POLICY ROUNDTABLES

# Competition Issues in the Food Chain Industry
## 2013

## Introduction

The OECD Competition Committee discussed competition in food chain industry in October 2013. This document includes an executive summary of the debate and the documents from the meeting: an analytical note by the OECD Secretariat, written submissions from Australia, Austria, Belgium, Brazil, Bulgaria, Czech Republic, EU, Finland, France, Germany, Greece, Hungary, India, Ireland, Israel, Italy, Japan, Latvia, Lithuania, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, South Africa, Spain, Turkey, Ukraine, United Kingdom, United States, BIAC, and a summary of the discussion.

## Overview

Food processing and retail chains often give rise to competition concerns especially due to recent trends of high and volatile commodity prices. The competition authorities are dealing with anti-competitive mergers, abuse of dominance, cartels and price fixing, vertical restraints and exclusive practices.

Yet, for the overall functioning of the food sector, ensuring competition at different stages of the supply chain is essential. This chain is a complex series of inter-related markets where concentration, mergers and acquisitions are increasing and large multi-product retailers have a dominant role. Concerns over competition may relate not only to the issue of selling power but also of buyer power which in turn can relate to vertical relations between any of the stages of the food supply chain. Moreover, how retailers compete may also influence the overall functioning of the food supply chain.

The competition authorities discussed in this roundtable how recent developments in the food chain across many countries tie in with increasing concerns about both horizontal and vertical market power.

## Related Topics

Competition and Commodity Price Volatility (2012)
Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling (2004)

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# COMPETITION ISSUES IN THE FOOD CHAIN INDUSTRY

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## FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Competition Issues in the Food Chain Industry held by the Competition Committee in October 2013.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

## PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à la table ronde sur la concurrence dans le secteur agro-alimentaire qui s'est tenue en octobre 2013 dans le cadre du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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## EXECUTIVE SUMMARY

*By the Secretariat**

In light of the background note, written submissions and the discussion, the following points emerge:

*(1)* *Further to the recent evolution of world food prices there is a renewed political interest around the Food Chain Industry. This has led to an increase in political interference with the work of competition authorities, and has affected the competition framework in the food sector.*

In many countries, competition agencies have been tasked with monitoring the domestic food sector, as a result of high prices paid by consumers and low prices paid to farmers. These monitoring activities often take the form of a market study that addresses such issues as the geographic competition in the retail sector or the evolution of concentration in the food sector. In some cases, in addition to monitoring the evolution of the price of food products, competition agencies have been requested to inform the public of these price movements, which, in increasing transparency in an already concentrated industry, may increase the risk of tacit collusion.

*(2)* *The product and geographic market definition in the food retailing sector has become an important issue. Several competition agencies have devoted special attention to this question with developing new measurement techniques, while others consider that the traditional methods for market definition should apply also to this sector.*

The analysis of product and geographic markets in the retail sector can be quite complex as it depends on the locality, the market conditions and the size and specialization of stores. There is a general consensus that the general framework for merger analysis, including the methodology for market definition, is applicable to markets in the food retailing sector as well.

However, a more detailed approach is required in market definition and merger analysis in the retail sector. Israel, for instance, developed a model which defines demand area for each store as a function of the stores' characteristics, size, amenities variety and travel time and then it identifies the competition group that constrains the pricing behaviour of each store. In France and in Japan a similar methodology is applied. In Ireland, on the other hand, the Competition Authority does not only consider market shares at the retail level but concentration along the supply chain as a whole in order to take into account market power that is often a result of vertical integration.

* This Executive summary does not necessarily represent the consensus view of the Competition Committee. It does, however, encapsulate key points from the discussion at the roundtable, the delegates' written submissions, and the Secretariat's background paper.

*(3) Several approaches are used to incorporate the analysis of buyer power and unfair trade practices into the competitive assessment of cases in the food chain industries but none is favoured by everyone.*

Some countries, like Canada and the UK, consider that, for buyer power to be a competition concern, it must be used by a dominant firm with the intention to be exclusionary or predatory in relation to competitors in the relevant market. The UK, in particular, pointed out that buyer power issues of dominant companies can be addressed under traditional competition policy tools under the UK equivalent of the EU's Article 102 unfair trading practices provisions. This view is shared by Germany and the European Commission. In addition, the European Commission argues that it is important to distinguish between the abuse of buyer power, which has an overall effect on competition in the market, and the abuse of bargaining power in bilateral relationships, by applying unfair trading practices, which only affects certain companies in the market. While the abuse of buyer power is a clear competition issue, which can be tackled under the current competition rules it is less obvious that competition law has to deal with unfair trading practices in bilateral relationships, which should be tackled by unfair trading laws or codes of conduct.

On the other hand, countries like Japan, Finland, Italy and Hungary consider that traditional competition policy tools are not enough to deal with issues of buyer power and unfair trading practices. These countries often advocate for additional regulation to tackle these issues like, in the case of Japan, special regulation to address the abuse of a superior bargaining power or, in the case of Finland, a bill that states that retail chains with above 30% market share are considered dominant.

*(4) Private labels have an important role in the type of competition that occurs in the food retailing industry but their positive impact is debatable.*

The use of private labels can have pro-competitive effects as they offer more variety for consumers, more competition in the store and can lead to lower prices with no real decrease in quality. However, they may raise the bargaining position of retailers against brand manufacturers; increase store loyalty for consumers and also lead to less innovation as they can copy innovations from brands. The practice of private brands would crucially depend on the business model of the companies supplying them and the competitive structure of the market. Typically, when dominant firms supply private labels, they may end up leveraging their market power at retail level to foreclose access to shelf space and distort competition between themselves and the suppliers of branded goods, and decrease the incentives to innovate.

*(5) Some types of conflicts in the food industry may not be resolved by regulation, and other forms of action may be considered, in particular, (i) the application of codes of conduct and (ii) the possible monitoring of contracts between retailers and suppliers.*

(i) The introduction of codes of conduct can solve problems that regulation might be too ungainly to address, in mediating and resolving conflicts that would fall outside the provisions of competition law. Several options exist from the 'soft' version to the statutory code with, for instance, the introduction of an adjudicator to mediate conflicts. Although mandatory codes have the potential to be more effective than voluntary codes (which do not require companies to sign up to them), they also have the potential to increase costs of doing business for both suppliers and retailers as they may increase rigidity in the market.

(ii) Alternatives to codes of conduct include the submission by the largest retail chains of their contracts with their main suppliers to the Competition Authority for assessment from a

competition policy perspective. This is an approach followed in France with long-term contracts between suppliers and retailers used as a legal tool to reach a balanced relationship between producers and distributors.

**BACKGROUND NOTE**

*By the Secretariat* [*]

## Introduction

Recent events on world commodity markets, coupled with high levels of food inflation across many countries, have raised concerns about the functioning of the food chain and the lack of transparency about price transmission through various stages in the food chain from upstream segments through to consumers. While there are potentially many factors that can influence the functioning of the food chain in specific settings (either at the country or sector level), there has been increasing concern about competition throughout the food supply chain in many countries.

The overall aim of this Roundtable is to address competition issues in the food chain, to assess how the recent developments that have been experienced in the food chain across many countries (i.e. the growing dominance of retailing, consolidation, the increased penetration of private labels, concerns over bargaining power, a low share of the 'food dollar' received by farmers and so on) tie with increasing concerns about both horizontal and vertical market power. Also, in the context of recent events on world commodity markets, we address the issue of price transmission between different stages in the food supply chain and how competition may impact on the price transmission process.

This background paper builds on both theoretical and empirical research to provide relevant insights into various aspects of competition that arise throughout the food sector, despite the many challenges resulting from the on-going changes in the food sector, the complexity of dis-entangling horizontal and vertical issues and difficult access to data. These issues constitute a barrier to increasing transparency on how prices are determined and commodity price shocks are transmitted through the food supply chain.

This paper is organised as follows. Section 1, discusses, as background, how food price developments have affected the food supply chain. Section 2 addresses competition issues that arise in the food sector. Issues relating to price transmission and competition are covered in Section 3. Section 4 concludes.

## 1. How Food Price Developments have affected the Food Supply Chain

Three elements can explain the recent intensification of interest in the food sector:

- First, food inflation has been high across OECD countries, although the extent of retail food price inflation has varied considerably;
- Second, raw commodity-retail food margins have varied over this period but the pattern of retail price changes have not reflected changes at the raw commodity (farm level) stage; and

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- Third, over the longer time frame, there has been concern that increased competition in the downstream stages of the food chain has been a factor in the widening spread between farm and retail prices.

### *1.1 Food Inflation*

Since 2007 economies at all levels of development have experienced high food price inflation. The cumulative impact for selected OECD countries is shown in Table 1. Inflation from 2005 to 2011 saw food prices increase by around 22 per cent on average across OECD countries. However, there has been substantial variation: relatively low levels of food inflation in the US (14 per cent) through to higher levels in Turkey (67 per cent) and Mexico (48 per cent). Trade and macroeconomic policies-as well as underlying levels of national food supplies-can all affect the exposure of the domestic food sector to events in world markets, partly explaining why food inflation would differ[1]. However, even in the EU with a more common policy environment, food inflation has varied: in the UK, for example, between 2005 and 2012, food inflation resulted in food prices increasing at twice the rate experienced in Italy (36 per cent versus 15 per cent).

To put the food inflation experience in context, Table 1 also reports the cumulative rise in prices in the non-food sector. On average, across the OECD as a whole, non-food inflation has resulted in an 11 per cent cumulative increase in prices, which is approximately half the level experienced in the food sector. But the difference between food and non-food inflation has been more marked in other countries as shown in Table 1.

**Table 1: Cumulative Impact of Food and Non-Food Inflation between 2005-2011 in Selected OECD Countries**

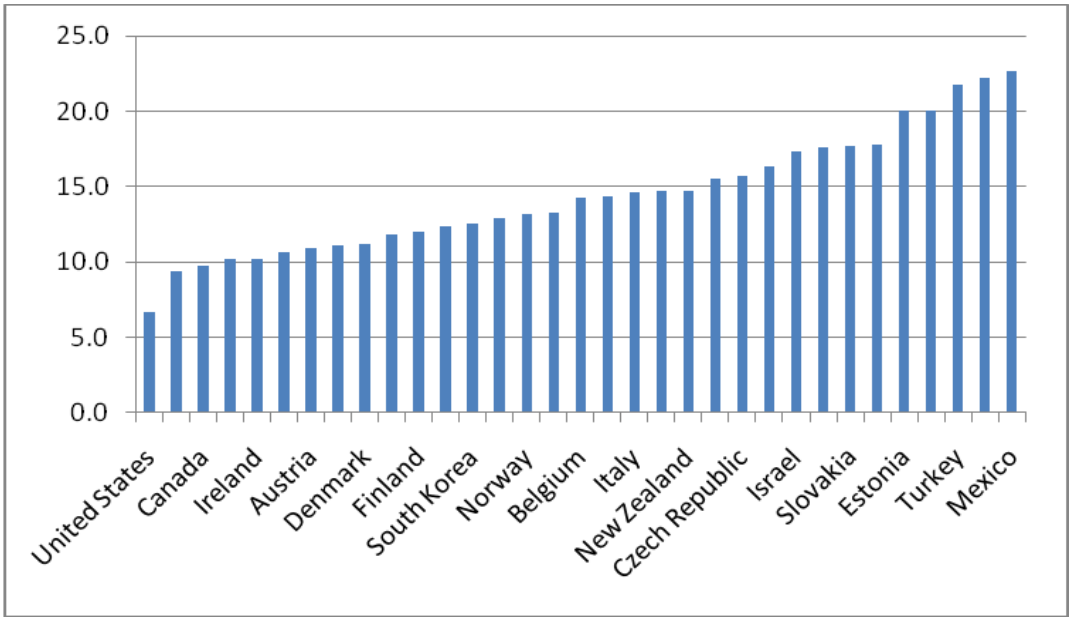
| Country | Food Inflation, Cumulative Effect (%) | Non-Food Inflation, Cumulative Effect (%) |
|---|---|---|
| **Canada** | 23.8 | 9.3 |
| **Mexico** | 47.8 | 24.5 |
| **Hungary** | 45.7 | 22.5 |
| **Italy** | 15.3 | 11.2 |
| **Spain** | 31.7 | 10.7 |
| **Turkey** | 67.4 | 50.9 |
| **UK** | 36.4 | 13.1 |
| **US** | 14.2 | 12.1 |
| **OECD Average** | 21.7 | 11.4 |

**Source:** Data compiled from OECD

Food prices are a sensitive issue largely due to the proportion of income spent on food and also the potentially regressive effect it has on lower income households. Figure 1 presents the share of household income spent on food in OECD. This can vary substantially, from around 22 per cent in Turkey and Mexico to less than 10 per cent in the US, Canada and the UK. However, even in countries where the aggregate share is relatively low, since the lower income groups spend a greater proportion of their income on food, the rise in food prices can have a regressive effect on the less well-off.

[1] Gelos and Ustyugova (2012) present an overview of why food inflation may differ across countries.

**Figure 1: Share of Household Expenditure Spent on Food, 2011 (%)**



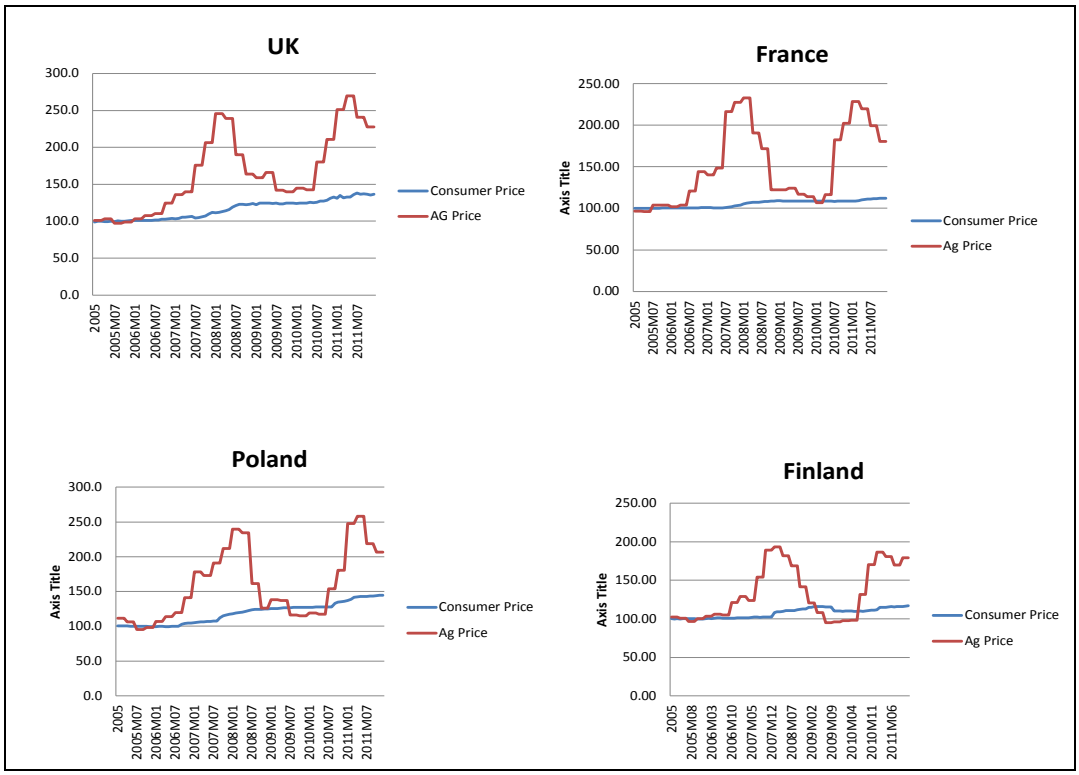

**Source:** Data compiled from USDA Economic Research Service

### *1.2 Recent Behaviour in Farm-Retail Spreads*

While retail food price inflation has been more volatile than non-food inflation, retail food prices have been *less* volatile than farm level/raw commodity prices recently. This causes farm-retail margins to change. As an example of this, Figure 2 presents data for farm-retail price spreads for a selection of EU Member States covering the cereals-bread sector. Though the magnitude of the changes can differ, the experience is common: during the 2007-2008 commodity price 'spike', prices at the farm level increased while retail prices increased by less, causing the farm-retail margin to narrow. The behaviour of the farm-retail price level following the 2011 commodity price rise was similar: most of the fluctuations in prices originated in the upstream sectors. Commodity price 'spikes', by definition, are associated with steep declines following the initial surge. This caused the farm-retail price margins to widen once again as prices subsequently fell.

Concerns about competition in the food sector often relate to the behaviour of farm-retail spreads, specifically the complex issue of price transmission through the food supply chain. Concerns relate to the extent of the pass-through, to the rate at which the price changes are passed through, for how long it takes to the upstream price changes to be passed through into the retail sector, as well as the particular pattern of the price dynamics.

**Figure 2: Farm-Retail Price Spreads for Cereals-Bread, 2005-2011, for Selected EU Member States.**




**Source:** Data compiled from Eurostat

Observations about the behaviour of farm level (or raw commodity) prices and corresponding retail prices tie in with competition issues throughout the supply chain[2]. To the extent that competition in the food sector does affect the outcome, the mechanism is important. Recent research has tied the price transmission process more directly with the characteristics of the vertically-related food sector. We examine this issue in Section 3.

### *1.3 Long-Term Retail-Farm Margins*

Concerns about market power in the food sector can be reflected in what happens to the farm-retail spread over a longer period of time. In Figure 3, the cereals-bread farm-retail price spread for the US is presented but covering a longer time period than the EU data shown above. Consistent with the EU experience on spreads, in the period when commodity prices rose post-2007, the farm-retail spread narrowed. However, over the longer time frame, there is a tendency for the farm-retail price spread to widen. The concern here is that market power throughout the food supply chain may have contributed to this widening; this could arise from seller power at either or both the food processing or retailing sectors, and/or via the exercise of buyer power.

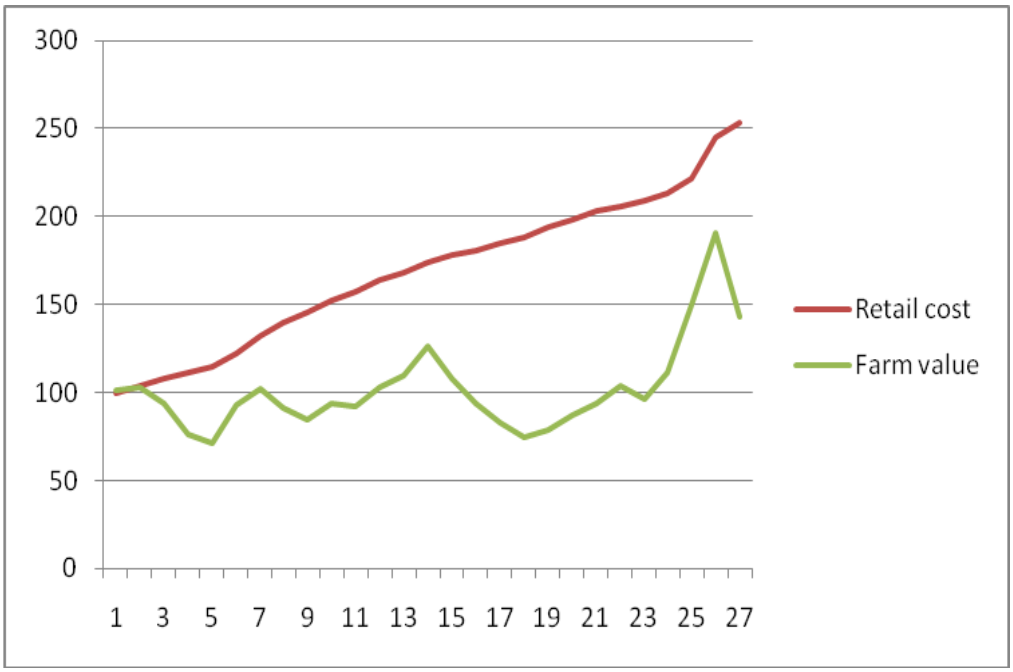
2 Reflecting these concerns, a recent US General Accounting Office (GAO) report noted:

"While experts told us [market] concentration did not cause the commodity and food price increases, some experts suggested that concentration may nevertheless have affected food prices. Some experts told us that market power, to the extent that it exists in these industries would likely have dampened the food price impact. This is because firms with market power may absorb some rising input costs, rather than pass them through to consumers in the form of higher food prices. However, other experts said that market power, particularly at the retail level, may have played a role in maintaining high food prices…declines [in commodity prices] may not have been reflected in food prices" GAO, 2009. p.27).

Of course, cereals at the farm level and bread and bakery products at the retail level are not the same thing, though observing the widening spread serves to highlight one of the main challenges in assessing the impact of market power at either end of the food marketing chain. The spread could widen, for example, due to productivity or technological developments. Changes in the patterns of consumer purchasing patterns and the increasing share of 'marketing inputs' (packaging, transportation, increases in quality etc) into the final product could also impact on this spread[3]. In this context, the share of farm value in the final price of bread and bakery products has fallen from around 12 per cent in the mid-1980s to around 5-6 per cent in the 2000s[4]. Though the decline in the share of the food dollar received by farmers may reflect increased bargaining power of agents downstream, given the range of factors that can determine how the spread changes over time, it is challenging to allocate precisely the contribution of each of the potential factors to the farm-retail spread.

In sum, although there are many factors that affect the functioning of the supply chain and the behaviour of farm-retail spreads over both the short and long-run (including technology, changing consumer tastes, regulation and so on), there has been a concern that competition (or the lack of it) can also have an important impact on price developments.

**Figure 3: Cereals-Bread Farm-Retail Price Spreads, US: 1983-2009 (1983-100)**




**Source:** Data compiled from USDA

## 2. Competition Issues in the Food Sector

With the food supply chain being characterised as a series of vertically-related markets, competition issues can arise *within* any stage of the food chain or with respect to the vertical linkages *between* any of the stages.

[3] Wohlgenant (2001) discusses the range of factors that impact on marketing margins over time.

[4] The share of cereal inputs intro bread and bakery products is based on US data.

**Figure 4: Stylised Framework to Address Competition and Pricing Issues in the Food Sector**

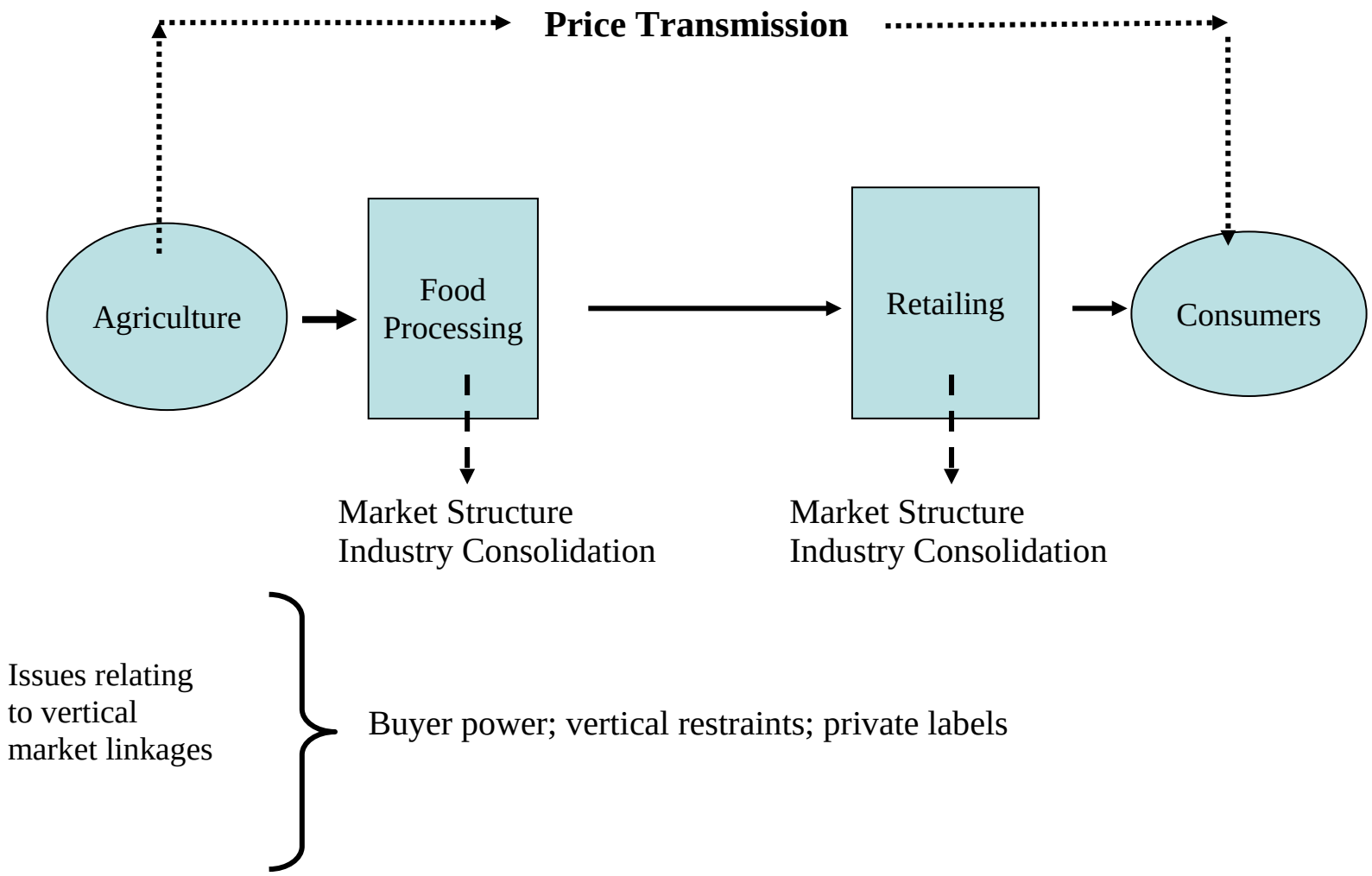


Figure 4 presents a stylized representation of a vertically-related food sector. It highlights the intermediate stages between agriculture at one end (or, if an internationally imported raw commodity, the international market), through to consumers at the other. In between, there is a range of activities involving food processing and manufacture, and food retailing.

Concerns with competition in the food chain most obviously arise with respect to the levels of market concentration at food processing and retailing stages, resulting from a consolidation trend associated with mergers and acquisitions. Buyer power or vertical restraints-related issues in the food sector are part of these concerns.

## *2.1 Concentration in the Food sector*

### *2.1.1 Food Processing stage*

Though much of the recent attention regarding competition in the food chain has focused on developments in retail markets (see below), some of the highest levels of concentration in the food sector are to be found in food manufacturing. Table 2 reports data on the 3 firm concentration ratios (CR3) for food processing across several EU Member States. Although the data refers to the mid-1990s, it nevertheless shows already high levels of concentration across a number of countries. There are two key points to note from this table. First, for many of the food manufacturing activities, there are on average high levels of concentration across the EU. For example, baby food, canned soup, pet food, ice cream and chocolate manufacture, all show high levels of concentration. Second, there is also substantial variation in industry concentration across the EU, even for the same industry classifications. Take, for example, wrapped bread which has an average CR3 across the selected EU countries of around 60 per cent; but it is as high as 96 per cent in Spain and as low as 44 per cent in Finland. Even though these figures are dated (and have likely increased), the data serves the purpose of highlighting the high levels of concentration that exist in the intermediate stage in the food supply chain.

**Table 2: Food Manufacturing Industry Concentration (3 Firm Ratio) in Europe (mid-1990s)**

| | *Ireland* | *Finland* | *Denmark* | *Italy* | *France* | *Spain* | *UK* | *Germany* | **Average** |
|---|---|---|---|---|---|---|---|---|---|
| Baby Food | 98 | 100 | 99 | 96 | 93* | 54 | 78 | 86 | 88 |
| Canned Soup | 100 | 85 | 91 | 50 | 84 | - | 79 | 41* | 76 |
| Ice Cream | - | 84 | 90 | 73* | 52 | 84 | 45 | 72 | 71 |
| Yoghurt | 69 | 83* | 99* | 36 | 67 | 73 | 50 | 76 | 69 |
| Chocolate Man | 95 | 74 | 39 | 93 | 61 | 79 | 74 | - | 74 |
| Pet Food | 98 | 80 | 40 | 64* | 73 | 53 | 77 | 87 | 72 |
| Breakfast Cereal | 92 | - | 70 | 88 | 70 | 82 | 65 | 67 | 76 |
| Tea | 96 | 90 | 64 | 80 | 82 | 62 | 52 | 55 | 73 |
| Snack Foods | 72 | 70* | 78 | 71 | 50 | 56 | 73 | 48 | 65 |
| Carbonates | 85 | 50 | - | 60 | 69 | 79 | 55 | 60* | 65 |
| Pasta | 83 | 97 | 61 | 51 | 57 | 65 | 37 | 49 | 63 |
| Wrapped bread | 85 | 44 | 59 | 80 | 70 | 96 | 58* | - | 70 |
| Biscuits | 83 | 73 | 44 | 55 | 61 | 53 | 42 | 50 | 58 |
| Canned fish | - | 70 | 49 | 68 | 43* | 33 | 43* | - | 51 |
| Mineral Water | - | 100 | 70 | 37 | - | 31 | 14 | 22 | 46 |
| Fruit Juice | - | 70 | 65 | 62 | 26 | 38 | 35 | 46 | 54 |
| Canned vegetables | - | 68 | 50 | 36 | 29 | - | - | - | 46 |
| **Average** | 88 | 77 | 67 | 66 | 62 | 63 | 55 | 58 | 67 |

*Denotes 2 firm concentration ratio
**Source:** Cotterill (1999)

Table 3 shows more recent data, this time the 4 firm concentration ratio (CR4), covering the US food manufacturing sector and reflects the concerns about increasing concentration in the food sector over recent years. Again, high levels of concentration can be found in some activities, most notably, pet food (71 per cent), wet corn milling (84 per cent), cane sugar refining (95 per cent) and soybean processing (82 per cent). These figures compare with an average CR4 of 50 per cent for US food manufacturing as a whole (covering 47 industries at the 6 digit NAICS level). The table also shows the change in industry concentration since 1997. In most cases, concentration has increased and, in some cases, the increase has been considerable. On average, the CR4 has increased by 13 per cent over this 10 year period. Most of the industries reported above witnessed large increases in concentration: pet foods (an increase of 22 per cent), wet corn milling (17 per cent), butter manufacturing (51 per cent). Even for industries with relatively low CR4s, the increase has been substantial: fluid milk manufacturing has a CR4 of 46 per cent but has shown an increase in concentration between 2007-1997 of 116 per cent.

**Table 3: US Food Manufacturing: Industry Concentration (1997) and Changes in Concentration (2007-1997)**

| Industry | 4 Firm Concentration Ratio (CR4, %) | Changes in CR4: 2007-1997 (%) |
|---|---|---|
| Pet food | 71 | 22 |
| Wet corn milling | 83.8 | 17 |
| Soybean processing | 81.5 | 2 |
| Other oilseed processing | 79.5 | 19 |
| Breakfast cereal manufacturing | 80.4 | -2 |
| Cane sugar refining | 95.2 | -4 |
| Fluid milk manufacturing | 46 | 116 |
| Creamery butter manufacturing | 78.9 | 51 |
| Dry pasta manufacturing | 62.9 | 10 |
| **Average (47 industries)** | 50.3 | 13 |

**Source:** Crespi *et al.* (2012)

Concentration ratios may not in themselves indicate concerns relating to the abuse of market power; rather it is firm conduct that matters. In this regard, there have been efforts by the research community to measure the degree of market power in food manufacturing with most of these empirical studies being applied to US data. These studies apply the New Empirical Industrial Organisation (NEIO) approach to measure market power[5]. Sperling and Sheldon (2003) give an overview of this approach as applied to the food sector. On the whole, the evidence as it arises from these studies does not indicate significant departures from the competitive benchmark. The GAO overview of the food sector also arrives at the same conclusion (GAO, *op. cit.*)[6]. Where there have been (statistically significant) departures from the competitive benchmark, the degree of imperfect competition estimated has been relatively weak.

5 The NEIO approach aims to address the extent of competition rather than the focus just on the number of competing firms.

6 The GAO (2009) study concludes: "Most of the studies we reviewed found either no evidence of market power, or efficiency effects that were larger than the market power effects of concentration. While some studies found some evidence of market power, it is unclear whether concentration caused it." GAO, 2009, p.26).

There are well known criticisms of this approach: it tends to assume product homogeneity, that the industry is characterised by symmetric firms and that firms exhibit constant returns to scale. Morrison-Paul (2001) has addressed this latter issue and has shown that scale effects can often dominate the market power effect (i.e. there are efficiency benefits associated with high levels of concentration), even if some departure from the competitive benchmark is found. In their estimates of departures from the competitive benchmark across forty food manufacturing activities, Bhuyan and Lopez (1997) found that 20 of these exhibited increasing returns to scale.[7]

In sum, despite of the high levels of concentration in some industries, empirical research does not indicate an overwhelming concern associated with firm conduct in food manufacturing. Of course, it could be the case that firm conduct is a concern but either the data is not available to uncover it (the studies that have been carried out tend to focus on a narrow array of industries) or the underlying model is not appropriate. It may also be the case that the main concerns are not with seller power (as the references above refer to) but with buyer power (addressed below). It may also be the case that the concerns about competition in the food sector arise primarily with respect to retailing.

### *2.1.2 Retailing stage*

Competition in food retailing has, arguably, attracted the most attention in recent years. There are likely several reasons for this. First, retailers are the most obvious stage of the food chain when consumers purchase food. Second, concentration is high in several countries and has risen at a rapid rate. At the same time, the number of outlets involved at the food retailing stage has fallen sharply. The expansion of retailing is also worldwide: supermarkets have penetrated a wide range of markets in Asia, Latin America and Africa; Reardon *et al*. (2003) document these changes. This expansion has involved some supermarket chains operating across a wide range of countries. Wrigley and Lowe (2010) present evidence on the country reach of these global chains: Wal-Mart (US) operates across 16 countries, Carrefour (France) over 33 countries and Metro (Germany) over 33 countries[8]. Finally, given the growing presence of food retail chains, there has also been concern about the growing role and increasing concentration of retailers on the food supply chain as a whole; the range of concerns stretch beyond seller power to the implications for suppliers at the manufacturing and farming sectors.

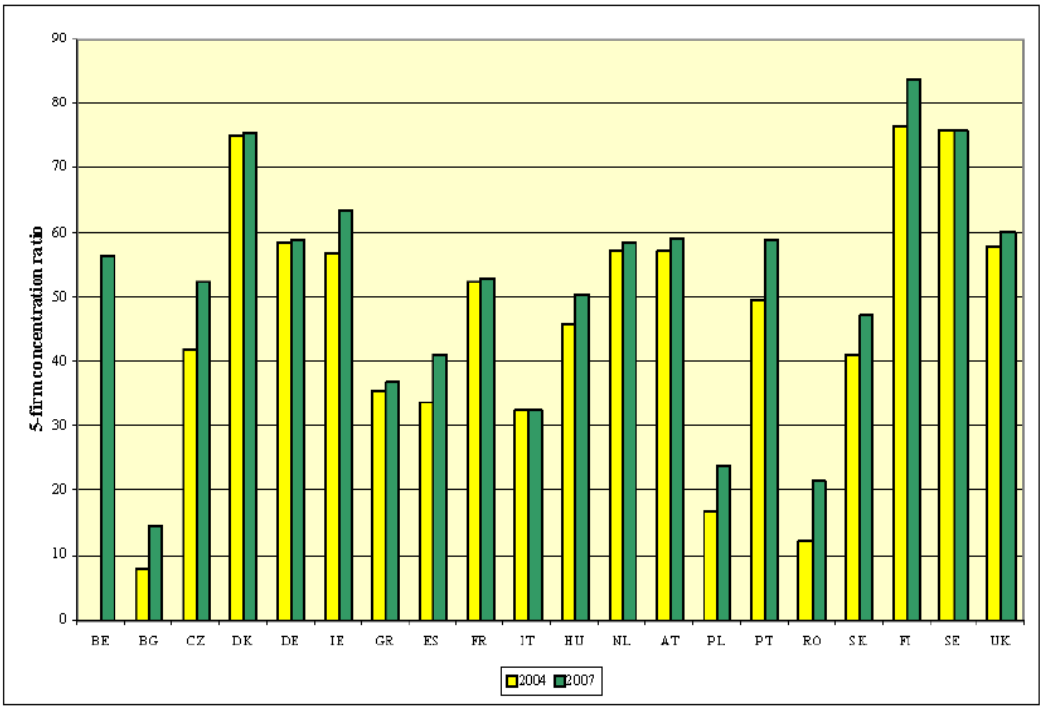
Figure 5 highlights concentration in food retailing across European countries. There are several notable points to make here. First, it is certainly the case that there are high levels of concentration in food retailing in several European countries. In some cases, the CR5 is particularly high, most notably in Finland, Denmark and Sweden. Second, even though concentration is high across some EU Member States, there are also a large number of cases across Europe where the retail sector is not concentrated, such as Bulgaria, Poland and Romania. However, the trend appears to be towards increasing concentration. Even over this relatively short time span the change in the CR5 has been quite high in some cases. For some countries, this increase has been from a relatively low base (the CR5 in Romania has for example doubled over this three year period) but even for countries with relatively high levels of concentration, it has increased. Third, despite these changes, there are some countries where retail concentration is limited, most obviously, Belgium. The variation across Europe in retail concentration can, of course, reflect a wide

[7] Nevo (2001) explored the ready-to-eat breakfast cereal market and allowed for product differentiation between firms.

[8] Wrigley and Lowe (2010) survey the broad range of factors that have given rise to the growth in multinational retailing and the implications it has for international restrictions on trade and investment in services.

variety of factors related to regulation, planning laws and other factors which may give rise to barriers to entry[9].

**Figure 5: Concentration in Food Retailing in Europe, 2004 and 2007**
**(5 Firm Concentration Ratio, CR5)**



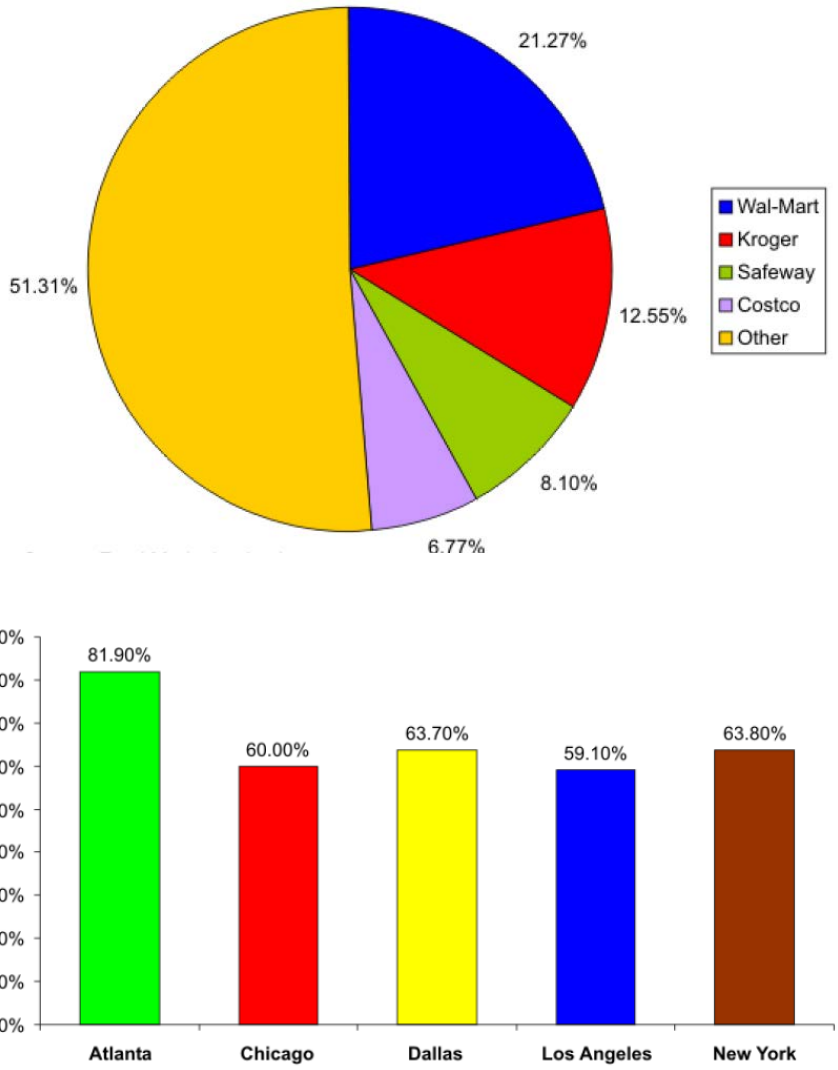

**Source:** Bukeviciute *et al*. (2009)

Changing retail trends in Australia give another example of high and rising levels of concentration in food retailing. A recent study (NARGA, *op. cit.)* reports that the top two food retailers (Coles and Woolworths) accounted for around 80 per cent of retail food sales in 2009. This compares with the UK where, even though food retailing is seen as being relatively concentrated, the top two firms account for 48 per cent of total sales. The trend towards increased concentration in Australia has occurred at a fast rate. In 1990, these two firms accounted for 50 per cent of market share; by 1999 61 per cent, rising to around 80 per cent by the mid-2000s.

Food shoppers tend to shop locally which means that national data on concentration ratios may not give an accurate reflection regarding the potential impact of market power in food retailing in specific geographical locations (see discussion in Section 2 on market definitions). This is reflected in data for concentration in US food retailing. As shown in Figure 6, at the national level, the CR5 is reported to be a little less than 50 per cent. However, the national market may not be the appropriate focus. Richards and Pofahl (2010) present data that shows that across several states, the levels of concentration can be much higher. Figure 6 also highlights this dimension of concentration: the data shows that the CR5 is much higher in several US cities, most notably in Atlanta where the CR5 is around 80 per cent.

9 Reflecting the change in concentration in food retailing, there have also been changes in shopping formats. In the UK, the number of grocery outlets (including the number of supermarkets) declined between 2000 and 2006 (Competition Commission, 2007). Herrmann *et al.* (2009) report an increase in the number of hypermarkets, supermarkets and discount outlets in Germany between 1980 and 2004 with the number of remaining grocery outlets falling by around 50 per cent.

**Figure 6: National and City Level Five Firm Concentration Levels in the US, 2008**

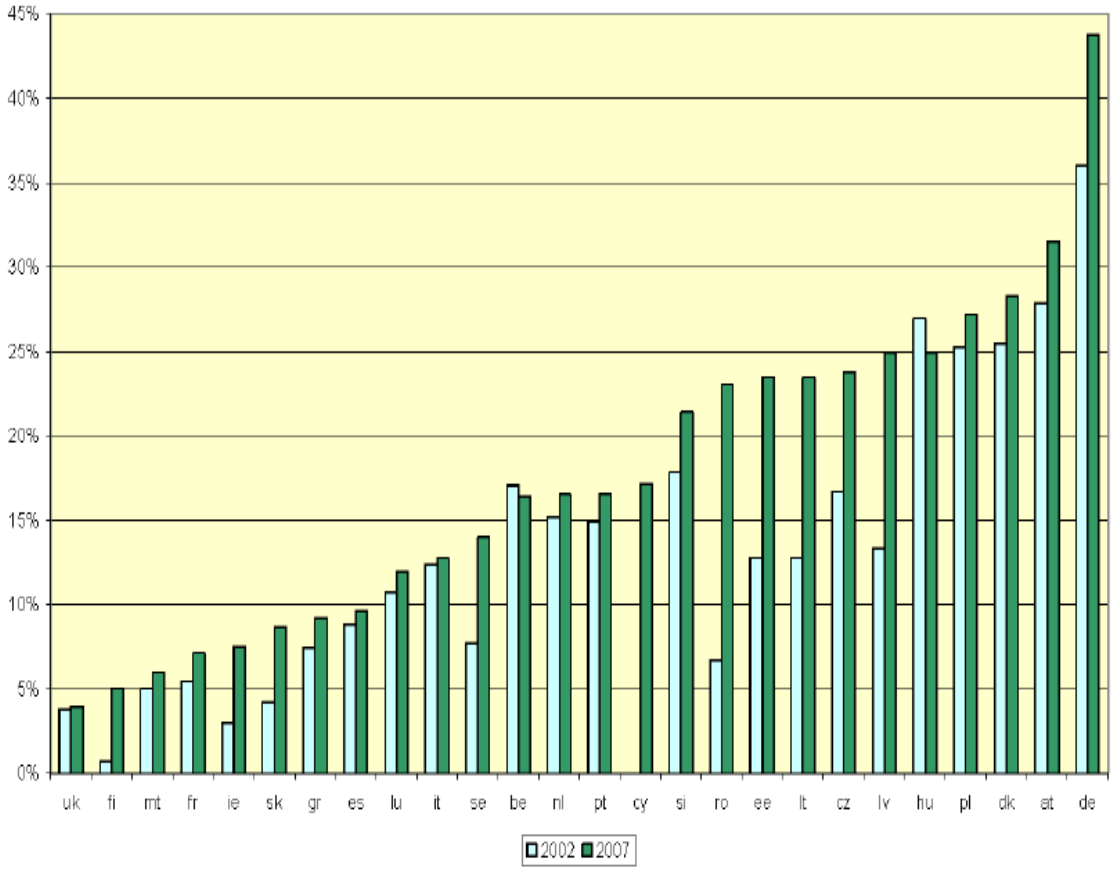



**Source:** Richards and Pofahl (2010)

A further feature of competition in food retailing is the growing importance of discounters such as Aldi and Lidl[10]. Data on the presence of discounters in Europe is presented in Figure 7. There are two notable features from this figure. First, the relative importance of discounters varies markedly across countries. Discounters have a strong presence in Germany (most notably), Austria, Denmark, Poland and Hungary but have only a relatively minor role in the UK and Finland. The second notable point is that the role of discounters has been increasing (with some exceptions, most notably the UK).

10 Senauer and Seltzer (2010) report that Aldi (a German discounter) had expanded into the US with more than 1,000 stores in 31 US states.

**Figure 7: Discounters across EU Member States**




**Source:** Bukeviciute *et al*. (2009)

### *2.2 Consolidation through mergers and acquisitions*

As noted above, the increase in concentration at both processing and retailing stages results in large part from a process of consolidation, which in turn reflects the declining number of enterprises operating at each stages[11] and the number of mergers and acquisitions. The European Competition Network (2012) review of anti-trust investigations into the food supply chain across Europe since 2005, noted 1,300 investigations by national authorities related to merger and acquisitions (M&As).

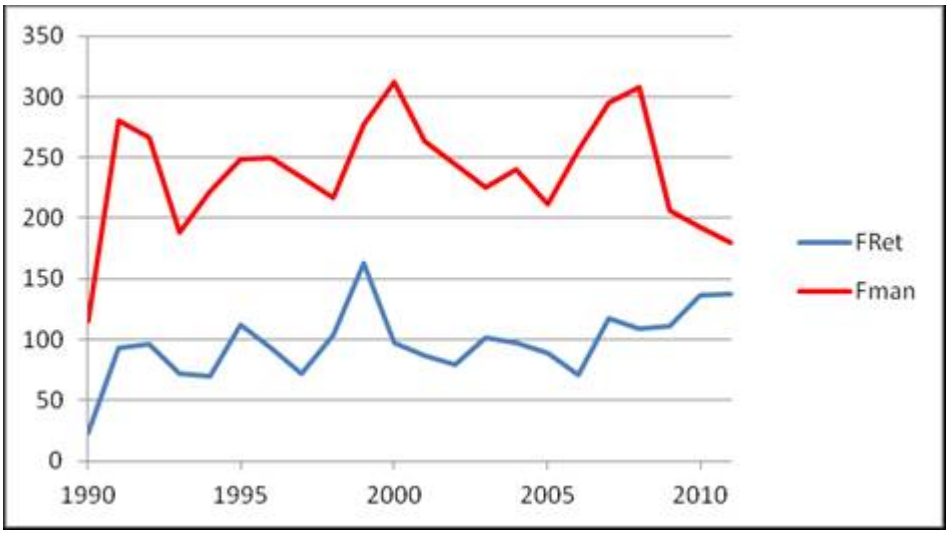
Three main features characterize the trends in M&As in the food sector across OECD countries over the past 20 years: First, merger and acquisition activity can be volatile; second, most M&As occur in the food manufacturing not retailing stage in the supply chain; third, cross-border M&As account for a significant proportion of overall M&A activity (though the relative significance of this can vary by country).

Figure 8 reports on the number of acquisitions in the EU food sector since 1990 separating acquisitions in the food retailing sector from food manufacturing. The figure shows clearly the first two of the points made above: that there are more acquisitions in food manufacturing than retailing and that the number of deals can vary considerably between years. This wave-like behaviour in M&As is not uncommon. Explanations often relate to technological change and de-regulation. More recently, one of the main factors that have been highlighted has been mis-valuation in financial markets. The mis-pricing of

[11] This may reflect the role of economies of scale and scope at various stages in the food supply chain.

firms may lead to patterns of M&As that has little to do with "fundamentals". A discussion of these issues can be found in Mitchell and Mulherin (1996), Harford (2005) and Rhodes-Kropf and Viswanathan (2004).

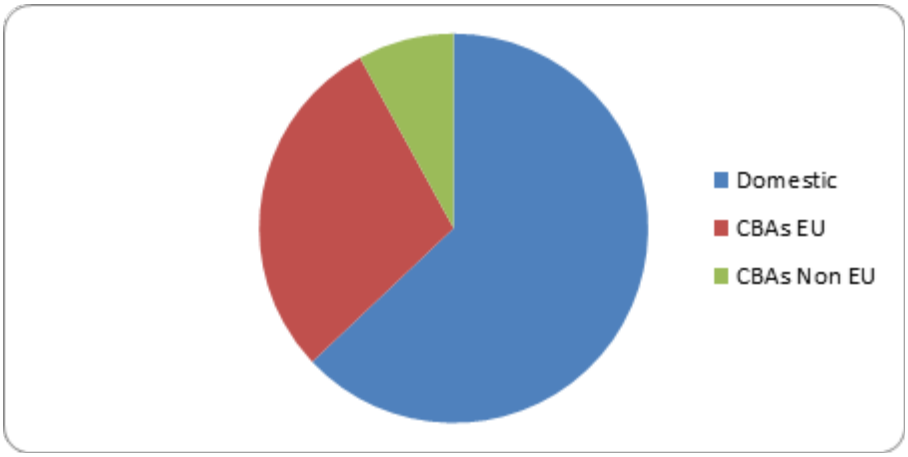
**Figure 8: M&As in EU Food Manufacturing and Retailing**




**Source:** Data compiled from *SDC Platinum*

The data reported in Figure 8 covers both domestic and cross-border M&As in the EU. Focussing specifically on the food manufacturing stage, cross-border deals (CBAs) accounted for around 35 per cent of total M&As over the 1986-2011 period. Most of these cross-border deals originated and were targeted at other EU Member States. This data is presented in Figure 9 which highlights the distribution of M&A deals: domestic activity clearly accounts for the majority of M&A activity in EU Member States with the relative importance of deals involving EU countries clearly apparent. There may be good reasons why EU cross-border M&As typically involve other EU countries (for example, geographical proximity, close trade links, common policies and so on).

**Figure 9: Distribution of Total M&As by Source: EU Manufacturing, 1986-2011**

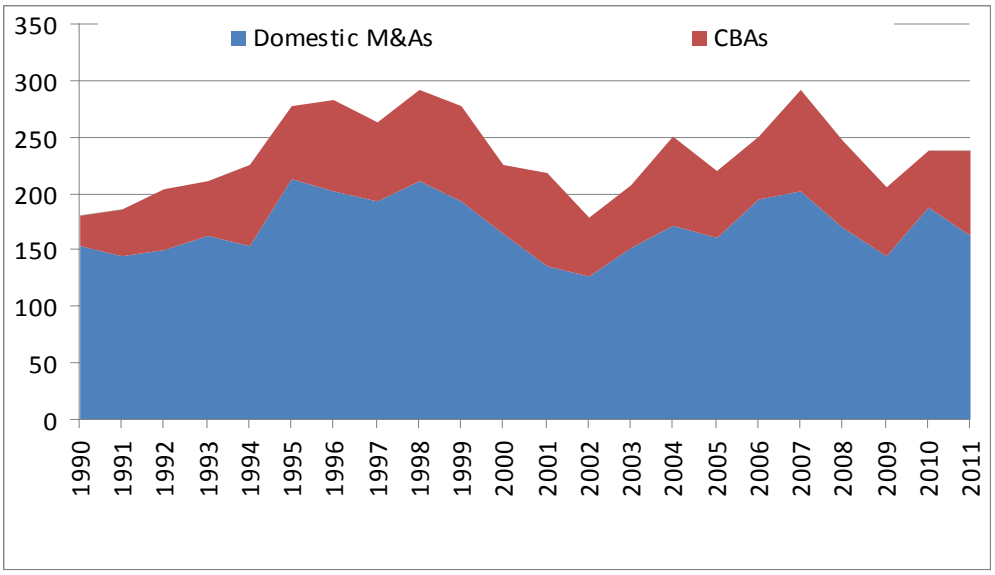



**Source:** Data compiled from *SDC Platinum*

The patterns in M&A activity reported for the EU are more general. Figure 10 reports M&A activity in the US food manufacturing sector between 1990 and 2011. The main features noted above are apparent

here too: overall, the process of consolidation via M&As can be volatile; cross-border deals account for a significant proportion of total M&A activity; domestic deals nevertheless account for the majority of activity.

**Figure 10: M&As in the US Food Manufacturing Sector, 1990-2011**




**Source**: Data compiled from *SDC Platinum*

There have not been many studies of mergers with specific data for the food sector. One of the key insights that arises is the market definition effect. Barros *et al*. (2006) assess the potential effects of mergers in the Portuguese food retailing sector: they estimate that prices to consumers would likely rise, for two reasons. There are two competing effects. First, competition at the local level weakens; second, retailer buying power via suppliers will increase thus lowering costs. The net effect on consumers from the merger depends on how these cost savings are passed through to consumers. They find that pass-through is limited so that the effect of mergers at the retail level is for consumer prices to rise[12]. Allain *et al*. (2013) look at whether retail mergers would increase food prices. Using scanner level data from France, they find that mergers significantly raise prices, both for the merged firms and non-merged firms. They highlight that the main effect of these price changes comes through the impact on local competition.

Little research has addressed the reasons for the overall trends in M&As in the food sector. Focussing on US cross-border acquisitions, McCorriston and Sheldon (1998) highlight the role of the stock market and exchange rate fluctuations. Herger *et al*. (2008) take a more global perspective of cross-border deals in the food sector and also highlight the importance of macroeconomic and financial factors in driving cross-border M&As over time. They also found the Euro plays a role in increasing M&As between EU Member States.

### *2.3 Market Power*

The rapid growth in concentration at the food retailing level has given rise to concerns about market power. Early research on this issue focused on the links between levels of concentration and price levels.

12 Smith (2004) applies his framework on competition across supermarkets in the UK to simulate the potential effect of mergers between the largest firms.

Cotterill (1986), using store level data from supermarkets in Vermont, found that higher prices were associated with more concentrated markets. However, this conclusion was questioned by Newmark (1990) who showed that the relationship between concentration and prices did not exist when other factors (such as variation in income levels) were accounted for. There has been a lack of NEIO studies on food retailing and, those studies that have been carried out (for example, Gohin and Guyomard (2000) for France) are not wholly convincing. Smith (2004) takes a broader perspective of competition amongst supermarket chains using data for the UK. The potential impact of discounters has been assessed by Hausman and Leiptag's study of Wal-Mart: they find that in specific geographical markets, prices in other supermarkets decreased by around 4 per cent following the entry of Wal-Mart (Hausman and Leiptag, 2007)[13].

Concerns about market power in food retailing can relate to seller or buyer power, or both. It is the interaction between horizontal and vertical issues that can determine potential market power in the retail sector. Two notable enquiries on competition in grocery retailing have shown less concern with retailer seller power. Griffith (2004) notes the conclusion of the Australian parliament's review on food retailing which identified the major winners from the expansion of food retailers as consumers, who benefited from wider choice, greater accessibility and convenience and lower prices. These lower prices arose in part from greater economies of scale and scope. Similarly, the UK Competition Commission's investigation into the grocery sector also highlighted the potential benefits to consumers from competition in food retailing despite the increase in market share of the major retailers. However, the Commission did express concerns relating to how the increasing role of food retailers affects upstream suppliers (Competition Commission, 2008).

Buyer power has been defined as:

> "...the situation which exists when a firm or a group of firms, either because it has a dominant position as a purchaser of a product or a service or because it has strategic or leverage advantages as a result of its size or other characteristics, is able to obtain from a supplier more favourable terms than those available to other buyers" (OECD, 1981)

and, more recently, as:

> "[a buyer] can credibly threaten to impose a long term opportunity cost (i.e. harm or withheld benefit) which, were the threat carried out, would be significantly disproportionate to any resulting long-term cost to itself" (OECD, 1998).

Buyer power can arise in a number of forms including the price paid to suppliers, the nature and determination of contract terms, payments requested by retailers for access to shelf space and so on. Chen (2007) makes the point that, in addressing buyer power, a distinction should be made between buyer power where the supplier is powerless and the case where the supplier has some degree of market power. In the latter case, buyer power may be framed in the context of countervailing market power. Not only may the exercise of market power take different forms but the welfare and efficiency effects of buyer power will also be different. We should therefore make a distinction between buyer power that affects the farm sector

[13] There are significant challenges to addressing market power in food retailing and which have yet to be addressed adequately by research. The first of these is to recognise that food retailers are multi-product in nature often having on sale 30-40,000 product lines and are characterised by economies of scale and scope. Studies that have focussed on single product lines do not capture the multi-product nature of food retailing as retailers may compete across a variety of dimensions, not just on price but also on variety (Richards and Hamilton, 2006) and store attributes (Smith, *op. cit.*). Ellickson (2007) suggests that the multi-product nature of food retailing makes the supermarket industry a 'natural' oligopoly.

(or other agents in the supply chain who are 'powerless' e.g. small processing firms) and buyer power that involves an interaction between retailers and food processors where market concentration in both sectors is relatively high.

Concerns have arisen about buyer power in the food supply chain. With high and increasing concentration at both the food manufacturing and retailing sectors, coupled with (to date) a lack of clear evidence that seller power in food retailing is a significant concern, attention has focussed on market power being exercised via procurement. For example, the UK Competition Commission's investigation into the grocery sector highlighted 30 practices with respect to the relationships between supermarkets and buyers that could give rise for concern (Competition Commission, 2000). This issue was the focus of a subsequent investigation (Competition Commission, 2008). In a similar vein, Griffith (*op. cit*.) documents these concerns with the high levels of concentration in the Australian food retailing sector as noted above. Concerns regarding procurement were also raised in the US Department of Justice's workshops on competition in the agricultural sector (DoJ, *op.cit*.). The academic literature has also reflected these concerns; see, for example, Dobson and Waterson (1999) and Dobson *et al.* (2003). The OECD have summarised issues with respect to buyer power in OECD (2008).

There are several dimensions to the buyer power issue as they arise in the food sector. First, simply measuring growing concentration in food processing and retailing by the number of firms or their market shares might under-estimate the potential for buyer power. Dobson *et al.* (*op. cit*.) report that the role of buyer groups increases the level of concentration upstream suppliers face, at least in some countries. This is evident from Table 4. Though the data on retailer concentration is older than that presented in Table 2, it nevertheless indicates that buyer groups are an important feature of the food supply chain in several EU countries. While buyer groups are not important in some EU Member States (notably, Austria, the UK and Ireland), concentration at the retail stage increases in Denmark, France, Italy, the Netherlands and Spain when the top buying groups are accounted for.

**Table 4: Retail Concentration Accounting for Buyer Groups, 1996.**

| Country | Excl. Buyer Groups | Incl. Buyer Groups | Country | Excl. Buyer Groups | Incl. Buyer Groups |
|---|---|---|---|---|---|
| **Austria** | 58.6 | 58.6 | **Ireland** | 64.2 | 64.2 |
| **Bel/Lux** | 61.6 | 84.6 | **Italy** | 11.8 | 26.2 |
| **Denmark** | 59.5 | 76.6 | **Netherlands** | 50.4 | 69.6 |
| **Finland** | 89.1 | 89.1 | **Portugal** | 55.7 | 62.4 |
| **France** | 50.6 | 78.2 | **Spain** | 32.1 | 49.3 |
| **Germany** | 45.4 | 50.0 | **Sweden** | 77.9 | 77.9 |
| **Greece** | 28.0 | 28.0 | **UK** | 56.2 | 56.2 |

**Source:** Dobson *et al.* (2000)

Crespi *et al.* (*op. c*it.) focus on issues relating to meat packing in the US, a sector which has attracted a reasonable amount of research on buying (and selling) power in the past. They note that the high levels of concentration that have emerged at this stage in the food supply chain, might under-estimate the scope for buyer power. This is because the rise in the 4 firm concentration ratios in the meat packing industries has been associated with the closure of meat packing plants. For example, between 1980 and 2000, the CR4 in the cattle packing sector increased from 36 per cent in 1980 to 85 per cent in 2010, an increase of 136 per cent. The number of meat packing plants decreased by 82% from 743 to 135. Similar trends can be found in other meat sectors. As Crespi *et al*. (*op. cit*.) note, the decline in the number of plants can also have a regional dimension which can exacerbate the degree of market power in procurement. Crespi and Sexton (2005) reports evidence that the number of plants can have a greater impact on pricing than the number of firms. The regional aspect to procurement also arose in the Department of Justice workshops (see DoJ, *op. cit*.).

Secondly, buyer power can be reflected in a number of ways. The standard textbook treatment of monopsony or oligopsony is that, with an upward sloping supply function, the buyer limits the quantities procured resulting in a lower price for suppliers and, in a single stage setting, a higher price for consumers. But there are other ways in which buyer power may occur, as expressed in specific contractual terms between participants at each stage of the food supply chain. Examples include de-listing (or threat of de-listing) of suppliers, slotting fees, forced discounts, retrospective payments, late payment, retrospective changes to contracts. They are all means via which buyers may influence the relations with suppliers. Griffith (*op. cit*.) highlights some of these issues in her assessment of food retailing issues in Australia and these issues (among others) have also been highlighted by the UK Competition Commission (Competition Commission, 2000 and 2008). Concerns here relate not just to prices upstream suppliers receive but to the risk for suppliers arising from unforeseen changes in the contract or the terms via which suppliers engage with retailers.

Empirical evidence on the existence of buyer power is generally lacking. There has been research applying the NEIO methodology, most commonly to the US meat packing sector, to measure mark-downs. Schroeter (1998), Schroeter and Azzam (1990) and Koontz *et al*. (1993) found weak departures from the competitive benchmark. Crespi and Sexton (*op. cit*.) found rather stronger declines in the levels of prices paid to suppliers in the meat packing sector. However, and in line with the comments made above, the framework used to estimate mark-down departures from the competitive benchmark may not take account of efficiency benefits arising from processors having access to inputs at the right time. This is referred to as "captive supplies" and its role in ensuring efficiency in meat packing was highlighted in the GAO (*op. cit*.) assessment of market power in the US food sector.

### *2.4 Vertical Restraints*

Vertical restraints come in a variety of forms and represent a departure from the assumption of arms length or linear pricing between the vertical stages: exclusive dealing, two-part tariffs, slotting fees, over-riders, discounts, resale price maintenance among others, are examples of vertical restraints. An overview of the issue of vertical restraints in the food sector is covered by McCorriston (2002) and McCorriston and Sheldon (1997). Early research on vertical restraints assumed an oligopolistic manufacturing stage and a competitive retail stage with more recent work reflecting the circumstances more likely to arise in the food sector i.e. where there is market power at retailing and where the vertical restraints may reflect the bargaining power of retailers over (oligopolistic) suppliers.

The challenge in addressing the role of vertical restraints is not that they arise but what effects they are likely to have on efficiency and welfare at different parts of the food chain[14]. Take, for example slotting allowances: fees paid by food processors to retailers for shelf space or slots, such as end-of-aisle placement). Early papers on slotting allowances associated them with asymmetric information. New products are frequently introduced into the food sector, so the fees could be interpreted as a signal by the processor to the retailer about the likely success of the new product (Chu, 1992). Hamilton (2003), however, notes that the experience of slotting allowances as applied in the US food sector suggests that they are not limited to new product introductions and tend to be confined to certain product groups.

Slotting allowances can affect the efficiency of the food chain and have important welfare outcomes though there is no consensus on the direction of the effect. Shaffer (1991), for example, assumes the retail sector is oligopolistic and the manufacturing sector competitive. The use of the slotting fee arises from the retailer's market power and is used to extract rent from the processors. Retail prices rise and consumer

[14] McCorriston (2002) cites the UK case where 40 per cent of suppliers noted they had to pay slotting allowances to retailers and the high level of promotional activity that is accounted for by slotting allowances in both the UK and US.

welfare decreases. Hamilton (*op. cit*.), however, sets out a different characterisation of vertically-linked industry; the retail sector is competitive and the processing stage has oligopsonistic power vis-à-vis the farm sector. The slotting allowances are instigated by the processors, the effect of this being to increase procurement from the farm sector. Farm prices and quantities procured rise and consumer prices fall, the outcome here being the mirror image of the welfare effects that arise in the Shaffer (*op. cit.)* characterisation with retailer market power. The lack of a clear consensus on the impact of slotting allowances shows that the impact is contingent on assumptions about market power in the supply chain and whether it is retailers or processors who instigate the slotting fees.

Perhaps unsurprisingly, the arrangements that characterise manufacturer-retailer relations in the food sector are difficult to assess empirically. Villas-Boas (2007) makes an attempt to do this with an application using data from yoghurt sales in US retailing. The innovation pursued by Villas-Boas is to identify the links between retailers and manufacturers when upstream prices cannot be observed, the approach here being to simulate market outcomes with alternative characterisations of retailer-manufacturer links to assess which one fits the observed data 'best'[15]. She finds that manufacturer-retailer relations in this sector are most likely characterised by wholesale price at marginal cost with retailers having pricing power. This outcome is consistent with non-linear pricing by manufacturers or with retailers having bargaining power in the food supply chain.

### *2.5 Private Labels*

The penetration of private labels by retail chains is an increasingly important feature of the food sector. This has to do with how retailers compete directly with one another and with how they compete with products originating from the manufacturing sector. Private labels have therefore both a vertical and horizontal effect. On average, private labels account for 23 per cent of total retail food sales in Europe and 15 per cent in North America[16]. But even across Europe, there is substantial variation in the extent of private labels as shown in Table 5. Private label penetration ranges from 48 per cent of sales in the UK to a low of 17 per cent in Italy. In all countries, private label penetration has been increasing over the time period shown with notably high rates of growth in Slovakia, the Czech Republic and Poland. The extent of private label penetration varies by product category (Bergès-Sennou *et al.*, 2004) and it can also vary by retail chain. Although often perceived to be lower quality than the nationally branded products (as demonstrated by the fact that the penetration of private labels is higher when focussing on volume rather than value shares), private labels can range across high and low quality products.

15 The innovation of accounting for retailer-manufacturer relations when only limited data exists (specifically when upstream price data is not available) has also been extended to addressing price transmission issues in the food supply chain (see below).

16 The penetration of private labels is lower in other regions; NARGA reports the share of private label sales as low as 4 and 2 per cent respectfully in Asia-Pacific and Latin America (NARGA, 2010).

**Table 5: Private Label Penetration in EU Member States, 2003-2009 (per cent of total sales).**

| Country | 2003 | 2009 | % Change |
|---|---|---|---|
| United Kingdom | 41 | 48 | 7 |
| Germany | 35 | 40 | 5 |
| Belgium | 38 | 40 | 2 |
| Spain | 29 | 39 | 10 |
| Austria | n/a | 37 | n/a |
| Slovakia | 11 | 37 | 26 |
| France | 28 | 34 | 6 |
| Portugal | n/a | 34 | n/a |
| Denmark | 25 | 28 | 3 |
| Hungary | 17 | 28 | 11 |
| Finland | 24 | 28 | 4 |
| Czech Rep. | 13 | 28 | 15 |
| Sweden | 22 | 27 | 5 |
| Netherlands | 22 | 25 | 3 |
| Poland | 7 | 21 | 14 |
| Greece | n/a | 18 | n/a |
| Italy | 14 | 17 | 3 |

**Source:** European Commission (2011)

For the retailer, private labels are a means via which they can differentiate themselves from other retailers. Since the retailer effectively also becomes the supplier, it also competes directly with the producer of the nationally branded product. In sum, the penetration of private labels can have both horizontal and vertical impacts on competition in the food chain. Research to date has, in large part focussed on the vertical dimension and whether the competition between private labels and nationally branded products leads to higher prices. As detailed below, insights from research on private labels suggest that the impact on consumers is ambiguous[17].

Mills (1995) is an early attempt which highlights the interaction between vertical and horizontal effects arising from the introduction of private labels. The benchmark characterisation of the vertical supply chain is with a monopoly retailer and a monopoly manufacturer of the nationally branded good. In this context, the manufacturer charges a monopoly wholesale price as does the retailer, and social welfare is lower due to double monopoly. The private label (if introduced) will be of lower quality than the national brand but the effect of the introduction of the new (private label) product is two-fold. First, there is competition at the retail level between the national brand and the private label good. However, the vertical dimension is that the retailer now accrues a greater part of the (total) food chain rent. Second. the manufacturer of the national brand reduces the wholesale price of this product which implies that, at the retail level, the price of the nationally branded good will fall. Taken together, there is a redistribution of rent between the national brand manufacturer and the retailer, and consumers gain because the price of the national brand good falls. The double marginalisation issue diminishes and social welfare increases.

However, Gabrielsen and Sørgard (2007) show that the introduction of private labels may result in an increase in the prices of nationally branded products. Their set-up relies upon splitting consumers into two groups: those consumers who are loyal to the national brand and those who are more opportunistic and

[17] A survey on the broader issues with private labels can be found in Bergès-Sennou *et al.*, (2004). Steiner (2004) also provides an overview of the competition issues arising from private label penetration.

willing to switch to the private label. The national brand manufacturer has to decide between competing for the opportunistic consumers or exploiting the loyal consumers; in the former case, they will charge a lower price while, in the latter case, since the loyal consumers have price inelastic demand, a higher price can be charged. Gabrielsen and Sørgard (*ibid*.) show that if the share of loyal consumers is relatively high, the branded manufacturer will focus on that group and a higher price will be charged. They also show that, in some circumstances, a private label may not be introduced at all. This would arise if the national brand manufacturer competes for the opportunistic consumer group by offering an exclusivity contract to the retailer at a low price and no private label will be introduced.

The empirical evidence on the effects of private labels on prices is also mixed. Using US data, Harris *et al.* (2002), show that the entry of private labels is correlated with an increase in the price of national brands. Cotterill and Putsis (2000), looking at 143 product categories and 59 geographical markets in the US, report that prices for both national brands and private labels tend to be higher when markets are concentrated and national brand share is high. Bontemps *et al.* (2008) explore the effects of private labels using French data covering 218 product groups. The effect on prices of national brands tends to be positively correlated with private label purchases though the effect on prices will vary depending on the type of private label (i.e. whether it is of lower quality or competes more directly with the national brand; low price private labels will have less of an impact). Further, the price effects have more impact on the leading national brand rather than second-tier brands.

There are three observations to note on research on private labels. First, while empirical evidence may be consistent with a stream of the theoretical research, empirical studies do not detail the mechanisms that cause this effect, therefore making it difficult to choose between alternative theoretical models that would be consistent with the data. Second, as noted above, the introduction of private labels has both a horizontal and vertical effect. The latter arises through the retailer now competing directly with the national brand manufacturer, and the retailer is able to capture some of the (total) supply chain rent. However, inter-retailer competition is not accounted for even though private labels allow some differentiation across retailers; the retailer is typically assumed to be a monopolist such that the focus is largely on the impact on national brands within a retail chain but not across retail chains. Third, it may be the case that not all impacts of private labels are accounted for. For example, a retailer may threaten to de-list national brands following the introduction of private labels (Daskalova, 2012). A final concern with private labels relates not to the price effects but on the incentives for product innovation. Steiner (2004) and Daskalova (*op. cit.)* raise these issues, the latter highlighting that the development of private labels may raise issues about propriety information developed by national brand manufacturers, though an overview sponsored by the EU suggests that there was no significant impact on innovation arising from the penetration of private brands (EU Commission, 2011).

### *2.6 Some unresolved issues*

In reviewing various aspects of competition issues in the food sector, it has become apparent that the current state of economic research to some extent lags behind the increasing concerns about the functioning of the food supply chain and competition in the food sector. In particular, attention should be devoted to the interaction between horizontal and vertical effects, the distinction between static and dynamic effects and the broader issues of ‘fairness’ in the food supply chain.

#### *2.6.1 The Interaction between Horizontal and Vertical Effects*

The framework outlined in Figure 4 highlighted that competition concerns can be horizontal in nature (given the high and rising levels of market concentration in food manufacturing and retailing) or vertical in nature (due to buyer power between the different stages). The important point to note is that these two dimensions of competition interact. Dobson and Waterson (1997) address this issue. They model the case

where there is competition among a limited number of retailers who purchase inputs from a single upstream supplier. When there is consolidation in the retail stage, the effects on consumers (i.e. final prices) will be ambiguous since two effects are at play. On the one hand, consolidation lowers the number of firms, so prices may be expected to rise. On the other hand, consolidation at retail increases the retailers' bargaining power with respect to the upstream supplier, which may be expected to lower consumer prices. Which effect dominates-and therefore the final effect on consumers-will depend on the intensity of competition at retail. If consumers regard the retailers' services as strong substitutes, then prices will fall and the combination of consolidation at one stage will interact with increased bargaining power with regard to the upstream stage, the combination of these horizontal and vertical effects having the potential to benefit consumers.

Another dimension to the horizontal-vertical interaction is the "waterbed" effect. In this case, strong retailers may be able to extract better terms from their upstream suppliers. But the upstream suppliers, to partially offset this effect via the main purchasers, may charge higher prices to the remaining buyers. Even if the net effect on consumers is positive, the impact of buyer power is to raise the costs for the weaker competitors in the final stage. Inderst and Valletti (2011) provide a recent analysis of this issue and they highlight the circumstances where the 'waterbed' effect can lead to consumer harm. This will arise if the supplier is able to price discriminate between purchasers and where the 'weaker' retailers rely on discounts for their competitive positions.

### *2.6.2 Static versus Dynamic Effects*

In large part, the discussion above relates to the potential impact of market structure on prices; but this may not be the only aspect that matters. The (potential) lack of competition may also impact on the incentives to invest and to innovate. For example, in the context of the penetration of private labels, concern has been expressed on how the growing share of private labels will impact on product innovation. Daskalova (*op. cit*.) discusses these issues as does Ezrachi (2010). The report coordinated by the EU also explored these issues (European Commission, *op. cit*.). With regard to oligopsonistic power, Crespi *et al*. (*op. cit*.) express some doubt on this as it would not be in the long-term interests of buyers if suppliers were unduly influenced by short-term effects that impacted on their long-run potential to efficiently supply the inputs.

Inderst and Shaffer (2007) is a recent attempt to address this issue. They show that with retail mergers, product variety may also decrease following consolidation. Specifically, the retailer will no longer carry all products and the de-listing of products impacts on the incentives for the suppliers. The supplier re-positions its product lines which reduces product differentiation. This then further reduces consumer welfare. As above, these insights arise from recognising the interaction between horizontal and vertical effects, the horizontal effect of the retail merger impacting on the supplier which feedbacks through to consumers.

### *2.6.3 'Fairness' in the Food Supply Chain*

Many of the concerns about developments in the food sector relate to the impact on certain groups within the supply chain (e.g. farmers) even though the effect on consumers may be positive. Developments in the food sector may be pro-competitive insofar as they lead to lower prices to consumers (or at least no evidence of consumer harm) even though this may involve rent re-distribution between players and across different stages in the food supply chain. It is important to differentiate between these two issues (i.e. the effect on consumers and fairness or rent distribution throughout the food chain), and the scope for competition authorities may be one but not the other. Other policies can also have an effect on re-distributional concerns, most obviously agricultural policy that has, in large part across OECD countries, been concerned with income issues in the farm sector. Changes in agricultural policy towards less support

(or at least support in a particular form of sustaining high prices) may also impact on the concerns about re-distribution for this specific group of constituents.

## 3. Price Transmission and Competition

As previously noted, part of the concern about food prices and the related role of competition refers to a notion of 'fairness': certain groups within the food supply chain would take most of the burden of adjustment in the presence of sector specific shocks. As Figure 1 shows, in recent years when commodity prices have been volatile, farm prices have varied considerably more than retail prices. Also, while firms in an imperfectly competitive industry may be willing to pass on (to some extent) cost shocks through to consumers, they are less willing to reduce retail prices when costs subsequently decline. With such an asymmetric price adjustment, while mark-ups could decline in the face of cost increases, they subsequently widen when commodity prices decline. Given that a principal characteristic of commodity markets is volatility and, more recently, commodity price spikes, with asymmetric price adjustment, retail prices do not decline to match these commodity price falls[18].

This section explores the potential link between competition in the food supply chain and the transmission of price changes originating from the farm to the retail sector, with an Appendix providing more technical coverage of the issue. In exploring this link, the key mechanism centres around the change in mark-ups: if firms have mark-ups above the competitive level, how these mark-ups change will be an important determinant of the outcome. The extent to which these mark-ups change will depend on not only the intensity of competition but also the characterisation of the demand function. Recent econometric developments and data availability allow for structural models to be estimated that account for brand competition at the retail stage (an obvious characterisation of the food retail sector) with extensions allowing for alternative characterisations of contracts between retailers and manufacturers. While this is an emerging research area, the framework presented here coupled with recent advances show that competition throughout the food supply chain has an important influence on price transmission. It also shows how consumers are affected by commodity price changes when the competitive aspects of the food supply chain are accounted for.

### *3.1 Competition and Pass-Through: Basic Insights*

The main intuition relating commodity price changes to competition can be highlighted by drawing on the model of farm-retail price spreads initially developed by Gardner (1975). This model has been adapted by McCorriston *et al* (1998) to account for imperfect competition. In this framework, there is a single intermediary stage that is labelled the 'food processing/retailing sector' that produces a homogeneous good with firms pursuing quantity-setting strategies. As McCorriston *et al*. show, the main intuition that lies behind the extent of price transmission arising from the impact of shocks occurring at the farm stage on retail prices can be separated into two parts:

$$PT = f(\Delta MU, \Delta C) \qquad (1)$$

i.e. the extent of price transmission depends on the change in the aggregate mark-up for firms that constitute this intermediate, oligopolistic food sector and the change in costs. Assume, initially, that the food sector is competitive such that the mark-up is zero. The extent of price transmission will then depend only on the change in costs. If a fixed proportion technology is assumed, then the extent of price

[18] This issue of asymmetric price adjustment has been noted in other contexts and has been referred to as "rocket and feather" price dynamics. This pattern of price behaviour has been addressed in the context of gasoline prices (see OECD, 2013). Tappata (2009) provides a formal attempt to explain this pattern of asymmetric price behaviour,

transmission will reflect the share of agricultural raw materials in the (competitive) food industry cost function. So, if the share of agricultural raw materials in the food industry costs function is 25 per cent, the price transmission elasticity should be 0.25[19].

However, if the mark-up is positive, then market power influences the degree of price transmission as the mark-up may change due to the change in the food industry costs where the change in the aggregate mark-up will depend upon the degree of market power (itself contingent on the nature of competitive interaction between firms and the number of competing firms) and the nature of the demand function. Note that if the demand function is log-linear, even if there is a positive mark-up, it will not change following any change in costs so the change in the mark-up will not influence the degree of price transmission in these circumstances. However, in other circumstances, the change in the mark-up plays a role and serves to reduce the price transmission elasticity (as long as the demand function is not 'too' convex). In this case, there is 'under-sifting' and retail prices will change less than farm-gate prices.

The main insight from the above is that with a change in the costs purchased by the food sector, there are essentially two factors which will determine how food prices will change. The first is the share of costs in the industry cost function. If the food industry is competitive, this will be the only factor which will matter. However, if the food industry is imperfectly competitive, the effect on food prices will depend on how the food industry mark-up changes. Conditional on the assumptions on the demand curve, the industry mark-up will fall and retail prices will rise by less than the increase in costs. In other words, the imperfectly competitive food industry absorbs some of the cost increases.

What other characteristics of the food industry will likely matter in determining this pass-through effect? One potential factor is economies of scale. We noted previously that, even if there was evidence of (a low degree of) market power, this may be offset by efficiency effects (see Morrison-Paul, (*op. cit.*) and Buyan and Lopez, (*op. cit*.)). Millàn (*op. cit*.) has also documented the existence of economies of scale in the Spanish food sector. If we had constant returns to scale, then we retrieve the comparison between the competitive and imperfectly competitive case as noted above. With increasing returns to scale, the under-shifting effect will weaken; conditional on the extent of the scale effect, it could be the case that food prices rise by more than the cost increase such that we would have 'over-shifting' rather than under-shifting.

The existence of buyer power in the food industry, too, may have an effect on the transmission elasticity. Wedegebriel (2004) shows that the existence of oligopsony power may offset the effect of oligopoly power in determining the effect of cost changes on food prices. Specifically, while as we have discussed above, with (seller) market power in the food sector, the change in the mark-up determines what the transmission elasticity will be, when buyer power exists, what is important is the change in the mark-down with the change in this mark-down being dependent upon the extent of competition in the procurement market and the functional form of the supply function. If the mark-down increases due to the change in costs, then this increases the price transmission elasticity and offsets the reduction in the mark-up. If oligopsony and oligopoly co-exist, it will be difficult to ascertain what aspect of market structure and competition is determining the (net) price transmission effect.

[19] Even with a competitive food industry, there may be imperfect price transmission if we have a variable proportions technology as in Gardner (1975). However, the role of the substitution elasticity is likely to be swamped by relatively low degrees of market power as shown in McCorriston *et a*l. (1999), so for simplicity, we will confine the discussion to a fixed proportions technology. The role of the elasticity of substitution appears in the more formal representation of the price transmission effect as outlined in the Appendix.

The vertical structure of the food chain will also determine the extent of price transmission; as noted in Figure 4, the food supply chain is a complex series of inter-related markets that could be characterised by imperfect competition at each stage. The issue then is how cost changes from the agricultural sector are passed through this chain of imperfectly competitive markets. McCorriston and Sheldon (1996) show that as the number of stages in the vertical chain increases, price transmission decreases below that expected in the single stage case. However, the extent of the decline is not a simple multiple of the single stage case since, in their framework, the perceived derived demand function facing each stage is contingent not just on the degree of market power at that stage (i.e. horizontal market power) but also on the degree of market power at succeeding stages. With this mechanism (and conditional on the demand function), market power throughout the successively oligopolistic food chain exacerbates the degree of 'under-shifting'.

The insight is straightforward since what determines the final change in food prices is the change in the mark-ups at each stage in the food chain. Even if we assume arm's length pricing between each of the stages in the food chain, market power at each successive stage determines what the change in the final price will be. What determines the mark-up in this intermediate sector is not just the extent of competition at that stage but the slope of the derived demand function facing that stage where this derived demand function depends on the extent of competition at the retail stage. The extent to which this cost is passed through to retail (assuming linear demand) will depend on how the food processing industry mark-up changes. Mark-ups in the retail sector are now only determined by the intensity of competition at the retail stage but also by the level of costs arising from the intermediate stage. As costs are passed through (albeit diluting the initial agricultural cost increase) the food manufacturing stage, then the change in the final retail price will be determined by the extent of cost pass-through that reaches the retail firms plus the change in the mark-up at the retail stage. Taken together, and conditional on the assumptions concerning the demand function, the vertically-related nature of the food chain exacerbates the extent of under-shifting that is likely to arise from imperfect competition.

Note that, in the case of successive oligopoly outlined here, we have assumed arm's length pricing has been assumed. But we also know from Figure 4 that how we characterise the links between the vertical stages is also an important feature of the food supply chain. In the McCorriston and Sheldon (*op. cit.*) paper, the degree of under-shifting is exacerbated due to the existence of double marginalisation. Any contract between the food processor and retailer that diminishes the double marginalisation effect should have an effect on pass-through. For example, if the contract (or vertical restraint) between retailers and manufacturers had the equivalent effect of vertical integration, price transmission would increase (at least relative to the successive oligopoly/arms length pricing case).

Recognising the chain aspect of the food supply sector raises further questions regarding the transparency of food prices in the food chain. First, is tying down precisely the effect of alternative vertical contracts on the price transmission effect. Second, and perhaps a more practical issue in terms of empirical research, there is a challenge to addressing price transparency by not just determining how prices at either end of the food sector change (i.e. agricultural and retail prices) but also intermediate prices. This poses a challenge, discussed below, with recent research addressing the price transparency issue with the focus on processing and retail prices thus excluding price changes from further upstream.

### *3.2 Matching Empirics with Theory*

There is already a large empirical literature on the price transmission process in agricultural and food markets. Vavra and Goodwin (*op. cit.*) explore these issues with respect to price transmission in the food chain. Often motivated by widening margins between agricultural prices and downstream (usually consumer) prices, this strand of the literature has employed time series data to estimate the extent, rate and nature of the price adjustment process, This approach is informative in outlining the general features of the functioning of the food supply chain (see, for example, Bukeviciute *et al.*, *op. cit.*) with the econometric

approach being flexible enough to address several interesting issues with respect to food price adjustment. For example, the methodology can be used to address asymmetric price adjustment as well as non-linear aspects of price behaviour; for example, that small cost changes may not be passed through to consumers but large price changes are.

While informative and - subject to data availability - relatively straightforward to apply, one problem with this approach is that it is largely *a*theoretical. In this context, it becomes difficult to 'explain' any of the results that are produced. For example, the econometric results may indicate imperfect price transmission; but since there can be many factors that influence pricing in the food supply sector, it becomes difficult to ascertain what has caused the observed lack of pass-through or particular pattern of retail price adjustment. Similarly, while the econometrician may conjecture that the lack of competition may result in asymmetric price transmission, in the absence of any structure to the underlying framework, it is difficult to 'blame' imperfect competition for this observation. At best, time series approaches on (typically) pairs of price series can be a "first test" relating to the functioning of the food chain but it is difficult to ascertain from this framework what factors will likely be driving the results.

Structural models improve upon purely time series approaches to price transmission insofar as they allow for the specification of the demand function and address the issue of mark-up changes that features as part of the price transmission process. Initial attempts to address price transmission in this way (though these are not necessarily reporting evidence of pass-though in food markets) give some insights. For example, Barnett *et al*. (1995) estimate a model of structural model for the US tobacco industry. They show that in the presence of market power, taxes are 'over-shifted'. However, it should be noted that their model allows for increasing returns to scale which, as discussed above, may outweigh the influence of imperfect competition between firms. Recently, Delipalla and O'Donnell (2001) have estimated the incidence of taxes in the European cigarette industry and find evidence of 'under-shifting' of taxes among the largest EU countries though some evidence of 'over-shifting' arises in other countries. In terms of the European food sector, Bettendorf and Verboven (2000) have estimated a model of the Dutch coffee industry and found evidence of 'under-shifting' of raw coffee bean prices on retail prices.

### *3.2.1 Decomposing Pass-Through*

An important contribution to understanding the links between price transmission and competition in the food sector comes from the work of Nakamura and Zerom (2010). They focus on the US coffee sector largely due to the availability of data and the ability to trace the raw agricultural input (raw coffee beans) through to the retail stage. Also, since coffee is imported, they can easily allocate the share in costs to the raw commodity input and other costs. They make several contributions to the issue. First, they allow for sticky price adjustment in the form of menu costs. Recent research in macroeconomics on the micro-foundations of inflation suggests that prices may be sticky in the sense that, due to menu costs (i.e. changing prices is costly), firms adjust prices infrequently. Second, they estimate a structural model that allows for product differentiation at the retail stage. Third, they can retrieve a measure of the mark-ups and assess how they change in face of cost shocks to the price of coffee.

The results are insightful. Overall, (long-run) pass-through is relatively low in the coffee sector with a one per cent shock in costs leading to around 0.3 per cent increase in retail prices. There are several factors that lie behind this result. Specifically, in their framework, menu costs are relatively low but even low menu costs can contribute to short-run price stickiness and delayed response to shocks. More importantly, the low pass-through arises because of downstream firms reduce their mark-ups by around one-third. As we have noted in the outline above, part of the mechanism of this effect is due to the change in the price elasticity of demand that depends on the curvature of the demand function. Borrowing the terminology from Klenow and Willis (2006), they refer to this "super-elasticity" (the percentage change in the price elasticity for a given percentage increase in prices) which they estimate to be relatively high at 4.6 per cent;

it is the nature of this change in the price elasticity due to the shape of the demand function which gives rise to a substantial change in firm's mark-ups. While not the only change that determines the overall price transmission effect, it is nevertheless indicative that how firms' mark-ups change is an important aspect of the price transmission effect.

### *3.2.2 Asymmetric Price Adjustment*

One of the common insights from time series econometric studies of price transmission is the existence of asymmetric price adjustment. This ties with common concerns about price adjustment in the food sector and elsewhere i.e. that the food industry is quick to pass cost increases on to consumers but less willing to reduce prices when costs subsequently decline. Meyer and von Cramon-Taubadel (2001) provides a review of these issues in agricultural and food markets. Peltzman (2000) explored whether this issue could be tied to concentration though insights from theoretical models on this issue have been limited. One possible reason for price asymmetry relates to search costs. Bernabou and Gertner (1993) highlight the interaction between inflation and search costs: if search costs are high, rising prices reduces the returns to consumer search and the firm widens its mark-up; if search costs were low, consumer search intensifies and price-cost margins narrow.

Richards *et al.* (2012) have explored this issue in the context of the recent experience with food price inflation. They show that the pricing conduct of firms varies with the direction of underlying commodity price shocks but that the outcome can vary by commodity sector. For example, for one commodity (potatoes), when commodity prices are rising, the industry mark-up decreases but when prices subsequently fall, the mark-up widens. They also show that the increase in the mark-up in the declining commodity price phase is greater than the reduction in the margin when commodity prices were rising. In the other commodity sector they explore (fluid milk), these asymmetric effects do not exist though there is still some degree of asymmetry to the extent that when commodity prices are falling, margins are unchanged but when they are rising, margins narrow.

### *3.2.3 Multi-Product Retailers.*

Most (if not all) of the research that forms the basis of the previous discussion relates to single product firms; with imperfect competition, under-shifting is likely to arise unless the demand function is sufficiently convex. Yet, as we highlighted above, food retailers are multi-product outlets selling a wide variety of products and competing across a wider range of attributes. Previous work allowing for product differentiation did not tie down specific outcomes where product differentiation reversed the outcomes or insights significantly from what we have noted above. For example, in Anderson *et al.* (2001), the convexity of the demand function will still play a crucial role in determining whether over-or under-shifting will arise.

Kim and Cotterill (2008) were among the first to estimate a structural model which allowed for product differentiation between brands with an application to the food sector. With the data relating to the US processed cheese market, the change in costs refer to the price of raw milk. Estimating a discrete choice model that allows them to estimate price (own and cross) price elasticities at the brand level, price transmission will depend on the substitutability between brands. They simulate pass-through for two alternative characterisations of firm behaviour, one where the market is fairly competitive (Bertrand-Nash pricing) and the other where pricing is collusive. In the case of competitive pricing, pass through of cost changes is almost complete; but with collusive pricing, there is a considerable reduction in pass-through. Since the estimates are at the brand level, the extent of pass-through also varies by brand. In aggregate, the transmission elasticity for collusive pricing is estimated to be around 85 per cent lower than the competitive case.

Hamilton (2009) has made an important contribution to understanding the links between the extent of price transmission and the existence of multi-product retailers. In essence, there are two aspects at play here; the first is the change in costs for a particular product; the second is the number of varieties put on sale by the multi-product retailer. Hamilton shows that as costs increase, the retailer puts less product varieties on sale. This softens price competition such that the net effect causes the retail price of the good to rise by more than the initial increase in costs. Though we have noted above that over-shifting of cost increases could arise with the demand function being sufficiently convex, under-shifting was more likely. However, in this case, over-shifting does not depend on the curvature of the demand function. The over-shifting effect among multi-product retailers arises here because variety withdrawal weakens the extent of competition in the retail market.

Hamilton and Richards (2011) have explored this issue empirically using detailed retail price data from the US ready-to-eat cereal market. They show that, in isolating the pass-through effect without the variety effect, pass-through of costs is indeed less than perfect. But when accounting for the variety withdrawal effect due to the increase in costs, pass-through increases above the initial increase in costs. While preliminary, the empirical results support the idea that accounting for the multi-product nature of supermarket retailers can give an outcome that would not arise in the standard framework and show that this particular characterisation of the food sector has to be accounted for in gauging the overall effect.

#### *3.2.4 Pass-Through and Vertical Restraints*

We have noted above that market power at each stage of the food supply chain can affect the overall price transmission effect (McCorriston and Sheldon, *op. cit.*). But we have also noted that vertical restraints are an important aspect of the relation between retailers and manufacturers. While McCorriston and Sheldon assume arm's length pricing-and therefore that the extent of double-marginalisation determines the cost pass-through the successive stages in the vertical chain, it may nevertheless be likely that vertical restraints may also affect the price transmission outcome. Intuitively, if double marginalisation is the 'benchmark outcome', to the extent that vertical restraints ameliorate this effect, they will affect the extent of pass-through.

This issue has been explored recently by Bonnet *et al.* (2009). Estimating a structural model using data from the German coffee market, they explore how non-linear pricing and vertical restraints such as wholesale price discrimination affects the pass-through of costs from the upstream sector. Benchmarked against the linear contract (arm's length pricing), they show that the existence of vertical restraints serves to increase price transmission. With a 10 per cent increase in costs, the linear pricing case leads to an average 7.2 per cent increase in retail prices. The main result from their paper is that vertical restraints in the form of resale price maintenance increase the level of pass-through. The intuition they offer is that, in the presence of resale price maintenance, when there is a cost shock, the existence of the vertical restraint limits the ability of firms to adjust their mark-ups. Since we know from previous discussion that the change in the mark-up can help to reduce the price transmission effect, since the vertical restraint limits the extent to which firms can adjust their mark-ups, pass-through therefore increases.

Bonnet and Réquillart (2012) apply a similar framework to the EU sugar sector. Again, they allow for the existence of vertical restraints between soft drink manufacturers and the sugar processors, though they do not explore the range of outcomes with alternative characterisations of vertical restraints. However, they do highlight the pass-through effect at the brand level and draw a distinction between national brands and private labels. In aggregate, there is over-shifting (retail prices change by more than the change in costs), but the transmission effect varies by between 1.1 per cent and 1.23 per cent at the brand level. On the whole, the pass-through effect is greater for national brands than private labels though this may be due to differences in the initial mark-ups between branded and private labels.

## 4. Summary and Conclusion

Addressing competition issues in the food sector is complex and further research is needed. The successively-related nature of the food supply chain highlights the interdependence between horizontal and vertical aspects of competition in the food sector. The multi-product nature of increasingly dominant retailers poses a significant challenge both for policy makers and researchers.

In many ways, the role of anti-trust authorities in addressing competition in the food sector should be no different from their role in any other. Dealing with anti-competitive mergers, abuse of dominance, cartels and price fixing, vertical restraints and exclusive practices are all general concerns of competition authorities. Yet there are notable additional concerns in addressing competition in the food sector.

First, the food supply chain is a complex series of inter-related markets where competition at different stages of the supply chain matters for the overall functioning of the food sector. Concerns over competition may relate not just to selling power but also to buyer power, relating to the vertical relations between any of the stages of the food supply chain (retailer-processor or retailer/processor-farmer). Furthermore, how retailers compete may also have an effect on the overall functioning of the food supply chain. For example, the increased penetration of private label products can affect how retailers and food manufacturers interact and also impact on product innovation.

Second, concerns over the farm sector's role in the food sector and the increased use of contracting has, in some cases, led to the introduction of codes of practice to ensure more transparency on how farmers are tied into the overall functioning of the food chain. This, in part, reflects concerns that even if consumers benefit (or at least are not harmed) by competition at the retail stage of the food chain, there are concerns with "fairness" and that the increased bargaining power of downstream food processors and retailers, has a potentially negative impact on the farm sector.

Finally, the sensitivity over food pricing issues coupled with the complexity of the vertically-related food chain has increased demands for greater transparency in how prices evolve throughout the food supply chain. There is also a need for greater understanding of how competition at any stage - and between stages - has an effect on the process of price transmission from the upstream stage through to retail.

While the evidence reported in this paper has drawn on developments in the food chain in a limited number of countries, commentators have suggested that the trends are likely to be common (or increasingly so) across a wider range of countries (Sexton (2010), Cotterill (*op.cit*.) and Reardon *et al*. (*op.cit*.)) i.e. increasingly dominant retail firms, consolidation at all stages in the food chain and a lower share of the 'food dollar' received by farmers. Addressing competition in the food sector is therefore likely to be an on-going concern, not only because of these apparently common trends but also due to the volatility in world agricultural markets and the increased emphasis on food security. Competition issues in the food sector will therefore fit within this broader policy agenda.

## APPENDIX: CHARACTERISING PASS-THROUGH IN AGRICULTURAL AND FOOD MARKETS

The transmission from agricultural (raw commodity) prices through to retail food prices depends on a number of factors with the impact of market structure influencing the extent to which the downstream firms' mark-ups change in face of the cost change. These factors take into account the nature of the food industry cost function (i.e. the shares of agricultural and other marketing inputs and the substitutability between these two sources of inputs), the supply elasticity of marketing inputs and the food industry demand function. These factors determine the extent of pass-through setting aside the potential influence of market structure.

To see the issues more directly, McCorriston *et al*. (1998) derive a price transmission elasticity involving an upstream agricultural market with an imperfectly competitive food industry as given by:

$$\tau = \frac{s_A\ (1 + \gamma\sigma)}{(1 + s_A\gamma\sigma)\ ((1 + \mu) + s_B\gamma\eta} \qquad (1)$$

where $s_A$ is the share of the raw agricultural commodity in the food industry cost function, $s_B$ is the share of other inputs, $\sigma$ is the elasticity of substitution between agricultural and materials inputs, $\gamma$ is the inverse elasticity of supply of marketing inputs and $\eta$ is the industry elasticity of demand. The effect of competition enters via the $\mu$ parameter which relates to the elasticity of the industry mark-up which is given by $\mu=\omega(\theta/n\eta-\theta)$ with $\omega$ representing the change in the elasticity of demand for a given change in the retail price, where $n$ is the number of competing firms and $\theta$ is a measure of the intensity of competition between firms.

It is useful to isolate the specific role market power may play in determining price transmission. To see this, assume a zero value for the elasticity of substitution between agricultural and other inputs together with a perfectly elastic supply for marketing inputs i.e. $\sigma = \gamma = 0$ [1]. Also assume there is no market power in the food sector (for example, n is sufficiently large that the market is very competitive). Then the price transmission elasticity will be given by:

$$\tau_c = s_A \qquad (2)$$

In other words, the change in retail prices should equal the share of agricultural inputs in the food industry cost function. If the share of agricultural inputs is relatively low this should be the extent to which retail food prices change.

To see how imperfect competition influences the price transmission outcome, employing the same assumptions above ($\sigma = \gamma = 0$), the pass-through effect will be given by:

[1] With the assumption of $\sigma = 0$ relates to the technology of the industry cost function and whether the inputs are substitutable; in the case of $\sigma = 0$, this implies a fixed proportions technology.

$$\tau = \frac{s_A}{(1 + \mu)} \tag{3}$$

Comparing this with the pass-through elasticity in a competitive food sector, we have:

$$\frac{\tau_c}{\tau} = 1 + \mu \tag{4}$$

With a linear demand function, $\theta > 0$ and *n* sufficiently small, then $\mu > 0$; intuitively, the mark-up in the downstream food sector falls in face of the increase in costs. This serves to dampen the price transmission effect compared with the competitive case. In sum, subject to conditions on the demand function, market power in the food sector will lead to 'under-shifting' of retail food prices. So, if the agricultural input accounts for 25% of the food industry costs, the transmission elasticity will be less than 25%.

In summary, the effect of market power on price transmission in the food sector depends on how the food industry mark-up changes. This is the key point about competition and pass-through. It is not just about the number of firms and the intensity of competition; it is how these influence the *change* in the mark-up. In this context, even if we have a highly concentrated food sector (e.g. *n*=2) and competition between these firms is not "too" intense, the change in the mark-up will also depend on the nature (or, more formally, the convexity) of the demand function. If we had a log-linear demand function for example, the change in the mark-up would be zero no matter the structural characteristics of the industry.

McCorriston *et al.* (2001) have developed the pass-through elasticity to account for scale effects. The scale effect is captured by the parameter ρ; with ρ greater (equal, less) than 1, this represents increasing (constant, decreasing) returns to scale. McCorriston *et al.* (*op. cit*.) amend the price transmission elasticity to account for this feature of the food industry cost function, the comparison with the competitive benchmark (subject to assumptions made about other parameters) now being amended to give:

$$\frac{\tau_c}{\tau} = 1 + \mu - \eta(\rho - 1)/\rho \tag{5}$$

If we had constant returns to scale ($\rho = 1$), then we retrieve the comparison between the competitive and imperfectly competitive case as noted above. With increasing returns to scale, the under-shifting effect now weakens; conditional on the extent of the scale effect, it could be the case that food prices rise by more than the cost increase such that we would have 'over-shifting' rather than under-shifting.

This basic structure highlights the main factors that would drive pass-through arising from shocks to the agricultural market through to the retail food market, but it necessarily relies on some simplifying assumptions. Relaxing these assumptions may affect the extent of pass-through.

First, it assumes the 'food industry' is characterised by symmetric (equal-sized) firms. Specifically, the market is split evenly between them implying they have equal cost structures and market shares. This simplifies the theoretical framework considerably though it does not settle easily with the characterisation of the food sector outlined in the text: it is obvious that firms are not of equal size, have identical market shares and have the same costs. When firms are asymmetric, the aggregate mark-up will change not just because of the change in costs but that the change in costs affects each firm to varying degrees. As such the level of market concentration may also change as the fall in costs favours larger and lower cost firms more

than smaller, higher cost firms. Dung (1993), for example, shows that market power will increase. In turn, in the context of the above outline, this will serve to lower the degree of price transmission.

Second, it assumes that the downstream "food industry" is comprised of a single stage, effectively meaning that the food processing and retailing stages can be treated together. This therefore sets aside the issues associated with successive oligopoly and characterising vertical ties between stages.

Third, it also sets aside one of the main issues of the food sector where retailers are multi-product in nature and where consumers can choose from a wide-variety of (potentially) close substitutes. How vertical structure of the food chain and the existence of multi-product retailers may affect price transmission between agricultural markets and the retail food sector are highlighted in the text.

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# AUSTRALIA

## Executive summary

Australia has a substantial food industry and is a net exporter of food. As a trade-exposed industry, it has been affected by the improvement in Australia's terms of trade and the appreciation in its exchange rate over the past decade. While these pressures have softened recently, the adjustment process continues with ongoing pressure on these industries to improve efficiency and innovate in order to improve their international competitiveness. The sector is also being influenced by factors such as the increasing globalisation of food production and distribution and trends in consumer preferences.

Competition is critical in ensuring the food industry remains flexible and resilient to changing market circumstances. Firms in the food industry will increasingly need to innovate, including by adapting to changing consumer preferences and taking advantage of opportunities in emerging markets. Over the longer term, increasing demand for food in Asia will generate new opportunities. Lifting productivity to increase output and capturing opportunities to add value to the supply chain will be important in this regard.

Domestically, many of the current issues relating to competition policy in the food industry involve the strong market position of two major supermarket chains (MSCs), Coles and Woolworths. These vertically integrated retailers hold significant shares of retail grocery sales in Australia, and possess substantial bargaining power compared with many of their suppliers, including primary producers and food processors.

The most significant competitive pressure on the MSCs in recent years has come from the entry to the market of two major international chains, ALDI and, to a much lesser extent, Costco. Independent supermarkets[1] also provide a level of convenience and service that can provide strong, non-price competition to the major players.

Consistent with international trends, the food processing industry in Australia tends to be concentrated, with two or three key players in each product type and a number of smaller competitors. However, many processors (including some with large market shares) have faced new challenges as the MSCs have increased their sales of private label groceries. The increased use of private labels by the MSCs follows international trends but may in part also be seen as a response to retail competition from the new entrant ALDI.

The primary production sector is characterised by the presence of many small agricultural establishments. Deregulation in some industries has driven increasing efficiency and productivity, with some producers exiting the industry in the process.

Inquiries and investigations by the Australian Competition and Consumer Commission (ACCC), the independent national competition authority, have focused on the effectiveness of retail competition in delivering outcomes for consumers, concerns relating to the conduct of the MSCs in their dealings with suppliers, and the effect on competition of the MSCs' arrangements linking grocery purchases with petrol

[1] Throughout this paper references to supermarkets more broadly refer to all supermarkets including MSCs, (i.e., Coles and Woolworths) as well as independent and smaller chain supermarkets.

discounts. A number of credence claims have also been investigated, which raise questions of misleading conduct and the potential for the MSCs' claims to distort competition.

The Australian Senate has also inquired into issues relating to the impact of supermarket pricing on primary producers.

The ACCC's merger review functions include the examination of acquisitions by supermarket chains of competing supermarkets or new supermarket sites, with a view to preventing a substantial lessening of competition at a local level. The ACCC has also reviewed a number of significant mergers in the food processing sector in recent years.

Some mechanisms in Australia's competition framework potentially provide a means to address imbalances in bargaining power between small primary producers and larger participants further down the food supply chain. These include the ability for firms to seek ACCC authorisation to bargain collectively. There is also a mandatory Horticulture Code dealing with the clarity and transparency of transactions between growers and traders, and proposals for a code to govern dealings between supermarkets and their suppliers.

## 1. Outline

This paper begins with an outline of the structure of the Australian food industry. It then examines relevant inquiries into the food supply chain, current issues in food retailing (including MSC buyer power, petrol shopper docket discounting schemes and various issues posed by recent mergers), current issues in food processing (also arising principally in the merger context) and those concerned with primary production (including collective bargaining and codes), before touching briefly on specific aspects of consumer protection that are related to competition.

In February 2013, the ACCC announced that competition and consumer issues in the supermarket sector and credence claims (discussed below) in the food industry are two enforcement priority areas.

## 2. Structure of the Australian food industry

Australia’s food industry is growing, worth A$42.6 billion in primary production (2011–12), A$91.2 billion in manufacturing (2010-11) and A$135.8 billion in retailing (2011-12). Supermarket and grocery store expenditure (excluding non-food grocery items) represented 62 per cent of food retailing expenditure in 2011-12.[2]

Australia is a net exporter of food, with A$30.5 billion worth of food exports in 2011-12 compared to A$11.3 billion worth of food imports in the same year. More than 50 per cent of Australian food exports went to Asia in that year, as producers and processors took advantage of emerging Asian markets and the opportunities they presented. However, as a net exporter, the Australian food industry is exposed to changes in global demand and price levels, as well as changes in the terms of trade.[3]

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[2] Department of Agriculture Fisheries and Forestry (DAFF) 2013, Australian Food Statistics 2011-12, p. 2. Australian and New Zealand Industrial Classification, 2006, Class 4110 describes ‘Supermarket and Grocery Stores’ as follows: ‘units mainly engaged in retailing groceries or non-specialised food lines (including convenience stores), whether or not the selling is organised on a self-service basis. Primary activities: convenience store operation; grocery retailing; Grocery supermarket operation’. It excludes units mainly engaged in retailing specialised food lines.

[3] DAFF 2013, Australian Food Statistics 2011-12, introduction.

The Australian food industry encompasses a complex series of supply chains, which vary between products. Key participants include primary producers, food processors, and grocery wholesalers and retailers. However, rationalisation and integration of food supply chains continues as large food retailers pursue efficiencies through cost savings and greater scale. Ongoing changes in lifestyles, demographics and food habits of Australian consumers are also driving the evolution of food distribution and retail formats.

### *2.1 Retail*

There are two vertically integrated MSCs in the Australia grocery sector, Coles and Woolworths. In addition to the MSCs, ALDI is a vertically integrated retailer with supermarkets in Victoria, New South Wales, the Australian Capital Territory and Queensland. ALDI has also announced that it is planning to expand into South Australia and Western Australia. It supplies mainly private label products and has a more limited product range compared with the MSCs. The two MSCs have a large share of packaged grocery sales. However, their share of fresh produce sales is substantially less.[4]

There are also a number of independent supermarket operators who are mainly supplied with packaged groceries by Metcash, which is the largest grocery wholesaler in Australia. These independent operators generally have smaller retail stores, although there are a number of large-format independent supermarkets. In 2008, the ACCC held an *Inquiry into the competitiveness of retail prices for standard groceries* (the Grocery Inquiry). The Grocery Inquiry found that a lack of competition at the wholesale segment of the food chain restricted the independent retail sector's ability to compete with the MSCs on price.

The retail sector has seen some changes over the past decade, such as intensified price competition in relation to certain key value items (such as milk) between the two MSCs, and downward pressure on prices paid to processors and suppliers. While lower prices are generally good for consumers, there are concerns about the possible effect on processors and suppliers (and potentially consumers) in the medium to longer term.

Retail competition has been augmented by the entry of the international low cost chain supermarket ALDI. ALDI has been a vigorous retail price competitor since its entry into the Australian food market. It has had a dynamic impact on the retail grocery sector and brought about a competitive response from the MSCs in the form of price reductions and increased use of private label products.

The MSCs also have a significant and growing presence in petrol, liquor and hardware markets and may offer price discounts in these sectors to consumers who purchase a minimum amount of groceries from a particular MSC.

### *2.2 Processors*

Consistent with international trends, the food processing industry in Australia tends to be concentrated, with two or three key players in each product type and a number of smaller competitors. High market concentration, however, does not necessarily indicate that incumbent firms have market power.

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[4] The ACCC found in its 2008 Grocery Inquiry that Coles and Woolworths accounted for approximately 70 per cent of packaged grocery sales in Australia and approximately 50 per cent of fresh produce sales. No comparable current data is available but a range of industry estimates suggest these figures have probably not changed substantially.

In recent years, MSCs in Australia have, following overseas trends, focused on developing their private label products to compete directly with the branded products of food processors. This has in part been a competitive response to new entrants such as ALDI and Costco, which offer private label brands.

Private labels can increase consumer choice and competition for suppliers of proprietary branded products. However, the growth of private labels can distort competition if retailers have incentives to promote their own brands on their shelves, foreclosing access to shelf space and consumers for branded products.

Changes in the international landscape can also present challenges for Australia's food processing industry. For instance, higher input costs can affect the manufacture of some products where there is increased competition from low-cost producers overseas. However, opportunities for food processors are also likely to arise from growing global demand for safe, quality and convenient food.

### *2.3 Primary producers*

The Australian horticultural industry is characterised by the presence of many small agricultural establishments.[5] This is driven by many factors including distances between producers and customers given the geographically dispersed customer base, generational farming, the diversity of products produced, and financial challenges faced by participants in the industry.[6] This fragmented commercial structure means that many producers lack economies of scale and scope, and bargaining power in their relationships with processors and retailers.

Unlike many other types of groceries, there is relatively strong competition in the retail supply of fruit and vegetables, with green grocers, farmers markets and even co-ops competing directly on price with the MSCs. Channels such as farmers markets allow some primary producers a direct route to consumers, although normally on a small scale.

Primary production of other foods such as meat, dairy and chicken is also fairly fragmented despite the presence of a number of large producers, but there is a far higher level of market concentration at the processing level. This has led to some competition concerns in relation to proposed mergers in these sectors, as set out below under 'Current issues in primary production'.

Deregulation has occurred in some industries, in part due to the implementation of reforms drawn together in 1995 and agreed upon by all Australian Governments, under the National Competition Policy (NCP). For instance, until 2000, the dairy industry in Australia was highly regulated, with state and territory authorities being responsible for setting the farm-gate price for fresh drinking milk. NCP reforms in the dairy industry deregulated the market. The need to deregulate was agreed to by dairy industry representative bodies. The then Australian Government supported the process through a A$2 billion adjustment program funded by an 11 cents levy on the retail sale of drinking milk over a nine year period (2001–2009). Deregulation of the dairy industry has resulted in more efficient production systems and, for processors, more innovative product development and marketing. It also ensured that local market returns are open to international market price movements. This drove producers to become more efficient and productive and some exited the industry leading to lower prices and a better product range for consumers.

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5 ABARES 2012, *Agricultural Commodity Statistics 2012*, Australian Bureau of Agricultural and Resource Economics and Sciences, December, Canberra, Table 21.

6 *The Australian Horticulture Plan, FutureFocus, Removing Commercial Impediments*, March 2008.

## 3. Recent inquiries into the food supply chain

Many of the competition issues in the Australian food supply chain arise from the retail sector and the conduct of the MSCs in particular. A number of recent inquiries reflect these issues.

### *3.1 The ACCC's 2008 Grocery Inquiry*

In 2008, the ACCC held an *Inquiry into the competitiveness of retail prices for standard groceries* (the Grocery Inquiry). The Grocery Inquiry was held amid concerns about increasing concentration at the retail and wholesale levels of various supply chains and concerns about the potential for retailers and wholesalers to use their buyer power to harm competition further up the food supply chain, particularly at the primary producer level.

The Grocery Inquiry found that there were a number of factors that limited the effectiveness of price competition, such as barriers to entry, the limited incentives for the MSCs to compete aggressively on price, and limited price competition from the independent sector.[7] It found that ALDI had been a vigorous price competitor since its entry and had the incentive and ability to engage in sustained price competition, which had a dynamic impact on the grocery sector and brought about competitive responses from the MSCs on many products.

The then recent growth of the MSCs had largely occurred organically rather than through acquisition. The Grocery Inquiry did not find significant evidence that innovation or competition at the food processing level had been damaged as a result of the exercise of retail buyer power or that retailers were using private label products at that time to distort competition.

However, the Grocery Inquiry found that access to suitable supermarket sites was a critical barrier to entry and expansion at the retail level. There was evidence that the MSCs imposed restrictive provisions in leases to ensure they maintained exclusive access to prime sites. Following further action by the ACCC, the MSCs, Metcash and other retailers voluntarily provided court enforceable undertakings which phase out restrictive lease provisions over a number of years.

One recommendation of the Grocery Inquiry was the introduction of a mandatory unit pricing regime for standard grocery items (so that price is displayed by unit of measurement such as per litre or kilogram). This resulted in the Unit Pricing Code, a mandatory industry code under the *Competition and Consumer Act 2010* (the CCA),[8] which applies to grocery retailers with more than 1000 square metres of floor space and who sell a minimum range of food-based grocery items. The Code also applies to online retailers.

### *3.2 Other inquiries*

Since the Grocery Inquiry there have been other inquiries relevant to the food industry. For example, the Senate Economics References Committee held two inquiries into competition and pricing in the Australian dairy industry, the first in 2010 on the impact of farmgate price reductions (which resulted in the report 'Milking it for all it's worth'), the second in 2011 on the impacts of supermarket decisions on the

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7 *Grocery Inquiry*, p xiv.

8 There are three types of code of conduct. Codes can be prescribed under the CCA as either mandatory or voluntary (which only apply to those who sign up to them (none have been prescribed by regulation)). Section 51AD of the CCA states that a person must not contravene the prescribed provisions of any mandatory or voluntary industry code. Many other industry codes of conduct are voluntary and non-prescribed but where they contain provisions which may risk breaching the CCA, they can be authorised if they meet the relevant public benefit tests under the CCA.

dairy industry, including the A$1 price point for a litre of milk in supermarkets (which resulted in the report 'The impacts of supermarket price decisions on the dairy industry'). The Senate Economics References Committee is a standing parliamentary committee, comprised of members across parliament. It does not speak for government but it is a mechanism of review and independent advice. Also in 2011, the Senate Select Committee inquiry into Australia's Food Processing Sector was tasked to investigate possible policy responses to the challenges and pressures within the broader economy that threaten the ongoing viability and the competitiveness of food processing in Australia.

These Senate inquiries were motivated, in whole or part, by concerns about the impact of supermarket pricing on farmers, in particular the potential for lower retail prices to lead to lower prices being paid to farmers rather than reductions in retail margins. The 2010 Senate Economics References Committee inquiry found that there had been significant consolidation in the dairy processing industry and that milk prices were largely determined by the amount of competition between processors in the various dairying regions. In January 2011, Coles (an MSC) decided to heavily discount the retail price of its private label milk and other dairy products. The retail price of private label milk fell to A$1 per litre for 2 litre containers or greater. Woolworths and ALDI quickly responded to Coles' pricing by reducing the prices of their own private label milk products. The 2011 Senate dairy industry report did not find evidence that farm gate prices were being driven down by the pricing practices of the MSCs. The main determinants of farm gate prices were found to be world markets, the degree of competition between processors, and the level of access to export markets. In July 2011 (in the course of the 2011 dairy industry inquiry) the ACCC announced that the major impact of the reduction in milk prices that year seemed to it to have been a reduction in the supermarkets' profit margins on house brand milk and there was no evidence that Coles had acted in breach of the CCA.

## 4. Current issues in food retailing

The CCA is Australia's national competition law. The Australian Consumer Law (ACL) is the national consumer law and is applied at the Commonwealth level and in each Australian State and Territory. At the Commonwealth level it is included as part of the CCA. The ACCC is the independent Commonwealth agency responsible for administering and taking enforcement action under the CCA.

The following sections discuss matters that highlight the nature of competition and consumer issues of current concern in Australian food supply chains. The MSCs' market power in retail grocery markets continues to raise competition concerns in relation to buyer power, and petrol shopper docket fuel discount arrangements and mergers are also of interest.

### *4.1 Buyer power of the major supermarket chains*

Supermarket chains deal with a large number of suppliers across a wide range of product categories. In Australia, there have been concerns for several years that some supermarket suppliers are being treated harshly by MSCs.

There is the potential for MSCs, wholesalers and/or food processors to use their buyer power to damage competition further up the food supply chain, particularly in their dealings with primary producers who are often small and fragmented but also in relation to manufacturers. Concerns about the competitive effects of imbalances in bargaining power are heightened where primary producers and food processors may have little option other than dealing with the stronger party.

The potential for supermarket buyer power to be used in an anti-competitive or unfair way was a key issue examined during the Grocery Inquiry in 2008. As noted above, the Grocery Inquiry found little

evidence at that time to substantiate anecdotal allegations of buyer power being exercised in an anti-competitive or unconscionable manner.

Supermarkets' dealings with suppliers emerged again as a key issue in late 2011 with media reports of suppliers being treated harshly by the MSCs. The ACCC commenced an investigation of these concerns in early 2012. Its initial investigations focused on whether there was evidence that the major supermarket chains were misusing their market power in breach of section 46 of the CCA and/or were engaging in unconscionable conduct in their dealings with suppliers in breach of sections 20, 21 and/or 22 of the ACL.

The ACCC's initial investigation identified a number of issues, as a result of behaviour that has been raised with the ACCC, which have the following relevance to the CCA:

1. Whether the major supermarket chains are engaging in unconscionable conduct in their dealings with their suppliers; and

2. Whether the major supermarket chains are misusing their market power by discriminating in favour of their own private label products to deter or prevent suppliers of proprietary brands from engaging in competitive conduct.

The allegations raised with the ACCC, and subsequently illuminated in its investigations, include allegations of some conduct that may be unconscionable or a misuse of market power. Such conduct, which is not necessarily identical across suppliers, product lines or even supermarkets, includes:

- persistent demands for additional payments from suppliers, above and beyond that negotiated in their terms of trade;

- the imposition on suppliers of penalties that did not form part of any negotiated terms of trade, and which apparently do not relate to actual costs incurred by the MSCs as a result of the conduct which has led to the penalty being imposed;

- threats to remove products from supermarket shelves or otherwise disadvantage suppliers if claims for extra payments or penalties are not paid;

- failure to pay prices agreed with suppliers; and

- conduct discriminating in favour of private label products.

While private label products may promote competition and benefit consumers, they also have the potential to foreclose suppliers' access to shelf space in a concentrated retail market. This raises concerns that the MSCs' use of private labels could distort competition between branded and unbranded products. The ACCC's investigations are continuing.

### *4.2 Supermarket codes*

The ACCC's investigation of supermarket supplier issues is focussing on specific concerns with possible anti-competitive and/or unconscionable conduct. There are, however, a number of broader issues associated with supermarket-supplier relations that result from existing market structures and market power that are outside the scope of an ACCC investigation into potential breaches of the CCA.

A supermarket and grocery industry working group, including Coles, Woolworths and the Australian Food and Grocery Council, is drafting a voluntary industry code to be enforceable under the CCA. The

current model could be applied to dealings between supermarkets and suppliers, rather than to transactions throughout the supply chain. However, it remains to be seen whether agreement may be reached on such a code, as the parties have been discussing it for a long time.

### *4.3 Petrol shopper docket discounting schemes*

Petrol shopper dockets tie the offer of discounted fuel purchases at nominated fuel outlets to the purchase of a minimum amount of groceries from a particular supermarket. A significant proportion of the fuel sold by the supermarket fuel outlets is sold with a shopper docket redemption.

In Australia, the main petrol shopper docket schemes are offered by the two MSCs: Woolworths in alliance with Caltex Australia and Coles in alliance with Shell. The concern is that the MSCs may be leveraging market power from supermarket retailing to petrol retailing through the use of shopper dockets.

In recent years, there has been an increased proliferation of shopper docket discounts, including extended frequency, duration and quantum of the shopper docket fuel discounts offered by both Coles/Shell and Woolworths Caltex. While larger shopper docket discounts provide short term benefits to consumers, the ACCC is concerned about the potential harm to other fuel retailers and to competition in petrol retailing over the longer term.

The ACCC's current investigation involves an assessment of whether or not Coles and/or Woolworths may be distorting price competition between fuel retailers by offering discounts on fuel purchased from their retail fuel sites in circumstances where, due to retail fuel margins, the discounts may be difficult or even impossible for efficient competing retailers to match. The ACCC's concern is that if sufficient customers are price sensitive and take advantage of the shopper docket offers by switching from other higher-priced retailers, then the effect of the arrangements may be to deny efficient competitors access to a sufficient customer base to be able to compete effectively.

Shopper docket arrangements may potentially raise concerns under a number of provisions of the CCA, such as: section 45 which prohibits contracts, arrangements or understandings with provisions that have the purpose, effect or likely effect of substantially lessening competition in a relevant market; and section 46 (including section 46(1AA)) which prohibits the misuse of market power, including predatory pricing, for a proscribed anti-competitive purpose.

The ACCC's review of shopper docket discounting schemes is continuing.

### *4.4 Mergers*

Section 50 of the CCA prohibits a corporation from acquiring shares or assets if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

The ACCC reviews mergers arising from the growth through acquisition of the two MSCs within and across markets. At the retail level, there is the potential for higher retail grocery prices and a loss of consumer choice following a merger. For suppliers, the concerns focus on the potential for enhanced retail buyer power to be used unfairly or anti-competitively in supply chain transactions.

The ACCC has reviewed several supermarket acquisitions over the past few years. These were primarily acquisitions of single supermarkets or 'greenfield'[9] sites. When undertaking a review the ACCC assesses each merger on its merits according to the specific nature of the transaction, the market context

[9] A 'greenfield' site is a vacant site identified for a new development (in this context, of a supermarket).

and the particular competitive impact likely to result in each case in accordance with its published merger guidelines[10].

When considering a single site retail acquisition involving Coles or Woolworths, the ACCC's approach has been to focus on the competitive effects of the individual acquisition in the relevant local retail market. While the broader market impact is also considered, single acquisitions that do not have a substantial competitive effect in the local retail market are generally unlikely to cause broader concerns, including in markets for the acquisition of grocery products.

Two recent merger investigations, discussed below, highlight the ACCC's approach to such mergers.

### *4.4.1 Glenmore Ridge (New South Wales)*

In June 2013, the ACCC concluded that Woolworths' proposed acquisition of a supermarket site at Glenmore Ridge, a retail development in an outer suburb of Sydney, was likely to result in a substantial lessening of competition in the local retail market. It would have this effect by precluding the potential for increased future price or non-price competition in the relevant local market between Woolworths (which already has a significant presence in the local retail market) and a non-Woolworths supermarket at the target site. In addition, as there are no other suitable sites for supermarket development, the proposed acquisition would foreclose a non-Woolworths supermarket from introducing a third unique retail offer into the relevant local market, thus limiting product and service variety and quality. Customers would therefore be negatively affected by the proposed acquisition because they would have to travel further to access a choice of supermarkets, and because the proposed acquisition would remove the competitive incentive for Woolworths to increase the quality of its local retail offering.

### *4.4.2 Hawker Supa IGA (Australian Capital Territory)*

In July 2013 the ACCC announced that it would not oppose Woolworths' proposed acquisition of a Supa IGA independent supermarket in Hawker, a suburb of Canberra. The ACCC announced in July 2013 that it would not oppose the acquisition, having earlier expressed the preliminary view in a statement of issues that the proposed acquisition may result in a substantial lessening of competition in the local retail supermarket market.[11]

The ACCC found that the local market included several supermarket offerings. Within this market, the Hawker Supa IGA's closest competitor was a Coles supermarket at the nearby Jamison Centre, which also has an ALDI. The local Woolworths supermarkets were significantly more distant competitors. Customer surveys commissioned by the ACCC showed that the Hawker Supa IGA differentiated itself from its competitors through non-price aspects of its offer, which were valued by consumers. That competitive dynamic would have been lost as a result of the acquisition. However, it was not differentiated sufficiently to attract customers from beyond the very closest suburbs within the market, or to engender a competitive response from Woolworths. The ACCC concluded that the loss of the differentiated offer from the local market would involve the loss of some competition. However, this did not reach the threshold of a substantial lessening of competition required under section 50 of the CCA.

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10 See ACCC, *Merger Guidelines*, November 2008, http://www.accc.gov.au/system/files/Merger%20guidelines.pdf.

11 The Hawker Supa IGA is a 2,000m$^2$ supermarket in the Hawker Group Centre, a moderate sized retail precinct in the Belconnen area of north Canberra in Australia.

## 5. Current issues in food processing

Large retailers and wholesalers often have buyer power in their dealings with suppliers. However, some suppliers also have market power or bargaining power vis-a-vis the large retailers and wholesalers, especially if they supply 'must have' consumer products. The ACCC has found that the bargaining position of large retailers and wholesalers is not necessarily sufficient to address market power and competition concerns further up the supply chain, particularly when competing suppliers of a 'must have' consumer product merge.

The ACCC has recently considered two mergers that highlight the competition issues that arise in these circumstances.

### *5.1 Nestlé/Pfizer*

On 22 November 2012, the ACCC announced its decision not to oppose the proposed acquisition by Nestlé S.A. (Nestlé) of Pfizer Nutrition, a global infant nutrition business, from Pfizer Inc. (Pfizer), subject to undertakings accepted by the ACCC pursuant to section 87B of the CCA.[12]

The ACCC had earlier (in its Statement of Issues for this proposed acquisition) expressed the preliminary view that the proposed acquisition, in conjunction with the undertakings, would be unlikely to have the effect of substantially lessening competition in the national market for the wholesale supply of Infant Formula and Follow-on (IFFO) Milk and the national market for the wholesale supply of Growing-up Milks (GUMs) in contravention of section 50 of the CCA.

The ACCC considered that the proposed acquisition would lead to the consolidation of two of the three major suppliers in an already concentrated industry with high barriers to entry. The degree of countervailing power held by the MSCs and wholesale suppliers to pharmacies in relation to the supply of IFFO Milk and GUMs would be unlikely to effectively constrain the merged entity. This is because Nestlé's and Pfizer's infant formula brands are "must have" brands for the MSCs given their strong customer loyalty and role in attracting high value retail customers. Private label entry by MSCs would involve considerable risks to a major retailer's reputation if any quality issues were to arise as well as substantial investment in brand credibility and relationship building with healthcare professionals.

Following market feedback on an initial in-principle remedy proposal, Nestlé proposed a revised remedy in the form of a section 87B undertaking. Pfizer also offered a section 87B undertaking to support the obligations in Nestlé's undertaking.

The Nestlé undertaking is aimed at ensuring that the current level of competition in the relevant markets will be maintained through the creation of a strong third major supplier of IFFO Milk and GUMs in Australia. It requires Nestlé to divest an exclusive ten year licence for Pfizer Nutrition's infant nutrition S-26/SMA brand portfolio in Australia to a purchaser to be approved by the ACCC, followed by a further ten year 'black out' period in which Nestlé will not be permitted to re-enter the markets with Pfizer Nutrition's brands. The undertaking also carries various supporting obligations to improve the effectiveness of the divestiture as a remedy.

Taking into account the undertakings proposed by Nestlé and Pfizer, the ACCC formed the view that the proposed acquisition would not contravene section 50 of the CCA.

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[12] Section 87B allows the ACCC to accept a court-enforceable undertaking from merger parties to allow a merger to proceed which would otherwise breach section 50.

### *5.2 Heinz/Rafferty's Garden*

On 6 June 2013, the ACCC announced its decision to oppose the proposed acquisition by H J Heinz Company Australia Limited (Heinz) of Rafferty's Garden Pty Ltd (Rafferty's Garden). The ACCC concluded that the proposed acquisition would have or be likely to have the effect of substantially lessening competition in the national markets for the wholesale supply of wet infant food, infant cereals and infant snacks.

The ACCC considered that the proposed acquisition would result in a substantial increase in concentration in already concentrated markets, where barriers to entry and expansion are high. These barriers arise primarily from the challenges of overcoming entrenched brand loyalty to incumbent suppliers' products, and limitations on access to retail shelf space. Brand loyalty and reputation are particularly significant in the infant food category due to consumers' heightened desire to trust that products will be safe and healthy to feed their children.

In 2007, Rafferty's Garden's entry into the supply of infant food products in Australia was facilitated by its successful introduction of a certain kind of packaging known as 'pouch-and-spout'. This form of packaging proved extremely popular in Australia and enabled Rafferty's Garden to overcome the high barriers to entry and long standing brand loyalty of Heinz.

The MSCs were able to provide a material competitive constraint on Heinz and Rafferty's Garden in relation to the supply of wet infant food through the Baby Macro (Woolworths' private label wet infant food product) and Ella's Kitchen (supplied exclusively through Coles). However, the ACCC found that the retailers through their private label products do not necessarily provide a strong competitive constraint on branded suppliers in relation to innovation and non-price aspects of infant food products.

The ACCC considered that, in this instance, grocery retailers do not have sufficient countervailing power to constrain a merged Heinz/Rafferty's Garden. Instead, countervailing power is limited by Heinz and Rafferty's Garden's superior brand strength and strong consumer trust and support. As purchases of infant foods are typically high value grocery customers, retailers have a strong incentive to stock the infant food brands preferred by those customers.

## 6. Current issues in primary production

As noted above, Australian primary producers tend to be small and fragmented. The key issues in this section of the food supply chain are the potential detrimental effects of the exercise of buyer power by processors and/or retailers further down the supply chain.

Reflecting this, in recent years the ACCC has conducted extensive reviews in relation to a number of mergers between processors. These have included proposed mergers between processors of:

- meat (Swift's proposed acquisition of Rockdale in 2010 – not opposed);
- dairy (Murray Goulburn's proposed acquisition of Warrnambool Cheese and Butter in 2010 – proposal withdrawn; National Foods' proposed acquisition of Dairy Farmers in 2008 – not opposed subject to undertakings);
- chicken (Baiada's proposed acquisition of Bartter in 2009 – opposed); and
- edible oils (Cargill's proposed acquisition of Goodman Fielders edible fats and oils business, 2010 – opposed).

Other recent inquiries and enforcement activities that have focused on this issue have been discussed above. There are also a range of mechanisms available that may help to redress imbalances in bargaining power between primary producers and participants further down the food supply chain.

### *6.1 Collective bargaining authorisations and notifications*

To deal with imbalances in bargaining power, small businesses (including primary producers) may wish to enter into collective bargaining arrangements in their dealings with large processors or retailers. Collective bargaining can help to redress bargaining power imbalances and allow small businesses to have more effective input into negotiations thus leading to more efficient negotiated outcomes. However, by allowing businesses to coordinate rather than compete, collective bargaining arrangements ordinarily raise concerns under the CCA.

The authorisation provisions of the CCA allow businesses wishing to engage in collective bargaining arrangements to obtain legal protection from the relevant competition provisions of the CCA if the arrangements are of net benefit to the public.

The authorisation process typically takes around six months to complete and involves extensive public consultation. However, there is a streamlined collective bargaining authorisation process for eligible small businesses. Under this process, authorisations are normally finalised within three months of an application being received.

The ACCC has authorised a number of collective bargaining arrangements involving primary producers in the last few years, including in the dairy, chicken and potato growing sectors.

In some cases, as an alternative to authorisation, small businesses (including primary producers) can obtain protection from legal action under the CCA for collective bargaining arrangements by lodging a collective bargaining notification. There are a number of requirements that must be met in order to lodge a collective bargaining notification including being able to identify, at the time of lodgement, all members of the bargaining group and the target/s with whom the group wishes to negotiate. There is also an annual transaction threshold. For primary producers to be eligible to lodge a collective bargaining notification, each member of the collective bargaining group must reasonably expect that the value of the transactions that it will conduct with the target under the collective bargaining arrangement will not exceed A$5 million in any 12 month period.

The protection from legal action for the notified collective bargaining arrangement begins at the conclusion of a 14 day statutory period and lasts for three years from the date at which the notification was lodged. The ACCC may remove the protection provided by a notification at any time if it is satisfied that the arrangements are not in the public interest.

Since the notification provisions were introduced in 2007, the ACCC has considered collective bargaining arrangements involving, among others, citrus growers, chicken growers and dairy farmers.

### *6.2 Codes of conduct – the Horticulture Code*

Where there are broader structural issues in a market a code of conduct may enable more effective enforcement of contracts, may better encourage supplier investment, may see a more appropriate sharing of risk and allow more effective dispute resolution.

The Horticulture Code (the Code) is a mandatory code of conduct prescribed under the CCA. The Code sets out what needs to be included in a horticulture produce agreement between growers and traders. The purpose of the Code is to improve the clarity and transparency of transactions between growers and

wholesalers of fresh fruit and vegetables. Growers and traders must enter into a signed and written horticulture produce agreement (HPA) that complies with the Code before they can trade with each other. The Code sets out what needs to be included in the HPA.

The ACCC investigates alleged breaches of the Horticulture Code and can take enforcement action where appropriate. Most recently, the ACCC has accepted a court enforceable undertaking from a Victorian produce trader, V. & A. Liangos Pty Ltd (VAL), for alleged breaches of the Horticulture Code that were detected during a compliance audit.

## 7. Current issues in consumer protection affecting competition in the food supply chain

Markets can only work well to promote efficiency and welfare if consumers are able to make well-informed decisions. In this regard, Australian consumers often make purchasing decisions on the basis of claims made about the attributes of a product, such as where or how a product was made, grown or produced. Such claims can sometimes also be used to justify higher prices and may create a competitive advantage for a supplier of such products. As such, it is important that these claims are accurate so as not to mislead consumers into making ill-informed purchasing decisions, thus distorting competition.

### *7.1 Credence claims*

Credence claims, or claims which represent a product as possessing a premium attribute, are a current enforcement priority for the ACCC; particularly those in the food and beverage industry with the potential to influence consumers and disadvantage competitors.

In July 2013, the Federal Court found Baiada Poultry Pty Ltd and Bartter Enterprises Pty Ltd engaged in false, misleading and deceptive conduct in describing on product packaging and in advertising that its meat chickens were ‘free to roam’ in large barns when this was not the case. The Australian Chicken Meat Federation, the peak industry body for Australia’s chicken meat industry, was also found to have engaged in false, misleading and deceptive conduct by claiming on its website that chickens produced in Australia were ‘free to roam’ or able to ‘roam freely’ in large barns.

In June 2013, the ACCC instituted proceedings in the Federal Court against Coles Supermarkets Australia Pty Ltd (Coles) alleging false, misleading and deceptive conduct in the supply of bread that was partially baked and frozen off site, transported to Coles stores and ‘finished’ in-store. The products were then promoted as ‘Baked Today, Sold Today’ and/or ‘Freshly Baked In-Store’ at Coles stores with in-house bakeries. As well as misleading consumers, the ACCC alleges that the conduct disadvantages other suppliers who sell fresh bread made ‘from scratch’ in their retail premises.

### *7.2 Certification Trade Marks*

The ACCC has responsibilities in relation to the approval of Certification Trade Marks (CTMs) under the *Trade Marks Act 1995*. A CTM indicates to consumers that a product or service meets a particular standard. ACCC approval is required before CTMs can be registered under the *Trade Marks Act 1995*. In order to approve the CTM rules the ACCC must be satisfied that the rules would not be to the detriment of the public or raise competition, unconscionable conduct or consumer protection concerns.

The Australian Egg Corporation has recently withdrawn its CTM application which proposed a number of standards for free range egg production. The ACCC proposed not to approve the CTM because it considered that the proposed standards may mislead consumers about the nature of eggs described as ‘free range’.

## 8. Conclusion

As this paper has shown, the Australian food industry has been impacted by structural change in the economy and trends in consumer preferences. Competition has and will continue to play a key role in positioning this industry to meet future challenges, including by spurring innovation and fostering productivity improvements. Competition concerns have arisen as a result of the high level of concentration in the grocery sector, with current concerns focussed on the impact of market power on the supply chain and allegations of unfair trading terms. The ACCC investigations are expected to shed light on these issues, with a view to Australia continuing to promote well-functioning, competitive and open markets.

# AUSTRIA

While the Austrian Competition Authority (Bundeswettbewerbsbehörde, BWB) has always been very active in the food sector in general, amongst others carrying out a sector inquiry in 2007, the food retail market has been in the explicit focus since 2011 leading to an important number of dawn raids and first proceedings with fines amounting to about € 23 Mio. As a consequence, guidelines on vertical price fixing have been issued. Many proceedings are still on-going therefore leaving the food sector in the BWB's focus in the next future.

This contribution will first portray the Austrian food market highlighting issues like the development of concentration and private labels, then summarise legal provisions and recent competition enforcement and monitoring activities. Last but not least it will outline some activities mainly driven by the Ministry of Agriculture, Forestry, Environment and Water Management to which the BWB is contributing its expertise.

## 1. Developments in Austria

### *1.1 General Information*

The food industry represents a crucial trade sector of the national economy which - from agricultural production to the preparing and serving of meals and beverages - comprises a wide range of economic activities. The core fields of work of this value-adding chain are the enterprises of the agricultural, food processing, food trade, and 'eating out' sectors. At the end of the value-adding chain there are the consumers who, through their demand behaviour, co-determine the structural development of the entire food industry.

The food sector as a whole is estimated to contribute approximately 12 % to the annual gross domestic product. In Austria, about one in six persons employed is working in this economic sector. Approximately one third of the Austrian territory and associated ecosystems is used for food supply.

In 2012 the production value of Austria's agriculture (sold production) amounted to 7.8 billion EUR.[1] In 2009 plant production accounted for 44 %, animal production for 46 % of the production value of the agricultural sector. Agricultural services and secondary activities accounted for about 10 %.

The number of organic farms is at a high level, amounting to about 21,500 in 2012. In 2009 approximately 15 % of all agricultural holdings in Austria are organic farms. 18.5 % of the agricultural area was managed according to the principles of organic farming in Austria in 2009. The EU-average is 4.7%. Austria is thus a global leader in organic farming and number 1 in Europe.[2]

The food industry sectors with the highest turnover rates are the brewing industry, the non-alcoholic soft drink industry, the confectionary industry, the meat industry, and the fruit juice industry. Over the past

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1 Zahlen, Daten, Fakten - Die österreichische Lebensmittelindustrie, 2012, http://www.lebensministerium.at/lebensmittel/lebensmittelbericht/lebensmittelbericht.html

2 http://www.lebensministerium.at/lebensmittel/biolebensmittel/Bio_Markt.html

few years the food industry was affected by the growing price pressure exerted by the food trade, by the boom of agricultural prices and the subsequent, partly strongly decreasing prices of raw materials.

Agricultural exports (agricultural products, food and beverages) in 2009 achieved a share of 7.6 % value in the total export volume of the Austrian economy. All in all, the Austrian agricultural exports amounted to 7.15 billion EUR in 2009 and 9.13 billion EUR in 2012[3]. Exports are very important for agricultural products[4]: based on value already two thirds of agricultural products are sold on export markets, amounting to exports of more than 5 billion EUR in 2012.

Austria's agricultural exports focus above all on the European area. In 2012 about 70 % of the Austrian agricultural exports took place inside the EU. Most important export destinations were Germany (33 %) and Italy (8.4 %). Important markets for Austrian food and beverages outside the European Union were the US, Switzerland and Russia.

The agricultural imports (agricultural products, food and beverages) amounted to 10.16 billion EUR in 2012.[5] Imports most importantly come from Germany and Italy.

In food retail trade a turnover of approximately 17 billion EUR was achieved in 2009.

In the European comparison, Austria's food retail trade continues to be characterized by an extraordinarily high market concentration. Meanwhile the three biggest trade companies cover more than 82 % of the total turnover of the Austrian food retail trade.

The most important trends in food trade are presently the speedy growth of the discount sector, the increasing importance of 'house brands', the rising significance of online shopping as well as the progressing differentiation of the convenience market (filling station shops, railway station stores, airport stores as well as various mixed forms).[6]

### *1.2 Concentration and discounter*

Austria's food retail trade continues to be characterized by an extraordinarily high market concentration. Although figures only exist for 2010, the tendency is clear: in 2010 the three biggest trade companies cover about 82 % of the total turnover of the Austrian food retail trade: Rewe accounts for about 34 %, Spar for 30 % and the discounter Hofer for about 18 %.

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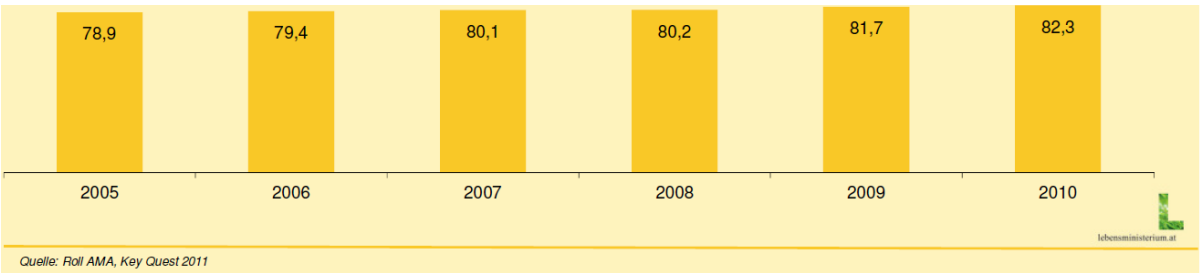
3 Agraraußenhandel 2012, http://www.lebensministerium.at/lebensmittel/lebensmittelbericht/ lebensmittelbericht.html; see also http://www.ama-marketing.at/home/groups/7/Aussenhandel.pdf

4 These are all products of customs chapter 16-24 in the combined nomenclature.

5 http://www.ama-marketing.at/home/groups/7/Aussenhandel.pdf

6 For all data see in particular Lebensmittelbericht 2010, http://www.lebensministerium.at/lebensmittel/lebensmittelbericht/lebensmittelbericht.html

**Fig 1: Concentration in Austria: Market share of Rewe, Spar and Hofer in %**

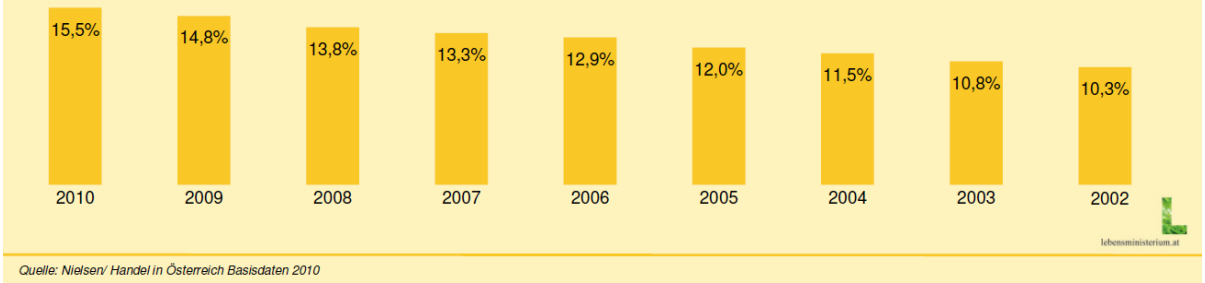



Source: Roll AMA, Key Quest 2011, printed in Federal Ministry of Agriculture, Forestry, Environment and Water Management, Lebensmittel in Österreich: Zahlen-Daten-Fakten 2011, p 8

### *1.3 Private label*

The importance of private labels in the food retail market is growing constantly (see Fig 2 below).

**Fig 2: Part of private labels in food retail (food products, excluding discounter Hofer/Lidl)**




Source: Nielsen, Trade in Austria, Basic data 2010, printed in Federal Ministry of Agriculture, Forestry, Environment and Water Management, Lebensmittel in Österreich: Zahlen-Daten-Fakten 2011, p 8

The degree of private label penetration varies however substantially in the different procurement markets. According to the market study by the BWB finished in 2007 the private label penetration is as follows:

- meat and sausage products: up to 70%
- milk products: up to 40%
- poultry/eggs: up to 40%
- bread/pastries: very variable numbers (from minimal up to 70%). It shall be noted that in this industry the significance of semi-finished products has increased significantly, since many retailers have increasingly introduced the concept of own bakeries in their outlets.
- beer: traditional retailers barely stock own-brand products, whereas discounters almost exclusively stock private label beers.
- non-alcoholic drinks: < 20%
- hot drinks: > 20%
- sweets/confectionary: > 20% (discounters excluded)

- basic foodstuffs: < 20% (discounters excluded).

Private label products are predominantly produced by branded good producers, only as comes to meat and sausage products the level of vertical integration of retailers is very high.

A question to be raised is whether the increased penetration of private labels has brought more anti-competitive effects than pro-competitive effects or vice versa. The BWB has considered the degree of private label penetration as an 'aggravating factor' when it comes to measuring buyer power. When it comes to the direct effect on consumer, there is a positive effect on prices and price competition, however, also possible negative effects on innovation and quality. The BWB has however not carried out any kind of formal assessment of these possible effects.

## 2. Competition enforcement and monitoring

### *2.1 Legal provisions*

Only under certain conditions specific agreements in the agricultural sector are excluded from the Austrian Cartel Act: § 2 para 2 (5) Cartel Act contains an exception similar in wording to Art 176 para 1 Single CMO Regulation: Upstream, certain agreements and practices concerning the production, supply, storage and processing of agricultural products are excluded from the application of the Austrian Cartel Act if they do not include price fixing and if competition can be upheld. In contrast to that, the retail sector is not exempted (neither partly nor totally) from the scope of Austrian Competition Law.

§ 4 (3) of the Austrian Cartel Act introduces a specific definition of market dominance in vertical relations: A company is also considered to be market dominant if it has a superior position vis-à-vis its customers or suppliers. Such a superior position is considered to exist if the customer/supplier is dependent on the maintenance of business relations in order to avoid serious economic disadvantages. Unfair trading practices can therefore be addressed under competition law, namely §§ 4 (3) and 5 of the Austrian Cartel Act that prohibit abuse of dominance in vertical relations. In November 2009 the Cartel Court (29 Kt 13, 14/08) has rendered judgment in a case dealing with dominance in vertical relations in the food supply chain. Though in the present case the Cartel Court did not assume abuse of dominance, it acknowledged in principle that a dominant buyer has to justify objectively when terminating a course of dealing with a dependant supplier.

Besides general antitrust legislation, the Federal Law for the Improvement of Local Supplies and the Competitive Conditions (“Nahversorgungsgesetz”, “NVG”) is a national specific: The law protects local suppliers and retailers without the precondition of dominance. It prohibits a certain number of practices, such as discriminatory practices or requests for payments or services without equivalent[7].

[7] § 1 NVG contains a legal base for the prohibition of certain unfair practices by the Cartel Court. Such conduct comprises especially the offering or asking, giving or accepting of money or other benefits, rebates or special conditions between suppliers and wholesalers that are not justified by substance, particularly if an additional benefit is not justified by a correlating trade-off.

§ 2 NVG states that suppliers, which offer different conditions to its resellers under same conditions and without objective justifications, can be confronted with an injunctive relief claim of the discriminated reseller. The same is true for resellers that request unjustified conditions of suppliers.

Additionally, § 3 NVG prohibits any non-delivery as a retaliatory measures of undertakings based on injunctive relief claims of the discriminated resellers. § 4 NVG obliges wholesalers to deliver to retailers, if otherwise the local supply is threatened or if otherwise the competitiveness of the retailer would be essentially limited.

By introducing the NVG, the legislator especially focused on the food sector. However, the Austrian Cartel Supreme Court now clearly confirmed, that the term "resellers" includes not only the food sector, but all undertakings which are not end-users, but which resell their (also processed) goods.[8]

### *2.2 Sector inquiry on Buyer Power of Supermarkets*

In 2004, the BWB started its sector inquiry on buyer power of big supermarket chains vis-a-vis their suppliers. The inquiry has been triggered off by anonymous complaints and media reports. Initially, around 40 market participants, mainly producers, were interviewed by the BWB. Subsequently, 180 questionnaires were sent to market participants on the supply and demand side.

Since a significant number of companies refused to provide certain information related to terms and conditions, the BWB initiated legal proceedings at the Cartel Court in February 2005 to enforce the undertakings' obligation to provide such information. The last company provided the requested information only in late 2006. Due to these procedural difficulties, the BWB abstained from requesting additional information. The BWB concluded the inquiry in June 2007 with the subsequent main results:

The grocery sector in Austria is - even compared to other markets in Europe - highly concentrated. The main competitive constraint comes primarily from the growing limited assorted discounters. The entry barriers into the grocery market are high.

