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The codification of unfair trading practices

An efficiency based approach

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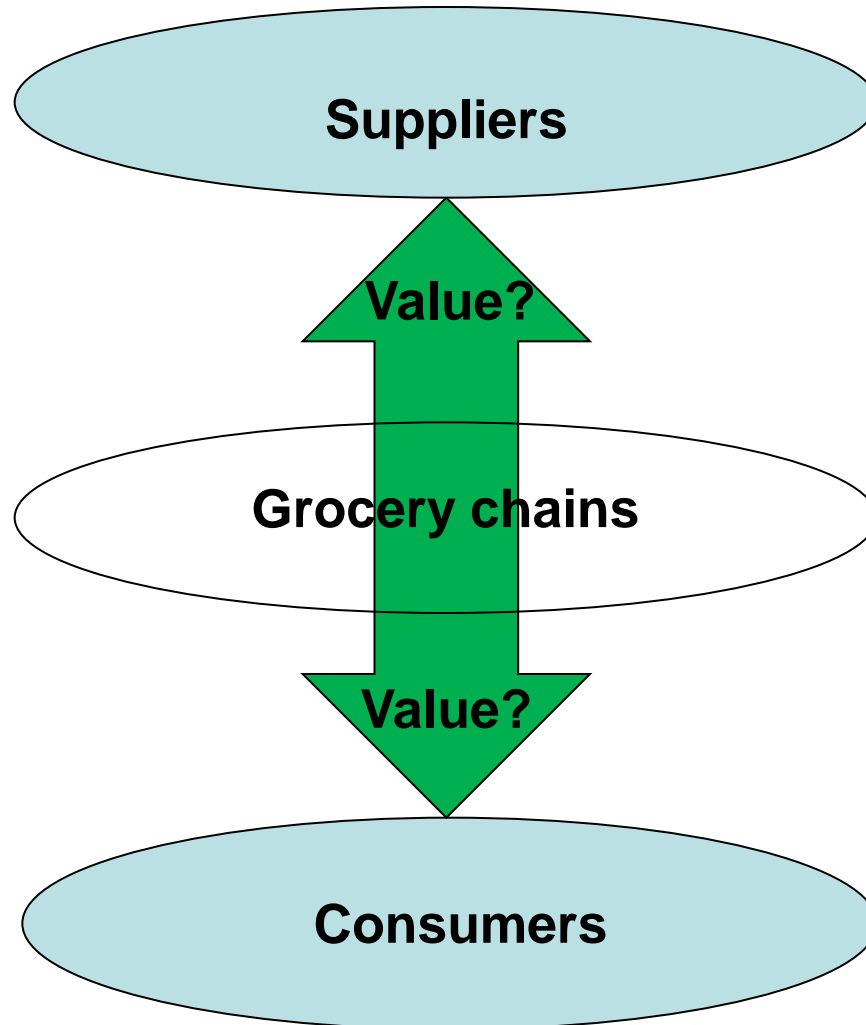
Outline

- Efficient transactions as a proxy for fair trading
 - Explaining the efficiency based approach
- The need for public enforcement
 - Sanctions with sufficient deterrent effect
 - Protecting anonymity
- Background:
 - Norwegian Law committee proposal 2013 (NOU 2013:6)
 - Currently processed by the Ministry

What is "unfair"?

- Conflict of interest: Suppliers vs customers
 - "Fairness" is linked to redistribution; i.e. the economic output allocated to each party to a transaction
 - Notions of "fairness", "reasonableness", "good faith" etc. inherently imply value judgments
- The distribution chain is expected to produce benefits for the ultimate consumers
 - If e.g. suppliers are "over-protected", the costs will be borne by consumers
 - The need for a focal point, reconciling consumer & industry interests

The tension in redistribution



Redefining fairness in terms of efficiency

- Basic distinction; two elements in a bargain:
 - Maximise contract value
 - Bake the biggest pie
 - Distributing the surplus
 - Sharing the pie
- Economic efficiency:
 - Maximization of total welfare for society (size of the pie) key factor
 - The distribution of wealth in itself is irrelevant

Redefining fairness in terms of efficiency

- Legislation should be neutral as to distribution of wealth
 - Separate 1) the creation of values from 2) the distribution of values
- Conditions for "efficient relationships" coincide with principles of fair dealing
 - If redistributive elements are removed
 - E.g. ensuring proper protection of investments
- "Fair dealing" to be defined according to the conditions for efficient business relationships

The need for legislation

- Weaknesses in current legislation
 - Legislation too vague or specific
 - No consensus on the notion of fairness
- "Under-enforcement" of current rules
 - Lack of compliance & realistic deterrent mechanisms
 - Law suits costly, time-consuming & detrimental to business relationships

The Norwegian law committee's proposal

- Define standards of fair dealing as preconditions for efficient transactions
 - Avoiding regulating the redistribution of wealth
 - Maximizing value creation in the vertical chain
 - Passed on to consumers (depending on the level of retail competition)
- Key factors
 - Access to information
 - Predictability promoting investments
- Public and private enforcement

