who face a specific situation. To reduce the inaccuracies, the analysis set out below will take appropriate account of such particularities by, for example, analysing the automotive retail sector separately from the other respondents active in the distribution sector. This enables the particular problems linked to the sale of specific products to be taken into account.

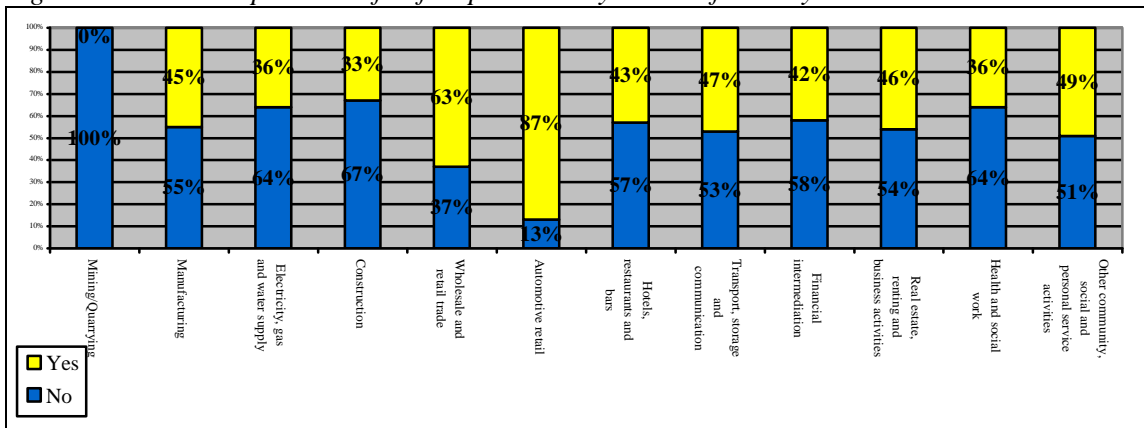
Figure 16: Recent experiences of unfair practices by Member State of operation



Source: European Commission (EBTP Survey)

32. Looking at the **respondents' sectors of activity**, the sector in which most unfair practices were indicated is the automotive sector, where 87% of respondents experienced unfair practices during the past two years (see Figure 17, below).

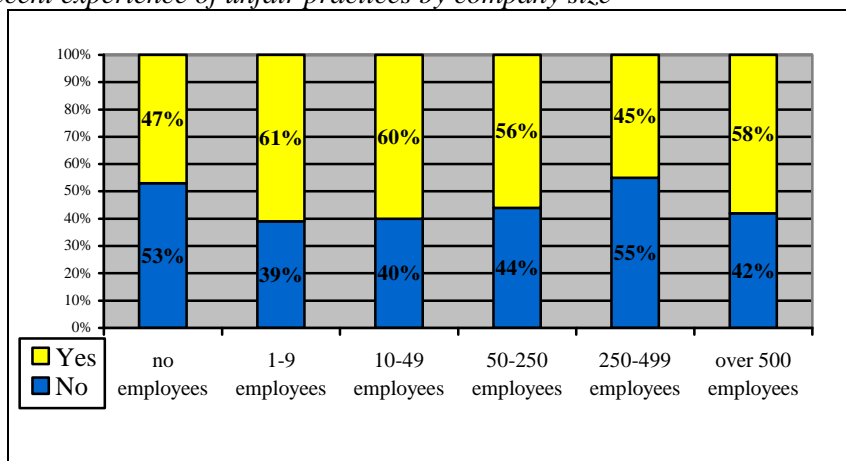
Figure 17: Recent experience of unfair practices by sector of activity



Source: European Commission (EBTP Survey)

33. Grouping the recent experience of unfair practices by respondents according to **company size**, small enterprises with up to 50 employees seem to have experienced unfair practices the most, with 60% of respondents answering that they had experienced unfair practices during the past two years (see Figure 18, below).

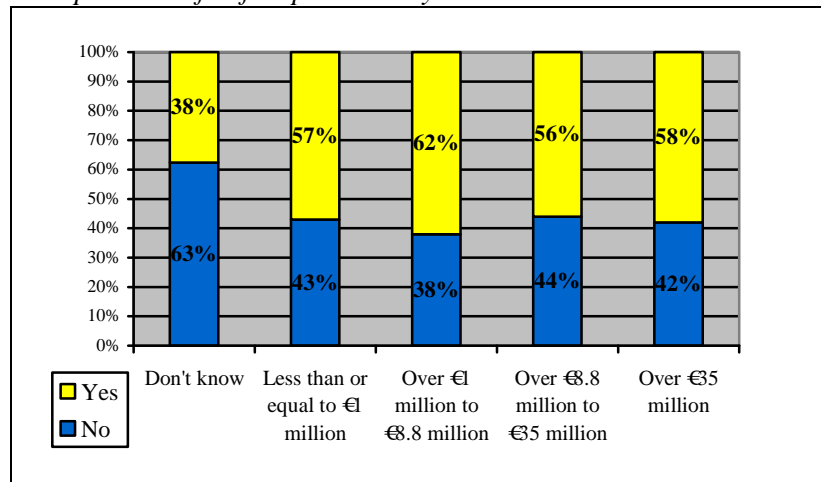
Figure 18: Recent experience of unfair practices by company size



Source: European Commission (EBTP Survey)

34. As regards the correlation with annual turnover, the highest percentage of respondents claiming to have experienced unfair practices within the last two years had an annual turnover of between €1 million and €8.8 million (see Figure 19, below).

Figure 19: Recent experience of unfair practices by annual turnover



Source: European Commission (EBTP Survey)

4.1.3. The link between feeling sufficiently protected and recent experience of unfair practices

35. As can be seen from the data above (see Figures 14 and 19, respectively), the annual turnover numbers of responding companies who do not feel sufficiently protected against unfair practices in a Member State differ from the annual turnover numbers of respondents who have experienced unfair practices in this Member State within the last two years.
36. With the sole exceptions of **Cyprus** and **Malta**, the percentage of respondents who do not feel sufficiently protected in a Member State is always higher than the percentage of companies who have had recent experiences of unfair practices in this Member State.¹¹ This discrepancy is especially high in two Member States, namely **Portugal** and **Greece**. In the case of **Portugal**, 50% of respondents indicated that they had experienced unfair practices within the last two years. However, 84% of the responding companies doing business in **Portugal** do not feel sufficiently protected against unfair practices in this Member State, which means that the 34% of respondents who have not experienced unfair practices recently nonetheless feel that they are not sufficiently protected in **Portugal**. As far as **Greece** is concerned, 58% of the respondents experienced unfair practices within the last two years, but again 84% of respondents in **Greece** do not feel sufficiently protected against unfair practices.
37. *Prima facie*, there are two reasons which might account for this discrepancy. Firstly, the responding companies may have experienced the unfair practice more than two years ago. A second factor which might explain the discrepancies could be a general sense of the shortcomings / deficiencies of a Member State's legal system

4.2. Pre-contractual negotiations¹²

38. The analysis of responses to questions regarding unfair practices during pre-contractual negotiations is divided into three parts. It consists of: (i) a general analysis of all answers submitted (Section 4.2.1); (ii) a sector specific analysis looking in more detail at the

¹¹ However, it should be kept in mind that from both countries, the number of respondents was very small.

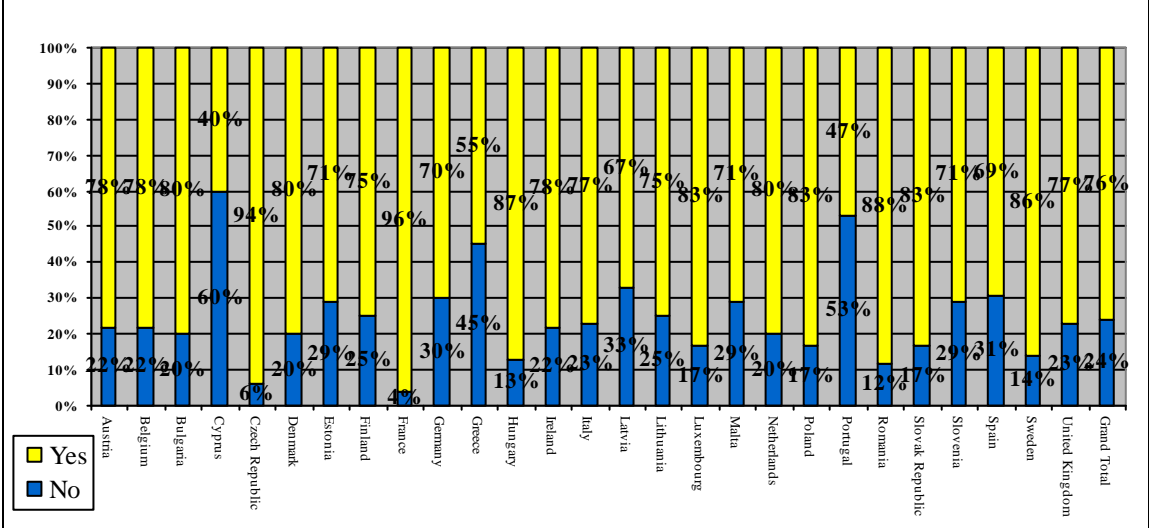
¹² Cf. questions 5 to 7 of the questionnaire.

answers of a few industries to this set of questions (Section 4.2.2); and (iii) an analysis by company size which allows size-related factors to be taken into account (Section 4.2.3).

4.2.1. General analysis

- 39. All respondents were asked whether, in the last two years, they had experienced a practice by their business partner during pre-contractual negotiations which they considered unfair. An average of 76% of all respondents answered 'yes' to this question. This indicates that only 24% of respondents had not experienced an unfair practice during pre-contractual negotiations.
- 40. A breakdown by Member State where the unfair practices were experienced shows that the percentage of companies subjected to unfair practices during pre-contractual negotiations is significant in most Member States (see Figure 20, below).
- 41. In conclusion, this pre-contractual stage of a contractual relationship is also where the bargaining power of the negotiating parties is most important.

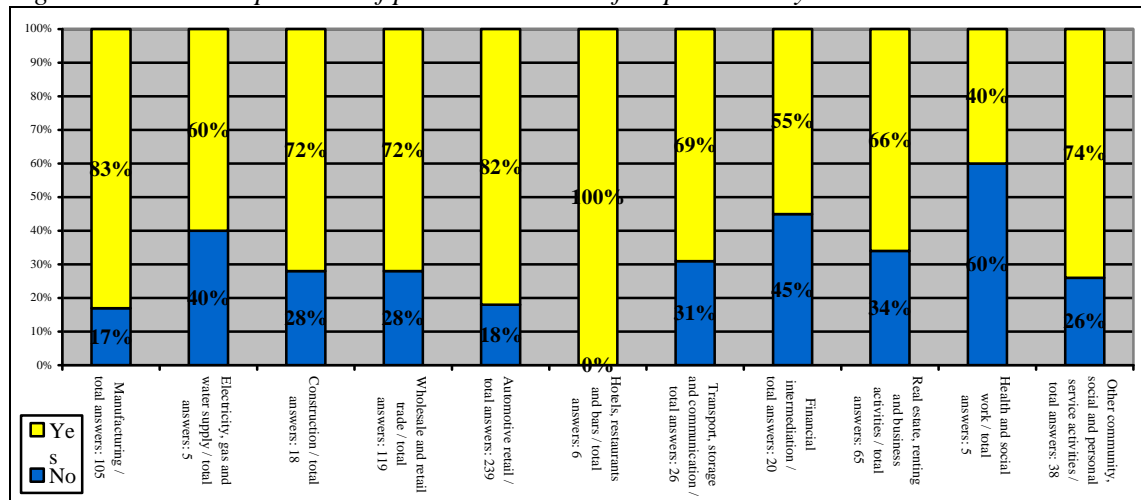
Figure 20: Unfair practices during pre-contractual negotiations



Source: European Commission (EBTP Survey)

- 42. There are only two Member States – **Cyprus** and **Portugal** – for which the majority of respondents stated that they had not been subject to unfair practices during pre-contractual negotiations. In contrast, for **17 Member States** the percentage of respondents having experienced unfair practices during pre-contractual negotiations within the last two years is greater than or equal to 75% (see Figure 20, above).