The inquiry on several upstream supply markets resulted in strong evidence for the existence of buyer power. The high dependency of suppliers is evident. A change of the sales channel, e.g. to exports, is in many instances not a viable option. The loss of a big customer leads to heavy financial losses. If there are neither strong brands nor any strong concentration on the supplier side, the buyer power of the retailers is almost unlimited.

An inquiry into the specific procurement markets is necessary to assess the degree of buyer power in the specific market. The higher the number of suppliers, the lower the alternative to the grocery sales channel, the lower the importance of brands (respectively the stronger the importance of private brands), the stronger is the buyer power of retailers. The positive effects of buyer power, like efficiency gains, have to be taken into account as far as they increase consumer welfare. The effects on consumer welfare depend on the level of competition between the supermarket chains. On the other hand, the possible reductions in product variety and innovation and the negative effects on investment due to buyer power have to be considered.

The terms and conditions between suppliers and retailers often lack transparency. Sometimes there is no quid pro quo, sometimes the services related to specific payments are rather unclear. The lack of transparency and the agreement on retrospective payments requirements reduce the planning security of suppliers. This may result in a reduction on investment and innovation.

Another possible anticompetitive effect ensuing from enhanced buyer power is that smaller retailers may suffer a further loss in competitiveness in relation to their suppliers. New entrants face the same problem, that is the lack of economies of scale in the negotiations with their suppliers. This may reinforce the trend towards higher concentration.

The central importance of competition in the grocery sector to the benefit of consumers demands intensive surveillance of the grocery sector and of the supply markets by the competition authorities,

[8] In July 2010 the Supreme Cartel Court has rejected a claim of several sawn wood producers complaining about discriminatory practices of a large merchant for round timber.

especially on those procurement markets characterised by high buyer power. Investigations however require sound evidence to be provided by suppliers, which have proven to be highly reluctant to provide such information in fear of retaliatory measures such as de-listing of products.

### *2.3 Buyer power*

The main focus of the above mentioned sector inquiry by the BWB was on the retailer's buyer power. It draws the following conclusions:

As a summary it can be stated that the market power varies amongst different product-segments. In general, buyer power rises with the increase of the number of suppliers, the decrease of alternatives for the suppliers and the non-importance of brands (e.g., in the meat sector).

Going into more detail it can be said that in general the strong economic dependence of suppliers is evident, mainly because of the high quantities procured by the leading supermarkets on the one hand and the lack of alternative large-scale distribution channels on the other hand. Replacing significant sales quantities by shifting distribution to other sales channels, e.g. to exports, is therefore often not a viable option. The loss of a big customer may consequently entail heavy financial losses.

If there are neither strong brands ("must-stock"-products) nor other forms of countervailing power on the supply side, the buyer power of the retailers is almost unlimited. If the supply side is highly fragmented, if there are no alternative sales channels, if brand awareness is not distinctive but private label products directly compete with branded ones, buyer power of retailers is strengthened.

However, also the positive effects of buyer power, like efficiency gains, have to be taken into account insofar as they increase consumer welfare. The effects on consumer welfare depend on competition on the level of competition on the sales markets. Possible negative effects on consumer welfare, such as reductions in product variety and innovation caused by a decrease in investments have to be taken into account. Such a decrease in investments may also be caused by uncertainties in business relations and consequently the result situation.

### *2.4 Guidelines on vertical price fixing*

In the course of recent enforcement activities the BWB has observed wide spread practices in vertical and trilateral price fixing by food retailers and their suppliers as well as in the consumer electronics industry. As yet fines amounting to € 26 Mio have been imposed for those infringements. For the purpose of competition advocacy and prevention of future infringements the BWB prepared a written standpoint clarifying the BWB's legal assessment of the practices involved. The paper was presented to the public on 13 June 2013. All interested parties were invited to comment by 1st August 2013.

The BWB outlines in the beginning of the paper the legal framework for its scrutiny: Horizontal and vertical price fixing is qualified as hard core restriction under EU as well as national competition law. Vertical price fixing combined with horizontal coordination is addressed as special concern. Those practices imply horizontal coordination of retailers eg by way of the communication between retailers and suppliers. Only non binding recommendations of resale prices by suppliers are compatible with competition law. The standpoint draws a list of conduct that is qualified illegal by the BWB as well as a list of compatible conduct.

## 3. Illegal conduct (outline):

- Oral or written coordination or fixing of resale prices / minimum prices (for promotion) between retailers and suppliers.

- Agreement on bonuses, rebates and other incentives as remuneration for observance of agreed prices.

- Applying penalties, suspension of deliveries or other disadvantages for non observance of agreed prices.

- Penalties applied or the threatening with a reduction of purchase prices by a retailer to a supplier who fails to implement identical or similar resale prices when selling its products to other retailers.

- The retailer demands as condition for a raise of the purchase price that a particular resale price level is observed by other retailers which has to be proven by the supplier.

- Agreements between supplier and retailer with the purpose to safeguard that the resale prices of other retailers keep within a particular frame or to safeguard a best price clause (preventing underpricing of a retailer's particular product by competing retailers) or a most favoured customer clause (aiming at uniform prices at wholesale and/or retail level).

- Participation of a retailer in the supervision of resale prices (price monitoring) by a supplier or vice versa: eg obligations or incentives for suppliers to communicate to retailers deviations from recommended/minimum prices by other retailers, obligations or incentives for retailers to communicate to suppliers deviations from recommended/minimum prices by other retailers;

- A supplier communicating to retailers in advance time and amount of resale price changes by one other retailer.

- Agreements between suppliers and retailers on exclusive time frames for promotions or on coordination of the timing of promotional activities by different retailers.

**4. Legal conduct (outline)**

- Recommendation of resale prices to a retailer provided the recommendation is in fact and legally non binding.

- Promotional activities have to be organized autonomously by retailers. Information exchange with supplier is legal only to the extent that it is necessary for the planning of quantities.

- Price monitoring is acceptable for retailers and suppliers on their respective markets.

- Suppliers are allowed to clarify towards retailers their marketing strategy when submitting non binding price recommendations, unless this supports directly or indirectly horizontal coordination of retailers.

The BWB is assessing the answers received during the review. A final version will be published in due time.

### *4.1 Recent case law*

#### *4.1.1 Cartels: Vertical and horizontal anticompetitive agreements*

Following the extensive sector inquiry in 2005 to 2007, the BWB has again focused on the food retail market since 2011. Enforcement activities were triggered amongst others by complaints. Meanwhile ex officio investigations and dawnraids were conducted on the premises of two leading food retail chains, accounting for approximately 65 % of the market, as well as of a large number of producers. In total, the BWB dawnraided more than two dozen companies (food retailers as well as producers) since 2012. A large number of product categories were concerned.

Several food retailers and their suppliers are alleged to have participated in cartels, infringing Art 101 AEUV and § 1 Austrian Cartel Act 2005, by fixing consumer prices vertically and trilaterally.

While several proceedings are still pending, in 2013 some proceedings could be ended via a settlement procedure. Following ex officio investigations and dawnraids conducted by BWB on the companies' premises, several companies cooperated with the authority in bringing the infringement to an end. Since the BWB is one of the smallest competition authorities in Europe (20 case handlers) settlements allow swift resolution of cases and at the same time ensures fast compliance with competition law.

On the producer level, the Cartel Court handed down a fine of € 1.125 Mio in January 2013 against the dairy producer Berglandmilch[9]. The Court held that Berglandmilch agreed on consumer prices with several food retailers between 2006 and 2012. The product concerned is mainly cheese.

In September 2013 a fine of € 58.500 was imposed on the mill company Vorarlberger Mühlen- und Mischfutterwerke[10]. The Court held that the company infringed Art 101 TFEU and § 1 Cartel Act due to vertical agreements on price with food retailers between November 2006 and May 2011. The products concerned were flour, semolina and bread mix bread. The fine is rather low as the Cartel Court held that it had to be considered that the food retailers had put much pressure on the company to implement the price agreements.

In October 2013 a fine of € 210.000 was imposed on the dairy producer Emmi. The Court held that the company infringed Art 101 TFEU and § 1 Cartel Act due to vertical agreements on price with food retailers

On the retail level, the Cartel Court imposed a € 20.8 Mio fine in May 2013 on the REWE Group[11], one of the leading Austrian food retail groups, for Resale Price Maintenance (RPM) between the latter and a number of retailers. The Court held that REWE agreed on consumer prices with a number of producers between 2007 and 2012 concerning a variety of products. However, the infringement mainly concerned beer and dairy products.

Several investigations as well as proceedings are ongoing.

Based on the application of the BWB, fines amounting to € 1.1 Mio were imposed by the Cartel Court on the three leading breweries[12] in Austria in March 2012. The investigation was triggered by a complaint

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9 Judgment of the Cartel Court of 23 January 2013, case number 29 Kt 77/12; BWB/K-311

10 Judgment of the Cartel Court of 3 September 2013, case number **29 Kt 80/13; BWB/K-313**

11 Judgment of the Cartel Court of 13 May 2013;

12 Judgment of the Cartel Court of 5 March 2012, BWB/FD-212

of a cash&carry company concerning an alleged infringement of Art 101 TFEU. According to the complaint, the main Austrian breweries would not supply cash&carry companies with draught beer as they were distributing their beer themselves or through small local beverage distributors. This boycott was based on an agreement which had been reached in the context of a trade association meeting, according to which no cash&carry company should receive draught beer. The complainant also informed the BWB about illegal resale price maintenance and restriction of sales.

The BWB sent requests for information, questioned witnesses and conducted inspections end of June 2011. Evidence was found that the breweries concluded an agreement within the framework of their professional association to not supply cash&carry markets with draught beer. The companies decided to cooperate with the authority and the case was brought to court via a settlement procedure. The Cartel Court established that the refusal to supply cash and carry markets with draft beer based on an agreement which had been reached in the context of a trade association infringed Article 101 TFEU and Article 1 of the Cartel Act. In total, the Court imposed fines of € 1.11 Mio.

The BWB has brought a suspected cartel in the sugar market before the Austrian Cartel Court in autumn 2010. A leniency application revealed that two international sugar companies and their Austrian subsidiary allegedly engaged in geographic market sharing from approximately 2004 until the end of 2008 infringing Art 101 TFEU. Whereas the leniency applicant will not face a fine, the BWB has requested the Cartel Court to impose a fine on the other company and their subsidiary involved. Court proceedings are ongoing.

#### *4.1.2 Mergers*

The essential mergers between retailers in Austria have been notified with the European Commission, ie Rewe / Billa, Rewe/Meinl and REWE / ADEG[13].

On national basis, the BWB dealt with a local merger in the cash and carry segment in 2011. Pfeiffer intended to take over sole control over Nussbaumer, both active in cash and carry markets.[14]

The BWB applied a SSNIP-Test (experiment approach) to determine the relevant market. The market analysis of the BWB (SSNIP Test, turnover as well as distance analysis) showed that first, the pick up cash and carry market needs to be distinguished from the delivery cash and carry market and that, second, the geographical market for the pick up market is maximum 30 km from the business premises and for the delivery market 100 km from the business premises.

In the market for pick up cash and carry the BWB identified the regional area of Bruck/Mur for remedies on the basis of the market concentration in combination with the feedback from customers. The favoured remedy by the BWB was a divesture of Nussbaumer's cash and carry in Bruck/Mur. Unfortunately, this remedy was not realisable due to the fact this location also included a coffee roasting facility which was part of the merger. Insisting on a structural remedy, would have led to a shut down of the location in Bruck/Mur which is less preferable than conduct remedies to ensure supply in this undeveloped region. The BWB therefore conduct remedies which were then officially imposed by a decision of the Cartel Court. One conduct remedy foresees a guaranteed internal price level in comparison to the competitive location in Vienna over a period of 10 years. This guarantees that the prices of all goods at the location Bruck/Mur are equal to the location in Vienna (competitive location). The remedy is monitored by an independent expert who reports to the BWB every 6 month. Any deviation in price will be

[13] COMP/M. 803 – Rewe / Billa, M.1221 - Rewe/Meinl, M.5047 - REWE / ADEG.

[14] BWB/Z-1387

fined. The second remedy concerns an unlimited prohibition of future acquisitions within the region Styria/South Burgenland to prohibit further announced acquisitions in this region.

With regard to the acquisition of WEDL by M-Preis the BWB initiated a phase II proceeding due to concerns on local level[15]. In particular, the BWB looked at a small village (Serfaus), where M-Preis – by acquiring WEDL - was intending to take over the only other retailer in the village. The BWB based its concerns on an information of the village itself following which inhabitants of Serfaus had to ride more than 20 minutes to reach the next supermarket outside the village.

However, the transaction was cleared after it was found out that the riding time in fact was only 15-20 minutes (the BWB included supermarkets within a reach of 20 minutes to be included in the same geographical market). Furthermore, due to the small size of Serfaus, there was no other retailer interested in taking over the WEDL branch in Serfaus.[16]

In October 2003 the BWB dealt with the acquisition of Römerquelle by Coca Cola Beverages Austria[17]. Coca Cola Beverages bottles drinks of The Coca Cola Company (e.g. Coca Cola, Sprite, Fanta), while Römerquelle mainly produces and distributes mineral water and mineral water products in Austria.

The BWB had reservations concerning the market for mineral water where Römerquelle was presumed to have a dominant position, especially in the direct consumption sector which is characterized by long-term contracts and rigid structures. Coca Cola Beverages Austria could strengthen this dominant position by its financial power, its know-how as distributor and bottler and its distribution network. Furthermore, the BWB was concerned about the market for functional drinks where Römerquelle has a very dominant position and Coca Cola Beverages Austria bottles a small but not insignificant brand (Almdudler Pro Ego).

After intensive negotiations a court settlement was reached. The most important points the parties agreed on are the following:

- Coca Cola Beverages Austria distributes products of The Coca Cola Company directly to the catering industry. Up to three mineral waters which are not owned by the merging parties have to be distributed in addition under non-discriminatory conditions. This should help especially mineral waters with a small or medium market share to gain access to the distribution channel.

- In the distribution to the catering industry (directly or via wholesaler) the delivery (including rebates and other contract conditions) of products of The Coca Cola Company must not be linked to the delivery of Römerquelle products.

- Coca Cola Beverages Austria has to cease the production of its functional drinks "Almdudler Pro Ego".

After acquiring already two competitors in the past two years Berglandmilch eGen, a major player in the Austrian milk market, agreed on commitments to get clearance for its acquisition of Stainzer Milch in autumn 2011[18].

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15 BWB/Z-1318.

16 See Questions for National Reporters of LIDC Kiev 2013, Austria, Gerhard Fussenegger, bpv Hügel Rechtsanwälte OG

17 BWB/Z-726

Due to the high market share of Berglandmilch on the market for raw milk as well as on several markets for milk products, the merger was examined intensively by the BWB and the Federal Cartel Prosecutor. After an extensive market test of proposed commitments (inquiring milk farmers, trade and competitors), they decided to clear the merger under certain conditions with immediate effect.

These conditions primarily concern the delivery area, the obligation to buy raw milk and bio raw milk from third parties as well as the obligation to offer for sale certain (large) quantities of raw milk to third dairies in an amount which was almost as high as the raw milk collected by the target. The competition authorities accepted these commitments to ensure access to milk procurement markets in a merger affecting dairy products markets. To address the authorities' concerns, the parties offered to introduce an additional distribution channel for raw milk by committing to procure milk from non-member farmers at the generally available index price for milk exports. Consequently, farmers who were not members of an association and whose contracts of sale to other dairies were discontinued were offered access to the market at market price.

With these rather far reaching commitments which were considered by the BWB and Federal Cartel Prosecutor to be sufficient to solve any competition problem, the merger could be cleared in phase I.

#### *4.1.3 Abuse of dominant market position*

"Red Bull"[19]: Claimant (retailer in Austria with a market share of approx. 5%) could not prove that Billa, Austria's biggest grocery retailer, was abusing its dominance by reselling products (inter alia, Red Bull) below the purchase price. The claim was rejected as the plaintiff could not even submit evidence with regard to its own purchase price (not to mention the purchase price of the dominant undertaking).[20]

The BWB investigated a case relating to the purchasing, storage and drying services of organic corn. The trading association Österreichische Agentur für Biogetreide GmbH, in which producers, processors and traders held equity, was accused of foreclosing the purchasing of organic corn in certain regions in Austria.[21] It had entered into exclusivity contracts with local storage and drying facilities for organic corn. Since farmers have a limited radius within which they can deliver their harvest[22], they need to bring the organic corn to a nearby drying and storing facility. The contracts were therefore found to foreclose the purchasing of organic corn in certain regions in Austria. This case was closed with commitments ensuring that there is no exclusivity for the provision of storage and drying facilities and that these facilities may also deal with organic feedgrain.[23]

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18 BWB/Z-1511

19 Judgment of the Cartel Supreme Court of 16 December 2002, case number 16 Ok 11/02.

20 See Questions for National Reporters of LIDC Kiev 2013, Austria, Gerhard Fussenegger, bpv Hügel Rechtsanwälte OG

21 BWB/M-232

22 The drying and storing facilities are a bottleneck for organic corn trade. During the harvesting season, farmers need to bring the organic corn to a nearby drying and storing facility. The farmers can't drive far with their tractors and they need to do the harvesting during a very short period. Due to these constraints, they can't go far away from their farm.

23 See also Questions for National Reporters of LIDC Kiev 2013, Austria, Gerhard Fussenegger, bpv Hügel Rechtsanwälte OG

## 5. Linked activities

### *5.1 Food price monitoring*

Due to the critical developments on the milk market in 2009, the Austrian Ministry of Agriculture, Forestry, Environment and Water Management induced a study with the title "Estimating Market Power in Food Retailing – The Case of Milk Products in Austria" to analyse price building and price transmission more deeply. The study, which was conducted by the Austrian Institute of Economic Research and finalized in 2010, was a more in-depth study of a first more general study of the with the title "Marktspannen und Erzeugeranteil an Nahrungsmittelausgaben als Ansatz zum Messen von Marktmacht im Agrar- und Ernährungskomplex", which was also conducted by the same institution.

Having gained these informations and in reaction to the recent developments on the European level concerning the High Level Forum for a better Functioning of the Food Supply Chain, the Division III/6 Milk, Value Chain and Risk Management of the Austrian Ministry of Agriculture, convened a new working group of different stakeholders of Austrian companies and official institutions in March 2010. The first meeting was held as an information and discussion platform concerning relevant issues of the food chain development. The working group is meeting on a regular basis and consists of members of the Austrian Ministry of Agriculture, Forestry, Environment and Water Management, the Federal Ministry of Economy, Family and Youth, the Austrian Competition Authority, members of the different social partners, and the Agrarmarkt Austria.

Due to the efforts the European Commission is undertaking concerning a European Food Prices Monitoring Tool (in the course of the Working Group within the High Level Forum), the Division III/6 Milk, Value Chain and Risk Management of the Austrian Ministry of Agriculture, has initiated a national working group of stakeholders to develop such a tool on a national basis in Austria. Members of this national working group are again the Ministry of Agriculture, Forestry, Environment and Water Management, the Austrian social partners and statistic institutions such as Statistik Austria, the LBG (one of the leading tax consulting and auditing firms in Austria) and the Agrarmarkt Austria.

The aim of this working group is to improve the transparency of the Austrian food chain. Thus, a pilot project has been initiated to find out which data is available in what quality. The aim of the project is twofold: first, a set of price indices shall be developed that contains price developments of certain products over time. This shall illustrate the reaction of prices to input-/raw material price changes on the various stages of the food chain. Second, a set of absolute prices of selected homogenous products shall demonstrate the proportion of value added in the food chain. This shall give an image of the raw material price proportion of the final consumer price.[24]

The Federal Institute of Agricultural Economics designed the project outline and gathered the relevant information. In a report mid 2012 it reported that for the production level (agriculture) a very good data base is available for the description of prices, costs and structure. With the available knowledge of experts and statistics prices and costs can be calculated per unit (Lebensmitteleinheit).

On other levels, like the processing level, it is much more difficult to gain insight into data. The project members are more reluctant to disclose their prices and costs. The Institute explains this with a possibly fiercer competition than in other countries. Still, the calculation of average costs that cover the biggest part of the market is envisaged.

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See answer by the Austrian Ministry of Agriculture, Forestry, Environment and Water Management on the OECD survey of activities in food price formation, transparency and monitoring along the chain - Austrian activities

A conclusion on the situation regarding the food retail was not possible by the Institute at the time of the report. With some food, eg drinking milk, the description of the cost components will only be possible if the retail market will cooperate. Aggregated data is available for product groups. For particular food consumer prices are available, but it must still be evaluated which sort of price information describes the reality best. It still has to be clarified whether sales volumes of the food retailers are available for individual food categories.

The report was discussed with the working group of stakeholders. Due to the mentioned problems, especially the need of cooperation with the retail level, the progress of the project slowed down.

At the latest after the substantial price increases in 2008 the Austrian Ministry of Economic, Family and Youth started to focus price monitoring activities on the process of price formation in the food retail sector. Austria has a rather high income per capita and GDP per capita. This fact has to be considered in general while analysing price levels in comparison to the EU average. Nevertheless the price level index of Eurostat shows that Austria seemed to have a relative high price level within the EU regarding food prices. But additional factors, beside the economic ones, also affect the price formation process in the food retail market.

The Austrian Ministry of Economic, Family and Youth thus has ordered several studies. The aim was to elaborate which factors and mechanism can determine the price level. One of these studies ("Foreign components of Austrian food") explores the impact of global development on food prices as well as the mechanism for transmission. The study (in cooperation with the Ministry of Agriculture) will be finished soon.

The following possible explanations for the higher price level in Austria could be identified:

In general it has to be considered that in Austria in particular the high density of stores in the food retail market is a cost factor. This implies higher costs for staff, rent and logistics. Also the type of products have to be considered when comparing food prices in Austria with other countries: the Austrian consumers put much emphasis on high quality food, the percentage of biologically produced food is especially high and more fresh products are consumed (eg fresh milk is however more expensive than UHT milk due to costs for cooling and more frequent deliveries). Last but not least, the method for the collection of prices is important: Often only regular prices are taken. However, in Austria the percentage of special offers is particularly high. Those reduced prices often do not find their way into statistical analysis, eg the consumer price index. Therefore an Austrian project tries to incorporate better prices according to scanning data.

The Ministry of Economic, Family and Youth continuously monitors the rates of inflation down to the level of production and tries to identify critical developments by comparison with other countries and to explain them by economic analysis respectively. In particular the price dynamic is examined in context with other economic variables like the developments of real wages, distribution of income or global developments of raw material (stock exchange) in order to get a full picture and insight into the interplay between the individual parameters.

### *5.2 Unfair trading*

The European Commission has set up an expert platform on B2B Contractual Practices within the High Level Forum for a Better Functioning Food Supply Chain in 2010. The result was the elaboration of a voluntary code of good practice.

Once discussions are finalised on EU-level if the implementation will stay on a voluntary level or extended on an EU-based legislation, the Austrian Ministry of Ministry of Agriculture, Forestry,

Environment and Water Management will discuss with the parties involved how to implement them on national level.

### *5.3 Competition advocacy: CAP, milk package*

The BWB was active in competition advocacy in the on-going reform of the Common Agricultural Policy of the European Union with regard to the application of competition law in the agricultural sector: The BWB was involved in discussions at national level as well as within the ECN. It also commented on the legislative proposal of the European Parliament in written form to the Austrian Ministry of Agriculture and members of the European Parliament.

Furthermore, the BWB was involved in the implementation of the milk package into national law and advised different stakeholders (Austrian Ministry of Agriculture, representatives of chambers and companies) on how competition rules apply to the agricultural sector.

# BELGIUM

## 1. Background

### *1.1 What have been the main characteristics of retail food trends in recent years and what factors have given rise to these trends?*

Belgian retail food prices have increased more than the retail food prices in the neighbouring countries and are, as a result, significantly higher.[1] The Belgian Competition Authority commissioned Nielsen (a marketing consultancy) to identify price differences between products sold in supermarkets with the same EAN code (European Article Numbering). The results of the study point to significant price differences:

- Based on 18 287 shared products between Belgium and the Netherlands, consumer prices appear to be 10.4% cheaper in the Netherlands (12,5% for food products only, based on 7774 shared products);
- Based on 20 181 shared products between Belgium and France, consumer prices appear to be 7.0% cheaper in France (8,6% for food products only, based on 15277 shared products);
- Based on 6 981 shared products between Belgium and Germany, consumer prices appear to be 10.6% cheaper in Germany (7,5% for food products only, based on 4824 shared products).

### *1.2 Have there been increased concerns about the functioning of the food supply chain following the world commodity price spikes in 2007-2008 and 2011?*

Yes, both in the popular press and in the form of questions to the Minister in the Parliament. It is worth emphasizing that the effect of price rises is even more important in Belgium, because wages are indexed automatically.

In 2009 the competition authority helped to define in consultation with the European Commission, another national competition authority and departments of the Fod/Spf Economie (federal ministry of economic affairs), what was compatible with the rules of competition in respect of the provisional arrangement between the Agrofront and Fedis regarding the support by the distribution sector in favour of the milk producers. Equally in consultation with the Boerenbond, with het Algemeen Boerensydicaat, and two other organisations, we offered guidelines concerning projects for contractual agriculture and quality labels.

The market monitoring service of the ministry of economic affairs (which later became the Price Observatory) also analyzed at the request of the competition authority or the government the bovine and porcine meat chains, general issues in respect of the prices of agricultural products and the development of mais oil prices. The analysis of the bovine meat chain did not point to issues requiring a reaction of the competition authority. With regard to the pork and porcine meat sectors, the competition authority

[1] Direction générale de la concurrence (2012), Niveau de prix dans les supermarchés.

indicated its agreement with a code of good contractual practices, similar to the code that was later adopted at the EU level.

*1.3 What factors may result in retail prices not fully reflecting changes in world commodity markets? What factors may cause these potential differences in the patterns of price adjustment between the raw commodity and retail price levels?*

The Belgian price observatory has shown in its 2012 annual report[2] that price developments are characterized by an asymmetry in the price transmission mechanism in the food chain. When commodity prices rise, retail prices react promptly but, when commodity prices decrease, retail prices react much more slowly and in much smaller proportions. A phenomenon sometimes referred to as "rockets and feathers".

This phenomenon is more prevalent for basic (lower priced) products than for premium brands. It can either reflect the relatively higher marketing and overhead costs embedded in the product, or the lower price elasticity of the product resulting from the lower degree of competition.

*1.4 Has the functioning of the food chain featured in the concerns about national food security and, if so, how?*

There have been several food security issues over the last two decades in Belgium. The dioxine crisis in particular has had a significant political impact. While these scandals have raised the level of regulation in the food supply chain, the competition authority has not noticed a general effect of these regulations on the degree of competition at the various levels of the value chain.[3]

*1.5 Are food prices monitored in your jurisdiction? If so, by whom and to what purpose?*

Yes, by the Belgian price observatory, which observes prices in order to identify markets that work less well. When such markets are identified, the Price observatory may suggest courses of actions to the Minister of economic affairs and hand its report over to the competition authority (and sector regulators, when appropriate).

## 2. Recent Developments in the Food Chain

*2.1 What have been the primary changes in the food chain over the past decade or so? Has concentration increased? Have these changes been more notable at the retail or manufacturing levels? What has driven these changes?*

Over the last two decades branded food producers have increasingly been taken over by multinational companies. As in most other countries, penetration of private label products has increased to one third of the market (although exact figures diverge depending on the products taken into account). The raising market share of private label products provides (usually cheaper) alternatives to national brands, which strengthens competition on the market and can be beneficial to consumer, who can both access a wider variety of products and pay a lower price. Until now, there is no evidence that retailers exploit their stronger competitive position towards their suppliers in a manner that indirectly harms the final consumer.

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2 Observatoire des Prix (2012), Rapport annuel de l'Observatoiredes prix.

3 It should be noted that the Competition Prosecutor found horizontal restrictive competition practices regarding pricing and the organization of BSE (bovine spongiform encephalopatie) tests in a reasoned report submitted to the Council. However, the Council has not followed the Competition Prosecutor. There are no signs of other restrictions at this level.

At the retail level, the largest incumbent retailer (which has also been taken over by a multinational company) has seen its market share plumb, while a relatively small soft discounter has become the largest retailer. The market share of hard discounters has increased, and their stores now cover the major part of the country.

*2.2 To what extent have the changes in the food supply sector been associated with increased presence of foreign firms?*

At the retail level, the Belgian Competition Authority has not seen any significant effect associated to foreign ownership. Two of the three largest companies (with together more 50% market share) are not owned by foreign companies. The third one, which used to be the largest incumbent, has been taken over by a foreign competitor; its market share decreased before the merger and further decreased since then. Hard discounters are foreign owned. Their development has probably had an effect on the competitive dynamics in the sector (but it is unclear whether this effect should is associated to the foreign ownership, or to their specific business model).

At the food producers level, foreign firms appear to segment markets along the national borders (territorial supply constraints) and to set higher wholesale prices in Belgium than in neighbouring countries. As a consequence, Belgian consumers do not appear to benefit from the economies of scale generated by the European Single Market.

*2.3 Have there been any notable changes in the retail sector following recent experience in food price inflation and the economic downturn? For example, through the increased presence of discount outlets? Have there been changes in policies directed at the retail food sector? What have been the main factors driving these policies where applicable?*

The raising market share of soft and hard discounters has raised steadily over the last two decades. It is not yet possible to identify a (positive) structural break in this increase associated with the economic downturn. Changes in policies directed to the retail food sector are not directly related to the economic downturn (and are further discussed to answer question 13).

## 3. Competition in the Food Chain

*3.1 Have there been sector reviews of the food chain in recent years? If so, what has been the primary motivation for these reviews? What has been the principal focus: vertical, horizontal or both? What were the conclusions?*

The Belgian Competition Authority has conducted an informal review of the supermarket sector (report published in 2012).[4] The report underlined the higher retail prices in Belgian supermarkets (see question 1 above), as well as a number of causes for higher prices:

- Tax differences cannot explain more than a 2% price difference;
- Differences in wholesale prices can cause up to 3% price differences: it appears that multinational food producers use national borders to segment customers (territorial supply constraints) and apply higher wholesale prices for Belgian supermarkets;[5]

[4] Direction générale de la concurrence (2012), Niveau de prix dans les supermarchés.

[5] This result has been further documented in a study commissioned by Belgian supermarkets : http://www.comeos.be/menu.asp?id=9563&lng=fr

- Differences in social legislation: in contrast to their Belgian colleagues, the bulk of workers in Dutch supermarkets are very young and work less than 16 hours a week (most of them are students);
- The ban on resale-below-cost in Belgium may reduce the degree of competition between supermarkets, and between their suppliers;
- Although the study did not identify significant barriers to entry in Belgium (three supermarket chains have shown a rapid organic growth over the last two decades and are now amongst the five largest chains), there might be important difficulties to exit and/or restructure; amending some aspects of the social legislation and uniformising franchise contracts may help.

We also refer to our answer to question 2.

*3.2 Has there been an increase in competition authority enforcement in the food sector in recent years? Please supply details.*

The Belgian College of competition prosecutors has submitted a number of reasoned reports to the Council. There are two significant reports on alleged hub-and-spoke agreements of supermarket chains with the help of their suppliers in the chocolate and body care sectors. One of them has been

*3.3 How have competition investigations addressed buyer power? What (if any) provisions exist for addressing buyer-supplier relations in the food chain? How are these relations regulated (for example, through guidelines, soft law provisions, codes of conduct)? Are there plans for tighter regulations in the future?*

Competition investigations have not dealt directly with buyer power.

The buyer-supplier relations are not regulated, but representatives of farmers, food producers and retailers meet in the so-called 'ketenoverleg' (food chain consulting)[6]. They have agreed on a code of conduct and discuss issues such as to low commodity prices. They try to agree on a course of actions (as was for instance the case for the price of milk and beef). Such courses of actions are usually submitted to the Belgian competition authority to ensure that they do not infringe competition laws.

*3.4 What exemptions (if any) are applied by the competition authority relating to competitive practices at any stage of the food supply sector?*

There are no specific exemptions in Belgium, but the European exemptions apply in Belgium.

## 4. Other Factors Determining the Functioning of the Food Chain

*4.1 What other policies affect the functioning of the food supply chain including the extent and intensity of competition? For example, restrictions on retail practices (planning, price controls, restrictions on the services sector)?*

The OECD[7] and the European Commission[8] have suggested that the Belgian legislation on commercial sites may restrict entry on the market, and may therefore reduce the degree of competition

[6] See eg http://www.boerenbond.be/Home/Ketenoverleg

[7] OECD (2011), OECD Economic Surveys – Belgium, July 2011.

[8] European Commission (2011), Evaluation of the National Reform Programme and the Stability Programme 2011 of Belgium.

between supermarket chains. They fear that the motivated notice that the National Socio-Economic Committee for distribution hinders market access, especially for new foreign entrants. The review of the supermarket sector[9] has not been able to confirm the negative impact of the law (as revised in 2009).

On the contrary, the review of the supermarket sector[10] highlights that the ban on resale at a loss is likely to have a significant effect on prices. As shown in the theoretical work of Allain and Chambolle (2009)[11] and confirmed in the empirical estimations of Biscourp, Boutin and Verge (2011)[12] laws banning resale at a loss, such as the Galland law in France, encourage food producers and retailers to increase both wholesale prices and back margins. Such legislations can therefore act as a uniform price floor, which dampens competition not only at the retail level, but also between suppliers. The law banning resale at a loss should be slightly revised (to include more rebates in the reference price) in the coming month.

*4.2 What aspects of state enterprise involvement in the supply chain or marketing boards may (or have) affect(ed) the food chain?*

A priori not relevant in Belgium.

## 5. Advocacy

Has there been an increased advocacy role for the competition authorities in recent years with regard to the functioning of the food chain (for example, with respect to barriers to entry, promoting regulation/de-regulation, trade and agricultural policies)?

The Belgian competition authority has taken a very active advocacy role in the food chain. The review of the supermarket sector[13] has had a wide echo in the popular press, was presented in the economics commission of the Parliament and was repeatedly cited by the Minister of Economics affairs to foster changes. It has also taken an active role in the 'ketenoverleg' (see answer to question 11).

9 Direction générale de la concurrence (2012), Niveau de prix dans les supermarchés.

10 Direction générale de la concurrence (2012), Niveau de prix dans les supermarchés.

11 Allain, M.-L. and C. Chambolle (2011), 'Anti-competitive effects of resale-below-cost laws,' International Journal of Industrial Organization, 29(4): 373-385.

12 Biscourp, P., X. Boutin and T. Vergé (2008), 'The Effects of Retail Regulations on Prices Evidence form the Loi Galland,' Documents de Travail de la DESE G2008-02, INSEE.

13 Direction générale de la concurrence (2012), « Niveau de prix dans les supermarchés ».

# BRAZIL

## CADE's Enforcement Measures to Maintain a Competitive Environment in the Brazilian Food Chain Industry

### 1. Introduction

According to the Brazilian Constitution of 1988, the right to food is a constitutional social right.[1] The Constitution was amended in this sense in February 2010.[2] Since 2003, the Brazilian Government has embarked on a massive Zero Hunger (*Fome Zero*) program, thereby harnessing the fight against hunger by monitoring the food sector. Contextually, the access to food is a priority for the governments of developing countries and in this vein, the proper regulation of the food market is a means to guarantee the population's access to food. It is on such grounds and with this objective that the Brazilian Competition Authority (CADE) shows tremendous interest in the food chain industry which it monitors thoroughly: the end line of the food chain is closed by the consumer. Part of the food chain is indeed very sensitive as it relates to the population's basic needs. Similarly, it is surely one of the rare fields which potentially concerns the purchasing power of every class of the population, from the richest to the poorest. And being of especial relevance for the poorer section of the population, the food market is closely supervised by CADE. Moreover, the food sector is of paramount importance to the Brazilian economy in terms of the gross income which it generates, in terms of the level of unemployment absorbed and, finally, as far as the exports are concerned.[3]

The Brazilian food industry covers a wide perimeter. It ranges from agricultural products to industrial products which include, for instance, packaged food, frozen food or processed food. The production capacity in both of these fields – agricultural and industrial – is very dynamic and it has been adjusting itself to the soaring national and international demands. The lucrative prospects of the food industry have, in this sense, been attracting new national and multinational players, thereby giving competitive colours to this particular market. Competition exists all over the food chain – from the production level to the distribution channels. However, even if the competition spirit theoretically lurks behind this industry, competition can easily and potentially be dwindled by some strategies of the biggest players.

The role of CADE is hence detrimental to monitor the competitive structure as well as any anti-competitive behaviour in this sector in the interest of the final consumers. Basic food prices must remain reasonable, especially because the demand in this market is rather inelastic, and this is technically possible if the market has a good competitive health. The new Brazilian Competition Law of 2011 enables CADE to act preventively in order to maintain and foster a competitive spirit in the Brazilian economy, and therefore in the food industry. The new legislation (Law 12.529/11) provides for a pre-merger control system which enables the Competition Authority to block any anti-competitive merger at the upstream.

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1 Article 6 of the Brazilian Federal Constitution of 1988.

2 DE SCHUTTER (O.), *Report of the Special Rapporteur on the right to food*, United Nations Human Rights Council, A/HRC/13/33/Add.6, 19/02/2009, p.8 ; CHMIELEWSKA (D.), SOUZA (D.), *The Food Security Policy Context in Brazil*, International Policy Centre for Inclusive Growth, Country Study, no.22, June 2011, p.3.

3 DINIZ NANTES (J.F.), MACHADO (J.G.), "Aspectos competitivos da indústria de alimentos no Brasil", *in*, De BEM (S.) *et al.*, *Identificação de Gargalos Tecnológicos na Agroindústria Paranaense*, Workshop, Curitiba, IPARDES, 2005, p.5.

Under the precedent law (Law no.8.884/94), prevailed a post-merger review system. CADE has indeed been able to supervise all the important mergers in this sector, using in so doing, some specific preventive techniques in order to ensure competitive structures, behaviours and results.

Following the food chain logic, CADE has by this means fostered a competition spirit both at the production level (**I**) and at the distribution level (**II**). The aim here is not to sketch a complete analysis of the food industry *per se*, but to explain how CADE has been called to monitor the competition structure therein. Accordingly, the study will focus on the main food-related cases which have been recently investigated by CADE.

## 2. CADE's enforcement actions in the Food Industry Production Sector

The enforcement is generally done *a priori* through a merger control (A) and *a posteriori* by the enforcement of performance agreements signed with the players (B). Recently, the most important case concerned the merger between *Sadia* and *Perdigão* and its impacts on the competition environment in the food industry production sector, regarding namely the market position of the main competitors, *JBS* and *Marfrig*.

### *2.1 The Merger Review: CADE clears mergers in the Food Industry only after ensuring that the market remains competitive.*

One of the characteristics of the Brazilian food industry is the presence of a high number of competitors at the regional levels, but limited number of important players at certain markets of the national level. In view of larger economies of scale – which they claim beneficial for the consumers in terms of lower prices – these companies may decide to join forces and merge under the control of one unique private entity, thereby dominating the food industry. The Brazilian food industry recently faced such a situation, namely in the industrialized meat and poultry market. This sector is detrimental to the Brazilian economy. A recent study of the United States Department of Agriculture shows that Brazil is the world's second producer, consumer and exporter of meat products.[4] As for the broiler meat market, Brazil ranks second as a consumer and as a producer and leads the worldwide exports ranking.[5] Accordingly, when *Sadia* and *Perdigão*, two Brazilian top players – and historical rivals – decided to merge into *Brasil* Foods[6] in 2009, the merger raised serious competition conundrums. It was feared that the increased market power could result in higher prices to consumers, considering *Brasil* Foods' market position. The market shares of the respective companies justified these concerns.

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4 See: *Livestock and Poultry: World stock and Trade*, United States Department of Agriculture – Foreign Agricultural Service, April 2013, available at: http://www.fas.usda.gov/psdonline/circulars/livestock_poultry.pdf

5 *Ibid.*

6 Brasil Foods is considered as the world's largest producer and exporter of processed meat. See: ROWLEY (J.), SAMADI (F.), "CADE Clears Brasil Foods With Conditions", *Global Competition Review*, 14th July 2011.

| Market Share in Brazil[7] | | | |
|---|---|---|---|
| Product | **Perdigão** | **Sadia** | **Brasil Foods** |
| Chilled Meat | 25% | 28% | 53% |
| Frozen Meat | 34% | 36% | 70% |
| Pasta | 38% | 50% | 88% |
| Frozen Pizzas | 34% | 33% | 67% |
| Margarine | 18% | 30% | 48% |

*Sadia* and *Perdigão* represented together between 50% and more than 80% of sales in the Brazilian market of processed food.[8] The merger obviously represented the possibility of a dominant position – and, hence, the eventuality of an abuse which could, in turn, contribute to food inflation given the market shares implied. Considering this particular market's nature, the barriers to entry for potential (and small) competitors are normally very high; *Sadia* and *Perdigão* had already acquired goodwill and longtime consumers; they normally reacted to each other's prices changes but remained placid to any change from smaller producers.[9] This again cast a doubt on the competitive effects of such an important merger.[10]

However, this merger did not imply anticompetitive consequences *per se* and it is namely CADE's role to ensure that a *prima facie* merger does not, in practice, kill competition. In this lies its preventive function. For such purposes, the Brazilian Competition Authority uses a methodology to maintain a competition spirit in the food market. In this vein, before clearing any merger of this type, it sees to it that the concerned market conditions are fertile and favorable for new players. Two techniques have been used by CADE to ensure that such mergers do not erect insuperable barriers for new business initiatives. Firstly, CADE imposes divestment measures to the merging companies. The latter must, in this sense, divest part of their production assets and distribution channels, thereby reducing its productive capacity. This, for instance, implies the disposal of production units, of storage rooms, of slaughterhouses, of distribution centers and of all the rights and contracts thereto related.[11] Secondly, CADE also imposes the disposal of some of the brands of the merging companies in specific markets where the competition environment is stiffer.[12] This means is used to combat barriers to entry and, at the same time, to control the merging companies' advertising strategies.[13]

In the *Brasil Foods* case, it was decided that *Sadia* and *Perdigão* would maintain one or two brands in most markets and that only the brand *Sadia* – and not *Perdigão* – would be used for a certain number of

7 The table has been translated from: DALLA COSTA (A.), DE SOUZA-SANTOS (E.R.), "Brasil Foods: A fusão entre Perdigão e Sadia", *Economia e Technologia*, vol.17, April/June 2009, p.170 (the authors' translation). For more details on the specific market shares of bothe companies, see: CADE's decision, *Merger Filing no. 08012.005523/2009-18* (13/07/2011), para.17 (Reporting Commissioner: Ruiz).

8 See: CADE's decision, *Merger Filing no. 08012.005523/2009-18* (13/07/2011), para. 2 (Reporting Commissioner: Ruiz).

9 *Ibid.*, paras. 34-38.

10 *Ibid.*, paras. 6-7.

11 See for example: CADE's decision, *Merger Filing no. 08012.005523/2009-18* (13/07/2011), para. 92 (Reporting Commissioner: Ruiz).

See also: ROWLEY (J.), SAMADI (F.), "CADE Clears Brasil Foods With Conditions", *Global Competition Review*, 14th July 2011.

12 CADE's decision, *Merger Filing no. 08012.005523/2009-18* (13/07/2011), para 87 (Reporting Commissioner: Ruiz).

13 *Ibid.*, para. 89.

years. In addition, *Brasil Foods* was unauthorized to buy assets from this sector for the next 5 years. This measure forced an organic growth, at the same time that it enabled an easier expansion of other competitors. This whole process is that of a market (re)formation and creation in the quest of new players or in the non-isolation of existing ones, like *JBS* and *Marfrig*; CADE sows all the ingredients enabling competitors to share the market. The productive capacity lost by the merging companies is, under this logic, the available production space of a potential competitor.

When a merger does not lead to the above-mentioned market barriers – normally when there are other strong competitors in the market or when the profit margin is relatively small – CADE approves the operations. This was the case in the *JBS* case or in the *Marfrig Alimentos* case, both related to the same meat industry. Recently, CADE approved a merger between *JBS* and *Bertin* and this new merger was considered as potential strong competitor to face *Brasil Foods* – although the first merger concerned primarily cow meat, while the main problem in the latter concerned industrialized pork and poultry meat markets. By enforcing the competition law, CADE also follows the law's spirit of healthy competition by drawing a line of coherence in its decisions pertaining to the same sector. By limiting the productive capacity of *Brasil Foods*, CADE did not want the food sector's production level to be reduced but, rather, it expected the production level to be maintained or further fostered not by one but by the intervention of several players.

Sometimes, and still acting in its preventive role, CADE follows the new merger's activities by enforcing a Performance Agreement signed with the company. It is a means to remain informed of the company's future activities as far as the competition environment is concerned. By this means, the merged company produces timely and regular reports to the Competition Authority to confirm its good faith in its respect of the competition spirit. CADE's monitoring of a cleared merger therefore continues *a posteriori*: the control obeys to a long term and not to a punctual, volatile logic.

### *2.2 The a posteriori Monitoring: CADE Follows Cleared Mergers in the Food Production Industry by Enforcing Performance Agreements.*

The aim of a performance agreement is to maintain the level of competition which existed in a given industry before the acceptance of a merger. It is signed by CADE and the involved companies who have the obligation to implement the performances imposed by the Competition Authority as a modality of the merger. In the *JBS* case, the Performance Agreement required the company to notify CADE on every future lease or acquisition of meat packing companies, even if the production units were inactive. This is supposed to be done over a period of 30 months. The reporting commissioner in this case asserted that "the measure is adequate to ensure that the activities related to *JBS* meatpacking industry are properly monitored by CADE". By this means, the Brazilian Competition Authority wants to control the ins and outs of all potential future anticompetitive actions or behaviour of an approved merger. Many of the conditions imposed to clear a merger cannot be executed in a short time period and the Performance Agreement is a convenient technique enabling the monitoring of the prescribed measures – over the longer run.

In the *Brasil Foods* case, the Performance Agreement imposed that divestments should be addressed to companies that bring evidence of its financial health in all of its future transactions; it also has to prove its administrative capacity to manage the business; it has to guarantee the employment level of the production units disposed of during a period of six months; the merging companies cannot not buy back the sold production units before a period of ten years; they cannot sell their products, whether to wholesalers or to retailers, on the basis of an exclusivity agreement, even *de facto*, and they cannot negotiate any sales condition whereby their products would benefit from preferential advertising or merchandising. The fair competition spirit was here again duly respected as part of the divestment was

bought by a competitor, *Marfrig*. The latter bought, for instance, 8 distribution centers, 10 production plants, 4 slaughterhouses, 12 farms, 2 hatcheries and more than 10 brands from *Brasil Foods*.

Normally, the violation of the Performance Agreement – like the violation of any contract – engages the companies' responsibility, making them liable to a fine. The repressive technique is the last recourse; the educative and preventive paths are preferred. CADE is fully aware that close collaboration with the companies of this strategic and sensitive industry is a more pragmatic means to foster competitive behavior.

The same preventive logic and techniques are adopted to monitor competition at the middle of the food chain, in the food industry distribution sector.

## 3. CADE's enforcement actions in the Food Industry Distribution Sector.

The enforcement measures in the food industry distribution sector are also undertaken through the merger review system (A) and they are further maintained by CADE by the imposition of performance agreements to merging companies whose operations can be detrimental to the competition spirit (B).

### *3.1 CADE enforcement actions through Strict Merger Reviews.*

The food industry distribution sector in Brazil is dominated by a constellation of major players, amongst which the *Pão de Açúcar* Group and the *Carrefour* Group. In a recent survey undertaken by the *Brazilian Association of Supermarkets* (ABRAS) these two groups are considered as - respectively - the first and second owners of the distribution channels in Brazil.[14] This survey covered the year 2012 and the scenario was the same ten years earlier if we refer to a study undertaken by ABRAS in 2004.[15] For a comparative illustration, in 2012, the *Pão de Açúcar* Group owned 1,882 channels all over Brazil whilst *Villarreal Supermercados*, ranked 20th in the ABRAS survey, owned only 12 channels.

[14] This study is available at: http://www.abrasnet.com.br/clipping.php?area=20&clipping=35061

[15] This study is referred to in: GOLDBERG (D.), *Poder de compra e política antitruste*, São Paulo, Editora Singular, 2006, pp.210-2011.

| RANKING 2013 | RANKING **2012** | COMPANY | 2012 GROSS ANNUAL REVENUE (BRL) | NUMBER OF STORES |
|---|---|---|---|---|
| 1 | 1 | GRUPO PÃO DE AÇÚCAR | 57.233.633.201 | 1.882 |
| 2 | 2 | CARREFOUR | 31.474.808.100 | ND |
| 3 | 3 | WALMART BRASIL | 25.932.914.725 | 547 |
| 4 | 4 | CENCOSUD BRASIL | 9.718.136.572 | 205 |
| 5 | 5 | ZAFFARI E BOURBON | 3.305.000.000 | 30 |
| THE BIGGEST FIVE MAIN GROUPS' TOTAL | | | **127.664.492.598** | **2.664** |
| 6 | 7 | SUPER MUFFATO | 2.770.132.015 | 37 |
| 7 | 9 | CONDOR SUPER CENTER LTDA | 2.626.577.519 | 35 |
| 8 | 11 | SUPERMERCADOS BH | 2.357.464.000 | 117 |
| 9 | 12 | SONDA SUPERMERCADOS | 2.301.795.053 | 32 |
| 10 | 8 | ANGELONI | 2.207.757.985 | 26 |
| THE BIGGEST TEN MAIN GROUPS' TOTAL | | | **139.928.219.170** | **2.911** |
| 11 | 10 | EPA/MART PLUS/VIA BRASIL | 2.129.885.693 | 91 |
| 12 | 13 | SUPERM COMPER | 2.070.598.000 | 48 |
| 13 | 15 | Y. YAMADA | 1.775.875.657 | 36 |
| 14 | 14 | COOP | 1.765.243.560 | 28 |
| 15 | 17 | SUPERMERCADOS SAVEGNAGO | 1.579.991.987 | 34 |
| 16 | 16 | LIDER | 1.545.805.886 | 15 |
| 17 | 18 | CARVALHO SUPERMERCADO | 1.322.613.383 | 51 |
| 18 | 20 | SUPER NOSSO / APOIO MINEIRO | 1.288.752.690 | 23 |
| 19 | 19 | ZONA SUL | 1.171.735.302 | 34 |
| 20 | 23 | VILLARREAL SUPERMERCADOS | 1.093.687.618 | 12 |
| THE BIGGEST TWENTY MAIN GROUPS' TOTAL | | | 155.672.408.946 | 3.283 |

*Ranking of the distributors in the food industry in Brazil.* Source: ABRAS[16]

The table shows that of the top twenty players, the first three hold together 74% of the total annual gross revenue. With this market concentration, the risk of anticompetitive actions or behaviour is very tenuous. The food industry distribution sector in Brazil is characterised by regional and international influences: many distribution channels are formed on regional and local levels, but at the same time, they experience international influences.[17] Being a huge country, the economy has to work under a decentralisation logic whereby the regional and municipal levels are as important as the national one; being in a highly industrialisation process, Brazil obviously attracts foreign investors in this specific sector. The presence of the *WalMart* Group or of the French controlled *Carrefour* on the Brazilian territory is here a good example. Similarly, the French controlled *Casino* recently took over the *Companhia Brasileira de Distribuição*, trading name of *Pão de Açucar* Group. The merger was here unconditionally cleared by CADE which considered that the operation could neither be characterised a horizontal merger nor as a vertical one considering that *Casino* did not hold any shares in a Brazilian company operating in the same market as the Brazilian Group.[18] In addition, during these last years, the Brazilian Group *Bompreço Supermercados do Nordeste* purchased five supermarkets of the *Carrefour* Group. This operation was cleared by CADE with only one condition. CADE ordered *Bompreço* to sell one of its two supermarkets in the city of Petrolina: one was originally under the control of Carrefour and the other belonged to the *Bompreço* Group. With the merger, this implied that both supermarkets operating in the same city would

16 See: http://www.abrasnet.com.br/clipping.php?area=20&clipping=35061.

17 CADE's decision, *Merger Filing nos. 08012.004857/2009-18 and 08012.010473/2009-34* (17/04/2013), Reporting Commissioner: Verissimo, para.50.

18 CADE's decision, *Merger Filing no. 08012.005586/2012-13* (04/07/2012), para.13

be owned by the same Group. To maintain competitive conditions, one of the supermarkets was sold to a competitor.[19]

The distribution channels have been expanding in Brazil since 2004 with the general increase in the Brazilian's purchasing power related to an increase in income and a fall in the level of unemployment.[20] To benefit from this favourable conjuncture and also from better economies of scale, some of these distributors sometimes decide to work hand-in-hand. In this context, the *Pão de Açúcar* Group recently declared a merger between one of its units, *Ponto Frio*, and one eponymic channel of the *Casas Bahia* Group, incorporated as *Casas Bahia*. The new merger created the largest retail company in Brazil, called *Via Varejo*. The latter operates on both physical and electronic markets. The two Groups have a strong influence and an acquired market both at the national and at the local levels and the merger was considered as critical from a competitive perspective. Indeed, there are normally in such cases structural factors which can act as important barriers to entry for potential competitors.[21] Due to its size, capital, portfolio and goodwill, *Via Varejo* has a considerable purchasing power and therefore a solid bargaining power: it can negotiate advantageous prices to consequently offer its products at a price which could easily oust other distributors from the market. The company is also credit worthy and can obtain unique financial advantages: this can again have determining effects on the final prices. Moreover, it has comparatively sufficient means to invest cannily in advertising campaigns to valorise the visibility of its channels and products. It is important to note that main concerns were related to specific geographic relevant markets, such as small cities, since competition was intense in wider metropolitan areas.

This holistic configuration is always duly taken into account by the Brazilian Competition Authority before clearing a merger in general and in this industry in particular. The techniques used in this case are very close to those referred to in the food production competition issues. CADE examines, in this case, the various channels of the new merger throughout the Brazilian territory. It then analyses the market share of these distribution channels. A threshold is then set: if the market share exceeds 60%, the market domination is considered as anticompetitive and to be deconcentrated. The method used for such purposes is that of divestment. The newly merged company has to reduce its distributive capacity and divest its activities in localised areas in order to make room for competitive space for other distributors. This logic of downsizing was therefore applied in the *Via Varejo* case as the holding's market share exceeded 60% in various municipalities. The merger was successful due to the efficient cooperation of the *Pão de Açúcar* and the *Casas Bahias* Groups. They accepted the divestment order and were eager to follow CADE's decision. The latter provided for the adoption of a Performance Agreement in order to better implement the divestment. The agreement has the same function as the aforementioned one: it is a means for CADE to embark on persuasive preventive and educative policies which it does by continuing an *a posteriori* monitoring of a cleared merger.

### *3.2 CADE's a posterior monitoring of cleared mergers in the Food Industry Distribution Sector.*

CADE acts as a permanent watch-dog over cleared mergers in the food industry distribution sector. For this purpose, the Authority makes sure that the Performance Agreement signed with a newly merged company is duly respected. In the *Via Varejo* case, CADE noted that the company detained a very high level of market shares in 117 municipalities. Accordingly, the Performance Agreement provided that such market shares should be reduced for the merger to be a competitive one. As a result, *Via Varejo* agreed to sell 74 distribution spots in 54 municipalities: 25 in the State of São Paulo, 15 in the State of Rio de

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19 CADE decision, *Merger Filing no. 08012003972/2001-18* (12/12/2007).

20 CADE's decision, *Merger Filing nos. 08012.004857/2009-18 and 08012.010473/2009-34* (17/04/2013), Reporting Commissioner: Verissimo, para.51.

21 *Ibid.*, para.134.

Janeiro, 6 in Minas Gerais, 5 in the Federal District, 1 in the State of Goiás, 1 in Espírito Santo and finally 1 in Mato Grosso. The Reporting Commissioner in this case noted that "[t]*here is a high probability that those firms will exercise their market power in those municipalities that demands the imposition of structural measures to ensure competition*"[22].

It is interesting to note that CADE's task is in this ambit is facilitated by the keen participation and comprehension of the concerned parties – which somehow corroborates the Authority's efficiency in its educative method. Beyond the mere contentious aspects of CADE's work, it can be noted that the techniques of cooperation with the different players are also very productive to enhance the competition spirit. In this sense, these techniques – the divestment process, the capacity reduction measures and their follow-up through Performance Agreements – are those which CADE has, for the time being, applied with expected results for a healthy competitive environment. These techniques and their efficiency have no doubt created a useful precedent.

[22] CADE's decision, Merger Filing no. 08012.004857/2009-18 (17/04/2013).

# BULGARIA

In recent years relations between suppliers and retailers are becoming more and more an issue and subject of research and analysis across the European Union. For this reason, the European institutions and national authorities are looking for ways to solve the different problems arising incl. these which are related to the competition on the food markets. This note will address the issues of the relations between suppliers and retailers in the background of the economic changes in the food chain in Bulgaria over the last years and will present some of the important decisions by the Commission on Protection of Competition (CPC) related to this matter.

## 1. Background

Retailers are the last link in the food supply chain and the developments that occur at this level have a direct effect on the consumer interests in terms of price, product variety and quality of goods. In the last decades the retail market underwent significant changes in its structure terms. There has been a process of consolidation - from a highly fragmented sector consisting of several independent shops, to new formats of grocery stores and a more rapid entry of new large retail chains that attract the majority of users. As a result the major retail chains have increased their market shares, which shifted the proportion of the positions of suppliers and retailers in favour of the latter. The growing importance of the food chains as an instrument for accessing the end users allows big supermarkets to impose favourable pricing and conditions on their suppliers.

## 2. Commodity and retail prices

Meanwhile, the sharp increase in commodity prices in the second half of 2007 and later in 2011 quickly transferred and reflected on the prices of the final food products in Bulgaria. At the same time, the opposite scenario did not establish an equivalent reliance. It was therefore evident that, according to different price reviews, competition in the food supply chain did not function efficiently.

One of the most obvious examples was the sharp decrease in the price of raw milk in the second half of 2009. This change in the price did not, however, reflect on the prices on the following levels of the food supply chain and most of all not on the prices of the final milk products which remained unchanged from their level in 2007-2008. This situation raises serious concerns about the sharing of the capital gain throughout the chain between producers, dairy companies, dairy industry and retailers. It was evident that the dairy companies which use the raw milk to process it to the end product "swallow" the big part of the capital gain. Consumers are unable to benefit from low prices and this hampers the development of demand for dairy products, which leads to the weakening and delayed recovery of the milk sector. A similar tendency can be found in most sectors of the food chain industry.

## 3. Price Monitoring

The monitoring and the supply of relevant information to the competent authorities in regards to the current price changes of basic food products in Bulgaria is done by the Commodity Exchanges and Wholesale Markets State Commission (CEWMSC). The Commission is a state executive body to the Council of Ministers for regulation and control of the establishment and activity of the commodity exchanges, commodity wholesale markets and producers markets. For the purpose of monitoring

CEWMSC has developed an information system for the daily collection of relevant information on trade on commodity wholesale markets, producer markets and commodity exchanges in the country. The information is then analysed by the staff of CEWMSC and published.

## 4. Recent Developments in the Food Chain Industry

The most significant development in the food industry of Bulgaria over the last two decades is the transition from a centrally planned system to a market-competitive agri-food sector. Many international companies have established branches in the country and today the largest companies in the Bulgarian food industry have foreign capital. Usually they are market leaders in their sectors. Sole exceptions are the meat sector and the one for fruits and vegetables, where even the biggest producers are Bulgarian companies.

With the Act of accession of Bulgaria to the EU on January 1, 2007, production and marketing of foods are conducted with new economic, institutional and market conditions that create opportunities and constraints. Investments made by enterprises restructuring contributed to meeting the European standards, but increased costs have reduced their price advantages. On the other hand, the firms' ability to use investment subsidies from European funds for modernization, promote quality improvement of products, efficiency and competitiveness of production. However, the responsible state authorities have not proven to be efficient enough in creating the conditions for maximum absorption of EU funds.

## 5. Modern Trade

The food supply chain has changed significantly due to economic, social and demographic reasons. As a result of increased concentration and vertical integration across the EU, structural changes occurred in the supply chain of food and other products in Bulgaria, the result of which is the development of the "modern trade"-model with an increased entering of new retail chains at the expense of traditional trade by small shops and mini markets. The trends in the retail market point towards the steady growth of such chains and the reducing of the total amount of retailers in the long run.

The model of "modern trade" is a result of changes in the needs of final consumer, their quality and food safety requirements, as well as major requirements of service. A distinctive feature of these formats is the size of the commercial areas and the rich assortment at affordable prices. Retail chains operate through national coverage or within a certain geographical region in the form of hypermarkets, supermarkets, "Cash and Carry", with mostly a self-service area of over 100-300 square meters with more than 3-4 cash-desks, offering a wide range of several thousands to several tens of thousands of items, mostly for basic shopping - monthly, weekly or 2-3 times per week.

In general, the distinction between the different types of shopping facilities allows for them to be divided into two main groups: "modern trade"-shops which include supermarkets, hypermarkets and the so-called "discounters", on one hand, and "traditional marketing", on the other, which include neighbourhood stores and specialized stores. The similarity between all of them is that they all sell to the end consumers, while the difference is in the volume of supply, determined by the different amount of working capital for buying this kind of products.

Another important trend for the food market in Bulgaria is the entry of the so-called "discounters", characterized by lower prices (compared to those in traditional retail stores) and their own "private labels" – goods that are sold only within their own outlets, making them main competitors to their own suppliers. Economies are achieved through a limited number of employees, limited advertising costs, maintenance of equipment, cost optimization of logistics and distribution.

Despite the increasing number of shops of the big retail chains, there are still a big number of independent shops on the market of food products, which have a small commercial area and are suited to

meet the demands of the daily shopping for the households. Despite the strong market position of the retailers from the "modern trade" sector, the majority of sales are still carried out through "traditional" trade.

The concentration in the food retail market can be described as rather low in comparison with other European countries. There are more than ten big retail chains in Bulgaria. Only few of them are owned by Bulgarian investors, and the rest are branches of some of the largest retail companies in the European market and changes in the food chain industry are mostly connected to their entry into the Bulgarian market. With regard to the concentration on the regional level the common practice is the presence of one single chain, while in the large cities several different chains are present.

## 6. Competition Concerns in the Food Chain

In recent years, especially after the world commodity price spikes in 2007, the EU institutions and the national competition authorities of the EU Member States took action in relation to identified problems in the competition such as determining the conditions of delivery between major distributors, which have buyer power (hypermarkets and supermarkets) and food producers. In particular, the authorities found the presence of numerous vertical restraints imposed by the buyers on their suppliers, which lead to several negative consequences for upstream competition in the food supply (between distributers) and the downstream competition (between commercial chains). These problems ultimately affect the consumers, including their ability to freely choose goods and services, as well as the end price that they pay.

### *6.1 Buyer power*

Dominance has been defined under EU law and CPC practice as a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers. The notion of independence is related to the degree of competitive constraint exerted on the undertaking in question. Dominant market position entails that these competitive constraints are not sufficiently effective and hence that the undertaking in question enjoys substantial market power over a period of time.

Both vendors and buyers can have market power. In cases when the buyer is the one with market power, CPC uses the term “buyer power”. According to relevant CPC’s practice, buyer power occurs primarily in the individual relationship between the buyer and his suppliers, in cases when the buyer is economically independent from his suppliers. However, according to CPC, the establishment of substantial market power on the market of delivery cannot be determined only by the presence of imbalance and dependence in the bilateral relations between the suppliers and retailers. It also implies the establishment of such a market position on the whole market of delivery.

Factors determining the buyer power of retail chains on the market of supply are generally the size of turnover, the total commercial area, the number and spatial distribution of outlets, the market position of the other participants in the markets for the supply and distribution of certain staple foods.

As an example, CPC concluded in Decision No. 121/2011 that some retail chains possess market power (buyer power) on the market for the supply of staple foods, which is particularly manifested in their individual relationships with the suppliers. However, the degree of market power was not sufficient to ensure the independence of the retail chains compared to other competitors in the market and therefore no dominant position was established.

### *6.2 Exemptions in the food supply sector*

Bulgarian legislation does not provide for exemptions from the application of the national competition rules (LCP) in regards of agreements between farmers and therefore forms of cooperation between farmers, through agreements, decisions and concerted practices; insofar as they do not affect trade between Member States, obey the general competition rules that apply to all other sectors of the economy.

In view of the direct applicability of EU law in the field of competition and in the field of the common agricultural policy, the relevant exemptions from the competition rules should be derived from EU law, which contains some specific provisions on cooperation between farmers and allows for exemptions in the application of competition rules in respect of certain agreements and decisions of producers of agricultural products and their associations.

### *6.3 Sector analyses in the food supply chain*

The Bulgarian CPC has conducted three sector inquires in the food supply markets in the last years:

#### *6.3.1 Dairy products market (CPC Decision № 1641/2010)*

This sector analysis was conducted in the background of the fluctuations over the past few years that the dairy market has undergone, both globally and at European level. Food prices, in particular milk and milk products, rose significantly 2007-2008, but in 2009 the trend went backwards and the price of raw milk fell rapidly. The sharp drop in prices led to an unprecedented crisis of the income of the milk producers.

The purpose of the sector review was to analyse the specific competition problems in the Bulgarian dairy sector, which by the time was in a process of restructuring and consolidation and was characterized by a fragmented structure of dairy cooperatives and dairy companies, which leads to a dependence of the milk producers from the purchasers and dairy processors.

CPC established that there was a significant imbalance between the concentration of participants on the market for the production of raw milk and the concentration of participants on the market for milk processing. At the same time the increase in the price of raw milk transferred fast as a trend on the prices of milk products. When the prices of raw milk fell, it did not bring any significant change in the price of the final dairy products.

In view of this, the CPC found that the market of raw milk in Bulgaria consisted of the same asymmetry found by the European Commission for a number of other Member States between the market position of the different market players in the production chain - processing of raw milk, wholesale and retail of heat-treated milk and milk products. This asymmetry was likely to lead to an unjust allocation of the capital gain throughout the whole chain from the milk producer to the end consumer, in which a large part of the income generated is focused at the level of processing of the raw milk.

#### *6.3.2 Sunflower seed and sunflower oil markets (CPC Decision № 686/2012)*

The reason for conducting the sector analysis was the sharp increase in prices of oilseed sunflower and sunflower oil in the period August - October 2010. The purpose of the analysis was to determine the structure of the market, the market conditions for the production and trade of oil-yielding sunflower seed and sunflower oil and to trace whether price trends are influenced by objective economic factors or are a consequence of a distortion of the competitive environment through the implementation of any restrictive practices.

When analysing the price data of the oil-yielding sunflower seed in the entire chain (production, processing wholesale), it was observed that discrepancies exist between price changes at the level of agricultural production of sunflower seed, on one hand, and sunflower seed processing to the final product, on the other. There is an asymmetry in the fluctuations of the prices of sunflower seed and the wholesale price of sunflower oil and hence of its retail price.

These discrepancies in price fluctuations may be partly explained by the structural weaknesses at different levels of the chain – production, processing and trade. When analysing the market for the production it has been established that it is highly fragmented and consists of a large number of participants (farmers) - manufacturers of agricultural raw materials. The number of participants is reduced on the next level of the chain – the one dealing with the storing of sunflower seeds. A part of the raw material is purchased directly from the processing companies which are much fewer and have more opportunities to impose favourable conditions when negotiating the price of the war material. This unequal bargaining power affects the dynamics of the price changes along the chain and provides with an explanation for its asymmetry. In addition, CPC initiated subsequent proceedings on its own initiative for vertical agreements imposing directly or indirectly sale prices (discussed below).

#### *6.3.3 Wheat and flour markets (CPC Decision № 1125/2012)*

In terms of market production and marketing of wheat in Bulgaria, it has been found that the market is highly fragmented, with a high number of producers with different legal status. The milling companies are able to negotiate their supply of raw material with a large number of potential suppliers, which in turn provides them with the advantage to negotiate favourable conditions for the purchase prices of wheat.

Discrepancies in the price fluctuations were observed in the course of the study. It can be assumed that the value of wholesale flour is not formed only as a result of the increase in the price of the main raw material, which is deemed to be an objective factor. Based on this sector analysis the CPC considered it likely that the high index of the price increase of flour compared to the index of the wheat is a consequence of an agreement for coordination of prices on the market for wholesale flour. Follow-up antitrust proceedings were initiated by the CPC, which however found no breach of competition rules had been committed.

### *6.4 Antitrust cases in the food supply sector*

In addition, there has been an increase in the Bulgarian competition authority enforcement activity in the food sector during the recent years:

#### *6.4.1 Price-fixing cartel in the sunflower oil market (CPC Decision No. 1150/2007)*

The legal proceedings before the Commission for Protection of Competition (CPC) for establishing an alleged infringement of Article 9 of the Law on Protection of Competition (LPC) (repealed) by Oilseed Oil Producers Association in Sofia, Bulgaria (the Association) and 13 undertakings producing vegetable oil in Bulgaria were instituted on CPC's own initiative in December 2007.

The legal proceedings were initiated further to a series of publications in the press and announcements in the mass media related to the increase in the price of vegetable oil on the territory of the whole country in 2007.

The subject of the legal proceedings is an alleged prohibited agreement between undertakings and/or decision by association of undertakings in relation to their activities on purchasing oil-yielding sunflower seed and fixing sunflower oil prices. All defendant undertakings are members of the Association and active participants in the market of oils and oil products.

The relevant product market has been defined by the CPC as the market of sunflower oil production and marketing.

As a result of the investigation conducted under the case, the CPC has reached the conclusion that the defendant undertakings producing vegetable oil have been involved in collusion and committed an infringement of Article 9 (1) LPC in the form of an agreement between undertakings for direct fixing of the purchase price of oil-yielding sunflower seed and indirect fixing of the purchase price of sunflower oil as well as for taking measures for concerting and coordinating the market conduct of the undertakings when implementing their activities on the relevant market and the market related to it, that are aimed at preventing, restricting, or damaging competition.

The defendant Association of undertakings has committed an infringement under Article 9 (1) LPC (repealed) in the form of a decision by association of undertakings for direct fixing of the purchase price of oil-yielding sunflower seed and indirect fixing of the purchase price of sunflower oil as well as for facilitating and administrating the coordinated and concerted conduct of its members. The Association has created favourable environment for organising meetings between independent competitors at which issues related to undertakings' specific commercial and pricing conduct on the relevant market were discussed, measures for coordinated market reactions among many of the participants in the relevant market were undertaken, and sensitive commercial information on the activities of the members of the Association was exchanged, with the aim of preventing, restricting, or distorting competition.

The CPC decision was appealed before the Supreme Administrative Court (SAC) and was ultimately upheld in full.

*6.4.2 Cartel in the poultry products market (CPC Decision No. 601/2008)*

The procedure with CPC is initiated based on own initiative (ex officio) of the Commission in September 2007 for establishing potential infringement of Article 9 LPC (repealed), namely decision of association of undertaking "Bulgarian Poultry Union", Sofia. Additionally in the course of the procedure 36 Bulgarian undertakings, producing eggs and poultry meat have been constituted as defendants and the subject of the procedure has been supplemented by an investigation on ascertainment of potentially committed infringement under Article 9 LPC (repealed), covering prohibited agreement and/or concerted practice between undertakings.

The grounds for initiating the procedure are series of publications in the newspapers and other mass media on the abrupt increase of the poultry meat price in July-August of 2007, which reveals the active involvement of the Bulgarian Poultry Union (BPU), represented by its Chairman and by a member of the Managing Board of BPU, owner of one of the largest producers of poultry products in the country.

The subject of the procedure is the presence of potential prohibited agreement and/or concerted practice between undertakings and/or decision of association of undertakings related to the activity, conducted by the defendant undertakings, comprising production and sale of poultry meat and eggs.

The Commission defined two affected product markets: the poultry meat market and the eggs market.

On the basis of the facts and analysis of the case, CPC assumes as established that the defendants have committed infringement under Article 9 (1) LPC, expressed in prohibited agreement and/or concerted practice at the market of eggs on the territory of the Republic of Bulgaria within the period 2002–September, 2007.

The CPC decision was upheld in substance by the review court.

*6.4.3 Restrictive practices of Bakers' associations (CPC Decision No. 622/2008)*

The legal proceedings before the CPC for establishing an alleged infringement of Article 9 LPC (repealed) by "Federation of Bakers and Confectioners in Bulgaria" (FBCB), "Regional Union of Bakers and Confectioners" (RUBC) and Association of Bakers and Confectioners "Bread for Bulgaria" (ABCBB) were instituted on CPC's own initiative. The legal proceedings were initiated further to a series of publications in the press and announcements in the mass media related to the increase in the price of bread on the territory of the country.

CPC established that in the period October, 2002-July, 2007 on meetings held by FBCB some of the main topics discussed were matters related to pricing issues in the industry, the low prices of bread, and prepositions and opinions vis-a-vis the setting of minimum price of bread etc. CPC found that these discussions facilitated a mechanism of jointly setting prices of bread which is prohibited by law and accepted as established that there has been a direct or indirect fixing of prices, which aims at preventing, restricting or distorting the competition on the relevant market.

Although the first judicial instance repealed the CPC decision, the cassation chamber of the Supreme administrative court finally confirmed it in full.

*6.4.4 Restrictive practices of Dairy processors' associations (CPC Decision No. 345/2008)*

The legal proceedings before the CPC for establishing an alleged infringement of Article 9 LPC (repealed) by "Bulgarian Association of Dairy Processors in Bulgaria" (BADPB) and by "National Association of Dairy Processors" (NADP) were instituted on CPC's own initiative. The legal proceedings were initiated further to a series of publications in the press and announcements in the mass media related to the increase in the price of the yellow and Bulgarian white cheese on the territory of the country in July and August 2007.

CPC established that that the decisions taken at the meetings at the associations run against the prohibition of Article 9 (1) LPC (repealed) by directly or indirectly fixing the purchase price for raw cow's and sheep's milk and the price for yellow and Bulgarian white cheese produced from cow's milk, which aims to prevent, restrict or distort competition in the relevant market.

The CPC decision was upheld in substance by the review court.

*6.4.5 Competition concerns as to the retail chains (CPC Decision No. 121/2011 and CPC Decision No. 833/2012)*

The legal proceedings before the CPC were for establishing an infringement of Article 15 (1) and 21 (1) LPC by some of the biggest retail chains in Bulgaria.

CPC concluded that some retail chains possess market power (buyer power) on the market for the supply of staple foods, which is manifested in their individual relationships with the suppliers. However, the degree of market power is not sufficient to ensure the independence of the retail chains compared to other competitors in the market and no conclusion about the existence of a dominant position of any of these retail chains can be made. Moreover, there are three chains with buyer power which in itself excludes the presence of one single chain with single dominant position on the market of supply.

In its parallel case CPC found that some of the major retail chains were implementing common mechanisms for the coordination of trade policy on the market for the supply of goods and of their marketing policy in terms of promotions in breach of Article 15 (1) LPC. After addressing its Statement of objections to the defending companies, they made proposals to correct their market behaviour by taking

commitments which, at discretion of the CPC, were sufficient to restore the effective competition. Therefore, the CPC adopted a commitment decision obliging them to remove some of the clauses in the contracts with their suppliers in order to eliminate the existing competition concerns.

*6.4.6 Anticompetitive coordination within Millers' association (CPC Decision 1118/2013)*

The CPC initiated on its own initiative proceedings against "Union of Bulgarian Miller" (UBM) for a possible violation of Article 15 LCP, consisting in a decision by an association of undertakings having as their object or effect the prevention, restriction or distortion of competition. The proceedings were a follow-up to the findings in sector analysis № 1125/2012.

The analysis of the overall behavior of UBM in the observed period established that the association did not impose on its members to follow certain coordinated actions for fixing prices and setting quotas on the wholesale market of wheat. As a result, CPC found that there was no breach of competition rules.

*6.4.7 Vertical restraints in the sunflower oil market (CPC Decision 844/2013, CPC Decision 898/2013 and CPC Decision 1261/2013)*

CPC initiated on its own initiative proceedings against three oil producers for a possible violation of Article 15 LCP as a follow-up to the findings in sector analysis № 686/2012.

The undertakings concerned concluded agreements with their distributors for fixing retail prices and therefore, according to CPC, violated Article 15 LPC by conducting a vertical agreement which prevents, restricts or distorts competition in the market for the production and trade of oil-yielding sunflower seed and sunflower oil.

## 7. Final Remarks

In order to determine whether an undertaking has a dominant position it needs to be established that the undertaking in question enjoys substantial market power over a period of time.

In recent years it has been evident that with the entry of big retail chains on the market, the balance towards small suppliers, usually small and medium undertakings, has been distorted. Thanks to their stronger market positions retail chains are able to impose lower prices to suppliers or other unfavourable conditions for the products they buy from them. This asymmetry is provided by the so-called "bargaining power" of retail chains. Bargaining power occurs when one party, no matter whether seller or buyer, has stronger power to negotiate (bargain) and therefore may impose prices or terms of the contract that the other party considers unfavourable or unfair.

It should be noted that the described features of the unequal bargaining position of one of the parties does not lead to the establishment of a dominant market position within the meaning of competition rules.

Buyer power, on the other hand, may have a twofold effect on consumers, both a positive and negative one. Buyer power occurs in cases, when the buyer has a stronger position on the market and aims to negotiate more favourable contract terms from his supplier. The application of the buyer power may lead to anticompetitive practices on the market and infringement of competition rules, if it has a proven harmful effect on the functioning of the market competition. If the buyer enjoys the position of a monopsony, i.e. he is the only buyer on the market, or, if he enjoys significant market power on an upper level of the chain within the market of buying products, combined with significant market power on a lower level of the chain on the retail market, problems for competition may arise in cases when the undertaking concerned has not transferred to the final customers a significant part of the benefits obtained due to the lower prices negotiated with the supplier.

In this sense, it is necessary to clearly distinguish between the two types of market behaviour: in the first case there is an imbalance between the position of the counterparties to the chain in the negotiation process, which could potentially lead to the usage of unfair trading practices by the stronger partner against its weaker counterpart; in the latter case the existence of "buyer power" can lead to the application of anti-competitive practices that distort competition in the market and should therefore be addressed by the relevant competition rules. In this line of thinking there is no equality between the “bargaining power” and “buyer power”.

Moreover, distinction must be outlined between the objectives of the competition law and the laws on unfair trading practices. Unfair trading practices are practices that clearly deviate from good commercial behaviour and are contrary to good faith commercial practices. The main objectives of the rules concerning unfair trading practices differ from competition law, since they regulate contractual relations between businesses by setting conditions that suppliers have to offer distributors, regardless of the actual or presumed effects on competition on the market.

Competition law may cover some unfair trading practices in the relations in food supply chain between businesses. It does not, however, cover all such practices, as it is aimed at protecting competition on the market and usually addresses situations of influence in regards of the market and not in regards of the counterparty.

The solution to the problem of unfair trading practices cannot be done by the rules of competition (antitrust), but through separate legislation that covers all forms of unfair trading practices.

Nevertheless, in Bulgaria in the last years there have been attempts to find a solution to the problems between suppliers and buyers by putting forward an amendment to the Law on Protection of Competition and adding the term “substantial market power” and prohibiting the abuse by an undertaking of such “substantial market power”. According to the amendment, an undertaking enjoys substantial market power, which has no dominant position, but in view of its market share, financial resources, possibilities for market access, level of technology and economic relations with other undertakings may hinder competition on the relevant market, because *its suppliers or buyers are dependent on it*. This amendment has been brought already several times before the National Assembly, but has not yet been adopted by it.

# CZECH REPUBLIC

## 1. Recent trends in food retail sector

The first changes in retail food market may be noticed after the year 1989 when the transformation of centrally planned economy into market economy took place. This economic reform enabled the entry of foreign companies into the Czech market in 1990s.

In 1995, the dynamic development of the chain of supermarkets[1] was initiated. Following the first changes in the format of the retail stores, the sector of discounts began to be established in 1997 followed by the tremendous increase in the number of hypermarkets[2] in 1999 (the number of hypermarkets tripled compared to the year 1998, see Table 1).

In recent years, the hypermarkets suppressed the popularity of supermarkets and became the prevailing form of the stores in large cities. Currently, the Czech Republic has the largest retail space of hypermarkets per capita in Central and Eastern Europe (117 $m^2$ per 1000 inhabitants) and the fourth densest network of hypermarkets in Europe (26 hypermarkets per 1 million inhabitants).

Since the early 1990s, a total number of 15 retail chains entered the retail food market of the Czech Republic (see Table 2). However, the size of the Czech market was not sufficient enough for all market players which resulted in the decision of some of the companies to leave the market after the year 2006 when the competition culminated. Having regarded these circumstances the concentration of the market got increased.

On the one hand the new trend of super- and hypermarkets has brought benefits for consumers, especially extended offer of goods. On the other hand this trend has caused significant changes for suppliers in the form of new practices of foreign retail chains, some of them of the abusive character.

According to several international studies the national food security is at high level in the Czech Republic. The food security is measured by the level of availability, price and quality of food products in the Czech Republic. All these variables are on sufficient level according to recent analysis. Therefore, the Office for the Protection of Competition (hereinafter referred to as “the Office”) presumes that in terms of national food security the food retail chain functions sufficiently.

Monitoring of development of food prices falls within the scope of competence of the Czech Statistical Office for statistical purposes.

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1 Supermarket is defined as a store with the retail space of 400 – 2500 $m^2$.

2 Hypermarket is defined as a store with the retail space larger than 2500 $m^2$.

**Table 1: Number of hypermarkets in the Czech Republic (number of stores)**

| | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Number of hypermarkets** | 2 | 7 | 25 | 51 | 82 | 106 | 127 | 145 | 161 | 192 | 215 | 231 | 246 | 248 | 282 | 300 |

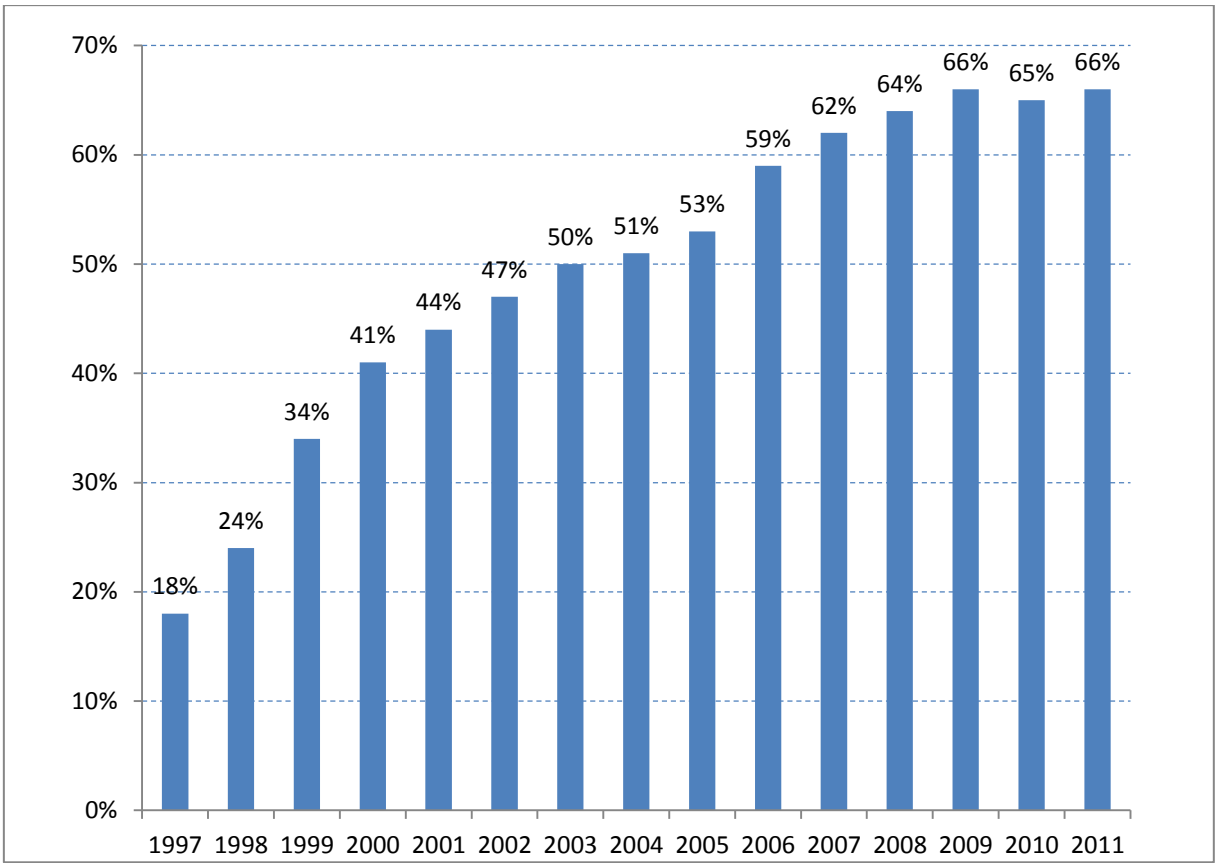
**Table 2: Entry of the international retail chains to the Czech market and their exit**

| | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Ahold (Euronova)** | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ |
| **Billa** | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ |
| **Delvita** | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | | | | |
| **Plus Discount** | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | | |
| **Edeka** | | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | | | | |
| **Norma** | | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ |
| **Julius Meinl** | | | | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | | | | |
| **Tesco** | | | | | | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ |
| **Globus** | | | | | | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ |
| **Interspar** | | | | | | | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ |
| **Penny Market** | | | | | | | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ |
| **Makro** | | | | | | | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ |
| **Kaufland** | | | | | | | | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ |
| **Carrefour** | | | | | | | | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | | | | |
| **Lidl** | | | | | | | | | | | | | ■ | ■ | ■ | ■ | ■ | ■ | ■ |

## 2. Concentration of the Market

Over the past decade the concentration of the food retail market has slightly increased; several retail chains have left the market while others have strengthened their position. Currently there are 8 large food retail chains in the Czech market. In the year 2010 the individual market shares of these chains varied from 3.6 % to 12 % of the food retail sale market indicating low market concentration. Total market shares of these companies represent app. 64 % of the market.

**Graph 1: Total market share of the TOP 10 retail chains**




The retailers at the first three positions in the mentioned market held in total app. 33 %. This market is specific for the existence of a high number of retailers, however, the most of them have the significantly lower total value of sales than every single large retail chain, e.g. the undertaking in the 10th place despite having trade network has the market share app. 0.1 to 0.9 % and the most of the others from total number of undertakings have their market share app. 0.01 to 0.09 % or 0.001 to 0.009 %.

In comparison with the years 2004 – 2008 when the mergers of the retails chains took place annually, the last four years represent the period of stability when only new stores were established.

Currently, large retail chains at the first 8 positions of the food retail market are all subsidiaries of the international firms.

**Table 3: The largest retail chains in the Czech Republic according to revenues**

| Retail chain | Revenue in 2011 (in billions of CZK) |
|---|---|
| Schwarz (Kaufland, Lidl) | 65,5 |
| Rewe (Billa, Penny Market) | 53,6 |
| Tesco Stores | 51,0 |
| Ahold | 44,0 |
| Macro Cash&Carry | 32,5 |
| Globus | 27,0 |
| Spar (Interspar, Spar) | 14,1 |

## 3. Act on Significant Market Power in the Sale of Agriculture and Food Products and Abuse thereof

The rapid development of food retail chains has resulted in practices that may have a negative impact on companies within the supply sector. Since the number of retail chains has increased, a lot of complaints have been submitted by suppliers concerning retailers' unfair behaviour towards them. However, because none of the retail chains held the dominant position as defined by the Act on the Protection of Competition, there were no legal grounds to solve these complaints. In the late 1990s, persisting problems led to the discussion of amending the Act on the Protection of Competition. From 1999 to 2007 there were several legal proposals of amendments to Czech competition law; however, none of them was adopted. Finally in 2009, the new Act No. 395/2009 Coll. on Significant Market Power in the Sale of Agricultural and Food Products and Abuse thereof (hereinafter referred to as "the Act") was approved and came into force in 2010. Enforcement of the new Act fell within the scope of competence of the Office.

Problematic issues occurred immediately arising from the fact that the Act itself had been adopted very swiftly upon a proposal of a group of MEPs. The Office had pointed out that serious concerns may threaten the enforcement of the Act as no formal expert study or impact assessment had been conducted prior to the legislative procedure. Moreover, standard procedure of proposal finalization had been extremely short, due to eminent interest of the government to adopt the law, thus finalization of wording and in particular problematic provisions had not been sufficiently clarified. From the very beginning, the Act had to face challenges which may have been eluded should the legislative procedure have followed standard proceeding.

As soon as the Act entered into force the Office was put into a difficult situation that despite the fact it had no actual means to influence the legislative process it was entrusted with surveillance over the Act on significant market power and subjected to criticism of involved parties. Among many, one of the crucial issues has been the fact that the Act addresses solely the retail chains, leaving the suppliers' side of the chain completely deregulated. Representatives of retail chains have repeatedly pointed out that such practice is discriminatory regarding the fact that the concentration at the suppliers' side is at considerably high level as well, be it at the international (e.g. Coca Cola) or at domestic level (e.g. company Agrofert, one of the largest undertakings in the market of agricultural production). Therefore the position of the Office was difficult, having legal provisions with vague definitions on one hand and discriminatory concerns on the other.

As for the scope of the Act, it addresses only retailers in the market of agricultural and food products having reached particular threshold which was set for the purposes of the application of the Act pursuant to the findings of the sector inquiry conducted before drafting the legal provision. The aim of the low threshold was to ensure that the new Act would be applied on entities holding significant market power

(not the dominant position). There is a rebuttable presumption of significant market power, if the net turnover of the buyer exceeds 5 billion CZK (approx. EUR 200 million) in the last accounting period in the Czech Republic. The definition of the significant market power is based on the economic analysis, i.e. an ability to act independently; hence the provisions of the Act don't refer whether the independence in question is related to all suppliers or merely to some of them. As the Office's practice has proven it is desirable to define the "independence" in relation to all suppliers from the obvious reasons whilst to define a significant market power in relation to single entities is extremely difficult and requires enormous efforts and human resources. From this reason the Offices applies legal presumption that the net turnover above CZK 5 billion is deemed to constitute a market power even though from the economic point of view the concept might be misleading. This concept of the significant market power was confirmed by the second instance decision issued by the Chairman of the Office in the case of Kaufland.

As for the particular abusive practice, there is a demonstrative list of prohibited abusive practices such as application of prohibited payments periods, below cost selling, requests for payments or services without equivalent, listing fees or retroactive rebates. The Office is empowered to impose a fine up to CZK 10 million (approximately EUR 0.4 million) or 10 % of the net turnover achieved by the undertaking in the last accounting period for an abuse of significant market power. The Act should be amended in near future, especially the provisions relating to assessment of the significant market power.

As regards the exemptions applied, in general, de minims rules for anticompetitive agreements are applied pursuant to the Czech competition law. The Act does not contain any exemption; the rules are applied to all relationships in which one of the contractual parties is a buyer with significant market power.

## 4. Assessment of the relations in the market

In February 2010, the Office initiated a sector inquiry in the field of the agricultural and food products to find out how the food chain and retail market were operated and to find out the possible infringements of the new Act. The Office examined mainly the main characteristics of relationships between retailers and their suppliers, contractual terms of supply of goods and provided services, payment conditions, systems of rebates and bonuses, and payments connected with delivery of goods or services provided. Acquired information indicated that there had been a lot of issues raising competition concerns. The principal focus was on vertical issues and the problem of significant market power of food retail chains.

After conducting a sector inquiry the Office concluded that the retail chains abused their significant market power towards their suppliers. Such conduct of the retail chains was proved when negotiating terms and conditions with suppliers. Retail chains were strictly establishing contractual terms and conditions and suppliers did not have any possibility to oppose. Retail chains required non-sense fees for which they provided no advantages and set too long payment periods (60 – 90 days).

Feedback received in the meantime by the Office indicated certain positive impact of the adoption of the Act. However, the application of the new Act has been complicated since its beginning because of several ambiguous terms and definitions that were broadly criticised by law practitioners as well as stakeholders. In 2011, the Government of the Czech Republic decided that the law should be amended and some of its parts transferred to the Act on the Protection of Competition and to the Price Act. The Office has been entrusted with the task to draw an amendment in this respect. However, the discussions about the amendment have continued and the overall concept has not been drafted yet.

## 5. Investigations of the Office for the Protection of Competition related to the new Act

Since the adoption of the Act, the Office has been enforcing the new legal provisions. As a result of the sector inquiry and following investigations mentioned above several proceedings for possible

violations of the Act were initiated. So far the first instance body of the Office issued two decisions which are currently under appeal procedures at the second instance body of the Office, and one final commitment decision. Some proceedings have not been completed yet as all cases require relatively wide-ranging investigations where the gathering of evidence is a complicated process, mainly due to the number of entities from whom the Office must gather and verify information. Every individual case involves hundreds of entities.

In 2011, the Office issued its first decision in which it found an infringement of the Act in the matter of infringement of provisions relating to due dates, discounts and fees for the assignment of receivables to third parties. Kaufland, which was given a fine of CZK 13,628,000 (approximately EUR 545,120) by the Office, appealed this decision. In 2013, the Chairman of the Office upheld the first instance decision and confirmed the attitude of the Office to the significant market power, i.e. the aim of the law is the protection of the weaker contractual party. There was stated in the decision that a particular behavior may be forbidden in general. The infringement may be perceived as threatening offence against not only one undertaking but against all undertakings involved in relationships between suppliers and customers.

In 2012, the Office received 23 complaints and carried out a total of 5 administrative proceedings for possible breaches of the Act. However, no decision has come into force as they are still in the process of the Office's investigation. The parties to the proceedings are large international retails chains (Kaufland, Globus, TESCO and Lidl). The cases deal with the issue of abusive conduct by the retailers related to their relationship with suppliers such as applying longer payment periods than it is allowed by the Act, requiring retroactive fees and payments not corresponding to any service actually provided.

As regards the payment periods, retailers are suspected of applying payment periods longer than 30 days in three pending cases. Longer payment period may cause problems with cash flow for suppliers. In another case, retailer required high fees for payments before expiration of payment periods without prior agreement. This case was finally closed with adoption of commitments.

The second group of abusive conduct regards requiring retroactive payments which were not contractually fixed in advance. The Office is currently investigating this kind of conduct of retailers in two cases. These practices can have the negative effects on supplier's market. The aim of the Office is to sanction all these cases when suppliers are forced to pay more than original price is (e.g. more than tenths of per cents).

The Office has also focused on system of bonuses, fees and agreements concerning promotional activities which can lead to amendments of agreed prices and negative effects on suppliers. It is sometimes difficult to prove that these payments are unjustified because of the fact that various types of agreements exist concerning this issue. The Office has investigated mainly bonuses, fees and promotional actions which are not agreed in advance or there is no equivalent performance from a retailer. There is no problem with e. g. logistic bonus which is not considered illegal if the service is proportional and actually provided, if not it is considered as unjust enrichment and can be declared as abusive.

Besides the individual cases, the Office carried out sector inquires in the milk and meat sectors and bakery products´ sector. These sector inquiries represent a good source of information about the market and demand for agricultural and food products. The Office has been facing the problem of reluctance of suppliers to provide information because of the fear of termination of their commercial contracts which can result in termination of their whole business activity.

## 6. Other Factors Determining the Functioning of the Food Retail Chain

In the Czech Republic the Act on Prices generally prohibits making excessive property gains by abuse of preferential economic position of undertakings. However, it is not primarily focused on competition issues and its enforcement is entrusted to the Ministry of Finance. There are no other specific legal provisions affecting the functioning of the food supply chain.

The Office has not carried out any investigation concerning the influence of state enterprise involvement in the supply chain. In the Czech Republic, most of the entities active in food retail chain are private undertakings. To certain extent, the state has the possibility to influence the functioning of food retail chain by adopting rules and regulations on qualitative food standards. Czech Agriculture and Food Inspection Authority, a state administration body, is responsible for supervision of safety, quality and labelling of food products.

## 7. Advocacy and Amendments to the Act

The Office has been actively engaged in advocacy activities in the area of food retail chain since its very beginning. Ensuring efficient competition and related consumer benefits in the food sector has represented one of the basic goals of the Office. In order to provide fair competitive environment for food suppliers in the relevant markets the main activity of the Office has recently been the provision of dynamic discussion on the amendment of the Act. Views of all relevant parties are taken into account in the process of drafting the new legislative framework.

As the Office is aware of the non-sufficient legal grounds for the fair competition enforcement in this sector and the application of the Act on the Protection of Competition is not suitable to these specific issues the Office focuses its capacities on the prevention of abusive practices. Therefore seminars, workshop and discussions with the relevant parties are organized in order to improve the awareness of the potential problematic aspects of the undertaking´s conduct in the markets.

Finally, it is considered that the further amendment of the Act is inevitable. It is necessary to determine whether the Act should apply solely to retail chains or should it cover suppliers or eventually extend its scope beyond the food sector. In this perspective it is absolutely necessary to adjust the definition of the market power to decide whether it should be assessed only formally (net turnover) or in economic terms (further definition of independence and its relevance). The new amendment should also enable more flexible conduct of administrative proceedings.

# EUROPEAN UNION

## 1. Introduction

A number of recent developments in the area of food and agricultural commodity markets in the EU and worldwide have prompted action by policymakers in general and competition authorities (at national as well as EU level) in particular.

First, since mid-2007 EU food prices have increased significantly at all levels of the supply chain. After a peak in mid-2008 and decreasing food prices in 2009, food prices rose again very steeply in the 2nd half of 2010. Since the 2nd half of 2011 food prices are stabilizing but remain at a higher level than before the EU economic and financial crisis. Key drivers of these price hikes included the rise in agricultural commodity prices and higher costs in food processing, especially caused by steep increases in energy costs.

Second, together with the increase in food price levels the volatility, notably of prices for agricultural commodities, has also increased.

Third, in many EU Member States asymmetries in the transmission of price changes throughout the food supply chain have been observed. Competition concerns were raised in cases where consumer prices (at retail level) kept on increasing when producer and/or commodity prices were already declining. Many National Competition Authorities ("NCAs") of the European Union have put a lot of effort in identifying anomalies in the price adjustments at any of the stages in the food supply chain.

Fourth, in the area of retail, the increased concentration of retailers, the existence of buying alliances as well as the rising successfulness of private label products, has raised concerns about the bargaining power of retailers in their commercial relationships with their suppliers and the perceived existence of unfair trading practices within the framework of such relations.

Finally, the atomistic structure and presence of many small-scale farmers at the primary level of the food supply chain has raised concerns in many Member States about the competitiveness of the agricultural sector, as well as the lack of balance in some of the relationships between farmers and their buyers.

In Europe, the NCAs and the European Commission ("Commission") have responded to these challenges by actively enforcing competition rules in the food sector and by closely monitoring the structures and functioning of food markets.

## 2. Competition policy at the service of better-working food supply chains

Competition policy plays a key role in maintaining a level playing field in the food supply chain by ensuring that competition is not distorted by any market player operating within the chain.

Consequently, the Commission, together with NCAs in the European Competition Network ("ECN") have been very active on food markets in the past years. As emphasised in the ECN Food Report of May

2012[1], NCAs have initiated more than 180 antitrust investigations, close to 1300 merger control proceedings and have carried-out more than 100 market monitoring actions at all levels of the food supply chain between 2004 and 2011 (cf. Section IV).

In parallel to the activities that NCAs led in their domestic territories and in addition to the joint work of the ECN in this respect, the Commission's Competition Directorate-General ("DG COMP") set-up a dedicated Food Task Force in 2012.

The Commission consequently launched in December 2012 a study managed by the Food Task Force, to assess the economic impact of modern retail on choice and innovation in the EU food sector ("retail study")[2]. In addition to this work, the Food Task Force monitors food markets, and investigates any alleged anticompetitive practices arising at European level. For instance it has launched the investigation of a possible cartel of sugar producers in April 2013. Finally, the Task Force is also involved in the process of reform of the Common Agricultural Policy, supporting the competition principles that lie at the core of a modern European agriculture, as well as in the policy debate on Unfair Trading Practices (cf. Section V).

## 3. Trends and characteristics of the European food supply chains

The food supply chain accounts for 5% of EU value added and 7% of employment, bringing together the agricultural sector, the food processing industry and the distribution sector. It is therefore a very important sector for the European economy, creating many jobs (also for low-skilled workers).

However, in practice there is no single, homogeneous, and common food supply chain at European level. Different products create different chains. Also, by their very nature, food markets remain predominantly national or regional in scope, all the more so in the case of fresh, unprocessed products.

Moreover, wide differences exist in terms of market structures, productivity and importance in the household expenditure of Europeans. For instance, while the share of food in the average EU household budget has fallen from over 30% in the 80's to less than 15% today, wide differences can be observed across different Member States. In Belgium, food takes 13.5% of household expenses, while in Romania and Bulgaria food is the most important component of the household budget (44% and 32 % respectively).

The length and the degree of complexity of the food supply chains also vary. For certain products, production and processing are often closely integrated (for milk or sugar) and the product can be processed and sold through a rather short supply chain. For other products, especially for fruit and vegetables, retailers often deal with a plethora of wholesalers who in turn rely on a large number of atomized suppliers, especially in South-Eastern Europe. Before the product reaches retail level, it goes through a number of market players, which add a commercial margin at each step of the chain. The complexity of this type of supply chain implies a number of structural inefficiencies that are often coupled with low productivity.

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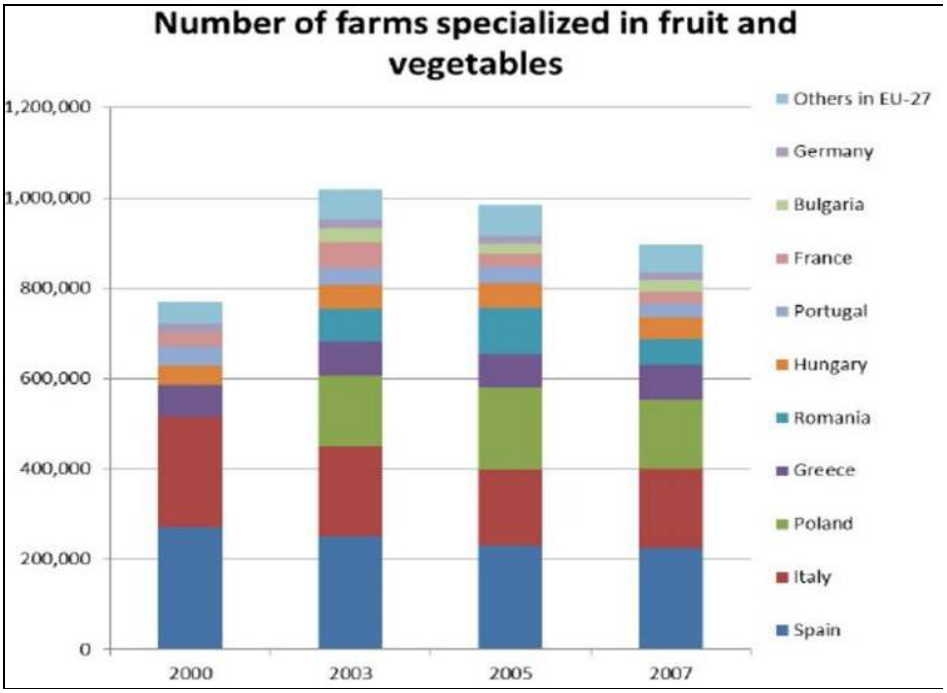
1 "ECN Activities in the Food Sector – Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector". ECN Subgroup Food (May 2012). Available at: http://ec.europa.eu/competition/ecn/food_report_en.pdf.

2 COMP/2012/015 study on "The economic impact of modern retail on choice and innovation in the EU food sector", published in the Official Journal OJ/S S244 on 19/12/2012 (2012/S - 244 400412).

**Figure 1: Atomistic primary level in the area of fruit and vegetables**




Source: Eurostat, Farm Structure Survey

Primary producers are the least concentrated level in the food supply chain, which leaves them at a comparative disadvantage in terms of bargaining power (see e.g. the situation for fruit and vegetables in a number of EU Member States in Figure 1). Such suppliers are often unable to build a critical mass in terms of volumes and lack an efficient and speedy delivery infrastructure that would allow them to supply ranges of products within a given category and ensure stable volumes, enabling them to sell directly to retailers or processors. This is particularly true for new Member States, where history has created a negative image for farmer organisations which led to a very low degree of penetration of cooperatives (below 25% compared to 40% or above in old Member States)[3].

Due to this fragmented structure and low efficiency in their marketing operations, farmers are often unable to directly supply retailers or food processors. In the case of cereals for instance, producers often sell to aggregators who in turn sell to traders or food processors. The agricultural produce is thus, in many cases, purchased and re-sold by a number of intermediaries before it can reach a processor or shop shelves.

While producers increasingly join forces in producer organizations ("POs"), wide differences remain across Europe as to the strength of such organizations. For example, in 2003, while in the Netherlands and Belgium more than 70% of all fruit and vegetable production was marketed through POs, the percentage was significantly lower in the three most important producing Member States: less than 30% for Italy, 50% for Spain and 55% for France. In Italy, for example, according to the findings of the Italian Competition Authority, up to four different intermediary operators intervene in the fruit and vegetables supply chain.

By contrast, other levels of the chain - such as the food processing and manufacturing industry and the retail sector - are more concentrated.

[3] Study carried out for the Commission, "Support for Farmers' Cooperatives", available at http://ec.europa.eu/agriculture/external-studies/support-farmers-coop_en.htm

Food processors are for example quite concentrated in certain sectors and areas: the largest dairy processor represents more than 50% of domestic production in Denmark, Sweden, and The Netherlands. Food manufacturers are also concentrated. For instance in many Member States more than 70% of baby food products are supplied by two manufacturers. The situation may nevertheless vary depending on the Member State concerned: for instance for chocolate products (tablets, confectionary) the UK, Irish and Polish markets are supplied essentially by two manufacturers whereas the French market is supplied by more than five manufacturers[4].

As regards retail, Commission research of 2009[5] found that retail concentration is high in a number of Member States at national level: e.g. Finland has a C2 ratio of 75%, the Netherlands has a C3 ratio of 83%[6]. A European Central Bank Report of 2011 reached the same conclusions[7] - not only at the national but also at the local level - showing highly concentrated regions in many local areas in the euro area (HHIs above 2,000). Concentration measured at parent company level is especially high in countries like The Netherlands, Finland, Germany, France, and Portugal. Nevertheless, large differences can be observed, with a more significant presence of smaller traditional shops in South-Eastern countries (cf. Figure 2).

**Figure 2: Local retail concentration measures in the euro area**

Table 5 Downstream concentration measures using a *local market definition* – national averages of local HHIs computed at the store and parent company levels

| | Store level | | | Parent company level | | | |
|---|---|---|---|---|---|---|---|
| Country | 5 km | Country | 10 km | Country | 5 km | Country | 10 km |
| NL | 13 | NL | 4 | BE | 21 | BE | 12 |
| AT | 15 | BE | 6 | AT | 23 | AT | 16 |
| IT | 16 | AT | 7 | IT | 24 | IT | 17 |
| ES | 16 | IT | 7 | ES | 25 | ES | 20 |
| BE | 16 | DE | 7 | GR | 27 | FR | 21 |
| DE | 16 | ES | 9 | DE | 29 | GR | 22 |
| GR | 17 | GR | 11 | NL | 30 | PT | 24 |
| PT | 23 | PT | 14 | FR | 31 | DE | 24 |
| FI | 26 | FR | 16 | PT | 32 | NL | 26 |
| FR | 27 | FI | 19 | FI | 40 | FI | 38 |
| Euro area average | 19 | Euro area average | 9 | Euro area average | 28 | Euro area average | 21 |

Source: Eurosystem staff calculations based on information from the Nielsen store location database.

Source: ECB (2011),"Structural Features of Distributive Trade and their Impact on Prices in the EA"

Such concentration raises issues of buyer power. While the buyer power of manufacturers towards their suppliers has not been studied so far, the buyer power of retailers has been studied in many markets[8]. The buyer power of retailers is particularly relevant for purchases from producers and small processors and manufacturers. The same is not necessarily true for purchases from large multinational suppliers. Indeed,

4 See Case COMP/M.4842 – Danone/Numico; Case COMP/M.5644 – Kraft Foods/Cadbury

5 See, European Commission Communication on a "Better functioning food supply chain in Europe" COM(2009) 591.

6 The C(k) ratio is calculated by summing up the market shares of the k-largest firms in the industry.

7 "Structural Features of Distributive Trade and their Impact on Prices in the Euro Area", ECB (2011). Available at:http://www.ecb.europa.eu/pub/pdf/other/structuralfeaturesdistributivetrades201109en.pdf.

8 For the existence of buyer power of retailers in the UK: See, UK Competition Commission (2000), " Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom". Also, Lloyd, T., McCorriston, S., Morgan, W., Weldegebriel, H.T. (2006), "Buyer market power in UK Food Retailing", Working paper.

such multinational suppliers are often producers of a portfolio of goods that are often "must-carry" brands, and such suppliers may have significant market power. In these cases, the buyer power of the largest retailers may be offset by, or even become less relevant, than the market power of suppliers.

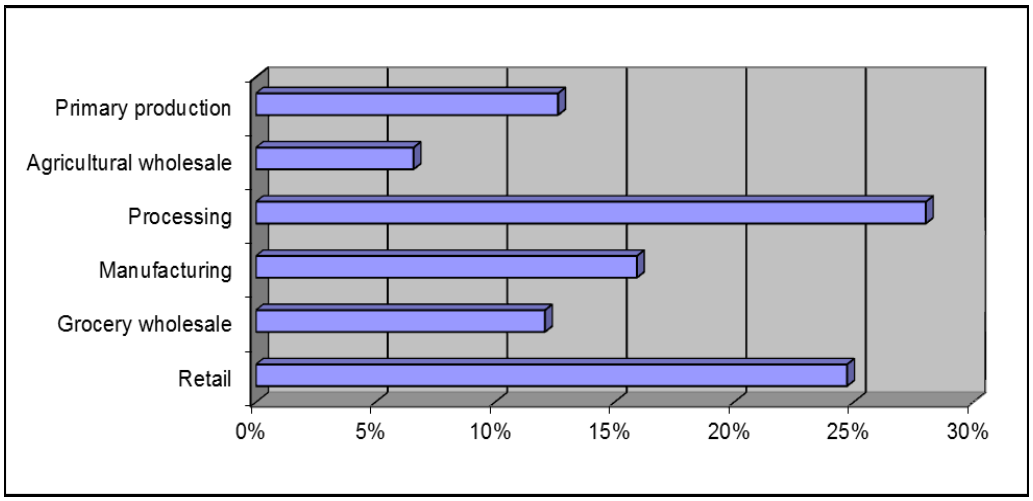
## 4. Enforcement and market monitoring activities by competition authorities

### *4.1 Antitrust cases*

The more than 180 antitrust cases investigated by the European competition authorities over the period 2004-2011 (cf. ECN Food Report, see footnote 1) cover a wide range of food markets, with particular emphasis on multi-products (21%), cereals and cereal-based products (18% of all cases), milk and dairy (12%), followed by fruit and vegetables (10%), and meat, poultry and eggs (9%). Other markets in which competition authorities have intervened include alcoholic drinks, coffee, soft drinks, sugar and confectionery, and fish and seafood.

The European competition authorities have scrutinised all levels of the supply chain, with the largest number of cases regarding the processing level (28%), followed by retail (25%) and manufacturing (16%). Interestingly, the transformative part of the supply chain (processing and manufacturing) accounts for about 44%, thus close to half, of all cases (cf. Figure 3).

**Figure 3: Relative importance of antitrust cases in terms of level of the food supply chain (2004-2011)**




Source: ECN Food Report of May 2012

In terms of types of infringements, competition authorities have focused on horizontal agreements among competitors, which account for about half of all cases investigated (49%). Competition authorities have detected horizontal infringements in the form of price fixing, market and customer sharing and exchanges of confidential information at most levels and for most products investigated.

In particular, cartels have been found between flour millers (in Hungary, the Netherlands and Portugal), baker (association)s (in Belgium, France, Italy, Slovakia and Portugal), and egg (in Lithuania and Hungary) and poultry (in the Czech Republic and Bulgaria) producers. While most cartels have been investigated at the national level by the NCAs, in some cartels several Member States were involved and the cases have been investigated by the European Commission (e.g. bananas, shrimps).

These cartels can be very harmful for the final consumer. This is for instance demonstrated by the pasta cartel in Italy, whereby the price coordination agreement between the main pasta manufacturers and

their industry association over the period 2006-2009, led to an average increase in the wholesale price for pasta of 51.8 % while the retail price increased by 36 %.

Apart from horizontal agreements between manufacturers/suppliers, also buyer cartels have been detected (e.g. in the milk sector in Greece and Portugal, in the pork sector in France).

The European competition authorities have also investigated a number of cases dealing with vertical anti-competitive agreements (19% of all cases). Prominent examples are price-related anti-competitive agreements in particular resale price maintenance ("RPM") and exclusive purchasing agreements that restrict the freedom of the immediate customer to deal with other suppliers. Competition authorities found vertical restraints mainly in coffee, sugar and multi-products (retail) markets.

In the area of retail, RPM often takes place in the case of supermarkets working with franchise agreements. In particular, the Greek, Swedish, Finnish and Romanian NCAs have been investigating antitrust cases dealing with RPM imposed by large supermarket chains in their franchise networks. The French and the Belgian NCAs identified concerns about some barriers to exit related to franchise contracts (see below paragraph 53).

Finally, the NCAs have further investigated cases which involved abusive conduct by dominant operators (20% of all cases). These abuses mainly involved strategies to foreclose competitors, such as exclusivity obligations, minimum purchasing obligations, tying and refusals to supply, but also some exploitative abuses, such as unjustified contractual obligations. The large majority of these cases related to abusive conduct subject to Art.102 TFEU or equivalent national rules. However, some NCAs applied stricter national rules, beyond the scope of Art.102 TFEU, such as the abuse of economic dependency.

Sectors with the most abuse cases were dairy products (in Cyprus, Greece, Portugal and the Nordic countries)), soft drinks (in Austria, Belgium, Bulgaria, Greece and Portugal), and multi-products/retail (in the Czech Republic, France, Hungary, Italy, Latvia, Poland and Slovenia). For instance the Belgian, Bulgarian and Greek authorities as well as the European Commission investigated a number of exclusionary practices of Coca-Cola companies (exclusivity provisions, fidelity rebates, discriminatory access to storage, preventing parallel trade or resale).

In a number of cases the NCAs have applied specific national laws which sanction abusive behaviours in situations of economic dependency or similar situations[9]. This was especially the case in the area of retail where cases concerned abusive terms in contracts between retailers and their suppliers (such as e.g. unfair risk-sharing terms, retro-active changing of contract terms, the abusive charging of certain fees). There were also a few cases in other sectors: the Cypriote NCA investigated an abuse of economic dependency, whereby a dairy cooperative, which delivered and sold milk, had illegally terminated its trading relationship with a dairy farmer who produced yoghurt.

### *4.2 Merger control cases*

Not only antitrust enforcement, but also merger control plays a significant role in ensuring that markets remain competitive. The European competition authorities have analysed close to 1300 mergers in the food sector between 2004 and 2011, of which 83 mergers raised concerns mainly in the retail sector. Other problematic sectors include the dairy and meat sectors.

[9] Note that Member States are allowed to have legislation on unilateral conduct that is stricter than Art.102 of the TFEU. While the concept of economic dependency is not recognized and cannot lead to an abuse of a dominant position under EU competition law, some EU Member States address conducts such as the abuse of economic dependence or superior bargaining power as part of their national competition rules.

The European competition authorities have ultimately cleared most of the 83 mergers which raised concerns, but only subject to commitments from the merging parties. The main concerns were increased market concentration, elimination of an important competitor, and the need to ensure access of competitors to inputs at non-discriminatory terms.

The competition authorities have also prohibited 8 mergers raising serious concerns in the sectors of pastry products, cheese, meat, beverages and confectionery products. For instance, the Czech NCA prohibited a merger that would have led to a combination of the two biggest bakeries, which were the only sources of supply to Czech retailers. The Polish NCA prohibited a merger which affected the markets for the sale of vodka and wholesale distribution of spirits. Since the parties to the merger were the largest producer and the largest distributor of alcoholic drinks the NCA was concerned that third parties would no longer have access to some of the best-selling vodka brands in Poland.

This merger enforcement record shows that in some Member States, certain markets have reached such a level of concentration that further increases would risk a significant impediments of effective competition.

### *4.3 Market monitoring actions*

Apart from competition law enforcement, the high priority given to the food sector by the NCAs over recent years is also reflected in the number of market monitoring actions. These actions have included sector inquiries pursuant to which the NCAs use extensive investigative tools (e.g. requests for information, inspections, etc.), or other market studies, reports, or surveys carried out on specific food issues. Sector inquiries and market monitoring actions are generally not used by the NCAs for concrete enforcement purposes to find and punish infringements of competition rules by individual undertakings, but rather to better understand how markets work.

Since 2004, 25 NCAs have carried out 103 market monitoring actions on food-related issues. Some of the investigations came to the conclusion that competition was working, while others have identified potential structural problems, which may negatively affect the well-functioning of the food supply chain. In certain cases, national sector inquiries have also revealed anti-competitive practices, which have led to the opening of infringement proceedings against individual companies.

The scope and focus of these monitoring investigations vary. For instance, of the 103 market monitoring actions, 9 have looked at the food supply chain and agro-food sector as a whole. Others have focused on specific products, in particular milk and dairy (which accounted for 16 monitoring actions), fruit and vegetables (10 actions) and cereals/cereal-based products (9 actions). The largest number of monitoring investigations has focused on the retail sector (with a total of 36 market monitoring investigations). Other sectors (e.g. alcoholic drinks, sugar and meat) and food-related issues accounted for 28 monitoring investigations.

Despite the diversity and high number of monitoring investigations undertaken by the NCAs, the issues and main aspects on which the NCAs have concentrated their efforts present significant similarities. For instance, many NCAs have focused to a large extent on the analysis of price formation and price transmission along the different levels of the supply chain (producers, processors/manufacturers, wholesalers, retailers), whether for one specific product or for multi-products. This has allowed them to have a better understanding of the different factors that influence price adjustments along the supply chain and to detect price asymmetries which may be indicative of potential competition problems.

These monitoring investigations have revealed that price developments along the supply chain are influenced by many factors. In some cases asymmetric price transmission is caused by a lack of competition or weakened competition at some levels of the food supply chain.

For instance, in its market study of 2010 the Lithuanian NCA observed that changes in producers' prices for dairy products and cereals did not fully explain the changes downstream at wholesale and retail level. It therefore concluded that the increase of food prices in Lithuania may not be fully explained by objective economic reasons but may be also caused by weakened competition. Also the Swedish NCA found certain asymmetries in price transmission: consumer prices were more prone to rise with higher input costs than to decline with lower input costs. One of the explanations for this observation was the use of market power by certain undertakings in the supply chain.

While anti-competitive conduct might be a good explanation for certain price developments along the chain in some cases, in many other cases these price developments were found to be rather of a structural or cyclical nature. These factors include, among others, fluctuations on worldwide commodity markets, increases in input costs for agricultural products, global supply and demand developments, availability of stocks, energy and labour costs, seasonal production of certain food products, length and degree of complexity of the supply chain, differences in bargaining power among market players, etc.

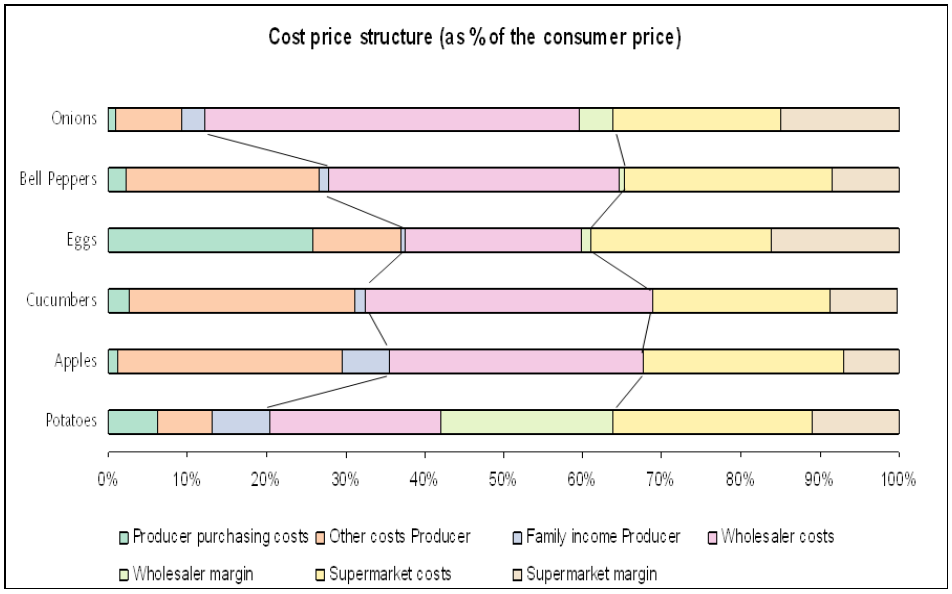
The vast majority of the NCAs' monitoring investigations that have analysed price formation in the food sector have been national in scope. However, a few investigations have also compared prices between Member States and identified significant price differences between neighbouring countries. For instance, a report of the Belgian NCA revealed a more than 10% price difference between retail prices in Belgium compared to the Netherlands and Germany[10].

Some NCAs have also focused on the analysis of the costs, prices and margins of the different players in production, processing/manufacturing and distribution of food products in order to identify potential price asymmetries that may be indicative of a potential malfunctioning at any of these stages. The most comprehensive study in this area comes from the Dutch NCA[11], who investigated the pricing of eight basic food products along the food supply chain in the Netherlands (cf. Figure 4).

[10] Cf. FOD Economie, KMO en Middenstand (2012), "Prijsniveau in supermarkten". Available at: http://economie.fgov.be/nl/binaries/studie_prijsniveau_supermarkten_tcm325-163021.pdf.

[11] See, NMa (2009), “Pricing in the agri-food sector”. Available at: http://www.tweedekamer.nl/images/NMa_Rapportage_Prijsvorming_118-200762.pdf.

**Figure 4: Cost price structure (as % of the final consumer price, 2005-2008 average)**




Source: NMa (2009), "Pricing in the agri-food sector"

The investigation examined in detail selling prices, costs and margins at different stages of the chain, and looked at the transmission of shocks[12] in food commodity prices. The analysis revealed that costs are very much spread along the supply chain, whereby especially costs at the distributive trade level (wholesale and retail) are relatively high. Moreover, while the size of the absolute margin is highest at supermarket level, retailers do not always have the highest relative margins (margin expressed as percentage of the selling price). For instance apple producers had on average higher relative margins than supermarkets over the period 2005-2008.

### *4.3.1 Need to overcome inefficient market structures by pro-competitive means*

Through their market monitoring investigations, many NCAs have identified structural shortcomings which may have a negative effect on the functioning of food markets and have proposed policy recommendations and guidance (in most cases beyond the remit of competition law) on how to tackle these shortcomings.

Among these structural problems, some NCAs have identified in particular the highly atomistic structures of agriculture primary production in combination with the small-scale of farmers in their Member States as factors which can hamper the overall competitiveness of the sector and the market position of agricultural producers. These NCAs have called for the restructuring and consolidation of the agricultural sector and have recommended market-oriented and pro-competitive mechanisms to achieve this goal, such as the promotion and creation of cooperatives and other efficiency-enhancing forms of cooperation among producers as a means of becoming more competitive and reinforcing their bargaining position in the chain. Some NCAs have also advocated the rationalisation of the chain (in particular at its intermediary stages) as a means of improving its functioning and efficiency.

[12] By using "impulse response analysis" – based on specific models (such as the Vector Autoregressive (VAR) model and the Vector Error Correction (VEC) model) - it is examined whether and if so how an unexpected one-time shock in the price of a product in a certain link ('price shock') knocks on into the different prices in the supply chain.

The inquiry on food distribution carried out by the Italian NCA in June 2007 concluded that the supply chain of fruits and vegetables in Italy was characterised by a complex structure stemming from factors such as the different typology of products, the different number and features of the agents active in each stage of the chain, or the different variety, origin and destination of the products. It also found a number of factors having a negative effect on the efficiency of the sector, such as the highly atomistic and fragmented structure of primary production and the excessive length and complexity of the chain. For instance, it noted that distributors had to rely on intermediaries, in particular, in cases in which the agriculture primary production was fragmented or poorly organised. That had an impact on prices. The more intermediaries were involved, the higher end consumer prices were. Indeed, the increase of average prices (mark ups and production costs) could range from 77% to 300% (as compared with producer prices) as a result of the length and number of intermediary stages in the supply chain.

#### *4.3.2 Problems arising from entry barriers to retail markets*

Many NCAs concur that the retail sector has modernised and consolidated over recent years, which has led to high concentration of the sector in many Member States. These highly concentrated retail markets coupled with structural factors, such as regulatory entry barriers, stemming from planning or zoning laws or other administrative constraints (e.g. administrative authorisations required for the opening or extension of retail outlets) may limit or prevent competition in these markets by raising entry barriers. The relevant NCAs have advocated the removal of such regulatory barriers, so as to facilitate the entry of new players and improve competition (in particular in highly-concentrated local retail markets).

For instance, the French NCA - in its opinion 07-A-12 on the legislation on commercial planning of October 2007 - proposed to remove the system of authorisations based on economic criteria required for the opening or extension of commercial sites in France (insofar as it amounted to an entry barrier with negative effects on competition). The opinion led to a legislative change which removed the economic objectives as an element to be considered when authorising the opening or extension of new retail stores.

Contractual constraints which hamper the exit of independent retailers or switching retail networks have also been identified as problematic by a few NCAs. The French competition authority also indicated its concerns about several potential barriers to exit related to franchise contracts, such as the long duration, post-contractual non-competition clauses, etc. The Belgian NCA in turn recognized in its report on the price level in supermarkets that similar practices exist in the retail sector in Belgium[13].

Other constraints of this type include contracts which limit the use and availability of land suitable for retail sites or other contractual arrangements implemented by large incumbent retailer groups. For instance, in its inquiry on the groceries sector, the UK Competition Commission ("CC") raised objections against restrictive covenants and other exclusive arrangements that retailers could use to limit access by (potential and/or actual) competitors to land suitable for grocery stores in highly-concentrated local markets. In order to address the concerns above, the CC enacted the Controlled Land Order of August 2010. The Italian NCA has been analysing two cases about market foreclosure by dominant retailers, who had allegedly impeded new competitors to enter the market by preventing them from access to the land or physical space necessary to open new retail outlets.

The NCAs which have addressed these issues have recommended modifications to such contracts and agreements to facilitate the entry of new players.

[13] See, FOD Economie, KMO, Middenstand en Energie (2011), "Prijsniveau in Supermarkten", Available at: http://economie.fgov.be/nl/binaries/studie_prijsniveau_supermarkten_tcm325-163021.pdf.

#### *4.3.3 Using the appropriate instruments for certain trading practices*

In their monitoring investigations a large number of NCAs have also identified as an issue the existence of certain practices linked to imbalances of bargaining power between market players that are deemed unfair by many stakeholders. Although this is an issue which has been identified regardless of the level of the chain, particular focus has been devoted to this type of practice in the context of the commercial relations between suppliers and retailers.

Nevertheless, the NCAs have found that most of these practices usually do not fall within the scope of competition rules at the EU level or in most of the Member States. Consequently, a few NCAs have proposed alternative solutions to tackle them, such as the application of national laws against unfair trading practices or the adoption of codes of conduct with effective enforcement mechanisms.

A few NCAs (in particular the Spanish and Finnish NCAs) have also expressed concerns about the potential anti-competitive effects that certain of these unfair trading practices may have in the long term, should they ultimately negatively affect the competitive process in the supply chain or consumer welfare by reducing investment and innovation or limiting consumer choice.

## 5. Recent policy developments and initiatives at the EU level

### *5.1 Cap Reform*

The question of the farmer's position in the value chain (the farming sector is, in general, highly atomised and dispersed) and particularly their lack of bargaining power vis-à-vis their buyers was at the heart of the recent reform of the Common Agricultural Policy ("CAP").

The solution ultimately retained consists in the introduction in the text of the new single Common Market Regulation ("sCMO") of an exemption from the application of competition rules for those farmers active in the olive oil, beef and arable crops sectors who are organised in Producer Organisation (POs) and would like to engage in joint selling (and implicitly price fixing) for part or all of their production. This exemption is however subject to market share thresholds not being exceeded (see below paragraph 64).

However, this exemption will apply only if certain conditions are met, and particularly if farmers also engage in other activities able to create significant efficiencies in order to counterbalance the negative effects of price fixing on the achievement of the CAP objectives[14].

This specific condition is designed to encourage farmers to take concrete steps to increase their economies of scale and scope by, for instance, pooling together at the appropriate scales their input procurement, investments in storage facilities, output planning and production assets as well as by increasing their degree of vertical integration into processing of products which can add value. This would enable them to reduce their overall production costs and improve their margins, while enhancing their competitiveness.

The precise activities that farmers should engage into in order to benefit from the exemption will be set in the Guidelines that the Commission will publish in order to clarify the implementation of this new rule. All interested stakeholders will have the opportunity to express their views in the context of the public consultation the Commission will organise when preparing for the adoption of these Guidelines.

[14] The CAP has the following objectives: (i) to increase agricultural productivity; (ii) to ensure a fair standard of living for the agricultural community; (iii) to stabilise markets; (iv) to assure the availability of supplies; (v) to ensure that supplies reach consumers at reasonable prices.

In any event, the benefit of this exemption is limited to those situations where the quantity of production covered by such negotiations does not exceed 15% of the total national production of the Member State concerned (20% of the relevant market for olive oil). In addition competition authorities may intervene and sanction collective negotiations in case of exclusion of competition or if the CAP objectives are jeopardised even if these thresholds are respected.

### *5.2 Unfair Trading Practices*

In the aftermath of the food price crisis in 2008/09, the European Parliament ("EP") has been repeatedly calling for action against the alleged unfair trading practices ("UTPs") by retailers (vis-à-vis their suppliers, farmers or small industry manufacturers). For instance, in its resolution of 19 January 2012 the Parliament asked for competition law enforcement including a sector inquiry on the issue.

In addition to the EP's resolutions food manufacturers and to some extent consumer associations also complain that choice and innovation have deteriorated in recent years due to the retailers' (unfair) commercial practices and their increased market power.

As a response to this pressure, an Expert Platform on B2B Contractual Practices within the High Level Forum for a Better Functioning Food Supply Chain (HLF) was set up by the Commission in 2010 to work on a solution to this issue. As a result, in November 2011 all operators in the chain agreed (through their European Associations) on a code of good practices, and in December 2012 all operators but farmers agreed on an implementation mechanism. In the course of 2013 the participants to this voluntary initiative have been working hard to implement this code of good practices, while maintaining the dialogue with Copa-Cogeca (farmers' association).

In parallel to this self-regulatory initiative of the HLF, the Commission issued, on the 31st of January 2013, a "Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe"[15]. The Green Paper lists a number of claims which - if proven relevant and correct - may justify action on UTPs at EU level: (1) unfair trading practices raise concerns about innovation in the industry and (2) different national unfair trading rules lead to a fragmentation of the internal market. The public consultation, launched by the Green Paper, aims at gathering opinions on the introduction of EU-wide regulation of B2B relationships, in particular in the EU food supply chain.

This input from different stakeholders will make part of an Impact Assessment ("IA") whereby the Commission will assess the issue of unfair trading practices and identify different policy options to tackle the alleged unfair trading practices in the B2B food supply chain. The findings of the IA are expected to become public by the end of 2013.

The retail study of the Food Task Force[16] will provide quantitative evidence across European markets on the evolution of choice and innovation in food products. It will also identify the main drivers of that evolution, by analysing market concentration (at manufacturer and retailer levels), as well as other relevant factors such as shop type and size, private label penetration, and socio-demographic characteristics, to correct for other structural differences. It will also analyse whether certain areas of the sector are less competitive than others.

The purpose of this study is twofold: (1) building further on the work of the NCAs and other authorities in order to find out whether certain local areas and/or specific product categories face

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15 Cf. http://ec.europa.eu/internal_market/consultations/2013/unfair-trading-practices/index_en.htm.

16 Cf. footnote 2.

competition problems, and (2) providing quantitative evidence on the evolution of choice and innovation, which feeds into the debate on a regulation of unfair commercial practices.

## 6. Conclusion

The entire European food supply chain has undergone a profound transformation in the last decade in order to meet the demands of consumers and to adapt to the requirements of world competition. At the same time, the sector has also been hit by a severe crisis even before the unprecedented economic and financial crisis unfolded. It is understandable therefore that a number of tensions have arisen in this context, linked to concerns about buyer power, unfair bargaining practices, and sometimes anticompetitive behaviour.

The Commission, together with sister NCAs in the European Competition Network have been very active on food markets, as illustrated by the number of cases and policy initiatives pursued.

Europe's priority is now the return to growth and job creation, and it is more important than ever to have a modern and competitive food sector that delivers safe, high-quality and affordable goods. Competition principles - be they embedded in legislation or put to practice through rigorous enforcement action - can help achieve this purpose.

# FINLAND

This paper is a response to the Chair's letter of 3 July 2013 calling for submissions for the roundtable on "Food Chain Industry". The Finnish Competition and Consumer Authority (the FCCA) has had a lot of activities concerning the food supply chain, especially in the past few years. In this paper we provide a description of the situation in Finland and list the most important challenges that have been identified through sector inquiries. We also briefly discuss the recent amendment to the Finnish Competition Act with respect to the food retail sector, which will come into force on 1 January 2014.

## 1. Background

The Finnish Food Chain Industry is characterized by high level of concentration both in the food industry (with some exceptions) and food retailing. Primary production is relatively unorganized and the size of farms still relatively small, but growing. This gives rise to multiple competition concerns. In Finland, as in many other EU member states, the conditions of competition within the food chain has been one of the main focus areas of the competition authority in recent years.

### *1.1 Food Retailing*

According to Nielsen's statistics the value of the retail sales of groceries in Finland was about 16 billion euros in 2012. The value of sales increased by 5.1 % compared to 2011. The key factor behind the growth in the value of sales is an increase in food prices. The volume of sales decreased by 0.1 % in 2012 compared to year 2011.

The Finnish grocery market is very concentrated, even duopolistic. The market leader in recent years has been the S group with a current market share of 45.6 % (Nielsen). The S group is a conglomerate aiming to provide its customers products and services in all areas of consumption and with lower prices than competitors. It has been steadily increasing its market share in groceries both by acquiring stores from smaller competitors and by establishing new stores. The challenge faced by the competition authority in the M&A cases has been the unique structure of the S group. It consists of 28 different cooperatives that own stores in separate geographic areas. Each cooperative's stores form a part of the S group´s nationwide grocery store chains (Prisma, S-market, Sale/Alepa). These store chains are centrally managed by the S group's central unit SOK, which is owned by the abovementioned 28 cooperatives. When a cooperative has been acting as the buyer in an M&A case, it has not been possible for the Finnish competition authority to take into account the change in the market position of the S group as a whole.

The S group's main competitor, the K group, has a current market share of 34.7 % (Nielsen). It is aiming for quality leadership in the market. In recent years the K group has been losing its market share. The competitive challenge it is facing is partly due to its structure: it consists of independent store retailers (entrepreneurs) while the competing stores are either centrally owned or under strict central management. Kesko plc. acts as a wholesaler for the K stores and is vertically managing the chain concept for the K group's different store chains (Citymarket, K-supermarket, K-market, K-extra).

The third largest player in the market is Suomen Lähikauppa Oy (SLK) with a substantially smaller market share of 7.3 % (Nielsen). Recently SLK has been struggling for its market share and with its

profitability, which has led the company to come up with a completely new strategy. SLK has three convenience store chains Siwa, Valintatalo and Euromarket, which all have their own special characteristics but are united under the concepts of locality and being close to people. SLK has divested itself from the supermarkets and hypermarkets sector.

Lidl entered the Finnish food retailing market in 2002. It is a discounter store chain with a more limited selection and a higher share of private labels. Lidl´s competitive advantages include very short inventory turnover time and efficient processes. Nielsen's estimate of Lidl's market share in Finland is 5.5 %.

According to Nielsen the surface area of grocery stores has grown by 28 % in the 21st century. The largest stores' (hypermarkets, and supermarkets of over 1000 $m^2$) share of total groceries sales has increased to 62 %. Hypermarkets have increased their share of sales the most, and their current share of total groceries sales is presently 27.6 %.

### *1.2 Food Industry*

Key indicators/facts by the Association for Food Industry in Finland (ETL):

The gross value of total production in 2012 was 11.2 billion euros and the total value added was 2.5 billion euros. Domestic net sales were 10.4 billion euros in 2012. Exports in the same year amounted to 1.5 billion euros. Presently, the food industry as a whole provides jobs for approximately 32.500 people.

The dairy industry is the largest branch of industry in Finland if measured by gross value of production, whereas bakery and meat processing are the largest if measured by number of employees. Large branches of industry also include the brewery industry.

All these industries are characterized by a high level of concentration, usually with two large companies dominating the market:

- Dairy: Valio and Arla Ingman
- Meat processing: Atria and HKScan
- Bakery: Fazer and Vaasan&Vaasan
- Brewery: Sinebrychoff (Carlsberg Group) and Hartwall (Royal Unibrew, since 07/2013)

In addition to these large companies there are numerous small (and medium size) companies competing in the market, usually with a more limited variety of products. The Finnish grocery market is also characterized by a lack of international foodstuff producers. Foreign companies have concluded many agreements with local suppliers but they still operate under the same Finnish brands that are familiar in the local market.

### *1.3 The research on price formation in the food chain[1] conducted by the Research Institute of the Finnish Economy (ETLA)*

In this study ETLA analysed the price formation and market functionality of the Finnish food chain. The main comparison countries were the so-called old EU countries (EU15) of Western Europe, the new EU countries (EU12) and the United States. The price formation of the food chain, the degree of concentration, the intensity of competition, and the position of small producers in Finland were also analysed.

The main findings of the research were that the consumer prices of foodstuffs are relatively high in Finland by international comparison. Although the most significant reason for this is the high value added tax on foodstuffs, one explaining factor is also the weakness of agricultural competitiveness (attributable to unfavorable weather conditions and the small average size of farms).

In Finland, the wholesale and retail trade have a greater share of food chain income than in other EU countries on average. This is mainly due to the fact that the wholesale and retail trade also bear a greater share of the costs. Among other things, these higher costs are due to long transport distances.

ETLA concluded that in order to safeguard competition, it is important that barriers relating to entry to and exit from the Finnish market by foreign and domestic enterprises are as low as possible. In addition, government aid and regulation should distort competition as little as possible and/or rectify market imperfections. Nowadays, small producers already have adequate forms of support.

## 2. Competition in the Food Chain

### *2.1 The FCCA's sector inquiries*

Multiple sector reviews have been made in Finland concerning food retail and the food supply chain. Recently, the FCCA has made two sector inquiries, one published in 2012 focusing on unfair trading practices and buyer power (B2B relations between the food industry and the retailers) and the other published in 2013 focusing on primary production and producers' vertical relations both to manufacturers and retailers. The industries involved in the first survey were meat processing, bakery, milling and pet food. In the second survey, meat production, fish farming and open air and greenhouse cultivation were reviewed. The sector inquiries were made using questionnaires to and interviews with the market operators and combining that with academic research on the topics.

The main focus in every inquiry has been on the vertical relationship between retailers and suppliers. The FCCA has tried to analyze the effect of increased buyer power in the food supply chain. The main results have been that there are a lot of ways in which retailers use their buyer power towards the suppliers. The unfair trading practices that were identified were considered to be on the grey zone with respect to competition law. The same findings were also made in the primary production inquiry; additionally, the FCCA found that regulation plays an important role in the competition landscape.

[1] "Elintarvikkeiden hinnanmuodostus ja markkinoiden toimivuus", 01.02.2010, ETLA Discussion papers No. 1209, p. 111-112.

## *2.2 Unfair trading practices*

### *2.2.1 Marketing allowances*

In its sector inquiry of 2012, the FCCA found that gratuitous marketing allowances are very common in the Finnish grocery trade. The replies from the suppliers showed that around 40 percent of the respondents got nothing in return for marketing allowances paid to the biggest retail group, the S group. Marketing allowances are used by every trading group in the Finnish grocery retail market. They are not explicitly set as a condition for access to the category but it appears often *de facto* necessary to pay marketing allowance. In many cases marketing allowance is paid as a percentage of the purchase price and is in fact a pure rebate for the retailer.

Such rebate-like "marketing allowances" are likely to raise barriers to entry and also raise price levels. Gratuitous marketing allowances may induce price increases to other customers because suppliers seek to pass on all their cost increases to purchase prices. In addition, gratuitous marketing allowances may have in some cases a wider impact of weakening the price competition in the field.

### *2.2.2 Risk shifting*

The FCCA explored several ways in which retailers transfer their own risk to suppliers. Buy-back requirements for unsold products were the most common way. To give an example, three-thirds of the respondents in the bakery and pet food industries announced that they had encountered buy-back requirements from the retailers. Furthermore, a considerable amount of primary producers said they had encountered reimbursement demands. With risk shifting, the increased uncertainty typically results in production cuts and pressure to increase prices. The suppliers' willingness to innovate may also decrease due to risk shifting practices.

In addition to affecting the suppliers, risk shifting may also have an impact on the weaker competitors at the retail level: if one retailer succeeds in transferring a risk to the supplier, the affected supplier may try to obtain better conditions when negotiating with relatively weaker retailers. This so-called waterbed effect can further weaken the competitive pressure in the retail market.

### *2.2.3 Private labels and category management*

In Finland, the share of private labels is lower than in EU countries on average. However, the share of private labels in grocery sales has risen considerably in the last 5 years from 9 percent in 2007 to 20 percent in 2012. In its sector inquiry, the FCCA concluded that consumers benefit from private labels because they increase product variety and offer lower prices. On the other hand, private labels may increase retail sector's buyer power. Retailers have a dual role in this respect since they are in charge of the category management and pricing but can, at the same time, be perceived to be using their private labels to compete against branded products and suppliers. A retailer is able to obtain more information about new brand products and can use this to its advantage as a commissioner of private label products (copycat phenomenon). The contract manufacturing of private label products may also give the retailer a better insight of a given product's cost structure. In the FCCA's inquiry, many suppliers stated that retailers place branded products in a weaker slot on the shelves (86 percent of the replies) and that retailers price branded products just above private label products (around 80 percent of the replies).

The FCCA concluded that as a result of private label products, the prices of foodstuffs may increase. The retailers seek to keep their private label products competitive at all times. The outcome of this is that in some circumstances the price difference can only be obtained by increasing the margins of branded products. This phenomenon could possibly be prevented by the suppliers' maximum resale price maintenance. However the FCCA concluded that it is difficult to present tenable estimates about the

possibilities and incentives of the suppliers to include conditions on maximum price maintenance into agreements. In Finland, the share of private label products will probably continue to increase, and the final consequences thereof can only be seen in the long run. The essential question is whether the value of positive results in the short term (broader product variety and real price competition) will be greater than the value of potential negative effects in the long term (increase in uncertainty and decrease in innovation incentives).

Besides private labels, also category management reinforces retailers' role as gatekeepers. The FCCA found that only a few suppliers can influence their shelf space or product range in the store. The gatekeeper role is also reinforced by asymmetric information (retailers either do not share or share asymmetrically their point of sales data) and lack of transparency.

#### *2.2.4 Regulation*

Partly in reply to the problems identified in the Finnish food supply chain but also to the discussion on the EU level on how to improve the functioning of the food supply chain in EU, the Finnish government has drafted sector specific regulations for the food retail sector by amending the Finnish Competition Act. The aim is to secure the functioning of a highly concentrated market.

According to the government bill, an undertaking or an association of undertakings, whose market share in the retail market for daily consumer goods (food retailing), is 30 % or more shall be considered to be in a dominant position. Thus the legal provisions of abuse of dominant position apply to these undertakings. Currently there are two retail groups in the Finnish food retailing market that exceed this market share limit: the K group and the S group.

In practice this means that the leading retail groups have to refrain from all such trading practices that lead to exclusion or are otherwise abusive. The object and purpose of the government bill is not to prevent the leading retail groups from increasing their market shares, but this should be based solely on competition on the merits. The law is due to come into force as from the beginning of 2014. The FCCA is currently providing guidance to undertakings about the provisions of the law.

A number of so called unfair trading practices (UTPs) can be identified in the food retail sector in Finland. These problems may not necessarily be tackled by the new law. At the EU level, UTPs are discussed within the High Level Forum for a Better Functioning Food Supply Chain set up in 2010. In 2011, the Expert Platform delivered a set of principles and examples of fair and unfair practices in vertical relations in the food supply chain signed by eleven organisations representing different interests across the European food supply chain. The FCCA is observing the situation in Finland.

## 3. Other factors determining the Functioning of the Food Retail Chain

### *3.1 Regulation affects competition in the retail sector*

In its report titled *Regulation of store locations – Perspective of entry and competition* published in June 2013, the FCCA states that the regulation of store locations and/or municipal plotting policy do not make way for retail competition. According to the FCCA, the present regulation system, which is complicated, detailed and open for interpretation, strengthens the position of the leading companies in the field. The current system has led to a situation where it is nearly impossible to establish new large retail units. As the result of said report, the FCCA has published recommendations. Among those are:

- The objective of promoting competition and an obligation to make a competition assessment should be added to the Land Use and Building Act (132/1999)

- The requirement that large retail units must be located in urban centres should be abandoned where necessary in order to secure healthy competition

- The laxity of store location regulations should be increased by reviewing the size limitations and maximum permitted gross floor space

- The use of tendering should be increased in the sale of plots, and all companies should be given an equal opportunity to make plot reservations

The current regulation works to create an artificial shortage of plots, not least due to strict interpretation by authorities whereby large retail units cannot be situated outside urban centres. Should there be suitable plots in urban centres, they are often already owned by the leading players in the retail sector and are, in any case, more expensive to establish and maintain than already existing large retail units. The FCCA also pointed out that municipal practices in the sale of plots favour the leading players in the retail sector.

The Ministry of Employment and the Economy has launched a programme for promoting healthy competition. There are two actions by which the competition in the retail sector is going to be fostered. The first is the addition of the new section to the Competition Act concerning the dominant position of retail operators with a market share of over 30 percent. The second action concerns the national alcoholic beverage retailing monopoly, Alko Oy, and the process of deciding on its store locations.

Alko Oy is a state-owned company which has a limited amount of outlets. In practice, the location of Alko outlets bolsters the competitive advantage of the two largest retail groups compared to smaller operators. Only one Lidl outlet has an Alko outlet located next to its store, while all the other outlets are next to the K or S group's stores. It is now stated in the programme that corporate governance will be used to influence the decisions regarding the placement of Alko outlets, so that account is taken of the impact of such decisions on competition within the grocery trade.

### *3.2 Access to market information/data*

An important point of discussion recently, within the food industry especially, has been the lack of information on the retail sales developments (point-of-sales data). This has caused difficulties in production planning, benchmarking and investment and innovation planning.

The unsatisfactory situation is due to a series of events in 2008 after the FCCA had found the information on food retailing markets conveyed through A.C. Nielsen´s Scantrack service too accurate and not open to everyone (since it was practically not accessible to small companies because of relatively high prices). Thus it was found harmful to competition on the retail level (FCCA decision no. 154/61/2007, 19.6.2008). As a consequence of this decision, the retailer parties stopped supplying the POS data to A.C. Nielsen, making the whole system worthless. The service was discontinued. This was not the aim of the FCCA, who recognised the efficiencies now lost in the food chain and the additional market power gained by the two largest retail groups. The FCCA is now re-evaluating the situation.

### *3.3 Loyalty rebates and fidelity programmes*

Another important point of discussion is the loyalty programmes of the largest retailers and their potential effect on competition. As a conglomerate, the S group is active in various branches of business (food retailing, hotels and restaurants, liquid fuel/gas stations, banking, insurance etc.). Through its loyalty scheme it offers consumers a possibility to add together all the purchases made from the stores/companies in almost all markets where the S group is active and get a monthly bonus of a maximum 5 % in value paid

to their bank account in the S Bank. The K group has a similar scheme, but it is less rewarding and the K group is active on fewer markets. Both S group and the K group have entered into bonus partnerships with various companies from various markets. The range of products and the areas of consumption covered by these loyalty programs are potentially substantial.

Questions such as to what extent do these programs steer consumers to concentrate their purchases to one of the groups and how significant is this steering effect in the Finnish food retailing market are yet to be answered. The FCCA is planning to make an inquiry on the subject.

Important points to consider are e.g. do these programs lead to exclusion of competitors or do they form a barrier to entry? How substantially do they add market power in the food retailing market and how much do the partnerships add to that effect? What are the implications of these loyalty schemes to the price sensitivity of consumers? Do they soften price competition in the duopolistic market? Would the price level be lower if it wasn´t for the expensive loyalty programs? And finally, what are the real efficiency benefits of these programs to customers - are those paying off to customers or solely to food retailers?

## 4. Conclusions

The FCCA has observed multiple issues in the retail sector. Some relate to regulatory issues and are part of the FCCA's advocacy work. Some issues that have been said to be competition problems are in fact a result of the market process with an imbalance of bargaining power and the highlighted role of the retailers as gatekeepers. The FCCA is not convinced that competition law is the best tool to tackle all these problems. In terms of price competition, buyer power usually enhances consumer welfare, whereas the effect on dynamic efficiency remains more ambiguous. Therefore, one question is extremely topical: how to address potential buyer power issues in a manner which at the same time secures the possibility to compete with choice and innovation and does not undermine buyer power's positive effects on consumer welfare?

