

Unfair trade practices: An economist's point of view

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What are UTPs?

- Used to be unclear, but now clarified after Green Paper, 2014 Study, 2014 Communication
- Two types:
 - At the contract formation stage: for the most part, contract terms that are highly favorable to one party
 - At the contract execution stage: for the most part, unilateral changes to contract terms

Is there an economic issue with UTPs?

- Caveat 1: Acceptance/prevalence not informative
- Caveat 2: Public interventions/regulation not informative
- UTPs can be bad for economic efficiency, not because they are “unfair” but because they distort the allocation of resources

Is there an economic issue with UFPs?

(2)

- First problem: *ex ante* exploitation/market power
 - Market power is bad in general and should be avoided: it is the *source* of the problem
- Second problem: *ex post* exploitation/weak contracting framework
 - Clarity/Predictability
 - Risk allocation
 - Commitment power
- Two economic distortions:
 - Socially beneficial transactions that should take place don't
 - Less entry/more exit than desirable on the “weak” side

The “fear factor”

- For the most part, if really unilateral, a lot of UTPs are illegal under contract law
- Why don't suppliers assert their rights under contract law?
- Two possible reasons:
 - Litigation is a costly and uncertain endeavor (legal problem)
 - Continuation value of the business relationship (including future UTPs) is higher than short-term alternative (“lock-in”) (economic problem)

What to do?

- Small players:
 - Know the trade (and contract law): from B2b to B2B
 - Diversify customer base/commercial risk
 - Get organized to acquire countervailing market power?
- Big players
 - Realize the value of lasting relationships
 - Be aware of risk and costs of intrusive regulation
- Public authorities
 - Fight market power
 - Train small players
 - Favor alternative dispute resolution fora
 - Public enforcement through anonymous complaints?

A word of caution

- Courts (and competition authorities) have always been very cautious when it comes to interfering with negotiated contract terms
 - Major exception = consumer protection laws
- Competition law everywhere relies on dominance threshold
 - Concern for over-deterrence
- Similar issues at play with UTPs