



Reaction of Dutch Retail Association – Detailhandel Nederland – to consultation of European Commission on Green Paper on unfair trading practices in the business food and non-food supply chain in Europe

Detailhandel Nederland, further referred to as Dutch Retail Association, represents the Dutch council for SME-retailers (MKB-Nederland) and of large retailers (Raad Nederlandse Detailhandel).

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Preliminary remarks

Unfair trading practices are defined by the European Commission as practices that grossly deviate from good commercial conduct and are contrary to good faith and fair dealing. Although it would at first glance appear highly unreasonable to be against combating practices that grossly deviate from good conduct, some caution is warranted. Much depends on how good conduct is exactly defined and what interventions are considered appropriate to ensure it.

Retail companies operate in Europe in a free market economy. This translates for example in the freedom of contract. Businesses are free to sign a contract, if they consider this to not to be in their interest they could abstain from doing so. The freedom of contract is not totally free in the sense that national laws provide rules which must be respected in the pre-contractual phase, which apply to the contract itself and which cover the post-contractual phase. For the Dutch Retail Association it seems obvious that civil law must be respected and that practices that grossly deviate from what civil law prescribes are unfair.

In the context of trading practices – i.e. practices at the level of two companies or a company and a public authority – it is also important to note that competition law provides protection. Abuse of dominant position is for example prohibited under European and national competition law. For the



Dutch Retail Association it seems obvious that competition law must be respected and that practices that grossly deviate from what competition law prescribes are unfair.

The key question which now must be answered in the context of the Green Paper on unfair trading practices in the business food and non-food supply chain in Europe is whether apart from national civil law and European and national competition law there is a need for an additional layer of legal rules and enforcement mechanisms. By answering this question we focus on trading practices between different links – for example practices between farmers, manufacturers and retailers – in the supply chain.

We have strong doubts on whether there is a need for an additional layer of legal rules and enforcement mechanisms on the following ground. Terms as good commercial conduct and conduct contrary to good faith and fair dealing, mix up legal obligations and ethical aspirations. We will easily agree that breaking the law is unacceptable. That's the bottom-line. What constitutes fair play from an aspirational perspective is much harder to agree upon and even harder to regulate.

Let us take a football match perspective. The referee could easily discern which players behave against the rules. Depending on how serious or persistent their misbehavior is, he could ultimately send them off the pitch. That's the bottom-line. But as referee there is not much he could do to ensure a fair match in the sense that all players behave in a manner which is beyond reproach in terms of fair play.

The latter kind of more aspirational goal cannot be achieved without a commitment of the players themselves to fair play. It might in this respect be helpful if the players would sign up to a voluntary code of conduct in which they commit to fair play. An additional layer of rules and enforcement mechanisms will not be effective in achieving a fair game.

It should also be noted that players are ultimately not on the field to play fair, but to win the match. Of course, ideally they win the match in a fair manner. But the referee can only ensure that they don't win in an unfair manner. The



rest will depend on the players themselves and their commitment to fair play. If the referee aims to ensure that the match will be won by a team of players who behave in a manner which is beyond reproach in terms of fair play, he runs the risk of having to intervene so often that he will ultimately ruin the match all together.

Unfair trading practices remain a black box

The introduction of the Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe suggests that there might be an issue, but it remains unclear what the scale and impact of the issue is. This poses from a policy making perspective the risk that interventions will go nowhere. It will also make it hard for the European Commission to conduct a proper Impact Assessment. The Commission claims to use Impact Assessments as ‘a key tool to ensure that its proposals are prepared on the basis of transparent, comprehensive and balanced evidence on the existence of a problem, the costs and benefits of alternative solutions and the appropriateness of the suggested alternatives from the point of view of subsidiarity.’

The most comprehensive and credible data on unfair trading practices as collected by the European Commission up to now, is a European Competition Network (ECN) report on competition law enforcement and market monitoring activities by European competition authorities in the food sector. This report dates May 2012. The Commission refers to this report in the Green Paper to back its claim that there is ‘a confirmation of the existence of the issue’.