# FRANCE

*(Version française)*

## 1. Développements récents dans le secteur agro-alimentaire

Le secteur agroalimentaire qui inclut la production agricole et l'élevage, les industries de transformation et le secteur de la grande distribution, occupent une place importante de l'économie française, et sa compétitivité a un impact direct sur le bien-être du consommateur, que ce soit en termes de prix, mais également de choix et de qualité, puisqu'il représente environ 13% du budget des ménages. A ce titre, il fait l'objet d'une attention particulière de l'Autorité de la concurrence, qui a notamment consacré une étude thématique à ce secteur dans son rapport annuel pour l'année 2012[1].

La production agricole et l'élevage occupe 966 300 actifs permanents, représentant 3,4 % de la population active. L'agriculture française est la première de l'Union européenne, la valeur de sa production hors subventions sur les produits atteignant 71,4 milliards d'euros en 2011.

Ce secteur se caractérise par des contraintes structurelles pesant sur l'offre, en raison notamment des problématiques de stockage et de transport de biens périssables ou de l'existence de cycles de production et de vente fixes en fonction de chaque produit, et de contraintes propres à l'économie française, particulièrement atomisées pour certains produits tels que le lait et l'élevage bovin, en dépit d'un mouvement de regroupement au sein de coopératives et entre coopératives. Par ailleurs, ce secteur est soumis à d'importantes variations en fonction de la conjoncture mondiale, liées à la volatilité du prix des intrants.

L'industrie agroalimentaire, c'est-à-dire la transformation valorise 70 % de la production agricole et constitue ainsi le principal débouché des quelque 500.000 exploitations agricoles. Il s'agit de la première industrie française regroupant 10 000 entreprises.

Elle se caractérise par un degré relativement élevé de concentration : environ 95 % du chiffre d'affaires et de la valeur ajoutée de l'industrie agroalimentaire sont générés par à peine 30 % de ces entreprises. Ainsi, si l'industrie agroalimentaire française est composée à 90 % de petites et moyennes entreprises et à 70 % de très petites entreprises de moins de 20 salariés, elle compte par ailleurs également de grands groupes mondiaux (tels que Danone, Lactalis, Pernod-Ricard, Bongrain) et des groupements coopératifs verticalement intégrés qui sont présents aux stades de la production et de la transformation (notamment Terrena et In Vivo), et dont certains sont d'envergure mondiale.

La grande distribution constitue un autre débouché incontournable des marchés agricoles et concentre plus des deux tiers des achats en produits alimentaires des ménages.

[1] http://www.autoritedelaconcurrence.fr/doc/etude_thema_2012.pdf

L'Autorité de la concurrence a relevé dans un avis concernant les contrats d'affiliation[2] que les grandes surfaces d'alimentation générale (hypermarchés, supermarchés et magasins de hard discount) fournissaient plus des deux tiers du marché des produits alimentaires. En 2012, les six principaux groupes de distribution à dominante alimentaire, tous d'origine française (Auchan, Carrefour, Casino, E. Leclerc, ITM Entreprises et Système U), détenaient près de 90 % de parts de marché.

L'application du droit de la concurrence au secteur agricole tient compte des efficiences économiques liées à certaines formes de coopération. Combinée au droit des pratiques restrictives, il vise à accompagner le renforcement du pouvoir de négociation de ces acteurs face à la grande distribution et est susceptible d'assurer à long terme davantage de choix en termes d'offres de produits, de prix et de qualité (cf. point I). Sur le marché aval de la grande distribution, l'Autorité de la concurrence a toutefois veillé à ce que le degré de concentration du marché ne conduise pas à des distorsions de concurrence (cf. point II).

## 2. De la production à la transformation des produits : le droit de la concurrence vise à stimuler la compétitivité et intègre les efficiences économiques

Le droit de la concurrence s'applique au secteur agricole (cf. point 1.1) et autorise largement des coopérations et opérations de concentration porteuses d'efficiences entre producteurs (cf. point 1.2). Le droit français des pratiques restrictives joue par ailleurs un rôle essentiel en ce qu'il régule les relations entre producteurs et distributeurs et participe ainsi à l'une des dimensions du bien-être des consommateurs à long terme, la variété des produits et la différenciation en prix et qualité (cf. point 1.3).

### *2.1 Le secteur agricole : un secteur soumis au droit de la concurrence*

Au niveau européen, l'article 42 du Traité sur le fonctionnement de l'Union européenne (TFUE) prévoit que le droit de la concurrence s'applique dans le respect des objectifs de la politique agricole commune tels que défini à l'article 39 du TFUE[3]. En France, le législateur français n'a pas exclu le secteur agricole du champ d'application du droit de la concurrence défini par les articles L. 420-1 et L. 420-2 du code de commerce prohibant les ententes et les abus de position dominante. Il a dessiné des exemptions liées au progrès technique à l'alinéa 2 du titre I de l'article L. 420-4 de ce même code. Cette disposition identifie plus particulièrement - sous réserve que toutes les conditions du progrès technique, analogues à l'article 101 paragraphe 3 TFUE soient remplies - les pratiques qui peuvent consister « *à s'organiser, pour les produits agricoles ou d'origine agricole, sous une même marque ou enseigne, les volumes et la qualité de production ainsi que la politique commerciale, y compris en convenant d'un prix de cession commun* »[4].

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2 Avis n°10-A-26 du 7 décembre 2010 relatif aux contrats d'affiliation de magasins indépendants et les modalités d'acquisition de foncier commercial dans le secteur de la distribution alimentaire.

3 L'article 39 du TFUE, auquel renvoie l'article 42 énumère les objectifs poursuivis par la politique agricole commune : accroître la productivité (a), assurer un niveau de vie équitable à la population agricole (b), stabiliser les marchés (c), garantir la sécurité des approvisionnements (d) et assurer des prix raisonnables aux consommateurs (e). Voir aussi en particulier l'article 175 du règlement (CE) n° 361/2008 du Conseil du 14 avril 2008, JO L 121 du 7 mai 2008 et le Règlement n° 26 du Conseil du 4 avril 1962 portant application de certaines règles de concurrence à la production et au commerce des produits agricoles, JO 30 du 20 avril 1962, p. 993/62, abrogé et remplacé par le règlement (CE) n° 1184/2006 du Conseil du 24 juillet 2006, JO L 214 du 4 août 2006, p. 7.

4 Cette disposition introduite par une loi de 1996 sur la loyauté et l'équilibre des relations commerciales (Loi n° 96-588 du 1er juillet 1996.) vise notamment les « signes de qualité » (labels, appellations d'origine, indications géographiques, etc.). A l'époque, les pouvoirs publics souhaitaient en effet que la concurrence puisse être animée par des entreprises indépendantes de petite taille et non uniquement par des grandes entreprises qui seraient seules capables d'affronter la concurrence internationale ou de conquérir des marchés si les petites et moyennes entreprises (PME) ne pouvaient pas se regrouper.

L'Autorité de la concurrence et la DGCCRF veillent au respect des règles de concurrence dans le secteur agricole, et ce essentiellement pour des ententes, accords ou pratiques concertées. Dans ce cadre, l'Autorité de la concurrence, sur plainte ou sur saisine du ministre chargé de l'économie (DGCCRF), a été conduite, à plusieurs reprises à sanctionner de telles pratiques. L'Autorité effectue dans ce cas une analyse concrète des pratiques en cause, de leur incidence sur la concurrence, du contexte dans lequel elles interviennent et de leurs justifications possibles. Chaque affaire appelle ainsi une application des règles de concurrence reposant sur un examen circonstancié des données factuelles et économiques du dossier.

En ce qui concerne spécifiquement le stade de la production agricole, l'Autorité de la concurrence a rappelé à plusieurs reprises l'interdiction des ententes entre opérateurs économiques indépendants, sans transfert de propriété, qui tendent à fixer les prix, à répartir les clients ou les marchés ou encore à limiter la production[5] et constituent des restrictions par objet.

Dans ses activités consultatives[6], l'Autorité de la concurrence a rappelé le bien-fondé, d'un point de vue économique, de cette interdiction retenue par les législateurs européen et français.

En effet, l'Autorité de la concurrence considère que des accords sur les prix ou les quantités sont inefficaces dans un marché intégré comme peut l'être le marché unique puisque rien n'interdit aux acheteurs – transformateurs ou distributeurs - de mettre en concurrence les produits agricoles français avec ceux de nos voisins européens et de les importer, si besoin est, lorsque ces derniers sont plus compétitifs. En outre, elle estime que de tels accords ou pratiques nuisent à la compétitivité agricole française en retardant le nécessaire mouvement de concentration de l'offre agricole encore trop atomisé à ce jour, alors que des exemples en France et au sein d'autres Etats de l'Union européenne ont montré que ce mouvement avait porté ses fruits dans certains secteurs tels que les céréales, les semences ou encore les betteraves sucrières. Ce constat vaut également pour certains transformateurs, intermédiaires dans la chaîne agro-alimentaires, qui doivent faire face à la double contrainte du pouvoir de négociation de la grande distribution, à l'aval, et aux exigences en matière de prix d'achat, en amont auprès des producteurs, ce qui peut entrainer une compression de leur marge.

Deux exemples récents d'ententes dont l'Autorité de la concurrence a été saisie sont plus particulièrement exposés ci-dessous.

En amont, au stade de la production agricole, l'Autorité de la concurrence, sur saisine de la DGCCRF, a sanctionné en mars 2012 10 producteurs d'endives à une sanction de 3,6 millions d'euros et leurs organisations professionnelles ( 7 syndicats) à une sanction de 320 000 euros pour avoir enfreint les règles de concurrence[7] et poursuivi leurs pratiques malgré des rappels à la loi effectués par la DGCCRF. L'Autorité de la concurrence a établi que la quasi-totalité du secteur avait mis en œuvre un plan global de

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5 En pratique plusieurs secteurs en France ont fait l'objet par l'Autorité de la concurrence de sanctions pécuniaires: le secteur des fraises (Décision n°03-D-36 du 29 juillet 2003, le secteur des choux-fleurs (Décision n°05-D-10 du 15 mars 2005), le secteur des céréales (Décision n°07-D-16 du 9 mai 2007), le secteur des endives (Décision n°12-D-08 du 6 mars 2012) et le secteur des farines (Décision n°12-D-09 du 13 mars 2012).

6 Voir avis n°09-A-48 du 2 octobre 2009 relatif au fonctionnement du secteur laitier (http://www.autoritedelaconcurrence.fr/pdf/avis/09a48.pdf) et avis n°08-A-07 du 7 mai 2008 relatif à la filière fruits et légumes (http://www.autoritedelaconcurrence.fr/pdf/avis/08a07.pdf)

7 Décision n°12-D-08 du 6 mars 2012 relative à des pratiques mises en œuvre dans le secteur de la production et de la commercialisation des endives.

gestion du marché afin de soustraire la fixation du prix des endives au jeu naturel de la concurrence. Un appel de cette décision est pendant devant la Cour d'appel de Paris[8].

Cette pratique, dont la forme et les modalités ont évolué pendant les quatorze années de sa mise en œuvre, s'est traduite notamment par la diffusion de consignes de prix minima de vente pour chaque catégorie d'endives, la coordination collective de la politique tarifaire et commerciale des producteurs, la détermination des volumes de vente et par la mise en place d'un système d'échanges d'informations sur les prix pratiqués par les producteurs qui a été détourné de son objet initial et utilisé pour s'assurer de la bonne application de l'entente.

L'Autorité de la concurrence a examiné les différents arguments invoqués par les participants pour expliquer cette infraction et constaté qu'ils n'étaient pas de nature à la justifier au regard des exemptions prévues par les textes en vigueur au niveau national et européen. Pour autant, elle a constaté que l'intégration de certains des acteurs au sein d'une association d'organisations de producteurs de commercialisation avec transfert de propriété, à partir de 2009, avait fait cesser les pratiques[9].

En aval, au stade des transformateurs, l'Autorité de la concurrence a sanctionné en février 2013 huit abatteurs de porcs ainsi que deux organismes professionnels à hauteur de 4,57 millions d'euros pour avoir notamment fixé de manière concertée pendant 12 semaines en 2009 leurs quantités de porcs achetées sur la principale zone de production porcine française dans le but de faire baisser le prix du porc payé aux éleveurs établi à partir d'une cotation de référence issue d'un marché au cadran bihebdomadaire[10]. Cet exemple illustre par ailleurs le fait que les règles de concurrence peuvent également contribuer à protéger les éleveurs contre des ententes en aval dans la chaîne de valeur[11]. Un appel de cette décision est pendant devant la Cour d'appel de Paris.

En mars 2012, l'Autorité de la concurrence a également sanctionné à hauteur de 242,4 millions d'euros plusieurs ententes dans le secteur de la farine en sachets dont 95, 5 million d'euros à 13 entreprises de meunerie françaises et allemandes pour une entente visant à limiter les importations de farine entre la France et l'Allemagne, et 146,8 millions d'euros à 7 meuniers français pour deux ententes visant à fixer le prix, à limiter la production et à répartir la clientèle de la farine en sachet vendue à la grande et moyenne distribution et aux enseignes du hard discount en France, dans le cadre des structures de commercialisation France Farine et Bach Mühle.[12] 14 des 17 entreprises sanctionnées ont fait appel.[13]

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8 Sur les 16 entreprises ayant formé un recours, (6 syndicats et 10 organisations de producteurs), 14 ont demandé un sursis à exécution du paiement des sanctions auprès du premier président de la Cour d'appel de Paris sur le fondement du second alinéa de l'article L.464-7 du code de commerce, qui leur a été accordé.

9 S'agissant du montant de la sanction, l'Autorité a tenu compte, d'une part, de l'impact limité de cette entente sur les prix au détail en raison du contre-pouvoir de la grande distribution et, d'autre part, des ressources financières limitées des producteurs.

10 Décision n° 13-D-03 du 13 février 2013 relative à des pratiques mises en œuvre dans le secteur du porc charcutier.

11 En l'espèce, il faut souligner que l'Autorité avait été saisie à la suite d'une plainte de quatre éleveurs porcins situés en Bretagne.

12 Décision n° 12-D-09 du 13 mars 2012 relative à des pratiques mises en œuvre dans le secteur des farines alimentaires.

13 Les trois meuniers les plus fortement sanctionnés ont demandé un sursis à exécution du paiement de la sanction auprès du premier président de la Cour d'appel de Paris et deux d'entres elles l'ont obtenu. L'Autorité de la concurrence s'est pourvue en cassation s'agissant de ces derniers. Par ailleurs, la direction

Ainsi, l'Autorité de la concurrence a eu l'occasion de rappeler à plusieurs reprises que le secteur agricole était soumis aux règles de concurrence au même titre que toutes les autres activités économiques et que certaines pratiques, comme celles consistant à s'entendre sur les prix, ne peuvent être admises quel que soit le stade d'activité concerné. Toutefois, le législateur européen a adopté des mesures qui tendent, dans certains secteurs (en particulier les secteurs du lait, de la viande bovine, des céréales ou encore de l'huile d'olive), à assouplir les règles de concurrence auxquelles sont soumis les agriculteurs (cf. infra point 1.2 qui précise ces mesures de façon plus détaillée).

### *2.2 L'application du droit de la concurrence: un levier pour la compétitivité du secteur*

Tout en rappelant clairement qu'une entente entre producteurs indépendants est illégale et que cette interdiction est justifiée d'un point de vue économique, l'Autorité de la concurrence a aussi mis en lumière, dans ses décisions comme dans ses avis, que d'autres formes de coopérations, conformes à la loi et porteuses d'efficacité économique pouvaient permettre aux différents opérateurs agricoles de s'adapter aux nouvelles conditions dans lesquelles ils sont appelés à remplir leurs missions.

En premier lieu, l'Autorité de la concurrence a rendu des avis sur des projets de textes législatifs ou réglementaires ou sur la situation concurrentielle de la chaîne agroalimentaire et a mis en exergue certaines pistes susceptibles de contribuer à un meilleur fonctionnement de l'ensemble du secteur agricole.

À titre d'exemple, l'Autorité de la concurrence s'est prononcée sur un certains nombre de problématiques concernant le secteur laitier[14] et la filière des fruits et légumes[15]. Dans le premier avis, l'Autorité avait été saisie sur le fonctionnement du secteur laitier au moment où ce dernier était victime d'une baisse brutale des prix à la production.

En l'état du droit au moment de sa saisine, l'Autorité de la concurrence avait souligné que si la diffusion de recommandations de prix aux producteurs par des organisations interprofessionnelles reconnues en France était dans le secteur laitier couverte par une exemption en droit national[16], cette pratique était susceptible d'enfreindre le droit de l'Union européenne et semblait difficilement pouvoir faire l'objet d'une exemption ou d'une dérogation. L'Autorité avait par ailleurs souligné qu'un tel système était peu efficace dans un contexte de concurrence internationale, la demande risquant *in fine* de se reporter vers l'étranger au détriment des producteurs français appliquant les prix recommandés.

Depuis cette date, des modifications du droit européen ont eu lieu. En particulier, dans le secteur du lait, les interprofessions du secteur peuvent améliorer la connaissance et la transparence de la production et des conditions de marché, notamment par la publication d'indicateurs de tendance - c'est-à-dire de données statistiques sur les prix, les volumes et les durées des contrats de livraison de lait cru qui ont déjà été conclus - ainsi qu'en fournissant des analyses de prospectives du potentiel de développement des marchés régionaux, nationaux et internationaux, pour contribuer à une meilleure coordination de la mise sur le marché. Les accords doivent être notifiés à la Commission, qui dispose de trois mois pour vérifier qu'ils ne sont pas incompatibles avec la réglementation de l'Union européenne. Elle peut interdire tout accord qui (i) institue un cloisonnement des marchés, (ii) crée des distorsions de concurrence qui ne sont pas indispensables pour atteindre les objectifs de la PAC, (iii) comporte la fixation de prix, (iv) conduit à

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générale des finances publiques a accordé à l'ensemble des meuniers français sanctionnés le bénéfice d'un étalement de paiement au titre de leur participation à l'entente franco-allemande et un sursis à paiement jusqu'au prononcé de la décision de la Cour d'appel au titre de leur participation à l'entente française.

14 Avis n° 09-A-48 du 2 octobre 2009 relatif au fonctionnement du secteur laitier.

15 Avis 08-A-07 du 7 mai 2008 relatif à l'organisation économique de la filière fruits et légumes.

16 Voir l'article L. 632-14 du code rural et de la pêche maritime.

l'indisponibilité d'une proportion excessive du produit concerné ou (v) crée des discriminations ou éliminent la concurrence pour une partie substantielle des produits en question. Un accord intervenu en juin 2013 entre le Parlement européen et le Conseil dans le cadre de la modification du règlement n°1234/2007 d'organisation du marché unique prévoit l'extension de ces dispositions à toutes les organisations communes de marché.

Dans ces deux avis, l'Autorité de la concurrence avait en revanche mis en avant un outil juridique encore peu utilisé et qui lui semblait pertinent pour tenter de réduire les déséquilibres existant dans les relations commerciales entre agriculteurs et acheteurs dans la mesure où ils introduisent une certaine visibilité pour les opérateurs du marché, tant pour les approvisionnements, au bénéfice des transformateurs, que pour la planification des investissements et des achats d'intrants, pour les producteurs : la contractualisation. L'Autorité de la concurrence a ainsi souligné les bénéfices de contrats-type portant sur plusieurs années, définissant des volumes, des prix et les conditions de leur évolution à moyen terme ainsi que des éléments de qualité, permettant de donner la visibilité nécessaire aux producteurs mais également aux transformateurs, qui pourraient ainsi avoir une meilleure prévisibilité de leurs approvisionnements et de leurs coûts, pour autant que le contenu de chaque contrat reste négocié individuellement. De même, elle a indiqué que la mise en place de clauses de révision des contrats en fonction de l'évolution des prix et des coûts était possible dès lors qu'elles font l'objet d'une négociation bilatérale.

La loi de modernisation de l'agriculture et de la pêche de 2010 (la « LMAP »)[17] rend désormais possible la contractualisation obligatoire par la conclusion de contrats de vente écrits entre producteurs et acheteurs lorsque ces produits sont destinés à la revente ou à la transformation. Cette loi reprend ainsi le socle de propositions de l'Autorité de la concurrence dans ces deux avis, socle depuis repris au niveau de l'Union européenne dans la version modifiée du règlement Organisation Commune de Marché Unique adoptée en juin 2013.

La LMAP prévoit une saisine pour avis de l'Autorité de la concurrence en cas de définition de contrats-type par voie réglementaire ou par celle d'une convention collective[18]. Sur ce fondement, l'Autorité s'est prononcée à de nombreuses reprises sur la mise en œuvre de la contractualisation, ce qui témoigne de l'intérêt de cet outil[19].

Par ailleurs, l'Autorité de la concurrence a mis en avant d'autres pistes telles que le développement de marchés à terme, le recours aux assurances publiques et la promotion des produits de qualité comme moyen de garantir un revenu stable et équitable aux agriculteurs. En particulier, l'Autorité de la concurrence estime que la différenciation des produits agricoles de qualité protégés par des labels ou appellations est un atout pour l'agriculture française et européenne car il s'agit d'un moyen permettant à la fois de se positionner sur un segment du marché où s'exerce une moindre pression sur les prix et correspond dans le même temps à une attente forte de la part des consommateurs de plus en plus soucieux de la qualité et de l'origine des produits qu'ils consomment.

En deuxième lieu, l'Autorité de la concurrence a mis l'accent sur l'existence de formes de coopérations licites et efficaces permettant aux différents opérateurs agricoles (notamment les producteurs et transformateurs) de s'adapter aux conditions de marché en vue de garantir un fonctionnement

[17] Article L. 631-24 du code rural introduit par la Loi n° 2010-874 du 27 juillet 2010.

[18] Article L. 632-4 du code rural et de la pêche maritime.

[19] Voir en particulier les avis n°10-A-28 concernant le secteur des fruits et légumes et le secteur laitier, avis n°11-A-03 concernant l'élevage ovin, avis n°11-A-12 concernant la dinde, avis n°11-A-14 concernant les vins de la région de Bergerac. Par ailleurs, l'Autorité s'est prononcée à plusieurs reprises sur de tels accords sans publier d'avis spécifique. Ce fut notamment le cas dans les secteurs du vin, des prunes, de la chicorée à boisson, du tabac, de l'armagnac, du lin, des plantes potagères et des fleurs.

concurrentiel du secteur qui soit pérenne dans la préservation de débouchés pour les agriculteurs et favorise ainsi la diversité au bénéfice du consommateur.

Comme elle l'avait relevé en 2009 dans son avis concernant le secteur laitier[20], dans le cas où l'offre est atomisée, la concentration (par le regroupement des coopératives) et l'intégration verticale (notamment par l'acquisition par des coopératives d'actifs dans le secteur de la transformation et de la distribution) peuvent être des moyens structurels de rééquilibrer le pouvoir de négociation au profit des producteurs tout en maintenant une diversité de l'offre au profit des consommateurs.

Ainsi, entre la création de l'Autorité de la concurrence en mars 2009 et le 1er septembre 2013, 52 opérations de concentrations ont été notifiées par des coopératives agricoles et autorisées, dont trois sous condition de la mise en œuvre d'engagements pour répondre à des préoccupations de concurrence.

S'agissant de la question de l'impact concurrentiel des opérations notifiées par des coopératives, l'Autorité n'a identifié de problèmes de concurrence que lorsque la concentration aboutissait à la création de monopoles locaux ou à un risque de verrouillage des agriculteurs dans l'écoulement de leurs produits ou dans leurs achats d'agrofournitures en raison des liens qui les unissent à des coopératives.

Deux cas peuvent illustrer l'intervention de l'Autorité de la concurrence, tant s'agissant de la question de la liberté de choix dans l'approvisionnement en intrants des agriculteurs :

- Dans la décision n°11-DCC-150[21], l'Autorité de la concurrence a constaté que l'opération en cause risquait de limiter significativement la concurrence sur les marchés de la fourniture d'intrants aux agriculteurs dans trois départements de la région Bretagne dans la mesure où l'opération conférait à la coopérative Agrial une très forte position sur ces marchés et où celle-ci, de par ses statuts, liait le fait pour les éleveurs de livrer leur lait à la coopérative à la condition de s'approvisionner en intrants auprès d'elle à hauteur de 80 % de leurs achats. Les adhérents n'auraient pas eu d'autre choix que la nouvelle entité pour la collecte de lait et auraient été contraints de s'approvisionner quasi-exclusivement aussi en produits d'agrofourniture auprès de la coopérative, ce qui était de nature à inciter la coopérative à relever le prix de ces produits.

  L'Autorité de la concurrence a ainsi constaté que la nouvelle entité acquérant une position particulièrement forte en matière d'agrofourniture dans les zones concernées (avec des parts de marché trois fois ou quatre supérieures à celle des négociants ou entreprise en concurrence avec elle sur ce marché), elle serait donc en mesure d'augmenter fortement les prix au détriment des coopérateurs sans que le retour aux coopérateurs des excédents - hypothèse que l'Autorité de la concurrence a examinée avec attention - ne suffise à limiter ce risque. L'opération a donc été autorisée sous réserve que la coopérative s'engage à modifier ses statuts pour abaisser à 50 % le taux d'approvisionnement obligatoire en intrants auprès de la coopérative sans pour autant remettre en cause le modèle coopératif.

- De même, dans la décision n°12-DCC-42 relative à la fusion entre les coopératives Champagne Céréales et Nouricia, l'Autorité de la concurrence a souligné la nécessité que les agriculteurs puissent (i) avoir le choix localement entre au moins deux fournisseurs de produits d'agrofournitures afin d'être en mesure de négocier les prix de leurs intrants (ii) ainsi que d'avoir un choix en matière de collecte de leur production céréalière. En l'espèce, compte tenu de la situation concurrentielle particulière sur le marché de la vente de produits d'agrofournitures dans

[20] Avis n° 09-A-48 du 2 octobre 2009 relatif au fonctionnement du secteur laitier.

[21] Décision 11-DCC-150 du 10 octobre 2011 relative à la prise de contrôle exclusif de la coopérative Elle-et-Vire par le groupe coopératif Agrial.

un département (Haute-Marne), l'Autorité de la concurrence a conditionné l'opération à l'engagement des parties de ne pas s'opposer à la sortie du groupe coopératif EMC2, leur principal concurrent sur le marché local concerné, d'une structure commune auxquelles elles appartenaient ensemble et qui agissait comme central d'achats.

Il s'agissait donc, dans des cas exceptionnels, de préserver une marge de liberté aux éleveurs membres d'une coopérative, tout en laissant intact le modèle coopératif et le principe du regroupement ou de l'union entre coopératives. L'Autorité de la concurrence n'a pas porté d'appréciation de principe sur le modèle coopératif, mais a pris en compte, dans les deux décisions précitées, une configuration de marché spécifique. Elle a souligné, dans d'autres décisions de concentration dans le secteur laitier, dont la situation concurrentielle était différente, que l'existence d'un accord d'approvisionnement exclusif pouvait permettre de garantir à l'ensemble des membres une sécurisation de leurs débouchés d'autant plus appréciable que l'opération prenait place dans une conjoncture marquée par une surproduction de lait en France[22].

L'approche suivie par l'Autorité de la concurrence quant à la nature même des coopératives agricoles a été précisée dans une annexe de ses lignes directrices relatives au contrôle des concentrations, et plus particulièrement dans leur version révisée publiée le 10 juillet 2013[23]. Ce texte témoigne de la prise en compte par l'Autorité de la concurrence des spécificités des coopératives agricoles.

Ainsi, l'Autorité de la concurrence rappelle que la spécificité des liens unissant les coopératives à leurs adhérents[24] est prise en compte pour l'analyse des marchés les mettant en présence comme les marchés amont sur lesquels les coopératives collectent les produits des adhérents ou les marchés de l'agrofourniture sur lesquels les adhérents s'approvisionnent en intrants auprès des coopératives. L'Autorité de la concurrence tient notamment compte du fait que les bénéfices des opérations réalisées par les coopératives avec leurs adhérents leurs sont redistribués. Toutefois, dans ses lignes directrices et en accord avec sa pratique, elle rappelle que la spécificité des liens unissant les coopératives à leurs adhérents ne suffit pas à considérer que la coopérative constitue avec ses membres une entité juridique unique dans la mesure où aucun agriculteur-adhérent n'exerce d'influence déterminante sur la coopérative.

Dans sa pratique décisionnelle en matière de concentration, l'Autorité de la concurrence a également analysé les effets unilatéraux d'une concentration sur le marché aval de la commercialisation de produits bruts ou transformés, qui a nécessité des engagements de la part des parties. Dans une décision dans le secteur du sucre[25], elle a considéré que la situation de monopole résultant de la fusion au sein du même groupe des deux sociétés commercialisant le sucre produit sur l'île de La Réunion à destination des distributeurs et des industriels locaux risquait de conduire à une hausse des prix du sucre pour les consommateurs réunionnais. Au regard de ces effets, elle a autorisé la prise de contrôle de Quartier Français par Tereos (contrôlée exclusivement par une union de coopératives) sous réserve de la cession par la société Tereos d'actifs permettant de maintenir deux offres indépendantes sur les marchés de l'approvisionnement en sucre de bouche et en sucre industriel sur l'île. Cette cession s'est d'ailleurs effectuée sans problème particulier à un consortium composé d'investisseurs industriels et financiers.

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22 Décision 13-DCC-47 du 17 avril 2013 relative à la prise de contrôle exclusif de la société coopérative agricole Les Fromageries de Blâmont par la société coopérative Sodiaal Union paragraphe 48 ; voir également la décision 11-DCC-150 du 10 octobre 2011 relative à la prise de contrôle exclusif de la coopérative Elle-et-Vire par le groupe coopératif Agrial, paragraphe 68.

23 Lignes directrices révisées du 10 juillet 2013 relatives au contrôle des concentrations.

24 La coopérative et ses adhérents entretiennent une double relation capitalistique et économique.

25 Décision 10-DCC-51 du 28 mai 2010 relative à la prise de contrôle exclusif du Groupe Quartier Français par Tereos.

L'approche suivie par l'Autorité de la concurrence en matière de contrôle des concentrations doit toutefois être différenciée de sa pratique en matière d'ententes anticoncurrentielles, où le facteur critique d'analyse est le transfert de propriété ou non des produits commercialisés.

En troisième et dernier lieu, en dehors du cadre coopératif, d'autres formes de regroupements sont admises par le droit de la concurrence, qui offre quatre grandes catégories de flexibilités :

- La première flexibilité concerne la possibilité pour les organisations de producteurs, sous certaines conditions de parts de marché, de jouer le rôle de courtiers pour accroître leur volume de vente et donc leur pouvoir de négociation auprès des transformateurs au bénéfice de l'ensemble de leurs membres, qui reçoivent ainsi une rémunération plus élevée.

- La deuxième flexibilité a été mise en avant dans l'avis 09-A-48 du 2 octobre 2009 précité. Dans ce dernier, l'Autorité de la concurrence a préconisé, dans le prolongement de l'avis 08-A-07 du 7 mai 2008 relatif à l'organisation économique de la filière fruits et légumes, de généraliser les dispositions du règlement relatif à l'organisation commune de marché des fruits et légumes[26] au secteur du lait. Ces dispositions permettent à une association d'organisations de producteurs, sous réserve qu'elle ne soit pas en position dominante, d'être chargée, même si elle ne détient pas la propriété des produits, comme c'est le cas pour une coopérative, de la commercialisation des produits et de l'optimisation des coûts de production. Ces dispositions s'appliquaient jusqu'à peu sans préjudice du règlement n°(CE) 1184/2006, qui exclut la fixation commune de prix[27].

  Depuis cette date, la Commission européenne a proposé d'étendre ce dispositif à l'ensemble des organisations de producteurs et un accord entre le Parlement européen et le Conseil a été conclu en vue de la suppression de l'exigence d'absence de position dominante afin de bénéficier de ces dispositions.

- La troisième catégorie de flexibilité concerne la mise en commun d'outils de stockage ou de production, qui peut constituer une collaboration horizontale source de progrès économique. En deçà d'un seuil de 20%, ces accords sont acceptés. Au-delà, une analyse au cas par cas est nécessaire[28].

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26 Règlement (CE) n° 1182/2007 du Conseil du 26 septembre 2007 établissant des règles spécifiques pour le secteur des fruits et légumes, modifiant les directives 2001/112/CE et 2001/113/CE ainsi que les règlements (CEE) n° 827/68, (CE) n° 2200/96, (CE) n° 2201/96, (CE) n° 2826/2000, (CE) n° 1782/2003 et (CE) n° 318/2006, et abrogeant le règlement (CE) n° 2202/96.

27 Une brochure de la Commission européenne fait écho à cet avis. Elle expose que « *Les règles de concurrence de l'UE permettront, sous certaines conditions, une commercialisation conjointe du lait cru, y compris par le biais d'organisations ou d'associations intermédiaires. De tels accords sont généralement acceptés s'ils n'incluent pas, directement ou indirectement, de fixation des prix, et si la part de marché totale des agriculteurs impliqués dans l'accord ne dépasse pas 15 %. Au-delà d'une telle part de marché, l'accord n'est pas présumé illégal, mais une évaluation au cas par cas est nécessaire.* » (Brochure de la Commission européenne, *Comment la politique de concurrence de l'UE aide les producteurs de lait en Europe*). Depuis la publication de cette brochure, le règlement européen n°261/2012 du 14 mars 2012 a été adopté offrant désormais, sous certaines conditions, la possibilité aux organisations de producteurs et aux associations d'organisations de producteurs de négocier au nom de leurs membres (cf. infra). Toutefois, les éléments mis en avant dans cette brochure sont toujours transposables dans les autres secteurs agricoles et qui ne font pas l'objet d'exemptions partielles ou totales.

28 Lignes directrices sur l'applicabilité de l'article 101 du traité sur le fonctionnement de l'Union européenne aux accords de coopération horizontale. Voir aussi la Brochure de la Commission européenne Comment la

- La quatrième catégorie de flexibilité porte sur la fixation en commun de prix, qui est autorisée, dans des cas très exceptionnels, si l'une ou l'autre des deux conditions suivantes sont satisfaites: (i) si un acheteur important ne souhaite pas avoir affaire à une multitude de prix et réclame un prix d'approvisionnement unique; (ii) si les agriculteurs conviennent du lancement conjoint d'un nouveau produit, telle une marque de lait commune, et si cette initiative ne peut raisonnablement aboutir qu'avec la normalisation de tous les aspects de la commercialisation, y compris le prix [29].

Au niveau de l'Union européenne, des mesures d'adaptation de l'application du droit de la concurrence ont été adoptées ou sont en cours de discussion.

Dans le secteur du lait, le règlement (UE) n°261/2012, entré en vigueur au début du mois d'avril 2012, a modifié le règlement n°1234/2007 du Conseil du 22 octobre 2007 (dit « règlement d'organisation commune du marché unique ») en prévoyant la possibilité pour une organisation de producteurs de négocier au nom des producteurs qui en sont membres, pour tout ou partie de leur production conjointe, des contrats de livraison de lait cru d'un agriculteur à un transformateur. Les négociations peuvent être menées par l'organisation de producteurs, qu'il y ait ou non transfert de propriété du lait cru des agriculteurs à l'organisation de producteurs et que le prix négocié soit ou non identique pour la production conjointe de tous les agriculteurs membres ou de seulement certains d'entre eux. Pour une organisation de producteurs spécifique, le volume de lait cru faisant l'objet de ces négociations ne doit pas excéder 3,5% de la production totale de l'Union et le volume de lait cru faisant l'objet de ces négociations produit dans tout Etat membre excéder 33% de la production nationale totale de l'Etat membre concerné[30]. La Commission européenne, dans le cas de négociations portant sur plus d'un Etat membre, ou une autorité nationale de concurrence, dans le cas contraire, peut rouvrir la négociation faisant intervenir l'organisation de producteurs ou ne pas l'autoriser si celle-ci a un effet d'exclusion de la concurrence ou si elle affecte sérieusement des PME de transformation de lait cru.

Par ailleurs, des discussions sont en cours au sujet de la modification du règlement d'organisation commune du marché unique. Dans ce cadre, il est prévu que des dispositions équivalentes à celles entrées en vigueur dans le secteur du lait puissent s'appliquer également, sous réserve de certaines conditions, pour le secteur bovin, le secteur de l'huile d'olive ainsi que pour celui des céréales. Enfin, comme cela a déjà été rappelé, le Parlement européen et le Conseil examinent également le principe selon lequel les interprofessions du secteur du lait puissent diffuser des indicateurs de tendance (cf. supra).

### *2.3 Le droit des pratiques restrictives, permet de préserver un certain équilibre des relations commerciales dans le secteur agricole*

En France, le secteur de la distribution alimentaire se caractérise par une concentration élevée, proche de celle d'un oligopole. La structure du marché est donc propice au développement des pratiques commerciales déloyales ou pratiques restrictives de concurrence entre entreprises. La nature des produits en cause, très souvent périssables et élaborés à partir de matières premières dont les prix sont soumis à fluctuations, explique également les tensions existantes entre les cocontractants.

Le code de commerce dresse une liste de clauses et de pratiques abusives dans les relations commerciales, pouvant être civilement sanctionnées. Par exemple, engage la responsabilité de son auteur et l'oblige à réparer le préjudice causé le fait d'obtenir ou de tenter d'obtenir d'un partenaire commercial un

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politique de concurrence de l'UE aide les producteurs de lait en Europe (www.autoritedelaconcurrence.fr/doc/dg_comp_brochure_lait.pdf).

29 Idem.

30 Règlement n°1234/2007 du Conseil du 22 octobre 2007, article 126 quater.

avantage quelconque ne correspondant à aucun service commercial effectivement rendu ou manifestement disproportionné au regard de la valeur du service rendu, ou de soumettre ou de tenter de soumettre un partenaire commercial à des obligations créant un déséquilibre significatif dans les droits et obligations des parties.

Le code de commerce dresse aussi une liste de pratiques abusives dans les relations commerciales spécifiques au secteur agroalimentaire ou agricole. Par exemple, l'article L. 442-9 du code de commerce permet de lutter contre la pratique des prix abusivement bas dans un contexte de crise conjoncturelle ou de forte fluctuation des cours.

La loi n° 2010-874 du 27 juillet 2010 de modernisation de l'agriculture et de la pêche avait pour objectif la définition et la mise en œuvre d'une politique publique de l'alimentation, et de renforcer la compétitivité de l'agriculture française. Cette loi a intégré dans le code de commerce de nouvelles dispositions visant à protéger le monde agricole.

Cette loi a permis de rendre obligatoire, par extension d'un accord interprofessionnel ou à défaut par décret en Conseil d'Etat, la contractualisation écrite entre producteurs ou organisations de producteurs et leurs clients professionnels (comprenant les distributeurs), achetant des produits agricoles livrés sur le territoire français. La conclusion du contrat doit être précédée d'une proposition de contrat, conforme au décret, par l'acheteur.

Les remises, rabais et ristournes pour l'achat de fruits et légumes frais imposés par un acheteur, distributeur ou prestataire de services sont désormais interdites. En effet, le caractère éminemment périssable des produits frais tendait à déséquilibrer les négociations tarifaires entre des fournisseurs condamnés à vendre leur production dans un laps de temps très court et des acheteurs tentés de profiter de cette situation. Dans le cadre du projet de loi consommation, actuellement débattu au Parlement, cette interdiction est assouplie. En effet, des rabais seront possibles dans certains cas spécifiques lors de problèmes de qualité par exemple.

La circulation des fruits et légumes destinés à un acheteur implanté sur le territoire national est désormais conditionnée, à la détention d'un bon de commande établi par l'acheteur ou d'un contrat passé avec le commissionnaire ou le mandataire. La loi précise que ces deux documents doivent notamment contenir des modalités de détermination du prix. La détention du bon de commande vise à encadrer la pratique du différé de facturation par laquelle le grossiste ne rémunère le fournisseur de fruits et légumes qu'après avoir revendu les produits fournis et en fonction du prix de revente pratiqué. De même, la détention du contrat permet de clarifier la pratique de la vente à la commission par laquelle le fournisseur confie ses produits à un commissionnaire ou mandataire chargé de trouver un acheteur au meilleur prix, en échange d'une rémunération habituellement proportionnelle au prix de vente.

La pratique de la publicité hors du lieu de vente a été davantage encadrée. L'accord préalable du fournisseur sur le prix de cession des fruits et légumes doit désormais figurer dans un contrat écrit passé entre acheteur et vendeur. Chacune des parties doit détenir un exemplaire de ce contrat avant la diffusion de l'annonce de prix et être en mesure de le présenter aux agents chargés du contrôle.

L'article L. 443-1 du code de commerce permet de limiter les délais de paiement des producteurs de denrées alimentaires et ainsi de préserver leur trésorerie. Le non respect de cet article est passible d'une amende de 75 000 euros. Le délai de paiement, par tout producteur, revendeur ou prestataire de services, ne peut être supérieur :

- À trente jours après la fin de la décade de livraison pour les achats de produits alimentaires périssables et de viandes congelées ou surgelées, de poissons surgelés, de plats cuisinés et de conserves fabriqués à partir de produits alimentaires périssables, à l'exception des achats de produits saisonniers effectués dans le cadre de contrats dits de culture visés aux articles L. 326-1 à L. 326-3 du code rural ;

- À vingt jours après le jour de livraison pour les achats de bétail sur pied destiné à la consommation et de viandes fraîches dérivées ;

- À trente jours après la fin du mois de livraison pour les achats de boissons alcooliques passibles des droits de consommation prévus à l'article 403 du code général des impôts.

- Des dérogations à ces dispositions sont possible dans le secteur viti-vinicole, à condition d'être conclus sous forme d'accords interprofessionnels.

La DGCCRF procède à des investigations notamment dans le secteur du commerce de détail alimentaire et non alimentaire dans le cadre d'un plan de contrôle annuel sur les relations interentreprises ou d'enquêtes spécifiques à un secteur.

Sur les 211 indices de dysfonctionnement de concurrence établis par les services d'enquêtes de la DGCCRF en 2012 dans le cadre des investigations annuelles sur les relations commerciales, 74 concernaient le secteur alimentaire.

Lorsque les investigations mettent en exergue des manquements aux règles du code de commerce, le Ministre de l'économie via les services de la DGCCRF, dispose d'un droit d'agir en justice à l'encontre de l'auteur des pratiques, que ce soit devant les juridictions pénales ou commerciales, et ce sans avoir à recueillir le consentement de la victime de la pratique qui doit, dans certains cas, être informée de cette action.

Le Ministre en charge de l'économie peut demander aux juridictions commerciales de prononcer la nullité des clauses ou contrats illicites, la cessation des pratiques abusives, la répétition de l'indu au profit des fournisseurs lésés par la pratique incriminée et enfin une amende civile.

Depuis 2001, 142 affaires ont été engagées devant les juridictions commerciales et ont abouti à ce jour à 68 condamnations à une amende civile et 28 condamnations au remboursement des sommes indûment perçues.

Au demeurant, la plupart des affaires (26 sur 38) actuellement pendantes devant les tribunaux dans lesquelles le Ministre est partie ou intervenant volontaire porte sur des pratiques déloyales mises en œuvre dans le secteur du commerce de détail alimentaire (certaines affaires concernent plusieurs pratiques) :

- 12 portent sur des faits d'obtention d'un avantage sans contrepartie

- 10 portent sur un déséquilibre significatif dans les droits et obligations des parties

- 5 portent sur un abus de puissance d'achat (cette pratique n'existe plus dans la loi, elle a été remplacée par la notion de déséquilibre significatif)

- 2 portent sur des faits de rupture brutale

- 1 porte sur des déductions d'office de pénalités

- 1 porte sur des délais de paiement abusifs

Le projet de loi relatif à la consommation, actuellement en débat au Parlement, renforcera les moyens d'action de la DGCCRF en vue d'une meilleure protection de l'ordre public économique

Le nouvel article L. 441-8 du code de commerce permettra une meilleure prise en compte de la volatilité des cours des matières premières dans les contrats portant sur la vente des produits alimentaires. Il s'agit ici d'imposer aux parties d'anticiper, dès leur négociation, les effets négatifs des fluctuations, parfois erratiques, de ces cours sur l'équilibre des contrats. Les parties devront ainsi prévoir, en amont, les conditions dans lesquelles elles devront, face à de telles fluctuations, procéder à une renégociation du prix.

De plus, le projet de loi prévoit que la DGCCRF sera dotée d'une capacité d'injonction et de sanctions administratives. Les sanctions administratives remplaceront les sanctions civiles et pénales en matière de délais de paiement et de formalisme contractuel. L'action de la DGCCRF, notamment dans les secteurs agroalimentaire et agricole sera immédiate et plus efficace

La « soft law » tient également une large place dans le dispositif actuel :

- Le médiateur des contrats agricoles a une expertise des contrats amont et de l'organisation économique particulière de ce secteur.

- Le développement de l'Observatoire de la formation des prix et des marges des produits alimentaires, est important pour fournir aux filières, les éléments permettant un dialogue plus objectif entre leurs différents maillons.

- La Commission d'examen des pratiques commerciales, créée en 2011 par la loi n° 2001-420 du 15 mai 2001 relative aux nouvelles régulations économiques est une instance de discussion entre fournisseurs, distributeurs et administration, qui édicte des avis et rédige des réponses à des saisines, qu'elles proviennent des tribunaux ou des professionnels.

- Le code de commerce ouvre ponctuellement la possibilité de dérogations par accords interprofessionnels (notamment en matière de délais de paiement ou de rupture brutale) afin de tenir compte des spécificités sectorielles.

- Des engagements de bonne conduite (ou « engagements ») sont ponctuellement pris par les acteurs économiques, devant les autorités publiques.

Enfin, des réflexions sur en cours sur les voies d'action les plus pertinentes en vue de préserver l'équilibre et la loyauté des relations commerciales au niveau européen.

La commission européenne a lancé une consultation sur l'opportunité de prévoir la sanction des pratiques commerciales déloyales[31] au niveau communautaire.

Plus de 500 millions d'Européens consomment chaque jour, en toute sécurité, les différents produits alimentaires et boissons que proposent les nombreux opérateurs (UE et non-UE) sur le marché. Ce poste de consommation représente en moyenne 15 % des dépenses des ménages. Moteur vital de l'économie, le

[31] Les pratiques commerciales déloyales sont des pratiques qui s'écartent manifestement de la bonne conduite commerciale et sont contraires aux principes de bonne foi et de loyauté. Les PCD sont généralement imposées lorsqu'il y a un déséquilibre entre une partie forte et une partie faible et peuvent exister des deux côtés de la relation entre entreprises et à toute étape de la chaîne d'approvisionnement.

secteur agro-alimentaire européen comprend 17 millions d'entreprises dans le secteur agricole, l'industrie de transformation alimentaire et les services connexes.

Afin de lutter contre les pratiques commerciales déloyales dans le secteur de l'alimentation, une plateforme d'experts sur les pratiques contractuelles interentreprises a été mise en place en 2010 au sein du Forum à haut niveau sur l'amélioration du fonctionnement de la chaîne d'approvisionnement alimentaire. Les pratiques contractuelles interentreprises, la compétitivité de l'industrie agroalimentaire et la surveillance des prix des denrées alimentaires ont été les trois grands axes de l'approche globale de ce Forum.

Dans le prolongement de ces travaux, la commission a adopté, le 31 janvier 2013, un plan d'action européen pour le commerce de détail et a lancé une consultation sur les pratiques commerciales déloyales au sein de la chaîne d'approvisionnement interentreprises alimentaire et non alimentaire. Le livre vert sur les pratiques commerciales déloyales au sein de la chaîne d'approvisionnement interentreprises alimentaire et non alimentaire dénonce la rédaction de clauses ambiguës, l'absence de contrats écrits, les changements rétroactifs dans le contrat, les transferts abusifs de risque commercial, la cessation abusive de relation commerciale par exemple. Les résultats de la consultation sont en cours d'analyse et la Commission devrait prochainement annoncer les suites qu'elle entend proposer.

## 3. La distribution de produits agroalimentaires : favoriser la concurrence et protéger le consommateur

La distribution fait le lien entre les activités économiques menées en amont et en aval de la chaîne agroalimentaire. L'Autorité de la concurrence a fait de ce secteur l'une de ses priorités compte tenu de son importance pour l'économie et de son incidence sur le pouvoir d'achat des français. Elle s'est, dans ce cadre, penchée ces dernières années sur de nombreux aspects de ce secteur que ce soit au travers de cas individuels ou de recommandations par l'intermédiaire de son activité consultative.

S'agissant de ce stade de la chaîne agroalimentaire, son rôle en matière de contrôle des concentrations du secteur de la distribution peut être plus particulièrement relevé (cf. point 2.1). Elle a également énoncé des recommandations au regard des barrières tant réglementaires que contractuelles à l'implantation et au développement de nouveaux établissements (cf. point 2.2). Enfin, elle a mené une action spécifique dans les Départements d'Outre-mer (DOM) (Martinique, Guadeloupe, Ile de la Réunion, Guyane), dans lesquels la régulation concurrentielle a été récemment renforcée (cf. point 2.3).

### *3.1 Préserver la concurrence entre distributeurs au bénéfice des consommateurs : le contrôle des concentrations*

De manière générale, s'agissant du secteur de la distribution alimentaire, le contrôle des concentrations permet d'empêcher des rapprochements qui limiteraient substantiellement la concurrence au détriment des consommateurs, par exemple par la création ou le renforcement de positions dominantes au niveau local. L'Autorité de la concurrence peut ainsi être amenée à accepter des engagements de la part des parties afin de limiter les niveaux de concentration locale par le biais de cessions de magasins.

Le contrôle des concentrations dans le secteur de la distribution au détail obéit à un régime particulier depuis la loi de modernisation de l'économie du 4 août 2008[32] (la « LME »), qui a défini des seuils spécifiques de notification s'agissant des opérations dans le commerce de détail.

[32] Loi n° 2008-776 du 4 août 2008 de modernisation de l'économie.

Constatant que de nombreuses opérations susceptibles d'avoir un impact sur la concurrence au niveau local ne faisaient l'objet d'aucun contrôle au titre des concentrations en raison des seuils élevés de chiffres d'affaires prévus en droit français, comme l'avait relevé l'Autorité de la concurrence[33], le législateur a procédé à une réduction très significative des seuils de contrôle des concentrations dans ce secteur. Ainsi le premier seuil français, concernant le chiffre d'affaires mondial consolidé des parties, est passé de 150 à 75 millions d'euros. S'agissant du second seuil, concernant le chiffre d'affaires individuel réalisé en France par au moins deux des entreprises concernées par l'opération, ce dernier est passé de 50 à 15 millions d'euros.

Cette nouvelle disposition vise ainsi à mieux prévenir les opérations qui pourraient affaiblir substantiellement la concurrence dans certaines zones de chalandise, en permettant d'examiner des opérations qui n'étaient auparavant pas soumises au contrôle des concentrations. L'abaissement des seuils a ainsi conduit à contrôler de très nombreuses opérations dans le secteur de la distribution alimentaire.

L'Autorité de la concurrence a développé une pratique approfondie des opérations dans ce secteur : elle a rendu 225 décisions entre le 2 mars 2009[34] et le 1er septembre 2013, dont 8 sous réserve d'engagements, soit environ 4% des décisions.

Parmi ces décisions, la décision n°13-DCC-90 du 11 juillet 2013 concernant le passage d'un contrôle conjoint à un contrôle exclusif du groupe Casino sur le groupe Monoprix[35] mérite plus particulièrement d'être relevée en raison de son ampleur spécifique et de son caractère très récent.

Cette décision est intéressante à plusieurs égards :

- Tout d'abord, l'Autorité de la concurrence a relevé que si Casino détenait déjà le contrôle conjoint de Monoprix avant l'opération, le retrait de Galeries Lafayette du capital conduisait à une modification de la situation concurrentielle. En effet, dans la mesure où, avant l'opération, Casino et Monoprix se positionnaient sur le marché comme deux concurrents, avec la prise de contrôle exclusif de Monoprix, Casino pouvait désormais définir sa politique commerciale et en particulier sa politique tarifaire en toute autonomie.

- Ensuite, afin d'identifier les zones de chalandises soulevant des problèmes de concurrence, elle a appliqué dans sa décision plusieurs filtres successifs que sont (i) la part de marché en surface de la nouvelle entité (cette part de marché étant calculée en utilisant le test du « consommateur hypothétique »), (ii) le degré de concentration du marché à l'issue de l'opération, ainsi que (iii) la réduction du nombre de groupes concurrents accessibles aux consommateurs dans chaque zone de chalandise au terme de la concentration. Sur la base de cette méthode, elle a écarté de son analyse approfondie les zones de chalandises parisiennes dans lesquelles la nouvelle entité était amenée à disposer de moins de 60% de surfaces de vente et à faire face à au moins 3 groupes concurrents.

- L'Autorité de la concurrence a par ailleurs analysé, s'agissant des zones de chalandises parisiennes, la pression concurrentielle exercée par les hypermarchés implantés en périphérie de

33 Avis n°07-A-12 du 11 octobre 2007.

34 Date de création de l'Autorité et du transfert du contrôle des concentrations à cette dernière, le contrôle des concentrations étant auparavant sous la responsabilité de la Direction Générale de la Concurrence et de la Répression des Fraudes (DGCCRF), direction dépendant du ministère de l'économie.

35 Casino détenait déjà 50 % du capital de Monoprix et projetait de rachetait les 50% restants détenus par les Galeries Lafayette.

Paris. Les achats de consommateurs parisiens dans ces hypermarchés ne représentant que 5% de leurs dépenses, l'Autorité de la concurrence n'a pas intégré la totalité des surfaces de ces magasins dans le cadre du calcul des parts de marchés des parties. En revanche, à travers trois méthodes alternatives proposées, elle a évalué - pour chaque hypermarché de périphérie concerné- le poids qu'il représentait en réalité dans la consommation des clients parisiens et elle a pris en compte cette pression concurrentielle dans le calcul de la taille des marchés concernés par l'opération.

- Enfin, une fois les zones de chalandises problématiques identifiées, ayant soulevée l'existence de barrières à l'entrée sur les marché en cause, elle a estimé les risques de hausse de prix au terme de l'opération à partir du calcul des indices GUPPI (« *gross upward pricing pressure index* ») qui mesurent les reports de clientèle entre magasins en cas d'augmentation de prix et ont confirmé l'impact de l'opération sur les zones considérées[36].

Cette analyse, fondée sur différents outils d'analyse économique complexes qui sont d'ailleurs décrits de manière détaillée dans les nouvelles lignes directrices de l'Autorité de la concurrence en date du 10 juillet 2013, a conclu au risque de renforcement de la position dominante de Casino sur une cinquantaine de zones de chalandises, dont 47 à Paris. En réponse, Casino a présenté plusieurs propositions d'engagements, qui ont été améliorées au fil des discussions, la version finale de ces engagements répondant à toutes les préoccupations de concurrence soulevées par l'Autorité de la concurrence. Pour prévenir les risques d'atteinte à la concurrence, Casino s'est ainsi engagé (i) à céder un ensemble substantiel de surfaces de vente, dans les différentes zones concernées permettant le maintien d'une situation concurrentielle équilibrée (Casino limitant sa position à 50% dans toutes les zones concernées) et (ii) à ne pas acquérir pendant 10 ans d'influence directe ou indirect sur les actifs cédés.

Outre cette décision, l'Autorité de la concurrence a eu l'occasion de soumettre à des engagements l'autorisation d'une opération sur le marché de la distribution de détail de produits alimentaires à plusieurs autres reprises[37].

### *3.2 Renforcer la fluidité du secteur : des recommandations en vue de limiter les barrières à l'implantation de nouveaux établissements*

En France, la croissance rapide de la grande distribution dès les années 1960 a suscité des craintes relatives à l'affaiblissement du petit commerce. Le législateur a cherché, par le contrôle du développement

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36 En l'espèce, compte tenu de l'influence particulière déjà exercée par Monoprix sur Casino avant la réalisation de l'opération qui conduisait Casino à prendre en compte le report éventuel de ses consommateurs vers Monoprix au moment de décider d'une hausse des prix, l'Autorité de la concurrence a prix en compte ce facteur dans le calcul de l'indice GUPPI de Casino vers Monoprix. Elle n'a pas en revanche pas pris en compte ce facteur s'agissant du calcul de l'indice GUPPI de Monoprix vers Casino en retenant au contraire que Monoprix disposait de suffisamment d'autonomie avant l'opération pour fixer ses prix indépendamment de Casino (point 466 de la décision).

37 Voir notamment les décisions 10-DCC-25 du 19 mars 2010 dans le cadre de laquelle l'Autorité de la concurrence a autorisé l'acquisition de certaines sociétés du groupe de distribution Louis Delhaize par le groupe Hoio sous réserve de la cession d'un magasin à La Martinique, la décision 11-DCC-134 par laquelle l'Autorité de la concurrence a autorisé, sous réserve d'engagements, l'acquisition en Martinique d'un hypermarché Cora par le Groupe Bernard Hayot ou encore la décision du 10 mai 2013 n°13-DCC-57, dans le cadre de laquelle l'Autorité de la concurrence, constatant que, sur une des zones de chalandises, l'opération entraînait le passage de trois à deux opérateurs, a soumis l'autorisation de l'opération à la cession d'un magasin.

des grandes surfaces alimentaires, à concilier les objectifs de protection du petit commerce et de promotion d'une offre variée et de prix aussi concurrentielle que possible pour les consommateurs. Il a ainsi introduit des dispositions visant à réguler les implantations commerciales. Toutefois, cet environnement réglementaire, qui renforce la difficulté intrinsèque de trouver des emplacements adaptés à l'implantation d'une grande surface, tend parfois à freiner le libre jeu de la concurrence au détriment des consommateurs. A ces barrières à l'entrée de source réglementaire, s'ajoutent un certain nombre de freins, notamment contractuels, à l'implantation de nouvelles surfaces sur lesquels l'Autorité de la concurrence s'est par ailleurs penchée.

En premier lieu, elle est intervenue sur le sujet des barrières réglementaires injustifiées affectant le jeu concurrentiel sur le marché français à plusieurs reprises.

Dans son avis 04-A-18 du 18 octobre 2004, l'Autorité (alors Conseil de la concurrence) a analysé les conséquences économiques de l'interdiction de la revente à perte, mécanisme mis en œuvre par la loi n°96-585 du 1er juillet 1996 dite « loi Galland ».

Dans cet avis, le Conseil de la concurrence a toute d'abord constaté que cette loi avait favorisé le déplacement des négociations commerciales vers les marges arrière. Or, les avantages commerciaux obtenus en amont ne pouvant être répercutés en aval, les conséquences de cette loi ont été défavorables aux consommateurs. Par ailleurs, le Conseil de la concurrence avait relevé que la définition du seuil de revente à perte résultant de la loi Galland avait servi de mécanisme facilitateur à des pratiques anticoncurrentielles de fixation des prix de revente[38], sanctionnées par le Conseil dans plusieurs décisions[39].

Depuis cet avis, la définition du seuil de revente à perte a été amendée à deux reprises afin de rendre moins difficile la répercussion en faveur du consommateur des avantages tarifaires obtenus par le distributeur auprès du fournisseur[40]. La loi n°2008-776 de modernisation de l'économie du 4 août 2008 a par ailleurs assoupli les conditions de négociation commerciale entre le distributeur et chacun de ses fournisseurs et a levé l'interdiction de discrimination tarifaire[41] qui imposait aux distributeurs d'appliquer les mêmes conditions générales de vente à tous les fournisseurs.

Dans son avis 07-A-12 du 11 octobre 2007, le Conseil de la concurrence a mis en lumière l'impact défavorable sur la concurrence du système d'autorisation préalable, par une commission consultative nationale, des ouvertures et extensions de surfaces commerciales supérieure à 1000 m² puis, à compter de 1996, pour l'ensemble des surfaces commerciales supérieures à 300 m²[42]. Cette autorisation était fondée sur une série de critères en matière économique, environnementale, d'urbanisme et de politique de transport.

Le Conseil de la concurrence a rappelé dans son avis que (i) la limitation de l'installation de nouvelles grandes surfaces rend plus difficile l'arrivée de nouveaux entrants, notamment étrangers, susceptibles d'introduire plus de concurrence entre enseignes de distribution et protège ainsi les distributeurs en place et

38 Le fournisseur pouvait en effet fixer, dans ses conditions générales de vente, le prix facturé déterminant le seuil de revente à perte, tarif public qui devait être identique pour tous ses distributeurs en raison du principe de non-discrimination, et ensuite, négocier avec chaque distributeur le montant des marges arrière. La déconnexion entre le prix facturé et le prix unitaire effectif (net des marges arrière) permettait ainsi au producteur de fixer un prix plancher uniforme à ses distributeurs.

39 Voir pour illustration les décisions n°05-D-70 du 19 décembre 2005 et n°07-D-50 du 20 décembre 2007.

40 Loi n° 2005-882 du 2 août 2005 et loi lois du 2 août 2005 et loi n°2008-3 du 3 janvier 2008.

41 Ancien 1° du I de l'article L. 442-6 du Code de commerce.

42 Loi n°96-603 du 5 juillet 1996.

(ii) a constaté que la mise en œuvre de la loi avait eu un effet négatif sur l'emploi et avait conduit à des résultats peu conformes aux objectifs attendus, l'offre du petit commerce de proximité s'étant considérablement réduite au profit des distributeurs installés.

Le Conseil de la concurrence a donc recommandé, d'une part, de supprimer le dispositif existant de consultation des commissions et, d'autre part, de réduire l'examen des projets présentés à la seule instruction des documents d'urbanisme de portée générale et non sur le fondement de critères économiques. A tout le moins, il a été préconisé de rehausser les seuils d'autorisation (en rétablissant, a minima, le niveau antérieur à celui de 1996), de supprimer les critères de nature économique et d'abaisser le seuil d'examen préalable des concentrations dans le commerce de détail afin de mieux prévenir la constitution ou le renforcement de positions dominantes locales et de contrôler l'incidence de changements d'enseigne (cf. supra). C'est cette deuxième option proposée par le Conseil qui a été retenue par la LME.

En second lieu, s'agissant des barrières à l'entrée du marché de type non réglementaires (c'est à dire contractuelles ou résultants de pratiques commerciales), l'Autorité de la concurrence s'est saisie en 2010 de deux types de pratiques, qui ont chacune fait l'objet d'un avis le 7 décembre 2010.

Dans son avis 10-A-26, l'Autorité de la concurrence s'est intéressée aux pratiques relatives à la gestion du foncier commercial et aux relations contractuelles entre têtes de réseaux de franchises ou de coopératives, et magasins indépendants affiliés, qui représentent environ 70% du secteur. Elle a relevé que sur le marché français le niveau de concentration de certaines zones de chalandise, notamment sur les formats des hypermarchés et du commerce de proximité, était préoccupant et qu'il demeurait très fréquent qu'un groupe de distribution ne soit confronté, sur une zone de chalandise donnée, qu'à la concurrence de deux ou trois opérateurs. Quant au commerce de proximité, elle a souligné qu'il demeurait majoritairement concentré autour des opérateurs Casino et Carrefour, le cas de la ville de Paris étant particulièrement frappant à cet égard.

Or, selon l'Autorité de la concurrence, la facilitation du changement d'enseigne des distributeurs indépendants, qui sont affiliés via des contrats de franchise à des groupes intégrés ou sont membres de coopératives, est important pour la concurrence et inciterait notamment les centrales d'achat à être performantes en stimulant les têtes de réseaux pour qu'elles offrent des prestations performantes à leurs affiliés, et donc aux consommateurs locaux ce qu'empêchent un empilement de barrières contractuelles[43].

Dans ce contexte, l'Autorité de la concurrence a recommandé (i) afin de contrer les stratégies de gel du foncier commercial, la suppression des clauses de non-concurrence et des droits de priorité dans les contrats de vente et d'acquisition de foncier commercial et (ii) afin de favoriser la mobilité entre enseignes, le renforcement de la transparence des contrats passés entre les têtes de réseau et leurs affiliés et l'alignement de leurs échéances, la limitation de la durée des contrats d'affiliation à une durée permettant largement d'amortir les investissements spécifiques, par exemple à 5 ans, la limitation des clauses de non-réaffiliation et non-concurrence post-contractuelles ainsi que l'interdiction des droits de priorité au profit des groupes de distribution dans les contrats d'affiliation.

Depuis cet avis, la position retenue par l'Autorité de la concurrence concernant la durée des clauses de réaffiliation a été reprises par des juridictions judiciaires, l'Autorité ayant même été saisie pour avis dans

[43] Notamment : non-alignement d'engagements contractuels divers entre la tête de réseau et le magasin affilié, clauses de tacite reconduction, clauses de non-concurrence et droits de priorité dans les contrats de vente et d'acquisition de foncier commercial, paiement différé de droits d'entrée, durée d'affiliation disproportionnée au regard des amortissements nécessaires – pouvant aller jusqu'à 50 ans, droits de veto ou de blocage des décisions dans le cadre de participations minoritaires non proportionnelles à l'engagement financier consenti.

une affaire[44]. Les recommandations qu'elle a émises ont été par ailleurs examinées par le Parlement à l'automne 2010, mais la loi dans laquelle les dispositions ont été introduites n'a pas été adoptée en raison d'un changement de législature[45].

Dans son avis 10-A-25, l'Autorité de la concurrence a abordé les pratiques dites de « gestion par catégorie » ou « category management », par lesquelles un distributeur s'appuie, totalement ou en partie, sur un fournisseur important (appelé alors « capitaine de catégorie ») de son secteur pour organiser ses rayons, pratique naissante en France au moment où l'Autorité de la concurrence s'est saisie.

Dans cet avis, elle a relevé que cette pratiques soulevait certains risques et en particulier (i) des risques d'éviction de concurrent des linéaires, le capitaine de catégorie pouvant chercher à profiter de sa position pour influencer l'approvisionnement du distributeur à son avantage et au détriment de ses concurrents, (ii) des échanges d'informations sensibles potentiels, le capitaine de catégorie ayant accès pour réaliser ses missions à certaines données de façon exclusive lui donnant un avantage concurrentiel (données issues de cartes de fidélité, données sur les ventes, les prix ou le stocks) et (iii) des risques d'ententes entre distributeurs dans le cas où un même fournisseur exerce les fonctions de capitaine de catégorie auprès de plusieurs distributeurs et peut servir de pivot pour leurs transmettre des informations.

Dans ce contexte, l'Autorité de la concurrence a proposé afin d'éviter tout risque (i) que la désignation du capitaine de catégorie soit rendue publique, (ii) qu'une telle relation fasse l'objet d'une contractualisation qui encadre clairement les fonctions du capitaine de catégorie et (iii) qu'un guide de bonnes pratiques soit publié par la Commission d'examen des pratiques commerciales en prévoyant les modalités générales d'exercice de cette collaboration ente fournisseurs et distributeurs.

De nombreuses propositions de l'Autorité de la concurrence ont été reprises dans une recommandation de la Commission d'examen des pratiques commerciales[46] en date du 7 novembre 2011.

### *3.3 L'action de l'Autorité de la concurrence dans les territoires d'outre-mer : dynamiser la concurrence au bénéfice des consommateurs*

Depuis 2009, l'Autorité de la concurrence s'est enfin particulièrement intéressée aux DOM, économies insulaires éloignées de la métropole, qui sont touchées par un différentiel de prix de détail par rapport à la métropole très important (de 30 à 50%).

Cette situation est fortement préjudiciable à la population locale qui a, en moyenne, un pouvoir d'achat inférieur à celui de la France métropolitaine et l'Autorité de la concurrence a donc agi de diverses manières afin de pouvoir parvenir à une maîtrise en particulier des prix des produits agroalimentaires.

Elle a en particulier opéré un constat de la situation difficile dans les DOM s'agissant de la distribution au détail dans le cadre de son avis n°09-A-45 du 8 septembre 2009 et a ainsi relevé que des facteurs objectifs expliquaient le renchérissement des prix de détail dans ces régions et en particulier le fait qu'ils s'agissaient d'économies insulaires avec des marchés étroits qui subissaient par ailleurs un coût d'acheminement élevé des produits.

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44 Avis n°12-A-15 du 9 juillet 2012 rendu à la cour d'appel de Paris concernant des litiges opposant les sociétés Carrefour Proximité France et CSF à la société Établissements Ségurel.

45 Projet de loi renforçant les droits, la protection et l'information des consommateurs, n°3508.

46 La Commission, créée par la loi du 15 mai 2001 relative aux nouvelles régulations économiques, a pour mission de donner des avis ou de formuler des recommandations sur les questions, les documents commerciaux ou publicitaires et les pratiques concernant les relations commerciales entre producteurs, fournisseurs, revendeurs, qui lui sont soumis.

Elle a toutefois relevé que les surprix constatés étaient également le fruit d'une concurrence réduite par la concentration des acteurs et leurs comportements. Elle a constaté en particulier (i) la très forte concentration de certaines zones de chalandise[47], (ii) le fait qu'il soit nécessaire d'avoir recours pour son approvisionnement à des grossistes-importateurs disposant d'exclusivités sur de nombreux produits, (iii) l'existence de participations croisées entre les différents distributeurs et (iv) une forte intégration verticale de certains acteurs augmentant encore la concentration sur le marché.

A la suite du constat réalisé par l'Autorité de la concurrence et des recommandations émises, plusieurs réponses ont été apportées et, en premier lieu, la loi n°2010-853 du 23 juillet 2010 a entraîné un abaissement du seuil de notification des opérations de concentration dans le commerce de détail ultra-marin de 15 à 7,5 millions d'euros pour le seuil secondaire – le chiffre d'affaires individuel réalisé dans les DOM - seuil de nouveau abaissé à 5 millions d'euros dans le cadre de la loi n°2012-1270 du 20 novembre 2012 dite « loi Lurel ». L'Autorité de la concurrence a dans ce cadre rendu 7 décisions, dont 5 sous réserve d'engagements dans ces départements d'outre-mer.

L'une de ces décisions est intéressante en ce qu'elle a abordé le statut particulier d'un grossiste-importateur bénéficiant d'exclusivités de faits. L'Autorité de la concurrence a obtenu sur le marché martiniquais que le groupe de distribution au détail Bernard Hayot renonce aux exclusivités d'approvisionnement dont il bénéficiait en tant que grossiste-importateur et s'engage à ne pas avantager ses propres enseignes dans la distribution du budget de coopération commerciale abondé par les fournisseurs[48].

Toutefois, ces évolutions n'étaient pas suffisantes à elles seules. La loi Lurel a pour cette raison, dans le prolongement de l'avis précité de l'Autorité de la concurrence, renforcé la régulation concurrentielle dans les DOM.

Cette loi prévoit, en premier lieu, que le Gouvernement peut arrêter, après avis public de l'Autorité de la concurrence et par décret en Conseil d'Etat, les mesures nécessaires pour remédier aux dysfonctionnements des marchés de gros dans les DOM[49]. Le champ de ces mesures est large dès lors qu'elles peuvent viser les problèmes d'accès à ces marchés, la lutte contre la discrimination tarifaire, la déloyauté des transactions ou encore la gestion des facilités essentielles. L'Autorité de la concurrence s'est vue confier la tâche d'assurer le respect de ces mesures en prononçant des injonctions dont l'inobservation peut être sanctionnée.

Ensuite, la loi Lurel prévoit l'interdiction des accords exclusifs d'importation[50], sauf si les parties démontrent à l'Autorité de la concurrence que ces accords dégagent des gains d'efficacité économique en réservant au consommateur une part du profit qui en résulte.

Par ailleurs, la loi instaure un dispositif spécifique d'injonction structurelle[51]. Depuis 2008, l'Autorité de la concurrence disposait déjà d'un pouvoir d'injonction structurelle lui permettant d'ordonner des cessions d'actifs dans le commerce de détail[52] dans le cas d'exploitation abusive d'une position dominante

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47 Certains groupes détenant des parts de marché en surfaces commerciales supérieures à 40 %, soit sur la totalité du département concerné, soit sur une ou plusieurs zones de chalandise.

48 Décision n°11-DCC-134 du 2 septembre 2011, Louis Delhaize/Groupe Bernard Hayot.

49 Article L. 410-3 du Code de commerce.

50 Article L 420-2-1 du code de commerce.

51 Article L. 752-27 du Code de commerce.

52 Article L. 752-26 du Code de commerce.

ou d'un état de dépendance économique de la part d'une entreprise ou d'un groupe d'entreprise exploitant un ou plusieurs magasins de détail. Toutefois, ce pouvoir n'avait jamais été mis en œuvre en raison de conditions très strictes d'application.

La loi modifie donc les conditions d'exercice de ce pouvoir dans les DOM de façon à ce que l'Autorité de la concurrence puisse disposer des outils nécessaires et proportionnés au rétablissement d'une concurrence effective. Cette disposition a notamment été introduite en écho à la position soutenue par l'Autorité de la concurrence dans son avis n°12-A-01 sur le secteur de la distribution à Paris, dans lequel elle avait mis en avant la difficulté d'utiliser le pouvoir d'injonction structurelle dans le cadre du droit en vigueur. La loi Lurel encadre toutefois strictement cette nouvelle mesure.

En effet, dans le cadre de ce nouveau dispositif, elle peut faire part à une entreprise ou à un groupe d'entreprises en position dominante, de ses préoccupations de concurrence du fait des pratiques de prix ou de marges élevés en comparaison des moyennes observées du secteur que cette position lui permet de pratiquer. Si l'entreprise ne propose pas d'engagements ou si les engagements proposés ne paraissent pas de nature à mettre un terme aux préoccupations de concurrence, l'Autorité de la concurrence peut, par une décision motivée prise après un débat contradictoire, lui enjoindre de modifier ses contrats ou son comportement et, lorsque ces mesures ne sont pas suffisantes pour rétablir une concurrence effective, de céder des actifs. A la différence des articles L 420-2 et L 752-26 du code de commerce et 102 TFUE, ce nouveau dispositif n'exige pas la qualification juridique des faits et notamment celle d'un abus pour être mis en œuvre à l'encontre d'une entreprise en position dominante.

Enfin, la loi Lurel prévoit que dans certains territoires ultramarins, un accord annuel de modération du prix global d'une liste limitative de produits de consommation courante doit être négocié chaque année entre le Préfet et les organisations professionnelles du secteur du commerce de détail. En l'absence d'accord dans un délai d'un mois, le Préfet peut réglemente les prix des produits de la liste. (Cf. article L.410-4 alinéa 1 et L. 410-5 alinéa 2 du Code de commerce). En 2012, cette règlementation des prix n'a pas été mise en œuvre puisque des accords ont été conclus dans l'ensemble des DOM concernés.

# FRANCE

*(English version)*

## 1. Recent Developments in the Food Chain Industry

The Food Chain Industry, which includes agriculture and livestock rearing, food-processing industries and retail distribution, occupies a major place in the French economy and its competitiveness has a direct impact on consumer well-being, in terms of price, as well as in terms of choice and quality, since it represents about 13% of household budgets. Consequently, it is a subject to which particular attention is paid by the Autorité de la concurrence, which devoted an entire study to the subject of this sector in its annual report for 2012[1].

Agriculture and livestock rearing accounts for 966,300 permanent jobs, representing 3.4% of the active population. French agriculture is the leader in the European Union in terms of its unsubsidised production of agricultural produce, which amounted to 71.4 billion euros in 2011.

The sector is typified by structural constraints that affect the industry, mainly due to the storage and transport of perishable items and the existence of fixed production cycles and sales on a per product basis as well as constraints that are specific to the French economy, especially the fragmentation of certain products such as milk and cattle-rearing, despite a move to regroup into cooperatives and combine cooperatives. Furthermore, the sector suffers from major variations depending on the world economic climate, linked to the volatility of input costs.

The food-chain industry, i.e. food processing accounts for 70% of the value of agricultural production and is thus the principal outlet for some 500,000 farming operations. It is France's leading industry, consisting of 10,000 enterprises.

It is characterised by a relatively high degree of concentration: about 95% of turnover and added value in the food chain industry is generated by barely 30% of these companies. Thus, although the French food industry consists of up to 90% of small and medium-sized enterprises and 70% of very small enterprises employing fewer than 20 people, it also contains large groups on a global scale (such as Danone, Lactalis, Pernod-Ricard and Bongrain) and vertically integrated cooperative groupings that are present at all stages of production and processing (in particular Terrena and In Vivo), some of which are of global size.

Large-scale retailing constitutes another vital outlet for the agricultural markets, accounting for more than two-thirds of food product purchases for households.

The Autorité de la concurrence stated in a notice concerning affiliation contracts[2] that the large general retail food outlets (hypermarkets, supermarkets and deep discount stores) covered more than two-

[1] http://www.autoritedelaconcurrence.fr/doc/etude_thema_2012.pdf

[2] Notice no. 10-A-26 of 7 December 2010 covering affiliation contracts for independent shops and ways of acquiring businesses in the food retailing sector

thirds of the food products market. In 2012, the six main retailers that mainly sold food, all of French origin (Auchan, Carrefour, Casino, E. Leclerc, ITM Entreprises and Système U), accounted for nearly 90% of market share.

The application of competition law to the agricultural sector takes account of the economic efficiency connected with certain forms of cooperation. Combined with the law on restrictive practices, it is designed to support the reinforcement of negotiating power by those involved when dealing with major retailers and is liable to provide greater choice in the long term with respect to product ranges, prices and quality (see point I). With respect to the major retailing outlets, the Autorité de la concurrence has nevertheless tried to ensure that the degree of concentration in the marketplace does not lead to competition distortions (see point II).

## 2. From food production to processing: competition law is designed to stimulate competition and incorporate economic efficiency

Competition law applies to the agricultural sector (see **point 1.1**) and generally permits cooperation and concentration operations between producers so as to make them more efficient (see **point 1.2**). French restrictive practices law also plays an essential role in that it regulates the relationship between producers and distributors and thus contributes to one of the aspects of consumer well-being in the long term, namely the variety of products and differentiation in terms of price and quality (see **point 1.3**).

### *2.1 The agricultural sector: a sector subject to competition law*

At a European level, article 42 of the Treaty on the Functioning of the European Union (TFEU) provides that competition law applies in compliance with the objectives of the Common Agricultural Policy as defined in article 39 of the TFEU[3]. In France, the French legislator did not exclude agriculture from the field of application of competition law as defined in articles L. 420-1 and L. 420-2 of the Code of Commerce prohibiting cartels and abuses of a dominant position. It outlined exemptions linked to technical progress in sub-paragraph 2 of Title I of article L. 420-4 of this same code. This provision especially identifies – subject to all the conditions of technical progress, analogous to article 101 paragraph 3 TFEU having been fulfilled – practices that could consist in "*organising, with respect to agricultural products or those of agricultural origin, under the same brand or logo, volumes and production quality as well as commercial policy, including arranging a common selling price*"[4].

The Autorité de la concurrence and the DGCCRF ensure that the rules of competition in the food chain sector are respected and this applies mainly to cartels, agreements or restrictive practices. In this context, the Autorité de la concurrence, in response to a complaint or when informed by the Ministry for

[3] Article 39 of the TFEU, to which article 42 refers lists the objects of the Common Agricultural Policy, namely increasing productivity (a), ensuring a fair standard of living for the farming population (b), stabilising markets (c), guaranteeing security of supply (d) and ensuring reasonable prices for consumers (e). See also, in particular, Council's article 175 of the (EC) Council regulation no. 361/2008 dated 14 April 2008, OJ L 121 of 7 May 2008 and Council Regulation no. 2 dated 4 April 1962 concerning the application of certain competition rules to the production and trade in agricultural products, OJ 30 of 20 April 1962, p. 993/62, deleted and replaced by (EC) Council Regulation no. 1184/2006 of 24 July 2006, OJL 214 of 4 August 2006, p. 7.

[4] This provision, introduced through a law passed in 1996 concerning loyalty and balance in commercial relationships (Law no. 96-588 of 1 July 1996.) is aimed in particular at "quality marks" (labels, appellations of origin, geographical indications, etc.). At the time, the authorities wanted competition to be maintained by small independent enterprises and not solely by large companies who alone would be capable of dealing with international competition or conquering markets if small and medium-sized enterprises (SMEs) were unable to form groups.

the Economy (DGCCRF), has been led on several occasions to impose sanctions on such practices. In such a case, the Autorité performs a concrete analysis of the practices in question, their effect on competition, the context in which they occur and any possible justification in respect thereof. Each case thus requires the application of rules of competition based on a circumstantial examination of the facts and economic data of the case.

With specific respect to the agricultural production stage, the Autorité de la concurrence has on several occasions reiterated the prohibition on cartels between independent economic operators, without a transfer of ownership, the aim of which is to fix prices, share customers or markets or even restrict production[5] and that these constitute restrictions of purpose.

In its consultative activities[6], the Autorité de la concurrence has reiterated the merits from an economic point of view of this prohibition, which been adopted by European and French legislators.

In fact, the Autorité de la concurrence considers that agreements on prices or quantities are ineffective in an integrated market, such as the Single market, since there is nothing to prevent purchasers – processors or retailers – from allowing French agricultural products to compete with those of our European neighbours and to import them, if necessary, if the latter are more competitive. Furthermore, it considers that such agreements or practices are harmful to French agricultural competition and delay the necessary movement towards concentration of food chain products which are still too fragmented, while examples in France and other member states of the European Union have shown that this movement has borne fruit in several sectors such as cereals, seeds and sugar beet. This finding also applies to certain processors who are intermediaries in the food chain, and who need to deal with the dual constraint of the power to negotiate with major retailers downstream and the requirements in terms of purchase prices from the producers upstream, which could involve compression of their profit margin.

Two recent examples of cartels of which the Autorité de la concurrence was informed are provided hereunder.

Upstream, at the agricultural production stage, in March 2012, the Autorité de la concurrence, acting on information from the DGCCRF, imposed a fine of 3.6 million euros on ten chicory (Belgian endive) producers and ordered their professional bodies (seven trade unions) to pay a fine of 320,000 euros for having broken competition rules[7] and pursued their practices despite reminders of the law from the DGCCRF. The Autorité de la concurrence established that virtually the whole sector had implemented an overall plan for managing the market in order to remove the price of chicory from natural competition. An appeal against the decision is currently pending before the Paris Court of Appeal[8].

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5 In practice, several sectors in France were fined by the Autorité de la concurrence: the strawberry sector (Decision no.03-D-36 of 29 July 2003, the cauliflower sector (Decision no.05-D-10 of 15 March 2005), the grains sector (Decision no.07-D-16 of 9 May 2007), the chicory sector (Decision no.12-D-08 of 6 March 2012) and the flour sector (Decision no.12-D-09 of 13 March 2012).

6 See opinion no. 09-A-48 of 2 October 2009 concerning the operation of the dairy sector (http://www.autoritedelaconcurrence.fr/pdf/avis/09a48.pdf) and opinion no.08-A-07 of 7 May 2008 concerning the fruits and vegetables sector (http://www.autoritedelaconcurrence.fr/pdf/avis/08a07.pdf)

7 Decision no.12-D-08 of 6 March 2012 concerning the practices applied in the production and sale of chicory.

8 Of the 16 companies that appealed, (6 trade unions and 10 producers' organisations), 14 requested a stay of execution of payment of the fines from the first presiding judge of the Paris Court of Appeal on the basis of the second sub-paragraph of article L.464-7 of the Code of Commerce, and this was granted.

This practice, whose form and methods developed during the fourteen years in which it was implemented, translated in particular in the distribution of minimum selling price instructions for each category of chicory, the collective coordination of a pricing and commercial policy by the producers, setting the volumes of sales and introducing a price information exchange system for the prices applied by the producers which had been diverted from its original purpose and was being used to ensure that the cartel was properly applied.

The Autorité de la concurrence examined the various arguments invoked by the participants to explain this breach and established that it was not of a justifiable nature with respect to the exemptions provided by current legislation at both national and European level. Furthermore, it established that the inclusion of some of those involved in an association of producer organisations with transfer of ownership, as from 2009, caused these practices to cease[9].

Downstream, at the processing stage, in February 2013, the Autorité de la concurrence fined eight pig slaughterers and two professional bodies the sum of 4.57 million euros for having come together for 12 weeks in 2009 to fix the price on the quantity of pigs purchased in the main area of French pork production with the aim of reducing the price paid per pig to the livestock producers established on the basis of a reference quotation resulting from a biweekly livestock market[10]. This example also illustrates the fact that the rules of competition can also contribute to protecting growers and producers against cartels that are applied downstream in the value chain[11]. An appeal against the decision is currently pending before the Paris Court of Appeal.

In March 2012, the Autorité de la concurrence also imposed a fine of 242.4 million euros in respect of several cartels in the bagged flour sector, comprising 95.5 million euros applied to 13 French and German millers due to their creating a cartel that was designed to restrict flour imports between France and Germany, and seven French millers were fined 146.8 million for two cartels designed to fix prices, limit production and distribute among themselves the customers for bags of flour sold to large and medium-sized retailers and deep discounters in France, through the France Farine and Bach Mühle marketing structures.[12] Fourteen of the seventeen companies fined have appealed.[13]

Thus, the Autorité de la concurrence has had occasion to recall on several occasions, that the agricultural sector is subjected to competition rules in the same way as all the other economic activities and that certain practices, such as those of coming to an arrangement as to pricing, cannot be accepted regardless of the stage of the activity. The European legislator has adopted measures, however, that in

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9 With respect to the amount of the fine, the Autorité took account, on the one hand, of the limited impact of the cartel on the retail prices due to the counterbalancing power of the major retailers and, on the other hand, of the limited financial resources of the producers.

10 Decision no. 13-D-03 of 13 February 2013 concerning the practices implemented in the processed pork products sector.

11 In this case, it should be emphasised that the Autorité had been informed following a complaint by four pig producers in Brittany.

12 Decision no. 12-D-09 of 13 March 2012 concerning practices implemented in the flour for human consumption sector.

13 The three millers who were most heavily fined asked for a stay of execution of payment of the fine from the first presiding judge of the Paris Court of Appeal and two of them were granted it. The Autorité de la concurrence appealed against this order through the Court of Cassation in relation thereto. Furthermore the general directorate of public finance granted all of the French millers who had been fined the benefit of payment by instalment for their participation in the Franco-German cartel and a stay of execution of payment until the Court of Appeal pronounced judgment on their participation in the French cartel.

certain sectors (especially milk, beef, cereals and olive oil) tend to bend the competition rules to which farmers are subjected (see point 1.2 below which provides more detailed information about these measures).

### *2.2 The application of competition law: a lever for competition in the sector*

While clearly reiterating that a cartel between independent producers is illegal and that this ban is justified from an economic point of view, the Autorité de la concurrence has also highlighted, in both its decisions and opinions, that other forms of cooperation that comply with the law and have the benefit of economic efficiency could allow various operators in the food chain to adapt to new conditions in which they are called upon to fulfil their functions.

Firstly, the Autorité de la concurrence has issued opinions on proposed laws or regulations or on the competition situation in the food chain and highlighted certain routes that could contribute to better functioning of the whole agricultural sector.

As an example, the Autorité de la concurrence issued an opinion on a certain number of issues in the dairy sector[14] and in fruits and vegetables[15]. In the first opinion, the Autorité had been informed of the way the dairy sector was operating at a time when it was the victim of a sudden drop in production prices.

As the law stood at the time it was informed, the Autorité de la concurrence stressed that although the circulation of price recommendations to producers from professional associations recognised in France was covered in the dairy sector by an exemption in national law[16], this practice was liable to breach European Union law and so would be unlikely to be the subject of an exemption or derogation. The Autorité also stressed that such a system would be have little effect in the context of international competition, since ultimately demand might be directed abroad to the detriment of French producers applying recommended prices.

Since then, changes have been made to European law. In particular, in the milk sector, professional bodies have been able to improve their knowledge and the transparency of production and market conditions, especially through the publication of trend indicators – i.e. statistical data on pricing, volumes and the lengths of the raw milk delivery contracts already signed – as well as through supplying analyses of prospects for development potential in regional, national and international markets in order to contribute to better marketing coordination. The Commission must be notified of the agreements and then has three months to check they are not incompatible with the European Union regulations. It can ban any agreement which (i) introduces compartmentalisation of the markets, (ii) creates competition distortions unless these are indispensable for achieving the objectives of the CAP, (iii) involves price-fixing, (iv) leads to the unavailability of an excessive proportion of the product in question or (v) creates discrimination or eliminates competition in respect of a substantial amount of the products in question. There was an agreement in June 2013 between the European Parliament and the Council with respect to the amendment to regulation no. 1234/2007 of the organisation of the single market providing for an extension to these provisions to all the organisations that shared a market.

In both of these opinions, however, the Autorité de la concurrence had promoted a legal device that was at this time still little used but which seems relevant to the attempt to reduce the existing imbalances in the commercial relationship between farmers and purchasers to the extent that they introduce a certain

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14 Notice no. 09-A-48 of 2 October 2009 concerning the operation of the dairy sector.

15 Notice 08-A-07 of 7 May 2008 concerning the economic organisation of the fruits and vegetables sector.

16 See article L. 632-14 of the Rural and Sea Fishing Code.

visibility for market operators, both in respect of supplies, to the benefit of the processors, as well as for planning investments and purchases of input for producers – contractualisation. The Autorité de la concurrence stressed the benefits of standard contracts for terms of several years, defining the volumes, prices and conditions of changes thereto in the medium term as well as elements of quality, making it possible to grant the necessary visibility to producers as well as to processors who might thus be able to make better provision for their supplies and costs, as long as the content of each contract could be negotiated individually. Similarly, it indicated that the introduction of contract revision clauses based on changes in prices and costs was possible as long as it was the subject of bilateral negotiation.

The 2010 law modernising agriculture and fishing (the "LMAP")[17] now makes compulsory contractualisation possible through the signing of written contracts of sale between producers and buyers where these products are destined for resale or processing. This law thus uses the foundation of the proposals made by the Autorité de la concurrence in the two opinions, a foundation since repeated at European Union level in the modified version of the Common Organisation of a Single Market regulation adopted in June 2013.

The LMAP provides for the Autorité de la concurrence to be notified so it can give an opinion in the case of definition of the standard contracts through regulation or through a collective agreement[18]. On this basis, the Autorité issued opinions on numerous occasions concerning the implementation of contractualisation, demonstrating the benefit of this instrument[19].

Furthermore, the Autorité de la concurrence has promoted other routes such as the development of futures markets, recourse to public insurance and the promotion of quality products as a way of guaranteeing a stable and fair income for farmers. In particular, the Autorité de la concurrence considers that the differentiation of quality agricultural products protected by labels or appellations is an advantage for French and European agriculture since this is a resource that makes it possible to occupy a position in a market segment in which there is less pricing pressure and at the same time matches high expectations by consumers who are becoming ever more concerned about quality and the origin of the products they are consuming.

Secondly, the Autorité de la concurrence stressed the existence of legal and effective forms of cooperation making it possible for various food chain operators (especially producers and processors) to adapt to market conditions in order to guarantee competitive operation in the sector that will continue to preserve outlets for farmers and thus promote diversity for the consumer's benefit.

As it noted in 2009 in its opinion concerning the dairy sector[20], where the market is fragmented, concentration (by grouping into cooperatives) and vertical integration (especially through the acquisition by cooperatives of assets in the processing and distribution sector) can be structural means of rebalancing the power of negotiation to the benefit of producers while maintaining a diverse range for the benefit of consumers.

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17 Article L. 631-24 of the Rural Code introduced by Law no. 2010-874 of 27 July 2010.

18 Article L. 632-4 of the Rural and Sea Fishing Code.

19 See in particular opinion no.10-A-28 concerning the fruits and vegetables and the dairy sector, opinion no.11-A-03 concerning sheep-rearing, opinion no.11-A-12 concerning turkeys, opinion no.11-A-14 concerning wines of the Bergerac region. Furthermore, the Autorité made pronouncements on several occasions concerning these agreements without publishing a specific opinion. This was the case in the wine, plum, drinking chicory, tobacco, armagnac, flax, root vegetable and flower sectors.

20 Opinion no. 09-A-48 of 2 October 2009 concerning the operation of the dairy sector.

Thus, between the creation of the Autorité de la concurrence in March 2009 and 1 September 2013, 52 concentration operations were notified by agricultural cooperatives and given permission, three of them subject to implementing commitments to meet the concerns of the competition.

With respect to the question of the competitive impact of operations notified by the cooperatives, the Autorité only identified competition problems when concentration resulted in the creation of local monopolies or there was a risk of locking farmers into their product stream or their purchases of farming supplies due to the links binding them to the cooperatives.

Two cases illustrate the way in which the Autorité de la concurrence intervenes, including in respect of the issue of freedom of choice in the supply of input for farmers:

- In decision no. 11-DCC-150[21], the Autorité de la concurrence established that the operation in question risked significantly restricting competition on the market for the supply of input to farmers in the three départements of Brittany to the extent that the operation placed the Agrial cooperative in a very strong position in these markets since its articles of association bound the delivery by livestock-breeders of their milk to the cooperative to the condition of buying 80% of their purchases of input from it. Members of the cooperative would have had no other choice than this new entity for collecting milk and would have been forced to buy almost all their agricultural supplies from the cooperative, which would have encouraged the cooperative to increase the price of its products.

- The Autorité de la concurrence thus established that the new entity was acquiring a particularly strong position in agricultural supplies in the areas concerned (with a market share that was three or four times greater than that of merchants or companies that were in competition with it in the marketplace), so it would thus be in a position to heavily increase prices to the detriment of the co-operators without the return of the surplus to its members – a hypothesis that the Autorité de la concurrence examined carefully – being sufficient to reduce the risk. The operation was thus permitted subject to the cooperative undertaking to amend its articles of association to reduce to 50% the compulsory level of supplies that had to be purchased from the cooperative, without nevertheless challenging the cooperative model.

- Similarly, in decision no. 12-DCC-42 concerning the merger between the Champagne Céréales and Nouricia cooperatives, the Autorité de la concurrence emphasised the need for farmers (i) to have the choice locally between at least two suppliers of agricultural supplies so as to be able to negotiate the price of their inputs (ii) as well as being able to choose who should collect their cereal production. In this case, in view of the special competition situation on the market for the sale of agricultural supplies in a département (Haute-Marne), the Autorité de la concurrence made the operation conditional upon an undertaking by the parties not to oppose the cooperative group EMC2, their main competitor on the local market in question, from leaving the shared structure to which they both belonged and which acted as a central procurement operation.

Thus, in exceptional cases, a margin of freedom of action can be preserved for livestock-breeders who are members of a cooperative, while leaving intact the cooperative model and principle of forming groups or unions between cooperatives. The Autorité de la concurrence did not assess the principle of the cooperative model but, in the two aforementioned decisions, took into account the configuration of a specific market. It stressed, in other concentration decisions in the dairy sector in which the competition situation was different, that the existence of a contract for exclusive supply could enable it to guarantee

[21] Decision 11-DCC-150 of 10 October 2011 concerning the takeover of exclusive control of the Elle-et-Vire cooperative by the Agrial cooperative group.

secure outlets to all members, which was all the more appreciable since the operation was taking place in an economic climate marked by overproduction of milk in France[22].

The approach followed by the Autorité de la concurrence with respect to the very nature of agricultural cooperatives was specified in an appendix to its guidelines concerning control of concentrations, and especially their revised version published on 10 July 2013[23]. This text demonstrates how the Autorité de la concurrence takes into account the specific nature of agricultural cooperatives.

The Autorité de la concurrence thus reiterates that the specific nature of the links binding the cooperatives to their members[24] is taken into account when analysing the markets that bring them together, such as the upstream markets at which the cooperatives collect their members' produce or the agricultural supply markets through which the members get their supplies from the cooperatives. The Autorité de la concurrence takes particular account of the fact that the profits from operations performed by the cooperatives through their members are redistributed to them. In its guidelines, however, and in accordance with its practice, it recalls that the specific nature of the links between the cooperatives and their members is not sufficient to consider that a cooperative, including its members, constitutes a single legal entity since no single farmer-member exercises a decisive influence over the cooperative.

In its decisional practice as regards concentration, the Autorité de la concurrence also analysed the unilateral effects of a concentration of the downstream market on the sale of unprocessed or processed products which required commitments to be made by the parties. In a decision relating to the sugar industry[25], it considered that the monopolistic situation resulting from the merger within the same group of two companies marketing sugar produced on the island of La Réunion and destined for local distributors and industries could lead to the Quartier Français being taken over by Tereos (controlled exclusively by a union of cooperatives) subject to the sale by Tereos of assets that would lead to two independent offers on the market for the supply of table sugar and industrial sugar on the island. This sale in fact took place without any particular problems to a consortium consisting of industrial and financial investors.

The approach taken by the Autorité de la concurrence with respect to control of concentrations ought nevertheless to be differentiated from its practice concerning cartels that are designed to eliminate competition in which the critical analytical factor is the transfer or non-transfer of ownership of the products for sale.

Thirdly and lastly, outside the cooperative context, other types of groupings are allowed under competition law, which offers four major categories of flexibility:

- The first flexibility concerns the possibility for producer organisations, under certain market share conditions, to play the role of brokers in order to increase their sales volume and thus their powers of negotiation with processors to the benefit of all their members, who will thus receive higher remuneration.

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22 Decision 13-DCC-47 of 17 April 2013 concerning the takeover of exclusive control of Les Fromageries de Blâmont agricultural cooperative group by the Sodiaal Union cooperative company, paragraph 48; see also decision 11-DCC-150 of 10 October 2011 concerning the exclusive takeover of control of the Elle-et-Vire cooperative by the Agrial cooperative group, paragraph 68.

23 Revised guidelines dated 10 July 2013 concerning control of concentrations.

24 The cooperative and its members maintain a dual capitalistic and economic relationship.

25 Decision 10-DCC-51 of 28 May 2010 concerning the exclusive takeover of the Groupe Quartier Français by Tereos.

- The second flexibility was highlighted in opinion 09-A-48 of 2 October 2009 abovementioned. In this opinion, the Autorité de la concurrence recommended, as an extension to notice 08-A-07 of 7 May 2008 concerning the economic organisation of the fruits and vegetables sector, to generalise the provisions of the regulation concerning the sharing of the organisation of the fruits and vegetables market[26] with that of the diary sector. These arrangements made it possible to create an association of producer organisations, as long as it did not have a dominant position, and for it to handle, even though it did not own the produce as would be the case for a cooperative, the sale of the products and optimisation of the production costs. These arrangements applied until recently without prejudice to regulation (EC) no. 1184/2006, which excludes shared price-fixing[27].

  Since that date, the European Commission has suggested extending this arrangement to all the producer organisations and an agreement between the European Parliament and the Council was entered into for the removal of the requirement for the absence of a dominant position if an organisation were to be permitted to benefit from this arrangement.

- The third category of flexibility concerns the sharing of storage or production facilities, which could constitute horizontal collaboration as a source of economic progress. Below a 20% threshold, these agreements are accepted. Where the percentage is higher, a case-by-case analysis is necessary[28].

- The fourth category of flexibility relates to joint price-fixing which is permitted, in very exceptional cases, if one or other of the following two conditions has been met: (i) if a major buyer does not want to deal with a multitude of prices and demands a single supply price; (ii) if the farmers agree to jointly launch a new product, such as a shared brand of milk, and if this initiative can only reasonably be achieved if there is standardisation of all aspects of marketing, including the price[29].

At European Union level, the adaptation measures for applying competition law were adopted or are currently under discussion.

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26 Council Regulation (EC) no. 1182/2007 of 26 September 2007 establishing specific rules for the fruits and vegetables sector, amending directives 2001/112/EC and 2001/113/EC as well as regulations (EEC) no. 827/68, (EC) no. 2200/96, (EC) no. 2201/96, (EC) no. 2826/2000, (EC) no. 1782/2003 and (EC) no. 318/2006, and abolishing regulation (EC) no. 2202/96.

27 A brochure published by the European Commission echoes this opinion. It states that "*EU competition rules permit, under certain conditions, the joint marketing of raw milk, including through intermediate organisations or associations. Such agreements are generally accepted as long as they do not include price-fixing, either directly or indirectly and as long as the total market share of farmers involved in the agreement does not 15%. Above such market share, the agreement is not presumed to be illegal, but a case-by-case assessment becomes necessary*". (European Commission Brochure, *How EU Competition Policy Helps Milk Producers in Europe*). Since this brochure was published, European regulation no. 261/2012 of 14 March 2012 was adopted which now offers, subject to certain conditions, the option for producer organisations and associations of producer organisations to negotiate on behalf of their members (see below). The factors highlighted in this brochure can always be transposed into other agricultural sectors and are not the subject of partial or total exemptions.

28 Guidelines concerning the applicability of article 101 of the Treaty concerning the Functioning of the European Union relating to horizontal cooperation. See also European Commission Brochure entitled *How the EU's Competition Policy Helps Milk Producers in Europe* (www.autoritedelaconcurrence.fr/doc/dg_comp_brochure_lait.pdf).

29 *Ibid.*

In the dairy sector, regulation (EU) no. 261/2012, which came into force in early April 2012, amended Council regulation no. 1234/2007 of 22 October 2007 (the so-called "common organisation regulation of the single market") by foreseeing the possibility for a producers' organisation to negotiate on behalf of its producer-members, for all or part of their joint production, raw milk delivery contracts between farmer and processor. The negotiations could be conducted by the producers' organisation, whether or not there was transfer of ownership of the raw milk from the farmers to the producers' organisation and whether or not the price negotiated was identical for shared production by all the member farmers or only some of them. For a specific producers' organisation, the volume of raw milk that is the subject of these negotiations should not exceed 3.5% of total production by the Union and the volume of raw milk that is the subject of these negotiations produced in all the member states should not exceed 33% of the total national production of the member state in question[30]. The European Commission, in the case of negotiations involving more than one member state, or a national competition authority, can reopen the negotiations by bringing in the producers' organisation or refuse to permit it if it could have the effect of excluding competition or if it seriously affected SMEs involved in the processing of raw milk.

Discussions are also in progress on the subject of amending the regulation of the common organisation of the single market. In this context, it is planned that arrangements equivalent to those that came into force in the dairy sector could also be applied, subject to certain conditions, to the cattle sector, the olive oil sector and for cereals. Finally, as already mentioned, the European Parliament and the Council are also examining the principle whereby the various professional associations in the dairy sector can circulate trend indicators (see above).

### *2.3 Restrictive practices law makes it possible to retain a certain balance in commercial relations in the agricultural sector*

In France, food chain distribution is typified by high concentration, close to that of an oligopoly. The market structure is thus favourable to unfair commercial practices or restrictive practices between companies. The nature of the products in question, which are very often perishable and produced from raw materials subject to price fluctuations, also explains the existing tensions between co-contractors.

The Code of Commerce contains a list of clauses and abusive practices in commercial relationships that could be punishable under civil law. For example, the action of obtaining or attempting to obtain from a trading partner an advantage of any kind that does not correspond to a commercial service actually rendered or one that is manifestly disproportionate to the value of the service rendered, or to submit or attempt to submit a commercial partner to obligations creating a significant imbalance in the rights and obligations of the parties all make the perpetrator liable and require it to repair the damage caused.

The Code of Commerce also contains a list of abusive practices in commercial relationships that are specific to the food chain and agricultural sector. For example, article L. 442-9 of the Code of Commerce makes it possible to combat the practice of abusively low prices in the context of an economic crisis or steep fluctuation of trading prices.

Law no. 2010-874 of 27 July 2010 concerning the modernisation of agriculture and fishing was intended to define and implement a public food policy and reinforce the competitive nature of French agriculture. This law incorporates new provisions into the Code of Commerce that are designed to protect farming.

This law enabled it to become compulsory, through an extension to a trade association agreement or by default by a decree issued by the Council of State, for written contracts to exist between producers or

[30] Council Regulation no.1234/2007 of 22 October 2007, article 126 fourth part.

producers' organisations and their business customers (including retailers), when buying agricultural produce delivered within French territory. The signature of such a contract must be preceded by a draft contract from the purchaser that complies with the decree.

Discounts, rebates and reductions for the purchase of fresh fruits and vegetables imposed by a buyer, retailer or service provider are now prohibited. That is because the eminently perishable nature of fresh produce tends to create an imbalance in pricing negotiations between suppliers forced to sell their production within a very short space of time and purchasers who are tempted to take advantage of this situation. In the context of the draft consumption law currently being debated by parliament, this prohibition has been made more flexible. In fact, reductions are possible in certain specific cases, when there are problems of quality, for instance.

The circulation of fruits and vegetables destined for a buyer on national territory is henceforward conditional on the holding of a purchase order produced by the buyer or a contract entered into with a broker or agent. The law specifies that both documents must contain, in particular, the methods by which the price is reached. The possession of a purchase order is designed to govern the practice of delayed invoicing whereby the wholesaler does not pay the supplier of fruits and vegetables until it has resold the products supplied and on the basis of the resale price obtained. Similarly, the fact of having a contract makes it possible to clarify the practice of selling on commission whereby the supplier assigns its products to a broker or agent responsible for finding a buyer at the best price, in exchange for a fee that is usually proportional to the selling price.

The practice of advertising away from the place of sale is also now subject to regulation. A prior agreement by the supplier concerning the price at which the fruits and vegetables are to be sold must henceforward feature in the written contract between buyer and seller. Each of the parties must hold a copy of this contract before the stated price is circulated and be capable of showing it to inspectors.

Article L. 443-1 of the Code of Commerce makes it possible to restrict the due dates for payment to the producers of foodstuffs and thus preserve their cash flow. Failure to comply with this article is subject to a fine of 75,000 euros. The due date for payment by any producer, reseller or service-provider, may be no greater than:

- Thirty days from the end of the ten-day delivery period for perishable foodstuffs, chilled or frozen meat, frozen fish, cooked meals and preserves made from perishable foodstuffs, with the exception of the purchase of seasonable foods made through the so-called cultivation contracts covered under articles L. 326-1 to L. 326-3 of the Rural Code;

- Twenty days after delivery for purchases of livestock destined for consumption and fresh meat derived therefrom;

- Thirty days after the end of the month of delivery for the purchase of alcoholic drinks subject to excise duty provided for under article 403 of the General Code of Taxation.

- Exemptions to these provisions are possible in the wine and grape-growing sector, on condition that they are entered into in the form of agreements within professional associations.

The DGCCRF performs investigations, especially in the retail food and non-food sector, as part of its annual inspection plan of relationships between businesses or specific investigations of a sector.

Out of 211 indications of malfunction of competition established by the DGCCRF's investigation services in 2012 under its annual investigations concerning commercial relationships, 74 involved the food chain.

Where these investigations highlight breaches of the Code of Commerce, the Minister for the economy, via the DGCCRF's departments, has the right to take legal action against the perpetrator of such practices, and this could be in either the criminal or commercial courts, even without having acquired the consent of the victim of the practice who must, in certain cases, be informed of the action.

The Minister responsible for the economy may ask the commercial jurisdictions to declare the nullity of illegal clauses or contracts, the cessation of abusive practices, the recovery of overpayments made to the benefit of the suppliers damaged by the practice in question and finally a civil fine.

Since 2001, 142 cases have been brought before the commercial jurisdictions and have so far resulted in 68 orders to pay a civil fine and 28 orders to reimburse sums paid unlawfully.

Moreover, most of the cases (26 out of 38) currently pending before the courts in which the Minister is a party or has intervened voluntarily involve unfair practices implemented in the retail food sector (some cases involve several such practices):

- 12 concern the obtaining of an advantage without an equivalent consideration
- 10 concern a significant imbalance between the rights and obligations of the parties
- 5 deal with an abuse of purchasing power (this practice no longer exists in law, having been replaced by the concept of significant imbalance)
- 2 deal with acts of sudden cancellation
- 1 concerns the prior deduction of penalties
- 1 deals with overdue payments

The draft law concerning consumption, currently being debated in Parliament, will reinforce the DGCCRF's courses of action in order to improve protection of the economic public order.

The new article L. 441-8 of the Code of Commerce will make it possible to better take into account the volatility in the trading price of raw materials in contracts for the sale of foodstuffs. It is a matter here of requiring the parties to anticipate, as soon as they are in negotiation, the negative effect of the sometimes erratic fluctuations of these trading prices on the balance of contracts. The parties must therefore provide, in advance, for conditions under which, if faced with such fluctuations, they will renegotiate the price.

Furthermore the proposed law provides that the DGCCRF will be able to issue injunctions and administrative penalties. Administrative penalties will replace civil and criminal penalties with respect to overdue payments and contractual formalities. Action taken by the DGCCRF, especially in the foodstuffs and agricultural sector, will be immediate and more effective.

"Soft law" also has a significant place in the current arrangement:

- The mediator in agricultural contracts has expertise in prior contracts and the special way the economy of the sector is organised.

- The development of the Observatory for the creation of prices and profits for foodstuffs is important to provide the sectors with the elements that will enable more objective dialogue between the various links in the chain.

- The Commission d'examen des pratiques commerciales [Commission for examining commercial practices], created in 2011 by law no. 2001-420 of 15 May 2001 with respect to the new economic regulations is a discussion forum between suppliers, distributors and the administration, which issues opinions and produces responses to complaints, whether from the courts or from those in the sector.

- The Code of Commerce regularly opens up the possibility of exemptions through inter-occupational agreements (especially with respect to payment terms or sudden cancellation) in order to take account of the specifics of the various sectors.

- Good conduct commitments (or "engagements") are regularly made to the authorities by the economic stakeholders.

Finally, there are current considerations as to the most relevant form of action to be taken in order to preserve the balance and fairness of commercial relationships on a European level.

The European Commission launched a consultation about the opportunity to provide for a penalty for unfair commercial practices[31] on a community level.

More than 500 million Europeans daily consume, in complete safety, the various food and drink products offered to them by numerous operators (EU and non-EU) in the marketplace. This consumption represents an average of 15% of household consumption costs. As a vital engine of the economy, the European food chain sector consists of 17 million businesses in farming, food-processing and related services.

In order to combat unfair commercial practices in the food sector, a platform of experts on unfair inter-company commercial practices was set up in 2010 within a high-level Forum on the subject of improving the operation of the food supply chain. Contractual practices between companies, competition in the food chain sector and supervision of the price of foodstuffs were the three main areas of the overall approach adopted by this Forum.

In an extension of these works, on 31 January 2013, the Commission adopted a European plan of action for retail trade and launched a consultation concerning unfair commercial practices within the intercompany food and non-food supply chain. The green paper concerning unfair commercial practices within the food and non-food supply chain condemns the drawing up of ambiguous clauses, such as the absence of written contracts, retroactive changes to the contract, wrongful transfers of commercial risk and the wrongful cessation of a commercial relationship, for example. The results of the consultation are currently being analysed and the Commission will soon be announcing how it intends to follow them up.

[31] Unfair commercial practices are those which are manifestly not good conduct and are contrary to the principles of good faith and fairness. UCPs are generally imposed when there is an imbalance between a strong party and weak party which can exist on either side of the inter-company relationship and at any stage of the supply chain.

## 3. The distribution of food products: encouraging competition and protecting the consumer

Distribution is the link between the economic activities carried out upstream and downstream in the food chain. The Autorité de la concurrence has made this sector one of its priorities given its significance in economic terms and its impact on French purchasing power. Within this framework, it has turned its attention to numerous aspects of this sector over the last few years whether in the form of individual cases or recommendations through its advisory activity.

It is particularly worth highlighting its role in monitoring mergers at this stage of the food chain (cf. point 2.1). It has also issued recommendations on both regulatory and contractual barriers to the entry and development of new establishments (cf. point 2.2). Finally, it has taken specific action in the Overseas Departments [*Départements d'Outre-mer* (DOM)] (Martinique, Guadeloupe, Ile de la Réunion, Guyane), where competition regulation has recently been strengthened (cf. point 2.3).

### *3.1 Maintaining competition among distributors for the benefit of consumers: merger control*

Generally speaking, in relation to the food distribution sector, controlling mergers makes it possible to prevent groupings that substantially limit competition to the detriment of consumers, for example by the creation or strengthening of dominant positions at a local level. The Autorité de la concurrence can, therefore, sometimes accept commitments from parties in order to limit local concentration levels through the transfer of shops.

Merger control in the retail distribution sector has been subject to a particular regime since the Law of Modernisation of the Economy of 4 August 2008[32] (the "LME"), that defined specific notification thresholds in relation to retail business operations.

Observing that numerous operations liable to have an impact on competition at a local level were not subject to any merger control due to the high turnover thresholds set out in French law, as highlighted by the Autorité de la concurrence[33], the legislature carried out a very significant reduction in merger control thresholds in this sector. Thus the first French threshold, in terms of the parties' global consolidated turnover, fell from 150 to 75 million euros. The second threshold, in terms of the individual turnover generated in France by at least two undertakings involved in the operation, fell from 50 to 15 million euros.

This new provision is thus aimed at more efficient prevention of operations that could substantially weaken competition in certain shopping areas, making it possible to examine operations that were not previously subject to merger control. The lowering of the thresholds has therefore led to monitoring of numerous operations in the food distribution sector.

The Autorité de la concurrence gained an in-depth practical knowledge of operations in this sector, issuing 225 decisions between 2 March 2009[34] and 1 September 2013, 8 of which were subject to commitments, namely around 4% of decisions.

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32 Law no. 2008-776 of 4 August 2008 on Modernisation of the Economy.

33 Opinion no. 07-A-12 of 11 October 2007.

34 The date when the Autorité was established and when merger control was transferred to it. Merger control had previously been the responsibility of the Directorate General of Competition and the Repression of Fraud *[Direction Générale de la Concurrence et de la Répression des Fraudes (DGCCRF)]*, a directorate under the Ministry of Economy.

Among these decisions, decision no. 13-DCC-90 of 11 July 2013 concerning the transfer of joint control to exclusive control by the Casino group over the Monoprix group[35] is particularly worth highlighting due to its specific scope and very recent nature.

This decision is interesting on several fronts:

- First the Autorité de la concurrence found that although Casino already held joint control of Monoprix before the operation, the withdrawal of Galeries Lafayette from the capital would lead to a change in the competition situation. In fact, while prior to the operation Casino and Monoprix were positioned on the market as two competitors, by taking exclusive control of Monoprix, Casino could then define its commercial policies, in particular its pricing policy, completely autonomously.

- Then, in order to identify the shopping areas where competition issues arose, it applied several successive filters in its decision, namely (i) market share in terms of floor area of the new entity (this market share is calculated using the "hypothetical consumer" test"), (ii) the extent of market concentration on completion of the operation, as well as (iii) the reduction in the number of competing groups accessible to consumers in each shopping area on completion of the merger. On the basis of this method, it excluded from its in-depth analysis Parisian shopping areas where the new entity would have less than 60% of sales' floor area and would be facing at least 3 competing groups.

- The Autorité de la concurrence also analysed, with regard to Parisian shopping areas, the competitive pressure exerted by hypermarkets located in the Parisian suburbs. As purchases by Parisian consumers in these hypermarkets only represent 5% of their expenditure, the Autorité de la concurrence did not include the whole floor areas of these supermarkets in the framework of the calculation of the parties' market shares. By contrast, using three proposed alternative methods, it assessed – for each suburban hypermarket – the weight that it actually represented in Parisian customers' consumption and took this competitive pressure into account in calculating the size of the markets concerned by the operation.

- Finally, having identified the problematic shopping areas and removed the barriers to entry into the market in question, it estimated the risk of price increases at the end of the operation on the basis of the calculation of GUPPI ("*gross upward pricing pressure index*") which measures customer switching between shops in the event of price increases and confirmed the impact of the operation on the areas in question[36].

This analysis, based on various complex economic analysis tools that are further described in detail in the new Autorité de la concurrence guidelines dated 10 July 2013, concluded that there was a risk of strengthening Casino's dominance in around fifty shopping areas, forty-seven of which were located in Paris. In response, Casino submitted several commitments: improvements were made to these in the course

[35] Casino already held 50% of Monoprix's capital and was planning to buy out the remaining 50% held by Galeries Lafayette.

[36] In the case in question, bearing in mind the particular influence already exerted by Monoprix over Casino prior to the completion of the operation that led Casino to take into account any possible switching of its customers to Monoprix in the event of a decision to increase prices, the Autorité de la Concurrence took this factor into account in calculating Casino's GUPPI in relation to Monoprix. It did not, however, take this factor into account in relation to calculating Monoprix's GUPPI in relation to Casino, holding that on the contrary Monoprix had sufficient autonomy prior to the operation to fix its prices independently of Casino (point 466 of the decision).

of discussions and the final version of these commitments met all the competition concerns raised by the Autorité de la concurrence. To prevent the risk of undermining competition, Casino undertook (i) to transfer a substantial amount of sales space, in the different areas in question allowing a balanced competitive situation to be maintained (with Casino limiting its position to 50% in all the areas in question) and (ii) not to acquire direct or indirect influence over the transferred assets for 10 years.

Aside from this decision, the Competition Authority had the opportunity to make the authorisation of operations in the retail-distribution or food markets subject to commitments on several other occasions[37].

### *3.2 Strengthening fluidity in the sector: recommendations aimed at limiting barriers to the entry of new establishments*

In France, the rapid growth of large retail outlets since the 1960s has given rise to fears about the weakening of the position of small shops. The legislature has sought, by controlling the development of large food retailers, to meet the aims of protecting small shops and at the same time promoting diversity of offer and prices that are as competitive as possible for consumers. To this end it brought in provisions aimed at regulating the establishment of retail outlets. However, this regulatory environment, which adds to the intrinsic difficulty of finding locations suited to the establishment of large retail outlets, has a tendency in some cases to hinder the free play of competition to the detriment of consumers. Added to these regulatory barriers to entry are a certain number of other obstacles to the establishment of new outlets, in particular of a contractual nature, which the Autorité de la concurrence has also studied.

Firstly, it has been involved in cases of unjustified regulatory barriers affecting competition on the French market on a number of occasions.

In its opinion 04-A-18 of 18 October 2004, the Autorité (then the Conseil de la concurrence) analysed the economic consequences of the prohibition of resale below cost, a mechanism implemented by Law no. 96-585 of 1 July 1996 known as the “Galland law”.

In this opinion, the Conseil de la concurrence stated first that this law had favoured the shifting of commercial negotiations towards back margins. Since the commercial advantages obtained upstream could not be recovered downstream, the consequences of this law were unfavourable to consumers. In addition, the Conseil de la concurrence had noted that the definition of the resale-below-cost threshold resulting from the Law Galland had acted as a mechanism to facilitate antitrust practices of fixing resale prices[38], sanctioned by the Conseil in several decisions[39].

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37 See in particular decision 10-DCC-25 of 19 March 2010 within the framework of which the Autorité de la concurrence authorised the acquisition of certain companies in the Louis Delhaize distribution group by the Hoio group, subject to the transfer of a shop in Martinique, decision 11-DCC-134 in which the Autorité de la concurrence authorised, subject to commitments, the acquisition in Martinique of a Cora hypermarket by the Bernard Hayot Group and decision no. 13-DCC-57 of 10 May 2013, in which the Autorité de la concurrence, holding that in one of the shopping areas, the operation would occasion a change from three to two operators, made authorisation of the operation subject to the transfer of a shop.

38 The supplier could in fact, in its general terms of sale, fix the price charged determining the resale at a loss threshold, a public price that had to be identical for all its distributors on account of the non-discrimination principle, and then negotiate the amount of back margins with each distributor. The decoupling of the price charged from the actual unit price (net of back margins) thus allowed the producer to fix a uniform price ceiling with its distributors.

39 See by way of illustration decisions no. 05-D-70 of 19 December 2005 and no. 07-D-50 of 20 December 2007.

After this opinion, the definition of the resale-below-cost threshold was amended on two occasions in order to facilitate passing the price benefits obtained by the distributor from the supplier to the consumer[40]. Law no. 2008-776 on the Modernisation of the Economy of 4 August 2008 also made commercial negotiation conditions between the distributor and each of its suppliers more flexible and lifted the ban on price discrimination[41] that had obliged distributors to apply the same general sales conditions to all suppliers.

In its opinion 07-A-12 of 11 October 2007, the Conseil de la concurrence highlighted the adverse impact on competition of the prior authorisation system (by a national consultative committee) for openings and extensions of commercial outlets larger than 1000 m², then from 1996 for all commercial outlets larger than 300 m²[42]. This authorisation was based on a series of criteria related to economics, environment, town-planning and transport policy.

The Conseil de la concurrence stated in its opinion that (i) the limitation on the establishment of new large outlets hindered the arrival of new entrants, particularly foreigners, likely to introduce more competition between distribution companies and so protect the distributors in place and (ii) the implementation of the law had had a negative effect on employment and had led to results that were not in line with the desired objectives, with the offer from small local shops being considerably reduced to the benefit of established distributors.

Therefore, the Conseil de la concurrence's first recommendation was to remove the existing committee-consultation mechanism and, secondly, to reduce inspection of submitted projects to town-planning documents of a general nature not based on economic criteria. At the very least, it was decided to increase authorisation thresholds (by re-establishing the pre-1996 levels, as a minimum), to remove economic criteria and decrease the threshold for the prior examination of retail business mergers in order ensure better prevention of the establishment or strengthening of local dominance and control the impact of brand changes (cf. above). It was this second option put forward by the Conseil that was selected by the LME.

Secondly with regard to non-regulatory barriers to entry into the market (namely contractual barriers or those arising from commercial practices), in 2010 the Autorité looked into two types of practice, both of which were the subject of an opinion on 7 December 2010.

In its opinion 10-A-26, the Autorité de la concurrence looked into practices related to commercial property management and the contractual relations between the heads of franchises or networks or cooperatives and affiliated independent shops, which represent around 70% of the sector. It noted that on the French market in certain shopping areas there were worrying concentration levels, particularly in terms of hypermarkets and convenience stores, and that it was often still the case that a distribution group only faced competition, in a given market area, from two or three operators. It highlighted that convenience stores were mostly centred on the operators Casino and Carrefour, a fact that was particularly striking in the case of the city of Paris

According to the Autorité de la concurrence, facilitating changes of brand among independent distributors, which are affiliated via franchise agreements to integrated groups or are members of cooperatives, is important for competition and should in particular engender better performance on the part of central purchasing offices by providing network heads with an incentive to offer high-performance

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40 Law no. 2005-882 of 2 August 2005 and the Law of 2 August 2005 and Law no. 2008-3 of 3 January 2008.

41 Formerly section 1 of I of Article L. 442-6 of the French Commercial Code.

42 Law no. 96-603 of 5 July 1996.

services to their affiliates and so to local consumers, thus preventing the accumulation of contractual barriers[43].

In this context, the Autorité de la concurrence recommended (i) the removal of anti-competition clauses and priority rights in sale agreements and the acquisition of commercial property, in order to counter commercial property freeze strategies and (ii) in order to encourage mobility between brands, increased transparency of contracts entered into between network heads and their affiliates and improvement in their term matching, limits on the duration of affiliation contracts to a period which broadly allows specific investments to amortise, for example 5 years, limiting non-reaffiliation clauses and post-contractual non-competition clauses as well as banning priority rights to the profit of distribution groups in affiliation contracts.

Since this opinion, the Autorité de la concurrence's position on the duration of reaffiliation clauses has been examined by the courts, and the Autorité even referred to for an opinion in a case[44]. The recommendations that it issued were further examined by Parliament in autumn 2010, but the law in which the provisions were included has not been adopted due to a change of term[45].

In its opinion 10-A-25, the Autorité de la concurrence tackled practices known as "category management", under which a distributor relies totally or partially on an important supplier (then known as "category captain") in its sector to organise its lines, a relatively new practice in France at the time when the Autorité de la concurrence took up the issue.

In this opinion, it stated that these practices led to certain risks and in particular (i) risks of eviction of line competitors, with the category captain able to seek to profit from its position to influence the distributor's supply to its own advantage and the detriment of its competitors, (ii) potential exchanges of sensitive information, the category captain having exclusive access in the course of its job to certain data giving it a competitive advantage (data from loyalty cards, data on sales, prices or stocks) (iii) risks of agreements between distributors in the case of a single supplier carrying out the role of category captain with several distributors with the ability to act as a hub to pass information on to them.

In this context, the competition authority proposed in order to avoid any risks (i) that the appointment of the category captain be made public, (ii) that such a relationship should be subject to a contract that would clearly set out the role of the category captain and (iii) that a good practice guide be published by the Committee for the examination of commercial practices, setting out general terms under which this collaboration between suppliers and distributors should conducted.

Numerous proposals from the Autorité de la concurrence were included in a recommendation by the Committee for the examination of commercial practices[46] dated 7 November 2011.

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43 In particular: non-term matching of contractual undertakings between the network head and the affiliated shop, - tacit renewal clauses, non-competition clauses and priority rights in sales contracts and contracts for the acquisition of commercial property, deferred payment of entry rights, disproportionate duration of affiliation in relation to necessary amortisation – in some cases up to 50 years, rights of veto or blocking of decisions within the framework of minority participation interests out of proportion with the agreed financial undertaking.

44 Opinion no. 12-A-15 of 9 July 2012 made to the Paris Appeal Court on legal action brought by the companies Carrefour Proximité France and CSF against the company Établissements Ségurel.

45 Draft law enhancing consumer rights, protection and information, no. 3508.

46 The task of the Committee, set up under the Law of 15 May 2001 on new economic regulations, is to give opinions or draw up recommendations on any questions, commercial or advertising documents and practices concerning commercial relationships between producers, suppliers and resellers that are submitted to it.

### *3.3 Action by the Autorité de la concurrence in the Overseas territories: stimulating competition to the benefit of consumers*

Since 2009, the Autorité de la concurrence has been taking a particular interest in the Overseas Departments, island economies a long way from the mainland, which are affected by a very large retail price differential in comparison with the mainland (from 30 to 50%).

This situation is extremely prejudicial to the local population which has, on average, a lower purchasing power than that in mainland France and so the Autorité de la concurrence has taken various courses of action in order to achieve control over the prices of food products in particular.

It has in particular provided a report of the difficult situation in the Overseas Departments related to retail distribution in its opinion no. 09-A-45 of 8 September 2009, highlighting that objective factors explained the increased retail prices in these regions, in particular the fact that they were island economies with narrow markets that were also subject to the high cost product transportation.

It also noted however that the observed overpricing was also the result of reduced competition due to the concentration of players and their behaviour. It particularly noted (i) very strong concentrations in certain shopping areas[47], (ii) the fact that it is necessary to get supplies from importers/wholesalers with exclusivity over numerous products, (iii) the existence of crossed participation interests between the different distributors and (iv) extensive vertical integration of certain players increasing concentration on the market still further.

Following the report made by the Autorité de la concurrence and the recommendations issued, several changes were made: first, Law no. 2010-853 of 23 July 2010 led to a decrease in the notification threshold for merger operations in the overseas retail trade from 15 to 7.5 million euros for the secondary threshold – the individual turnover made in the Overseas Department – a threshold reduced again to 5 million euros under Law no. 2012-1270 of 20 November 2012 known as the "Lurel Law". Within this framework the Autorité de la concurrence has issued 7 decisions in these overseas departments, 5 of which are subject to commitments.

One of these decisions is interesting in that it tackles the specific status of an importer/wholesaler enjoying de facto exclusivity. On the Martinique market, the Autorité de la concurrence obliged the retail distribution group Bernard Hayot to forfeit the exclusivity of supply that it enjoyed as an importer/wholesaler and undertake not to favour its own labels in the distribution of the commercial cooperation budget agreed by the suppliers[48].

However, these developments are not in themselves sufficient. For this reason, the aforementioned opinion of the Autorité de la concurrence has been extended in the Lurel law, strengthening antitrust regulation in the Overseas Departments.

This law allows, first, the Government to order, further to the public opinion of the Autorité de la concurrence and by decree of the Council of State, the measures necessary to remedy any dysfunction in the wholesale markets in the Overseas Departments[49]. The scope of these measures is broad since they can tackle problems of access to these markets, price discrimination, disloyal transactions and the management

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47 Some groups hold market shares in commercial surface areas of more than 40%, either across the whole of the *department* in question, or over one or several shopping areas.

48 Decision on. 11-DCC-134 of 2 September 2011, Louis Delhaize/Groupe Bernard Hayot.

49 Article L. 410-3 of the Commercial Code.

of essential facilities. The Autorité de la concurrence has been given the task of ensuring compliance with these measures by issuing legal orders which if not met may result in penalties.

Secondly, the Lurel law prohibits exclusive import agreements[50], unless the parties can demonstrate to the Autorité de la concurrence that these agreements will result in gains in economic efficiency and that a share of the resulting of profit will be passed on to the consumer.

In addition, the law sets out a specific mechanism known as a "structural injunction"[51]. Since 2008, the Autorité de la concurrence has had the power to use a structural injunction to order the transfer of assets in the retail trade[52] where there is abusive use of a dominant position or a state of economic dependence by an undertaking or a group of undertakings operating one or several retail shops. However this power has never been used due to the very strict conditions of application.

The law therefore amends the conditions for the exercise of this power in the Overseas Departments so that the Autorité de la concurrence may have the necessary and proportionate tools at its disposal to re-establish effective competition. This provision was notably brought in as an echo of the stance taken by the Autorité de la concurrence in its opinion no. 12-A-01 on the distribution sector in Paris, in which it had highlighted the difficulty of using the power of a structural injunction within the framework of the current law. However the Lurel law strictly regulates this new measure.

Indeed, within the framework of this new mechanism, it may inform an enterprise or a group of enterprises in a dominant position of its competition concerns arising from the practice of high prices or margins in comparison with observed averages within the sector that this position allows it to practice. If the enterprise does not suggest commitments or the proposed commitments do not appear to be of a sort to bring competition concerns to an end, the Autorité de la concurrence may, giving a duly justified decision taken after discussion in the presence of both parties, order it to change its contracts or its behaviour or, when these measures are not sufficient to establish effective competition, to transfer assets. Unlike articles L 420-2 and L 752-26 of the Commercial Code and 102 TFUE, this new mechanism does not require the legal characterisation of the facts, particularly that of an abuse, to be brought against an enterprise in a dominant position.

Finally, the Lurel law states that in certain overseas territories, an annual global-price moderation agreement for a limited list of everyday consumer products must be negotiated each year between the Prefect and the professional organisations in the retail trade sector. If no agreement is reached within one month, the Prefect may regulate the prices of the products on the list. (Cf. article L.410-4(1) and L. 410-5(2) du Code de commerce). In 2012, this price regulation was not implemented since agreements were reached in all the Overseas Departments concerned.

[50] Article L 420-2-1 of the Commercial Code.

[51] Article L. 752-27 of the Commercial Code.

[52] Article L. 752-26 of the Commercial Code.

# GERMANY

## 1. Introduction

Access to food products of sufficient quality and quantity at affordable prices is vital for a society and its economy. Rising food prices worldwide have therefore led to an increasing interest in the markets on the side of governments as well as legislators. Recently, the European Commission launched the consultation about its Green Paper "Unfair trading practices in the business-to-business food and non-food supply chain" (Green Paper), with a view to finding a way to address trading practices in these markets that are deemed "unfair".

At the same time, competition authorities have increasingly had to intervene on the relevant markets. The markets falling under the general category of the food chain industry have been investigated by the Bundeskartellamt on several occasions and concerning all types of anti-competitive conduct, including merger reviews and sector inquiries. Markets investigated included the markets for potatoes, meat, flour production and milling, sugar, chocolate and confectionery, candies, coffee and coffee-based products, beer and the milk and the food retail sectors in particular. Competition issues raised in these markets ranged from evident horizontal price fixing over different forms of vertical restraints to abuses of dominance or market power.

This contribution will first provide an overview of food price developments in Germany (B.) and a comment on relevant legislative activities at the level of the European Union (EU) concerning the Green Paper (C.). This will be followed by a selection of recent enforcement activities by the Bundeskartellamt (D.), showing areas of the food chain sector that are being or have been investigated and highlighting some of the competition issues relevant in these markets, including buyer power. The contribution closes with a few concluding remarks (E.).

## 2. Price Developments in Germany

Rising prices for food products have a large impact on a society and its economy. The food industry (i.e. the markets in the food supply chain downstream of the agricultural sector) is the fourth largest industry sector in Germany. Consumers spend around 200 billion euro on food products per year. Food prices have been rising considerably in the last years. According to the Federal Statistical Office, non-alcoholic beverage and food prices increased by 12, 5 % between 2005 and 2011, while overall living costs (as measured in the consumer price index) increased in the same time by only 8,2 % [1] Prices for non-alcoholic beverages and food products are also higher in Germany than the EU-average.[2]

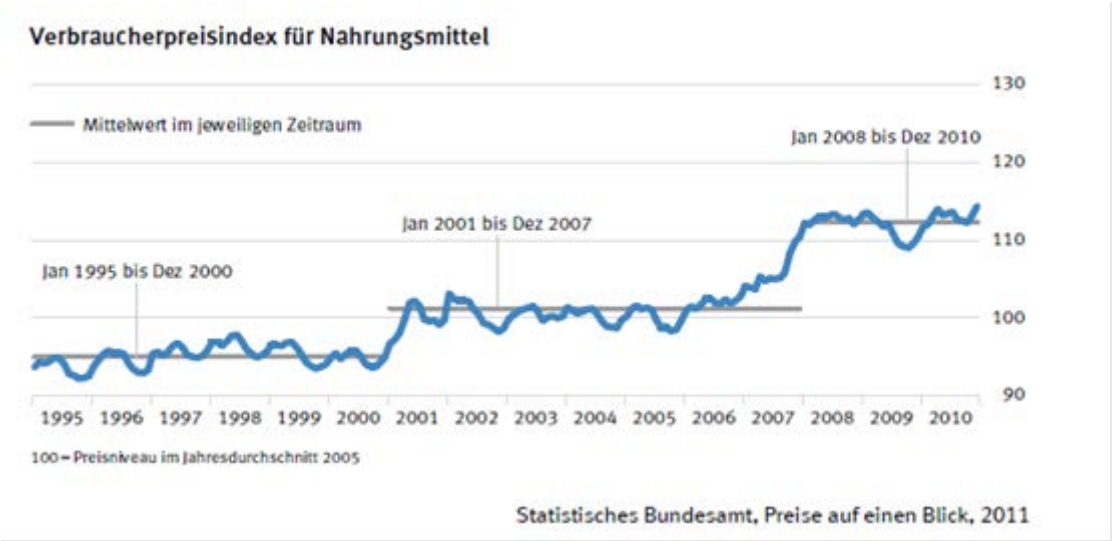
Food prices generally are quite volatile over time; this is due i.a. to seasonal changes or reflects increasing scarcity, such as e.g. diminished fish stocks. However, German food prices saw two major and

[1] Federal Statistical Office, Preise auf einen Blick, 2011: https://www.destatis.de/DE/Publikationen/Thematisch/Preise/Verbraucherpreise/PreiseAufEinenBlick0170005107004.pdf?__blob=publicationFile, p. 60

[2] Statistic by eurostat, comparing prices in 2012. Available at: //epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/2-21062013-AP/DE/2-21062013-AP-DE.PDF

permanent increases around 2001 and 2008. According to the Federal Statistical Office, the first increase was connected to rising prices of products of animal origin following i.a. several animal epidemics, such as bovine spongiform encephalopathy (BSE). The second rise was linked to dairy and cereal products becoming more expensive during a time in which market prices for these products rose world-wide.

This can be seen quite clearly in a graph published by the Federal Statistical Office depicting the development of the consumer price index for food[3]:




A study conducted in 2010 revealed that consumers are not aware of many of these price increases.[4] The study concluded that price competition has to be fierce only in 40 out of 275 "groups of the fast moving consumer goods". Only in these 40 segments, e.g. bread, yogurt, and milk, are consumers familiar with prices and so are aware of price increases. Indeed, these segments cover 50% of the revenue earned with the 275 groups. But this also means that half of the revenue can be earned without strong price pressure.

On account of these price increases the legislator felt a need to become active – recently in particular on the level of the European Union (EU). At the same time, the activities of the Bundeskartellamt on these markets have become more important and received more attention in society.

## 3. Legislative initiatives at the EU level

The European Commission (Commission) felt the need to become active with regard to the food supply chain to address perceived problems caused by developments on these markets over the last decades. In its Green Paper "Unfair trading practices in the business-to-business food and non-food supply chain", the Commission stated that the business-to-business food and non-food supply chain has changed considerably over the last two decades, due to economic, social and demographic reasons. Increased concentration and vertical integration that can be witnessed in Germany also take place across the whole EU and have led to structural changes in the food supply chain.

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3 Federal Statistical Office, Preise auf einen Blick, 2011, p. 36. Prices are not inflation-adjusted, however, prices for food increased more than the general inflation rate (as measured by the consumer price index) as mentioned above.

4 Joint survey of GfK and SAP, Preisoptimierung im deutschen Lebensmitteleinzelhandel – von einer wettbewerbs- zur kundenorietierten Preisfindung, 2010, available at: http://www.sap-nah-am-kunden.de/.

Germany welcomes that initiative and generally supports measures that enhance the functioning and competiveness of the supply chain from the producer to the consumer. However, the Federal Government of Germany doubts that the lack of EU-wide rules dealing with so-called unfair trading practices constitutes a hindrance for a fully functioning internal market. EU-Member States address the problem with varying measures that might simply reflect their different legal systems.

Existing legislation in Germany does not provide for a specific definition of unfair trading practices. Situations of economic imbalance are addressed in the Act against Restraints of Competition; for example with provisions that are based on the concept of relative market power and allow an effective approach on a case-by-case basis. The concept of unfair trading practices is also recognised and addressed by existing legislation through contractual law (in particular provisions on the invalidity of provisions contrary to public policy (section 138 German Civil Code), of provisions contrary to good faith (Section 242 German Civil Code) or on unfair general terms and conditions.

The German competition law has its own prohibitions of abusive practices in Sections 19 and 20 of the Act against Restraints of Competition (ARC) which allow for a case specific assessment of whether a particular conduct constitutes acceptable „tough negotiations“ or an abuse of market power. The Bundeskartellamt's previous practice has shown that Sections 19 (2) and 20 (2) ARC are also appropriate for covering cases of abusive practices in the business-to-business supply chain, even where the market dominance threshold has not been reached. Section 20 (4) ARC is also of particular relevance for practical abuse control.

In view of the diversity and complexity of possible cases of potential unfair trading practises, the Federal Government considers regulation at EU level as not useful at this stage.

## 4. Selected enforcement activities by the Bundeskartellamt on food related markets

In view of the internationalisation of markets, competition authorities have also been increasingly active in the food chain sector.[5] The Bundeskartellamt can look back on a considerable array of recent enforcement activities in the food chain sector. These can be grouped into cases relating to market distortions on the manufacturer level (1.), on the retail level (2.), and investigations, where the whole value chain of a specific product is covered (3.). In the following, some selected case examples and the issues relevant to them are presented.

### *4.1 Market distortions at the manufacturer level*

In the last years, several food manufacturers active in different markets have been subject to investigations and sometimes fines imposed by the Bundeskartellamt. The following cases are selected examples of such investigations.

[5] The European competition authorities have published a report on competition in the food sector in Europe. The report gives an account of all the examinations and proceedings conducted by the 27 national competition authorities and the European Commission in this sector. See the full report at the following website: http://ec.europa.eu/competition/ecn/documents.html.

### *4.1.1 Cartels*

#### 4.1.1.1 Milling industry

Recently, the Bundeskartellamt concluded its fine proceedings, which were initiated in 2008, against companies in the milling industry and imposed fines amounting to approx. 65 million euros on 23 companies, the association of German mills (*Verband Deutscher Mühlen e.V.*), as well as their representatives involved.[6] Since 2001 representatives of the milling companies involved had agreed on prices, customer allocation and supply volumes in regular rounds of talks. The agreements applied to all forms of flour distribution, i.e. to industrial customers (such as e.g. bakery product manufacturers and bakery chains), artisan bakers and the direct sale of flour in small packages (max. 1 kg packets) to food retailers. 17 of 24 proceedings could be concluded by settlement.

#### 4.1.1.2 Branded confectionery market

Also this year, the Bundeskartellamt concluded its fine proceedings against several manufacturers of branded confectionery. On account of several cartel infringements, fines of approx. 60 million euros were imposed on 11 companies and some of their sales representatives. The companies met regularly over several years in several discussion groups. In 2007, prices for important raw materials for the production of chocolate, such as milk and cocoa, increased significantly. The participants exchanged information on their negotiations with and on planned price increases for retailers. In one of the discussion groups some manufacturers of chocolate coordinated price rises. The proceedings were initiated after a leniency application filed by Mars GmbH, against which no fine was imposed in accordance with the Bundeskartellamt's Leniency Programme.

#### 4.1.1.3 Consumer goods

In 2011 and 2013, the Bundeskartellamt imposed fines on three manufacturers of consumer goods: These had violated competition law with their exchange of competition-relevant information.

The companies involved were widely known manufacturers of consumer goods. The proceedings were triggered by an application for leniency filed by Mars.

The companies met regularly over several years in a discussion group. In these meetings high-ranking sales executives informed each other on the state of negotiations between their companies and several major retailers. In various product areas, i.e. confectionery, instant coffee, dry ready-to-eat meals, frozen pizzas, pet food and detergents, the main rivals sat face to face at these meetings. Some of the participants also exchanged information on planned price increases for retailers for some of the product areas.

#### 4.1.1.4 Coffee roasters

During 2008 and at the beginning of 2009 the Bundeskartellamt opened a series of investigations into a cartel of coffee roasters and manufacturers of instant cappuccino. In December 2009 the Bundeskartellamt imposed fines totalling approx. € 160 million against the coffee roasters for price fixing: The aim of the cartel was above all to maintain the “price architecture” of the companies’ final sales prices and special offer prices for their major roasted coffee products. The infringement lasted from at least early 2000 until the dawn raids in 2008. Furthermore, in June 2010 fines totalling approx. € 30 million were imposed on coffee roasters for price fixing in the so-called “out-of-House” market and in October 2011

[6] http://www.bundeskartellamt.de/wEnglisch/News/2013_07_16_Case_summary.php

fines totalling approx. € 9 million were imposed on manufacturers of instant cappuccino for having agreed on price increases for 'Family Cappuccino' in late 2007 / early 2008.

The Bundeskartellamt also investigated several other cases in the food manufacturing sector. Amongst others the investigations concerned sugar producers, sausage manufacturers, beer producers and – most recently –the potato market.

#### *4.1.2 Mergers*

Following an in-depth Phase II investigation, the Bundeskartellamt prohibited a merger in the market for curdled milk cheese. The Bundeskartellamt considered that the merger would have led to a dominant position of the Theo Müller group on the market for the manufacturing of this cheese in Germany. Important merger proceedings on the manufacturer level recently included decisions concerning ice-cream, aquavit. On 17 November 2011 the Bundeskartellamt also prohibited the intended acquisition of the slaughterhouse operator Tummel by Tönnies, which holds a dominant position in the procurement of cull sows and distribution of sow meat to meat processors in Germany. In the context of Nordzucker's acquisition of its Danish competitor, Danisco, the Bundeskartellamt found that the market for industrial sugar in Germany was characterised by an uncompetitive duopoly between the producers Nordzucker and Südzucker and that the acquisition would have further expanded their joint dominant position. To avoid the negative effects of the addition of production capacities and the elimination of a powerful competitor by the merger, the parties offered the up-front divestiture of a production plant in the north of Germany.

#### *4.1.3 Boycott*

The Bundeskartellamt also prohibited a boycott of raw milk sales to processors in 2008. In this case, a German milk farmers' association had requested farmers not to sell milk to all major dairies in Germany, with the aim of achieving a uniform price for milk in Germany. The boycott was accompanied by a physical blockade of the dairies that still received large quantities of raw milk from various sources. The boycott was called in order to force the dairies to agree on a uniform price to demand in their contractual negotiations with the retailers and to force the retailers to raise the price that end consumers would have to pay for milk above a certain level. The Bundeskartellamt found that this behaviour infringed the specific German national competition rules on boycott cases. The decision was upheld on appeal.

### ***4.2 Market Distortions at the retail level***

In the last ten years Germany witnessed a strong tendency towards concentration. In 1990 eight retailers together reached a market share of about 70 percent. Today, the combined market share of the four largest undertakings, namely the REWE Group, EDEKA, the Schwarz Group and Aldi, amounts to approximately 85 percent. There is concern that the gap between the market leaders and their followers will widen even further. The largest retailer Edeka showed a sustained growth of 30% in the last 4 years according to its annual report of 2012 (€ 41,6 bn. turnover in 2012).[7] Overall, it could be that already small changes to the market structures in this sector might gradually result in their substantial deterioration: Outstanding economies of scale and buyer power might develop a momentum of their own.

At the retail level, the issue of market power on the demand side (buyer power) has been the subject of an increasing number of expert and political discussions in the last years in particular. The topic has also been relevant for several cases investigated by the Bundeskartellamt. To get further insights into the issue and the driving factors of the balance of bargaining power in the food value chain, the Bundeskartellamt is currently conducting a sector inquiry into the food retail sector which will, inter alia, contain a broad

[7] http://www.edeka-gruppe.de/Unternehmen/de/geschaeftsbericht/kennzahlen/kennzahlen_2012.jsp

empirical analysis and econometric assessment of the actual results of negotiations between manufacturers and retailers for a representative sample of food products (a). In addition, the Bundeskartellamt has investigated a number of merger and unilateral conduct cases, where the "two faces" of buyer power have played an important role in the assessment – either as countervailing buyer-power (b.) or as a potentially problematic form of market power (c.).

### *4.2.1 Food retail sector inquiry*

In 2011, the Bundeskartellamt launched its sector inquiry into the food retail sector. The examination focuses on the competitive conditions in the markets for the procurement of food and beverages by food retailers. The sector inquiry is not only relevant for the case practice of the Bundeskartellamt but is also meant to provide new information for the public debate of the issue. The ongoing debate on the concentration process in the food retail sector as well as the balance of bargaining power between retailers and manufacturers proves that there is a strong public interest in this issue. The launch of the sector inquiry has therefore been welcomed by a large part of the industry.

Contrary to the alternative view of buyer power as the perfect mirror image of seller power (known as "monopsony power") – the sector inquiry conceptually considers bargaining theory to be the suitable theoretical framework for the analysis of buyer power in the food value chain. In this context, buyer power is considered to be equivalent to bargaining power with the outside options of each player determining their (relative) bargaining strength. The larger the buyer's outside option, and the smaller the outside option of the seller, the greater the share of incremental surplus of the contractual relationship captured by the buyer. The value of the buyer's outside option depends on its ability to switch to alternative suppliers. Similarly, the value of the seller's outside option depends on its ability and willingness to substitute to alternative buyers.

Based upon the experience with complex inquiries into the food retail industry of other jurisdictions, the empirical analysis of the Bundeskartellamt is conducted in two steps: In the first investigative stage, the Bundeskartellamt conducted a survey on company and market structures in the food retail sector. The survey in particular focused on the data relevant to assess the market positions of retailers and the options available to producers to partially or completely bypass the major retailers. The second, still ongoing investigative stage was initiated in 2012 and intends to gather and assess the relevant panel data set for an econometric assessment of concrete results of negotiations between manufacturers and retailers in order to determine the most relevant factors determining their (relative) bargaining power.

The contents of the complex data request were based on numerous talks the Bundeskartellamt previously held with market participants. It contains detailed data requests on a stratified sample of approx. 250 individual products with regard to a time-series of quantities, turnover, list prices and terms and conditions, including non-monetary conditions and standardized discounts which do not refer to a specific product. To measure and assess the relative outside options of manufacturers and retailers and the most important drivers of their (relative) bargaining position properly, further detailed data are requested that allow for an estimation of e.g. the strength and "must-have character" of a specific brand and the competitive pressure exerted by other distribution channels and branded products or private labels for each of the products of the sample.

Since it would be disproportionate to investigate each product listed in the food retail trade, the Bundeskartellamt has concentrated on a selection of products. The sample was carefully selected so that the 250 products included are representative of the full product range of the German food retail trade with up to 50,000 products. This is why the sample does not only include top brands of large producers but also products that are typically part of the food retail product range but are less well-known as a brand.

After the evaluation of both surveys the Bundeskartellamt will present the results of the empirical analysis in a report and publish them for discussion. It is expected that the results will be published in 2014.

### *4.2.2 Countervailing buyer power*

Although the Bundeskartellamt has intervened in some cases where buyer power had negative effects on competition, this must not necessarily always be the case. A company's power to supply can not only be limited by competitors but, under certain circumstances, also by countervailing buyer power. A powerful buyer can thus counteract the effect of (relative) power of supply, if he can credibly threaten to switch to another supplier within a short time frame or to take other effective retaliatory measures. Moreover, a powerful buyer can feel induced (and be able) to distribute his demand over several suppliers (thereby possibly facilitating market entry). He can thus already prevent the emergence of market power on the supply side. The concept of countervailing buyer power is also part of the analysis in i.a. merger review.[8]

One case example where countervailing buyer power was one relevant factor, amongst others, concerned a merger of ice cream manufacturers that the Bundeskartellamt cleared in March 2013.

In second phase proceedings the Bundeskartellamt cleared the plans by DMK Eis Gmbh to acquire the Roseneis group. The merger was considered to mainly affect the German production of ice cream sold by food retail companies under their own private labels (so-called private-label ice cream). Although the level of concentration in the private-label ice cream sector is very high and still increasing, the merger could be cleared following an in-depth examination of the project. The Bundeskartellamt was of the opinion that the food retail sector would continue to have enough scope in its procurement activities. In the production of ice cream there are free capacities of the remaining competitors, which lead to competitive pressure.

In addition, the manufacturers of ice cream face a strong demand side with the food retail sector. The food retailers usually invite new tenders for the production of private-label ice cream each year and largely specify the recipes. This enables them to change supplier on a short-term basis, an opportunity which they have actually made use of in the past. According to the Bundeskartellamt's investigations, one undertaking active on that market in particular is, and will continue to be, a key competitor of the parties to the merger. For these reasons, the merger could be cleared.

### *4.2.3 Buyer power as a problematic form of market power*

In addition to its potential to counteract market power, buyer power also has the potential to cause market distortions. In the Bundeskartellamt´s practice so far buyer power has played a role in the following three case constellations: (i) two or more large buyers merge to form one buyer, (ii) buyers conclude joint purchasing agreements, and (iii) dominant or powerful buyers induce suppliers who depend on them to grant them advantages without any objective justification.

