The Abuse of Supermarket Buyer Power in the EU Food Retail Sector

Preliminary Survey of Evidence

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On behalf of:
AAI- Agribusiness Accountability Initiative

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Colophon

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Contents

Summary

The report provides a preliminary survey of evidence in EU member states about abusive practices towards suppliers by large supermarket chains resulting from their buyer power. This evidence, which is far from comprehensive, was gathered by an informal network of civil society groups, supplier groups and trade associations, who meet under the Agribusiness Accountability Initiative (AAI). It aims to support a request by the European Parliament to the European Commission, especially Directorate General Competition, to investigate and remedy “the abuse of power by large supermarkets operating in the European Union”.[1]

This preliminary survey of evidence has found that buyer power abuses are practiced in at least 17 EU member states. These buyer power abuses arise from increasing concentration of market shares by supermarket chains, which has happened in most EU member states, and their buying arrangements at the national level and the EU level. This has changed the bargaining power between supermarkets and their suppliers, who now have fewer alternative outlets to sell their produce. In the longer term this will negatively affect consumer interest. Buyer power abuses have been increasingly discussed and researched, as well as solutions searched, by competition authorities, governments and parliaments, branch organisations and the media in EU member states. Currently, only a few EU member states have laws that can deal with abusive supermarket practices towards suppliers.

Evidence of supermarkets’ abusive buyer power practices that has been reported and that result in distorted and unfair business to business relations and anti-competitive behaviour include:

- Extra payments or retro-active payments by suppliers to supermarkets, such as payment for advertisements and renewal of stores, sometimes outside contractual arrangements or without assent from the suppliers.
- Payments to be able to supply to, and be on the shelves of, supermarkets (listing fees, slotting fees).
- Harsh negotiations and threats of de-listing which result in very low payments for suppliers’ products.
- Late payments which enable supermarkets to gain profits at the expense of suppliers.
- Reducing the number of suppliers to a few or just one.
- Requiring that suppliers do not sell at lower prices to competitors.

All these payments can amount up to 50% (Italy, Hungary) or even 70% (France) of suppliers’ revenues. As a result, some suppliers have gone under or survived on very low profit margins. This survey found that small and medium enterprises (SMEs) in the food sector and farmers have been especially vulnerable.

The rapid growth of ‘private labels’, i.e. products with the supermarkets‘ own brand label, in different EU member states have resulted in an important additional element of buyer power of supermarkets. Private labels are increasingly replacing branded products and are mostly cheaper, so that a supermarket can threaten branded product suppliers to be de-listed since supermarkets can decide what products are sold on the shelves. Also, supermarkets can easily replace producers of their private label goods, and supermarkets can thus easily abuse their buyer power towards private label producers. The impact of private labels, and its continuous growth, is shown to be a new challenge for competition authorities and smaller suppliers.

[1] Declaration tabled by Caroline LUCAS (Verts/ALE/UK), Gyula HEGYI (PSE/HU), Janusz WOJCIECHOWSKI (UEN/PL), Harlem DÉSIR (PSE/FR) and Hélène FLAUTRE (Verts/ALE/FR) pursuant to Rule 116 of the European Parliament's Rules of Procedure, EP reference number: DCL-0088/2007 / P6-TA-PROV(2008)0054

The increasing buyer power of large supermarket chains and their competitive prices for consumers has resulted in many European countries in serious diminished number of small independent retail stores as well as independent wholesalers, and a lack of opportunity for them to expand due to the collective dominance of a few supermarket chains. It has also resulted in growing concentration of buying arrangements not only at the national level but also the EU level.

Concerns have been raised that buyer power abuses of supermarkets have long term consequences for consumers, as clearly indicated by some competition authorities. They have negative effects on (long term) consumer interests such as decreasing choice and quality of products, lack of food available in local neighbourhoods, decreasing innovation of products for consumers and increasing dependence on private labels.

The preliminary survey of evidence concludes that an EU wide investigation of the retail sector and all its aspects of relations with suppliers, as well as EU wide proposals to remedy abusive practices are needed. Such action at EU level rather than only at national level is warranted because many purchasing and distribution practices operate on an EU wide basis and not only on a national basis. National authorities have no means to deal with EU cross border abusive buying practices, and different approaches and solutions to buyer power problems in different member states might undermine a single market, while not dealing with an EU wide solution to cross-border abuses.

This survey also advises that an investigation or enquiry should not only investigate malpractices and dependency relationships which cannot be made public by suppliers, who rightly fear loss of their outlets, and discussion with those not involved in the industry. Such an investigation or enquiry should also assess what kind of national and EU wide solutions would be possible given the fear of suppliers to testify, the limited capacity of competition authorities and the economic and social needs of a particular country. Based on an investigation or enquiry by the European competition authorities, remedies can be proposed that can be considered among the wide range of EU policies regarding the food supply chain, and potentially other supply chains of products sold in supermarkets.

Introduction

This document is intended to support the written declaration[2] that was adopted by a majority of Members of the European Parliament (MEPs) on 19 February 2008, which requested the European Commission, particularly Directorate General Competition, to investigate and remedy "the abuse of power by large supermarkets operating in the European Union".

This request was based on concerns about abusive purchasing practices by large supermarkets, which were being raised in many EU member states. Due to the increased concentration of supermarket stores belonging to the same chain, the relationship between retailers and suppliers has changed. Since current laws prohibit abusive seller power by suppliers towards retailers, the changing bargaining power in the retail and food chain has resulted in abuses of buyer power. This abuse of 'buyer power' has been dealt with in different ways in many EU countries. Despite large supermarkets operating in different European Union (EU) member states and cross border trade being affected through their buying and selling activities across the EU, an EU-wide approach has been lacking to date. This could have important long term consumer effects, which are often overlooked in the current discussions, such as decreasing investments in innovation, less consumer choice and higher prices.

The preliminary survey of evidence about abusive buyer power problems reported in this document has been carried out by an informal network of civil society groups, supplier groups and trade associations, who meet under the Agribusiness Accountability Initiative (AAI). Given the limited resources available to the AAI group, this preliminary survey of evidence has used desk-top research, particularly data bases, reports and internet sites, as well as information from supplier organisations in different EU members. This document is not intended to give a complete and detailed overview of the positive and negative impacts of supermarkets on society, but aims to raise awareness about abusive buyer power practices which are still not being fully discussed at national or EU level.

Although this preliminary evidence survey is not comprehensive, it provides an indication of what impact buyer power abuses might have in EU member states. The report identifies buyer power abuse in the growing number of countries that face increasing concentration in the retail and wholesale markets. The evidence search also found other aspects of abusive and anti-competitive supermarket practices that strengthen the argument for an EU wide investigation about abusive buying power in the 27 EU member countries. We acknowledge, however, that in small countries like Malta, and in a few Central and Eastern European countries where supermarket concentration is low, it was difficult to find evidence of buyer power abuses.

Indeed, this preliminary evidence survey has reinforced the argument that an EU wide investigation needs to be carried out by competition authorities, not by those outside the food and retail chains. We say this for a number of reasons:

1. Suppliers are mostly unwilling to be identified and publicly reveal information about abusive practices they experience because they fear commercial retaliation by supermarkets, and especially lost sales to supermarkets, which constitute very often the majority of their clients. However, in private and informally, suppliers have been providing evidence to the members of the AAI group, which cannot be brought into the public domain. In the UK the Competition Commission (CC) and the Department for Business Enterprise and Regulatory Reform (DBERR – formerly the DTI) reported a 'climate of apprehension' that prevents suppliers from coming

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[2] Declaration tabled by Caroline LUCAS (Verts/ALE/UK), Gyula HEGYI (PSE/HU), Janusz WOJCIECHOWSKI (UEN/PL), Harlem DÉSIR (PSE/FR) and Hélène FLAUTRE (Verts/ALE/FR) pursuant to Rule 116 of the European Parliament's Rules of Procedure, EP reference number: DCL-0088/2007 / P6-TA-PROV(2008)0054

forward with information. During its recent inquiry into the UK groceries market, the CC had to use its legal powers to force suppliers to testify. Fear of speaking out has been cited as preventing suppliers from providing competition authorities with information even in countries like France, Italy and Germany where existing legal arrangements allow some sanction against buyer power abuses. In France, a supplier who testified on television that an annual rebate costs as much as a new factory was immediately banned as a supplier. This survey of evidence found that fear of testifying is a significant problem in Austria and Slovakia. Some competition authorities are trying to find ways to circumvent this problem. For example, some years ago in France, the authorities investigated different supermarkets at the same time so that it would be difficult for supermarkets to suspect any of their suppliers. In Germany, the competition authorities carried out thorough investigations using questionnaires among suppliers about the impact of buyer power abuses on suppliers before agreeing on an acquisition by Edeka (Netto) of Plus that was part of Tengelmann, including at the sub-regional level. Suppliers were forced to answer the questionnaire or be sanctioned but could remain anonymous.

2. There are a lot of issues that are difficult for those not involved in the industry (referred to below as “third parties”) to investigate, such as the dependence of suppliers on supermarkets, the degree of market concentration, details about companies’ internal policies and practice and “solid proof of actual specific complaints that are the same throughout all of the 27 Member States".
3. Researching buyer power abuses requires substantial financial and human resources to gather evidence, as the UK CC inquiries have demonstrated.
4. Only a thorough investigation carried out by competition authorities will yield the necessary evidence on which policy and remedies should to be based. In the UK, for instance, authorities (notably DBERR) argued that there was not enough evidence to warrant carrying out an investigation, however they were forced to act as a result of political pressure. Once the CC undertook a comprehensive market inquiry and used the resources at its disposal, it found more than 50 malpractices of buyer power and dominance abuses. Studies that are based on competition theories and available statistics, like in the Netherlands[3] and Portugal, often fail to reveal abusive buyer power problems in the field and its long term impact on consumers.[4]

Although the AAI group is willing to provide support for finding evidence, it concludes that evidence-gathering research on buyer power abuses is not a task for citizens and third parties but a task that needs to be undertaken by DG Competition and national competition authorities through an official investigation. If DG Competition were to launch an inquiry, it could access information which is unavailable to third parities and citizens, such as documentary evidence of commercial transactions. The AAI Group therefore would like to encourage DG Competition to respond positively to the request by a majority of MEPs to begin an investigation and propose remedying measures.

In its document on food prices[5] published on 10 December 2008, the European Commission indicated that it wants to look into particular supermarket practices as part of a comprehensive multi-faceted response to increasing food prices and other problems in the food chain. The EC states that a “joint effort at Community, national and local levels is necessary to put in place framework conditions for an improved functioning of the food supply chain. This effort is necessary to ensure that the integration and consolidation of sectors along the food supply go hand in hand with fair earnings of agricultural producers, competitive prices and improved competitiveness of the food processing industry as well as greater choice, better affordability and higher quality of food products for European consumers.”

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3 NMA, Visie op inkoopmacht, 2004; H. Creuse, A. Mejier, Gijsbert Zwart, H. van der Wiel, Static efficiency in Dutch supermarket chain, CPB document nr.163, April 2008.

4 Sector studies about fresh fruit and vegetable sectors in the Netherlands have discovered very low profit margins for farmers and high margins for supermarkets; the CPB document (April 2008) recognizes that its study did not cover different 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.

5 Food prices in Europe - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels 10 December 2008, COM(2008) 821/4.

“[P]ractices which distort the relationship between suppliers and retailers should be discouraged. This is for example the case for late payments, unjustified or excessive fees paid by suppliers for services provided by retailers or tempting consumers with misleading offers.” The AAI Group hopes that this short report already contributes to such effort.

The preliminary survey of evidence consists of this document in which we set out the evidence we have gathered. The evidence and references to countries used in this report are backed up by annexes in which the sources of this evidence are clearly stated. The four sections of this survey are, in order:

- Official approaches at different levels to problems of buyer power
- Evidence of buyer power abusive practices across the 27 EU member states
- The impact of supermarkets’ private labels on buyer power abuses
- Impacts of buyer power on independent retailers and wholesalers

1. Abusive buyer power problems are being discussed in many fora while a comprehensive EU approach is still missing

Buyer power problems caused by large supermarket chains are being discussed at many national, regional and international fora. There are many reasons why this discussion is being taken up. Supermarkets have acquired substantial retail or seller power, and this seller power has given them substantial buyer power. Retailer and buyer power now reinforce each other very strongly. The change in bargaining power between suppliers and supermarkets has led to practices:

1. which are considered to breach competition law, such as the prohibition on abuse of dominance,
2. which are considered to breach other laws that promote fair relations between businesses such as unfair payment practices, in particular with regard to farmers and SMEs, or
3. which appear to undermine competition and fair business relations as well as consumer welfare but for which current legislation is lacking.

1.1 Competition authorities have been discussing these issues at international level among others in the following fora:

- The International Competition Network (ICN): the Kyoto Annual conference for the on 14-16 April 2008 had an ICN Special program with a Task Force, preparatory papers (questionnaires from member countries) and workshops on the “abuse of superior bargaining positions”.
- UNCTAD, “Abuse of dominance”, meeting of the Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 15-18 July 2008.
- The OECD: see for instance the publication by H. Kyvik Nordås, M. Geloso Grosso, E. Pinali, Market structure in the distribution sector and merchandise trade, OECD Trade Policy Working Paper No.68, 1 February 2008, TAD/TC/WP(2007)16/FINAL.