However, that unfair practices exist is not the key issue. Of course they exist. The business-to-business food and non-food supply chain represents millions and millions of transactions with an annual value of hundreds of billions of euros. It should be rather naïve to presume that all these transactions would be conducted beyond reproach. What should become clear is whether unfair practices are systemic, and if so, what the true impact of unfair practices is and



what could be done to combat these practices as to avoid them or at least offer proper redress to those who have suffered damages.

Against that backdrop, the aforementioned ECN Report delivers a very mixed bag of conclusions. Just to quote a few:

'In a subsequent report of October 2006 on buyer power and pass-through, the Portuguese National Competition Authority also assessed the issue of buyer power from an econometrics standpoint. Its results revealed that purchasing pools among retailers and vertical agreements had contributed to increase the buyer power of large retail groups. That resulted in lower prices paid to suppliers which tended to be partially passed-through to final consumers in terms of lower retail prices. The report also found that large retail groups tended to increase their selling prices less than national trade, including other retailers such as traditional small businesses.'

'The Finnish National Competition Authority concluded that these practices between suppliers and retailers lied in a grey area when it comes to the application of competition law.'

'The sector inquiry on the supply of groceries carried out by the Competition Commission upon reference from the UK National Competition Authority particularly focussed on the relations between suppliers and retailers. The final report, published in April 2008, found that all large retailer, wholesalers and buying groups had buyer power over at least some of their suppliers but such buyer power can have positive effects in terms of lower retail prices for consumers. It also found that the financial viability of food and drink manufacturers was not under threat as a result of the exercise of buyer power by grocery retailers.'

'The Spanish National Competition Authority in its report on the relations between manufacturers and retailers in the food sector, of October 2011, concluded that the strong bargaining power of retailers may have a positive impact on consumers' welfare in the short term if there is a sufficient level of competition among retailers in downstream markets. However, the report also highlighted that in the medium and long term it may have a negative effect on



competition among manufacturers (inter-brand competition) and among retailers (intra-brand competition) and may contribute to a slowing down in the rate of innovation in the food industry. Should these effects materialise, they may outweigh the initial positive impact.'

A main characteristic of all these findings, is how carefully they are worded. Effects may occur. But: they also may not occur. Overall, nothing alarming comes to the surface. It is also important to highlight that from an economic perspective buyer power is linked to lower retail prices for consumers. Would that not need to be the ultimate benchmark whether markets function properly: consumer welfare?

One wonders what a new round of consultations such as the current one on the Green Paper might add to this picture. We may assume that National Competition Authorities take a general interest perspective and are well equipped to pierce through the complexities of how supply chains work from a legal and economic perspective. Other stakeholders will without any doubt take a partisan view. Moreover, the whole exercise of a consultation on trading practices poses important methodological problems, which will lead to unreliable outcomes from a validity of data perspective.

This unreliability is closely linked to the fact that questions about unfair practices are to a substantial degree of an ethical nature. Asked about deemed unfair practices respondents will tend to hide true responses to protect their privacy, to avoid legal problems, to gain economic advantage, to obtain social approval and avoid social disapproval, and to project or protect particular identities. This means that responses will be highly distorted and that it will be extremely difficult to get 'transparent, comprehensive and balanced evidence on the existence of a problem'.



Response to the questions

Questions:

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

The Commission defines unfair trading practices as practices that grossly deviate from good commercial conduct and are contrary to good faith and fair dealing. We do not agree with this definition, because it poses a number of practical problems. Fair dealing is for example a highly subjective concept. Is selling below production cost fair or unfair? Farmers will argue that it is unfair. However in a free market someone who sources agricultural goods will argue that paying more than the market price at a certain moment, will not be possible from a commercial perspective because it will put him at a competitive disadvantage in comparison with other companies sourcing the same goods.

Good commercial conduct should first and for all be defined by abiding to the relevant law and if applicable specific codes of conduct. Moreover, relatively broad and vague definitions as suggested by the Commission are also troublesome from an enforcement point of view.