Figure 21: Recent experience of pre-contractual unfair practices by sector



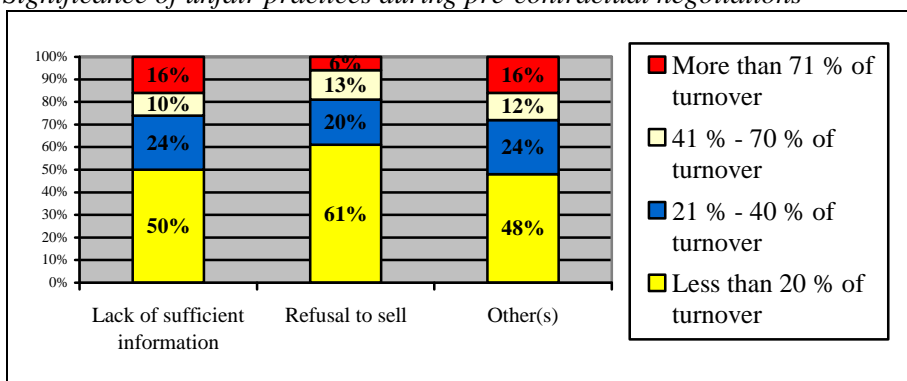
Source: European Commission (EBTP Survey)

43. Where a company indicated that it had been subject to unfair practices during pre-contractual negotiations, the responding company was asked to reply to a multiple choice question, specifying what kind of unfair practice they had experienced. They could indicate whether the unfair practice(s) involved a refusal to sell, or a lack of sufficient information regarding the future contract terms, or if it fell into another category (or any combination of these three options). If the unfair practice was neither a refusal to sell nor related to a lack of sufficient information, the respondents were asked to specify what kind of unfair practice they had experienced in a follow-up open reply question. A lack of sufficient information regarding the future contract was mentioned most often, with 43%, followed by other practices (41%) and refusal to sell (16 %).
44. The answers to the follow-up open reply question, which gave respondents the opportunity to specify which 'other' practices they had experienced, show that in the process of pre-contractual negotiations the responding companies were confronted with a variety of practices which they considered unfair. In particular, respondents stressed that they had been subjected to one or more of the following practices:
 - Abuse of bargaining power (pressure on weaker companies during the negotiations) or no willingness/room whatsoever to negotiate;
 - Sales targets which were unrealistic and unilaterally set;
 - Unilateral (and repeated) changing of contract terms;
 - Unilateral imposition of (sales or IT/EDP) standards or requirements;
 - Discriminatory terms relative to competitors (who are larger or based in other countries);
 - Unilateral reductions of margins;
 - Unfair pricing or very lengthy payment terms;
 - Imposition of unacceptable warranty/guarantee handling requirements;
 - Stipulation of disproportionate/excessive contractual penalties.
45. Respondents who stated that their companies had been confronted with a refusal to sell were also given the possibility to further specify the reasons for that refusal to sell in a second follow-up open-reply question. The reason why most of the responding companies had been confronted with a refusal to sell was their unwillingness to agree to contract terms which

they considered unfair or prices that were not feasible considering the market situation. Another recurring reason is the fact that the possible contract partners had exclusive agreements or a list of preferred (generally larger) suppliers. Some respondents attributed the refusal to sell to the fact that their possible contract partners did not want to sell or buy cross-border.

46. Overall, the majority of unfair practices experienced during pre-contractual negotiations were linked to contracts involving less than 20% of the companies' annual turnover. However, this leaves 49% of the unfair practices that are linked to contracts worth more than 20% of the companies' annual turnover, with 13% linked to contracts amounting to over 71% of the company's annual turnover (see Figure 22, below).

Figure 22: Significance of unfair practices during pre-contractual negotiations



Source: European Commission (EBTP Survey)

4.2.2. Sector specific analysis

47. The sector specific analysis will be limited to the three sectors for which most answers to the consultation were received, namely: (i) manufacturing; (ii) retail and wholesale trade; and (iii) the automotive retail sector. In all three sectors assessed, the percentage of companies having recently experienced unfair practices during pre-contractual negotiations is fairly high, and in the manufacturing and automotive sector it even exceeds 80%.

4.2.2.1. Manufacturing

48. Among the answers received from manufacturers, 83% indicated that they had had experienced unfair practices during pre-contractual negotiations within the last two years.
49. A large proportion of these manufacturers (41%) attributed the unfair practices (also) to reasons other than a lack of sufficient information regarding the future contract terms or a refusal to sell. 31% said that they lacked sufficient information about the contract, and 28% had been confronted with a refusal to sell. Thus, the percentage of respondents claiming to have been confronted with a refusal to sell is 12 percentage-points above the corresponding percentage for all sectors concerned.
50. However, the significance of the contracts linked to the unfair practices experienced is below the average for all sectors, with 70% of these respondents stating that the contract was less than 20% of their annual turnover, and only 2% was linked to contracts worth more than 71% of the company's annual turnover.

4.2.2.2. Wholesale and Retail (except automotive)

51. 72% of the companies active in the distribution sector (retailers and wholesalers, except automotive trading) stated that they had experienced unfair practices within the last two years.
52. During pre-contractual negotiations almost half of the responding companies (46%) from the wholesale and retail distribution sector were (also) subject to unfair practices other than a lack of sufficient information regarding the future contract-terms or a refusal to sell. Only 25% of respondents lacked information about the contract to be concluded and 29% were confronted with a refusal to sell.
53. In 76% of all cases, the significance of the contracts to which the unfair practice was linked amounted to less than 20% of the companies active in the distribution sector turnover, and only 1% of contracts linked to the unfair practices concerned more than 71% of the turnover of the companies active in the distribution sector. This ranks the significance of unfair practices during pre-contractual negotiations experienced by the companies active in the distribution sector considerably below the average for all sectors (see above).

4.2.2.3. Automotive retail

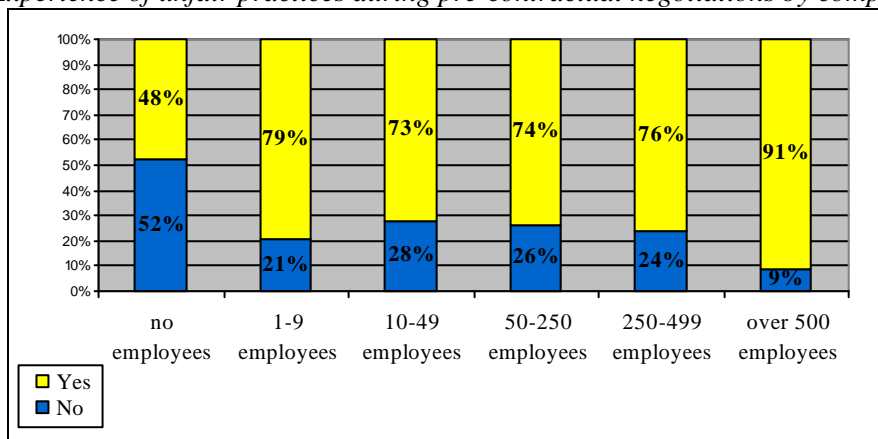
54. With figures similar to those of manufacturers, 82% of the companies operating in the automotive sector have experienced unfair practices within the last two years.
55. For almost half of them (47%), this unfair practice was (also) related to insufficient information about future contract terms. Only 13% experienced a refusal to sell. 40% claimed to have (also) experienced other practices.
56. The statements regarding the significance of the contracts to which the unfair practices were linked indicate that, in the automotive sector, unfair practices during pre-contractual negotiations may have a much greater impact on businesses. Only 23% were linked to a contract worth less than 20% of annual turnover, whereas 27% (14 percentage points over the average for all sectors) were linked to a contract which concerned more than 71% of the companies' annual turnover.

4.2.3. Analysis by company size¹³

57. A look at the figures below shows that the largest companies, with over 500 employees, have by far the highest percentage of recent experiences of unfair practices during pre-contractual negotiations (see Figure 23, below). Correspondingly, self-employed entrepreneurs with no employees seem to experience the least unfair practices. At first glance, this may appear contradictory, given that it is generally the case that the larger the company, the greater its bargaining power. However, this apparently paradoxical result may be at least partly explained by the higher percentage of large companies operating cross-border.

¹³ Given that 15 of the responding companies have indicated not to know their annual turnover, the number of employees is taken as the relevant criterion for the analysis in this section.

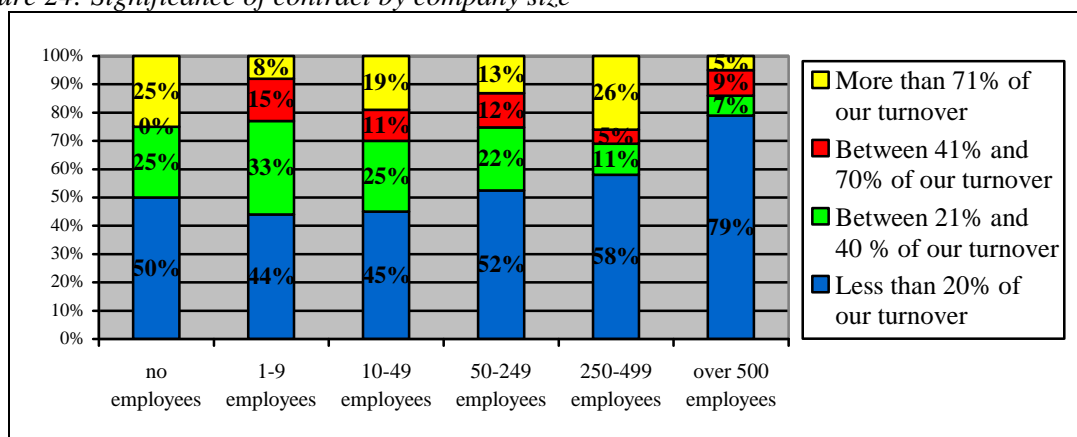
Figure 23: Experience of unfair practices during pre-contractual negotiations by company size



Source: European Commission (EBTP Survey)

58. An analysis of the significance of the possible future contract relating to **company size** generally shows that the smaller the company, the more significant the respective contract and, vice versa, the larger the company, the smaller the significance of the contract (see Figure 24, below).

Figure 24: Significance of contract by company size



Source: European Commission (EBTP Survey)

4.3. Unfair practices in the contract¹⁴

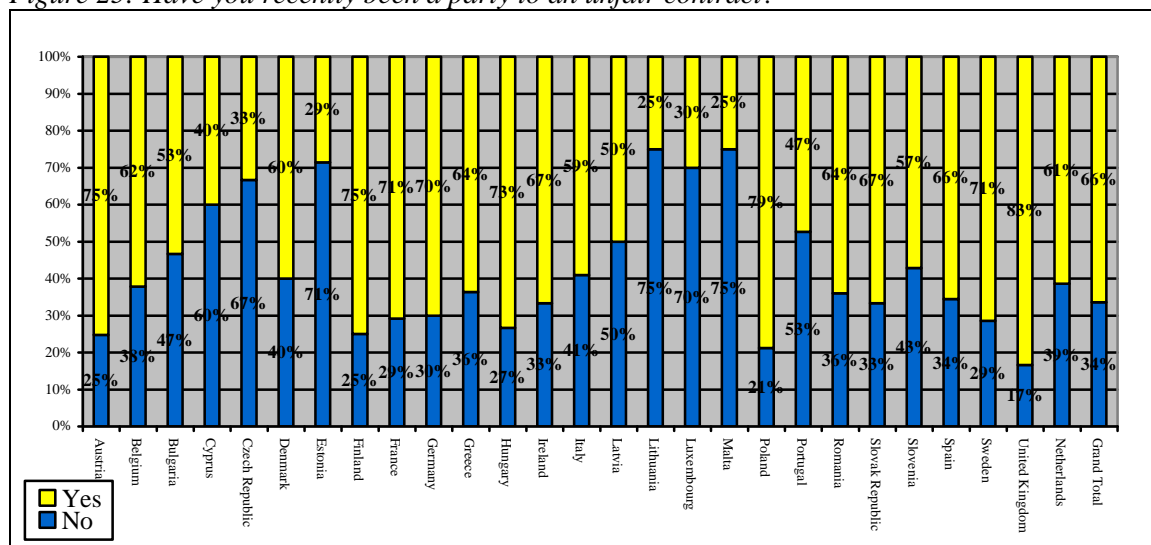
59. Parties to a contract can be faced with a situation not just during the pre-contractual negotiations but also after the conclusion of the contract where they feel that they are being treated unfairly by their contracting partner. Following the same structure as for unfair practices during pre-contractual negotiations, the responding companies were first asked to state whether they had recently been a party to a contract that contained unfair terms, before they were asked to specify which terms they considered unfair. The analysis of this part thus follows the same pattern as the one dedicated to pre-contractual negotiations, namely starting with a general analysis for all sectors (Section 4.3.1) before going on to look at the specificities of the sectors of operation (Section 4.3.2) and company size of respondents (Section 4.3.3) in detail. Finally, the percentage of respondents operating outside their country of origin is discussed (Section 4.3.4).

¹⁴ Cf. questions 8 to 10 of the questionnaire.

4.3.1. General analysis

60. The responding companies were asked whether, during the last two years, they had been a party to a contract that contained terms which they considered unfair. Overall, 66% of respondents answered 'yes' to this question.
61. Compared to the practices experienced during pre-contractual negotiations, it can be seen that fewer companies thought that their contracts contained unfair terms. Nonetheless, in eight of the Member States, namely **Austria, Finland, France, Germany, Hungary, Poland, Sweden and the United Kingdom**, the number of respondents having been party to an unfair contract was 70% or higher. On the contrary, in only seven Member States, namely **Cyprus, Czech Republic, Estonia, Latvia, Lithuania, Luxembourg and Malta**, the number of respondents that claimed to have been party to an unfair contract was 50% or less (see Figure 25, below).