1.2 Discussions at the EU level about buyer power have among others been held at:

- DG Enterprise within the High Level Group on the Competitiveness of the Agro-Food Industry.
- DG Agriculture relating to discussions about the future of farmers in the EU.
- EC working documents and policies on food prices (published on 9 and 10 December 2008)[6] mentioning practices in the food chain that are anti-competitive and concerns about the earnings of agricultural producers, which need investigation by competition authorities.
- The European Economic and Social Committee: through seminars and publications such as “The large retail sector: trends and impacts on farmers and consumers” (17 April 2005) and

[6] Food prices in Europe - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels 10 December 2008, COM(2008) 821/4; Commission of the European Communities, The functioning of the food supply chain and its effects on food prices – Commission staff working document SEC (2008) 2972, Brussels 9th December 2008.

"OPINION of the European Economic and Social Committee on the Developments in the retail industry and impact on suppliers and consumers" (December 2008, own-initiative opinion).[7]

- The European Parliament (EP): Written declaration[8] signed by a majority of MEPs requesting DG Competition to investigate buyer power issues across the EU, and a subsequent seminar on 14 May 2008 on buyer power issues. The European Parliament drafted a report on the "gap between producer prices and the prices paid by consumers" (2008/2175(INI)) by Katerina Batzeli, Rapporteur for the Committee on Agriculture and Rural Development, submitted on 19 November 2008 and voted upon in the Committee in February 2009: the report demands the establishment of a permanent European monitoring body of food prices and the supply chain in order to reveal price differentials across Europe between retail prices and farm gate prices.[9]
- The CIAA called to review the late payment directive 35/2000 to improve the relationship between the small and medium sized companies (SMEs) in the food sector and retailers. [10] An investigation among CIAA members revealed buyer power problems in many EU member states and lack of legislation, which it has also raised during the High Level Meeting on the Competitiveness of the Agro-Food Industry.[11]

1.3 Discussions and actions by competition authorities in different EU countries[12]

There have been extensive public debates and media attention on supermarkets' abusive buyer power practices in different EU member states (see Annex 1). This has resulted in discussions at the political level, including the involvement of Ministries or parliaments, or new laws to prevent abusive practices. Political discussions and non-legal measures have been taking place in Austria, Belgium, France, Hungary, Italy, Latvia, The Netherlands, Romania, Slovakia and the UK.

National competition authorities have undertaken activities such as investigations and research regarding buyer power and related abuses in the following countries: Austria, the joint competition authorities of the Nordic countries (Denmark, Finland, Greenland, Iceland, Norway and Sweden), Germany (during the assessment of the planned acquisition of Plus of Tengelmann by Edeka), France, Hungary, Italy, Ireland, Latvia, the Netherlands, Portugal, Spain, and the UK.

In France, different Committees of experts and parliamentarians have looked into how to address the oligopolistic situation of the French supermarket sector and how to deal with the increasing abuse represented by extra payments which suppliers have to pay. The public debate in France has been stifled by the suppliers' refusal to publicly testify due to fear of being de-listed.

In June 2008, the Italian competition authorities sent a report to the two chambers of the Italian Parliament, the President of the Council of Ministers and different Ministers, which included proposals for regulation of markets in the retail and agro-food sector. The Italian competition authorities issued a separate recommendation on how to deal with the problems of, and to regulate, the 'modern' retail sector in its dealings with suppliers: they highlighted such issues as raising the costs of entry into the modern distribution channels, listing fees, and additional payments for marketing and other services,

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7 "Les évolutions de la grande distribution et leur incidence sur ses fournisseurs et les consommateurs" (avis d'initiative), Brussels, 3 December 2008, CCMI/050, <http://eescregistry.eesc.europa.eu/viewdoc.aspx?doc=%5C%5Cesppub1%5Cesp_public%5Cces%5Cccmi%5Cccmi050%5Cen%5Cces1922-2008_ac_en.doc>

8 Declaration tabled by Caroline LUCAS (Verts/ALE/UK), Gyula HEGYI (PSE/HU), Janusz WOJCIECHOWSKI (UEN/PL), Harlem DÉSIR (PSE/FR) and Hélène FLAUTRE (Verts/ALE/FR) pursuant to Rule 116 of the European Parliament's Rules of Procedure, EP reference number: DCL-0088/2007 / P6-TA-PROV(2008)0054.

9 For information about the voting and adoption of the report, see <http://www.europarl.europa.eu/oeil/file.jsp?id=5666062>

10 http://www.ciaa.be/documents/press_releases/sme_pr_02072008.pdf

11 http://www.ciaa.be/documents/brochures/CPT00209E_Annex1.pdf

12 Information contained in this paragraph is based on an evidence search which is contained in Annex 1 where the sources of information are also clearly mentioned.

all of which are disproportionate. They also see the opportunity – through regulation or the development of a code of conduct – to deal with vertical relations between the large retailers and suppliers, particularly contractual arrangements, forms and terms of payment and the issues of compulsory contributions.

In the UK, the authorities did not want to take legal action after a first investigation in 2000 of the competition authorities found more than 50 buying power abuses that were possible as soon as a retailer had at least 8% market share. Rather a national code of practice was established in 2001. However, after a few years, it became evident that the code did not work because suppliers did not submit complaints since they were afraid to lose their outlets, and the code was not enforced. As a new 2-year investigation of the UK Competition Commission (published in April 2008) found the buyer power abusive practices had not disappeared so that a new code of conduct and the creation of an ombudsman was proposed to address the continuing problem. However, the UK supermarket chains strongly opposed the proposal to set up an ombudsman service.

1.4 Legislation particularly targeted at dealing with buyer power

In many Member States, legislation to address buyer power and related consumer concerns and unfair competition does not exist. This exercise has identified so far only the following EU member countries as having introduced legal measures to curb abuse of buyer power and abuse of dominance:

- 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.
- France has changed the Loi Galand (1996) into the Loi Dutreil (2005) and the Loi Chatel (2008) which prohibit the selling below the purchasing price (whose threshold has been lowered with every law) as well as legislate and limit particular buyer power practices such as extra payments not related to the products and rebates which cannot longer be paid without informing the supplier.
- Germany has introduced a number of different laws that address buyer power malpractices by supermarkets resulting from superior bargaining power without having to prove harm to the consumer (Act against restraints of competition, Unfair Trade Act).
- At the end of November 2008, "Hungary's farm ministry prepared a proposal to fine supermarkets and hypermarkets up to 2 billion forints (EUR 7.7 m) if they demonstrate unfair practices against suppliers." 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.
- In Italy, existing national law (and article 82 EC) against imposition of unfair prices and exploitation of "economic dependence" (section 9 of Law n. 192 of 18 June 1998) can deal with abuse of dominant bargaining position.
- On 13 March 2008, the Parliament of Latvia adopted a set of material amendments to the Latvian Competition Law to change, inter alia, the legal definition of a dominant position, and the introduction of a new concept of abuse of dominant position in retail markets over suppliers. 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."

- 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).
- Slovakia introduced a revised law on 'inadequate conditions in commercial relations' in 2008. This law targets abuses of buyer power and limits extra payments by suppliers to 3% of the annual sales of the supplied goods to individual retailers per calendar year – which was objected to by the European Commission (DG Internal Market).

1.5 Lack of EU wide rules

This exercise has indicated that in many EU countries, competition authorities are active on the issue of buyer power and related abusive practices. Even in countries with well-established competition authorities, regulation to counteract abuses of buyer power is sometimes inadequate, un-enforced or non-existent.

However, as the UK competition authorities found, the exercise of buyer power can have adverse effects on consumers. In the Final Report of its recent investigation into the UK groceries market, the UK Competition Commission (CC) found that "the transfer of excessive risk and unexpected costs by grocery retailers to their suppliers through various supply chain practices if unchecked will have an adverse effect on investment and innovation in the supply chain, and ultimately on consumers" (Final Report, 2008, Paragraph 3).

The EU might wish to assess whether existing legislation in member state countries which has addressed the problem (more or less) effectively could also be adopted at EU level. The experience of different EU countries would be a good basis to start an EU response to the issue of buyer power abusive practices. For instance, in the Netherlands there is discussion about the existing cartel law (based on European competition policy[13]) which prohibits cooperation arrangements between suppliers with over 5% of market share or Euro 40 million. However, two supermarket chains have more than 25% of market share and the 3 largest buying combinations in the Netherlands have a 73% market share (Albert Heijn, Superunie and TSN). This is a clear indication of an unlevel playing field while the EU cartel law should also apply to distributors.

Many EU countries provide no redress for affected producers, particularly if they are based outside of that country. EU-wide measures and rules could provide an avenue of redress for EU producers inside and outside a particular EU country. Common EU measures or rules could also save duplication

[13] Official Journal of the European Communities, Commission notice on agreements of minor importance which do not appreciably restrict competition under Article 81 (1) of the Treaty establishing the European Community (*de minimis)* (2001/C368/07), 22 December 2001.

for countries that do not wish to establish national level regulation, and provide a model law for countries that do.

The EU is a common market that needs common measures and rules to establish a level playing field, as far as is possible. The absence of even a minimal legal framework, common across the EU, is not good for competitiveness and the financial health of companies across Europe. Common rules are needed in order to dissuade supermarkets from re-locating to or buying from countries with weaker regulation on buyer power in order to gain competitive advantage. Without EU-wide laws and measures, supermarkets that operate across the EU in countries where rules are weak or non-existent will gain competitive advantage and the internal market will become weighted in favour of some operators over others. One example is Carrefour, which moved its headquarters to Switzerland when France tightened restrictions on buyer power. Also, products bought in a supermarket's home country can be freely transported across national borders and sold in outlets belonging to the same corporate body in other EU countries. The home country's law therefore becomes superimposed over other countries' laws, while the latter are rendered unenforceable.

A common framework would avoid continued fragmentation of the EU food market, promote an internal market and have a positive effect on the whole of the EU economy. However, in order to create such a framework, a thorough investigation in all the EU member states that looks into the EU trade aspects is needed to act as a sound basis from which to develop remedies.

2. Abusive buyer power is a common reality across most EU-member states

Notwithstanding national, European and international discussions about buyer power malpractices, this preliminary survey of evidence[14] has found that many buyer power problems, anti-competitive behaviour and malpractices by large supermarket chains continue in EU member states. Moreover, they are on the increase in countries where retailers are consolidating or have been taken over by foreign supermarket chains – for example, Italy, Hungary, Latvia, Lithuania and Slovakia.

The level of concentration among retailers plays an important role in making it possible for supermarkets to abuse their suppliers. Buyer power exists when, for like transactions, a supermarket can obtain from a supplier more favourable terms than other buyers. For instance, the biggest UK supermarket, Tesco, consistently paid suppliers 4% below the average price paid by other retailers. These more favourable terms do not just relate to price. The UK Competition Commission investigation in 2000 revealed that there was a strong link between a retailer's market share and its ability to exercise buyer power.

2.1 Concentration of large supermarket chains continues in EU member states[15]

While concentration among top supermarket chains might vary from country to country, concentration in some EU member states is very high, including in a few in Central and Eastern European countries. Available data also indicate that concentration in food retail has been growing in many EU member states and is likely to continue to grow in many countries where concentration is still low.

Because it is difficult or very costly (due to private data bases) to find comparable figures for all EU member states, the table below uses comparable, but not the most recent, figures of levels of concentration of large supermarkets. They are figures for 2005 and show the market shares of the top 5 retail chains ('CR5' ratios). In 2005, CR5 ratios were more than 50% in 17 countries, while some Mediterranean or Central and Eastern European countries had not reached this level of retail concentration.

Table: Market share of top 5 grocers in 25 EU member states (%) in 2005

Sweden	81.8%
Slovenia	81.6%
Ireland	81.4%
Denmark	80.7%
Estonia	78.8%
Belgium	77.4%
Lithuania	75.6%
Austria	74.2%
Luxembourg	71.6%
Germany	70.1%

[14] See Annex 2.
[15] Except otherwise indicated, information is based on EU member state evidence reported in Annex 2.

France	70.0%
Portugal	65.3%
Spain	65.2%
Netherlands	62.7%
United Kingdom	59.1%
Hungary	58.3%
Greece	46.4%
Slovakia	36.4%
Italy	35.3%
Czech Republic	35%
Latvia	32.6%
Poland	21.0%
Romania	19.2%
Bulgaria	17.8%

N.B. :figures for Cyprus and Malta lacking
Source: Global Retail Concentration – e-intelligence on global retailing, September 2006, p. 31.38, <www.planetretail.net>

Non convenience retailers often achieve a higher concentration in purchasing through buying alliances, that is, bargaining centres composed of various non-convenience or organised modern supermarket chains, who are organised through their own chain's purchasing groups. This is for instance the case in countries where retailer concentration is low. For example, in Italy, while CR5 was 35% in 2005, the market share for the five top buying alliance groups reached in the same year over 80%, spread relatively equally between the individual buying groups that each include a large supermarket chain.