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

The Dutch civil law code offers a number of provisions which for example relate to unforeseen circumstances (article 6:258 Civil law book), reasonable and fairness (article 6:248), delusion (article 6:230) and abuse of circumstances (article 3:54). These rules give a certain guidance on what conduct in business-to-business relations is required. However, Dutch law grants businesses a large degree of contractual freedom.

3) In your view, should the concept of UTPs be limited to contractual negotiations or should they include the pre- and/or the post-contractual phase as well?



Unfair trading practices could occur in the pre-contractual phase (for example withholding essential information), the contractual phase and the post-contractual phase (for example unilateral retroactive change of contract). Parties have pre-contractual duties to disclose and investigate and take into account the other parties interests when contracting or terminating contracts. Parties can be held liable for damages for breach of pre-contractual, contractual and post-contractual duties. Unfair practices should be prevented and if they occur properly remedied. The same principle is adopted in the Unfair Commercial Practices Directive (2005/29/EG).

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

In our view they could occur at any stage.

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

Fear to complain in a relation of dependency might exist. In daily live there will always be weaker and stronger parties. It is however important to note that the whole concept of fear factor is at odds with the fact that buyers and suppliers in the business food and non-food supply chain often have long term relationships, which is usually in their mutual interest. Of course this does not mean that there will never be any wrongdoing. In case of an unfair business-to-business practice fear to speak up might be related to the risk of losing a commercial relation, even in case it turns out that a complaint was justified (for example on the basis of a court verdict). This fear could reflect a dependence relation. It is important to note that this dependence will neither be fundamentally changed by introducing a self-regulatory regime nor a regulatory approach to combat unfair trading practices. However, one could argue that a self-regulatory regime has a lower threshold to speak up and also entails a lower risk of escalation and is therefore the preferred approach to mitigate fear where this might exist.



6) In your experience, to what extent and how often do UTPs occur in the food sector? At which stage of the commercial relationship do they mainly occur and in what way?

Unfair practices exist but are the exception, not the rule.

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

Unfair practices exist in the non-food sector as well, but are the exception, not the rule. It is important to note that these practices are not limited to the retail part of the chain, but also might occur in the preceding stages. Non-food retailers face for example unfair practices of large suppliers, which could be related tying and pure bundling. It is important to notice that to determine whether these practices are unfair requires an assessment taking into account all specific circumstances.

8) Do UTPs have an adverse impact in particular as regards the ability of your company to invest and innovate? Please provide concrete examples and quantify to the extent possible.

Given that in our view unfair practices are the exception and not the rule, adverse impacts would also be uncommon and in any way very hard to quantify.

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

Some unfair trading practices negatively affect consumers for they drive up the sourcing costs of retailers, which translates into unnecessarily high prices at the till for consumers.



10) Do UTPs have an impact on EU cross-border trade? Do UTPs result in a fragmentation of the Single Market? If yes, please explain to what extent UTPs impact the ability of your company to trade cross-border.

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

In the Netherlands currently discussions are going on to start pilot projects with voluntary self-regulatory business-to-business codes for the food supply chain and some non-food supply chains (fashion and textiles). The Dutch Retail Association supports these initiatives. Due to the recession, competitive pressures have increased and this also causes sometimes more tense business-to-business relations. Voluntary self-regulatory business-to-business codes could be a good way to address these tensions. We prefer that these codes will be extended throughout the whole economy, including trade relations between businesses and government.

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

Voluntary self-regulatory business-to-business codes could be a good way to address tensions wherever unfair practices exist.

13) Do measures that seek to address UTPs have effects only on domestic markets or also on cross-border trade/provision of services? If so, please explain the impact on the ability of your company to trade cross-border. Do the differences between national regulatory/self-regulatory frameworks in place result in fragmentation of the Single Market?

