

ANNEX 1: LEGISLATION, INITIATIVES AND DISCUSSIONS ABOUT ABUSIVE BUYER POWER ISSUES in EU MEMBER STATES

AUSTRIA

Existing regulation

The Austrian Cartel Act explicitly incorporates the concept of economic dependency in its definition of a dominant market position applying to both sides of the market (buyers and sellers), which allows for dealing with “abuse of superior bargaining position” in business to business relations. The Cartel Act Art. 4.(3.), defines dominance also in a situation where a company has a superior position on the market vis-à-vis its suppliers or customers, in particular when the affected suppliers or customers are dependent on the maintenance of business relations with this company in order to avoid very heavy financial losses.

An other law, the Act Protecting Local Supply which protects local supply in local areas prohibits a number of practices which relate to buyer power, such as e.g. discriminatory practices or demanding payments or services.

Source:

ICN, Questionnaire on abuse of superior bargaining position – Answer from Austria (see: <http://www.icn-kyoto.org/documents/abuse.html> : page 2 missing)

Investigation by competition authorities into buyer power in the food chain (2007)

After massive media coverage and many anonymous complaints about alleged abuses of buyer in the food chain, the Austrian Federal Competition Authority (Bundeszweitsbewerbsbehörde) undertook a sector inquiry in the food commerce with particular attention to the issue of buyer power of the big supermarket chains on the Austrian market, between 2004 and 2007. The investigations were hindered because a significant number of supplying companies refused to provide information in response to questionnaires. Juridical proceedings were not successful in obliging companies to provide information because companies were very reluctant to provide such information in fear of retaliatory measures such as the de-listing of products (called “horse and rider” problem). The problem of lack of information from affected fearful suppliers might be a problem any future inquiry into buyer power.

The competition authorities published the sector enquiry in June 2007 and concluded that:

- ❑ The Austrian grocery sector is highly concentrated.
- ❑ The barriers to entry are high, which is reflected in the low number and limited expansion of new market entrants in the retail and wholesale business over the last years.
- ❑ There is a strong evidence for the existence of buyer power. In sectors with private labels and especially when neither important brand products (“must-stock-products) nor other forms of countervailing power on the supply side exist, the buyer power of the retailers is almost unlimited.
- ❑ Suppliers are highly dependent (in some sectors more than in other sectors) on the outlets of the leading supermarkets which had high market shares, since there are no viable alternative distribution channels for significant sale volumes.
- ❑ There is a lack in transparency and reliability regarding the arrangements between retailers and suppliers who have to pay all kind of costs such as retroactive (post sales) rebates or discounts, payments for advertisements. This results in uncertainty for suppliers and is detrimental for

planning investments. This lack of transparency and sometimes lack of agreement for payments is objectionable from a competition policy perspective.

- ❑ A possible anticompetitive effect from enhanced buyer power is that smaller retailers may get less competitive as regards their own suppliers (prices), i.e. wholesalers, and that new retailers may be hampered to enter the market, thus even further increasing the concentration.
- ❑ Investigation of buyer power has to look at the positive effects (e.g. competition between shops) and negative effects (lack of investment in innovations) on consumer welfare.
- ❑ Each buyer power case has to be looked at by competition authorities whether it is abusive, but there is also the problem of lack of resources by the competition authorities.

The competition authorities decided to continue to scrutinize the grocery sector because of the market situation revealed by the sector inquiry.

Sources:

Republik Österreich Bundeswettbewerbsbehörde, Allgemeine Untersuchung des österreichischen Lebensmittelhandels unter besonderer Berücksichtigung des Aspekts der Nachfragemacht – Zusammenfassung, Vienna, June 2007.

Republik Österreich Bundeswettbewerbsbehörde, “FCA accomplished Sector Inquiry on Buyer Power of Supermarkets”, 30 August 2007, <http://www.bwb.gv.at/BWB/English/groceries_sector_inquiry.htm>; (ENG summary :

<http://www.bwb.gv.at/BWB/English/groceries_sector_inquiry.htm>

BELGIUM

Existing regulation

Belgian competition law has no particular provision to deal with abuse of superior bargaining position.

Source: ICN, Questionnaire on abuse of superior / dominant bargaining position – Answer from Belgium, (see:

<http://www.icn-kyoto.org/documents/abuse.html>)

The 2006 Belgian competition law Art. 2 para 1, (5) however prohibits extra services that have been imposed due to dependency but which are normally not part of the agreement between the parties – which could relate to post sale rebates etc.

Public and political discussions and non-binding measures about buyer power

Farmers supplying to supermarkets have been complaining that the supermarkets pay them too low prices for their products such as milk compared to prices charged to consumers. In September 2008, the retailers agreed with the Flemish and Walloon farmers as well as with the Minister of Agriculture and the Minister of Economy that all retailers would provide sales prices of some of their products to the federal economic service that could then investigate whether the price forming has been correctly done compared to the prices paid to farmers. The retailers' branche claims that 80% of the fresh agricultural produce is Belgian and promised to start a campaign to promote Belgian food.

Source:

Supermarkten gaan Belgische voeding promoten, Het Beland van Limburg, 12 September 2008,

<<http://www.hln.be/hln/nl/942/Economie/article/detail/413366/2008/09/12/Supermarkten-gaan-Belgische-voeding-promoten.dhtml>>

DENMARK

Investigation by competition authorities into buyer power in the food chain

The competition authorities of the Nordic countries Denmark, Finland, Greenland, Iceland, Norway and Sweden have undertaken a joint study “Nordic food markets – a taste for competition” in

November 2005, looking into the competitiveness of the food and retail markets. One of their conclusions (p. 19) was that some of the agreements between suppliers and retail chains may include arrangements with foreclosing and other anticompetitive effects (e.g. slotting payments, marketing support). If these agreements or practices can be shown to limit competition, they “constitute a breach of competition rules.”

Source:

“Nordic food markets – a taste for competition”, report from the Nordic competition authorities, November 2005.

FINLAND

Implementation of existing regulation

“The Finnish Competition Authorities’(FCA) prohibited producers to make agreements solely to the retail chains and made invoicing through the chains obligatory. The reason for this prohibition was that a suspension of the invoice agreements led to a decrease in supplier’s assortment.”