Through this growing level of concentration, supermarkets have acquired substantial retail or seller power, which in turn has given them substantial buyer power. Analysts have observed a 'spiral of supermarket growth', in which retailers use economies of scale to lower costs and buying power to lower prices and attract more customers. This expands their market share and increases their margins, resulting in raising barriers to entry and/or expansion for competitors. The result is in increased buyer power, even lower costs and higher market share and so on, until the retail sector becomes dominated by a small number of firms.[16] Experts also refer to this situation as a virtuous circle and collective dominance.[17]

Observers also point out that firms can exercise buyer power with substantially lower market share than they need to exert seller power.[18] The UK Competition Commission 2000 inquiry into the UK grocery market[19] concluded that supermarkets "with more than an 8 per cent share of grocery purchases for resale from its stores […] are, for the most part, able to control their relationships with suppliers to their own advantage, whilst the smaller multiples are not able to do so to anywhere near the same extent."[20] 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 [dominant retailing] 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."[21] This is far lower than the 25% market share that is commonly recognised as being needed by a firm to exert seller power.

[16] Burt and Sparks, 2003, 'Power and competition in the UK retail market' *British Journal of Management*, 14 (3) 237-254
[17] For instance by P. Dobson, "Supermarket buyer power: What should the European Commission do?", at the Seminar at the European Parliament, Brussels, 14 May 2008.
[18] B. Vorley, Food, Inc: corporate concentration from farm to consumer', London (UK Food Group), 2003.
[19] Supermarkets, CC, October 2000, http://www.competition-commission.org.uk/rep_pub/reports/2000/446super.htm#full
[20] Supermarkets - Conclusions, CC, October 2000p. 97-98, paragr. 2458.
[21] Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom - Summary, CC, October 2000,

Buyer power results from the supermarket concentration and domination of outlets for food producers who can become dependent on these supermarkets to sell their products. Already in 2004, supermarkets (including hypermarkets and discounters) were responsible for more than 60% of fruit and vegetables sales in France, Germany and the Netherlands.[22] In Nordic countries, supermarkets account for 80-90% of retail food sales. In another example, in 2000, the top five supermarkets accounted for an average of 65.5 % of UK sales for a group of large suppliers.[23] In Austria, competition authorities concluded that suppliers are highly dependent (in some sectors more than in others) on the outlets of the leading supermarkets since there was no viable alternative distribution channels for significant sale volumes. In Slovakia, although the CR5 concentration level was still very low in 2005 (36.4%) large supermarkets were claimed to control 70% to 90% of the food markets in Slovakia in 2008, so that suppliers have become dependent on large supermarkets or their local competitors who imitate the foreign large retailer practices. The threat of no longer being able to supply supermarkets makes suppliers vulnerable during bargaining over prices, delivery conditions or abusive practices. This may be of less concern to large brand manufacturers which produce "must-stock" products that customers expect to be on the shelves, but fresh (agricultural) product producers who need rapid sales after production, and SMEs who struggle to fulfil the quantity and other demands of large retailers are more vulnerable.

The ability by supermarkets to exert abusive buyer power is enhanced (1) by removal of import barriers and the possibility of replacing European products with cheaper imports, (2) sometimes by oversupply, and (3) by the introduction of private labels (see below).

2.2 Evidence of buyer power malpractice in many EU member states

The dominant position of many retail chains has allowed them to impose conditions and standards of delivery to their suppliers who have little choice but to accept them for fear of loosing their main outlet. While some retailers' requirements relate to health and safety or other quality requirements which can improve the quality offered to consumers, this preliminary survey of evidence found that supermarkets have abused their dominant position that results in losses and harm to suppliers.

2.2.1 Abusive buyer power practices towards suppliers [24]

Competition authorities, suppliers or the media have identified abusive practices in at least 17 EU member states. Research for this report shows this was the case in the Nordic countries (Denmark, Finland, Sweden), Austria, Belgium, France, Germany, Italy, Ireland, Hungary, Latvia, the Netherlands, Poland, Romania, Slovakia, Spain, and the UK. In Annex 2, abusive practices found in these countries are described per country and references below to such practices in EU member countries can be found in Annex 2 under the relevant country, where the source of information is clearly mentioned.

Buyer power practices are considered abusive when they squeeze suppliers' income and margins to such an extent that suppliers' have little bargaining power nor means of defence or redress. As a

<http://www.competition-commission.org.uk/rep_pub/reports/2000/446super.htm#full>

[22] M. Vander Stichele, S. van der Wal, J. Oldenziel, Who reaps the Fruit. SOMO, June, 2006, p. 43-48, <http://www.somo.nl/html/paginas/pdf/Who_reaps_the_fruit_june_2006_EN.pdf>

[23] Economic Note on UK Grocery Retailing, produced by Food and Drink Economics Branch - Defra, May 2006, p. 18; Supermarkets- Conclusions, CC, October 2000, Paragraph 2453- 2459, <http://www.competition-commission.org.uk/rep_pub/reports/2000/446super.htm#full>;

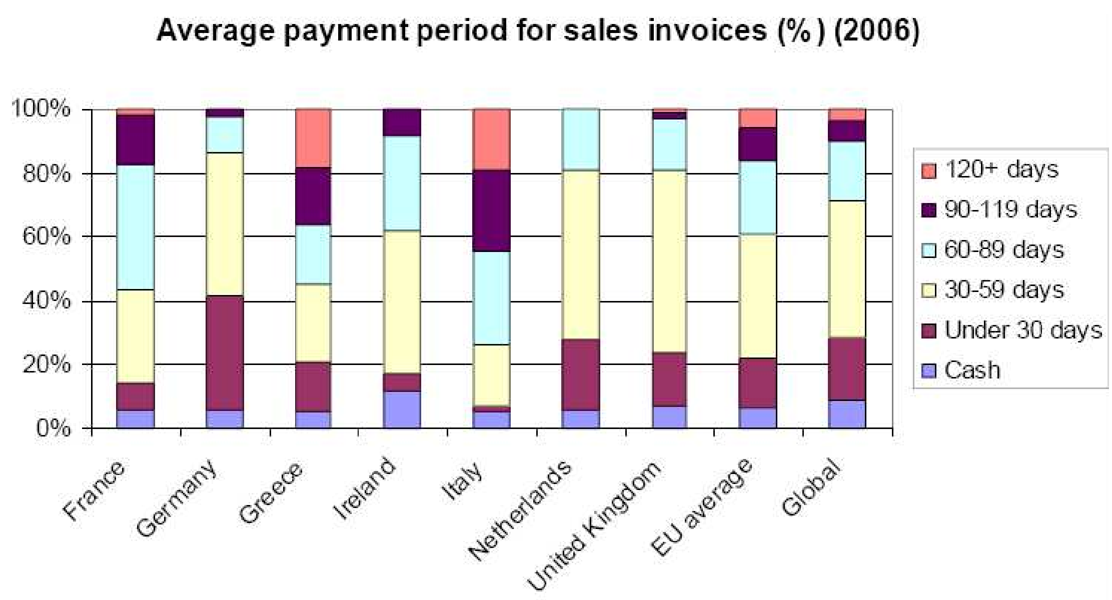
[24] Except otherwise mentioned, all examples from countries are mentioned with their source of information in Annex 2.

result of abusive buying practices, suppliers' income has become unpredictable and suppliers have to bear excessive risks. Meanwhile supermarkets' income increases and their risks are diminished.

The number of specific buyer power malpractices that retailers could engage in is potentially limitless. The following list presents some of the abusive practices of buyer power identified in EU member states, but is by no means exhaustive:

- **Listing fees and slotting allowances for shelf space**: Supermarkets have been imposing conditions on suppliers to get their product on the shelves. These include listing fees by which suppliers are required to make annual lump sum payments to be on a list of (potential) suppliers, or to gain access to supermarket shelf space. Increasing listing fees have been reported in the Nordic countries by the competition authorities, and in Italy. Such practices have also been reported in: France, Hungary, Ireland, Italy (where shelf wars have been reported), Latvia (where additional allowances are paid to locate products in end-of-aisle displays), Romania, Slovakia, and the UK.
- **Delisting**: When suppliers refuse to reduce prices or make other payments and concessions supermarkets have been threatening (and actually carrying out the threat) not to deal with them any more. These 'delisting' practices were revealed in Germany during an investigation by the competition authorities and in Italy by meat suppliers. Research for this document has discovered a letter from a supermarket in Italy belonging to the Auchan chain containing such threats. A similar letter has also been mentioned in the media in Poland. In Slovakia in 2008, Metro and Kaufman required, under threat of delisting, that their suppliers provide a declaration that their relationship is advantageous for both sides and that there is no dependency by the suppliers but a voluntary relationship.
- **Imposing very low prices** on suppliers through abusive negotiations, seriously eroding profit margins of suppliers. For instance, Leclerc in France was in February 2009 accused by an official Commission (la Commission d'examen des pratiques commerciales (CEPC)) to propose contracts that cannot be changed while proposing very low prices, with guarantees of 25% margins to Leclerc, no matter what the selling price would be. Paying very low prices can include deep discounting and can result in producers making little or no profit, or even losses, while prices to consumers are much higher. Low prices to suppliers are a complaint in all countries where buyer power problems have been reported.
- **Demanding extra or unexpected payments by suppliers** –sometimes without consent of the suppliers – for costs and 'services' made by retailers such as for advertisements, promotions, new store openings, remodelling of stores, use of packing boxes, etc. These practices were reported among others in Austria, the Nordic countries, France, Germany, Hungary, Ireland, Italy, Latvia, Romania, Slovakia, and the UK. In Belgium, total promotional repayments to the consumer through vouchers providing a price cut amounted to more than 100 million Euro in 2008, and was paid by the suppliers. In 2006, Delhaize's promotion stunt to offer a free product of one Euro was paid by suppliers who could, however, no longer bear the costs.
- **Retro-active payments and extra discounts**, **and after-sale rebates** ("marges arrière" in French): After sales have been made, often at the end of the year, supermarkets have been deducting a percentage of the total sales it made from products of a particular supplier from the total sum that needs to be paid to the supplier for that year. This is often done in a non-transparent way or without agreement from the supplier. In France, it was done without the suppliers' consent until a new law made it compulsory to inform the supplier. Practices of after-sales rebates were revealed by the German competition authorities and the Italian food industry who argue that it was done without negotiation. They are also practised in Latvia and the UK. These retro-active payments make arrangements between retailers and suppliers unreliable in a way which disadvantages the supplier, who is not sure how much income and profit for investment will be available.

- **Below cost selling** : Supermarkets have been selling products below the price of production or purchasing. This is considered a particularly abusive form of buyer power because it puts suppliers' profits under high pressure, and because other buyers might demand the same low prices. The UK Association of Convenience Stores (ACS) provided examples to the UK Competition Commission of below-cost selling by supermarkets of alcohol at Christmas and of Easter Eggs at Easter. The practice of below cost selling is being discussed in the Netherlands and Slovakia, and selling under the purchasing price has been forbidden in France. The practice of below cost selling includes the practice of "loss leading", i.e. selling a product that attracts customers, often a popular fresh food item such as bananas in the UK and milk in the Netherlands, under the production or purchasing price, and paying the supplier very low prices. In February 2007, the Irish Farmers Association accused large supermarket chains of forcing Irish vegetable growers out of business by paying below cost prices.
- Supermarkets have been **returning unsold units** to suppliers who are not paid for the returned produce, including fresh food that cannot be resold. This practice was reported in Latvia and Slovakia.
- **Late payments** for products already delivered and sold to customers: Supermarkets have not been paying suppliers immediately after customers had paid for their products in the stores. Supermarkets have often used the money from customers to invest with profit (e.g. get interest from the bank) before paying the supplier. Late payments in France are a continuing practice that in the past provided more income to supermarkets than the profit margins from selling products. In the Nordic countries, competition authorities noted longer periods before farmers were being paid. In Hungary, farmers protested in November 2008 against late payments by the major grocery retailers including Tesco. Late payments are a serious problem in Italy too, and have also been denounced in Slovakia. The UK competition authorities discovered delays of payments to suppliers outside agreed contractual periods, or by more than 30 days from the date of invoice, where deliveries had been made to the retailer's specification.



Source: IBOS, Grand Thorton

- A practice that was reported by the UK competition authorities was the requirement by supermarkets to suppliers to compensate when the retailer's profits from a product were less than it expected.

- The UK competition authorities reported retrospective changes to agreed prices or quantities, re-enforced in some cases by the absence of written contracts, without compensation to the supplier.

2.2.2 Farmers' protests

Some research, such as that by the Austrian and Nordic competition authorities and the Dutch studies investigating the retailer-farmer relationship in The Netherlands, have indicated that farmers are especially vulnerable to buyer power. The UK competition authorities mentioned that the impact of abusive buyer power practices "may be felt not only among immediate suppliers to grocery retailers, but also by those further upstream. In particular, increasing buyer power on the part of grocery retailers and intermediaries may facilitate the adoption of various purchasing practices that shift risks and costs to primary producers." In various EU member states, farmers -in particular those producing meat, poultry, diary, vegetables and fruit- have been organizing public protests against the low prices they receive and supermarket demands which are difficult to meet for smaller farmers. In the Nordic countries, supermarkets are only interested in those farmer's who can deliver the packaging and cover the cost of trading with other farmers to secure safe and stable supplies to the supermarkets. In Hungary, dairy, poultry and meat producers staged protests and held road blocs outside supermarket warehouse facilities in November 2008 against the purchasing and payment terms of the country's major grocery retailers. The Hungarian poultry association argued that the international retailers "often reclaim as much as 40-45 percent of farm gate payments as various fees and service charges". In the Netherlands, different studies show that income and profit margins of fruit and vegetable growers, dairy and pork farmers are very low while the profit margins of retailers and processors are higher, and the retailers were able to determine the prices. In Poland, producers of poultry, meat, processed fruit and vegetables, fish and others were requested in a letter by Tesco [25] in November 2008 to cut prices by 5-20 %, sometimes with threats not to take the produce any more. A poultry company argued that price cuts of by 5-20 % were impossible since the profit margins were already close to zero in the sector – which was echoed by other producers. Tesco's demands were clearly part of a strategy to compete with discount retailers in Poland such as Lidl and Biedronka.

