



NOTAT

30. April 2013

Green paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe

General remarks

The Danish government supports the European Commission's focus on providing an appropriate framework for more efficient markets in the business-to-business supply chain.

In the opinion of the Danish government the trade between the actors in the supply chain is generally well-functioning. Most trade is based on good, solid, long-term relations where trust is a key factor and annual contracts and payment terms are respected. The Danish government however also recognizes that markets in some respects do not function in an optimal way and the UTPs described in this Green Paper are among the main reasons.

As presented in the Green Paper general competition law addresses many of the issues concerning UTPs. Some behaviour is not covered by the current legislation but the Danish government is worried that increased regulation may have unwanted negative consequences on contractual freedom and make otherwise well-functioning markets more rigid.

That being said, the European Commission may have a role in facilitating voluntary agreements between the actors of the food and non-food supply chain that can reduce current impediments to more well-functioning markets.

1. *Do you agree with the above definition of UTPs?*

It can be hard to give a precise definition of an unclear concept such as UTPs. Overall the Danish government however agrees with the definition used in the Green Paper. There may be a thin line between fair and unfair practices and care should be taken before practices that are a normal part of cooperation between trading partners are labelled as "unfair". In this context the Danish government stresses that it is important to clearly distinguish between illegal behaviour from dominant firms and unfair practices.

2. *Is the concept of UTPs recognised in your MemberState? If yes, please explain how.*

The relationship between producers and suppliers has received some attention in Denmark. Several suppliers express that retailers have started to force tougher conditions on them. Ambiguous contract terms, retroactive contract changes and transfer of com-

mercial risk seem to be the most common examples. The experience of the Danish government is however that payment conditions and annual agreements are generally respected. In Denmark, no specific regulatory framework for UTPs exists.

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?*

The experience of the Danish government is that suppliers primarily experience what they see as unfair treatment during the annual negotiations between suppliers and retailers. There are however also examples of suppliers that report that strong retailers introduce non-agreed fees and fines during the year. The concept of UTPs should therefore not only be limited to the contractual negotiations.

4. *At what stage in the B2B retail supply chain can UTPs occur?*
See answer to question 3.

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

The Danish government has experienced that companies have been reluctant to complain due to among others a fear of retaliation from their stronger trading partners. This is seen in the relationship between suppliers and retailers.

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?*

The Danish government does not have sufficient information on how often unfair practices occur but the impression is that the agreed terms with some exceptions are followed in most trade relationships.

The examples of UTPs that are listed in the Green Paper are to a large extent however also observed in Denmark. Some suppliers report that they are faced with retrospective margin claims and other claims that is not part of actual contract. Other examples are marketing fees for activities that are carried out and producers of private label products that demand to receive information about the suppliers' input prices. Risk sharing may in some cases improve market efficiency but there are examples of risk transfer that may only benefit the stronger party.

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

The examples of UTPs that have been highlighted in Denmark are all from the food sector. Sectors that deal with perishable goods

may be more exposed to unfair practices but there is no reason why UTPs should not be present in other sectors in our view.

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.

Not applicable.

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

The behaviour of retailers may be the result of short term thinking that could lead to a smaller product choice and less innovation. The Danish government however is not able to give concrete examples of this.

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.

Not applicable.

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

The Danish government is not able to assess the efficiency of the frameworks that are in place in other Member States.

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

In Denmark no specific regulation of UTPs exists. The Danish government view is that general competition and marketing law addresses many of the issues concerning UTPs along the supply chain.

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?

Not applicable.

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

The Danish government can support initiatives that will improve cross border trade. Forcing additional legislation on the food and non-food supply chain may have with negative consequences on

contractual freedom and make otherwise well-functioning markets more rigid.

The EU may however have a role in stimulating voluntary agreements such as a code of conduct between suppliers and retailers. Such an initiative has already been taken by the High Level Forum for a better functioning food supply chain, who has had their mandate extended to the end of 2014 to pursue voluntary agreements with organisations representing the food supply chain in Europe.

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.

As mentioned earlier the Danish government is not able to assess the efficiency of the schemes that are in place in other Member States. In Denmark there is a general tradition of little regulation on contractual freedom and a belief that competition law sufficiently covers most of the issues related to UTPs. Further regulation could create more rigid markets where the dynamics that characterize a well-functioning market is unnecessarily hampered.

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.

The Danish government does not possess the required knowledge about other countries' legal treatment of UTPs that is required to answer this question.

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

Not applicable.

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?

National competition authorities already have many of the proposed remedies. The right to accept anonymous complaints may have a positive effect on the will of the weaker party to complain but the EU Commission should be careful not to introduce measures that will significantly reduce the due process of the stronger actors.

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

The practises listed in the answer to question 6 are the most common in Denmark.

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 Danish government supports the creation of a list of loyal practices but setting up the list ought to happen in cooperation with trade organizations and should be introduced on a voluntary basis.

21. For each of the UTPs and corresponding possible fair practices identified above, please:

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

The general and very broad list of practices that is found in chapter 5 of the Green Paper probably describes the issues that all member states are facing. The Danish government agrees with the overall analysis of each category of practice. It is however noted that the transfer of risk in some cases can improve market efficiency - even if more risk is transferred to the weaker part in a negotiation. An example of this is the use of listing fees that in some cases may lead to a more efficient allocation of shelf space for new products by reducing the inefficiency that can be caused by asymmetry in information between suppliers and retailers. It is therefore important to be very precise in the definition of which risk transfers the Commission sees as unfair. The examples given in the Green Paper are however good examples of risk transfer that is harmful for market efficiency.

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

Not applicable.

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

The Danish government considers it plausible that some of the fair practices could be applied across the board.

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

The Danish government find assessment on a case-by-case basis very hard to implement and resource demanding to enforce for all described practices. A general code of conduct could be sufficient in reducing much of the mentioned undesirable practices.

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?

The Danish Government considers this issue sufficiently covered by the Guidelines on Vertical Restraints.

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?

The Danish Government considers this issue sufficiently covered by the Guidelines on Vertical Restraints.

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

Fair practices might just as well be part of the framework but the main focus should be on the more specific types of practices that should not be part of the B2B supply chain.

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 Danish government would prefer a self-regulatory initiative that could be facilitated by the European Commission, and no legislative instruments. Such an initiative has already been taken by the High Level Forum for a better functioning food supply chain, who has had their mandate extended to the end of 2014 to pursue voluntary agreements with organisations representing the food supply chain in Europe.

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?

We do not consider there to be omitted or underrepresented issues.