Source:

“Nordic food markets – a taste for competition”, report from the Nordic competition authorities, November 2005, p. 92.

In 2001, the FCA estimated “that Kesko’s chain operations are effective but the concentrated market structure creates buying power, which may eliminate the competitive advantages.”

Therefore, when the Finnish competition authorities (FCA) assessed the granting of an exemption to the Finnish retail marketing and logistics company Kesko to set the maximum resale prices to some of the products sold in the K supermarket chain, they agreed only certain conditions. The FCA estimated “that Kesko’s chain operations are effective but the concentrated market structure creates buying power, which may eliminate the competitive advantages.”

Source:

Finish Competition Authority, Conditional exemptions to K and S blocks, Press release, 29 January 2001, <<http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=news-archive&sivu=news/n-2001-01-29>>

Investigation by competition authorities into buyer power in the food chain

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FRANCE

Existing regulation

Abuse of superior bargaining position comes under restrictive trade practices governed by civil law.

Objectionable practices include:

- Unfair discrimination,
- Abuse of trade dependence (all forms: open list)
- Subjecting a partner to unjustified obligations or trading conditions,
- Sudden severance of established business relations (or the threat thereof),
- Subjecting a partner to manifestly unfair terms of payment,

□ Automatic debiting of suppliers by distributors.

Article 36 of an order of 1 December 1986 provided for “prohibition” of what it considered to be intrinsically anti-competitive behaviour such as refusal to sell, discriminatory practices, tied selling and bundling.

Buyer power issues have been raised since more than a decade and there have been different processes to address buyer power problems and deal with the imbalance in supplier-retailer relations through laws and regulations. The Loi Galland (Galland Law, 1996) instituted a ban on selling below the price at which the supermarkets buy a product. Despite pressure to change this, the ban was retained in the amendments made by the Loi Dutreil II (2005)¹ that was designed to protect SMEs but allowed the buying price to be defined by including some rebates and other financial contributions by suppliers. Loi Dutreil II limited retrospective payments because retailers had been automatically debiting their suppliers and increasing the penalties to their suppliers. In general, the law penalised any extra payment by suppliers to supermarkets which was done retrospectively without contract or in writing beforehand, and any extra service cost fees that retailers were asking from suppliers without clear statements of the service (costs, duration, services delivered). For instance, a retailer has to inform each year its suppliers by the 31st of January of the total amount of payments relating to all the services provided during the preceding year, expressed as a percentage of turnover for each product to which the services relate. The new law also requires that contracts between a retailer and its supplier clearly state all pricing terms with no hidden discounts. The law introduced new procedures for penalising offenders.

According to some experts this law legalised the practice of retailers demand extra payments from suppliers. The purpose of stimulating price cuts through competition and free trade is undermined by the fact that the small group of supermarkets and their buyer power practices in fact result in no real competition and no new entrance by other players.

Beginning 2008, the Loi Chatel again changed the way how the threshold of selling below buying price was being calculated. Now all rebates and other financial contributions by suppliers to supermarkets could be included in such calculations. In addition, a law to modernise the economy (Loi de modernisation de l'économie, August 2008) limited the delay in payments without eliminating them. Experts see this as a proof that buyer power malpractices by supermarkets are so entrenched that they cannot be properly dealt with and eliminated by the authorities.

So far there is no discussion about what level of the market shares supermarkets can obtain before the competition authority intervenes.

Source:

Associazione Industriali delle Carni, The large retail sector and the food industry, July 2008, p. 19-20.

ICN, Questionnaire on abuse of superior / dominant bargaining position – Answer from France, (see: <http://www.icn-kyoto.org/documents/abuse.html>)

C. Jacquiau, interview, 18 February 2009.

“Marge arrière”, <http://fr.wikipedia.org/wiki/Marge_arri%C3%A8re> (viewed on 20 February 2009)

Public and political discussions and non-binding measures about buyer power

Many Committees have been dealing with the buyer power issue. In 2000, the report by Jean Yves Le Déaut (on « l'évolution de la distribution ») proposed some ways to avoid abusive practices resulting from economic dependence. In 2004, a report of experts on the large retailers was presented by Guy Canivet. After an investigation into the retailing sector and due to new European laws on liberalising services, the Competition Council (Conseil de la Concurrence) delivered an opinion on 11 October 2007, recommending to the Government –who later followed the advice- that the current system of opening sales areas depending on an economic licence be abandoned, arguing that it created entry barriers in distribution markets to protect itself against new operators. In 2009 an official Commission

¹ Ministerial Circular (France) of 8th December 2005; FICT Circular No. 64 of 3/10/2005, No. 81 of 13/12/2005.

is examining commercial / purchasing practices including between supermarkets and suppliers (la Commission d'examen des pratiques commerciales (CEPC)) and is to come up with recommendations.

Source:

L. Di Via – L. Marciano, Le relazioni tra Industria Alimentare e GDO tra tutela della concorrenza e contemperamento di interessi economici, in *Revista di diritto alimentare*, II, nr. 3, July-September 2008

Marge arrière <http://fr.wikipedia.org/wiki/Marge_arri%C3%A8re>

Letessier, "Leclerc pointé du doigt pour ses méthodes avec ses fournisseurs", in *Lefigaro.fr*, 13 February 2009, <http://marches.lefigaro.fr/news/communiqués.html?OFFSET=2&ID_NEWS=97286670&LANG=fr>

Many abusive practices and negotiations by large French retailers have been revealed in a publication by J. Jacquiau. However, other journalists have tried to raise the debate but have been met with stiff refusal to testify by suppliers out of being de-listed and not being able to supply any more to any supermarket. One soap and shampoo manufacturer who testified before television that the annual rebates were as much as the price of a new factory every year, was immediately refused supply by a major supermarket chain. Discussions about malpractices and collective concentration by supermarkets are being stifled by legal actions by retailers and threats of delisting those newspapers and reviews that write about the issue.

In the past, the government undertook investigations into buyer power malpractices by adopting a methodology that would avoid retaliation by retailers against their supplier for supposedly denouncing their practices, namely by investigating several retailers at the same time so that it was difficult to guess by a supermarket whether it was one of its suppliers who had complained. The government is no longer doing such investigations but has been asking different Committees to look into the case. An Observatory of prices and margins in the food chains or commercial relations being promoted and set due to continued concerns about the gap between consumer prices and farm prices.