Milk farmers especially have been complaining. Milk might be constantly used as a "loss leader" in different countries like the Netherlands.[26] In 2007, Campina, the second largest dairy cooperation in the Netherlands, wanted to increase the milk price by 5%, but Campina claimed that the power to determine the price was in the hands of the retailers. Compared to 2006, the cooperation suffered a loss of 37 % in 2007. In 2008, Austrian dairy farmers' protested against dairy price cuts. In Ireland, the Irish Farmers Association campaigned in early 2008 against supermarkets, accusing them of "using food as a loss leader, selling below the cost of production, and putting the livelihood of farmers at risk." In Belgium in 2004, Delhaize used milk price cuts to gain market share back from discounters Aldi and Lidl. In October 2008, milk farmers in Northern France blocked milk processing companies after the latter had reduced their prices. Also other farmers' actions have taken place in France protesting against low milk prices and rebates, which are suspected to cross-subsidise other products on sale in the supermarket.

Farmers often argue that the farm gate prices they receive are too low compared with the much higher prices consumers pay on supermarket shelves. Protests on such issues took place in Belgium in 2008

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[25] "Due to the deepening financial crisis, dropping prices of materials (milk, grain, oil, vegetable and fruit), increased price aggressiveness of discount stores (Lidl, Biedronka), and our willingness to provide competitive offers to our customers, we are forced to lower purchasing prices and improve commercial terms in 2009," said the letter sent by Tesco to a poultry company.

[26] F. Kremer. Het boodschappenbolwerk – Macht en onmacht van de Nederlandse supermarkt, Amsterdam, 2008, p 21.

and the authorities responded with a price forming monitoring system. In France, the French consumer organisation UFC-Que choisir published a research report in January 2009, indicating that the large differences between the farm gate prices for beef, pork and chicken, and consumer prices are caused by high margins by retailers. While supermarket prices to the consumer had increased considerably for these products between 1990 and 2008, farm gate prices had fallen or not increased as much over the same period, with indications that lower price were not transmitted to the consumers. This investigation by the consumer organisation UFC-Que choisir concluded that supermarkets, not processors or farmers, had taken the benefits of the increasing prices. For instance, beef prices to consumers had gone up by 50% between 1990 and 2008 while farm prices for beef/animal prices had declined by 15%. During the same period, consumer prices for chicken increased by 40% and pork by 26% while agricultural prices declined 7% and 30% respectively.

In Ireland, farmers protested in October 2008 in order to highlight to the consumer the difference in pricing between what the farmers were getting and what the consumer was paying. The supermarket price for "[t]wo legs of lamb is the equivalent to what a farmer is getting for a whole lamb. The price of lamb is dropping all the time". Also the decreasing number of fresh vegetable growers in the North Dublin area in 2007 was blamed on the supermarkets paying prices which were too low compared to the retail prices to consumers. In 2008, Spanish farmers organised campaigns, actions and a massive demonstration in Madrid to protest against the very low prices they receive and the very large differences between the prices they are being paid and the prices the consumers pay for their produce in the supermarket. They argue that in general the money received by farmers is not more than 25% of the retail price. Indeed, the price difference between the consumer prices at large retailers and farmers are, on average, bigger than 400% as their price monitoring research has shown.

2.2.3 Anti-competitive behaviour

Some buying practices and requirements by large supermarkets are not always directly abusive towards their suppliers but make the market very oligopolistic and result in anti-competitve behaviour in the markets more broadly.

Examples of such anti-competitive supermarket practices and behaviour are:

- **Supermarkets only wanting to have one, or very few, suppliers in a (sub)-category**: This is the case for the largest Dutch retailer (Albert Heijn who is supplied by Bakker Barendrecht) and the Nordic supermarkets who also try and stop farmers 'holding up' supplies and demanding their own prices. Another practice, uncovered by the UK competition authorities, was the requirement that only one company would supply a particular product, other than the retailer's own-label. This was confirmed by a lobby note circulated to MPs by the UK supermarket Sainsbury's, which shows that Sainsbury changed from an arrangement of 2 suppliers to a "solus supply" arrangement whereby one of the two suppliers would cease to supply that product, after an assessment process by Sainsbury decided which supplier would be the "solus" supplier.
- Applying **exclusive category management practices** whereby one supplier is chosen by the retailer to decide which other producers can be suppliers within the same category. This practice was especially prevalent in the UK as discovered by the competition authorities there.
- **Vertical restraints and foreclosure of supplies:** In Romania, food [producer] groups complained in March 2008 about supermarket contract conditions that did not allow producers and manufacturers to supply other shops at cheaper prices. The UK Association of Convenience Stores provided evidence to the UK Competition Commission that, under supermarket pressure, convenience retailers were denied supplies of Coca-Cola packaged in football-shaped containers during the World Cup 2006.
- **"Minus margins" practices** whereby the suppliers of a supermarket are not allowed to supply another supermarket at a higher price. For instance, in February 2009 the Leclerc buying group

in France was accused by an official Commission (la Commission d'examen des pratiques commerciales (CEPC)) of forcing suppliers who also supplied Lidl to reduce their prices. In addition, Leclerc was denounced for proposing contracts that could not be changed but that contained guarantees of 25% margins to supermarket Leclerc while prices would always have to be lower than the competing supermarkets whatever the selling price.

- When retailers deliberately mislead consumers by offering discounts on a few products while recouping their losses on other, less visible products, this leads to undue competition. These practices have been uncovered in the UK and the Netherlands. These practices solely exist to maximise supermarkets' profits and take market share from their competitors, not to serve the consumer.

2.2.4 The costs to suppliers of buyer power malpractice

In the UK, the 2000 CC enquiry found 52 types of buyer power malpractice. In France, supermarkets have been used in total more than 500 reasons to require suppliers to make extra payments. These extra payments required by French retailers in some food sectors can reach up to 70% of the value of goods supplied. Already in 2003, it was already officially reported by the Minister of trade and SMEs, R. Dutreil, that extra payments in the form rebates had been increasing annually 2 to 3% and could reach 30 to 50% of the invoiced price while the value of the services paid to retailers is not as high. This was considered at the detriment of supplying SMEs who are not in a good bargaining position with retailers. One manufacturer of soaps and shampoos calculated that the extra payments he made to supermarkets annually was equal to the price of a new factory every year. In Italy, one estimation of the costs to a supplier to be present throughout a modern retail network (22,00 sales outlets) are a minimum of €7.6 million and a maximum of €33 million.[27] In 2009, the cost of extra payments to suppliers in Italy was estimated to be 30% of their revenues. In Slovakia, the extra fees to be paid to retailers by suppliers are claimed to reach between 4% and 19% of suppliers' revenues.

As well as farmers, food processors have also suffered losses in some countries. In France, the dominant position of large retailers has clearly led to a reduction in the number of food companies. Small and medium sized enterprises (SMEs) are more vulnerable to buyer power than large brand manufacturers and manufacturers of 'must-stock-products. The Austrian competition authorities concluded that 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. According to the Nordic competition authorities, small suppliers suffer from the high volume requirements by retailers who can easily replace them by larger suppliers. German competition authorities recognised, in 2008, that the situation in the retail sector was such that the remaining small suppliers were not expected to expand their market share nor new competitors be able to enter the market and change the bargaining position of the market leader. In Italy, meat producing SMEs have been protesting against buyer power abuses which they consider unfairly undermine their livelihood.

The prices and incomes of large brand companies are reportedly also under pressure by buyer power practices. In Belgium, Delhaize announced in February 2009 it would remove 50 brand products of Unilever because of demands by Unilever for higher prices and better promotion conditions. In the Netherlands, the Association of Food Manufacturers complained about receiving lower prices due to buyer power which was used to wage a ´price war´ among supermarkets in 2003-2005. It warned that these reduced investments in innovation and would result in job losses. Indeed, Unilever closed some of its factories in the Netherlands in 2007. In the UK, there are different views as to whether the supply side had shrunk as a result of supermarkets' buying practices. The Competition Commission did not think this was the case while the Department for Environment, Food and Rural Affairs observed that

[27] Il sole 24 ore, 10 October 2006.

there is high concentration in the food and drink manufacturing industry and there has been a net exit from the sector in the past decade [before 2000].

2.3 Buyer power harms consumer interests

The use of buyer power, even where it abuses suppliers, appears to have benefited consumers because it has resulted lower prices. However, in France, since prices of rebates increase annually, the suppliers had to ask for higher prices which were then reflected by higher prices in the retail stores. In 2003, the consumer organisation UFC-Que choisir indicated ever higher prices. This was considered to be the result of increasing rebates and non-transparent agreements between the large retailers and large industrial suppliers who were able to continue to negotiate prices that are beneficial to the large manufacturers while paying more to the retailers.
Also, diversity of goods has not always expanded, or has happened only during a first phase and not in all categories. For instance the diversity of fruit might have increased while some traditional canned or frozen vegetables might have disappeared. In Slovakia, when western European supermarkets entered, there was more choice than before (e.g. more imported food). Later, the choice became more limited and some Slovak products have disappeared from the shelves.
In addition, while the purchasing power of customers might be expanded through lower prices, there is little discussion about the decreasing purchasing power of farmers, workers and employees in the food sector whose income is being squeezed through abuse of buyer power.

In the long run, these bad practices towards suppliers can have adverse effects on consumers too. Such terms and conditions, taken together, result in minimised returns and uncertainty to suppliers. This limits their ability to plan and invest in new products and/or in quality improvements. Research in Germany from 1992 to 2006 showed that expenditure on innovation in relation to turnover in the food sector had decreased and had stayed almost constant since 2002.

Supermarkets not only squeeze prices but also impose many onerous and costly conditions of supply (delivery timing, large quantities), as well as often high private standards (hygiene, health safety, traceability) on top of official standards. This results in more and more suppliers unable to meet the conditions so that they have to resort to mergers and acquisitions, or to bankruptcy. The Nordic competition authorities concluded that this resulted in “fewer opportunities for food suppliers to get their products on the shelves”. In Italy, the shelf wars and high listing fees are making the entry into supermarkets very costly and difficult for small suppliers. This reduces competition among suppliers, reduces the number of suppliers and reduces the choice to consumers. In the long run, the lack of competition among supermarkets and among suppliers can easily lead to higher prices for consumers. As the 2008 UK Competition Commission report stated “the transfer of excessive risk and unexpected costs by grocery retailers to their suppliers through various supply chain practices if unchecked will have an adverse effect on investment and innovation in the supply chain, and ultimately on consumers” (Final Report, Paragraph 3).
The Nordic competition authorities concluded that Nordic consumers have a much narrower choice of food, and more uniformity of choice across their supermarkets partly because of the concentration in the wholesale, retail and food industry, and the increase of hard discounters. “Also, all supermarkets belonging to the same marketing chain offer nearly the same range of products….One reason behind the high food prices and the narrower food supply seems to be the high concentration on both supply and retail level in the Nordic region.” The transfer excessive risks to suppliers by supermarkets such as unexpected special payments for promotions, rebates at the end of the year, the free-of-charge return of unsold goods, are also onerous to suppliers.

There remain many questions, which might be answered in different ways in different countries, whether the lower prices to suppliers are being passed on to the consumers. In France, for instance, the consumer organisation UFC-Que Choisir noted that farm gate prices went down over the period

1990-2008 while the consumer prices went up over the same period. In Italy, research shows that consumers have had to pay relatively higher prices compared to the increase of production prices.[28] Over the period 1995-2006, the trend for production prices in the food industry confirms a slower rate of increase (+12.2%) compared to retail prices (+22.1%) and to inflation (+27.8%) in Italy. In the UK, it remains questionable whether consumers enjoy much price dispersion in what they wish to buy. An exercise by ACS, comparing some 300 product prices across three major supermarkets in the first Quarter of 2007, found that over 70% of items showed price dispersion of under 3%. There are different reasons why supermarkets might not pass the profits from lower supplier prices to consumers, for instance they might use the high profits to pay for their expansion worldwide in order to remain competitive and continue to make higher profits for their shareholders.

2.4 The need for an EU approach

The European Commission has stated it intends to look into the relationship between retailers and producers within the context of its new policy on food prices[29] and an improved functioning of the food supply chain. In this context the EC declared that "practices which distort the relationship between suppliers and retailers should be discouraged. This is for example the case for late payments, unjustified or excessive fees paid by suppliers for services provided by retailers or tempting consumers with misleading offers." Regarding behaviour of retailers towards suppliers, the EC also identifies a non-exhaustive list of practices to be considered such as buying alliances and purchasing agreements, private labels and exclusive supply agreements. The EC wants to ensure that the integration and consolidation of sectors along the food supply chain go hand in hand with fair earnings of agricultural producers, competitive prices and improved competitiveness of the food processing industry as well as greater choice, better affordability and higher quality of food products for European consumers."