### *4.2.4 Buyer power and market dominance*

In merger control, buyer power plays a particular role with regard to the creation or strengthening of a dominant position. Buyer power can create a dominant position directly in the relevant procurement market

[8] See the discussion of countervailing buyer power in the Bundeskartellamt`s 2012 Guidance on Substantive Merger Control. Availalbe at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/2012-03-29_Guidance_final_neu.pdf

concerned. At the same time, it can also be an aspect to consider within the framework of the assessment of a supply-side market position, namely with regard to access to procurement markets.[9]

As for market definition, the demand-side oriented market concept which is tailored to supply markets has gained acceptance in practice. Under this concept it is primarily the actual ability of the opposite market side to resort to other sources which limits a supplier's scope of action. In the case of buyer power it is the procurement markets, not the supply markets, which have to be defined. The demand-side oriented market concept is applied inversely in this context. From the suppliers' point of view the market definition is thus based on their ability to switch to alternative sales opportunities. In practice, the inverse application of the demand-side oriented market concept to procurement markets leads to application problems. In those cases of buyer power which have proved relevant in practice, the number of companies on the demand side, and usually also on the supply side, is relatively low. In such a constellation the companies' individual differences in the products they produce, their individual sales alternatives and individual flexibility to switch to other sources, become much more apparent.

Another important issue in this context is the issue of market dominance and/or significant impediment to effective competition. In the case of supply markets the consideration of market shares generally allows for statements about the supplier's position vis-à-vis his competitors and the opposite side of the market. This approach cannot easily be applied to procurement markets. In this area, buyer power is less often expressed in the classical sense as market power affecting the opposite market side as a whole, but more often in the form of bargaining power exercised bilaterally vis-à-vis individual suppliers. However, market dominance or market power cannot simply be equated with an imbalance in bilateral power relationships and therefore the issue needs to be carefully assessed on a case-by-case basis.

In the light of an already high concentration in food retail; merger projects have to be assessed carefully in this sector. This is necessary even if a single merger may lead to just a small increase in concentration. What should be avoided are kinds of "creeping acquisitions": Instead of buying a whole retail store chain, parties could try to split up their acquisitions into several transactions. As such, every single one might be "too small to fail".

Maybe the most prominent retail merger case was the already mentioned acquisition of Plus by Edeka in 2008. This merger could only be cleared subject to the condition that several of the target stores were sold to a third party. In the acquisition of Plus by Edeka, the notified merger intensified the already high level of market concentration in the procurement of goods. To counterbalance the loss of purchasing power resulting for Tengelmann, the parent company of Plus, Tengelmann and Edeka planned a purchasing cooperation. The result of this would have been an even greater dependence on the supplier side. Lowered purchasing prices would have further strengthened Edeka's position in comparison to that of its competitors. It was unclear whether cost savings would be passed on to the consumer. Consequently, the planned purchasing cooperation between Edeka and Tengelmann, the former parent company of Plus, was denied. The acquisition of Plus by Edeka was cleared under remedies.

A more recent case involves the markets for drinks: Edeka planned to takeover trinkgut, one of the biggest drinks store chains in Germany. The case could again be cleared under conditions. In both cases the Bundeskartellamt also had a closer look at procurement markets and the problem of buyer power. In Edeka/trinkgut the Bundeskartellamt had some indications that the big retail chains together dominate the

[9] See the discussion of the assessment of buyer power in the Bundeskartellamt`s 2012 Guidance on Substantive Merger Control. Available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/2012-03-29_Guidance_final_neu.pdf

procurement markets for trade mark products in the non-alcoholic beverages sector. However, this aspect was not sufficient to support a prohibition decision.

#### *4.2.5 Buyer power and anti-competitive unilateral conduct*

The German legislator provided the competition law with specific rules to capture specific forms of market power that also apply to buyer power. Section 19 (1) of the ARC prohibits the abusive exploitation of a dominant position. Under Section 19 (2) No. 5 ARC such an abuse of a dominant position exists if a company uses its market position to invite or cause other companies to grant it certain benefits without any objective justification. According to Section 20 (2) ARC this also applies to the relationship between companies if one company is dependent on the other.

In one case of such unilateral anti-competitive conduct, a statement of objections was issued against the largest German retailer EDEKA in July 2013 for the use of "wedding rebates" after its takeover of Plus (another large retailer).

The Bundeskartellamt currently assumes that this constituted an abusive practise insofar as EDEKA demanded benefits from its suppliers without an objective justification. Tough negotiations between retailers and producers are normal in the food retail sector and, despite the strong market position of the few large retailers, generally not objectionable under competition law. According to the preliminary assessment, however, in the present case EDEKA may have crossed the line and abused its buyer power vis-à-vis its suppliers. After its takeover of the Plus stores, EDEKA had demanded special conditions from about 500 suppliers in different product areas without consideration. EDEKA had demanded that better purchase conditions granted to the Plus market stores also be offered to the EDEKA Group as a whole. The same applied to longer payment periods that had been granted to Plus in some cases. In addition, the suppliers were asked to pay certain amounts of money under the rubrics of "synergy bonus", "partnership compensation" or "bonus for product range expansion". The Bundeskartellamt takes a particularly critical view of those demands that were not met with corresponding compensation by EDEKA: The "cherry picking" of individual preferential conditions granted to Plus by suppliers in the past; the application and extension of the preferential conditions granted to Plus for specific products to the entire range of products purchased by EDEKA from the respective supplier; the demand of special bonuses on account of cost and turnover benefits allegedly resulting from the Plus takeover for suppliers, without sufficient explanation or substantiation of such benefits; and the fact that the demands were made retroactively.

Such demands can have negative effects not only for the suppliers. A large company such as EDEKA can also use them to further expand its market power to the detriment of smaller retailers. Competition may also be hindered by the fact that such demands induce suppliers to abstain from offering preferential conditions to smaller trading companies. This was confirmed by the Bundeskartellamt's investigations in this case. The suppliers feared that in the case of a future merger or purchase cooperation between retailers, they would be forced to offer such individual conditions to a significantly larger extent to the new partner as well.

### *4.5 Investigations covering the whole value chain of a specific product*

Also investigations concerning the whole value chain of specific products have been conducted by the Bundeskartellamt. Important enforcement activities include cases of vertical restraints in branded consumer goods and the sector inquiry milk.

#### *4.5.1 Vertical restraints and branded consumer goods*

At the beginning of 2010, the Bundeskartellamt dawn raided 15 companies, 11 retailers and 4 manufacturers of branded consumer goods. The allegations concerned the fixing of end consumer prices

for confectionery, coffee and pet food. In the course of the investigation, the proceeding was extended to the products beer; baby foods and body care products. In this context a lively debate had started about the need for collaboration between retailers and producers and the limits which competition law sets.

### *4.5.2 Sector inquiry milk*

In 2012 the Bundeskartellamt published its final report on its milk sector inquiry. In the report the authority presents an in-depth assessment of the business relationships in the milk sector, identifying several distortions of competition on different levels of the food value chain.[10]

In its sector inquiry the Bundeskartellamt conducted an extensive analysis of the milk sector, ranging from the procurement of raw milk through the dairy to the retail sector. Whereas its interim report in January 2010[11] focused on competition structures and power relationships between the individual market levels, the final report concentrates on the classification under competition law of the competition problems identified and on the authority's case practice.

The Bundeskartellamt considers, for example, market transparency, in particular with regard to market information systems which publish current and dairy-specific data on the price of raw milk, as critical. The exchange of these data can facilitate the standardisation of such prices by dairies competing with one another in the same region.

The final report illustrates that the issue of power imbalances between dairies and the food retail sector must be addressed individually. The market position of a dairy depends strongly on the size of its share of supply to retailers, its product portfolio and whether it has distribution alternatives.

## 5. Conclusion

Food supply and food prices are extremely important issues not only for competition authorities but also for consumers, politicians and regulators. Competition can contribute to more innovation in production and distribution, lower prices and better services. The role of competition authorities therefore is to safeguard the competitive process and to help establish healthy competition in the food supply markets. The food sector does not differ much from any other sector from the point of view of a competition authority. In particular cartel infringements occur in a wide variety of sectors. Overall, there is no reason to fear an enforcement deficiency in the food industry, at least not in Germany. Therefore, Germany would caution against overreaching legislative intervention where private law and competition law already are sufficient to deal with remaining issues.

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[10] Available in English: http://www.bundeskartellamt.de/wEnglisch/download/pdf/2012-Milk_Sector_Inquiry_Final_Report.pdf

[11] http://www.bundeskartellamt.de/wEnglisch/download/pdf/10-006_Sektoruntersuchung_Milch-E.pdf

# GREECE

## 1. Introduction

The food supply sector in Greece is constantly evolving, mainly driven by the severe economic downturn, as well as ensuing changes in consumer preferences and commercial relations between members of the food supply chain.

As a result, there are two main trends characterizing the Greek food supply sector:

- An increasing degree of market concentration in food retailing,
- A growing consumer preference towards private label (own label) products.

In view of the ongoing economic crisis, the Greek Competition Authority has placed renewed emphasis in recent years on antitrust enforcement in the food supply, processing and retailing markets, while further expanding both (a) its market monitoring efforts as to identify inefficiencies and asymmetries in the transmission of price changes throughout the supply chain of certain products and (b) its advocacy efforts as to identify regulatory barriers to competition that may lead to rigidities in the marketplace.

During the period 2004 – 2012, the Greek Competition Authority initiated/issued the highest number of antitrust enforcement proceedings and binding decisions in the food sector, as compared to other National Competition Authorities within the European Competition Network. For an overview of activities undertaken by the Greek Competition Authority, please refer to the ECN Food Subgroup Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector (http://ec.europa.eu/competition/ecn/food_report_en.pdf).[1]

## 2. Key characteristics of the food supply chain in Greece

The Greek food supply chain consists of a number of players, which can be categorized as follows:

| Agricultural Producers | Food Processors | Food Retailers | Food Consumers |
|---|---|---|---|

### *2.1 Agricultural Producers*

The agricultural production in Greece exhibits an apparent decreasing trend over the last few years. Greek agriculture, despite its considerable size relative to the economy and its contribution to main macroeconomic indicators (such as GDP, employment and exports), is subject to several natural, structural and demographic impediments that hinder its efficiency and overall competitiveness. In brief, large mountainous and less-developed areas, scarcity of useful and fertile agricultural land, dry climate especially during irrigation periods, insufficient water resources, the prevailing small size and fragmentation of agricultural holdings that disallows for economies of scale, relatively high production

[1] See, e.g. comparative overview, Table 2, page 30.

costs, as well as the ageing and low education level of farmers are usually identified as the sector's main impediments.

The agricultural sector's activities include crop production and the raising of livestock, which has been declining over the last years. Farmers' output can be used as inputs for the production of final food products, but farmers also sell directly to retailers, final consumers or alternative markets (e.g. biofuels).

In general, Greece exhibits a surplus with regard to the production of fruit and vegetables, tobacco, cotton and olive oil, while it is deficient in the production of meat, dairy products (except of goat-cheese and feta-cheese), foodstuff, coffee, spices, animal feed, oilseeds and timber.

### *2.2 Food Processors*

Processed foods, as opposed to traditional agricultural commodities, are becoming increasingly important in the agri-food trade. Moreover, a key role in this process is played by a few major companies, as food manufacturing is characterized by a high degree of transnationality, with production by food multinationals steadily increasing.

A key characteristic of the Greek food processing industry is its structure. About 200 large firms produce 85% of total output. On the other hand, approximately 16.000 small companies produce the remaining percentage. These small firms, albeit lacking in technology and innovation, contribute significantly to employment in rural areas, to the production of traditional goods and to agri-food diversity.

As regards product focus, the most important sub-sectors in Greece include fruit and vegetable processing, beverages, dairy, confectionary and snacks. These sub-sectors account for more than 75% of sales, added value of production and employment in the food industry sector.

### *2.3 Food Retailers*

The current economic situation in Greece has re-shaped the retail grocery environment, the main characteristic being the increasing degree of market concentration in food retailing. Until recently, Greece had one of the lowest degrees of retail concentration in EU-27.[2] Albeit the growing number of mergers and acquisitions in the food retailing sector, retail concentration is still relatively low as compared to other EU Member States (with the 7 larger retailers accounting for approx. 75% of total sales). The Greek retail food industry is focused on major retail supermarket chains in urban areas, with the Attica region dominating with around 55 percent of national sales. However, hypermarket development in Greece remains restricted to specific areas, limited by the vast rural, island areas and the lack of large cities in the country. Large companies are trying to expand geographically by increasing their selling points through mergers, acquisitions and franchising, while most small and medium size companies are increasing join buying groups.

As regards the key retail categories, supermarkets/hypermarkets and cash and carry stores account for almost 90% of total turnover in the Greek food sector, while small grocery shops, mini markets, and small self-service stores represent the remaining 10%. The market share and turnover of the smaller shops have been constantly declining in recent years, because of the rapid expansion and increase in the number of outlets of the supermarket chains. This is notwithstanding that Greece's geography - with its numerous populated islands - is beneficial to small local shops and businesses.

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[2] See EU Commission Staff Working Document - A better functioning food supply chain in Europe {COM(2009) 591 final: (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2009:1449:FIN:EN:PDF)

During last years there has been an increase of private label products offered at stores. Estimations show that private label products have a market share of about 20% of all sales of super market chains. The value of total sales of private label products, through Greek supermarkets and cash & carry, grew at an average annual rate of change of 11% for the period 2007-2011 and was estimated at approximately € 2.6 bln in 2011.

### *2.4 Consumers*

As far as food consumption is concerned, food products in Greece have generally inelastic price and expenditure demand. Food expenditure, as a significant part of the average Greek household expenditure, has been declining over the last years. Meat, dairy products, as well as fruit and vegetables are the largest food commodities in terms of household budgetary shares.

Furthermore, with rising unemployment rates - which currently stand at about 27 percent - and price rises after two VAT increases during the last years, the spending power of Greek consumers has been reduced significantly. Consumers continue to buy the essential products, while taking advantage of any promotional offerings. In addition, consumers are turning increasingly towards private label items that combine product quality with the lowest prices. On-line shopping is continuing to grow, but still represents a relatively small customer base.

## 3. Antitrust enforcement

As already mentioned, during the period 2004 – 2012, the Greek Competition Authority initiated/issued the highest number of antitrust enforcement proceedings and binding decisions in the food sector, as compared to other National Competition Authorities within the European Competition Network. This emphasis is to be attributed to the Authority's realignment of strategic goals in view of the economic crisis affecting severely household spending.

Key (selected) antitrust investigations undertaken recently by the Greek competition authority include:

### *3.1 Ex officio investigation in the markets for coffee distribution – infringement of antitrust rules by "NESTLE HELLAS S.A."*

Following complaints, the Authority conducted an ex officio investigation in the coffee product market(s) regarding alleged infringements of articles 1 and 2 of law 703/77, as well as articles 101 and 102 of the EC treaty by "NESTLE HELLAS S.A".

The Competition Commission concluded in its Decision No. 434/V/2009 that:

1) "NESTLE HELLAS S.A." infringed articles 2 of law 703/77 and 102 of the TFEU by abusing its dominant position in the market for instant coffee, in particular by:

- granting target and fidelity rebates to retailers, impeding parallel imports, as well as by prohibiting parallel marketing activities of its products and competitive products;
- imposing exclusive supply and bundling contract arrangements in the HO.RE.CA. segment of the market, as well as by granting fidelity rebates aiming at inducing customer loyalty; and
- imposing a non-compete obligation (equivalent to an "English clause").

2) "NESTLE HELLAS S.A." infringed articles 1 of law 703/77 and 101 of the TFEU, by prohibiting/ impeding parallel imports with regard to specific super market chains, while further prohibiting passive sales by its distributors.

In view of the above, the Competition Commission imposed fines totaling € 30 million.

The Commission's decision was upheld in substance by administrative courts (albeit some reduction of total fines).

### *3.2 Decision concerning infringements of Articles 1 of Law 703/77 and Article 101 TFEU by the retailer Carrefour Marinopoulos S.A. in connection with the franchise network for the operation of '5 Marinopoulos' retail stores*

Following complaints by franchisees, the Directorate General for Competition launched an investigation into alleged infringements of Articles 1 and 2a of Law 703/77, as well as of Article 101 TFEU, in connection with the franchise system for the operation of «5' Marinopoulos» retail outlets.

The Competition Commission, in its Decision No. 495/VI/2010 found that Carrefour Marinopoulos infringed competition rules by imposing resale price maintenance and restricting cross-supplies between members of the franchise network (coupled with exclusive supply obligations). In particular, the Competition Commission concluded that specific conditions in the franchise agreement amounted to resale price maintenance, by requiring franchisees to adhere to Carrefour's recommended prices. In addition, the operation of a joint IT system, which formed an integral part of the network, rendered the management of prices by the franchisees difficult and time-consuming in practice, thereby facilitating price rigidity.

The Competition Commission imposed fines totaling € 12.5 million on Carrefour Marinopoulos for the said practices. Moreover, it asked Carrefour Marinopoulos to refrain from the infringements and to amend (or withdraw) the restrictive contractual terms.

The Commission's decision was upheld in substance by administrative courts (albeit some reduction of total fines).

### *3.3 Decision concerning infringements of Articles 1 of Law 703/77 and Article 101 TFEU by companies active in the fish farming sector*

The Competition Commission, in its Decision no. 492/VI/2010, held that the memorandum of cooperation, which the five largest fish farming companies had signed on 6 November 2008 for the limitation and control of their production and supply of fresh fish of Mediterranean aquaculture, infringed Articles 1 of Law 703/77 and 101 of the TFEU.

In its Decision, the HCC ordered the parties to the above agreement to discontinue their violation of the competition rules and to refrain from that conduct in the future. The HCC also imposed reduced fines on NIREUS AQUACULTURE S.A, SELONDA AQUACULTURE S.A, DIAS AQUACULTURE S.A, ANDROMEDA FISHFARMING S.A. and HELLENIC FISHFARMING S.A. totaling € 680.000 (taking into account the special circumstances of the present case and the rather limited duration of the violation. In addition, the HCC has threatened the above undertakings with a fine of 10% of the value of their aggregate sales, in case the illegal behaviour resumes or is not discontinued.

Albeit the parties' arguments seeking to justify the arrangements as a "crisis-cartel", the decision expressly confirmed that overcapacity in the sector was of cyclical (and not structural) nature and, thus, in accordance with the EU case law and decisional practice, the existence of an economic crisis could not be deemed to justify restrictions of competition.

The Commission's decision was upheld in substance by administrative courts.

### *3.4 Decision concerning infringements of Articles 1 and 2 of Law 703/77, as well as of Articles 101 and 102 TFEU, by TASTY FOODS in the market for salty snacks in Greece*

By its Decision No. 520/VI/2011, the Competition Commission found that TASTY FOODS, a company that is mainly active in the production and distribution of salty snacks in Greece, notably under the brand name Lay's, infringed Articles 2 of Greek Law 703/77 and 102 TFEU (abuse of dominance), as well as Articles 1 of Greek Law 703/77 and 101 TFEU (restrictive agreements).

According to the Decision, TASTY FOODS has adopted and implemented a single, consistent and targeted policy in the market for salty snacks that sought to exclude its competitors from smaller retail outlets (notably kiosks, grocery stores and traditional food stores & mini-markets), and to limit their growth possibilities. To achieve this objective, TASTY FOODS employed various abusive practices throughout the period from 2000 until at least 2008, some of which exhibited extraordinary intensity, including:

- Exclusivity agreements at wholesale level,
- Agreements for the provision of cabinets on the basis of exclusivity, aimed at capturing the available space at smaller retail shops (e.g. kiosks) and raising entry/expansion barriers, to the exclusion of competitors,
- Rebates conditional upon the commitment of all, or the most substantial part of, available shelf/store space for its products,
- Target rebates at both wholesale and retail level, and
- Coordinated and targeted acts aimed at replacing and removing, by unorthodox means, the products and cabinets/ of competitors from those outlets.

Fines totaling € 16 million were imposed on the company for the above said infringements.

The Commission's decision was upheld in substance by administrative courts (albeit some reduction of total fines).

### *3.5 Statement of Objections addressed to undertakings active in the production and distribution of poultry-meat regarding an alleged infringement of article 1 of Law 703/1977, now article 1 of Law 3959/2011, and article 101 TFEU*

In the course of 2012, the HCC also issued a statement of objections concerning suspected price-fixing by undertakings and an association of undertakings active in the poultry meat sector in Greece. This is the widest ever cartel case pursued by the authority, with more 14 addressees and duration exceeding 10 years.

In particular, according to the statement of objections, he implicated undertakings coordinated to fix the selling prices of their products (fresh and frozen poultry meat) towards downstream suppliers (namely wholesalers, super markets, butchers, rotisseries), and engaged in market sharing by allocating customers. The collusive scheme was implemented through regular meetings of representatives of the poultry meat producers and of their trade association. Based on the statement of objections, the said anti competitive practice existed for over a decade (from as early as 1996 until 2010).

## 4. Merger control

The Commission has reviewed a number of merger and acquisitions in the food sector in recent years. Key (selected) cases include:

### *4.1 Clearance of the acquisition by ELAIS UNILEVER HELLAS S.A. of the ice cream brands of EVGA S.A. subject to conditions and obligations*

The Competition Commission decided on January 2011 to clear the notified concentration of EVGA S.A. and ELAIS UNILEVER HELLAS S.A., whereby the latter acquires the ice cream brands of the former. The concentration was cleared with the following conditions and obligations, which correspond to specific commitments made to and accepted by the HCC:

- EVGA's existing cooperation and distribution contracts and contracts for the provision of freezer cabinets on a rent-free basis shall be modified so as to delete any exclusivity clause therein; and

- The duration of the transaction's non-competition clause which binds EVGA, as far as production and marketing of branded ice cream in cooperation with third parties is concerned, shall be reduced from three (3) to one (1) year.

In reaching the above decision, the HCC mainly aimed at safeguarding conditions of effective competition and, in particular, at ensuring unimpeded access by competitors to the relevant markets and sales outlets.

### *4.2 Clearance of the proposed acquisition by the VIVARTIA Group of MEVGAL, subject to conditions and obligations*

The Competition Commission cleared on February 2011 the notified concentration between MEVGAL and VIVARTIA, both companies active in a range of dairy product markets, whereby the latter acquires control over the former.

The HCC's in-depth investigation indicated that the proposed transaction, as originally notified, could have raised competition concerns in the markets for the procurement of raw milk, chocolate milk and fresh milk. The notifying party offered commitments to remedy the HCC's concerns. By this decision, the HCC approved the notified concentration, subject to the following conditions and obligations:

- The merged entity shall divest the chocolate milk business currently operated under the brand name "Topino", in order to remove the horizontal overlap between the parties. To ensure the viability and competitiveness of the divested business activity, Vivartia further commits to provide potential buyers with access to its distribution network and production, at their own choice, for a transitional period of two (2) years following completion of the divestiture.

- In order to ensure sufficient access to raw milk, competitors shall be able to source raw milk from the merged entity for a maximum yearly volume of 30,000 tn of raw milk, at cost basis and pursuant to objective, transparent and verifiable set of criteria, for a total period of five (5) years following completion of the merger.

- The merged entity shall refrain, for a total period of five (5) years, from any practice which may result to or may otherwise be deemed to induce, directly or indirectly, exclusivity at retail outlets, including freezer-cabinet exclusivity.

- Pending initiatives at European and at national level regarding contractual relations between producers and processing companies, the merged entity shall continue to procure milk, under current volumes and general trading terms, from producers situated in five (5) prefectures of Northern Greece for a transitional period of three (3) years, at the producers' absolute choice and freedom.

The above measures aimed at safeguarding conditions of effective competition in the markets for chocolate milk and the procurement of raw milk, in particular by facilitating unimpeded access by competitors to the relevant markets and sales outlets, while also strengthening the negotiated power of producers in local areas of Northern Greece where the merged entity is expected to hold significant buying power.

### *4.3 Review of several concentrations in food retailing*

The Competition Commission has also cleared a number of recent acquisitions in the food retailing sector.

In those cases, the Authority conducted a competitive assessment by reference to the following key segments at national level:

- Supermarket and hypermarket chains,
- "Soft discount stores" and "hard discount stores" and
- Traditional groceries,

Notwithstanding the increasing degree of retail concentration, the Competition Commission concluded that there is no impediment to effective competition in all such cases so far – the emphasis growingly placed on examining competitive conditions in narrow local markets (i.e. radius usually defined by distance at local level).

## 5. Market monitoring activities

During the course of 2012 – 2013, the Competition Commission also undertook a market inquiry in the fruits & vegetables sector:

### *5.1 Fruits & vegetables market inquiry*

The market inquiry examined the organization of the supply chain of fresh fruit and vegetables, and the manner as well as the degree of price transmission from the producer level to the consumer level. The research focused on investigating the competitive conditions in production, distribution and retail, for the period 2005 to 2011, regarding the following products: apples, oranges, peaches, tomatoes, potatoes, cucumbers and lettuce. More specifically, it considered both the effectiveness of the supply chain, and the fluctuation of prices, costs and margins in the various stages of the supply chain for these products, price transmission mechanisms and the formation of the final price.

To explore these issues, the Authority collected extensive price data for all the products concerned and for all stages of the supply chain. In addition to these data, it also collected cost and profit margin data of wholesalers, supermarket chains, Central Vegetable Markets and business auctions, as well as general information regarding the operation of the above links in the logistics chain.

The findings on pricing were based on the economic and the econometric analysis of the data collected for each product, separately. The econometric analysis notably included the following three main steps:

- Cointegration analysis by Johansen and Juselius (1990) in order to determine whether there is a long-term relationship between the prices, after prior examination of stationarity of the prices using the Augmented Dickey Fuller test. When the prices are cointegrated, this relationship was estimated by using an error correction model which included the differences of the prices.

- Exogeneity testing, statistical significance of the error correction terms and joint statistical significance of the previous two tests in order to establish causal relationships between the stages of the supply chain (producer - wholesaler - consumer). In that way, the Authority investigated if price transmission exists, with a view to further assessing whether the price transmission is symmetric or non- symmetric.

- Estimation of three (3) error correction models in order to investigate possible asymmetries in price transmission along the supply chain.

Additionally, the market inquiry included impulse response analysis diagrams to examine how long and to what extent a change in price has an effect on the other prices in the supply chain.

Based on the results of the study arising from the economic and econometric analysis of the data, the following key conclusions were drawn:

- The regulatory framework is still characterized by complexity and anachronisms that lead to rigidities.

- The production of fruits and vegetables has been gradually shrinking over the last 20 years partly due to the small agricultural clergy and inefficiencies in production and distribution in Greece, while economies of scale have been achieved in several other Member States.

- The wholesale level of trade is not organized and remains fragmented, the result being the lack of economies of scale, while the phenomenon of proxy multitude of wholesalers in the supply chain is intensified.

- For the period 2005-2010 and for almost all of the products, there is a positive average annual rate of change for both producer and consumer prices. For the period of 2009-2011, an increase in production costs of farmers is reflected. On average, production costs represent 40% of the final product price. The wholesale (which includes, depending on the product, packaging, storage, handling, etc.) corresponds to about 21%, while the retail sale to 28%, respectively. VAT stands at 9% of the final price.

- There is an upward trend of super markets in the supply of vegetables. The Farmer Market still has the first place among retail channels, with a share of 58%, but with a downward trend, in contrast to supermarkets with 32% and an upward trend, while traditional greengrocers retain only 10%.

- The econometric analysis of the price transmission mechanism in the supply chain verifies the relatively weak position of agricultural producers. With the exception of potato and cucumber, at all stages of the supply chain the price transmission is symmetric, while for the other products it was concluded that the non-symmetric price transmission often places agricultural producers in

the most unfavourable position, as they are usually responding either symmetrically (tomato, lettuce) and / or generally respond more quickly to negative changes of prices in the other stages (apples, oranges). Only in the case of peaches, the producers derive relatively more benefits, as they achieve higher price with the same margins before price changes compared with the other two levels (wholesalers, retailers). Overall, the econometric analysis also confirms that wholesalers are the most favoured group in the supply chain for fruits & vegetables, responding more quickly to price increases by both the agricultural producers (tomatoes) and the retailers (oranges), while in all other cases they react symmetrically.

The report thus corroborated the findings regarding the inefficient operation of supply chain, particularly at the wholesale level. It further suggested structural reforms aimed at removing the regulatory barriers to competition, reinforcing the producer organizations (for example, by reshaping the auction system, etc.) and consolidating ("shortening") the supply chain.

## 6. Advocacy efforts

In recent years, the Competition Commission expanded considerably its advisory/monitoring functions, in order to promote structural reforms in the context of Greece's Economic Adjustment Program overseen by the EU Commission, the ECB and the IMF. In particular, the Authority placed renewed emphasis on issuing Opinions aimed at identifying and removing regulatory barriers to competition. With regard to the food sector, these Opinions referred to wholesale prices, distribution of infant milk and the revision of the Market regulation Code.

### *6.1 The opinion concerning wholesale price lists*

By its Opinion No. 21/VII/2012, the Competition Commission, in response to the request of the Ministry of Development, Competitiveness and Shipping, recommended Article 9 of the Market Regulations 7/2009, which imposed on businesses the obligation to submit/notify wholesale price lists to the Ministry, be abolished.

In particular, the Commission noted that wholesale price lists might work in practice as retail price lists, since the difference between the wholesale price and the retail price present only a light deviation, as emphasized by the competent services of the Ministry for 90% of the products. In this sense, the wholesale price lists may essentially function as "ceiling" prices. According to the Commission, the said regulation could be deemed an effective tool for monitoring prices, but created cumulatively distortions of competition at the wholesale and retail level, while further incurring significant administrative costs on businesses.

### *6.2 The opinion concerning the distribution of infant milk*

By its Opinion No 12/VI/2011, the Competition Commission proposed the abrogation of paragraph 2 of Article 2 of the Ministerial Decision Y1/G.P. 47815/2008-GG 1478/B/28.07.2008 concerning the selling of infant formulas (for infants under the age of 6 months) solely in pharmacies, and in particular for those of such products which are available without prescription. The aforementioned regulation, which provided for such formulas to be exclusively sold in pharmacies, constituted – according to the Commission's Opinion – an impediment to the proper functioning of free competition, which could be justified on the basis of overriding public policy considerations. The said regulation further imposed entry barriers to potential competitors (e.g. food retailers) and foreclosed the retail market, while limiting the freedom of suppliers to use alternative distribution networks. It thus rendered the distribution of the products concerned less efficient and resulted in the consumer being deprived of choice and potential benefits arising from combining distribution and price competition.

Far from being suitable and objectively necessary, the ensuing entry barriers lack a proportional regulatory objective pertaining to public interest, such as possibly the protection of infants' health and the encouragement of breastfeeding. This is due to the fact that consumer protection, as well as the quality of infant formulas, is ensured by means of the applicable European and national legislation that regulates inter alia the products´ composition, labeling, advertising and marketing, with binding provisions and regardless of infants' age. In addition, according to the Commission's Opinion, the perceived consumer benefit resulting by the existing system of pharmacies on night-services duty will not be adversely affected by the proposed abrogation, since pharmacies will continue to sell infant formulas alongside food retailers, as is currently the case with follow-on formulas for infants above the age of 6 months and other baby foods.

### *6.3 The opinion concerning the product and market regulation code*

The Competition Commission finally issued Opinion No. 24/VII/2012 concerning the revision of the Product and Market Code.

In particular, the HCC proposed to remove delegation provisions concerning:

a) regulating interaction between production, supply, distribution and retail companies [Article 1 par. 1(a) και (m) of Decree-Law 136/1946], as these provisions raise doubts in terms of their constitutionality, on the one hand, due to their broadness, vagueness and lack of precision, and pose a significant risk for potential distortion of competition, on the other.

b) the prohibition on the transport of domestic and foreign products between different regions and the prohibition/restriction on selling and consuming subsistence goods [Article 1 par. 1(f) and (g) of Decree-Law 136/1946], as these provisions entail foreclosure of the (national or community) market and undermine effective competition.

c) the prohibition on exports [Article 1 par. 1(h) of Decree-Law 136/1946], as these provisions create a foreclosure between national markets and result in artificial supply and demand conditions.

d) the categorisation of products as assessed or non-assessed on a national or regional basis and their sub-categorisation as assessed for possible excessive profit or as fixed-price products (Article 2 par 1 and 2 of Decree-Law 136/1946), as these measures constitute a hardcore restriction of competition, while the aims pursued may be served by less restrictive measures laid down in applicable national law.

e) minimum price fixing for domestically produced or imported goods, regardless the way of their placing on the market, [Article 1a (e) of Decree-Law 136/1946], as any such measures constitute hardcore restrictions of competition, generating market foreclosure.

f) fixing of fares and hub rates for the transport, by any means, of persons and goods respectively [Article 1 par. 1(l) of Decree-Law 136/1946), as, on the one hand, there is an extensive body of sector-specific legislation on transport of persons and goods, and on the other, enhancing competition in transports will contribute to also spurring competition in goods and services markets, thus creating, ultimately the necessary conditions for price improvement.

g) price monitoring mechanisms [Articles 1a (a) and (d) of Decree-Law 136/1946] for the reasons outlined in the Opinion No 21/VII/2012 of the HCC.

The Commission also proposed to replace a number of provisions by more detailed provisions better attuned to their claimed public service interest, as well as to amend and further specify other provisions (notably regarding the organization and transport of products).

# HUNGARY

## 1. Background - Retail food trends and concerns about the functioning of the food chain

Retail trends in recent years have shown a decline in demand due to the early beginning of the economic downturn in Hungary. Until 2006 the GDP rose quite sharply, later stagnated, in 2009 plummeted, and in 2012 it was only 3 per cent higher than in 2004. Real per capita income fell by 14.2% between 2006 and 2010, and in 2011 it was still 5.2% lower than in 2004. (Annex 1)

Accordingly, food retail sales set at constant prices declined by 16.7% from 2005 to 2009, and in spite of some recovery, in 2012 they were still 11.7% under the 2005 level. If non-alcoholic drinks, spirits, coffee and tobacco are also taken into account then the difference is smaller (6.9%, Annex 2).

Between 2004 and 2012, consumption of all major food products decreased by 2 to 8 per cent; and more drastically in the case of sugar (-14.7%), fruits (-19.5%), and eggs (-24.5%; Annex 3).

Consumer habits have changed during the recession. People have started to also economise on their food budgets by purchasing cheaper products (often retailers' own brands), by taking advantage of special offers/discounts, and by switching to stores with lower prices (such as discounters). There has also been an increase in the number of visits consumers have been making to convenience, so called 'corner shops'. This has been to the detriment of shopping centers, as the number of weekly visits by consumers has declined as a result.

Food inflation has surpassed general inflation: between 2004 and 2012 retail food prices rose by 65%, while the consumer price index rose by only 48.1%.

Agricultural producer prices in Hungary have soared several times in recent years: in 2007 (+22.2% to previous year), in 2010 (+16.9%) and in 2012 (+15.4%; Annex 4). On the retail side, food inflation reached double-digits in 2007 (+11.5%) and in 2008 (+10.2%). Due to depressed domestic demand, commodity price increases were only partly passed through to retail food prices.

During the whole period of 2004 to 2012, agricultural producer prices increased by 92.7%, while food retail prices only increased by 65%. The difference is even greater if we take into account food inflation without the effect of consecutive V.A.T. rate increases (50.4%).

In recent years, Hungarian governments have appeared to be less concerned about the level of food prices, and more about the level of agricultural incomes.

There are other concerns in relation to the soaring food imports. Prior to Hungary's accession to the EU in 2004, the domestic market had been protected by high import tariffs. Following the elimination of these tariffs, imports have increased and this has had a particularly devastating effect on Hungarian food manufacturers, who have lost significant market shares to products imported from other member countries. While the import boom was an inevitable consequence of accession, it also reflected the weak competitiveness of parts of the food sector in Hungary, in particular processing.

Hungarian governments, being concerned about this import expansion, initiated campaigns including the introduction of the "Hungarian Product" logo, which was accompanied by relevant legislation. Another defensive measure included placing the promotion of local markets and local products at the core of its activities.

## 2. Recent developments in the food chain

Following commodity price spikes, from all vertical levels of the food chain, processors seemed to get into the most difficult situation as their margins came under pressure from both sides: from soaring raw material prices and from competing retail chains which were also pressed by shrinking consumer demand.

The processing sector, which had been protected from imports prior to EU accession, has been struggling in the past decade. The Hungarian food industry has suffered severe market share losses: its total sales were 14.8% lower in 2009 than in 2004 (at constant prices; Annex 5), and its domestic sales in 2011 were 25% lower than in the year of accession. Reasons for this decline include structural weaknesses e.g. in the meat, dairy and bakery subsectors.

The profits of food processors have been constantly depressed, and in 2008 processing made almost no profit at the sector level. Bankruptcies have been quite common, particularly among meat processors.

Looking at the role played by foreign firms, by 1996 these dominated food processing in Hungary, holding two thirds of the total equity of the industry in their hands. Their early inroad was, however, partly a consequence of the strong Hungarian protection from imports that was applied until accession to the EU. After the accession in 2004, several multinational firms re-allocated their processing to other Central-East European countries, or scaled down their activities in Hungary. Other reasons for this withdrawal included deteriorating macroeconomic prospects in Hungary, an unfavorable business climate, and frequently changing regulations. As a consequence, the foreign share within the total equity of food processors is now already less than 50%.

The presence of foreign firms is also significant in the food retail sector. There are six leading international retailers present in Hungary – Tesco, Spar, Auchan, Lidl, Penny Market and Aldi – with Tengelmann (Plus) leaving the country in 2007 and the Delhaize Group (Cora, Match, Profi) leaving in 2012. The leading chains in domestic hands are CBA, Coop and Reál. The shops of Plus have been taken over by another foreign firm (Spar) and, similarly, Auchan has purchased the Cora hypermarkets (see COM/M.6505/Groupe Auchan/Groupe Magyar Hipermarket), but the units of Match and Profi have been shared between the Hungarian-owned chains CBA and Coop.

In 2004 the share of foreign firms within the total turnover of food retail chains was 55%, rising to 59% by 2006 and stagnating since then (Annex 6). With recent takeovers, the share of domestic chains is expected to increase slightly. Hungarian-owned retail chains can hold their positions because they can be flexible thanks to their franchise-model (e.g. by flexibly responding to local market demands) and because some of their shops are not competing directly with foreign outlets (operating in urban areas as convenience shops, or positioned in less populated areas or in smaller villages). They can also benefit from government planning and taxation policies.

Within the retail sector structural changes are still ongoing but have slowed down in recent years. The share of modern store formats (hypermarkets, supermarkets and discount stores) within the total FMCG sales was increasing until 2007, and has been stagnating just below 60 per cent since then. (Annex 7)

From all store types, hypermarkets had the highest share with 26% of total sales in 2011, followed by supermarkets (17%) and discount chains (16%). Traditional formats like small shops being organized in chains (15%), and independent small shops (12%) are also significant. Until 2005, hypermarkets had been

sharply increasing their market share, but this has stabilized in recent years. The share of supermarkets had been stagnating until 2007 at around 15% but has since slightly increased due to the transformation of several former Plus and Profi discount stores into supermarkets after the takeovers.

As regards discounters, data is contradictory. According to GfK[1] shop surveys, after a gradual increase from 15 to 18% by 2008, their share fell back again to 16%. Based on retail chain revenue data published by Nielsen (Annex 6), however, the share of discount chains has increased in recent years. Discounters are in keen competition with hypermarkets (primarily on prices), but first of all with each other. Late starters Lidl (opening its first shops in 2004) and Aldi (arriving in 2008) seem to be the winners in the fight for market shares. Penny Market has also been quite successful, while Plus and Profi have left Hungary in recent years.

Within the discounter category, there are considerable productivity differences. With similar shop sizes in terms of sales area, Lidl achieved a revenue of 1865 million HUF (6.4 million EUR) per outlet in 2012, compared to only 801 million for Penny Market and 798 million (2.8 million EUR) for Aldi (Nielsen).

Hungarian-owned franchise chains, consisting primarily of small shops, are holding out but the share of independent small shops fell drastically from 17% in 2004 to 12% in 2011.

The number of store openings was much lower in 2012 than in former years: only the discount segment was able to expand by opening 21 new stores, with the number of supermarkets falling by 7. Nowadays it is probably the supermarket segment that is suffering the most because they depend on the more affluent shoppers.

Looking at store size categories (in terms of selling space), the great transformation seems to have ended by 2008: the share of large area food shops (above 400 $m^2$) rose from 53.7 in 2004 to 61 per cent in 2008 within total FMCG sales, while the share of smaller food shops fell from 41.4 to 33.9%. (GfK, Annex 8)

For the years 2008 to 2013, the data only refers to food sales (sales of 90 major food product categories recorded by Nielsen). The data reflects slowing structural changes since only the shop category 400 to 2500 $m^2$, comprising mainly of supermarkets and discount stores, was able to increase its share from 32% in 2008 to 36% in 2013 by acquiring a small amount of shares from all other, bigger and smaller size categories. Large store formats (above 400$m^2$) were altogether able to increase their share from 63 to 66% in this period, which is much less than the increase before 2008.

The total number of general food stores fell drastically from 24 thousand in 2004 to 19.9 thousand in 2008 (Annex 10). This decline has continued but at a much slower pace, with 19.2 thousand stores still remaining in 2012.

The number of big stores with a sales area of more than 400$m^2$ rose sharply until 2008, increased slightly until 2011 and stagnated after 2011. This stagnation cannot yet be attributed to the planning policy restrictions which were introduced in 2012 (see below). Shop numbers in the mid-small size category (200 to 400$m^2$) were stagnating until 2011.

The number of the smallest shops (less than 50$m^2$) fell between 2004 and 2008 by one quarter but has been stagnating since then as convenience stores have become more popular in the years of depression.

[1] GfK Hungária market research firm

In spite of the structural adjustment, in international comparison the store structure in Hungary is not concentrated yet: the number of food shops per 10 thousand inhabitants is 19 in Hungary, 15 in the Czech Republic and 7 in Austria.

However, regarding selling space per inhabitant, Hungary is within the highest category of 400 to 600 $m^2$ per thousand inhabitants, together with only Austria, Germany, Denmark and Sweden in Europe. (Planet Retail)

The retail market structure shows stability as far as the leading players are concerned: rankings on the top list of FMCG retailers have been unchanged since 2008 with Tesco as the market leader, followed by CBA, Coop, Spar and Reál. (Annex 6)

In the hypermarket segment, Tesco has been able to increase store numbers and sales continually, supplementing its network with Tesco Express supermarkets in recent years. Auchan has shown less dynamism but with the takeover of Cora hypermarkets in 2012 its prospects for expansion are better. (Annex 11)

Hungarian chains CBA, Coop and Reál, consisting of smaller shops and supermarkets, have only been able to nominally increase their sales since 2008. Spar has shown more dynamism – partly due to the takeover of Plus shops from Tengelmann in 2008.

The most dynamic players are within the discounter segment: in terms of growth rates, Aldi and especially Lidl have been very successful. In both cases their expansion policies were based almost exclusively on greenfield investments. Penny Market has been growing at a slower pace.

While contradicting data makes it more difficult to measure retail concentration, the trend is clear: the leading four retail chains were able increase their combined market shares even after 2008, as were the next four (rankings 5 to 8); i.e. C4, C(5-8) and C8 increased at the same time, even though at a slower pace than before 2008. Nevertheless, in international comparison, retail concentration rates are not high yet in Hungary. Even the market leader Tesco is well under the 20% market share.

As in the food processing sector, the food retail sector also has profitability problems. Its Return on Assets Ratio (ROA) declined from 2% before 2008 to -4% in 2010. Returns on Sales (ROS) show the same: the ratio was low even prior to 2008 (well under 1%) and fell to -2.2% by 2010. (Annex 12)

Foreign chains fared worst: their combined ROS data fell between -2.5 and -3.1% in the years 2010 to 2012. Only Tesco and Penny Market were able to maintain (moderate) profitability while others made huge losses: Spar -33.9 bn HUF (-120 million EUR) in 2011, Auchan -10.1 bn HUF (-35 million EUR) in 2012, and even Lidl -7.7 bn HUF (-27 million EUR) in 2012.[2]

At least one of the reasons behind this decline in profitability was over-investment, based on an over-optimistic anticipation of demand.[3]

[2] Source: e-beszamolo.hu

[3] The productivity and profitability of the food retail sector (Research Institute of Agricultural Economics, Budapest, 2012)

## 3. Competition in the food chain

As the Gazdasági Versenyhivatal (Hungarian Competition Authority GVH) continuously monitors different sectors, it carried out and ordered several market studies in the grocery retail sector some years ago.[4]

In 2007, the GVH ordered a market study on the relationship between large retail chains and their suppliers (hereby referred to as "the 2007 Study")[5], as a preparatory step prior to conducting a broader market study. The emergence of big retail chains has led to higher concentration in the vertical chain of the retail sector, and has altered the bargaining positions of different market players in the vertical chain. To address this issue the Hungarian legislator introduced the Trade Act (in effect as of 1 January 2006) with the aim of protecting suppliers from the conducts of large retail chains. The GVH conducted the 2007 Study in order to assess the effects of the Trade Act on the food retail sector and the concept of buyer power.

The study aimed to discover the important features of the situation of suppliers in the food-chain, such as market position of the suppliers. In addition, the study examined the effects of the Trade Act (suppliers' awareness of the new law, application of the law in businesses, etc.). The Study pointed out the vulnerability of suppliers vis-à-vis large retail chains having and sometimes abusing significant market power. Abusive conducts may include the following: various fees and conditions that serve as a "tax" that suppliers have to pay to the buyers in order to access the market; breach of contractual terms (such as deadlines for payment), threatening to terminate contracts, etc.

The 2007 Study concluded that the larger (in size) a retail chain became the more its conducts tended to resemble the above-mentioned patterns. The study also indicated that bigger suppliers were more likely to suffer from these practices than smaller competitors, resulting from the fact that they needed access to the market in order to grow. Many companies did not respond to the questionnaires; therefore, it is possible that the most vulnerable companies were afraid of providing data for the study. The Study also suggested that the high standards applied by the retail chains affect the competitiveness of the suppliers positively: in order to comply with those standards, the suppliers have to improve and invest in their activities.

In September 2008, the Agricultural Committee of the Hungarian Parliament called upon the GVH to analyse the buying processes of agricultural products in 2008. The GVH was asked to do so because the buying processes of four agricultural markets were in line with its top enforcement priority in 2008. The low prices paid by retail chains to producers of sour-cherries, melons and apples caused serious tensions, and the European milk market crisis also hit the Hungarian market players. Subsequent to these events the GVH increased its attention to these products and markets in the course of its competition supervision

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4 Apart from the market studies that are analysed here, two other market studies must to be mentioned. Unfortunately no english translations are available for these two studies, since they were carried out by private research firms on behalf of the GVH.

The effects of the supplier protection rules from the perspective of the agricultural suppliers. http://www.gvh.hu/domain2/files/modules/module25/179022F8460EB1B13.pdf (in Hungarian)

Experiences on the effects of the supplier protection provisions in the Act on Trade and in the Act on the Regulation of Agriculture.

http://www.gvh.hu/domain2/files/modules/module25/179022F8460EB1B13.pdf (in Hungarian)

5 See: http://www.gvh.hu/domain2/files/modules/module25/pdf/elemzesek_gvhtanulmanyok_beszallitok_2007.pdf (in Hungarian)

activity. However, no proceedings under the Competition Act were initiated by the GVH, since it could not have been proven that buyers or merchants had formed cartels or abused their market dominance.

In September 2009, the GVH published its market study (hereby referred to as "the 2009 Study") in which it analyzed the buying processes of agricultural products in 2008, a year that was very turbulent for various reasons in the sectors concerned. The main topics of the 2009 Study were the sour-cheery, melon, apple and milk sectors, together with a general investigation into the relationship in the vertical chain of the grocery production and retail sectors.

The main conclusions of the 2009 Study were the following:

- Legislative actions altering the legal environment of the activities of the market players were not sufficient to solve the deep-rooted problems that producers have faced (e.g. asymmetry in the level of concentration in the vertical chain, low efficiency).

- Competition law and the specific rules could not resolve the issues arising from illegal market (the so called 'black market') activities, such as breaches of tax obligations.

- Small and medium enterprises need to become more "market-oriented", and more adaptive to the changing economic environment and competitive challenges.

- Legislative and enforcement activities needed to be systematic in order to achieve the substantial changes that took place in the sectors concerned.

Based on these findings of the 2009 Study, the GVH concluded that it would be neither desirable nor legally defensible to exempt the agricultural sector from competition law as this would preserve the poor competitiveness of the producers.

## 4. Enforcement

As the "call for contributions" letter of the Chairman suggested in his question for consideration, the trend these days for national competition authorities is to increase the enforcement efforts in the food sector due to the soaring prices of food and the increasing bargaining power of big retail chains vis á vis suppliers of agricultural products. However, these general trends do not apply to the GVH, due to the increasing intervention of the legislator throughout the whole food supply chain.

First of all, the legislator has introduced specific legislation to be applied to food suppliers. This legislation regulates the suppliers' relations with large scale retail chains (see details later). Since 2012, these provisions have not been enforced by the GVH, but by another governmental body, the National Food Chain Safety Office (in Hungarian: Nemzeti Élelmiszerlánc-Biztonsági Hivatal; hereinafter referred to as: the "NÉBIH"). This has reduced the ability of the GVH to engage in enforcement action in the food retail sector (it is possible still to conduct an investigation if a retail chain possesses a dominant position, however it is unlikely, since the downstream food-retail market is highly competitive in Hungary). Secondly, during the autumn of 2012 the amendment of the Interbranch Organisations Act (see details later) provided for a wide exemption for agreements between players of the agricultural sector.

## 5. The regulation of buyer power in Hungary

Act No. LVII of 1996 on the Prohibition of Unfair Market Practices and the Restriction of Competition (the "Competition Act") contains no specific rules with regard to the grocery sector. As a general rule, the provisions of the Competition Act are applicable to all companies carrying out economic

activities in Hungary, unless otherwise specified by a relevant Act. Thus, as a general rule, the behaviour of companies operating in the grocery sector is governed by the Competition Act.

The Competition Act does not define buying power (or dependency). Thus abuse of buying power is not per se prohibited by the Competition Act, whereas the abuse of a dominant position (including dominant buying power) is prohibited in general. Due to the market structure in Hungary, the activities of large retail chains are not likely to be currently investigated based on Article 102 TFEU (or the equivalent provision [Article 21]) of the Competition Act), in spite of the fact that certain conducts may be regarded as abusive if dominance is proved. The Hungarian legislator assumed that the concentration of the retail sector and the expansion of large (often worldwide) retail chains may have a negative effect on the relationship of retailers with suppliers and may be a source of various abuses and unfair practices. Therefore, a different concept of 'significant market power' was introduced relatively early by the legislator in the retail sector (primarily within agricultural retail) in Hungary.

Besides the Competition Act, there are other laws in force that specifically govern the activities carried out in the retail market. Act No. CLXIV of 2005 on Trade (hereinafter: the "Trade Act") sets out provisions applicable to traders having significant market power (SMP). The Trade Act defines the notion of SMP – as the Hungarian equivalent for "buying power".

According to the definition set out in Article 2 of the Trade Act "the term "significant market power" refers to a market situation as a consequence of which the dealer becomes or has become a contracting partner for the supplier which the latter is unable to reasonably evade at forwarding its goods and services to the customers and which is able, due to the size of its share in the turnover, to influence regionally or all over the country market access of a product or a group of products".

According to Paragraphs (3) and (4) of Article 7 of the Trade Act "significant buyer power vis-à-vis suppliers exists where the consolidated net turnover derived from the commercial activities of the group of undertakings in question, including all the parent companies and subsidiaries under Act C of 2000 on Accounting, or in the case of joint purchasing, all the undertakings establishing the purchasing association in the previous year was higher than 100 billion HUF" (approximately 332 million EUR). Moreover, the significant market power of a dealer also exists when a commercial undertaking or a group of undertakings or a purchasing association is in, or acquires – based on the structure of the market, the existence of entry barriers, the market share and the financial strength of the undertaking and its other resources, the size of its trading network, the size and location of its outlets and all of its trading and other activities – a one-sidedly favourable bargaining position vis-à-vis its suppliers.

The Trade Act stipulates that companies falling under the scope of the Trade Act shall not abuse their significant market power towards their suppliers. The Trade Act provides for a non-exhaustive list of unfair business conducts which qualify as abuses of significant market power in Article 7, Paragraph (2).

According to the Trade Act, the following in particular amount to abuses of significant market power:

- unjustifiably discriminating against suppliers;
- unjustifiably restricting suppliers access to sales opportunities;
- imposing unfair conditions on suppliers;
- unjustifiably altering contractual terms to the detriment of suppliers;
- subjecting the future business relations of the dealer with the suppliers to conditions;
- charging fees one-sidedly to suppliers;
- threatening with delisting;
- unjustifiably forcing suppliers to avail themselves of third persons as suppliers or of an own service provider of the dealer;
- applying sales prices which are lower than the invoice prices determined in its contracts in cases in which the dealer is not the owner of the goods.

It must be highlighted, however, that the Trade Act did not introduce a definition for small or medium sized suppliers, although it is in favour of all of them, regardless of their size or bargaining power. It is also important to note that all of the big retail chains in Hungary are above the SMP threshold mentioned earlier, since their yearly net turnovers are substantially above 100 billion HUF. On this basis, all of them have significant market power. According to the Trade Act, the GVH is vested with the competence to conduct proceedings against retailers with significant market power for any case of abuse defined in the Trade Act. Since the 1 August 2012 (due to an amendment), only non-food products have fallen under the scope of the Trade Act and for this reason only non-food product suppliers are protected by this law against the practices of retail chains with significant market power. These provisions are still enforced by the GVH.

In 2009, after an unsuccessful attempt to force a non-binding code of conduct on the big retail chains, the government decided to pass another Act in order to support suppliers in Hungary. As a consequence, Act No. XCV of 2009 on the Prohibition of Unfair Distributional Practices Applied Towards Suppliers with regard to Agricultural and Food Products (hereinafter: the "Unfair Distributional Practices Act") entered into force on 1 January 2010. The above mentioned piece of legislation differs from the Trade Act because it covers not only retailers with significant market power but all types of retailers, for example, small convenience stores. In addition, it protects all types of food and agricultural product suppliers regardless of their size or bargaining power. However, such rules are only applicable to unfair distribution practices involving agricultural and food products.

The Unfair Distributional Practices Act contains agricultural and food industry specific provisions prohibiting unfair distribution practices from being applied by traders on suppliers.

According to its preamble, the Unfair Distributional Practices Act aims to ensure that traders of agricultural and food products conduct themselves fairly in their business relations with their suppliers by listing prohibited unfair distribution practices.

Under the Unfair Distributional Practices Act, unfair distribution practices include (among others)

- one-sided risk sharing to the detriment of suppliers;
- the application of contractual provisions which place a repurchase obligations on suppliers;
- cost externalisation towards suppliers;
- applying shelf prices, listing charges and extra charges for services not rendered;
- provisions containing payment deadlines exceeding 30 days;
- excluding interest for late payment, or penalty payment;
- a requirement regarding exclusive supply of suppliers without proportionate payment;
- an unjustified unilateral contract amendment by the trader;
- below cost pricing by the trader;
- applying discriminative customer prices with regard to equivalent products depending on the country of origin.

The Unfair Distributional Practices Act places additional requirements on traders whose annual net sales revenues exceeded 20 billion HUF (approximately 67.1 million EUR) in the preceding business year. Such larger traders are obliged to prepare and publish their business rules and submit them to the NÉBIH. The rules must cover the services offered by the trader; the terms and conditions governing the provision of the services; the maximum prices that may be charged for the services; the calculation method used to set the prices; and the conditions of inclusion in and exclusion from the trader's suppliers list.

Since the introduction of the Unfair Distributional Practices Act in 2010 it has been enforced by the NÉBIH. The NÉBIH may initiate proceedings at request or ex officio. Prior to August 2012, the NÉBIH had to suspend its proceedings when the GVH was conducting an investigation related to the same subject matter on the basis of Article 7 of the Trade Act or on the basis of the abuse of dominance provision of the Competition Act. From 1 August 2012, the GVH only has competence to conduct investigations based on Article 7 of the Trade Act (abuse of SMP) in relation to "non-food" products and the NÉBIH enforces the Unfair Distributional Practices Act in relation to food and agricultural products. If the GVH conducts investigations in accordance with the abuse of dominance provision of the Competition Act, the NÉBIH still has to suspend its proceedings which are related to the same conduct.

It must be emphasized that the Trade Act's provisions regarding the prohibition of abuse of significant market power are applicable to all traders having significant market power, whereas the Unfair Distributional Practices Act's provisions are only applicable to traders active in the agricultural and food industry, regardless of the market power of an undertaking. If an unfair business conduct falls under the Unfair Distributional Practices Act, the Trade Act shall not be applied.

## 6. Exemption of the food supply sector from competition law

As a general rule the retail grocery sector is not exempted from competition law, but the *de minimis* rule, Article 101 (3) of TFEU (exemption under certain conditions) and its national equivalent are applicable, furthermore the block exemption possibility exists. By contrast, there are sector specific regulations which provide exemptions under certain circumstances.

Act No. CXXVIII of 2012 regulating the Conduct of Interbranch Organizations in the Agricultural Sector (hereinafter the "Interbranch Organizations Act") introduced new rules which aim to create better market conditions for farmers by taking into account the special features of the agricultural sector. The Act also introduces an exemption from the prohibition of anticompetitive agreements and concerted practices in the field of agricultural products.

The Interbranch Organizations Act was created as a special Hungarian version of Council Regulation 1234/2007/EC (Single CMO[6] Regulation). The Interbranch Organizations Act contains some narrow exemptions from competition law. These rules provide exemptions for interbranch organizations. The Act states that agreements of interbranch organizations falling under the general prohibition of anticompetitive agreements of the Competition Act shall not be prohibited when they carry out the activities listed in paragraphs (3) point c) and (4) point c) of Article 123 of the Single CMO Regulation[7] if they

3. do not affect the organization of markets in a harmful manner;

4. do not lead to – by any means – the sharing of Hungarian markets;

5. do not lead to a restriction of competition which exceeds the extent necessary to attain the goals of the interbranch organization;

6. do not lead to price fixing of any form and;

7. do not lead to discrimination and the complete elimination of competition in respect of a substantial part of the product markets concerned.

Interbranch Organizations have to notify these agreements to the agricultural minister. The exemption is only available if – within two months from the notification – the minister and the GVH both approve the agreement concerned.

Pursuant to the Interbranch Organizations Act, interbranch organizations representing suppliers of big retails chains can co-ordinate the conduct of their members if the economic and social benefits from such co-operation exceed the disadvantages from the restriction of competition.

## 7. The special regulation related to the grocery retail sector

There are legal provisions in Hungary which affect the establishment of new large grocery retail stores. The relevant provisions of Act No. LXXVIII of 1997 on the Formation and Protection of the Built Environment (hereinafter: the "Built Environment Act") are aimed at minimizing the number of newly created large retail stores and shopping centres (retail stores and shopping stores are collectively referred to as: "Commercial Buildings"). The Built Environment Act prohibits (i) the establishment of Commercial Buildings with floor areas which exceed 300 $m^2$ and (ii) the enlargement of existing Commercial Buildings which would result in their floor areas exceeding 300 $m^2$. Such large Commercial Buildings cannot be built, unless the relevant minister exceptionally approves.

The moratorium was introduced in January 2012 and is due to expire in December 2014. Until late 2012 only half of the received requests were approved and all foreign firms were rejected. Thus, Lidl and Aldi had to change their expansion policies which had been based on greenfield investments and started to

[6] CMO - Common Market Organisation

[7] Activites in the fruit and vegetable sector and activities of other producer's organizations

open shops on purchased premises also in city centres. Functioning practically also as convenience shops, these will compete directly with Hungarian chains.

Another policy measure which affected the functioning of the food supply chain and competition was the introduction of the "crisis tax". Retail chains with high sales revenues had to pay approximately 30 bn HUF (107 million EUR) in 2010. Tesco, Spar and Auchan were hit hard while other chains, due to their different organisational (franchise) structure, escaped with lower payments.

## 8. Food supply chain policies

The Hungarian government has changed its general attitude towards the food sector, especially the food retail sector in many ways in recent years. The most important change has been the government's ban on the construction of retail stores bigger than 300m$^2$ (so called "plaza/shopping centre-stop" - discussed earlier). This measure has resulted in the opening of smaller cash&carry stores in larger cities and smaller stores in smaller settlements. The overall market structure, however, did not change.

There has been evidence of a shift in the attitude of the government concerning the above-mentioned issue. These days, more than ever, politicians in Hungary (both from the governing party and the opposition) are stressing the importance of assisting producers. A good example of this shift in policy in Hungary can be seen in the "watermelon-case".

The GVH started an investigation in August 2012 against six big retailers and two inter-branch organisations for fixing the selling price of watermelons at 99 HUF per kg (approximately 35 cents in euros). This agreement between the market players was initiated by the Ministry of Rural Development. According to the announcement of the Ministry this agreement ensured a fair price for melon farmers – and this was the original aim of the whole deal. After the initiation of the proceeding a Member of the Parliament – who was also a large-scale melon farmer – submitted a draft amendment of the Act on Interbranch Organizations and certain issues regulating agricultural markets in order to exempt the sector in some way from the general prohibition of competition law. The GVH took immediate advocacy steps and drew the attention of the policy-makers to the anti-competitive features of the draft amendment. The GVH stressed that the draft may be contrary to certain provisions of Council Regulation 1/2003/EC since – among other problems – it impedes the GVH's decision making power related to Article 101 TFEU. The GVH further indicated that the amendment would contradict general competition policy principles.

Regardless of the concerns of the GVH, Act No. CLXXVI of 2012, which amended the Interbranch Organizations Act, was adopted in November 2012.The aim of the legislator – according to the reasoning of the new legislation – was to relax the rigor of competition rules in the agricultural sector taking into account the special characteristics of this market, including security and seasonality of supply, unpredictable weather changes and most of all to guarantee a fair income for farmers.

Paragraph (1) of the new Article 18/A of the Act provides that '[t]he infringement of Article 11[8] of the Competition Act cannot be established in case of agricultural products if the distortion, restriction or prevention of competition resulting from an agreement according to Article 11 of the Competition Act does not exceed what is necessary for an economically justified, fair income, provided that the actors of the market affected by the agreement are not debarred from benefiting from such income and that Article 101 TFEU was not applied.' According to paragraph (2), 'the fulfilment of the conditions of exemption provided for in paragraph (1) shall be established by the agricultural minister.' Paragraph (3) provides that the GVH shall obtain and adhere to the resolution of the minister if it conducts an investigation into agricultural products based on Article 11 of the Competition Act. The GVH must suspend its procedure

[8] Prohibition of anticompetitive agreements

while awaiting the minister's resolution, which must be made within 60 days of receipt of the request by the GVH.

Paragraph (4) obliges the Competition Council[9] to suspend the imposition of fines if an agreement according to Article 11 of the Competition Act or an agreement or concerted practice between competitors according to Article 101 (1) TFEU relates to agricultural products. Instead, the Competition Council shall set a time limit for the parties involved in the agreement or concerted practice to reconcile their behaviour with the provisions of the acts. Should the parties fail to comply with this, the Competition Council must impose fines.

Since the scope of the Act also covers the processing stage of the product chain, even wholesalers, multinational retail chains and food processors may benefit from the exemption.

As a consequence, the GVH closed the investigation as it was no longer possible to effectively safeguard the public interest as a result of the new legislation.

## 9. Advocacy

The GVH did not play a pro-active role during the adoption of the Trade Act and the Unfair Distributional Practices Act. However, since there is a statutory obligation to ask for the GVH's opinion on legislative proposals which could affect the tasks of the GVH, the GVH attempted to fully exercise its advocacy powers during the drafting procedure and provided several studies, papers, opinions etc. to the legislator. The objectives of the GVH were clear: to promote fair competition in the sector and to highlight to the legislator that unnecessary exemptions from competition rules do not help suppliers to achieve higher efficiency and as a result increase their success on the market.

Furthermore, the GVH is of the opinion that the existing regulation (Article 18/A) in the Interbranch Organisations Act gives rise to serious concerns as it causes legal uncertainty in the evaluation of cartel activities concerning agricultural products.

As the current situation shows, in this particular case the advocacy actions of the GVH have not been very successful. As long as the amendments of the Act on Interbranch Organizations are in force the GVH cannot effectively exercise its powers that are set out in Council Regulation 1/2003/EC in its fight against cartels. Moreover, these provisions allow not only farmers, but also big retail chains and other market players to violate competition law, and conduct unlawful cartel agreements, to the serious detriment of consumers in Hungary (and competitors in other Member States).

[9] The Competition Council is the decision-making body of the GVH.

# STATISTICAL ANNEXES

## Annex 1

### GDP and per capita real income indices for Hungary 2004 - 2012

| | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|---|---|---|
| GDP (2004=100) | 100.0 | 104.1 | 108.1 | 108.1 | 109.2 | 101.6 | 103.0 | 104.6 | 103.0 |
| per capita real income (2004=100) | 100.0 | 103.7 | 105.2 | 100.4 | 98.9 | 95.1 | 90.3 | 94.8 | n.a. |

Source: Central Statistical Office (KSH)

## Annex 2

### Retail food, drink and tobacco sales in Hungary 2004-2012

Source: Central Statistical Office (KSH)

| | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|---|---|---|
| *food, drink and tobacco sales* | | | | | | | | | |
| at current prices bn HUF | 1 952 | 2 084 | 2 089 | 2 241 | 2 435 | 2473 | 2 545 | 2 777 | 3 097 |
| at constant 2004 prices bn HUF | 1 952 | 2 029 | 1 904 | 1 854 | 1849 | 1 783 | 1 754 | 1 826 | 1 890 |
| volume indices (2004 = 100) | 100.0 | 103.9 | 97.5 | 95.0 | 94.7 | 91.3 | 89.9 | 93.5 | 96.8 |
| *food sales* | | | | | | | | | |
| at current prices bn HUF | 1 372 | 1 493 | 1 457 | 1 587 | 1688 | 1 717 | 1 790 | 1 921 | 2 124 |
| at constant 2004 prices bn HUF | 1 372 | 1 457 | 1 320 | 1 289 | 1245 | 1 213 | 1 225 | 1 233 | 1 287 |
| volume indices (2004 = 100) | 100.0 | 106.0 | 96.2 | 94.0 | 90.7 | 88.4 | 89.3 | 89.9 | 93.8 |

## Annex 3

**Per capita food consumption in Hungary 2004 – 2011**

| | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 |
|---|---|---|---|---|---|---|---|---|
| meat and meat products | 60.9 | 63.5 | 65.9 | 63.2 | 61.5 | 61.7 | 56.7 | 55.8 |
| milk and dairy products | 155.2 | 166.8 | 163.1 | 163.5 | 158.2 | 155.9 | 156.8 | 152.3 |
| eggs | 16.7 | 16.0 | 15.6 | 15.4 | 14.9 | 14.4 | 13.7 | 12.6 |
| fats | 36.0 | 36.5 | 37.7 | 37.4 | 36.8 | 36.6 | 34.6 | 34.4 |
| cereals | 89.4 | 97.3 | 92.0 | 88.3 | 88.9 | 88.4 | 88.2 | 84.9 |
| potato | 68.0 | 66.8 | 61.8 | 59.7 | 65.5 | 60.8 | 60.5 | 63.5 |
| sugar | 32.7 | 31.2 | 32.3 | 31.2 | 31.9 | 29.8 | 28.7 | 27.9 |
| vegetables | 117.7 | 112.1 | 119.9 | 117.6 | 120.2 | 116.9 | 105.3 | 111.7 |
| fruits | 93.7 | 82.7 | 90.7 | 76.5 | 88.7 | 92.4 | 84.7 | 66.2 |

kg/head/year
Source: Central Statistical Office (KSH)

## Annex 4

**Agricultural producer and food retail price indices 2004 – 2012**

| | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|---|---|---|
| agricultural producer prices (2004=100) | 100.0 | 100.7 | 111.4 | 136.1 | 132.4 | 119.8 | 140.0 | 167.0 | 192.7 |
| food retail prices (2004=100) | 100.0 | 102.5 | 110.4 | 123.1 | 135.6 | 141.6 | 146.1 | 155.8 | 165.0 |
| food retail prices without V.A.T. (2004=100) | 100.0 | 102.5 | 105.8 | 118.0 | 130.0 | 133.2 | 135.2 | 144.1 | 150.4 |

Source: Central Statistical Office (KSH)

## Annex 5

**Sales and financial data of the Hungarian food industry 2004 – 2012**

| | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|---|---|---|
| total sales, volume indices (2004=100) | 100.0 | 97.1 | 95.9 | 93.0 | 86.9 | 85.2 | 85.8 | 86.1 | 90.1 |
| domestic sales, volume indices (2004=100) | 100.0 | 95.7 | 94.8 | 90.0 | 82.5 | 78.7 | 77.0 | 75.0 | 76.0 |
| foreign share within total equity (%) | 52.4 | 49.3 | 47.1 | 48.4 | 48.3 | n.a. | n.a. | n.a. | n.a. |
| pre-tax profit (bn HUF) | 35.4 | 38.3 | 46.0 | 20.8 | 9.6 | 52.8 | 59.2 | n.a. | n.a. |
| total sales revenue (bn HUF) | 2 326 | 2 270 | 2 316 | 2 418 | 2 854 | 2 754 | 2 690 | n.a. | n.a. |

Source: Central Statistical Office (KSH) and National Tax and Customs Office (NAV)

## Annex 6

**Revenues of retail chains 2004 – 2012**

| | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|---|---|---|
| Tesco | 415 | 470 | 544 | 555 | 602 | 638 | 667 | 705 | 709 |
| CBA | 495 | 525 | 538 | 525 | 545 | 548 | 555 | 565 | 579 |
| Coop | 358 | 375 | 400 | 440 | 500 | 510 | 510 | 510 | 530 |
| Spar | 184 | 202 | 246 | 285 | 374 | 397 | 318 | 390 | 421 |
| Reál | 240 | 282 | 312 | 331 | 348 | 358 | 360 | 367 | 370 |
| Auchan | 182 | 187 | 201 | 212 | 222 | 226 | 225 | 230 | 258 |
| Lidl | | 50 | 89 | 124 | 165 | 191 | 221 | 235 | 291 |
| Metro | 264 | 254 | 250 | 232 | 262 | 219 | 210 | 184 | n.a. |
| Penny Market | 130 | 127 | 132 | 145 | 162 | 162 | 161 | 169 | 188 |
| Aldi | | | | | 20 | 49 | 53 | 69 | 85 |
| Plus | 90 | 102 | 102 | 107 | | | | | |
| Honiker | 118 | 58 | | | | | | | |
| Cora | 127 | 123 | 128 | 119 | 105 | 104 | 97 | 86 | |
| Match | 57 | 55 | 58 | 54 | 54 | 55 | 42 | 41 | 33 |
| Profi | 38 | 40 | 40 | 33 | 33 | 29 | 25 | 28 | 26 |
| total | 2 694 | 2 843 | 3 035 | 3 162 | 3 392 | 3 486 | 3 444 | 3 579 | 3 660 |
| of which Hungarian chains | 1 211 | 1 240 | 1 250 | 1 296 | 1 393 | 1 416 | 1 425 | 1 442 | 1 479 |
| share of Hungarian chains from the total revenue (%) | 45.0 | 43.6 | 41.2 | 41.0 | 41.1 | 40.6 | 41.4 | 40.3 | 40.4 |

Source: AC Nielsen
billion HUF

## Annex 7

**Shares of different store types from total FMCG retail sales in Hungary 2004 - 2011**

| | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 |
|---|---|---|---|---|---|---|---|---|
| hypermarkets | 22 | 24 | 24 | 25 | 23 | 23 | 26 | 26 |
| supermarkets | 15 | 14 | 15 | 15 | 17 | 20 | 17 | 17 |
| discounters | 15 | 17 | 17 | 18 | 18 | 16 | 15 | 16 |
| C+C units | 4 | 3 | 3 | 3 | 3 | 2 | 2 | 2 |
| small shop chains | 16 | 15 | 15 | 14 | 14 | 13 | 15 | 15 |
| independent small shops | 17 | 16 | 15 | 15 | 14 | 13 | 13 | 12 |
| others | 11 | 12 | 11 | 11 | 11 | 13 | 11 | 12 |
| total | 100 | 100 | 100 | 100 | 100 | 100 | 100 | 100 |
| modern store types together | 52 | 55 | 56 | 58 | 58 | 59 | 58 | 59 |

Source: GfK Hungária

## Annex 8

**Shares of different store size categories from total FMCG sales in Hungary 2004 – 2008 (%)**

| sales area in $m^2$ | 2004 | 2005 | 2006 | 2007 | 2008 |
|---|---|---|---|---|---|
| above 2500 | 29.4 | 30.3 | 30.6 | 32.0 | 32.0 |
| between 400 and 2500 | 24.3 | 25.7 | 26.7 | 28.1 | 29.0 |
| between 200 and 400 | 9.5 | 9.6 | 9.4 | 7.8 | 8.1 |
| between 50 and 200 | 18.9 | 18.5 | 17.7 | 16.9 | 16.1 |
| less than 50 | 13,0 | 11.6 | 11.0 | 10.4 | 9.7 |
| perfumeries | 4.7 | 4.1 | 4.3 | 4.6 | 4.8 |
| drugstores | 0.2 | 0.2 | 0.3 | 0.2 | 0.2 |
| total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

Source: AC Nielsen

## Annex 9

**Shares of the different store size categories from total food sales in Hungary 2008 – 2013 (%)**

| selling area in $m^2$ | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 first half |
|---|---|---|---|---|---|---|
| more than 2500 | 31 | 31 | 31 | 31 | 29 | 30 |
| between 400 and 2500 | 32 | 33 | 33 | 34 | 36 | 36 |
| between 200 and 400 | 9 | 9 | 9 | 8 | 8 | 8 |
| between 50 and 200 | 18 | 18 | 18 | 18 | 18 | 17 |
| less than 50 | 10 | 9 | 9 | 9 | 9 | 9 |
| total | 100 | 100 | 100 | 100 | 100 | 100 |

Source: AC Nielsen (for the 90 food categories recorded by Nielsen, in value terms)

## Annex 10

**Number of general food stores by size categories in Hungary 2004 – 2012**

| sales area in $m^2$ | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|---|---|---|
| more than 2500 | 77 | 92 | 109 | 123 | 137 | 152 | 166 | 170 | 171 |
| between 400 and 600 | 753 | 814 | 868 | 943 | 1 007 | 1 071 | 1 103 | 1 121 | 1 104 |
| between 200 and 400 | 879 | 851 | 852 | 853 | 805 | 801 | 834 | 848 | 768 |
| between 50 and 200 | 6 936 | 6 914 | 6 894 | 6 888 | 6 593 | 6 426 | 6 355 | 6 294 | 6 421 |
| less than 50 | 15 310 | 14 415 | 13 237 | 12 533 | 11 393 | 11 451 | 11 111 | 11 111 | 10 785 |
| total | 23 955 | 23 086 | 21 960 | 21 340 | 19 935 | 19 901 | 19 569 | 19 544 | 19 249 |

Source: AC Nielsen (on December 31)

## Annex 11

**Number and types of the stores of food retail chains in Hungary 2004 - 2012**

| retail chain | typical store type | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|---|---|---|---|
| Tesco | hypermarket (supermarket) | 69 | 89 | 99 | 122 | 148 | 176 | 205 | 212 | 216 |
| CBA | small shop, supermarket | 2 836 | 3 000 | 3 182 | 2 924 | 3 038 | 3 054 | 3 072 | 3 077 | 3 225 |
| Coop | small shop, supermarket | 4 487 | 4 963 | 5 286 | 5 283 | 5 250 | 5 250 | 5 250 | 5 225 | 5 459 |
| Spar | supermarket, hypermarket | 153 | 168 | 189 | 204 | 391 | 398 | 399 | 389 | 391 |
| Reál | small shop, supermarket | 1 840 | 2 290 | 2 310 | 2 310 | 2 310 | 2 320 | 2 320 | 2 140 | 2 300 |
| Lidl | discounter | | 51 | 68 | 90 | 105 | 122 | 135 | 148 | 156 |
| Auchan | hypermarket | 9 | 10 | 10 | 10 | 11 | 12 | 12 | 12 | 19 |
| Penny Market | discounter | 142 | 148 | 155 | 163 | 169 | 178 | 186 | 189 | 191 |
| Aldi | discounter | | | | | 45 | 58 | 73 | 78 | 86 |
| Match | supermarket | 132 | 132 | 125 | 124 | 124 | 123 | 123 | 121 | 63 |
| Profi | discounter | 67 | 73 | 73 | 73 | 73 | 73 | 73 | 73 | 73 |
| Cora | hypermarket | 7 | 7 | 7 | 7 | 7 | 7 | 7 | 7 | 7 |
| Héliker | small shop | 61 | 57 | 54 | 53 | 53 | | | | |
| Metro | C + C | 13 | 13 | 13 | 13 | 13 | 13 | 13 | 13 | 13 |
| Plus | discounter | 157 | 165 | 165 | 172 | | | | | |
| Interfruct | C + C | 22 | 22 | 22 | 23 | | | | | |

Source: AC Nielsen

## Annex 12

**Profitability of food retailing in Hungary 2005 – 2010**

| | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 |
|---|---|---|---|---|---|---|
| Return on Assets (ROA, %) | 0.0 | 2.0 | 2.0 | 0.0 | -1.0 | -4.0 |
| Return on Sales (ROS, %) | 0.0 | 0.8 | 0.9 | -0.1 | -0.7 | -2.2 |

Source: The productivity and profitability of the food retail sector (Research Institute of Agricultural Economics, Budapest, 2012)

# INDIA[1]

## Executive summary

In the Indian context, the huge figure of food consumption, production and processing contemplates a goliath market, which requires competition scrutiny and compliance for ensuring consumer and producer welfare. 'Food Chain Industry' would include various related concepts starting from production to consumption of food products. In consideration of the mandate of this written submission, 'Food Chain Industry' would focus on identification of different organisational structures, upstream and downstream factors of concentration, balance between markets and regulation, factors that influence the efficiency and transparency of the overall chain leading to competition distortions.

Unlike many countries, food chain industry in India is growing in diversification and moving fast from traditional localised models to modern food industry and product models. It may be contemplated that food processing and retail chains may give rise to competition concerns, especially given recent public and political concerns arising from high inflation in food commodity prices. Competition concerns in 'Food Chain Industry' in India have to take into account constitutional mandate, which guides Indian polity to remain committed towards social justice. One of the important elements of Government Policy is to ensure food security for citizens of the country. Towards this end, the government manages a public distribution system (PDS) through efficient procurement at Minimum Support Price (MSP).

Federal system of governance in India brings in a number of legislations rules and regulations covering multitude aspects of food chain industry in India. Aligned with complex legislations in the food sector, Competition Commission of India (CCI) established under the Competition Act, 2002, aims to address competition concerns in the food sector, which are in no way different from any other sector.

CCI recognises that the food supply chain is a complex series of inter-related markets where competition at different stages of the supply chain matters for the overall functioning of the food sector, further modes of retailers competition among themselves and its impact on the overall functioning of the food chain industry. Although, it is early for CCI to provide a comprehensive country paper on 'food chain industry', yet given the experience CCI has acquired since 2009 and the growing-changing landscape of domestic 'food chain industry' in India, this submission may act as a document highlighting structure and regime of 'food chain industry' in India.

## 1. Introduction

The concept of 'Food Chain Industry' includes various related concepts starting from production to consumption. It begins at the level of farming and involves the agricultural production, procurement and sale of the farm produce in markets, and then consumption of food by consumers, which also include the intermediary industries like food processing and the latest food retail chains. Further, 'food' may include cereals, pulses, vegetables, fruits, milk, fish, meat, and eggs. Each of these, as a food has different chain of production, retail and consumption and thus has separate issues of its own.

[1] This note was prepared by the Competition Commission of India.

Agriculture is the backbone of Indian economy and it may be contemplated that growth of 'food chain industry' would have beneficial impact on farmers and the agrarian economy. India is a union of 28 States and 7 Union Territories, with population size of more than 1.2 billion people. As per constitutional distribution of areas of legislation agriculture falls in List II of Schedule VII of the Constitution, and state governments are having power and authority to control production and movement of agricultural produces. Given this mandate, 'food chain industry' market in India becomes complex owing to multitude of legislations, rules and regulations.

Further, India is committed towards social justice and one of the important elements of Government Policy is to ensure food security for citizens of the country. Towards this end, the government manages a public distribution system (PDS) through efficient procurement at Minimum Support Price (MSP), storage and distribution of food grains (cereals)[2].

## 2. Regulatory Institutions and Key Regulations

'Food chain industry' in India is governed by a set of legislations, rules and regulations framed by the central and state governments. The most recent legislation having connection with the 'food chain industry' is the National Food Security Act, 2013.

### *2.1 Key Regulatory Institutions*

The Department of Food & Public Distribution is a government of India department responsible for the management of the food economy of the nation[3]. It manages the PDS, ensures availability of food grains, sugar and edible oils through appropriate policy instruments; including maintenance of buffer stocks of foodgrains; makes foodgrains accessible at reasonable prices, especially to the weaker and vulnerable sections of society[4].

Ministry of Food Processing Industries (MFPI) – This Ministry was setup in July 1988 to give an impetus to development of food processing sector in the country. The focus of this ministry is to give boost and growth to food processing sector.[5]

The Food Safety and Standards Authority of India (FSSAI) - It has been established under Food Safety and Standards Act, 2006, which consolidates various acts & orders that have hitherto handled food related issues in various Ministries and Departments. FSSAI has been created for laying down science based standards for articles of food and to regulate their manufacture, storage, distribution, sale and import to ensure availability of safe and wholesome food for human consumption. Ministry of Health & Family Welfare, Government of India is the Administrative Ministry for the implementation of FSSAI

Ministry of Commerce – In relation to export of agricultural produce (food), MoC is the key ministry which formulates policies regarding export of the food products from India. Other than this ministry, the limits on the FDI investments in retail sector is formulated and by Ministry of Finance with Foreign Investment Promotion Board (FIPB) having jurisdiction to approve these proposals.

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2 INDIA 2013: A Reference Annual, Publications Division, Ministry of Information and Broadcasting, Government of India, 2013 at p.414.

3 INDIA 2013: A Reference Annual, Publications Division, Ministry of Information and Broadcasting, Government of India.

4 Id.

5 For more details visit http://www.mofpi.nic.in

### *2.2 Key Regulations*

Integrated Food Law – the Food, Safety and Standards Act, 2006 – This legislation is a comprehensive legislation which takes care of the gamut of issues with the primary objective of providing safe, hygienic and quality food to the people. Various central Acts like Prevention of Food Adulteration Act, 1954; Fruit Products Order, 1955; Meat Food Products Order, 1973; Vegetable Oil Products (Control) Order, 1947; Edible Oils Packaging (Regulation) Order 1988; Solvent Extracted Oil, De- Oiled Meal and Edible Flour (Control) Order, 1967; Milk and Milk Products Order, 1992 have been replaced or are in the process of being replaced with this law.[6].

Standard Setting –Bureau of Indian Standards formed under the BIS Act, 1986 is the National Standards Body in India and works towards the harmonious development of standardization, marking and quality certification. There are several food items, which are under the mandatory certification of BIS like milk products, infant milk substitute, packaged drinking water, complementary foods, and hexane – food grade[7].

The Legal Metrology Act, 2009 and the Legal Metrology (Packaged Commodities) Rules, 2011- It provide for the compliances required to be adhered to for the sale and distribution of packaged commodities by the manufacturer, packer or importer including the MRP, name and address of the manufacturer, etc.

The Essential Commodities Act, 1955 – A number of food products are also regulated under this Act. For example, Sugar prices are regulated through the Control Orders under this Act. This aspect has been dealt with by CCI in relation to sugar (please see the case discussed below).

1.2.5 Policies by Department of Food and Civil Supplies – Policies by this department relate to procurement for the public distribution system and maintaining the stock for distribution in various welfare schemes of the government like Antodaya Anna Yojana, Mid-day Meal Scheme, etc. Other than these schemes, there are certain food commodities for which prices and export/import are regulated, for example:

- Sugar – Sugar and sugarcane are Essential Commodities under the Essential Commodities Act 1955. Under this policy, a certain percentage of sugars produced by sugar factories are requisitioned by the government as compulsory levy at price fixed by government in every sugar season. Levy sugar is distributed under the PDS at a uniform retail issue price throughout the country. The non-levy (free sale) sugar is allowed to be sold as per the quantity released by the Govt. on a monthly basis under the regulated release mechanism. Other than this, there is a statutory minimum price (SMP)/Fair and Remunerative Price (FRP) of sugar fixed by Sugarcane (Control) Order, 1966.

- Edible Oils – In order to augment domestic supply of edible oil and to provide relief to consumers especially BPL households, the export and import of edible oils (both crude and refine) is regulated.

Price Management of Food – The Wholesale Price Index (WPI), released by the Office of the Economic Adviser, DIPP is an indicator of general price trend of essential commodities in the country. Government has given high priority for containing the rise in prices of commodities at reasonable level. The prices of essential commodities are being closely monitored and reviewed at the appropriate levels,

[6] For more details visit http://www.fssai.gov.in/AboutFSSAI/introduction.aspx

[7] For more details visit http://www.bis.org.in/cert/man.pdf

Commodities which are in short supply such as edible oils and pulses are being imported to supplement the domestic availability.

During the year 2011-12, the retail and wholesale prices of 22 essential commodities, viz, rice wheat, atta (flour), gram dal, arhar dal, masoor dal, moong dal, sugar, salt, tea, potato, onion, gur, milk and tomato across 59 centres were monitored by the Department of Consumer Affairs on a daily basis. The Cabinet Committee on prices (CCP) and Committee of Secretaries (COS) reviewed the prices and availability of essential commodities at regular intervals, based on the agenda note on General Prices Situation and availability of Essential commodities prepared by the Price Monitoring Cell (PMC) of the Department of Consumer Affairs.

Food Processing – This is one of the largest industries in India in terms of production, consumption, export and expected growth. The Confederation of Indian Industry (CII) has estimated that the foods processing sectors has the potential of attracting US$33 billion of investment in 10 years and generate employment of 9 million persons days[8]. The food processing industry may be segmented into the sectors like dairy, fruits and vegetables, grains and cereals, fisheries, meat and poultry and consumer foods[9]. The highest share of processed food is in the dairy sector; however, the processing by organized sector is far less than the un-organized sector. Primary food processing is a major industry with a highly fragmented structure that includes hundreds of thousands of rice mills and hullers, four mills, pulse mills and oil-seed mills, several thousands of bakeries, traditional food units, and fruits, vegetable and spice processing units in the unorganized sector[10]. The non-availability of actual data in the unorganized sector becomes a major constraint to undertake any competition assessment.

Export Policy –Export policy of government in the area of food chain industry is especially directed towards cereals like rice, wheat and wheat products as well as sugar, edible oils and at times onion/potato. The restriction on the export of these products is decided on the basis of availability of the products in the country.

## 3. Recent Developments in Food Chain Industry

Over the last couple of years, inflation and the rising food prices have been a major challenge for the Government. Food has an important share in the calculation of Wholesale Price Index (WPI) as is evident from the latest index for 'food articles' group rose by 3.4 percent to 237.7 (provisional) from 229.8 (provisional) for the previous month[11].

The food supply chain industry in India can be categorized into four major types depending upon the consumption pattern and the sophistication of organization. The basic difference is between the rural and urban consumption pattern. There is a trend in urbanizing of the Indian food market[12]. The food supply

8 A Brief Report on Food Processing Sector in India, Corporate Catalyst India (August 2012).

9 Ministry of Food Processing, Government of India, Annual Report 2004.

10 A Brief Report on Food Processing Sector in India, Corporate Catalyst India (August 2012), at p.3.

11 See Index Numbers of Wholesale Price in India (Base: 2004-05=100) Review for the month of July, 2013, Government of India – Ministry of Commerce and Industry, available at http://eaindustry.nic.in/cmonthly.pdf (due to higher price of fruits & vegetables (11%), rice (5%), fish-inland (5%) and fish-marine, barley, urad, condiments & spices, mutton, wheat and masur (1% each). However, the price of poultry chicken (9%), coffee (3%), gram and egg (2% each) and arhar, bajra and moong (1% each) declined.)

12 Reardon, Thomas and Bart Minten, *The Quiet Revolution in India's Food Supply Chains*, International Food Policy Research Institute (IFPRI) Discussion Paper 01115 (September 2011)

chain's composition has diversified over the past three decades. The share of cereal consumption in the urban food basket has declined from 36 percent in 1972 to 23 percent in 2006. In the same period, the share of cereals in rural areas declined from 56 to 32 percent (*Indiastat*).[13] Non grain food (dairy, pulses, fruits, vegetables, meat, and fish) are 71 percent of India's food consumption and are important sources of calories, protein, and vitamins. These foods share centre stage with grains for food security.

Food Security is an important issue in India and Government has a direct role to play in this where the government makes procurement of grains and distributes the same through PDS. However, it may be noted that even after such a direct role, the government is a very minor actor in the Indian food economy (mainly grain sector), say 7 percent[14]. The 93 percent of the food economy is in hands of the private players and has seen a major transformation as the income levels of the people have risen, increase in urbanization, and the consumer preferences have changed with opening up of retail chains, fast food chains, supermarkets and hypermarkets.

The National Food Security Act, 2013 (No. 20 of 2013) - on July 5, 2013 the National Food Security Act, 2013 came into force. This parliamentary law is enacted to provide for food and nutritional security in human life cycle approach, by ensuring access to adequate quantity of quality food at affordable prices to people to live a life with dignity and for matters connected therewith. This effort is in line with the constitutional obligations[15] and government's commitment towards food security to the people of the country to live a life with dignity. As noted above, this ordinance deals with only a minor area of food chain industry, i.e. food grains (which under the ordinance means rice, wheat or coarse grain or any combination thereof).

Multi-brand Retail and 'Food Chain Industry' – The food retailing is an important industry in India. Over the past few years, the industry had grown at about 10% a year, exceeding the GDP growth rate. Food retail outlets account for one third of all retail outlets and 63% of total retail sales. The traditional food retail industry comprised of two basic formats: *Kirana* (mom and pop) stores and pushcart vendors. The *Kirana* stores were (typically) family-owned, small in size (100 sq ft and above), carry a limited number of items, and are run mostly by family members, supplemented with some hired help. There were approximately 12 million such outlets in India with half of them involved in food retailing[16]. As per *Assocham and Yes Bank Study*[17], the overall retail market (organized and unorganized) is expected to grow at a compounded rate of15 % over the next 5 years from INR 23 trillion in 2011-12 to INR 47 trillion in 2016-17 which would include the food chain industry.

## 4. Competition in Food Chain Industry

One of the significant issues raised in terms of food chain industry has been in relation to agriculture marketing and the role of Agricultural Produce Market Regulation, which establishes regulated wholesale agricultural produce markets with marketing committees comprising of farmers, traders, commission

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13 Id.

14 Id.

15 See Supreme Court Orders on Right to Food: A tool for action, available at *www.righttofoodindia.org/data/scordersprimer.doc*

16 Kalhan, A (2007): ―Impact of Malls on Small Shops and Hawkers‖, *Economic and Political Weekly*, 42(22), 2063-2066, cited in Singh, Sukhpal and Naresh Singla, *Fresh Food Retail Chains in India: Organisation and Impacts*, CMA Publication No – 238 (2010)

17 See FDI in Retail Advantage Farmers, Background Material by Assocham and Yes Bank (October 2012), http://www.assocham.org/arb/general/Background-FDI-Retail.pdf

agents, local bodies and state government representatives. It is alleged that the licensing and procurement practices of APMC such as restrictions on direct access of farmers to retailers in relation to *fruits and vegetables* as a food leads to distortionary effects in the market.

Another potential issue in the food chain industry may be in relation to storage. Food Corporation of India (FCI) along with the Central and State Warehousing Corporations are authorised to store the procured grains under PDS discussed above. However, due to the increased procurement of foodgrains, government has formulated the Private Entrepreneurs Guarantee (PEG) Scheme under the private-public partnership (PPP) mode for construction of storage godowns. Though, there seems to be no immediate competition issue in this area, due to the minor share of procurement of grains in the overall 'food chain industry', CCI would keep a watch on the developments in the area of storage and warehousing from the competition perspective.

The Competition Act, 2002 does not make any exemption for the food chain industry in terms of enforcement and the Commission has dealt with the following cases in this sector. The definition of 'enterprise' under the Act includes departments of government, which are or have been engaged in any activity relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provisions of services of any kind. Thus, the complete 'food chain industry' would be under the ambit of competition law enforcement of India, either it be public or private.

### *4.1 Cases by Commission in 'Food Sector'*

Sugar Industry (SuoMotu Case 1 of 2010 – In Re Sugar Mills decided on 30.11.2011)– CCI undertook a *suo motu* investigation into the certain alleged anti-competitive practices (*raising prices and reducing production, etc.*) of sugar industry under the auspices of Indian Sugar Mills Association (ISMA) and National Federation of Cooperative Sugar Factories Limited (NFCSF). After investigating the case, however, the Commission did not find any cartelization in the matter. CCI observed that "*the sugar industry is not free from control and is at present highly controlled and regulated.*" The Commission also observed that "*sugar prices are not a mere function of demand and supply and there are complex forces at pla, which distort and in a way proscribe the market from working in a competitive and free manner*[18]."

In view of the aforesaid, Commission recommended that "the government, after taking into account all aspects including need to have such measures in place, which may be necessary for overall social and economic welfare, may frame a policy which allows the market and competitive forces to play a bigger role in the sector. While competition in the sector may enable the efficient firms to perform better, it may also ultimately bring benefits to the consumers since efficient firms in a competitive environment may not only compete for greater share of the market but also incentivize the consumers through better product and lower prices[19]."

Alleged Cartelization in the Onion Markets – (Suo Motu Case 1 of 2011 – In Re Rise in Onion Prices decided on 10.04.2012) –This case was initiated by CCI *suo motu* in view of the abnormally rising prices of onion in the month of December 2010. It was apprehended that there may be a cartelization in the supply chain. After investigation, the Commission did not find any evidence of collusion or cartelization among the traders/commission agents or any other players in the supply chain and thus closed the matter. However, one Member observed that a re-investigation should be done in this case. Pursuant of this, the

[18] Para 7 of the Order

[19] Para 9 of the Order

Commission got a market study done in this sector[20]. The study recommended changes in the agriculture marketing (APMC) regulations.

Competition issues in 'food chain industry' – CCI does find competition concerns in 'food chain industry'; however, owing to complexities of legislations, rules and regulations and still growing nature of 'food chain industry' in India, no definite competition case has been made out as on date. CCI expects to obtain knowledge and information from counterpart jurisdictions on this sector. CCI contemplates that Government investment policies on the subject would be playing crucial role in increased competitiveness in this sector and CCI is fully equipped to handle issues of competition scrutiny in this sector.

[20] CCI Market Study on Competitive Assessment of Onion Markets in India – done by Agricultural Development and Rural Transformation Center, Institute for Social and Economic Change (ISEC) Bangalore (2012), available at http://www.cci.gov.in/images/media/completed/AO.pdf

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Consolidated FDI Circular 1 of 2013 of Government of India with latest Press Note 5 on multi-brand retail.

# IRELAND

## 1. Introduction

The food supply chain may be characterised in terms of the interplay between:

i. Small agricultural producers and large food processing companies;

ii. Suppliers (including food processing companies) and retailers (and other large purchasers such as wholesalers or buying groups); and,

iii. Large and small retailers.

In Ireland, the evolution of market structures (both horizontal and vertical) has been an important determinant of how different sectoral interests have fared in the allocation of value in the chain. That allocation of value has also been significantly influenced by the market and non-market strategies employed by the different categories of market participants to increase their individual and collective shares.

Viewed in this way, in Ireland the food sector is driven, to a significant extent, by changes in the structure of the retail level of the supply chain. For example, the market response to the arrival and growth of the supermarket chain format in Ireland in the 1950s was the consolidation of wholesaling operations and the emergence of group trading models consisting of coalitions of wholesalers and small retailers.

Non-market responses to the growth of the supermarket chain format included intense lobbying activity by sectoral interests including farming representative organisations and trade associations. Such non-market responses have played an important role in the evolution of the sector. Quinn and Leavy (2006)[1] identify a unique alliance between wholesaling interests and small retailer interests who, when threatened by the growing presence of the supermarket chain format, lobbied successfully to introduce various restrictions.[2] Quinn and Leavy note that the Irish Association of Distributive Trades (IADT), driven principally by Musgrave, the largest wholesaler in Ireland for the last number of decades, "… *mobilised its institutional power to extract better terms from manufacturers, a significant measure of protective legislation from government and a change in the planning laws to prevent large-scale hypermarket development.*"

It is likely that the non-market responses of the various sectoral interests have ensured that policy in the food sector and, more generally the grocery sector, remains continually under review. Over the last

[1] Quinn, J. and Leavy, B. (2006), The Drivers of Industry Evolution: A Study of Irish Wholesaling, Journal of Marketing Channels, Vol. 13(1) pp. 37-62.

[2] For example, the Restrictive Practices (Groceries) Order 1987 ("1987Order") prohibited sales below cost where the relevant cost benchmark was the so-called net *invoice price*. The 1987 Order had two related effects. First, it prevented larger retailers from competing aggressively on price. Second it allowed manufacturers to have a degree of control over the downstream retail price and, as such, the 1987 Order provided for a form of resale price maintenance. The Order was strongly opposed by the Competition Authority and was revoked in 2006.

number of years, the Competition Authority has carried out four studies of the grocery sector and has initiated a number of investigations.[3,4] Sector specific legislation has also been enacted (The Competition Amendment Act, 2006) and the Government is now committed to introducing a mandatory Code of Practice for the grocery sector.

This submission is structured as follows. Section 2 provides a description of the vertical and horizontal structure of the grocery sector. While the focus is on the distribution and retail segments of the supply chain, the structure of upstream production segments is also noted. Building on the structure explained in the previous section, Section 3 looks at the major changes in the supply chain which have occurred over the last decade or so. Section 4 concludes with some commentary on likely future developments.

## 2. Food Supply Chain: Vertical and Horizontal Market Structure

Table 1 shows the approximate market share of those involved in grocery retailing in Ireland. There are three main retailers in Ireland (i.e., Tesco, Supervalu/Superquinn and Dunnes Stores) who between them command approximately three quarters of the market. These retailers are traditional full-line retailers. The SuperValu retail brand differs from the other two main retail brands in that it is owned by Musgrave, the largest wholesaler in Ireland, and is licensed to so-called affiliated (i.e., franchised) retailers. The retailers Lidl and Aldi are relatively recent arrivals to the Irish grocery sector and have grown their market share slowly but steadily over the last decade. The remainder of the sector is highly fragmented.

3 The four studies are: Grocery Monitor: Report No.1 (2008), A Description of the Structure and Operation of Grocery Retailing and Wholesaling in Ireland: 2001 to 2006; Grocery Monitor Report No.1 (2008), Price Trends in the Irish Retail Grocery Sector: A Description of the Evolution of Retail Grocery Prices between 2001 and 2007; Grocery Monitor Report No.3 (2008) The Retail Planning System as Applied to the Grocery Sector: 2001 to 2007; and, Retail-related Import and Distribution Study (2009). The fourth study focussed on the clothing and pharmaceutical sectors in addition to the grocery sector.

4 At the time of writing these investigations are ongoing and will not be the subject of further comment in this submission.

**Table 1: Principal operators in Grocery Retail (Supermarkets**

| Retail Brand | Share | Description |
|---|---|---|
| Tesco Ireland | 27.9% | Full-line supermarket chain, 100+ outlets, vertically integrated |
| Supervalu/Superquinn | 24.7% | Full-line supermarket chain, 200+ outlets, in group trading arrangement with Musgrave* |
| Dunnes Stores | 23.2% | Full-line supermarket chain, 100+ outlets, vertically integrated |
| Lidl | 6.2% | The Limited Assortment Discounters, 200+ outlets, vertically integrated |
| Aldi | 6.2% | |
| Others | 11.7% | Includes smaller supermarket formats, predominantly in group trading arrangements |

* Superquinn was acquired by the wholesaler Musgrave in 2011. Superquinn had been a vertically integrated full-line supermarket chain with store located primarily in the Dublin.

Source: The market share data is from the Kantar World Panel Ireland data and was published by The Irish Times in an article entitled "Tesco adds to its position as dominant supermarket player", December 11th 2012.

At the national level, the Irish retail grocery sector therefore appears concentrated. Based on market share data for 2012, for grocery retailers of all types, the HHI measure of concentration is approximately 1,800.[5] This level of concentration is typically regarded by antitrust agencies as falling in the moderately concentrated range, indicating that competition is potentially weak. Measures of concentration which are calculated on a national basis and which include all types of grocery retailer in the calculation are potentially misleading and tend to understate the degree of market power possessed by operators with respect to both their suppliers and customers. This is because such measures may ignore the fact that operators have different vertical arrangements, are differentiated in terms of the product ranges that they offer and have different geographical locations.

## 3. Retail and Distribution

A number of authors have described the Irish food supply chain, principally distribution and retail, in terms of its dualistic structure (Walsh and Whelan (1999)[6], Donnelly (2006)[7] and Evans (2013)[8]). The dualistic structure refers to the presence of competitive niches which are, to a significant extent, served by different classes of operators:

- *More integrated operators*: Supermarket chains who own and operate multiple retail outlets which serve one-stop shoppers in relatively densely populated urban areas; and,

5 The market share data is from the Kantar Worldpanel Ireland data and was published by The Irish Times in an article entitled "Tesco adds to its position as dominant supermarket player", December 11th 2012.

6 Walsh, P.P. and Whelan, C. (1999), A Rationale for Repealing the 1987 Groceries Order, The Economic and Social Review, Vol. 30, No. 1, pp. 71-90.

7 Donnelly, G. (2006), The Impact of the Restrictive Practices (Groceries) Order on Competition in the Irish Groceries Trade, Journal of the Statistical and Social Inquiry Society of Ireland, Vol. 35, pp. 151-178.

8 Evans, J. (2013), The Structure of the Irish Grocery Sector, PhD Thesis, UCD.

- *Less integrated operators*: Wholesalers and affiliated retailers who operate group trading arrangements (so-called 'symbol groups') which serve one-stop shoppers in less densely populated areas, as well as convenience shoppers in all areas (along with truly independent retailers, i.e., retailers who do not participate in symbol group arrangements).

There are two aspects to this characterisation of channel structure; vertical and horizontal. In the dualistic view of the supply chain, different channels may be distinguished by the degree of integration of the operators within those channels. This is the vertical structure. Crucially however, these channels serve different wholesale and retail market segments, such that the competitive constraint imposed by different channels upon one another is limited. This is the horizontal structure.

The vertical structure of the Irish food supply chain is described in Figure 1. In this figure, five supply channels, or distribution models, are identified. Each channel is characterised by a different degree of vertical integration of the operators in those channels. The distribution models range from the completely disintegrated distribution channel in Distribution Model 1 (where suppliers trade with independent wholesalers, who do not carry private label ranges, and who in turn trade with independent retailers that are responsible for their own retail branding); to the vastly more integrated channel in Distribution Model 5 (where suppliers manufacture private label groceries for retailers (including the Limited Assortment Discounters (LADs), Lidl and Aldi) who carry out wholesaling activities internally and who predominantly retail their own private label products). In between are the group trading models (e.g., BWG/Spar, Musgrave/Centra and Musgrave/SuperValu) who, depending on their size and sophistication, operate much like the more formally vertically integrated traditional supermarket chain retailers (i.e., Tesco Ireland and Dunnes Stores).

**Figure 5: Food Channel Structure, Distribution and Retail (Evans 2013)**

| Supply Chain Level | Supply Chain Activity | Degree of Vertical Integration → | | | | |
|---|---|---|---|---|---|---|
| | | Distribution Model 1 | Distribution Model 2 | Distribution Model 3 | Distribution Model 4 | Distribution Model 5 |
| Supply | *Production* | Branded Goods Suppliers | Branded Goods Suppliers | Branded Goods Suppliers and Private Label Manufacturers | Branded Goods Suppliers and Private Label Manufacturers | Private Label Manufacturers |
| | *Branding* | | | Licensing Fascia and wholesaling a mixture of Branded and Private Labels: **Musgrave** | Retailing a mixture of Branded and Private Labels: **Superquinn** **Dunnes Stores** **Tesco Ireland** | Predominantly retailing Private Labels: **Lidl** **Aldi** **Marks & Spencer** |
| Wholesale | *Buying* | Cash and Carry wholesalers: **Musgrave** **ADM Londis** **Barry Group** **BWG Foods** **Gala Wholesalers** **Mangan Wholesale** **Independent Cash and Carry Wholesalers** | Licensing Fascia and wholesaling Branded Goods: **ADM Londis** **Barry Group** **BWG Foods** **Gala Wholesalers** **Mangan Wholesale** | | | |
| | *Storage* | | | | | |
| | *Distribution* | | | | | |
| Retail | *Retailing* | Independent Retailers | | | | |
| | *Retail Branding* | | A variety of Affiliated Retailers, for example: **Spar** **Londis** **Costcutter** **Mace** | Centra and **SuperValu** Retails | | |

In principle, all of these distribution models are potentially in competition with one another, though two fields of rivalry can be identified by reference to the level at which they operate:

- At the *wholesale* level: distribution models may compete at the wholesale level, that is, there is potential competition between Distribution Model 1 through Distribution Model 3; and,

- At the *retail* level: there may be competition between all grocery distribution channels at the retail level, Distribution Model 1 through Distribution Model 5.

### *3.1 Wholesaling*

At the wholesale level of the grocery supply chain, a useful framework for considering market delineation in an Irish context involves regarding wholesaling as, at a minimum, the activities of negotiating terms with multiple grocery suppliers and distribution activities which include at least one of (a) delivery, (b) cash and carry[9], or (c) central billing. In terms of the channel structure of Figure 1, this approach implies that the vertically integrated retailers offer no direct competitive constraint to operators carrying on wholesaling activities.

From the perspective of customers within the wholesale market, i.e., the retailers, the different degrees of integration which characterise the different distribution channels serve to differentiate wholesalers. As different wholesalers offer differentiated products, they will exert different degrees of competitive constraint upon one another depending on how substitutable their products are. For smaller retailers, active in the small supermarket and convenience store market, this distinction may not be crucial; there may be a variety of potential wholesalers which adequately satisfy their requirements. However, as store size and product range increase, different wholesalers may not be as readily substitutable for one another. Affiliated retailers active in supermarket markets may therefore have only a very limited choice of potential wholesalers. This line of argument implies that the largest wholesaler, Musgrave, may face only a limited competitive constraint from wholesalers in the less integrated channels, at least with respect to [its?] larger affiliated retailers (that is, principally the Supervalu retailers).

In 2006 the Competition Authority estimated that the two largest wholesalers, BWG Foods and Musgrave, accounted for around 80% of wholesale turnover, though Musgrave is approximately two to three times the size of BWG Foods. With a HHI measure of approximately 4,200 the wholesale level of the supply chain is highly concentrated, implying that direct competition between wholesalers is likely relatively weak. This, however, does not preclude the possibility that there may still be an *indirect* competitive constraint from the vertically integrated retailers via indirect competitive pressure exerted through downstream retail markets.

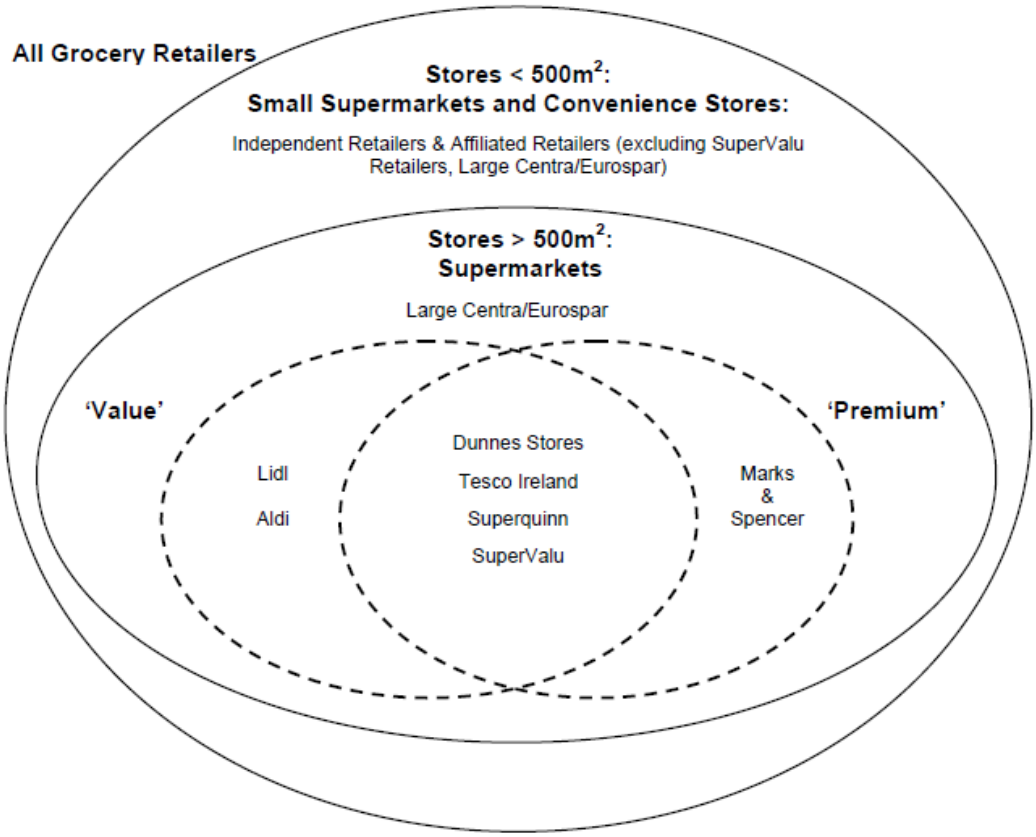
### *3.2 Retailing*

At the retail level, a useful framework for considering market delineation in an Irish context is set out in Figure 2. Here, there are (a) *full-line* grocery retailing in supermarkets with floor space exceeding an appropriate threshold in locally defined areas and (b) *convenience and top-up* grocery retailing in stores with floor space exceeding an appropriate threshold in locally defined areas, where the local sphere of

[9] Cash and carry wholesaling is a type of wholesaling, normally availed of by truly independent retailers as well as those involved in the catering sector, in which ,in the past, wholesalers did not deliver and were paid in cash. The format has evolved so that [most/generally?] so-called cash and carry operators now offer a delivery service and lines of credit.

influence of a store depends on its size.[10] These markets are referred to as the *supermarket market* and the *small supermarkets and convenience store market*.

**Figure 6: Market Structure at the Retail Level of Food Chain (Evans 2013)**




In terms of the channel structure, this characterisation of horizontal market structure has two main implications. The first implication is straightforward. The convenience retail segment is served by small supermarkets and convenience stores that are predominantly from the less integrated channels, i.e., retailers and wholesalers in group trading arrangements as well as truly independent retailers. In this segment, retailers from the less integrated distribution channels are insulated from competition from the more integrated distribution channels because the latter predominantly serve a different product market (i.e., the one-stop segment).

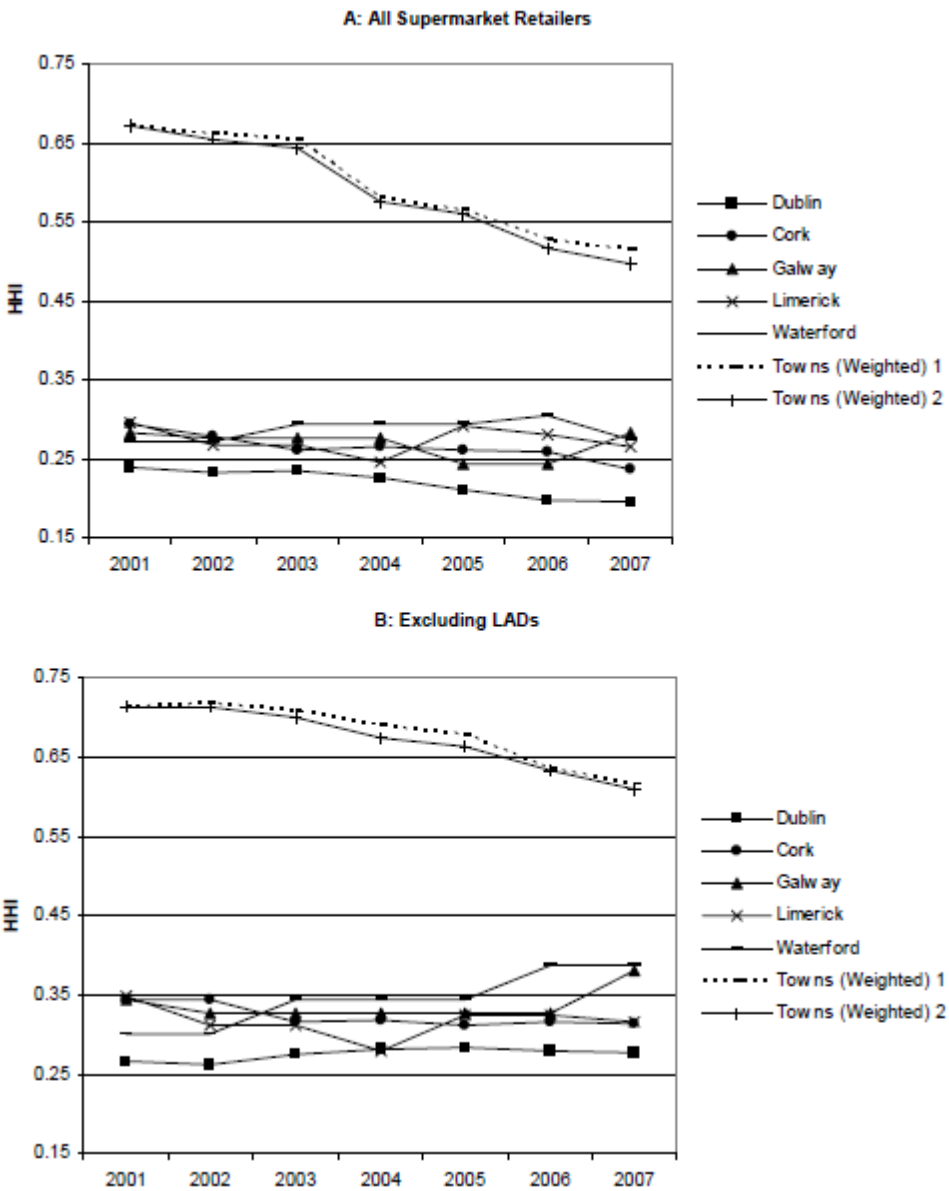
Figure 3 shows the evolution of floor space ownership in the supermarket across different geographic areas, i.e., the five main cities and a weighted average across towns. While the cities are quite highly concentrated, they are less so when the Limited Assortment Discounter (LAD) supermarkets are seen as close substitutes for more traditional supermarket formats. Importantly however, outside the cities (where about half the population is resident) concentration levels are high, but have declined somewhat over the

[10] Many agencies use some threshold to differentiate smaller stores from larger supermarkets. The principle is that larger stores can carry larger product ranges. At some point, floor space becomes large enough to permit a supermarket to carry a sufficiently broad product to satisfy one-stop shopping requirements. While there is a certain arbitrariness as to precisely where the threshold should be drawn, or indeed about the number of thresholds used, the approach is analytically useful.

period. This evolution of concentration outside the cities was facilitated primarily by extra-urban population growth.

The second implication is more complex and hinges on the extent of the relevant geographic market rather than product market. In the one-stop segment supermarkets which are supplied by the more integrated channels (i.e., the vertically integrated retailers) and supermarkets which are supplied by the less integrated channels (i.e., those supermarket retailers in group trading arrangements with wholesalers), are all potentially in competition with one another, in the sense that they occupy the same product market dimensions. However, because the nature of competition in geographic dimensions is local and the distribution across local markets of retailers from the more integrated channels and from the less integrated channels is markedly different, this means that, in practice, the degree of competition between the two types of channel is limited.

**Figure 7: Concentration of Floor Space Ownership (HHI) 2001 to 2007**



Supermarket retailers in group trading arrangements, principally SuperValu retailers, are present in the most urbanised areas and, as such, it seems likely that at least in these geographic areas, there is a degree of channel competition. However, outside the most urbanised areas, the vertically integrated retailers have a more limited presence implying limited competition between these two channels. As of 2007 when the Competition Authority last looked closely at local market structure, the LAD retailers were beginning to penetrate less urban areas in a more significant way. However, because the LADs serve a discount niche within the overall market for one-stop supermarket retailing, they too have traditionally imposed only a limited competitive constraint on more traditional one-stop operators, though this dynamic may have changed somewhat more recently.

## 4. Primary Production and Food Processing

The supply level of the food chain consists of a variety of different operators active in the production or processing of food products sold to retailers, either directly or indirectly through intermediaries such as wholesalers, licensed distributors and agents. It is possible to distinguish:

- Primary producers, i.e., farmers who are sometimes members of cooperative organisations (for example in the dairy sector) and who are represented by farming organisations; and,

- Food processors, i.e., manufacturers of food products who may be domestically or internationally based.

The structure of many of the agricultural subsectors in Ireland may be characterised as atomised and, as such, the primary producers active in these subsectors have relatively little bargaining power with respect to their customers, i.e., those downstream operators involved typically in food processing but also distribution.

At the food processing level of the food supply chain there is a much different market structure. On the one hand there are primary brands, which are frequently supplied by multinational companies and that command substantial market share in many food categories. Such producers tend to invest heavily in marketing, advertising and the promotion of their produce by creating and developing internationally recognised brand names. These suppliers often own a portfolio of brands, for example, Diageo, Nestlé and Unilever. Irish examples include the Kerry Group and Glanbia. Alongside the primary brands exist the secondary or regional brands which are often supplied by the domestic SME sector. Such producers also frequently supply own-label produce to downstream wholesalers and retailers.

Whereas primary producers may have little bargaining power with respect to their customers, the same cannot generally be said of operators involved in the manufacture of food products. In particular, where there are few sellers (i.e., producers in the relevant food product category) and few buyers (i.e., wholesalers and retailers), to analyse the balance of power in a trading relationship, a number of factors are important. Of particular importance however are:

- The strength of own brand varieties in the product category: the introduction, or threatened introduction of an own brand range, is seen as a mechanism for enhancing the retailer's strength when it comes to bargaining over terms and conditions with suppliers and where buyer power is enhanced the more substitutable is the retailer's or wholesaler's brand; and,

- The extent of local market power possessed by retailers: The dependency of a supplier is often thought of in terms of the retailer's role as gatekeeper to consumers. The more control over route to market a retailer commands (and the less valuable alternative distribution channels are), the more dependent will be a supplier. The more local market power that a retailer possesses, other

things being equal, the greater will be its countervailing buyer power over suppliers. Measures of local market power should therefore be informative about the degree of buyer possessed by retailers over suppliers.

As a determinant of buyer power, the importance of the latter factor is an important consideration given the dualistic channel structure of distribution and retail described in para 2.2 above. In the same way that the national HHI figure for retail concentration, at around 1,800, understates the degree of market power possessed by supermarket chain retailers, it also underestimates their degree of control over routes to market and therefore the strength of their buying power with respect to suppliers.

## 5. Developments over the last Decade in the Food Supply

The model of channel structure described in the previous section relies on certain assumptions about product and market definition. For example, with respect to the product market definition, stores below a certain size threshold are presumed to serve a convenience store and small supermarket niche while stores above this threshold serve a one-stop supermarket niche.

More importantly, however, the dualistic structure of the supermarket sector hinges on the local nature of geographic markets. Specifically, the sphere of influence or catchment area of a store is presumed to be a function of the product range carried (or its size) and, moreover, catchment areas are presumed not to be so large as to generate national retail markets (through chain of substitution effects). However plausible these assumptions (most agencies appear to use a variation of this approach), they clearly do not always precisely hold. Nonetheless, it is a useful framework for thinking about vertical and horizontal competition in the food supply chain.

Over the past decade, there have been a number of developments which have threatened to upset the stability of the dualistic channel structure described above. Three significant changes in market structure are:

i. Expansion by traditional supermarket retailers into less urban areas;

ii. The entry of LAD supermarket retailers; and,

iii. The growing penetration of own label produce.

### *(i) Expansion by Traditional Supermarket Retailers*

The period from the latter end of the 1990s up until the economic downturn of 2007 corresponded to a decade or so of dramatic demographic change in Ireland. Strong economic growth in Ireland during the 1990s and first half of the 2000s brought with it unprecedented population growth (partly driven by inward migration). For the inter-censal periods, 1996 to 2002 and 2002 to 2006, the overall population of the State grew by 8% and 8.2% respectively.

The pattern of population growth in the State was not uniform however. While the major cities all saw growth (the combined populations of the largest cities of Dublin, Cork Limerick, Galway and Waterford grew by 4.2% between 2002 and 2006), the most marked changes occurred in smaller urban centres. The combined populations of the large towns (defined as towns with populations of 10,000 or more) grew by 11.6% between 2002 and 2006. The population growth of small towns (defined as towns having a population between 1,500 and 9,999) was even more marked at 20%, as was the population growth of villages (defined as having at least 50 households and less than 1,500 inhabitants) which showed increases of 18.6% over the same inter-censal period. Much of the growth in population in the State was therefore accounted for by the growth of previously less urbanised areas.

These developments naturally led to increased demand for retail services, including grocery retail services across Ireland. Traditionally, operators in group trading models (principally SuperValu/Musgrave) have held the largest shares in the vast majority of local geographic markets (based on 10, 15 or 20 minute drive time catchments) outside the cities. But since 2000, the full-line vertically integrated supermarkets have established a greater presence in provincial towns. Nonetheless such markets still remain concentrated. It is a feature of Irish demography that a relatively large proportion of towns have populations that remain capable of only supporting a limited number of supermarkets. One implication of this is that retailers active in those markets enjoy a certain first mover advantage which may never be challenged.

The ECB, in a study of the distributive trades in the Euro area, including grocery wholesaling and retailing, noted that prior authorisation to establish retail outlets is required in the majority of Member States. Ireland is no different in this regard. The European Commission, in a study of retail services, has noted that while the Services Directive has led to a degree of harmonization of authorisation regulations, there remains a substantial degree of heterogeneity. Whereas some countries have only general authorisation regimes, others have authorisation regimes which are sector specific and include criteria relating to "economic need", or incorporate some form of "competition test", in addition to other criteria encompassing environmental and urban planning concerns. In Ireland, entry to the retail trade, including the retail grocery trade, is subject to retail-specific planning legalisation. Planning guidelines specific to the retail sector were first introduced in Ireland in 1982 and have been redrawn and revised on a number of occasions since. Broadly speaking, the entry controls relate to the size (including an upper limit or cap on the size of stores) and location of retail developments and take into account the impact of new retail development on the profitability of incumbents. Following the Competition Authority's Grocery Monitor Report No. 3, which focussed on the entry regime embodied in the planning system, revisions were made to the planning guidelines. While the revised guidelines represent a significant improvement, they still contain some restrictive elements, specifically, the guidelines retain caps on the size of retail development.

***(ii) LADs***

The second significant development of the last decade relates to the entry and expansion of the so called 'limited assortment discounters'. LADs first appeared in Irish food retail sector in 1999 with the entry of European discounters Lidl and Aldi. With mid-sized stores and a limited product range, the LAD retailers targeted price-sensitive customers. Expansion was rapid and by 2006 there were approximately 120 LAD stores across Ireland. Despite the onset of the economic downturn in 2007, the expansion of the LAD format has continued apace. By 2012, there were approximately 210 LAD stores in Ireland.[11]

In terms of retail market structure, there is a degree of uncertainty surrounding the impact on the competitive environment of the entry of LAD. While store numbers have grown significantly, growth in market share has lagged behind. For example, whereas there are around the same number of SuperValu stores as LAD stores in Ireland, the LAD market share is only around half that of SuperValu stores. Similarly, whereas Dunnes Stores and Tesco Ireland, taken together, also have around the same number of Stores, the LAD market share is only just above a quarter of their combined market share.

[11] The rapid expansion of LADs is a development that is playing out in most western economies. Cleeren et al (2010) note that Aldi and Lidl, the two most successful hard discounters, between them operated 13,000 stores and accounted for 50% of the discount sales market in Europe. In the US too, the LAD format has gained traction and a number of European LADs, including Lidl and Aldi, have begun to expand there. The phenomenon has attracted some attention in the academic literature which has focused on the nature of intra and inter-format competition, i.e., to what extent do LADs compete with each other and with more traditional retailers. Cleeren, K., Frank Verboven, F., Dekimpe, M.G., Gielens, K. (2010), Intra- and Interformat Competition among Discounters and Supermarkets, Marketing Science, Vol. 29, No. 3, pp. 456-473.

***(iii) Own Labels***

One likely reason that the traditional format supermarkets have, to a degree, maintained their market position in the face of substantial expansion of the LAD format is that the traditional format supermarkets have responded by developing significantly their own brand offerings. In Ireland, the grocery chains now all carry own brand produce, as do the main wholesale groupings. Own brand penetration has however lagged behind other countries. In 2005, penetration of own brand products in Ireland stood at just 7% of total retail grocery sales. This compared with 45% of grocery sales in Switzerland, 30% in Germany, 28% in Great Britain, 22% in the Netherlands and 11% in Italy and Portugal. Recent market surveys suggest that Ireland has, to some extent, caught up other European countries, a development most likely prompted by the economic downturn of 2007.

The introduction of private label grocery ranges may be viewed as a form of backward integration by retailers and wholesalers into grocery supply. The models of private label introduction allow for strategic behaviour by branded goods manufacturers, in terms of their price response to the introduction or threatened introduction of a private label, as well as the strategic behaviour of retailers who must decide not only on whether or not to introduce a private label alternative, but also on its quality. In these models, manufacturers may attempt to deter the introduction of a private label by offering the retailer a better price, or accommodate the entry of the private label. The manufacturer's choice will depend on the quality of the private label offering of the retailer and on the retailer's costs. While these models make different predictions about, for example, the manufacturer's ability to deter the introduction of a private label, they all predict an increase in retailer bargaining power, whether the private label is actually introduced or not.

On the supply side, one response to this development by the food industry has been to stress the Irish origin of products. While there are a number of such schemes, for example the Guaranteed Irish scheme, the Love Irish Food initiative and the Bord Bia Quality Assured scheme, the scheme currently in operation in the liquid milk sector is illustrative of the strategy.

In September 2009, the National Dairy Council, a industry funded body which aims to promote dairy products,[12] launched a packaging mark which, according to its website, "… *allows consumers in the Republic of Ireland who are buying milk or cream to instantly identify which products are supporting over 4,676 local jobs, contribute to our own tax returns and contribute to our own economy - and it empowers consumers to make purchases based on being informed about the source of the milk and cream products which they purchase … It gives consumers in the Republic of Ireland the assurance that they are supporting thousands of local jobs, because the milk or cream they are purchasing has been farmed and processed in the Republic of Ireland.*" While such schemes are not targeted specifically at own brand labels, by drawing attention to their Irish origin and playing on people's desire to buy locally, such schemes attempt to diminish the threat posed by non-Irish sources of primary agricultural produce and manufacturing industry. This threat has been particularly noticeable in the liquid milk sector: milk imports from Northern Ireland now account for 26% of milk consumed in the Republic of Ireland, up from 0-2% in 1992.

The Bord Bia Quality Assured scheme is somewhat different from the other schemes in that the State is involved in its operation. An Bord Bia (The Irish Food Board) is the State agency charged with the

[12] The National Dairy Council was established in 1964 as a semi-state body. The aims of the National Dairy Council were defined as maintaining and supporting the growth in the consumption of milk and dairy products. The National Dairy Council thus engages in the generic promotion of milk and dairy products. Originally funded through both Exchequer and EU funding, the National Dairy Council is now financed by its members who consist of dairy processors and a number of representative bodies including the Irish Farmer's Association.

promotion of Irish food, both in Ireland and abroad. To this end, An Bord Bia operates a quality assurance scheme for pigmeat, lamb, beef, poultry, eggs and horticulture producers, which is designed to provide consumers with assurance that products carrying the Bord Bia mark have been produced to high standards. This scheme is open to any producer in the State who meets the requisite standards.

## 6. Final Observations

While the last two decades have seen a gradual shift in the Common Agricultural Policy, the legacy is that atomised agricultural primary producers face more powerful, often international, buyers with whom they have little choice but to trade. As the European Commission notes, since 1992 " … *the Common Agricultural Policy (CAP) has been going through a reform process with the objective of helping farmers to better respond to market signals and to face new challenges, whilst improving their incentives to develop more innovative and more market-oriented business models.*"[13] However, the agricultural sector remains "… *characterised by atomised weaker suppliers and stronger buyers, who are often intermediary operators and rarely retailers. Such buyers are the often "unavoidable" trading partners for producers.*"[14] The European Commission continues by noting that producers "… *feel compelled to satisfy terms and conditions stipulated by their buyers – and that farmers often perceive as going beyond what is "fair" – so as not to lose these indispensable buyers.*"[15] In this way, the European Commission characterises the friction between the primary producer level of the supply chain and subsequent levels of the chain (but primarily the intermediate, as opposed to the retail, level) in terms of unequal bargaining strengths and outcomes which are regarded as fair or unfair by particular interests in the chain.

Similar themes emerge when the vertical relationships between processors and manufacturers on the one hand, and distributors and retailers on the other, are examined, but for different reasons. The grocery processing and manufacturing sectors are often concentrated. As noted earlier, a handful of primary brands, frequently supplied by multinational companies, command substantial market share in many grocery categories. Alongside the primary brands are the secondary or regional brands which are often supplied by the domestic SME sector. In this context, while there may be a relatively even balance of power between the suppliers of primary brands and large retailers, the same may not be true of regional and secondary brands. The European Commission notes that when "…*negotiations occur between retailers and large multinational suppliers, who are often producers of a portfolio of goods which are in some cases must-carry brands, suppliers may have significant market power. In such cases, the buyer power of even the largest retailers may be offset by the market power of the suppliers.*"[16] However, it goes on to note in contrast that a "… *significant number of SMEs are also active in agri-food industries and contribute to the complex structure of the processed food chain. In this last case, the bargaining position could be the opposite, with the suppliers in a weaker position than the retailers.*"

In practice, then, the imbalance in bargaining strengths described here leads to two sources of friction between the levels of the supply chain. First, much like the relationship between small primary producers

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13 Competition in the Food Supply Chain, (Commission staff working document accompanying Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions entitled "A better functioning food supply chain in Europe"), Brussels, COM(2009) 591, October.

14 *Ibid.*

15 *Ibid.*

16 Competition in the Food Supply Chain, (Commission staff working document accompanying Communication from the Commission to the European Parliament, the Council, the European Eonomic and Social Committee and the Committee of the Regions entitled "A better functioning food supply chain in Europe"), Brussels, COM(2009) 591, October.

and downstream intermediaries, small producers of grocery products often feel compelled to satisfy terms and conditions stipulated by their retailers which are perceived as being unfair. From the perspective of suppliers, the introduction by retailers of private label brands, which may sometimes replace secondary or regional brands, exacerbates this problem. Second, whereas large retailers are able to extract more favourable terms from suppliers, the same may not be true of smaller retailers. One competitive response to this development is that smaller retailers frequently join group trading arrangements to leverage collective purchasing strength. Over the years, these sources of friction have attracted a variety of responses from policy makers and legislators.

The Irish Government plans to introduce legislation in the near future establishing a mandatory Code of Conduct in the grocery sector. The Code will regulate contractual relations between retailers and distributors and upstream suppliers and will prohibit certain practices currently engaged in by retailers (mainly the large retailers).

The background to this is that, in August 2009, the Department of Enterprise, Trade and Employment[17] launched a consultation document seeking views on a proposal to introduce a *voluntary* Code of Conduct for the grocery sector.

The Draft Code published in 2009 sought to promote fairness and strike a balance in the contractual dealings between retailers and suppliers in the case where there are frequently large disparities in the bargaining power of each party. It tried to do so primarily by requiring written contracts and minimising the possibility of introducing retrospective contract changes (which have the effect of shifting risk from the party with greater bargaining power to the party with lesser bargaining power).

The Draft Code listed a number of practices which are prohibited, namely:

- Variations to the business agreement and the manner in which the variations may be made;
- A retailer requiring a supplier to pay for the marketing costs of a retailer;
- A retailer requiring a supplier to pay for shrinkage;
- A retailer requiring a supplier to pay for wastage;
- A retailer not paying full compensation for errors of forecast which would otherwise be payable under the Code provided other conditions are met;
- A retailer requiring a supplier to participate in a promotion regarding advertising or display of grocery goods.

The Competition Authority argued that the Code of Conduct, as drafted, would increase the cost of doing business for both suppliers and retailers and would not achieve its intended aim for two main reasons.[18] First, because of a reluctance of suppliers to report breaches of the Code; it has been the experience of the Competition Authority that suppliers are reluctant to come forward for fear of damaging trading relationships and the Draft Code did little to remove suppliers' fears of, in particular, being delisted by retailers. Second, virtually all "prohibited" conduct or practices would be permitted if they were provided for in the written Terms of Business Agreement; this will result in these practices being

[17] Now the Department of Jobs, Enterprise and Innovation.

[18] Competition Authority submission to the Department of Jobs, Enterprise and Innovation on the proposed Code of Practice for Grocery Goods Undertakings, S-11-008, September 2011.

incorporated into companies' standard contracts by way of practice, making it very difficult for smaller operators who lack the legal expertise, bargaining power and resources to negotiate.

It is expected, nevertheless, that the proposed statutory Code of Conduct will be put in place soon. Details of its contents have not yet been made public.

# ISRAEL

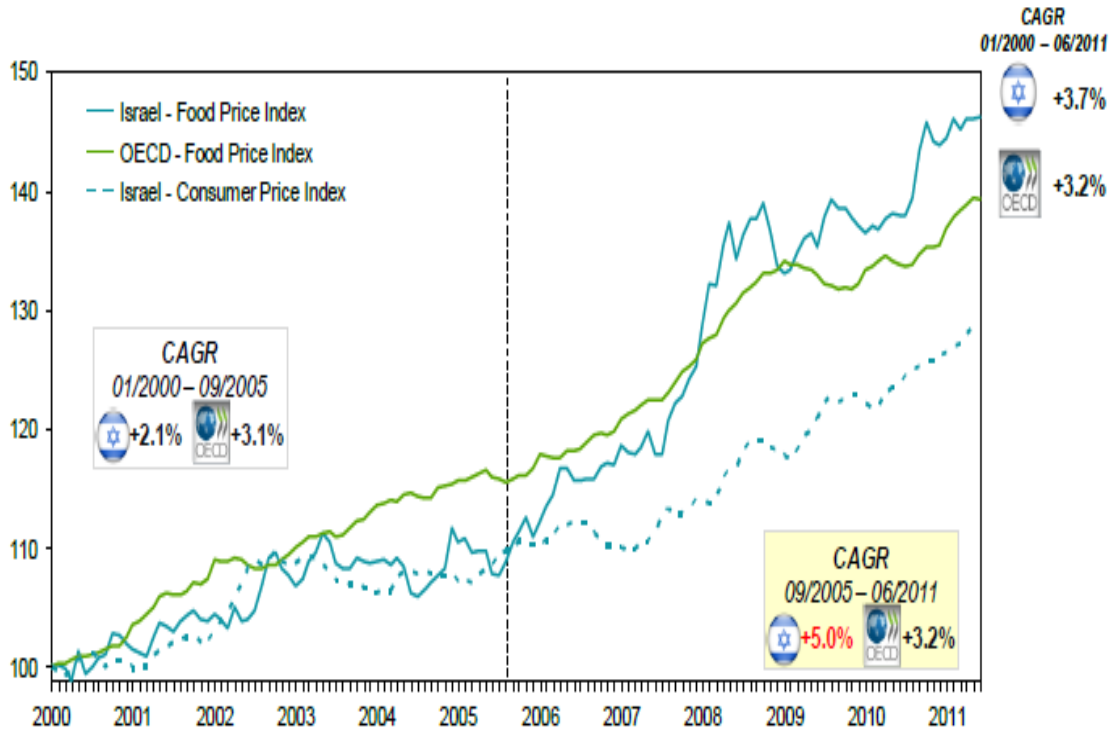
## 1. Background

During the summer of 2011, there was significant social protest in Israel. Among the various issues raised by the protesters was the high cost of living. The government's response to the social protest included the establishment of the Committee for Economic and Social Change (known as the "Trajtenberg Committee") and the Committee on Competitiveness in the Food and Consumer Goods Market (known as the "Kedmi Committee"). The Trajtenberg Committee's report contained a section dedicated to the cost of living in Israel, headed by the IAA's representative in the committee, chief economist at the time Shlomi Parizat. The section identified major economic drivers that led to market failures, which in turn led to low levels of competition and high levels of concentration in many sectors. Of the various industries studied, the food industry was identified as being among the most anticompetitive, due to, among other reasons, the high level of concentration in the food production and import segments and the presence of various barriers to competition. In its conclusions, the Trajtenberg Committee suggested that its findings be passed onto the Kedmi Committee, with the recommendation to open the industry to competing imports, to reduce concentration in the production and import segments, and to complete the analysis of the retail segment in the food industry, including arriving at a portfolio of solutions dedicated to this issue.

The Kedmi Committee was established to study the characteristics of food markets and consumer products, to identify market failures in those segments, and to formulate recommendations aimed at increasing competition, lowering the cost of living, and improving consumer welfare in Israel.

The committee found that food prices in Israel have been rising more sharply than Israel's Consumer Price Index, and that the increase in food prices in Israel in recent years has been significantly steeper than the increases experienced by the other members of the OECD. As shown in Figure-1, between 2005 and 2011 the average annual increase in food prices was 5% in Israel, and only approximately 3.2% on average across the OECD.

**FIGURE 1: FOOD PRICE INDEX IN ISRAEL AND THE OECD FOR THE YEARS 2000-2011**[1]




As part of its findings, the committee identified key barriers to competition along the supply chain, with high concentration in the import segment, the production segment, and the retail segment. The team found that the food and consumer products market was dominated by a small number of vendors with substantial market shares. They found, inter alia, that existing ties and arrangements between the supply segment and the retail segment entrench the position of the dominant players and hamper competition on either the suppliers' side or retailers' end.

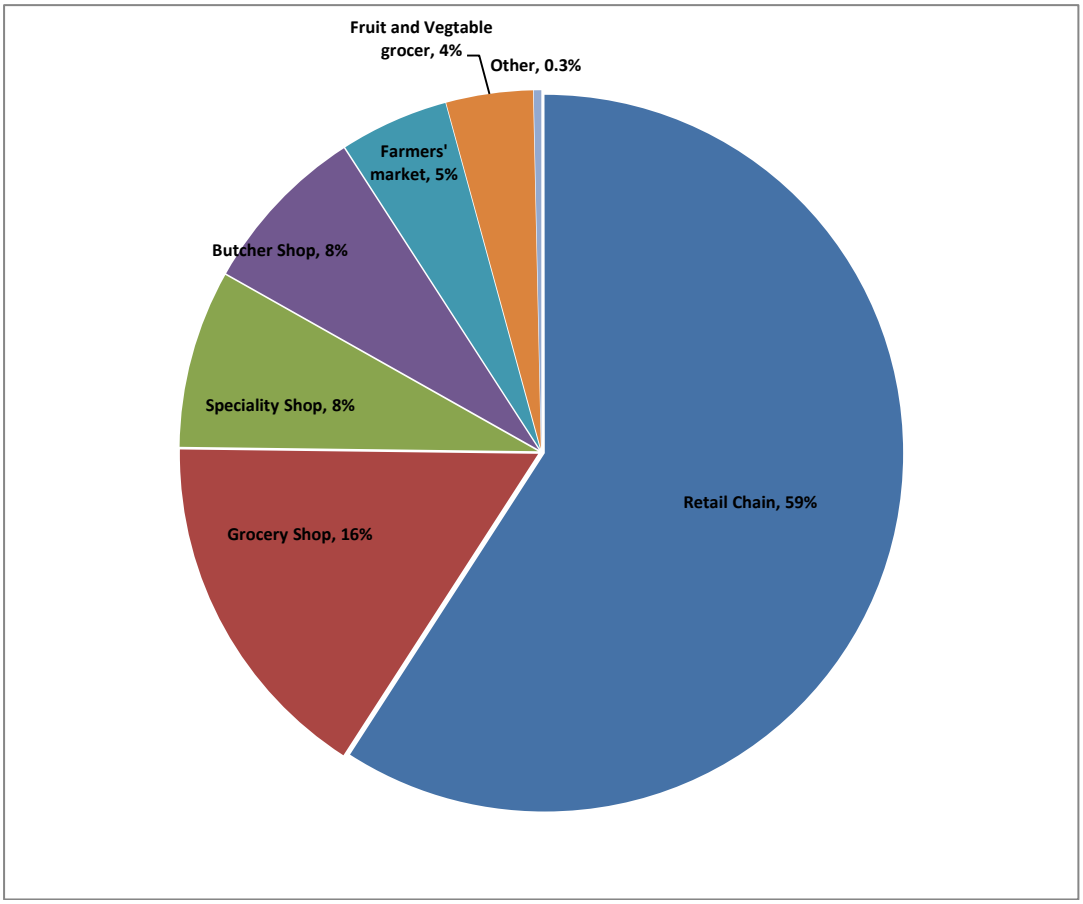
## 2. Overview of the grocery retail sector

Household spending at grocery retailers who are part of retail chains represented approximately 60% of total food expenditure (excluding meals away from home) in 2011.[2] Figure-2 shows the share of food expenditure by store type for 2011.

1 Source: The team for the review of competition and prices in the food and consumer products market – Final Report, July 18, 2012

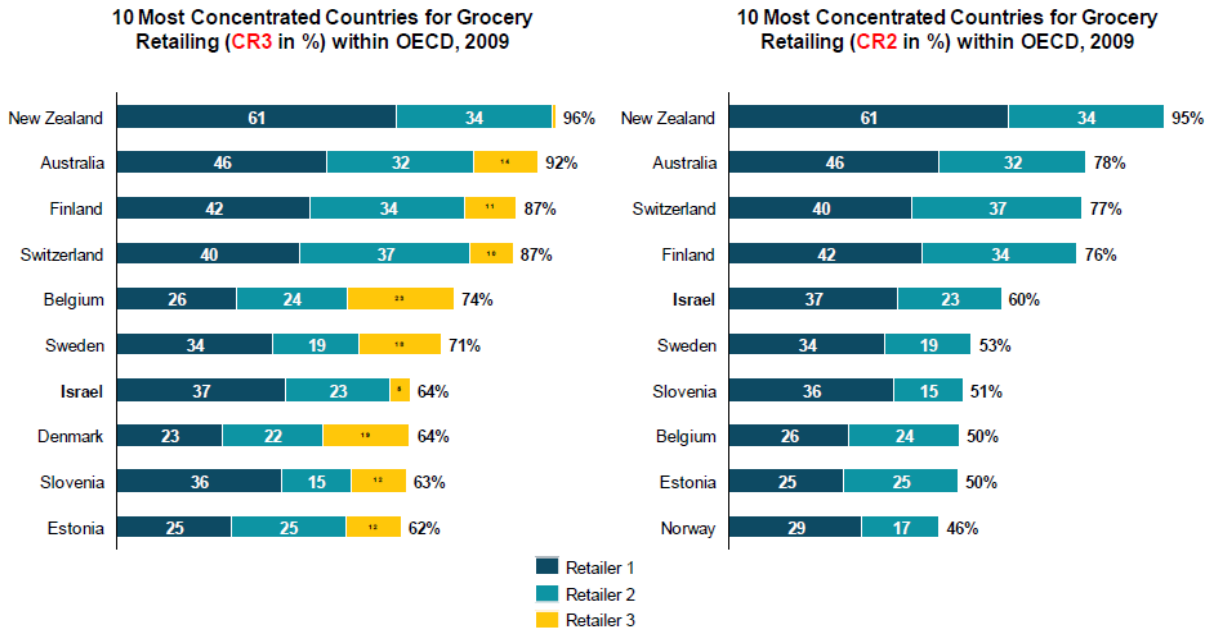
2 This rate was approximately 50% of all food expenditures in 2003. Source: Central Bureau of Statistics Household Expenditure Surveys 2003 – 2011.

**FIGURE 2: FOOD EXPENDITURE (EXCLUDING MEALS AWAY FROM HOME), BY TYPE OF STORE (2011)**




The concentration level in the grocery retail sector at the national level in Israel is among the highest in the OECD. According to the CR3 index Israel was ranked seventh among the OECD countries, while according to the CR2 index Israel was ranked fifth, as shown in Figure-3 below.

**FIGURE 3: TEN OECD COUNTRIES WITH THE HIGHEST CR2/CR3 RATES IN THE RETAIL SECTOR, 2009**[3]




Note: 2009 data except New Zealand, Finland, Denmark, Norway (2008) and Estonia (2007)
Source: Planet Retail, GfK, Kesko, CIAA, Monitor Analysis

Historically, and still today, the two leading grocery retailers in Israel were Shufersal and Mega,[4] operating chains of hundreds of stores. The past decade can be divided into the following periods based on major trends:

- 2003-2005, the years leading out of the preceding financial crisis saw independent retailers expanding and opening new stores, and the leading retailers opening formats of discount stores. At the same time, non-negative, and at times positive growth in same store sales for the two leading retailers was observed, though overall they lost market share to the smaller independent retailers.

- In 2005, a retailer named ClubMarket collapsed, having been a maverick with a market share of 17% in 2003. The retailer was acquired by Shufersal, the largest chain, leading to an increase of roughly 10% in Shufersal's market share,[5] and a significant reduction in competition in the market. At the same time, Mega's market share grew slightly, driving the combined market share of these two leading retailers to approximately 68% in 2006.[6]

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3 Monitor Group report – "Examining the Level of Competition and Prices in the Food and Consumer Goods Market", July 2012 (hereinafter: "Monitor report"). Prepared for the Kedmi Committee.

4 The retail chain Mega Retail Ltd is a subsidiary of Alon Holding Blue Square – Israel Ltd.

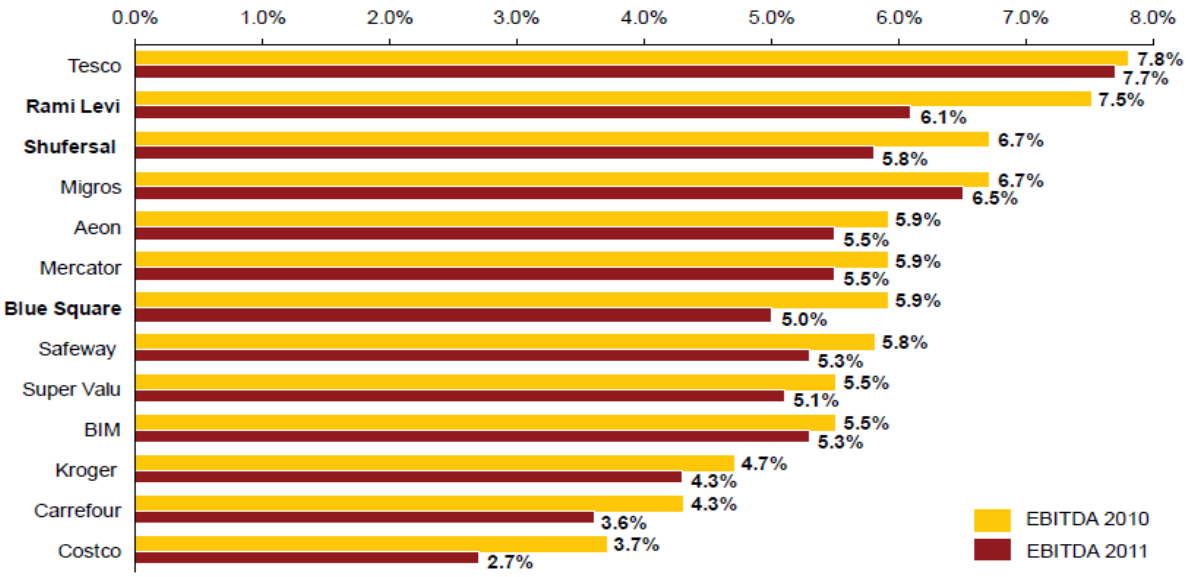
5 On August 31, 2005, the IAA approved the merger of Shufersal and ClubMarket under the failing firm doctrine subject to restrictive conditions. The central condition was the sale of 18 ClubMarket stores, which were located in areas the authority identified as presenting particularly serious competitive concerns, to a separate entity who would maintain them as competing supermarkets.

6 Monitor report.

- Since 2006, new discount retailers have entered the market and existing discount retailers increased their market presence, driving a decline in the market share of the two leading retailers. In particular, "The fourth chain", an association of private retailers, was established in 2007 with a mission of centralizing procurement and developing a private label to market to its members. The largest member of this association is the retailer Rami Levi, which is now operated via a publicly-traded company. In 2011, among the leading Israeli grocery retailers, Shufersal held 37% of the market, Mega 27%, and Rami Levi 7%.[7]

A comparison of the profitability of the public Israeli retailers, Mega, Shufersal, and Rami Levi, reveals likely differences in business models and operations. In terms of gross profit margin, the gross profit margin of the two largest retailers is between 25%-27%, while the profit margin for Rami Levi is 22%.[8]. The picture is reversed when EBITDA is considered, with the two leader retailers at between 4%-5% and Rami Levy with approximately 6%. A comparison of EBITDA of these three retailers, according to their financial statements, with that of a variety of publicly-traded leading international retailers, indicates that in general the profitability of the leading Israeli retailers is on par with the profitability of its international peers.