Source:

C. Jacquiau, *Les coulisses de la grande distribution*, Albin Michel, Paris, 2000.

C. Jacquiau, interviewed 18 February, 2009.

GERMANY

Existing regulation and initiatives by the competition authorities

The German Act against Restraints of Competition (ARC²) provides for a prohibition of unfair hindrance directed at dominant undertakings (Art. 20.1). Art 20.2 provides that this ARC Act also applies to firms holding a superior bargaining position and defines such a position especially in terms of dependence of small and medium-sized enterprises as suppliers or purchasers. There is no need to prove harm to the consumer in such cases of superior bargaining position, nor that the hindering firm holds a dominant position.

The Unfair Trade Act³ prohibits unfair trade practices that are detrimental to competitors, consumers and other market participants. e.g. rebates that hinder the entrance of competitors.

The German competition authorities consider the following activities as abuse of superior bargaining position:

- ❑ "Demanding retrospective rebates (so called "tapping a company for rebates");
- ❑ Refusal to supply undertakings with "must-stock" items;
- ❑ Abusive and unjustified setting of sales prices by a franchisor;

² Gesetz gegen Wettbewerbsbeschränkungen

³ Gesetz gegen den unlauteren Wettbewerb)

- ❑ Agreements on an exclusive purchasing obligation within a franchising system;
- ❑ Purchasing benefits are not passed on to the franchisee;
- ❑ Manufacturers requiring trading firms to comply with their provisions in terms of quantities and turnovers on the type of resale; e.g. the setting of a maximum threshold for internet sales without any objective justification;
- ❑ Deliberate non-disclosure of interface information in the software sector by a car manufacturer;
- ❑ The use of pressure.”

Source :

ICN, Questionnaire on abuse of superior / dominant bargaining position – Answer from Germany, (see: <http://www.icn-kyoto.org/documents/abuse.html>)

When assessing the planned merger between supermarkets EDEKA and Tengelmann (Plus), the German competition authorities (Bundeskartellamt) have extensively investigated (through questionnaires) how the merger would deteriorate the bargaining power and dependence of suppliers towards the merged retail businesses. Note that a large number of suppliers did not want to be mentioned by name in the publications by the German competition authorities for fear of losing business.

The competition authorities acknowledged that too much buyer power in the hands of a few major retailers vis-à-vis the less concentrated manufactures, especially the medium and small sized enterprises, would be problematic. They recognized that price competition alone was not any more able to regulate market forces of individual market participants. It should be noted that in Germany, the food retailing market is considered to have been ‘almost static’ for over two years. Since the merger would have led to a dominant market position of EDEKA and Tengelmann, especially when looking at regional markets, the competition authorities decided on 30 June 2008 that a number of retail shops of the supermarkets needed to be sold, or closed if there was no buyer for the shops that were identified for sale. After the divestitures were completed, the competition authorities allowed the merger to go through on 9 December 2008. They recognized that the merger would increase the buyer power of the merged group since EDEKA’s position was already larger than the position of its competitors, but stated that the merged group would not lead to a dominant position in the consumer market.

In December 2008, EDEKA and Tengelmann appealed the decision. They want to prevent that the finding on their dominant market position in the food retail market is being incorporated in legal decisions so that their dominant position does not allow them future strategic acquisitions.

Sources:

Bundeskartellamt, Beschluss in der Verwaltungsverfahren B 2 – 333/07, 30 June 2008

Oxfam Deutschland, Entscheidung des Bundeskartellamtes im Fusionsverfahren Edeka-Plus(B 2 – 333/07), Press information, [July 2008].

Oxfam Deutschland, Ergebnisse der Befragung der Lieferanten, Press information, [July 2008].

M. Wiggerthale (interview), 10 January 2009

“The German Competition Authority (Bundeskartellamt) took a severe stand against a joint venture between supermarket chains owned by two major German large retailers. It did so by not only considering the national market when the post merger entity would be pre-eminent, but by also considering more than 100 local markets, in that the merger would create a single dominant player.”

Source: L. Di Via – L. Marciano, “Le relazioni tra Industria Alimentare e GDO tra tutela della concorrenza e contemperamento di interessi economici”, *Revista di diritto alimentare*, II, nr. 3, July-September 2008.

Public and political discussions and non-binding measures about buyer power

In September 2008, the Federal Cartel Office held a conference on buyer power. The German association of brand producers has raised the discussion about buyer power and has asked members of parliament to participate in this debate.

A coalition of non-governmental development organisations placed this topic on the agenda of policy makers, authorities, conferences and research plans of key actors. It also attracted the attention of the media.

Source: M. Wiggerthale (interview), 10 January 2009.

GREECE

Existing regulation and action by the competition authorities

In December 2008, the Greek competition commission “fined seven dairy companies a total of EUR 48.3 million for fixing prices paid to dairy producers and among themselves.”

Source:

Greek Competition Watchdog Levies Further Fine on Milk Cartel (DJ), Dow Jones Newswires, 28 December 2007, <<http://www.flex-news-food.com/pages/13246/Dairy/Greece/greek-competition-watchdog-levies-further-fine-milk-cartel-dj.html>>

Mid 2007, a decision of the Competition Commission was awaited regarding Dia’s imposition of prices and profit margins on its franchise network, which may be considered to break free competition rules. Other franchisees were expected to have recourse to the Commission if Dia would be found guilty.

Source:

“Supermarket chains brace for more intense competition”, Business & Economy - Shopping, 17 June 2007, <<http://grhomeboy.wordpress.com/2007/06/17/supermarket-chains-brace-for-more-intense-competition/>>

HUNGARY

Existing regulation and action by the competition authorities

When assessing and authorising the Austrian interest group Spar to acquire the Hungarian Plus Élelmiszer Diszkont Kft (Plus Food Discount Store), the European Commission’s investigation of the food retail and purchasing market took into account whether or not the proposed merger transaction would result to a significant increase of buyer power (be in a position to influence its suppliers' prices).

Source:

Hungarian Competition Authority, “Green light to Spar for the acquisition of Plus Hungary”, 26 June 2008, <http://www.gvh.hu/gvh/alpha?do=2&st=2&pg=133&m5_doc=5326&p4j1i=5>

The Hungarian competition authorities intervened in 2001 by making a statement against misleading advertisement made by Tesco hypermarket that distributed leaflets making misleading comparisons with prices from Auchan.

