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

Suppliers

Value?

Grocery chains

Value?

Consumers
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

Suppliers

Maximizing value

Grocery chains

Added value passed on to consumers

Consumers
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