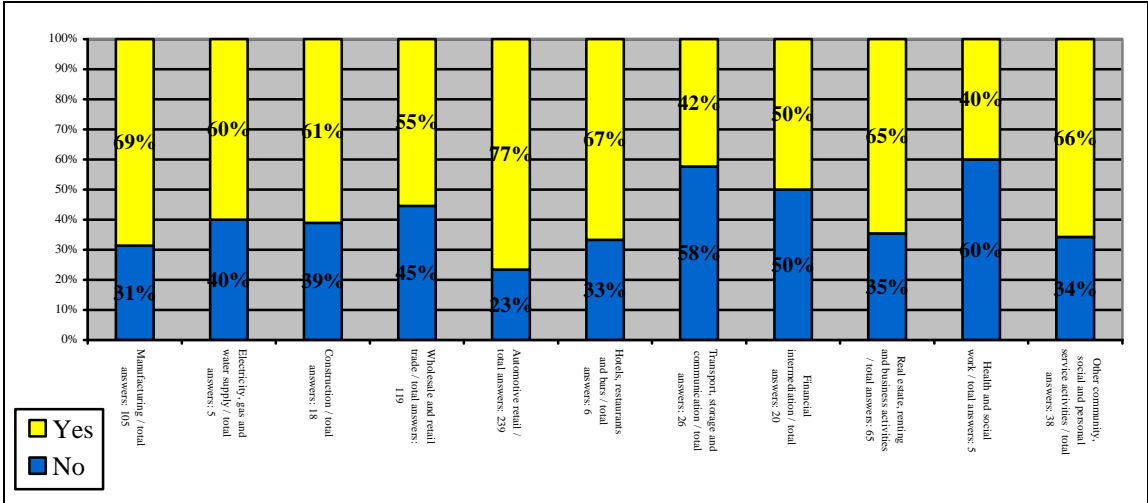
Figure 25: Have you recently been a party to an unfair contract?



Source: European Commission (EBTP Survey)

62. Looking at the answers to this question **by sector of operation**, it can be noted that the sector in which most respondents had during the previous two years, been a party to a contract containing terms which they considered unfair is the automotive sector, with 77%. The two sectors with the fewest experiences of unfair contracts are the health and social work sector and the transport, storage and communication sector with 40% and 42%, respectively (see Figure 26, below).

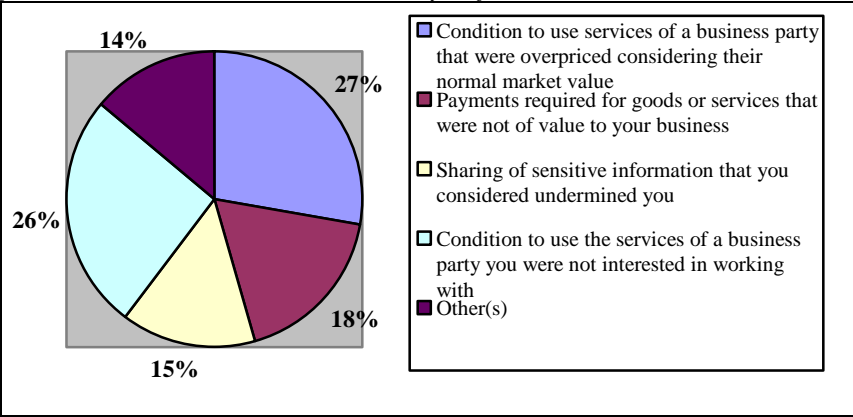
Figure 26: Unfair contracts by sector



Source: European Commission (EBTP Survey)

- 63. However, a multiple choice question was put to respondents in order to elicit more specific answers about the situations they faced, i.e. why they considered the contract unfair. Multiple answers were possible. The questionnaire covered four situations: (i) the condition to use services of a business party that were overpriced considering their normal market value, (ii) payments required for goods or services that were not of value to the respondent's business, (iii) the sharing of sensitive information that the respondent considered to undermine his position and (iv) the condition to use the services of a business party the respondent was not interested in working with. For all unfair terms that did not fall in any of these four categories, respondents could (also) choose the answer "Other(s)", which allowed them to give more specific information by answering an open reply question.
- 64. The situation most often experienced was the condition which required people to use the services of a business party that were **overpriced relative to their normal market value** (27%). However, the percentages of answers for each option to this question are fairly balanced overall (see Figure 27, below).

Figure 27: Unfair contracts - which situations did you face?



Source: European Commission (EBTP Survey)

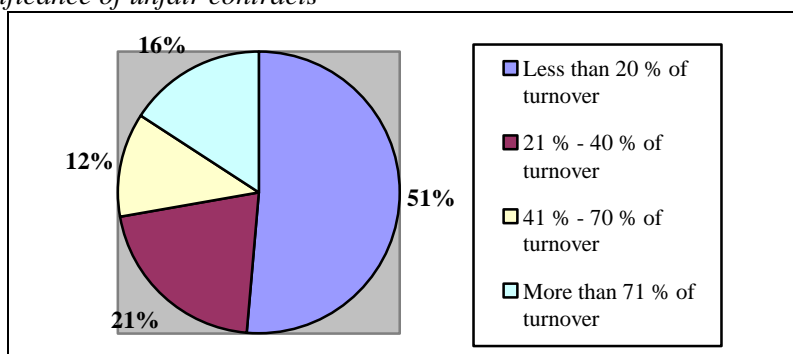
- 65. Those respondents who (also) ticked "Other(s)" – (14%) – mainly emphasized that the following five situations were problematic for them:
 - Disadvantageous conditions that were non negotiable and non challengeable;

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- Unfair payment deadlines (very long payment deadlines for the contracting partner or very short payments deadlines for the company concerned);
- Clauses allowing the company positioned as a customer in the business relationship to unilaterally withdraw from the contract;
- Requirements for minimum sales-floor space;
- Imposition or change of (overly high) standards and requirements to undergo compulsory training.

66. Respondents were asked to estimate the significance of the contracts containing unfair terms with regard to their annual turnover. More than 50% of the contracts had a value of less than 20% of the companies' annual turnover. However, 16% of the respondents were party to an unfair contract, the value of which exceeded 71% of the annual turnover of the respondent's business (see Figure 28, below).

Figure 28: Significance of unfair contracts



Source: European Commission (EBTP Survey)

4.3.2. Sector specific analysis

4.3.2.1. Manufacturing

67. 69% of respondents stated that they had recently been a party to an unfair contract; this percentage is only slightly higher than the overall figure of 66% for all sectors.
68. When looking at the specific situations faced by the respondents, the deviation from the overall average for all sectors is not excessively high, although the focus differs. The terms most frequently experienced by respondents from the manufacturing sector were payments required for goods or services that were not of value to the respondent's business (27%); other practices were mentioned by fewer respondents overall (10% as opposed to the average for all sectors of 14%).

Condition to use services of a business party that were overpriced considering their normal market value	Payments required for goods or services that were not of value to the respondent's business	Sharing of sensitive information that the respondent considered undermined his position	Condition to use the services of a business party the respondent was not interested in working with	Other(s)
20%	27%	21%	22%	10%

69. Looking at the value of the unfair contracts to which the responding companies active in the manufacturing were a party, it can be seen that the relevant contracts were significantly lower in value than the average for all respondents, with 71% of the contracts worth less than 20% of the annual turnover, 15% of contracts with a value between 21% and 40% of turnover, 10% worth from 41% to 70%, and only 4% of the contracts exceeding 71% of turnover.

4.3.2.2. Wholesale and Retail (except automotive)

70. Compared to the overall results, as well as to the results in the manufacturing sector, only 55% of the respondents in the wholesale and retail distribution sector, i.e. more than 10% less than those in the other two categories, felt that they had been parties to an unfair contract within the last two years,.

71. However, the detailed breakdown of the answers also differs significantly from the overall average. First and foremost, the percentage of respondents that had experienced other practices is significantly higher than the average for all sectors (an increase of 10 percentage points). Correspondingly, the percentages of respondents who had been party to a contract which contained the condition to use services of a business party that were overpriced considering their normal market value (21%) or the condition to use the services of a business party with whom the respondent was not interested in working (18%), were considerably lower than the overall average for all sectors.

Condition to use services of a business party that were overpriced considering their normal market value	Payments required for goods or services that were not of value to the respondent's business	Sharing of sensitive information that the respondent considered undermined his position	Condition to use the services of a business party the respondent was not interested in working with	Other(s)
21%	21%	16%	18%	24%

72. The value of the unfair contracts to which the responding companies active in manufacturing were a party was considerably lower compared to the average significance of unfair contracts for all sectors. In the manufacturing sector, 79% of the contracts were worth less than 20% of the annual turnover, 12% had a value between 21% and 40%, and 6% between 41% and 70% of the turnover. Only 3% of the contracts accounted for more than 71% of turnover.

4.3.2.3. Automotive retail

73. In the automotive sector, the percentage of companies which had recently been party to an unfair contract is significantly higher than the average for all sectors, at 77% compared to the overall figure of 66%.

74. The two practices most frequently experienced in the automotive sector were the condition to use services of a business party that were overpriced considering their normal market value (25%) and payments required for goods or services that were not of value to the respondent's business (25%). Compared to the overall average for all sectors, the automotive sector shows significantly higher figures for payments required for goods or services that were not of value to the respondent's business and, correspondingly, a

significantly lower rate for the condition to use the services of a business party with whom the respondent was not interested in working (only 19%).

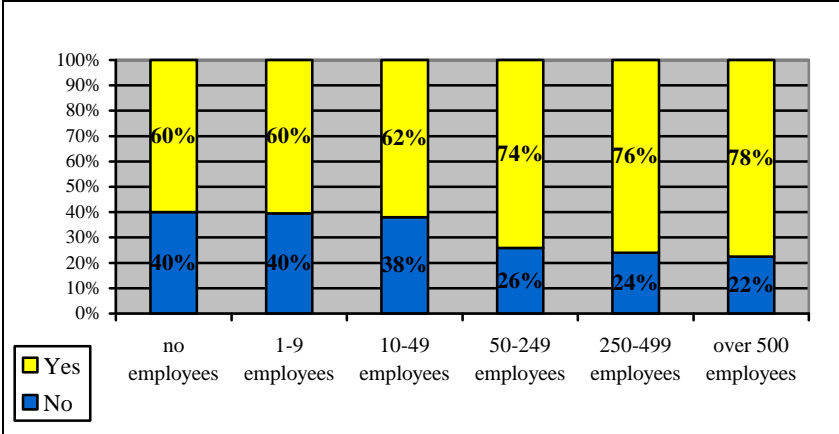
Condition to use services of a business party that were overpriced considering their normal market value	Payments required for goods or services that were not of value to the respondent's business	Sharing of sensitive information that the respondent considered undermined his position	Condition to use the services of a business party the respondent was not interested in working with	Other(s)
25%	25%	18%	19%	13%

75. The value of the contracts concerned relative to the respondents' annual turnover highlights a considerable sector-specific discrepancy. The highest percentage of the unfair contracts was worth over 71% of the respondent's annual turnover (32%), 18% was worth between 41% and 70% of the turnover and 28% between 21% and 40% of the turnover; while on the other hand only 22% (compared to the overall average for all sectors of 51%) of contracts concerned less than 20% of the turnover. This significant discrepancy may arguably be explained by the fact that, in the automotive industry, most licensed car dealers only have one main contract with a manufacturer/importer. If such a contract then contains unfair clauses, it naturally affects most of the company's turnover.

4.3.3. Analysis by company size¹⁵

76. In this section, the recent experiences of unfair contract terms is analysed by company size. In particular, it has to be considered that the majority of responses were received by SMEs. However, the results of an analysis by company size are somewhat surprising: the more employees a respondent had, the more claims he made that he had recently been a party to an unfair contract (see Figure 29, below).

Figure 29: Unfair contract during the last two years by company size



Source: European Commission (EBTP Survey)

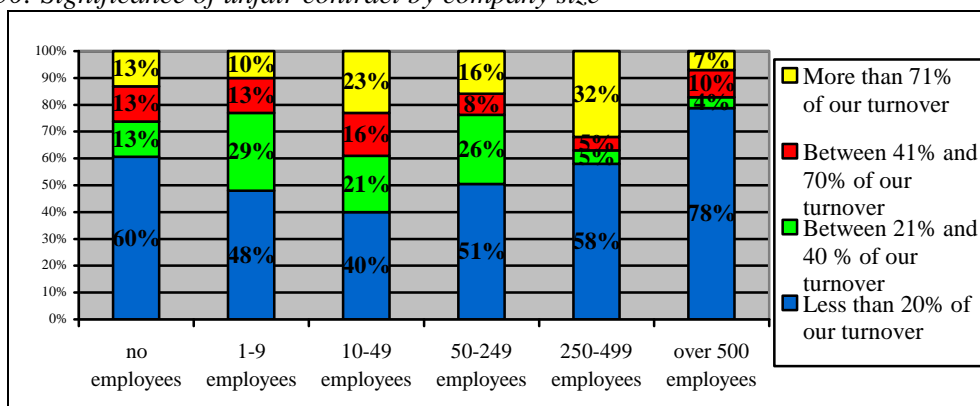
77. When asked about the different categories of unfair contract terms, the answers seem to be fairly uniformly spread among companies of different sizes. The only significant

¹⁵ Given that 15 of the responding companies have indicated not to know their annual turnover, the number of employees is taken as the relevant criteria of analysis in this section.

discrepancy can be seen in individual companies (with no employees), which chose the category 'Other(s)' twice as often than companies with over 500 employees. Individual companies (with no employees) declared that they were "party to contracts containing the condition to use the services of a business party the respondent was not interested in working with" only half as often as companies with over 500 employees.