Source:

Hungarian Competition Authority, “The misleading advertisement made by Tesco hypermarket”, March 2001, <http://www.gvh.hu/gvh/alpha?do=2&st=2&pg=113&m5_doc=2693>

Investigation by competition authorities into buyer power

The Hungarian Competition Authority did an enquiry into the relations between big-size retail chains and their suppliers, which was published in September 2007 in Hungarian.

Source :

<http://www.gvh.hu/domain2/files/modules/module25/pdf/elemzesek_gvhtanulmanyok_beszallitok_2007.pdf>

Public and political discussions and non-binding measures about buyer power

At the end of November 2008, "Hungary's farm ministry has prepared a proposal to fine supermarkets and hypermarkets up to 2 billion forints (EUR 7.7 m) if they demonstrate unfair practices against suppliers, business daily Vilaggazdasag said". "The ministry said the proposal would be submitted to parliament unless the chains agreed to sign a bilateral agreement on "well-intentioned business practices" and deal with suppliers in a "conscientious and professional" manner.

Under the agreement, the ministry wants to see the ceiling for late delivery fees reduced to 20 %, while chains' own-brand products should not be more than 20 % cheaper than other brands. Chains would be obliged to sell at least 80 % Hungarian goods as against the current 30 %".

Source:

"Agriculture ministry said to be preparing draconian bill targeting hypermarkets", Realdeal.hu (Hungary's international business daily), 1 December 2008, <<http://www.realdeal.hu/20081201/agriculture-ministry-said-to-be-preparing-draconian-bill-targeting-hypermarkets>>

IRELAND

Existing regulation

Before July 2006, the Groceries Order had been removed.

Source:

A.-M. Walsh, "Supermarkets are 'fleecing farmers' with 200pc mark-ups", Independent.ie, 22 July 2006, <<http://www.independent.ie/national-news/supermarkets-are-fleecing-farmers-with-200pc-markups-89264.html>>

In 2005, it seemed that the following legislation was in place which relates to buyer power issues:

- ❑ limits by governments to the size of stores
- ❑ ban on below cost selling

Source:

"Is Tesco taking over?", BBC News, comments on the story, 21 January 2005, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/talking_point/4183965.stm>

Public and political discussions and measures about buyer power

Between 1997 and 2004, Irish food prices had risen by more than 26% and were the most expensive in Europe. At the same time farm gate prices had hardly risen at all. Prices of other products in retail sectors with similar labour, rent and insurance costs had fallen. The competition authority stated that "[w]here competition is weak, costs rise more quickly. Food retailers, distributors and manufacturers are protected from competition by regulations such as the Groceries Order." The example given was the decision in January 2004 by the Dublin District Court to fine two supermarkets for reducing the price of baby food.

Source:

The Competition Authority [of Ireland], "High food prices not explained by costs according to Chair of The Competition Authority", News release, 27 January 2004,

<http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=77

ITALY

Laws, initiatives and discussions about buyer power issues

There is an existing national law (and article 82 EC) against imposition of unfair prices and exploitation of "economic dependence" (defined as a "situation where an undertaking is capable of determining an excessive imbalance of rights and obligations in its commercial relations with another undertaking").

Exploitation of "economic dependence" is dealt with in section 9 of Law n. 192 of 18 June 1998:

"(1) The abuse by one or more undertakings of the situation of economic dependence of their business clients or suppliers is prohibited ... Economic dependence is assessed taking into account also the actual chance of the aggrieved party to have access to satisfactory alternatives on the market.

(2) The abuse can also consist in the refusal to supply or to buy, in the imposition of unjustifiably burdensome or discriminatory contractual conditions, or in the arbitrary severance of existing commercial relations".

The abuse of dominant position and the harm to consumer welfare does not necessarily be demonstrated, but buyer power must be taken into account when assessing economic dependence. However, the law has not lead to claims against retailers because retailers have to prove their dependence in front of a judge which might lead to losing the accused client and probably all other clients.

Source :

ICN, Questionnaire on abuse of superior bargaining position – Answer from Italy, (see: <http://www.icn-kyoto.org/documents/abuse.html>)

A. Radice, [comments], ASS.I.CA. - Associazione Industriali delle Carni, March 2009.

Initiative by competition authorities to better regulate relations between retailers and suppliers

On 11 June 2008, the Italian competition authorities (Autorità Garante della Concorrenza e del Mercato) sent a report to the two chambers of the Italian Parliament, the President of the Council of Ministers, and different Ministers regarding "Considerations and proposals for a competitive regulation of markets aiming at supporting economic growth" (Considerazioni e proposte per una regolazione proconcorrenziale dei mercati a sostegno della crescita economica - AS453). The report deals with the retail sector (p. 6-7) and the agri-food sector (p.28-30).

The Italian competition authorities issued a separate recommendation on how to deal with the problems of, and regulate, the 'modern' retail sector vis-a-vis their suppliers such as the raising costs of entry into the modern distribution channels, listing fees, additional payments for marketing and other services, which are disproportionate. They also see the opportunity to deal with, through regulation or the development of a code of conduct, the vertical relations between the large retailers and suppliers regarding contractual arrangements, forms and terms of payment and the issues of compulsory contributions.

Problems by the suppliers are being addressed by the Italian Food Industry and reported in the media

Federalimentare (Italian Food Industry Federation), a federation representing 17 trade associations and a member of Confindustria (Confederation of Italian Industries), represents the second-largest manufacturing industry in Italy after the metal engineering industry and has, for the first time, elected a Vice President responsible for relations with the Large Retail Sector and has also set up an ad hoc working group on the matter.

Source:

Associazione Industriali delle Carni, The large retail sector and the food industry, July, 2008.

Over the last years, there have been several articles in the press and branch reviews revealing problems in the relationship between suppliers and retailers, such as high costs of entry of suppliers into supermarkets, increasing listing fees and advertising costs that are preventing many companies from investing, shelf wars, concentration issues, etc.

Here are some examples of these articles in last years:

Paolo Bricco, "Fornitori nella morsa dei supermarket - gli imprenditori: costretti a versare oltre il 30% dei ricavi", *Il Sole 24 Ore*, 19 February 2009, p. 19.

