

The Netherlands' response to the 'Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-food Supply Chain in Europe'

1. Introduction

The Dutch government welcomes the 'Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-food Supply Chain in Europe'. The Netherlands recognises the problem of unfair trading practices and believes that solutions at the European level will offer valuable points of departure for further action.

The Dutch government attaches great importance to free enterprise. That entails allowing room for parties to firmly negotiate and reach their own agreements. At the same time, there must be confidence that those agreements will be honoured. However, in practice we see situations in which one party unilaterally amends contract terms such as prices and payment periods. The Dutch government believes that every company, whether a supplier or customer and whether large or small, must be confident that the terms and conditions to which they have agreed will continue to apply at all times. We therefore welcome and support efforts by the sector organisations to tackle unfair trading practices through a system of self-regulation. Trade is, after all, a question of the commercial relationship between the individual supplier and the individual customer. In principle, the government must restrict its involvement in this commercial relationship to the absolute minimum. Recent research¹ reveals that extant civil law and competition law do not provide adequate means to combat unfair trading practices in the Dutch situation. Based on the experiences of other member states, the research further concludes that new supplementary legislation is unlikely to provide a solution to the problem. This supports the Dutch government's view that self-regulation, as an adjunct to the existing legislation, is the most appropriate route to follow. It then becomes important to establish a Code of Conduct which contains clear norms for fair trading practices, and to appoint an impartial body which acts as coordinator, reporting centre, advisor, mediator and arbitration service, its decisions being binding on both parties to a dispute.

In 2010, the European Commission made an important step towards effective self-regulation with the establishment of the 'High Level Forum for a Better Functioning Food Supply Chain'. This Forum has since worked to find solutions to unfair trading practices in the food chain. The 'Expert Platform on B2B Contractual Practices' within the 'High Level Forum for a Better Functioning Food Supply Chain' (a working group operating under the auspices of the Forum) has delivered a set of 'Principles of Good Practice' which serve to define terms 'fair' and 'unfair' in this context. The Principles of Good Practice were officially endorsed by the Forum in November 2011, since which time the Platform has, at the request of the European Commission, engaged in close dialogue with the relevant stakeholders to arrive at an effective implementation and enforcement plan.

The Dutch government is very much in favour of continuing these successful efforts to establish a system of self-regulation at the European level, which we believe should not be confined to the food supply chain. The food and non-food supply chain between companies in Europe indeed transcends national borders and involves many commercial sectors.

2. Definition of unfair trading practices

The discussion of unfair trading practices has been ongoing in the Netherlands for several years. The Dutch parliament has called attention to the topic on a number of occasions, particularly with regard to the adverse effects experienced by small and medium-sized companies. As a result a significant body of research into the nature of unfair trading practices and means by which they can be countered has been produced.

¹ Report SEO Economisch Onderzoek "Oneerlijke handelspraktijken, voldoet bestaande (zelf)regulering?", January 2013.

2.1 The concept of unfair trading practices

Unfair trading practices can be seen in various phases of commercial transactions, at various stages of the supply chain, and in various sectors. They can occur at all stages of contractual negotiations, before, during as well as after the contract has actually been signed. The most common manifestation of unfair trading practices in the post-contractual phase is the unilateral amendment of terms and conditions, often with retrospective effect. Unfair trading practices can also be seen at every stage of the supply chain between suppliers and their customers. Moreover, unfair trading practices are not confined to the agricultural and food supply chain, but have been noted in Dutch sectors as diverse as fashion, textiles and footwear, construction, toys and plastics. The Dutch government agrees with the Commission's conclusion that unfair trading practices can be perpetrated by either party to a commercial agreement, i.e. a customer can impose conditions which disadvantage the supplier, while it is equally possible for a supplier to impose conditions which disadvantage the customer. The Dutch government therefore considers it important that any solution to the problem of unfair trading practices addresses all phases, stages and sectors rather than being confined to one specific supply chain or certain areas thereof. This solution needs to pay attention to the effects of unfair trading practices to small and medium-sized enterprises and to the selfemployed.