An approach at the EU level towards buyer power problems that distort relations between suppliers and retailers is to be welcomed as a necessary complement for efforts by some EU member states to deal with the problem. While buyer power problems arise and increase in many EU countries, many do not have adequate national regulation to counteract abuses of buyer power,[30] nor do they provide avenues of redress for affected producers, particularly if they're based outside that country. An EU wide investigation of abusive buyer power practices would be able to establish in a comparable way the problems facing many suppliers and authorities while taking into account the diversity of the situation in different countries. An EU wide investigation would also identify where cross-border aspects are playing an important role (see also below: buying groups).

An EU wide investigation should be the basis on which EU-wide solutions could be identified. For instance, the EU could develop common measures or rules as a way to ensure that the EU retail market does not collectively erect barriers to entry or expansion by small retailers and wholesalers, and to small food companies through buyer power behaviour. Also, the EU, with member states, might need to assess whether the existing legislation at the EU level is sufficient against buyer power problems. The experience of the different EU countries would be a good basis to start an EU approach to the issue of buyer power abuses and its negative impacts on consumers, and to examine whether existing legislation in member states could be adopted at EU level. It should be noted that bargaining positions in the food supply chain have been changing recently and have not yet been taken into account during the drafting of the current EU Treaty and its competition laws.

[28] Source: Analysis by Federalimentare on data issued by ISTAT (Italian National Statistics Office).
[29] Commission of the European Communities, Food prices in Europe, Communication COM (2008) 821/4, Brussels, 10 December 2008, p. 10-12.
[30] In particular the newly acceded states, which it seems are being hit hardest by supermarket buyer power.

3. Private labels increase buyer power and can have anti-competitive effects

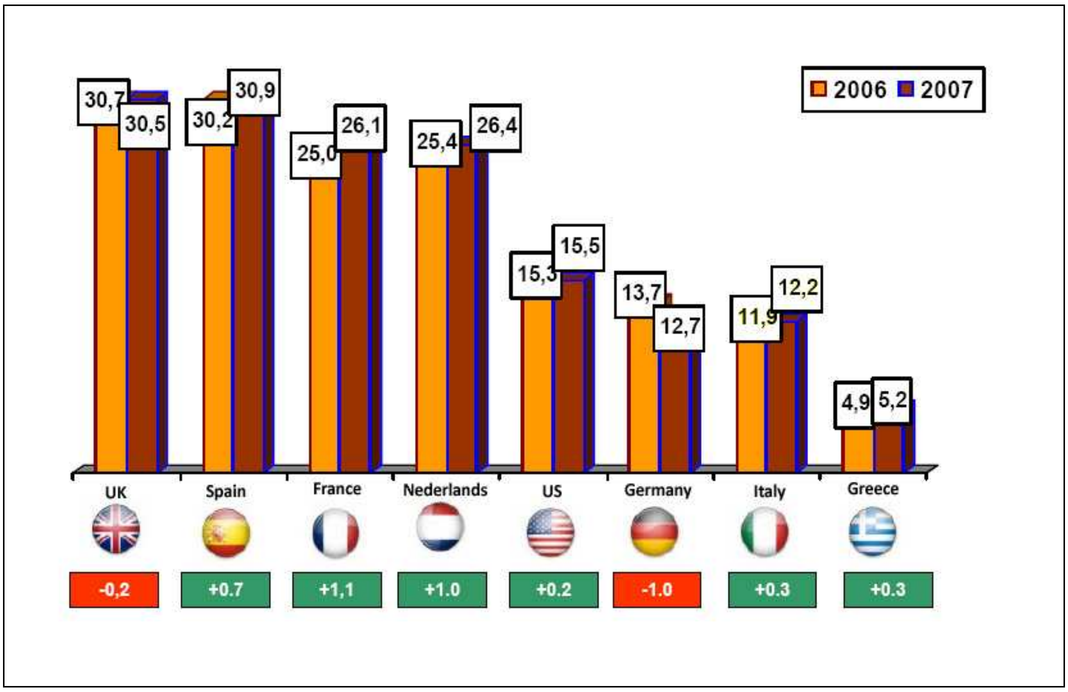
Private labels, sometimes referred to as house brands or own labels, are a relatively new phenomenon for competition policy authorities. The market share of private label products is growing rapidly in EU member countries. The growth of private labels is an important element in the changed relationship between retailers and food suppliers, the growing buyer power of supermarket chains and their ability to pressure suppliers to meet their demands. Indeed, supermarkets can replace suppliers' branded products by private labels and decide what is being put on their shelves, which gives them the power to threaten to replace the suppliers' products by their own private labels. By increasingly replacing branded products with private labels, the interests of consumers and small independent stores are also affected. The information below summarises evidence about the use and impact of private labels in EU countries. Further detail and sources of the information can be found in Annex 3.

3.1 The growing trend of private labels

This exercise has revealed that supermarket private labels are on the increase in many EU countries where large retail chains are operating, such as Belgium, Denmark, Finland and Sweden, France, Germany, Greece, Hungary, Italy, the Netherlands, and the UK.

The rapid growth of private labels has been reported in many studies[31]. The table below is one example of the trends over the recent period.

Table : Trend of private label presence in some EU countries and US

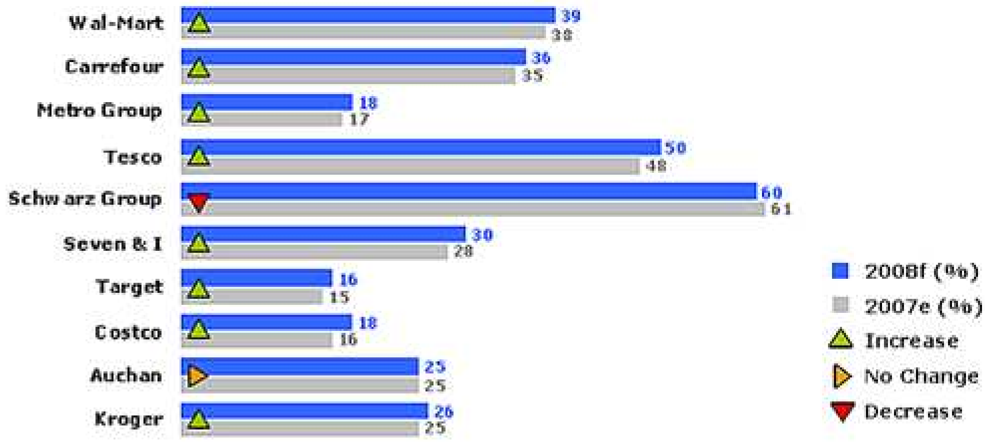


Source IRI, Information Resources Europe, December 2008

[31] See for instant reports of IRI, Planet Retail and AC Nielsen, such as ACNielsen: A review of growth trends around the world 2003 and 2005, quoted in “Nordic food markets – a taste for competition”, report from the Nordic competition authorities, November 2005, Chapter 5.4, <http://www.ks.dk/en/service-menu/publications/publication-file/publikationer-2005/3/nordic-food-markets-5-competition-for-the-store-shelves/#fn67>

In a recent study[32], Nielsen indicates that the market share of private labels is high in those countries around the world where a high volume of retail sales is concentrated among a few large retailers. Apart from discounters like Aldi and Lidl, private labels are a significant share of the sales some major retail chains (see table).

Top 10 Retailers: Private Label Penetration Change in Share of Sales, 2007e-2008f (%)



Note: Ranked by percentages; * - excludes pharmacy; f - forecast; e – estimate.
Source: Planet Retail Ltd - www.planetretail.net quoted in Planet Retail, Economic downturn spurs on sophisticated private labelling, Press release, 11 February 2009

Given the increasing range of products, variety in quality, and prices of private label products, customers are increasingly willing to buy private labels, as for instance a questionnaire in Belgium 2009 established. Indeed, diverse private labels formats have been developed by several retailer chains and offered in the same store ranging from cheap products, to premium products, healthy and wellness products and organic or ethical products.[33]

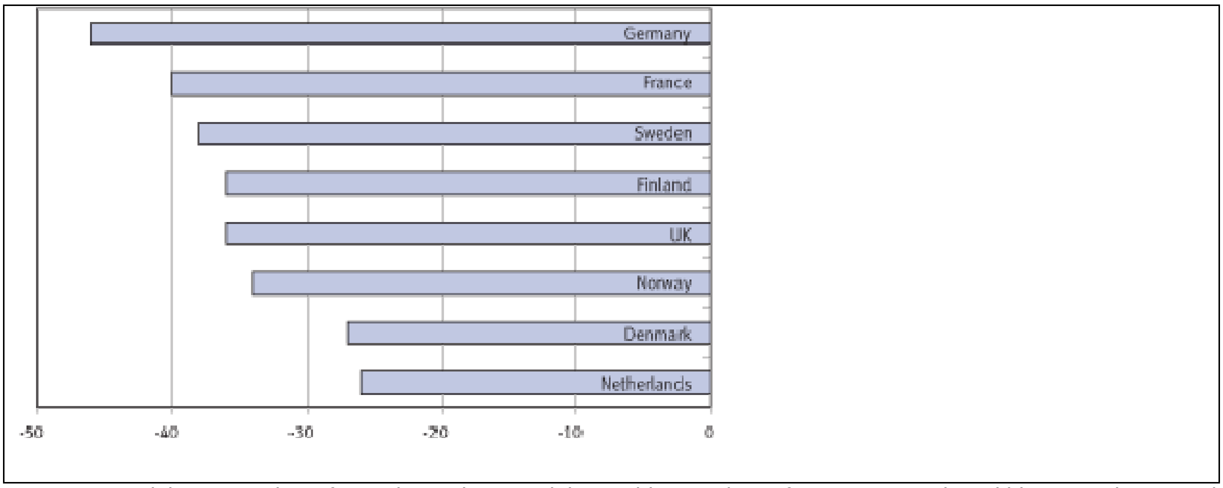
Due to the economic downturn and decreasing purchasing power of customers, private labels are expected to continue to grow significantly.[34]

3.2 How private labels disadvantage suppliers, especially food SMEs

The growth of private labels is a deliberate and central strategy by large supermarket chains in response to their price cutting rivals, i.e. discounters some of whom only use private labels to keep prices low.[35] Indeed, private label products are often significantly cheaper than branded products as the table below indicates, together with evidence found in countries like Belgium, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Sweden and the UK.

[32] Nielsen, What is hot around the globe: Insights on food and beverage categories, 18 June 2008, p. 25.
[33] IRI, Times and trends Special Report. US and EU private label 2008 – Tapping market potential through retail branding, 2008, < http://us.infores.com/portals/0/articlePdfs/TT_October_2008_Private_Label_USEU_web.pdf>
[34] Planet Retail, Economic downturn spurs on sophisticated private labeling, Press release, 11 February 2009, <http://www.planetretail.net/PressRelease.aspx?NewsItemID=48444>
[35] "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/>

Table : Price differential between private label and manufacturing brands by country



Source: ACNielsen: A review of growth trends around the world, 2005 (Data from 80 categories within 14 product areas) quoted in “Nordic food markets – a taste for competition”, report from the Nordic competition authorities, November 2005, Chapter 5.4, http://www.ks.dk/en/service-menu/publications/publication-file/publikationer-2005/3/nordic-food-markets-5-competition-for-the-store-shelves/#fn67

Private labels can be produced and sold more cheaply because they are not subject to listing fees and other extra payments. When private labels are “copy cats” of branded products (e.g. in the UK and in the Netherlands) they do no have to meet the costs of developing the product and for advertisements. Supermarkets can also pressure their private label suppliers to produce at very low prices. In Germany[36], the competition authorities recognized that private label producers can be easily de-listed as the consumers are not aware of who produces them. Producers of private labels are vulnerable to becoming economically dependent on their major retail customers, leaving them open to severe bargaining pressure arising from supermarkets retail *and* buyer power. The lack of a clear and visible indication of the producer on the packaging of private labels gives retailers an enormous contractual power in its dealings with companies that, as they no longer have any knowledge of or loyalty relationship with the consumer, they can be replaced at any time, including by non-EU producers. The EC[37] argues that “while private labels products provide opportunities for their producers to have access to a large customer base, they may also reinforce their dependency towards a particular retailer”. While some private label producers are actually brand manufacturers, in Germany[38], this is not a popular option: when they asked suppliers whether it would be a viable option to produce private labels instead of branded products, when faced with unacceptable retailer demands or threats of de-listing, 72 suppliers responded “no” while 10 said “yes”.

Private labels are also used in the fresh food and ready-made meals sectors, by which retailers respond to increasing demands for convenience food. This means that processors and also farmers can be put under pressure to lower prices, in the same way as explained above.

Supermarkets are able to promote their own label products by using their decision-making power on where to put private labels on the shelves. In the Netherlands and Italy for instance, supermarkets decided to influence customers by putting private labels at eye level while moving branded products to the lower shelves which are more difficult to see and to reach. Brand producers had to offer big price cuts to win customers back. The increasing amount of private labels resulted in lost shelve place for branded products as reported in the Netherlands and Italy. In France and the UK, private label

[36] Bundeskartellamt, Beschluss in der Verwaltungsverfahren B 2 – 333/07, 30 June 2008. p. 97; Oxfam Deutschland, Entscheidung des Bundeskartellamtes im Fusionsverfahren Edeka-Plus(B 2 – 333/07), Press information, [July 2008].