78. The picture is less well balanced when looking at the significance of the contracts concerned in terms of the companies' annual turnover and size. In particular, when large enterprises with over 500 employees experience unfair practices, such practices generally do not relate to contracts worth more than 20% of the company's annual turnover. On the other hand, companies with 250 to 499 employees were the group where the highest percentage of unfair contracts involved more than 71% of the company's turnover. For small companies with between 10 and 49 employees, as many as 60% of the contracts concerned were worth more than 20% of the annual turnover (see Figure 30, below).

Figure 30: Significance of unfair contract by company size



Source: European Commission (EBTP Survey)

4.4. Unfair practices after the conclusion of the contract¹⁶

79. The analysis of the practices after the conclusion of the contract will follow the same structure as the two previous subheading. Consequently, it will be divided into (i) a general analysis; (ii) a sector-specific analysis; and (iii) an analysis by company size.

4.4.1. General analysis

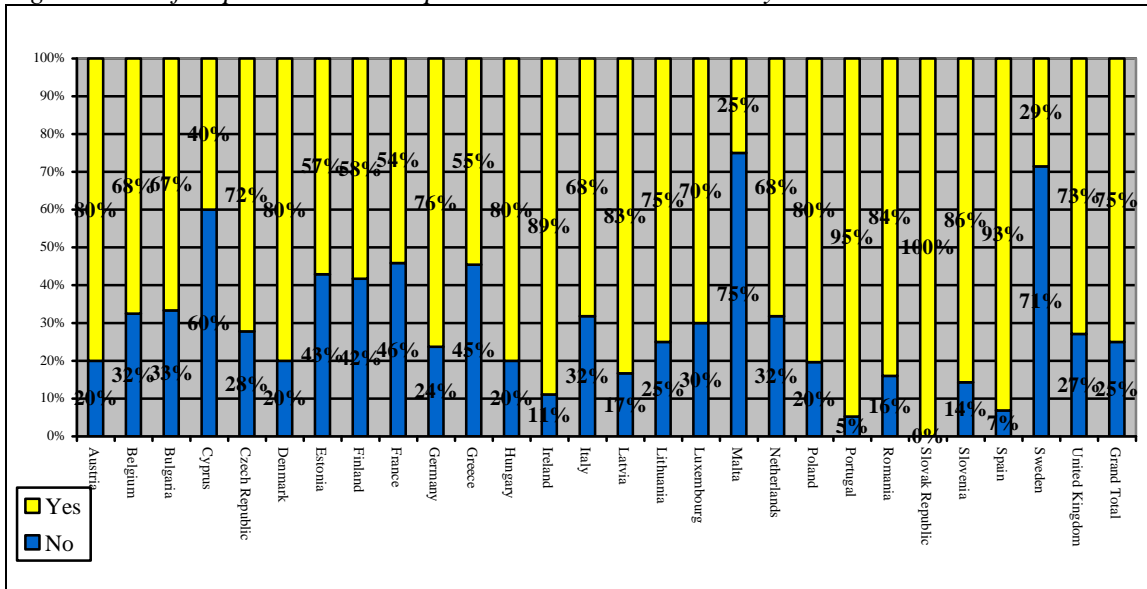
80. Respondents were again asked to specify whether, within the last two years, they had experienced unfair practices by one of their business partners after a contract had already been concluded. **Three quarters** of all respondents answered this question in the affirmative, leaving only 25% of respondents who had not (recently) experienced unfair practices.
81. Only in three Member States (**Cyprus, Malta and Sweden**) less than 50% of the responding companies had recently experienced unfair practices by a contract partner.¹⁷ On the other hand, in eleven Member States (**Austria, Denmark, Hungary, Ireland, Latvia, Poland,**

¹⁶ Cf. questions 11 to 13 of the questionnaire.

¹⁷ This, however, has to be read in relation to the fact that for all of these three Member States, the number of responses received was very small (only 6 responses for Cyprus, 4 for Malta and 13 for Sweden).

Portugal, Romania, Slovak Republic, Slovenia and Spain), 80% or more of the respondents had experienced unfair practices by a contract partner within the last two years (see Figure 31, below).

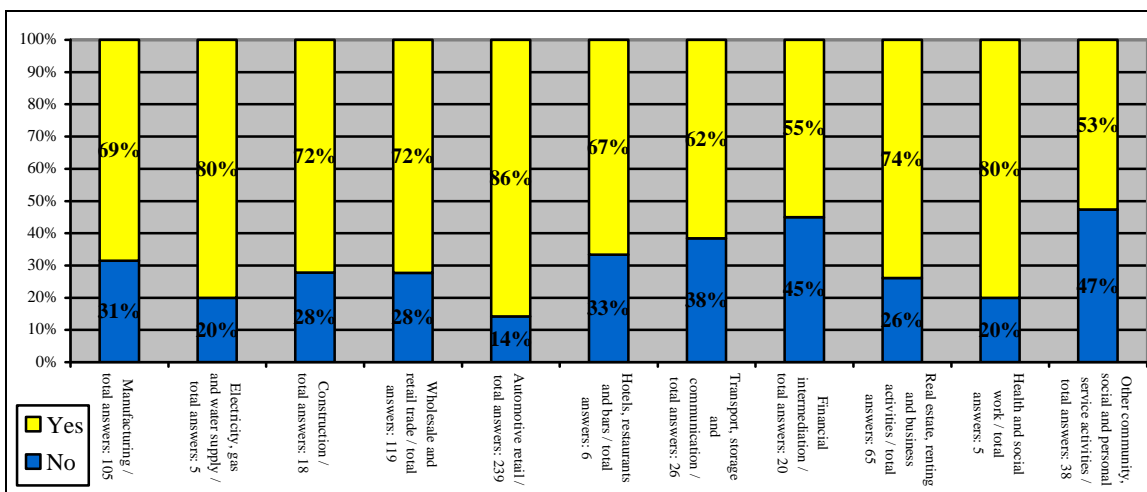
Figure 31: Unfair post-contractual practices within the last two years



Source: European Commission (EBTP Survey)

82. In the breakdown by sector, it is once again the participants from the automotive sector who are most affected as a result of unfair practices by a contract partner. 86% of respondents from the automotive sector are suffering from unfair post-contractual practices, which is even higher than the corresponding number for unfair contract terms and unfair practices during pre-contractual negotiations. The sector with the fewest respondents that have recently experienced unfair post-contractual practices is the sector 'Other community, social and personal services activities', with 53% of respondents suffering from unfair practices in this stage of the business relationship (see Figure 32, below).

Figure 32: Recent experience of post-contractual unfair practices by sector

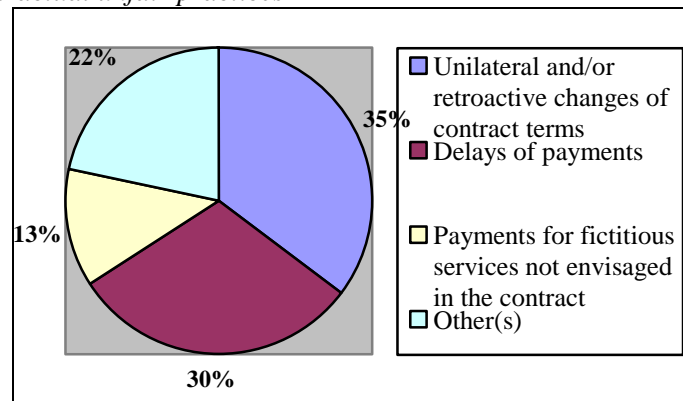


Source: European Commission (EBTP Survey)

83. Respondents were asked to further specify the types of post-contractual practices which they had encountered, again with the possibility of multiple answers. The unfair practice that was experienced most often was unilateral and/or retroactive changes of contract terms

(35%), followed by delays of payments (30%) and other practices (22%). The option 'payments for fictitious services not envisaged in the contract' received the fewest answers (13%) (see Figure 33, below).

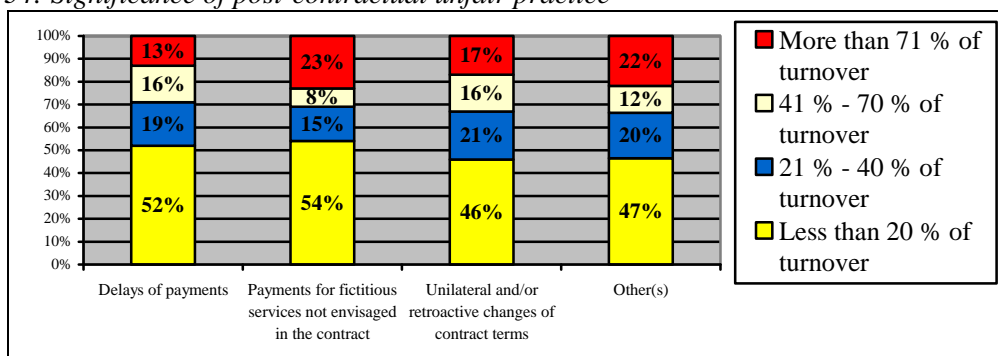
Figure 33: Post-contractual unfair practices



Source: European Commission (EBTP Survey)

84. The responses for other practices (22%) mainly emphasized the following 8 practices:
- Non-compliance with contract terms;
 - Delays in delivery;
 - Refusal to pay;
 - Unilateral price increases;
 - Unilateral and repeated amendments to the contract;
 - Unilateral imposition of higher standards (equipment, tools etc.);
 - Problems in the handling/reimbursement of guarantee works;
 - Termination of the contract without reason, prior notice or compensation.
85. Regarding the significance of the contract(s) in relation to the unfair practice concerning the companies' annual turnover, there do not appear to be any major discrepancies between the different practices. Overall, around 50% of the unfair practices relating to contracts were worth less than 20% of the annual turnover (see Figure 34, below).

Figure 34: Significance of post-contractual unfair practice



Source: European Commission (EBTP Survey)

4.4.2. Sector specific analysis

4.4.2.1. Manufacturing

86. 69% of respondents from the manufacturing sector have recently had experience of unfair practices; this percentage is considerably lower than the average of 75% for all sectors.
87. Regarding the specific practices which have been experienced, the highest percentage of respondents in the manufacturing sector claimed to have experienced delayed payments (33%), followed by unilateral and/or retroactive changes of contract terms (28%) and other practices (22%). Payments for fictitious services not envisaged in the contract account for 17%, with the result that the manufacturing sector ranked considerably above the average of 13% for all sectors.
88. 67% of the relevant contracts, were worth less than 20% of the annual turnover of the responding company. 19% of the contracts were worth between 21% and 40% of the turnover, while 7% corresponded to 41%–70% of turnover and over 71% of turnover, respectively.

4.4.2.2. Wholesale and Retail (except automotive)

89. Once the contract had been concluded, the companies active in the distribution sector also experienced fewer unfair practices than the average for all sectors. 72% stated that they had experienced unfair practices by a contract partner in the previous two years.
90. The different practices are represented in similar shares as the overall average: 36% experienced unilateral and/or retroactive changes of contract terms, 26% delays of payments, 29% other practices and only 9% payments for fictitious services not envisaged in the contract.
91. 77% of the contracts relating to the unfair post-contractual practices experienced by the respondents from the wholesale and retail distribution sector corresponded to less than 20% of the companies' turnover in that year, 17% to between 21% and 40% of the turnover and 3% to between 41% and 70% of the turnover. Only 3% of the contracts concerned more than 71% of the company's annual turnover.

4.4.2.3. Automotive retail

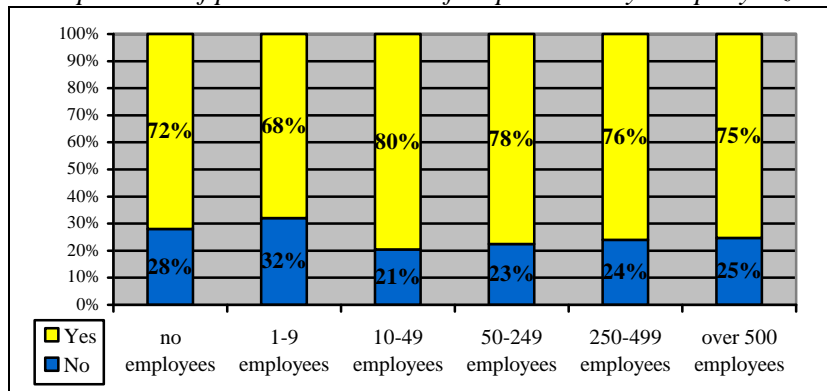
92. Also as regards post-contractual unfair practices, recent experiences of unfair practices in the automotive retail sector account for 86%, i.e. significantly higher than the average for all sectors and also in comparison with each of the other sectors.