[Suppliers in supermarket stranglehold - entrepreneurs: forced to pay more than 30% of revenues].

A. Capparelli, "Prezzi alimentari in frenata - Un'intesa per tagliare gli alti costi d'ingresso nei supermercati", *Il Sole 24 Ore*, 6 November 2008, p. 22.

[Food prices on the brake - An agreement to cut the high cost of entry in supermarkets]

M.S. Sacchi, R. Scagliarini, "Coop e Caprotti: duello a spese dei grande marchi - Secondo round della causa giudiziaria. La prima sentenza descrive una guerra commerciale senza esclusione di colpi", *CorriereEconomia* (weekly), 29 September 2008, p. 8.

[Coop and Caprotti: duel at the expense of big brands - Second Round of the Judicial Case. The first sentence describes a war with no holds barred]

A. Frigerio, "Anche i salumieri, nel loro piccolo, s'incazzano", *Salumi & consumi*, 6 September 2008, p. 3.

[Even meat based producers, despite the fact they are small, got angry]

A. Frigerio, "L'Authority va all'attacco Della distribuzione moderna "No ai contributi indiscriminati" ", *Salami & Consumi Newsletter On-line* (Edizione Straordinaria), I, nr14, 11 July 2008.

The Authority attacks modern distribution "No indiscriminate contributions"]

V. Chierchia, "Costi, primo sì all'Antitrust "vigile" ", *Il Sole 24 Ore*, 18 January 2008, p. 19.

[Costs, first yes to the vigilant antitrust]

V. Volponi, "Le Supercentrali d'acquisto non hanno ridotto I prezzi – Il progetto nato negli anni '90 non ha influito sui costi, scontentando l'industria, Solo Sma e Crai hanno svoltato", *Liberio Mercato*, 8 January 2008, p. 12.

[The Super purchase centers have not reduced prices - the project born in the 90s has not affected costs, dissatisfying Industry . Only Sma and Crai have succeeded].

G. Auricchio, "Lettera di Federalimentare a Prodi – Serve la vigilanza dell'Antitrust", *Il Sole 24 Ore*, 1 December 2007, p. 2.

[Letter of Federalimentare to Prodi. The monitoring of the Antitrust is needed]

“L’agroindustria fa i conti con i rincari delle materie prime – “Gli aumenti sono giustificati””, Il Sole 24 Ore, 1 December 2007, p. 2.

[The agro-Industry is dealing with the price increase of raw materials - "the increases are not justified"]

Z. Kratchmarova, «Scaffali tempestosi, - Prezzi & consumi/1 : La guerra industria-distributori », Economy (il business magazine di mondadori), 24 October 2007, p. 14-22.

[Shelves in the storm. the war Industry - Distributors]

M. Bommezzadri, « Private label : le ultime tendenze emerse al PLMA di Amsterdam sulla marca – Europa, l’ascesa continua”, Food, July 2007, p. 44-45.

[Private label: the latest trends at the PLMA in Amsterdam on the brand - Europe, the rise continues]

“Per un futuro di brand” (Editoriale), Food, June 2007, p. 3-4.

[For a future of the brand]

G. Narciso, “Rinnovo contratti, la logica del fiorino – Il rito delle negoziazioni si fa sempre più ripetitivo: perché i retailer non hanno ancora capito che è tempo di evolversi?” Food, June 2007. p. 12.

[Contract renewal, the logic of the forint - The rite of trading is becoming increasingly repetitive, why retailers have not yet understood that it is time to evolve?]

“Sistema retail 7/ Il parere dell’industria sul futuro Della GDO di qui a cinque anni – Negoziare ad armi pari? In un sondaggio realizzato da Food, i produttori si cimentano a prevedere l’evoluzione del sistema distributivo”, Food, April 2007, p. 43- 45.

[The opinion of the future of the big retailers from now to five years - to negotiate on equal terms? In a survey conducted by Food, manufacturers try to anticipate changes in the distribution system]

A.D. Scotti, “Innovare è difficile, ma ci vuole più carattere – L’aumento dei listing fee e dei costi di advertising frena molte aziende dall’investire: ma così si imbocca un vicolo cieco”, food, March 2007, p. 10.

[Innovating is difficult but we need to have more gut - The increase in listing fees and the cost of advertising is holding many companies from investing, but this will lead into a dead end.]

R. Bolwijn, “Il giusto prezzo Della pl – Uno studio dell’università di Toronto analizza le opportunità dei retailer nelle scelte di pricing della categoria in cui sviluppa la marca privata”, Food, March 2007, p. 160-163.

[The right price of private Labels - A study of the University of Toronto examines the opportunities for retailers in the choices of pricing of the category in which private label develop]

V Cornero, “Grande distribuzione tiranna del mercato”, La Stampa, 10 December 2006, p. 35.

[The big retailers tyranny of the market]

V. Ch., “P&G sfida il “caro-scaffale » - L’a.d. Vito Varvaro contro la barriera dei costi de accesso”, Il Sole 24 Ore, 10 November 2006.

[P&G defies the "increase in the shelves cost" - the CEO Vito Varvaro against the barrier of the access costs]

LATVIA

Legislative initiatives and discussions about buyer power issues

“On 13 March 2008, Saeima (the Parliament) has adopted a set of material amendments to the Competition Law of Latvia, changing, inter alia, the legal definition of a dominant position, merger (concentration) notification requirements and procedures, eliminating the individual exemption procedures for anti-competitive agreements and introducing a new concept of abuse of dominant position in retail markets. In addition to the substantive amendments, a number of new procedural rules have been introduced as well.” “The related penalty provisions entered in force on 16 April 2008. The provisions concerning change in the definition of a dominant position and the concept of abuse of dominant position on a retail market will enter in force on 1 October 2008.”