In the Netherlands, the 'fear factor' plays an important part in unfair trading practices. The disadvantaged party may be reticent to complain lest the commercial relationship is disrupted or terminated altogether. The fear factor severely restricts the effectiveness of civil law as a remedy to unfair trading practices (as discussed in Section 3.1). One way in which it may be possible to mitigate the fear factor is to introduce a right of anonymity for the complainant. Given that the Dutch government has adopted self-regulation as its favoured solution to unfair trading practices, the sector organisations themselves should be allowed to determine whether it is possible and desirable to permit a complaint to be made anonymously, doing so on a case-by-case basis. The factors to be taken into consideration will include not only the mitigation of the fear factor, but also the personal responsibility of the complainant to broach the matter with the other party, and the potential adverse impact on that party if anonymity is permitted. The company concerned will wish to know the exact nature of the complaint and who has made it. Where a specific supplier or customer appears to be engaging in unfair trading practices on a regular basis, or where there have been numerous allegations of unfair trading practices, it is of course conceivable that a sector organisation will wish to lodge a complaint on behalf of its members, whereupon the individual members can indeed remain anonymous.

One effect of the fear factor is that it is difficult to arrive at any firm information about the precise extent of unfair trading practices, the sectors in which they are prevalent, or the stage of the supply chain at which they are most likely to occur. The paucity of statistical information is also due to the lack of clear definitions: what constitutes an unfair practice? The research² in the Netherlands, commissioned by the Ministry of Economic Affairs, is qualitative in nature, and does not therefore present hard figures. The Dutch government is optimistic that the proposals contained in the Green Paper, as well as the forthcoming national pilot projects of a Code of Conduct, will help to further our knowledge and understanding of unfair trading practices, their nature and prevalence.

2.2 Examples of unfair trading practices

The research³ commissioned by the Ministry of Economic Affairs concludes that the following conduct is seen as problematic by suppliers, or in some cases by their customers:

² Report EIM "Aard en omvang van inkoopmacht", 2009.

³ Report TISCO "Eerlijk, scherp en betrouwbaar", January 2012.

- Unilateral amendment of agreements, terms and conditions, possibly with retrospective effect:
 - o Failure or refusal to pay the price originally agreed;
 - o Amounts deducted of invoices (a 5% surcharge for rebuilding work, a company anniversary, etc.);
 - o Extension of payment periods (from 60 to 90 days or from 90 to 120 days).
- Refusal to enter into a written contract.
- Imposition of unfair terms and conditions:
 - o A price which is extremely unfavourable to the supplier;
 - o A requirement whereby suppliers must offer a discount in respect of promotional costs, shopfitting and displays, returns or wastage;
 - o A requirement whereby customers can unilaterally apply a longer payment period;
 - o A clause whereby customers can impose unreasonable performance demands, such as delivery at a precise time of day;
 - o Unreasonably high penalties;
 - o A requirement whereby the supplier must guarantee not to offer the same product or service to another customer at a lower price (without first offering that price to the original customer);
 - o A clause prohibiting the use of accounts receivable as security on loans.
- Miscellaneous:
 - o Imposing obstacles to market entry;
 - o 'Free riders': companies which do not commit to the development of sustainable products;
 - o Imitation.

The European Commission is already aware of these problems. The Green Paper cites several other types of unfair trading practices, such as ambiguous contract terms, unfair transfer of commercial risk, unfair termination of a commercial relationship and territorial supply constraints. The Dutch government endorses the European Commission's summary and description of the most prevalent unfair trading practices.

If the problem is to be confronted successfully, it is important to define precisely what constitutes 'fair' and 'unfair' trading practices⁴. It will be useful to produce a list with examples. Moreover, it should be remembered that the terms 'fair' and 'unfair' are fluid and their definition may well change over time. Regular updating of the list will therefore be required, a process which can rely on the support of the Netherlands.

3. Legal frameworks on unfair trading practices

3.1 Existing legal frameworks

In the Netherlands, companies which consider themselves to have been disadvantaged by unfair trading practices are able to seek redress through the courts. They can take action, jointly or severally, further to various provisions of the *Burgerlijk Wetboek* (the Netherlands Code of Civil Law). Those provisions provide cause for action in cases of non-performance, breach of contract or wrongful action (a tort as opposed to a criminal offence), and such action can be brought by the aggrieved party. In addition, the *Mededingingswet* (national competition law) prohibits the abuse of a dominant position. The Authority for Consumers and Markets acts as the regulatory body and can take action based on its own findings or on information received.