93. The practices most often mentioned by automotive retailers were unilateral and/or retroactive changes of contract terms (40%), followed by delays in payments (24%) and other practices (24%). The practice least often invoked was payments for fictitious services not envisaged in the contract (12%).
94. The responses from the automotive retail sector regarding the significance of the contracts linked to the unfair practices differ considerably from the average for all sectors. This deviation is explained by the fact that automotive retailers have, for the most part, only one main contract with an importer/manufacturer. Thus, only 25% of the contracts linked to the unfair post-contractual practices were worth less than 20% of the company's turnover, 24% were worth between 21% and 40 % of turnover and 22% were worth between 41% and 70% of turnover. However, the most unfair practices, at 29%, were linked to contracts with a value of over 71% of the company's annual turnover.

4.4.3. Analysis by company size¹⁸

95. Looking at the correlation between recent experiences of post-contractual unfair practices and company size, there are no obvious major discrepancies. The group invoking the most unfair practices at this stage are companies with between ten and 49 employees (see Figure 35, below).

Figure 35: Recent experience of post-contractual unfair practices by company size

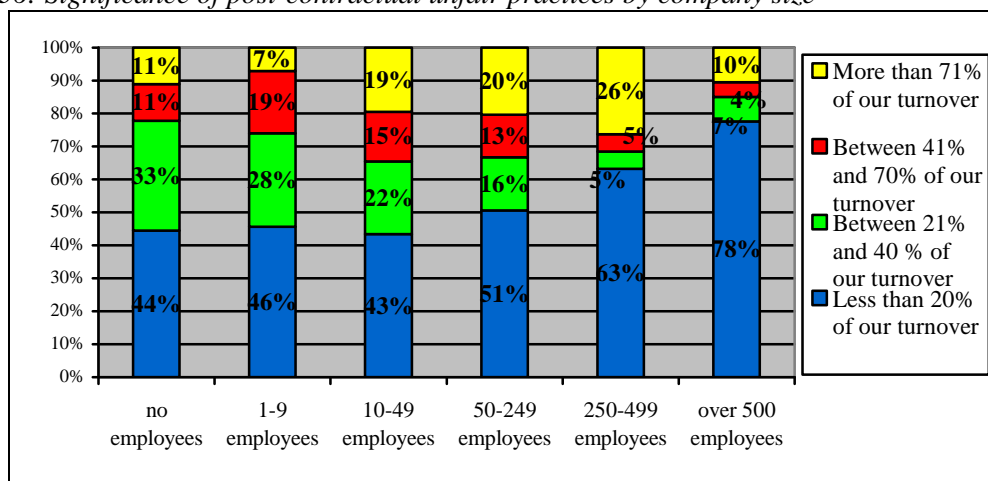


Source: European Commission (EBTP Survey)

96. Differences in company size make very little difference to which practices are mentioned. However, it should be noted that individual companies (with no employees) seem to have experienced more frequent delays of payment and correspondingly fewer unilateral and/or retroactive changes in contract terms.
97. Regarding the significance of the contracts concerned, the differences between companies of different size becomes more evident, as the chart below shows (Figure 36). Generally speaking, the larger the company, the less significant the contracts to which the unfair practices are linked.

¹⁸ Given that 15 of the responding companies have stated that they do not know what their annual turnover is, the number of employees is taken as the relevant criteria of analysis in this section.

Figure 36: Significance of post-contractual unfair practices by company size



Source: European Commission (EBTP Survey)

5. ENFORCEMENT

98. The analysis in this part of the report will deal with questions 14 to 18 of the questionnaire. First, it briefly presents the responses to the question concerning the awareness of existing enforcement bodies (Section 5.1). Secondly, it expresses the respondents' satisfaction with existing enforcement mechanisms (Section 5.2) and, thirdly, describes the reluctance to make use of existing enforcement bodies (Section 5.3). Lastly, respondent's awareness of the possibility to submit complaints anonymously (Section 5.4) is analysed.
99. The aim of the questions to ascertain how aware respondents are about existing enforcement bodies, as well as the possibility of making anonymous complaints, was to give the Commission an idea of how much companies know in general about the enforcement options in the countries where they operate. Although the basic data will be presented, it is important to note that, at this stage, the information value of such data is limited. In order to show how the data will be used within the on-going work of the Commission on unfair commercial practices, the French system will be taken as an example for the awareness of the existing enforcement bodies and the Slovenian system will serve as an example of the awareness of the possibility to make anonymous complaints.

5.1. Awareness of existing enforcement bodies¹⁹

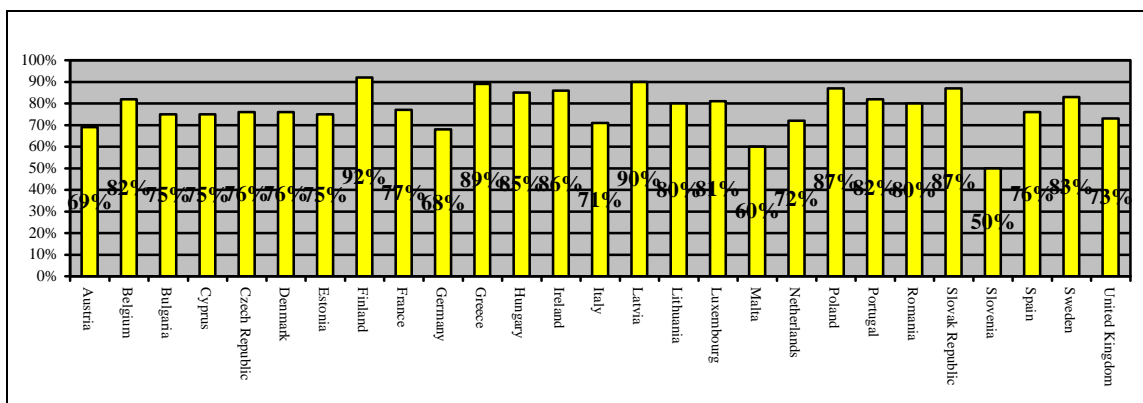
100. As explained above, the aim of this part is not to provide facts but rather to show the awareness/perception of existing enforcement mechanisms by the players in the market. The main aim here is to understand the lack of motivation "to react" to unfair practices, since presumably one of the main reasons could be a lack of information. Since the informative value of such data arguably depends on comparison with the actual facts – i.e. to know whether it is good that 75% of respondents in a Member State are aware that they can complain to a court against unfair practices – it is important to ascertain first of all whether this possibility is actually available in this Member State (the analysis will be confined to one Member State – **France**) and simply show the answers for the other Member States. The reasons for having chosen **France** as an example of how aware companies are of their possibilities to combat unfair practices are, first, the fact that the Commission has complete information about the French system and – second and more importantly – that **France** has

¹⁹ Cf. question 14 of the questionnaire.

a sophisticated framework in place designed to prevent unfair commercial practices in business-to-business relationships.

101. The respondents were asked to name the enforcement options of which they were aware in their respective country. Possible answers were ‘Courts’, ‘Administrative bodies’, ‘Competition authority’, ‘Self-regulatory body’ or ‘Others’ (see Figures 37 to 41 below).
102. In **France**, courts are competent to decide on contractual remedies, such as damages, if a contract violates the law on unfair commercial practices (this protection against unfair practices is mainly regulated in Art. L.442-6 *Code de Commerce*). The action can be brought before the court either directly by the injured party, or by the public prosecutor, the Ministry of Economy or the President of the Competition Authority. In practice, most of the cases are brought by the Ministry of Economy, after an inquiry, or by the injured party. Yet, as the figures below show, only 77% of respondents stated that they were aware of the possibility for the injured party to complain directly to a court, and only 11% of the possibility for the Ministry of Economy to bring the case to court.
103. Furthermore, and if the unfair practice leads to an infringement of competition law, the French Competition authority (*Autorité de la concurrence*) is duly empowered. 30% of the respondents are aware of this option, although it has to be acknowledged here that competition law does not cover some of the practices experienced by the responding companies. Since the adoption of the Law of 4 August 2008 on the Modernisation of the Economy (LME), **France** also has a self-regulatory mechanism supported by the Ministry of Economy and Members of the Parliament, which deals with unfair practices. The CEPC (*Commission d'Examen des Pratiques Commerciales*) is a non-binding advisory body which identifies unfair practices in the supply chain and develops codes of good practice. However, the CEPC can also initiate inquiries and receive and consider complaints, e.g. by affected companies. Nevertheless, only 9% of respondents are aware of this new instrument.

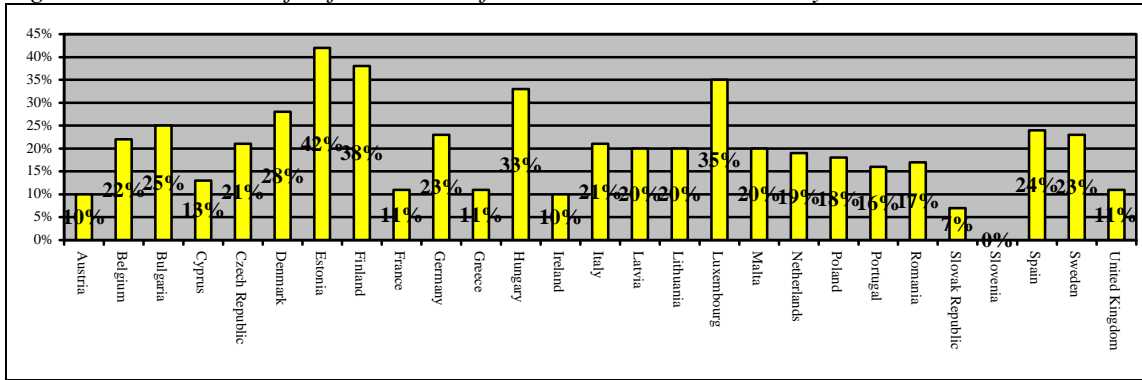
Figure 37: Awareness of enforcement before courts by Member State



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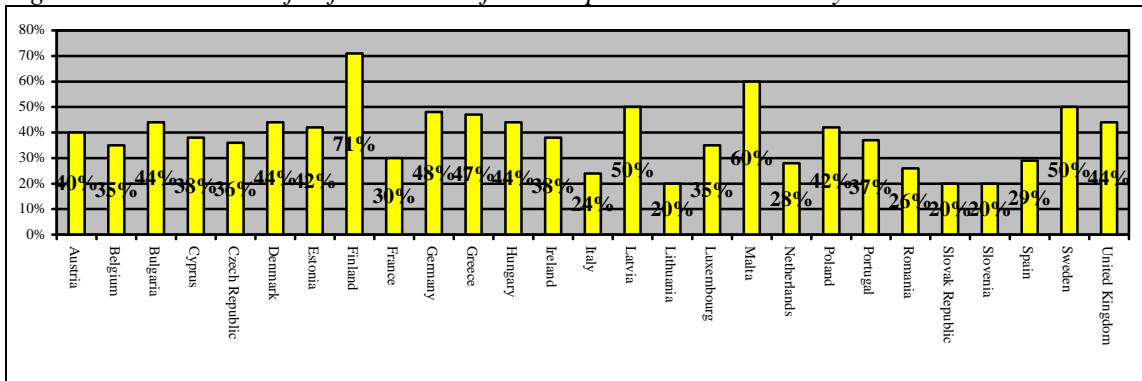
Source: European Commission (EBTP Survey)

Figure 38: Awareness of enforcement before administrative bodies by Member State



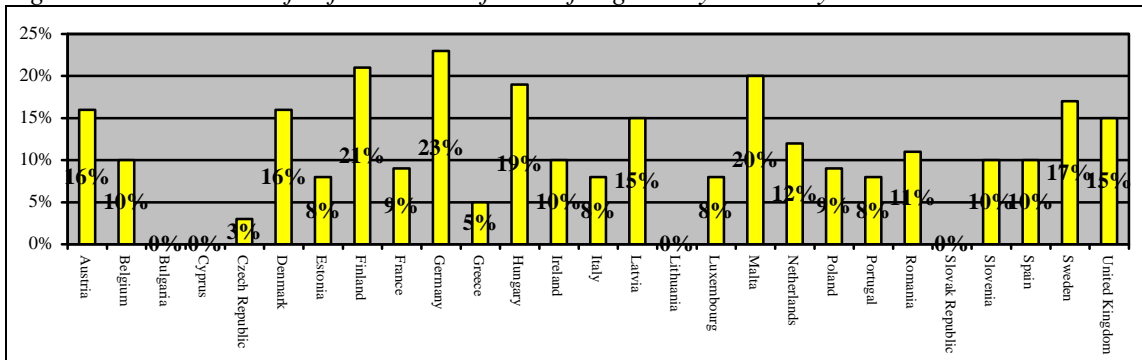
Source: European Commission (EBTP Survey)