**FIGURE 4: INTERNATIONAL RETAILERS' EARNINGS BEFORE INTEREST TAXES DEPRECIATION AND AMORTIZATION (2010-2011, %)[9]**




Note: Blue Square: Supermarkets segment only

Source: Capital IQ, Annual Reports

In addition to a high level of concentration nationally, a report prepared for the Kedmi Committee ("the Monitor report") contained a preliminary examination of geographical concentration, finding that over 40% of geographical areas were highly concentrated (HHI>1800).[10]

7 Shufersal, Blue Square, and Rami Levi are all publicly traded companies.

8 Data from annual financial reports for 2011 and 2012.

9 Monitor report.

In geographic areas where concentration is reduced, consumers benefit from lower prices. For example, in March 2012, following the entry of two discount chains into the industrial areas of the city Ashdod, the incumbent chains reacted to entry and price levels in the geographic vicinity dropped by 5%-10%, according to claims by industry executives.[11] A study conducted for the Milken Institute in 2012 estimates that gross profit margins of incumbent stores drop by 4.5% on average when a new store enters their geographic market.[12]

## 3. Regulatory framework

The Kedmi Committee formulated recommendations for the regulation of each segment in the food market. It proposed introducing a new statute to promote competition in the food industry (hereinafter: "the Food Act").

The purpose of the Food Act, which is currently working its way through the legislative process in the Israeli parliament, the Knesset, is to increase competition in the food industry and the consumer products market in order to reduce prices for the benefit of consumers. The Food Act will serve, inter alia, to regulate the activities of suppliers and retailers in the food industry. The Act focuses on two main issues: setting a code of conduct between retailers and suppliers, and increasing geographic competition among retailers.

With regard to geographic competition among retailers, the Food Act authorizes the director general of the Antitrust Authority to conduct proactive tests of the level of geographic competition in every region of the country.[13] The principles of the Food Act concerning geographic competition of food retail chains, the subject matter of this paper, state that[14]:

- A grocery store is defined as one selling fresh produce, dairy and non-food household goods, with a majority of its sales being food products. A "major retailer" for the purposes of the act is a retailer with three or more grocery stores and annual sales exceeding 250 million NIS.[15]

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10 The analysis was carried out on the basis of a geographic database detailing the ownership, location and type (grocery, neighborhood supermarket, standard supermarket, discount store or specialty store) of all grocery retailers in Israel. The methodology used to conduct the preliminary analysis of local retail concentration was to partition Israel into 3,000 statistical geographic regions, and to then group these regions into 520 retail regions. In each retail region the stores were divided based on store type and distance from the center of the region. Accordingly, a map was created for each region specifying all the stores customers were likely to buy from. The HHI calculation by the Monitor report is based on assumptions as to the sales of each store type rather than on actual sales.

11 According to publications in Israeli newspapers, Rami Levi testified that the effect of an opening of a competing store by him in concentrated areas led to a decline of approximately 20% in the price of a representative basket of groceries.

12 See Ori Avner, Milken Institute, “The Grocery Chain Market – The Effect of Geographic Concentration on Local Competition, Fellows Program, Koret Milken Institute, Research paper number 62 (November 2012).

13 According to the Monitor report, a number of countries regulate geographic concentration of food retailers by providing guidelines to retailers (e.g., with respect to opening new stores) including Britain, Australia, France and Greece.

14 Changes may be made to the wording of the bill as part of the legislative process.

15 An additional requirement, currently under review, is that the average store size in the chain exceeds 120 square meters.

- A grocery retailer is defined as "concentrated" in the area of a particular store if the retailer has sales in excess of 30% of total sales in the geographic competition area relevant to that store. Such a concentrated grocery retailer shall not open additional stores in that same area without the approval of the director general of the Antitrust Authority.[16] In considering whether to approve the opening of a store, the director general will take into account, inter alia, the following evidence:

  – A detailed review of the stores that are within the geographical area of demand of the store undergoing the test

  – Trends in competitive indices and concentration measures in the relevant area, particularly evidence of barriers to entry or expansion, such as the scarcity of properly-zoned land in the area.

  – The prospects that other retail chains, which do not have presence in the relevant area, would open the store instead of the major retailer in question, and their viable alternatives for opening a different store in the same area if the major retailer opens the store.

- The director general of the Antitrust Authority may apply to the Antitrust Tribunal and inform it of a major retailer with a market share above fifty percent in a geographic area of demand in possession of three or more stores in that area. The court has the authority, if it deems it necessary to increase competition in that area, to order the retailer to close down, transfer the rights or sell one or more of its stores in that area.

## 4. Methodology

To support the implementation of the Food Act, the antitrust authority developed a model that defines geographical markets in the grocery retail sector and establishes a demand area and competition group for each store of a major retailer.

The application of the model consists of three stages:

1. Defining the demand area – a demand area is defined from the perspective of each store as a collection of statistical regions in its vicinity that account for a significant portion of the store's sales.[17] This area will be defined based on the characteristics of consumer behavior in the area (or at the national level) such as preference for certain store characteristics (size, amenities, variety, etc.) and average travel time to a store.

2. Defining the competition group – a store's competition group is comprised of a collection of rival stores that compete over a significant number of consumers with the store in question. That is, any rival store for which the number of consumers existing in both the demand area of the rival store and the demand area of the store in question is above a certain threshold will be included in the competition group. The underlying assumption is that for the rival store to serve as a competitive restraint on the behavior of the store in question there needs to be a critical mass of consumers both stores compete over. The threshold corresponding to this critical mass is

[16] The director general of the Antitrust Authority will provide major retailers, once a year, with written notice of the geographical area of demand for each of its stores defined as concentrated.

[17] A statistical region (also known as output area) is the smallest area for which the Israeli Central Bureau of Statistics releases statistical data.

determined by the director general ("the determined rate"). Three main points regarding the determination of the competition group call for clarification:

A. A rival store may be located outside a store's demand area but included in its competition group as long as there is overlap between the demand areas of the two stores. For example, as shown in the figure below, stores B and C compete with store A despite the fact that they are not in store A's demand area. Store B is in store A's competition group because these two stores share statistical regions 1 and 4 and the population in these two regions constitutes 40% of the total population of store A's demand area (statistical regions 1 to 5). Hence store B constrains store A's incentive to raise prices, as then store A stands to lose 40% of its potential customers. A similar reasoning shows that store C too is in store A's competition group.

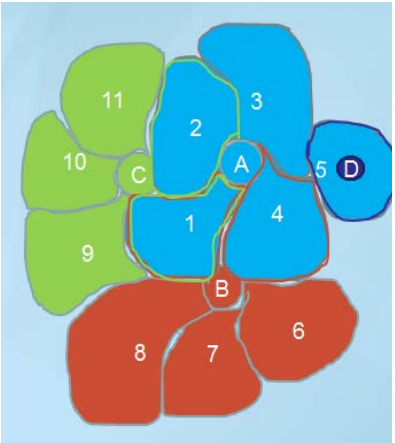
B. Not every rival store in the demand area of the store under examination is necessarily included in the store's competition group. For example: store D in the figure below is not in competition with store A despite being in store A's demand area. Store D attracts only consumers from statistical region 5. Hence, if store A raises prices, the highest number of consumers it could lose to store D is the population of statistical region 5, which constitutes only 15% of the population in store A's demand area.

C. The relationship of being in one's competition group is not necessarily symmetric. For example, a high revenue store located near a low revenue store may be in the competition group of the low revenue store, but not vice versa. To illustrate, as noted, store A does not see store D as a competitor (only 15% of store A's potential customers come from store D's demand area). Nevertheless, store D sees store A as a competitor: 100% of store D's potential customers (the population of statistical region 5) are also in store A's demand area. When store D raises prices, it might lose all of its potential customers to store A.

3. A store is determined to be "concentrated" if the total revenues of all stores in its competition group that belong, along with the store in question, to the same chain constitute more than 30% of the total revenue of all stores in the competition group.

**FIGURE 5: ILLUSTRATIVE EXAMPLE FOR CONSTRUCTING A STORE'S COMPETITION GROUP**

- There are four stores: A, B, C, D
- The demand area of each store consists of the statistical areas as follows:
  - The demand area of store A includes statistical region 1-5;
  - The demand area of store B includes statisti
  - The demand area of store C includes statistical region 1,2,9-11;
  - The demand area of store D includes statistical region 5.
- Constructing competition groups (assuming an overlap threshold of 30%):




| Store under Examination | Potential Competitor | Overlap Rate | Rival Store? |
|---|---|---|---|
| A | B | 40% | Yes |
| A | C | 50% | Yes |
| A | D | 15% | No |
| D | A | 100% | Yes |

- This results in the following competition groups for stores A and D:

| Store | Competition Group |
|---|---|
| A | B,C |
| D | A |

# ITALY

## 1. Introduction: food price is the key driver for competition analysis

In Italy, as in other European countries, the food industry has been the object of recent public and political concerns focusing both on volatile prices and relationships between market players at different stages of the industry chain. Obvious social implications make food a peculiar sector, which consistently becomes a central topic in times of crisis.

In case of food price increase, the general public and political powers often approach the national competition authorities and ask them to assess the market dynamics and find out the reasons for such increase.

In addition to antitrust enforcement[1], the Italian Competition Authority (ICA) has carried out two market surveys in the last few years to have a clearer understanding of competition issues in this sector. The first survey, published in 2007, dealt with the food distribution chain, specifically in the fruit and vegetable sector; the second, concluded in 2013, examined the large retail sector[2]. Although the studies did not identify specific conducts requiring immediate action, they highlighted several issues, especially of vertical nature, which need to be carefully considered in the competition analysis of the food industry.

Notably, the Italian food distribution chain, despite a lower degree of concentration than in other European countries, has experienced a remarkable consolidation process over the last 15 years: the share of total value of food sale pertaining to the large retail distribution (GDO) has reached 72% in 2010. Many retailers have joined non-structural forms of cooperation such as cooperatives, franchising systems and, above all, buying alliances. The 2013 survey on the large retail sector highlighted significant asymmetries and conflicting relationships between producers and large retailers. This might suggest the existence of a certain degree of buyer power that might affect competition. The ICA will need to wisely use the "antitrust toolbox" with a view to promoting level-playing field and effective competition, to the benefit of consumers.

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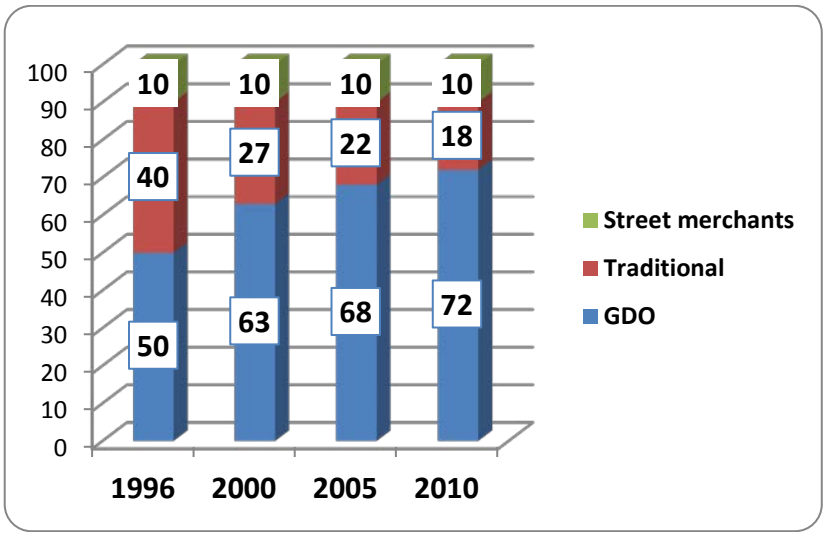
1 In 2008 and 2009 respectively, the ICA fined agreements among bread baking companies (case I695 *Listino Prezzi del Pane*) and among pasta producers (case I694 *Listino prezzi della pasta*) that had led to price increases.

2 IC28 *Indagine sulla distribuzione alimentare*, Autorità Garante della Concorrenza e del Mercato, 7 June 2007, http://www.agcm.it/stampa/news/3381-ic28-indagine-sulla-distribuzione-agroalimentare-chiusura-indagine-conoscitiva.html; IC43 *Settore della Grande Distribuzione Organizzata*, Autorità Garante della Concorrenza e del Mercato, 24 July 2013, http://www.agcm.it/stampa/comunicati/6548-ic43-agroalimentare-antitrust-piu-forte-il-potere-di-mercato-della-gdo-rapporti-conflittuali-con-i-fornitori-e-effetti-incerti-sui-consumatori.html. Another remarkable in-depth study of the Italian food retail sector is E. Viviano *et al.*, *La Grande Distribuzione Organizzata e l'industria alimentare in Italia*, Occasional Papers, Banca d'Italia, March 2012, http://www.bancaditalia.it/pubblicazioni/econo/quest_ecofin_2/QF_119.

## 2. Concentration in the Italian food retail sector: higher than it seems

The Italian food retail sector has experienced a remarkable consolidation process over the last 15 years. In 1996, the large retail distribution (GDO) accounted for 50% of the total value of food sale. The remaining 50% was split between traditional food shops (40%) and street merchants (10%). From 1996 to 2010, the share of the GDO has increased to 72%. Quite interestingly, the growth of the GDO has come to the detriment of traditional retail only, while street merchants seem to have been unaffected (*graph 1*).

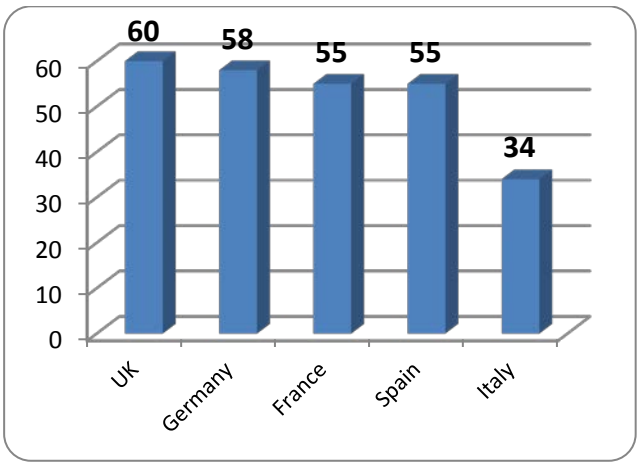
**Graph 1. Food retail in Italy – value shares**




Source: Elaboration of Federdistribuzione data

Despite the recent developments in the GDO, the food retail sector is less concentrated in Italy than in other European countries. The three top retailers account for less than 35% of the total value, whereas in UK, Germany, France and Spain the shares of the three top retailers are equal or higher than 55% (*graph 2*).

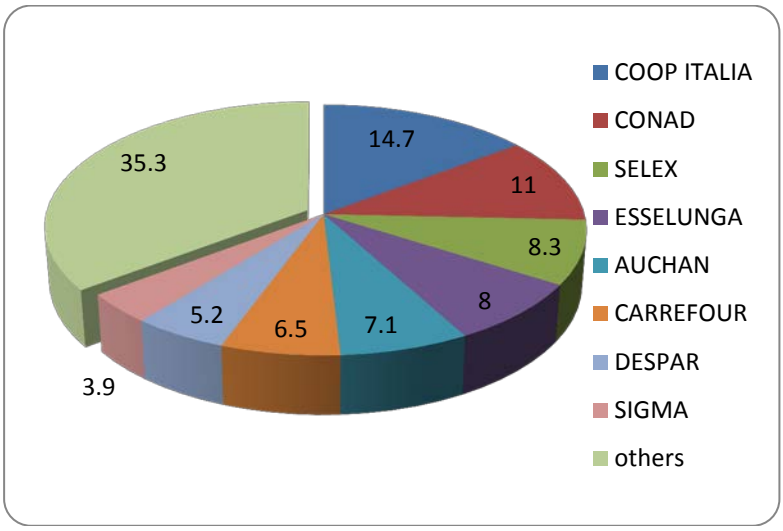
**Graph 2. Combined market share of the top 3 large food retailers (2011)**




Source: Elaboration of AC Nielsen data by Federdistribuzione

The top retail chains in Italy are Coop Italia, Conad, Selex and Esselunga, followed by Auchan and Carrefour. In 2012 the CR4 index was 42% whereas the CR8 index was 65%. Approximately one third of the market value originated from retailers whose market share was lower than 4% (*graph 3*).

**Graph 3. Large retailers in Italy – market shares (2012)**




Source: Elaboration of AC Nielsen data

Italy's lower degree of concentration is even more evident when considering the Hirshman-Herfindhal index (HHI), which takes into account the retail sector as a whole. The HHI index in Italy is 0,058 versus 0,126 in the entire Euro zone (*table 1*).

**Table 1. HHI index in some countries of the Euro zone, 2011**

| Country | Retail chain |
|---|---|
| Finland | 0,310 |
| Germany | 0,216 |
| Belgium | 0,190 |
| Portugal | 0,132 |
| Netherlands | 0,121 |
| Greece | 0,110 |
| Spain | 0,095 |
| Austria | 0,082 |
| France | 0,079 |
| **Italy** | 0,058 |
| Euro zone | 0,126 |

Source: Bank of Italy, *La Grande Distribuzione Organizzata e l'industria alimentare in Italia, cited in footnote 1*.

The survey on the large retail sector underlined that a recurrent feature in the Italian GDO is that retailers have engaged in forms of non-structural cooperation. Such cooperation forms include retail cooperatives and franchising systems. Retail cooperatives are groups of independent retailers that establish a central buying organization and conduct joint promotion efforts, also offering the same brands of products. They involve 65% of GDO points of sale and 56% of overall GDO sale value. Franchising is a network of contractual relationships between a franchiser and several independent entrepreneurs (franchisees) who purchase the right to own and operate units in the franchise systems and offer a common

service, business method and trade name. Franchising is the main organization form for important players like Carrefour and Auchan.

Although the Italian food retail sector is not particularly concentrated and hence asymmetry between fragmented supply and concentrated distribution does not appear to be very pronounced, the 2013 survey identified two key factors that could indicate the existence of buyer power:

- Retailers have increased their bargaining power by forming "super-alliances", i.e. forms of collaborative purchasing by chains of retailers. In 2012, 7 super-alliances comprised 21 retail chains and accounted for 78% of GDO sale in Italy;

- Concentration can be extremely high at local level. In some provinces, the main retailer is worth up to 60% of the GDO sale and in other areas the top two super-alliances represent 70% or even 80% of the local GDO sale.

## 3. Competition concerns

Concentration due to non-structural forms of cooperation raises some competition concerns. It might entail cost uniformity and affect horizontal price competition, as independent retailers share the same purchasing price and non-price conditions because they belong to the same cooperative, franchise system or super-alliance. In addition, the survey on the large retail sector ascertained that GDO market players often change alliances or super-alliances, thus facilitating transparency, exchange of strategic information and horizontal coordination.

The 2003 survey included a large inquiry on agro-food firms, by means of a sample representative of 23 food sectors in different Italian areas. The ICA sent a questionnaire to 471 companies and received 320 replies. The questions focused on the characteristics of their contractual relationships with large retailers, on the nature and relevance of the fees paid by producers to large retailers and on the degree of suppliers' satisfaction. This allowed to take a careful look at vertical relationships in the food chain and find out which issues are perceived as crucial by suppliers. Several of these issues relate to usual trade relationships among market players at different stages of industry chains and do not necessarily raise competition concerns. The in-depth analysis in the survey points out which matters are likely to be submitted to the ICA in the future and gives guidance to the ICA to focus on competition issues.

In particular, the findings of the ICA's survey show that food producers are confronted with complex and long negotiations; suppliers are often requested to deliver goods to large retailers even before the agreements have been formalized; sometimes large retailers unilaterally change the contractual conditions. Negotiations focus on two main categories of items: discounts and trade spending, i.e., additional fees paid by suppliers in return for promotional and display services. Trade spending has become a key contractual element because it represents up to 40% of the overall value of negotiations and is the main cause of tensions between suppliers and large retailers. In particular, smaller producers often claim that these services are not required by them and that the amount of trade spending is too high for the actual services provided.

The survey also emphasized that frequently negotiation by super-alliances does not replace negotiation by single retail chains, so that a double or even triple level of negotiation is needed. This entails longer and more complex transactions which may affect efficiency.

## 4. Buyer power: issues and antitrust enforcement

The last chapter of the survey on the large retail sector focused on the competitive analysis of the effects of buyer power, also in view of the application of a new provision that allows the ICA to tackle unfair practices in case of significant imbalance of contractual power in the food sector. In fact, buyer power emerges at levels of concentration lower than those needed to establish monopolistic power. It appears that market shares of 15-20% might already be sufficient for large retailers to exert buyer power vis-à-vis food suppliers[3], as long as a large retailer is able to obtain more favorable terms than those available to other buyers, or which would otherwise be expected under normal competitive conditions.

Buyer power might be seen in positive terms insofar as the "powerful" retailer obtains better purchasing conditions from the producers, in the upstream market, and passes on this benefit to consumers, because competition among retailers, in the downstream market, forces the "powerful" retailer to reduce prices.

However, buyer power might also be detrimental for competition and consumer welfare in the long term. For producers, the pressure on prices caused by "powerful" retailers might decrease the supplied quantity and, in the end, unduly restrict input supply available to consumers. Buyer power might also oblige producers to reduce investments so as to cope with lower sale prices. Reduced investments would affect innovation, limit consumer choice and worsen quality.

Moreover, weaker retailers might suffer from buyer power. In fact, food suppliers might try to compensate the better commercial terms granted to powerful buyers by worsening the commercial terms applied to less powerful buyers. This might lessen retail competition, because smaller retailers would suffer from a competitive disadvantage, regardless their actual efficiency, solely due to buyer power enjoyed by their larger competitors (the so-called *Waterbed effect*). In other words, "powerful" retailers would not only enjoy better purchasing conditions, but would also worsen purchasing conditions of other retailers, thus raising their rivals' costs. Weaker retailers would be gradually pushed out of the market. Absent significant competition in the retail market, "powerful" retailers might have low incentives to pass-on to consumers the gain resulting from buyer power in the upstream markets.

Since the retailer does not need to be a monopsonist or reach a dominant position to enjoy buyer power, the survey on the large retail sector observed that there is a "grey-zone" where vertical relationships might restrain competition in the downstream or in the upstream markets, but the typical antitrust tools against abuse of dominant position and restrictive agreements might not be available to ensure effective intervention.

For instance: unfair conditions, such as unjustified trade spending, might be scrutinized as possible exploitative abuse; attempts to eliminate rival buyers and weaken competition in the downstream markets might be considered as exclusionary abuses[4]. However, Art. 102 of the Treaty (or Article 3 of Law no. 287/90, which is the equivalent provision in the Italian legislation) would not be applicable to non-dominant undertakings.

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[3] See Dobson P. (2005), *British Grocery Trade Lessons*, 72 Antitrust Law Journal, where the author argues that even a distributor holding 8% of total sale value might be able to exert buyer power. Notably, in the decision *Toys R US vs Federal Trade Commission*, the Federal Trade Commission expressed concerns about a distributor that held a share of 20% of the market.

[4] For example, in 2012 the Italian Competition Authority examined conducts by dominant GDO retailers aimed at hampering and delaying the administrative procedures that competitors had to carry out to open new points of sale.

In case the buyer is not dominant, vertical agreements might be examined under Art. 101 of the Treaty (or under Article 2 of the Italian Law no. 287/90). Nevertheless, in this context, a distinction should be made among, on the one hand, cases in which suppliers simply suffer from unfair conditions unilaterally imposed by the "powerful" buyer or, on the other hand, cases in which certain suppliers share with the "powerful" retailer a common incentive to introduce some unfair conditions (for example, because those suppliers expect to recover their loss in future contracts with other retailers).

Merger control could play an important role in preventing buyer power. Namely, the effects of concentrations should be carefully scrutinized not only in the downstream market, with respect to consumers, but also in the upstream markets vis-à-vis food suppliers.

A recent provision introduced by the Italian legislation[5] might prove helpful to curb buyer power. It concerns vertical relationships within the agricultural food chain and is designed to prevent unfair conducts in case of significant imbalance of contractual power (*see box below*). The provision entrusts the ICA with surveillance and fining powers. For the provision to be applicable, a dominant position is not required: it suffices that an asymmetrical contractual power exists.

**Box 1. Art. 62 of Law No. 27 of 24 march 2012 in brief**

It applies to "commercial agreements for food and agricultural products, with particular respect to economic relationships between undertakings in the food chain characterized by a significant imbalance of contractual power".

Contracts shall be formalized in writing (they must indicate: duration, characteristics and price of the products, mode of delivery and payment terms).

The following commercial practices are forbidden:

- imposing unfair price conditions, as well as non-contractual and retroactive conditions;
- applying objectively different conditions to equivalent transactions;
- subordinating implementation of the contract to other obligations that are not connected with the subject-matter of the contract;
- obtaining undue unilateral services that are not justified by the nature or content of trade relations;
- putting in place any other conduct that can be considered unfair in light of typical commercial relations in the sector.

Art. 62 has not been applied yet. The 2013 survey suggests that the ICA will prioritize its interventions under Art. 62 according to the following criteria: *i)* significance of the competition restriction, i.e., if there is at least indirect evidence that the unfair practice does have an appreciable effect on the correct functioning of competition in the markets; *ii)* pervasiveness of the unfair conduct, which should be widespread and thus have a high potential to impact on the competitive level playing field. In fact, the aim of antitrust enforcement is not to protect weaker market players, but to promote level-playing field and effective competition. This may also imply protecting weaker players, insofar as, due to buyer power, they risk being eliminated from the market although they are as efficient as their stronger competitors.

[5] Art. 62 of law no. 27 of 24 March 2012 (*Discipline of commercial relations relating to the sale of agricultural and food products*).

## 5. Conclusion

The ICA will continue to carefully monitor developments in the food sector. The surveys on the food industry chain carried out by the ICA have outlined that it is not easy to disentangle competition issues from issues merely related to trade relationships among market players at different stages of the industry chain. The recent legislative innovation enabling the ICA to sanction certain form of buyer power in the food sector may prove useful to this end.

# JAPAN

## 1. Introduction

The food chain herein refers to the flow from production to consumption. This is the process by which foods are delivered by producers of edible agricultural and marine products inside and outside Japan through food manufacturers, wholesalers, retailers, etc. to final consumers.

According to the *Future Vision of the Food Industry (March 2013)* published by Japan's Ministry of Agriculture, Forestry and Fisheries, edible agricultural and marine products produced in Japan or imported from abroad are delivered to final consumers in the form of food services, processed goods, perishable products, etc.[1] via three routes: (1) through the food service industry, (2) through food manufacturers or (3) for final consumption. Among these routes, edible products delivered through food manufacturers are supplied from the manufacturers through (processed) foods wholesalers to food retailers or the food service industry. Then the food retailers deliver products to end consumers in the form of processed goods, perishable products, etc. and the products are delivered by the food service industry in the form of food services. The food chain includes all these flows.

In recent years, the international prices for corn, soybeans and other agricultural products are rising. However, the food price (food consumer price index) in Japan is rising relatively slowly compared to in the United States and the European Union[2]. The food price is determined through the food chain. It is difficult to identify the reasons for the slow rise in food price in Japan as compared to other countries. It is presumed that a host of factors are interrelated in a complex way. These include Japanese Yen appreciation (Japan's ratio of foods import reaches about 60%[3])[4]. They may also include the characteristics of Japan's food retail industry, such as diversified business types and low degree of concentration.

This report focuses on the food retail industry from among the various players in the food chain. Two issues exist: the horizontal issue of competition among retailers and this competition's effects on consumers, and the vertical issue of buying power, etc. exercisable against suppliers. The situations in Japan and the initiatives and efforts that the Japan Fair Trade Commission (JFTC) has made regarding these issues are explained below. Lastly, the report about the so-called "waterbed effect" caused by retailers, prepared by the Competition Policy Research Center (CPRC) of the JFTC, is covered.[5]

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1 Perishable foods, etc. include polished grain (rice, wheat, etc.), butchering (meats) and frozen seafood.

2 "Changes in the food price" posted on the website of the Ministry of Agriculture, Forestry and Fisheries (in Japanese): http://www.maff.go.jp/j/zyukyu/anpo/kouri/

3 Calculated from the food self-sufficiency rate on a calorie basis for FY2012 indicated in "Food Self-sufficiency Rate for FY2012" posted on the website of the Ministry of Agriculture, Forestry and Fisheries.

4 The trend has reversed more recently. From 2013, the international prices for grains are decreasing, while the Japanese Yen is depreciating. Therefore the government continues to carefully observe the situations.

5 In Japan, agricultural cooperatives (abbreviated as 'nokyo' in Japanese) have great influence on collection of agricultural products, such as rice, for distribution. The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (hereinafter the "Antimonopoly Act") in principle is not applicable to

## 2. Horizontal issues: Competition in Japan's food retail sector

Regarding the horizontal issue of competition among retailers and this competition's effects on consumers, the characteristics of Japan's food retail industry are explained below. Then, the latest merger case among retailers will be discussed to demonstrate competition among retailers and such competition's effects on consumers.

### *2.1 Characteristics of Japan's food retail industry*

Japan's food retail industry is characterized by diversity and a low degree of concentration, as described below.

#### *2.1.1 Diversity*

According to the *Current Survey of Commerce 2007* published by the Ministry of Economy, Trade and Industry, the business types of the food retail industry can be divided into seven: (1) department store, (2) general merchandise store (GMS), (3) specialty supermarket (food supermarket[6]), (4) convenience store, (5) specialty store (food specialty store[7]), (6) store dealing mainly in food products (food-centered store)[8], and (7) others. Stores dealing mainly in food products include small-scale stores such as independent food stores (mom-and-pop stores). In addition to these business types, also seen are sales by cooperatives (co-ops), food delivery (by placing orders online, by phone, by mail, by visiting customers, etc.), direct sales to end consumers by farmers, and other various business types[9].

Foreign-affiliated retailers have entered Japan's market directly or through mergers and acquisitions in GMS, food supermarkets and other segments. Such retailers include business operators from the United States, France, Germany and the United Kingdom. For instance, SEIYU, one of the leading GMSs established in 1963, at first received partial capital participation from the US corporation Walmart in 2002 and is now its wholly owned subsidiary.

#### *2.1.2 Degree of concentration*

In terms of the number of business establishments of food retailers, business types are ranked in the following order: food specialty stores and food-centered stores, convenience stores, food supermarkets, and GMS. In terms of value of commercial sales, however, business types are ranked in the following order: food supermarkets, food specialty stores and food-centered stores, GMS, and convenience stores. Among these, convenience stores are increasing both in terms of the number of establishments and the value of commercial sales. On the other hand, small- and medium-scale food supermarkets, food specialty stores and food-centered stores are decreasing in both the number and the value.

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agricultural cooperatives subject to certain requirements. However, "this [exemption] shall not apply to cases where unfair trade practices are employed, or where competition in any particular field of trade is substantially restrained, resulting in unjust increases of prices" (the Antimonopoly Act, Article 22). In fact, agricultural cooperatives received one cease and desist order and four warnings over the past 10 years due to dealing on restrictive terms, etc.

6 Food product sales account for 70% or more of the value of commercial sales of products.

7 Food product sales account for 90% or more of the value of commercial sales of products.

8 Food product sales account for 50% or more of the value of commercial sales of products.

9 Sales by cooperatives, delivery of foods, and direct sales by (certain) farmers are included in the Census of Commerce.

With respect to food supermarkets in Japan, noteworthy features are that several leading business operators are dispersed throughout Japan and that the leading food supermarkets differ from region to region. At the national level, the 5-firm concentration ratio in terms of sales in the food retail market is about 12% (FY2010)[10]. At the regional level, however, independent/local food supermarkets often have significant market shares where nation-wide GMSs and food supermarkets are not dominating, even though no leading independent/local food supermarket in each region has a market share of 50% or more[11].

In the meantime, many mergers and acquisitions took place between food-related business operators from the latter half of the 1990s until about 2008[12]. Both in terms of the number of establishments and the value of commercial sales, small-scale food supermarkets, food specialty stores and food-centered stores have decreased. However, 5-firm concentration ratio in the food retail market has not substantially changed, staying at about 12% in both FY2000 and FY2010[13].

### *2.2 Examples of review of merger*

A recent merger case related to food retailers is the proposed acquisition of shares of Daiei, Inc.,(hereinafter "Daiei") by AEON CO., LTD.(hereinafter "AEON") published by the JFTC on July 19, 2013.

In this case, AEON, which controls subsidiaries in the supermarket business and other areas planned to acquire shares of Daiei, also in the supermarket business and other areas. In terms of consolidated sales in 2012, AEON and Daiei, respectively, were the largest and 4-th largest among Japanese supermarkets. After the acquisition, Daiei would become a subsidiary of AEON. This acquisition principally falls under the category of horizontal mergers[14].

In the review of this case, relevant markets are defined based on the following judgment: (1) in terms of service range, the "supermarket business" is defined as including both GMS and food supermarkets since competition exists between GMS and food supermarkets and consumers choose stores to buy food, etc. without distinguishing between these two supermarket types and (2) in terms of geographic range, since supermarkets compete with each other on a store-by-store basis, the relevant market is determined by the trading area of each store.

To examine the possibility of substantial restraint of competition, the JFTC made close review of the influence of share acquisition on competition in regions where one party's store has chosen the other party's store as the main competitor and in regions with few stores of competitors. It found that all geographic ranges fall under either situation described below: (a) Where the parties' store was in a weaker competitive position due to size or other disadvantages, there was one or more competitive stores of other competitors; (b) Where one party's store is located relatively apart from the other party's store within the same geographic range, there exist one or more competitive stores, located relatively close to the parties' store, which is owned by other competitors; and (c) Where one party's store is located relatively close to

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10 "Production/Sales Share of the Alcoholic Beverage And Food Industry - Demand trends and price changes - FY2011" edited by Nikkan Keizai Tsushinsha, Inc.

11 *Food Supermarket Yearbook 2012 (national version)*, Ryutsukikaku Inc.

12 "White Paper on Agriculture, Forestry And Fisheries 2012," Ministry of Agriculture, Forestry and Fisheries

13 "Production/Sales Share of the Alcoholic Beverage and Food Industry - Demand trends and price changes - FY2011" and "Production/Sales Share of the Alcoholic Beverage and Food Industry - Demand trends and price changes - FY2005" edited by Nikkan Keizai Tsushinsha, Inc.

14 "Nikkei Industry map 2013FY", Nihon Keizai Shinbunsha

the other party's store and in active competition with each other, there also existed one or more competitive stores of other competitors within the same actual trading area. Consumers in this region can switch between the parties' and competitors' stores. Thus, the JFTC concluded that, even after the acquisition, there will still be active competition between the parties' and their competitors' stores, and approved the acquisition without remedy.

### *2.3 Conclusion of this section*

To summarize, Japan's food retail industry currently has diversified types of business. The degree of market concentration is not high either in the national or regional level and competition between retailers is considered unlikely to be restrained. Consequently, in Japan's food chain, retailers' horizontal market power is not at present a crucial issue requiring urgent attention from the competition policy viewpoint.

Still, as regards individual companies, some of the major retailers' scales are extremely large when compared to those of most suppliers, and there are more than a few abuse of superior bargaining position cases, as discussed in the following section.

## 3. Vertical issues: Buying power

Regarding the vertical issue of buying power, etc. against suppliers, two types of regulation are present in Japan: (1) regulation on abuse of superior bargaining position (as a part of the regulation on unfair trade practices) and (2) regulation under the Act against Delay in Payment of Subcontract Proceeds, Etc. to Subcontractors (hereinafter the "Subcontract Act"). The outline of these regulations is explained below, together with related cases and the survey on actual situations.

### *3.1 Regulation on abuse of superior bargaining position*

#### *3.1.1 Outline of regulations*

The Antimonopoly Act prohibits abuse of superior bargaining position, which is defined as taking specified acts (to be explained below) "unjustly in light of the normal business practices by making use of one's dominant bargaining positioning over the other party" (Antimonopoly Act, Article 2 (9), v).

The regulations on abuse of superior bargaining position are different from those on abuse of a dominant position in market. That is to say, it is not required that a party (Party A) has market-dominant position or an absolutely dominant bargaining position equivalent thereto. It is sufficient that Party A has relatively superior bargaining position as compared to the other transacting party (Party B).

Party A is said to have superior bargaining position over Party B, who is a transaction counterpart, in such a case where if Party A makes a request, etc., that is substantially disadvantageous for Party B, Party B would be unable to avoid accepting such a request, etc., on the grounds that Party B has difficulty in continuing the transaction with Party A and thereby Party B's business management would be substantially impeded.

In determining the presence or absence of superior bargaining position, the degree of dependence by Party B on the transactions with Party A, position of Party A in the market, the possibility of Party B changing its business counterpart, and other concrete facts indicating the need for Party B to carry out transactions with Party A are comprehensively considered.

Acts that will be regulated as abuse of superior bargaining position are categorized mainly into the following: (1) forcing Party B to purchase goods or services other than the one pertaining to the said transactions, (2) request for payment of monetary contribution, etc., (3) request for dispatch of employees,

etc., (4) request for provision of other economic benefits[15], (5) refusal to receive goods pertaining to the transactions, (6) return of such goods, (7) delay in payment, (8) price reduction, and (9) other establishments, etc. of trade terms in a way disadvantageous to Party B.

The JFTC published the "Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act" (hereinafter the "Guidelines") in November 2011 to improve the transparency of application of laws and foreseeability of business operators.

In addition to the existing measure of cease and desist order against abuse of superior bargaining position, surcharge payment order[16] was introduced into the Antimonopoly Act in 2010.

*3.1.2 Examples of legal actions against abuse of superior bargaining position*

A recent case in which legal action was taken against abuse of superior bargaining position is the case against SANYO MARUNAKA K.K. (hereinafter "Sanyo-Marunaka")[17]. In another case, a warning was issued against the possibility of unjust low price sales by liquor wholesalers (the review was also conducted regarding the abuse of superior bargaining position by liquor retailers).

3.1.2.1 Case against Sanyo-Marunaka

Given that Sanyo-Marunaka conducted the following acts against some of the suppliers in an inferior bargaining position (hereinafter referred to as "specific suppliers"), the JFTC issued a cease and desist order and a surcharge payment order on June 22, 2011(Total amount of surcharge: 222 million JPY).

8. Request for dispatch of employees, etc.

On the occasion of opening stores etc., Sanyo-Marunaka forced the specific suppliers who supplied the merchandise to these stores to dispatch employees to move the merchandises including what had not been supplied by the specific suppliers.

9. Request for monetary contribution, etc.

On the occasion of opening stores etc., Sanyo-Marunaka forced the specific suppliers to offer money, even though there was no merit for the specific suppliers such as sales promotion effects for the merchandise they had supplied.

10. Return of products

Regarding the merchandise dealt with by the food division of the supermarket (hereinafter referred to as "food division merchandise"), Sanyo-Marunaka returned the food division merchandise that was past the expiration date for sale originally set by Sanyo-Marunaka to the specific suppliers of said merchandise, even though the expiration date came after Sanyo-Marunaka purchased the merchandise from these suppliers.

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15 For instance, patents and other intellectual property rights are included in "other economic interests"

16 The amount of surcharge is calculated by multiplying the total amount of trading between the business operator subject to abuse and the breaching party by a certain calculation rate (1%).

17 The other most recent case is that against RALSE Co., Ltd. (a cease and desist order and order for payment of surcharge was issued on July 3, 2013).

11. Price reduction

Regarding the food division merchandise or merchandise dealt with by the supermarket's daily food division which was to be sold at a discount price due to stock clearance associated with renovation of the stores, Sanyo-Marunaka reduced the amount to the equivalent of the discounted amount at the said discounted sales from what should be paid to the specific suppliers of the merchandise, even though there was no attributable reason.

12. Forced purchase and use

On the occasion of selling the Christmas-related merchandise, Sanyo-Marunaka forced the specific suppliers to buy the merchandise. For example, its buyers distributed order sheets to the specific suppliers, indicating the minimum amount of purchase, and forced them to place an order.

3.1.2.2 Case against liquor wholesalers

The JFTC issued a warning to three liquor wholesalers on August 1, 2012 since they engaged in an act that was likely to fall under unjust low price sales. These wholesalers continually supplied certain beer products to liquor retailer X, a leading supermarket, at a price substantially below the supply cost. Consequently, it was likely that the liquor wholesalers might hinder business operations of the other liquor retailers located in the areas around X's stores. In this case, under the Antimonopoly Act, in addition to the issue of unjust low price sales by liquor wholesalers, the issue of abuse of superior bargaining position by liquor retailer X also needed to be considered. After the close review, the JFTC ultimately issued warning to the liquor wholesalers on the ground of unjust low price sales.

*3.1.3 Report on survey on actual situations*

Regarding retail industries, the JFTC published the following three reports in relation to abuse of superior bargaining positions during the past three years: (1) "Report on the Fact-Finding Survey on Trading Between Food Manufacturers and Food Wholesalers," (2) "Report on the Fact-Finding Survey on Trading Between Large-Scale Retailers, etc. and Suppliers," and (3) "Report on the Fact-Finding Survey on Trading Through the Use of Distribution Centers." These reports are summarized below.

- "Report on the Fact-Finding Survey on Trading Between Food Manufacturers and Food Wholesalers"

In view of the presence of cases that appear to be an abuse of superior bargaining position in the trading of food products, the JFTC conducted a survey on the actual conditions surrounding trade between manufacturers and wholesalers of food products with an additional focus on trade between food products wholesalers and large-scale retailers,

According to the survey results (published in October 2011), there were indications of food product manufacturers being subject to actions that could lead to the abuse of superior bargaining position by food product wholesalers, such as undue return of products, undue purchase of goods and services, requests for payment of monetary contributions, requests for dispatch of employees. It was also found that food wholesalers engaged in such acts not only to secure their own benefits but sometimes also to respond to the requests, etc. from their own customer retailers. As such, it was inferred that a structure existed under which large-scale retailers were the root cause for the issue (of abuse of superior bargaining position).

- "Report on the Fact-Finding Survey on Trading Between Large-Scale Retailers, etc. and Suppliers"

Following the above report that revealed the presence of cases in which the wholesalers made unreasonable requests to the manufacturers due to such requests they received from retailers, the JFTC conducted a fact-finding survey on the trades between large-scale retailers and suppliers in order to investigate the level of recognition among enterprises of the Superior Bargaining Position Guidelines and the actual situation about requests or conducts categorized in the guidelines as those that come under the abuse of superior bargaining position, and to contribute to appropriate law enforcement in the future.

The survey results (published on July, 2012) indicated that certain large-scale retailers engaged in acts that might lead to abuse of superior bargaining position. According to suppliers' responses, large-scale retailers made requests for the following acts; payment of monetary contributions, return of products, and request of purchases and uses (in decreasing order).

In addition, the survey results implied that suppliers sometimes passed the burden arising from an act that might lead to abuse of superior bargaining position by large-scale retailers onto the supplier's suppliers (manufacturers).

- "Report on the Fact-Finding Survey on Trading Through the Use of Distribution Centers."

The JFTC conducted this survey to wholesalers and manufacturers dealing primarily in foods or daily necessities and retailers trading with such wholesalers and manufacturers (published in August, 2013). It purports to comprehend the realities of trading through the use of distribution centers because earlier cases and observations suggested possible abuse of superior bargaining position through the use of distribution centers.

When wholesalers or manufacturers use distribution centers operated by retailers, it can be considered that the following cases may constitute possible abuse of superior bargaining position: (1) when retailers demand payment of center fees from wholesalers or manufacturers without prior negotiation, not indicating the grounds for determination of the fees, the purpose of the fees, etc., (2) when wholesalers or manufacturers are forced to pay center fees exceeding the direct profits obtained through the use of such centers and without satisfactorily consent to it upon negotiation and (3) when retailers raise the center fees (rates) without prior negotiation, not indicating the grounds for determination of the fees, the purpose of the fees, etc. The results of the survey to wholesalers and manufacturers indicated the presence of such cases. In particular, many cases were observed in which retailers demanded payment of center fees without prior negotiation, not indicating the grounds for determination of the fees, the purpose of the fees, etc., that is, pattern (1) above. In some of these cases, based on responses from some wholesalers showing that they demanded payment of center fees from manufacturers in whole or in part, it was found that wholesalers could not bear payment of the fees demanded by retailers and thus demanded payment from manufacturers.

### *3.2 Regulation under the Subcontract Act*

#### *3.2.1 The Subcontract Act*

The Subcontract Act was enacted to complement the Antimonopoly Act (regulation of abuse of superior bargaining position) with the purpose of ensuring fair trade between subcontractors and their main subcontracting companies in an economically dominant position and protecting the interests of subcontractors.

The Subcontract Act provides for simplified procedures as compared to those under the Antimonopoly Act to promptly and appropriately ensure the interests of subcontractors. Specifically, the Subcontract Act limits the scope of trade it governs based on the details of the trade such as the

manufacturing contract and provides that superior bargaining position is formally determined according to capital classification. The Subcontract Act also explicitly provides for specific prohibited acts.

Under the Subcontract Act, subcontract trade, among others, is focused as trade with high likelihood of abuse of superior bargaining position. Subcontract trade subject to the Subcontract Act is further categorized into the following: (1) manufacturing contracts, (2) repair contracts, (3) information-based product-creation contracts and (4) service contracts. Among these, manufacturing contracts, which are frequently seen in food distribution, refer to "contracts of manufacturing of articles for a business operator by another business operator specifying the specifications, quality, performance, shape, design, brand, etc." For instance, when retailers and wholesalers order suppliers to manufacture private-brand products (PB products) this constitutes a manufacturing contract subject to the Subcontract Act. On the other hand, when food manufacturers supply national brand products (NB products) manufactured and sold under their own specifications and brands, this transaction does not constitute a manufacturing contract, and thus it is not subject to the Subcontract Act.

### *3.2.2 Permeation of private brands in Japan*

In recent years, the scale of the market for PB products has been expanding. These products are developed by supermarkets, convenience stores and other retailers under their own plans/specifications and sold under their original brands. The PB product market scale was about 2,400 billion Japanese Yen in 2010; 1.5 times the scale of about 1,600 billion Japanese Yen in 2007[18].

Food manufacturers undertaking production of PB products and food retailers selling PB products have also increasingly expressed their intent to be willing to deal in such products[19, 20]. Therefore, the PB ratio is expected to rise in the future despite the current low PB ratio as compared to those of Western countries[21].

### *3.2.3 Cases of the Subcontract Act*

In recent years, the number of cases where the JFTC issues recommendations to wholesalers and retailers regarding manufacturing contracts of PB products has been increasing. In FY2012, 11 of the 16 recommendations issued under the Subcontract Act were related to PB products, including food and clothing. As an example of a violation related to PB products under the Subcontract Act, the recent case of the Japanese Consumers' Co-operative Union (JCCU) is briefly discussed below.

The JCCU contracted out manufacture of its PB food products, etc. to subcontractors. Even though the subcontractors were not responsible or liable for them, the JCCU reduced the subcontract proceeds payable to the subcontractors, delayed payment and engaged in other similar acts. Given the above findings, on September 25, 2012 the JFTC issued recommendations and instructions to the JCCU on the grounds of violation of the provisions of the Subcontract Act.

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18 "White Paper on Agriculture, Forestry and Fisheries 2012," Ministry of Agriculture, Forestry and Fisheries

19 "Survey on Food Industry Trends for the Latter Half of 2012," Japan Finance Corporation

20 Ibid, Ministry of Agriculture, Forestry and Fisheries

21 The average PB ratio of European countries was 35% and that of the US was 17% in 2009 (according to "The Rise of the Value-Conscious Shopper – A Nielsen Global Private Label Report," 2011). On the other hand, the average PB ratio of Japan is 8.5% (according to "Comprehensive Survey on the Realities of the PB Food Market," Fuji Keizai Co.,Ltd.).

It should be added that the JCCU paid the subcontractors (about 450 firms) a total reduced amount (2,560 million Japanese Yen), interest for delayed payment (1,320 million Japanese Yen) and other amounts payable, and resolved the issue of delayed payment prior to the issue of the JFTC's recommendation.

### *3.3 Conclusion of this part*

As shown by the recent cases described in 3.1.2 and 3.2.3 above, there occurred many cases involving regulation of abuse of superior bargaining position or issue of the Subcontract Act with respect to trade between retailers and suppliers in the food chain. As already stated in 2.1 above, there are cases where leading retailers expand their business scale through (horizontal) mergers and acquisitions in the food retail industry. In the case in which AEON acquired shares of Daiei, likewise, AEON stated that " [a] close capital tie-up is likely to enable both AEON and the Target Company to procure merchandise more effectively and efficiently leveraging the scale of economy as well"[22]. Under these circumstances, it cannot be denied that there may still occur abuse of superior bargaining position cases or violations of the Subcontract Act in the food chain field. Therefore, attention is warranted on the issue of vertical trading relationship between retailers and suppliers in Japan's food chain.

## 4. Waterbed effect

### *4.1 What is the waterbed effect?*

The waterbed effect[23] refers to the effect of a rise in purchasing expenses borne by some retailers when large-scale retailers can purchase products at a low price from suppliers by exercising their buyer power (including unreasonable requests for discounts). It occurs as suppliers have to compensate for losses arising from supply of products at a low price to large-scale retailers. That is, suppliers have no choice but to raise the price for products supplied to other retailers (involuntary price discrimination).

### *4.2 Questionnaire results published in CPRC joint research report*

The JFTC's Competition Policy Research Center (CPRC) published a joint research report titled "Impact of Buyer Power on Competition in the Distribution Market – Large-Scale Retailer" in December 2010[24]. This report sought to identify the existence of waterbed effect with reference to responses to requests for discount from retailers (whether or not suppliers engage in involuntary price discrimination) based on the results of the questionnaire conducted for suppliers (food manufacturers and wholesalers) on their sales prices to the retailers by the latter's type, in particular large-scale supermarkets versus small-scale retailers.

Among suppliers engaging in food-product-related businesses, three manufacturers and three wholesalers (six business operators in total) responded to the questionnaire. The responses from a certain wholesaler lead to the presumption that the wholesaler had no choice but to engage in price discrimination and raise prices applicable to some suppliers (retailers, especially small-scale general retail stores) since it is forced to meet demands from large-scale supermarkets, etc. for discounts not agreed upon under contracts. This case can be considered an example of waterbed effect and suggests that small-scale general

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22 Press release of AEON Co., Ltd. titled "Notice regarding Commencement of Tender Offer for stock of Daiei, Inc." dated March 27, 2013, p. 5.

23 Competition Commission, Safeway plc and ASDA Group Limited (owned by Wal-Mart Stores, Inc.); Wm Morrison Supermarkets plc; JSainsbury plc; Tesco plc, Cm5950, HMSO (2003)

24 CPRC reports CR 04-10 available at www.jftc.go.jp/en/cprc/reports.html (only summary is available in English with the main text in Japanese only).

retail stores may have been placed under more stringent market conditions, such as decrease in gross profit margin, since they had to purchase products at a relatively higher price (as compared to that for large-scale supermarkets, etc.) as a result of price discrimination by suppliers. It is inferred from the case that ultimately the position of large-scale supermarkets, etc. that forced their wholesalers to cause the waterbed effect may be reinforced in the market.

### *4.3 Regulation on the waterbed effect*

The waterbed effect is the influence of suppliers' involuntary price discrimination arising from acts of retailers possessing buyer power over third parties, which are these retailers' competitors.

The possible *ex post* regulation measure is to regulate the exercising of buyer power by retailers that may cause the waterbed effect by applying regulation of abuse of superior bargaining position. However, it is not easy to determine whether a trading price is decided as a result of retailers' abuse of superior bargaining position.

The regulation on price discrimination can be also applied to the suppliers. However, it is difficult to distinguish between price discrimination based on reasonable grounds such as volume discount and that which may violate the Antimonopoly Act.

## 5. Conclusion

As stated above, diversified business types are seen in Japan's food retail industry. At the moment, the degree of market concentration seems low. There can be said to be active competition between retailers. Consequently, the horizontal market power of retailers is not a crucial issue requiring urgent attention in Japan's food chain. However, cases of merger involving leading retailers are expected to still possibly occur. In review of such cases, it may occur that the JFTC must consider not only influences on the market in which such companies sell their products but also those on the market in which they purchase their products.

On the other hand, many abuse of superior bargaining position cases or the Subcontract Act with respect to trade between retailers and suppliers have been seen in the food chain. With regard to the trade, competition policies have to be implemented maintaining a balance not impeding market trade based on free bargaining and restricting unfair trade by making use of superior bargaining position.

In recent years, both the number and ratio of cases for issuing recommendation regarding manufacturing contracts of PB products, etc. by retailers under the Subcontract Act have been increasing and expanding. It is necessary to establish a system for retailers to comply with the Subcontract Act and take other needed measures. There also occurred some cases of dispute over trade terms and conditions when paying a price under an order placed orally or without providing for explicit trading terms and conditions. It is necessary to encourage preparation of documents stating the terms, conditions and other details of a trade and secure transparency of the trade. The Subcontract Act mandates the obligation to issue an order form in writing.

These issues of course arise in various other industries as well as the food distribution industry, such as orders placed by clothing manufacturers with sewing companies, orders by assemblers with suppliers, and orders by system companies with programmers. In the food retail industry, likewise, these issues have become visible as PB food products have increased.

There may still occur many cases of (horizontal) merger in the food retail industry. These merger cases must be appropriately reviewed. In addition, when any merger produces a larger-scale company or a company with a large market share, such companies must be monitored so that no abuse of superior

bargaining position or violation under the Subcontract Act against suppliers arises and no waterbed effect caused by the buying power or foreclosure effect on other retailers arises. In particular, changes in market environment and technological developments are bringing about the opportunity for retailers of new business types, such as online mail-order sales, to acquire market share. It also generates movement to develop new systems for purchasing and delivery in response to the aging of consumers, regional depopulation and other changing social conditions. Active competition between enterprises adopting new business models and existing food retailers beyond conventional market boundaries will promote competition in the food retail industry and increase consumer benefits. The JFTC, as the competition authority, must closely monitor the food retail industry so that procompetitive movements will not be impaired.

# LATVIA

## 1. Background

### *1.1 What have been the main characteristics of retail food trends in recent years and what factors have given rise to these trends?*

Milk procurement prices over last three years have been changing between the price 174 LVL (248 EUR)/ton (in July and August, 2012) and 216 LVL/ton (April, 2011).

Data of Central Statistical Bureau of Latvia shows that the average milk retail price in shops has been 0,60 LVL (0,85 EUR)/liter (in 2011) and 0,59 LVL (0,84 EUR)/liter (in 2012). The average milk procurement price per liter in 2011 was 0,21 LVL (0,30 EUR)/liter and a small decrease in 2012 - 0,19 LVL (0,27 EUR)/liter. There has been noticed that milk retail price has direct impact from milk procurement price which retailers are following although not always. After CC investigation in milk sector in 2010 CC came to conclusion that retail prices at retail shops most of the times have their own independent price setting politics and not always they set retail prices based on the changes of purchase price. The most important is to look at all product portfolios as an aggregate from one supplier. If we look at meat product sector, beef retail price in last years (2009-2012) has been rising for 20% in three years reaching 3,21 LVL (4,57 Eur)/kilo, in the same time price of pork meat has changed in the middle but arrived (in 2012) at the same price level as in 2009 - 2,48 LVL (3,53 Eur)/kilo. There has been egg price rise starting from year 2011 (23% in 2012 and 23,5% in 2013). It is possible that egg consumption has been decreased exactly due to the price rise. One of the biggest price rise in Latvia over the last years have been for coffee: in year 2011 it raised for over 34%, in year 2012 it raised for 2%. It is explained with poor harvest of coffee beans in of the biggest countries of coffee production. In 2013 there has no newly data from Central Statistical Bureau, but it is notable that in Latvia starting from year 2009 the excise duty for coffee has been doubled from 0,50 LVL/per kilo to 1,00 LVL/per kilo.

There has been constant growth of retail market. In the second quarter of year 2013 there have been 5.5% growth of all retail sector comparing with the second quarter of year 2012. Food retail sector in non-specialized shops has growth of 5% in the same time food retail sector in specialized shops has been reduced over 3.7%. The rise for mentioned retail sectors can be explained with people ability to spend more money to household improvements and their overall salary rise. The numbers show that lately food retail sector in specialized shops has been decreasing and there are no tendencies of new showing up in the meanwhile people tend to buy vegetables and local fruits in fresh markets straight from farmers.

The biggest food retailers are spreading their chains over the territory of Latvia by buying new properties or renting. Also there is quite intense competition among both biggest retail chains (RIMI and MAXIMA) and in some territories there is evidence that soon after one brand shop is appearing in new territory, competitor is finding a way to establish its shop on the opposite side of the street. It can be explained both with familiarization of new territories and with intense competition.

There is one example of e-commerce development in food retail. It is provided by one of the biggest food retail chains (Maxima Latvija, Sia) and became on force starting from year 2012. In the first year they had 15 000 deliveries all over Latvia. This kind of food delivery service from food retail chains is not so

widely popular in Latvian market due to the fact that there are wide range of smaller food retail shops in the city centers and the biggest (hypermarkets) shops outside the cities but reachable ~ till 15 minutes from the city center by car.

In recent years there have been tendency of new market participant entry in fast food sector (canteens, etc.). For example Streetburger's entry which is an American brand „Burger Joint" restaurant who offers organic burgers with beef meat which has been produced organically in the local Latvian farm. There is planned opening for Subway restaurant at the end of year 2013. The tendency of fast food spreading can be explained with life speed in the city as well as slow but still welfare improvement when people tend to eat outside homes.

### *1.2 Have there been increased concerns about the functioning of the food supply chain following the world commodity price spikes in 2007-2008 and 2011?*

There have not been increased concerns about functioning of the food supply chain due to world commodity price spikes although there have been noticed that in this period several local suppliers have left the market due to financial problems. Taking into account that Latvian food supply market sectors are quite fragmented the wave of several market participants leaving market was not the major factor what made impact on all industry.

### *1.3 What factors may result in retail prices not fully reflecting changes in world commodity markets? What factors may cause these potential differences in the patterns of price adjustment between the raw commodity and retail price levels?*

Common tendency in milk sector is that prices in local milk market are following by global price trends in the same market. There are exceptions when price rise or decrease independently from global price trends, those factors are listed below in the text. Also latest situation in milk sector showed that local dairy producers follow up the world commodity markets and have announced that they will raise their product prices (it is happening right now and still will continue also in autumn year 2013).

The factors what might cause potential differences in the patterns of price adjustment between the raw commodity and retail price levels:

- Change of market structure – new entrants are coming into the market – competition raises or completely opposite when market is closed and the market participants within market has stable market shares and they are spreading over the geographical boarders;

- The rise of such factors as electricity, gas, water which play large role in the business activities;

- The popularity of the product;

- The willingness of each part to earn taking into account other expenses (for raw commodity it is connected more with other expenses of materials, for retailers – average profit from all product portfolio of supplier (where are cost-effective products and cost-ineffective products);

- There has been quite different mark-up strategy for big retail chains regarding different products. The main orientation is on whole product portfolio from each supplier and positive profitability, i.e., some of products from one supplier can be sold with small or almost no mark-up (for example, milk is one of the most unprofitable products) in the same time for other products retail chains can apply significant mark up. At the end obtaining positive profitability for product portfolio. Therefore it is notable that retailers do not calculate their profit to each and every

product what they are selling in their retail shops but they are calculating their expenses and profits for all one supplier product group.

## 2. Recent Developments in the Food Chain

### *2.1 What have been the primary changes in the food chain over the past decade or so? Has concentration increased? Have these changes been more notable at the retail or manufacturing levels? What has driven these changes?*

There have been no minor changes in the food chain over the past decade. The retail sector of food industry has been quite concentrated where two of the biggest retailers control over 50% of the market. The third biggest market participant controls less than 10% of market. Some of market participants have been joining to create food retail cooperation which commonly operating under francize agreement which includes organized marketing plan for all shops, roof agreement under which several suppliers supply to francize shops under the same conditions and getting rebates after summing up all supplied amount of goods among francize shops. There has been a case when one market participant has left the market in 2008 and another market participant entered in the market for one year (2008) and left the market. It can be explained with impact of already existing market participants. Two biggest food retailers (RIMI Latvia, Sia and Maxima Latvija, Sia) both together have ~ 250 shops all over territory of Latvia (mostly supermarkets and hypermarkets). Not looking at their big impact in the market (market shares >50%) they are managing just 1/8 from all existing non-specialized retail shops (the total amount of all fast moving consumer good (non-specialized) shops within territory of Latvia reaches ~2000 shops plus independent food retail shops and specialized shops) together with other market participants who belongs to retail chains/francize the amount reaches ~ 2000 shops all over the Latvia plus. Also there is a tendency in the market: biggest fast moving consumer product retail chains spread their shops in best places of the city whether they invest money and built new ones or rent/buy existing ones. Both of biggest fast moving consumer goods retail chains have ability for foreign capital due to the fact their mother companies is in Lithuania and Scandinavia. This is the factor why there exist rather high entry barriers for new market participants.

Latvian food retail market is functioning mostly by non-specialized supermarkets, hypermarkets and specialized shops (meat, bakery products, milk products etc.). During last year the third biggest fast moving consumer product retail chain (Palink, Sia) has changed all their discount chain shops (Cento) to supermarkets – IKI. Due to that, at the moment there exists just one brand for discount shops in Latvian market – “Supernetto” which belongs to “RIMI Latvia”, Sia. The poor discount shop presence can be explained with the factor that the price level in discount shop is not far from price level comparing with other biggest retail chain price strategy for final retail prices.

Regarding production level and supply level, there are markets where in producing level have rather high competition level in the markets where are many producers/importers and they are fragmented and produced output overlapping (milk, bread, oils, sauces etc.) and there are markets where are rather few producers/importers (sugar, eggs, chicken meat etc.).

There are another tendency in Latvian supply side market having a big amount of wholesalers which number over the last years have been growing and who have an agreement with many producers and importers (food, non-food goods). The main gain of wholesalers in this level is their possibility to minimize costs of logistic (supplying different kind of products from different producers to one participant shop).

Producers tend to find more legal ways of cooperation with competitors in the purpose to reduce costs. For example in 2012 two of the biggest dairy companies agreed to merge in one concern, another

example is bread and bakery product manufacturers who agreed to manage their logistic with one transportation.

Private Label products becoming more popular in food retail sector. Consumer product retail chains had developed Private Label products in such product categories as sugar, milk products, corn products etc. In year 2011 private label products made ~ 5-10% from all yearly turnover of retail chain and in past two years it has reached 20% mark. This tendency can be explained with the fact that still big part of inhabitants tends to choose cheaper products in the shops. And private label is a way from retailer how to offer cheaper product as well as in some product categories private label products are making good competition in the field of quite few brands (for example – sugar).

## 3. Competition in the Food Chain

### *3.1 Have there been sector reviews of the food chain in recent years? If so, what has been the primary motivation for these reviews? What has been the principal focus: vertical, horizontal or both? What were the conclusions?*

In recent years there had been one sector review of the food chain in year 2008. Sector review was a comprehensive study of the competitive situation and the situation in the retail sector in non-specialized stores. The main target of review was to analyze the competitive environment in the retail sector in non-specialized stores and prospects as well as to assess competitive effects of suppliers and customers into grocery retail sector. The main concentration of study was on the horizontal relations among retail chains. Main conclusions:

1. Due to the slower national economic development Latvian retail sector and retail in non-specialized shops in year 2008 decreased for 10%;

2. Average shopping area is increasing with every year in the meanwhile the total number of shops decreases. Supermarkets and hypermarkets are widely spreading over the territory of Latvia due to their wide product assortment, fast and convenient service for customers and other benefits;

3. Over the last years market participants within food retail market have stable market shares (two biggest have >50%) which is one of the indicators for high barriers to entry;

4. The amount of turnover of retail chains has increased and reached 75% from all non-specialized shops in Latvia (NACE 47.11).

5. ~75% of all retail chain assortments consist of food products.

Competition Council of Latvia has provided bread and bakery market supervision, as well as milk and milk product market supervision during year 2008 and 2009. The primary motivation for this sector supervision was to evaluate the competition situation in the bread market and to analyze pricing mechanism, by evaluation of balance of forces among market participants in this relevant market. In frameworks of this supervision were identified several problems (the same problems exist also in milk and cottage cheese market) : 1) the discrepancy between rise of product price and changes of raw material prices; 2) dependence of producers from the buying power of big retail chains. Particular bread producers are selling until 70 % of their relevant products to these retail chains, often for price which is close to production costs or even below these costs. Similarly as it is in the milk market, also in the bread market bread producers use to compensate their non-gained profit or possible losses, created from selling their products for lower price to big retail chains, by selling certain products for higher price to smaller retailers. The turnover period of producer stocks is short, but the terms of time, used by retailers in their payments to bread producers are considerable longer. However during this market supervision violations of the

Competition Law were not detected, the obtained information has affirmed the necessity to include in the Competition Law the prohibition to abuse dominant position in retail trade (the particular law amendments have entered into force by 1 October 2008). Other conclusions from survey were:

1. Milk purchase amount in two biggest retail chains have been growing over 10-20% in 2009 comparing the level in year 2008. The consumption of milk and bread products has increased.

2. There is intense competition among milk and milk product suppliers as well as among bread and bakery product suppliers in additional product groups. The most successful suppliers in long term period are suppliers who can offer the widest range of product portfolio and well-known brands in the market.

3. Competition arises from neighbor (Lithuania, Estonia) suppliers in milk and milk product group which can offer lower price for almost the same quality products. Due to that there has been local producer's decrease in their turnover in year 2009, for some even till 35%.

4. Food retail chains have big impact on suppliers in Latvian market. It is explained also with the fact that for some suppliers in milk sector and bread sector ~ 50% of total delivered amount of production goes to one particular food retail chain.

5. Food retailer mark-ups differ from product to product in one product group. Also there has been evidence that mark-up strategy differs from one product group to another.

6. In both product sectors (milk and milk products, bread and bakery) producers take ~ 50-80% from final retail price and retailers take around 20-50%.

### *3.2 How have competition investigations addresses buyer power? What (if any) provisons exist for addressing buyer-supplier relations in the food chain? How are these relations regulated (for example, through guidelines, soft law provisions, codes of conduct)? Are there plans for tighter regulations in the future?*

In 2008 amendments to the Competition Law introduced a new term – dominant position in retail trade1. This statutory provision regulates relations between retailers and suppliers in the food and non-food chain considering retailers' buyer power and the suppliers' dependence in the relevant procurement market. Particular regulation includes: return of products (unless returned product is of poor quality or is unknown/new product), excessive or unfair discounts for the delivery of products, the presence of the delivered product at a retail outlet, including for the placement of products on shelves of shops, and for the promotion measures of the trade, payments for entering into a delivery contract, payments for the delivery of products to newly opened retail outlet, lengthy payment periods for the delivered products (generally considered unfair and unjustifiably lengthy, if it exceed 30 days from the day of the delivery of products).

Following amendments of Competition Law, Competition Council adopted guidelines for Competition Law Section 13(2)2 with the aim to explain market participants the concept of a dominant position in the retail trade and scope of unfair trading practices.

So far Competition Council of Latvia investigated four cases against two largest food retail chains in Latvia (SIA „RIMI Latvia" and SIA „Maxima Latvija"), where in two of the cases in year 2010 and year

[1] Competition Law of the Republic of Latvia, Art.13, par. two, http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Competition_Law.doc

[2] http://www.kp.gov.lv/documents/9d396409afc09362cc57c6bad6b258f1c731c15b (available in Latvian)

2011 resulted in a fining decision. First decision held excessively long payment period (60 days) which SIA „Maxima Latvija" (food retailer) practiced towards bread and pastry producer SIA "Siguldas Maiznieks". Second decision held unfairly imposed discount by SIA "RIMI Latvia" to its dairy product supplier.

There have been several discussions on possible improvements to the new provisions regarding dominant position in the retail trade and subsequently a new draft Law on prohibition of unfair retail practices has recently been elaborated. A draft Law on the prohibition of unfair retail practices proposes to abolish the concept of a 'dominant position in the retail trade' and apply regulation to all food retailers. However, the debate is still on-going whether to exempt smaller retailers having no significant buyer power, by replacing existing 'dominant position in the retail trade' with that of 'a retailer with a significant impact' on the basis of a quantitative criterion.

The current legal framework and the draft Law contain an exhaustive list of prohibited activities. Draft Law foresees separate exhaustive lists of prohibited activities in the food, as well as in the non-food retail trade. Unlike the prohibited activities in the food retail trade, the list of prohibited activities in the non- food retail sector will refer only to non-food retailers with a significant impact defined in the same way based on qualitative criteria as the existing 'dominant position in the retail trade'. At this moment draft law has been submitted for the approval of the government after which adoption process in parliament should follow.

### *3.3 What exemptions (if any) are applied by the competition authority relating to competitive practices at any stage of the food supply sector?*

National competition provisions do not contain any particular exemption for food supply sector. General block exemptions3 as well as particular exemptions prescribed by EU for agriculture sector are available, e.g. Council Regulation No 1234/2007 establishing a common organization of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) and Council Regulation No 1184/2006 applying certain rules of competition to the production of, and trade in, agricultural products as well as Regulation No. 261/2012 on exemptions for contractual negotiations in the milk and milk products sectors

## 4. Advocacy

### *4.1 Has there been an increased advocacy role for the competition authorities in recent years with regard to the functioning of the food chain (for example, with respect to barriers to entry, promoting regulation/de-regulation, trade and agricultural policies)?*

There has been increased advocacy role prior the Competition Council adopted guidelines for Competition Law Section 13(2)4 and made amendments to Law regarding dominant position in retail.

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[3] Cabinet of Ministers "Regulations Regarding Non-subjection of Certain Vertical Agreements to the Prohibition of the Agreement Specified in Section 11, Paragraph One of the Competition Law" **No.797** http://www.vvc.gov.lv/export/sites/default/docs/LRTA/MK_Noteikumi/Cab._Reg._No._797_-_Non-subjection_of_Certain_Vertical_Agreements....doc , „Regulation Regarding Horizontal Co-operation Agreement Exemption from the Agreement Prohibition Specified in Section 11, Paragraph one of the Competition Law" **No.798** http://www.vvc.gov.lv/export/sites/default/docs/LRTA/MK_Noteikumi/Cab._Reg._No._798_-_Non-subjection_of_Separate_Horizontal_Co-operation_Agreements.doc

[4] http://www.kp.gov.lv/documents/9d396409afc09362cc57c6bad6b258f1c731c15b (available in Latvian)

There have been several written and oral discussions with market participants, as well as participation in Conferences together with national Law Offices for market participants in the fields of:

- unfair and unjustified payments;
- unfair and unjustified provisions concerning return of products;
- unfair and unjustifiably lengthy settlement periods for the delivered products;
- unfair and unjustified fines for violating the provisions of a transaction.

There have been several meetings with Associations regarding legal ways of cooperation among market participants, restricted actions under Competition Law as well as explanations of actions what association should not do, what kind of data they should not ask from their members and what not to discuss in member meetings.

Competition Council also has provided several presentations for market participants regarding participation in tenders all over Latvia covering different cities. Main topics:

- what is Competition Council and what kind of duties it has;
- which are the things what market participants who want to take part in tenders have to be aware regarding Competition Regulation in country;
- Leniency possibility.

# LITHUANIA

## 1. Background

### *1.1 What have been the main characteristics of retail food trends in recent years and what factors have given rise to these trends?*

In Lithuania four major retail chains operate in the food retail sector. Market shares of these retailers have been gradually increasing during recent years and currently cover about 75 percent of the market. This market structure and participants (four major retail chains) of the food retail sector has not changed for the last fifteen years (1997-2013). Even though there was no significant new entrant to the food retail sector during the last fifteen years, in 2009 largest Finnish retail company *Suomen Osuuskauppojen Keskuskunta (SOK)* opened its first *Prisma* hypermarket for daily consumer goods in Vilnius. Currently *SOK* manages three hypermarkets (two in Kaunas, one in Vilnius) and is considering expanding its hypermarket chain. In 2013 Germanys *Schwarz Gruppe* managing one of the biggest discount supermarket chains has started construction of the first *Lidl* supermarket in Vilnius. The food retail market attracted interest from foreign companies, which launched their business in Lithuania (see question 2.2 for a more detailed description). As to the other participants in the food retail sector it is noticeable that cooperation process between small retail shops in order to negotiate more favourable conditions of sale and purchase with food product manufacturers increased.

Although consumers remain very price sensitive, there is increasing demand for high quality food products. This is also reflected in the product assortment of the major retail chains, which are not only expanding supply of low price private label products, but also offering organic, gourmet food products branded with private label. Recent trends show that both specialized shops of organic, gourmet products and cash and carry, discount type shops are expanding their activities; however they still are of low prevalence in Lithuania.

One more growing trend, which may not be directly related to the food retailing, but is significant for food price transparency and thus price setting in general is an increasing popularity and number of price comparison sites in Lithuania (see question 1.5 for more detailed description).

Since in recent years large retail chains are gaining more market power and a number of certain business risks are shifted onto their suppliers, these problems were addressed in 2009 by the Parliament of the Republic of Lithuania law passing the Law on the Prohibition of Unfair Practices of Retailers of the Republic of Lithuania. This law imposes certain restrictions and requirements on retailers having significant market power when dealing with their suppliers which might have impact on the competition conditions in the retail market (see question 3.3 for a more detailed description).

### *1.2 Have there been increased concerns about the functioning of the food supply chain following the world commodity price spikes in 2007-2008 and 2011?*

The Competition Council of the Republic of Lithuania (the “CC” or the “Competition Council”) often receives requests to address changes in the food prices and provide assessment on the functioning of the food supply chain both from the governmental institutions and public. Especially the retail level raises

major public concerns. For example in the year 2007 the CC conducted two market studies: first, pursuing the mandate of the Government of the Republic of Lithuania the CC analyzed causes for the price volatility across wide range of food products (see question 3.1 for a more detailed description); second, the CC *ex officio* conducted a market study regarding changes in the food retail sector and standing of four major retail chains in Lithuania (see question 2.1 for a more detailed description).

As already mentioned, concerns about the functioning of the food supply also prompted the Parliament of the Republic of Lithuania to enact the Law on the Prohibition of Unfair Practices of Retailers of the Republic of Lithuania in order to prohibit retailers from performing actions contradictory to the fair business practice (see question 3.3 for a more detailed description).

### *1.3 What factors may result in retail prices not fully reflecting changes in world commodity markets? What factors may cause these potential differences in the patterns of price adjustment between the raw commodity and retail price levels?*

Results of the market studies regarding price volatility of food products (see question 3.1 for a more detailed description) suggest that retail prices are affected not only by the changes in world commodity markets, but also by increases in production costs, changes in value added tax and other factors.

The Competition Council has also indentified that one of the reasons why retail prices does not fully reflect changes in the commodity markets or increases in production costs in the food supply chain might be the different capacity of food supply chain participants to influence and apply pressure over the remaining chain members, e.g. retail sale channels and processing of primary food products are mainly controlled by large undertakings, though productions of primary agricultural commodities like milk, grain and vegetables are often produced by small farms and individual farmers. Therefore lack of bargaining power by certain participants in the supply chain adds to the concern about the present situation in food markets and retail prices not fully adjusting to changes in agricultural commodity markets.

### *1.4 Has the functioning of the food chain featured in the concerns about national food security and, if so, how?*

N/A

### *1.5 Are food prices monitored in your jurisdiction? If so, by whom and to what purpose?*

#### *1.5.1 Food prices monitoring activities*

In October 2010 the Competition Council launched a market study on retail prices of food products. Purpose of this study was to continually gather and analyze information regarding food prices in order to provide consumers with possibility to compare prices of different food products and also enable the CC promptly respond to the changes in food prices and provide preliminary conclusions on reasons for price spikes. For the collection, management and publication of relevant information the CC entered into a cooperation agreement with the SE Agricultural Information and Rural Business Centre and the Lithuanian Institute of Agrarian Economics. Results were placed on the website www.produktukainos.lt and included weekly data on the lowest, highest and average prices of most important food products (total 45 articles), also aggregated data on the margins charged by the retail chains in respect of 10 most common food products and average price comparisons among Lithuania and the EU member states. In July 2013 the Competition Council cancelled this market study after consideration that measures by the CC are not the only source of information on food prices and both Statistics of Lithuania and increasing number of private initiatives (price comparison websites) are providing information on food prices for consumers.

## 2. Recent Developments in the Food Chain

### *2.1 What have been the primary changes in the food chain over the past decade or so? Has concentration increased? Have these changes been more notable at the retail or manufacturing levels? What has driven these changes?*

For the last decade no significant structural changes has occurred in the food retailing sector and market shares of four major retail chains were gradually increasing. No legal requirements for the establishment of retail centers provided the possibility for the retail chains to expand successfully and allowed them to locate their stores not at the outskirts but in the center and residential areas of the cities. Locally some changes in the retail market are caused by the emerging specialty food stores and other new initiatives such as Farmers‘Markets, which provide fresh products straight from the manufacturers to consumers; however their market shares are very small.

In 2007[1] the CC analysed the changes in the food retail sector and gathered information on the standing of the large retail chains. The CC established that in the period 2004-2007 the market share of the four major retail chains increased by about 10 percent. The operating strategy of the retail chains was mainly targeted expansion in regional centres and major settlements. The CC concluded that due to their extensive capacities major retail chains acquire a significant advantage in respect of the smaller undertakings both in terms of consumers and in their negotiations with the suppliers concerning product prices, discounts and other supply terms. The more favourable terms in supply agreements enable major retailers to ensure higher profit margins or fix lower sale prices which eventually grant them significant competitive advantage in respect of smaller retailers. On the other hand, the capacities operated and facilities offered by retail chains are beneficial to consumers who can purchase all their necessities in a single place, are offered a wider assortment of merchandise.

### *2.2 To what extent have the changes in the food supply sector been associated with increased presence of foreign firms?*

#### *2.2.1 Foreign firms in Lithuanian food retail*

In 2002 low-price retail chain *Lidl* decided to expand its activities in the Baltic countries. Lithuanian *UAB Lidl* was founded in 2002 and in 2004 *Lidl* purchased land and buildings suitable for developing its shops. However, in 2007 *Lidl* announced that due to adverse market conditions it decided to postpone development plans in the Baltic countries. Since 2011 the company returned to active development in Lithuania and the first *Lidl* store is expected to open in 2014 in Vilnius.

In September 2009 Finland's largest retail company *Suomen Osuuskauppojen Keskuskunta (SOK)* already operating in five European countries opened its first hypermarket *Prisma* in Vilnius. SOK was planning to open 6-7 *Prisma* stores. However the original plans to expand in Lithuania was affected by the market situation and investors plans, therefore currently (2013) *SOK* owns three Prisma hypermarkets, two in Kaunas and one in Vilnius. *Prism*a offers not only food products, but clothing and household, leisure products. In addition to products already known in Lithuania *Prisma* introduced new brands; among which the chain's own brands for food, hygiene, household and home textiles.

[1] More information in Annual Report of 2008, p. 14-15. http://www.kt.gov.lt/en/annual/2008_eng.pdf

***2.3 Have there been any notable changes in the retail sector following recent experience in food price inflation and the economic downturn? For example, through the increased presence of discount outlets? Have there been changes in policies directed at the retail food sector? What have been the main factors driving these policies where applicable?***

N/A

## 3. Competition in the Food Chain

***3.1 Have there been sector reviews of the food chain in recent years? If so, what has been the primary motivation for these reviews? What has been the principal focus: vertical, horizontal or both? What were the conclusions?***

### *3.1.1 Study on price volatility across wide range of food products*[2]

In August 2007 following the price spikes in world markets and pursuing the mandate of the Government of the Republic of Lithuania, the Competition Council conducted analysis addressing price increases of food products. The CC concluded that price increase for grain was caused by a nearly double jump of grain prices in global markets as a result of poor grain harvest. Due to the spike in grain purchase prices, flour sale prices, as a result bread and bakery product prices increased. The increase in meat product prices was mainly caused by higher labour costs and increase in prices of raw materials used in the production. The analysis into the dairy production showed that to quite a tangible extent the price spike was caused by the increase in raw materials purchase prices and labour costs. The analysis of the data on the changes in retail prices of food products showed a rather diversified pattern in the manner of changing prices. In most cases the retail chains increased prices following the increase by the producers, but on individual occasions the retailers would increase the prices to a higher rate than the producers, and vice versa.

### *3.1.2 Study on milk and retail sectors*[3]

In 2009 the Competition Council conducted study regarding milk and retail sectors. Analysis covered structural developments and activities in milk sector and food retailing analysis focused on development of four major Lithuanian retail chains and evaluation of supply contracts. Analysis showed than in the period 2004-2008 the number of retail food stores, sales area and the share of the retail food sector held by the major retail chains were continuously increasing and the number of sales outlets operated by independent or incorporated small retailers decreased. Accordingly the share of the four major retailers in the retail food product market in 2004–2008 increased by 11 percent – from 61.9 to 72.3 percent, while the share of the independent or incorporated smaller retailers decreased from 38.1 to 27.7 percent. Information collected did not support the conclusion that major retail chains would unlawfully use their market power. However, the CC found that certain practices, e.g. fines for the failure to supply products or fulfil other obligations, marketing fees for trading in trade centres, discounts, etc, could be considered excessive since during 2008 major retail chains collected about 244 million LTL from their suppliers in the form of different charges and fees (discounts, advertising, promotion, marketing), also during the same period claimed about LTL 5 million in fines.

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2 More information in Annual Report of 2007, p. 17. http://www.kt.gov.lt/en/annual/2007_eng.pdf

3 More information in Annual Report of 2009, p. 18. http://www.kt.gov.lt/en/annual/2009_eng.pdf

### *3.1.3 Study on price volatility across wide range of food products*[4]

In autumn 2010 the Competition Council has completed a study concerning price volatility across a wide range of food product prices. This market analysis was prompted by price increases for certain food products. The purpose of the investigation was to identify the factors and reasons that have caused changes in food product prices. The information collected in the course of the investigation led to a conclusion that the price increase trend had been observed both in Lithuania and in other neighbouring markets and the causes for price volatility had not been limited to the national territory. The investigation has also revealed that the price fluctuations are also dependent on the number of intermediaries operating in the food supply chain, the competitive structure of the elements of the chain and the differences in the bargaining power of the parties.

## ***3.2 Has there been an increase in competition authority enforcement in the food sector in recent years? Please supply details.***

### *3.2.1 Anti-competitive agreements*

The Competition Council conducted several investigations of possible anti-competitive agreements in the food sector.

### *3.2.2 Exchange of commercially sensitive information in diaries sector*[5]

In September 2007 the Competition Council ex officio initiated investigation into activities of undertakings purchasing and processing milk, and the association joining such companies. The investigation has been prompted by the increase in prices of food products in the middle of the year and the interim findings of the analysis of the price increase conducted by the experts of the CC. This investigation involved analysis of the different levels of dairy products supply chain – purchasing of raw milk and marketing of various dairy products. As a result of the investigation, the CC concluded that for the period from 2000 to 2007 the undertakings active in the milk and dairy processing market on regular monthly basis exchanged sensitive information which provided them with data on prices of the procurement of raw milk, as well as quantity data. Undertakings concerned were able to precisely monitor the activities and strategic decisions of their competitors, to align their behaviour accordingly and maintain stable market shares. The CC imposed fines total 647 590.44 EUR. However several undertaking appealed the decision of the CC and the Supreme Administrative Court of the Republic of Lithuania annulled findings of the CC on the grounds of the expiration of prescription regarding the undertakings which filed the appeals.

### *3.2.3 Investigation into the meat processing market*[6]

In 2007 the Competition Council closed an investigation into possible anticompetitive agreements between meat producers and their association. The trend of price increases in year 2006-2007 on the market for processed meat products and a preliminary market analysis suggested that undertakings engaged in the meat processing activities as well as their association could have coordinated their actions related to setting the price and also could have exchanged confidential information. However, the Competition Council did not gather substantial evidence that would have allowed it to conclude that a price-fixing agreement has been concluded between the undertakings active in the meat processing market.

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4 More information in Annual Report of 2010, p. 32. http://www.kt.gov.lt/en/annual/2010_eng.pdf

5 More information in Annual Report of 2007, p. 8. http://www.kt.gov.lt/en/annual/2007_eng.pdf

6 More information in Annual Report of 2007, p. 9. http://www.kt.gov.lt/en/annual/2007_eng.pdf

### *3.2.4 Investigation into the pricing practices in the flour and bakery products, milk and milk products markets*

After having observed substantive price increases in August – September 2010 in the food retail sector and having received additional information from the Ministry of Agriculture, the Competition Council has conducted an assessment of the change in the key input prices as well as the wholesale and retail prices for dairy and grain products. The study showed that recent increase in the input prices alone did not fully account for the extent of the increase in the retail prices for dairy and grain products in the country. The analysis of the CC revealed that the prices for food products had not increased exclusively for objective economic reasons and that the fluctuations could have emerged due to a weakening of competition. Based on these findings, the CC initiated investigation aimed at assessing whether a number of undertakings engaged in the production and/or marketing of food products (milk and milk products, flour, bakery goods) have participated in anti-competitive agreements or concerted practices that could have possibly led to the increase in retail prices of mentioned products. The investigation is still ongoing.

## ***3.3. How have competition investigations addressed buyer power? What (if any) provisions exist for addressing buyer-supplier relations in the food chain? How are these relations regulated (for example, through guidelines, soft law provisions, codes of conduct)? Are there plans for tighter regulations in the future?***

### *3.3.1 The Law on the Prohibition of Unfair Practices of Retailers of the Republic of Lithuania*[7]

In 2009 by the Parliament of the Republic of Lithuania passed the Law on the Prohibition of Unfair Practices of Retailers of the Republic of Lithuania (the „Law on Unfair Practices“). The purpose of the Law on Unfair Practices is to ensure the balance between the interests of the suppliers and large retailers and to limit the use of market power by large retail undertakings enjoying a significant market power. The Law on Unfair Practices prohibits retailers having significant market power to perform any actions contradictory to the fair business practice that result in the transfer the operating risk from retailers upon their suppliers, or additional supplementary obligations which limit the possibilities of the suppliers to freely operate in the market and which are expressed as requirements for the supplier. For example black list of practices which are deemed to be in conflict with the requirements of this law include “entry” fees, compensation for the lost or smaller-than-expected income of the retailer from the sale of goods received from the supplier, acquiring goods, services or property from third parties specified by the retailer, etc. The Competition Council is the authority responsible for the enforcement of the Law on Unfair Practices and according to this Law is obliged to draw up and submit the Statement on the Monitoring of this Law specifying the progress in attaining the objectives pursued by this Law, any negative outcomes, as well as any proposals concerning improvement of the Law on Unfair Practices. The CC has conducted couple of investigation regarding infringements of the requirements of the Law on Unfair Practices.

In 2012 the CC acknowledged that *PALINK*[8], managing the stores belonging to the retail chain *IKI*, had infringed the Law on Unfair Practices as it unreasonably restricted possibilities of suppliers to freely operate in the market. *PALINK* as a retailer having significant market power conducted prohibited actions while concluding contracts with food and beverages suppliers regarding the provisions of advertising services. These contracts included a provision whereby analogous goods will not be supplied to the undertakings engaged in the retail trade for the same or lower price during the whole period of the promotional campaign in *IKI*. In the resolution, the CC noted that *PALINK* by the means of prohibited actions not only limited the freedom of suppliers, but also due to such limitation the consumers could have

[7] Law of the on the Prohibition of Unfair Practices of Retailers, 22 December 2009 – No XI-626 http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=406491

[8] More information in Annual Report of 2012, p. 19-20. http://www.kt.gov.lt/en/annual/2012_eng.pdf

been harmed, since other shopping centres had less opportunities to offer the same goods for a lower price. For the established infringement the company was fined of 104 250 EUR.

### *3.4 What exemptions (if any) are applied by the competition authority relating to competitive practices at any stage of the food supply sector?*

No national legislation provides exemptions for anti-competitive practices in the food supply sector. In 2001 the Competition Council has adopted a decision providing general exemption for certain agreements between the agricultural land users. Mentioned decision was abolished in the autumn of 2004. Since May 1st of 2004 when the Republic of Lithuania became a member of the European Union, the CC is subject to European Union legislation. For example **Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) provide certain** exemptions from competition law to agricultural commodities is directly applicable. Naturally, The Law on Competition as also TFEU provides possibility to argue individual exemption to certain anticompetitive practices.

## 4. Other Factors Determining the Functioning of the Food Chain

### *4.1 What other policies affect the functioning of the food supply chain including the extent and intensity of competition? For example, restrictions on retail practices (planning, price controls, restrictions on the services sector)?*

#### *4.1.1 Merger assessment*

The Competition Council has been assessing a number of notified mergers in the food supply chain. The market assessed included manufacturing and wholesale of food products and also retail of food products. The Competition Council has issued a merger prohibition decision in food retail sector.

In *Maxima (2008)*[9] merger case the CC passed a decision ordering *Maxima* – one of the biggest retail chains in Lithuania, to remove the outcomes of concentration, i.e. extinguish lease contracts for the commercial premises in which *Maxima* has been conducting its retail trade activities of food products and household products, or to transfer the ownership rights in respect of such premises. The CC concluded that in the geographic markets examined (certain municipalities) *Maxima* had a sufficiently large market share and with an increase in the market share (up to 5 percent) as a result of concentration a dominant position could have been created in these markets or competition in the retail markets for retail of food products could have been significantly weakened. During this concentration the Competition Council also established that although the possibilities of any new market participant to enter the retail food product market is neither directly nor indirectly restricted by any statutory requirements, the entry is impeded by the administrative restrictions in respect of the construction of new trade centres, significantly increased prices for the lease of trading space, etc. Remedies imposed by the CC were considered sufficient for the purpose of responding to competition problems in the relevant markets as they facilitated the reduction in the level of concentration down to the previous level in these local markets.

### *4.2 What aspects of state enterprise involvement in the supply chain or marketing boards may (or have) affect(ed) the food chain?*

N/A

[9] More information in Annual Report of 2008, p. 12. http://www.kt.gov.lt/en/annual/2008_eng.pdf

## 5. Advocacy

***5.1 Has there been an increased advocacy role for the competition authorities in recent years with regard to the functioning of the food chain (for example, with respect to barriers to entry, promoting regulation/de-regulation, trade and agricultural policies)?***

N/A

# THE NETHERLANDS

## RELATIONSHIP BETWEEN FARMERS AND MULTIPRODUCT RETAILERS

*Note by the Ministry of Economic Affairs*

### 1. Introduction

Last year, a large multi-product retailer in the Netherlands brought its suppliers in turmoil with an to attempt to introduce a one-off and unilateral discount of 2%. Shortly after, a lot of other multi-product retailers followed this attempt. Farmers feared to be the biggest victim of this discount because their customers, the suppliers of the multi-product retailers, would reclaim this discount by lowering purchasing prices. According to farmers, their bargaining power is to low to heavily protest against such discounts. Farmers believe their bargaining power is reflected in a ‘’low’’ share of the food dollar. Ever since this action, tensions have been rising between farmers and multi-product retailers in the food chain. This contribution will therefore primarily focus on this relationship. We will shortly discuss and analyse why and if farmers have low bargaining power and research opportunities for farmers to strengthen their bargaining power.

### 2. Analysis

In the Netherlands, the market for multi-product retailers is very concentrated. The market is characterised by a limited amount of players, many having a fairly large market share. The farmers market is more diverse. This market is characterised by a large amount of players, almost all having a fairly small market share. Although farmers are frequently united in a cooperation or a growers association, they often produce separately. Nowadays, multi-product retailers often cooperate with farmers via a supplier, such as a trading house. A farmer, possibly via a cooperation, sells its products to a supplier, which sells the product to a multi-product retailer.

If a multi-product retailer would attempt to unilaterally raise its payment discount with 2%, like it did last year, this could possibly affect the farmer. Suppliers could reclaim purchasing prices via the farmer. Because of the large number of farmers in the Netherlands, farmers feel they have low bargaining power. The farmer fears a multi-product retailer will switch to another farmer if he would protest. Question is if the farmers low bargaining power is reflected in a ‘’low’’ share of the food dollar. The assumption that the ‘’low’’ share of the food dollar is caused by the dominant position of large multi-product retailers seems to be incorrect. The Netherlands Competition Authority Nma(now ACM)[1], and LEI conducted research in price changes in 8 different chains in the agricultural sector.[2] This research showed that price changes were passed on efficiently. Moreover, research of the SEO showed that the ‘’low’’ share of the food dollar

[1] Nma, OPTA and the CA are now merged into ACM.

[2] Report LEI & NMa, ‘’Pricing in the agricultural food sector’’, 2009.

follows from temporary or structural overproduction.[3] If prices are passed on efficiently and research shows that the low share of the food dollar follows from overproduction, the assumption that the multi-product retailer is abusing its market power does not seem very likely. The unilateral discount does not significantly affect the farmers immediately.

If farmers still feel they are damaged by unfair trading practices, they could go to court to claim a damage restitution. Farmers, however, are very reserved to go to court. Although the assumption that the dominant multi-product retailer is responsible for the ‘’low’’ share of the food dollar seems to be incorrect, it is still relatively easy for a multi-product retailer to switch from one farmer to another by, for example, purchasing its goods from a different trading house.

Fair practices should therefore be stimulated. The Dutch government believes self regulation is the way to stimulate fair practice. An important step towards fair practices via self regulation was taken two weeks ago, with the introduction of a new code of conduct on fair practices. This code of conduct was welcomed and accepted by, amongst others, farmers as well as multi-product retailers. The code of conduct consists of guidelines which all parties have to comply with. One of these guidelines consists of a prohibition to unilaterally change a payment discount. If, for example, a multi-product retailers does not comply with the guidelines, a farmer can make an (anonymous) complaint. If the complaint is justified, the multi-product retailer is taking off the list of participants. This could ultimately lead to very bad publicity, which makes this a sufficient deterrent mechanism.

## 3. Opportunities

If the ‘’low’ share of the food dollar follows from temporary or structural overproduction it might be wise to evaluate the way in which a product is produced. A lot of farmers still handle a product-oriented way of production. It might be beneficial to switch to a more market oriented way of production. It is therefore important for farmers to look at the demand of the market. The EMFI conducted research to the market demands of the consumer. According to research of EMFI the demand for agricultural products will increase rapidly in the near future.[4] The world population is growing and welfare increases in large economies such as Brazil, China and India. These developments may lead to an increasing demand for ‘’western’’ agricultural products. The increase in demand for agricultural products may offer great opportunities for farmers. A higher demand for agricultural products could increase the farmers turnover. The question is if farmers can meet these high demands. Because of the scarcity of raw materials, farmers will have to innovate and produce more sustainable if they want to meet these high demands.

A more sustainable way of production may not only be necessary because of the scarcity of raw materials, there is an increasing demand for sustainable products in the Netherlands. In the Netherlands, the consumption of sustainable products increased with 25% in 2012.[5] This increase comes from new product related demands of the consumer. Research shows that the average consumer wants to have more insight in the way a product is produced. An increasing amount of consumers highly appreciates a product that is produced in an environmentally friendly way or in a way that reduces risks to human health. Producing in more sustainable way may be a way to counterbalance other factors such as pricing, image and quality.

Sustainable production thus may be necessary to fulfill the demand of the world population, and it may strengthen the position of the farmers on the market because it distinguishes himself from other

[3] Report SEO ‘’Farmers and sustainable initiatives ’’, 2011.

[4] Report EFMI Business school ‘study of cooperation in the agricultural food sector’ , September 2013.

[5] Monitor Sustainable Food, Ministry of Economic Affairs , June 2013.

farmers. However, a more sustainable way of production often brings with it higher production costs. If an undertaking acts by itself, it may be confronted with a first mover ‘’disadvantage’’: if prices rise, customers may switch to suppliers that have not shifted to a more sustainable way of production, and are therefore cheaper. For example: an individual fisherman who, on his own, adopts a fishing quota cannot solve the bigger problem, and may price himself out of the market. This means that individual fishermen do not have any incentive for conservative fishing, unless other fishermen do the same. Only by shifting to conservative fishing together are the fishermen able to solve the problem. Thus, a joint approach may be successful in such cases. Although many sustainability initiatives have developed in the agricultural sector, farmers still seem reluctant to cooperate with other partners to produce a more sustainable product. One of the reasons is the lack of clarity about the application of competition rules for sustainability initiatives and agreements. A horizontal agreement with a partner may conflict with the cartel prohibition of Article 101 TFEU/Article 6 CA. As long as the costs of a sustainable initiative are less than the increase in welfare, welfare will increase on balance, and it will be more likely that the sustainable initiative will not infringe competition law. ACM’s contribution for this roundtable on food chain industry, will elaborate further on the different requirements of Article 101 TFEU/ Art. 6 CA.

Because the increase in welfare should be higher than the costs of production, it is essential to develop business models which will lower the costs of a sustainable initiative. The development of business models is primarily the responsibility of the undertakings that operate in the market. Nonetheless, for this contribution it may be valuable to examine some models which may contribute to the lowering of costs for sustainability initiatives. The EMFI conducted research to such business models.[6] These business models are, however, not tested against the relevant competition rules. It is therefore important that the following business models, in practice, are examined against the relevant competition rules on a case by case basis.

A first example of a business model is a direct cooperation chain between a farmer and a multi-product retailer. Multi-product retailers are seeking for new opportunities to satisfy the new demands of the consumer. Because the market for multi-product retailers is very concentrated in the Netherlands, it is necessary for retailers to distinguish themselves from the competition. Multi-product retailers are therefore seeking for chain partners which produce new innovative products in a more sustainable way. Cooperating with a chain partner will make the market more transparent for the consumer and meet the demands of the consumer for a more sustainable product. A new innovative product will also increase the diversity of the stock of the multi-product retailer, and therefore strengthen the identity of the retailer. A direct cooperation chain may also lead to advantages for farmers. A direct chain with the multi-product retailer would shorten the production chain and therefore lower production costs. It would eliminate the third player in the chain, such as a trading house. A second advantage for a farmer would be that it would help to distinguish himself from other farmers. A disadvantage could be that the farmer would also be occupied with other activities that fall outside the scope of their core business such as balancing demand and supply. Another example could be a cooperation-chain between the farmer, a shared warehouse and the multi-product retailer. The shared warehouse would only have a connecting and advising role between supply( farmers) and demand (consumer/multi-product retailer). In this way, there is still a direct cooperation link between the farmer and multi-product retailer, but the farmer is not occupied with activities that fall outside the scope of his core business.

## 4. Conclusion

In the agricultural market, the market power of farmers is relatively small compared to the market power of the multi-product retailer. However, this difference in market power is not reflected in a ‘’low’’ share of the food dollar. Research shows that prices are passed on efficiently. The ‘’low’ share of the food dollar may primarily follow from overproduction. It is therefore essential to evaluate the manner of

[6] Report EFMI Business school ‘study of cooperation in the agricultural food sector’ , September 2013.

production. It might by beneficial for farmers to produce more market-orientated instead of product-orientated. The market demand for agricultural products will increase in the near future. However, because of scarcity of raw materials farmers have to innovate en produce more sustainable. Producing in more sustainable way may also be valuable for farmers in the current market. There is an increasing demand in the market for sustainable products. Producing in a more sustainable way may therefore be an opportunity for farmers to strengthen their position. Producing in more sustainable way may be a way to counterbalance other factors such as prices, image and quality. It may help farmers to distinguish themselves from the competition. However, producing in a more sustainable way may often bring with it higher costs. A coordinated approach may therefore be beneficial. Undertakings are, however, often reluctant to cooperate because they find it difficult to assess whether a joint approach complies with the relevant competition rules. Cooperating with other partners in the chain will have to comply with the cartel prohibition. The ACM will assess compliance of a joint approach with the relevant competition rules on a case-by-case basis.

## SOURCES

1. Report EFMI Business school ‘study of cooperation in the agricultural food sector’ , September 2013,

2. Position Paper on Competition and Sustainability, ACM, July 2013,

3. Policy Letter Sustainable Food production, The Netherlands Ministry of Economic Affairs, July 2013,

4. Report of the Council for Agriculture and Fisheries, June 2013,

5. The assessment of anticompetitive practices as a result of sustainability initiatives in practice, ACM, March 2013,

6. Support for Farmers' Cooperatives, Wageningen University, March 2013,

7. Crisis prevention via the Association of Mushroom Growers, 2013,

8. Letter of the State Secretary of Economic Affairs to the Netherlands House of Parliament, November 2011,

9. Pact of ’s-Hertogenbosch, September 2011,

10. The farmer in the food chain, Council for the Environment and Infrastructure, September 2003.

**Legislation**

1. Article 6 of the Dutch Competition Act (CA),

2. Article 101 of the Treaty on the Functioning of the European Union (TFEU),

3. Council Regulation (EC) No 1234/2007, (last modification Council Regulation (EC) No 261/2012).

# SUSTAINABILITY INITIATIVES

*Note by the Authority for Consumers and Markets*

## 1. Introduction

The Authority for Consumers and Markets (a new market authority, since 1 April 2013, incorporating the former Netherlands Competition Authority (*NMa)*, the Independent Regulator of Telecommunications and Post *(OPTA)*, and the Consumer Authority *(CA)*) has as its mission the promotion of options and opportunities for businesses and consumers[1]

The concept of sustainable production is taking root in the Dutch market. As consumer demand for sustainably produced goods increases, producers and retailers are stepping up to the mark, and assuming responsibility for sustainable production, both as individual market players, and in co-operation with others.

A free-market system can sometimes have adverse effects, for example, on the environment, which cannot be solved by the market. In response to increasing demand for sustainably produced goods, many Dutch producers in the agri-food sector have developed sustainability initiatives, which are critical to competitiveness and long-term welfare growth.

Having arrangements between undertakings could be desirable in order to protect public interests such as the environment and innovation. At the same time, such arrangements could run counter to the public interest of having well-functioning markets. Such arrangements could, for example, lead to higher consumer prices, thereby reducing consumer welfare, at least in the short run.

In this paper, ACM sets out how its preliminary thinking on the assessment of such initiatives under the competition rules.

## 2. Development of sustainability initiatives

In the Dutch agri-food sector, many sustainability initiatives have developed[2]. Undertakings and associations of undertakings partner up to make the food chain more sustainable, whether by improving products or through the introduction of sustainable packaging or transport. Often, such initiatives require cross-column cooperation. The Authority for Consumers and Markets *(ACM)*, is confronted with demands to end a widely perceived lack of clarity about the application of competition law to business, has endeavoured to end unnecessary uncertainty in several ways.

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1 See Strategy ACM https://www.acm.nl/en/publications/publication/11993/Strategy-Netherlands-Authority-for-Consumers-and-Markets.

2 See Contribution of the Netherlands Ministry for Economic Affairs to the OECD for the combined meetings of the Food Chain Analysis Network (FCAN) and the Competition Committee (CC).

In 2012, the Netherlands Competition Authority issued a short-form opinion on sustainable shrimps fishing and invited business to come forward with initiatives that it could assess against competition concerns. Also, in the spring of 2013, ACM set up a Knowledge Bank on its website. Here, interested parties can study summaries of cases dealt with by competition authorities in the past as well as an overview of these kind of cases and their classification according to the likelihood that they run into difficulties from an antitrust point of view. Finally, in a third effort to clarify the law and its enforcement intentions, ACM issued a draft position paper on sustainability and competition law. The consultation process on this draft ended early September.[3] ACM expects to publish its final paper in November of this year. Simultaneously, the Netherlands Ministry of Economic Affairs held a public consultation on new policy rules that would require ACM to take sustainability issues into consideration when applying the exception to the cartel prohibition.[4] ACM's stated intention is to guard against over-enforcement and to avoid type I-errors that may dissuade the development of sustainability arrangements that are welfare enhancing.

## 3. Main elements of ACM's approach to sustainability initiatives

Sustainability is a very broad term that does not have a single definition. It encompasses topics such as environmental protection, public health, fair trade production, animal welfare, etc. The activities and products that currently exist in sustainable versions include organic food, sustainable wood, sustainable fishery, fair-trade coffee, and renewable energy. ACM starts from the premise that sustainability initiatives can and will be assessed just like any other form of cooperation, i.e. based on an economic approach to competition law and on a case-by-case basis. In other words: sustainability initiatives do not get a special treatment from ACM when applying competition law. Undertakings will have to assess the compatibility of their arrangements with the law (self-assessment). With these principles in mind, ACM wants to emphasize that sustainability initiatives will not always amount to an appreciable restriction of competition. There are situations where an initiative hardly affects the competitive process, or does not affect the competitive process at all.[5]

The cartel prohibition is contained in section 6 of the Dutch Competition Act, which mirrors Article 101 of the Treaty on the Functioning of the European Union. Once the arrangement falls within the scope of paragraph 1 of the relevant provision[6], the arrangement may qualify for exemption from the cartel prohibition if it fulfils the four following criteria cumulatively:

7. The arrangement contributes to improving the production or distribution of goods or to promoting technical or economic progress;

8. Consumers get a fair share of the resulting benefit;

9. The arrangement is necessary to achieve these benefits and does not go beyond what is necessary (proportionality test);

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3 See: https://www.acm.nl/en/publications/publication/11733/Opportunities-for-collaborations-with-regard-to-sustainable-development/.

4 See: http://www.internetconsultatie.nl/mededinging_en_duurzame_ontwikkeling.

5 The examples given on the website include an agreement of minor importance such as a recommendation, developed collectively, to reduce the fat content in food items, where the undertakings involved were still able to compete on price, quality, flavour, image, etc., and other undertakings remained in the market that did not take part in the agreement.

6 I.e., Section 6 of the Dutch Competition Act (CA) or Article 101 of the Treaty on the Functioning of the European Union (TFEU). The cartel prohibition of the CA is materially similar to Article 101 TFEU.

10. The arrangement does not lead to competition being eliminated in a substantial part of the market. The arrangement must leave enough room for competition (residual competition requirement).

## 4. Application paragraph 3: arrangements must promote welfare

### *4.1 Introduction*

When a sustainability initiative is appreciably anticompetitive, the arrangement is tested against the above mentioned four exception criteria of the cartel prohibition. These criteria are cumulatively applicable and must be applied in relationship to each other. The economic background of the competition law assessment of collaborations with regard to sustainability is explained in this contribution. ACM intends to apply the four exception criteria on sustainability initiatives against this economic background.

### *4.2 Broad definition of welfare*

When we look at an issue such as sustainability in the context of economic welfare, it is important to take consumer preferences into account. From an economic point of view, this may be quite a broad definition of economic welfare. Many consumers find product features that are related to sustainability important, and attach value to products that have been created in an environmentally and/or animal-friendly manner. It is also important from an economic perspective to use scarce resources as efficiently as possible. Doing so promotes economic welfare. This may also involve a sustainable approach to the use of depletable resources and how the environment is treated.

### *4.3 The market often works as it should - but not always*

In most situations, the market mechanism is an excellent way to ensure an efficient use of scarce resources. However, market failures can occur. This is the case, for example, when the value of the environment or that of scarce resources is not sufficiently reflected in the price and/or the quality of the products for which they were used. This causes inefficiencies in the market process, which in turn lead to a sub-optimal welfare level. Welfare increases are thus, in principle, possible. This is a factor that relatively often plays a role in issues related to sustainable development.

Some of the inefficiencies may concern future generations, for example, if the current generation uses scarce resources in such a way that is inefficient from a long-term perspective. An example is over-fishing leading to extinction of certain species of fish. If current and future generations are taken into consideration in the decision-making on fishing, it may lead to less fishing in order to ensure fishing is still possible in the future. Future generations thus benefit from conservative fishing now, but, at the same time, fish as a consumption product may become scarcer for the current generation and, therefore, possibly more expensive.

### *4.4 Collaboration may lead to a more sustainable supply*

Anticompetitive arrangements may play a role in undertakings' sustainability initiatives for various reasons. For example, some undertakings may develop or bring to market a sustainable product more efficiently or more effectively by collaborating with others. This may also be the case when introducing certificates that are related to sustainability, leading to consumers being able to rely on products actually being manufactured in a sustainable manner. For such initiatives, it is often enough when only a limited number of suppliers join forces. If their collaboration requires arrangements that restrict mutual competition (more or less appreciably), such arrangements must be tested for compliance with the criteria in paragraph 3, as listed above. If there are enough other providers in the market that do not participate in these arrangements, this test can be met relatively easily.

### *4.5 Arrangements may be required to solve a coordination problem*

A coordination problem may arise if a sustainable product brings with it higher production costs. Undertakings are then confronted with a 'first mover disadvantage': if prices rise, customers may switch to suppliers that have not shifted to a more sustainable production. In such cases, the market may be unable to create sufficient incentives to help implement sustainable production. A joint approach may be successful in such cases.

This can be demonstrated using the above example of overfishing. An individual fisherman who, on his own, adopts a fishing quota cannot solve the bigger problem, and may price himself out of the market. This means that individual fishermen do not have any incentive for conservative fishing, unless other fishermen do the same. Only by shifting together to conservative fishing methods are the fishermen able to solve the problem.

Therefore, entering into arrangements may offer a solution in order to correct market failures. The welfare increase, in such cases, is the avoided welfare costs resulting from the market failure. The solutions, however, may be imperfect and/or involve additional costs themselves (such as transaction costs). In addition, the assessment and weighing of the interests involved will not always be straightforward in practice. A cost/benefit analysis is required. This does not alter the fact that the starting point should be that competition law serves to promote consumer welfare, and for that reason, it can be argued to take the solution of the market failure into consideration in the assessment.

### *4.6 Economic approach implies careful assessment*

From the above, it is clear that certain sustainability questions may require a coordinated approach. Solving a sustainability problem may result in welfare increases. As long as the costs of resolving the problem are less than the increase in welfare, welfare will increase on balance. If several solutions are possible to resolve the market failure, the solution with the lowest costs is preferred.

In exceptional circumstances, the solution to a sustainability question may consist of undertakings in a certain sector making market-wide arrangements to realize a sustainability objective. In particular, if the arrangement results in higher prices of the relevant products, or reduced quality or variety of the products involved, such disadvantages must be assessed against possible other consumer benefits of this arrangement.

### *4.7 Conclusion*

In ACM's perspective, there is room for sustainability initiatives under the cartel prohibition. In some cases, the cartel prohibition does not apply to a sustainability initiative at all, for example because the initiative does not significantly affect the competitive process. However, even in cases in which the competitive process is affected, ACM sees possibilities, because sustainable production can benefit current and future consumers. Such opportunities can be found in particular in initiatives that leave sufficient options for consumers. Even where this is not the case for example when market-wide sustainability arrangements are concerned, there is still a certain margin. If the benefits of a certain sustainability measure outweigh the costs, an exemption might still be achievable. The extent of this margin will have to be assessed on a case-by-case basis, considering the specific circumstances. In its Position Paper, ACM elaborates the four exception criteria separately.

# NORWAY

## 1. Introduction

The food chain industry in Norway has attracted a lot of attention over the past few years. One important reason is that consumers in Norway face the highest prices in Europe on food and non-alcoholic beverages. In addition the Norwegian consumers have smaller range of products to choose from. Important explanations for this picture are high cost and tax levels as well as high import barriers for agricultural products. Because of the import protection, the volatility in world market prices of commodities will only to a small extent affect commodity prices in Norway.

The Norwegian food markets are small and concentrated at both the supplier and retail level. As in many developed countries, the retail sector in Norway has undergone a significant transformation over the last two decades, mainly driven by economies of scale in retailing. This trend has shifted the bargaining power from suppliers to retailers. When the retailer's increased buyer power is exercised as a countervailing power to achieve better prices and from suppliers, and the savings are passed on to the consumers, buyer power has beneficial effects for consumers.

However, consolidation at the retail level also has the potential to raise horizontal and/or vertical competition concerns. Moreover, suppliers in particular have raised questions of whether there exist unfair trading practices between suppliers and retailers.

Section 2 describes the policy framework as well as recent trends in the food chain in Norway, while section 3 focuses on developments in concentration at different levels of the value chain. Section 4 discusses the enforcement of competition law in the food sector in past few years, focusing on recent cases and how competition law can address issues related to buyer power. Recent sector reviews are also described. Section 5 shortly summarizes the Competition Authority's (the NCA's) advocacy role in the food markets in recent years.

## 2. Trends in recent years

### *2.1 Background – the agricultural policy in Norway*

The functioning of the food supply chain in Norway is closely linked to agricultural policy. Important policy tools are tariffs on a wide range of products[1], an exemption from the Competition Law for agriculture and the determination of prices on a range of commodities set in yearly negotiations between The Ministry of Agriculture and Food and the farmers' organizations. In addition, some of the large suppliers, often with market shares above 50 %, are given the role of regulating the production volume in the market. In some markets and segments large suppliers have lost market shares due to stronger competition from private labels and vertically integrated retailers. However, in other segments and markets, the largest suppliers maintain high market shares above 80 %.

[1] E.g. milk, cheese, meat, grain, fruit and vegetables.

### *2.2 How international commodity prices affect prices in Norway*

The regulations mentioned above may shelter a number of commodity markets in Norway, such as meat, milk, eggs, grain and fruit and vegetables from price shocks in foreign markets.[2] As a consequence, retail prices will not fully reflect changes in world commodity markets for many products in Norway. Nevertheless, Norway still needs to import other products, such as coffee, sugar and spices. For such commodities, price increases on the world market will have a direct effect on Norwegian suppliers' input costs.

Another group of products that could be affected by an international price increase is the so-called industrial processed commodities. In Norway differences in input prices (prices on commodities) between Norwegian and foreign processed products traded in Norway are leveled out through a specific regulation on industrial processed commodities. When prices on such commodities increases on the world market, the subsidy transferred to Norwegian suppliers for using Norwegian commodities in the production process will decrease. Hence, the Norwegian suppliers who benefit from this regulation will face higher prices on commodities when international prices increase.

Moreover, the supply of certain commodities in Norway, such as grain, is not sufficient to meet the domestic demand. Whether increases in prices on grain on the world market will have an effect on the prices faced by Norwegian suppliers, depends on the Norwegian price level on grain compared to the price on the world market. Generally, the price level on Norwegian grain has exceeded world market prices. Under such circumstances there is a tariff on imported grain, and foreign price increases will not affect the Norwegian price level. However, if the foreign price level exceeds the level in Norway, which was the case in 2008, the tariff will be removed and the total effect on prices in the Norwegian markets will among other things depend on the share of imported grain.

In 2009 the NCA did a comparative study of the development in retail prices in Norway and other Nordic countries.[3] The study was done after the world commodity price spikes in 2007 and 2008. On an aggregated level, the retail prices in Norway increased less than in the other Nordic countries. This may indicate that changes in world commodity prices affect retail prices to a lesser extent in Norway than in other Nordic countries.

### *2.3 The monitoring of food prices in Norway*

The Norwegian Agricultural Economics Research Institute (NILF), an independent research institute under the Ministry of Agriculture and Food, monitors foreign and domestic food prices at different levels of the supply chain. Information on the development in prices is published monthly.

### *2.4 Trends in the retail market*

During the last 20 years the retail sector in Norway has grown substantially and expanded both horizontally and vertically. Today there are five grocery retail chains in Norway, see Box 1 for detailed overview of each chain. Each of the four largest chains has its own integrated wholesale business, and there are no independent wholesalers. The grocery retail market is highly concentrated compared to most European countries. However, the concentration is quite similar to the other Nordic countries.

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2 In order to allow Norwegian producers to maintain prices on an appropriate level, a few modifications have been implemented in how tariffs are calculated in recent years. The modifications have resulted in a stronger protection from foreign competition for raw milk and cheese in Norway.

3 The other countries in the study were Sweden, Denmark, Iceland and Finland.

A study[4] from 2011 suggests that the productivity growth in the Norwegian retail sector has been high compared to other sectors. It is likely that the productivity growth could be explained by the consolidation in the market.

Another trend is an increase in private label products. However, even though the market share of private labels varies between different markets and segments, it is still relatively low in Norway compared to other European countries. The overall share was 12.6 % in 2012, increasing from 6 % in 1996 and 9.8 % in 2008.

Discount supermarkets have also continued to expand and increase their markets shares. In 2012 discount chains had a market share of 57.4 %, increasing from 52.7 % in 2010.[5]

Following the increase in concentration at the grocery retail level in Norway, the government has initiated studies on the functioning of the value chain, focusing on the relationship between retailers and suppliers. Based on these studies, a new Act on negotiations and fair trading practices in the grocery sector has been proposed, see chapter 0 and 0 for a closer description of the proposed act. The government has also proposed a grocery web portal to improve the consumers' opportunities for checking assortment, quality and prices.

**Box 1: The retail chains in Norway**

**Norgesgruppen ASA (Norgesgruppen):**

Norgesgruppen is the largest retail chain in Norway. It has different concept stores; discount store chains, convenience store chains, supermarket chains and hypermarket chains. Noregsgruppen owns the chain concepts Meny, Ultra, Kiwi and Kjøpmannshuset. Kjøpmannshuset owns and operates the chain concepts Spar and Joker. Outlets are partly owned by the shopkeeper and operated by franchise contracts.

Through the company ASKO Norge AS, Norgesgruppen is active on the wholesale level.

Norgesgruppen is also active in some supply markets, mainly in the segments of fruit and vegetables, coffee and bakery products.

**Coop Norge (Coop):**

113 cooperatives are owners of the joint organization, Coop. The cooperatives are independent legal entities and owned by the members.

Coop has different concept stores; discount store chains, convenience store chains and hypermarket chains. The stores are named Coop Prix, Coop Extra, Coop Marked, Coop Mega and Coop Obs. Coop is active on the wholesale level through Coop Norge Handel AS, and also active on the supply level, inter alia in the segments of bakery products and coffee.

**Rema 1000 Norge AS (Rema 1000):**

Rema 1000 is owned by Reitangruppen. Reitangruppen is a vertically integrated operator that operates both distribution and retail of groceries through service trade and grocery stores. Business includes Rema 1000 in Norway,

4 "Produktivitetsutvikling i leveringskjeden for matvarer" in "Dagligvarehandel og Mat 2011", Ivar Pettersen and Tommy Staahl Gabrielsen (red), Norsk Institutt for landbruksøkonomisk forskning (NILF).

5 Source: The Nielsen Company, 2013.

Sweden and Denmark as well as Reitan Servicehandel. Rema 1000 has only one concept store; discount store chains. This is based on franchise contracts.

Rema 1000 also has business on the supply level, inter alia in the markets of poultry, fruit and vegetables, bread products and in the brewery sector.

**Ica Norge AS (Ica Norge):**

Ica Detalj AS, a subsidiary of Ica Norge, owns and operates the concept stores; Rimi, Ica Supermarket and Matkroken. These cover different segments.

Outlets are partly owned and operated as filial stores by Ica Norge, and partly operated on franchise contracts. Ica is active on the wholesale level through ICA Norge Logistikk AS, and on the supply level through Totenpoteter AS.

**Bunnpris**

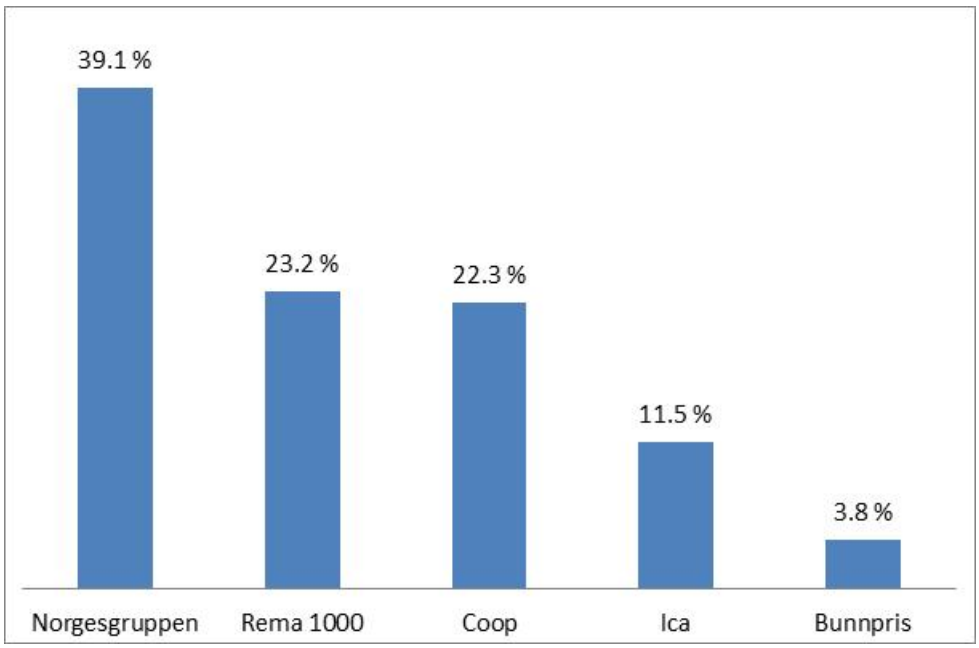
Bunnpris is managed by I. K. Lykke AS. In 2011 Bunnpris had 216 grocery stores in Norway. Bunnpris sources most of its products from Rema 1000.

## 3. Developments in concentration

### *3.1 Retail markets*

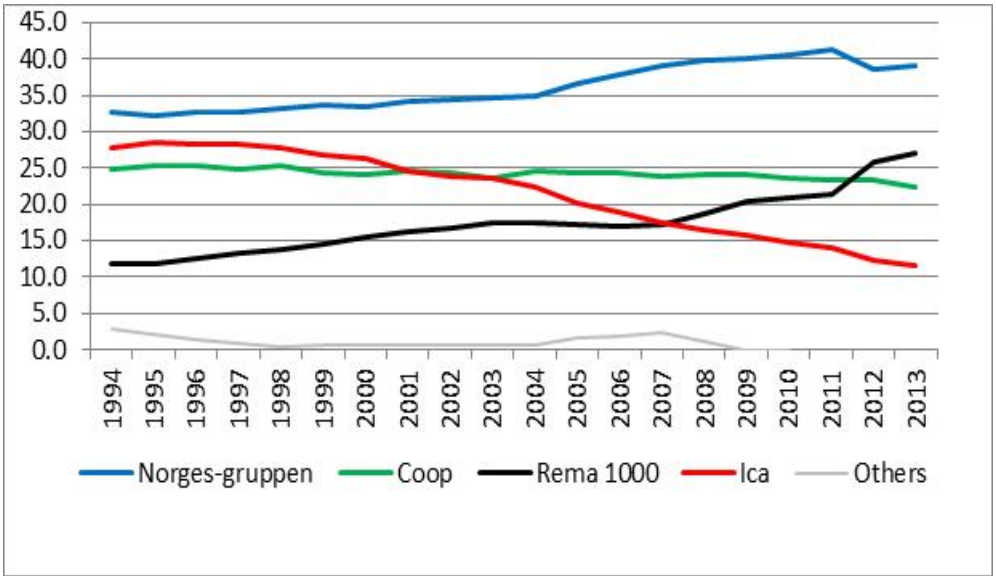
The Norwegian grocery retail market is concentrated compared to most European countries. In 2013 there are five grocery retail chains in Norway. Norgesgruppen is the largest, with a market share of almost 40 %. Rema 1000 and Coop have over 20 % of the market each, while Ica has 11.5 % of the market. Bunnpris has about 4 % market share.

**Figure 1: Market shares retail**[6]




Each of the four largest chains has its own integrated wholesale business. There are no independent wholesalers. The development in concentration in the Norwegian wholesale market is illustrated in Figure 2 below

**Figure 2: Market shares wholesale level**[7]




As Figure 2 shows, Rema 1000 has over a relatively short period of time grown to become the second largest player in the market in 2013. Simultaneously Ica has lost significant market shares from 1994 to 2013. To counter this development, Ica has entered into an agreement giving Norgesgruppen the

6 Source: Dagens Næringsliv and Dagligvarehandelen.

7 Source: NOU 2013:6 and market shares in figure 1.

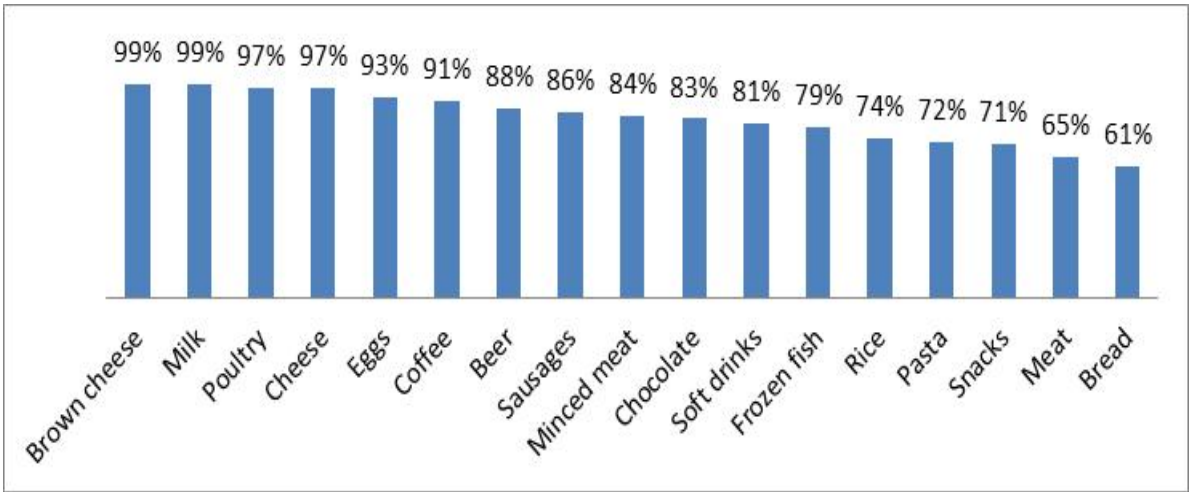
responsibility for purchasing and distribution in the Norwegian market. This agreement will give Norgesgruppen and Ica a combined market share of approximately 45-55 % in the procurement markets. The agreement is currently under review at the Competition Authority in Norway, see chapter 0 below for a description of this case.

A final point relates to the German retail chain Lidl's entry into the Norwegian market in 2004. Their entry in the Norwegian market failed, and Lidl sold their business in Norway to Rema 1000 in 2008. This may indicate that the barriers to entry and expand in the Norwegian retail market are significant, c.f. chapter 0 below.

### *3.2 Supply markets*

The supply side in Norway is even more concentrated than the retail market. A study[8] from 2011 showed that the combined market share for the three largest suppliers in different product groups varied from 61 % to 99 %, c.f. figure 3 below:

**Figure 3: Market shares in supply markets**




The development in concentration varies between different markets and segments. Foreign suppliers might find it challenging to enter small Norwegian markets, in particular if protective regulations are present. The degree of competition will however vary in different markets. High concentration in supply markets may be indicative for dampened competition, high prices and a lower selection of products. Some markets might have a wider geographic scope than Norway. In such markets competition could be stronger than in domestic markets: However, many markets are characterized by dominant domestic producers mainly supplying Norwegian retailers.

For instance, in the dairy segment, the dairy cooperative Tine SA has a high market share in most markets. In the field of dairy production a market regulation system is implemented, leaving Tine SA tasks linked to the regulation of the production volume. Tine SA faces competition mainly from one minor competitor in each segment, and the import of dairy products is limited. The share of private labels varies between different segments, however it is generally low.

[8] The report NOU 2013:6 "Mat, makt og avmakt, om styrkeforholdene i verdikjeden for mat", attachement 12

Some domestic markets have however undergone significant changes in the past few years. One example is in the poultry sector. The market regulation scheme in the poultry sector was revised in 2008, and the cooperative Nortura is no longer the market regulator in this sector.

97 % of the Norwegian consumption of poultry comes from domestic production.[9] Domestic markets are sheltered from import by high tariffs. During the five past years there have been a number of mergers in these markets, both horizontally and vertically. The retail-chain Rema 1000 is now vertically integrated with affiliated chicken-farmers and its own hatchery and slaughterhouse. Two other large suppliers, Nortura and Cardinal Foods, supply the rest of the retail-chains.

In the poultry market there have been significant changes in the market shares in the latter years. Cardinal Foods and Rema 1000 have captured market shares, while Nortura has lost market shares.[10] Moreover, the share of private labels has increased substantially in the product group of fresh poultry, from 18 % in 2008 to 40 % in 2010.[11] At the same time, innovation in the market, measured by the number of new products, has increased.[12]

## 4. Competition in the food sector

### *4.1 Introduction*

The Norwegian Competition Act was revised in 2004. This revision constituted a harmonization with the EC competition rules. The prohibition against agreements that restrict competition as stated by article 101 TFEU and by article 53 of the Agreement on the European Economic area (EEA Agreement) corresponds to the Norwegian Competition Act's section 10. Furthermore, the Norwegian Competition Act's section 11, which prohibits abuse of a dominant position, corresponds to article 102 TFEU of the EC Treaty and article 54 of the EEA Agreement. The merger control regime in Norway is also partly harmonized with the merger control in the EU. A further harmonization of the Norwegian Competition Act with EU will follow with the new revision of the Competition Act in Norway. The newly revised Competition Act becomes effective 1. January 2014.

### *4.2 Exemptions from the competition law*

Section 3 in the Norwegian Competition Act states that the King in Council can decide to exempt from Article 10 and 11 (corresponding to TFEU 101 and 102) to implement agriculture and fisheries policies. This exemption is implemented through a specific regulation.[13] The exemption allows farmers to reduce quantity or fix prices in the market without breaching the Competition Act. The only requirement is that such actions are in accordance with other laws and regulations and/or the agreement between the government and the farmers' organizations.

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9 The report "Mat, makt og avmakt, om styrkeforholdene i verdikjeden for mat", attachement 4.

10 Ibid, attachement 12.

11 Ibid.

12 Ibid, attachement 11.

13 2004.04.23 nr 0651: (FAD) "Forskrift om unntak fra samarbeid mv. innen landbruk og fiske".

### *4.3 Enforcement of competition law and recent cases*

#### *4.3.1 Introduction*

Enforcement of the Competition Act in the food sector has been a priority for the NCA in recent years. The NCA has carried out more investigations in antitrust cases and examined more mergers in the food markets than in any other sector. The NCA has also been active in its advocacy role in these markets, c.f. chapter 0 below. In the following sections some of the most important cases and monitoring actions are briefly presented.

#### *4.3.2 Antitrust-cases*

##### 4.3.2.1 The AC-Nielsen case (2007)

In 2007 the NCA considered intervening in grocery retailers' exchange of weekly price information through the marketing information company AC Nielsen. AC Nielsen provided detailed information on each retailer's prices within a given geographic area. The NCA considered that this reduced uncertainty in the market and contributed to suppressing competition between grocery retailers. After having been presented with the NCA's assessment, the parties themselves chose to amend the practice.

##### 4.3.2.2 The Tine-case (2007)

In 2007 the NCA imposed a fine of 5.5 million Euros on the dairy producer Tine for infringement of the Norwegian Competition Act, section 11, corresponding to article 102. According to the NCA Tine violated the Norwegian Competition Act through its behavior during the negotiations with the grocery chain Rema 1000, resulting in Tine becoming the sole supplier of certain types of cheese to Rema 1000. It was the NCA's opinion that there was a great risk of Tine's sole competitor, Synnøve Finden, could be excluded in the market due to Tine's behavior.

However, a Supreme Court judgment in 2011 reversed the decision.

##### 4.3.2.3 The Norgesgruppen – Ica-case (pending)

In January 2013 Norgesgruppen and Ica entered into a joint purchase and distribution agreement in the grocery market. In April 2013 the agreement was temporarily banned by the NCA. The parties appealed this decision. The decision was upheld by the Ministry of Government Administration, Reform and Church Affairs in July 2013.

However, the parties offered to suspend the joint distribution part of the agreement. Provided these commitments the parties were given the opportunity to implement the joint purchasing agreement.

### *4.4 Mergers*[14]

#### *4.4.1 The Gilde – Prior-case (2007)*

In 2007 a merger between the largest poultry processor and the largest meat processor in Norway was prohibited. It was considered that the merger would eliminate a potential competitor in the market for

[14] In addition to the cases mentioned here, NCA in 2008 cleared a merger in the grocery market between Rema 1000 and Lidl, subject to certain conditions. In the supply market for poultry the Authority in 2007 cleared the merger between Nortura and Hå Rugeri with conditions, while the merger between Findus and Gro in the frozen vegetable market was cleared with conditions in 2006.

poultry and therefore lead to a further weakening of competition in the market for poultry products. The decision was overruled by the Ministry of Government Administration, Reform and Church Affairs, which cleared the merger. The Ministry disagreed with the NCA's opinion that the merger would lead to a weakening of the competition in the market.

4.4.1.1 The Prior – Norgården-case (2006)

In 2006 the NCA prohibited a merger in the market for eggs. The prohibited merger would have strengthened the position of the acquiring party, which already had a 60 % market share prior to the merger. In addition, it would have acquired one of its largest competitors in the market for processing and sale of egg products. The decision was overruled by the Ministry of Government Administration, Reform and Church Affairs, on political grounds.

### *4.4.2 Monitoring in the food supply chain*

In 2005 the NCA decided that the four largest grocery chains are required to notify their annual contracts with large suppliers. The notification requirement implies that the grocery chains must submit their agreements with leading suppliers to the NCA. The arrangement allows the Authority to examine the contracts and assess whether they have adverse competitive effects. As part of this arrangement, the NCA also arranges yearly meetings with the grocery chains where agreements and relevant topics are discussed. In 2010 the NCA decided to extend the grocery chain's obligation to notify until 2015.

The NCA has also established a gross margin surveillance scheme in the dairy sector which came into force on 1 January 2008. The purpose of this scheme is to monitor whether anti-competitive margin squeeze occurs in the dairy markets.

## *4.5 How competition investigations could address buyer power*

In economic theory there is no generally accepted definition of what constitutes buyer power.[15] However, usually the term broadly refers to the ability for a buyer to obtain more favourable terms of trade from its suppliers, either compared to other buyers or to the terms it would obtain under normal competitive conditions.[16] Economic theory predicts that buyer power often has beneficial effects for consumers. This could be the case if countervailing buyer power is used to achieve better prices and terms from the suppliers, and such savings are passed on to consumers. Generally, with sufficiently intense competition on downstream markets, lower prices obtained on upstream markets will be passed on to consumers.[17] Buyer power may also increase output in the upstream markets and thus increase the welfare of consumers in the long run.

However, the exercise of buyer power may also harm consumers. For instance, this may happen through the so-called "waterbed effect".[18] It also seems to be a growing concern that buyer power may have negative welfare effects in the long term. For example, if the exercise of buyer power causes lower profitability for suppliers, this may in certain circumstances induce suppliers to invest less in new products and may lead to a loss in product diversity and quality for end consumers.[19] The European Commission in

[15] C.f. Johansen, 2011.

[16] C.f. Johansen, 2011.

[17] C.f. Commission staff working document, Competition in the Food Supply Chain, 2009.

[18] C.f. Dobson and Inderst, 2008.

a report from 2009 underlines that this aspect "*is taken into account by EC Competition policy when assessing the impact of the exercise of buyer power on consumers. Consumer welfare encompasses prices, diversity and quality*". In its enforcement of the Norwegian Competition Act the NCA applies a similar approach.

### *4.6 Sector reviews in the food chain in recent years*

#### *4.6.1 Introduction*

Since 2005 a great deal of interest and debate has focused on the vertical relationship between retailers and suppliers in the Norwegian food sector. Several reports have been published on the topic.

#### *4.6.2 Payment for shelf space (2005)*

In 2005, the NCA conducted a market survey, "Payment for shelf space", looking at the types of fees and payments requested by retailers from suppliers for allocation of shelf space. It found that this type of payments can be regarded as one of the several means that retailers have to exercise buyer power. If competition between retailers is fierce in downstream sales markets, such fees may be passed on to the consumers in terms of lower prices. However in certain cases such fees, in conjunction with other arrangements, may have foreclosure effects for smaller competitors. The NCA concluded that any ban on shelf fees would have limited effects on competition to the extent that retailers could achieve the same purpose through other tools (volume rebates, rebates for stocking certain products or bonuses on total sales). As a result of potential foreclosure effects, the NCA imposed the obligation upon the four largest retailers (which accounted for more than 99% of the national market) to notify their agreements with approximately 20 suppliers. These suppliers were presumed to be dominant in their respective markets. As such the NCA has been in position to monitor the practical application of such supply agreements.

#### *4.6.3 Food, power and impotence – on the relative strengths in the food chain (2011)*

In February 2010 The Norwegian Government established an Inquiry Commission ("the Commission") to study the power relations in the food supply chain. A central issue in the Commission's work was "*the significance the grocery chains' consolidation, increasing vertical integration and buyer power has had in relation to the exercise of power, use of resources and interests of the consumers*."[20]

The Commission has conducted an extensive analysis of the market conditions in the supply chain for food. As described in chapter 0 above, markets are concentrated at both the retail- and supply-level in Norway. According to the Commission, the consolidation trend has been particularly strong on the retail side, shifting the power from suppliers to retailers. In addition to horizontal consolidation, the retailers have become more vertically integrated.[21]

In conjunction with the high concentration at retail level, the Commission expresses concerns for tacit collusion.[22] The Commission is also concerned about the changes in the balance of power between suppliers and retailers and pinpoints the increased market share of private labels as a source of increased

[20] The powerful and the powerless in the food supply chain, english translation of the report: "Mat, makt og avmakt", chapter 6.

[21] Ibid.

[22] Ibid, chapter 6.1.

buyer power. The Commission also raises the question of whether the increased use of private labels could be detrimental to welfare in the long run.[23]

The Commission is of the opinion that "if the trend in Norway continues at the same pace and in the same direction, where the umbrella chains can more or less unilaterally dictate the terms in agreements, such a development would be detrimental to healthy competition and balanced power relations in the food supply chain."[24] According to the Commission, "[b]alanced power relations in the food supply chain will ultimately both serve the individual consumer and support the development of a robust Norwegian food supply chain. The inquiry commission does not believe it would be possible to remedy the demonstrated distortions and imbalance by issuing instructions and recommendations to actors in the food supply chain. (…). Therefore, the inquiry commission is of the opinion that concrete, compulsory measures need to be introduced to correct the demonstrated distortions".[25]

The Commission recommended numerous measures to address the practices mentioned above. Among these were an act relating to negotiations and fair trading practices in the grocery sector, and the creation of a grocery web portal to help consumers compare prices and quality of products.

#### *4.6.4 Fair trading practices in the food chain (2013)*

In October 2012 the Norwegian Government established a second inquiry commission in the food sector ("The second Commission"). This commission's mandate was to evaluate how the interests of fair trading practices and consumer welfare could be safeguarded in the legislation in Norway. The commission delivered its report in April 2013. The empirical foundation was studies performed by the initial inquiry commission.

This commission put more emphasis on consumer welfare than the former, and found that fair trading practices to a large extent are covered by existing legislation. However, existing legislation is fragmented. Consequently, the commission proposed a new act on fair trading practices in the food supply chain which intends to facilitate efficient negotiations between suppliers and retailers. Efficient negotiations are defined as negotiations that contribute to the maximization of social welfare.

## 5. Public hearings and the NCAs advocacy

The NCA considers the barriers to entry in the Norwegian grocery market to be substantial. The NCA's investigations have revealed that concentration in local markets may be higher than what follows naturally from demographic and geographic structure in Norway.

Several food markets in Norway are sheltered from foreign competition by high tariffs. The use of tariffs to protect Norwegian producers is important to achieve agricultural policy goals. However, a system with tariffs may also increase barriers to entry in the grocery market, e.g. because foreign retail chains could be prevented from importing their own private label products.

In addition, the design and the implementation of the Planning and Building Act may have an impact. Changes in how this law is practiced by municipal and county authorities may encourage increased competition in local markets. In 2008 the NCA advised a municipality to take local competition into

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23 Ibid, chapter 6.5.1.

24 Ibid, chapter 6.4.2.

25 Ibid.

account in the amendment of a development plan. In 2009 the NCA pointed out to a county governor that consumers' welfare should be part of the evaluation of the application of a new supermarket entrant.

Public hearings have been called for the two abovementioned reports mentioned in chapter 0 and 0. The consultative bodies had quite different opinions about what measures was needed to secure fair and effective trading practices in the food supply chain. This is especially the case when it comes to the first inquiry commission's report. In its response to the hearings, the NCA expressed that an act or regulation aimed at possible unfair trading practices must address behavior detrimental to consumer welfare. Hence, the NCA shares the view of the second commission that regulations intended to facilitate efficient negotiations are preferable. The NCA has however emphasized that the enforcement of the proposed Act could be challenging, including challenges related to dual enforcement.

Concerning the initial Commission's approach, the NCA in its response claimed that changes in the balance of power mainly have improved the competitive situation in the food chain. Fewer and stronger retailing groups have served as a counterweight to the supplier's seller power, lowering the prices for retailers. Hence, buyer power at the retail level can be positive for consumers.

In 2011 the NCA examined the grocery chains' profit margins at the wholesale and retail level and performed a qualitative assessment of the competition between the grocery chains. These analyses indicated that competition on the retail level worked relatively well. However, the NCA is worried that the entry barriers are high, not representing a threat to the incumbents in the market in the long run.

The NCA shares the initial Commission's concern that the market conditions in the Norwegian grocery market might facilitate tacit collusion. Potentially, tacit collusion could also be a problem in concentrated markets on other levels of the value chain. Caution must be exercised with respect to measures that increase transparency in these concentrated markets. For instance, in such markets, it is the NCAs opinion that a web portal that allows consumers to compare grocery prices can easily have effects contrary to those intended.

The NCA has given advice in connection with the establishment of a "food portal" aimed at providing consumers with information about prices and quality of products in the grocery market. The NCA supports a portal that does not make it easier to engage in tacit collusion, e.g. by using delayed price information, comparing grocery chains rather than individual products and comparing randomly defined baskets of goods. The NCA will however strongly advise against a portal that will provide a complete and frequently updated set of price data from the different grocery chains, because such a portal may increase the risk of tacit collusion in the market.

The Norwegian government is now considering whether and how this should be followed up.

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NOU 2013:6 "Mat, makt og avmakt, om styrkeforholdene i verdikjeden for mat" (2011)

NOU 2013:6 "Mat, makt og avmakt, om styrkeforholdene i verdikjeden for mat", attachements, (2011).

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# POLAND

## 1. Background

Poland's agricultural sector is fragmented, with the average area of the farm at 10.4 hectares, lower than the EU average of 15 hectares. The overall number of farms was 1.5 million. The Polish food sector generates a positive international trade balance – in 2012 the food sector recorded a 4.3 bln EUR trade surplus, while the overall trade showed a deficit of 10.5 bln EUR. The food retailing sector is also relatively unconcentrated on the national level and characterized by high intensity of competition. The situation in the food processing sectors varies between segments. Most food processing industries are characterized by a relatively low level of concentration. However, an increase in the level of concentration on all levels of the food supply chain can be observed in recent years.

The producer prices of food in Poland are monitored by the Ministry of Agriculture and Rural Development. The Ministry publishes detailed weekly reports through its Integrated System for Agricultural Markets Information (http://www.minrol.gov.pl/pol/Rynki-rolne/Zintegrowany-System-Rolniczej-Informacji-Rynkowej/). The data is collected by the employees of the ministry, the farming advisory centers, the agricultural chambers and from wholesale trading platforms and farmers' markets. Specialized bulletins on poultry, eggs, milk, oily plants, fresh fruits and vegetables, pork, beef and other product groups are available. The purpose of these publications is keeping individual farmers informed about market trends in order to improve production planning and management.

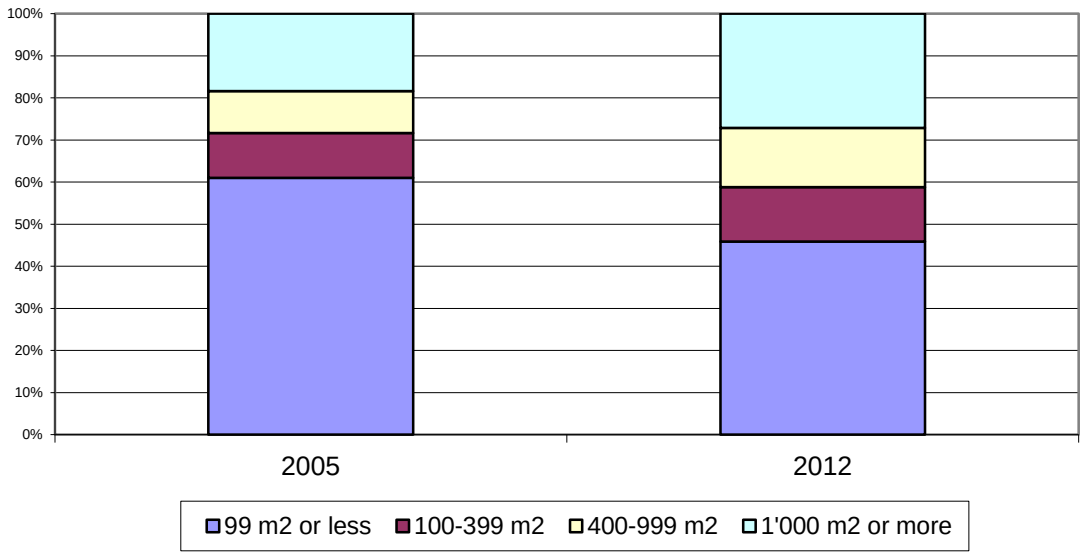
The Polish Main Statistical Office (GUS) publishes monthly data on consumer price index (CPI), together with a breakdown into various food and non-food categories (e.g. baked goods, fruits, sugar, eggs, flour, poultry, pork, beef). The index is calculated based on two sources: prices at retail outlets (current prices quotes) and a longitudinal study of household budgets (basket weighting). The COICOP/HICP classification is used. GUS also publishes monthly data on producer prices of agricultural goods.

## 2. Market structure and main trends in the food retail markets

The overall number of food retail outlets in Poland has remained relatively stable since 2005. However, the average size of the outlet is changing. As Figure 1 below shows, from 2005 until 2012, the share of large outlets (1000 $m^2$ or more) has grown from 17.4% to 27.1%, while the share of the smallest stores (99 $m^2$ or less) decreased from 61% to 45.9%.

**Figure 1.**

**The distribution of retail outlets in Poland, by size (square metres)**




Źródło: *Rynek wewnętrzny w 2012 r.*, GUS, s. 41;

http://www.stat.gov.pl/cps/rde/xbcr/gus/CH_rynek_wewnetrzny_w_2012.pdf; download date 7.10.2013 r.

Competition in the retail food markets plays out mostly between international chains of modern format stores segment (hypermarkets, supermarkets and discount stores – HSD). This segment already accounts for about 60% of the volume of FMCG sales (fast moving consumer goods). More than 10 such chains are currently present in Poland. Among the largest retail chains in this segment are Jeronimo Martins Distribution ('Biedronka'), Metro Group ('Real')[1], Tesco, Schwarz Group ('Lidl', 'Kaufland'), Carrefour, Auchan, E.Leclerc. Some national chains are also present ('Piotr i Paweł', 'Alma', 'Polomarket'). The concentration level in the HSD format on the national level is increasing but remains moderate. The national level C3 index of concentration, calculated on volume shares, has increased by about 2 percentage points from 2007 until 2011 and currently stands at about 55%. The level of HHI has increased by about 150 pts. during that period and is currently below 1600[2].

The increase in the market share of modern outlets (HSD) happens mostly at the expense of small grocery stores. The high intensity of competition within the HSD segment has driven many small stores out of the market. Other stores decided to join one of the growing franchises or partnership chains (such as 'Żabka' or 'abc'). The discount store format experienced the highest market gains in recent years, resulting in continued increase in the share of food sold under private labels (store brands), which reached 21% in 2011[3].

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1 Auchan is planning to take over Real's stores. Merger notification to UOKiK is currently pending.

2 UOKiK's calculations, based on P. Chechelski, *Tendencje zmian w handlu detalicznym żywnością pod wpływem korporacji transnarodowych*; referat z 26.06.2013 r. http://www.ierigz.waw.pl/aktualnosci/seminaria-i-konferencje/1372425479; www.ierigz.waw.pl/download/7988-Tendencje_zmian_w_handlu_detalicznym_zywnoscia__P._Chechelski.pdf; data pobrania 8.10.2013 r.

3 ibidem

The process of consolidation of the food retail sector in Poland still lags behind the other EU states. The main factors that limit the expansion of modern retail outlets are the low level of urbanization (40% of inhabitants live in rural areas, only 22% in cities larger than 200 thousand inhabitants), relatively low income levels and high level of self-provision by farmers as well as high fragmentation of food processing. Difficulties in constructing new stores (access to suitable land parcels, administrative barriers) and consumer preferences (favouring small stores and local products) can also constitute barriers to expansion.

### *2.1 Market structure and trends in food processing*

The food processing sector in Poland is marked by a strong presence of international corporations, which account for over 40% of the production volume. These corporations sell under their own, well recognized brands and often use their own wholesale distribution channels to reach the small grocery stores[4]. The entry of foreign food producers may have a positive impact on the functioning of the supply chain. The opening of a slaughterhouse in central Poland by Pini Group was a strong stimulus to competition in the sector.

A growing trend among national food processing companies is tightened cooperation with one of the retail chains from the HSD segment. Such cooperation usually means that companies focus on producing under a private label (store brand), which allows them to significantly expand production volumes. However, at the same time such producers tend to give up or neglect the development of their own brands, which increases their dependency on the retailer.

The trend towards vertical integration of the distribution channel is visible in the alcohol production sectors (beer and spirits). A producer of beer or spirits was a party to 18 out of 23 mergers involving a food producer and a wholesaler, which were notified to the Office of Competition and Consumer Protection (UOKiK) between 2004 and 2011.

