

# Remedies to the adverse effects of buyer power

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SOMO

# Having adverse effects of buyer power being recognised

- Diverse picture in EU, incl. private label sales
- Not all (competition) authorities and governments see the negative effects of buyer power: fighting inflation & crisis, increased competition against big brands, etc.
- Innovation : PL present innovative products & respond to consumer needs
- Fear by suppliers to testify, incl. private labels,
- No or too little information given by supermarkets on PL producers
- Rapid growth of private labels: too little monitoring
- Lobby of retailers ! : argue profit margin by large brand manufacturers is larger

# Full sector enquiry



- (Full sector) enquiry or ‘investigation’? Whole supply chain !  
vs. “asking [some] stakeholders & NCAs for their opinion” (EC, 2009)
- Why to do enquiry? See contradictory lobby arguments
  - (Anti-competitive) effects of private labels not fully understood
  - Buying groups/alliances for private labels: anticompetitive risks:
    - negotiate international discounts,
    - risk of market partitioning, payments from suppliers,
    - little incentive to transfer low prices to consumers
  - Role of PLMA not known
- How to do enquiry: well resourced. What legal powers? Involvement of all stakeholders,
- Nationally and/or EU?
- Who to do enquiry? Competition authorities or others (see at EU level: also EU retail monitoring);



# What should enquiry look at?

- EC & NCA research: comparison of profit margins, transmission of prices, competitiveness of the food chain
- The full contractual and non-contractual relationships between suppliers (national, EU, world wide) and retailers or their buying houses, relating to: all payments, conditions of delivery, negotiation methods, abusive practices etc.
- The percentage of comparable (!) 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 large supermarket chains;
- Market shares: supermarkets, suppliers, farmers, SMEs
- 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).

# Additional function of enquiry



- Establishing in how far suppliers are willing to publicly reveal abusive buyer power malpractices by supermarkets or protection needed
  - Explore whether the conditions are available to make particular solutions workable and effective
    - e.g. whether a voluntary national code of conduct is workable and effective in a context in which suppliers are afraid to mention abuses buyer power practices out of fear of retaliation
    - e.g. 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.
  - Explore the potential impact of regulatory measures
  - Assess the existing competition laws that are applicable in the different sectors and how they affect buyer power or solutions to buyer power
- e.g. more cooperative arrangements between agricultural producers are being advised but to what percentage of market share vs competition laws: cartel law: agricultural producers are not allowed to form a cooperative or other formal cooperation beyond a 5% market share at national level, even though two supermarket chains each have more than 25% market share

# Code of practice



- UK : Groceries Supply Code of Practice
- Others: e.g. corporate social responsibility : e.g. code of conduct towards suppliers

## PROPOSALS

- EU code of practice: at least to deal with cross border malpractices and EU wide buying groups

and/vs.

- National code of practice: diversity: behavioural vs prescriptive
  - Contents: e.g.
    - clearly & carefully stating of abusive practices that are not allowed: in case of strong enforcement
- Vs.
- List of principles?
- Include abusive practices of all suppliers world wide

- Mandatory rather than voluntary



# Essential : enforcing the code of practice

- Legally binding or enforcement via a specialised agency vs voluntary code which did not work in the UK
  - National and EU wide body responsible for implementation and enforcement
  - Independent monitoring & (propos<sup>11</sup>) adaptation
  - Independent interpretation of the code
  - Independent & pro-active investigations
  - Receiving & selecting complaints, including from indirect suppliers, other stakeholders + mandate to arbitrate in dispute
  - Independent enforcement body, able to (indirectly) sanction
- e.g. :
- Ombudsman: including arbitration in disputes
  - Ministry unit (Fr) and special monitoring commission

## Slide 7

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**J1**

these points for next point - "receiving complaints" - include "pro-active" - must have powers to take evidence from indistrict suppliers i.,e primary producers and trade associations. Ideally , has power to impose fines on retailers who breach Code.

Judith, 27/05/2010





# Unfair Business-to-business Commercial Practices Directive



- Comparable with current EU Unfair Commercial Practices Directive (business to consumer):
- Should contain list of forbidden unfair practices
- EU wide common denominator
- Member states legislate and enforce nationally

# Potential problems: implementation and monitoring

- EU member states do not always properly implement (transpose) EU directives
  - EU member states do not do all proper supervision of implementation nor take into account EU dimension
  - No proper transborder supervision of transborder commercial practices in different EU member states
- > Different traditions, state of industry, legislation and structures of supervision

# Late Payments Directive

- Late payments are problem throughout the supply chain, especially in times of crisis
  - Exist at EU level but not strictly enforced
  - Recent improvement at EU level only for governmental suppliers
- Stricter enforcement to be introduced

# Model Fair Contract Law

- Works only for contractual relations
- Fear of interference with contractual freedom
- France experience of 20 years of measures: legal constraints within the frame of the relation between suppliers and buyers
- EU wide harmonised minimum conditions, preferably extended to contracts with non-EU suppliers (enforcable ? cf. UN law)
- Compulsary contracting?



# Enforcement of competition laws

- EU competition laws vs **national competition laws** and related laws:
  - e.g. economic dependency laws (difficult to apply)
  - e.g. taking into account concentrations within a region during merger approvals
  - e.g. prohibition of unfair buyer power practices, with sanctions
- **Anti-competitive behaviour of some buying alliances:** rebates from suppliers but no transfer of low prices, market partitioning, suppliers fear of being de-listed
- **Anti-competitive behaviour of private labels:** concentration by some large PL producers, foreclosure and lack of inter-brand competition, exploitation of loyal consumers of branded products, reducing innovation, agreements between the few brands left on shelf & PL
- During retail **mergers & acquisition** approval process
- Uncompetitive behaviour of slotting allowances, rebates, etc.
- More focus and **implementation of stated claim** of guaranteeing consumer choice & quality, market functioning between businesses

# Cartel investigations



- Related to buying groups or alliances :
  - those with large supermarkets chains members
  - those producing private labels for many supermarkets
  
- In whole food and grocery supply chain
  
- EU law to be adapted for farmers cooperatives and joint groups
  
- Reasons for forming cartel: how far in response to buyer power? Why increasing concentration?  
→ THE CONCENTRATION OF RETAILERS WITH PL IS NOT THE SAME AS CONCENTRATION OF SUPPLIERS: shift of power

# Beyond existing interpretation of competition laws



- Limits of EU competition law: “not dealing with unequal bargaining power” except if resulting in less consumer choice & quality
- **Structural problems**: dealing with high market shares in whole supply chain, related to its effects on suppliers !? Limiting market shares per sector? According to floor space
- Promoting the interest of the producer vs focus on ‘consumer interests’: how far may latter be at expense of former? Non-economic objectives e.g. keeping SMEs which are more accessible for small entrepreneurs, more diversity & job creation
- Use diversity of national laws → harmonizing at EU level  
e.g. economic dependence laws  
supplier-retailer laws

## Other solutions

- EU: European farm prices and margins observatory
- Prohibition of buying and selling under production price
- France: compulsory reduction of margins in case of very low prices to farmers
- Deal with buyer power abusive practices towards non-EU suppliers (to avoid shift from regulated EU suppliers):
  - comity agreements,
  - free trade agreements with cooperation clauses on cross border supplier-buyer problems between parties of the agreement
- Splitting up large retailers from their buying houses
- Beyond pure economic benefits of competition policy: link with SME policy, job creation policy, sustainable agriculture,