Figure 39: Awareness of enforcement before competition authorities by Member State



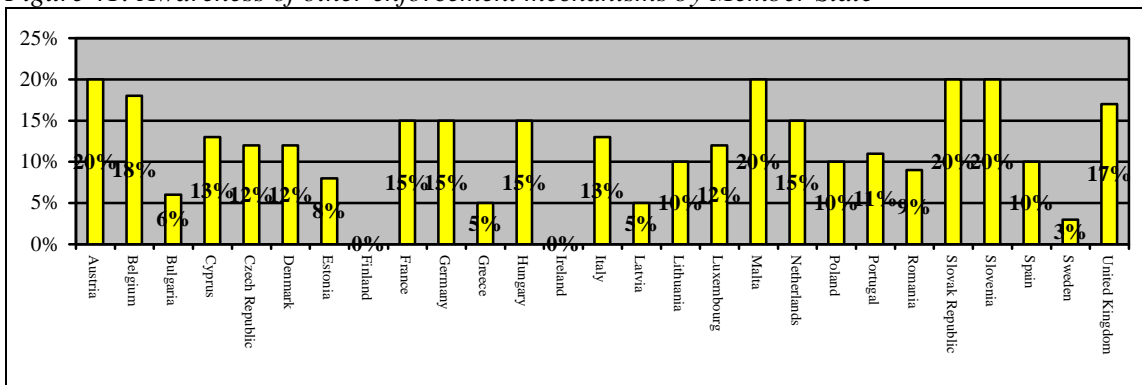
Source: European Commission (EBTP Survey)

Figure 40: Awareness of enforcement before self-regulatory bodies by Member State



Source: European Commission (EBTP Survey)

Figure 41: Awareness of other enforcement mechanisms by Member State

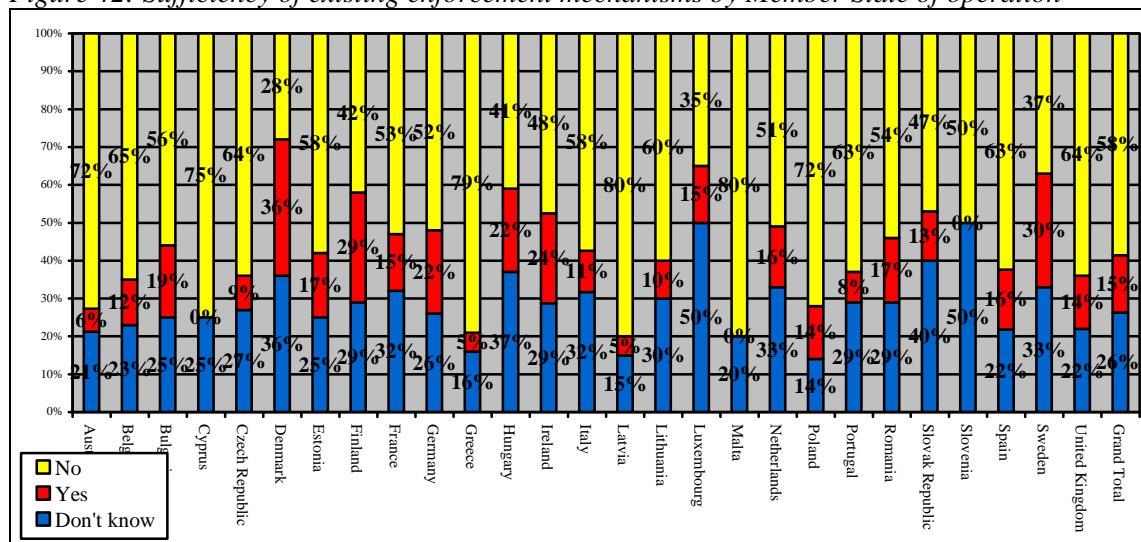


Source: European Commission (EBTP Survey)

5.2. Sufficiency of existing enforcement mechanisms²⁰

104. Irrespective of which enforcement options were available to respondents in their Member States of operation and irrespective of whether they were aware of these mechanisms, the Commission services further asked the responding companies whether they thought that the existing enforcement mechanisms provided sufficient safeguards to protect their businesses against unfair practices. More than half, namely 58%, of all respondents thought that **existing enforcement mechanisms were not sufficient**. However, the numbers vary significantly from country to country, with a considerable number of respondents (26% overall) stating that they did not know. In **Austria, Cyprus, Greece, Latvia, Malta and Poland**, more than 70% of the responding companies thought that enforcement mechanisms were insufficient. Except for **Denmark, Finland, Germany, Hungary, Ireland and Sweden**, the percentage of respondents who found the existing enforcement instruments sufficient amounted to less than 20%. Only in **Denmark** did the percentage of respondents who found existing enforcement options sufficient exceed the number of those who did not. The highest percentages of respondents who were not informed enough to answer the question were in **Luxembourg and Slovenia** (both with 50%) (see Figure 42, below).

Figure 42: Sufficiency of existing enforcement mechanisms by Member State of operation

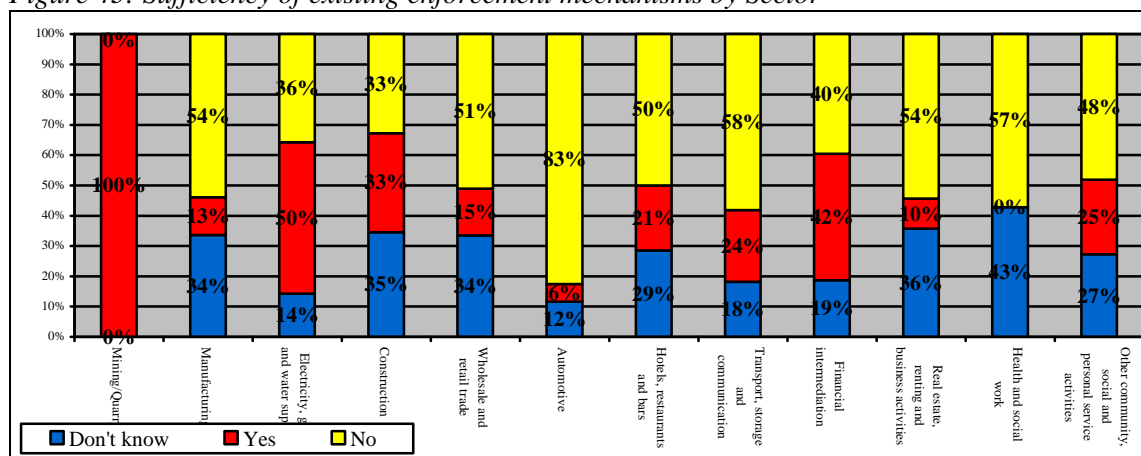


Source: European Commission (EBTP Survey)

105. Also, when looking at the breakdown by sector, the numbers differ considerably depending on the sector. The highest satisfaction with existing enforcement instruments can be found in the electricity, gas and water supply sector (50%) and in financial intermediation (42%), while the automotive retail sector once again had the highest percentage of respondents (83%) who were unhappy with existing enforcement mechanisms. The highest number of respondents who were insufficiently informed is found in the health and social work sector, with 43% of respondents choosing the "Don't know"-option (see Figure 43, below).

²⁰ Cf. question 16 of the questionnaire.

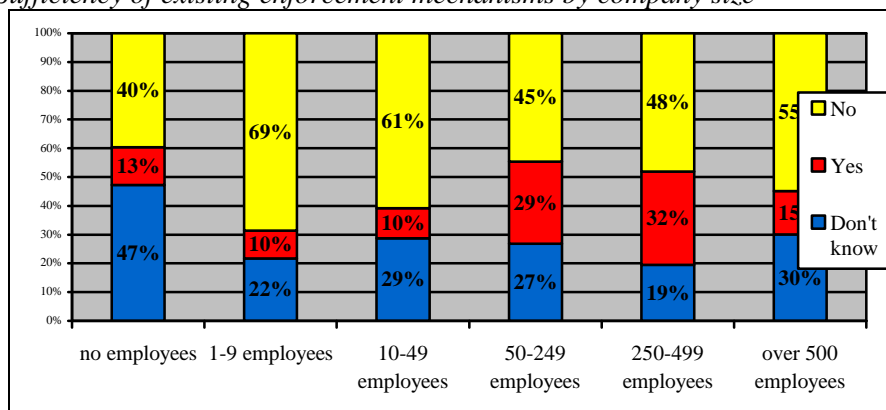
Figure 43: Sufficiency of existing enforcement mechanisms by Sector



Source: European Commission (EBTP Survey)

106. Also with respect to company size, interesting differences can be seen when it comes to the issue of whether existing enforcement instruments are seen as sufficient. Firstly, it is clear that by far the highest number of companies who were insufficiently informed to answer this question are one-man-businesses. This shows that it is difficult for businesses without employees to know what their legal options are when they are subjected to unfair practices. On the other hand, the highest percentages of companies taking the view that the existing option is not sufficient are found in micro enterprises with between one and nine employees, and in small companies with ten to 49 employees. This shows that smaller market players, who do consider themselves to be informed about their legal options, find these options insufficient. Conversely, the highest satisfaction with existing enforcement mechanisms is found in larger companies with between 50 and 500 employees (see Figure 44, below).

Figure 44: Sufficiency of existing enforcement mechanisms by company size



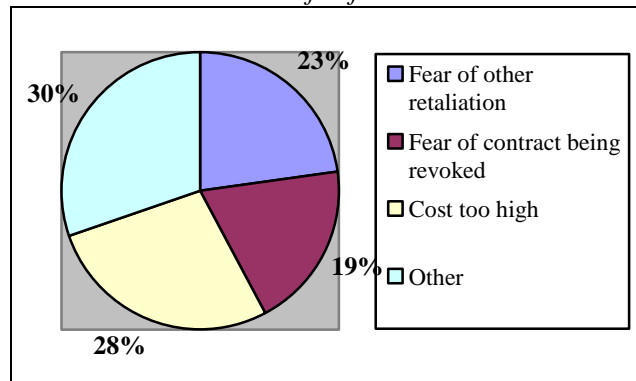
Source: European Commission (EBTP Survey)

5.3. Use of and reluctance to make use of enforcement mechanisms²¹

107. Respondents were asked whether they had made use of existing enforcement mechanisms and, if not, what was the reason for their reluctance to make use of them. 80% of the responding companies had not made use of existing enforcement mechanisms for several reasons (see Figure 45, below).

²¹ Cf. questions 17 and 18 of the questionnaire.

Figure 45: Reasons for reluctance to make use of enforcement mechanisms



Source: European Commission (EBTP Survey)

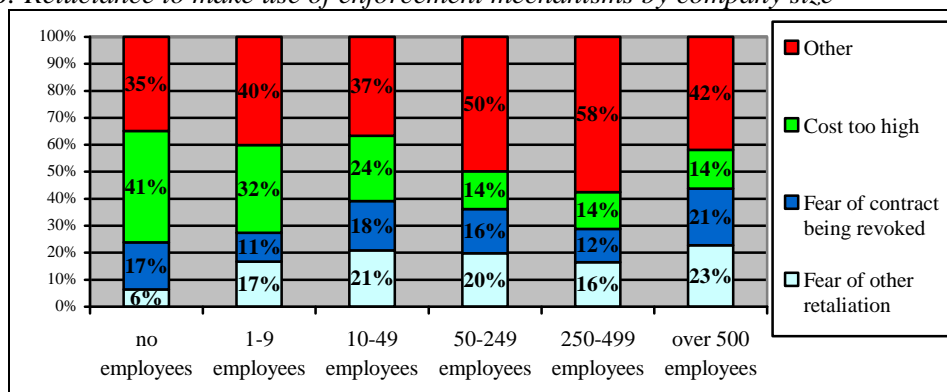
108. The arguments advanced by those respondents who specified other reasons for not making use of existing enforcement mechanisms were as follows:

- No need;
- Length and complexity of proceedings;
- Legal issues (different legal system) and language barriers in cross-border relations;
- Fear that the courts would have a national bias;
- Doubts as to whether such mechanisms would help (unpredictable outcome, no suitable remedies).

109. As regards the three sectors which are looked into in more detail in this report, it is manufacturing, as well as the wholesale and retail distribution sector, which have significantly higher than average rates under 'other reasons' for not making use of enforcement instruments (40% for the manufacturing sector and 47% for the wholesale and retail distribution sector). In the wholesale and retail distribution sector, only 8% of respondents gave 'Fear of contract being revoked' as a reason, while 23% in the automotive sector had this fear. Indeed, also the fear of retaliation - at 26% - was also significantly higher in the automotive sector than in manufacturing (17%) or wholesale and retail distribution (16%).