### *2.2 Market structure and trends in wholesale of food products*

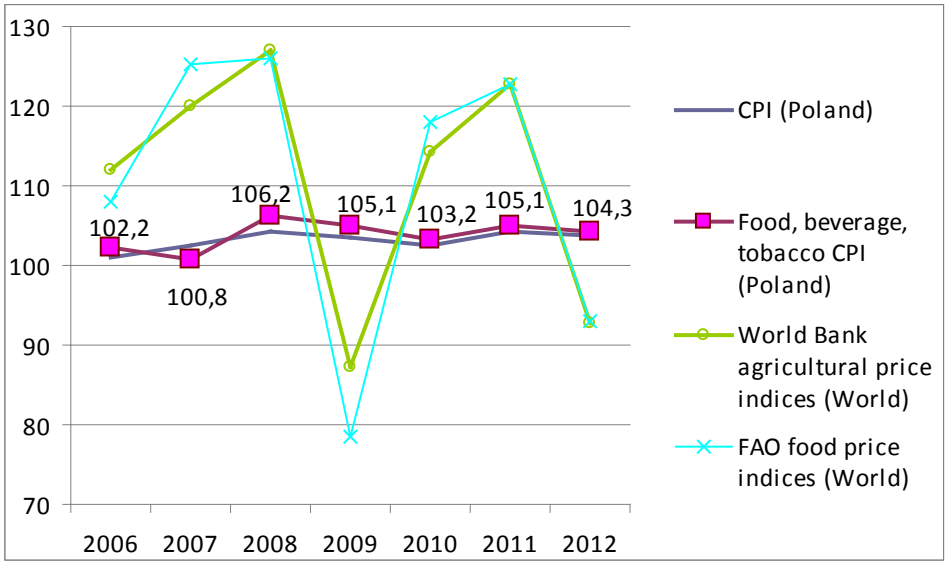
As the share of the volume of sales by the modern retail segment (HSD) increases, the market available to traditional wholesalers shrinks. Part of the market is also being captured by modern logistics centers. This forces traditional wholesalers to put more focus on the HORECA segment (hotels, restaurants, cafes), consolidate their operations or vertically integrate with a producer (especially alcohol or meat producers) or with one of the smaller retail chains. The vast majority of the 150 mergers in the food chain notified to UOKiK during the 2004-2012 period involved at least one wholesaler of food commodities.

## 3. The impact of commodity price spikes

The sharp rise in world agricultural commodity prices has had a moderate effect on retail prices in Poland (see Figure 2) and has not affected the functioning of the food chain noticeably. During the 2006-2011 period, the highest annual rise in consumer food prices (6.2%), which significantly exceeded the overall CPI, was recorded in 2008. The increase by 5.1% in 2011 was close to the overall level of CPI. In 2008, the highest spike (33.4%) was observed in the price of rice, an imported commodity. A strong increase in the price of vegetable oils (18.6%) was caused mostly by increasing demand in the fuel and energy sector.

[4] ibidem

**Figure 2. Year-on-year price indices (nominal)**




Source: Main Statistical Office of Poland, World Bank, FAO.

The decisive factor in agricultural commodity price formation were internal conditions, affecting the level of crops. The increased demand for vegetable oils from the energy sector and the ensuing price rise has positively affected the area under such crops, which stabilised the future prices.

As Figure 2 shows, the sharp swings in producer food prices are not fully reflected in the changes of consumer food prices. It is not clear, however, whether this phenomenon could be attributed to improper functioning of the food supply chain.

## 4. Regulatory issues

Market regulations seem to explain price dynamics in some food commodity groups. For example, the EU policy of improving farm animal welfare (larger cages for hens) has caused an increase in egg prices. The EU's Common Agricultural Policy has an impact on some food commodity pries. In particular, sharp swings in the price of sugar and milk can be attributed to the rigid production quotas.

In Poland, the only national regulations related to the functioning of the supply chain are contained in Article 15 of the Act of April 16, 1993 on Combating Unfair Competition (Ustawa o zwalczaniu nieuczciwej konkurencji). The most important provisions are

- the prohibition of resale below purchase price in outlets larger than 400 $m^2$, if it limits the access of small enterprises to the market (promotional and some special sales are exempt from the prohibition);

- the prohibition of requesting fees for introducing a product for resale, other than a (per unit) retail margin (i.e. the prohibition of imposing shelf fees by retailers).

The provisions mentioned above are aimed mostly at preventing the exercise of market power by retailers in relation with wholesalers and food producers. In practice, the prohibition of shelf space fees has little effect on the functioning of the food chain, as market participants find many ways to circumvent the prohibition. In 2008 the Parliament passed an Amendment to the Act, which liberalized the prohibition of

resale below purchase price, by exempting the issuing of store coupons at prices below the face value. The Amendment was vetoed by the President of Poland.

Polish authorities become concerned with the functioning of the food chain mostly due to complaints from food producers about the low level of wholesale prices and the growing buyer power of retail chains. In 2010 an Inter-Ministerial Team for Increasing the Transparency of Agri-food Markets and Improving the Functioning of Food Chain was created, with the President of the Office of Competition and Consumer Protection (UOKiK) as one of the members. The team prepared a code of conduct for contractual arrangements between food suppliers and food retailers, however, the code was not adopted by market participants. Polish authorities are currently abstaining from unilateral action in the area of food chain regulation. Poland is actively participating in the High Level Forum for a Better Functioning Food Supply Chain[5].

The only exemptions regarding anticompetitive practices in the food supply sector applicable in the Polish jurisdiction are those stemming from Article 42 of the Treaty on the Functioning of the European Union and Regulation 1234/2007, establishing a common organisation of agricultural markets.

## 5. Market monitoring and interventions by UOKiK

UOKiK has not conducted a wide review of the food chain sectors. Several market studies were conducted, focused on specific sectors. The most recent examples are the beer market study and the pork market study.

The beer market **study** was completed in 2013. The inquiry covered all levels of the beer supply chain: beer production, wholesaling of beer and beer retailing with emphasis on the HORECA segment. The reasons for undertaking the study were: (1) high production concentration - the 'Big Three' producers (SABMiller, Heineken and Carlsberg) together account for more than 80% of the market; (2) complaints from small breweries regarding the existence of exclusionary arrangements in the distribution through HORECA segment. (3) antitrust interventions in the beer sector in other EU jurisdictions. The study has not identified major problems with the functioning of the distribution chain. One interesting insight was that small regional breweries were quite successful in penetrating the market in recent years, which increased the variety of beer available in the market.

The pork market study, which focused on the market for purchasing live pigs from farmers, was completed in 2010. The primary motivation for this review were complaints from the Ministry of Agriculture and Rural Development, as well as from pig farmers and their associations, (e.g. the Chamber of Agriculture) about alleged anti-competitive horizontal practices by main purchasers (slaughterhouses and traders), which depressed producer prices of live pigs. The market study identified evidence pricing parallelism by some slaughterhouses, however, there was no evidence that this phenomenon could be a result of explicit collusion. Concentration on the pig procurement market is very low, even in narrowly delineated regional markets. Vertical arrangements between intermediaries and pork processors were also investigated, as well as the functioning of the so-called 'pricing commission' – a potential platform for the exchange of information organised by producer associations. No evidence of anticompetitive practices was found.

There was no increase in the number of UOKiK's interventions in the food sector in recent years, except for the apparent increase in merger decisions, resulting from an increase in merger activity. The issues of buyer-supplier relations did play a role in some of the mergers reviewed by UOKiK. However, so

[5] http://ec.europa.eu/enterprise/sectors/food/competitiveness/forum_food/index_en.htm

far the risk of significant lessening of competition was identified only in relation to horizontal effects in food retailing on local level.

# PORTUGAL

## Executive Summary

The contribution of the Portuguese Competition Authority (PCA) to the OECD Roundtable on the "Food Chain Industry" sets out an overview of the Portuguese "food chain industry", following the October 2010 PCA Report entitled *Final Report on the Commercial Relations between the Large Retail Groups and their Suppliers*[1], as well as later developments. The October 2010 PCA Report identified four main areas of concern directly related to an imbalance in bargaining power between food suppliers in general and large retail groups:

- the unilateral imposition of contract conditions (on top of a pre-set purchasing agreement);
- the unilateral imposition of discounts (sometimes retroactive in nature);
- the imposition of penalties including de-listing;
- the violation of payment terms.

These concerns do not come strictly within the scope of prohibited practices as per competition law, a finding that is in line with similar studies undertaken in other countries of the European Union. Specifically:

- the provisions of the contracts between the two sides do not impede, distort or restrict competition in any substantial way (article 4 of the 2003 Portuguese Competition Law (PCL), now article 9 of the new 2012 PCL, or Article 101 TFEU);
- there is no evidence of abuse of a dominant position, bearing in mind that none of the large retail groups (LRG) has a dominant position (Article 6 of the PCL or Article 102 TFEU);
- although some suppliers only work with one LRG, there is no evidence that equivalent alternatives do not exist, meaning that there is no evidence of abuse of suppliers in terms of economic dependence (Article 7 of the PCL).

Some issues, however, may fall within the provisions of legislation on (individual) unfair trading practices and are therefore under rigorous scrutiny. This point, however, does not detract from the fact that a detailed analysis of the many contracts signed between distributors and suppliers and their follow-up reveal an imbalance in bargaining power, generally to the detriment of suppliers. On the basis of the market study carried out, and the applicable legal framework, both domestic and European, the PCA put forward a raft of recommendations geared at promoting a culture of competition, which could contribute to address the identified concerns and to push for effective action by the authorities that have jurisdiction in the matter, together with an effort by the different operators along the vertical chain to credibly self-regulate their B2B relations.

[1] The full Report is available in Portuguese on the PCA website, as well as an abridged English version. (http://www.concorrencia.pt/vEN/Estudos_e_Publicacoes/Estudos_Economicos/Other/Pages/Final-Report-Commercial-Relations-Between-Large-Retail-Groups-and-Suppliers.aspx?lst=1).

## 1. The October 2010 PCA Report

The Report focused on the business relations between the nine largest retailers operating in Portugal[2] – the so-called large retail groups (LRG)[3] – and their suppliers for most of the "fast moving consumer goods" (FMCG)[4].

This Report was undertaken following an on-going public debate on potential unbalanced commercial relations between LRG and their suppliers and increasing tensions in these relations, resulting not only from the commodity price increases between 2006 to 2008, but also in the aftermath of the 2003 reform of the Common Agricultural Policy (CAP).

In this Report, 'primary production', the upstream activity to suppliers, is only analysed in the sectors where either suppliers are vertically integrated on the production side (*e.g.* large multinationals), or suppliers operate as producers (*e.g.* in the meat, fish, and fruits and vegetables sectors). For these reasons, we refer to "suppliers" or to the "supplying sector" as the overall upstream activity to large firms acting as purchasers in this sector, which include general wholesalers and large retailers.

In turn, wholesalers (Cash & Carry chains and others) act as intermediate suppliers of firms which do not have the dimension and/or the logistical capacity to purchase directly in the upstream supplying sector. These smaller dimension customers are the so-called "traditional retailers", which include, among others, traditional small grocery stores, bakeries, local municipal markets as well as small dimension firms within the HORECA (i.e., Hotels, Restaurants, and Cafeterias) channel.

Hence, in its Report, the PCA addressed the following three stages of the "food supply chain":

1. The upstream supplying activity, whether or not this includes 'primary production';

2. The wholesaling activity of sales to small retailers which do not have the dimension to buy in the upstream supplying sector; and

3. The retailing activity of sales to final consumers.

In particular, wholesalers and LRG compete in the upstream supplying level as buyers, but not downstream. Wholesalers act as sellers to small retailers, and these latter compete with other retailers, including LRG as well as other regional-based retailing chains (see below), on sales to final consumers.

In Portugal, as in many other European countries, wholesalers along with their major customers (traditional retailers) have been showing a decline in both their sales (in volume and value) when compared

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2 The Autonomous Regions of Azores and Madeira have not been considered because of their specific characteristics, partially related to the fact of being archipelagos and relatively small when compared to the Portuguese mainland. Hence, in this note, "Portugal" refers to the Portuguese mainland.

3 LRG – Large retailing groups i.e., retailing chains. There are ten of those in mainland Portugal: Aldi, Auchan (Jumbo and Pão de Açúcar), Carrefour (Dia%/Minipreço small stores network), Continente (Group Sonae), El Corte Inglés, E. Leclerc, ITMI (Intermarché), Jerónimo Martins (Pingo Doce, 49% held by the Dutch Group Ahold), Lidl, and Spar (this one, which opened its first store in Portugal in 2007, was not included in the 2010 Report).

4 FMCG refer to the basket of goods usually found in supermarkets *i.e.*, from general grocery to drinks, meat, fish, fruits and vegetables as well as general household and hygiene products.

with large retailers, and in number of stores. For this reason, rather than considering wholesalers, the PCA Report focused mostly on the commercial relations between LRG and their suppliers in the FMCG sector.[5]

The large retailers which are, along with wholesalers, direct customers of the supplying sector, include large dimension firms within the HORECA channel, regional retailing chains, and the LRG.

Although the Report considered the 9 largest LRG in Portugal, there are actually 10 such LRG. Together, these 10 currently represent more than 90% of total FMCG retail sales in mainland Portugal.

Ranked according to their 2011 annual turnover (in millions €, €M)[6], these LRG are:[7] (i) *Continente* (Portuguese, from the Sonae Group, €M 3779); (ii) *Pingo Doce* (€M 3677) controlled by Portuguese Group Jerónimo Martins (although 49% of its social capital is held by the Dutch Group Ahold), which, apart from the Pingo Doce retailing chain, has one wholesaling chain "Recheio"; (iii) *Intermarché* (French, also called "Les Mousquetaires") with two types of retailing stores in the Portuguese FMCG sector: the discount stores "Netto" and the Intermarché/Ecomarché super/hypermarkets, with a 2011 annual turnover of around €M 2800; (iv) *Auchan* (French, €M 1659); (v) *Lidl* (German, €M 1175); (vi) *E. Leclerc* (French, around €M 1060); (vii) Carrefour through its '*Dia%/Minipreço*' small stores network (French, €M 897) [8]; (viii) *Aldi* (German, €M 62); (ix) El Corte Inglés (Spanish, around €M 95 in the FMCG sector); and (x) *Spar* (Dutch, €M 44).[9]

As opposed to traditional retailers, LRG along with general wholesalers, have a large network of small to large dimension stores and the entire network buys, in general, as a single unit through a specific purchasing centre, from the different suppliers. Their large dimension, as well as the fact that they centralise their purchases, allows these groups to have a much higher buyer/bargaining power over their suppliers than traditional retailers.

Also as a consequence of their high buyer power, LRG tend to be more price competitive in downstream sales to final consumers than traditional retailers. This partially explains the progressive decline of traditional retailers when compared with LRG, as well as the decline of wholesalers, *i.e.*, the traditional retailers' major suppliers, when compared with LRG.

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5 Nevertheless, the supplying agreements established with both wholesalers and large retailers do not show significant differences.

6 As referred by the Portuguese Association of Distribution Enterprises (APED, the Portuguese acronym for "*Associação Portuguesa das Empresas de Distribuição*", *cf.* http://www.aped.pt/Media/content/ 348_1_G.pdf). APED includes most of the large retailers operating in Portugal, from the general food sector to the so-called specialized commerce (e.g., furniture, clothing, etc.).

7 The referred turnovers for Intermarché and E. Leclerc refer to PCA estimates based on these Groups' total purchases of FMCG. They are not publicly available (*e.g.*, in the APED ranking) because both these Groups operate as franchising networks, with their respective stores acting independently of each other at the retailing level. In turn, since El Corte Inglés is a network with a much wider retail scope than that regarding FMCG, this Group's turnover in this sector has also been estimated based on its respective total purchases of FMCG.

8 Carrefour's hypermarkets operating in Portugal (except its '*Dia%/Minipreço*' network) were bought in Portugal by the Portuguese Group Continente in the December 2007.

9 As reported by this Group (*cf.* http://www.spar-international.com/media/80988/spar-international-annual-report-2011.pdf).

Actually, the present situation in Portugal suggests that traditional wholesalers' customers which are still present in the market – i.e., traditional retailers and most of the HORECA channel – tend to move their purchases from wholesalers to LRG (see also section IV below).

## 2. Competition Law and PCA Enforcement Powers

Like most competition authorities, the PCA has a limited scope to address business practices resulting from bargaining power imbalances between contracting parties, apart from the so-called "*abuse of economic dependence*", specific to some jurisdictions but which poses difficulties in its enforcement. Instead, and in the absence of evidence of dominant positions held by any LRG, most of these practices fall under specific sector regulations – e.g. 'individual unfair commercial practices' - , which do not require the occurrence of 'harm to competition', as competition law does. In turn, on economic grounds, it might be conceptually difficult to define what one ought to understand by an 'unfair commercial practice' when this refers to the relation between a large buyer exerting its stronger bargaining power over a comparably weaker seller.

In other words, 'unbalanced bargaining powers' between large buyers and comparatively smaller sellers – *i.e.*, between LRG and their suppliers – are, usually difficult to be framed within:

i. Practices which harm competition i.e., which fall within the scope of competition legislation or within the scope of intervention of CAs, notably, those falling under the provisions of "prohibited agreements" or of "abuse of dominance"; and

ii. Practices which may be considered, on economic grounds, as conceptually 'unfair'.

Most of these practices may be better framed within sector specific regulations, or self-regulation codes, namely:

i. within legislation regarding 'individual unbalanced bargaining powers', whereas this 'imbalance' may or not be considered 'unfair' on economic grounds; or

ii. In 'codes of conduct' (i.e., codes of good commercial practices, which the parties, buyers and sellers abide to on a voluntarily basis and may or may not involve some sort of penalties for violations); or even

iii. In legislation regarding concerns on national food security.

In this respect, one way the PCA may intervene in this sector, in particular in order to redress or mitigate the perceived differential in bargaining power between LRG and their suppliers, is either through its regulatory powers – by issuing specific recommendations to the sector or/and to the Government – and/or through its powers in merger control if and when commitments might be offered by the parties as necessary for the clearance of a merger.

### *2.1 Specific sector regulation which falls outside the scope of competition rules*

#### *a) Specific legislation on 'individual restrictive commercial practices' (IRCP)*

In Portugal there is specific legislation on so-called "individual restrictive commercial practices"[10], henceforth "IRCP". This legislation is outside the scope of competition law as it is related to individual

[10] Decree-Law No. 370/93, of 29 October, with the amendments introduced by Decree-Law No. 140/98, of 16 May.

practices between two or more parties without requiring the existence of harm to competition. It addresses commercial practices deemed unfair or abusive, some of which may be relevant when analysing commercial relations relate LRG with their suppliers.

In particular, the IRCP prohibits:

i. "Sales below cost" (Article 3) i.e., that the retailer cannot sell a specific good below the price it effectively paid the supplier for it. The 'effective price' is defined as the 'tabulated price' subtracted from discounts the retailer got from the supplier; and

ii. "Abusive bargaining practices" (Article 4-A) which consider, among others, the imposition from LRG on their suppliers of "[…] payment conditions, selling or commercial cooperation conditions which result in granting an advantage to the purchaser [the retailer] that is either not proportional to the volume of purchases or to the value of services rendered on the supplier's request"11.

Most of the unfair practices between LRG and their suppliers which are possible to detect fall within the "sales below cost" provision. On the other hand, it has been difficult to detect "abusive bargaining practices", mostly due to the reluctance of potential plaintiffs (suppliers) to come forth with enough evidence that could substantiate and support the prosecution of such type of illicit conducts.

The current PCA Statutory Law requires the PCA to carry out the handling of the respective cases' proceedings, adopting decisions, and imposing fines if justified, whereas the Portuguese Authority for Food and Economic Security (or ASAE, the Portuguese acronym for "*Autoridade de Segurança Alimentar e Económica*") is responsible for the investigation of such cases.

This means that, apart from the existing PCA powers on enforcing the national IRCP legislation, the PCA powers over the 'food supply chain functioning' are, in practice, mostly regulatory in nature, by issuing specific Recommendations to the sector or/and to the Government , or in terms of merger control, should the situation arise.

*b) Codes of Conduct or Codes of Good Practice*

Alongside legislation addressing IRCP as well as payments delays and other harmful B2B practices, in many jurisdictions stakeholders have adopted Codes of Conduct or Codes of Good Practice, to which they often abide on a voluntary basis. However, it is the PCA's view that in the absence of enforcement mechanisms (e.g. the existence of an Ombudsman with monitoring powers, the power to enforce compliance and to impose some type of penalties on deviants) they may be deprived of full effectiveness.

That seems to have been the case with the 1997 "Code of the Best Commercial Practices" signed by the Portuguese Industry Confederation (CIP, in the Portuguese acronym) and APED. As the Code's provisions were non-binding, its practical effects have fallen short of what would have been desirable.

11 The translation of the Portuguese Competition Law is a non-binding text and is provided by the Portuguese Competition Authority for information purposes only. While every effort has been made to ensure its accuracy, the only legally binding text is the original Portuguese document, Law No 19/2012, of 8 May, as approved by the Portuguese Parliament. The Portuguese Competition Authority reserves the right to revise any part of this translation as it deems appropriate in the light of comments and suggestions that are made.

## 3. PCA's Recommendations

The October 2010 PCA Report made several recommendations to the Government, stakeholders and an independent entity. These recommendations were mostly related with:

i. The updating of existing legislation, notably, on the required evidence for the IRCP;

ii. The establishment of a successful self-regulatory framework, including a new voluntary Code of Best Practices or Code of Conduct, buttressed by some form of binding power, e.g. the creation of the figure of an Ombudsman, who would be able to collect relevant data from the different parties, especially those in conflict, and take action against violations of the Code[12] ;

iii. To reinforce the importance of the monitoring and the enforcement of the national legislation on IRCP as well as of the new legislation on payment delays, with a special emphasis on the joint work carried out on these matters by ASAE and the PCA;

iv. To promote the regular collection, treatment, and dissemination of statistical data (prices and quantities) along the chain, over its four stages, 'primary production', 'supplying sector', 'wholesaling', and 'retailing', in order to allow for a faster intervention of the responsible public entities, in particular, ASAE and the PCA; and

v. The proactive participation by the competent Portuguese authorities on the work undertaken by European institutions dealing with these issues.

More specifically, in the context of the present topic, the PCA has recommended:

i. The promotion of a competition culture among the major stakeholders' associations (APED, Centromarca,[13] and CIP) in order to improve the sector's self-regulation, notably, by reinforcing the legal binding effect of the APED/CIP Code of Conduct, by improving this Code or by developing a new one, so as to reduce conflicts in the commercial relations between LRG and their suppliers;

ii. For the Government to analyse the possibility of creating new regulation regarding the commercial practices between LRG and their suppliers which do not fall within the existing regulatory framework (the PCL, the IRCP, the sector's self-regulation framework as well as within the legislation on Intellectual Property Rights, on the protection of MDF *vis-à-vis* MDD)[14]; and

iii. The reinforcement of the importance of the monitoring and application of national legislation on restrictive commercial practices as well as of the new legislation on payment delays, with a special emphasis on the joint work carried out on these matters by ASAE and the PCA.

On the follow-up of these Recommendations, one major implementation has been the creation by the Government of a "Platform for the Monitoring of the Relations in the Portuguese Food Chain" (PARCA[15]),

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12 Contrary to the case dealt with by the UK Competition Commission.

13 Portuguese Association of the Major Brands' Stakeholders in the FMCG processing industry.

14 MDF from the French *"marques du fabricant";* MDD from the French *"marques de la distribuition"*

15 From the Portuguese acronym "*Plataforma de Acompanhamento das Relações na Cadeia Agroalimentar*".

in November 2011[16], bringing together all the major stakeholders along the food vertical chain aiming at updating existing legislation and promoting credible self-regulation initiatives so as to address the various concerns identified above.

More to the point, its mission is to "promoting the analysis of the relations in the agricultural [or food] sector, at the production, processing, and distribution levels, with the aim of improving the equity and the equilibrium in the food chain"[17].

Those stakeholders are as follows:

i. The Ministry of Economy;

ii. The Ministry of Agriculture;

iii. The Confederation of the Portuguese Agriculture (CPA);

iv. The National Confederation of Agricultural Cooperatives and of the Portuguese Agricultural Credit;

v. The National Confederation of Agriculture;

vi. CIP;

vii. APED;

viii. The Portuguese Association of the Stakeholders' major brands, in the FMCG processing sector (Centromarca);

ix. The Federation of the Portuguese Food Processing Industry;

x. The PCA, as an observer;

xi. The Directorate General for Economic Activities; and

xii. The Planning and Political Bureau of the Ministry of Agriculture.

The development of a platform available to stakeholders of statistical data on the food chain as a way to promote more transparency in the commercial relations along the food chain, from the upstream primary production level to the supplying and the retailing levels, is also under discussion within the PARCA framework.

One of the outcomes of PARCA is the revision of the previous legislation on IRCP and new legislation on payment terms. The new legislation on IRCP has been already reviewed by the Portuguese Parliament and is now with Government for final revision and publication in the near future.

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16 Common Resolution of the Ministries of Agricultural and of Economic Affairs, No. 15480/2011, of 10 November.

17 Only the Portuguese version of the Resolution which created the PARCA is available and authentic. Translations are our own.

PARCA is now mostly focused on creating a new framework for self-regulation, including a new 'Code of Good Practices' and the possible creation of an Ombudsman's Office, as recommended by the PCA in its October 2010 Report. The members of PARCA will take the "Framework for the implementation and enforcement of the principle of good practice in vertical relations in the food supply chain", published on 25th January 2013, and adopted by several European stakeholders, as a starting point.

One of the most contentious topics that has thus far been and will remain on the future agenda of discussions is the role to be played by MDD's *versus* MDF's, as well as the ever increasing supply of copycats and lookalikes.

## ANNEX: A HISTORICAL OVERVIEW OF LRG'S EVOLUTION IN PORTUGAL

The first LRG in Portugal dated from the seventies, with the opening of the first two hypermarkets in 1970 and 1973 by the former "Pão de Açúcar" group, formerly Brazilian and today controlled in Portugal by the French Group Auchan. The major Cash & Carry chains appeared at the same time, in the years 1972-1974 for the supply of traditional retailers (small stores) in auto-service.

This expansion saw considerable increase in the 80s with the opening of new hypermarkets by the Group "Pão de Açúcar" and the appearance of the two largest Portuguese retailers, namely: Continente and Pingo Doce, today the two largest FMCG retailers in Portugal which, altogether, control around 45% of total FMCG retail sales in Portugal.

In turn, the first discount stores appeared in the 90s, first by Lidl (in 1990), then by Dia%/Minipreço (controlled by Carrefour), by the "Netto" stores controlled by the Group Intermarché (also called "Les Mousquetaires"), by the "Plus" stores of the German Group Tengelmann in 2001 – bought in April 2008 by Pingo Doce –, by the Dutch Group Spar in 2002, and by Aldi in 2006.

These discount stores intensified the competition between LRG in Portugal. Hence, in order to become more competitive amongst themselves and with respect to traditional, smaller dimension retailers, these groups started developing in other dimensions, with the most relevant being:

i. The creation of "purchasing centres", buying a single unit from suppliers, thus benefiting from stronger buyer power;

ii. Intensifying their investment in the opening of smaller dimension stores (mini to supermarkets) rather than on hypermarkets,[18] located in urban areas, in proximity with traditional retailing stores; and

iii. More recently, since the appearance of discount stores, on the development of their own private labels (MDD, from the French "*marques de la distribution*" i.e., private or own brands), mostly, produced by their own suppliers, in competition (for shelf-space) with the latter's own brands (MDF, from the French "*marques du fabricant*" i.e., manufacturers' brands).

These new strategies enabled LRG, on the one hand, to reinforce their buyer power vis-à-vis their suppliers – i.e., on the upstream side of the market – also through some sort of "vertical integration" in the context of (horizontal) competition between MDD and MDF for LRG's shelf-space and, on the other hand, to reinforce their higher price competitiveness both downstream vis-à-vis traditional retailers and at the intermediate market level vis-à-vis general wholesalers.

This evolution is confirmed by data from Nielsen which shows that the market share of hypermarkets in the Portuguese sales of FMCG evolved from 35% in 2000 to 26% in 2008. Instead, supermarkets' market share in this sector evolved from 44% in 2000 to 60% in 2008, being expected to have further risen since then. In turn, the market share of traditional grocery stores declined from 11% in 2000 to 5% in 2008 and do not show any tendency of having increased.

[18] Although the move from hypermarkets to smaller dimension stores was also related with more restrictive legislation criteria, implemented in the nineties but abolished, in part, in 2004 as well as with less land availability in the periphery of urban centers.

According to PCA estimates, including those referred to in our October 2010 Report, which covers up to 2008, the overall market share of these ten LRG in the Portuguese FMCG retail sales has evolved from around 70% in 2000 to 85% in 2008, and, according to more recent estimates, to more than 90% in 2011. The global sales of the groups in this sector represented, altogether, around €M 7200 in 2002, €M 10,000 in 2008 and more than €M 15,000 in 2011 (see Table 1 below).

The overall concentration in the sector – as measured by the respective HHI level – also shows a growing tendency, having evolved from 1071 in 2002 to 1492 in 2011, although this latter value is quite close to the common 1200 (European) threshold of a moderately concentrated market.

However, the cumulative market share of the two largest retailers (C2) in Portugal – Continente and Pingo Doce (as highlighted in Table 1) – also shows a growing tendency, from 36.7% in 2002 to 44.4% in 2011, quite close to half the market and of the total of the 10 LRG (48.7%).

Some additional notes regarding Table 1 below:

i. The values for the period 2004-2008 come from the October 2010 PCA Report whereas the estimates for 2011 are based on more recent data as well as on the data referred in paragraph above;

ii. The data for the Dutch Group Spar is only available for 2011, as reported by this Group;

iii. Data for the German Group Plus (Tengelmann) is only available up to 2008, with the respective stores in Portugal having been acquired by "Pingo Doce" in April 2008; and

iv. The decline of Carrefour's sales occurred between 2007 and 2008 is mostly due to the acquisition of these Group's hypermarket by the Portuguese Group Continente in December 2007.

**Table 1 – LRG's shares in the global retail sales of FMCG in Portugal (mainland), in value (€M) and in % of the total, together with these Groups' concentration in the sector (IHH) and their cumulative market share, of the 2 largest (C2) and of the 4 largest (C4), from 2004-2008 as well as an estimate for 2011**

| | 2004 | | 2005 | | 2006 | | 2007 | | 2008 | | 2011* | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Value | % Total | Value | % Total | Value | % Total | Value | % Total | Value | % Total | Value | % Total |
| TOTAL | 9,346 | 100.0% | 9,651 | 100.0% | 10,221 | 100.0% | 11,542 | 100.0% | 12,154 | 100.0% | 16,800 | 100.0% |
| LRG | 7,264 | 77.7% | 7,691 | 79.7% | 8,297 | 81.2% | 9,652 | 83.6% | 10,276 | 84.6% | 15,316 | 91.2% |
| Aldi | 0 | 0.0% | 0 | 0.0% | 6 | 0.1% | 14 | 0.1% | 25 | 0.2% | 62 | 0.4% |
| Auchan | 887 | 9.5% | 876 | 9.1% | 881 | 8.6% | 859 | 7.4% | 913 | 7.5% | 1,659 | 9.9% |
| Carrefour | 804 | 8.6% | 834 | 8.6% | 980 | 9.6% | 1,282 | 11.1% | 829 | 6.8% | 897 | 5.3% |
| Continente | 2,009 | 21.5% | 2,098 | 21.7% | 2,206 | 21.6% | 2,362 | 20.5% | 2,880 | 23.7% | 3,779 | 22.5% |
| E. Leclerc | 107 | 1.1% | 129 | 1.3% | 168 | 1.6% | 269 | 2.3% | 337 | 2.8% | 1,060 | 6.3% |
| El Corte Inglés | 54 | 0.6% | 59 | 0.6% | 78 | 0.8% | 88 | 0.8% | 89 | 0.7% | 95 | 0.6% |
| Intermarché | 980 | 10.5% | 1,099 | 11.4% | 1,121 | 11.0% | 1,636 | 14.2% | 1,676 | 13.8% | 2,868 | 17.1% |
| Lidl | 935 | 10.0% | 1,031 | 10.7% | 1,105 | 10.8% | 1,145 | 9.9% | 1,207 | 9.9% | 1,175 | 7.0% |
| Pingo Doce | 1,424 | 15.2% | 1,488 | 15.4% | 1,652 | 16.2% | 1,872 | 16.2% | 2,253 | 18.5% | 3,677 | 21.9% |
| Plus | 64 | 0.7% | 79 | 0.8% | 99 | 1.0% | 125 | 1.1% | 67 | 0.6% | | |
| Spar | | | | | n.a. | n.a. | n.a. | n.a. | n.a. | n.a. | 44 | 0.3% |
| HHI | 1070.7 | | 1113.6 | | 1134.6 | | 1167.0 | | 1305.5 | | 1491.7 | |
| C2 | 36.7% | | 37.2% | | 37.7% | | 36.7% | | 42.2% | | 44.4% | |
| C4 | 57.2% | | 59.2% | | 59.5% | | 62.0% | | 66.0% | | 71.3% | |

*Source*: PCA estimates and the sources referred in paragraph 0 above concerning what reported for the year 2011.

The PCA has some statistics on the growth of MDD retail sales, but only until 2009 (see Table 2 below).

In real terms of the annual turnover deflated by the harmonized consumer price index, the ten LRG have, overall, also always grown, as opposed to traditional retailers and general wholesalers whose real growth rate has been negative during most years of the current century and, in particular, during the current decade.

**Table 2 – A brief overview of MDD (LRG's private labels) expansion in the Portuguese retail sales of FMCG (MDD & MDF)**

| LRG | Stores | 2004 | 2008 | 2009 |
|---|---|---|---|---|
| Aldi | | | 93.1% | 92.0% |
| Auchan | | 10.4% | 26.1% | 29.5% |
| Carrefour | Dia%/Minipreço | 39.6% | 50.9% | 47.3% |
| | Hipers | 6.8% | | |
| E. Leclerc | | | 11.1% | 11.8% |
| El Corte Inglés | | | 2.3% | 2.2% |
| Intermarché | | | 39.8% | 41.9% |
| Pingo Doce | Feira Nova | 9.9% | 22.7% | 15.2% |
| | Pingo Doce | 26.9% | 51.9% | 61.8% |
| Continente | Continente | 28.5% | 43.4% | 51.0% |
| | Modelo | | 38.3% | 41.1% |
| Lidl | | | 58.1% | 58.8% |
| Tengelmann | Plus | 52.4% | | |
| **Total GGR** | | **21.6%** | **36.7%** | **40.5%** |

*Source*: PCA estimates included in its October 2010 Report.

# ROMANIA

## 1. Background - the main characteristics of food retail trends in recent years

In recent years traditional food retail trade experienced a decrease in the preferences of the Romanian consumers, which reoriented their shopping activities towards large retail chains such as supermarkets or hypermarkets. Thus, on a national level, the weight of traditional trade (in value) decreased from 60% in 2008 to 50% in 2012.

The modern trade sector continued its growth in terms of network development, as more than 200 new stores opened their doors in 2012, with the majority being supermarket outlets, proximity shops or discounter stores. The hypermarket segment recorded slight increases, while the cash and carry segment stagnated.

Unlike certain production markets, food retail is subject to stronger competitive pressure due to the presence of a significant number of competitors. Thus, apart from small and medium sized traditional traders, a large number of big retail chains are present on the Romanian market (Cora, Kaufland, Lidl, Billa, Selgros, Metro, Carrefour, Auchan, Rewe etc.). In the last three years, the market registered both entries and exits of important players (Lidl entered in the Romanian market by taking over the discounter network Plus, Auchan took over Real, whereas Mic.ro, MiniMax şi CDER Interex exited the market) as well as changes in the top 5 retailers, where now Schwarz Group holds top position in total sales.

However, compared to other EU member states, the concentration degree of the food retail sector does not pose major competition concerns, since the five-firm concentration ratio is 30%[1]. During the last 3 years, the Romanian Competition Council (RCC) has analysed only 5 mergers in the retail sector and 6 in the food production sector.

The economic crisis saw the retail networks operating on the Romanian market switching from an aggressive expansion promoted prior to experiencing the effects of the economic crisis to a cautious approach. Only the networks that experienced a solid increase up to the crisis managed to deal with the decrease in cash flow, sales and turnover as well as with the process of consumer reorientation towards articles that are absolutely necessary.

Thus, market studies showed a recent modification in the Romanian consumers' perception towards certain categories of essential products ("More than half of the shoppers who consider that food prices have increased resorted to buying only the essential products and giving up high-priced products in order to meet their budget" - Nielsen - Shopper trends 2012). Such changes could be attributed to the effects of the economic crisis on buyers' incomes, which led to a conservative attitude towards spending.

## 2. Food retail chain – pricing and monitoring

There are several factors that may cause the retail prices not to fully reflect the changes in world commodity markets.

[1] Based on total sales of the biggest retailers, including cash & carry.

In the case of increases in commodity markets, the need may arise to further increase prices for finished products, due to the increase in costs associated to a certain commodity, or the producers' decisions to buffer against perceived future increases by increasing the price slightly more than the necessary amount to cover the increase in the commodity price. Another reason may be that, at the time of the price increase, the producers have a certain quantity of raw materials in stock so that the price increase will not be felt immediately at consumer level. In Romania's case, an analysis conducted by the RCC has shown that, in the case of increased prices at producer/processor level, for certain categories of food products, the retailer absorbs a portion of the price increase, thus alleviating the effect on the final consumer.

In the case of price decreases for raw materials, there seems to be little incentive from the producers' side to lower the prices for certain goods. In highly competitive markets, the functioning mechanisms will automatically lead to a price decrease.

Regarding food prices monitoring, the National Institute for Statistics compiles prices for different commodities, including food products. These prices are published monthly in a statistical bulletin, shown as price indices that have as a base the same month of the previous year.

In July 2010, the Minister of Economy proposed the establishment of a Price Observatory, managed by the Romanian Consumer Protection Authority. The project would have provided to the Romanian consumers price information from 1400 retail outlets, concerning products from the daily basket of consumer goods. RCC has voiced its opinion on this matter, drawing attention to the fact that implementing such a project might facilitate exchanges of information on prices between retailers, which might in turn lead to:

- competitors coordinating pricing policies in order to allocate profit-yielding products between them

- competing stores/chains aligning prices, and not necessarily at minimum levels

The positive impact of such an initiative would be that, if implemented correctly, by reporting daily/weekly on prices for each of the brands in every retail chain/shop, the price observatory might help reduce prices throughout the food retail sector. If wrongly implemented, by reporting only average prices or price intervals, the initiative might not bring any beneficial results for the end consumers. Up until now, however, the site is currently under maintenance and there is no evidence that it was ever functional.

## 3. Competition in the food sectors – enforcement

A productive way of finding where significant barriers to competition exist is by looking at the situation in key sectors of the economy. Against this background, in recent years the food sector has been closely monitored and scrutinised by RCC. Thus RCC initiated sector inquiries, monitored and issued opinions on legislation proposals and other forms of policy initiatives. The food sector was also included several times in the annual reports that RCC elaborates on the state of competition in key sectors of the Romanian economy.

### *3.1 Sector inquiries – retail sector, milk, cereals etc*

#### *3.1.1 Cereals used in the baking industry*

In 2007 RCC initiated a sector inquiry on cereals used in the bakery industry. The inquiry focused on the bread wheat market because it holds a paramount weight in the analysed sector, and because the

conclusions could be easily extended to other markets traditionally or recently included in the sector. Moreover, the wheat storage market was analysed too, since the services provided on this market have a crucial importance in the well-functioning of the whole wheat market, especially by influencing the behaviour of the wheat demand.

Taking into account these objectives, the report of the competition authority highlighted a series of characteristics and specific features of these markets:

- On the bread wheat market and on the wheat storage services sector, the price is formed freely, as a result of the interaction between the offer and the demand, and without the direct intervention of the State

- The market analysis did not identify significant market entry barriers.

- A defining characteristic of the bread wheat market and of the whole agricultural sector of Romania is the disintegration of the agricultural property, which generates a very large number of individual agricultural exploitations (of a very small dimension). This crumbling has a direct impact over the efficiency and the profitability of the sector;

- Another feature of the wheat market is the asymmetry of the bargaining power between the individual agricultural producers - representing the offer - and the representatives of the demand on the market; this asymmetry has a significant influence over the price formation. This situation is relatively similar on the wheat storage market.

- However, a public intervention is not necessary for lowering this asymmetry (if anticompetitive practices are not identified). This is because the only results of such interventions would consist of harming competition and slowing or even blocking the consolidation process of the agricultural property and the effort of making this activity more efficient;

- The price formation on the bread wheat market is strongly influenced by the international markets and by the quotations registered on the external commodities exchange markets.

- The market of wheat storage services has certain significant legal entry barriers justified by the necessity of quality services and the importance of this service in the wheat transactions, taking into account that the storage certificates are negotiable titles on the commodities exchange market.

### *3.1.2 Food retail market*

Tensions in the distribution chain in the food sector were one of the reasons for which in 2008 RCC opened a sector inquiry on the food retail market. The retailers had been accused by the local producers and suppliers to artificially increase the final prices to the consumers due to listing fees and slotting allowances. From an abuse of dominance perspective, this was not the case, as the total modern commerce in Romania represented around 40% of the entire market. The sector inquiry revealed that these fees increased in the last years in Romania, but seemed to be the result of the interaction between demand and supply. RCC could not find anticompetitive practices regarding these fees.

The analysis observed the last segments of the distribution chain (suppliers – retailers – final consumers) and it covered 5 main issues:

- Market analysis;

- "Most Favoured Customer" clause;
- Slotting allowances;
- Category management and the notion of *"Category Captain";*
- Costs and prices situation on the distribution chain, for the most consumed food products.

Also, the main food categories analysed in this investigation were: bread, milk, poultry, pig meat, eggs, wine, processed meat, oil.

The inquiry showed both positive and negative effects of the superior bargaining power. Among the positive effects was the countervailing buyer power that balances the producers' power and increases efficiency. Moreover, due to the fact that the Romanian market is highly competitive, the benefits are transferred to the consumer. The negative effects may show on a longer time period and may appear in the form of forcing the producers to reduce investments in new products, or eliminating brand extensions combined with the strengthening of private labels, or using downstream buyer power to increase prices at consumer level.

No systemic competition problems were identified in the sector. However, RCC identified certain specific issues, concerning vertical commercial relations between certain undertakings. As a result, these findings constituted the grounds for initiating certain investigations on possible price restrictions in the food retail sector.

Main recommandations of RCC resulting from the sector inquiry:

- the elimination of taxes that do not present a visible and immediate connection with the services rendered by the retailers, such as the tax for expanding/modernizing the retail chain or taxes collected for covering in some way the risk of products not being sold.
- Regarding category management, the allocation of shelf space should fall within the tasks performed by the retailer, in order to guarantee equal treatment to all suppliers.

#### *3.1.3 Milk*

RCC launched a sector inquiry in the milk sector in February 2009 and published the Final Report in February 2011. The inquiry analysed the market structure of the milk sector (supply and demand), the specific market mechanisms (i.e. quota mechanism, state intervention), the participants' behaviour and the level of competition on the market. The objectives pursued were set in order to identify the factors that influence milk price formation on this market, as well as the economic conditions having the potential to distort competition.

Due to the structure of the Romanian farms, the national milk production is divided as follows: 40% for own consumption, 36% for direct sale and 22% for processing. Specifically, the production fragmentation leads to a lower bargaining power of farmers, who are forced to accept the price offered by processors.

The conclusions of the sector inquiry Report reflected the impact of the EU agricultural policy on the functioning of the milk sector in Romania. Subsequently, the report concludes on the relevant factors having an impact on the sector, i.e. the asymmetry of the bargaining power among parties, the role of contracts and the price transparency.

As regards the asymmetry on bargaining power, the Report highlighted the difference existing between Romania and other EU member states, where milk producers are also in many cases shareholders in processors' firms, being vertically integrated. This situation largely avoids conflict among producers and processors. In Romania, this structure is difficult to set as the processors are private companies having a sole or controlling shareholder.

The Report also pointed out that the issue of imbalances of bargaining power is subject to discussions at EU level. In this context, the Report recalled that in the framework of the ECN Joint Working on Milk, the national competition authorities have not opposed to the adoption of codes of conduct / best practices by undertakings in the milk sector. Such codes could provide certain technical criteria for the conclusion of contracts between producers and buyers/processors, but they should not lead to the standardization of the content of the contracts, thereby limiting the freedom of contract, nor constitute an additional barrier for the free negotiation between parties. In its assessment of the price transparency, the Report pointed out that a high degree of price transparency may lead to price alignment at the lowest level (reference price), having anticompetitive effects in the detriment of producers.

The recommendations made in the sector inquiry Report refer to the legislative framework (in order to complement the national law on the types of associations in the agricultural sector with national competition rules applicable to this sector), market mechanisms (i.e. milk quota, milk traceability and state intervention) and correction of the asymmetry on bargaining power (i.e. framework contract).

### *3.2 Investigations*

In May 2007, CC initiated an investigation on the bread market, for a potential infringement of art. 5 of the Romanian Competition Law (the equivalent of art. 81 of the Treaty) following some increases in bread prices. As a result, in 2009, 48 bread producers and an association were sanctioned for fixing selling prices in some counties in Romania:

- the Association of Traders and Depositaries of Wheat was fined for taking an anticompetitive decision which sought to influence the competitive behaviour of its members and for the restriction of competition on grain storage services market by transmitting levels of tariffs to be applied by its members.

- 31 bread producers in Vrancea County were fined for price fixing on the bread market in that county. The 31 producers decided and raised prices for white bread up to 2,1 lei/kg in the same day. RCC had evidences regarding a meeting where the producers decided to act in the same way and some declarations of the producers present at the meeting.

- 17 bread producers in Maramures County were fined for price fixing on the bread market. The decision was taken during a meeting of the association where the producers set a minimum price level for bread.

In 2011, RCC fined Interfruct (supplier), Albinutza Shops and Profi (retailers) for an agreement of setting resale prices on the retail market for fruits and vegetables in Bucharest.

As mentioned before, as a result of the food retail sector inquiry, RCC opened 4 investigations regarding the possible infringement of the provisions of European Treaty and of the Romanian Competition Law by some cash & carry chains, hyper/supermarkets and some of their suppliers of food products. The investigations target possible anticompetitive agreements between the retailers and their suppliers, concerning setting the sale or resale prices, with the potential of causing harm to end consumers.

In 2013, RCC has opened another two investigations in the food sector:

- regarding a possible infringement of the Competition Law by the Romanian Employers' Association of Dairy Industry (APRIL) and its members for possible agreements on the dairy collection, processing and marketing market and

- regarding a potential price cartel on the market for acquisitions of cereals.

Within these investigations dawn raids were conducted at the headquarters of the investigated undertakings. The documents found in the dawn raids are still under scrutiny and the procedures are still on-going.

## 4. Policies affecting the functioning of the food supply chain and advocacy

### *4.1 Points of view and recommendations on legislative and regulatory initiatives*

RCC involved itself actively in modifying the legislation in the field, issuing points of view or recommendations.

One example is the annulment of the Government Decision for the approval of criteria for establishment of retail structures with large area and definition of selling structures typology. The respective normative act stipulated that a committee was to be set up in order to issue permits for placing a large retail outlet based on some criteria such as competition around the outlet, price etc. The committee was to be comprised of representatives of the public administration, Chamber of Commerce and competitors active in the area where the outlet was due to be opened.

Ever since the apparition of the Decision, RCC has sent numerous letters stating that the regulation should be abrogated. The competition authority pointed out that such a solution that exceeds the provisions of Competition Law may lead to unjustified protection of existing undertakings, contrary to the principles of market economy and free competition.

The abrogation of GD no.1454/2004 was also necessary having in view the requirements of the Emergency Ordinance no.49/2009 on freedom to establish the service providers and freedom to provide services in Romania and of the European Directive on services in the internal market ("the Directive").

The authorization regimes are the most common formalities applied to service providers in member states and constitute a restriction of settlement freedom, as it was constantly admitted by the European Court of Justice (ECJ)[2]. However, the Directive sets a list of requirements that the member states cannot impose either for the access to a service activity or for providing it. Requirements in question are considered either discriminatory or restrictive and therefore cannot be maintained in national legislation. In many cases, CEJ ruled that they are incompatible with the TFEU.

Based on ECJ's jurisprudence, the economic reasons (i.e. the protection of certain types of companies, maintaining a certain market structures cannot justify the restrictions of fundamental freedoms on internal market, including freedom of establishment. Moreover, the Directive requires member states to eliminate from the national legislation the requirements that provide the intervention of competitor undertakings in adoption of the individual decisions by the competent authorities. This type of requirement is contrary to the aims of the TFEU to ensure objective and transparent procedures and can impede the entry of

[2] See ECJ Decision of January 22, 2002, Canal Satellite, Cause C-390/99

newcomers. The prohibition laid down in the Directive includes cases where the competitors are part of a body that is consulted on individual authorization applications of certain undertakings.

In 2012, the Decision was merged with the Government Ordinance no 99/2000 concerning the sale of goods and services on the market, and the committee was finally abolished in June 2013.

However, Ordinance no. 99/2000 also forbids selling below costs and provides that discount sales should take place only in two pre-set periods of the year. RCC recommended constantly in the last years that selling below costs should be abolished. It has an anticompetitive character and leads to minimum prices for the consumers. Also, RCC recommended the elimination of the pre-set periods for promotions/sales.

RCC has also issued several notes of advice and points of view for other legislative proposals that could have affected the functioning of the food supply chain, such as the "Buy Romanian" initiative, the obligation to display costs at the retail shelf, the "10% Romanian products in retail shops", or the payment terms proposal.

There have been also changes in the policies directed at the sector. For example, a Code of Practice was issued in 2008. The main purpose of the code was to ensure normal commercial practices between suppliers and retailers. The Code's provisions included general recommendations with regard to relations between retailers and suppliers. Subsequently, the provisions of this Code were transposed in the national legislation through Law no. 321/2009 regarding the commercialization of food products. The law had several provisions that were of interest to the RCC:

- It forbade the retailer to require to and charge the supplier with the payment of services with no direct connection with sales activities, or with the payment of services related to the extension of the trader' distribution network, arrangements of sale spaces or actions and events conducted to promote the activities and image of the trader. RCC welcomed the elimination from the contracts of those provisions concerning payments to be made by suppliers, with no direct connection with the object of the contract, to protect the consumers' welfare and to maintain a normal competition environment for all resellers

- It set payment deadlines for specific food products. RCC stated that payments terms must be negotiated by the parties and therefore they should not be set by law.

- It forbade the use of the *"most favoured customer clause"* in the contracts between suppliers and retailers. *Most favoured customer clause*, also called the anti-discrimination clause, or MFN clause („Most Favoured Nation"), is a promise of a party, e.g. a supplier, to deal with a buyer (retailer) just as it treats its best customer. Named for their use in international trade agreements, most MFN provisions provide that a seller will reduce the buyer's price for a product or service if it charges a lower price to any other buyer during the term of the agreement. While such clauses may be viewed as procompetitive, since the lower price may help the buyer lower its price, or at least remain competitive with other customers, and help to reduce transaction costs of the negotiation, the primary reason for our concern was the possible anticompetitive effects of MFN clauses when used by firms with a large share of the market. The potential effects identified included raising barriers to entry by new or smaller firms and raising rivals' costs. MFN clauses may also act as a disincentive for sellers to offer discounts, since they will require the seller to provide the same discount to all buyers. Therefore, RCC approved the provision.

- Given the amount of interaction between the retailers that the provisions of the law created the conditions for, RCC warned also that it is essential to avoid setting up of a platform to exchange

information, which could facilitate the transfer of sensitive data amongst parties, in the detriment of free competition.

### *4.2 Other advocacy initiatives*

As mentioned before, since 2009 RCC took upon itself to elaborate and publish a yearly report that analyses competition in key sectors of the Romanian economy, and food retail sector was featured in several of these reports (2009, 2011, and 2012). This initiative is a first step in developing a more active cooperation between all decision makers and social partners. The aim is to raise their awareness on the fact that the course of the economy towards competitiveness and performance involves observing the legal rules, deference for the business partners, and, in the first place, for the principles of functional free market. The publication of these reports was always accompanied by public debates, press conferences and public conferences. These events were opportunities for all the stakeholders and actors on the food retail market to meet, express their concerns and propose solutions for the problems and issues identified in the RCC reports.

Moreover, representatives of RCC participated in a large number of media events discussing this sector.

# RUSSIAN FEDERATION

## 1. Introduction.

The field of production and distribution of food is one of the fields which is in the purview of the antimonopoly bodies, as the state of this field of the economy is crucial for ensuring Russia's food security.

At present in the world market one may see the exacerbation of the food deficit.

With the Order of the President of the Russian Federation dated 30.01.2010 the Food Safety Doctrine was adopted which presents a summary of official views on aims, tasks, and main areas of the state economic policy in the food safety of the Russian Federation.

In accordance with this Doctrine, the main tasks to ensure the food safety include sustainable development of domestic production of food and raw materials which is sufficient to guarantee the country's food independence, to achieve and to maintain physical and economic accessibility for citizens of secure food products in volumes meeting the rational consumption norms.

One of the criteria of evaluation of the state of food safety is specific weight of the domestic agricultural and fish produce being in the overall volume of goods resources, which have the following thresholds:

- grain – no less than 95%;
- sugar – no less than 80%;
- vegetable oil – no less than 80%;
- meat and meat products – no less than 85%;
- milk and milk products - no less than 90%;
- potatoes – no less than 95%;
- edible salt – no less than 85%;
- fish produce – no less than 80%

On the basis of the tasks provide for by the Food Safety Doctrine, the Ministry of Agriculture of the Russian Federation and the Service for Consumer Rights and Health Protection of the Russian Federation are the federal bodies of executive power, which are in charge of implementation of the state economic policy in the food safety sphere.

At the present stage, the task of the FAS Russia is to improve regulating mechanisms in the agricultural products and food markets towards the creation of the competitive landscape and favorable conditions for competition in the agricultural markets.

The Russian markets of the agricultural produce and food are evaluated as low-concentrated and highly competitive. As a rule, in such markets the change in a product's price is not correlated with the monopolistic activity of economic entities (including the price fixing); and conclusion of anticompetitive agreements is hampered by a big number of alternative sellers. Such markets are open for the interregional and international trade; the number of economic entities holding a dominant position in the regional markets within the meaning of Article 5 of the Federal Law of 26.07.2006 No.135-FZ "On Protection of Competition" (hereinafter referred as the Law on Protection of Competition) is insignificant; in the majority of cases there are no unreasonable administrative barriers of the potential competitors' market access or they are expugnable.

## 2. The Monitoring of Food Prices.

Recurrent "bursts" of prices to food are typical for the agricultural markets. As the Russian legislation does not provide for state regulation of food prices (except for cases determined by the Federal Law dated 28.12.2009 No.381-FZ "On Fundamentals of Regulation of Trade in the Russian Federation", in these cases the FAS Russia and its regional bodies perform a lot of work to determine the reasons for price increase as a result of abuse of a dominant position, conclusion of agreements or performance of concerted actions by food markets participants and as a result of anticompetitive actions of state bodies in order to maintain stability at the agricultural markets.

For the purposes of prevention and suppression of violations of the antimonopoly legislation the FAS Russia conducts the monitoring of prices of socially significant food, in particular in the periods of significant increases as it was done in 2007-2008 and 2010-2011. At that, it is worth mentioning that the price monitoring led by the FAS Russia differs from the "massive" price monitoring by the Ministry of Economic Development of the Russian Federation. The FAS Russia analyzes information received from major manufacturers/suppliers of socially significant food products in respective regions along the entire chain from the manufacturing of agricultural produce, through its processing, to the wholesale and retail distribution.

In 2013, in conformity with the decision of the Interstate Council for Antimonopoly Policy (ICAP) the FAS Russia performed a monitoring of retail prices of the main types of socially significant food products carried by the largest trade chains in Moscow. At that, the share of trade chains encompassed by the monitoring was 20 percent of the retail market of Moscow, which allows considering, that the study has been sufficiently representative.

In the course of that study, the FAS Russia found that retailers had fixed prices of goods sold under their own trademarks, making them lower than prices of the other suppliers' goods, which, according to the FAS Russia, could affect dealings among retailers and manufacturers by way of creating competitive preferences for manufacturers of goods under the chains' trademark.

## 3. Notable Changes over the Past Decade. Enforcement by the antimonopoly authority in the recent years.

One of the significant changes over the last ten years in the food retail is adoption of the Federal Law of 28.12.2009 No.381-FZ "On Fundamentals of Regulation of Trade in the Russian Federation" (hereinafter referred as the Law on Trade). This Law regulates relationship between buyers and sellers in the field of food production and distribution.

The Law on Trade established requirements to information disclosure on the procedure of selection of suppliers by trade chains, to conditions of food supply contracts (time extension, amounts of

compensation) and other requirements to trade chains and food suppliers when making supply contracts and supplementary contracts (Article 9 of the Law on Trade).

Article 13 of the Law on Trade prohibits trade chains and food suppliers to create discriminatory conditions for counter-parties, to impose unfavorable contractual conditions and to perform wholesale trade with the use of a commission contracts or a mixed contract containing elements of the commission contract.

Taking into account such characteristics of a relationship, which were detected in the course of the study on food retail done by the Federal Antimonopoly Service, as a high market power of retail trade chains, unfair behavior of participants in trade, and monopolization of local markets as a result of merger and acquisition transactions, the FAS Russia elaborated antimonopoly rules and requirements in the field of trade, which were adopted by the Law on Trade.

The Law on Trade establishes trade requirements to trade chains and food suppliers and requirements to state and local authorities.

In addition, the Law on Trade was amended with a rather tight norm, which bans for trade chains to acquire new sales premises if the market share may reach 25%. This is done because retail markets are local and inclusion of even 2-3 stores located in one area into one trade chain may significantly affect competition.

**4. Changes in the field of production and wholesale trade.**

It is necessary to note that general tendencies in economic concentration have been preserved, including the obtainment of the absolute control by acquiring shares (participatory shares), powers to determine terms and conditions of business operations, or powers to perform functions of an executive body.

At the same time, from 2004 to 2013, as a result of transactions concluded to acquire assets of economic entities which play on the agricultural markets, changes in economic concentration ratios in separate agricultural commodity markets have occurred.

Nonetheless, in spite of changes in positioning separate market players, including in favor of the market share increase, the agricultural markets remain rather competitive and non-monopolized.

The most significant changes occurred at the markets of sunflower oil, milk and milk products, edible salt, and baker’s yeast.

**Example 1: Sunflower oil market**

Beginning 2006, the group of companies "Yug Russi" (South of Rus) took a leading position at the sunflower oil market as a result of acquisition of oil-extracting plants in the Voronezh Region, an oil and fat plant in Krasnodar, and the Labinskiy oil-extracting plant in the Krasnodar Region, which had been previously owned by the group "Rusagro", then as a result of acquisition of WJ Group's Russian assets, including the Valuyskiy and Chernyanskiy plants for vegetable oils in the Belgorod Region, and of the Nevinnomysskiy oil-extracting plant. Acquisition of new assets allowed "Yug Russi" to reinforce its leading positions; its share exceeded 35%, and the aggregate share of three largest oil producers, such as the group "Yug Russi", the company "Bunge", and "EFKO" exceeded 50%. On that basis, the federal market for refined, deodorized and bottled sunflower oil is a market with a moderate degree of concentration.

**Example 2: Markets for milk and milk products**

Significant changes occurred in the markets for milk and milk products. As a result of the merger of the companies UNIMILK and DANONE, their share in the market considerably increased. At present, the largest players in this market are the companies "Wimm-Bill-Dann", which has recently been acquired by the Company PEPSI, and the united company DANONE-UNIMILK. Their aggregate share of the purchase of raw milk is around 50% at the federal market. In some regions, these groups of people have a share in the market of raw milk for more than thirty-five percent. The group of persons UNIMILK is in Saint-Petersburg, in the Krasnoyarsk and the Perm Regions, the Samara, the Tyumen, the Kemerovo, the Smolensk, the Lipetsk, the Tomsk, the Vladimir, the Kurgansk, the Tver (10 districts) and the Orlov Regions (18 districts). The group of persons "Wimm-Bill-Dann" is in Moscow, in the Voronezh, the Moscow, the Novosibirsk and the Krasnoyarsk Regions.

That transaction was approved by the FAS Russia taking into account the social and economic impact, because the transaction stimulated foreign investments to the milk industry, the extension of assortment of goods and the increase of their quality. In addition, the execution of this transaction allowed ironing out seasonal fluctuations in purchasing prices for raw milk, which has a positive impact on agricultural activities.

At the same time, because, when considering the transaction, the competition authority came to the conclusion that as a result of that transaction certain regional markets may experience emergence or strengthening of a dominant position, it issued remedies in the markets of raw milk and dairy products markets to ensure competition. These remedies, in particular, provide for control over the prices of milk and dairy products and ensure the non-discrimination of suppliers of raw milk in relation to suppliers which are in the same group of persons with the companies listed.

Comparison and analysis of quantitative and qualitative ratios of the milk market structure within the geographical boundaries, which have been identified as regional, inter-regional and local markets, may attribute this commodity market to the market with a weak competitive environment. However, in the Altai, the Kursk, the Irkutsk, the Pskov regions and St. Petersburg the market for raw milk is characterized by developed competition.

**Example 3: Baker's yeast market**

In 2011, the FAS Russia considered the application of Joint Stock Company "Compagnie des Levures Lesaffre" on acquisition of 100% of the charter capital of the Limited Liability Company "Voronezhskie Drozhzhi" (Voronezh Yeast).

Summary results of the assessment of the competitive environment, as well as comparison and analysis of the quantitative indicators of the market of the baker's yeast, led to the conclusion that the commodity market in question, within the boundaries of the Russian Federation is highly concentrated.

After the transaction on acquisition by Joint Stock Company "Compagnie des Levures Lesaffre" of 100% of the shares in the charter capital of the Limited Liability Company "Voronezhskie Drozhzhi" (Voronezh Yeast) the share of the group of persons of Lesaffre was 56.6% in the Russian Federation in the baker's yeast market.

Despite the fact that the transaction could lead to a dominant position of the group "Compagnie des Levures Lesaffre" in the baker's yeast market, the FAS Russia approved the transaction taking into account the company's plans for reconstruction and modernization of production and the launch of new consumer products. In that case, the FAS Russia requested behavioral remedies.

In all mentioned cases, upon consideration of applications, the FAS Russia issued remedies to ensure competition.

### *4.1 Changes in the sphere of retail trade*

Trade is a complex and strategic sector of economy, the development strategy of which should ensure the balance of goals of interested groups. Such groups include state, consumers, and entrepreneurs in the trade sphere.

Over the last years, in the sphere of retail trade, there was the growth of the number of retail trade chains characterized not only by development of Russian companies, but also by foreign retailers coming to the Russian market. The strengthening of the activity of foreign trade chains led to the number of transactions on merger and acquisition among Russian market players.

A high extent of competition among trade chains for a limited number of commercial space which is relevant to trade chains mainly which work in the format "supermarket" and "neighborhood store", led to new formats of trade, such as hypermarkets. (A hypermarket is a trade company which sells food and non-food products of universal assortment predominantly in the form of self-service, is a trade space of 5,000 $m^2$ (State Standard R 51773-2009 "Trade services. Classification of trade companies"). Taking into account the characteristics of a hypermarket as a big space, the maximum assortment of goods, and low prices, the geographic boundaries of a hypermarket are significantly broader, then those of the stores of the formats "supermarket" or "neighborhood store".

As a rule, hypermarkets are located in administrative centers of subjects of the Russian Federation – no more than one trade object within the boundaries of an urban district (except for the federal cities of Moscow and Saint-Petersburg). Development of trade chains of the "hypermarket" format occurs via the opening of trade objects in new subjects of the Russian Federation, which makes trade chains master new markets and develop new logistics.

The model of development of trade chains as franchising becomes more and more popular. The trade chain X5 Retail Group (stores "Perekriostok", "Pyaterochka", and "Karusel'") uses franchising very actively.

One of the factors, which has impact on the increase of the number of trade chains and consolidation of trade chains, the improvement of technical equipment and efficient organization of the logistic chain, is the increase of requirements of consumers to the quality of services provided by trade chains, assortment, quality, and prices of goods.

### *4.2 Law enforcement*

During 2012-2013, for the purposes of ensuring the implementation of provisions of the Law on Trade to implement the instructions of the President of the Russian Federation and the Government of the Russian Federation, the FAS Russia and its regional offices conducted the monitoring of the implementation of provisions of the Law on Trade.

Since the entry into force of the Law on Trade (January 1, 2013) the FAS Russia revealed 1,129 violations of the provisions of Article 9 of the Law on Trade.

In this case, the antimonopoly bodies did not initiate administrative cases in relation to 999 violations because of the expiration of bringing to administrative responsibility.

The violations, which are most frequent, are the ones of the provisions of Article 9 of the Law on Trade, in which an economic entity engaged in trade activities and (or) a goods supplier:

- include in the price of the supply contract a remuneration paid to the economic entity engaged in trade activities, as it buys from the goods supplier a certain quantity of food products in the amount of not exceeding 10 percent of the price of obtained food products. The violation is also the payment of such remuneration because the economic entity engaged in trade activities obtained some types of socially important food products provided for by the List approved by the Government of the Russian Federation;

- establish terms of payment in the supply contract which exceed the terms provided for by the Law on Trade;

- include conditions in the supply contracts which provide that an economic entity involved in trade activities shall exercise particular actions with regard to the supplied food products, render services for advertising the goods, marketing and similar services aimed at promoting food products.

In 2010-2013, the FAS Russia and its regional offices initiated 405 cases on violation of the antimonopoly legislation because of violations under Article 13 of the Law on Trade.

Paragraph 1 of Part 1 of Article 13 of the Law on Trade (creation of discriminatory conditions) is the most frequently and effectively applied provision.

**Example 4: Market for fish and fish products**

The FAS Russia considered the case on the violation by "METRO Cash and Carry", LLC, of Paragraph 1, Part 1, Article 13 of the Law on Trade (creation of discriminatory conditions for suppliers of fish and fish products).

By the results of consideration the following decision was taken:

1. to declare the actions of "METRO Cash and Carry", LLC, (creation of discriminatory actions for 65 suppliers of fish and fish products by establishing the price of the agreement of the paid services as a percentage of the total price of the goods delivered under the delivery agreement and by collecting different payment for the same volume of services in comparison with other suppliers of fish and fish products) as a violation of Paragraph 1 Part 1 of Article 13 of the Law on Trade.

2. to issue to "METRO Cash and Carry", LLC, the instruction on termination of discriminatory conditions and actions aimed at ensuring competition.

Within this case the FAS Russia proves a discriminatory character of services rendered by "METRO Cash and Carry", LLC, to 65 suppliers of fish and fish products. Also, the FAS Russia established the disproportion between the costs of services and the actual costs and the inability to trace the efficiency of services provided by "METRO Cash and Carry", LLC, to suppliers of fish and fish products on promotion of the goods.

From 01.08.2010 to 30.06.2011, only suppliers of fish and fish products paid "METRO Cash and Carry", LLC, more than 580 million rubles for three types of services.

Upon review of the case of violation of the antimonopoly legislation against "METRO Cash and Carry", LLC, 65 administrative cases were initiated and examined under Part 1 of Article 14.40 of the Code of the Russian Federation on Administrative Offences. Upon review of 63 of the cases decisions on fines in the amount of 126 million rubles have been handed down.

Also, the most frequently reported violations of the provisions of Paragraph 1, Part 1, Article 13 of the Law on Trade are, as follows:

- establishment of different interest of benefit payments to suppliers of similar goods;
- provision in the supply agreement of the supplier's right to unilaterally terminate the delivery contract with the buyer in the case of trade in similar goods;
- establishment of different penalties in contracts with suppliers in relation to similar goods;
- establishment of the cost of marketing services as a percentage of the goods supplied;
- establishment of various prices of marketing services in contracts with suppliers of similar goods.

According to the results of the inspections by the regional bodies over 2012-2013 the FAS Russia initiated 109 cases of violations of the provisions of Article 15 of the Law on Trade.

The most frequently reported violations of the provisions of Article 15 of the Law on Trade are, as follows:

- adoption of legal acts establishing:

1. unreasonable restrictions of economic entities' rights by establishing requirements on agreement of a working pattern and assortment of goods with the unit for the consumers' market of the City Administration;

2. the unreasonable broadening of a list of documents submitted for the purposes of conclusion of an agreement for rent of a trade space;

3. discriminatory conditions of performing operations depending on whether the economic entity has indebtedness in uniform tax on imputed income;

4. restrictions of beer and beer based drinks sales in the territory of the city;

5. rules of trade in the commodity market that are different from analogous rules established by the Federal Laws and other legal acts;

6. restrictions for economic entities when selecting counteragents;

7. discriminatory conditions when affirming the scheme of location of non-stationary objects of small networks and consumer services;

- forcing businesses engaged in trade, selling goods at prices determined by the executive authorities of the Russian Federation.

During the enforcement the antimonopoly body has difficulty applying the rules of the Law on Trade, in relation with which the FAS Russia has drafted amendments to this Law.

With regard to the relationship of manufacturers and wholesale distributors, recently antimonopoly authorities have not considered cases of violation of the antimonopoly legislation in this area.

## 5 Other factors determining the functioning of the food chain. Other policies affecting the functioning of this sector (restrictions on retail practices, planning, price controls, and restrictions on the services sector).

As mentioned above, the legislation of the Russian Federation does not establish strict government regulation of food prices. Paragraph 8 of Part 2 of Article 8 of the Law on Trade provides that entities involved in trade activities, when organizing and implementing trade activities, independently determine the prices of the goods sold, with the exceptions established by the Law on Trade and other federal laws.

Thus, according to Parts 5 and 6 of Article 8 of the Law on Trade, if during thirty consecutive calendar days retail prices for some types of essential socially important food products increase by thirty and more percent in a particular constituent territory of the Russian Federation or constituent territories of the Russian Federation, to stabilize retail prices for such types of goods the Government of the Russian Federation can set maximum allowable retail prices[1] for such goods within the constituent territory of the

[1] Regulation of the Government of the Russian Federation of 15.07.2010 No.530 "On approval of the Rules of establishment of maximum allowable retail prices of certain types of socially important food products of prime necessity, of a list of certain types of socially important food products of prime necessity for which maximum allowable retail prices may be set, and of a list of certain types of socially important food products, for the purchase of a certain amount of which an entity engaged in trade activity is not permitted to receive compensation."

Russian Federation or the constituent territories of the Russian Federation for a period no longer than ninety calendar days.

In this case, proposals for the establishment of maximum retail prices of food products are prepared by the Ministry of Economic Development of the Russian Federation on the results of the weekly macroeconomic analysis of retail food prices.

This analysis is carried out on the basis of the evaluation data of the federal statistical observation, which are represented by the Federal State Statistics Service of the Russian Federation over the average retail food prices and their changes in the subjects of the Russian Federation, as well as information on the causes and conditions for the growth of prices received from the executive authorities of the Russian Federation.

According to the results of the analysis, the Ministry of Economic Development of the Russian Federation shall provide the Government of the Russian Federation with a draft decree of the Government of the Russian Federation for establishing maximum retail prices of food commodities sold in a constituent entity of the Russian Federation or the constituent entities of the Russian Federation, with reference to the names of food products, the amount of maximum allowable retail prices of such goods and the terms of maximum allowable retail prices.

So far, the measures for establishing maximum allowable retail prices for certain types of socially important food products of prime necessity in the Russian Federation have never been adopted.

In addition, the regulation of the Government of the Russian Federation of 07.03.1995 No. 239 “On measures to streamline state regulation of prices (tariffs)” provides for the right of the state authorities of subjects of the Russian Federation, to regulate trade margins of the prices of the produce and the commodities sold in the Far North and similar areas with limited time terms of delivery of goods, as well as of the prices of baby food (including food concentrates).

The list of separate types of socially important food products of prime necessity, in relation to which maximum allowable retail prices may be established, contains the following goods:

- Beef (except for boneless meat)
- Pork (except for boneless meat)
- Mutton (except for boneless meat)
- Chickens (except for chicken legs)
- Whole frozen fish
- Butter
- Sunflower oil
- Drinking milk
- Chicken eggs
- Sugar
- Edible salt
- Black tea
- Wheat flour

- Rye bread, rye-wheat bread
- Bread and bakery products made from wheat flour
- polished rice
- Millet
- Buckwheat - ungrounded
- Noodles
- Potatoes
- Fresh cabbage
- Onions
- Carrots
- Apples

In addition, at present, the Ministry of Agriculture of the Russian Federation has elaborated the draft Federal Law “On Amendments to the Federal Law “On the Development of Agriculture”, which provides for distribution of state aid stipulated for agricultural producers (mainly in the form of subsidies from the federal and regional budgets) and for processors of agricultural raw materials, which could increase the competitiveness of the food manufacturers. However, it should be noted that this measure can only be used within restrictions established at Russia's accession to the World Trade Organization.

In addition to the adopted Law on Trade, which directly affects the food retail sector, the Association of Retail Companies (which includes retail chains), together with the associations of suppliers of food products, and with the participation of the FAS Russia, developed the Code of Good Practices among Retail Chains and Suppliers of Consumer Goods (hereinafter – the Code).

The Code is a set of recommended rules of interaction among retail chains and suppliers of consumer goods.

The main objectives of the Code are:

- to form the interaction practices based on the principles of good faith during negotiations and contracts’ execution between suppliers and trade networks, and to ensure the balance of commercial interests of trade chains and suppliers;

- to increase the efficiency of interaction between suppliers and retail chains and to optimize costs throughout the entire supply chain;

- to create the conditions for compliance by all market participants with rules of ethics when using the market power and to promote competition in the market;

- to assist in meeting customers' needs for high-quality consumer goods.

The provisions of the Code are not mandatory for trade chains and / or services suppliers unless an economic entity sends in a prior written consent with the provisions of this Code (“adherence to the Code”, including by indicating this in the supply contracts and other related agreements).

## 6. Advocacy

In recent years, the main objective of the competition authority in the food sector has been advocacy of competition rules and requirements, as they were new to the trading activities of the participants, whereas some rules are innovative.

To better understand the problems of the application of the Law on Trade, in 2010, the FAS Russia performed a monitoring of the implementation of the provisions of the Law on Trade.

Since the entry into force of the Law on Trade the FAS Russia held 9 meetings of the Advisory Council of the Federal Antimonopoly Service for the development of competition in the retail sector. At meetings of expert panels the FAS Russia explained the requirements of the new Law on Trade which came into force, and discussed the problems of application of the Law on Trade and suggestions for overcoming them. At the meetings of the Advisory Council amendments to the Law on Trade, which are proposed by the FAS Russia, get considered without fail.

On an ongoing basis the FAS Russia is engaged in explaining the provisions of the Law on Trade to applicants-economic entities.

Also, given the large number of applications received for clarification of the requirements of the Law on Trade, the FAS Russia developed a manual for entrepreneurs, which clarifies the requirements of the antimonopoly legislation on the regulation of trade activities.

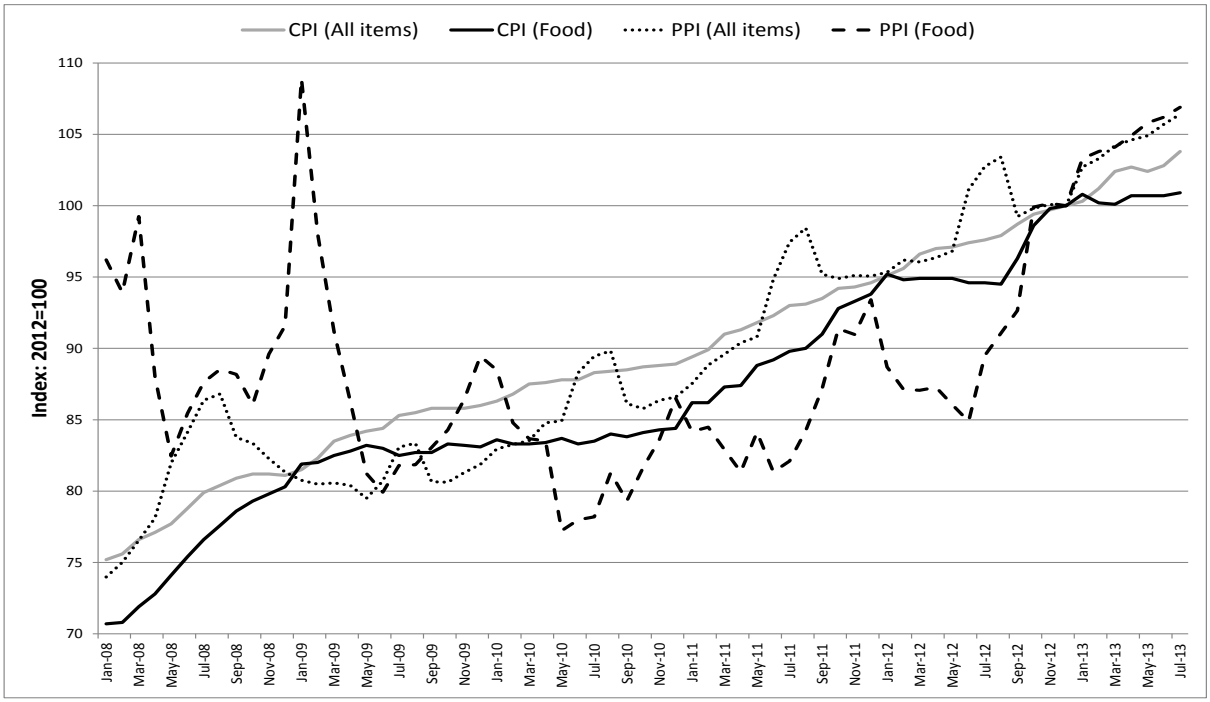
# SOUTH AFRICA

## 1. Background

The food and agro-processing sector has been a priority sector for the South African competition authorities given the negative impact of high and increasing staple food prices on the majority of South Africans and the uncovering of various contraventions of the South African Competition Act by firms active at various levels of the food chain.

Food inflation has been one of the major contributing factors to the increase in the overall Consumer Price Index (CPI). However, the CPI for food has in actual fact been lower than the overall CPI index (see Figure 1 below). The Producer Price Index (PPI) for food has consistently been lower than the overall PPI index for all sectors since the middle of 2010 despite having been consistently higher than the overall PPI for all sectors prior to this. The PPI for food has also been lower than the CPI for food since mid-2010 to around October 2012 when the trend reverses suggesting the presence of larger margins at the manufacturing level of the food value chain relative to the retail level.

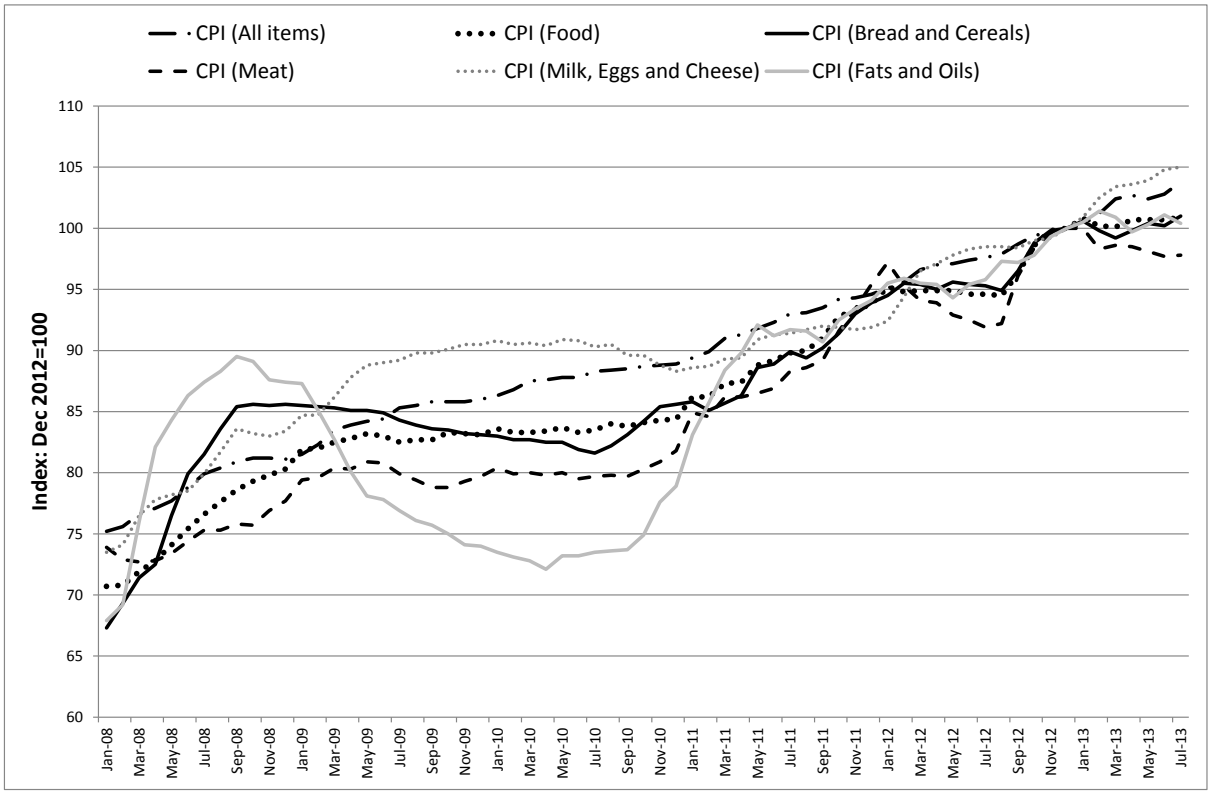
**Figure 1: CPI and PPI Trends (Jan 2008 to Jul 2013)**




Source: Statistics South Africa

Figure 2 below, which provides an overview of the retail price trends of staple foods in South Africa, shows that food prices have generally been on the increase and have increased significantly since 2008. Notably, the CPI for dairy products and eggs has consistently been higher than that of overall CPI for food.

**Figure 2: CPI Trends of Staple Foods in South Africa (Jan 2008 to Jul 2013)**




Source: Statistics South Africa

Since the world commodity price increases in 2007-2008 and 2011 concerns have been raised by various stakeholders about the effects of input cost increases on poor consumers in South Africa and national food security in the country. This prompted government to request the Competition Commission (Commission) to review and provide its views on the causes of high food prices in 2011. A recent review on food costs in South Africa[1] revealed that the margin between farm gate prices and the price the consumer pays for selected staple food items increased for all of the staple food categories, except milk. The same review also highlights concerns with the increased proportion of food expenditure as part of the total basket of goods purchased by South African consumers and its negative effect on household food security in the country.

The position of South Africa as a relatively open economy, but located quite far from other sizeable economies means that there is a substantial margin between import and export prices in tradable products such as many basic foodstuffs. Under competitive conditions, prices would be expected to be in line with import prices where local production is less than local demand, and in line with export prices where local production exceeds local demand. Anti-competitive behaviour, however, can engineer price increases to import parity levels even where local production and demand conditions are favourable. This could be by creating an artificial shortage through exporting product, or through absorbing the surplus that would be exported in other ways. Anti-competitive conduct can also have a similar effect in turning what should be favourable, low cost conditions for production into high cost conditions.

[1] The South African Food Cost Review 2011. Published by the NAMC. Accessed at http://www.namc.co.za/upload/food_price_monitoring/final%20food%20cost%20review%202011-lr.pdf on 25 September 2013.

Food prices are monitored on a monthly basis by Statistics South Africa in calculating the CPI as well as by the National Agricultural Market Council (NAMC), a government organisation established by law with the primary objective of providing agricultural marketing advisory services to key stakeholders, including the Minister of Agriculture, Forestry and Fisheries.

## 2. Recent Developments in the South African Food Chain

Up until the 1990s, the marketing of agricultural products in South Africa was extensively regulated by the state through the Marketing Act of 1937 (consolidated in the Marketing Act of 1968). Institutions mandated to implement the legislation included the Land and Agricultural Bank as well as Control Boards for every individual agricultural product (Kirsten & van Zyl, 1996).[2] Fixed price schemes and the agricultural co-operatives were generally appointed as agents of the relevant boards. The co-operatives functioned as regional monopolies. Under these schemes, farmers were paid a fixed price on delivery of their produce to the co-operative, regardless of where the delivery was made. This resulted in substantial cross-subsidisation from farmers proximate to the market to farmers situated further away from the market (Vink & Kirsten, 2000).[3] The system was also meant to ensure the stability of agricultural prices as well as the reduction of marketing margins between producers and consumers.

Since the liberalisation of the sector in 1996 concentration levels on the manufacturing and processing level of the food value chain have remained consistently high for most of staple food products in South Africa, with the exception of poultry where new entry has created a more competitive environment for local consumers (see below).

There has been an increased presence of foreign firms in the food supply sector since the acquisition by Wal-Mart Stores Inc. (Wal-Mart) of Massmart Holdings Ltd. (Massmart), a South African wholesaler and retailer in 2012.[4] The acquisition was approved with conditions by the competition authorities after objections to the proposed acquisition were raised by several government departments. Part of the rationale of the proposed acquisition was the stated intention of Wal-Mart to expand the wholesale food business of Massmart to also include retail food stores in direct competition with the three major supermarket groups in South Africa.

Although it is too early to ascertain what the impact (if any) of this acquisition has been on South African retail food prices and competition on this level of the value chain, it should be noted that there has also been an increase in the presence of discount retail food outlets in South Africa in recent years. For example, U-Save was established as a discount outlet of Shoprite, one of the major supermarket groups in South Africa. Another major supermarket group, Pick ‘n Pay, has also acquired the chain of Boxer Supermarkets with the aim of providing a low-cost option to consumers in rural and poor urban areas of the country.

## 3. Competition in the Food Chain

The food and agro-processing sector is the largest manufacturing sector in South Africa in terms of employment. The food and agro-processing sector has also been of particular importance to the Commission as part of its prioritisation framework, given the negative impact that high and increasing

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2 Kirsten, JF & Van Zyl, J, 1996. The contemporary agricultural policy environment: undoing the legacy of the past. OUP, Cape Town.

3 Vink, N & Kirsten, J, 2000. Deregulation of agricultural marketing in South Africa: lessons learned. Briefing Paper prepared for the Free Market Foundation.

4 See South African Competition Tribunal Case No:73/LM/Dec10

staple food prices have on the majority of South Africans. The sector is highly concentrated with few significant firms active on the processing and retail levels of the value chain and is also characterised by a long history of regulation and anti-competitive behaviour in the post-liberalisation period since 1996.

In 2008 the Commission conducted a comprehensive review of the food and agro-processing sector in South Africa, mainly focusing on the pricing of staple foods, and competition concerns at various stages in the supply chain. Sharply increasing food prices internationally at the time, as well as in South Africa sparked protests and grave concerns over the implications for consumers, particularly low income households. This sector review concluded that there were many different factors contributing to the food price increases in South Africa, including international price changes given the internationally traded nature of many foodstuffs, as well as increasing input costs. Anti-competitive conduct, such as through collusion, was also found to have compounded this by directly increasing prices above the competitive level and by indirectly exerting upward price pressure including increasing costs of inputs and services.

Since 2008 the South African competition authorities have investigated several complaints in this sector, with successful prosecutions in bread, milling, poultry and eggs.[5] Below we provide a brief summary of the findings of the competition authorities in these markets:

### *3.1 Poultry and Eggs*

The poultry industry represents the largest segment of the South African agriculture sector, accounting for approximately 23% of total agricultural production. More poultry products are consumed annually in South Africa than all other combined sources of meat protein. There is also significant import competition in the frozen poultry products market with imports mainly from Europe and Brazil.

Up to 2007 the poultry industry was effectively a duopoly market structure with Astral and Rainbow Chickens having been the only significant vertically integrated competitors with a combined market share of more than 60%. Although Pioneer Foods was a vertically integrated player in the poultry industry through its Tydstroom subsidiary they remained relatively small and did not compete in providing breeding stock to independent broiler producers. In order for an entrant to successfully compete in the upstream breeding stock market, they need an anchor customer with sufficient volumes uptake in order to meet the minimum efficient scale required to profitably operate a breeding stock operation. Potential new entrants into the downstream poultry products market also need to have access to a breed which is consistent in its performance. Not all breeds available internationally perform well in South Africa. This inhibits new entry into the breeding market and further limits the choices which are available to customers of day old parent and broiler stock.

In 2007 Country Bird lodged a complaint with the Commission alleging exclusionary conduct by Astral through the Elite Breeding Farms partnership between Country Bird and Astral which inhibited them from gaining access to their own breeding stock upstream and to become an effective vertically integrated competitor in the market. The Commission found that Astral had engaged in exclusionary conduct. The conduct involved various strategies, but primarily the restriction that Country Bird should source 90% of its parent stock from Elite which excluded them from dealing with alternative suppliers of parent stock that compete with Astral and its subsidiaries.

While these arrangements meant that Country Bird was removed as a competitor to Astral and its subsidiaries in the parent stock market, there is also an important implication for the grandparent market as

[5] It should also be noted that the Commission initiated a complaint in the fats and oils industry after the 2008 Food Sector Review relating to possible cartel and predatory conduct. However, after exhaustive investigations no evidence was found to prove the alleged conduct.

successfully bringing in a competing bird requires an anchor customer base of sufficient size. The arrangements thus prevented competing breeding operations at this level of the value chain as well. The Commission referred the case to the Competition Tribunal in 2008 for adjudication. However, Country Bird unilaterally exited the arrangements on the basis that they were anti-competitive.

The developments since the exit from the arrangement by Country Bird demonstrate substantially increased competition in the supply of parent stock to the benefit of independent broiler producers and end purchasers of poultry products. In addition, substantial parent stock operations independent of Astral/RPB has enabled the entry of Arbor Acres at the grandparent level, in competition with RPB, with substantial benefits in terms of price and quality for end-consumers of poultry products.

The increase in vigorous competition in the poultry industry since the end of the anti-competitive conduct through the Elite partnership and the subsequent successful entry of Country Bird as a vertically integrated competitor of Astral and Rainbow is reflected through lower margins and increased output in the industry to the benefit of consumers. A rough calculation of the potential gains to consumers since the successful entry of the Arbor Acres breed by Country Bird and the subsequent declining of margins in the poultry industry shows that in 2011, consumers saved approximately R1.2bn per annum compared with peak margins achieved in 2006. The new entry in the industry has undoubtedly had a great impact in realising more competitive outcomes for consumers of poultry products.

### *3.2 Grains, milling and bread*

Since December 2006, the South African competition authorities have uncovered cartels in the bread, wheat flour milling and white maize milling markets. This conduct involved all of the major vertically integrated companies in the sub-sector. This led to the prioritisation of the sub-sector for antitrust enforcement activities.

Complaints from bread distributors in the Western Cape in December 2006 led to an investigation into allegations that the major bread manufacturers), all of whom are vertically integrated up to the wheat flour milling level of the value chain, were fixing bread prices. The four vertically integrated firms account for a combined 95% of the wheat flour market whilst also collectively dominating the downstream bread market.

The Commission’s investigations found that these firms had been part of a hard core price fixing cartel from at least 1994 up to early 2007. In addition, the investigation found that the bakeries were engaged in market allocation conduct by agreeing to close down certain bakeries in specific areas in favour of competitors. One of the firms was granted leniency for its involvement in the bread cartel, whilst the other three respondents paid fines for their involvement.

The Commission’s investigation into the wheat milling cartel found that national price changes over time reflected coordinated conduct. Even though some agreements were struck in the different regions over a period of time, these were not discrete regional agreements with different adherents, but they were part and parcel of the execution of a national, overall agreement with the same participants, the same procedures and the same common object, namely to establish and implement a mechanism for fixing prices and other trading conditions and market division through customer allocation.

Investigations into the wheat-to-bread value chain by the Commission have also highlighted exclusionary strategies by the four vertically integrated firms of non-vertically integrated independent bakeries. One of the four firms was alleged to be involved in predatory pricing against independent bakeries. Although the bread baking industry in South Africa is characterized by low exogenous barriers to entry, the existence of the cartel in flour mitigated the ability of independent bakers to enter and expand

within the industry. Independent bakeries have the potential to exert a significant competitive constraint on the major bakeries through aggressive pricing and offering an alternative choice to consumers within narrow geographic regions. These bakeries are however dependent on the major firms for their supply of wheat flour as the major input in their operations which exposes them to exclusionary strategies by their competitors who are also their major suppliers.

The Commission also found that these anti-competitive practices also took place concurrently with information sharing through an industry association wherein the firms shared information on sales volumes that was highly disaggregated and frequently exchanged. The conduct of the firms was in many ways mutually reinforcing especially where anti-competitive conduct has occurred in the presence of vertical integration that is coupled with horizontal competition.

In the white maize milling cartel, the Commission established that the respondents were engaged in a hard core price fixing cartel. Some of the respondents have since entered into settlement agreements with the Commission.

### *3.3 Buyer Power*

The South African competition authorities encountered the question of buyer power in the Wal-Mart acquisition of Massmart wherein concerns were raised that Wal-Mart would exercise its buyer power to the detriment of local suppliers. This culminated into a remedy involving investment by Wal-Mart in the development of local suppliers. There are currently no separate provisions for dealing with food chain issues relating to buyer-supplier relations apart from the provisions that are applicable to any other sector.

An extensive investigation into possible anti-competitive conduct, including price fixing, by South African supermarkets with regards to the retail pricing of food was initiated in 2009. One of the allegations in that investigation included alleged buyer power by the supermarkets with the effect of raising prices to end-consumers. However, the Commission found that there was insufficient evidence of significant buyer power of the supermarkets in that investigation and this alleged contravention was not pursued further.

## 4. Advocacy

The importance of competition policy as part of the broader government economic development framework has become apparent through the Commission's work in the food and agro-processing sector. The uncovering of several cartels by the Commission in the food and agro-processing sector has shown that the liberalisation of the sector in 1996 did not immediately serve the purpose of increased competition and benefit to consumers as envisaged at the time. The behaviour of firms in this highly concentrated sector has shown that anti-competitive behaviour had become entrenched over time.

Recent competitive dynamics in the poultry industry indicate that consumers have reaped the benefits of new entry in the form of declining margins and greater rivalry between competitors.

The Pioneer Foods settlement in 2010 also sought to address the problems in the wheat-to-bread value chain where vertically integrated firms colluded and excluded independent bakeries from becoming effective competitors by introducing remedies aimed at lowering barriers to entry and enabling smaller bakeries to compete with the major firms in this market.

Another legacy of the history of state intervention in the South African food and agro-processing sector concerns the formation of various industry associations after deregulation in order to provide firms within specific sub-sectors with a collective platform to deal with government relations, policy issues and other issues of concern within that sub-sector. Whilst the competition authorities are not in principle concerned with the existence of these industry associations as they could potentially have several pro-

competitive benefits in the sector, the possibility of *per se* collusion or tacit collusion between competitors in a horizontal relationship through its common membership of an industry association is of great concern.

Information exchange through industry associations could be used to facilitate anti-competitive behaviour among competitors or industry players, thus ultimately causing harm to consumer welfare.

The Commission has recently investigated three separate information exchange cases in this sector and has also engaged extensively in advocacy work with the National Agricultural Marketing Council (NAMC) on information exchange in the food and agro-processing sector. In light of the Commission's investigations into information exchange in the sector as described above, the NAMC requested the Commission to provide it with guidelines on information exchange which would make it possible for firms and industry associations to exchange information without fears of being found in contravention of the Act. The Commission engaged with the NAMC via a formal written response as well as through participation in a joint workshop together with representatives of the various industry associations and the Department of Agriculture, Forestry and Fisheries.

Since this engagement with the NAMC the Commission has also reviewed and responded to several advisory requests from industry associations in the food and agro-processing sector with regards to information exchange and possible contraventions of the Competition Act.

## 5. Other Factors Determining the Functioning of the Food Chain

As briefly mentioned above, the first democratic government in South Africa initiated a complete transformation of the industry with the introduction of the Marketing of Agricultural Products Act, No. 47 of 1996. The new Act dramatically changed agricultural marketing, moving away from statutory intervention and geared towards liberalisation to promote market efficiency and competitiveness. Changes included the closure of the marketing boards, a conversion from quantitative trade restrictions to tariffs and gradual reductions in the tariffs themselves. It also aimed to address socio-economic factors such as the increased participation of previously disadvantaged individuals in agriculture, to promote equitable access to markets by emerging African producers and speed up the process of land reform in the country.

Under liberalisation most of the cooperatives, at the heart of the regulatory system, converted to private companies. There has been extensive consolidation of former co-operatives through mergers and acquisitions. Along with horizontal expansion has been increased vertical integration. This has meant, for example, firms owning the grain silos are simultaneously important grain traders, suppliers of inputs and finance, and, in some cases, also involved in processing.

The Commission has seen a high probability, post-liberalisation, of continued coordination between competitors in combination with exclusionary conduct in order to maintain similar outcomes as under previously regulated environments. The Commission cases further highlight the importance of ensuring new entry into markets and the growth of smaller firms as part of achieving competitive outcomes in practice. The Commission has also sought to stimulate this through the settlement with Pioneer Foods in 2010 which involved a price reduction commitment and a fund for investment in smaller players in the value chain.[6]

[6] Bonakele, T. & Mncube, L. 2012. Designing appropriate remedies for competition law enforcement: The Pioneer Foods settlement agreement. Journal of Competition Law & Economics, 8(2), 425–447.

## 6. Conclusion

It is now apparent from the Commission's extensive investigations in several markets in this sector since the food sector review in 2008 that liberalisation did not equate to ensuring competitive outcomes. In fact, the behaviour of firms in this sector has shown that anti-competitive behaviour had become entrenched over time and that firms have found it hard to adapt to a competitive environment where there is uncertainty and risk with regards to pricing and production output. The importance of entry is consistent with what has been found in other sectors of the South African economy, such as construction, where entry in the concrete pipes market has led to an undermining of the status quo.[7]

[7] Khumalo, J., Mashiane, J. & Roberts, S. 2012. Harm and overcharge in the South African precast concrete products cartel. Working Paper 6/2012, UJ Centre for Competition Economics www.uj.ac.za/cce

# SPAIN

## 1. Background

The Spanish food chain is influenced by a complex and difficult competitive environment in which low consumption growth together with an abundant supply constantly tend to push prices down. This pressure is even more intense since September 2008, when the effects of the economic crisis hit hard in the market, and consumers started to modify their behavior by looking for lower-priced alternative food products while maintaining their food intake. Additionally, the sharp increase in prices of raw materials and production inputs during 2007 and part of 2008 introduced additional pressures on margins.

It is frequently assumed that the agricultural production sector is made up of a set of uniform characteristics. However, a quick look at the various sub-sectors or products that comprise it, shows that there are profound and wide-ranging differences from the point of view of their costs structures, their marketing and distribution channels, the weight of imports in the total offer or the importance of exports in the sales of the sector, amongst other factors. In the same way, the percentage of the final price that the producers receive in comparison with the percentage received by the rest of the agents in the chain varies greatly depending on the product.

During the last few decades, food retailing, a crucial link within the chain, has undergone considerable transformation in response to a conjunction of economic, social and demographic changes.

As in other countries, in Spain the previous model of food retailing based on the traditional commercial format has been replaced by another one in which large-scale retailers have firmly established themselves and supermarkets and hypermarkets have achieved a clear predominance.

This transformation, moreover, has affected a particularly important sector of the Spanish economy, in which there is growing social concern over the consequences of the increasing bargaining power of retail distribution over operators in the rest of the food supply chain, specifically, in the last link, and over end consumers.

Three main trends have been driving the sector's evolution in Spain:

First, increased concentration of retailers. Nationally, the combined market share of the four biggest operators expanded from 48.7% in 2002 to 58.0%in 2009. At the regional level, concentration in food retailing has increased in most of the Regions.

Second, the ever more important role of medium and large supermarkets versus other retail formats. Supermarkets are the dominant format at present, concentrating 47% of grocery purchases by households. In recent years, the growing importance of this commercial format, spurred by the restrictive nature of the law regulating the retail sector (Act 7/1996 of 15 January 1996; the *Ley del Comercio Minorista*, hereinafter LCM), has been accompanied by a decline in the role of traditional retailers, whose market share dropped from 35.6% in 1995 to 27.7% in 2009. Aiming at solving this problem, the Spanish Government has approved Royal Decree-Act 19/2012, dated 25 May, concerning urgent measures to liberalise trade and certain services, Title I of which removes the requirement for a municipal authorisation or licence prior to opening small retail businesses, an initiative which the government does not rule out applying it to larger retail venues or other kinds of activities in the near future.

Third, the rise in the market share of retailer own brands (ROBs or private labels) from 22% in 2003 to 34% in 2009. This increase has been seen across practically all categories, although there are notable differences between products. Greater concentration, growing importance of large retail outlets and shopping centers, and a notable expansion of retailer brands, which are carving out ever larger market shares. This last factor merits special attention given its capacity to modify both the competitive dynamic between retailers and their traditional function, which is no longer confined to distributing manufactured goods and is increasingly focusing on developing ROBs to compete on store shelves with the manufacturer brands.

All of these factors, together with other trends that have also been characterizing the sector's development in this period, such as the tendency toward vertical integration, the creation of group purchasing organisations and the heightened restrictiveness of commercial legislation beginning in the mid-1990s, have contributed to a sharp gain in the bargaining power of retailers versus manufacturers.

In relation to the agrifood chain, Europe is at a critical moment from the perspective of antitrust authorities: while the CAP reform is on its way, competition authorities are stressing the need for continued application of competition rules in the sector to enhance productivity and efficiency. In this regard, the Spanish National Competition Authority (*Comisión Nacional de la Competencia –CNC-)* and other European competition authorities have published various statements and studies in support of that approach, based on a rigorous application of competition rules which not only improves the welfare of end consumers but also benefits producers and the links throughout the food chain. In recent years, the CNC has undertaken numerous actions, from the standpoint of both enforcement and advocacy, aimed at defending and promoting healthy effective competition in the food industry.

## 2. Recent Developments in the Food Chain

One of the historical main problems in the Spanish food sector has been the food processing industry's remarkable weak position before the distribution sectors. Aiming at attenuating the imbalance between food processors and distributors the Spanish government has just passed (on August 3, 2013) an Act[1] on *Measures to improve the Functioning of the Food Chain*.

With this new regulation of the food chain, the Spanish government aims at increasing efficiency and competitiveness in the sector and at reducing the imbalance in commercial relations between the various operators in the value chain in order to prevent that products are overpriced. The Act is based on a mixed model of regulation and self-regulation for commercial relations between the agents in the food chain that covers two fundamental factors: food contracts and abusive commercial practices. The self-regulation focuses on the establishment of a Code of Best Trading Conduct in food contracting, the adoption of which will be voluntary.

The new Act introduces a food chain watchdog, which will replace the Observatory of Food Prices. Hence, the food price observatory will become the *'Food Supply Chain Observatory'*. The primary tasks[2] of the former will be now assumed by the new observatory which will also be responsible for identifying unfair commercial practices. If necessary, the Competition Authority can be called in for enforcement.

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1 Act 12/2013 of 2 August 2013

2 To analyse the price structure in the food chain and the influencing factors; Initiate studies to explain the imbalance of power in the market; to promote dialogue, better understanding and cooperation between the interested parties in the chain; to put forward policy proposals to the relevant government authorities and formulate recommendations for all other interested parties. The Observatory of Food Prices has also been issuing a weekly report on developments in the price of 36 fresh products at three points in the food chain (farm, wholesale, and retail).

During the legislative process that preceded the adoption of this Act, the CNC has had the opportunity to inform the Bill drafted by the government: *Report IPN 84112 on the Draft Bill on Measures to lmprove the Functioning of the Food Supply Chain*[3] (hereinafter the January 2013 Report). More recently, in response to certain specific issues raised by the Ministry of Agriculture, Food and Environment (MAGRAMA) the CNC, according to Article 25 LDC, published a new Report on the Draft Bill on the Food Chain[4].

Both Reports negatively assess some measures contained in the Draft eligible to lead (either directly or indirectly) to price fixing mechanisms. Moreover, the CNC stresses that the Bill could generate legal uncertainty as well as unnecessary and disproportionate bureaucratization of trade relations between the actors in the chain.

Specifically, the CNC January 2013 Report considers that any initiative aimed at disciplining the trading relationships between the operators in the agrifood supply chain ought to be compatible with dynamic efficiency and consistent with the proper operation of the sector and of the economy in general. In particular, the Report refers to:

- Legal uncertainty and an unnecessary and disproportionate level of bureaucracy in the trading relationships between agents in the chain resulting from the thresholds used to determine the sphere of application of the obligations that are imposed on the parties to the relationship and the administrative disciplinary regime to which certain trading practices are subject.

- Abusive commercial practices – the bill prohibits some practices that the CNC had previously identified as potentially anti-competitive under certain circumstances:

  - the obligation imposed on producers to provide commercial payments or share the cost of promotional activities that were not explicitly agreed in the contract;

  - the exchange of sensitive commercial information which is unnecessary for the contractual relationship; and

  - unfair use of another party's brands, patented packaging and product presentation.

- The CNC acknowledges that although certain commercial payments may be abusive and may weaken competition, they can also lead to efficiencies. In particular, certain types of commercial payment (eg, those used to assign shelf space or those required for stock control and supply purposes) should not be prohibited, since they act as incentives to distributors and producers for the maintenance of a more efficient food chain.

- Code of good practice – the bill anticipates the drafting of a code that will regulate certain elements of trading relationships which are not currently expressly regulated. The content of the code is to be agreed between representatives of the Ministry of Agriculture, sector associations and other organizations. The bill foresees the possibility for market operators to join other codes of practice that may introduce more detailed and demanding provisions than those included in this code. Although the CNC has promoted the existence of codes of practice in the past – provided that they comply with competition law – it also states that the combination of legislation

[3] http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=198284&Command=Core_Download&Method=attachment

[4] http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=188438&Command=Core_Download&Method=attachment (only in Spanish).

with a self-regulating tool could be confusing. Similarly, the CNC fears that the co-existence of several codes of practice may harm sector unity.

- New penalties procedure – the introduction of a stricter penalties procedure is one of the most controversial aspects of the bill. The CNC criticised this provision and stated that it should not be included in the bill, since existing competition law and legislation that regulates unfair practices cover any potential infringement. However, despite the criticism, the bill retains these powers, including the possibility of imposing fines of up to €1 million as a result of proceedings initiated either by the Ministry of Agriculture or regional government departments.

The Act that has been passed does not differ much from the Draft Bill informed by the CNC. More recently, the Spanish Competition Authority has issued its Position Statement[5] as regards to the introduction of mediation as a tool to set the price on food contracts within the framework of the Code of good practice foreseen by the Act. Such possibility, suggested by certain parliamentary amendments has ended up being part of Article 16 of the final wording of the Act. The CNC is aware that the mediation tool introduced via amendments to the parliamentary proceedings, is not necessarily binding, but since the price of the contract determined by mediation can be a reference value to other operators there is a danger of causing anticompetitive coordination if it involves alignment by setting maximum or minimum thresholds and it may even be considered as price recommendation.

## 3. Competition in the Food Chain

Over the past years the CNC has adopted a number of opinions[6] regarding the overall efficiency of the supply chain, for both food and non-food products.

In these opinions the CNC has assessed under a competition standpoint issues such as the barriers to the establishment and operation of commercial outlets, the impact of the development of retailers' own brands, and the so-called 'unfair trading practices' (UTP), among others.

On 16 June 2010, the CNC published its report on the application of the competition rules to the agrifood sector. The report, which was a response to a request from the Chairman of the Economy and Finance Committee of the Spanish Parliament, starts from the basis that the competition rules and regulations are fully applicable to the agrifood sector. As far as the Community rules and regulations are concerned, the Treaty provisions on competition are generally applicable. Although sector Regulations allow certain exceptions from those rules and regulations, the situations in which the exceptions apply are very limited.

In terms of domestic rules and regulations, the Act 15/2007 of 3 July 2007 (the Spanish Competition Act) applies without restrictions to the agrifood sector. As with the other sectors of the economy, prohibited practices can only be deemed to be compatible with competition rules if they satisfy the requirements of Article 1.3 of the Act, are *de minimis* or are covered by a legal rule which means that they are exempted from their application.

Both agricultural producers individually and associations of producers and, without prejudice to the exceptions laid down in the EU rules and regulations, inter-branch organisations ("IBOs") are subject to

5 http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=198966&Command=Core_Download&Method=attachment (only in Spanish).

6 Not only the regulation reports mentioned in the previous section but also market studies and reports such as "The Investigation of the Distribution Food Chain of Certain Fruits and Vegetables" (January 2004); "Competition and the Food Sector" (June 2010); "The Relations between Manufacturers and Retailers in the Food Sector" (October 2011); and "Competition in the Service provided by the Wholesale Central Markets supplying Perishable Food Products at destination" (January 2013).

the competition rules when engaging in their economic activities. They therefore have a self-assessment responsibility to determine whether by their conduct they may be engaging in a restrictive practice. For these purposes it must be borne in mind that the participation of public authorities in agreements that facilitate, permit or lead to such conduct does not alter the fact that it constitutes a prohibited practice.

The CNC takes the view that the current framework governing the interface between the competition rules and the specific rules that regulate the agrifood sector, which starts from the basis of the general applicability of the competition rules to the sector, must continue to be the legal basis on which the future operation of agricultural production is supported. A different approach would not be justified in view of the operating characteristics of the market in the agricultural sector, would be discriminatory with respect to other activities and, ultimately, would not be effective in terms of resolving the sector's problems.

There is a very wide range of instruments that the public authorities and private operators can use to overcome the problems of the agricultural producers, without necessarily contravening the current competition regulatory framework.

## 4. Enforcement and Advocacy

In the aforementioned opinions, the CNC has tried to explain what conducts can be problematic from an antitrust perspective. It also focused on the reasons why an exception from competition rules for the agrifood sector would be an ineffective remedy to sort out whatever problems the sector is dealing with; and, lastly, how competition advocacy and pedagogy may help the sector to overcome the situation and make reforms, while fulfilling competition rules at the same time. Competition authorities should warn EU and national institutions of the consequences of such an anticompetitive exception: prices rises, fall of investment and R+D, and food quality will be impaired, all of which will be detrimental for consumers.

Besides, the CNC is particularly worried about the increased intervention of public administrations in the sector, well beyond their statutory role, in particular when they enable, acquiesce or participate in agreements with stakeholders that may include breaches of competition rules. That behavior disrupts competition in the market and again damages consumers.

An example of the type of restrictive practices which are not allowed under the framework of sector IBOs is found in a 2009 case, in which the CNC fined the nation-wide IBO active in the poultry sector for having adopted collective price recommendations addressed to its members. In particular, the representatives of this IBO, which included the vast majority of Spanish poultry producers and processors, had published a press release and made public declarations announcing an upcoming price increase of the poultry meat in Spain.

Similarly to the above case, the CNC also fined the IBO active in the egg sector in Spain for having adopted a collective price recommendation addressed to its members in 2009. That recommendation had taken place by two press releases which provided guidance to its members on the need to pass the increases of production costs on the prices applied to its customers.

Some other antirust cases[7] may be illustrative. The CNC imposed fines on mussel producers for market sharing and fixing the quantities, qualities and prices of mussels as well as on the main fish processors' association in Spain for a collective recommendation to pass on to consumers certain cost increases.

[7] See Decisions in Cases S/0107/08, Plataforma del mejillón; S/0167/09, Productores de Uva y Vinos de Jerez; S/0180/09, Conserveras; S/0231/10, Productores hortofrutícolas; S/0251/10, Envases hortofrutícolas; S/0289/10, Industria cárnica; S/0305/10, Uvas Denominación Origen Valdepeñas.

The CNC also imposed a fine on the National Association of Canned Fish and Seafood Manufacturers (*Anfaco*) as the author of a collective recommendation whose purpose was to coordinate the conduct of canning companies in order to pass on the increase in the price of the metal cans used for the canned fish and seafood.

The CNC imposed fines as well in a case related to price fixing of grape and grape juice undertaken by certain associations (winery associations and producer associations).

As regards to competition Advocacy, in the field of market studies, the above cited October 2011 Report[8] is worth to be profiled. The Report stresses that there are various factors in Spain that increase the risk that in the long term the distributors' greater bargaining power may have a negative effect in terms of competition and wellbeing:

- Certain commercial practices between manufacturers and distributors, when applied generally by the large distributors, may give rise to significant risks in terms of competition. Of the practices analysed in the report, those that present the greatest risks are the following: commercial payments from the distributor to the supplier which are determined unilaterally by the distributor and are unconnected to the actual consideration offered to the supplier; the failure to stipulate in writing the contractual terms and conditions that govern the commercial relationship between manufacturer and distributor; unforeseen changes to those conditions, frequently with retroactive effect; the excessive advance notice with which distributors request information from their suppliers regarding new products and the breadth of the information asked for in these requests; preferred client clauses; and the requirement for sensitive commercial information from suppliers regarding their commercial relations with third-party distributors.

- The persistence of a series of legal restrictions on the establishment and undertaking of commercial activity within the regulatory framework that governs retail distribution makes the entry of new operators with the ability to increase competitive pressure on distributors already established in the market more difficult and restricts the appearance of alternative distribution models. These restrictions also strengthen their bargaining power and reduce general wellbeing. Amongst these obstacles, the authorisation regimes for opening large commercial establishments, the restrictions on opening on public holidays and outside certain trading hours and the general prohibition on sales at a loss are of particular note.

In light of the analysis carried out in this report, the CNC considers it appropriate to make certain recommendations for an adequate functioning of the food distribution sector.

First of all, the CNC urges all public authorities with powers in relation to the regulation of retail distribution to eliminate the restrictions on the establishment and undertaking of commercial activity that still persist within the regulatory framework and to transpose the Services Directive correctly. In particular, it recommends:

- Removing the power of the Regions to make the opening of commercial establishments conditional upon any form of prior authorisation or permit.

- Removing the elements of the regulatory framework that restrict the freedom to set opening hours, opening on public holidays and sales periods, along with the prohibition of sales at a loss generally.

8 http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=122260&Command=Core_Download&Method=attachment

Secondly, the CNC considers it necessary to establish adequate mechanisms to facilitate the precise knowledge of the characteristics and level of incidence of commercial practices in distribution that may negatively affect competition and the efficient functioning of the market, and to advocate certain measures aimed at limiting the harmful effects of specific commercial practices. These measures include the following in particular:

- The formalisation of commercial relations in writing and the setting of limits on retroactive changes to contractual terms and conditions.
- The foreseeability, transparency and proportionality of commercial payments from manufacturers to distributors.
- The linking of requests for sensitive commercial information on products from distributors to their suppliers to the needs and times that are appropriate to the commercial relationship.
- The express warning to large distributors about the dangers that preferred client clauses and exchanges of information between suppliers and distributors on their commercial relations with third parties may have in terms of competition.

Finally, the report warns of the risk of a breakdown of the internal market as a result of the proliferation of different regulations and codes of practice between the Regions[9] when it comes to the treatment of certain commercial practices. This may reduce the intensity of competition and remove efficiency and competitiveness from the Spanish food sector and public authorities are urged to take competition criteria into account in these actions.

Some of the recommendations included in the Report such as removing obstacles in order not to make the opening of commercial establishments conditional upon any form of prior authorisation or permit, or the formalization of commercial relations in writing, have been taken into consideration by the Spanish Government in the provisions of some of the above cited recent Acts that have been passed (Royal Decree-Act 19/2012 and Act 12/2013).

## 5. Other Factors Determining the Functioning of the Food Chain

In addition to the above mentioned issues, some other CNC Reports have identified additional factors that determine the functioning of the Food Chain.

Thus, in a report on the certification of quality and safety standards, of July 2010[10], the CNC also analysed the competitive structures of the certification systems for wine designations of origin in Spain. The report found that the certification of quality and safety standards plays an important role in the economy, since it provides assurance that products and services conform to certain standards and specifications. Such is the case in particular of the certification of the product specifications for wine designations of origin. These specifications are voluntary quality standards which set down the parameters that must be satisfied by a wine in order for it to qualify for a designation of origin. Among other proposals, the report recommended that the activity of certification of wine product specifications should be carried out under market-based criteria which would allow certifying agencies to compete among themselves to provide such services. The report also alerted against the risks for competition arising from the system in which the sector organisations which participate in the determination of the product specifications are also entrusted with the certification functions of such specifications.

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9 Also in relation to this matter, the CNC has issued a Report on the draft Bill to Preserve Market Unity.

10 2010 - Report on the Certification of Quality and Safety Standards http://www.cncompetencia.es/Inicio/Informes/InformesyEstudiossectoriales/tabid/228/Default.aspx?pag=2

# TURKEY

## 1. Introduction

Food retailing sector serves a critical function in connecting producers with final consumers, and it plays a key role in the formation of prices at all levels of the food supply chain. This note aims to briefly explain the transformation of food supply chain and the legal framework for food retailing in Turkey. It also attempts to address buyer power related competition problems based on the findings of the recent FMCG retailing market investigation finalized and published by Turkish Competition Authority (the TCA) in 2012.

## 2. Transformation of Food Supply Chain in Turkey

The food retailing sector has gone through a transformation period from small retailers to large nationwide (sometimes international) chains due to rapidly changing supply and demand conditions. The transformation of the food retail sector implies a process, which has resulted in organized retailers gaining power before both producers and conventional retailers, thereby triggering a transformation in the whole supply chain. This process, which changed the balance of power in the supply chain to the advantage of organized retailers may lead to some conflicts and tensions among various actors of the supply chain.

Since the beginning of the 1990s, the share of organized retailers in food retailing has been increasing in Turkey. Food retail constitutes the largest share in the total retail market with a turnover of US $96 billion in 2010. The share of organized retailers in FMCG retailing grew from around 30% in 2005 to 50% in 2011. Although this implies an important growth rate for organized retailing, conventional retailing (small local shops, specialized shops, open bazaars etc.) still has an important role in food supply chain in Turkey.

In line with the growing pace of the organized retailers, as organized retailers growth gathered pace, many globally operating food retailers has decided to enter the Turkish market. International retail chains such as *Carrefour*, *Tesco* and *Metro/Real* operates in Turkey directly or through partnerships. Concentration levels have increased mainly due to acquisitions of smaller chains by the larger ones. Yet, concentration levels are still low compared to most of the European countries.

| | **Concentration Ratios in Organized Retailing** | | | | | |
|---|---|---|---|---|---|---|
| | **2006** | **2007** | **2008** | **2009** | **2010** | **2011 (6 months)** |
| CR3 | 20,57 | 20,23 | 21,56 | 23,03 | 23,38 | 23,36 |
| CR4 | 22,15 | 22,22 | 23,75 | 25,20 | 25,76 | 27,01 |
| CR5 | 23,44 | 23,66 | 25,13 | 26,61 | 26,96 | 28,41 |
| CR8 | 24,97 | 25,48 | 27,25 | 29,04 | 29,79 | 31,47 |

Organized retailing has been more developed in some regions of the country depending on the urbanization rate, the share of regions/provinces in the national income, consumer habits and differences in the economic and social life and the mobility of consumers. These differences eventually generate different competitive conditions in food retailing in various regions.

Regional/local retailers, mainly operating in the supermarket channel, create important competitive pressure on national retailers in Turkey. In the last two years, regional/local retailers have grown by about 50% in terms of number or stores and total sales area and some local retailers formed joint ventures to create economies of scale in buying.

In the last decade the most remarkable change in the food retailing in Turkey is the rise of discount stores. Discount stores channel, has been the fastest growing channel during the 2004-2009 period, with about three-fold increase in turnover. Between 2004 and 2009 organized retailing grew by 94% in sales, while discount retailing grew by 182% in the same period. The high demand for discount stores may be seen as a reflection of increased price sensitivity of consumers. In Turkey, *BİM* is the leading discount store by a wide margin. In 2011 BİM became the retailer with the highest yearly turnover. *A-101*, which entered the market in 2008, also showed significant growth in a short period.

Private label product consumption has been increasing from 2006 to 2011. This trend is parallel to the increase in demand for discount stores. About 60% of the leading discount stores turnover comes from private label sales. Not only have discount stores sold private label. Other retailers have been increasing the amount of private label products in their product mix as well. In 2011 11% of turnover in the sector was generated by private label sales.

## 3. Legal Framework in Food Retailing

There has been legislation preparation for FMCG retailing for a long time. The first draft law on the FMCG retailing was submitted to the Parliament in 1999. Following that, many draft laws were prepared at various times with different scopes.

There are basically two motives behind the preparation of the relevant draft laws. The first is to protect smaller food retailers in the conventional channel from the competitive pressures by organized retailers. The second motive is to protect small- and medium-scale suppliers from the unfair practices of large chains following the growth in organized retailing and, in particular, difficulty faced by these suppliers in accessing the shelves of retailers. For the purposes of protecting the suppliers, the envisaged policy/method is to introduce limitations on fees demanded by retailers as well as on private label products and to prevent late payments. For the purposes of protecting conventional retailers, on the other hand, introducing authorization criteria concerning shopping centers and retail chains as well as limits for business hours is envisioned. The TCA has officially submitted its opinion on the aforementioned draft law to the relevant Ministry. The opinion emphasized that the draft bill generates asymmetrical regulation and creates entry barriers. The Ministry of Customs and Trade is working on a new draft and the TCA has been in touch with the Ministry during this period to remark competitive concerns related to the legislation.

On the other hand, the Turkish Commercial Law no. 6102 (TCL), adopted by the Parliament on 13.1.2011, introduced a limitation of sixty days for payment periods in commercial relationships in order to protect creditors (TCL, Article 1530). This provision is primarily introduced in order to protect the supplier in supplier-retailer relationships and it is compliant with the new directive of the EU, adopted at the end of 2010 to struggle with the problem of late payments. This new provision in the TCL seems to have eliminated one of the motives behind the preparation of the retail draft law.

There is no price regulation in food supply chain. In some sectors like tea and sugar, the production is still at the hand of state owned companies however those state owned companies do not act as price regulators. In some limited circumstances, the government might take some measures to effect product prices as it happened in meat sector. In order to limit the dramatic increase in meat prices in 2010, the tax on livestock imports were decreased by the government for a certain time period.

## 4. Buyer Power Related Competition Problems in Food Retailing

The relationship between suppliers and retailers has changed in line with the increasing concentration in food retailing raising buyer power of retailers. Buyer power is related to how buyers affect trade conditions with sellers in the upstream markets. The fact that retailers possess buyer power means that they have a strong ability to affect trade conditions in their relations with the suppliers in their own interest.

On the one hand, the buyer power may generate some efficiencies, on the other hand it can also distort competition. Buyer power may balance market power of suppliers and this in turn may increase consumer welfare. Such a result necessitates a competitive retail market structure. If the powerful buyers feel competitive pressure from other retailers in the market, they would pass on the benefits they acquired from suppliers to consumers as decreased prices or better products.[1] Exercise of buying power might not benefit consumers if the buyer is not constrained by competitors and might distort competition in the downstream supplier markets. Large retailers might acquire advantageous terms of trade from suppliers due to buying in large amounts. This type of price reduction might not create competitive concern, however the discounts which are not related to cost efficiencies and which are just based on the use of buyer power might be detrimental to competition.

The TCA has received complaints from several suppliers about retailers' buyer power and related conduct. Problems between suppliers and retailers have also been addressed in the media. During the TCA's market investigation, interviews were made with both suppliers and retailers and a questionnaire was conducted for the both parties. According to the TCA's findings there are four main problematic areas within the commercial relationship between retailers and their suppliers:

8. the unilateral imposition of contract terms (i.e. negotiations within a pre-set purchasing agreement);

9. discounts and related mechanisms;

10. penalties;

11. payment terms.

Large retailers demand additional fees, discounts and services from suppliers under various names such as listing fees, shelf space fees, display area fees (such as gondolas, pallets, shelf position, placement in accordance with the traffic within the store, etc.), insert fees, electricity fees, personnel requests, free products, store opening fees, anniversary fees, end-of-year discounts and that such practices are gradually spreading within the sector. Suppliers state that a significant difference appears between the gross prices and net prices of their products due to these fees and additional services, and that the suppliers' business is impeded since it is impossible to reflect these extra costs to the price due to competition.

To analyze supplier-retailer relations, the terms of transactions and the extent of problems supplier questionnaire applied to more than 500 suppliers and 209 of them fully answered the questionnaire. Results show that the share of nationwide retailers in suppliers business is increasing gradually and has the highest share compared to other retail formats, on the other hand the share of traditional retailers and wholesalers in suppliers business is decreasing. The first four retailers share in supplier's business is increasing. In 2009 the share of first four retailer in supplier's business is more than 25%.

[1] DOBSON P., WATERSON M. and CHU A. 1998, "The welfare consequences of the exercise of buyer power", Office of Fair Trading Research Paper 16, p.6.

Agreements between suppliers and retailers are mostly written. Written agreements create transparency in transactions, and provide a ground for sharing the risks of the commercial activity between the parties in a foreseeable way. Questionnaire results show that agreement terms are changed rarely by the retailer and mostly determined by negotiation. 61% of the suppliers are not satisfied with the agreement terms. However dissatisfaction is for all the retailer formats, not just for the large retailers. In case of conflict between retailer and supplier, instead of going to court, solving the problem by negotiation is preferred.

51% of suppliers expressed that the gross profit margin has been decreasing in the past three years. However, 92% of the suppliers answered that they don't have the concern of exiting the market due to the decrease in gross profit margin. Also delisting of their products is not seen as a big concern, the first reason for delisting a product is that it does not create the expected profit. 55% of the suppliers said they produce private label products for retailers, but they are not concerned that private label products are going to take place of their branded products.

Market investigation shows that buyer power of FMCG retailers is increasing, and as the sector keeps its growth rate, the buyer power of large retailers is expected to increase accordingly. However the problems expressed by most suppliers are similar for all retailers. Buyer power of large retailers is not distinct from other retailers. There is a general dissatisfaction about relations with retailers but the dissatisfaction is not directed to large nationwide retailers. Especially suppliers who produce in product categories with low level of brand and customer loyalty (like dairy, meat, legumes etc.) have less bargaining power and they live more problems in terms of contract terms. The most important finding is that suppliers are not economically dependent on any type of retailers and for now buyer power of large retailers is not at a level that would distort competition in the long run. Eventually, the TCA concluded that food retailing sector in Turkey is in an early stage in terms of concentration levels and buyer power when compared to most of the European markets, and therefore for the time being there is no need to take any measure against the matter of buyer power.

# UKRAINE

## 1. Peculiarities of the food retail market in Ukraine

Contemporary specialists in the field of economic competition protection agree upon the fact that one of the modern trends in grocery retail development in Ukraine is “focus on increasing efficiency”.

This is the result of 2008 crisis. Before crisis one could observe “chaotic” development in Ukrainian retail: the players expanded their trading spaces for the purpose of booming sales, ignoring qualitative development and efficiency indexes. With the advent of crisis Ukrainian retailers had to change their strategies and to pay more attention to qualitative development and efficiency indexes. To date the main challenge for Ukrainian retail is to increase effectiveness (to bring it up to level of Central and Eastern Europe public players):

- to improve profitability (gross margin, EBIDTA margin, sales of 1 sq. m., average bill);
- to increase own brands’ sales;
- to introduce new IT systems;
- to promote and to improve logistic efficiency;
- to optimize costs and loan portfolio.

## 2. The structure of the Ukrainian food retail market

According to available information in the Antimonopoly Committee of Ukraine the characteristic feature of modern Ukrainian retail is low level of concentration in this sector.

During 2010-2013 years, about 40 trading networks specialized mainly on groceries functioned on the territory of Ukraine and more than 18 trading networks – in Kiev. Herewith, total shares of five biggest Ukrainian retailers were less than 30 percent in 2010.

Also, international retail networks are functioning on the territory of Ukraine. These networks have considerable experience in the area of grocery retail compared with Ukrainian enterprises. Practice of international enterprises affect significantly on the development of mentioned area. Unfortunately, sometimes impact may be negative: all market participants use their purchasing power excessively.

## 3. Ukrainian food retail market within the framework of activity of the Antimonopoly Committee of Ukraine

Area of grocery retail has been actively analyzed by the Antimonopoly Committee of Ukraine during last few years. The main reason for analyzing was faster growth of food prices in grocery retail, compared with other main growth rates in economy. The main focus is horizontal, however the subject of special analysis were exactly vertical relationship of goods’ supplies in the network as the main factor of growth rates, due to excessive use of networks of its purchasing power.

## 4. Why manufacturers and suppliers cooperate with food retailers

Since trading networks function not only in the territory of certain cities, but in the territory of whole state, suppliers are interested in supplying their products to trading networks.

This is due to retailers (trade networks):

- have large volumes of sales compared to small size of trade objects, that allows the vendor to dispose of larger volume of goods;
- have large retail space and vendor has ability to supply the entire assortment of products without restrictions;
- have large storage facilities, allowing the vendor to supply more products and wider assortment at a time;
- have specialized logistics and distribution centers for conveying goods all over the state, allowing vendor to save money on maintaining their own logistics network;
- have specialized technological equipment for handling and packaging products, allowing the vendor to save capacities and resources;
- have specialized equipment for long term storage of goods, allowing to store a consumer product qualities for a long time, and therefore the supplier has ability to supply larger volumes of goods.

It should be noted that other shopping facilities cannot provide the supplier in the complex of such conditions simultaneously.

Due to the analysis of the Ukrainian food retail market it was found that large and small manufacturers receive benefits from cooperation with trading networks, using them as supply channels of their goods:

- Inherently, for small manufacturers it's complicated to establish a system of sales which would go out of region where the production is situated themselves. Thereby, trading networks (retailers) offer to small manufacturers already established system of sales.
- Large manufacturers due its scale have ability to step up production permanently, establishing new production lines, workshops, factories etc. Whereas trading activity aimed on receiving operating profit, increasing of production volume should be followed by proportional increasing demand on definite product. Exactly retail through trading networks is a tool to ensure and stimulate demand and to support return from economic activity on sustainable level.

In terms of nationality of manufacturers and suppliers, trading networks also gain profits:

- Foreign manufacturers, entering national Ukrainian retail market find themselves in alien's environment which in terms of general economic and trading aspects. Trading networks (retailers) play role of guide and promote sustainable process of development on Ukrainian market.

- Since traditional trade became less large-scale and began to focus on narrow target audience, in terms of big cities trading networks became mostly the one effective distribution channel for national manufacturers.

The vast majority of large grocery manufacturers try to bring their products directly to trading networks (retailers) or to wholesale suppliers, who cooperate closely with trading networks as well.

## 5. Certain issues arising from contractual relationship between suppliers and retailers

The economic situation, due to the presence on the market of large retailers, makes the manufacturers of the goods to some extent dependent on retailers with large volume of sales. Aforementioned allows retailers to require from manufacturers (suppliers) certain conditions in the contractual relationship imposing an agreement terms such as unnecessary service providing, setting unreasonably long terms of payments, executing of transactions with non-transparent provisions, etc.

However, unlike other economic relations when the damaged party of the contract has ability to protect company's rights in court or, in some cases, through filing a complaint to regulatory authorities, one in retail contract is constrained by the risks of losing sales channel.

The larger is the volume of sales of the manufacturer (supplier) through the sales channel (trading network), the more challenging is transition from one sales channel to another.

## 6. Problems and prospects for regulation of economic competition in the field of food retail

Today in Ukraine there is no specific legislation or codes of conduct regulating the relations between buyers and suppliers in area of food retail. However, general requirements of the competition legislation are applied to regulate retail relations. There are number of exceptions for the application of legislation on protection of economic competition on possible restrictions in the supply chain of goods (provisions of Article 8 of the Law of Ukraine "On Protection of Competition"). However, the practice confirms that actions on using retailers' purchasing power (these actions are also under review) are not among these exceptions.

In the context of national security, conditions of food retail market and its connection with the processes of the relevant product markets are important for state. The State shall regulate prices for socially important goods, such as dairy products, bread and so on. Establishing maximum permissible level of retail trade increment is main method of regulation. In recent years, the Antimonopoly Committee has actively applied the legal mechanisms of restraining unjustified price growth for food in its workplace, and in retail sales with purpose to prevent or to eliminate consequences of violations of the legislation on protection of economic competition. In particular, a number of cases have been reviewed and a number of recommendations have been made. The Committee makes energetic efforts in competition advocacy, particularly among business environment, through conducting meetings, discussions and debates with relevant trade associations and others.

# UNITED KINGDOM


## Summary

This paper is submitted jointly by the Office of Fair Trading (OFT) and the Competition Commission (CC) (together the Authorities). The paper summarises the background and nature of various competition investigations and advocacy activities carried out by the Authorities into the food chain sector.

The harsher economic climate of the last few years, together with significant food prices increases, volatile commodity markets and perceived concerns about the functioning of the overall food supply chain, has put increased pressure on public authorities, including competition authorities, to watch consumer goods and agricultural markets more closely to ensure that such markets and competition therein are working effectively at all levels of the food chain to the ultimate benefit of consumers.

In recent years there have been several reviews of legislation and reports prepared about the food sector at the EU and national level. Reform proposals have included the narrowing of the application of competition law. This submission considers the OFT's competition advocacy work with other agencies including UK Ministries, DG-Comp and other EU members' national competition authorities.

In respect of merger investigations, the existence of buyer power has been an aspect of the Authorities' investigations. The relationship between suppliers and retailers was also investigated in the Groceries Market Investigation and in antitrust cases. This submission describes these considerations.

Following the Groceries Market Investigation a revised code of practice for food retailers was established (GSCOP), as was the Groceries Code Adjudicator (GCA) to oversee the operation of the GSCOP. This submission describes the code and explains the role and activities of the Adjudicator to date.


## 1. Background and Introduction

The Office of Fair Trading (OFT) is the relevant authority for Phase 1 of merger and market investigations, and in addition investigates and enforces antitrust cases and has lead responsibility for competition advocacy. The Competition Commission (CC) is the relevant authority for Phase 2 merger and market investigations.

Buyer power has been a key aspect of the Authorities' analysis in several merger investigations. Buyer power was also a theory of harm in the Groceries Market Investigation and the remedies implemented following that investigation have included a Code of Practice and the establishment of an adjudicator to monitor and enforce compliance of the Code. This submission focuses on these aspects of the competition analysis in such cases. It also explains the OFT's enforcement of the Competition Act 1998 in relation to various retailers and dairy processors, and competition advocacy activities in this sector.

## 2. Mergers and Market Investigations

### *2.1 Competitive Assessment of buyer power*

Over the past 10 years more than 120 mergers in the food sector, across a range of products, have been reviewed by the OFT at Phase 1. 10 of these were referred to the CC for review at Phase 2. The OFT also referred the Groceries Market in the UK to the CC for investigation in 2006. Buyer power has been a key aspect of the Authorities' analysis in many merger cases as well as the Groceries investigation.

#### *2.1.1 Mergers*

When considering whether the merger (or acquisition) will result in a substantial lessening of competition (SLC), the Authorities may consider buyer power in the following ways[1]:

a) In a horizontal merger, whether an increase in buyer power for the merged firm will result in horizontal unilateral effects;

b) In a vertical merger, in relation to coordinated effects, whether the merger might reduce countervailing buyer power. This could be the case if the merger involves the acquisition of a customer who would otherwise disrupt coordination; or

c) Whether the merged firm's customers have countervailing buyer power which will offset any anti-competitive effects resulting from the merger.

#### *2.1.2 Horizontal unilateral effects*

Where the merger firms purchase the same products, a horizontal merger might result in the merged firm enjoying greater buyer power (or monopoly power) than the firms could previously exert individually.[2] As the Joint Merger Assessment Guidelines note, while in many cases this in itself might not lead to unilateral effects it could do so where:

a) the merged firm has an incentive to lower the amount it purchases so as to reduce the purchase price it pays ("demand withholding"); and

b) the merged firm also has sufficient market power so that, as it reduces the quantity sold to its customers, it can achieve a higher price when it sells to them.[3]

Buyer power may also lead to suppliers having lower incentives to invest in new products and processes.

#### *2.1.3 Countervailing buyer power*

In some instances, an individual customer may be able to use its negotiating strength to limit the ability of a merged firm to raise prices. The Authorities refer to this as countervailing buyer power, and its existence will be a factor in making an SLC finding less likely in contrast to the scenarios discussed in above. If all customers of a merged firm possess countervailing buyer power *after the merger*, then an SLC

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1 Joint OFT/CC (Revised) Merger Assessment Guidelines September 2010,paras. 5.4.19, 5.6.15, 5.9 (Joint Merger Assessment Guidelines).

2 Joint Merger Assessment Guidelines, paras. 5.4.19 to 5.4.21.

3 For example, see *Clifford Kent Holdings and Deans Food Group* references to below.

is unlikely to arise. However, often only some customers of the merged firm will have countervailing buyer power. In these cases, the Authorities will assess the extent to which the countervailing buyer power held by these customers may be relied upon to protect all customers. Where individual negotiations are prevalent the buyer power possessed by any one customer will not typically protect other customers. Conversely where there are no bilateral negotiations between the suppliers and customers, the buyer power of one or more customers may act to protect the other customers with less or no buyer power by preventing a rise in the price ultimately paid by all customers.

As the Joint Merger Assessment Guidelines note[4], the factors considered by the Authorities when assessing the existence of countervailing buyer power and the effect of the merger include:

a) the presence, or likely entry, of credible alternative suppliers[5] and the ease of switching;[6]

b) the ability of a customer to impose costs upon its supplier;

c) the mutual dependency of the supplier and customers;

d) the nature of negotiations between suppliers and buyers in the relevant market;

e) the degree of price transparency in the relevant market; and

f) whether countervailing buyer power will remain effective after the merger.

The size of the buyer may be a relevant consideration in the assessment of the factors above, but the fact that the buyer is relatively large does not necessarily mean that it has buyer power. For example, it may be easier for a smaller buyer to switch supplier because of the lower volume of their purchases. As is illustrated by the cases referred to in this submission, there have been several occasions where the Authorities have not found countervailing buyer power and thereby prohibited a merger, notwithstanding the fact that customers were larger (for example, large grocery retailers).

### *2.1.4 Market Studies and Investigations*

In market investigations, the Authorities assess whether any features of a market have an adverse effect on competition. Features can be structural or be the conduct of suppliers or acquirers of the goods or services in the market being investigated, or the conduct of customers.[7]

Buyer power (the ability of a firm to secure from its supplier(s) prices or other terms in its favour) can be a structural feature.[8] For example, buyer power was identified as a feature in the Groceries Market Investigation.[9]

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4 CC2 Joint OFT/CC Merger Assessment Guidelines, paragraphs 5.4.2, 5.91-5.95, 5.97-5.98

5 Including the ability of the customer to sponsor entry or enter the market itself.

6 For example, see acquisition of *Boporan Holdings Limited of R F Brookes Chilled Food and Avance Bakeries* and acquisition of *Macaw (Holdings) Ltd by Cott Beverages*, referred to below.

7 "Features" are defined in section 131 (2) Enterprise Act 2002.

8 CC3 CC Guidelines for Market Investigations (CC Market Guidance) para 157.

9 See para. 20(g).

In some cases countervailing buyer power may be present and this may also be taken into account in the CC's competitive assessment.[10] In some markets prices are determined by the relative bargaining power of sellers and buyers, and countervailing buyer power can have the positive effect of preventing the exercise of a supplier's market power in the bargaining process. Countervailing buyer power can also undermine the stability of coordination.

The CC will take a number of factors into account when considering the effect of any countervailing buyer power including.[11]

a) the relative importance to each buyer and seller of its business with the other party;

b) the strength of the buyers' alternative sources for the relevant product;

c) whether suppliers have the ability to price-discriminate between customers in a way that reduces buyer power; and

d) the extent to which the benefits of countervailing buyer power are passed on to customers in lower prices.

The CC Market Guidance notes that the presence of large buyers relative to the size of the suppliers does not necessarily guarantee that the buyers can exert countervailing market power.

### *2.2 OFT and CC experience in merger and market investigations*

The following is a selection of merger and market cases involving the food sector considered by the Authorities:

a) OFT review of the acquisition by Boparan Holdings Limited of RF Brookes Chilled Food & Avana Bakeries (2012)[12];

b) OFT review of the acquisition by Nakano UK Holdings Limited of the vinegar and pickles in the vinegar business of Premier Foods Group Limited (2012)[13];

c) CC review of the acquisition of the HP Foods Group by the H J Heinz Company (2006)[14];

d) CC review of the acquisition of Macaw (Holdings) Ltd by Cott Beverages (2006)[15];

e) CC review of the merger of Clifford Kent Holdings and Deans Food Group (2007)[16];

f) CC review of the anticipated merger between AG Barr plc and Britvic plc (2013)[17]; and

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10 CC Market Guidance paras 176, 255(d).

11 CC Market Guidance para 176.

12 http://www.oft.gov.uk/OFTwork/mergers/decisions/2012/Solway.

13 http://www.oft.gov.uk/OFTwork/mergers/decisions/2012/Nakano.

14 http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/hj-heinz-hp-foods-group.

15 http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/cott-macaw.

16 http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/clifford-kent-holdings-deans-food-group.

g) CC Groceries Market Investigation (2008).[18]

*2.2.1 Acquisition by Boparan Holdings Limited of RF Brookes Chilled Food & Avana Bakeries*

2.2.1.1 The merger

This case concerned the completed merger of Boparan Holdings Limited, the owner of Matthew Walker, which was the largest supplier of Christmas puddings in the UK and RF Brookes Chilled Food & Avana Bakeries, the then second largest supplier of this product in the UK.

The OFT found that a SLC would arise with regard to the supply of Christmas puddings to large grocery retailers in the UK given that the parties' were each other's closest competitor, had high combined market shares and there was no evidence of potential entry or expansion. Further, large grocery retailers had a limited choice of suppliers for their volume requirements. The OFT therefore requested the divestment of one of the parties' Christmas puddings business.

2.2.1.2 Competition issues

The OFT considered the extent to which customers could exert buyer power to switch demand easily away from the merged firm. The OFT also considered whether customers with no choice could constrain prices by imposing costs on the supplier, for example, by refusing to buy other products produced by the supplier in respect of which it faced a greater degree of competition.

The parties argued that the large grocery retailers could switch to other suppliers or sponsor new entry or expansion of other firms; there were no long term contracts in place; and customers maintained pressure on parties throughout the term of the contracts by requesting lower prices and promotions funding. The parties also argued, supported by one customer, that they could not leverage their market power in supply of Christmas puddings given large grocery retailers' buyer power.

Amongst the evidence received from the large grocery retailers was that the supply of Christmas puddings was not an ideal market to sponsor entry in to. One customer stated that it would be forced to absorb any cost increases imposed by the parties post-merger.

The OFT found that the parties' combined market share exceeded 80% while the next largest supplier was significantly smaller with less than 5% market share and the parties faced limited competition constraints from other suppliers. The OFT found that there were limited opportunities to enter or expand in the supply of Christmas puddings. Therefore, the OFT concluded that countervailing buyer power was likely to be insufficient to alleviate the effects of substantial lessening of competition in the supply of Christmas puddings.

*2.2.2 Acquisition by Nakano UK holdings Limited and the vinegar and pickles in vinegar businesses of Premier Foods Group Limited*

2.2.2.1 The merger

This case concerned the completed merger of Nakano UK Holdings Limited and the vinegar businesses of Premier Foods Group Limited, which are the predominant two producers of various types of

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17 http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/ag-barr-britvic.

18 http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/groceries-market-investigation-and-remittal.

vinegar (malt, spirit, wine and cider vinegar) to the food ingredient, food service and retail sectors in the UK.

The OFT found an SLC was created and requested various divestments of production facilities.

2.2.2.2 Competition issues

The OFT considered whether countervailing buyer power was present for each of the products in the food ingredient, food retail and food services channel (that is food sold in bulk packaging which is often used in the restaurant trade) sectors in the UK for both branded and unbranded vinegar products.

Even where the market is characterised by customers who are larger than the suppliers, it does not necessarily follow that there will be countervailing buyer power. The OFT will assess whether and to what extent the merger is likely to reduce the customer's ability to pursue credibly any of the strategies set out above. It is possible, for example, that a merger may reduce a customer's ability to switch or even to sponsor new entry and, if this reduction adversely affects the negotiating position of a customer significantly, that customer's buyer power will not be sufficient to be countervailing.

Food ingredient sector: The OFT considered to what extent the merger was likely to reduce the customers' ability to exercise buyer power in relation to malt vinegar, wine vinegar and spirit vinegar. The merger parties submitted that food ingredient customers are predominantly large food manufacturers who are able to exert significant pressure on the merged entity to ensure that prices are competitive and cost-reflective. Evidence was presented of customers demonstrating strength in negotiations and playing off Nakano against its competitors, but the OFT ultimately viewed this as part of normal commercial relationships and not the exercise of buyer power. In relation to malt vinegars the parties were the only significant suppliers and customers indicated that the merger would result in them having only one supplier. Therefore, if there had been buyer power before the merger, it would have been lost post-merger. The OFT noted that even if certain customers did possess a degree of buyer power this would not be sufficient to protect other customers given the prevalence of individual price negotiations with customers.

Retail sector: The OFT considered to what extent the merger was likely to reduce the customers' ability to exercise buyer power in relation to (branded and unbranded) malt vinegar, wine vinegar and spirit vinegar. The merger parties argued that they had only a few customers and that these possessed buyer power. The OFT considered that customer requests for price reductions did not constitute evidence of buyer power and that this was simply part of ordinary commercial negotiations. None of the negotiations led to Nakano being unable to ensure that it could increase its prices in line with cost increases overall. The OFT did not find evidence that buyer power was being exerted. Given that the merger parties were the only two viable providers of the products the merger eliminated any choice they had and even in the event that they did possess some buyer power this would not continue after the merger.

Food service channel: The OFT considered to what extent the merger was likely to reduce the customers' ability to exercise buyer power. No food service customer expressed a belief that it possessed buyer power. Nakano argued that some customers have buyer power and presented evidence that several had threatened to switch supplier. The OFT commented that where individual negotiations are prevalent, the buyer power possessed by any one customer will not typically protect other customers from any adverse effect that might arise from the merger. The OFT therefore concluded that there was not enough evidence that buyer power existed in the relevant markets.

Ultimately, the OFT considered that Nakano's acquisition of Premier's vinegar business did not result in any reduction in buyer power.

### *2.2.3 Acquisition of HP Foods Limited, HP Foods Holdings Limited and HP Foods International Limited (HP) by HJ Heinz Company and HJ Heinz Company Limited (Heinz)*

#### 2.2.3.1 The merger

This case concerned the acquisition by H J Heinz Company (Heinz) of the HP Foods Group (HP). Both companies produced ranges of sauces, including ketchup, brown sauce and barbecue sauce, as well as tinned baked beans and tinned pasta products. The parties sold their products direct to supermarket retailers and indirectly to food service providers through distributors. The CC cleared the merger on the basis that it would not result in an SLC in any of the relevant markets, with the reasons for this finding differing in relation to each market, as detailed below.

#### 2.2.3.2 Competition Issues

The CC considered it appropriate to distinguish separate markets based on the supply channel of the relevant products. These were the food services sector and the retail sector. The latter of these was then sub-divided by product, with the retail markets for ketchup, brown sauce, barbecue sauce, baked beans and tinned pasta reviewed in turn. The CC considered that the relevant product markets were no narrower in the food services sector, and may even have been wider i.e. a market for table sauces more generally.

Retail sector: The CC used retail sales data to understand the responsiveness of final consumer demand to changes in the relative prices of the product supplied by the merger parties. This informed the assessment of the strength of the competitive constraint between the products.

The CC considered the role of the supermarkets as direct buyers of the parties' products. In this case, evidence as to whether or not buyer power was a factor involved considering whether a particular product was thought to be a "must-stock" item by retailers and their customers. So for example, in the case of Heinz's brand ketchup, it was argued by retailers that any buyer power they had in negotiations with Heinz was offset to some extent by Heinz's ketchup's must-stock status. However, in the case of barbecue sauce, which was not considered to be a must-stock item, the CC considered that buyer power played a greater role in negotiations between retailers and producers. This was because the lesser emphasis on brand for this product meant own brand acted as a greater competitive constraint. The CC concluded that buyer power, whilst limited, did make it less likely that an SLC would arise in the case of barbecue sauce.

A more influential consideration than buyer power was that Heinz and HP were not close competitors to each other prior to the merger. Furthermore, the retail markets for all products were highly concentrated and expected to remain so after the merger. The CC also found that retailers negotiated with manufacturers on a product by product basis. The CC thus determined that prices were unlikely to rise and that the lack of competition on non-price factors prior to the merger also meant that there would be no negative impact on product choice, innovation or quality in the retail sector post-merger. For these reasons, the CC found that an SLC was unlikely to arise in the retail sector market.

Food services sector: Buyer power played a more significant role in the food services market. This was due to factors such as buyer concentration, price deflation, wholesale suppliers' bidding for supply agreements, ease of customer switching and the relative unimportance of branding in comparison to the retail sector.

The CC considered that these factors also led to lower barriers to entry in the food services sector than in the equivalent retail markets. Similarly to the retail sector, evidence from prior to the merger indicated weak pre-merger competition between Heinz and HP in this sector. The CC therefore did not expect that an effect of the merger would be an increase in prices of the relevant products. Further, since there was no evidence of Heinz bundling or tying its products in the past, the CC did not expect that the merger would

increase Heinz's ability to bundle and/or tie its products in the food service sector. Nor did it expect that the merger would be likely to lead to a loss of service, product choice, innovation or quality. The possible existence of coordinated effects was not raised as an issue by any parties, and indeed the CC found no evidence of this. It therefore concluded that the merger would not be expected to result in a SLC in the food service sector market.

*2.2.4 Acquisition of Macaw (Holdings) Ltd by Cott Beverages*

2.2.4.1 The merger

The OFT referred the completed acquisition of Macaw (Holdings) Limited by Cott Beverages Limited (Cott) which concerned the acquisition of one of the leading suppliers of own-label plastic-bottled carbonated soft drinks to retailers by another supplier of the same products. The CC decided that the acquisition would not result in an SLC.

2.2.4.2 Competition Issues

In this case the power of customers was significant in reaching the no SLC finding. The CC found that prior to the merger, both large and smaller supermarkets and other customers held significant bargaining power when negotiating with suppliers. Retailers were able to switch quickly and easily between suppliers. In addition, suppliers were highly dependent on sales of own label brands to retailers and the existence of economies of scale meant that suppliers had a strong incentive to bid competitively for large volume business. In addition, the continued presence of spare capacity and the possibility of expansion meant that retailers would still be able to choose between suppliers and restrict Cott's ability to raise prices, despite its increased market share.