[37] Commission of the European Communities, “The functioning of the food supply chain and its effects on food prices” – Commission staff working document SEC (2008) 2972, Brussels 9th December 2008, p. 32.

[38] Bundeskartellamt, Beschluss in der Verwaltungsverfahren B 2 – 333/07, 30 June 2008. p. 97; Oxfam Deutschland, Entscheidung des Bundeskartellamtes im Fusionsverfahren Edeka-Plus(B 2 – 333/07), Press information, [July 2008].

products of supermarkets have increasingly been sold in convenience stores belonging to large supermarket chains. However, in France, private label products also replace branded products outside the retailer stores to whom the private labels belong, such as in small independent convenience stores as well as in other retailer chains: thus Casino private label products have been on sale in Spar stores.

As a consequence, the growth of private labels has occurred at the expense of branded products since private labels often replace manufacturers' brands, as reported in Denmark, France, Italy, the Netherlands, Sweden and the UK. In Sweden and Italy, the surge in retail labels within the food industry resulted in changing power structures. Meat producers in Italy have faced the problem recently, as a consequence of the development of pre-packed products. In Sweden, meat packers faced more competition among themselves due to reductions in shelf space in order to make room for private labels.

The EC[39] argues that while private labels "widen the range of available products and thus represent an additional source of competition, they may lead to foreclosure effects as suppliers of branded products become a direct competitor to the retailer".

Supermarkets are abusing their position as retailers to compete with brands as producers/distributors of private labels when they practice "switching campaigns" in order to encourage shoppers to switch from branded goods to own label goods. Such practices have been adopted by Ahold in the Netherlands through in-store tasting sessions in the UK by Tesco.com (Tesco's on-line shopping service) which invited online shoppers to seek "cheaper alternatives" when they select branded goods, and by J Sainsbury (the third largest UK supermarket group) which had in-store displays, leaflets etc inviting shoppers to "Switch to Sainsbury's own brand and save", with the tagline "Big brand quality or your money back". In Italy, Coop (which is the biggest retailer) and Conad (the second largest group) promote their private label with huge advertising campaign (both on TV and on newspaper) pointing out quality and convenience.

The rapid growth in private labels that resulted in a reduced number of outlets for branded goods and other suppliers and restriction of in-store inter-brand competition has considerably increased the buyer power of large supermarkets chains in relation to branded products. When suppliers of branded products do not comply with supermarket demands, they can easily be threatened with de-listing, or can be replaced by, or may to have to compete with, cheaper private label products. It is noticeable that some supermarkets are now introducing "premium" own label products, as is for instance the case in Denmark and the Netherlands. This provides a double blow to brand manufacturers: the buyer power of supermarkets forces down the prices of branded goods, and some cease to be available, while the supermarket replaces the old goods not only with their own cheaper products but also with their own more expensive products. The more private labels and branded products are interchangeable, the more powerful the buyer power.

Branded product producers manufacturers such as those in the UK, the Netherlands and Italy have been complaining that private labels undermine their investment in innovation and in their brand names. In June 2007 the British Brands Group (BBG) provided evidence to the Competition Commission of damage caused by copycat packaging and of the effective theft of brand owners' development plans so that supermarkets could launch own label products simultaneously with the equivalent branded products.[40] Some UK supermarkets require brand owners to share product development plans so that they can pass them on to suppliers of the supermarkets' own label products.

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[39] Commission of the European Communities, "The functioning of the food supply chain and its effects on food prices" – Commission staff working document SEC (2008) 2972, Brussels 9th December 2008, p. 32.

[40] http://www.competition-commission.org.uk/inquiries/ref2006/grocery/pdf/third_party_submissions_trade_british_bands_group.pdf

The impact of private labels on suppliers might differ according to product. The EC argues that “The increased bargaining power of retailers resulting from the introduction of private label products may be offset by the strong bargaining power of firms offering (internationally) branded products due to the 'must-have' status of such products. Producers of homogeneous products, for which brand awareness is not high, are likely to be in a much weaker position.”[41]

By not including the producer’s name, private labels can make consumers believe that it is the retailer that produces the product and therefore guarantees the food’s quality and safety. In reality, the whole responsibility, apart from problems arising in the distribution chain, remains with the producer who faces the wrath of the appropriate authorities and public opinion (e.g. in case of Listeria, Italy, the producer is traced back through the health mark on the label, is considered responsible and therefore pays for the consequences of health hasards). Retailers guarantee only the cold chain for which they can be held responsible.

3.3 Anti-competitive effects of supermarkets’ “own label” products/ private labels

Private labels have a strategy to hinder the development of consumer loyalty to particular commercial brands. Private labels make the producing companies anonymous and prevent the consolidation of a direct relationship with consumers. Thus, large-scale retailers render processing companies replaceable, thereby increasing their dominant position.

For many suppliers, a supermarket is production competitor + customer + gate keeper, i.e. supermarket chains are actually competing with other suppliers. When private labels are made by brand manufacturers, supermarkets are both essential customers and direct competitors of brand manufacturers especially when supermarket private labels are systematically cheaper. This puts supermarkets in a position where they may seek to use their advantage when controlling access to retail distribution channels and where they can abuse their market power. For instance, they can decide to put private labels at customers’ eye-level while moving branded products to lower shelves, called “hernia shelves” in The Netherlands. When supermarkets practice “switching campaigns”, deliberately seeking to replace branded goods with own label products, they can viewed as abusing both their buyer and seller power, by denying producers access to the market and restricting consumer choice.

As supermarket chains control all facets of the production and design of private labels, they represent, to all intents and purposes, vertically integrated arrangements. Independent small retailers do not have such integrated production arrangements, which puts them at a disadvantage. Also, in the Netherlands, during the price wars from 2003 to 2005, large supermarket chains were able to lower the prices for premium brands names more because they also sell a lot of private brand products. In contrast to the large supermarkets, the independent retailers had been selling relatively more premium brands but had no opportunity for cross-subsidisation by other products to compensate their loss of income.

As the EC argues, private labels can lead to “restriction of in-store inter-brand competition” when the buyer power represents an abuse of a dominant or jointly dominant position. A consequence of the increased buyer power and potential abusive practices is that the processing industry might resort to more cooperation and mergers, resulting in more market concentration.

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[41] Commission of the European Communities, “The functioning of the food supply chain and its effects on food prices” – Commission staff working document SEC (2008) 2972, Brussels 9th December 2008, p. 32.

3.4 How private labels affect consumers

Private labels – especially when they totally replace other identical or similar branded product – can reduce the number of product items on the shelves, thereby limiting consumer choice as is the case in the Netherlands. According to the EC[42]: “the increased use of private label products by retailers may lead to foreclosure of existing and potential competing suppliers. This could reduce the number of product items on the shelves, thereby limiting consumer choice.” This could thus represent an abuse of a dominant or jointly dominant position, when practiced by a single dominant retailer or group of powerful retailers.When private labels lead to fierce competition with the branded products they try to imitate, this reduces sales and profit margins of branded products. Brand producers can therefore lose the means to innovate and develop a trade mark.

In Italy[43], the large retail sector declared in 2006 to keep the choice of products low in some of those categories in which it has private label products. This could lead to a reduction in the number of other brands on the shelves, subsequently limiting consumer choice.

In addition, private labels reduce the ability of consumers to compare prices, as the Nordic competition authorities noted. If private labels alone are stocked the consumer has no opportunity to compare prices and is unable to use existing market and consumer means to ensure prices are constrained. It may also become inevitable that private label prices compensate for very low and non-profitable prices for some other products which are used to attract consumers to the supermarket. The lack of price comparability across retailers can be expected to result in higher prices for consumers and strengthen dominant or jointly dominant positions

The EC[44] argues that the long term impact of private labels on prices “is ambiguous, but there is nonetheless some evidence that they exert a downward impact on the price level of a given product category, which is particularly strong upon their introduction. Nonetheless, the effect of private label products on buyer power and on innovation on the food industry will continue to deserve attention.

3.5 The effects of private labels can be tackled at EU level

Given the rapid growth of private labels, it would be more efficient to have an EU wide approach to the (potential) problems they pose rather than to leave each EU member state to try and deal with it. Such an EU wide approach should be based on a full investigation in EU member states and on respecting the different needs, institutional capacities and levels of economic development.

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[42] EC, Idem, 9 and 10 December 2008

[43] Second Annual Report on the expansion of own-brands, Osservatorio Nazionale Private Label. Bologna, January 2006.

[44] Commission of the European Communities, “The functioning of the food supply chain and its effects on food prices” – Commission staff working document SEC (2008) 2972, Brussels 9th December 2008, p. 32.

4. Impacts on small and independent retailers and on wholesale at national and EU level

Large supermarket chains that use their buyer power in an abusive way make it difficult for independent retailers and wholesalers to compete and survive. Evidence of this trend is reported in Annex 4 and is the basis for the examples used below. In order to compete against the largest EU wide operating supermarket chains other supermarkets chains and independent retailers source and cooperate increasingly at EU level, which is important to take into consideration when investigating at an EU level.

4.1 Decreasing number of small and independent retailers

The competition from large retailers that are able to source at lower prices has resulted, in many EU countries, in decreasing numbers of small independent retailers and their independent wholesalers. Evidence has been found of these trends in for instance in Bulgaria, Denmark, Finland, France, Greece, Hungary (minus 3000 small retailers in 2007), Italy, the Netherlands (from 6460 to 5760 small retailers between 1995 and 2005), Sweden and the UK (loss of 10% or 5,600 outlets of convenience stores between 2003-2007). In France for instance, general grocery convenience stores diminished by 73,800 between 1966 and 1998, and many butchers (35,800) and bakeries (17,800) also disappeared in the same period. As a result, in several countries the position of the supermarkets collectively is now effectively impregnable so that independent or small retailers cannot expand. At the same time, convenience stores owned by big supermarkets chains are being set up in many countries such as Belgium, France, the Netherlands, and the UK. Since they can be sourced by the same buying houses as the large stores of the dominant supermarket chains, they can offer cheaper prices, which again constitutes a challenge for independent small retailers and convenience stores.

The viability of independent smaller retailers is thus threatened, which is clear from their diminishing numbers. In Ireland, the Independent Retail Association successfully protested against the opening of new large supermarkets in 2008.

From a consumer perspective, some consumers might lose access to a local retailer which would mean that these consumers have reduced choice as to where, when and how they shop. . This may particularly effect certain groups such as the elderly, and less mobile individuals who may be poorly served by public transport. The Nordic competition authorities also noted that concentration of larger retail chains also resulted in less choice in products for consumers. To the extent that smaller retailers supply non-grocery services that supermarkets do not, consumers may also lose access to these other services too. A survey commissioned by the BBG[45] found that nearly a third of the UK population over 16 find that supermarkets do not satisfy their shopping needs.

4.2 Negative effects on consumers work through the wholesale/retail chain

One of the reasons why small retailers find it difficult to compete on price with large supermarket chains is because they have independent and smaller buying arrangements. Independent wholesalers buy on disadvantageous terms compared with supermarkets as the UK Competition Commission

[45] *Consumers' shopping wants and UK grocery retailing: are consumer needs being met?* BBG, July 2007. See http://www.competition-commission.org.uk/inquiries/ref2006/grocery/pdf/third_party_submissions_bbg_3.pdf

determined in its investigation. In Austria, independent wholesalers are few and the barriers to enter the market are high. Independent wholesalers are also diminishing, resulting in further concentration in: the Nordic countries where the concentration in the wholesale sector supplying supermarkets is stronger than in other European countries; Finland where the 3 largest wholesale groups supply over 80% of the market; Portugal; and the UK (40% less cash-and-carry wholesalers between 2000 and 2006).
In Greece, the entrance of foreign supermarkets forced domestic supermarkets to create their own buying groups to be able to strengthen their position towards suppliers. In Italy, the wholesale market became much more concentrated between 2000, when the top 5 buying groups had 50% market share, and 2007, when they had around 90%, spread relatively evenly between them. Each of the major foreign supermarkets (REWE, Carrefour, Auchan) belonged to another buying group. In the Netherlands, the wholesalers in fresh fruit and vegetables are also consolidating, not only nationally but also internationally (UNIVEG Group).

Little or no evidence was found of the so-called “waterbed effect” whereby suppliers, under pressure from the major supermarket chains, effectively charge disproportionately higher prices to independent wholesalers. Another buyer power practice that affects other wholesalers and retailers is that large supermarket chains might engage in exclusive supply agreements, which oblige the supplier to sell the goods specified in the agreement to one buyer only, which can lead to a foreclosure of other buyers/retailers within the food supply chain. These disadvantageous terms mean that smaller retailers (who are dependent on the independent wholesalers) have to charge higher prices than they otherwise would in the absence of large dominating supermarket chains.