110. The picture is less diverse when looking at the reluctance to make use of enforcement mechanisms by company size. However, the main obvious conclusion is that micro-enterprises and small companies are confronted with a considerable cost issue which prevents them from reverting to national authorities (see Figure 46, below).

Figure 46: Reluctance to make use of enforcement mechanisms by company size

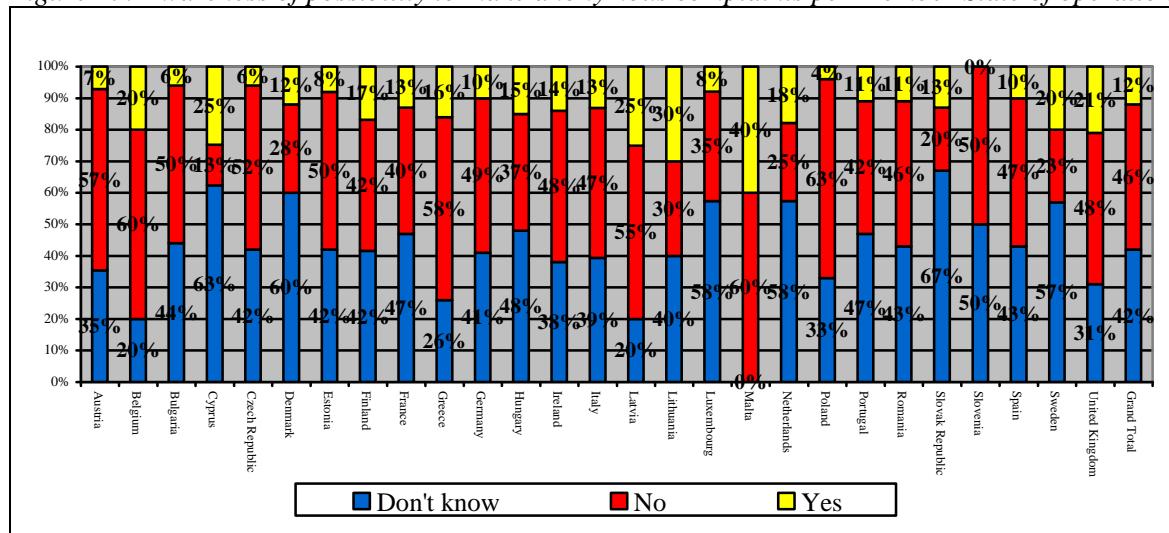


Source: European Commission (EBTP Survey)

5.4. Awareness of the possibility to make anonymous complaints²²

111. Respondents were asked whether existing enforcement mechanisms allow complaints to be dealt with anonymously. However, in many Member States, this possibility might not exist.
112. Therefore, in line with Part I of this section, the aim of this question was to compare it with findings on the systems put in place in the different Member States so as to obtain an accurate picture of how aware companies were that they could complain anonymously. Consequently, the analysis will confine itself to presenting the figures for the different Member States. **Slovenia** will be used as an example for how the responses to this survey may indicate general awareness of legal options available to companies who are faced with unfair commercial practices. As a general note, it should be added that, given the overall figure of 42%, there is a fairly serious lack of information on this issue, indicating that even in Member States where it is possible to complain anonymously against unfair practices, many companies who may be affected are unaware of that fact.
113. In **Slovenia**, anonymous complaints against unfair practices amounting to a violation of competition law can be brought before the Competition Protection Office (*Urad za Varstvo Konkurence*) according to Art. 17 ZPOMK-1. While it is true that competition law does not cover all unfair practices, the results for **Slovenia** nonetheless show that awareness in this area is low. **None** of the responding companies were aware of this possibility, while 50% thought that anonymous complaints were impossible and the remaining 50% did not know whether this was possible in Slovenia (see Figure 47, below).

Figure 47: Awareness of possibility to make anonymous complaints per Member State of operation



Source: European Commission (EBTP Survey)

6. TRANSPARENCY

114. The aim of this section of the questionnaire was to ascertain whether the businesses represented in the EBTP were often parties to oral contracts (Section 6.1) or to written contracts that were later changed orally (Section 6.2). Furthermore, the Commission wanted to find out whether the respondents would welcome the idea of contractual terms being provided solely in written form (Section 6.3). The idea behind this was that, even in those

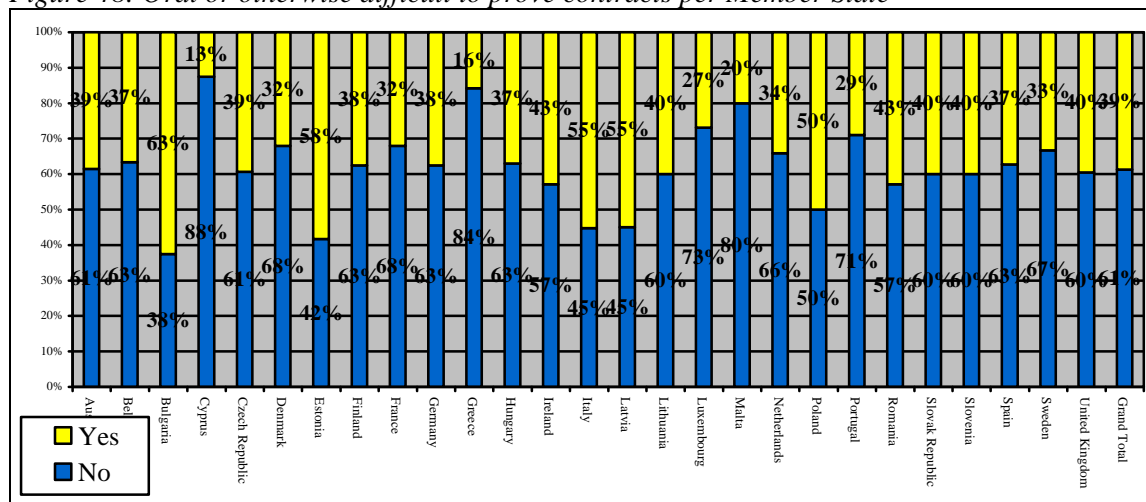
²² Cf. question 15 of the questionnaire.

Member States where there is legislation on unfair practices, the difficulty of proving the content of the contract between two parties might render these laws ineffective. In their answers to the last question, the respondents were able to share with the Commission their individual experiences of unfair practices (Section 6.4).

6.1. Oral/difficult proof of contractual terms²³

115. Initially, respondents were asked whether, in the last 24 months, they had been subject to contractual terms in oral form or in another form that made it difficult to prove the content of the agreement. Only 39% of all respondents have had such experiences. However, in five Member States (**Bulgaria, Estonia, Italy, Latvia** and **Poland**) 50% or more of the respondents had been subject to oral contractual terms within the last two years (see Figure 48, below).

Figure 48: Oral or otherwise difficult to prove contracts per Member State

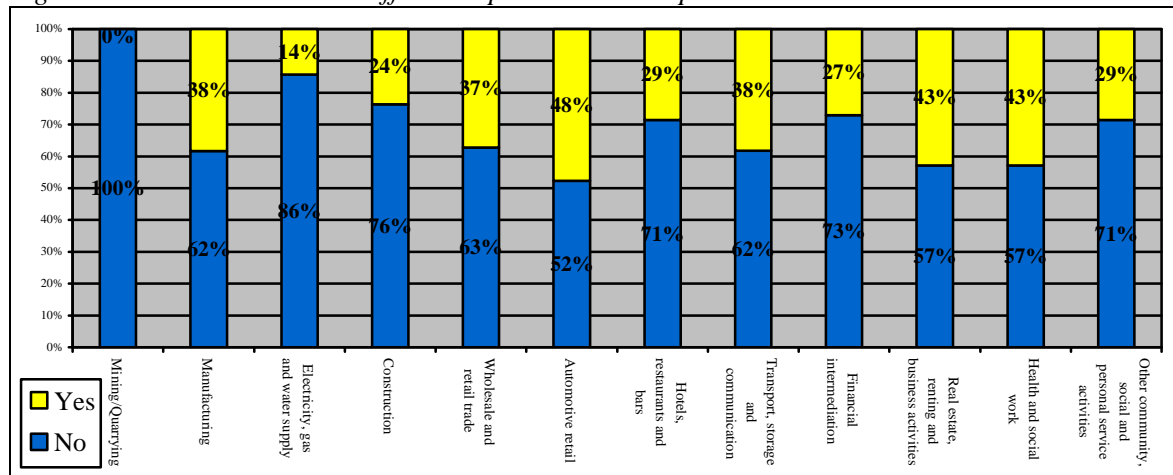


Source: European Commission (EBTP Survey)

116. The following chart presents sector specific deviations from the average for all sectors. In the case of electricity, gas and water supply, in particular, oral contracts appear to be very rare, with only 14% of respondents having recently been subject to contractual terms in oral or another form that makes it difficult to prove the content of the contract. On the other hand, 48% of respondents in automotive retail have had such experiences within the last two years (see Figure 49, below).

²³ Cf. question 19 of the questionnaire.

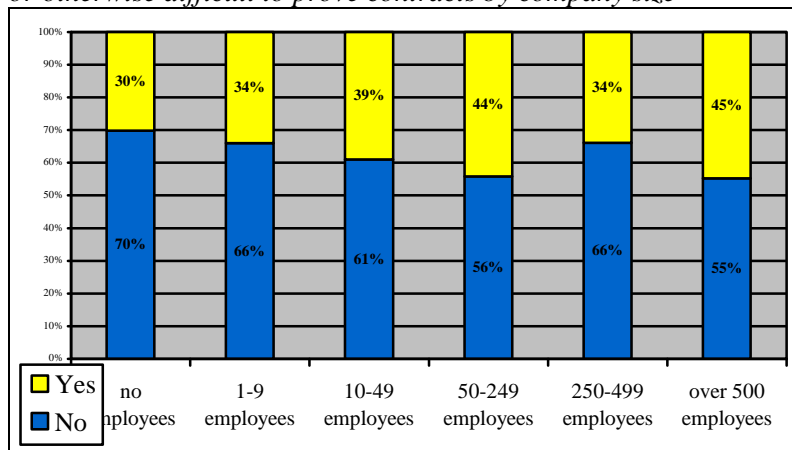
Figure 49: Oral or otherwise difficult to prove contracts per sector



Source: European Commission (EBTP Survey)

117. Company size does not seem to be a major factor in deciding whether a company is subject to oral contract terms. On the contrary, it seems that companies with no employees were less likely to be subject to oral contracts than companies with over 500 employees (see Figure 50, below).

Figure 49: Oral or otherwise difficult to prove contracts by company size



Source: European Commission (EBTP Survey)

6.2. Retroactive terms to an oral contract (or to a contract the content of which was otherwise difficult to prove)²⁴

118. Respondents were further asked whether, in the last 24 months, they had faced a situation where agreed contractual terms in oral form (or in another form that made it difficult to prove the content of the agreement) were changed for completed activities and/or delivered goods (retroactive terms).

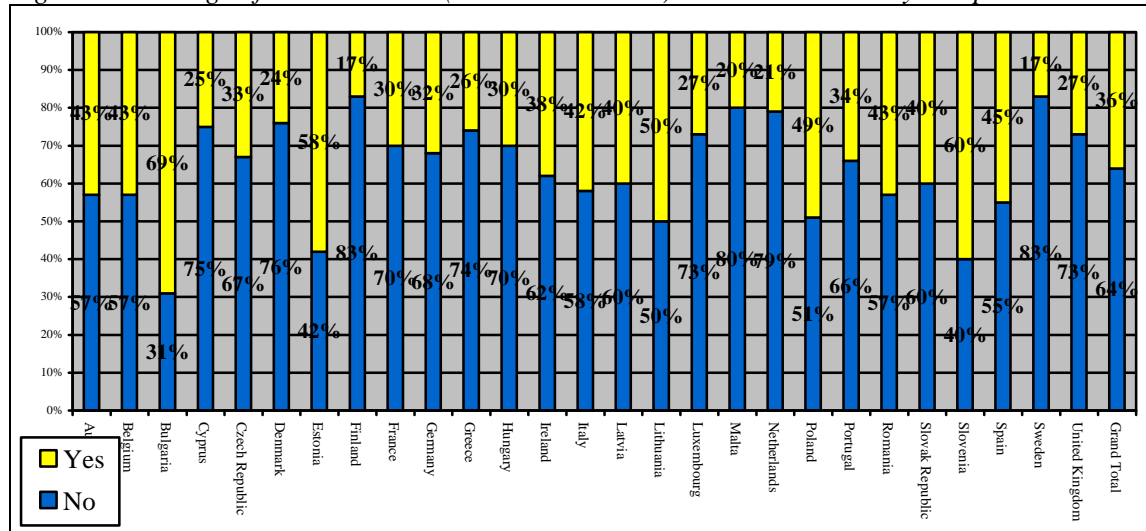
119. A majority of 64% of respondents had not faced such a situation. Only in three Member States (Bulgaria, Estonia and Slovenia) more than 50% of respondents operating in these States experienced a retroactive change of their orally agreed contract terms. In Finland,

²⁴ Cf. question 20 of the questionnaire.