*2.2.5 Clifford Kent Holdings and Deans Food Group*

2.2.5.1 The merger

This case concerned the completed merger of Clifford Kent Holdings, the owner of Stonegate Farmers Limited (Stonegate) and Deans Food Group. Stonegate was the second largest supplier of shell and processed eggs in the UK and the Deans Food Group was the largest supplier of these products in the UK. The CC found an SLC in the market for the supply of shell eggs to retailers and in the market for the procurement of eggs from producers.

2.2.5.2 Competition Issues

Retail: Noble Foods (i.e. the merged entity) said that their customers (including the four largest supermarkets in the UK) had countervailing buyer power which when combined with the presence of other suppliers in the market, including importers, would mean that Noble Foods would not have market power in supplying its retail customers.

The CC found that post-merger Noble Foods accounted for over 60 per cent of sales of shell eggs to retailers and the next largest supplier was significantly smaller. Consequently the potential for customers to switch from Noble Foods was much reduced as a result of the merger. The CC considered that Noble Foods would be able to raise its prices without experiencing significant switching by its customers. The CC also found that there were limited opportunities for entry and expansion in this market and limited competition from imports. It concluded that the bargaining power of retailers of all sizes would be materially reduced by the merger.

Procurement: In respect of the market for the procurement of eggs from producers, the CC concluded that as a result of the merger, Noble Foods would have increased buying power which would give it the ability as well as the incentive to buy eggs from producers on less favourable terms, including at lower prices. The CC considered that rather than resulting in lower prices for eggs for retailers and consumers, Noble Foods would reduce the quantity of eggs produced, leading to higher prices for retailers and consumers instead.

### *2.2.6 Anticipated merger between AG Barr plc and Britvic plc*

#### 2.2.6.1 The merger

The case concerned the merger of two producers of carbonated and still soft drinks. Both companies manufactured and supplied soft drinks and had individual portfolios of proprietary soft drinks as well as producing other brands under licence. The merger brought together the IRN-BRU and Pepsi brands in the UK under common control. The CC did not find an SLC. The CC's assessment, and the views of most retailers and other customers of the merging companies, suggested that consumers did not perceive the two companies' brands to be good alternatives to one another. The CC also did not consider that the increased size of the merged company would mean new entrants and smaller companies would be disadvantaged significantly in obtaining listings at retailers.

#### 2.2.6.2 Competition Issues

AG Barr claimed that retailers could exercise buyer power in a number of ways, such as threatening to delist products, reducing a product's shelf space, reducing promotional activity for a product and promoting the retailer's own-brand products instead. AG Barr claimed that there was a difference between must-stock products (AG Barr's IRN-BRU soft drink being such a product in Scotland) and other products which required retailers' support to be successful. Other soft drink producers agreed with the parties' assertion that their customers had buyer power.

The parties' customers made a number of points including that consumer demand for a brand and the competitive dynamic across the market between the retailers would determine the buyer's and seller's perception of their relative strength or weaknesses in negotiations. One customer said that it would query suppliers' price increases and generally looked to reach a negotiated solution which would benefit both sides and their customers. Another producer said it had refused to promote a supplier's products because of a pricing dispute and had delisted products in the past because of their performance.

The CC concluded that there was a balance between strong buyers and strong sellers in the case of must-stock brands. Overall, it did not consider that the merger would improve the ability of the parties to increase the price of IRN-BRU. An important consideration was that consumers did not consider the parties' brands to be good alternatives to one another. It was noted that soft drinks manufacturers and their customers negotiate on many other factors apart from price, and that these non-price aspects could also reduce any incentive to increase prices after the merger. For these reasons, the CC did not find an SLC.

### *2.2.7 CC Groceries Market Investigation*

#### 2.2.7.1 Background to the market investigation

Before the groceries market investigation that commenced in 2006, the CC's predecessors had previously conducted an investigation into the supply of groceries from multiple stores in the UK.[19] As a result of that investigation the CC made two recommendations to the UK Government, namely:

a) that a Supermarkets Code of Practice (SCOP) be established; and

b) that a system of consent for new supermarkets be established.

The first of the above recommendations was implemented by the acceptance of undertakings from the largest grocery retailer. The second was not.

The SCOP came into force on 17 March 2002. It regulated UK supermarkets with a national market share of 8 percent or more in relation to their behaviour towards their suppliers. The OFT had responsibility for overseeing the SCOP's operation.

Following the 2000 investigation, the OFT continued to look at a range of matters related to grocery retailing. This included oversight of the SCOP (including a review of the SCOP in 2004), an audit of retailers' compliance with the SCOP published in 2005 and competition assessments of various mergers in this sector.

In carrying out its responsibilities the OFT continued to receive complaints and representations about grocery retailing. In some cases, these related to competition matters, such as the operation of the SCOP, the pressures facing convenience stores, and the market position of Tesco relative to other grocery retailers, while in other cases the concerns raised with the OFT related to matters lying outside the OFT's remit.

In 2005, in response to continuing concerns about the effectiveness of the SCOP, the OFT commissioned and published the results of a compliance audit. In addition to inviting parties to present evidence related to the SCOP audit, the OFT also invited evidence on whether there were aspects of the supply of groceries by grocery retailers that adversely affected competition. The OFT initially decided that there were no grounds for a market investigation reference to the CC. However, following a challenge to this decision in the Competition Appeal Tribunal (CAT) by the Association of Convenience Stores and Friends of the Earth, the OFT withdrew its decision. After further investigation the OFT referred the supply of groceries by retailers to the CC.

#### 2.2.7.2 The market investigation

After a two-year investigation the CC found that:

a) there were no significant distortions of competition arising from price promotions or below-cost selling;

b) there was no waterbed effect caused by favourable supplier prices to large retailers increasing supplier prices to wholesalers and convenience stores;

[19] Supermarkets: A report on the supply of groceries from multiple stores in the UK, Cm4842 (2000).

c) a significant number of local grocery markets were highly concentrated and barriers to entry enabled this to persist. This allowed grocery retailers in these areas to provide poorer retail offers. This also meant that retailers could charge higher prices nationally than they would have been able to if competition was more effective in more local areas; and

d) grocery retailers were able to use their buyer power to pass on excessive risk and unexpected costs to their suppliers. This led to consumer harm as a result of reduced supply chain investment and innovation.

In order to address the adverse effects on competition it had found, the CC devised a set of remedies. Some of these it implemented itself and others were recommendations to the UK Government. The remedies comprised:-

a) Introduction of competition test as part of planning process (recommendation);

b) Prohibitions on restrictive covenants and exclusivity arrangements (order made by CC);

c) Code of practice (order made by CC); and

d) Creation of Groceries Code Adjudicator (recommendation).

2.2.7.3 Planning test

The CC recommended to the UK Government that it should introduce a competition test into the grocery retail planning process. This remedy was intended to prevent local grocery markets becoming too concentrated. A test would be used to determine whether further entry to a local groceries market should be allowed or blocked. This test was based on the number and size of grocery retailers in a given area. This recommendation was ***not*** accepted by the Government.

2.2.7.4 Restrictive covenants and exclusivity arrangements

In July 2010, the CC made an Order[20] requiring the seven largest grocery retailers to remove certain restrictive covenants and exclusivity agreements affecting the use of land, namely those listed in the Order and any others which are notified to the OFT and fail the Test set out in the Order. The Test is failed where one of the seven largest grocery retailers has a share of 60 per cent or more of grocery sales in a local area and faces little competition in that area (as defined in the Order). The Test went into operation on 1 July 2012. The OFT has so far completed nine Tests: eight were passed and one was failed. The Order also restricts the making and enforcement of any new restrictive covenants or exclusivity agreements.

2.2.7.5 Supply chain remedies

The CC made an Order in August 2009[21] which introduced a new Groceries Supply Code of Practice (GSCOP). This came into effect on 4 February 2010 and replaced the SCOP. The Order also provides for the 10 largest grocery retailers to provide compliance reports to the OFT and the Groceries Code Adjudicator (see below) to enable supplier – retailer relations to be monitored in order that any issues of concern can be detected early and dealt with.

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20 http://www.competition-commission.org.uk/assets/competitioncommission/docs/2011/inquirydocs/groceries_land_order.pdf.

21 http://webarchive.nationalarchives.gov.uk/20111108202701/http://competition-commission.org.uk/inquiries/ref2006/grocery/pdf/gscop_2_order.pdf.

The GSCOP includes provisions about fair dealing, prohibitions on retrospective changes to terms of supply, procedures for customer complaints and de-listing, the burden of proof on retailers for "requests", and compliance and enforcement, including dispute resolution and binding arbitration procedures and the requirement that retailers have in-house compliance officers. These provisions were intended to address the problems with the previous SCOP code.

As well as introducing the GSCOP, the CC recommended that an Ombudsman should be set up to oversee the operation of the GSCOP to help deal, amongst other things, with the climate of fear (for example, arising from the fear of being de-listed) which had discouraged suppliers from complaining under the predecessor code (i.e. the SCOP). The CC did not have the power to make an Order requiring the setting up of an Ombudsman. Accordingly, it sought to obtain statutory undertakings from the 10 largest grocery retailers that they would co-operate with an Ombudsman scheme. However, the retailers refused to provide suitable undertakings, and so the CC recommended that the UK Government set up an Ombudsman. The Government accepted this recommendation and on 25 June 2013 the Groceries Code Adjudicator (GCA) was created.

2.2.7.6 The Groceries Code Adjudicator

The Groceries Code Adjudicator (the Adjudicator) is an independent regulator set up in June 2013 to encourage, monitor and enforce compliance with GSCOP. It will do this by working with the large retailers, each of which must have a Code Compliance Officer, and their direct and indirect suppliers, trade bodies and other bodies such as the National Farmers' Union and the British Retail Consortium, other Government departments and regulators, and the Devolved Administrations. Although the GSCOP applies only to the large retailers with an annual UK groceries turnover in excess of £1bn and their direct suppliers of groceries in the UK, evidence of compliance or otherwise may come from other sources. Measures are in place to protect the anonymity of suppliers and others making complaints, should they wish to maintain it.

The Adjudicator will have powers to launch investigations into suspected breaches of GSCOP, and to arbitrate in disputes between large retailers and their direct suppliers if the supplier has been unable to resolve the issue directly with the retailer. Where an investigation leads to a finding by the Adjudicator that a large retailer has breached GSCOP, a range of enforcement measures will be available, including making recommendations for improved practice, publication of information about the breach, and for serious breaches, applying financial penalties. The Adjudicator is consulting on how these powers will be exercised, with the consultation due to close on 22 October 2013 and guidance to be issued by 25 December 2013. No investigation may be launched until the guidance has been published.

The Adjudicator may also issue guidance on interpretation of any elements of GSCOP.

## 3. Antitrust enforcement and competition advocacy

### *3.1 UK antitrust law*

The Chapter I prohibition of the Competition Act 1998 (CA98) and Article 101(1) of the TFEU (collectively 'the prohibitions') prohibit all agreements between undertakings, decisions by associations of undertakings and concerted practices (hereafter 'agreements' for ease of reference) which may affect trade and which have as their object or effect the prevention, restriction or distortion of competition. Agreements which affect trade within the UK are subject to the CA98, whereas agreements which affect trade between member states of the European Union are subject to Article 101 TFEU.[22]

[22] Agreements may be subject to both the CA98 and Article 101 of the TFEU.

### *3.2 OFT experience in antitrust investigations*

The OFT has taken enforcement action in respect of the co-ordination between certain supermarkets and dairy processors on increases in the retail prices for certain dairy products in the UK in 2002 and/or 2003 (so-called A-B-C information exchanges).

The OFT's investigation arose following an application for leniency by Arla in 2003. As a result of that investigation, in 2011 the OFT issued an infringement decision that four supermarkets (Asda, Safeway (prior to its acquisition by Morrisons), Sainsbury's and Tesco) and five dairy processors (Arla, Dairy Crest, McLelland (prior to its acquisition by Groupe Lactalis), The Cheese Company and Wiseman) had infringed the Chapter I prohibition and imposed financial penalties totalling £49.51 million.

The infringements found by the OFT concerned the indirect co-ordination of retail price increases, which was achieved by supermarkets indirectly exchanging their retail pricing intentions with each other via the dairy processors – so-called A-B-C information exchanges. The OFT found that three infringements were committed, in respect of:

a) Cheese in 2002 – involving Asda, Dairy Crest, McLelland (prior to its acquisition by Groupe Lactalis), Safeway (prior to its acquisition by Morrisons), Sainsbury's, Tesco and The Cheese Company.

b) Cheese in 2003 – involving Asda, McLelland (prior to its acquisition by Groupe Lactalis), Sainsbury's and Tesco.

c) Fresh liquid milk in 2003 – involving Arla, Asda, Dairy Crest, Safeway (prior to its acquisition by Morrisons), Sainsbury's and Wiseman.[23]

Arla benefitted from complete immunity from financial penalty as it applied for and was granted immunity under the OFT's leniency programme. Arla was the first company to alert the OFT to the existence of possible infringements and the first to apply for leniency. Asda, Dairy Crest, McLelland, Safeway, Sainsbury's, The Cheese Company and Wiseman received reductions in their financial penalties because they agreed to early resolution. Each of these parties admitted liability for the infringements and agreed to a streamlined procedure enabling parts of the case to be resolved more quickly, thus reducing the costs of the investigation. Tesco appealed the OFT's infringement decision. In a judgment on liability handed down in December 2012 the CAT upheld the OFT's findings that Tesco broke competition law three times by co-ordinating increases in the retail prices for cheese in 2002. The CAT also found that Tesco did not infringe the law in relation to a number of other instances of exchanges of future pricing information. By an Order of the CAT made in January 2013 (as agreed between the parties), the outstanding issues in the appeal were brought to an end. Following that Order, Tesco paid a penalty of £6.5 million.[24]

### *3.3 OFT competition advocacy role*

In recent years there have been several reviews of legislation and reports prepared about the agro-food sector in which the OFT has actively participated. For example, at EU level:

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23 See www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/dairy and www.oft.gov.uk/news-and-updates/press/2011/89-11.

24 The OFT issued the following statements following the CAT's judgment in December 2012 and following the CAT's Order bringing the outstanding issues in the appeal to an end: www.oft.gov.uk/news-and-updates/pressstatements/2012/120-12 and http://www.oft.gov.uk/news-and-updates/press/2013/18-13.

a) European Competition Network (ECN) reported on the case law enforcement and market monitoring activities of the European Competition Authorities in the Food Sector;

b) The EU Dairy Package (EUDP) Regulation[25] was adopted in 2012; and

c) Reform of the Common Agricultural Policy (CAP)

d) ECN resolutions concerning the need to safeguard effective competition, both in the context of improving contractual relations in the milk sector and in relation to the CAP reform more generally

At national level, activities include:

a) preparing guidance on implementation in England of the EUDP Regulation;

b) publishing revised guidance on the application of competition law to co-operation between farming businesses; and

c) Provision of informal views on two dairy industry codes of practice. The first of these is between UK producers and processors of dairy products and the second is between producers and milk purchasers in Northern Ireland.

The harsher economic climate of the last few years, together with significant food prices increases, volatile commodity markets and perceived concerns about the functioning of the overall food supply chain, has put increased pressure on public authorities, including competition authorities, to watch consumer goods and agricultural markets more closely to ensure that such markets, and competition therein, are working effectively at all levels of the food chain to the ultimate benefit of consumers. Reform proposals have included the narrowing of the application of competition law (for example, in relation to the reform of the CAP). There has therefore been an increase in the OFT's advocacy role with regard to the functioning of the food supply chain and trade and agricultural policies, both at European and national level. The OFT has worked closely with other authorities both at EU level and national level on a number of aspects concerning the agro-food sector and contractual relations therein. Further details of the various EU and UK initiatives are provided in the following paragraphs.

The OFT contributed to the report published by the ECN in 2012 which provides a comprehensive overview of the most significant enforcement, advocacy and monitoring actions undertaken by the NCAs and the Commission from 2004 to 2011.[26] The report shows that the EU Commission and national competition authorities have been very active in the food and retail supply chain in recent years and that these markets remain high on the agenda of national competition authorities in the years to follow.

The EUDP Regulation, amongst other things, introduces an exemption from competition law allowing organisations of dairy producers, i.e. Producer Organisations, to negotiate contract terms, including price, jointly subject to certain thresholds. There is however, an ongoing role for national competition authorities, as explained below.

With regard to the CAP reform proposals, and the Single Common Market Organisation Regulation (single CMO) in particular, the European Parliament was keen to relax competition rules to allow farmers

[25] EU Regulation No 261/2012 of 14 March 2012 amending Regulation (EC) No 1234/2007 (the Single CMO Regulation) as regards contractual relations in the milk and milk products sector.

[26] http://ec.europa.eu/competition/ecn/food_report_en.pdf.

to manage supply and fix prices in all agricultural sectors and to review the definitions of key competition law concepts such as 'dominance' and 'relevant market' to be applied in the agricultural sector. Thanks to the joint advocacy efforts of the OFT and the agricultural ministry (Defra) at national level, and the OFT and other national competition authorities within the ECN, the most potentially damaging proposed exceptions to competition rules were avoided. In particular, there is not going to be as wide a relaxation of competition rules as originally envisaged and no redefinition of key competition law concepts for the agricultural sector. Nor will there be immunity for exclusionary practices while POs' collective negotiations (of the EU Dairy Package type) will only be allowed in certain sectors (i.e. olive oil, beef and veal and arable crops) and will be conditioned upon efficiencies.

Additionally, specifically with regards to the implementation of the EUPD Regulation, the advocacy work of the OFT and others resulted in an ongoing role under the EUDP for the national competition authorities, which allows negotiations to be stopped if competition is being excluded or if they would cause serious damage to SME processors.

The OFT worked with Defra and the Rural Payments Agency (RPA) - the authority responsible for recognition of producer organisations in the UK - to finalise arrangements to facilitate the implementation of the EUDP in the UK. This included contributing to the Guidance for Dairy Producers Organisations (DPOs) published by the RPA, which aims to explain how this Regulation will work in practice, and has published on its website some text explaining the OFT's intervention role under this legislation.[27]

The OFT continues to work with Defra, DG Comp and other National Competition Authorities on the practical details of implementation of both the EUDP Regulation and the revised Single CMO in advance of the different regulations and implementing acts relating to the CAP being finalised by the end of 2013.

In respect of both the EUPD Regulation and the CAP reform, the OFT's view, shared by Defra and all other EU competition authorities within the ECN, is and always has been that while there are potentially valid concerns about the share of value in the supply chain received by producers, wide derogations from competition law are not the answer because competition law itself is not the main problem. Also, there is potential for such proposals to have a knock-on effect on calls for derogations from the application of competition law in other sectors.

With a view to ensuring that these views had and continue to have as strong and wide impact as possible, the ECN advocacy efforts in these two areas have included published resolutions on, respectively: 'The continued need for effective institutions' and 'ECN Recommendation of the High Level Group on milk aimed at improving the bargaining power of dairy producers' (16 and 17 November 2010) and 'The reform of the Common Agricultural Policy' issued by the Heads of the ECN on 21 December 2012.[28]

In the UK, with a view to clarifying that many forms of cooperation are already possible under existing competition law (i.e. without need for express derogations), the OFT also published on its website in 2011 updated guidance to UK farmers on how competition law applies to cooperation between farming businesses.[29]

Separately, the OFT was asked to provide views on two distinct industry codes of practice which aimed at ensuring contractual best practice between UK producers and processors of dairy products and

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27 See http://www.oft.gov.uk/OFTwork/competition-act-and-cartels, bullet point "OFT's intervention role under the EU Dairy Package".

28 All available at http://ec.europa.eu/competition/sectors/agriculture/documents_en.html.

29 http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/guidance-farmers/.

between producers and milk purchasers in Northern Ireland. While the OFT does not usually provide views in response to requests asking whether specific arrangements between businesses comply with competition law, on this occasion the OFT provided informal views on the two codes to the British and Northern Irish Governments and the authors of the codes given the exceptional circumstances in the UK dairy industry at the time. The OFT provided its informal views to assist the authors to assess their own arrangements under competition law.

**UNITED STATES**

This paper responds to Chairman Jenny's letter of July 3, 2013, inviting submissions for the Competition Committee's upcoming roundtable on competition in the food chain industry. The U.S. Federal Trade Commission ("FTC" or "Commission") and Antitrust Division of the U.S. Department of Justice ("DOJ") (collectively, "the Agencies") are pleased to provide our perspective on competition issues in the wide variety of markets that make up the U.S. food chain. The activities described range from producing and processing markets to retail food markets, including groceries.

The first U.S. antitrust law, the Sherman Act,[1] was enacted in 1890 to respond to the emergence of trusts in many industries, including food products such as beef. Such combinations restricted total output, raised prices for consumers, and excluded new entry. Concerns about monopoly power and trusts in agriculture markets were essential to securing the passage of the Sherman Act, and once passed, early enforcement efforts focused on the conduct of agricultural trusts in beef and sugar.[2]

Antitrust enforcement has an important role to play in fostering competitive markets throughout the food chain, which promotes efficient use of resources, low prices, and production improvements to the benefit of Americans and others who buy foodstuffs exported from the United States. Over the years, the Agencies have used a variety of tools to promote competition in these markets, including public workshops, research and studies, and the investigation and prosecution of suspected antitrust violations.

The U.S. antitrust laws do not invest the Agencies with authority to challenge mergers or business practices on non-competition grounds.[3] Thus, when making enforcement decisions, the Agencies do not balance effects on competition against other public policy interests, such as the environment and food safety and sanitation. Responsibility for non-competition public policy concerns rests with other regulatory authorities[4] and, ultimately, Congress. However, the competition regime may complement other regulatory regimes that further non-competition public policy objectives.

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1 15 U.S.C. § 1 (2013).

2 *See, e.g.*, *United States v. Swift & Co.*, 122 Fed. 529 (N.D. Ill. Cir. Ct. April 18, 1903), *aff'd in part*, *Swift & Co. v. U.S.*, 196 U.S. 375 (1905) (upholding lower court's ruling that various meat dealers, who were in the business of buying butchered livestock in one state and selling fresh meat to retailers or agents in other states, violated the Sherman Act). *See also* Philip J. Weiser, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Remarks at the Organization for Competitive Markets' Eleventh Annual Conference, "Toward a Competition Policy Agenda for Agriculture Markets," (Aug. 7, 2009), *available at* http://www.justice.gov/atr/public/speeches/248858.pdf (discussing the role that concerns about agricultural markets played in spurring enactment of the Sherman Act, and the DOJ's recent enforcement activities in the agricultural marketplace).

3 *Nat'l Society of Prof'l Engineers v. United States*, 435 U.S. 679, 688 (1978).

4 For example, the U.S. Food and Drug Administration is responsible for protecting the public health by ensuring that the U.S. food supply is safe, sanitary, and secure.

## 1. Food Production and Processing Markets

### *1.1 Review of Mergers*

#### *1.1.1 General Approach in Merger Reviews*

The ultimate legal question in determining the lawfulness of an acquisition under the U.S. antitrust laws is whether the acquisition may substantially lessen competition. In answering this question, it is important to identify the relevant product and geographic markets in which plausible anticompetitive harm may occur. When reviewing proposed mergers between competing food manufacturers, the Agencies analyze individual products manufactured by each firm to identify products for which there are horizontal overlaps. Although in some sense, consumers have many choices for how to spend their food dollars, the Agencies focus on the demand for particular products and the alternatives that may constrain their pricing. This is consistent with the approach outlined in the Agencies' Horizontal Merger Guidelines[5] and has led to alleged product markets for sliced fresh bread, beer, carbonated soft drinks, seasoned salt products,[6] super-premium ice cream,[7] refrigerated pickles,[8] and baking powder,[9] to name a few.

The Agencies employ the hypothetical monopolist test to evaluate whether groups of products in candidate markets are sufficiently broad to constitute relevant antitrust markets. The Agencies use the hypothetical monopolist test to identify a set of products that are reasonably interchangeable with a product sold by one of the merging firms. The hypothetical monopolist test requires that a product market contain enough substitute products so that it could be subject to post-merger exercise of market power that significantly exceeds that existing absent the merger. Specifically, the test asks whether a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products (the "hypothetical monopolist") likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market.

#### *1.1.2 Food Production and Processing Mergers*

In October 2008, the DOJ sued to block the proposed acquisition by JBS S.A. ("JBS"), a Brazil-based firm that is the world's largest beef packer and the third-largest U.S. beef packer, of National Beef Packing Company LLC ("National Beef"), the fourth-largest U.S. beef packer. The merger would have substantially changed the structure of the U.S. beef packing industry, eliminating a competitively significant packer and placing more than 80 percent of domestic cattle packing capacity in the hands of three firms: JBS, Tyson Foods Inc., and Cargill Inc. The combined entity would have become the largest

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5 U.S. Dep't of Justice & Fed. Trade Comm'n, HORIZONTAL MERGER GUIDELINES § 4 (Aug. 19, 2010), *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf) ("Market definition focuses solely on demand substitution factors, *i.e.*, on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service. The responsive actions of suppliers are also important in competitive analysis.").

6 *See In re McCormick & Co.*, FTC Docket No. C-4225, *available at* http://www.ftc.gov/os/caselist/0810045/index.shtm.

7 *See In re Nestle Holdings, Inc.*, FTC Docket No. C-4082, *available at* http://www.ftc.gov/os/caselist/0210174.shtm.

8 *See* Complaint, *FTC v. Hicks, Muse, Tate & Furst Equity Fund V, L.P.*, (D.D.C. Oct. 22, 2002), *available at*

http://www.ftc.gov/os/caselist/hicksmusetate.shtm.

9 *See In re Philip Morris Cos., Inc.*, FTC Docket No. C-3987, *available at* http://www.ftc.gov/os/caselist/c3987.shtm.

beef packer in the country, with more than one-third of the national fed cattle packing capacity. At the time, beef packers purchased $30 billion in fed cattle annually from feedlots, slaughtered them, and processed them into U.S. Department of Agriculture ("USDA") graded cuts of beef and other products. Packers then packaged the cuts as boxed beef for sale to wholesalers and grocery chains. The merger would have lessened competition among packers for the purchase of cattle in certain domestic regions, as well as lessened competition among packers in the production and sale of USDA-graded boxed beef nationwide. This would have resulted in lower prices paid to cattle suppliers and higher beef prices paid by consumers. In February 2009, JBS and National Beef announced their decision to abandon the transaction, and DOJ terminated the pending litigation.[10]

In the dairy sector, DOJ has enforced the antitrust laws to protect consumers in a number of cases. In 2010, for example, DOJ filed a lawsuit alleging that the 2009 acquisition by Dean Foods Co. ("Dean Foods"), the largest processor and distributor of milk and other dairy products in the U.S., of two processing plants from Foremost Farms USA Cooperative, would eliminate substantial competition between the two companies in the sale of milk to schools, grocery stores, convenience stores, and other retailers, in parts of three mid-western states.[11] In the fluid milk relevant market, the DOJ alleged the particular tri-state geographic market based on the locations of *customers* (*e.g.*, grocery stores), rather than the location of *competitors* (*i.e.*, fluid milk processing plants). This was because fluid milk processors could price discriminate, charging different fluid milk prices (net of transportation cost) to customers in different areas.[12] This price discrimination was possible because processors individually negotiated prices with many customers and delivered the fluid milk to their customers' locations, and customers could not eliminate price disparities through arbitrage, due in part to high transportation costs. The court-approved settlement of the case required Dean Foods to divest a significant milk processing plant and related assets, and to notify the DOJ before any future acquisition of milk processing plants when the purchase price exceeds $3 million.

In 2001, the FTC challenged a merger involving two of the three leading U.S. makers of baby food, a market with annual sales of nearly $1 billion. At the time, the market had a clear leader, Gerber, which controlled approximately 65 percent of the market, with products sold in over 90 percent of U.S. supermarkets. The second- and third-largest manufacturers, Heinz and Beech-Nut, proposed to merge. Both firms, the Commission alleged, competed aggressively at the wholesale level to gain and maintain position as the second brand (in addition to Gerber) on retailer shelves. The Commission relied on the hypothetical monopolist test to exclude homemade baby food, citing several factors such as convenience, special formulations suitable for feeding infants, and the lack of evidence that home-prepared foods constrained the pricing of baby food sold in stores.[13]

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10 *See* Press Release, U.S. Dep't of Justice, Justice Department Files Lawsuit to Stop JBS S.A. From Acquiring National Beef Packing Co. (Oct. 20, 2008), *available at* http://www.justice.gov/atr/public/press_releases/2008/238382.html.

11 *See* Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement With Dean Foods Company (Mar. 29, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/269072.htm.

12 *See* HORIZONTAL MERGER GUIDELINES, *supra* note 5, at § 4.22 for a discussion of price discrimination and geographic market definition.

13 *See* Brief for Plaintiff in Support of Motion for Preliminary Injunction, *FTC v. H.J. Heinz Co.*, No. 1:00CV01688 (D.D.C. July 14, 2000), *available at* http://www.ftc.gov/os/2000/07/heinzmemo.htm#N_30_. The district court, despite finding that jarred baby food was a relevant market in which to assess the competitive effects of the merger, denied the Commission's motion for a preliminary injunction, citing potential efficiencies. *FTC v. Heinz*, 116 F. Supp. 2d 190 (D.D.C. 2000). The appellate court reversed, *FTC v. Heinz*, 246 F.3d 709 (D.C.Cir. 2001), and the parties abandoned the merger.

The Agencies recently filed an *amicus curiae* brief in an appeal from a bankruptcy proceeding.[14] The case involves a national bakery that was the subject of a 1996 judicial decree following a DOJ merger challenge. At issue was whether a contract implementing a perpetual, exclusive license for a particular bread trademark, which was part of the decree, would survive the bankruptcy proceeding. The Agencies argued that antitrust decrees serve important remedial purposes in the public interest and should receive special consideration in bankruptcy proceedings, and that the appellate court should reconsider the issue *en banc*. The court granted *en banc* rehearing and will hear oral argument in October 2013.

In another case involving bakeries, DOJ alleged that the 2009 acquisition by Grupo Bimbo, a Mexican firm controlling the U.S. corporation BBU, of Sara Lee's North American Fresh Bakery business would substantially lessen competition in the market for sliced bread in eight relevant metropolitan geographic markets. BBU and Sara Lee were the largest and third-largest bakers and sellers of sliced fresh bread in the U.S. The eight cities each constituted a relevant geographic market, defined, as in the *Dean Foods* case described above, with respect to the location of customers (*e.g.*, grocery stores), rather than the location of manufacturers (*i.e.*, bakeries), because sliced-bread suppliers can price discriminate across local geographic markets. Sliced-bread suppliers compete by, among other things, offering lower wholesale list prices and larger promotional discounts, and have different pricing and promotional strategies that are influenced by the degree of competition in a particular area. BBU and Sara Lee aggressively competed head-to-head in these markets, and BBU's post-merger market share would range from approximately 52 to 63 percent, in highly concentrated markets, after the acquisition. The 2012 consent decree entered by the court required divestitures of the rights to sell various Sara Lee brands, along with associated manufacturing, distribution, and marketing assets required for effective competition.[15]

In 1999, DOJ challenged the merger of the second- and third-largest grain traders in North America, Cargill, Inc. and Continental Grain Company ("Continental"). DOJ was concerned that "unless the acquisition is enjoined, many American farmers and other suppliers likely will receive lower prices for their grain and oilseed crops, including corn, soybeans, and wheat."[16] The area of competitive concern was the grain terminals ("elevators") owned by the merging firms. As explained in the DOJ's court papers:

- Grain traders such as Cargill and Continental operate extensive grain distribution networks, which facilitate the movement of grain from farms to domestic consumers of these commodities and to foreign markets. Country elevators are often the first stage of the grain distribution system, with producers hauling wheat, corn, and soybeans by truck from their farms for sale to the country elevators. … The grain is then transported by truck, rail, or barge to larger distribution facilities, such as river, rail, or port elevators, … or to feedlots or processors.

- River elevators or rail terminals may receive grain directly from the farm or from country elevators. From the river elevator, grain typically moves outbound by barge to port elevators. From the rail terminal, grain typically moves outbound by rail to port elevators or to domestic feedlots or processors.

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14 *See* Brief for the U.S. Dep't of Justice and Fed. Trade Comm'n as Amici in Support of Rehearing, *In re Interstate Bakeries Corp.*, No. 11-850 (8th Cir. May 31, 2013), *available at* http://www.justice.gov/atr/cases/f297300/297300.pdf.

15 *See* U.S. Dep't of Justice, Antitrust Case Filings: *U.S. v. Grupo Bimbo, S.A.B. de C.V.*, *available at* http://www.justice.gov/atr/cases/grupobimbo.html.

16 Complaint, *U.S. v. Cargill*, No. 99-1875 (D.D.C. July 8, 1999), *available at* http://www.justice.gov/atr/cases/f2500/2552.htm.

- The final stage in the grain distribution system for grain intended for export is a port elevator, where it is transferred to ocean vessels for shipment to foreign buyers.[17]

In this context, the DOJ alleged that the purchasing of wheat, corn, and soybeans each constituted a relevant product market and that many farmers and other suppliers located within overlapping Cargill/Continental draw areas depended solely on competition among Cargill, Continental, and perhaps a small number of other nearby grain companies to obtain a competitive price for their products. The merger, DOJ alleged, thus would significantly lessen that competition.

The case was settled with a judicial consent decree that required the merging companies to divest a number of port terminals to third parties in several regions, including the Pacific Northwest, Central California, and the Texas Gulf. For example, in the Pacific Northwest, Cargill's port elevator in Seattle competed with Continental's port elevator in Tacoma for the purchase of corn and soybeans. The overlapping draw area for these facilities included portions of five Midwestern states. Cargill was required to divest all of its property rights in the Seattle port elevator.

The DOJ also has taken enforcement action in the beer industry. Most recently, DOJ sued, and then in April 2013, announced a settlement with Anheuser-Busch InBev SA/NV ("ABI") and Grupo Modelo S.A.B. de C.V. ("Modelo") that required the companies to divest Modelo's entire U.S. business – including the licenses of Modelo brand beers, its most advanced brewery, Piedras Negras, its interest in a Modelo/Constellation Brands Inc. joint venture that sells Modelo beers in the U.S., and other assets – to Constellation, in order to proceed with their merger. The settlement, pending in U.S. federal district court, resolved DOJ's concerns that ABI's $20 billion acquisition of the remaining interest in Modelo that it did not already own, as originally proposed would substantially lessen competition in the U.S. beer market as a whole and in at least 26 metropolitan areas. The settlement also requires ABI to enter interim supply and transition services agreements with Constellation, which was added to the case as a defendant for purposes of settlement, to enable it to compete in the U.S. as it expands the capacity of the Piedras Negras brewery in compliance with the settlement to export to the U.S. As a result, Constellation will fully replace Modelo as a competitor in the U.S. ABI is the number-one brewer and marketer of beer in the U.S., with a 39 percent national market share; Modelo was the third-largest brewer of beer sold in the U.S., with a 7 percent market share.

### *1.2 Vertical Integration in the Food Chain*

Vertical integration – the combination of noncompeting companies where one firm's product is a necessary component or complement of the other's – can achieve procompetitive efficiency benefits. Vertical integration can lower transaction costs, lead to synergistic improvements in design, production, and distribution of the final output product, and thus enhance competition. Consequently, few purely vertical transactions are challenged as anti-competitive.

However, some vertical acquisitions can be anticompetitive. Vertical mergers can create or raise entry barriers that lead to higher prices or lower quality or innovation for consumers. For example, in industries with extensive networks, many firms already have market power through their ownership of established networks or installed bases involving huge sunk costs. Vertical mergers can, in certain instances, increase those barriers to entry even more, raising rivals' costs and reducing innovation and quality for consumers. Second, a vertical merger can facilitate collusion in either the upstream or downstream market. For instance, the acquisition of a supplier by a purchaser may create opportunities to monitor the upstream supplier's competition. Also, a vertical merger may involve the purchase of a

[17] Competitive Impact Statement, *U.S. v. Cargill*, *available at* http://www.justice.gov/atr/cases/f2500/2584.htm.

particularly disruptive downstream buyer. By eliminating a buyer who played one upstream firm off of another, such a merger may facilitate collusion in the upstream market. Yet antitrust enforcers must take great care when considering the nature and extent of the remedy in vertical merger cases. Since many vertical mergers result in procompetitive efficiencies, remedies should be crafted narrowly to permit procompetitive efficiencies to the extent possible.

The FTC recently considered competitive issues raised by vertical mergers between soft drink manufacturers and bottlers. In 2010, two of the nation's largest soft drink manufacturers proposed to buy their respective largest bottlers. These bottlers each distributed soft drink products under a license with a competing manufacturer.[18] The FTC raised concerns that each merger would give the manufacturer access to competitively sensitive business information provided by the competing soft drink maker to its bottler to help them bottle and distribute their products. Due to the highly concentrated and difficult-to-enter markets for branded soft drink concentrate and branded and direct-store-delivered carbonated soft drinks, the Commission charged that access to this information could reduce competition for soft drinks by eliminating direct competition or facilitating coordinated interaction in the industry. To settle these charges, the companies erected a "firewall" to prevent the sharing of competitively sensitive business information via the bottling subsidiary.

### *1.3 Cartel Cases Involving the Food Chain*

The DOJ has a long history of prosecuting cartels in the food industry. In 1988, for example, DOJ brought its first case in a sustained criminal enforcement effort attacking bid rigging in the milk and dairy products industry. Over the next seven years, DOJ filed 126 criminal cases against 73 corporations and 80 individuals in 18 states, resulting in fines totaling $59 million. Twenty-nine of the individuals received jail sentences averaging almost seven months a piece. The defendants were rigging bids on contracts to supply milk to schoolchildren, including contracts for federally subsidized school lunch programs, as well as on contracts to supply dairy products to the United States military. Some of the conspiracies had been rigging bids since the late 1960s. In 1996, the DOJ successfully prosecuted Mrs. Baird's Bakeries for price fixing in the bread and bakery products market in Texas; after trial, the defendant was sentenced to pay a $10 million fine, which was many times higher than the previous court imposed record fine (as distinguished from an agreed-upon fine in a plea agreement).

DOJ has prosecuted other criminal conspiracies involving products that have a major impact on the food chain. As then-Assistant Attorney General Joel Klein observed of the global vitamins cartel in 1999, for example, "The criminal conduct of these companies hurt the pocketbook of virtually every American consumer – anyone who took a vitamin, drank a glass of milk, or had a bowl of cereal."[19] In the food preservatives industry, for 17 years the sorbates cartel fixed prices of chemical preservatives used primarily as mold inhibitors in high-moisture and high-sugar foods such as cheese and other dairy products, baked goods, and other processed foods. The citric acid cartel was another worldwide cartel broken up by DOJ with record-breaking fines; citric acid is a flavor additive and preservative found in soft drinks and processed foods.[20]

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18 *In re The Coca-Cola Co.*, FTC Docket No. C-4305, *available at* http://www.ftc.gov/os/caselist/1010107/index.shtm; *In the Matter of PepsiCo, Inc.*, FTC Docket No. C-4301, *available at* http://www.ftc.gov/os/caselist/0910133/100928pepscocmpt.pdf.

19 Statement of U.S. Assistant Att'y Gen. Joel Klein (May 20, 1999), *available at* http://www.justice.gov/atr/public/press_releases/1999/2451.htm.

20 *See U.S. v. Haarmann & Reimer Corp.*, *available at* http://www.justice.gov/atr/cases/f1000/1064.htm.

## 2. Retail Food Markets

According to the USDA, American consumers spent over $1.3 trillion on food purchases in 2011. Due to the importance of this sector to household budgets as well as the economy as a whole, the Agencies have a long-standing interest in preventing anticompetitive mergers and business practices that threaten competition in markets for food products that consumers buy every day. Specifically, the FTC evaluates the impact of proposed acquisitions among companies that operate in retail markets for food products.

The Agencies' approach to analyzing competition in retail food markets follows the same approach used in other markets, as outlined in the Agencies' Horizontal Merger Guidelines.[21] The Agencies have challenged a number of mergers involving the retail sale of food and grocery products by supermarkets and other retailers. The Agencies' approach to analyzing mergers in food retailing is discussed in more detail below.

The FTC also has considered the extent to which unbranded or private-label food products constrain the pricing of branded food products. This is a very market-specific inquiry. Just as consumers' unwillingness to switch from one differentiated brand product to another in response to a change in relative prices can be important evidence in defining a relevant market, strong consumer preferences for manufacturer-branded products over private-label products may lead to the exclusion of private label products from the relevant market. Exclusion is proper whenever sales of private label products do not constrain the prices of manufacturer branded products. This analysis led the FTC to exclude unbranded or private-label products in markets for carbonated soft drinks,[22] seasoned salts,[23] and super-premium ice cream.[24] On the other hand, in some cases, the ability of the merged firm to raise prices will be constrained by the availability of private-label products. This was the case with ready-to-eat cereals where the acquired company was the primary manufacturer of private label cereals for several national supermarket chains.[25] The concern was that the acquisition, if consummated, might have the effect of lessening competition in the ready-to-eat cereal market by increasing the likelihood of the unilateral exercise of market power and simultaneously restricting the entry of new private label cereal products. Of particular concern was a provision in the merger agreement that would have restricted the new firm's ability and incentive to produce and sell private-label products. The merger proceeded once that provision was eliminated in settlement with the FTC.

### *2.1 The Use of Slotting Allowances*

Access to sufficient retail space can be a significant issue for U.S. manufacturers of packaged consumer foods. One area that has generated particular interest is slotting allowances, which are payments made by a manufacturer or supplier to a retailer as a condition for placement on the retailer's shelves or possibly for access to the retailer's warehouse space. Slotting allowances can have procompetitive and anticompetitive effects. For example, payment of a slotting allowance may signal the

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21 *See* HORIZONTAL MERGER GUIDELINES, *supra* note 5.

22 *FTC v. The Coca-Cola Co.*, 641 F. Supp. 1128 (D.D.C. 1986).

23 The parties resolved the Commission's competitive concerns with a negotiated settlement. *See In re McCormick & Co.*, FTC Docket No. C-4225, *available at* http://www.ftc.gov/os/caselist/0810045/index.shtm.

24 *See In re Nestle Holdings, Inc.*, FTC Docket No. C-4082, *available at* http://www.ftc.gov/os/caselist/0210174.shtm.

25 Complaint, *In re General Mills Corp.*, 123 F.T.C. 1380 (May 16, 1997), *available at* http://www.ftc.gov/os/1997/05/c3742cmp.pdf.

quality of a new product, which can help retailers screen from among several products to determine which to stock, and increases incentives for manufacturers to make demand-enhancing investments.[26] In some instances, payments from a manufacturer to a retailer may reflect an ordinary price discount. On the other hand, manufacturers could use slotting to foreclose or otherwise disadvantage rivals, raising the costs of entry and ultimately leading to reduced incentives to innovate and a narrowing of product variety, as well as higher prices.

Given that slotting allowances can have such varied effects depending on the circumstances, the FTC's approach is to look for those situations in which slotting allowances are most likely to present competitive problems. If the retail market is competitive, slotting allowances are likely to be passed through to consumers and competition will not ordinarily be harmed: consumers will receive the benefits of low prices and wide product selection. Thus, when examining proposed mergers of competing manufacturers or retailers, the FTC will work to prevent combinations that result in high levels of concentration, when they have the greatest potential for practices such as slotting allowances to have anti-consumer rather than pro-consumer effects.

### *2.2 Retail Food Mergers*

As noted above, the FTC has a robust program for reviewing proposed mergers among food retailers. Following the fact-specific approach outlined in the Agencies' Horizontal Merger Guidelines, the FTC has challenged a number of mergers involving the retail sale of grocery products.[27] Virtually all of those challenges have involved combinations of "supermarkets."

When reviewing mergers, the FTC has previously defined supermarkets as full-line grocery stores that carry a wide selection and deep inventory of food and grocery products in a variety of brands and sizes, enabling consumers to purchase all or substantially all of their food and other grocery shopping requirements in a single shopping visit.[28] Supermarkets typically carry more than 10,000 different items (generally referred to as stock-keeping units or "SKUs"), and have at least 10,000 square feet of selling space. Supermarkets compete primarily with other supermarkets that provide one-stop shopping opportunities for food and grocery products.[29] Indeed, supermarkets base their food and grocery prices

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26 The "quality signal" theory assumes that manufacturers have better information than retailers about the likely success of a new product. Thus, if a manufacturer believes its product is very likely to succeed, it is more likely to pay a significant slotting fee, knowing that it is likely to recover this expense through profits from future sales. Similarly, retailers infer that a new product is more likely to succeed if a manufacturer is willing to pay a slotting fee (or a significant slotting fee). Based on this inference, retailers are more likely to stock products for which higher slotting fees are paid in part because they expect such products to be more highly valued by consumers and to generate greater profits. *See* Federal Trade Comm'n Staff Study, "Slotting Allowances in the Retail Grocery Industry, Selected Case Studies in Five Product Categories," at 1 & 62 (Nov. 2003), *available at* http://www.ftc.gov/os/2003/11/slottingallowancerpt031114.pdf.

27 For a recent list of FTC retail food merger challenges, *see* http://www.ftc.gov/bc/caselist/industry/cases/retail/RetailGrocery.pdf.

28 *See, e.g.*, Complaint at 2, *In re Koninklijke Ahold N.V.*, FTC Docket No. C-4367 (Aug. 17, 2012), *available at* http://www.ftc.gov/os/caselist/1210055/120817konkinlijkecmpt.pdf (defining, for purposes of the Complaint, a supermarket as "a full-line grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products, refrigerated and frozen food and beverage products, fresh and prepared meats and poultry, produce, including fresh fruits and vegetables, staple foodstuffs, and other grocery products, including non-food items, household products, and health and beauty aids.").

29 Because they often involve dozens, sometimes hundreds, of local markets and require the analysis of extensive retail pricing data, supermarket merger investigations can be very time- and resource-intensive.

primarily on the prices of food and grocery products sold at other nearby competing supermarkets. Supermarkets do not regularly conduct price checks of food and grocery products sold at other types of stores, and do not typically set or change their food and grocery prices in response to prices at other types of stores.

Although retail stores other than supermarkets also sell food and grocery products, including neighborhood "mom & pop" grocery stores, convenience stores, specialty food stores, club stores, limited assortment stores, and mass merchants, these types of stores generally do not provide sufficient competition to effectively constrain prices at supermarkets. For example, they typically do not offer a supermarket's distinct set of products and services that provide consumers with the convenience of one-stop shopping for food and grocery products. The vast majority of consumers who shop for food and grocery products at supermarkets are not likely to start shopping elsewhere, or significantly increase grocery purchases elsewhere, in response to a small but significant price increase by supermarkets.

The retailers competing in a given locale to provide consumers with this type of one-stop shopping experience can vary, however. In most areas, the FTC has found that competition from small neighborhood markets, convenience stores, specialty food stores, club stores, and mass merchants does not constrain pricing of food products sold in supermarkets. But in one case involving a merger of stores in Puerto Rico, the Commission concluded that Puerto Rican consumers regarded full-service supermarkets, supercenters, and club stores as reasonably interchangeable for the purpose of purchasing substantially all of their weekly food and grocery shopping requirements in a single shopping visit.[30] As a result, in challenging that merger, the FTC alleged a product market that included not only full-service supermarkets, but also club stores.[31] This outcome underscores that the FTC examines retail grocery market competition on a case-by-case basis, considers all of the relevant facts, and makes an informed decision regarding a proposed merger based on those facts.

In similar fashion, the FTC relied on a narrower market definition in an investigation of a merger of two food retailers with a specialized format. In *Whole Foods/Wild Oats*,[32] the Commission alleged that the two companies were each other's closest rival in the operation of premium natural and organic supermarkets. Based on evidence collected during its investigation, the FTC asserted that premium natural and organic supermarkets differed from traditional supermarkets in the breadth and quality of perishables (produce, meats, fish, bakery items, and prepared foods) and breadth of natural and organic products and services and amenities. As compared to conventional supermarkets, premium natural and organic supermarkets offer a distinct set of products and services to a distinct group of customers in a distinctive

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30 Supercenters are full-service supermarkets co-located with a mass merchandiser outlet, and club stores are stores that offer a wide selection and deep inventory of food and grocery items, and general merchandise – often in large packages or in packages of two or more conventional-sized items – to businesses and individuals that have purchased club memberships. *See* Complaint at 3, *In re Wal-Mart Stores, Inc.*, FTC Docket No. C-4066 (Nov. 21, 2002), *available at* http://www.ftc.gov/os/caselist/c4066.shtm.

31 *See id*. To settle FTC charges that the proposed merger would reduce competition, Wal-Mart agreed to sell four stores.

32 *FTC v. Whole Foods Market, Inc. and Wild Oats*, No. 07-cv-01021, case materials are available at http://www.ftc.gov/os/caselist/0710114/0710114.shtm. Following a brief trial on the Commission's motion for a preliminary injunction, the district court found that premium natural and organic supermarkets was not a distinct market and that Whole Foods and Wild Oats compete within the broader market of grocery stores and supermarkets. The parties merged, with some stores shutting down by the time an appellate court reversed the district court's ruling on the basis that it had ignored important evidence supporting a market for premium natural and organic supermarkets. *See FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008), *available at* http://www.ftc.gov/os/caselist/0710114/080729wholefoodsopinion.pdf.

way. As compared to other organic markets, they offer an extensive selection of natural and organic products to enable one-stop shopping.

Other issues the Agencies address in reviewing food retailing mergers include the appropriate scope of the geographic market and barriers to entry. In most cases, food retailing competition is localized, typically limited to the distance consumers are willing to drive for weekly shopping trips. The exact scope will depend on factors specific to each store location, such as population density, road networks, natural barriers (for example, rivers or railroad tracks), and store size. In addition, significant entry barriers include the time and costs associated with conducting market research, selecting an appropriate location, obtaining necessary permits and approvals, constructing a new supermarket or converting an existing structure to a supermarket, and generating sufficient sales to have a meaningful impact on the market.

Finally, when assessing the central question of whether a merger involving food retailers may substantially lessen competition, the FTC has assessed the likelihood of both unilateral effects and coordinated effects. For instance, in the *Whole Foods/Wild Oats* merger, the FTC alleged that the companies were often viewed by their shoppers as the other's next best substitute, resulting in the loss of direct and unique price and non-price competition. In other cases, the FTC challenged the merger out of concern that the elimination of direct competition would increase the likelihood and success of coordinated interaction among remaining firms post-merger.

## 3. U.S. Research on competition in the food chain

### *3.1 DOJ/USDA Workshops on Agriculture and Competition*

In 2010 the DOJ and USDA held five public workshops on different aspects of competition in agriculture and food markets. The workshops featured more than 10 hours of public testimony, and the participation of Attorney General Eric Holder and Secretary of Agriculture Tom Vilsack. Competitive conditions in the food chain were discussed in some form at commodity-specific workshops covering corn, soybeans, and hogs; dairy; poultry; and livestock. The goal for the final workshop was to focus on profit margins or price spreads at various levels of the supply chain across several different agricultural industries. This workshop encompassed several areas not previously highlighted, such as retail consolidation and monopsony power. In May 2012, the DOJ issued its report entitled "Competition and Agriculture: Voices from the Workshops on Agriculture and Antitrust Enforcement in Our 21st Century Economy and the Way Forward."[33] The report summarizes the major issues discussed at the workshops. One lesson of the workshops is that antitrust enforcement and competition advocacy play a crucial role in fostering a healthy and competitive agriculture sector. But it is also clear that many of the challenges facing the agriculture sector today fall outside the purview of the antitrust laws and will require public and private cooperation to find solutions.

### *3.2 FTC Studies on Retail Food Competition*

Between 1998 and 2011, the FTC investigated retail food mergers that affected 176 markets and challenged mergers that affected 152 of those markets.[34] To help inform assessments of likely competitive effects of conduct and transactions in retail grocery markets, FTC economists published a paper in

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33 The report is *available at* www.justice.gov/atr/public/reports/index.html. Transcripts and video of the workshops, as well as links to more than 18,000 public comments, are *available at* www.justice.gov/atr/public/workshops/ag2010/.

34 Federal Trade Comm'n, HORIZONTAL MERGER INVESTIGATION DATA: FISCAL YEARS 1996-2011 (Jan. 2013), at 2 n.8 & 8, *available at* http://www.ftc.gov/os/2013/01/130104horizontalmergerreport.pdf.

December 2012 regarding the pricing impacts of some of these mergers.[35] The paper examined data from 14 retail food mergers that took place in 2007 and 2008 in markets of various size and pre-merger concentration levels. Several econometric techniques were used to estimate the price impact of these mergers, as well as counterfactual prices that would have prevailed absent the merger. The main finding of this study was that mergers in already concentrated retail food markets most frequently yielded significant price increases, while mergers in less concentrated markets were often associated with price decreases.

FTC economists have also looked at trends in retail formats, focusing on entry, exit, and growth.[36] In 2009, the most prevalent format was large supermarket chains of over 100 stores (41 percent of stores), followed by single store supermarkets (23 percent), then small supermarket chains of 2 to 100 stores (21 percent), and finally supercenters (11 percent) and club stores (4 percent).[37] The study showed that while the number of retail grocery outlets stayed roughly constant at 31,000 nationally from 2004-09, the number of supermarkets declined and the number of supercenters and club stores increased. The study also found significant shifts in brand market share over time with most of the changes in local market structure coming from incumbent chains either expanding (opening new stores) or contracting (closing stores), not entry.

Another area examined by the FTC is slotting allowances. The FTC has conducted public workshops on the topic of slotting allowances, provided testimony to Congress,[38] and issued several reports. The most recent, published in 2003,[39] examined the practices of seven retailers and eight suppliers (six manufacturers and two food brokers) regarding five product categories: fresh bread, hot dogs, ice cream and frozen novelties, shelf-stable pasta, and shelf-stable salad dressing. This study constituted the first systematic analysis of product-level data on slotting allowances directly from retailers, and was important to the FTC's understanding of the use and magnitude of slotting allowances in the retail grocery industry. However, due to significant variation in the way retailers documented slotting allowances and the small data sample, FTC staff were not able to extrapolate any findings across the entire grocery industry.

## 4. Conclusion

In competitive markets, supply and demand are determined by consumers voting with their dollars. This is certainly the case in markets involving retail food products, where consumer spending has a direct impact on household budgets and consumers face a number of options. To maximize profit, a producer must satisfy consumer preferences for products, packages, and methods of distribution in the most efficient manner. Less efficient producers are driven from the market, thus freeing up scarce resources for uses that consumers value most highly. The Agencies play an important role in seeking to ensure that these markets operate competitively.

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35 Daniel Hosken, Luke M. Olson & Loren K. Smith, "*Do Retail Mergers Affect Competition? Evidence from Grocery Retailing*," Federal Trade Comm'n Bureau of Econ. Working Paper No. 313, (Dec. 2012), *available at* http://www.ftc.gov/be/workpapers/wp313.pdf.

36 Daniel Hanner, Daniel Hosken, Luke M. Olson & Loren K. Smith, "*Dynamics in a Mature Industry: Entry, Exit, and Growth of Big-Box Retailers*," Federal Trade Comm'n Bureau of Econ. Working Paper No. 308 (Sept. 2011), *available at* http://www.ftc.gov/be/workpapers/wp308.pdf.

37 *See* Section II.B. & fn. 32, *supra*, for a more detailed discussion of supermarkets, supercenters, and club stores.

38 *See* Testimony of the Fed. Trade Comm'n before the U.S. H.R. Comm. on the Judiciary, "Slotting Allowances and the Antitrust Laws," Oct. 20, 1999, *available at* http://www.ftc.gov/os/1999/10/slotting991020.htm.

39 *See* Federal Trade Comm'n Staff Study, "Slotting Allowances in the Retail Grocery Industry, Selected Case Studies in Five Product Categories," *supra* note 28.

**BIAC**

## 1. Introduction

The food supply chain consists of a complex series of inter-related markets. As such, competition at different stages of the food supply chain shapes the overall functioning of the food sector.

While industry specific issues arise in the food sector by virtue of the inter-related nature of markets, the rapid rate of innovation, consolidation, and buyer power at various levels of the supply chain, competition policy enforcement in the food supply chain should utilize the same principals as applied to other areas of the economy.

In particular, care must be taken to ensure that enforcement and legislative responses are based on objective and rigorous analysis of available evidence bearing on the presence, or absence, of anticompetitive effects in a given case. Moreover, the analysis should omit consideration of policy objectives outside the traditional scope of competition law, such as distributional concerns, fair dealing, or the protection of particular market participants. Such objectives are ultimately beyond the scope of competition law and, if they should be addressed, they should be addressed by separate (i.e., non-competition law) regulatory actors. Moreover, non-competition law regulations (e.g. planning laws) should be applied with great care as they may have unintended consequences on the overall efficiency and competitiveness of the industry.

This paper discusses issues and emerging trends in the food supply chain industry with respect to four areas in particular: (1) buyer power at various levels of the food supply chain; (2) the introduction of private labels; (3) mergers; and (4) trade associations and information sharing.

## 2. Discussion

### *2.1 Buyer Power – When does it become anticompetitive?*

A problem to be acknowledged at the outset is that the term "buyer power" is frequently used to broadly refer to a condition that may or may not be anticompetitive, and indeed may be procompetitive. Buyer power should properly refer only to the ability of a purchaser to bargain for lower prices from input suppliers. It has been observed that "[a]ny buyer that is not a pure price-taker has some buyer power," and that because the exercise of this sort of bargaining power is "the essence of every competitive market," it is "neither anticompetitive nor illegal."[1] Buyer power involves a transfer of wealth from suppliers to downstream industry participants[2] and, as such, buyer power has the capacity to transfer efficiencies downwards along the supply chain provided that the downstream (i.e., retail) markets are sufficiently

[1] John D. Shively, "When Does Buyer Power Become Monopsony Pricing?", 27 Antitrust (Fall 2012), 87, 93 n.1.

[2] Ariel Ezrachi, "Buying Alliances and Input price Fixing: In Search of a European Enforcement Standard" (2012) 8:1 *Journal of Competition Law & Economics* 41 at 51.

competitive.[3] In the food sector, competition among retailers typically is intense, with grocers having narrow margins and the pace of innovation being quite rapid.[4]

In some circumstances, however, buyer power becomes a risk to competition; for clarity these circumstances are referred to as "monopsony" (a market with a single buyer) or "oligopsony" (a market with a small number of buyers). Monopsony/oligopsony power is the ability of one or only a few buyers to affect input price through purchasing decisions. By depressing demand for the supplied products below competitive levels, monopsony power distorts resource allocation and harms suppliers. It is of concern to competition enforcers for this reason.[5]

Competition law traditionally has avoided sanctioning purchasers provided the exercise of their buyer power was not intended to manipulate the competitive conditions in the buyer's market. Indeed, the exercise of buyer power frequently is the product of a highly competitive retail market and narrow margins, which force robust competition and efficient input pricing.[6] On the other hand, some consumer advocates and economists claim that supermarkets have emerged as competitive bottlenecks, which control suppliers' access to grocery consumers. As a result, these competitive bottlenecks vis-à-vis suppliers could reduce social welfare and, if retail competition is not strong, consumer welfare[7]. Various jurisdictions have considered the issue buyer power.[8]

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3 Zhiqi Chen, "Buyer Power: Economic Theory and Antitrust Policy" (2007) 22 *Research in Law and Economi*cs 17 at 24; see generally United Kingdom, Competition Commission, "The supply of groceries in the UK market investigation" in *Grocery market investigation* (April 30, 2008) at 104, available at: http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2008/fulltext/538.pdf. See also Debra A. Valentine, General Counsel, U.S. Federal Trade Commission, "Retailer Buyer Power: Abusive Behavior and Mergers/Acquisitions Roundtable," Oct. 20, 2000 ("Retailer buyer power can be procompetitive or anticompetitive, and the tracks are ambiguous.").

4 Marcel Corstjens & Ludo Vanderheyden, "Competition, Risk and Return in the US Grocery Industry" (2010) 8:2 *Review of Marketing Science* 1 at 18-21; David A. Matsa, "Competition and Product Quality in the Supermarket Industry" (2011) 126:3 *Quarterly Journal of Economics* 1541 at 1582-83.

5 See Sharis A. Pozen, Acting Assistant Attorney General of the Antitrust Division, U.S. Department of Justice, "Agriculture and Antitrust: Dispatches and Learning from the Workshops on Competition in Agriculture," 26 Antitrust (Spring 2012) 8, 9).,

6 The Reinvestment Fund, "Understanding the Grocery Industry: Financing Healthy Food Options: Implementation Handbook" (September 30, 2011) at 10, available online: http://www.cdfifund.gov/what_we_do/resources/Understanding%20Grocery%20Industry_for%20fund_102411.pdf.

7 Mark Armstrong, "Competition in two-sided markets", (Autumn 2006) RAND Journal of Economics, 37-3.

8 To the extent that retailers have buyer power in the food sector, it tends to be because for the typical supplier of a major retailer, any given supply contract frequently represents a much larger portion of the supplier's overall business than the overall business of the retailer. However, this concentration in downstream markets constitutes a necessary, but not sufficient, condition for anticompetitive buyer power. By contrast "[i]f entry is easy in the buyer's market, or if the buyer's existing rivals can readily expand their capacity, the supplier can reject the large buyer's attempt to buy less and buy cheaper. ... Even if the buyer's market is fully insulated from new competition, the supplier need not accede to a powerful buyer's demands if the supplier's product is sold in several markets and carries a comparable value in each one." (Debra A. Valentine, General Counsel, U.S. Federal Trade Commission, "Retailer Buyer Power: Abusive Behavior and Mergers/Acquisitions Roundtable," October 20, 2000)

By contrast, competition law has taken an active role in three general (and non-exclusive) categories of buyer power cases: (1) buyer mergers (consolidations); (2) abusive or exclusionary conduct by dominant buyers; and (3) cartel behavior among buyers.[9]

United States: The U.S. competition enforcement agencies have long histories of challenging anticompetitive buyer power; indeed, "buy side" issues have figured prominently in a number of recent matters at both agencies, in industries as diverse as pharmacy benefits management and poultry raising and processing.[10] Both agencies have emphasized the importance of effective competition in the food supply chain industry and vigorous antitrust enforcement.[11] Nonetheless, while sympathetic to the impact of increased buyer power on suppliers, the US Department of Justice has noted that "antitrust laws focus on competition and the competitive process, and do not serve directly other policy goals like fairness, safety, promotion of foreign trade, and environmental welfare….[Thus these issues] require public or private solutions beyond anti-trust laws."[12]

Similarly, in the context of a grocery retailing merger in Puerto Rico, the FTC responded as follows to criticism that it had failed to consider the ability of the acquiring firm (Wal-Mart) to shift purchases away from local suppliers prices or various potential adverse social effects: "[T]he Joint Report also expresses concern that Wal-Mart's acquisition of Amigo ultimately would lead to reduced sales of Puerto Rico agricultural products, speed the displacement of small- and medium-sized businesses such as neighborhood groceries and pharmacies, and accelerate urban sprawl and the hollowing-out of urban centers. While the Commission recognizes that these concerns reflect important questions affecting local economic development, they are also not concerns on which antitrust policy is focused. The Commission has neither the competence nor the jurisdiction to evaluate matters of these kinds."[13]

Europe: The European Union has experienced similar issues related to consolidation in the food supply chain.[14] The European Competition Network ("**ECN**") has proposed a voluntary code to address anti-competitive conduct and buyer power in the food supply sector and advocated in favour of a case-by-

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9 See generally Debra A. Valentine, General Counsel, U.S. Federal Trade Commission, "Retailer Buyer Power: Abusive Behavior and Mergers/Acquisitions Roundtable," October 20, 2000, at 2, 11-27.

10 See Statement of the Federal Trade Commission Concerning the Proposed Acquisition of Medco Health Solutions by Express Scripts, Inc., FTC File No. 111-0210 (Apr. 2, 2012); United States v. George's Foods, LLC, No. 5:11-CV-00043-gec (W.D. Va. May 10, 2011) (complaint), *available at* http://www.justice.gov/atr/cases/f270900/270983.pdf.

11 United States of America, Federal Trade Commission, "Enforcement Actions in Industry/ Sector: Manufacturing – Food & Beverages (FY1996-FY2013)", available online: http://www.ftc.gov/bc/caselist/industry/cases/manufacturing/ManufacturingFoodBeverage.pdf; United States of America, Department of Justice, Antitrust Division, "Competition and Agriculture: Voices from the Workshops on Agriculture and Antitrust Enforcement in our 21st Century Economy and Thoughts on the Way Forward" (May 2012) at 2, 9, available at: http://www.justice.gov/atr/public/reports/283291.pdf.

12 United States of America, Department of Justice, Antitrust Division, "Competition and Agriculture: Voices from the Workshops on Agriculture and Antitrust Enforcement in our 21st Century Economy and Thoughts on the Way Forward" (May 2012) at 15, available at: http://www.justice.gov/atr/public/reports/283291.pdf.

13 U.S. Federal Trade Commission, response to comment from Hon. Anibal Acevedo-Vila, In re Wal-Mart Stores, Inc., Docket No. C-4066 (Feb. 27, 2003), available at http://ftc.gov/os/2003/02/letteracevedo.htm

14 European Economic and Social Committee, "The current state of commercial relations between food suppliers and the large retail sector" (2013) *Official Journal C133/16, 09/05/2013 P.0015-0021* at para 1.1, available at: http://www.eesc.europa.eu/?i=portal.en.nat-opinions.25763.

case enforcement strategy.[15] In addition, the ECN suggests that greater transparency along the food chain will promote more efficient pricing.[16]

- Recent research by European Union member states has reached differing conclusions on the effect of buyer power on consumer welfare, innovation, and the imposition of higher prices on smaller retailers through a 'waterbed effect' whereby the supplier attempts to compensate for the discount provided to larger retailers with buyer power by increasing its price to smaller competitors.[17] These reports have in turn proposed divergent regulatory responses including the adoption of laws regulating unfair trading practices, mandating certain standardized contractual provisions, self-regulation by retailers and suppliers, or relying on traditional competition law principles, which hold that regulation should only occur when the exercise of buyer power is designed to harm competitors in the downstream market.[18] As a result, the ECN has been unable to reach the consensus necessary to develop a voluntary code on anti-competitive buyer power.[19]
- In January 2013, the European Commission released a "Green Paper on Unfair Trading practices in the Business-to-Business Food and Non-Food Supply Chain in Europe." This report defined unfair trading practices as conduct which "grossly deviate[s] from good commercial conduct and [is] contrary to good faith and fair dealing."[20] This report acknowledges that competition law is concerned with the general operation of the market, rather than regulating unfair trading practices in individual business relations (unless these practices result in a market malfunction stemming from the exercise of market power).[21]

United Kingdom: Following the Competition Commission's 2008 "Groceries market investigation"[22] the United Kingdom enacted the "Grocery supply code of practice", which applies to designated grocery retailers with annual product turnover greater than £1 billion.[23] In addition, Parliament passed the *Grocery Code Adjudicator Act*, which created an independent regulator within the Office of Fair Trading ("**OFT**")

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15 Commission of the European Communities, "A better functioning food supply chain in Europe," (October 28, 2009) Com (2009) 591 at para 3.1.2.

16 Commission of the European Communities, "A better functioning food supply chain in Europe," (October 28, 2009) Com (2009) 591 at para 3.2.

17 European Competition Network: ECN Subgroup Food, "ECN Activities in the Food Sector" (May 2012) at 98, 111-118, available at: http://ec.europa.eu/competition/ecn/food_report_en.pdf.

18 European Competition Network: ECN Subgroup Food, "ECN Activities in the Food Sector" (May 2012) at 116-120, available at: http://ec.europa.eu/competition/ecn/food_report_en.pdf.

19 European Economic and Social Committee, "The current state of commercial relations between food suppliers and the large retail sector" (2013) *Official Journal C133/16, 09/05/2013 P.0015-0021* at para 2.6.1.

20 European Commission, "Green Paper on Unfair Trading practices in the Business-to-Business Food and Non-Food Supply Chain in Europe" (January 31, 2013) COM/2013/037 at part 1, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52013DC0037:EN:NOT.

21 European Commission, "Green Paper on Unfair Trading practices in the Business-to-Business Food and Non-Food Supply Chain in Europe" (January 31, 2013) COM/2013/037, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52013DC0037:EN:NOT.

22 See generally: United Kingdom, Competition Commission, "Grocery market investigation" (April 30, 2008), available at: http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/groceries-market-investigation-and-remittal/final-report-and-appendices-glossary-inquiry.

23 United Kingdom, "The Grocery Supply Code of Practice," (August 4, 2009), available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/208350/Groceries_Supply_Code_of_Practice__.pdf.

to adjudicate disputes under the Grocery Code.[24] The Grocery Code limits the ability of grocery retailers to impose restrictive contracts and imposes a duty of fair dealing.[25]

Canada: Prior to the release of the new Abuse of Dominance Enforcement Guidelines in 2012, the Canadian Competition Bureau provided sector specific guidance for abuse of dominance in the grocery sector ("**the Grocery Guidelines**").[26] The Grocery Guidelines acknowledged that although the exercise of buyer power can constitute an abuse of dominance, the exercise of monopsony power will not violate the *Competition Act* if it is not intended to harm the buyer's competitors. The Grocery Guidelines also provided specific examples of how the *Competition Act's* vertical restraint provisions could apply to grocery sector specific issues such as slotting fees, below cost pricing, and exclusive supply agreements imposed by suppliers on retailers.[27] By contrast, the current Abuse of Dominance Guidelines provides no specific examples of conduct which may constitute an abuse of dominance specifically in the food supply chain.[28] While recognizing that buyers are capable of exercising market power, the Abuse of Dominance Guidelines offers relatively little by way of clarification on when such conduct may violate the Act.

- The Competition Bureau's clearest statement on buyer power (albeit not specifically in regards to the food supply chain) was offered at the Organization for Economic Co-operation and Development's 2008 Round Table on Monopsony. The Bureau stated that although monopsony can reduce consumer welfare, competition law avoids sanctioning buyers when their exercise of market power was not intended to harm a competitor. Thus, it is "unlikely that lower input prices would, in isolation, meet the requirement of a practice of anti-competitive acts." [29]

France: This is one of the countries which have given the greatest political attention to buyer power, and consistently dealt with retail as a specific sector. Since 1973 a string of reforms have addressed problems such as barriers to entry in the retail sector and introduced specific reforms banning resale at a loss, etc. The outcome of these reforms has been extensively analyzed by the economic literature, and it appears that none of these regulations have achieved their purposes and that new reforms had to be implemented to correct the undesirable effects of the previous ones. In particular, this showed that barriers limiting the ability to open new large stores reinforced the market power of the incumbents and that protecting the bargaining power of producers resulted in higher retail prices. Since 2003, new laws, in particular the *Loi de Modernisation de l'Economie* in 2008, changed the regulatory landscape with a view to reintroducing competition rather than imposing specific regulations. The implementation of these new regulations was followed by a marked decrease of retail prices, but the observed evolutions can have other sources (world-wide evolution of demand for food products in particular) and it is difficult to ascribe these results on prices to the only change of regulation. The trend now is to encourage the efforts of the

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24 *Groceries Code Adjudicator Act 2013* (UK) c 19.

25 "United Kingdom, "The Grocery Supply Code of Practice," (August 4, 2009), available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/208350/Groceries_Supply_Code_of_Practice__.pdf

26 Canada, Competition Bureau, "The Abuse of Dominance Provisions (Sections 78 and 79) as Applied to the Canadian Grocery Sector" (November 2002) (Repealed).

27 Canada, Competition Bureau, "The Abuse of Dominance Provisions (Sections 78 and 79) as Applied to the Canadian Grocery Sector" (November 2002) (Repealed) at paras 5.2.1, 5.2.2.

28 Canada, Competition Bureau, "Enforcement Guidelines: Abuse of Dominance Provisions" at 1, available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-abuse-of-dominance-provisions-e.pdf/$FILE/cb-abuse-of-dominance-provisions-e.pdf.

29 Organization for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs, "Competition Committee, Round Table on Monopsony: Note by Canada" (October 21-23, 2008) at para 5, available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02995.html.

producers to enhance their bargaining power, through long term contracts, collective organization, etc., and due attention being given to compliance with competition law.

### *2.2 Private Labels*

The development of private label products by grocery retailers has introduced new competitive dynamics into the food supply chain.[30] It has been asserted by various constituencies that private label products can have both pro- and anti- competitive effects. In particular, vertical integration by grocery retailers can promote increased efficiency and consumer welfare since retailers have direct access to information on consumer preferences and can eliminate a margin in the supply chain. These positional advantages can also be used to exercise buyer power over independent brand-name suppliers and may result in discriminatory practices (i.e., market foreclosure of independent brands).

When retailers sell private label products there may be an incentive to move towards a duopoly product market in order to accentuate the contrast between the name brand and private label products.[31] Thus retailers may be hesitant to carry other discount brands, which could undermine the profitability of the private label product.

Because retailers do not incur the same marketing costs as independent suppliers, private label products can be sold at a substantial discount to brand-name products.[32] Regulation of private label products presents a unique challenge whereby regulators must carefully balance any potential loss in consumer welfare resulting from decreased product innovation, diversity, and quality against the reduced prices offered for these products.[33] Some consumer advocates and economists claim that the dual role of retailers as distributors and competitors of independent brands may give raise to new exclusionary practices (i.e., misuse of independent brands' sensitive commercial information and copycat packaging) or place the unfair trading practices vis-à-vis suppliers into a horizontal competition dimension.[34]

Since a consumer's choice of grocery retailer typically is based on a basket of goods, private label products are used as part of a grocery retailer's competitive strategy at the store level.[35]

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30 The Green Paper on Unfair Trading practices in the Business-to-Business Food and Non-Food Supply Chain in Europe, p. 3: "The expansion of retailers' own brands has turned some merchants into direct competitors of their suppliers".

31 Victoria Daskalova, "Private labels (Own brands) in the Grocery Sector: Competition Concerns and Treatment in EU Competition Law" (January 9, 2012) TILEC Discussion paper 2012-02 at 3.

32 Agriculture Council of Saskatchewan, "Canadian Grocery Retail Private Label Industry Guide" at 3, available at: http://www.saskvaluechain.ca/privateretailguides.htm.

33 The European Commission's DG Competition has commissioned an ongoing study into the effects of retail concentration and vertical integration into innovation and consumer choice. See COMP/2012/015 — Study on "The economic impact of modern retail on choice and innovation in the EU food sector", http://ec.europa.eu/competition/calls/tenders_closed.html.

34 The Green Paper on Unfair Trading practices in the Business-to-Business Food and Non-Food Supply Chain in Europe lists several UTPs that, when employed by vertically integrated retailers, may have a foreclosure effect on independent brands. See, for example, at p. 19: "While it is legitimate for a party to request some information on the products proposed, the details received should not be used, for example, to develop its own competing product, which would deprive the weaker party of the results of its innovation."

35 Howard Smith, "Store loyalty v product loyalty: the dynamics of consumer choice and competition" in *Trends in Retail Competition: Private labels, brands and competition policy: report on the 2012 Symposium on Retail Competition* (University of Oxford, May 25, 2012) at 7, available at: http://denning.law.ox.ac.uk/news/events_files/Symposium_report_2012.pdf.

Separate but related issues arise in relation to retailers' control over product placement. Shelf assignment fees and product placement can impact the competitive balance between private label and brand-name products.[36] Thus when a private label is present, retailers can, in certain circumstances, use product placement to facilitate and promote more rigorous competition with brand-name suppliers. Moreover, this interplay between brand-name and private label products can benefit consumers through increased innovation by brand-name suppliers who will develop new products in order to distinguish themselves from private labels, as well as contribute to product-category growth.[37]

### *2.3 Mergers*

Although consolidation has been a longstanding trend in the food supply chain,[38] increased competition has prompted merger activity in Canada and the United States and heightened enforcement activity in Europe.[39]

Mergers in the food supply industry can raise issues with respect to product market definition, as illustrated in the United States, with the merger of premium natural and organic grocery retailers Whole Foods and Wild Oats in 2008. In granting the Federal Trade Commission's (**"FTC"**) application for an injunction, the District of Columbia Court of Appeals identified a core group of customers who shop for a basket of goods, which can only be provided by premium natural and organic grocers.[40] Consequently, these customers could not respond to an exercise of market power by Whole Foods.[41] Although certain products such as dry groceries were sensitive to price changes by conventional grocery retailers, premium natural and organic grocers are in a separate product market from conventional grocers.[42] Following this decision, a consent agreement was reached between the FTC and Whole Foods in 2009, which required the

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36 *Trends in Retail Competition: Private labels, brands and competition policy: report on the 2012 Symposium on Retail Competition* (University of Oxford, May 25, 2012) at 6, available at: http://denning.law.ox.ac.uk/news/events_files/Symposium_report_2012.pdf.

37 Ranga Chimhundu, Robert P. Hamlin & Lisa McNeill, "Impact of Manufacturer Brand Innovation on Retailer Brands" (2010) 5:9 *International Journal of Business Management* 1 at 13-14.

38 Jean-Francois Wen, Market Power in Grocery Retailing: Assessing the Evidence for Canada (Ottawa: Competition Bureau, 2001) at 13, available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/wen_e.pdf/$file/wen_e.pdf.

39 Marina Strauss, "Grocery wars spur industry consolidation" (August 14, 2013), *The Globe and Mail*, available at: http://www.theglobeandmail.com/report-on-business/metro-to-reorganize-ontario-network-close-some-stores/article13751650/; Lydia DePillis, "Supermarkets are merging again. What does that mean for your grocery bill?" (July 28, 2013), *Washington Post*, available at: http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/28/supermarkets-are-merging-again-what-does-that-mean-for-your-grocery-bill/; Clifford Chance, *Consumer Goods and Retail Industry Competition Bulletin* (June 2013) at 6-7, available at: http://www.cliffordchance.com/publicationviews/publications/2013/05/consumer_goods_andretailindustry competitio.html.

40 For an alternative approach to defining product markets see: *Trade Commission v Staples, Inc. and Office Depot, Inc.* 970 F.Supp. 1066 (1997) (rather than applying a basket of goods approach, a series of price sensitive and non-price sensitive products were chosen and used to compare Office Depot's pricing patterns other retailers who sold office suppliers. The FTC's expert found that despite similar prices there was a low degree of cross-price elasticity between office superstores and other office supply stores).

41 *Federal Trade Commission v Whole Foods Market, Inc., et al,* 548 F.3d 1028 (D.C. Cir. 2008), Majority opinion of Justice Brown at 15.

42 *Federal Trade Commission v Whole Foods Market, Inc., et al,* 548 F.3d 1028 (D.C. Cir. 2008), Majority opinion of Justice Brown at 19-20.

divestiture of the Wild Oats trade name, 19 stores, and the lease rights to 13 former Wild Oats properties. The *Whole Foods* case may suggest that grocery markets may be segmented into multiple product markets, yet there is a broad spectrum of supermarket competition, and Justice Friedman noted that "differentiation . . . does not equate to a unique relevant product market".[43] Indeed, the blurring of retail format or channel distinctions led the FTC, in another grocery retailing merger, to include "club stores" in the same product market as conventional supermarkets, and the agency also treats "Supercenters" as participants in the same market as conventional supermarkets.[44]

- The FTC has also considered the competitive dynamics of the food supply industry at higher levels of the supply chain. In particular, the spectre of increased buyer power and sub-competitive pricing in upstream markets was at the core of the Department of Justice's challenge to George's Foods' acquisition of one of Tyson Foods' chicken processing plants. As a condition of allowing the merger in 2011, the United States required George's Foods to increase the capacity of the vendor's processing plant. By increasing the plant's capacity, farmers would be able to offset any sub-competitive monopsony pricing through the increased returns resulting from economies of scale.[45]

Merger review by European Union member states and the European Commission has focused heavily on the grocery retail sector with 30% of mergers in the grocery retail sector raising competitive concerns and were initially opposed by local or European regulators, compared to 17% in the dairy sector and 12% in the meat processing sector.[46] Given the high rate of enforcement in the grocery retail sector, it is important that the European Commission's approach to merger review is clearly articulated, responsive to changing market conditions, and balance the procompetitive effects of increased buyer power at the retail levels with concerns related to increased market concentration. Of the 1,289 food supply chain mergers subject to competition review between 2004 and 2011, the European Commission only exercised exclusive jurisdiction in 4% of cases.[47] This is not surprising as the market definition taken into account when reviewing transactions in the retail sector typically is based on a limited geographical radius around stores (at least for conventional "brick-and-mortar" distribution outlets). Consequently, it is critical that European Commission and domestic competition regulators cooperate and, to the extent possible, harmonize their merger review processes in order to ensure effective and efficient merger review.

- It should be noted that decisions relating to upstream stages of the food supply chain, while usually taken in accordance with the established principles of competitive analysis, with or without the enforcement of remedies like in other industries, sometimes take into account external factors such as the Common Agricultural Policy or preferential international trade agreements.[48]

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43 *Federal Trade Commission v Whole Foods Market, Inc.*, 502 F.Supp.2d 1 (2007) at 70-71.

44 Decision and Order, Wal-Mart Stores, Inc., FTC Docket No. C-4066 (Feb. 27, 2003), *available at* http://www.ftc.gov/os/2003/02/walmartdo.htm. See generally Deborah L. Feinstein & Michael B. Bernstein, "All Over the Map: Grocery Store Enforcement from *Von's* to *Whole Foods*," 22 Antitrust (Fall 2007) 52.

45 "Competitive Impact Statement," *United States of America v George's Foods, LLC et al*, (2011) No. 5:11-cv-00043 at 9-10, available at: http://www.justice.gov/atr/cases/f272500/272501.pdf.

46 European Competition Network: ECN Subgroup Food, "ECN Activities in the Food Sector" (May 2012) at 7-8, available at: http://ec.europa.eu/competition/ecn/food_report_en.pdf.

47 European Competition Network: ECN Subgroup Food, "ECN Activities in the Food Sector" (May 2012) at 42, available at: http://ec.europa.eu/competition/ecn/food_report_en.pdf.

48 For instance, Decision 12-DCC-06 of the French Autorité de la Concurrence (January 20, 2006) approving a merger in the sugar manufacturing industry.

As part of its "Grocery market investigation," the United Kingdom Competition Commission released a guidance document clarifying its approach to merger review in the grocery sector.[49] The Commission indicated that merger review should not be used as a proxy for investigations into the state of competition in the market more generally. Rather, merger review should be confined to analyzing the competitive effects of the merger *per se*.[50] Notwithstanding the high degree of concentration in the retail grocery industry in the United Kingdom, the OFT has challenged mergers which would result in increased concentration among suppliers and rejected arguments that grocers have sufficient buyer power to resist any price increases.[51] However, the OFT has been inconsistent in its consideration of economic analysis and evidence when defining relevant product markets.[52] Thus, clarification on the preferred methodological approach would assist corporations when preparing for subsequent merger reviews.

In Canada, following the recent entry of merchandisers such as Target and Wal-Mart into the Canadian grocery industry, Canadian incumbents have announced several proposed acquisitions and partnerships.[53] Unlike other jurisdictions, Canada has not provided guidance for food supply chain merger reviews. However, the Bureau has reviewed a number of transactions in this space and determined that these mergers can result in both competitive gains in some instances but also create the risk of a substantial lessening of competition in others. Thus, in certain transactions, the Bureau has required remedies, including divestitures, in select geographic markets.[54] Canadian regulators have also considered mergers at the supplier level. In the merger of the Better Beef Group of Companies and Cargill Limited, the Competition Bureau recognized the very complex nature of the food supply chain and the influence of foreign trade and government imposed regulations on the beef sector. In approving the merger, the Bureau

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49 United Kingdom, Competition Commission, "Observations regarding the competition assessment of future mergers in the grocery retailing sector" in *Grocery market investigation* (April 30, 2008), available at: http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/groceries-market-investigation-and-remittal/final-report-and-appendices-glossary-inquiry

50 United Kingdom, Competition Commission, "Observations regarding the competition assessment of future mergers in the grocery retailing sector" in *Grocery market investigation* (April 30, 2008) at A2(1)-2, available at: http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/groceries-market-investigation-and-remittal/final-report-and-appendices-glossary-inquiry.

51 United Kingdom, Office of Fair Trading, "OFT refers cash and carry merger to the Competition Commission" (November 8, 2012), available at: http://www.oft.gov.uk/?itemId=901144 (discussing Makro Holding Limited's acquisition of Booker Group plc); Clifford Chance, *Consumer Goods and Retail Industry Competition Bulletin* (June 2013) at 4, available at: http://www.cliffordchance.com/publicationviews/publications/2013/05/consumer_goods_andretailindustry competitio.html (discussing the Nakano Premier merger review).

52 Richard Blewett, "Bitter Sweet – The OFT's Recent Approach to Food Mergers" (2013) July 2013(1) *CPI Antitrust Chronicle* at 2.

53 Sylvian Charlebois, "What sent Shoppers and Loblaw down the aisle? Wal-Mart" (July 19, 2013), *The Globe & Mail*, available at: http://m.theglobeandmail.com/commentary/what-sent-shoppers-and-loblaw-down-the-aisle-wal-mart/article13316865/?service=mobile; Marina Strauss, "Grocery wars spur industry consolidation" (August 14, 2013), available at: http://www.theglobeandmail.com/report-on-business/metro-to-reorganize-ontario-network-close-some-stores/article13751650/ (Empire Company Ltd (parent company Sobey's Canada) has proposed to acquire Safeway Canada; Loblaw Companies Ltd has proposed to acquire Shoppers Drug Mart Ltd.; Metro Inc. has proposed a joint-venture with Target Canada Co. to operate Target's Quebec based pharmacies).

54 See for examples of transactions where divestiture were required in select geographic markets: Canada, Consumer and Corporate Affairs, "DIR announces decision on Canada Safeway Limited" (December 2, 1988); Canada, Competition Bureau, "Divestitures Resolve Competition Concerns in Sobey's Acquisition of the Oshawa Group" (December 22, 1999); Canada, Competition Bureau, "Divestitures Key to resolving Competition Concerns in Loblaw Transactions" (August 12, 1999) (Loblaw's acquisition of Provigo Inc and The Oshawa Group).

noted that although there are high barriers to entry and substantial economies of scale in the food supply chain sector, retailers possessed sufficient countervailing power and were capable of vertically integrating into the beef processing industry in response to a price increase.[55]

### *2.4 Trade Associations & Information Sharing*

When properly structured, *bona fide* pro-competitive organization among competitors can promote dynamism and an increase in total welfare.[56] However, such collaboration also presents the opportunity for anti-competitive conduct to arise.

In the United States, there has been significant focus on the potential for information sharing within trade organization to have anti-competitive effects.[57] In order to provide greater clarity the FTC has produced certain industry-specific (albeit not in the food supply chain industry) guidance documents. For example, the guidance document for the healthcare sector establishes a "safety zone" for information/data "(1) that are gathered and managed by a third party (like a trade association); (2) involve data more than three months old; and (3) involve at least five participants, where no individual participant accounts for more than 25% on a weighted basis of the statistic reported, and the data is aggregated such that it would not be possible to identify the data of any particular participant."[58] The DOJ has issued a number of Business Review Letters of relevance, including a favorable response to a proposal by competing supermarket operators to retain a retail shelf-price checking service.[59]

In the European Union, improper information sharing among competitors has been a frequent basis for charges of anti-competitive conduct or involvement in a cartel.[60] European regulations governing agreements among competitors and information sharing focus on whether these agreements enable the participants to coordinate their future strategic and competitive objectives.[61] Although subject to an

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55 Canada, Competition Bureau, "Acquisition of Better Beef by Cargill Limited: Technical Backgrounder" (August 2005), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01941.html; see also Canada, Competition Bureau, "Competition Bureau Statement Regarding Proposed mergers of Pork Processors and Hog Producers" (December 17, 2012), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03519.html.

56 Organization for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs, "Potential Pro-competitive and Anticompetitive Aspects of Trade/ Business Associations" (October 16, 2007) Working Party No.3 on Co-operation and Enforcement, available at: http://www.ftc.gov/bc/international/docs/ustradeass.pdf.

57 United States, Federal Trade Commission, "Dealings with Competitors: Spotlight on Trade Associations" (July 8, 2008) nhttp://www.ftc.gov/bc/antitrust/trade_associations.shtm

58 United States, Federal Trade Commission, "Statement of Department of Justice and Federal Trade Commission Enforcement Policy on Provider Participation in Exchanges of Price and Cost Information" in *Competition in the Health Care Marketplace* (July 8, 2009), available at: http://www.ftc.gov/bc/healthcare/industryguide/policy/statement6.htm.

59 DOJ Business Review Letter to DataCheck, Inc., 1997 DOJBRL LEXIS 1 (Jan. 6, 1997) (no intent to challenge supermarket shelf-price auditing service; no future prices would be included and risk of anticompetitive effect "is attenuated . . . where the prices at issue already are publicly available and generally are not subject to negotiation," and safeguards were adopted to prevent direct price communications between competing retailers).

60 European Competition Work: ECN Subgroup Food, "ECN Activities in the Food Sector" (May 2012) at 60, 65-66, 71, 86-87, available at: http://ec.europa.eu/competition/ecn/food_report_en.pdf.

61 European Commission, "Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal co-operation agreements" (January 14, 2011) C 11/1 at para 63, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF.

efficiency defence, this broad definition of unlawful collaboration and information sharing may create uncertainty as to the limits of permissible conduct for trade associations.

Canadian Competition Bureau Commissioner, John Pecman, has expressed concern that trade associations may facilitate unlawful collaboration among competitors resulting in potential criminal or civil sanctions,[62] leading to suggestions that trade associations may be subject to increased regulatory scrutiny.[63] Although the information sharing and collaboration promoted by trade associations may allow markets to operate more efficiently, the Bureau has emphasized the importance of ensuring that any commercially sensitive information shared among competitors is sufficiently aggregated and anonymous.[64] Moreover, the by-laws, policies, and practices of these associations should not reduce the autonomy of association members or reduce the incentives for vigorous competition.[65] In 2008, the Bureau released for comments a Draft Information Bulletin on Trade Associations, which discussed particular activities of trade associations which may raise competition law concerns.[66] However, this specific guidance document was not adopted. Instead, the Bureau developed the more broad-based, Competitor Collaboration Guidelines, which analyze how the competitor collaborations of the *Competition Act* would apply to information sharing and trade associations.[67] The Bureau has given limited consideration to how these agreements would apply to food supply chain firms facing civil charges resulting from information sharing or their involvement in a trade association.

## 3. Conclusion

While competition enforcement agencies must take into account the particular characteristic of the food supply chain industry – just as they take into account the particular characteristics of other sectors, such as, for example, the financial markets or the high-tech industries – in BIAC's view regulation of competition in the food supply chain industry should utilize the same normative principals as applied to other areas of the economy.

Incorporating other non-competition law principles into the mandate of competition law enforcement agencies could have unintended consequences, including introducing inefficiencies into the industry and having adverse effects on the welfare of consumers and the upstream food supply chain.

Any policies designed to address policy objectives outside the traditional scope of competition law – including, for example, distributional concerns or the protection of particular market participants – are

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62 Canada, Competition Bureau, "Remarks by John Pecman, Interim Commissioner of Competition" (October 30, 2012) at 4, available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02834.html.

63 Susan Pigg, "Competition Bureau sets sights on industry organizations" (February 1, 2013) Toronto Star, available at: http://www.thestar.com/news/gta/2013/02/01/competition_bureau_sets_sights_on_industry_associations.html.

64 Canada, Competition Bureau, "Competition Law and Trade Associations: 2008 Property & Casualty Industry Insurance Forum" speech by John Pecman, Acting Senior Deputy Commissioner of Competition (May 23, 2008) at 5, available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02718.html.

65 Canada, Competition Bureau, "Competition Law and Trade Associations: 2008 Property & Casualty Industry Insurance Forum" speech by John Pecman, Acting Senior Deputy Commissioner of Competition (May 23, 2008) at 5, available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02718.html

66 Canada, Competition Bureau, "Draft Information Bulletin on Trade Associations" (September 8, 2008), available online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02730.html.

67 Canada, Competition Bureau, "Enforcement Guidelines: Competitor Collaboration Guidelines" (May 8, 2009) at 42, 46, available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf.

ultimately beyond the scope of competition law. To the extent that such concerns should be addressed, they should be addressed by separate (i.e., non-competition law) regulatory actors and/or by industry codes of practice.

## SUMMARY OF DISCUSSION

The Chairman, Frederic Jenny, opened the Roundtable on the Food Chain Industry by noting that the unprecedented number of contribution (31 in total) was a token of Delegates' interest. He presented the structure of the discussion to be broken down under four main topics.

The first topic would be the political economy of the food sector, paying close attention to the different types of political interference along the food chain, from the farmers to the consumers. The next two topics would be discussed along the dividing line between the countries that believe that traditional instruments of competition law are sufficient to deal with this sector and those who believe that specific instruments should be added to competition law to deal with some of the problems raised in the vertical chain. On the side of the countries that think that traditional instruments are sufficient, the discussion would focus on merger experience, particularly when defining markets. On the side of those who are concerned about issues like buyer power, specific concerns would be discussed along with instruments used to address these concerns. The legal framework of the appropriate instrument would also be discussed: whether extending the power of competition authorities is the best way or another set of provisions like self-regulation or codes of conduct would be more appropriate. The last main topic would be a discussion on the effectiveness of other tools to mitigate the unbalance of contractual powers between food suppliers and food retailers such as giving powers to competition authorities to help de-concentrate the market or monitoring contractual relationship along the vertical chain.

The Chairman then introduced the four experts: Professor Steve McCorriston from the University of Exeter who had already contributed to the roundtable on commodity prices, Mr. Jaap van Driel from the Ministry of Economic Affairs from the Netherlands, Mr. Fabien Berges from the Toulouse School of Economics and Mr. Johan Swinnen from the University of Louvain.

### 1. Introduction and general overview of the economics of food chain industries

The Chairman asked Professor Steve McCorriston to give a general overview of the economics of the food chain industry.

Steve McCorriston introduced himself as a researcher with a focus on the economic issues and the economic mechanisms in the food sector and not as an antitrust expert. He explained that he would focus on three points, building on the Secretariat background paper he wrote: (i) the background of the food sector, (ii) the characterization of competition issues in the food sector and (iii) price transmission issues.

At the outset, he pointed out that in recent years the political sensitivity around food prices has increased, mainly since the commodity price spikes in the mid-2000s and in 2011. Agriculture products and food have changed from being relatively cheap raw commodities to commodities with more price volatility and price spikes. Food inflation increased across many countries and this has raised awareness about the functioning of the supply chain and the role of competition in that context. At the same time, experience has shown that price at retail level was quite different across even a relatively homogeneous group of countries like the EU countries, and this was connected to differences in the supply chain.

Another issue, according to Steve McCorriston, was that, despite the increased price volatility at the retail end, agriculture prices are much more volatile than those at the retail level. Moreover, the share of

agriculture in the food dollar has been declining: retail prices are going up and agriculture prices are staying steady (not going up as fast or even declining). This has been considered a 'reason for concern', although it does not seem to reflect aspects about competition throughout the food supply chain but just changes in technology and the role of other marketing inputs in the supply chain.

Steve McCorriston then highlighted some issues addressed in the Secretariat background paper. One was the increasing level of concentration at all stages of the food supply chain against the background of what was happening with agriculture raw commodity prices and retail prices and the declining share of the food dollar. Indeed, there has been a common trend of increased consolidation at the food processing level but also at the retail level across all countries. Consolidation has occurred through mergers and acquisitions but there has also been a development in the retail sector where large multi-products retailers have become dominant throughout the supply chain. The emergence of these large retailers has had horizontal effect with fewer retailers competing against each other, but also a vertical effect that is felt across the whole of the food chain; these retailers sell tens of thousands of products on their shelves and supply other services like insurance and banking.

The other general trend has been the growth of private labels. Although there are large differences between countries, private labels penetration is seen to be an important issue. One of the big challenges of private labels is the interaction between horizontal and vertical effects. Private labels on the retail shelves might have an important pro-competitive effect because they offer cheaper products but they are also competing directly with the manufacturers and so the difficult issue is teasing out what are the anti and pro-competitive effects of the penetration of private labels.

Buyer power, something that farmers have often been concerned with for a long time, is also an issue that has become increasingly important in recent years, with the growth of dominant firms throughout the rest of the supply chain. This is also related to the issue about codes of conduct and how we should deal with buyer power, how we should recognise it etc.

He then summarised the situation by presenting a diagram (attached) with the supply chain that links the farmers to the wholesalers, to the retailers and to the consumers, a chain of successively imperfectly competitive markets with increasing concentration leading to both horizontal and vertical effects. The price transmission effect has been the focus of many concerns at the EU level as many authorities have been trying to understand the link between prices at the farm gate level and prices at the retail level, and how the competitive process impacts on the price transmission process. Although in the past the focus was mainly on the relationship between agriculture and food processing, now it is more centred at the level of retailing. This is a difficult topic to deal with and is related to the aforementioned increased concentration at various levels, the penetration of private labels and the way in which they impact on upstream suppliers and how price transmission works.

To conclude, he stressed that both horizontal and vertical dimensions of the food chain are important. Fairness and the distribution of value or value added along the chain can also become a really important issue. He also advocated separating the static from dynamic efficiency effects so that the effects not only on prices but also on innovation be examined.

## 2. The political economy of the food industry

The Chairman noted that, on the basis of several contributions, there seemed to be some kind of political interference with either the work of the competition authorities or with the framework in which the competition authorities operate in the food sector. He pointed to the contribution from Israel, a country where there were severe concerns about the price index and the welfare of consumers in 2011. He asked

the delegate from Israel to explain the political background and its implications both for the competition authorities and for the legal environment of the food chain in Israel.

The delegate from Israel reminded the Committee that the public demonstrations in Israel in the summer of 2011 were motivated by concerns with the structure and conduct of the food market. These led the government and Parliament to respond by forming several committees where the Israeli Competition Authority participated in to deal with these problems.

This raised the awareness of the government and the public to the importance of the antitrust authority as an expert and an independent agency that is both determined and equipped to cope with problems in this sector. The Competition Authority recently created a division within the economic department to conduct market studies in the food sector. In particular, in order to promote competition in the food markets, the government initiated the Food Act that the Competition Authority helped draft and that is now making its way through the legislative process in the Israeli Parliament.

The two main issues contemplated in the Food Act are: (i) the geographic competition in the retail sector and (ii) the creation of a code of conduct that is mandatory, simple, clear and easy to enforce regarding the relationship between suppliers and retailers.

The main features of the code of conduct are preventing the exclusion of smaller retailers or suppliers and preventing suppliers from relaxing retail competition. Regarding the geographic competition among retailers, the premise behind the proposed legislation is that when a retailer has a substantial position in a relevant geographic market it may try to create barriers to entry for new retailers into these markets by opening more new stores. This may deter entry (that could have promoted competition) and allow the incumbent retailer to entrench its position. So they are in the process of developing an economic model that defines the relevant geographic markets in order to implement these rules. In essence, they can define for each store that belongs to a chain a demand area consisting of the potential consumers of this store and a competition group consisting of the rival stores of this store and they can use this in order to implement the new Act.

The Chairman pointed out that several contributions emphasised the political nature of the food market. The contribution of Brazil notes that, according to the constitution of 1988, the right to food is a constitutional social right. As a result, the Brazilian government has embarked on a specific program to eradicate hunger with the competition authority putting more resources into this sector than into some others because of its social significance. He noted that South Africa is in a somewhat similar position as this sector has been given a high priority by the Competition Authority because of its social and political impact. In the case of Norway, where there are possible exemptions for the agricultural sector, the Chair wondered whether there is some kind of political pressure in the enforcement of competition law in this sector.

The delegate from Norway pointed out that Norwegian food prices are the highest in Europe and the proportion of total income spent on food is higher than in the neighbouring countries such as Denmark and Finland. It is a political objective to secure a certain degree of self-sufficiency of agricultural products and to secure agriculture production in all parts of Norway. There may be indeed some tensions between these political objectives and objectives related to competition and consumer welfare. For instance, the Competition Authority has often signalled that high import tariffs to protect domestic producers may result in reduced competition and high consumer prices.

He continued stressing that agriculture and fisheries are exempted from the Norwegian Competition Act. However, when enforcing competition law, only the effects on competition and welfare are considered and not the impact on other political objectives. In practice, the possibility for the government to overrule

the Competition Authority decisions in merger cases, taking into consideration other political objectives, has only been done once, some seven years ago.

Finally, he noted that the political importance of the food sector has affected the prioritization of the enforcement for two reasons: (i) due to the high prices, the size of the sector and the concentration in the markets and (ii) because in the assignment letter from the Ministry the Competition Authority is specifically asked to follow this sector closely.

The Chairman commented that the political concerns come both from the perceived high prices to consumers and from the perceived low prices that farmers receive, and that several countries have undertaken studies of the transmission of prices through the vertical chain. He referred to the contribution of Greece, which describes a very thought-provoking market investigation on the supply chain of fresh fruits and vegetables that relied on interesting econometric methods to follow the prices of apples, oranges, peaches, tomatoes, potatoes and various other food products. To address the issue of high retail price, there is the temptation in some countries to set a monitoring mechanism. In that context, the Chairman invited the delegate from Belgium to explain how the price observatory in place has worked.

The delegate from Belgium noted that initially there was a price monitoring unit in the Ministry of Economic Affairs, which worked largely at the initiative of the Competition Authority. This unit then gradually developed into a more organised structure, which is now the Price Observatory, a special body within the Ministry of Economic Affairs. It analyses prices at its own initiative or that of any of the interested parties, makes regular reports by trimester and specific reports when it finds an issue. When the Observatory sees a specific issue that may require intervention it can bring the file to the Competition Authority, which is then competent to take provisional measures. This report is also passed on to the Ministry of Economic Affairs, which then has to report to the government whether some other measures need to be taken. The results of the monitoring are not made public; they are distributed at the level of the ministry.

The Chairman requested the delegate of Lithuania to explain how price monitoring is used in his country as a way to inform the public on what are the prices and the price movements.

The delegate from Lithuania explained that the Competition Authority launched a price monitoring activity in 2010 in response to some political pressure because of price increases. The purpose was twofold: (i) first to gather and analyse some data on prices of food products and perhaps then draw some conclusions or launch an investigation if necessary; (ii) second to make those prices available to the public. The information was available on a website to facilitate consumers informed choices on which supermarkets they should go. This experience was, however, terminated in 2013 for two reasons. First of all, huge amounts of data were collected but not treated by lack of resource; second, some private websites already provided the price comparison service to the consumers.

The Chairman turned to Norway which suggested in its contribution that, apart from the inefficiency of the instrument, price monitoring could facilitate collusion.

The delegate from Norway confirmed that, given the Norwegian markets, which are small, concentrated and to some degree protected by high import tariffs, there are risks of tacit collusion in these markets. Caution should be exercised with respect to measures that could increase the transparency especially in the grocery market in Norway. Investigations have been carried out to assess how increased transparency could increase the risk of tacit collusion in different competition cases, like in the 2007 case where the retail chains chose to amend their practice of information sharing through the Nielsen Company after being presented with the Competition Authority's assessment of this information exchange. In 2011, strong arguments were made against the setting up of a food portal aimed at providing consumers with

information about prices as this would provide complete and frequently updated set of price data from different grocery chains.

The delegate from Lithuania acknowledged that this was the third unspoken reason for terminating activities in this sector as the Competition Authority should be the last one to add extra transparency to an already oligopolistic market.

According to the Chairman these views represent a piece of advice for Romania, which according to its contribution, is considering the setting up of a price observatory managed by the Romanian Consumer Protection Authority although in fact, this observatory was already created in July 2010 and is now under maintenance.

The Chairman then turned to the other end of the chain at the food suppliers' level where the concern is the possibly too low price paid to farmers. Governance tends to try to find ways to increase the price, possibly by reducing the buying power of the downward buyers of food. Both the contributions from the Netherlands and Jaap van Driel consider alternative solutions to try to improve the earning power of farmers by better management of the supply of agricultural product.

Jaap van Driel introduced himself as a policy adviser trained as an agriculture economist. He explained what is the scope of the Food Chain Analysis Network, which covers both OECD and developing countries, and clarified that the question of competition at local level, the impact of food standard certifications both on the quality of product (which is in the interest of consumers) but also on the possibility of collusive behaviour are part of the concerns of this Network.

He also addressed the topic of cooperatives. According to him, the results from the EU submission and some results from North America show that the main function of cooperatives is creating economies of scale, sharing risks, reducing transaction costs, promoting product innovation and providing quality control and, particularly in developing countries, providing access to resources and markets. . Finally, cooperatives will also have the function to regulate volumes and quality of supply according to demand and seasonality.

Jaap van Driel concluded with the discussion of unfair trading practices and noted that unfair trading practices would usually start with a conflict in the bilateral relationship between a supplier and a buyer. In theory, it is specified in contract law or commercial law when can a party consider that the other party did a wrongful act and decide to go to court but contracts are not always specific on what to do in these cases. While some countries prefer to go through public regulation, other countries choose to have private regulation through a code of conduct to manage these conflicts. He noted that, in case of market failures (e.g. in case of sustainable food production), it was sometimes better to leave it to the industry to self-regulate itself than to go with public rules, although one should be mindful of the competition rules and the dangers of cartel behaviour.

## 3. Product and geographic market definition and merger control issues in the food industry

The Chairman then introduced the topic on the application of competition law to the problems of growing concentration in the food industry, particularly at the retail level. .

The delegate from the United States pointed out that the US has found that the broad general framework for the analysis of mergers including the definition of the relevant market were applicable to the food retailing sector, as well. He stressed the broad US experience in reviewing mergers in the supermarket industry.

He noted that the analysis of product and geographic markets in this industry could be quite complex, as it can depend on the locality and the market conditions, the size of stores, and even on the specialization

of stores. For example, in a merger case, a special kind of supermarket that focused on organic and health food products was found not to be directly competing with the more traditional supermarkets, at least in the minds of consumers. Looking at the role of private labels , differing conclusions were also reached depending on the extent to which consumers found the private labels to be an adequate substitute for the branded products.

Regarding geographic markets, it was very much a case-by-case determination depending on the physical characteristics, natural barriers, road conditions, etc.

The Chairman then noted that although Israel also applied the same general methodology in food industry markets as the US, they seemed to go further, particularly in the definition of the tools to be used in defining geographic markets.

The delegate from Israel agreed that the same reasoning is used with the food sector as with traditional geographic market definition analysis. They have, nevertheless, developed a model that goes further. They define a demand area for each store that belongs to a chain and then they identify a competition group for that store. If there is a critical mass of potential store A consumers that are also potential store B consumers then store B will constrain store A's pricing behaviour.

Thus, the geographic area from which a given store attracts consumers is defined by the stores' characteristics, size, amenities, variety and travel time. Then, they identify the competition group of each store, which consists of the other stores that compete with these stores and then they can calculate the stores' market share in the relevant market. They are, in essence, looking for a situation where the overlap between the demand areas of two stores leads to a significant number of potential consumers of one store belonging to the demand area of also the other store. If they find a critical mass of consumers shared by both demand areas then they conclude that the stores can constrain each other's pricing behaviour to the extent that they can both be part of the same geographic relevant market.

The Chairman then asked Ireland to explain the methodology they developed that is somewhat comparable to the Israeli methodology.

The delegate from Ireland explained that they found that it was important to consider the supply chain as a whole and not just the market shares at the retail level. Their national HHI figures for retail concentration are around 1800. While this figure does not show high concentration, it can disguise issues of local market power in terms of geographic market definition and closeness of competition.

In terms of the vertical structure of the market, they identified five different supply chains or distribution models. These would range from the completely fragmented model at one end of the scale where suppliers trade with independent wholesalers who in turn trade with independent retailers to the more integrated model where suppliers manufacture private label groceries for retailers without wholesale involvement. In this latter model the wholesale aspect is internalised.

In terms of the geographical dimension they looked at concentration of floor space ownership in the five major cities in Ireland and then in smaller towns and found these latter to be much more concentrated than the major cities (although these too are quite concentrated). Therefore, there are issues about local market power and these are compounded by demographics and planning. First, there are a limited number of supermarkets and retailers already active that have secured the best sites and enjoy a certain first mover advantage. Second, entry is subject to retail specific size limits and constraints on location. Specifically, there is an upper limit on the size of the stores and limitations on where they can be located in order to preserve the viability of town centres. Both these issues can raise potential competition concerns and can

impact on the market definition both in terms of the geographical area and the type of competition from other types of supermarkets.

The Chairman then asked Japan and France to talk about their experience with market definition by describing interesting cases where this issue came up.

The delegate from France confirmed that the French Competition Authority had recently dealt with a proposed merger between two major operators in the distribution in France: Casino and Monoprix. This case raised a certain number of methodological issues on market definition both on product and geographical dimensions. In simple terms, the Authority had to deal with the issue of whether product market definition should be homogeneous in the whole territory. It did find that the forms of consumption and competition were so different from the rest of the country in certain cities like Paris that the relevant markets should be differently defined. Another interesting technical discussion that arose around the Casino-Monoprix merger was about the competitive pressure of internet sales, a question that has not yet been dealt with neither by the French Competition Authority nor by the European Commission.

Regarding the geographic market definition, the French Competition Authority employs a methodology in its Guidelines where the customer catchment areas are calculated on the basis of the real behaviour of customers.

It was found during the Casino-Monoprix investigation that distributors outside the calculated catchment areas still exercised some competitive pressure on around 5% of the consumption of Parisians. Therefore, their presence had to be accounted for in terms of market shares inside the catchment areas.

The delegate from Japan described a very significant case they had in 2013 that involved the number one supermarket chain (AEON) acquiring the majority shares of the number four retail chain (Daiei). Market definition was, as usual, a difficult exercise first in establishing what types of stores to be included in the same market and then in defining the geographical market.

Detailed price and quantity data for every store was not available to estimate the demand function and the cross-price elasticity. Therefore, a consumer survey was conducted by distributing a questionnaire to consumers coming to the stores. In these questionnaires they were asked, for instance, if they would be willing to shop in another store if the price were to go up by a certain percentage. The results of the survey indicated that the relevant market should include general merchandise stores and food superstores. Further, the geographic market at store level would be defined within a radius of about 0,5-3 kilometres. In that way, they found 260 cases of overlapping AEON stores and Daiei stores but they found that for all of those cases there were effective competitors or a very high probability of new entrants and so they accepted the merger with no remedy.

## 4. Problems associated with buying power and how they can be addressed

The Chairman then introduced a new topic: the problems associated with buying power.

The delegate from Austria referred to an inquiry conducted in 2007. This dealt with buyer power of supermarket chains *vis-à-vis* their suppliers. The enquiry produced evidence of the existence of buyer power. However, they also found that most complaints dealing with buyer power were anonymous and it proved very difficult to obtain information from companies as they kept arguing it was confidential. They did eventually get the information but they could not obtain sufficient evidence to demonstrate abuse of buyer power in food retail.

Then, in 2011, they received a complaint in the food sector and the complainant produced evidence about illegal resale price maintenance in the food retail market. With this information, they could organise

unannounced inspections in 25-30 companies. They found that it was usually the producers that asked, for example, for a price increase and that the retailers would agree to this if they could increase prices to the end-consumer and if the producer made sure that other competitors increased their prices to the end consumers, too. This was clear evidence of a hub and spoke cartel. It was also apparent that it becomes easier to implement a hub and spoke system when there is buyer power.

The Chairman noted that RPMs or hub and spoke arrangements do not necessarily need buyer power to exist and these are more classical types of abuses that competition authorities are used to deal with.

The delegate from Turkey noted that they conducted a market investigation in the food retailing industry in 2012, motivated by several complaints from suppliers about buyer power-related problems and unfair trade practices of large retailers. The main problem areas identified by the investigation were the unilateral imposition of contract terms by retailers, such as discounts and related practices that decreased the price paid to the suppliers; and penalties in late payments.

However, they found that although there was an increase in the buyer power of retailers the concentration ratios in the market were still low, profit margins of suppliers had not decreased overall and suppliers were not economically dependent on large retailers. Therefore, they concluded that buyer power of large retailers was not at the level that would distort competition in the market. The Competition Authority decided to monitor the market but not to intervene at that stage.

The Chairman then asked the delegate from Japan what they would consider an abuse of superior bargaining power.

The delegate from Japan explained that in Japan there was regulation in place against the abuse of superior bargaining position. This is defined as implementing unjust business practices by relying on a dominant bargaining positioning over the other party. This is prohibited under the Antimonopoly Act. This is different from an abuse of dominant position because it is not required for a party to have a dominant position; it is sufficient to have a relatively superior bargaining position as compared to the other transacting party.

In 2011, the Japan Fair Trade Commission took legal action against the supermarket Sanyo-Marunaka for the abuse of superior bargaining position. The Japan Fair Trade Commission found that Sanyo-Marunaka illegally requested for the dispatch of employees, for monetary contributions, the return of products, and price reductions. As a result of their investigation, the Japan Fair Trade Commission issued a cease and desist order and surcharge payment order in June 2011.

The delegate also referred to three reports published by the Japan Fair Trade Commission in the past three years: a report on trading between food manufacturers and food wholesalers, a report on trading between large scale, etc. retailers and suppliers and a report on trading through the use of distribution centres. Regarding the report on trading between food manufacturers and food wholesalers, they found indications of an abuse of superior bargaining position by food wholesalers against food manufacturers in the form of undue return of products, undue purchase of goods and services etc., but they also found that the food wholesalers engaged in such acts not only to secure their own benefits but also to respond to request from their own retailers.

The Chairman then asked the United States to comment if they were also concerned about such practices by major retailers in their country (for instance Wal-Mart).

The delegate from the United States commented that these practices were not actionable under their competition law because although they have a provision for abuse of dominant position they do not have the means or the desire to address a dominant position only in relation to a particular supplier.

The delegate from BIAC noted that they wanted to concentrate on the question about when should competition authorities be concerned about firms with buying power.

Their view is that buyer power is only a concern where it is used or likely to be used either unilaterally or in an oligopsony manner with the intent to manipulate competitive terms, thus resulting in harm to suppliers and competitors in a relevant market. An analogy could be made between buyer power and dominance in this respect. It is not dominance per se that should raise issues under competition law but rather the conduct that reflects an abuse of that dominance and that gives rise to substantial effects in a relevant market.

The same (i.e. that buyer power is only problematic if there is an abuse of it) holds for both merger and cartel cases except for one fundamental distinction: the likely anticompetitive purpose and effect of buyer power is often much harder to show in merger cases than it is in conduct cases such as dominance or cartel cases because in the latter you have access to records of the company, the proven conduct of the company and you won't be projecting it into the future as in merger cases.

The Chairman noted that several countries align with BIAC on this position, the United Kingdom being one of them. He then asked the UK to explain their reasons to think that the normal framework of competition law was adequate to treat problems of buyer power.

The delegate from the United Kingdom noted that it was probably an open question whether traditional competition law provisions were sufficient. However, he did think it was certainly possible to address some buyer power issues using traditional tools.

For example, buyer power effects are taken into consideration the way EU competition law is framed, for instance the way the Commission framed the vertical agreement block exemptions, which now requires that buyers as well as sellers to be below the 30% threshold to benefit from the block exemption as safe harbour. Also, while there is nothing expressly in Article 101 that addresses the issue of buyer power, Article 102 and the UK equivalent, by contrast, expressly cover it as an abuse of imposition of unfair purchase prices or other unfair trading conditions. So this shows that the authors of the treaty regarded the abuse buyer power for dominant companies as a potential important element within the prohibition and so abuses could, in principle, include for instance exclusive purchase obligations, predatory overbuying, raising rivals' costs through overbuying and refusal to purchase by a vertically integrated buyer.

He noted that in the UK experience there were no cases where the equivalent clauses to Articles 101 and 102 were used to deal with buyer power issues.

He noted that in the merger field they had a little more experience of using traditional tools to look at buyer power. For example, in a case involving a merger in the eggs industry they were concerned that the merger between two eggs companies would give the merged entity a strong buyer power in the procurement of eggs.

The Chairman then turned to Germany and asked whether the abuse of dominance provisions in their Act were adequate to sanction some of the practices that were discussed or whether a specific type of regulation was needed.

The delegate from Germany considers that traditional law provisions concerning the abuse of a dominant position are able to capture not only the abuse of market power on the supply side but also on the demand side, i.e. buyer power.

However, when rules on the abuse of a dominant position are not sufficient to control the abuse of market power below the level of dominance, Germany is in a particular position in that they apply

additional rules below the level of dominance. In Germany, undertakings are barred from hindering, exploiting or discriminating against suppliers and purchasers which are SME and depend on their sales or supplies. Undertakings are also barred from hindering small and medium size competitors in an unfair manner and irrespective of the market position, all companies are prohibited under certain circumstances from inducing other companies to engage in anticompetitive conduct.

They are able to apply these provisions in the European competition law framework. They have cases of unilateral anticompetitive conduct like the statement of objection issued in July 2013 to the largest German retailer EDEKA. EDEKA, after its takeover of another large retailer, Plus, demanded that special purchase conditions, which had previously been granted to the Plus stores (which had a much smaller volume) from about 500 suppliers now be also offered to EDEKA on a retroactive basis and with no corresponding compensation.

The Competition Authority considered that such demands could also be used to further expand EDEKA's market power to the detriment of smaller retailers. Thus, competition could be hindered by the fact that such demands induce suppliers to abstain from offering better conditions to smaller companies because they would always fear that smaller retail chains would be taken over by large retailers and then they would be confronted with the same request on a very large scale for the whole volume and for long retroactive periods.

The Chairman noted that there were a number of countries that had specific provisions in their law to resolve some of the issues mentioned in the discussion.

The delegate from Finland explained that following a sector inquiry that found some buyer power issues that raised potential competition concerns their government decided to draft a bill that would come into force at the beginning of 2014.

The first buyer power issue they identified concerned marketing allowances that producers employed to put a product on the shelves or direct marketing payments that can be offered to the same effect. The second issue was risk shifting that was observed especially in the bakery industry: bakers had to purchase back any unsold items. These concerns led to the new law that stated that retail chains that had above 30% market share were automatically in a dominant position. However, the authority would then use standard requirements for analysing whether there was an abuse of this dominant position and to enforce article 102.

The Chairman noted that Hungary did not only have provisions against firms that have significant market power in terms of buyer power but also a new legislation to address unfair negotiating practices in the food chain.

The delegate from Hungary explained that the Hungarian Competition Act does not address buyer power at all. It prohibits the abuse of dominance but at the time when it came into force none of the big retail chains had a dominant position in the relevant markets. In 2005, the legislator came to the conclusion that there was a problem created by the concentration of big retail chains and their strong bargaining power *vis-à-vis* suppliers and that it could only be solved by a new legislation. As a result, the Trade Act was amended with a general clause that stated that it was prohibited to abuse significant market power *vis-à-vis* suppliers. The Hungarian Competition Authority was given the task to enforce these provisions with the same procedural rules as cases related to abuse of dominant position. The Trade Act works with the presumption that those retailers whose net turnover is over 300 million Euros have significant market power.

All retail chains in Hungary are over this threshold, so they are all considered to have significant market power *vis-à-vis* suppliers. After 2005, the Competition Authority launched a few investigations that

mostly concerned fees suppliers had to pay for big retail chains to sell their products there, such as shelf fees or marketing fees. All these investigations were closed because the parties offered commitments and the authority found them to be sufficient to maintain the necessary level of competition on those markets.

However, the Hungarian government decided that food suppliers needed extended protection against the big retail chains so it introduced a new legislation, the Unfair Distributional Practices Act, which differs from the Trade Act in that it is only applicable in the food chain and only in relation to retailers and food product suppliers. This new legislation is enforced by a different government agency than the Competition Authority. However, the Competition Authority can still deal with abuse of dominance cases even though this is unlikely to happen because retail chains do not seem to have a dominant position in their market. Similarly, the Authority still has some competence regarding market power or bargaining power in connection with non-food suppliers.

The delegate from Italy noted that the situation was similar in Italy. The Italian Competition Authority conducted two large sector inquiries in the food sector and they share some doubts on whether traditional tools might be sufficient to tackle the problem of buyer power. There are now new powers granted to the Competition Authority to deal with contracts in the food sector where there is a significant unbalance of contractual power. The provision forbids a number of conducts like imposing unfair price conditions or applying objectively different conditions to equivalent transactions.

The Competition Authority suggested using some criteria when applying the provision to ensure that their intervention falls in line with competition enforcement. They want to prioritise intervention where there is a significant competition restriction and would not like to be involved in single contractual problems. The law entered into force in March 2012 and the Competition Authority has not applied the provision yet.

The Chairman noted that the European Commission's "Green Paper on Unfair Trading Practices in the B2B Food and Non-Food Supply Chain" mentions two main reasons that could justify action against unfair trading practices. One of them was that these practices might hinder innovation and the other one was that they might raise concerns about the internal market. He asked the European Commission to explain the reasons why the EU was considering the possibility of acting against some of these practices and what were the practices concerned.

The delegate from the European Commission first explained that a distinction should be made between the treatment of "abuse of buyer power", which is a competition law concept, and the treatment of "abuse of bargaining power in bilateral relationships", which might lead to the use of unfair trading practices between individual companies. From a competition law point of view, buyer power is not per se bad – at least in the short run – when there is sufficient competition in the downstream market and downstream companies pass on the better conditions/prices they obtain from their upstream suppliers to the end consumer. In the long run however, there might be concerns that buyer power – by squeezing the margins of upstream manufacturers/suppliers - might lead to reduced means to invest in innovation, having an impact on the available variety of products and range of innovative products offered to the end consumer. So far there is no convincing evidence about this long run effect of buyer power, but the Food Task Force of DG Competition is undertaking a study on the modern retail sector to analyse how choice and innovation in the food sector have been evolving in recent years and whether concentration of retailers and suppliers and/or the unbalance between the concentration of retailers and suppliers (used as a proxy to measure the scope for buyer power and market power) would have a significant impact on this evolution.

She emphasised that the European Commission believed that the current EU competition policy instruments were sufficient to deal with the problem of abuse of buyer power and there was no reason to adopt special provisions in the competition.

This said, regarding the agricultural level of the food supply chain, the lack of bargaining power of farmers *vis-à-vis* their buyers, has been at the heart of the discussions on the recent reform of the Common Agricultural Policy. The European Parliament initially proposed relaxing the competition rules for the whole agricultural sector. However, a compromise has been reached where competition rules have been modified in some sectors (arable crops, olive oil and beef) and producers may engage in joint selling (including price fixing) as a means to effectively increase their bargaining power. This is only possible under certain conditions, first that they should create significant through activities other than joint selling (e.g joint storage, distribution, procurement) efficiencies and second that certain market share thresholds should not be exceeded.

To what extent any abuse of bargaining power in bilateral contractual relationships by applying unfair commercial practices, should be regulated is another issue that does not fall under EU competition rules. EU competition law is applied when a problematic behaviour of a company has an effect on the overall market and when there is harm to consumer welfare. These conditions are not necessarily met when looking at unfair trading practices in bilateral relationships. The experiences some NCAs obtained in their market monitoring investigations also indicated that competition rules are usually not the best tool to address unfair trading practices, since it is hard to demonstrate the harm to consumer welfare and so they could not act on it.

Nevertheless, apart from competition concerns, there might be good reasons, such as fairness or the protection of smaller companies, to act against unfair trading practices. It is then better to deal with unfair trading practices under contract law or unfair trading laws or to consider the introduction of codes of good practices. This has been done by some EU member states already in the past.

Further, the delegate from the European Commission stressed that before deciding on whether one should intervene in bilateral contractual relationships or whether one should take any regulatory action against unfair trading practicesit was important to assess the possible negative effects of these interventions as well as to gather evidence on the cost of introducing such regulations. She mentioned the example of France where the introduction of the 'Loi Galland' made inflation rise and thus showing that regulation might come at a cost.

Then, prompted by the Chairman, Fabien Verges gave an introduction to the economics of private labels. He started by pointing out that private label was not a homogeneous category. Most retailers offer first priced private labels that compete with hard discounts. They also offer mid-ranged private labels that compete with well-established national brands. Furthermore, high quality private labels are also on offer and are considered niche products. As the goal of all these private labels is to differentiate products in store, they offer more variety for consumers and more competition in store.

However, private labels constitute a credible alternative to national brands and this leads to better bargaining terms for a retailer when he negotiates with a branded manufacturer. Another specific point of private labels is that it also increases store loyalty. Econometric studies show that when one consumes a lot of private labels from one retailer one becomes more loyal to this retailer and therefore more captive.

There may be a potential impact of private labels on innovation: if one private label manufacturer innovates on a given private label then this innovation may spread on to the private labels of other competing retailers given that they are likely produced by the same manufacturer. Similarly, when a big brand innovates the brand manufacturer will inform the retailer because the retailer is an essential part of the outlet of the brand. As a result, that the private label of the retailer will likely copy the innovation after some delay. Thus, the existence of private labels may shorten the time to recover the necessary benefits of innovation and this may have a negative impact on innovation.

The delegate from Belgium pointed out that evidence in their country showed that food inflation was much lower for private labels than for the other labels (but higher than for the 'premier prix'). Therefore, the discipline created by private labels is very much appreciated, not least because consumer organization tests do not show any significant difference in product quality between private labels and branded goods. The Belgian delegate agreed that private labels constituted a very heterogeneous group and that it depended on the business model of the retail chain whether to sell private labels and how to position them. But he noted that he thought that it was in the consumer's interest to have private labels.

On the supplier side, he pointed out two issues regarding private labels. On the one hand, private labels tend to be supplied by SMEs and this give SMEs an opportunity to be on the production side, which is certainly appreciated. On the other hand, SMEs are by nature much smaller than the retailers, which may bring up the issue of buyer power. However, the Belgian Competition Authority has not identified any case of buyer power that could qualify as an infringement of the rules of competition.

The delegate from Australia explained that private labels were a relatively new phenomenon in Australia. There has been a rapid growth of private labels over the last decade, with one set of statistics showing an increase from 15% to 25% between 2003 and 2010. This was partly the result of the entry of Aldi into the Australian market, as this chain operates with a fully private label model. In addition, the two dominant supermarket chains (with a total of 70-80% share of the market) have also increasingly adopted the use of private labels.

On the one hand, there is a pro-competitive element in terms of Aldi's entry and expansion because it offers low prices and product variety to consumers. On the other hand, the concern in relation to the two dominant supermarket chains is that they could be leveraging their market power at retail level to foreclose access to shelf space and distort competition between themselves and the branded products. This could, on the long run, undermine incentives for investment and innovation.

Therefore, the ACCC are currently engaged in a market investigation where they are looking at private labels and also at dominant supermarket chains' conduct in terms of supplier relationships.

Fabien Verges noted that in France a study was conducted on 3080 staple goods to see whether private labels development hinder the development of second brands (that is not brand leaders that are well established but second brand products). The results showed that even though private labels did have a good development rate, the number of second brand manufacturers on shelves was not reduced.

The Chairman then directed the discussion to the question of defining codes of conduct to deal with buyer power issues. The delegate from Belgium explained that farmers' associations seemed to think that codes of conduct work. A code of conduct was adopted in Belgium in order to protect farmers in very special circumstances. The code is very minimalistic and does not really go beyond what would be considered abusive clauses under the relevant EU rules and regulations. The farmers' associations proposed it, the Competition Authority accepted it and it has now been in place for about three years and they have not seen a single complaint that it was not respected. The code of conduct is very similar to what later became the text discussed at the EU level.

The delegate from the United Kingdom stated that they had over 10 years' experience in applying a code of conduct. They had an investigation by the Competition Commission that determined that a code of conduct was an appropriate way to address buyer power issues. Consequently, the code was introduced in 2002. It was a voluntary code as it was not introduced by statutory means; it was introduced by voluntary undertakings given by very large retailers (four or five largest retailers) with significant market shares. It was left to the Office of Fair Trading to take action if there was breach of that code. They found that there

were very few substantive complaints, possibly because there were concerns by small suppliers about making complaints due to fear of retaliation.

The first code ran for about six years but because of the continuing degree of concern about a potential misuse of market power there was then a further inquiry by the Competition Commission. This inquiry ended in 2008. They found that the first code had some effect on the big retailers. However, as it was limited in its scope and the structure of the retail market had changed since its introduction it did not cover all the main retailers. Furthermore, they found that it was difficult to enforce because people were reluctant to complain. Therefore, the Competition Commission recommended a new code that contained a number of changes. In particular, it was made by order so it became statutory. Further, it recommended the introduction, by an Act of Parliament, of an adjudicator. That adjudicator, at present, has actually only been in office for a short period and is still consulting on the way it intends to apply its new statutory functions. It has a range of functions, such as providing advice to both suppliers and large retailers, an arbitration function, an investigation function, an enforcement function and it has the ability to impose sanctions including significant fines. It is also required to publish an annual report.

The new code has broader provisions than the first code. It also has broader coverage as it covers the ten major retailers. It forces retailers to have an in-house compliance function and it provides guaranties of anonymity for complainants. The delegate concluded that it remained to be seen how the code was going to work in practice but because it has an adjudication function and fines, it could have the effect of addressing some of the problems that are raised by claims about buyer power.

The UK delegate also noted that the real problem for a competition authority was trying to separate the pro- and anti-competitive effects in an extremely complex area of interrelated markets and where the supply chains were both complicated and diverse. Also, there has been a huge shift of the bargaining power from the large branch manufacturers to retailers over the last few years. Some of the complaints, therefore, may be more about trying to recover some of that lost bargaining power than real complaints about buyer power. On the other hand, there are some real concerns of buyer power further up the supply chain. However, it is unclear whether this has any anticompetitive effects and impacts on consumer welfare as opposed to raising issues of fairness.

The delegate from Australia explained that there was a debate in Australia about prescribed voluntary codes and prescribed mandatory codes. The difference is that in case of voluntary codes, the companies who sign up are subject to the provisions of the Act relating to them. With a mandatory code companies can be nominated to be signed up. The idea, at the moment, is to try and negotiate a voluntary code and then get that voluntary code prescribed for the major supermarket chains. The position of the ACCC is that the code should be workable and effective and should not create a situation that is worse than not having code.

The Irish delegate explained that the Irish government took a policy decision to introduce a mandatory and statutory code of conduct. This will come into force at the same time as the merging of the Competition Authority with the National Consumer Agency. Therefore, the Competition Authority will be enforcing the new legislation.

It was first attempted in 2009 to introduce a voluntary code of conduct in Ireland. It was envisaged at the time that by requiring contracts and changes to these contracts in writing would minimise the possibility of retrospective and unilateral changes in contract terms. However, the attempt to introduce this voluntary code of conduct failed because the retailers would not agree.

The Irish Competition Authority did not, at the time of the discussion, have the text of the proposed new mandatory and statutory code of conduct but based on the proposed voluntary code it feared that the

new legislation would increase the cost of doing business for both suppliers and retailers, as it would greatly increase rigidity in the market.

Furthermore, even if the policy aim was not debatable there are two reasons why the policy is unlikely to work. First, in Ireland there is only criminal enforcement, and so there are no civil fines or administrative fines. The only way to impose a penalty on a retailer for breaching a code of conduct is to take the case to court. For this, one would need a supplier who is willing to come forward and give evidence against their primary retailer in court. As people are very reluctant even to make non-anonymous complaints in relation to promotional allowance and similar issues, it is unlikely that people would come forward and give evidence about these abuses.

The other problem with the 2009 proposal was that almost everything was allowed if it was in the contract in writing. Their concern was that this provision did not remove the unbalance in power where it existed. The smaller suppliers would be again at a disadvantage compared to the large retailer that has access to a legal department and legal services and thus can draft the contract at their advantage.

## 5. Other tools to mitigate the unbalance of contractual powers between food suppliers and food retailers

The Chairman wanted to discuss some uncommon solutions used to try to achieve the same effect as codes of conduct. In Norway the four largest grocery chains have to submit their contracts with their main suppliers to the Competition Authority that can then decide whether those contracts are acceptable from a competition point of view.

The delegate from Norway explained that the monitoring schemes mentioned were motivated primarily by the large suppliers' market power not by the retailers' buyer power. The most important purpose was to discipline the suppliers and therefore it was not expected that the monitoring would result in any antitrust cases. The information is used to gain a deeper understanding of the market but it does not result in actions or cases.

The Chairman then mentioned that Russia had a similar monitoring of the contracts. Then he asked the delegate from France to explain the idea that the establishment of long-term contracts could alleviate some of problems in the food chain.

The delegate from France pointed out that there were two topics that could be discussed when dealing with the problem of buyer power: (i) the relationship between distributors and farmers and (ii) the relationship between food-processing companies and distributors.

Regarding the first relationship, the Competition Authority was asked twice for an opinion by the legislator, first on the sector of fruits and vegetables and then on the milk sector. In both cases, the opinion advocated long-term contracts as a legal tool to reach a balanced relationship between producers and distributors. These long-term contracts set price conditions, volumes and allow for the possibility to revise prices during the course of the contract. These contracts can provide safety both to the producers that will be able to plan investments and production and to the buyers, too.

There is a similar tool to manage the relationship between the food-processing sector and distributors.

These long-term contracts are complementary to competition law that forbids illegal agreements, abuses of dominant position and controls concentrations. Competition law preserves the rules of competition in the market but cannot, by itself, prevent the effects from structural imbalances between supply and demand. These, in France, are particularly severe in the food and vegetables sector because producers in this sector are always much smaller than distributors, even when they organise themselves

into cooperatives. Moreover, the perishable nature of the goods in question forces producers to resolve negotiations with the distributors in a timely manner.

Just as an example, there are some detailed provisions in these contracts: (i) an obligation for the buyers to pay for the merchandise acquired in a certain period of time; (ii) an interdiction for the buyers to demand from their suppliers advantages that would not correspond to any services rendered and (iii) a provision that limits considerably the behaviour of buyers and forbids them to benefit from discounts and refunds.

The Chairman added that there were at least two countries (Israel and France) where competition authorities had the right to propose de-concentration of retail even if there was no merger or abuse of dominance.

Johan Swinnen noted that the relevant geographic area on the sellers' side was much more limited than on the buyers' side where companies were sourcing from all over the world and certainly from across borders. Therefore, he pondered if it was a good idea to deal with the food supply chain from a national perspective.

He also noted that the problems discussed were very commodity specific. A model of a large retailer and a small supplier applies well to some commodities like fruits and vegetables where retailers are sourcing from farmers. But in other sectors suppliers are large companies like Nestle, Unilever, Campina, Danone, etc. Finally, he noted that even when there were large retailers and small suppliers the power distribution might not always be what it appeared. In fact, even the large processors or large companies may be dependent on high quality supply under specific conditions and that meant that the power distribution and also the income distribution within the supply chain could be quite different from than it looked at first sight.

Steve McCorriston noted that food security and the functioning of the food supply chain were some of the important issues to be addressed. He stressed the importance of data collection and pointed out the EU experts' platforms on food prices that were established to collect data in different stages of the food chain. Finally, he emphasised the need for ongoing research in this area.

## SYNTHÈSE

*Par le Secrétariat**

Il ressort de la note de référence, des contributions écrites et des discussions de la table ronde que:

*(1)* *Suite à l'évolution récente des prix des denrées alimentaires dans le monde, l'industrie alimentaire connait un regain d'intérêt politique. Cette évolution a abouti à une ingérence politique accrue dans les travaux des autorités de la concurrence et a eu une incidence sur le cadre de la concurrence dans le secteur de l'alimentation.*

Dans de nombreux pays, les autorités de la concurrence ont été chargées de contrôler le secteur alimentaire national, à la suite des prix élevés payés par les consommateurs et des bas prix payés aux agriculteurs. Ces activités de contrôle prennent le plus souvent la forme d'études de marché qui portent sur des aspects tels que la concurrence géographique dans le secteur de la distribution ou l'évolution de la concentration dans le secteur de l'alimentation. Dans certains cas, outre le contrôle de l'évolution des prix des produits alimentaires, les autorités de la concurrence se voient également confier la tâche d'informer le public de ces niveaux de prix, ce qui, tout en améliorant la transparence dans un secteur déjà concentré, peut aussi accroître le risque de collusion tacite.

*(2)* *La définition du marché de produits et du marché géographique dans le secteur de la distribution alimentaire est devenue un enjeu important. Plusieurs autorités de la concurrence accordent une attention particulière à cette question en mettant au point de nouvelles techniques de mesure, mais d'autres considèrent que les méthodes classiques de définition du marché devraient également s'appliquer à ce secteur.*

L'analyse du marché de produits et du marché géographique dans le secteur de la distribution peut s'avérer très complexe dans la mesure où elle dépend de la localité, des conditions du marché et de la surface et de la spécialisation des magasins. On s'accorde généralement sur le fait que le cadre général de contrôle des fusions, y compris la méthode de définition du marché, s'applique également aux marchés du secteur de la distribution alimentaire.

Cela étant, une approche plus détaillée s'impose quant à la définition du marché et à l'analyse de la concentration dans le secteur de la distribution. Ainsi, Israël a mis au point un modèle qui définit la zone de chalandise de chaque magasin en fonction de ses caractéristiques, de sa surface, de la diversité des services qu'il propose et du temps nécessaire pour s'y rendre, ce qui lui permet alors d'identifier le groupe de concurrents qui impose des limites à chaque magasin en ce qui concerne son comportement en matière de fixation des prix. La France et le Japon ont recours à une méthode similaire. En Irlande, en revanche, l'autorité de la concurrence examine non seulement les parts de marché au niveau du détail, mais aussi la concentration tout au long de la

* Ce résumé ne représente pas nécessairement le point de vue unanime du Comité de la concurrence. Il présente néanmoins les principaux points soulevés lors des débats de la table ronde, dans les contributions écrites des délégués ainsi que dans la note de synthèse du Secrétariat.

chaîne d'approvisionnement, de manière à tenir compte des rapports de force sur le marché, qui résultent souvent d'une intégration verticale.

*(3) Si plusieurs approches permettent de prendre en compte le pouvoir de l'acheteur et les pratiques commerciales déloyales lors des évaluations d'impact sur la concurrence portant sur des affaires relatives à l'industrie alimentaire, aucune ne fait l'unanimité.*

Certains pays, comme le Canada et le Royaume-Uni, estiment que, pour être considéré comme un problème de concurrence, le pouvoir de l'acheteur doit être utilisé par une entreprise dominante dans le but de recourir à des pratiques d'exclusion ou d'éviction vis-à-vis de ses concurrents sur le marché en cause. Le Royaume-Uni, en particulier, a fait remarquer que les problèmes liés au pouvoir de l'acheteur des entreprises dominantes pouvaient être traités à l'aide des instruments traditionnels de politique de la concurrence, en application de la législation britannique sur les pratiques commerciales déloyales transposant les dispositions de l'article 102 TFUE. L'Allemagne et la Commission européenne partagent cette opinion. La Commission européenne insiste en outre sur le fait qu'il est important de faire la distinction entre l'usage abusif du pouvoir de l'acheteur, qui a un effet global sur la concurrence sur le marché, et l'usage abusif du pouvoir de négociation dans le cadre de relations bilatérales par le recours à des pratiques commerciales déloyales, et qui ne concerne que certaines entreprises sur le marché. S'il est vrai que l'usage abusif du pouvoir de l'acheteur pose un problème de concurrence évident, qui peut être traité dans le cadre des règles actuelles de concurrence, il est moins sûr que le droit de la concurrence ait à régir les pratiques commerciales déloyales dans les relations bilatérales, qui devraient plutôt relever de lois sur la concurrence déloyale ou de codes de conduite.

D'un autre côté, des pays comme le Japon, la Finlande, l'Italie et la Hongrie considèrent que les instruments traditionnels de politique de la concurrence ne suffisent pas pour remédier aux problèmes liés au pouvoir de l'acheteur et aux pratiques commerciales déloyales. Ces pays sont généralement favorables à l'adoption de nouvelles règles pour s'attaquer à ces questions, à l'exemple de la réglementation spéciale visant à lutter contre l'usage abusif d'un pouvoir supérieur de négociation adoptée au Japon, ou du projet de loi adopté en Finlande prescrivant qu'au-delà d'une part de marché de 30 %, les chaînes de distribution sont considérées comme dominantes.

*(4) Les marques de distributeur jouent un rôle important concernant le type de concurrence qui s'exerce dans le secteur de la distribution, mais leur influence positive fait encore débat.*

L'utilisation des marques de distributeurs peut stimuler la concurrence dans la mesure où elles offrent une plus grande diversité aux consommateurs, permettent une plus grande concurrence dans le magasin et peuvent faire baisser les prix sans que la qualité s'en ressente véritablement. En revanche, elles peuvent augmenter le pouvoir de négociation des distributeurs face aux fabricants de produits de marque, renforcer la fidélisation des consommateurs au magasin, et en outre freiner l'innovation en copiant les innovations des marques. L'usage des marques de distributeurs dépend fondamentalement du modèle économique des entreprises qui les fournissent et de la structure concurrentielle du marché. Souvent, les entreprises dominantes qui fournissent des marques de distributeurs finissent par profiter de leur puissance commerciale au niveau de la vente au détail pour restreindre l'accès aux linéaires et fausser le jeu de la concurrence entre elles et les fournisseurs des produits de marque, et finissent par réduire les incitations à innover.

*(5) La réglementation ne permet pas toujours de résoudre tous les types de conflits dans l'industrie alimentaire, et d'autres formes d'action peuvent être envisagées, en particulier, (i) l'application de codes de conduite et (ii) l'éventuel contrôle des contrats entre distributeurs et fournisseurs.*

(i) L'adoption de codes de conduite peut résoudre certains problèmes que la réglementation pourrait ne pas traiter avec suffisamment d'efficacité, grâce à la médiation et au règlement des conflits qui ne relèvent pas des dispositions du droit de la concurrence. Plusieurs options sont envisageables, du texte « non contraignant » au code législatif avec, par exemple, la mise en place d'une instance de médiation pour arbitrer les conflits. Même si les codes obligatoires peuvent s'avérer plus efficaces que les codes facultatifs (auxquels les entreprises ne sont pas tenues d'adhérer), ils peuvent aussi augmenter les coûts des entreprises à la fois pour les fournisseurs et les distributeurs, tout comme ils peuvent renforcer l'inélasticité du marché.

(ii) Outre les codes de conduite, on peut envisager que les plus importantes chaînes de distribution soumettent les contrats qu'elles ont conclus avec leurs principaux fournisseurs à l'autorité de la concurrence, afin que celle-ci les évalue du point de vue de la politique de la concurrence. C'est l'approche suivie par la France, où les contrats à long terme entre fournisseurs et distributeurs sont utilisés comme un outil juridique pour parvenir à un équilibre de la relation entre producteurs et distributeurs.

# NOTE DE RÉFÉRENCE

*Par le Secrétariat* *

## Introduction

Les récents événements survenus sur les marché des produits agricoles, combinés aux niveaux élevés d'inflation des prix des denrées alimentaires dans de nombreux pays, ont soulevé de nombreuses interrogations quant au fonctionnement de la filière alimentaire et à l'absence de transparence sur la transmission des prix, depuis les phases en amont jusqu'aux consommateurs. S'il existe potentiellement de nombreux facteurs susceptibles d'influer sur le fonctionnement de la filière dans des contextes particuliers (que ce soit au niveau national ou sectoriel), la concurrence dans l'ensemble du secteur alimentaire de nombreux pays est une source croissante d'inquiétude.

La présente table ronde a pour objectif général d'examiner les problèmes de concurrence que rencontre la filière alimentaire, d'évaluer comment les récents événements, survenus dans de nombreux pays (par exemple, la domination croissante de la distribution, la consolidation, la pénétration accrue des marques de distributeurs, les questions liées au pouvoir de négociation, la faible part des ventes de produits alimentaires captée par les agriculteurs, etc.) posent des difficultés croissantes en termes de pouvoir de marché horizontal et vertical. De même, dans le contexte de l'instabilité récente des marchés internationaux des produits agricoles, nous aborderons la question de la transmission des prix entre les différentes étapes de la filière et la manière dont la concurrence peut affecter ce processus.

La présente note de référence se nourrit de travaux de recherche théoriques et empiriques afin d'éclairer utilement les différents aspects de la concurrence auxquels est confronté l'ensemble de la filière alimentaire, en tenant compte des nombreuses problématiques résultant de la constante évolution du secteur, de la complexité inhérentes à la résolution des problèmes horizontaux et verticaux et de la difficulté d'accès aux données. Ces difficultés nuisent à la plus grande transparence du mode de fixation des prix et du mode de transmission des chocs sur les prix des denrées alimentaires, tout au long de la filière.

L'étude est organisée en plusieurs parties. La première partie propose une analyse de fond sur les conséquences de l'évolution des prix des denrées sur la filière alimentaire. La deuxième partie traite des questions de concurrence auxquelles la filière alimentaire est confrontée. Les problématiques de la transmission des prix et de la concurrence sont examinées dans la troisième partie. La quatrième partie expose les conclusions de l'étude.

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## 1. Comment l'évolution des prix des denrées affecte la filière alimentaire

Le récent regain d'intérêt suscité par la filière alimentaire peut s'expliquer pour trois raisons :

- Premièrement, les prix des produits alimentaires sont soumis à une forte inflation dans l'ensemble des pays de l'OCDE, malgré la grande variabilité de l'inflation des prix de détail ;
- Deuxièmement, si les marges entre les prix des produits agricoles et les prix de vente au détail ont également fluctué au cours de la même période, l'évolution des seconds n'a pas suivi celle des premiers (au départ des exploitations) ;
- Troisièmement, à plus long terme, on craint qu'une concurrence accrue dans les phases en aval de la filière alimentaire ne contribue à accroître l'écart entre les prix au départ de l'exploitation et les prix au détail.

### *1.1 Inflation des prix des denrées alimentaires*

Depuis 2007, les économies, tous stades de développement confondus, ont été soumises à une forte inflation des prix des denrées alimentaires. L'impact cumulé pour une sélection de pays de l'OCDE est présenté au Tableau 1. Entre 2005 et 2011, la hausse des prix des produits alimentaires a atteint environ 22 % en moyenne dans les pays de l'OCDE. Malgré cela, les écarts demeurent très élevés entre des niveaux d'inflation relativement faibles aux États-Unis (14 %) et des niveaux plus élevés en Turquie (67 %) et au Mexique (48 %). Les politiques commerciales et macroéconomiques, de même que les niveaux sous-jacents de stocks alimentaires nationaux peuvent, conjointement, modifier l'exposition de la filière alimentaire domestique aux soubresauts des marchés mondiaux, expliquant en partie les écarts d'inflation relevés entre les prix des denrées[1]. Pourtant, même dans l'UE où l'environnement de politique économique est plus homogène, l'inflation des prix des denrées alimentaires a également fluctué. Ainsi, au Royaume-Uni, entre 2005 et 2012, cette inflation a provoqué une hausse des prix deux fois supérieure à celle enregistrée par l'Italie (36 % contre 15 %).

Pour mettre en perspective l'inflation des prix des denrées alimentaires, le Tableau 1 illustre également la hausse cumulée des prix dans le secteur non alimentaire. En moyenne, dans l'ensemble de l'OCDE, l'inflation des prix des produits non alimentaires a entraîné une hausse cumulée de 11 % des prix, soit environ la moitié de ce qu'a connu la filière alimentaire. En revanche, l'écart entre l'inflation des denrées alimentaires et des produits non alimentaires a été plus marqué dans d'autres pays, comme le montre le Tableau 1.

[1] Gelos et Ustyugova (2012) expliquent pourquoi l'inflation des prix des denrées alimentaires peut différer d'un pays à un autre.

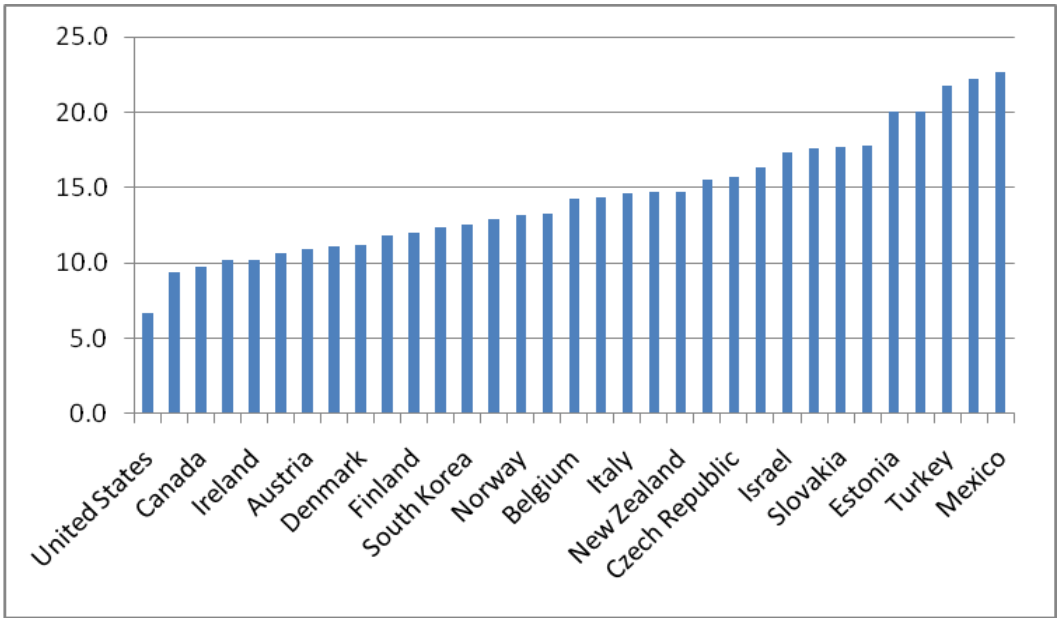
Tableau 1 : Impact cumulé de l'inflation des prix des denrées alimentaires et des produits non alimentaires entre 2005 et 2011, dans une sélection de pays membres de l'OCDE

| Pays | Inflation des prix des denrées alimentaires, effet cumulé (%) | Inflation des prix des produits non alimentaires, effet cumulé (%) |
|---|---|---|
| **Canada** | 23.8 | 9.3 |
| **Mexique** | 47.8 | 24.5 |
| **Hongrie** | 45.7 | 22.5 |
| **Italie** | 15.3 | 11.2 |
| **Espagne** | 31.7 | 10.7 |
| **Turquie** | 67.4 | 50.9 |
| **Royaume-Uni** | 36.4 | 13.1 |
| **États-Unis** | 14.2 | 12.1 |
| **Moyenne OCDE** | 21.7 | 11.4 |

**Source :** compilation à partir des données de l'OCDE

La question des prix des denrées alimentaires est sensible, en raison essentiellement de la part du revenu qui y est consacrée, mais également en raison de l'effet potentiellement régressif qu'elle exerce sur les ménages à faibles revenus. La Figure 1 présente la part du revenu des ménages consacrée aux dépenses alimentaires dans l'OCDE. Cette part peut varier considérablement, de 22 % en Turquie et au Mexique à moins de 10 % aux États-Unis, au Canada et au Royaume-Uni. Néanmoins, même dans les pays où la part cumulée est relativement basse, les groupes à faibles revenus consacrant une proportion plus importante aux dépenses alimentaires, la hausse des prix des denrées alimentaires peut avoir un effet régressif sur les ménages les moins nantis.