A dominant position in a retail market will be considered to be abused by the following behaviour (exhaustive list):

- ❑ “applying or forcing unfair or unreasonable conditions in respect of return of goods, except for return of goods of inferior quality and return of goods supply of which or the increase of the volumes of supply of which were initiated by the supplier itself;
- ❑ applying or forcing unfair or unreasonable payments in respect of placement of goods in retail premises, except if these payments are justified by introducing in the market a new product not known to consumers;
- ❑ applying or forcing unfair or unreasonable payments in order to enter into a contract unless these payments are justified on the grounds that the contract is entered into with a new supplier which as such requires a specific appraisal;
- ❑ applying or forcing unfair or unreasonable payments for supplies of goods to a new retail location;
- ❑ applying or forcing unfair or unreasonable payment settlement deadlines for the supplied goods;
- ❑ applying or forcing unfair or unreasonable penalties (sanctions) in respect of violation of the terms of a transaction.”

“The amendments have exempted the Competition Council decisions from the general principle of the Latvian administrative procedure according to which an appeal of an individual decision by a state institution is suspending the entry in force and application of the decision until the appeal procedures are completed.”

Some analysts consider that the law was not necessary given the relative low level of concentration.

Source:

Lejins, Torgans & Vonsovcis, “Competition Law Amended – Latvia”, Latvia, 5 June 2008, <<http://lexuniversal.com/en/articles/5256>>

A. Vanags, A. Paalzow, Competition in the Latvian and Baltic Grocery Retail Markets, SSE Riga/BICEPS Occasional Paper No. 3 (ISSN 1691-3620), September 2007.

NETHERLANDS

Investigations into buyer power in the food chain

*The Netherlands Bureau for Economic Policy Analysis (CPB) made an analysis of “Static efficiency in [the] Dutch supermarket chain” between 1995 and 2005. The reason was the increasing publicly voiced complaints that supermarkets’ buyer power, amongst others due to increasing private labels, was squeezing profits from suppliers, especially of processed food, and boycotts or legal disputes between suppliers and supermarkets since the ‘price war’ between supermarkets and other retailers started in 2003. The study was based on theoretical analysis and statistics as far as available and was not based on an investigation ‘in the field’.

The study concluded that it did not find increasing buyer power between 1993 and 2005 by supermarkets at the expense of suppliers' profits from a perspective of static efficiency and low prices for the consumer, because of increased competition among the supermarkets and manufacturers. The study suggested that supermarkets might have more buyer power in the non-brand segments than in the brand products. However, the study recognized that it did not look into some aspects of consumer well-fare such as dynamic efficiency (innovation and increasing quality), availability and choice of products, and the healthiness and environmental sustainability of products. The study did not cover trends after 2005 when the second largest retailer collapsed due to the price war that was waged among supermarkets (started by the largest one Albert Heijn) in 2003 and 2005.

Source:

H. Creuse, A. Meijer, Gijsbert Zwart, H. van der Wiel, Static efficiency in Dutch supermarket chain, CPB document nr 163, April 2008.

In 2008, the Dutch Competition authorities (De Nederlandse Mededingingsautoriteit, NMA) started to pay particular attention to the food sector because of increasing levels of concentration in the agro-food production chain which could enhance the risk of tacit collusion. A group of civil society organisations sent a letter to the NMA requesting to also look into the issue of buyer power as a potential cause of increasing concentration in the agro-food sector.

In 2004, the NMA had published its vision about buyer power in which it concluded that cooperation arrangements or concentration among suppliers could be allowed to counter-balance buyer power if no competition would be undermined.

Sources:

NMA, Consultatie NMA-agenda 2008, 2007.

Consultatie NMA-agenda 2008, Letter to NMA, 15 November 2007, signed by SOMO, Fair Food, Vereniging Milieudefensie, Stichting Greenpeace Nederland.

NMA, Visiedocument inkoopmacht, December 2004.

A study published in 2007 about the income of actors in the different links in the Dutch agribusiness chain related to dairy, pork, fruit and vegetables concluded that the income of the prime producers at the beginning of the chain was much less than in the other parts of the chain being retail, distribution and processing.

Source:

G. Cackus, J. Boone, E. ten Pierick, F. Bunte, K. van Calker, Ketenrendementen in de Nederlandse agribusiness, LEI rapport 5.07.05, May 2007.

The Dutch Agricultural Union (NAV) considers a recent report from the Agricultural Economical Institute of the University of Wageningen (LEI) - "Prijsvorming Glastuinbouw" (Price forming of greenhouse horticultural products) - to be one more example that proves the existence of a large gap between the price growers are paid and the price consumers pay, which is difficult to explain. The retailer chains have become larger and have been concentrating their purchasing, and have been able to make good profit. The NAV made a plea for establishing strong coalitions of growers in order for them to be in an equal negotiation position and get fair prices for their produce. However, the LEI study concludes that the current important Dutch cooperation arrangements and cooperatives have not been able to provide a good answer to the increasing concentration of large retailers and the loss of wholesale trading (only 5% of vegetables are still being auctioned, 50% of the cooperative wholesale traders disappeared).

Sources:

"NAV: Kracht- en machtsverhoudingen in de foodsector verdient vernieuwing", NAV, 14 January 2009, <<http://www.nav.nl/content/view/463/2/>>

F. Bunte, Prijsvorming Glastuinbouw, LEI, nota 09-02, January 2009, <http://www.nfofruit.nl/nl/25222685-%5BLink_page%5D.html?location=190062160913830,10047269,true>

Public and political discussions and non-binding measures about buyer power

According to the Dutch minister for Agriculture, Nature and Food Quality, Verburg, the prices growers of fruits and vegetables receive for their produce is too low. The wholesalers and supermarkets succeed to play them off against each other. This "right of the fittest" model is not fit for having balance in the chain", she expressed.

Source:

"Verburg: telers dupe van inkoopmacht", ANP, 7 January 2009, <http://www.nfofruit.nl/nl/25222685-%5BLink_page%5D.html?location=533898468932307,10043457,true>

There have been several political and public discussions about "Bagatelregeling mededingingswet" which is claimed to be based on European competition policy that does not allow cooperation arrangements between suppliers/producers beyond 5% of the market or Euro 40 million. The Dutch Parliament voted for a motion on the (arrangement for 'bagatel' within the competition law) and called upon the government to allow for small and medium large businesses to join forces in order to obtain a more equal position in the food chain. The politicians think the Dutch and European law on cartels now makes it impossible for these companies to have a good negotiation position next to wholesalers, processing food industry and supermarkets. Also the politicians feel that the imbalances in the cartel law are against the interest of the consumers. In the past, the competition authorities have stated that producers, in the case of shrimp fishers, could not form cooperation arrangements in case they would take a dominant national position, but could form regional cooperative arrangements. Parliamentary discussions continue in February 2009.