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Malta and Sweden, under 20% of respondents had experienced a contract partner retroactively changing an oral contract (see Figure 51, below).

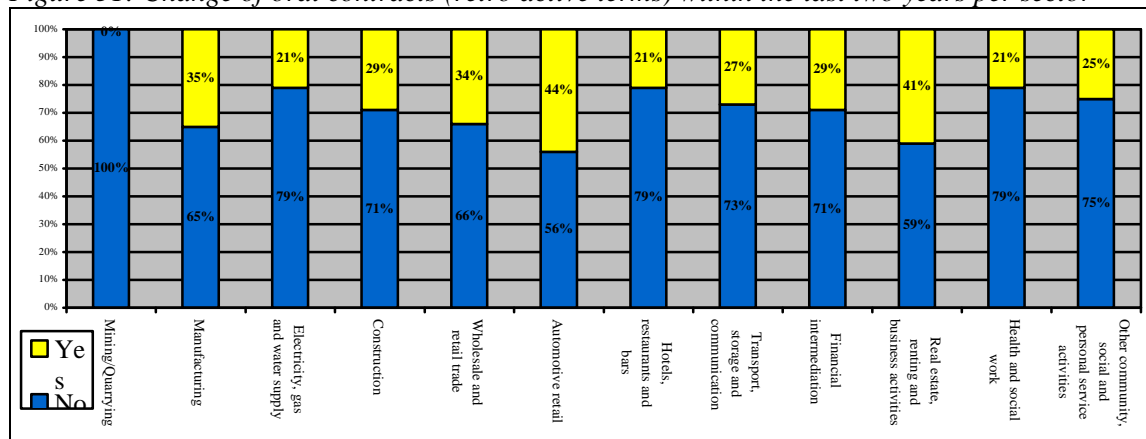
Figure 50: Change of oral contracts (retro active terms) within the last two years per Member States



Source: European Commission (EBTP Survey)

120. Furthermore, in the last two years, there has been no sector in which more than 50% of the respondents have faced a situation where agreed contractual terms in oral form or in a form which was otherwise difficult to prove were changed in respect of completed activities and/or delivered goods. The only two sectors in which the number of respondents affected by this practice is above average are the automotive sector and the real estate, renting and business activities sector (see Figure 52, below).

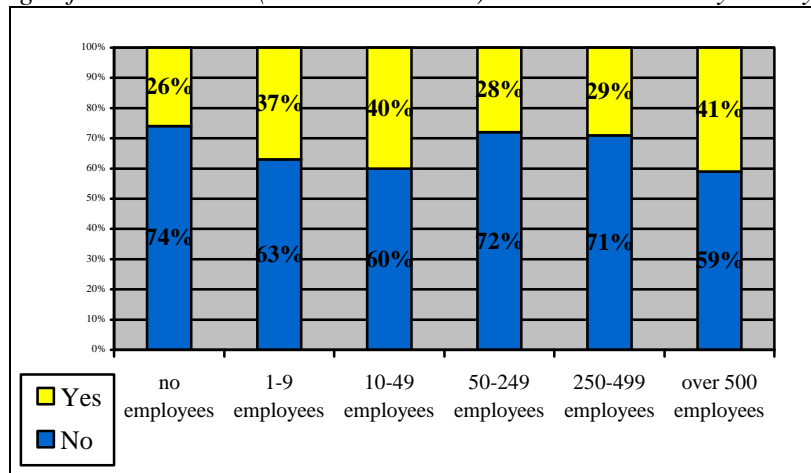
Figure 51: Change of oral contracts (retro active terms) within the last two years per sector



Source: European Commission (EBTP Survey)

121. The following chart shows the responses to this question broken down by size of the responding companies. Interestingly, the group of respondents who have had the least experience of a retroactive change of their oral contracts after goods were delivered or activities were completed are companies with no employees, i.e. one-man-businesses (see Figure 53, below).

Figure 52: Change of oral contracts (retro active terms) within the last two years by company size

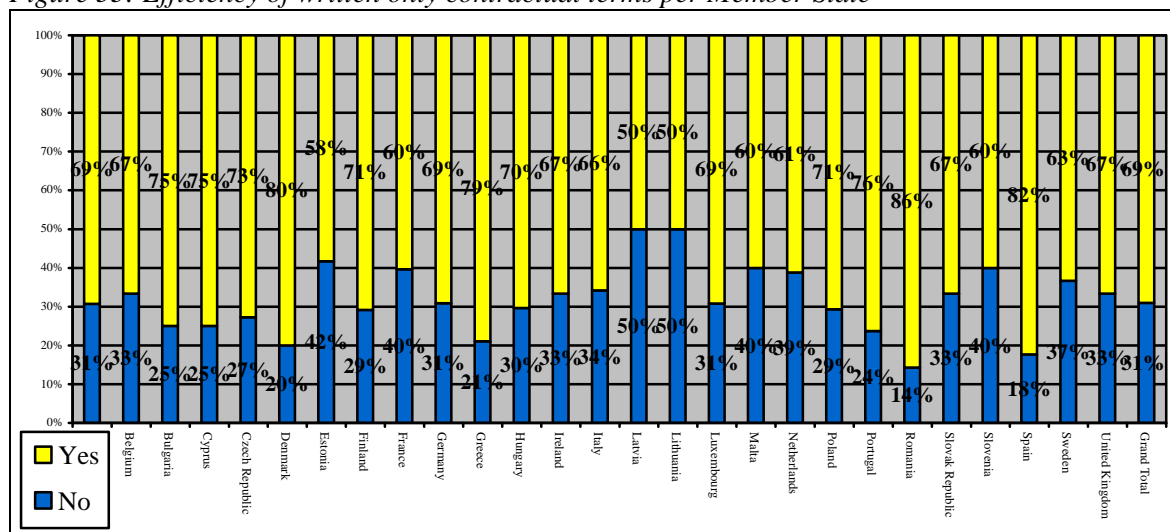


Source: European Commission (EBTP Survey)

6.3. Efficiency of written-only contractual terms²⁵

122. Respondents were also asked whether it would improve legal certainty and the predictability of their business if contractual terms were provided solely in written form. Most respondents (69%) replied in the affirmative (see Figure 54, below).

Figure 53: Efficiency of written only contractual terms per Member State



Source: European Commission (EBTP Survey)

6.4. Experiences with unfair commercial practices²⁶

123. In reply to the last question, respondents were able to share with the Commission any individual case of unfair practices which they had experienced. The comments received were very varied. The answers to this question, together with the answers to the other questions about the situations which the companies have faced and the follow-up open reply questions made it possible to identify a number of practices which appear particularly problematic:

²⁵ Cf. question 21 of the questionnaire.

²⁶ Cf. question 22 of the questionnaire.

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- Withholding essential information (e.g. general trading conditions)
- Abuse of information provided in business relations
- Problems in warranty handling (mainly concerning reimbursement by the manufacturer and access to spare parts)
- Payments for non-existent or unsolicited services
- Transfer of business risk to the other contracting party
- Unilateral changes imposed by one party in the price and quantity of goods provided or in the price and characteristics of services rendered
- Territorial supply constraints (mainly refusal to supply or constraints to sell cross-border)
- Non-transparent and disproportionate contractual penalties
- Late payments or unfair payment terms
- Unfair termination of contracts (no notice period, inappropriate notice period, or no legitimate reason)

Overall, however, the responses to this question confirmed the existence of unfair practices by providing specific examples and demonstrating the need for a consistent European approach in this area. Some respondents took this opportunity to expressly call upon the EU legislators to come up with a solution to the problem of unfair commercial practices at EU level.

Disclaimer: All responses as any other information or attachment remain confidential. They are solely for the use of the Commission services, in the framework of this consultation and are protected from disclosure. Personal data has been collected and, processed in accordance with the provisions of Regulation (EC) No 45/2001.

UNFAIR BUSINESS TO BUSINESS COMMERCIAL PRACTICES

0. PARTICIPATION

0. Are you interested in participating in this consultation?

- Yes
- No (End of consultation)

I. SIZE AND MARKET OF YOUR COMPANY

1. Could you please indicate your annual net turnover (either for the last year of account, or currently estimated)? (For the Member States outside the Euro zone, please convert the amount into €)

This information is necessary to be able to assess the weight that potential unfair commercial practices can have on your business.

- Less than or equal to €1 million
- Over €1 million to €8.8 million
- Over €8.8 million to €35 million
- Over €35 million
- Don't know

2. In which Member States does your company operate?

(List of 27 MS, by ticking a Member State, the rest of the questionnaire repeats for each ticked MS separately)

3. Do you consider that your company is sufficiently protected against unfair commercial practices in the country covered by this part of the questionnaire?

- Yes
- No

4. Have you, in the last 24 months, experienced a commercial practice that you consider unfair?

- Yes
- No (Go to Section: Enforcement)

II. OCCURRENCE, NATURE AND RELEVANCE OF THE PRACTICES

During pre-contractual negotiations

5. Have you, during the last two years, experienced a practice by your business partner during pre-contractual negotiations that you consider unfair?

- Yes (Go to Q6 to Q7)
- No (Go to Q8)

6. Could you please specify which of the following situations you faced?

- Refusal to sell (*if yes, please state reason why*)*free text filed required*
- Lack of sufficient information regarding the future contract terms (eg. Non-provision of general trading terms)
- Others, please specify (free text field with request to state the significance the respondent thinks these practices are for their business)

7. Could you please indicate how significant the contract to which the unfair practice was linked was or might have been in the year in which this unfair practice occurred?

- Less than 20% of our turnover
- Between 21% and 40 % of our turnover
- Between 41% and 70% of our turnover
- More than 71% of our turnover

Contract terms

8. Have you been during the last two years, a party to a contract that contained terms that you would consider unfair?

- Yes (Go to Q9 to Q10)
- No (Go to Q11)

9. Could you please specify which of the following situations you faced?

- Condition to use the services of a business party you were not interested in working with
- Condition to use services of a business party that were overpriced considering their normal market value
- Payments required for goods or services that were not of value to your business
- Sharing of sensitive information that you considered undermined your business
- Other(s), please specify (free text field with request to state the significance the respondent thinks these practices are for their business)

10. Could you please indicate how significant the contract to which the unfair practice was linked was or might have been in the year in which this unfair practice occurred?

- Less than 20% of our turnover
- Between 21% and 40 % of our turnover
- Between 41% and 70% of our turnover
- More than 71% of our turnover

After the conclusion of the contract

11. Have you, during the last two years, experienced what you consider an unfair practice by your business partner after a contract was concluded?

- Yes (Go to Q12 to Q13)
- No

12. Could you please specify which of the following situations you faced?

- Unilateral and/or retroactive changes of contract terms
- Delays of payments
- Payments for fictitious services not envisaged in the contract
- Others, please specify (free text field with request to state the significance the respondent thinks these practices are for their business)

13. Could you please indicate how significant the contract(s) to which the unfair practice was linked to was in the year in which this unfair practice occurred?

- Less than 20% of our turnover
- Between 21% and 40 % of our turnover
- Between 41% and 70% of our turnover
- More than 71% of our turnover

III. ENFORCEMENT

14. Could you please indicate enforcement instruments that were at your disposal in the country covered by this part of the questionnaire to deal with the adverse effect of unfair commercial practices?

- Courts
- Administrative body
- Competition authority
- Self-regulatory body
- Other, please specify the body and its role (free text field 500 characters)

15. Do existing enforcement mechanisms provide for the possibility of handling complaints anonymously vis-à-vis the subjects complained about?

- Yes
- No
- Don't know

16. Do you consider that the existing enforcement mechanisms provide sufficient safeguards to protect your business against unfair commercial practices?

- Yes
- No
- Don't know

17. Have you made use of any of the enforcement instruments that were at your disposal in this (these) Member State(s) during the last 5 years in order to seek a remedy against an unfair commercial practice exercised against your company by a business partner?

- Yes (Go to Q19)
- No (Go to Q20)

18. If not, why have you not made use of the enforcement instruments?

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- Because of the fear that my contract would be revoked by the business partner
- Because of the fear that I would be retaliated against by the business partner in another manner than by revoking the contract
- Because the cost of doing so is too high
- Other, please specify (free text field)

IV. TRANSPARENCY

19. Have you, in the last 24 months, been subject to contractual terms in oral form or in another form that makes difficult to prove the content of the agreement?

- Yes
- No

20. Have you, in the last 24 months, faced a situation where agreed contractual terms in oral form (or in another form that makes it difficult to prove the content of the agreement) were changed for completed activities and/or delivered goods (retro active terms)?

- Yes
- No

21. If contractual terms were provided solely in written form do you consider that it would enhance your legal certainty and the predictability of your business?

- Yes
- No

22. If you have experienced a case of unfair commercial practice yourself, feel free to share your experiences with the European Commission. Your experience might help to create a better framework against such practices.

Free text field of 1.000 characters