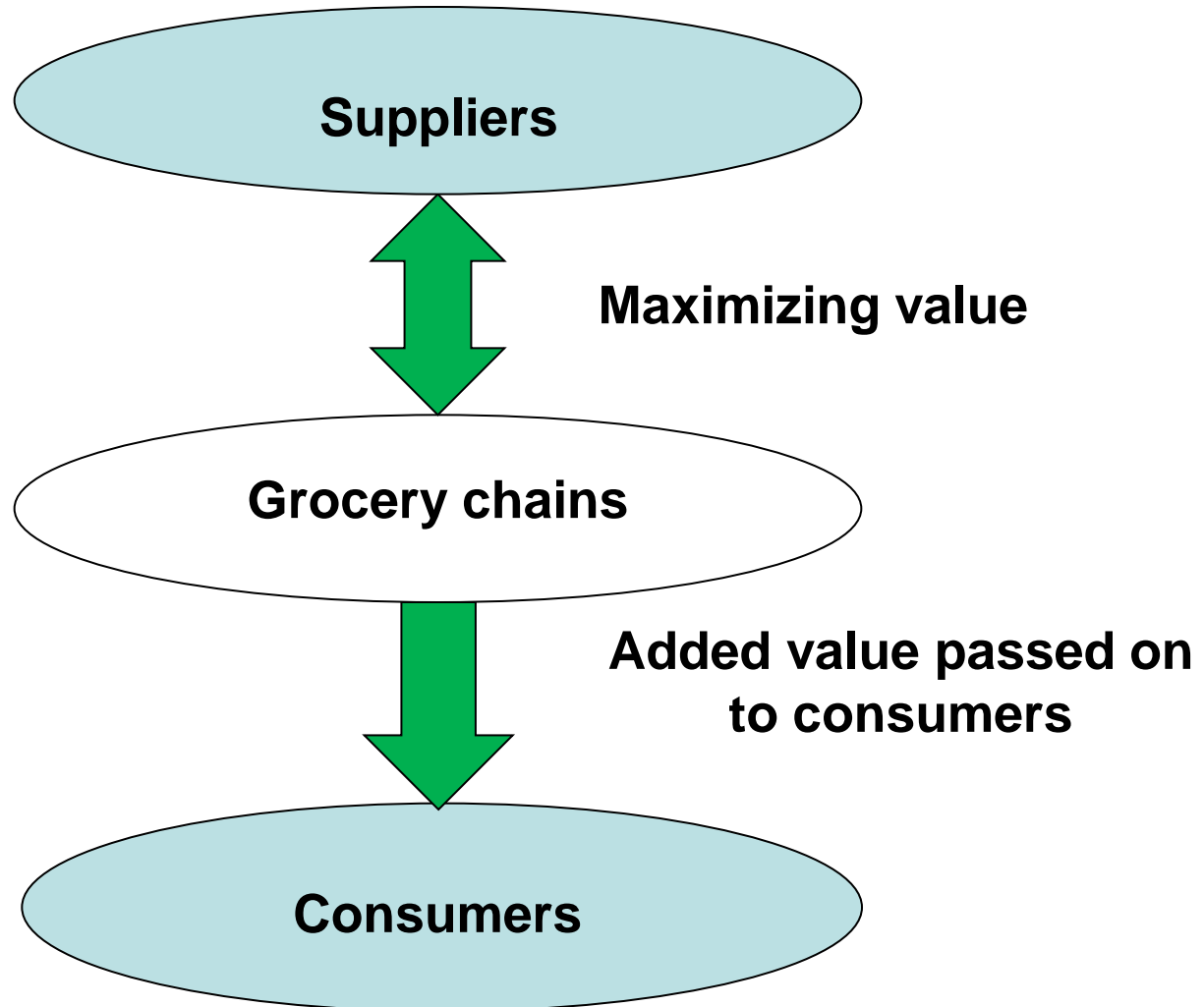
Implementation – substantive issues

- General clause requiring B2B relationships to be based on:
 - "honesty, predictability and mutual respect for intellectual property rights".
 - "Fairness", "reasonable" & similar terms leading to value judgments not included
- Supplemented by:

Implementation – substantive issues

- Specific requirements:
 - Contracts in writing
 - No retroactive/unilateral amendments
 - High level of specification (e.g. "joint marketing")
 - Right to access to relevant information pre-closing
 - Certain risks (shrinkage, complaints etc.) to be addressed
- Extended protection for receipts, business plans etc.
- Extended "good faith" obligations where investments are made

How it works



Implementation – enforcement

- The individual operator lacks incentives & means to enforce rights
 - "Coordination problem"
 - Anonymous complaints required
- Existing court-based enforcement insufficient
 - Deterrent effect not addressed
 - Ex post facto litigation does not promote efficiency and hardly deterrence
 - Ex ante compliance the key driver
- Legislation in the public interest calls for dual enforcement (public and private)

Implementation – enforcement

- "Trade authority" responsible for enforcement & implementation
 - Powers similar to the Norwegian Competition Authority
- Investigation
- Remedies
 - Termination orders
- Sanctions
 - Fines

Final observations

- No contradiction between B2B "fairness" and efficiency/consumer protection
- Focus: to enhance and facilitate efficient transactions rather than protecting one party from the other
- Public enforcement needed – preferably within existing administrative structure