Sources:

"NAV: Kracht- en machtsverhoudingen in de foodsector verdient vernieuwing", NAV, 14 January 2009, <<http://www.nav.nl/content/view/463/2/>>

"31 531 - Initiatief-Ten Hoopen/Aptroot/Vos; wijz. Mededingingswet ter versoepeling van de uitzondering op het verbod van mededingingsafspraken"

http://www.tweedekamer.nl/vergaderingen/plenaire_vergaderingen/volgende_weken/index.jsp

B. Janssens, A. Netjes, Aardappelkolom: Kansen voor verbetering, LEI, 23 October 2006,

<<http://www.lei.dlo.nl/nl/content/agri-monitor/pdf/Oktober2006Aardappelkolom%20kansen%20voor%20verbetering.pdf>>

M. van der Hoeven, Bagatelregeling Mededingingswet, letter to the Dutch Parliament EP/EMC 8007331, 25 January 2008, <<http://www.ez.nl/dsresource?objectid=155016&type=PDF>>

Since the supermarket price war started in 2003, there have been parliamentary and political debates about the need to prohibit pricing below cost but the government decided not to take legislative action.

Source:

H. Creuse, A. Meijer, Gijsbert Zwart, H. van der Wiel, Static efficiency in Dutch supermarket chain, CPB document nr 163, April 2008, p. 89.

POLAND

Existing regulation and initiatives by the competition authorities

In November 2006, the Polish Office of Competition and Consumer Protection (OCCP) approved that Eldorado SA would take direct control over the BOS company and indirect control over the companies

from its capital group, both companies operating in the sector of wholesale and retail trade in food products, domestic detergents and cosmetics. In its analysis, the OCCP took into account that there would be no “establishment or strengthening of a dominant position on the market.”

Source:

Office of Competition and Consumer Protection, Concentration on the food market, Press releases, 21 November 2006, <http://www.uokik.gov.pl/en/press_office/press_releases/art68.html>

PORTUGAL

Existing regulation

The Portuguese competition law includes articles on vertical and horizontal agreements, abuse of dominance (Art. 6) and abuse of the state of economic dependency (Art. 7). This is applied to both suppliers and consumers. This allows the competition authorities to intervene to prevent purchasing pooling and/or vertical integration agreements by large retail groups with other retailers or grocery stores in these would result in too strong concentration in specific product markets.

Investigation by competition authorities into buyer power in the food chain

In September 2006, the Portuguese competition authorities undertook a study about large retailing groups in the Portuguese food sector related to their buyer power and passing through of low prices to consumers.

Large retailer groups had been increasing their buyer power and market share in wholesaling at the expense of other wholesalers, through purchasing pooling and vertical integration agreements especially by large internationally retailers and groups. However, large retail groups had recorded decreasing concentration in the wholesale market and retail sales between 2002 and 2005. Also, lower prices were passed through to consumers. The competition authorities concluded that in general there was no harm to competition and consumer well-fare but that more research would be needed in specific product markets and that case per case analysis was needed.

Source;

J. Rodrigues, Buyer power and pass-through of large retailing groups in the Portuguese food sector, Autoridade da Concorrenca Working paper nr. 14, September 2006, <http://www.concorrenca.pt/download/WP14_Study_Sep-06_PubVers.pdf>

R. Maximiano, J. Rodrigues, Competition policy issues in the Portuguese food retail sector, power point presentation at the Ibero-American Forum, Mexico (La Peubla), 18-19 September 2007.

ROMANIA

Existing regulation

Around October 2007, Rewe-owned Billa and SPAR Romania have been fined by the Competition Council around 850,000 US\$ and around 100,000 US\$ respectively because they provided incorrect data regarding the absence in their commercial contracts of a client stipulation. This stipulation, however, constrains the supplier to offer the retailer the best price on the market for the contracted goods”. According to the Competition Council, “The impact of this stipulation on the market represents one of the important elements of the Council's investigation, together with the impact of shelf prices and the horizontal and vertical relations in this sector”.

Source: “REWE Billa and SPAR Romania fined by Competition Council”, Planet Retail [Daily News], 21 October 2008, published on Regoverning Markets website

<http://www.regoverningmarkets.org/en/news/c_e_europe/rewe_billa_and_spar_romania_fined_by_competition_council.html>

Public discussions

Food [producer] groups have asked for a "code of good trade practice" for the supermarkets in order to protect the suppliers against listing fees and other uncompetitive practices, which should be approved by the Competition Authority, and the Ministries of Agriculture and Finance. "They also threatened to take the issue to the European Parliament, as well as to the European Commission."

Source:

"Romanian supermarkets accused of anti-trade 'abuses' ", Planet Retail Daily News, 7 March 2008, <http://www.regoverningmarkets.org/en/news/c_e_europe/romanian_supermarkets_accused_of_anti_trade_abuses.html>

SLOVAKIA

Initiatives for new legislation and by competition authorities

In 2003, the Slovak parliament adopted a law on 'commercial chains' which prohibited certain practices by retailers towards their suppliers such as payments for non-existing or hardly existing services. This law never came into force because the retailers lobbied against it and the European Commission stated that this law was against European regulation since these practices were common in many other EU member states. A resulting new law has been seen as inefficient.

In 2008, because the government and the parliament considered that the conditions of suppliers was worsening, the Slovak parliament adopted a new law on 'inadequate conditions in commercial relations'. The law was supposed to become into force by 1st January 2009. The starting point of the law is the dependency of the suppliers. The law also limits buyer power abuses, and cash or non-cash extra fees demanded from suppliers by retailer at 3% of the annual sales of the supplied goods to individual retailers per calendar year. However, the European Commission (DG Internal Market) objected to the law after complaints by supermarkets. The latter also clearly objected to the law in Slovakia and had a strong voice in the media which has been earning money through advertisement payments from supermarkets (and media independence has thus been put in doubt).

It has been difficult to find proof of buyer power abuses because such documents, such as accountant documents, are covered by professional commercial secrecy arrangements, or because the suppliers fear that their name will be published and that they will be banned from supplying. Supermarkets even required from their suppliers a declaration as a proof that the relationship is advantageous for both sides and that there is no dependency by the suppliers.