4.3 EU wide purchasing agreements, "buying alliances" and buying groups

As a reaction against the increasing high market shares of big supermarket chains, independent national wholesalers and some supermarket chains are forming buying alliances and buying groups, not only at national level but also at EU level. According to M. Wiggerthale[46], these European wide buying groups (see table below) want to secure the same prices and conditions from suppliers as the large European retailer chains such as Carrefour and Tesco. These buying alliances are, however, different from the large supermarkets who have more closed supply chains and buying desks which take decisions for supplying stores throughout the whole company operating at the national, European and global level. Members of European buying alliances or buying groups – sometimes themselves national wholesalers for the smaller domestic supermarkets – can still make independent decisions whether to source from the buying alliance/group or not. This is the case for the SPAR stores belonging to BIGS which operates a system of collective purchasing[47] of more than 300 products. IGD[48] explains that these groups rarely purchase the full range of goods sold by their members, many of which still have independent buying arrangements. These buying alliances or groups, according to IGD, secure a range of benefits for their members such as promotional actions, rebates and private labels. These buying groups “often incorporate mechanisms intended to reduce competition between members, e.g. by requiring that members operate in tightly-defined individual territories.”[49]

[46] M. Wiggerthale, Endstation Ladentheke. Einzhandel –Macht – Einkoauf: Unter welchen Bedingungen Ananas and Bananane produziert werden, die in Deutschland über die ladentheke gehen. Oxfam Deutschland e.V. April 2008, p. 14.
[47] Source: “Nordic food markets – a taste for competition”, report from the Nordic competition authorities, November 2005, p. 70.
[48] “Grocery Buying Groups - Free fact sheet”, IGD, 26 February 2007, <http://www.igd.com/index.asp?id=1&fid=1&sid=17&tid=0&folid=0&cid=130Supermarkets’ buying groups>
[49] “Grocery Buying Groups - Free fact sheet”, IGD, 26 February 2007, <http://www.igd.com/index.asp?id=1&fid=1&sid=17&tid=0&folid=0&cid=130Supermarkets’ buying groups>

Table: According to IGD[50] in February 2007, the key grocery buying groups currently operating in the EU were the following :

Group	Members
Alidis	Intermarché (France), Eroski (Spain), Edeka (Germany)
AMS (one of the largest buying alliances in Europe for private label products[51], based in The Netherlands (Schiphol))	Ahold (The Netherlands), Booker (United Kingdom), Dansk Supermarked Gruppen (Denmark), Elomas* (Greece), Hagar* (Iceland), ICA (Sweden), Jerónimo Martins (Portugal), Kesko (Finland), Migros (Switzerland), Morrisons (United Kingdom) and Superquinn (Ireland). From January 2009, the AMS partnership will be joined by 3 new retailers: Delhaize (Belgium), Systeme U (France) and Esselunga (Italy). With the addition of these new members, AMS will have 14 retail members covering 22 European countries and annual retail sales of approximately €100 billion. * = Euro Shopper distributors only
BIGS (Buying International Group SPAR)	SPAR franchise holders in the following countries: Austria, Belgium, Czech Republic, Denmark, Eire, Finland, Greece, Hungary, Italy, Netherlands, Slovenia, Switzerland, UK
Bloc	Cactus (Luxembourg), Cora Louis Delhaize (Belgium), Delberghe (Belgium), Deli XL (Belgium), Distri-Group 21 (Belgium), Francap (France), Frost Invest (Belgium), Hanos Nederland (Netherlands), HMIJ EUG (Belgium), Huyghebaert (Belgium), HorecaTotaal (Belgium), Lambrechts (Belgium), La Provencale (Luxembourg), LDIP (Belgium), Maximo (France), Theunissen (Belgium), VAC (Belgium)
CBA	Miscellaneous independent retail and wholesale grocery businesses in Bosnia / Herzegovina, Bulgaria, Croatia, Hungary, Latvia, Lithuania, Montenegro, Poland, Romania, Serbia, Slovakia, Slovenia
Coopernic	Colruyt (Belgium), Conad (Italy), Co-op Schweiz (Switzerland), Leclerc (France), Rewe (Germany). Since 2007, Coopernic also owns an 80% stake in the Lithuanian retailer IKI Group.
Crai	Miscellaneous independent retail and wholesale grocery businesses in Albania, Italy, Malta, Switzerland
EMD (based in Switzerland)	Axfood (Sweden), Delhaize Le Lion* (Belgium/Luxemburg), Delhaize / Alfa Beta* (Greece), Delhaize / Mega Image* (Romania), ESD Italia (Italy), Euromadi (Spain), Euromadiport (Portugal), Markant Cesko (Czech Republic), Markant AG (Germany), Markant Slovensko (Slovakia), Musgrave Group (Eire), Musgrave / Budgens / Londis (UK), Super Gros (Denmark), Superunie (Netherlands), Systeme U* (France), Tuko Logistics (Finland), Unil/Norgesgruppen (norway), ZEV Markant (Austria) *Delhaize and Systeme U are only members of EMD until December 2008.

Source: IGD Research

50 "Grocery Buying Groups - Free fact sheet", IGD, 26 February 2007, <http://www.igd.com/index.asp?id=1&fid=1&sid=17&tid=0&folid=0&cid=130Supermarkets' buying groups>
51 "Delhaize Group Becomes Member of AMS Buying Alliance", Reuters, 16 June 2008, <http://www.reuters.com/article/pressRelease/idUS170484+16-Jun-2008+MW20080616>

Apart from the information about European buying groups, other buying alliances exist in Nordic countries[52], where several of the Nordic umbrella buyer organisations are part of more or less formalised cross-border cooperation. “Coop Norden aims to enter into agreements covering all the cooperative members in Denmark, Norway and Sweden. Coop also cooperates with the S-Group in Finland. ICA Norge ASA is a subsidiary of the Swedish ICA AB ” which was 60 per cent owned by Dutch Royal Ahold. Cooperation regarding purchasing happens e.g. through United Nordic Inc. AB in which the Finnish Kesko. Norgesgruppen (N), Axfood (Swe]) Tuko Logistics (FINL) and Supergros (DK) participate. “Edeka Danmark is partly owned by the German purchasing organisation Edeka Zentrale which is one of the largest purchasing companies in Europe.” In addition, a number of the Nordic buying groups are members of international groups designed to benefit from collective purchasing at an international scale. ICA, Dansk Supermarked and the Kesko-Group in Finland all participate in the AMS purchasing system.

While EU wide buying groups contain many members from different member states, they do not have much more market share than some of the single buying desks of the largest supermarket chains such as Carrefour, Tesco and Metro. Indeed, figures for Carrefour Europe alone are still larger than AMS, according to EMD. EMD estimations compared the turn over and market share of the European buying groups and the largest European supermarket chains as in the table below. Please note that the figure about EMD itself very probably includes turnover figures of Systeme U and Delhaize who reportedly would join AMS from 2009 onwards.

Table: Turnover and market share of the European buying groups and the largest European supermarket groups

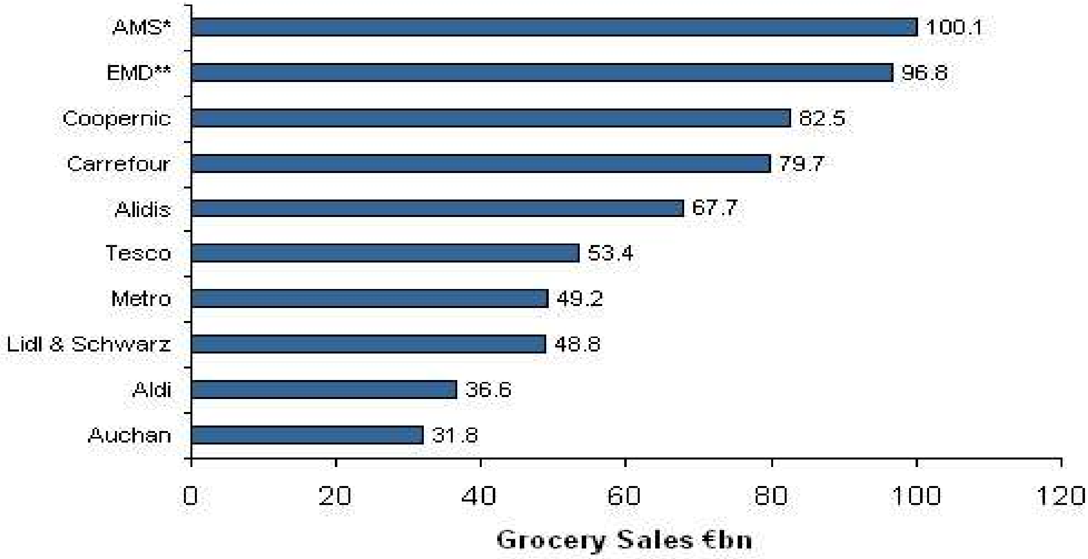
	Buying Group or large supermarket group	Turnover in Million Euro	Marketshare in Europe (%)
1	EMD	118,420	11.5
2	Coopernic	95,286	9.2
3	Carrefour Europe	80,865	7.8
4	AMS	76,110	7.4
5	Agenor/Aldis	74,081	7.2
6	Metro Group	61,770	6.0
7	Tesco Groop	58,391	5.7
8	Schwarz Group	43,795	4.2
9	Auchan Europe	36,421	3.5
10	Aldi	34,785	3.4
	TOTAL TOP TEN	**679,924**	**65.9**

Source: EMD reproduced in M. Wiggerthale, Endstation Ladentheke. Einzhandel –Macht – Einkauf: Unter welchen Bedingunge n Ananas and Bananane produziert werden, die in Deutschland über die ladentheke gehen. Oxfam Deutschland e.V. April 2008, p. 14.

The turnover is estimated differently by IGD, which estimates the aggregate grocery turnover of these buying groups as follows:

[52] Source: “Nordic food markets – a taste for competition”, report from the Nordic competition authorities, November 2005, p. 70.

Top 10 Leading Grocery Buyers in Europe (2008)



Source: IGD estimates
Notes:
1)Grocery sales are IGD estimates and exclude non-food formats such as DIY stores or consumer electronics.
*AMS figures include Systeme U, Delhaize Group and Esselunga which officially join the buying alliance in January 2009.
** EMD does not inlcude the turnover of Systeme U and Delhaize which were part of EMD in 2008.

How much anti-competitive behaviour?

While some large European retail chains such as Carrefour and Tesco do not participate in buying groups, some large retailers that operate in several countries in Europe do. These are as follows : Ahold, Colruyt, Delhaize, Intermarche, Edeka, Leclerc and Rewe.

Group	Members
Alidis	Intermarché (France, operating in 9 countries), Edeka[53] (Germany)
AMS (one of the largest buying alliances in Europe for private label products[54], based in The Netherlands (Schiphol))	Ahold (largest supermarket in the Netherlands, and operating in a.o. Northern, Central and Eastern Europe), Delhaize (large retailer chain in Belgium also operating elsewhere in Europe and the world) , AMS will have 14 retail members covering 22 European countries and annual retail sales of approximately €100 billion. Some members are Euro Shopper distributors only
Coopernic	Colruyt (Belgium, France, Luxemburg), Leclerc (France also present in a few EU member states), Rewe (Germany, operating in 14 European countries).

Source: own selection based on IGD Research and websites of the supermarkets

[53] “”Auf internationaler Ebene engagiert sich die EDEKA-Gruppe in der europäischen Einkaufs- und Vermarktungsallianz Alidis/Agenor mit Sitz in Genf, an der Seite der französischen ITM Entreprises-Gruppe (Intermarché) und der Eroski Gruppe aus Spanien. Die enge Zusammenarbeit erschließt vielfältige Vorteile für die Partner. So führt die gebündelte Beschaffung von Handelsmarken im Preiseinstiegssegment zu besonders attraktiven Einkaufspreisen. Zusätzlich profitiert EDEKA durch die europaweite Vermarktung von Markenartikeln.”< http://www.edeka.de/EDEKA/Content/DE/About/Unternehmen/Profil/Unternehmensstruktur/index.jsp>

[54] “Delhaize Group Becomes Member of AMS Buying Alliance”, Reuters, 16 June 2008, <http://www.reuters.com/article/pressRelease/idUS170484+16-Jun-2008+MW20080616>

The participation of large EU-wide supermarket chains in the buying groups independent, national wholesalers use could constitute an enormous concentration at the buying end of the market and in cross-European trade. Concern could be raised if these buying groups abuse their buyer power. According to Andres Font Galarza[55], buying alliances engage in practices that distort their relationship with suppliers such as predatory buying or bidding, arbitrary termination of orders or grossly exploitative abuses such as “wedding gifts”, for instance, the demand of excessive, unjustified or non-cost based discounts for the simple reason that the buyers have joined a bigger group or merged. However, Font Galarza does not mention what buying alliances are having such practices and whether he refers or not to one of the buying groups mentioned above or rather to buying desks by the top supermarket chains.

The argument that buying alliances or buying groups reduce prices to consumers disregards the fact that in the longer term, the concentration of market power amongst buying threatens to reduce competition, choice, and product quality and innovation. Moreover, the additional buyer power pressures resulting from private labels is being reinforced because supermarkets and wholesalers belonging to AMS also purchase private label products (e.g. Euro-shopper).

4.4 Need for EU competition approach to deal with cross-border buying groups

In order to remain competitive, leading retailer chains increasingly become multinationals operating in different EU member states or even worldwide, either with a common retail brand or under the original domestic retail brand after a merger or acquisition. This results in extensive intra-EU trade and sourcing from different member states. Because abusive buying practices usually originate from buying staff based at the central buying desk of a retail chain in another country, the exporting country authorities have no way of controlling them.[56] At EU level, an investigation could establish whether the profitability and viability of other parts of the supply chain in the EU are being undermined by retailer power exercised from one EU country and how this affects the short term and long term interests of consumers based on choice, quality, price and availability. EU-wide rules would fill this ‘regulatory void’ whereby national authorities have few measures to address buyer power abuses originating in another EU country. Such rules could also be used by suppliers based outside the EU.