⁴ See note 1

Nevertheless, the research⁵ reveals that, in practice, these opportunities for redress are not sufficient to counter the problem of unfair trading practices. Civil law is ineffective because the aggrieved party is often reluctant to take the matter to court because doing so is likely to disrupt the commercial relationship with a party on whom he may be heavily reliant (the earlier mentioned 'fear factor'). Moreover, the Code of Civil Law applies open norms, whereupon it is not always clear what constitutes an unfair trading practice in the eyes of the law. In addition, enforcement by the Authority for Consumers and Markets has not been fully effective because a company cannot always be deemed to enjoy a dominant position in the meaning intended by the relevant legislation, while it can be difficult to establish abuse of such power.

3.2 Desirable legal frameworks and self-regulation

In the opinion of the Dutch government, the problem of unfair trading practices is one that will offer valuable points of departure for further action at the European level. After all, the B2B supply chains, both food and non-food, transcend national borders. A uniform European solution will facilitate and promote trade within the internal market. The Dutch government considers self-regulation to be the most promising way forward, given that the problem occurs within a bilateral commercial relationship between a supplier and a customer. Moreover, research⁶ conducted in the Netherlands has established that a Code of Conduct setting out clear norms for fair trading practices as an adjunct to existing and supplementary legislation will be enough to counter the problem of unfair trading practices, particularly when accompanied by the establishment of an impartial body authorised to arbitrate in disputes. The advantages of self-regulation are that it is inexpensive, accessible and offers a relatively quick solution.

Self-regulation in the European food supply chain is at an advanced stage of development, but unfortunately has not been fully established as yet. Given that the Dutch government is keen to find a solution to the problem of unfair trading practices as quickly as possible, it wishes to establish a system of self-regulation at the national level. The Ministry of Economic Affairs is therefore currently facilitating two pilot projects which make extensive use of the Principles of Good Practice established at the European level in order to ensure ongoing coordination with European developments. Although the Principles of Good Practice have been drawn up by a High Level Forum which is specifically concerned with the food supply chain, we do not regard this as a problem. The Dutch government believes that the Principles of Good Practice can usefully be applied in all commercial sectors.

In preparation for the pilot projects, sector organisations representing suppliers and customers in the Dutch agro-food sector and the fashion, textiles and footwear sector have held (within each sector) constructive discussions with regard to the form and content of a Code of Conduct, including arrangements for dispute arbitration. These sector organisations have also undertaken to assist in the design and implementation of the pilot projects themselves. In the pilot projects particular attention will be devoted to the scope of the Code of Conduct, the manner in which companies will commit themselves to it, and the precise arrangements for dispute arbitration. The Minister of Economic Affairs is to inform the Lower House of the final form of the pilot projects and the Code of Conduct for the two sectors concerned, doing so before September 2013. In early 2014, the minister will present the results of the pilot projects.

The Dutch government believes that the Code of Conduct and accompanying arbitration arrangements should be as simple and accessible as possible in order to avoid any additional administrative burden for businesses. It is therefore preferable for the Code to include clear norms and standards, together with examples of fair trading practices, as is done in the Principles of Good Practice. This will enable each individual case to be

⁵ See note 1

⁶ See note 1

assessed against the rules and guidelines contained in the Code to determine whether there is indeed any unfair trading practice. In addition to the Code itself, the proposed system of self-regulation will include an impartial body which acts as coordinator, reporting centre, advisor, mediator and arbitration service, its decisions being binding on both parties to a dispute. When creating this body, the phenomenon of the 'fear factor' should be taken into account, as should the authority to impose sanctions and the enforceability of decisions across borders. It will fall to the sector organisations themselves to determine the most appropriate form of the impartial body and the manner in which it will arbitrate in disputes.

4. Conclusion

The Dutch government wishes to emphasise that the problems further to unfair trading practices occur within a bilateral commercial relationship between two or more companies, whereby the direct responsibility of those companies should be the prime consideration. Accordingly, the Dutch government intends to pursue a system of self-regulation. In the opinion of the Dutch government, it is important that both suppliers and customers recognise the importance of long-term, sustainable cooperation⁷. Strategic partnership between producers and the retail channel, whereby both parties acknowledge their mutual dependency, is likely to lead to sustainable growth. Given that B2B supply chains transcend national borders, it will be appropriate to institute a system of self-regulation at the European level. Because it is highly desirable to find a solution in the short term, the Dutch government will continue the process of establishing self-regulation at the national level which has now commenced. Its forthcoming pilot projects will draw upon the Principles of Good Practice agreed at the European level to the greatest extent possible in order to ensure full coordination with European developments.

⁷ Report Top Topics 2013 FMCG Nederland, 2013.