Some countries have taken regulatory measures on business-to-business practices (for example France and the UK) while in some other countries there



are developments concerning voluntary self-regulatory measures (for example Belgium and the Netherlands). This might indeed lead to fragmentation of the Single Market. The best way forward would be the successful introduction of the European voluntary self-regulatory code, as recently being developed for the food supply chain by European food retail and manufacturers associations.

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

As said the best way forward would be the successful introduction of the European voluntary self-regulatory code, as recently being developed for the food supply chain by European food retail and manufacturers associations. We would welcome more explicit support of the European Commission for the European voluntary self-regulatory code, as this would probably boost participation.

15) Where it exists, does UTP regulation have a positive impact? Are there possible drawbacks/concerns linked to introducing UTP regulation, for example by imposing unjustified restrictions to contractual freedom? Please explain.

Voluntary self-regulatory codes could have a positive impact because they have a low threshold to speak up and also entail a low risk of escalation of conflicts. Signing up of a substantial number of companies to these codes and subsequently full compliance to the codes, is important to obtain success in preventing and reducing unfair practices.

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

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

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18) Should the relevant enforcement bodies be granted investigative powers, including the right to launch ex officio actions, impose sanctions and to accept anonymous complaints?

In our view there is no compelling reason to grant enforcement bodies investigative powers, including the right to launch ex officio actions, impose sanctions and to accept anonymous complaints.

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

A number of examples are farfetched. We recommend to take for more realistic examples note of the Principles of good practices and the examples of unfair practices, as agreed upon by European food retail and manufacturers associations in the context of the European voluntary self-regulatory code for the food supply chain.

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

The preferred alternative solution is the European voluntary self-regulatory code for the food supply chain.



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

a) Indicate whether or not you agree the analysis of the Commission. If applicable, provide additional information.

b) Explain whether the UTP is relevant for the sector in which you are active.

c) Explain if the corresponding possible fair practice could be applied across the board in different sectors?

d) Explain if the UTP should be prohibited per se or if its assessment should be made on a case by-case basis.

Please be referred to answer on question 19

22) As regards specifically Territorial Supply Constraints, please explain:

a) What would you consider to be objective efficiency grounds justifying a supplier not to supply a particular customer? Why?

b) What would be the advantages and disadvantages of prohibiting territorial supply constraints (as described above)? What practical effects would such a prohibition have on how companies set up their distribution systems in Europe?

We are, with the notable exception of exclusive or selective distribution agreements which are compatible with EU law, against territorial supply constraints. Such constraints make it retailers very difficult, if not impossible, to source branded goods cross-border in the European Union. Large manufacturers of such products are skilled in frustrating the process of parallel imports by retailers. By fencing off markets along geographical borders, they



succeed to adjust the price levels of their products to the purchasing power of local consumers and to the level of competition in a given market alike.

The Dutch Retail Association urges the European Commission to come with proposals to combat the division of the Single Market by brand manufacturers. In order to prevent brand-manufacturers from refusing to deliver to retailers who engage in parallel imports, we recommend to enshrine in European law a 'non-discrimination' clause for manufacturers, comparable to such a clause in the Services Directive, whereby service providers may not differentiate between their customers on the basis of their nationality or place of residence unless objectively justified.

The burden of proof should lie on the brand manufacturer. Refusal to sell must be explained in writing to a retailer. Objectively justified reasons to refuse to sell should be limited to conflicts with the public interest, such as public safety or public health.

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

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24) If you consider further action should be taken at EU level, should this be a binding legislative instrument? A non-binding? A self-regulatory initiative?

The best way forward would be the successful introduction of the European voluntary self-regulatory code, as recently being developed for the food supply chain by European food retail and manufacturers associations. We would welcome more explicit support of the European Commission for the European voluntary self-regulatory code, as this would probably boost participation.



25) This Green Paper addresses UTPs and fairness of B2B relationships in the B2B food and non-food supply chain. Do you think that any important issues have been omitted or under-represented in it?

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For any questions and/or comments please contact the Brussels office of Detailhandel Nederland at 0032-2-7365830 or send a mail to the acting Head of the Brussels office: hendrikjan.vanoostrum@dedetailhandel.nl