In order to be able to compete against the buyer power of the largest supermarkets, EU wide buying groups have been growing and are made up by national wholesale groups and some larger supermarket chains operating in different EU countries as explained above. They trade across EU and EFTA borders (since some buying groups are based in Switzerland) and their buying practices can therefore not easily be regulated by the country in which the products are sold. For instance, when they would engage in anti-competitive collusion between supermarkets (such as sharing information on prices) it would be virtually impossible to address this through national laws.[57] In other words, in terms of buying practices, they again operate in a regulatory void that could be filled by EU-wide legislation and measures. The long term effects on consumers are often not recognised when buyers are colluding, or practice “tacit collusion”, because policymakers focus on short-term price benefits for consumers and the dampening effects on inflation figures (and politicians are thus less willing to intervene, unlike against cartels on the selling side, also because tacit collusion is harder for regulators to investigate).

[55] A. Font Galarza, “ Buying alliances and EU anti-trust law”, in Anti-trust & Competition Review, published by Mayer Brown, nr. 2 , 2008, p. 36-39.
[56] Note however that the UK Supermarkets Code of Practice applies to UK supermarkets direct suppliers based anywhere in the world.
[57] P. Dobson, “Retailer buyer power in European markets: lessons from grocery supply’”, Loughborough University

The EC has already recognised[58] that the “size and number of ‘buying alliances’ in the food sector has grown considerably throughout the EU, leading to increasing concerns expressed by food producers. On the one hand, such agreements may lead to efficiency gains from economies of scale within the Single Market. On the other hand, they can be used as a tool for obstructing rivals' access to essential inputs at competitive conditions and/or for competitors to engage in collusive behaviour on downstream markets. “

The existence of large supermarket multinationals buying and trading across EU borders, and the existence of EU and EFTA wide buying groups, whose buying practices and contractual relations cannot be regulated by national authorities, make it clear that an investigation at EU level into the causes of their growing concentration and into their practices would provide a basis for elaborating EU wide regulation and measures in the field of relations between manufacturers, suppliers, farmers and the retail sector. The late payment directive is an example of how the EU already had seen the need to intervene at the EU level in the relationship between suppliers and retailers.

[58] European Commission, Idem, 10 December 2008, p. 9.

5. Conclusions

This preliminary survey of evidence on buyer power abuses by large retailers shows that buyer power abusive practices have been found and discussed in at least 17 EU member states. Given the political and public discussions and activities regarding buyer power abuses in many EU countries, and given that this survey is not comprehensive, an EU-wide investigation would establish how widespread the problem is.
Buyer power abuses arise from increasing concentration of supermarkets and their buying arrangements at the national and EU level which change the bargaining power between retailers and suppliers. Competition laws in the past have especially dealt with selling power. Competition authorities in EU member states, including in the new member states where European supermarket chains have been expanding, are increasingly being faced with buyer power abuses which often cannot be dealt with adequately by existing laws. Only a few EU member states have laws that can deal with abusive supermarket practices towards suppliers, and some countries like Italy and Hungary are proposing new legislation.
Interestingly, there is very little discussion about what percentage of market share by supermarket chains at national level would be a threshold for competition authorities to intervene and prevent further concentration. Some supermarket chains have already more than 30% of national market share (e.g. Tesco in the UK and Ahold and Superunie in the Netherlands). However, the UK competition authorities found that buyer power exists when a supermarket has 8% market share.

Those competition policy authorities who have dealt with the buyer power of supermarkets have clearly indicated that buyer power malpractice has negative effects on (long term) consumer interests such as decreasing choice and quality of products, and innovation of products for consumers.

The abusive buyer power practices found during this short preliminary survey show significant unfair business to business relations and anti-competitive behaviour by supermarkets. Similar buyer power abuses were found in several EU member countries, including:

- listing fees;
- slotting fees;
- harsh negotiations with and (threats of) delisting of suppliers by supermarkets in order to obtain low prices;
- considerable extra payments and retro-active payments by suppliers to supermarkets often without assent from the suppliers;
- late payments reducing the number of suppliers to a minimum.

This survey of evidence indicates that the rapid growth of private labels by major retailers in EU countries adds to the buyer power of and potential abuses by supermarkets. Supermarkets can threaten to de-list branded product suppliers since supermarkets decide what products are sold on the shelves and can replace branded products by private labels. Although producers of private labels, which include fresh food products, can be easily replaced and thus be subject to abusive pressure to lower their prices or regarding delivery conditions, publicly available evidence has not been found for this short survey.

Many practices in the relationships and arrangements between supermarkets and suppliers are not transparent. Transparency, e.g. about contract changes and payments, is one area that needs to be improved to have a good insight in the impact of buyer power and related abuses. Investigations by competition authorities might give a better insight, but in different countries this is being hampered by suppliers who are afraid to publicly and officially testify.

This preliminary survey of evidence indicates different reasons why a common approach at EU level would be more effective than measures and legal arrangements at national level:

- There are many countries that have not developed means to deal with buyer power abuses while others have enacted a variety of laws that deal with buyer power problems. The lack of an EU-wide approach to fair relations between suppliers and retailers undermines a common European retail market and common food market.
- The level of market share held by a supermarket before competition authorities intervene seems to differ between EU countries. This might distort competition at the EU level. In addition, buyer power abusive practices might start at an earlier stage than is generally assumed by competition policy. The UK investigation concluded that buyer power by supermarkets started at 8% of market share, but the competition authorities have not acted upon the high market share of Tesco. In contrast, the German competition authorities looked at potential buyer power problems and high concentration at regional level and required that some stores in some regions would be sold before approving the acquisition of Plus of Tengelmann by Edeka.
- Private labels are a new challenge to competition authorities and are already sourced and traded across EU borders. An EU investigation and proposals to deal with the effects of private labels on buyer power abuses could be an effective way to deal with them in the interests of protecting consumers and of fair relations between suppliers. Also, perhaps solutions could be explored during the review of labelling rules by the European Commission.
- The largest supermarket chains which operate in different European countries have large buying desks that source and trade across the EU and whose abusive buying practices cannot be dealt with by national authorities in countries where products are exported or imported.
- EU wide buying groups include not only national supermarkets and wholesalers but also a few large supermarket chains that operate across different EU countries. Since these groups trade products across Europe and some are based outside the control of national authorities and even outside the EU, national authorities have little means at national level to deal with abuses whose effects might be felt on consumers and suppliers in different EU countries.
- Given the many cross-EU trading relations are run by buying desks and buying groups, more balanced and fair contractual relations between supermarkets and their suppliers can be best regulated at EU level. The EU late payment directive indicates that the EU can legislate in the area of business to business relations.
- Many countries are struggling to find solutions to buyer power malpractices at national level. A common search for solutions and an assessment of what is lacking at EU level to effectively tackle buyer power abuses might be an efficient way to deal with potentially growing problems as well as avoid the fragmentation of the EU market. Common measures and rules are needed in order to ensure minimum standards and dissuade supermarkets from re-locating to where laws are weakest in order to gain competitive advantage, or to dissuade supermarkets from buying goods in countries with weaker regulation on buyer power (e.g. through subsidiaries) and transporting them across EU borders. Without EU-wide laws and measures, supermarkets that operate across the EU in countries where rules are weak or non-existent will gain competitive advantage and the internal market will become weighted in favour of some operators over others.
- Finally, more investigations and inquiries are needed as well discussions among different policy sectors, also at EU level, on what would be a sound basis from which to start to develop policies, measures and regulations at the level of competition policy and other related areas to remedy buyer power abusive practices.

The AAI group, however, concludes that detailed research on buyer power is not a task for citizens and third parties, or even for academics, although the AAI group is willing to provide support for finding evidence. It is a serious task for DG Competition and national competition authorities through an investigation or an inquiry. If DG Competition would launch a proper inquiry, it could access information which is unavailable to third parties and citizens such as details of commercial transactions. Experience has shown that using available statistics and theoretical models are often not able to identify and expose the real practices in the relationship between retailers and their suppliers. In different countries suppliers that are being abused do not even dare to use legal (e.g. Germany) or voluntary instruments to complain about abusive practices. The EC's proposals to make/produce a 'monitoring report', which is different from and less than an investigation in the field, could not provide all information needed to understand the problems nor inform about what might be the best measures to deal with these buyer power abuses. Only a well-resourced investigation would be able to uncover the real practices and relationships between suppliers and supermarkets. Options should be explored as to how the EC could coordinate an EU wide investigation with some national competition authorities.

A DG competition investigation or inquiry should find additional evidence to ensure a better understanding and form a conclusive judgement about abusive buyer power problems. The investigation or inquiry could focus on finding more information about:

- The full contractual and non-contractual relationships between suppliers and retailers relating to all payments, conditions of delivery, negotiation methods, abusive practices etc.
- The percentage of margins in the different links of the supply chain, and the cost of production and the prices on the supermarket shelves;
- Dependency rates of suppliers on outlets owned by large supermarket chains;
- The impact of the role of large supermarket chains in EU wide buying desks and cross EU border purchasing practices;
- The role of private labels in enhancing buyer power and its abuses, and anti-competitive impacts of private labels (vertical integration).

During the investigation or inquiry, there should also be room to consult with the different sectors and stakeholders involved to hear what they see as the measures to deal with abusive buyer power practices.

- First of all, it should be established in how far suppliers are willing to publicly reveal abusive buyer power malpractices by supermarkets. In many countries, this a major obstacle for evidence to be provided and for competition authorities to get information. In the UK and Germany, legal means had to be used to force suppliers to testify.
- An investigation could explore whether the conditions in each of the EU member states are available to make particular solutions workable and effective. For instance, the EC and ECOSOC are proposing voluntary national codes of conduct. The questions is whether such a code is workable and effective in a context in which suppliers are afraid to mention abuses buyer power practices out of fear of retaliation. Also, self-regulatory solutions should be assessed in a context of fierce competition in the retail sector which might undermine the willingness of competing retailers to investigate/reveal information to each other in order to make "self-regulation" work. In the UK, the experience has been that a voluntary code did not work. More than 10 years of advocacy and dialogues in the clothing sector and some establishment of codes of conduct still have not improved the majority of the working conditions in the clothing sector. Also, many buying practices and the goods traded happen at EU level for which national rules are inappropriate to tackle problems.
- The investigation or inquiry could also explore the potential impact of regulatory measures. The discussions of the High Level Group on the Competitiveness of the Agro-Food Industry showed a strong interest in a regulatory framework in which the contractual relations between supermarkets and their suppliers would be strengthened to avoid abusive practices.
- An investigation or inquiry should look into the existing competition laws that are applicable in the different sectors and how they affect buyer power or solutions to buyer power. For instance, more cooperative arrangements between agricultural producers are being

advised but to what percentage of market share? In the Netherlands, agricultural producers are not allowed to form a cooperative or other formal cooperation beyond a 5% market share at national level, otherwise it is seen as a cartel by the competition authorities, even though two supermarket chains each have more than 25% market share, which farmers, the Ministry of Agriculture and some parliamentarians consider is not a level playing field.

An investigation or inquiry could also disclose what buyer power abuses are being applied not only to national or European suppliers but also overseas suppliers. If measures at national and European level are taken to eliminate supermarket abuses of buyer power against national and European suppliers, there should be no unfair competition from overseas suppliers who can produce cheaper because they are still subject to abusive buyer power malpractices that press their prices and profit margins down. Also, an investigation into abuses of buyer power by supermarkets need not be limited to the food sector but could also cover other sectors in which supermarket chains are selling goods in order to attract consumers into their mainly food stores, such as clothing, magazines, flowers, furniture, etc.

Farmers have been particularly affected and have been protesting in different countries against the low prices they receive while prices in supermarkets are visibly much higher.

The consequences of malpractices of buyer power include the decreasing number of SME-suppliers. While SMEs are considered as important innovators and job creators in the EU, there are a decreasing number of small independent stores and diminishing or concentrating wholesale traders. These trends have an impact on the choice and food quality for customers and sometimes affect the availability of food in the neighbourhood. The role of SMEs in the EU market and the competitiveness of the food industry is also now being discussed by a High Level Group on the Competitiveness of the Agro-Food industry[59].As the EC has indicated in its communication on food prices on 10 December 2008, an investigation, and proposals for remedies, by the EU competition authorities about abusive buyer power could be part of a wider approach to fairness and sustainability in the food chain, to the benefit of consumers. A multi-faceted approach to problems caused by the misuse of buyer power, using areas and policy of law outside the competition framework (for example, contract law, company law, environmental and rural policy) could be looked into after such an investigation.

During this time of increasing economic down-turn, this survey of evidence found indications that supermarkets are increasing pressure on their suppliers to further decrease their suppliers' prices, to ask for extra financial contributions or to increase the amount of private labels on offer. While low prices are attractive when purchasing power is declining, subjecting suppliers to unfair and anti-competitive pressures by retailers will in the long term undermine consumer and economic interests.

[59] See for more information: http://ec.europa.eu/enterprise/food/high_level_group_2008/hlg_intro1.htm