

## Remedies to the adverse effects of buyer power

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Not all competition authorities and/or governments believe that buyer power has negative effects. For instance, private labels are considered to fight inflation and increase competition with big brands. Some private labels are innovative new products created in response to consumer needs. However, this picture is incomplete. Not all stakeholders have their voice heard in the debate about private labels and the lobby by larger retailers argues that the profit margins of large brand manufacturers are higher.

In order to have a full understanding, there is a need for a full sector enquiry into the retail sector in the EU which covers the whole supply chain within and outside the EU, and involves all stakeholders. The rapid spread of private labels has not been matched by increased monitoring and understanding of the competitive effects. Retail buying alliances can negotiate substantial discounts for private labels from international suppliers. However, it is unclear to what extent these savings are the result of buyer power, abusive practices, or whether savings are passed on to consumers.

Before an enquiry, consideration would need to be given to its scope, resources and legal powers. The enquiry could be led by competition authorities, or governmental representatives, at national and/or EU level. The enquiry would need to understand profit margins throughout the supply chain and establish how prices are transmitted to the consumer. It would also need to examine the full contractual and non-contractual relationships between suppliers and retailers or their buying houses and buying alliances, e.g. payments, conditions of delivery and negotiation methods. The enquiry would need to look beyond the EU since many food products are sourced globally nowadays. The enquiry would assess the market shares of all those participating in the supply chain and the dependency of suppliers on large supermarket chains. There should be a particular focus on the role of private labels in enhancing retailers' buyer power and abuses, and anti-competitive impacts of private labels (vertical integration).

A full sector enquiry would also reveal suppliers' levels of willingness to reveal abusive buyer-power-related malpractices. The enquiry would investigate appropriate and effective remedies. For instance, possible solutions include voluntary codes of practice and self-regulation but they may not be appropriate if suppliers' fear leads to substantial under-reporting of malpractices. In such circumstances an independent regulator, similar to a telecoms regulator, might be tasked with carrying out proactive monitoring and enforcement of rules. In this context, the enquiry could see if lessons from regulated sectors would help us understand whether external regulation is appropriate. The enquiry could also assess the application of existing competition law and its effectiveness in combating excessive buyer power.

A code of practice is one possible solution to excessive buyer power that has been put in practice by the UK with the introduction of the Groceries Supply Code of Practice (GSCOP). Codes of practice might also be introduced by retailers themselves as part of their corporate social responsibility policy. One question is whether to establish an EU-wide code or a series of national codes. A second is whether to employ an 'Anglo-Saxon' principles-based approach, or a more prescriptive 'continental' approach. A third concerns a code's contents and scope. A fourth is whether a code should be voluntary or mandatory (and if mandatory, how it is to be enforced).

A code's effectiveness depends greatly on its enforcement. The UK's SCOP was considered by many to be ineffective in practice. It has now been amended to include greater mandatory elements. Any code to tackle buyer power would be most effective if a combination of national and EU-wide bodies existed with responsibilities for its implementation and enforcement. Alternatively an independent body could monitor, adapt and interpret the code. Such a body could also react to complaints from all stakeholders and proactively investigate implementation of the code. Such a body would be able to enforce and, ideally, sanction non-compliance with the code through fines or other means.

An alternative or complimentary approach to tackling the negative effects of buyer power might be to introduce an 'Unfair Business-to-Business Commercial Practices Directive' comparable with the existing Unfair Commercial Practices Directive, which deals with business-to-consumer practices. Such a directive would contain a list of prohibited unfair practices and act as an EU-wide common denominator for business practices. One problem with EU directives is that the Member States may not implement or enforce them correctly or uniformly given differences in legal traditions and supervision, but on the other hand that might deal with the diverse retail situations in EU countries. There may also be a lack of supervision of trans-border commercial practices between Member States, unless special EU-wide mechanisms to enforce the Directive were put in place.

One of the unfair practices relates to late payments. The current EU Late Payments Directive needs legal review to improve it and ensure stricter enforcement.

A new solution would be the introduction of a 'Model Fair Contract Law' which would only cover supplier-retailer relations when there is a contract except if compulsory contracting was considered. Such a law would inevitably reduce freedom of contract, but would be supported by France's long experience that dealing with buyer power malpractices needs legal constraints within the frame of the relation between suppliers and buyers. An EU-wide harmonised fair contract law would introduce minimum standards for all such relations. Preferably this law would also extend to contracts with non-EU suppliers to ensure retailers do not turn to outside suppliers to avoid the rules. However, it is not clear how non-EU suppliers could enforce this law, or would be able to turn to existing and non-existing international commercial law.

Existing national and EU competition laws could also be employed to better police abusive buyer power, for instance the uncompetitive behaviour of slotting allowances and rebates. It should be recognised that retailer-side concentration in markets where private labels are strong is different to normal retailer-side concentration, e.g. it can lead to foreclosure and lack of inter-brand competition since retailers act as gatekeepers to the retail market. Also, anti-competitive behaviour of some buying alliances, and in particular those for private labels, would need to be scrutinized. During retail mergers, more attention might be needed to levels of concentration at regional level within a country. Some national competition laws in some EU countries already take those elements into account, and could become practice throughout the EU through the EU procedure of harmonisation of national laws.

More radical solutions are, for instance, shifting competition rules towards the stated aim of guaranteeing consumer choice and quality, as well as market functioning between businesses, and away from the approach by which unequal bargaining power is not addressed unless price competition to lower prices for consumers is affected. Competition law could be adjusted to take into account the interests of producers and non-economic objectives such as job creation

and protection of SMEs.<sup>15</sup> At least cartel law should be adapted to allow farmers' cooperatives and other farmers' groups with a higher market share than 15% (current EU limit) if retailers have larger market shares.

Other new solutions might include monitoring of stakeholders' margins such as the pilot project for a 'European farm prices and margins observatory', banning below-cost sales, dealing with buyer power abusive practices towards non-EU suppliers, for instance through cooperation clauses in free trade agreements, and separating large retailers from their buying functions.

<sup>15</sup> SME: Small and medium sized enterprise.