Source:

B. Balogová, "New law tackles retail chains - Law 'nonsense' say large retailers, but producers are happy", Spectator, 21 April 2008, <http://www.spectator.sk/articles/view/31480/3/new_law_tackles_retail_chains.html>

I. Šarmír, [Testimony (in French)], Slovak Chamber for agriculture and food, Directorate Food Industry, Bratislava, November 2008.

In January 2007, the Slovak competition authorities (PMÚ) announced they would not allow Tesco to buy out supermarkets in Slovakia owned by Carrefour. After analysing the possible impact of the move on three local markets – Bratislava, Žilina and Košice – they claimed that if the deal was allowed to go through, Tesco would be able to create or strengthen a dominant position.

Source:

M. Ďurianová, "2007: Investments kept pouring in - Year in business – review", The Slovak Spectator, 17 December 2007, <http://www.spectator.sk/articles/view/30239/14/2007_investments_kept_pouring_in.html>

In January 2007 the Slovak competition authorities blocked the takeover by Tesco of 4 stores owned by Carrefour, proposed as part of a swap between Carrefour stores in the Czech Republic and Slovakia and Tesco stores in Taiwan.

Source:

M. Barriaux, Slovakia halts takeover of Carrefour stores by Tesco", guardian.co.uk, 6 January 2007, <<http://www.guardian.co.uk/business/2007/jan/06/supermarkets.tesco>> and <http://www.tescopoly.org/index.php?option=com_content&task=view&id=580&Itemid=143>

SPAIN

On 22 October [2007 or 2008], FACUA-Consumidores en Acción, the consumer organisation, sent a complaint to the National Competition Commission (CNC) about the high prices of milk products and the significant increases during previous months. The association asked the CNC, which has opened an investigation, "*que que evalúe si intermediarios, marcas y/o establecimientos se están aprovechando de determinados incrementos del precio de la leche en origen para aplicar subidas muy superiores al consumidor final*"

Source:

Documentation from UPA (see for instance: <http://www.hoyagro.com/articulo.php?id=1289>; <http://www.preciosjustos.es/>; http://www.upa.es/_noticias/27_05_08.php)

SWEDEN

Investigation by competition authorities into buyer power in the food chain

The competition authorities of the Nordic countries Denmark, Finland, Greenland, Iceland, Norway and Sweden have undertaken a joint study "Nordic food markets – a taste for competition" in November 2005, looking into the competitiveness of the food and retail markets. Their main findings of the problems of the concentration in the retail and food markets are described in this profile. One of their conclusions (p. 19) was that some of the agreements between suppliers and retail chains may include arrangements with foreclosing and other anticompetitive effects (e.g. slotting payments, marketing support). If these agreements or practices can be shown to limit competition, "constitute a breach of competition rules."

Source: "Nordic food markets – a taste for competition", report from the Nordic competition authorities, November 2005, p. 92.

The scant number of retailing actors and the highly Swedish food retail market have given rise to definite discussions and arguments concerning the market situation.

UNITED KINGDOM

Investigation by the the Competition Commission (CC) into buyer power in the food chain

In April 2008, the Competition Commission (CC) concluded a 2-year inquiry into the state of competition in the UK grocery market.⁴ This market investigation in turn followed several examinations by the Office of Fair Trading, which had, until 2006, been reluctant to order a CC investigation. In fact it took an appeal to the Competition Appeal Tribunal (effectively a judicial review) by a number of aggrieved parties to persuade the OFT finally to do so, in May 2006. The CC's inquiry was in fact the first into the grocery market as a whole. Earlier CC inquiries had been confined to supermarkets alone (2000)⁵ or to mergers between supermarkets^{6 7}.

⁴ *The supply of groceries in the UK market investigation*, Competition Commission, 30 April 2008. The report is available online at http://www.competition-commission.org.uk/rep_pub/reports/2008/fulltext/538.pdf.

⁵ *Supermarkets*, CC, October 2000, http://www.competition-commission.org.uk/rep_pub/reports/2000/446super.htm#full

⁶ *Safeway plc*, CC, September 2003, http://www.competition-commission.org.uk/rep_pub/reports/2003/481safeway.htm#full

The UK Competition Commission (CC) supermarket enquiry in 2000⁸ had concluded that supermarkets “having at least an 8 per cent share of grocery purchases for resale from their stores, have sufficient buyer power [to undertake abusive practices which] when carried out by any of these companies, adversely affect the competitiveness of some of their suppliers and distort competition in the supplier market—and in some cases in the retail market—for the supply of groceries.” In order to deal with buyer power malpractices, the CC enquiry had been followed by the establishment of a Supermarket Code of Practice, which was established in 2001. However, by 2006 it was clear that this Code did not work or lead to the expected results. Indeed the 2006-2008 new CC enquiry found many of the same abuses it had found in the 2000 enquiry. An important reason why the Code did not work was that suppliers were afraid to testify for fear of losing their outlets. Actually, the Competition Commission had to use legal powers and guarantees of confidentiality to get people to say to the authorities what they were saying in private. In this way, after years of claiming that there was not enough evidence of buyer power, the CC ended up finding that there was evidence once it undertook a proper enquiry, using the powers and resources at its disposal. The CC has proposed a new code of conduct and the creation of an ombudsman proposed to address the continuing problem. However, the UK supermarket chains were strongly opposing, in 2008 and beginning 2009, the creation of an ombudsman for suppliers.

Any CC investigation seeks wide-ranging evidence from interested parties, and much of it (though by no means all) is made public. The information below draws on published material submitted to the CC and on the CC’s analysis.

Public and political discussions and non-binding measures about buyer power

Over the last year, there have been many campaigns, public and political discussions by civil society organisations, citizens, convenience stores, farmers’ organisations and others, covered by all media regarding mostly buyer power abusive practices towards UK and overseas suppliers, lack of food shops in villages and towns, lack of choice of small shops.

⁷ *Somerfield plc, etc*, CC, September 2005, http://www.competition-commission.org.uk/rep_pub/reports/2005/fulltext/501.pdf

⁸ *Supermarkets*, CC, October 2000, http://www.competition-commission.org.uk/rep_pub/reports/2000/446super.htm#full