**Figure 1 : Part du revenu des ménages consacrée aux dépenses alimentaires, 2011 (%)**



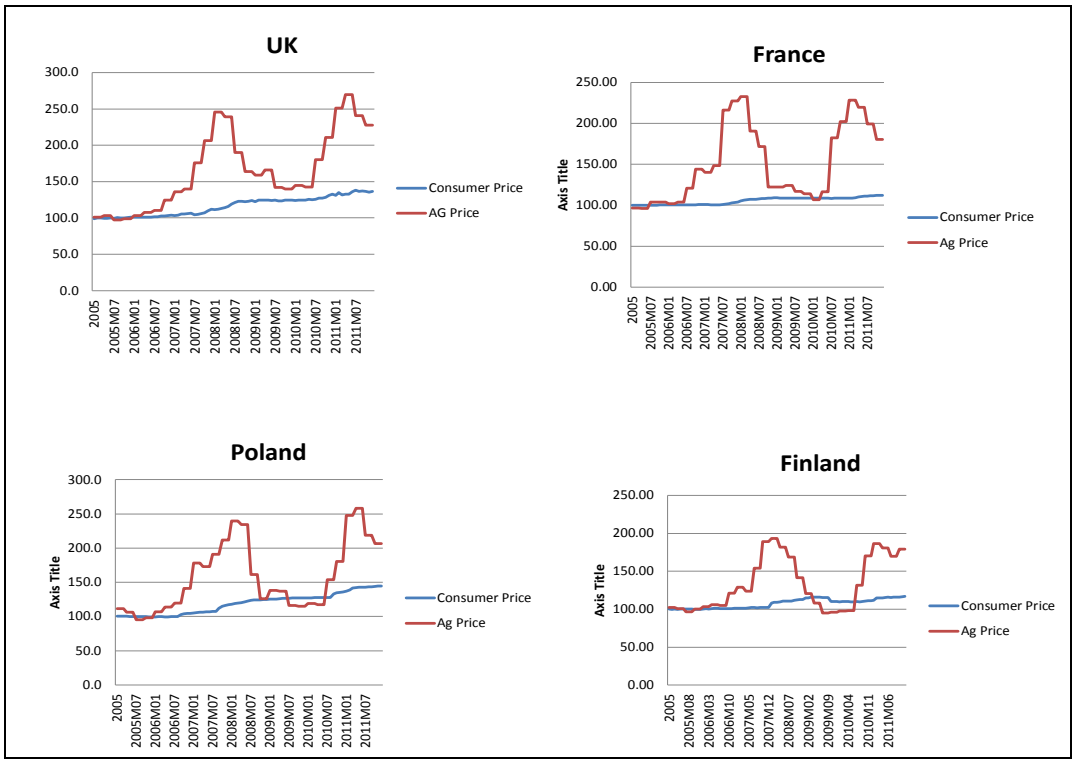

**Source :** compilation à partir des données du service de recherche économique de l'USDA

### *1.2 Évolution récente des écarts entre les prix au départ de l'exploitation et les prix de détail*

Alors que l'inflation des prix de détail des denrées alimentaires a été plus volatile que celle des produits non alimentaires, les prix de détail des denrées alimentaires ont connu ces derniers temps une volatilité plus faible que les prix au départ de l'exploitation/des produits agricoles. Or, cette situation est à l'origine de la fluctuation des marges entre les prix au départ de l'exploitation et les prix de détail. La Figure 2 présente, à titre d'exemple, le rapport entre les prix au départ de l'exploitation et les prix de détail, pour une sélection d'États membres de l'UE, dans le secteur des céréales et du pain. Si les écarts peuvent varier considérablement, l'expérience est commune : pendant la flambée des prix des matières premières agricoles de 2007-2008, les prix au départ de l'exploitation ont augmenté, tandis que les prix de détail enregistraient une moindre hausse, entraînant un rétrécissement de la marge entre les prix à la sortie de l'exploitation et les prix de détail. L'évolution des prix à la sortie des exploitations et au stade du détail, après la hausse des prix des produits agricoles de 2011, a été comparable, les fluctuations de prix provenant, pour l'essentiel, des phases en amont. Par définition, les flambées des prix des produits agricoles se caractérisent par de fortes hausses suivies de fortes baisses. Ces soubresauts entraînent un nouvel accroissement des marges entre les prix au départ de l'exploitation et les prix de détail lorsque les prix diminuent par la suite.

Les craintes liées à la concurrence dans la filière alimentaire résultent souvent de l'évolution des rapports entre les prix au départ de l'exploitation et les prix de détail, et plus particulièrement de la question complexe de la transmission des prix dans la filière de distribution. Ces craintes portent sur l'ampleur du transfert, la fréquence de la répercussion des variations de prix, le délai nécessaire pour que les fluctuations de prix en amont soient répercutées sur les prix de détail, mais également la structure de la dynamique des prix.

**Figure 2 : Rapport entre les prix au départ de l'exploitation et les prix de détail dans le secteur des céréales et du pain, 2005-2011, dans une sélection d'États membres de l'UE.**




**Source :** compilation à partir des données d'Eurostat

Les observations relatives à l'évolution des prix au départ de l'exploitation (ou des produits agricoles) et les prix de détail correspondants illustrent les problématiques concurrentielles relevées tout au long de la filière alimentaire[2]. Ce lien est essentiel, en ce sens que la concurrence dans la filière influence effectivement le résultat final. De récents travaux ont associé le processus de transmission des prix plus directement aux caractéristiques d'une filière alimentaire verticalement liée. Cette question sera examinée dans la troisième partie du document.

### *1.3 Marges à long terme entre les prix au départ de l'exploitation et les prix de détail*

Les craintes suscitées par le pouvoir de marché dans la filière alimentaire peuvent se refléter dans l'évolution à long terme du rapport entre les prix au départ de l'exploitation et les prix de détail. La Figure 3 illustre ce rapport aux États-Unis, mais sur une période plus longue que les données européennes présentées ci-dessus. Confirmant l'évolution constatée dans l'UE, après la hausse en 2007 des prix des produits agricoles, l'écart entre les prix au départ de l'exploitation et les prix de détail s'est resserré. Néanmoins, à plus long terme, on observe que cet écart a tendance à se creuser. La crainte ici est que le pouvoir de marché, sur l'ensemble de la filière de distribution, a peut-être contribué à ce creusement. Cette situation pourrait résulter du pouvoir du vendeur dans le secteur de la transformation alimentaire, du commerce de détail ou dans ces deux secteurs, et/ou au moyen de l'exercice du pouvoir de l'acheteur.

Certes, il existe une différence entre les céréales, au niveau du producteur, et le pain et les produits transformés, au niveau de la vente au détail. Toutefois, cet écart croissant permet d'illustrer l'une des principales difficultés de l'évaluation de l'incidence du pouvoir de marché à l'une ou l'autre extrémité de la filière de commercialisation des produits alimentaires. Cet écart pourrait se creuser, notamment, sous l'effet des gains de productivité ou des avancées technologiques. Les changements dans les habitudes d'achat des consommateurs et la part croissante des « intrants de commercialisation » (conditionnement, transport, améliorations de la qualité) dans le produit final pourraient également affecter cet écart[3]. Dans ce contexte, la part au départ de l'exploitation de la valeur du pain ou des produits de boulangerie dans le prix final est tombée d'environ 12 % au milieu des années 1980 à environ 5 à 6 % dans les années 2000[4]. Si le recul de la part des dépenses en produits alimentaires captée par les agriculteurs peut refléter une hausse du pouvoir de négociation des agents en aval, compte tenu de l'éventail des facteurs susceptibles de déterminer l'évolution des écarts dans le temps, il est difficile de mesurer précisément la contribution de chaque facteur potentiel à l'écart entre les prix au départ de l'exploitation et les prix de détail.

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2 Faisant écho à ces craintes, un récent rapport de l'US General Accounting Office (GAO) observe ce qui suit :

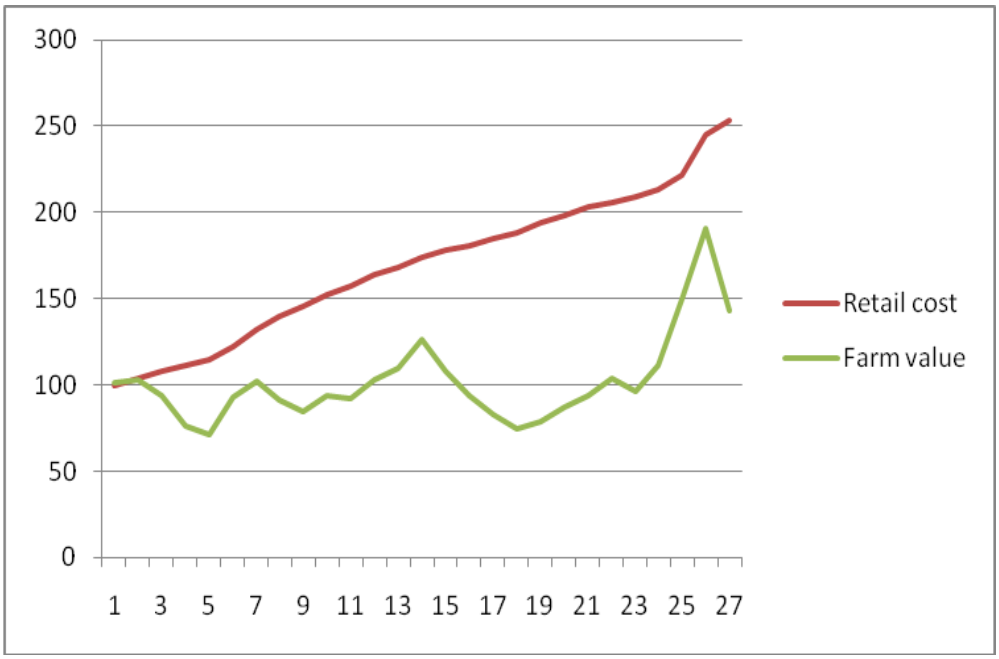
« Certains experts nous ont affirmé que la concentration [du marché] n'était pas à l'origine de la hausse des prix des produits agricoles et des denrées alimentaires, alors que d'autres considèrent que la concentration a pu malgré tout affecter les prix des denrées alimentaires. Pour certains experts, le pouvoir de marché, pour peu qu'il existe dans ces secteurs, aurait vraisemblablement réduit l'effet sur les prix des produits alimentaires. Un tel phénomène serait dû au fait que les entreprises disposant d'un pouvoir de marché peuvent absorber une partie de la hausse des coûts des intrants, au lieu de les répercuter sur le consommateur sous la forme de hausses de prix. D'autres experts estiment toutefois que le pouvoir de marché, notamment au stade du détail, pourrait avoir contribué à maintenir des prix élevés...les baisses [des prix des produits agricoles] pourraient ne pas avoir été répercutées sur les prix des denrées alimentaires » GAO, 2009. p.27).

3 Wohlgenant (2001) examine l'ensemble des facteurs qui influent sur les marges de commercialisation au fil du temps.

4 La part des intrants céréaliers dans le pain et les produits de boulangerie s'appuie sur des données américaines.

En résumé, si de nombreux facteurs modifient le fonctionnement de la filière de distribution et l'évolution de l'écart entre les prix au départ de l'exploitation et les prix de détail à court et à long terme (notamment les technologies, l'évolution du goût des consommateurs, la réglementation, etc.), on peut craindre que la concurrence (ou l'absence de concurrence) pèse aussi fortement sur l'évolution des prix.

**Figure 3: Écarts entre les prix au départ de l'exploitation et les prix de détail des céréales, aux États-Unis : 1983-2009 (1983-100)**

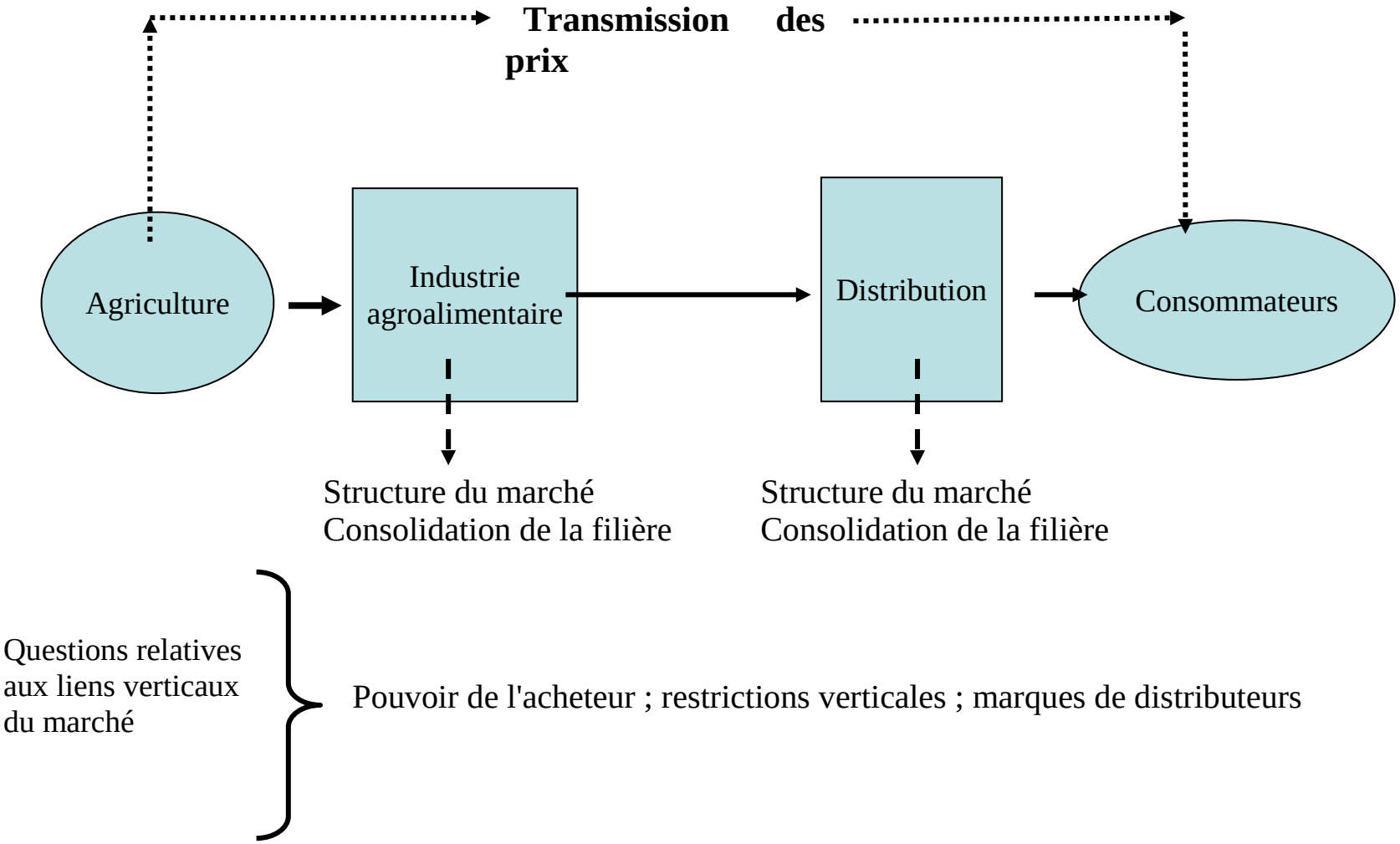



**Source :** compilation à partir des données de l'USDA

## 2. Questions concurrentielles dans la filière alimentaire

La filière de la distribution alimentaire se caractérisant par une série de marchés verticalement liés, les questions concurrentielles peuvent se manifester *à l'intérieur* d'une des étapes de la filière ou au niveau des liens *entre* ces différentes étapes.

**Figure 4 : Cadre stylisé des questions de concurrence et de prix dans la filière alimentaire**



La Figure 4 présente une représentation stylisée d'une filière alimentaire verticalement liée. Elle souligne les étapes intermédiaires entre d'un côté l'agriculture (ou, si les produits agricoles sont importés à partir des marché internationaux, le marché international), et de l'autre les consommateurs. Entre ces deux phases, le produit est soumis tour à tour à différentes actions, notamment la transformation, la fabrication et la vente au détail.

Les craintes en matière concurrentielle dans la filière alimentaire résultent le plus souvent des niveaux de concentration du marché, lors des étapes de transformation et de distribution du produit, qui résultent d'une tendance à la consolidation nourries par les fusions et les acquisitions. Le pouvoir de l'acheteur ou les questions liées aux restrictions verticales, dans la filière alimentaire, comptent parmi ces craintes.

## *2.1 Concentration dans la filière alimentaire*

### *2.1.1 Stade de la transformation alimentaire*

Si l'essentiel de l'intérêt suscité récemment par la concurrence dans le secteur de la filière alimentaire concerne l'évolution des marchés de la distribution (voir ci-après), c'est bien au sein de la filière agroalimentaire qu'ont eu lieu quelques-unes des opérations de concentration les plus importantes. Le Tableau 2 présente les données relatives aux coefficients de concentration de trois entreprises (CR3) dans l'industrie agroalimentaire de plusieurs États membres de l'UE. Si les données portent sur le milieu des années 1990, elles illustrent déjà pour l'époque des niveaux de concentration élevés dans plusieurs pays. Ce tableau révèle deux enseignements majeurs. Premièrement, les niveaux de concentration sont en moyenne élevés dans l'UE pour de nombreuses activités de l'industrie agroalimentaire. Par exemple, les secteurs des aliments pour bébé, des soupes en conserves, des aliments pour animaux de compagnie, des crèmes glacées et de la fabrication de chocolat présentent tous des degrés de concentration élevés. Deuxièmement, les écarts sont également importants au sein de l'UE en ce qui concerne la concentration, y compris à l'intérieur d'une même catégorie. Prenons par exemple le segment des pains emballés, qui présente un CR3 moyen d'environ 60 % dans la sélection des pays membres de l'UE. Ce CR3 peut atteindre jusqu'à 96 % en Espagne, et seulement 44 % en Finlande. Même si ces chiffres sont anciens (et ont probablement augmenté), les données illustrent parfaitement les niveaux élevés de concentration qui existent au stade intermédiaire de la filière alimentaire.

Tableau 2 : Concentration dans l'industrie agroalimentaire (coefficient de concentration de 3 entreprises) en Europe (au milieu des années 1990)

| | *Irlande* | *Finlande* | *Danemark* | *Italie* | *France* | *Espagne* | *Royaume-Uni* | *Allemagne* | **Moyenne** |
|---|---|---|---|---|---|---|---|---|---|
| Aliments pour bébé | 98 | 100 | 99 | 96 | 93* | 54 | 78 | 86 | 88 |
| Soupe en conserves | 100 | 85 | 91 | 50 | 84 | - | 79 | 41* | 76 |
| Crème glacée | - | 84 | 90 | 73* | 52 | 84 | 45 | 72 | 71 |
| Yaourts | 69 | 83* | 99* | 36 | 67 | 73 | 50 | 76 | 69 |
| Fabrication de chocolat | 95 | 74 | 39 | 93 | 61 | 79 | 74 | - | 74 |
| Aliments pour animaux de compagnie | 98 | 80 | 40 | 64* | 73 | 53 | 77 | 87 | 72 |
| Céréales pour le petit-déjeuner | 92 | - | 70 | 88 | 70 | 82 | 65 | 67 | 76 |
| Thé | 96 | 90 | 64 | 80 | 82 | 62 | 52 | 55 | 73 |
| En-cas | 72 | 70* | 78 | 71 | 50 | 56 | 73 | 48 | 65 |
| Carbonates | 85 | 50 | - | 60 | 69 | 79 | 55 | 60* | 65 |
| Pates | 83 | 97 | 61 | 51 | 57 | 65 | 37 | 49 | 63 |
| Pain emballé | 85 | 44 | 59 | 80 | 70 | 96 | 58* | - | 70 |
| Biscuits | 83 | 73 | 44 | 55 | 61 | 53 | 42 | 50 | 58 |
| Poisson en conserves | - | 70 | 49 | 68 | 43* | 33 | 43* | - | 51 |
| Eau minérale | - | 100 | 70 | 37 | - | 31 | 14 | 22 | 46 |
| Jus de fruit | - | 70 | 65 | 62 | 26 | 38 | 35 | 46 | 54 |
| Conserves de légumes | - | 68 | 50 | 36 | 29 | - | - | - | 46 |
| **Moyenne** | 88 | 77 | 67 | 66 | 62 | 63 | 55 | 58 | 67 |

*Indique un coefficient de concentration de deux entreprises
**Source :** Cotterill (1999)

Le Tableau 3 présente des données plus récentes, avec cette fois un coefficient de concentration de quatre entreprises (CR4), couvrant le secteur agroalimentaire américain et confirmant les craintes d'une concentration élevée dans la filière ces dernières années. Encore une fois, certaines activités se caractérisent par des niveaux de concentration élevés, en particulier les aliments pour animaux de compagnie (71 %), la mouture humide du maïs (84 %), le raffinage de la canne à sucre (95 %) et la transformation du soja. Ces chiffres sont comparables à un CR4 moyen de 50 % pour l'ensemble de l'industrie agroalimentaire américaine (couvrant 47 secteurs au niveau du code à six chiffres de la SCIAN). Le tableau illustre également une rupture dans la concentration de la filière depuis 1997. Dans la plupart des cas, la concentration s'est renforcée, parfois même considérablement. En moyenne, le coefficient CR4 a crû de 13 % au cours des dix dernières années. La plupart des secteurs ont enregistré une forte hausse de la concentration, par exemple dans les segments des aliments pour animaux de compagnie (plus 22 %), de la mouture humide du maïs (plus 17 %) et de la fabrication du beurre (plus 51 %). Même dans les secteurs où le coefficient CR4 est relativement faible, la hausse a été importante. Ainsi, le segment de la fabrication

de lait de consommation affiche un coefficient CR4 de 46 %, mais a enregistré une hausse de 116 % de la concentration entre 1997 et 2007.

**Tableau 3 : Industrie agroalimentaire américaine : concentration (1997) et évolution de la concentration (1997-2007)**

| Secteur | Coefficient de concentration de quatre entreprises (CR4, %) | Variation du CR4 : 1997-2007 (%) |
|---|---|---|
| Aliments pour animaux de compagnie | 71 | 22 |
| Mouture humide du maïs | 83.8 | 17 |
| Transformation du soja | 81.5 | 2 |
| Autre transformation d'oléagineux | 79.5 | 19 |
| Fabrication de céréales pour le petit-déjeuner | 80.4 | -2 |
| Raffinage de la canne à sucre | 95.2 | -4 |
| Fabrication du lait de consommation | 46 | 116 |
| Fabrication du beurre laitier | 78.9 | 51 |
| Fabrication de pâtes sèches | 62.9 | 10 |
| **Moyenne (47 secteurs)** | 50.3 | 13 |

**Source :** Crespi *et al.* (2012)

Les coefficients de concentration ne sauraient illustrer les craintes d'abus de pouvoir de marché. C'est au contraire le comportement des entreprises qui importe. À cet égard, les chercheurs se sont efforcés de mesurer le degré de pouvoir de marché dans l'industrie agroalimentaire, en confrontant la plupart de ces études empiriques aux données américaines. Ces études appliquent l'approche NEIO (New Empirical Industrial Organisation) pour mesurer le pouvoir de marché[1]. Sperling et Sheldon (2003) présentent cette approche telle qu'elle est appliquée à la filière alimentaire. Globalement, les conclusions de ces études ne relèvent pas d'écart significatif par rapport à la situation concurrentielle de référence. L'analyse que fait le GAO de la filière parvient également à la même conclusion (GAO, *op. cit.*)[2]. Lorsque des écarts (significatifs sur le plan statistique) par rapport à la situation concurrentielle de référence existent, le degré estimé de concurrence imparfaite est relativement faible.

Les critiques formulées à l'encontre de cette approche sont largement connues : elle part du principe d'une homogénéité des produits, selon laquelle la filière se caractériserait par des entreprises symétriques aux rendements d'échelle constants. Morrison-Paul (2001) a abordé cette dernière question pour démontrer que les effets d'échelle peuvent souvent surpasser l'effet du pouvoir de marché (autrement dit, que des niveaux de concentration élevés permettent d'obtenir des gains d'efficience), même si un écart par rapport à la situation concurrentielle de référence est observé. Dans leur estimation de cet écart dans 40 segments de

[1] L'approche NEIO porte sur l'intensité de la concurrence plutôt que sur le nombre d'entreprises concurrentes.

[2] L'étude du GAO (2009) conclut ce qui suit : « La plupart des études que nous avons analysées ne relèvent aucune preuve d'un pouvoir de marché, ni d'effets d'efficience supérieurs aux effets de concentration du pouvoir de marché. Si certaines études établissent certains éléments caractéristiques d'un pouvoir de marché, il ne ressort pas clairement si ce pouvoir résulte de la concentration » GAO, 2009, p.26).

l'industrie agroalimentaire, Bhuyan et Lopez (1997) constatent que 20 segments se caractérisent par des rendements d'échelle croissants.[3]

Pour résumer, malgré des niveaux élevés de concentration dans certains secteurs, la recherche empirique ne se montre pas particulièrement préoccupée par le comportement des entreprises de l'industrie agroalimentaire. Bien entendu, il peut arriver que le comportement d'une entreprise en particulier soit problématique, mais dès lors soit les données ne permettent pas de corroborer ce comportement (les études menées tendent à se concentrer sur un éventail réduit de secteurs), soit le modèle sous-jacent n'est pas adapté. Il peut arriver également que les principales craintes ne concernent pas le pouvoir du vendeur (comme dans les cas susmentionnés) mais celui de l'acheteur (comme nous le verrons par la suite). Enfin, les inquiétudes liées à la concurrence dans la filière alimentaire peuvent également concerner avant tout le commerce de détail.

### *2.1.2 Stade du commerce de détail*

La concurrence dans le secteur de la distribution alimentaire a incontestablement occupé le devant de la scène ces dernières années. Plusieurs raisons peuvent expliquer ce phénomène. Premièrement, les détaillants constituent la phase la plus évidente de la filière lorsque les consommateurs effectuent leurs courses alimentaires. Deuxièmement, la concentration est élevée dans plusieurs pays, après avoir connu une croissance rapide. Dans le même temps, le nombre de points de vente, au stade du commerce de détail, a considérablement diminué. L'expansion du commerce de détail est également un phénomène mondial : les supermarchés ont pénétré de nombreux marchés en Asie, en Amérique latine et en Afrique, comme le montrent Reardon *et al*. (2003). Cette expansion concerne plusieurs enseignes actives dans de nombreux pays. Wrigley et Lowe (2010) documentent la présence nationale de ces enseignes multinationales : Wal-Mart (États-Unis) est présent dans 16 pays, Carrefour (France) dans plus de 33 pays, de même que Metro (Allemagne)[4]. Pour finir, compte tenu de l'implantation croissante des enseignes alimentaires, la concentration et le rôle croissants des détaillants dans l'ensemble de la filière de distribution suscitent de plus en plus d'inquiétudes, qui loin de se limiter au seul pouvoir de marché du vendeur, s'étendent désormais aux conséquences pour les fournisseurs aux stades agroalimentaire et agricole.

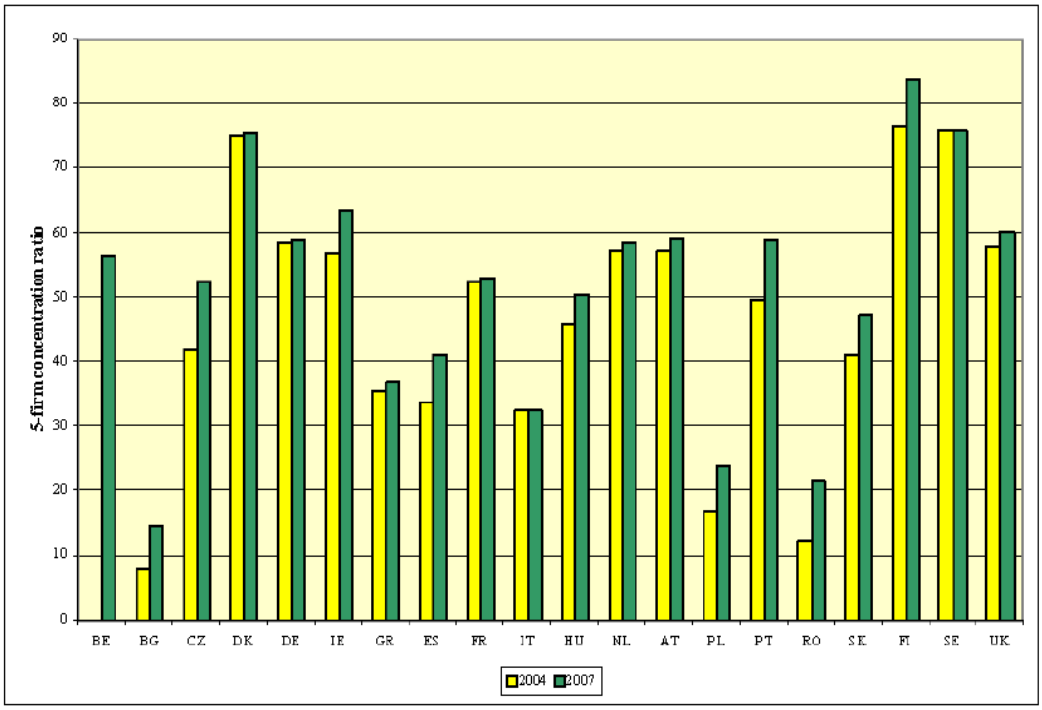
La Figure 5 présente les niveaux de concentration du commerce alimentaire dans les pays européens. Plusieurs éléments importants sont à relever. Premièrement, il est indiscutable que les niveaux de concentration sont élevés dans le commerce de détail dans plusieurs pays européens. Dans certains cas, le CR5 est particulièrement élevé, notamment en Finlande, au Danemark et en Suède. Deuxièmement, bien que la concentration soit élevée dans certains pays de l'UE, dans de nombreux autres pays européens, le commerce de détail n'est pas concentré, par exemple en Bulgarie, en Pologne et en Roumanie. Néanmoins, la tendance semble être à une plus forte concentration. Même dans ce laps de temps relativement court, le CR5 a suivi une évolution particulièrement marquée dans certains cas. Dans certains pays, cette hausse s'est faite à partir d'un niveau relativement bas (par exemple en Roumanie, le CR5 a doublé au cours de cette période triennale), mais même dans les pays aux niveaux de concentration relativement élevés, le coefficient a progressé. Troisièmement, malgré cette évolution, dans certains pays, la concentration du commerce de détail reste limitée, par exemple en Belgique. Les écarts observés en Europe en matière de

[3] Nevo (2001) analyse le marché des céréales prêtes à consommer et établit une différenciation des produits entre les entreprises.

[4] Wrigley et Lowe (2010) étudient les multiples facteurs qui ont conduit au développement des grandes enseignes multinationales et les implications d'un tel développement sur les restrictions internationales au commerce et à l'investissement dans les services.

concentration reflètent à l'évidence différents facteurs liés à la réglementation, aux lois de planification et à d'autres obstacles qui peuvent agir comme autant de barrières à l'entrée[5].

**Figure 5 : Concentration dans le commerce alimentaire en Europe, 2004 et 2007 (coefficient de concentration de 5 entreprises, CR5)**




**Source :** Bukeviciute *et al*. (2009)

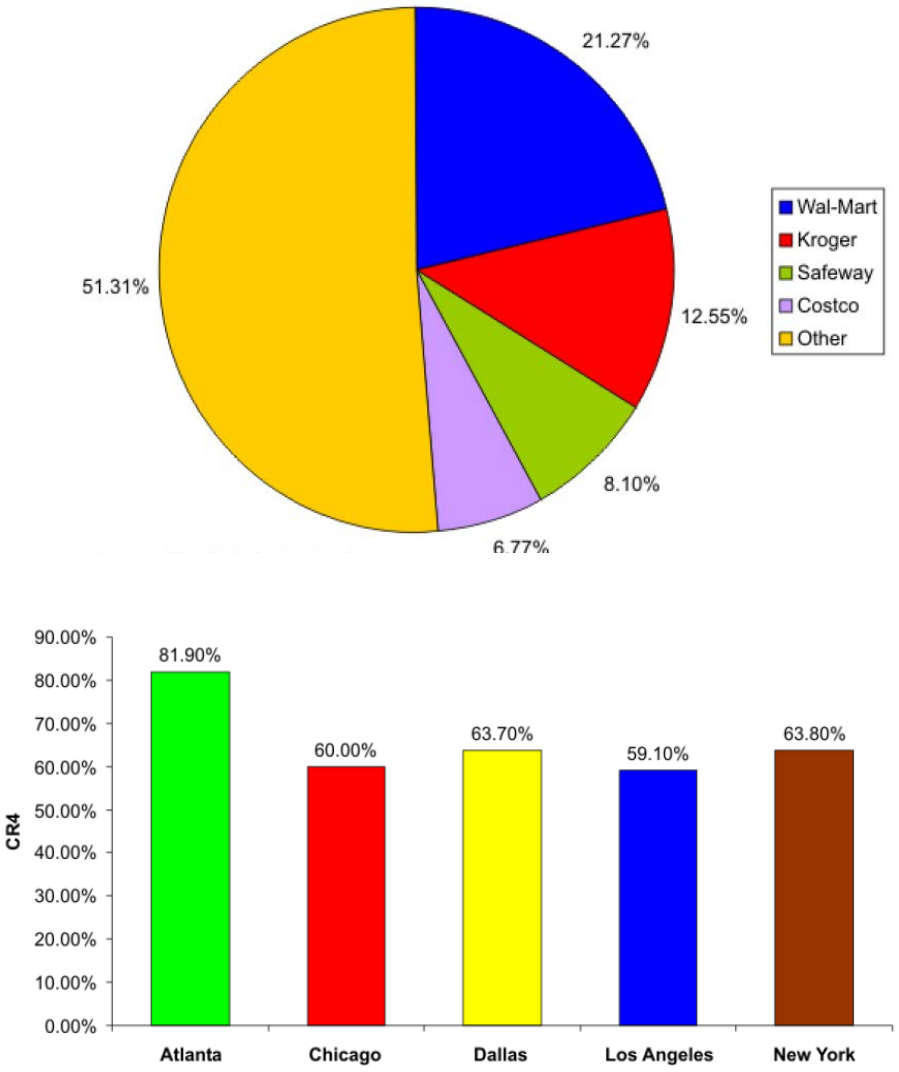
L'évolution des modes de distribution en Australie illustre également les niveaux élevés et croissants de concentration dans le commerce alimentaire. Une étude récente (NARGA, *op. cit.*) relève que les deux premiers détaillants alimentaires (Coles et Woolworths) représentaient en 2009 près de 80 % des ventes. Ce chiffre est à comparer à la situation du Royaume-Uni où, bien que le marché soit considéré comme relativement concentré, les deux premiers acteurs représentent 48 % du total des ventes. La tendance à une plus forte concentration en Australie suit un rythme soutenu. En 1990, deux entreprises captaient ensemble 50 % des parts de marché. En 1999, cette proportion grimpait à 61 % et s'élevait à 80 % au milieu des années 2000.

Les consommateurs ont tendance à effectuer leurs courses près de leur domicile. Par conséquent, les données nationales relatives à la concentration ne reflètent peut-être pas fidèlement l'impact potentiel du pouvoir de marché dans le commerce alimentaire de certaines régions spécifiques (voir l'analyse des définitions du marché dans la deuxième partie). Ce phénomène se retrouve dans les chiffres de la concentration du commerce alimentaire aux États-Unis. Comme le montre la Figure 6, au niveau national, le CR5 est légèrement inférieur à 50 %. Or, le marché national pourrait bien ne pas être le niveau d'analyse approprié. Richards et Pofahl (2010) présentent des données qui montrent que dans plusieurs États, les

5 Signe de la variabilité de la concentration dans le commerce alimentaire, les modes d'achats ont également évolué. Ainsi, au Royaume-Uni, le nombre d'épiceries (y compris les supermarchés) a reculé entre 2000 et 2006 (Commission de la concurrence, 2007). Herrmann *et al.* (2009) observent une hausse du nombre d'hypermarchés, supermarchés et magasins hard-discount en Allemagne entre 1980 et 2004, le nombre des autres types de commerce alimentaire reculant d'environ 50 %.

niveaux de concentration peuvent être sensiblement supérieurs. La Figure 6 souligne également cet aspect de la concentration : les données montrent que le CR5 est bien plus élevé dans plusieurs villes des États-Unis, notamment à Atlanta ou il atteint 80 %.

**Figure 6 : CR5 au niveau national et des villes aux États-Unis, 2008**



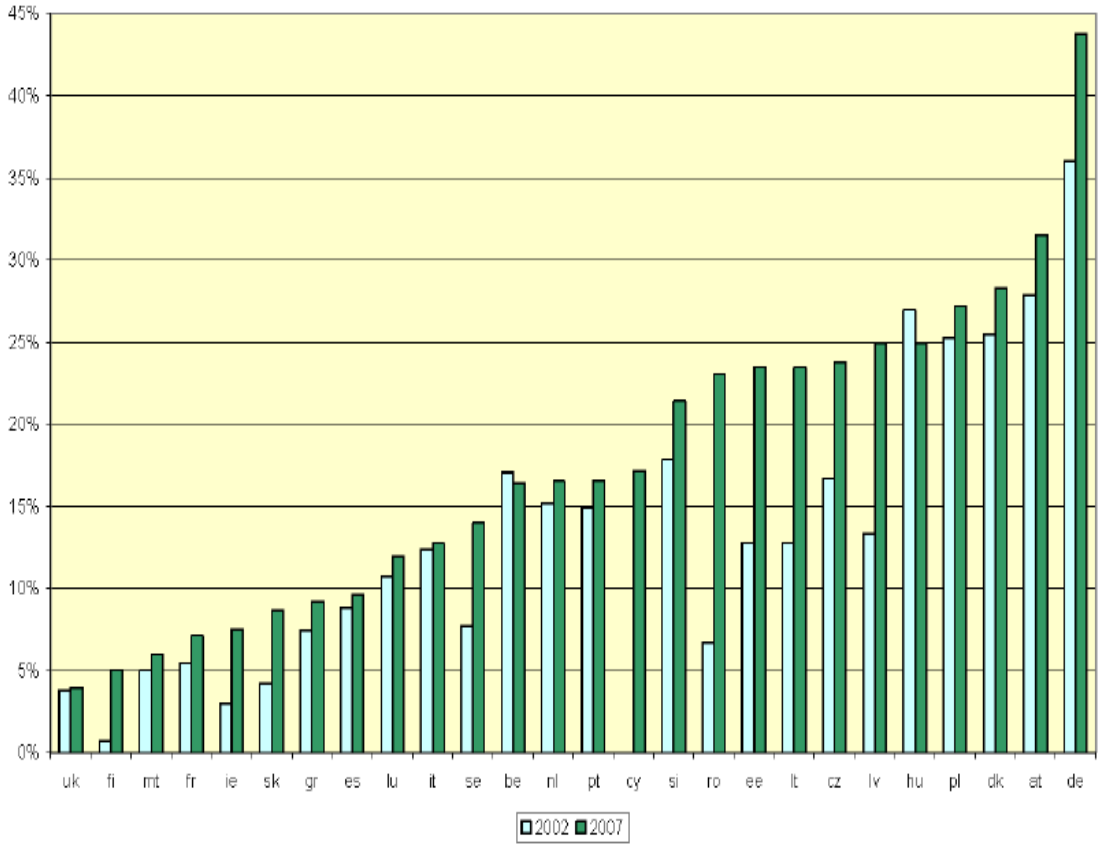

**Source :** Richards et Pofahl (2010)

La concurrence dans la distribution de produits alimentaires se caractérise également par l'importance croissante des enseignes de hard-discount, tels qu'Aldi et Lidl[6]. La Figure 7 illustre l'implantation des acteurs du hard-discount en Europe et renseigne sur deux points majeurs. Premièrement, l'importance relative des enseignes de hard-discount varie considérablement entre les pays. Ces enseignes sont très présentes en Allemagne (essentiellement), en Autriche, au Danemark, en Pologne, et en Hongrie et ne jouent qu'un rôle mineur au Royaume-Uni et en Finlande. Deuxième enseignement important, le rôle des

6 Senauer et Seltzer (2010) observent qu'Aldi (enseigne allemande de hard-discount) s'est développé aux États-Unis avec plus de 1 000 magasins dans 31 États.

enseignes de hard-discount ne cesse de se renforcer (à quelques exceptions près, dont la plus notable est le Royaume-Uni).

**Figure 7 : Enseignes de hard-discount dans les États membres de l'UE**




**Source :** Bukeviciute *et al*. (2009)

### *2.2 Consolidation par fusions-acquisitions*

Comme indiqué ci-dessus, la plus forte concentration aux étapes de transformation et de distribution résulte pour une large part d'un processus de consolidation symbolisé par le déclin du nombre d'entreprises opérant à chacune de ces étapes[7], ainsi que par le nombre de fusions et acquisitions. L'analyse par l'European Competition Network (2012) des enquêtes antitrust dans la distribution alimentaire en Europe depuis 2005 révèle 1 300 enquêtes effectuées par les autorités nationales sur des fusions et acquisitions (FA).

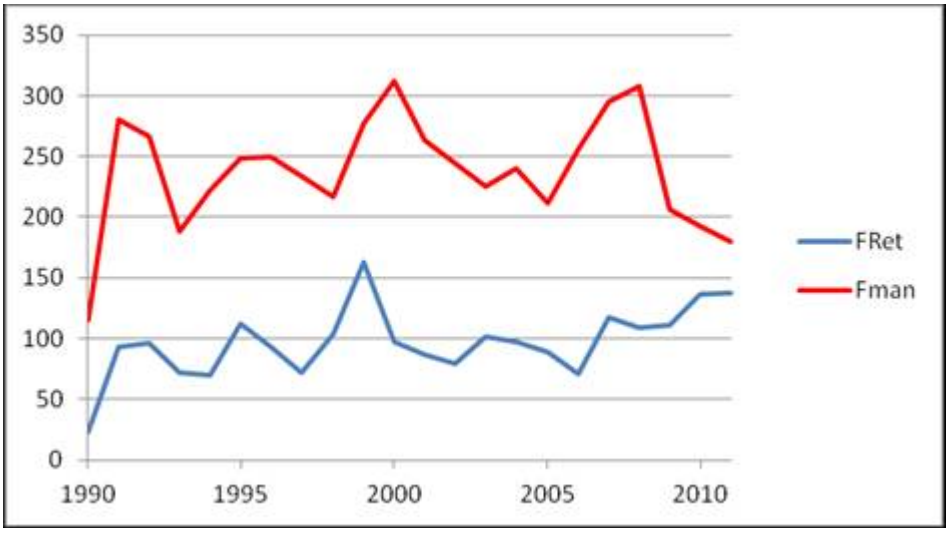
Trois éléments principaux caractérisent les tendances observées en matière de fusions-acquisitions dans les pays de l'OCDE ces vingt dernières années : Premièrement, cette activité peut être volatile. Deuxièmement, la plupart des fusions-acquisitions ont lieu au stade de la fabrication et non de la distribution. Troisièmement, les fusions-acquisitions transfrontalières représentent une part significative de l'ensemble de cette activité (même si cette importance relative peut varier d'un pays à un autre).

La Figure 8 présente le nombre d'acquisitions intervenues dans la filière alimentaire de l'UE depuis 1990, en distinguant celles qui ont eu lieu au stade de la distribution de celles réalisées au stade de la

[7] Ce chiffre illustre peut-être le rôle des économies d'échelle à différents stades de la filière alimentaire.

fabrication. La figure confirme les deux premières observations précédentes, à savoir que le nombre d'acquisitions au stade de la fabrication est supérieur à celui observé dans la distribution et que le nombre d'opérations peut varier considérablement d'une année à l'autre. Cette courbe en forme de vague est courante dans les fusions-acquisitions et s'explique souvent par l'évolution technologique et la déréglementation. Plus récemment, l'un des principaux facteurs mis en avant a été la sous-évaluation sur les marchés financiers. La mauvaise valorisation des entreprises peut conduire à des schémas de fusions-acquisitions sans grand rapport avec les « fondamentaux ». Mitchell et Mulherin (1996), Harford (2005) et Rhodes-Kropf, mais également Viswanathan (2004) examinent ces questions.

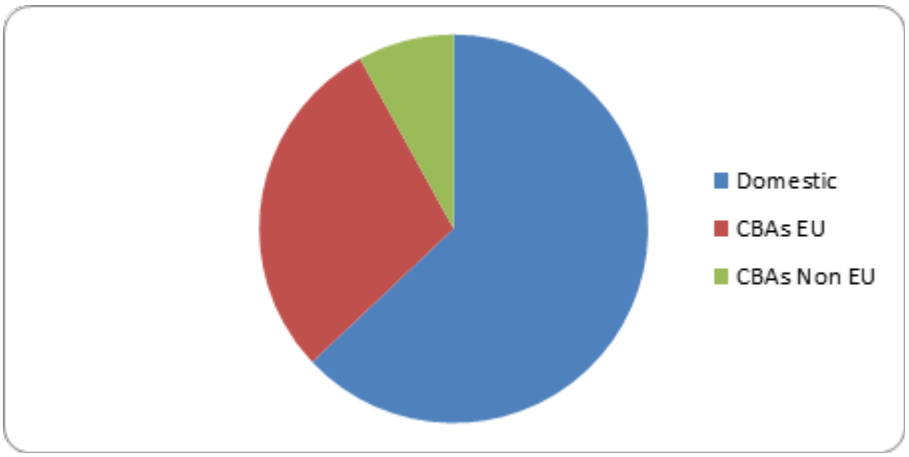
**Figure 8 : Fusions-acquisitions dans la fabrication et la distribution alimentaires**




**Source :** Compilation à partir des données de *SDC Platinum*

Les données rapportées dans la Figure 8 concernent tant les fusions-acquisitions domestiques que transfrontalières dans l'UE. Prédominantes au stade de la fabrication, les opérations transfrontalières ont représenté environ 35 % de l'ensemble des fusions-acquisitions entre 1986 et 2011. La plupart de ces opérations ont eu lieu dans et ont ciblé d'autres États membres de l'UE. Ces données sont présentées dans la Figure 9 qui précise la répartition des opérations de fusions-acquisitions. L'activité domestique représente à l'évidence la majorité des opérations réalisées dans les États membres de l'UE, et l'importance relative des opérations impliquant des pays de l'UE ressort clairement. Le fait que les fusions-acquisitions dans l'UE concernent généralement d'autres pays de l'UE s'explique (par exemple par la proximité géographique, par des liens commerciaux étroits, des politiques communes, etc.).

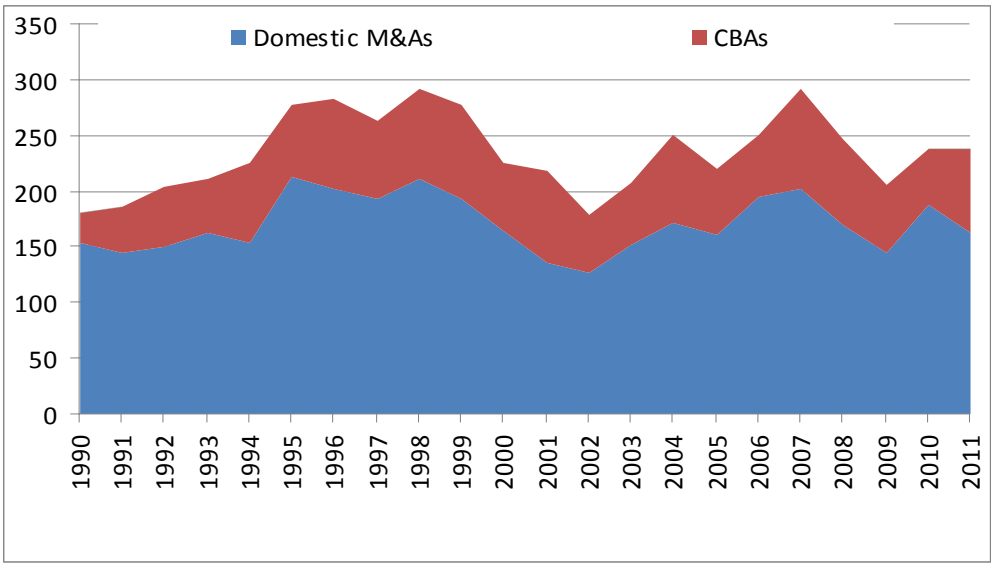
**Figure 9 : Répartition de l'ensemble des fusions-acquisitions par source : Fabrication dans l'UE, 1986-2011**




**Source :** Compilation à partir des données de *SDC Platinum*

Les tendances de l'activité fusions-acquisitions relevées pour l'UE sont plus générales. La Figure 10 rend compte de l'activité de fusions-acquisitions dans le secteur agroalimentaire américain entre 1990 et 2011. Les principaux traits relevés précédemment se retrouvent également ici. Globalement, le processus de consolidation par fusions-acquisitions peut être volatil. Les opérations transfrontalières représentent une part significative de l'ensemble des fusions-acquisitions. Les transactions domestiques comptent toutefois pour la majorité de l'activité.

**Figure 10 : Fusions-acquisitions dans le secteur agroalimentaire américain, 1990-2011**




**Source** : Compilation à partir des données de *SDC Platinum*

Les études d'opérations de fusion portant spécifiquement sur la filière alimentaire sont peu nombreuses. L'un de leurs principaux enseignements est l'effet sur la définition du marché. Barros *et al.* (2006) évaluent les effets potentiels des fusions dans le secteur portugais de la distribution de produits alimentaires. Ils estiment que les prix augmenteraient probablement pour deux raisons, sous l'incidence de deux effets concurrents. Premièrement, la concurrence au niveau local s'affaiblirait. Deuxièmement, la

puissance d'achat du détaillant sur les fournisseurs augmenterait, ce qui réduirait les coûts. L'effet net sur les consommateurs après la fusion dépendrait de la manière dont les réductions de coûts ainsi obtenues seraient répercutées sur les consommateurs. Pour eux, cette répercussion serait limitée de sorte que l'effet des fusions au stade du commerce de détail conduirait à une hausse des prix à la consommation[8]. Allain *et al*. (2013) étudient si les fusions dans le commerce de détail augmenteraient les prix des denrées alimentaires. S'appuyant sur des données précises du marché français, ils observent que les fusions augmentent considérablement les prix, à la fois des entreprises fusionnées et des entreprises non fusionnées. Ils soulignent que le principal effet de ces évolutions tarifaires se manifesterait sur la concurrence locale.

Peu d'études se sont penchées sur les raisons sous-jacentes aux tendances générales observées en matière de fusions-acquisitions dans la filière alimentaire. S'intéressant plus particulièrement aux acquisitions transfrontalières aux États-Unis, McCorriston et Sheldon (1998) soulignent le rôle de la bourse et des fluctuations des taux de change. Herger *et al.* (2008) adoptent une approche plus globale des opérations transfrontalières dans le secteur alimentaire et mettent également en lumière l'importance de facteurs macroéconomiques et financiers dans la structuration à long terme des fusions-acquisitions transfrontalières. Ils observent également que l'euro contribue à augmenter le nombre des fusions-acquisitions entre États membres de l'UE.

### *2.3 Pouvoir de marché*

La forte croissance de la concentration au stade de la distribution des produits alimentaires suscite des craintes en ce qui concerne le pouvoir de marché. Les premiers travaux sur cette question ont essentiellement mis en valeur les liens entre les niveaux de concentration et les niveaux de prix. Cotterill (1986), sur la base des données disponibles sur les supermarchés du Vermont, observe que les prix plus élevés caractérisent les marchés plus concentrés. Cette observation est toutefois remise en cause par Newmark (1990) qui montre qu'il n'y a aucun lien entre concentration et prix lorsque d'autres facteurs (tels que les écarts de niveaux de revenu) sont pris en compte. Les études du NEIO sur le commerce alimentaire sont peu nombreuses, et les rares disponibles (par exemple celle de Gohin et Guyomard (2000) pour la France) ne sont guère convaincantes. Smith (2004) adopte une approche plus large de la concurrence entre les enseignes de supermarché en se fondant sur les données disponibles pour le Royaume-Uni. L'incidence potentielle des enseignes de hard-discount est évaluée par l'étude de Hausman et de Leiptag sur Wal-Mart. Ils observent que sur certains marchés géographiques, les prix dans les autres supermarchés ont diminué d'environ 4 % après l'arrivée de Wal-Mart (Hausman et Leiptag, 2007)[9].

Les inquiétudes suscitées par le pouvoir de marché dans la distribution peuvent concerner le pouvoir du vendeur, de l'acheteur ou des deux. C'est l'interaction entre les questions horizontales et verticales qui peut déterminer le pouvoir de marché potentiel dans ce secteur. Deux enquêtes notables sur la concurrence

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8 Smith (2004) applique son approche de la concurrence à différents supermarchés au Royaume-Uni afin de simuler l'effet potentiel de fusions entre les plus gros acteurs.

9 L'examen du pouvoir de marché dans le commerce alimentaire de détail pose de nombreuses problématiques qui restent à explorer par la recherche. La première consiste à reconnaître que les détaillants de produits alimentaires sont multi-produits par nature, proposent entre 30 000 et 40 000 références, et qu'ils recherchent des économies d'échelle et gammes. Les études consacrées aux lignes de produits uniques ne rendent pas compte du caractère multi-produit du commerce alimentaire. De fait, au-delà du prix, les enseignes rivalisent sur de nombreux aspects de leur activité, notamment la variété (Richards et Hamilton, 2006) et les spécificités de leur points de vente (Smith, *op. cit.*). Ellickson (2007) laisse entendre que le caractère multi-produit du commerce alimentaire fait du secteur des supermarchés un oligopole « naturel ».

dans le secteur de l'épicerie ont levé une partie des craintes liées aux pouvoir du vendeur. Griffith (2004) note la conclusion de l'étude du Parlement australien sur le commerce alimentaire, pour qui les principaux bénéficiaires du développement des enseignes de distribution sont les consommateurs, qui profitent désormais d'un plus large choix, d'une plus grande accessibilité, d'un meilleur confort et de prix en baisse. Cette baisse des prix provient en partie des plus grandes économies d'échelle et de gamme réalisées. De même, l'enquête de la Commission britannique de la concurrence dans le secteur alimentaire souligne les bénéfices potentiels que pouvaient tirer les consommateurs de la concurrence dans le secteur de la distribution des produits alimentaires, malgré la hausse des parts de marché des grandes enseignes. En revanche, la Commission n'a pas exprimé de craintes particulières quant au rôle croissant des enseignes de distribution auprès des fournisseurs en amont (Commission de la concurrence, 2008).

Le pouvoir de l'acheteur se définit comme :

> « ...la situation qui existe lorsqu'une entreprise ou un groupe d'entreprises, soit parce qu'il détient une position dominante en tant qu'acheteur d'un produit ou d'un service, soit parce qu'il dispose d'avantages sur le plan de la stratégie commerciale ou d'un pouvoir de marchandage par suite de sa taille ou d'autres caractéristiques, est à même d'obtenir d'un fournisseur des conditions plus favorables que celles qui sont offertes aux autres acheteurs. » (OCDE, 1981)

et, plus récemment, comme une situation dans laquelle :

> « [un acheteur] peut menacer de manière crédible d'imposer un coût d'opportunité à long terme (c'est-à-dire un préjudice ou un manque à gagner) qui, si la menace était mise à exécution, serait sensiblement disproportionné par rapport au coût d'opportunité à long terme qu'il s'imposerait à lui-même. » (OCDE, 1998).

Le pouvoir de l'acheteur peut prendre différentes formes, notamment le prix payé aux fournisseurs, la nature et la détermination des conditions contractuelles, les redevances demandées par les distributeurs pour l'accès aux linéaires, etc. Chen (2007) souligne que, dans l'analyse du pouvoir de l'acheteur, il convient de faire la distinction entre les cas où le fournisseur est impuissant et ceux où il dispose d'un certain pouvoir de marché. Dans ces derniers cas, le pouvoir de l'acheteur peut être encadré par le pouvoir de marché compensatoire. Non seulement l'exercice du pouvoir de marché peut prendre différentes formes, mais le bien-être et les gains d'efficience tirés du pouvoir de l'acheteur seront également différents. Il convient par conséquent d'établir une distinction entre le pouvoir de l'acheteur qui affecte le secteur agricole (ou d'autres agents de la filière de distribution qui sont « impuissants », tels que les petits transformateurs) et le pouvoir de l'acheteur qui implique une interaction entre les détaillants et les transformateurs, lorsque la concentration du marché dans ces deux secteurs est relativement élevée.

Le pouvoir de l'acheteur soulève plusieurs interrogations dans le secteur alimentaire. Face à la concentration forte et croissante dans les filières de fabrication de la distribution, et compte tenu (à l'heure actuelle) que le pouvoir du vendeur, dans le commerce de détail des produits alimentaires, ne suscite aucune inquiétude réelle, l'attention s'est resserrée sur le pouvoir de marché exercé par le biais des achats. Ainsi, l'enquête de la Commission britannique de la concurrence sur le secteur de la distribution alimentaire a révélé 30 pratiques, dans la relation entre les supermarchés et les acheteurs, susceptibles de poser problème (Commission de la concurrence, 2000). Ces doutes ont ensuite débouché sur une enquête (Commission de la concurrence, 2008). Dans le même ordre d'idées, Griffith (*op. cit.*) documente ces craintes par la forte concentration observée dans le secteur australien de la distribution de produits alimentaires, comme précédemment évoqué. La question des achats a également suscité des interrogations lors des ateliers du ministère de la Justice américain consacrés à la concurrence dans le secteur agricole (DoJ, *op.cit.*). La recherche universitaire s'est également fait l'écho de ces craintes, voir par exemple

Dobson et Waterson (1999) et Dobson *et al.* (2003). L'OCDE résume les questions liées au pouvoir de l'acheteur dans OCDE (2008).

La problématique du pouvoir de l'acheteur dans la filière alimentaire revêt différents aspects. Premièrement, mesurer l'intensification de la concentration dans les filières de l'agroalimentaire et de la distribution par le seul nombre d'entreprises actives ou par leurs parts de marché pourrait conduire à sous-estimer le potentiel du pouvoir de l'acheteur. Dobson *et al.* (*op. cit.*) observent que le rôle des groupes d'acheteurs renforce le degré de concentration des fournisseurs en amont, tout du moins dans certains pays. Ce constat ressort clairement dans le Tableau 4. Bien que les données relatives à la concentration des détaillants soient plus anciennes que celles présentées dans le Tableau 2, elles indiquent néanmoins que les groupes d'acheteurs sont un maillon important de la filière de distribution dans plusieurs pays de l'UE. Si les groupes d'acheteurs ne sont pas importants dans certains États membres de l'UE (notamment en Autriche, au Royaume-Uni et en Irlande), la concentration au stade de la distribution augmente au Danemark, en France, en Italie, aux Pays-Bas et en Espagne lorsqu'on prend en compte les principaux groupes d'achat.

**Tableau 4 : Concentration dans la distribution, en tenant compte des groupes d'acheteurs, 1996.**

| Pays | Groupes d'acheteurs exclus | Groupes d'acheteurs inclus | Pays | Groupes d'acheteurs exclus | Groupes d'acheteurs inclus |
|---|---|---|---|---|---|
| **Autriche** | 58.6 | 58.6 | **Irlande** | 64.2 | 64.2 |
| **Bel./Lux.** | 61.6 | 84.6 | **Italie** | 11.8 | 26.2 |
| **Danemark** | 59.5 | 76.6 | **Pays-Bas** | 50.4 | 69.6 |
| **Finlande** | 89.1 | 89.1 | **Portugal** | 55.7 | 62.4 |
| **France** | 50.6 | 78.2 | **Espagne** | 32.1 | 49.3 |
| **Allemagne** | 45.4 | 50.0 | **Suède** | 77.9 | 77.9 |
| **Grèce** | 28.0 | 28.0 | **Royaume-Uni** | 56.2 | 56.2 |

**Source :** Dobson *et al.* (2000)

Crespi *et al.* (*op. c*it.) s'intéressent aux problématiques du conditionnement de la viande aux États-Unis, un secteur qui a fait l'objet par le passé de plusieurs études consacrées au pouvoir de l'acheteur (et du vendeur). Ils observent que les niveaux élevés de concentration qui émergent à ce stade de la filière pourraient conduire à sous-estimer la force du pouvoir de l'acheteur. Cela est dû au fait que la hausse des coefficients de concentration de quatre entreprises dans le secteur du conditionnement de la viande découle de la fermeture d'usines dans cette filière. Ainsi, entre 1980 et 2000, le CR4 dans le secteur du conditionnement de la viande de bovin est passé de 36 % en 1980 à 85 % en 2010, soit une hausse de 136 %. Le nombre d'usines dans cette filière a reculé de 82 %, passant de 743 à 135 unités. D'autres secteurs de la viande suivent une tendance similaire. Comme l'observent Crespi *et al.* (*op. cit.*), la diminution du nombre d'usines peut également revêtir une dimension régionale susceptible de renforcer davantage encore le pouvoir de marché dans l'approvisionnement. Crespi et Sexton (2005) démontrent que le nombre d'usines peut avoir un impact plus important sur la fixation des prix que le nombre d'entreprises. La dimension régionale des achats a également été débattue lors des ateliers du ministère de la Justice (voir DoJ, *op. cit.*).

Deuxièmement, le pouvoir de l'acheteur peut prendre différentes formes. Le traitement classique du monopsone ou de l'oligopsone consiste pour l'acheteur, dans une courbe d'offre ascendante, à limiter les quantités achetées, ce qui entraîne une baisse des prix pour les fournisseurs, et, dans le contexte d'une étape unique, une hausse des prix pour les consommateurs. Toutefois, le pouvoir de l'acheteur peut également prendre d'autres formes, telles que prévues par les conditions particulières contractées par les participants, à chaque étape de la filière de distribution, comme le déréférencement (ou la menace de déréférencement)

des fournisseurs, les redevances d'emplacement, les remises forcées, les paiements rétroactifs, les retard de paiement, les avenants rétroactifs aux contrats. Ces exemples sont des moyens par lesquels les acheteurs peuvent peser sur leurs relations avec les fournisseurs. Griffith (*op. cit.*) abordent certains de ces points dans son évaluation des problématiques de la distribution de produits alimentaires en Australie. Ces questions (notamment) ont également été mises en exergue par la Commission britannique de la concurrence (Commission de la concurrence, 2000 et 2008). Les interrogations ne portent pas ici uniquement sur les montants reçus en amont par les fournisseurs mais également sur les risques auxquels ils s'exposent en raison de modifications imprévisibles des contrats ou des clauses qui les lient aux détaillants.

Les preuves empiriques de l'existence d'un pouvoir de l'acheteur font généralement défaut. Plusieurs études ont appliqué la méthodologie NEIO, la plupart au secteur américain du conditionnement de la viande, pour mesurer les dépréciations. Schroeter (1998), Schroeter et Azzam (1990), et Koontz *et al.* (1993) n'ont relevé que peu de différences avec les données concurrentielles de référence. Crespi et Sexton (*op. cit.*) observent des baisses bien plus importantes des niveaux de rémunération versés aux fournisseurs dans le secteur du conditionnement de la viande. Néanmoins, et dans la droite ligne des observations ci-dessus, le cadre utilisé pour estimer les écarts de dépréciation par rapport aux données concurrentielles de référence peuvent ne pas tenir compte des gains d'efficience nés de l'accès, au bon moment, des industriels aux intrants. On parle alors d' « approvisionnements captifs », dont le rôle, à savoir garantir l'efficacité du conditionnement de la viande, a été souligné lors de l'évaluation par le GAO (*op. cit.*) du pouvoir de marché dans la filière alimentaire aux États-Unis.

### *2.4 Restrictions verticales*

Les restrictions verticales prennent différentes formes et rompent avec le principe de pleine concurrence ou de tarification linéaire entre les étapes verticales. La distribution exclusive, la tarification en deux parties, les redevances d'emplacement, les frais prioritaires, les rabais, les prix de vente imposés sont quelques exemples de restrictions verticales. McCorriston (2002), puis McCorriston et Sheldon (1997) analysent la question des restrictions verticales dans la filière alimentaire. Les premières études consacrées aux restrictions verticales prenaient pour hypothèse de départ une phase de fabrication oligopolistique. Plus récemment, une étape de distribution concurrentielle a été retenue, reflétant davantage le contexte plus réaliste de la filière, où le pouvoir de marché au stade de la distribution et les restrictions verticales sont de nature à refléter le pouvoir de négociation des détaillants sur les fournisseurs (oligopolistiques).

Le défi inhérent à l'examen du rôle des restrictions verticales n'est pas lié à leur existence, mais plutôt aux effets qu'elles sont susceptibles d'avoir sur l'efficience et le bien-être à différents stades de la filière alimentaire[10]. Prenons par exemple les redevances d'emplacement, ces frais payés par les industriels agroalimentaires pour obtenir des espaces dans les linéaires, notamment en tête de gondole. Les premières études consacrées aux redevances d'emplacement les associaient à des informations asymétriques. De nouveaux produits sont fréquemment proposés par l'industrie agroalimentaire, de sorte que ces frais peuvent être interprétés comme le signe, envoyé par l'industriel au distributeur, du succès probable du nouveau produit (Chu, 1992). Hamilton (2003) observe néanmoins que l'expérience des redevances d'emplacement, telles qu'elles sont appliquées dans la filière alimentaire américaine, suggère qu'elles ne se limitent pas à l'introduction de nouveaux produits mais tendent à être confinées à certains types de produits.

[10] McCorriston (2002) cite le cas du Royaume-Uni où 40 % des fournisseurs ont rapporté devoir verser des redevances d'emplacement aux détaillant et l'intense activité promotionnelle qu'elles impliquent tant au Royaume-Uni qu'aux États-Unis.

Les redevances d'emplacement peuvent affecter l'efficience de la filière alimentaire et présentent d'importants avantages en matière de bien-être, bien que la nature profonde de leur effet ne fasse pas consensus. Shaffer (1991), par exemple, avance que le secteur de la distribution est oligopolistique tandis que celui de la transformation est concurrentiel. Le recours aux redevances d'emplacement résulte du pouvoir de marché du détaillant et lui permet de percevoir une rente des industriels. Ainsi, les prix de vente augmentent et le bien-être du consommateur recule. En revanche, Hamilton (*op. cit.*), a une autre vision de l'industrie verticalement liée, selon laquelle le secteur de la distribution serait concurrentiel tandis que celui de la transformation disposerait d'un pouvoir d'oligopsone vis-à-vis du secteur agricole. Ce sont les industriels qui seraient à l'origine des redevances d'emplacement, qui ont pour effet d'augmenter les achats auprès du secteur agricole. Les prix agricoles et les quantités achetées augmenteraient, contrairement aux prix à la consommation, reflétant les effets de bien-être que l'on trouve dans la définition par Shaffer (*op. cit.)* du pouvoir de marché du détaillant. L'absence de consensus clair sur l'effet des redevances d'emplacement montre que cet effet dépend des hypothèses formulées en ce qui concerne le pouvoir de marché et de leur origine supposée (détaillants ou industriels).

Sans surprise, les modalités régissant la relation industriel-détaillant dans la filière alimentaire sont difficiles à évaluer du point de vue empirique. Villas-Boas (2007) tente de réaliser une telle évaluation, en s'appuyant sur les données du chiffre d'affaires réalisé par la vente de yaourts par le commerce de détail aux États-Unis. L'innovation recherchée par Villas-Boas consiste à identifier les liens entre les détaillants et les industriels lorsqu'aucun prix en amont ne peut être observé. L'objectif ici est de simuler les résultats, pour le marché, et de proposer une autre vision des liens qu'entretiennent détaillants et industriels, pour mieux coller à la réalité observée[11]. Villas-Boas découvre que les relations entre les industriels et les détaillants dans ce secteur sont régies essentiellement par un prix de gros au coût marginal, le détaillant jouissant du pouvoir de fixer les prix. Cette constatation cadre avec la politique tarifaire non linéaire pratiquée par les industriels et avec le fait que les détaillants disposent d'un pouvoir de négociation dans la filière alimentaire.

### *2.5 Marques de distributeurs*

La pénétration des marques de distributeurs de grandes enseignes est un aspect de plus en plus important de la filière alimentaire. Elle affecte non seulement la manière dont les détaillants se font concurrence, mais également la concurrence de leurs produits avec ceux des industriels. Les marques de distributeurs ont par conséquent à la fois un effet vertical et horizontal. En moyenne, les marques de distributeurs représentent 23 % des ventes totales de produits alimentaires en Europe et 15 % en Amérique du Nord[12]. Mais même en Europe, leur poids est très variable, comme le montre le Tableau 5. Le taux de pénétration des marques de distributeurs varie ainsi de 48 % (au Royaume-Uni) à seulement 17 % des ventes en Italie. Dans tous les pays, la pénétration des marques de distributeurs s'accroît sur la période considérée, avec notamment des taux de croissance élevés en Slovaquie, en République tchèque et en Pologne. Le taux de pénétration des marques de distributeurs varie selon la catégorie de produits (Bergès-Sennou *et al.*, 2004) et peut également fluctuer d'une enseigne à une autre. Si elles sont souvent perçues comme étant de moins bonne qualité que les marques nationales (comme l'atteste le fait que leur pénétration est plus importante en volumes qu'en valeur nominale), les marques de distributeurs peuvent tout à la fois concerner des produits haut de gamme que bas de gamme.

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11 La nouveauté de la prise en compte des relations entre les détaillants et les industriels lorsque seules des données limitées existent (notamment lorsque les données tarifaires en amont font défaut) a également été étendue à la problématique de la transmissions des prix dans la filière d'alimentaire (voir ci-après).

12 Dans d'autres régions du monde, la pénétration des marques de distributeurs est moins importante. Ainsi, NARGA observe que leur part de marché atteint à peine 4 et 2 % respectivement en Asie Pacifique et en Amérique latine (NARGA, 2010).

**Tableau 5 : Pénétration des marques de distributeurs dans les États membres de l'UE, 2003-2009 (pourcentage du total des ventes).**

| Country | 2003 | 2009 | % Change |
|---|---|---|---|
| United Kingdom | 41 | 48 | 7 |
| Germany | 35 | 40 | 5 |
| Belgium | 38 | 40 | 2 |
| Spain | 29 | 39 | 10 |
| Austria | n/a | 37 | n/a |
| Slovakia | 11 | 37 | 26 |
| France | 28 | 34 | 6 |
| Portugal | n/a | 34 | n/a |
| Denmark | 25 | 28 | 3 |
| Hungary | 17 | 28 | 11 |
| Finland | 24 | 28 | 4 |
| Czech Rep. | 13 | 28 | 15 |
| Sweden | 22 | 27 | 5 |
| Netherlands | 22 | 25 | 3 |
| Poland | 7 | 21 | 14 |
| Greece | n/a | 18 | n/a |
| Italy | 14 | 17 | 3 |

**Source :** Commission européenne (2011)

Pour le détaillant, les marques de distributeurs sont un moyen de se démarquer de ses homologues. Dès lors qu'il endosse aussi le rôle de fournisseur, le détaillant entre également en concurrence directe avec les produits des marques nationales. En résumé, la pénétration des marques de distributeurs peut avoir une incidence horizontale et verticale sur la concurrence dans la filière alimentaire. Les études menées à ce jour se sont dans une large mesure intéressées à la dimension verticale, pour déterminer si la concurrence entre les marques de distributeurs et les marques nationales entraînait une hausse des prix. Comme cela est détaillé ci-après, les enseignements de la recherche sur l'incidence des marques de distributeurs sur les consommateurs sont mitigés[13].

Très tôt, Mills (1995) tente de définir l'interaction entre les effets verticaux et horizontaux résultant de l'introduction des marques de distributeurs. Il caractérise ainsi la filière d'approvisionnement verticale à l'aide d'un détaillant et d'un industriel détenteur d'une marque nationale disposant tous deux d'un monopole sur leurs marchés respectifs. Dans ce contexte, l'industriel applique un prix de gros monopolistique, au même titre que le détaillant. La conséquence de ce double monopole est la diminution du bien-être. La marque de distributeur (si elle est commercialisée) sera de moindre qualité que la marque nationale mais l'effet l'introduction du nouveau produit (à marque de distributeur) sera double. Premièrement, il y aura une concurrence au stade de la vente de détail entre le produit de marque nationale et celui de marque de distributeur. Or, la dimension verticale tient au fait que désormais, le détaillant capte une part plus importante de la rente de la (totalité de la) filière. Deuxièmement, l'industriel détenteur de la marque nationale réduit le prix de gros de ce produit, ce qui signifie, qu'au stade de la distribution, le prix du produit de marque nationale diminuera. Ensemble, ces éléments entraînent une redistribution de la rente entre l'industriel détenteur de la marque nationale et le détaillant, au bénéfice du consommateur qui voit le prix du produit de marque nationale reculer. Ainsi, le problème de la double marginalisation est moindre et le bien-être social se renforce.

[13] Bergès-Sennou *et al.*, (2004) consacrent une étude aux problématiques plus générales des marques de distributeurs. Steiner (2004) examine quant à lui les questions de concurrence liées à la pénétration des marques de distributeurs.

Pourtant, Gabrielsen et Sørgard (2007) montrent que l'introduction des marques de distributeurs peut provoquer une hausse des prix des produits de marque nationale. Leur démonstration s'appuie sur la répartition des consommateurs en deux groupes : ceux qui sont fidèles à la marque nationale et ceux qui, plus opportunistes, sont disposés à adopter une marque de distributeur. L'industriel détenteur d'une marque nationale doit décider s'il cible les consommateurs opportunistes ou fidèles. Dans le premier cas, il appliquera un prix plus bas, alors que dans le deuxième, le prix demandé pourra être plus élevé, la demande de prix des consommateurs étant inélastique. Gabrielsen et Sørgard (*ibid.*) montrent que si la proportion des consommateurs fidèles est relativement élevée, l'industriel détenteur de la marque nationale concentrera ses efforts sur ce groupe et que des prix plus élevés seront pratiqués. Ils démontrent également que, dans certaines situations, la marque de distributeur ne pourra tout simplement pas être introduite sur le marché. Ce serait le cas si l'industriel détenteur de la marque nationale cible le groupe de consommateurs opportunistes en proposant au détaillant un contrat d'exclusivité, à bas prix, à la condition qu'aucune marque de distributeur ne voit le jour.

Les preuves empiriques des effets des marques de distributeurs sur les prix sont également mitigées. Se fondant sur des données américaines, Harris *et al.* (2002), montrent que l'introduction de marques de distributeurs est corrélée avec une hausse des prix des produits de marque nationale. Cotterill et Putsis (2000), après avoir analysé 143 catégories de produits et 59 marchés géographiques aux États-Unis, observent que les prix des marques nationales et des marques de distributeurs ont tendance à augmenter lorsque les marchés sont concentrés et que la part de marché détenue par les marques nationales est élevée. Bontemps *et al.* (2008) explore les effets des marques de distributeurs à l'aide de données françaises couvrant 218 groupes de produits. L'effet sur les prix de marques nationales a tendance à être corrélé positivement avec les achats de produits de marques de distributeurs, même si l'incidence sur les prix variera en fonction du type de marque de distributeur (s'il s'agit d'une marque de moindre qualité ou si elle est en concurrence plus frontale avec la marque nationale ; les marques de distributeurs à bas prix auront un impact moindre). En outre, les effets sur les prix seront plus importants sur les grandes marques nationales que sur les marques de second choix.

Trois observations sont à formuler en ce qui concerne la recherche sur les marques de distributeurs. Premièrement, si les données empiriques peuvent étayer un courant de recherche théorique, les études empiriques ne permettent pas de détailler les mécanismes à l'origine de cet effet, ce qui complique le choix entre des modèles théoriques alternatifs cohérents avec les données. Deuxièmement, comme indiqué précédemment, l'introduction des marques de distributeurs a produit à la fois un effet horizontal et un effet vertical. Ce dernier effet passe par le détaillant qui est désormais en concurrence directe avec l'industriel détenteur de la marque nationale, et qui est en mesure de capter une partie de la (totalité de la) rente de la filière alimentaire. Or, une telle situation exclut la concurrence entre les détaillants, même si les marques de distributeurs permettent de les différencier quelque peu. Le détaillant est normalement censé détenir un monopole, de sorte que c'est bien l'incidence sur les marques nationales au sein d'une enseigne et non pour l'ensemble des enseignes qui est l'objet de toutes les attentions. Troisièmement, certains effets des marques de distributeurs ne sont pas toujours pris en compte. Par exemple, un détaillant peut menacer de déréférencer des marques nationales après avoir introduit ses propres marques de distributeur (Daskalova, 2012). Pour finir, les marques de distributeurs soulèvent un dernier problème, qui tient non pas aux effets sur les prix mais aux incitations à l'innovation. Steiner (2004) et Daskalova (*op. cit.)* évoquent ces questions, ce dernier faisant valoir que le développement des marques de distributeurs peut poser des problèmes en ce qui concerne les informations propriétaires développées par les industriels détenteurs de marques nationales, même si une étude commandée par l'UE laisse entendre que l'incidence sur l'innovation, née de la pénétration des marques de distributeurs, n'est pas significative (Commission européenne, 2011).

### *2.6 Questions en suspens*

Après analyse des différentes questions concurrentielles dans la filière alimentaire, il ressort clairement que l'état actuel de la recherche économique, dans une certaine mesure, ne rend pas suffisamment compte des interrogations croissantes suscitées par le fonctionnement de la filière et de la concurrence en son sein. En particulier, il conviendrait de s'intéresser à l'interaction entre les effets horizontaux et les effets verticaux, la distinction entre les effets statiques et les effets dynamiques et aux questions plus générales d' « équité » dans la filière d'alimentaire.

#### *2.6.1 L'interaction entre les effets horizontaux et les effets verticaux*

Le cadre décrit à la Figure 4 montre que les problématiques concurrentielles peuvent être par nature horizontales (compte tenu du degré de concentration élevé et croissant du marché dans les secteurs de la transformation et de la distribution) ou verticales (en raison du pouvoir de l'acheteur entre les différents stades). Il importe d'observer que ces deux volets de la concurrence sont en interaction constante. Dobson et Waterson (1997) étudient cette question en modélisant la situation dans laquelle il existe une concurrence entre un nombre limité de détaillants qui s'approvisionnent en intrants auprès d'un fournisseur unique en amont. Lorsque le stade de la distribution fait l'objet d'une consolidation, les effets sur les consommateurs (à savoir les prix finals) seront mitigés dans la mesure où deux effets s'affrontent. D'un côté, la consolidation réduit le nombre d'acteurs, de sorte que l'on peut s'attendre à une hausse des prix. De l'autre, la consolidation au stade de la distribution accroît le pouvoir de négociation des détaillants par rapport aux fournisseurs en amont, ce qui devrait faire baisser les prix pour le consommateur. L'effet prédominant et, par conséquent, l'incidence finale sur le consommateur dépendront de l'intensité de la concurrence au stade de la distribution. Si les consommateurs considèrent les services des détaillants comme de forts substituts, les prix diminueront et la combinaison de consolidation, à un stade précis, interagira avec le pouvoir de négociation accru en amont, la combinaison de ces effets horizontaux et verticaux pouvant potentiellement bénéficier aux consommateurs.

L'effet de compensation est un autre aspect de l'interaction entre effets horizontaux et effets verticaux. Dans ce cas, les détaillants les plus solides pourront obtenir de meilleures conditions auprès de leurs fournisseurs en amont. Ces derniers, pour compenser partiellement cet effet imposé par leurs principaux acheteurs, seront tentés d'appliquer des prix plus élevés aux autres acheteurs. Même si l'effet net sur le consommateur est positif, le pouvoir de l'acheteur entraîne une hausse des coûts des concurrents plus fragiles au stade final. Inderst et Valletti (2011) proposent une analyse récente de cette question et soulignent le contexte dans lequel l'effet de compensation peut conduire à un préjudice pour le consommateur. C'est le cas lorsque le fournisseur est en mesure d'opérer une discrimination tarifaire entre les acheteurs et lorsque les détaillants « plus faibles » ont recours à des rabais pour conforter leurs positions concurrentielles.

#### *2.6.2 Effets statistiques et effets dynamiques*

Dans une large mesure, les observations précédentes déterminent l'incidence potentielle de la structure de marché sur les prix. Mais ce n'est peut-être pas là le seul facteur à prendre en compte. L'absence (possible) de concurrence peut également avoir une incidence sur l'incitation à investir et à innover. Par exemple, dans le contexte de la pénétration des marques de distributeurs, des inquiétudes ont été exprimées quant à l'incidence future de la part croissante des marques de distributeurs sur l'innovation produit. Daskalova (*op. cit.*) aborde cette question, tout comme Ezrachi (2010). Le rapport coordonné par l'UE explore également cette problématique (Commission européenne, *op. cit.*). En ce qui concerne le pouvoir d'oligopsone, Crespi *et al*. (*op. cit.*) font part de leurs doutes, dans la mesure où il ne serait pas dans l'intérêt à long terme des acheteurs que les fournisseurs soient inutilement influencés par les effets à court terme qui pèsent sur leur capacité à long terme à approvisionner efficacement leurs clients en intrants.

Inderst et Shaffer (2007) tentent dans une étude récente d'apporter leur réponse à cette question. Ils montrent qu'avec les fusions de détaillants, la variété des produits peut également reculer, après l'opération de consolidation. Plus spécifiquement, le détaillant ne pourra plus commercialiser tous les produits et le déréférencement de certains d'entre eux aura un effet sur la motivation des fournisseurs. Ces derniers repositionneront alors leurs lignes de produits, ce qui aura pour conséquence d'en réduire la différenciation. Cette action réduit à son tour un peu plus le bien-être du consommateur. Comme précédemment, ces enseignements découlent de la reconnaissance de l'interaction entre les effets horizontaux et les effets verticaux, l'effet horizontal de la fusion entre les détaillants ayant une incidence sur le fournisseur qui se répercute jusqu'aux consommateurs.

### *2.6.3 L' « équité » dans la filière alimentaire*

De nombreuses interrogations sur l'évolution du secteur alimentaire sont liées aux effets sur certains groupes au sein de la filière d'approvisionnement (par exemple les agriculteurs), même si l'incidence sur les consommateurs peut être positive. L'évolution de la filière alimentaire peut être pro-concurrentielle, dans la mesure où elle conduit à une baisse des prix à la consommation (ou à tout le moins ne cause aucun préjudice avéré au consommateur), même si cela peut impliquer une redistribution de la rente entre les acteurs et à différents stades de la filière. Il importe de faire la distinction entre deux problématiques (à savoir l'effet sur les consommateurs et l'équité ou le partage de la rente tout au long de la filière), et il revient aux autorités de la concurrence de faire leur choix. D'autres politiques peuvent également avoir un effet sur les craintes liées à la redistribution, notamment la politique agricole qui, dans une large mesure dans les pays de l'OCDE, s'est saisie de la question des revenus dans le secteur agricole. L'évolution de la politique agricole vers une réduction des aides (ou pour le moins au profit d'une forme particulière de soutien aux prix élevés) peut également peser sur les interrogations en matière de redistribution pour ce groupe spécifiques d'acteurs.

## 3. Transmission des prix et concurrence

Comme nous l'avons précédemment observé, les craintes relatives aux prix des denrées alimentaires et au rôle joué par la concurrence en la matière renvoient en partie à la notion d' « équité » : certains groupes, au sein de la filière alimentaire, seraient frappés de plein fouet en cas de chocs spécifiques au secteur. Comme le montre la Figure 1, ces dernières années, en raison de la volatilité des prix des produits, les prix agricoles ont fluctué bien plus que les prix au détail. En outre, si les entreprises dans un contexte de concurrence imparfaite peuvent être disposées à répercuter (dans une certaine mesure) les chocs sur les coûts aux consommateurs, elles sont moins enclines à réduire les prix au détail lorsque leurs coûts baissent par la suite. Face à un tel ajustement asymétrique des prix, si les marges peuvent reculer sous l'effet du renchérissement des coûts, elles augmentent par la suite lorsque le prix des produits agricoles diminue. La volatilité et, plus récemment, les flambées des prix caractérisant désormais dans une large mesure les marchés des produits agricoles, malgré l'ajustement asymétrique des prix, les prix au détail n'enregistrent pas de baisse comparable à la chute des prix des produits agricoles[14].

La présente section explore le lien potentiel entre la concurrence dans la filière alimentaire et la transmission des variations de prix au départ de l'exploitation et le stade de la distribution. Elle s'accompagne d'une annexe fournissant des données plus techniques. Pour explorer ce lien, le principal mécanisme s'intéresse plus particulièrement aux fluctuations des marges. Lorsque les entreprises génèrent

[14] Cette question de l'ajustement asymétrique des prix a été observée dans d'autres contextes et constitue désormais une dynamique à part entière, qui voit les prix augmenter à la vitesse d'une fusée et diminuer avec la lenteur d'une plume qui tombe (« rockets and feathers »). Cette évolution a été observée dans le contexte des prix de l'essence (voir OCDE, 2013). Tappata (2009) tente d'expliquer de manière formelle cette structure de prix asymétrique.

des marges supérieures à celles de leurs concurrents, l'ampleur de cette fluctuation détermine en grande partie le résultat final. Cette dernière dépendra non seulement de l'intensité de la concurrence, mais également du niveau de la fonction de demande. Les récents progrès de l'économétrie et la disponibilité des données permettent d'estimer des modèles structurels qui tiennent compte de la concurrence des marques au stade de la distribution (une spécificité reconnue de la filière alimentaire), dont les extensions permettent de qualifier différemment les contrats entre les détaillants et les industriels. Si ce champ de recherche n'en est qu'à ses débuts, le cadre présenté ici, associé aux récentes avancées, montre que la concurrence tout au long de la filière alimentaire influence fortement la transmission des prix. Il illustre également la manière dont les consommateurs sont affectés par les fluctuations des prix agricoles lorsque les aspects concurrentiels de la filière sont pris en compte.

### *3.1 Concurrence et répercussion de la fluctuation des prix : premiers enseignements*

La principale conclusion sur le lien entre les fluctuations des prix agricoles et la concurrence peut être déduite de la modélisation des écarts entre les prix au départ de l'exploitation et les prix de détail, développée initialement par Gardner (1975). Ce modèle a été adapté par McCorriston *et al* (1998) pour tenir compte de l'imperfection de la concurrence. Dans ce cadre, un stade intermédiaire unique, intitulé « secteur de l'agroalimentaire/la distribution », produit un bien homogène avec les entreprises mettant en œuvre des stratégies de fixation des quantités. Comme le montrent McCorriston *et al*., la principale conclusion que l'on peut tirer de l'ampleur de la transmission des prix due à l'effet des chocs se produisant au stade de l'exploitation sur les prix de détail présente une dichotomie :

$$PT = f(\Delta MU, \Delta C) \qquad (1)$$

autrement dit, l'ampleur de la transmission des prix dépend de la fluctuation de la marge cumulée des entreprises qui constituent ce secteur alimentaire intermédiaire et oligopole, et de la fluctuation des coûts. Supposons, au départ, que la filière alimentaire soit à ce point concurrentielle que la marge dégagée est nulle. L'ampleur de la transmission des prix dépendra alors uniquement de la fluctuation des coûts. Si l'on suppose une technologie à proportion fixe, l'ampleur de la transmission des prix reflètera la part des produits agricoles bruts dans la fonction (concurrentielle) de coûts de l'industrie agroalimentaire. Dès lors, si la part des produits agricoles dans la fonction de coûts de l'industrie est égale à 25 %, l'élasticité de la transmission des prix devrait être de 0,25[15].

En revanche, si la marge est positive, le pouvoir de marché influence le degré de transmission des prix, car il peut évoluer avec les fluctuations de coûts de l'industrie agroalimentaire. La marge cumulée évoluera dès lors en fonction du degré du pouvoir de marché (lui-même tributaire de la nature de l'interaction concurrentielle entre les entreprises et du nombre d'opérateurs concurrents) et de la nature de la fonction de demande. On notera que si la fonction de demande est log-linéaire, même en cas de marge positive, elle n'évoluera pas avec la fluctuation des coûts, de sorte que, dans un tel contexte, la fluctuation de la marge n'influera pas sur le degré de transmission des prix. Toutefois, dans d'autres circonstances, la fluctuation de la marge aura son importance et permettra de réduire l'élasticité de la transmission des prix (dès lors que la fonction de demande n'est pas « trop » convexe). Dans ce cas, un « sous-transfert » se produit et les prix de détail fluctueront moins que les prix au départ de l'exploitation.

[15] Même dans une industrie agroalimentaire concurrentielle, on observera une transmission imparfaite des prix si l'on retient une technologie à proportion variable, comme dans l'étude Gardner (1975). Néanmoins, le rôle de l'élasticité de substitution sera probablement supplanté par des niveaux de pouvoir de marché relativement faibles, comme le montrent McCorriston *et a*l. (1999), raison pour laquelle, par souci de simplicité, nous limiterons cette analyse à un technologie à proportion fixe. Le rôle de l'élasticité de la substitution apparaît dans la représentation plus formelle de l'effet de la transmission des prix, comme cela est exposé dans l'annexe.

Le principal enseignement de ce qui précède est qu'outre la fluctuation des coûts supportés par le secteur, deux facteurs majeurs déterminent l'évolution des prix des denrées alimentaires. Le premier est la part des coûts dans la fonction de coûts de l'industrie. Si la filière est concurrentielle, ce facteur sera le seul qui compte. En revanche, en cas d'imperfection concurrentielle, l'effet sur les prix des denrées alimentaires dépendra des fluctuations de la marge de l'industrie. Selon les hypothèses adoptées pour la courbe de la demande, la marge diminuera et les prix de détail augmenteront à un rythme moins soutenu que les coûts. En d'autres termes, une industrie agroalimentaire imparfaite sur le plan concurrentiel absorbera une partie de la hausse des coûts.

Quels autres traits de l'industrie agroalimentaire importent dans la détermination de cet effet de transfert ? Les économies d'échelle constituent un facteur possible. Nous avons observé précédemment que, même lorsqu'un pouvoir de marché (de faible ampleur) est avéré, celui-ci peut être compensé par les effets d'efficience (voir Morrison-Paul, (*op. cit.*), Buyan et Lopez, (*op. cit.*)). Millàn (*op. cit.*) a également documenté l'existence d'économies d'échelle dans la filière alimentaire espagnole. En présence de rendements d'échelle constants, la comparaison observée précédemment, entre des environnements parfaitement et imparfaitement concurrentiels, reste valable. Dans le cas de rendements d'échelle croissants, l'effet de sous-transfert sera moindre. Selon l'ampleur de l'effet d'échelle, les prix des denrées alimentaires pourraient augmenter plus vite que les coûts, de sorte que l'effet produit serait un « sur-transfert » au lieu d'un sous-transfert.

L'existence d'un pouvoir de l'acheteur dans l'industrie agroalimentaire peut également modifier l'élasticité de la transmission. Wedegebriel (2004) montre que l'existence d'un pouvoir d'oligopsone peut compenser l'effet d'un pouvoir d'oligopole dans la détermination de l'effet des fluctuations des coûts sur les prix des denrées alimentaires. Plus précisément, si comme nous l'avons évoqué précédemment, avec le pouvoir de marché (du vendeur), la fluctuation de la marge détermine l'évolution de l'élasticité de la transmission, en présence d'un pouvoir de l'acheteur, c'est bien la fluctuation de la dépréciation qui importe. Cette dépréciation dépend alors de l'intensité de la concurrence sur le marché des achats et de la forme fonctionnelle de la fonction de demande. Si la dépréciation augmente sous l'effet de la fluctuation des coûts, ce phénomène augmente l'élasticité de la transmission des prix et compense la baisse de la marge. En cas de coexistence d'un oligopsone et d'un oligopole, il sera difficile de savoir avec certitude quel aspect de la structure du marché et de la concurrence détermine l'effet (net) de la transmission des prix.

La structure verticale de la filière alimentaire déterminera également l'ampleur de la transmission des prix. Comme nous l'avons observé à la Figure 4, la filière alimentaire est un ensemble complexe de marchés imbriqués que l'on pourrait caractériser par une concurrence imparfaite à chaque étape. La question est alors de savoir comment les fluctuations de coûts dans le secteur agricole sont répercutées dans cette série de marchés concurrentiels imparfaits. McCorriston et Sheldon (1996) montrent qu'au fur et à mesure de l'augmentation du nombre d'étapes dans la chaîne verticale, la transmission des prix se réduit dans des proportions inférieures à ce à quoi on pourrait s'attendre dans un environnement d'étape unique. Néanmoins, l'ampleur de cette diminution ne sera pas un simple multiple de l'étape unique puisque, dans un tel cadre, la perception de la fonction de demande dérivée à laquelle s'expose chaque étape ne dépend pas uniquement du pouvoir de marché présent à ce stade (à savoir le pouvoir de marché horizontal), mais également du degré de pouvoir de marché aux étapes suivantes. Avec un tel mécanisme (et sous réserve de la fonction de demande), le pouvoir de marché dans l'ensemble de la filière alimentaire oligopolistique renforce le degré de « sous-transfert ».

Dès lors, la conclusion est simple puisque c'est bien la fluctuation de la marge à chaque stade de la filière qui détermine la variation définitive des prix des denrées alimentaires. Même en prenant pour hypothèse une fixation des prix conforme au principe de pleine concurrence entre chaque stade de la filière d'alimentaire, le pouvoir de marché à chaque étape suivante détermine ce que sera l'évolution du prix final.

Dans ce secteur intermédiaire, l'intensité de la concurrence ne détermine pas seule la marge. À ce stade, la courbe de la fonction de demande dérivée est l'élément déterminant lorsque cette fonction dépend de l'intensité de la concurrence au stade de la distribution. L'ampleur du transfert de ce coût au stade de la distribution (si l'on suppose une demande linéaire), dépendra de la fluctuation de la marge observée par l'industrie agroalimentaire. Les marges, dans le commerce de détail, sont désormais uniquement déterminées par l'intensité de la concurrence au niveau de la distribution mais également par le niveau des coûts résultant de la phase intermédiaire. Après répercussion des coûts (malgré une dilution de la hausse des coûts agricoles initiaux) au stade de la transformation, la fluctuation du prix de vente final sera déterminée par l'ampleur de la répercussion des coûts sur les détaillants et par la fluctuation de la marge au stade de la distribution. Globalement, et en fonction des hypothèses formulées pour la fonction de la demande, la nature verticale de la filière alimentaire renforce l'effet de « sous-transfert » susceptible de découler d'une concurrence imparfaite.

Il est à noter que dans le cas des oligopoles successifs exposés dans le présent document, nous avons pris pour hypothèse de départ une fixation des prix conforme au principe de pleine concurrence. Toutefois, la Figure 4 nous indique également que la manière dont nous caractérisons les liens entre les étapes verticales est également un élément important de la filière alimentaire. Dans leur analyse, McCorriston et Sheldon (*op. cit*.) observent un renforcement du degré de « sous-transfert » en raison de l'existence d'une double marginalisation. Tout contrat entre l'industriel et le détaillant qui réduit l'effet de double marginalisation devrait affecter la répercussion. Par exemple, si le contrat (ou la restriction verticale) entre les détaillants et les industriels avait un effet équivalent à celui d'une intégration verticale, la transmission des prix augmenterait (au moins par rapport à un contexte d'oligopole ou de fixation des prix conforme au principe de pleine concurrence).

Reconnaître l'aspect successif de la filière alimentaire soulève d'autres interrogations en matière de transparence des prix. Premièrement, cela revient à lier précisément les effets des contrats verticaux alternatifs à l'effet de transmission des prix. Deuxièmement, et peut-être de manière plus pratique sur le plan de la recherche empirique, il est difficile de répondre à la question de la transparence des prix en se contentant de déterminer la fluctuation des prix à chaque extrémité de la filière (à savoir les prix des produits agricoles et les prix de détail), sans prendre en compte les prix intermédiaires. C'est là une difficulté réelle, comme nous le verrons ci-après, pour la recherche récente qui aborde la problématique de la transparence des prix en privilégiant les prix à la transformation et au détail, excluant de ce fait les fluctuations de prix plus en amont.

### *3.2 Réconcilier empirisme et théorie*

La littérature empirique consacrée au processus de transmission des prix sur les marchés agricoles et alimentaires est abondante. Vavra et Goodwin (*op. cit*.) explorent ces questions de transmission des prix dans la filière alimentaire. Souvent mu par la volonté d'accroître les marges entre les prix agricoles et les prix en aval (généralement les prix à la consommation), ce courant de la recherche a recours à des données de séries chronologiques pour estimer l'ampleur, le rythme et la nature du processus d'ajustement des prix. Cette approche permet de préciser le mode de fonctionnement général de la filière alimentaire (voir par exemple, Bukeviciute *et al*., *op. cit*.), à l'aide d'une approche économétrique suffisamment souple pour répondre à différentes problématiques intéressantes relatives à l'ajustement des prix des denrées alimentaires. Par exemple, cette méthode peut être utilisée pour évaluer l'ajustement asymétrique des prix, mais également les aspects non linéaires du comportement des prix. Elle permet ainsi d'expliquer pourquoi les faibles fluctuations de coûts ne peuvent pas être répercutées sur les consommateurs, contrairement aux fluctuations importantes.

Si elle est instructive et, selon la disponibilité des données, relativement simple à appliquer, cette approche présente toutefois l'inconvénient d'être essentiellement théorique. Dès lors, il devient difficile d'

« expliquer » tout résultat qu'elle produit. Par exemple, les résultats économétriques peuvent indiquer une transmission imparfaite des prix. Mais comme de nombreux facteurs peuvent influencer la fixation des prix dans la filière alimentaire, il devient difficile de connaître avec certitude les raisons de la non répercussion observée ou d'un modèle particulier d'ajustement des prix de détail. De même, si l'économètre peut attribuer l'absence de concurrence à une transmission asymétrique des prix, en l'absence de toute structure au cadre sous-jacent, il est difficile de mettre cette observation sur le compte d'une concurrence imparfaite. Au mieux, l'approche fondée (généralement) sur des paires de séries de prix peut-elle constituer un « premier critère » pour s'assurer du bon fonctionnement de la filière alimentaire, même s'il sera difficile d'induire de ce cadre les facteurs susceptible de déterminer les résultats.

Les modèles structurels rendent davantage compte de la transmission des prix que les approches de séries purement chronologiques car ils permettent de préciser la fonction de demande et de résoudre la question des fluctuations de marge qui caractérise la transmission des prix. Les premières tentatives pour traiter de cette manière la transmission des prix (même si elles n'apportent pas nécessairement la preuve d'une répercussion sur les marchés alimentaires) sont instructives. Par exemple, Barnett *et al*. (1995) évaluent un modèle structurel pour l'industrie américaine du tabac et montrent qu'en présence d'un pouvoir de marché, les taxes font l'objet d'un « sur-transfert ». Néanmoins, il convient de noter que leur modèle permet d'augmenter les rendements d'échelle qui, comme nous l'avons indiqué précédemment, peuvent compenser l'influence d'une concurrence imparfaite entre les entreprises. Récemment, Delipalla et O'Donnell (2001) ont évalué l'incidence des taxes dans l'industrie européenne du tabac et établi l'existence d'un « sous-transfert » de ces taxes dans les plus grands pays de l'UE, bien que plusieurs indices d'un « sur-transfert » apparaissent dans d'autres pays. Pour la filière alimentaire européenne, Bettendorf et Verboven (2000) ont évalué un modèle du secteur néerlandais du café et ont établi l'existence d'un « sous-transfert » des prix de détail des grains de café bruts.

### *3.2.1 Ventilation de la répercussion*

Les travaux de Nakamura et Zerom (2010) ont largement contribué à la compréhension des liens entre transmission des prix et concurrence dans la filière alimentaire. Les auteurs s'intéressent principalement au secteur américain du café, en raison de la disponibilité des données et de la possibilité d'assurer la traçabilité des intrants agricoles (les graines de café) jusqu'au stade de la distribution. En outre, le café étant importé, il est aisé de distinguer la part des coûts attribuables au produit agricole brut et la part des autres coûts. Les auteurs font plusieurs constatations. Premièrement, ils observent un ajustement des prix rigide sous la forme de coûts d'affichage. De récentes recherches en macroéconomie sur les microfondements de l'inflation suggèrent que la rigidité des prix peut s'expliquer par le fait que, en raison des coûts d'affichage (les variations de prix sont coûteuses), les entreprises ajustent rarement les prix. Deuxièmement, les auteurs évaluent un modèle structurel qui permet une différenciation du produit au niveau de la distribution. Troisièmement, ils déduisent une mesure des marges et évaluent leurs fluctuations face aux chocs sur les coûts subis par le prix du café.

Les résultats obtenus sont fort instructifs. Globalement (sur le long terme), la répercussion est relativement faible dans le secteur du café, un choc d' 1% sur les coûts provoquant une hausse d'environ 0,3 % des prix au détail. Plusieurs raisons peuvent expliquer un tel résultat. En particulier, dans leur contexte, les coûts d'affichage sont relativement faibles, mais même à un tel niveau, ils peuvent contribuer à la rigidité des prix à court terme et à une réaction tardive aux chocs. Plus important, le faible niveau de répercussion provient de ce que les entreprises en aval réduisent leurs marges d'environ un tiers. Comme nous l'avons observé précédemment, le mécanisme de cet effet est en partie dû à la variation de l'élasticité des prix de la demande adossée à la courbe de la fonction de la demande. Empruntant la terminologie de Klenow et de Willis (2006), ils font référence à cette « super-élasticité » (la variation du pourcentage d'élasticité des prix pour un pourcentage donné de hausse des prix) qu'ils estiment à 4,6 %, chiffre relativement élevé. C'est la nature de cette variation de l'élasticité des prix, qui résulte du format de la

fonction de la demande, qui entraîne une fluctuation sensible des marges enregistrées par les entreprises. Si cette variation ne détermine pas à elle seule l'effet global de la transmission des prix, elle n'en révèle pas moins l'importance de la fluctuation des marges dans cet effet.

### *3.2.2 Ajustement asymétrique des prix*

L'ajustement asymétrique des prix est l'un des thèmes courants des études économétriques sur les séries chronologiques consacrées à la transmission des prix. Cet ajustement fait écho aux craintes couramment inspirées par l'ajustement des prix dans la filière alimentaire et dans d'autres secteurs, selon lesquelles l'industrie agroalimentaire serait prompte à répercuter les hausses de coûts aux consommateurs, mais moins disposée à réduire les prix lorsque ces coûts diminuent ensuite. Meyer et von Cramon-Taubadel (2001) examinent ces questions sur les marchés agricoles et des denrées alimentaires. Peltzman (2000) cherche à savoir si ce phénomène pourrait être lié à la concentration, même si les données issues de modèles théoriques n'apportent qu'une réponse parcellaire. L'asymétrie des prix pourrait notamment s'expliquer par les coûts de la recherche. Bernabou et Gertner (1993) soulignent l'interaction entre inflation et coûts de la recherche. Lorsque ces derniers sont élevés, la hausse des prix réduit le rendement de la recherche des consommateurs et l'entreprise réalise des marges plus importantes. Lorsque les coûts de recherche sont au contraire faibles, la recherche des consommateurs s'intensifie et les marges entre les prix et les coûts se rétrécissent.

Richards *et al.* (2012) ont étudié cette problématique dans le contexte de la récente inflation des prix des denrées alimentaires. Ils montrent que le comportement des entreprises en matière de fixation des prix varie selon la direction prise par les chocs sous-jacents sur les prix des produits agricoles, mais que le résultat final peut varier d'un secteur agricole à un autre. Par exemple, pour un produit agricole (la pomme de terre) : lorsque les prix sont à la hausse, la marge décroît mais lorsque les prix diminuent à nouveau, la marge augmente. Ils montrent également que la hausse de la marge au cours de la phase de diminution du prix du produit agricole est plus importante que la réduction de la marge lorsque le prix du produit augmente. Dans l'autre filière agricole étudiée (le lait de consommation), ces effets asymétriques sont absents, même s'il existe bel et bien un certain degré d'asymétrie dans la mesure où lorsque les prix du produit agricole chutent, les marges restent inchangées, mais lorsque les prix augmentent, elles se rétrécissent.

### *3.2.3 Détaillants multi-produits*

L'essentiel (voire la totalité) de la recherche sur laquelle s'appuient nos précédentes observations concerne des entreprises mono-produit. Un contexte de concurrence imparfaite entraînera probablement un « sous-transfert » sauf si la fonction de demande est suffisamment convexe. Or, comme nous l'avons souligné précédemment, les détaillants alimentaires sont multi-produits, proposent un large éventail de produits et s'affrontent sur de nombreux critères. Les précédents travaux de recherche sur la différenciation des produits n'ont pas conclu de manière probante qu'une telle différenciation des produits infirmait sensiblement les conclusions auxquelles nous sommes précédemment parvenus. Par exemple, Anderson *et al.* (2001), montrent que la convexité de la fonction de demande continue de jouer un rôle essentiel pour déterminer l'éventualité d'un sur-transfert ou d'un sous-transfert.

Kim et Cotterill (2008) ont été parmi les premiers à évaluer un modèle structurel permettant une différenciation des produits entre les marques et applicable à la filière alimentaire. À l'aide des données du marché américain du fromage fondu, un lien a été établi entre la fluctuation des coûts et le prix du lait cru. À l'aide d'un modèle de choix discret qui leur permet d'estimer les élasticités de prix (propres et croisés) au niveau de la marque, les auteurs ont pu établir que la transmission des prix dépend de la substituabilité entre les marques. Il simulent la répercussion dans deux contextes de marché : le premier est plutôt concurrentiel (fixation des prix de type Bertrand-Nash) tandis que dans le second, la fixation des prix

s'effectue de manière collusoire. Dans le contexte d'une fixation concurrentielle des prix, la répercussion des fluctuations des coûts est presque totale. Lorsqu'en revanche les prix sont fixés de manière collusoire, cette répercussion est considérablement réduite. Les estimations étant effectuées au niveau des marques, l'ampleur de la répercussion varie également d'une marque à une autre. Globalement, l'élasticité de la transmission dans le cadre d'une fixation collusoire des prix serait environ 85 % inférieure à celle qui prévaudrait dans un contexte concurrentiel.

Hamilton (2009) a largement contribué à la compréhension des liens entre l'ampleur de la transmission des prix et l'existence de détaillants multi-produits. En substance, deux phénomènes entrent en jeu ici : premièrement, la fluctuation des coûts pour un produit particulier ; deuxièmement, la variété des produits mis en vente par le détaillant multi-produit. Hamilton montre que plus les coûts augmentent, plus le détaillant réduit la variété des produits mis en vente. Ce phénomène réduit la compétition sur les prix au point que l'effet net est une hausse du prix de détail supérieure à la hausse initiale des coûts. Si nous avons observé plus haut qu'un « sur-transfert » des hausses de coûts pouvait avoir lieu lorsque la fonction de la demande est suffisamment convexe, un « sous-transfert » est pourtant plus vraisemblable. Or, dans ce cas précis, le « sur-transfert » ne dépend pas de la courbe de la fonction de demande. Cet effet de « sur-transfert » chez les détaillants multi-produits provient du fait qu'une moindre variété diminue la concurrence dans le commerce de détail.

Hamilton et Richards (2011) ont étudié cette question de manière empirique, à l'aide de données précises sur les prix de détail pratiqués sur le marché américain des céréales prêtes à consommer. Ils montrent que, en isolant l'effet de répercussion de l'effet de variété, la répercussion des coûts est effectivement loin d'être parfaite. Mais lorsque l'on tient compte de l'effet d'une moindre variété due à la hausse des coûts, la répercussion est supérieure à la hausse initiale des coûts. Même s'ils ne sont que préliminaires, les résultats empiriques corroborent l'idée selon laquelle la prise en compte du caractère multi-produit des enseignes de supermarché peut conduire à un résultat différent de ce que produirait un cadre classique. Ils montrent également que cette spécificité de la filière alimentaire doit être prise en compte pour mesurer l'effet global.

### *3.2.4 Répercussion et restrictions verticales*

Nous avons observé précédemment que le pouvoir de marché à chaque étape de la filière alimentaire peut modifier l'effet global de la transmission des prix (McCorriston et Sheldon, *op. cit.*). Mais nous avons également noté que les restrictions verticales constituent un élément important de la relation entre les détaillants et les industriels. McCorriston et Sheldon s'appuient sur le principe de la pleine concurrence et par conséquent sur le fait que la double marginalisation détermine la répercussion des coûts à chaque étape de la filière verticale. Pourtant, il n'en reste pas moins que des restrictions verticales peuvent également modifier le résultat final de la transmission des prix. À première vue, si la double marginalisation reste le « résultat de référence », dans la mesure où les restrictions verticales améliorent cet effet, elles affecteront également l'ampleur de la répercussion.

Cette question a été explorée récemment par Bonnet *et al.* (2009). Évaluant un modèle structurel à l'aide des données du marché allemand du café, ils analysent comment une fixation non linéaire des prix et des restrictions verticales, telles que la discrimination des prix de gros, modifie la répercussion des coûts sur le secteur en amont. En confrontant le résultat obtenu au contrat linéaire (fixation des prix conforme au principe de pleine concurrence), ils montrent que l'existence des restrictions verticales conduit à accroître la transmission des prix. Ainsi, face à une hausse de 10 % des coûts, la formule de la fixation linéaire des prix conduit à une hausse moyenne de 7,2 % des prix de détail. La principale conclusion de leur étude est que les restrictions verticales, lorsqu'elles prennent la forme de prix de vente imposés, augmentent le degré de répercussion. Ils estiment qu'en présence d'un prix de vente imposé, lorsqu'un choc se produit sur les prix, l'existence de restrictions verticales limite la capacité des entreprises à ajuster leurs marges. Or, nous

avons précédemment observé que la fluctuation de la marge peut contribuer à réduire l'effet de transmission des prix, puisque les restrictions verticales limitent la capacité des entreprises à ajuster leurs marges, amplifiant ainsi la répercussion.

Bonnet et Réquillart (2012) appliquent un cadre similaire au secteur européen du sucre. À nouveau, ils démontrent l'existence de restrictions verticales entre les fabricants de boissons gazeuses et les industriels du sucre, sans pour autant explorer l'éventail des autres restrictions verticales possibles. En revanche, ils identifient parfaitement l'effet de répercussion au niveau des marques et font la distinction entre les marques nationales et les marques de distributeurs. Au final, le phénomène de « sur-transfert » (les prix de détail fluctuent davantage que les coûts) est réel, mais l'effet de transmission varie de 1,1 à 1,23 % au niveau des marques. Globalement, l'effet de répercussion est plus important pour les marques nationales que pour les marques de distributeurs, même si ce phénomène peut s'expliquer par les écarts des marges initiales enregistrées par ces deux types de marques.

## 4. Synthèse et conclusion

Les questions de concurrence, dans la filière alimentaire, sont complexes et devraient faire l'objet d'une recherche complémentaire. La nature successive des étapes dans la filière souligne l'interdépendance entre les aspects horizontaux et les aspects verticaux de la concurrence. Le caractère multi-produit des détaillants qui occupent une place de plus en plus prépondérante pose un réel problème à la fois pour les décideurs politiques et les chercheurs.

À maints égards, le rôle des autorités antitrust face aux problèmes de concurrence dans la filière alimentaire ne devrait pas être différent de celui observé dans d'autres secteurs. La lutte contre les fusions anticoncurrentielles, l'abus de position dominante, les ententes et la fixation des prix, les restrictions verticales et les pratiques exclusives est une préoccupation générale des autorités de concurrence. Pourtant, les problèmes de concurrence, dans le secteur alimentaire, revêtent de nombreux autres aspects.

Premièrement, la filière consiste en un ensemble complexe de marchés imbriqués pour lesquels la concurrence, à différentes étapes de la chaîne d'approvisionnement, est essentielle pour le bon fonctionnement général du secteur. Ainsi, les problématiques liées à la concurrence peuvent, au-delà du pouvoir du vendeur, concerner également le pouvoir de l'acheteur, les relations verticales entre les différents stades de la filière (détaillant-industriel ou détaillant/industriel-agriculteur). En outre, la manière dont les distributeurs se font concurrence a peut-être également un effet sur le fonctionnement global de la filière. Par exemple, la pénétration croissante des produits de marques de distributeurs peut modifier les relations entre les détaillants et les industriels et affecter également l'innovation.

Deuxièmement, les interrogations sur le rôle du secteur agricole et le recours accru à la contractualisation ont, dans certains cas, conduit à l'adoption de codes de pratiques permettant de garantir une plus grande transparence sur la manière dont les agriculteurs sont associés au fonctionnement global de la filière alimentaire. Cette situation fait en partie écho aux craintes selon lesquelles même si les consommateurs bénéficient (ou du moins ne pâtissent pas) de la concurrence au stade de la distribution de la filière alimentaire, des interrogations subsistent quant à l' « équité » et au fait que le pouvoir de négociation des industriels et des détaillants en aval puisse avoir un effet potentiellement négatif sur le secteur agricole.

Pour finir, la sensibilité sur les questions liées à la fixation des prix alimentaires, combinée à la complexité de l'organisation verticale de la filière alimentaire, renforce l'exigence d'une plus grande transparence sur la manière dont évoluent les prix tout au long de la filière. Il est également indispensable de mieux comprendre comment la concurrence, à chaque stade, et avant chaque stade, influence le processus de transmission des prix depuis la phase en amont jusqu'à la phase de distribution.

Si les arguments avancés dans le présent document s'appuient sur la situation actuelle de la filière alimentaire, dans de nombreux pays, les commentateurs laissent entendre que la même tendance peut probablement (et de plus en plus) être observée dans nombre d'autres pays (Sexton (2010), Cotterill (*op.cit*.) et Reardon *et al*. (*op.cit*.)), dont le marché se caractérise par le rôle de plus en plus prépondérant des enseignes de distribution, une tendance à la consolidation à chaque étape de la filière et le recul de la part des dépenses alimentaires captées par les agriculteurs. En conséquence, encadrer la concurrence dans le secteur alimentaire deviendra probablement une préoccupation permanente, non seulement en raison des tendances communes précédemment évoquées, mais également de la volatilité des marchés agricoles mondiaux et de l'importance croissante accordée à sécurité alimentaire. Les problématiques concurrentielles de la filière alimentaire s'inscrivent dès lors dans ce cadre politique plus large.

## ANNEXE : CARACTÉRISATION DE LA RÉPERCUSSION SUR LES MARCHÉS AGRICOLES ET ALIMENTAIRES

La transmission des prix agricoles aux prix de détail dépend de plusieurs facteurs, dont l'impact sur la structure de marché influe sur la capacité des entreprises en aval à faire évoluer leurs marges face à la fluctuation des coûts. Ces facteurs tiennent compte de la nature de la fonction des coûts de l'industrie alimentaire (c'est-à-dire de la part des intrants agricoles et des autres intrants de commercialisation, mais également de la substituabilité entre ces deux sources d'intrants), de l'élasticité de l'offre d'intrants de commercialisation et de la fonction de demande. Ces facteurs déterminent l'ampleur de la répercussion, si l'on exclut l'influence éventuelle de la structure de marché.

Pour traiter ces questions plus directement, McCorriston *et al*. (1998) définissent une élasticité de la transmission des prix sur un marché agricole en amont caractérisé par une concurrence imparfaite, que l'on peut résumer de la manière suivante :

$$\tau = \frac{s_A\ (1 + \gamma\sigma)}{(1 + s_A\gamma\sigma)\ ((1 + \mu) + s_B\gamma\eta} \qquad (1)$$

où $s_A$ désigne la part du produit agricole brut dans la fonction de coût de l'industrie agroalimentaire, $s_B$ la part des autres intrants, $\sigma$ l'élasticité de la substitution entre les intrants agricoles et les intrants matériels, $\gamma$ l'élasticité inverse de l'offre d'intrants de commercialisation et $\eta$ l'élasticité de la demande. L'effet de la concurrence prend la forme du paramètre $\mu$ qui renvoie à l'élasticité de la marge de l'industrie symbolisée par $\mu=\omega(\theta/n\eta-\theta)$, $\omega$ représentant l'évolution de l'élasticité de la demande pour une fluctuation donnée du prix de détail, où $n$ est le nombre d'entreprises concurrentes et $\theta$ est une mesure de l'intensité de la concurrence entre les entreprises.

Il est utile d'isoler le rôle spécifique que peut jouer le pouvoir de marché dans la détermination de la transmission des prix. Pour cela, on prend comme hypothèse une valeur nulle pour l'élasticité de la substitution entre les intrants agricoles et les autres intrants, ainsi qu'une offre parfaitement élastique pour les intrants de commercialisation égale à $\sigma = \gamma = 0$ [1]. On suppose également qu'il n'existe aucun pouvoir de marché dans la filière alimentaire (par exemple, n'est suffisamment élevé pour désigner un marché très concurrentiel). Dès lors, l'élasticité de la transmission des prix sera représentée par la formule suivante :

$$\tau_c = s_A \qquad (2)$$

En d'autres termes, la fluctuation des prix de détail doit être égale à la part des intrants agricoles de la fonction de coût de la filière. Si la part des intrants agricole est relativement basse, cette valeur doit correspondre à la marge de fluctuation possible des prix de détail des denrées alimentaires.

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[1] L'hypothèse de départ $\sigma = 0$ renvoie à la technologie de la fonction de coût de l'industrie et à la substituabilité éventuelle des intrants. Dans le cas de $\sigma = 0$, cela suppose une technologie à proportion fixe.

Pour mesurer l'influence d'une concurrence imparfaite sur la transmission des prix, à l'aide des hypothèses précitées ($\sigma = \gamma = 0$), l'effet de la répercussion est calculée de la manière suivante :

$$\tau = \frac{s_A}{(1 + \mu)} \tag{3}$$

Si l'on compare cela à l'élasticité de la répercussion dans un secteur alimentaire concurrentiel, on obtient :

$$\frac{\tau_c}{\tau} = 1 + \mu \tag{4}$$

Avec une fonction de la demande linéaire, $\theta > 0$ et une valeur *n* suffisamment faible, $\mu > 0$. À première vue, la marge dans le secteur alimentaire en aval diminue lorsque les coûts augmentent. Ce phénomène permet de tempérer l'effet de la transmission des prix par rapport à une situation de marché concurrentielle. En résumé, sous réserve des conditions liées à la fonction de demande, le pouvoir de marché dans le secteur alimentaire conduit au « sous-transfert » des prix de détail des denrées alimentaires. Dès lors, si les intrants agricoles représentent 25 % des coûts de l'industrie agroalimentaire, l'élasticité de la transmission des prix sera inférieure à 25 %.

Pour résumer, l'effet du pouvoir de marché sur la transmission des prix dans la filière alimentaire dépend de l'importance des fluctuations de marges. C'est là le facteur essentiel de la relation entre concurrence et répercussion. Ce ne sont plus uniquement le nombre d'entreprises et l'intensité de la concurrence qui comptent, mais également la manière dont ces éléments influent sur la *fluctuation* de la marge. Dans ce contexte, même en présence d'une filière très concentrée (par exemple lorsque *n*=2) et d'une concurrence entre les entreprises pas « trop » intense, la fluctuation de la marge dépendra également de la nature (ou de manière plus formelle, de la convexité) de la fonction de la demande. Par exemple, en présence d'une fonction de demande log-linéaire, la fluctuation de la marge serait nulle, quelles que soient les caractéristiques structurelles de la filière.

McCorriston *et al.* (2001) ont élaboré le concept d'élasticité de la répercussion pour calculer les effets d'échelle. L'effet d'échelle est mesuré par le paramètre $\rho$ . Lorsque $\rho$ est supérieur (égal, inférieur) à 1, cela correspondant à une hausse (constante, décroissante) des rendements d'échelle. McCorriston *et al.* (*op. cit.*) modifient l'élasticité de la transmission des prix pour tenir compte de ce paramètre de la fonction de coût dans la filière alimentaire. Désormais, la comparaison avec la situation concurrentielle de référence (sur la base des hypothèses émises pour les autres paramètres), a pour résultat :

$$\frac{\tau_c}{\tau} = 1 + \mu - \eta(\rho - 1)/\rho \tag{5}$$

En cas de rendements d'échelle constants ($\rho = 1$), on obtient la comparaison entre un contexte concurrentiel et un contexte de concurrence imparfaite, comme indiqué précédemment. Lorsque les rendements d'échelle augmentent, l'effet de sous-transfert diminue. En fonction de l'importance de l'effet d'échelle, les prix de denrées alimentaires peuvent augmenter plus rapidement que les coûts, donnant lieu à un « sur-transfert » plutôt qu'à un sous-transfert.

Cette structure de base met en lumière les principaux facteurs déterminant la répercussion née des chocs se produisant sur le marché agricole et se propageant jusqu'au marché de la distribution. Toutefois,

elle s'appuie nécessairement sur des hypothèses simplificatrices. En assouplissant ces hypothèses, il est possible de modifier l'ampleur de cette répercussion.

Premièrement, on part du principe que l' « industrie agroalimentaire » se caractérise pas des entreprises symétriques (de taille égale). Plus spécifiquement, ces entreprises se répartissent le marché, ce qui implique pour elles des structures de coûts et des part de marchés identiques. Cette situation simplifie considérablement le cadre théorique, même si elle ne correspond pas vraiment à la définition de la filière alimentaire proposée par le texte. Il est évident que les entreprises ne sont pas de même taille, n'ont des parts de marché identiques et n'ont pas les mêmes coûts. Lorsque les entreprises sont asymétriques, la marge cumulée ne varie pas uniquement en fonction de la fluctuation des coûts mais parce que celle-ci affecte chacune d'entre elles à un degré divers. En tant que tel, le niveau de concentration du marché peut également fluctuer, dans la mesure où la baisse des coûts favorise les grandes entreprises supportant de faibles coûts plutôt que les petites entreprises exposées à des coûts élevés. Dung (1993), par exemple, montre que le pouvoir de marché augmentera. De même, dans le contexte précédemment rappelé, ce pouvoir permettra de réduire le degré de transmission des prix.

Deuxièmement, cette hypothèse suppose que l' « industrie alimentaire » en aval ne comporte qu’une seule et même étape, ce qui, dans la pratique, signifierait que les phases de transformation et de distribution peuvent être traitées conjointement. Une telle approche présente par conséquent l'avantage d'écarter les problèmes liés aux oligopoles successifs et à la nature des liens verticaux entre les différentes étapes.

Troisièmement, cela élimine également l'une des problématiques majeures de la filière alimentaire, où les détaillants sont par nature multi-produits et les consommateurs ont le choix parmi un large éventail de substituts (potentiellement) proches. La structure verticale de la filière alimentaire et la capacité des détaillants multi-produits à peser sur la transmission des prix entre les marchés agricoles et le secteur de la distribution ont déjà été soulignées dans la présente analyse.

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# COMPTE RENDU DE LA DISCUSSION

*Par le Secrétariat*

Le Président, Frédéric Jenny, ouvre la table ronde sur l'industrie agroalimentaire et souligne que le nombre sans précédent de contributions (31 au total) témoigne bien de l'intérêt des délégués. Il se propose d'articuler la table ronde autour de quatre grands thèmes.

Le premier thème, consacré à l'économie politique du secteur de l'alimentation, accorde une attention particulière aux différents types d'ingérence politique le long de la chaîne d'approvisionnement, depuis les producteurs jusqu'aux consommateurs. Les deuxième et troisième thèmes enjambent la ligne de démarcation entre, d'une part, les pays qui pensent que les instruments classiques du droit de la concurrence suffisent à résoudre les problèmes de ce secteur et, d'autre part, ceux qui pensent que les problèmes soulevés dans la chaîne verticale nécessitent de doter le droit de la concurrence d'instruments spécifiques. Du côté des pays qui pensent que les instruments classiques suffisent, la discussion portera essentiellement sur l'expérience des fusions, notamment pour définir les marchés. Du côté de ceux que préoccupent des questions telles que le pouvoir de l'acheteur, leurs interrogations spécifiques seront examinées en même temps que les instruments utilisés pour y répondre. Le choix du cadre juridique de l'instrument le plus approprié sera également examiné : faut-il privilégier l'extension de la compétence des autorités de la concurrence ou l'adoption d'un ensemble de dispositions, comme l'autoréglementation ou les codes de conduite ? Le dernier grand thème sera l'occasion d'un débat sur l'efficacité des autres outils utilisés pour atténuer le déséquilibre des forces contractuelles entre les fournisseurs de produits alimentaires et les grandes surfaces alimentaires, tels que la compétence donnée aux autorités de la concurrence pour aider à déconcentrer le marché ou encore le contrôle des relations contractuelles le long de la chaîne verticale.

Le Président présente les quatre experts : le Professeur Steve McCorriston, de l'Université d'Exeter, qui a déjà participé à la table ronde sur les prix des matières premières, M. Jaap van Driel, du ministère de l'Économie des Pays-Bas, M. Fabian Bergès, de l'École d'économie de Toulouse et M. Johan Swinnen, de l'Université de Louvain.

## 1. Introduction et aperçu général de l'économie de l'industrie alimentaire

Le Président demande au Professeur Steve McCorriston de donner un aperçu général de l'économie de l'industrie alimentaire.

Steve McCorriston se présente en tant que chercheur travaillant sur les enjeux et mécanismes économiques en œuvre dans le secteur de l'alimentation, et non en tant qu'expert des comportements anticoncurrentiels. Il explique qu'il s'intéressera particulièrement à trois aspects, sur la base de la note de synthèse du Secrétariat qu'il a écrite, à savoir : (i) le contexte du secteur de l'alimentation, (ii) la nature des problèmes de concurrence dans le secteur de l'alimentation et (iii) les problèmes liés à la transmission des prix.

Il indique pour commencer que la question politique des prix alimentaires s'est faite plus sensible ces dernières années, principalement depuis la flambée des prix des matières premières du milieu des années 2000 et de 2011. Les produits agricoles et alimentaires, qui sont des matières premières plutôt bon marché,

ont connu une grande instabilité des prix et de fortes hausses des cours. L'inflation des prix des produits alimentaires a augmenté dans bon nombre de pays, ce qui a sensibilisé l'opinion publique sur le fonctionnement de la chaîne d'approvisionnement et sur le rôle de la concurrence dans ce contexte. Dans le même temps, l'expérience montre que les prix au niveau du détail sont très différents d'un pays à l'autre, même au sein d'un groupe de pays relativement homogènes tels que ceux de l'UE, et que l'explication réside dans les différences de structure des chaînes d'approvisionnement.

Un autre problème, selon Steve McCorriston, tient au fait que, malgré l'instabilité accrue des prix en bout de chaîne, les prix agricoles sont beaucoup plus volatils que les prix de vente au détail. La part de l'agriculture dans le budget alimentaire est par ailleurs en baisse : les prix de détail augmentent mais les prix agricoles restent stables (c'est-à-dire n'augmentent pas aussi vite, voire diminuent). Ce fait est considéré comme un « motif de préoccupation », bien qu'il ne rende apparemment pas compte des aspects liés à la concurrence tout au long de la chaîne d'approvisionnement alimentaire, mais uniquement des modifications techniques et du rôle joué par d'autres ressources de commercialisation dans la chaîne d'approvisionnement.

Steve McCorriston rappelle ensuite certains problèmes abordés dans la note de synthèse du Secrétariat. Parmi eux figure le niveau croissant de concentration à tous les stades de la chaîne d'approvisionnement alimentaire, dans un contexte d'inflation des prix des matières premières agricoles et des prix de détail et de part décroissante du budget alimentaire. À vrai dire, on constate dans tous les pays une même tendance au renforcement des concentrations au niveau de la transformation des produits alimentaires, mais également au niveau du détail. Les concentrations se font à travers les fusions et acquisitions mais elles ont aussi lieu dans le secteur du commerce de détail où de grands distributeurs multiproduits occupent désormais une position dominante tout au long de la chaîne d'approvisionnement. L'émergence de ces grands distributeurs a un effet horizontal, qui réduit le nombre de distributeurs en concurrence, mais aussi un effet vertical, ressenti sur l'ensemble de la chaîne d'approvisionnement, ces distributeurs proposant des dizaines de milliers de produits à la vente et fournissant d'autres services comme des services d'assurance et de banque.

L'autre tendance générale concerne l'augmentation du nombre de marques de distributeurs. Même s'il existe de grandes différences entre les pays, l'apparition des marques de distributeurs est considérée comme un événement important. L'un des enjeux de taille de ces marques réside dans l'interaction entre les effets horizontaux et verticaux. Dans les linéaires, les marques de distributeurs peuvent avoir un effet positif notable sur la concurrence, dans le sens où elles proposent des produits moins chers, mais elles sont également directement en concurrence avec les fabricants de produits de marque. Il reste donc à tirer au clair la question délicate des effets anticoncurrentiels et proconcurrentiels de l'apparition des marques de distributeurs.

La question du pouvoir de l'acheteur, qui préoccupe depuis longtemps les producteurs, a également pris de l'importance ces dernières années, avec le nombre croissant d'entreprises dominantes tout au long du reste de la chaîne d'approvisionnement. Cette question est également liée aux codes de conduite et à la façon dont il nous faut aborder le pouvoir de l'acheteur, le prendre en considération, etc.

Steve McCorriston résume alors la situation en présentant un schéma (ci-joint) de la chaîne d'approvisionnement qui relie producteurs, grossistes, distributeurs et consommateurs, et où se succèdent des marchés de concurrence imparfaite sur lesquels la concentration accrue entraîne des effets horizontaux et verticaux. La transmission des prix est au centre de nombreuses préoccupations au niveau de l'UE, certaines autorités s'efforçant de comprendre le lien entre les prix au départ de l'exploitation et les prix au niveau du détail, et la façon dont le processus concurrentiel influence le processus de transmission des prix. Même si, jusqu'à présent, l'accent a surtout été mis sur la relation entre l'agriculture et la transformation des produits alimentaires, les regards se portent aujourd'hui davantage sur le niveau du commerce de

détail. C'est un thème difficile à traiter, lié à la concentration accrue déjà mentionnée et que l'on constate à différents niveaux, mais aussi à l'apparition des marques de distributeurs, et à la façon dont elles influencent les fournisseurs en amont et dont fonctionne la transmission des prix.

Il relève pour conclure l'importance des dimensions horizontales et verticales de la chaîne d'approvisionnement. L'équité et la répartition de la valeur ou de la valeur ajoutée le long de la chaîne peuvent aussi soulever des questions très importantes. Il préconise par ailleurs de distinguer les effets statiques des effets dynamiques en terme d'efficience, de manière à étudier non seulement les effets sur les prix mais aussi sur l'innovation.

## 2. L'économie politique de l'industrie alimentaire

Le Président relève que la lecture de plusieurs contributions semble indiquer l'existence d'une certaine forme d'ingérence politique, soit dans les travaux des autorités de la concurrence, soit dans le cadre dans lequel les autorités de la concurrence opèrent dans le secteur de l'alimentation. Il fait état de la contribution d'Israël, pays dans lequel l'indice des prix et le bien-être des consommateurs ont suscité de graves inquiétudes en 2011. Il demande au délégué d'Israël d'expliquer le contexte politique de son pays et ses répercussions à la fois pour les autorités de la concurrence et pour le cadre juridique de la chaîne d'approvisionnement en Israël.

Le délégué d'Israël rappelle au Comité que les manifestations publiques qui se sont déroulées en Israël au cours de l'été 2011 ont été suscitées par des préoccupations liées à la structure et au fonctionnement du marché des produits alimentaires. En réponse à ces préoccupations et pour remédier aux problèmes, le gouvernement et le Parlement ont constitué plusieurs comités, auxquels a participé l'autorité israélienne de la concurrence.

Le gouvernement et le public ont ainsi pris conscience de l'importance de l'autorité de la concurrence en tant qu'expert et organisme indépendant, ayant la volonté mais aussi les moyens de faire face aux problèmes dans ce secteur. L'autorité de la concurrence a récemment créé une division au sein du ministère de l'Économie, chargée de mener des études de marché dans le secteur de l'alimentation. En particulier, pour promouvoir la concurrence sur les marchés de produits alimentaires, le gouvernement a lancé la Loi sur les produits alimentaires (Food Act), dont l'autorité de la concurrence a contribué à la rédaction et qui est actuellement soumise au processus législatif au Parlement israélien.

La Loi sur les produits alimentaires aborde deux grandes thématiques : (i) la concurrence géographique dans le secteur de la distribution, et (ii) la création d'un code de conduite obligatoire, simple, clair et facile à mettre en œuvre régissant la relation entre fournisseurs et distributeurs.

Le code de conduite a principalement pour vocation de prévenir l'exclusion des plus petits distributeurs ou fournisseurs et d'empêcher les fournisseurs d'assouplir la concurrence de détail. S'agissant de la concurrence géographique entre distributeurs, la proposition de loi repose sur le postulat que, lorsqu'un distributeur occupe une position importante sur un marché géographique donné, il peut être tenté de créer des obstacles à l'entrée pour les nouveaux distributeurs en ouvrant de nouveaux magasins. Cette situation est susceptible de dissuader les concurrents d'entrer sur le marché (ce qui aurait pourtant pu promouvoir la concurrence) et de permettre au distributeur en place de renforcer sa position. Ainsi, les autorités travaillent-elles actuellement au développement d'un modèle économique qui définit les marchés géographiques à prendre en considération de manière à pouvoir appliquer ces règles. En substance, pour chaque magasin appartenant à une chaîne, les autorités peuvent définir une zone de demande composée des consommateurs potentiels de ce magasin et un groupe de concurrents composé des entreprises rivales de ce magasin, qui lui serviront de base d'application de la nouvelle loi.

Le Président remarque que plusieurs contributions ont souligné la nature politique du marché des produits alimentaires. Le Brésil fait ainsi observer que, aux termes de la constitution de 1988, le droit à l'alimentation est un droit social constitutionnel. C'est pourquoi le gouvernement brésilien s'est lancé dans un programme spécifique d'éradication de la faim, qui prévoit que l'autorité de la concurrence affecte davantage de ressources à ce secteur qu'à d'autres en raison de sa dimension sociale importante. Le Président relève que l'Afrique du Sud se trouve dans une situation quelque peu similaire, l'autorité de la concurrence ayant considéré ce secteur comme hautement prioritaire en raison de son impact social et politique. Dans le cas de la Norvège, où il existe des possibilités d'exemptions pour le secteur agricole, le Président se demande s'il n'existe pas une certaine forme de pression politique dans l'application du droit de la concurrence dans ce secteur.

Le délégué de la Norvège répond que les prix alimentaires dans son pays sont les plus élevés d'Europe et que la part du revenu total consacrée aux produits alimentaires est supérieure à celle des pays voisins comme le Danemark et la Finlande. L'objectif politique est de garantir un certain degré d'autosuffisance des produits agricoles et une production agricole dans toute la Norvège. Il peut en effet exister certaines divergences entre cet objectif politique et les objectifs liés à la concurrence et au bien-être des consommateurs. Ainsi, l'autorité de la concurrence a souvent mis en garde sur le fait que des droits d'importation élevés pour protéger les producteurs nationaux pouvaient entraîner une baisse de la concurrence et une augmentation des prix à la consommation.

Il souligne par ailleurs que l'agriculture et la pêche sont dispensées de l'application de la Loi norvégienne sur la concurrence. Or, dans l'application du droit de la concurrence, seuls sont pris en compte les effets sur la concurrence et le bien-être, et non l'impact sur les autres objectifs politiques. En pratique, le gouvernement n'a eu la possibilité de s'opposer aux décisions de l'autorité de la concurrence dans des affaires de concentration, sur la base d'autres objectifs politiques, qu'une seule fois il y a sept ans de cela.

Enfin, le délégué relève que l'importance politique du secteur de l'alimentation a une incidence sur la détermination des priorités en matière d'application de la loi à deux titres : (i) en raison de l'inflation, de l'importance du secteur et de la concentration sur le marché, et (ii) parce que la lettre de mission du ministère demande spécifiquement à l'autorité de la concurrence de suivre de près l'évolution de ce secteur.

Le Président note que les préoccupations politiques tiennent à la fois aux prix payés par les consommateurs, perçus comme élevés, et aux prix versés aux producteurs, perçus comme bas, mais également aux études sur la transmission des prix le long de la chaîne verticale menées par plusieurs pays. Il évoque la contribution de la Grèce, qui fait état d'une enquête de marché qui donne à réfléchir, réalisée sur la chaîne d'approvisionnement en fruits et légumes frais et qui recourt à des méthodes économétriques intéressantes pour suivre le prix des pommes, des oranges, des pêches, des tomates, des pommes de terre et de divers autres produits alimentaires. Certains pays sont parfois tentés d'adopter un mécanisme de surveillance pour agir sur les prix de détail élevés. Dans ce cadre, le Président invite le délégué de la Belgique à expliquer comment travaille l'Observatoire des prix en place dans son pays.

Le délégué de la Belgique indique qu'à l'origine, le ministère de l'Économie était doté d'une cellule de surveillance des prix qui travaillait en grande partie à l'initiative de l'autorité de la concurrence. Cette cellule s'est ensuite progressivement mieux organisée, jusqu'à devenir l'actuel Observatoire des prix, organe spécial du ministère de l'Économie. L'Observatoire analyse les prix de sa propre initiative ou sur demande de l'une des parties intéressées, rend des rapports trimestriels et même des rapports spécifiques lorsqu'il découvre un problème. S'il estime qu'un problème précis nécessite une intervention, il peut adresser le dossier à l'autorité de la concurrence, qui est alors compétente pour prendre des mesures provisoires. Ce rapport est également transmis au ministère de l'Économie, qui indique ensuite au

gouvernement si d'autres mesures s'imposent. Les résultats de cette surveillance ne sont pas rendus publics et ne sont distribués qu'au niveau du ministère.

Le Président demande au délégué de la Lituanie d'expliquer la façon dont la surveillance des prix sert dans son pays à informer le public sur les prix et leurs fluctuations.

Le délégué de la Lituanie explique que l'autorité de la concurrence a lancé une initiative de surveillance des prix en 2010 en réponse à certaines pressions politiques dues à la hausse des prix. L'objectif de cette initiative était double : (i) d'abord, rassembler et analyser certaines données sur les prix des produits alimentaires et même en tirer des conclusions ou lancer une enquête le cas échéant ; (ii) puis, mettre ces prix à la disposition du public. Les informations étaient disponibles sur un site internet de manière à permettre aux consommateurs de choisir leurs supermarchés en connaissance de cause. Cette expérience a cependant pris fin en 2013 pour deux raisons. Tout d'abord, des quantités énormes de données ont été recueillies sans pouvoir être traitées par manque de ressources, et certains sites internet privés proposaient déjà aux consommateurs des services de comparaison des prix.

Le Président se tourne vers la Norvège, qui tend à montrer dans sa contribution qu'en plus d'être inefficace, la surveillance des prix pourrait faciliter les ententes.

Le délégué de la Norvège confirme qu'il y a risque de collusion tacite sur les marchés norvégiens, qui sont petits, concentrés et dans une certaine mesure protégés par des droits d'importation élevés. La prudence est de mise quant aux mesures qui pourraient renforcer la transparence, en particulier sur le marché norvégien de l'alimentation. Des enquêtes ont été réalisées pour évaluer la façon dont une transparence renforcée pourrait accroître le risque de collusion tacite dans différentes affaires de concurrence, comme l'affaire de 2007 dans laquelle les chaînes de distribution ont choisi de modifier leur méthode de partage d'information par le biais de la société Nielsen après avoir pris connaissance de l'évaluation que l'autorité de la concurrence avait faite de cet échange d'informations. En 2011, le projet de mise en place d'un portail destiné à fournir aux consommateurs des informations sur les prix a été loin de faire l'unanimité, dans la mesure où il aurait fourni des données complètes et fréquemment mises à jour sur les prix de différentes chaînes.

Le délégué de la Lituanie reconnaît qu'il s'agit là d'un troisième motif tacite de cessation des activités dans ce secteur, étant donné que l'autorité de la concurrence devrait être la dernière à donner une plus grande transparence à un marché déjà oligopolistique.

Selon le Président, ces opinions peuvent inspirer la Roumanie qui, d'après sa contribution, étudie la mise en place d'un observatoire des prix, géré par l'autorité roumaine de protection du consommateur, même si en réalité, cet observatoire était déjà créé en juillet 2010 et qu'il est aujourd'hui en cours de restructuration.

Le Président s'intéresse ensuite à l'autre extrémité de la chaîne, au niveau des fournisseurs de produits alimentaires, où les prix potentiellement trop bas payés aux producteurs sont un sujet de préoccupation. La gouvernance tente en général de trouver des moyens d'augmenter les prix, le cas échéant en réduisant le pouvoir d'achat des plus petits acheteurs de produits alimentaires. Les contributions des Pays-Bas et de Jaap van Driel envisagent des solutions alternatives pour tenter d'améliorer la capacité de revenus des producteurs en gérant mieux l'approvisionnement en produits agricoles.

Jaap van Driel se présente en tant que conseiller politique formé comme économiste agricole. Il présente l'objectif du Réseau pour l'analyse de la chaîne agroalimentaire, qui couvre les pays de l'OCDE et les pays en développement, et explique que la question de la concurrence au niveau local et l'impact de

la certification des normes alimentaires à la fois sur la qualité du produit (qui intéresse les consommateurs) et sur la possibilité d'un comportement collusif comptent parmi les sujets de préoccupation de ce Réseau.

Il aborde également le thème des coopératives. D'après lui, les résultats de la contribution de l'UE et certains résultats de l'Amérique du Nord indiquent que les coopératives ont pour principale fonction la création d'économies d'échelle, le partage des risques, la réduction des coûts de transaction, la promotion de l'innovation des produits et le contrôle de la qualité ainsi que, dans les pays en développement notamment, l'assurance d'un accès aux ressources et aux marchés. Enfin, les coopératives ont également pour fonction de réguler les volumes et la qualité de l'approvisionnement selon la demande et le cycle saisonnier.

Jaap van Driel conclut par un examen des pratiques commerciales déloyales et relève qu'elles naissent souvent à l'occasion d'un conflit dans les relations bilatérales entre un fournisseur et un acheteur. En théorie, le droit des contrats ou le droit commercial précisent les cas dans lesquels une partie peut considérer que l'autre partie a commis un acte illégal et décider de saisir la justice, mais les contrats ne sont pas toujours précis sur ce qu'il convient de faire dans de tels cas. S'il est vrai que certains pays préfèrent passer par la réglementation publique pour gérer ces conflits, d'autres pays optent pour une réglementation privée, au travers d'un code de conduite. Il relève que, en cas de défaillance du marché (par exemple en cas de production durable de denrées alimentaires), il est parfois préférable de laisser au secteur le soin de s'autoréguler plutôt que de s'en remettre à la réglementation publique, même s'il convient de rester attentif aux règles de concurrence et aux dangers des comportements collusoires.

## 3. Les questions liées à la définition du marché de produits et du marché géographique et au contrôle des concentrations dans l'industrie alimentaire

Le Président aborde ensuite le thème du droit de la concurrence appliqué aux problèmes de concentration accrue dans l'industrie alimentaire, notamment au niveau du détail.

Le délégué des États-Unis indique que son pays considère que le cadre général pour le contrôle des fusions, y compris la définition du marché concerné, s'applique également au secteur de la distribution alimentaire. Il souligne la grande expérience des États-Unis en matière d'examen des concentrations dans le secteur des supermarchés.

Il indique que l'analyse du marché de produits et du marché géographique dans ce secteur peut s'avérer très complexe, dans la mesure où elle dépend de la localité et des conditions du marché, de la surface des magasins, et même de leur spécialisation. Par exemple, dans une affaire de concentration, il a été estimé qu'un type particulier de supermarché axé sur les produits biologiques et diététiques n'était pas un concurrent direct des supermarchés plus traditionnels, du moins dans l'esprit des consommateurs. Quant au rôle des marques de distributeurs, il conduit également à des conclusions différentes selon la proportion dans laquelle les consommateurs considèrent qu'elles remplacent de manière satisfaisante les marques de commerce.

S'agissant du marché géographique, il est très souvent défini au cas-par-cas en fonction des caractéristiques physiques, des barrières naturelles, de l'état des routes, etc.

Le Président remarque alors que, même si Israël applique la même méthode générale que les États-Unis sur les marchés agroalimentaires, ce pays semble aller encore plus loin, notamment dans la définition des outils utilisés pour définir le marché géographique.

Le délégué d'Israël confirme que le raisonnement appliqué dans le secteur de l'alimentation et dans l'analyse de la définition traditionnelle du marché géographique est le même. Le modèle développé par son pays va néanmoins plus loin. Il définit une zone de demande pour chaque magasin appartenant à une

chaîne et identifie alors un groupe de concurrents pour ce magasin. S'il existe une masse critique de consommateurs potentiels du magasin A qui sont également consommateurs potentiels du magasin B, alors le magasin B entravera le comportement du magasin A en matière de fixation des prix.

Ainsi, la zone géographique dans laquelle un magasin donné attire les consommateurs est définie en fonction des caractéristiques du magasin, de sa surface, de la diversité des services qu'il propose et du temps de déplacement pour s'y rendre. Le modèle identifie ensuite le groupe de concurrents de chaque magasin, qui se compose des autres magasins en concurrence, et peut alors calculer sa part de marché sur le marché concerné. Il s'intéresse pour l'essentiel au cas de figure dans lequel la superposition des zones de demande de deux magasins amène une grande partie des consommateurs potentiels de l'un à relever aussi de la zone de demande de l'autre. Si le modèle constate qu'une masse critique de consommateurs est identique aux deux zones de demande, il en conclut alors que chaque magasin peut entraver le comportement de l'autre en matière de fixation des prix dans la mesure où ils peuvent tous deux faire partie du même marché géographique.

Le Président demande ensuite à l'Irlande d'expliquer la méthode mise au point au niveau national, qui est quelque peu comparable à la méthode israélienne.

Le délégué de l'Irlande explique que son pays juge important d'examiner la chaîne d'approvisionnement dans son ensemble et pas seulement les parts de marché au niveau du détail. L'indice IHH national de concentration du commerce de détail avoisine 1 800. Si ce chiffre n'est certes pas révélateur d'une forte concentration, il peut toutefois dissimuler des problèmes de puissance commerciale locale en termes de définition du marché géographique et d'étroitesse de la concurrence.

Quant à la structure verticale du marché, le pays recense cinq chaînes d'approvisionnement ou modèles de distribution différents. Ceux-ci vont d'un modèle totalement fragmenté à un bout de l'échelle où les fournisseurs négocient avec des grossistes indépendants qui à leur tour négocient avec des distributeurs indépendants, à un modèle plus intégré où les fournisseurs fabriquent des produits alimentaires portant la marque des distributeurs, sans intervention des grossistes. Dans ce dernier modèle, la partie « commerce de gros » est internalisée.

Quant à la dimension géographique, la concentration de la propriété de l'espace au sol dans les cinq plus grandes villes d'Irlande, puis dans les villes plus petites a permis de constater que ces dernières étaient plus concentrées que les grandes villes (même si elles sont aussi très concentrées). Il existe donc des problèmes de puissance commerciale locale, doublés de problèmes démographiques et de planification. D'abord, il n'y a qu'un nombre limité de supermarchés et de distributeurs déjà actifs, qui se sont assurés les meilleurs sites et qui jouissent d'un certain avantage en tant que précurseurs. Ensuite, l'entrée sur le marché est subordonnée à des limites de surfaces propres au commerce de détail et à des contraintes sur les emplacements. Plus précisément, une limite supérieure est fixée pour la surface des magasins et leur emplacement fait l'objet de restrictions de manière à préserver la viabilité des centres-villes. Ces deux aspects peuvent soulever d'éventuelles préoccupations concurrentielles et peuvent avoir une incidence sur la définition du marché du point de vue de la zone géographique et du type de concurrence de la part d'autres types de supermarchés.

Le Président demande ensuite au Japon et à la France de faire part de leur expérience en matière de définition du marché en relatant des affaires intéressantes soulevant cette question.

Le délégué de la France confirme que l'autorité française de la concurrence a récemment traité une proposition de concentration entre deux grands opérateurs de la distribution en France : Casino et Monoprix. Cette affaire soulève un certain nombre de questions méthodologiques relatives à la définition du marché, qu'il s'agisse du marché de produits ou du marché géographique. En termes simples, l'autorité

a dû examiner la question de savoir si la définition du marché de produits devait être la même sur l'ensemble du territoire. Elle a constaté que les modèles de consommation et de concurrence étaient à ce point différents du reste du pays dans certaines villes comme Paris qu'il était justifié de définir les marchés concernés de manière différente. Un autre débat technique intéressant suscité par la concentration Casino-Monoprix porte sur la pression concurrentielle des ventes sur Internet, question que ni l'autorité française de la concurrence ni la Commission européenne n'ont encore résolue.

S'agissant de la définition du marché géographique, l'autorité française de la concurrence applique une méthode dans ses Lignes directrices selon laquelle les zones de chalandise sont calculées sur la base du comportement réel des clients.

L'enquête Casino-Monoprix a conclu que les distributeurs situés en dehors des zones de chalandise calculées continuaient néanmoins d'exercer une certaine pression concurrentielle sur près de 5 % de la consommation des Parisiens. C'est pourquoi leur présence a dû être prise en compte en termes de parts de marché dans les zones de chalandise.

Le délégué du Japon cite une affaire très révélatrice datant de 2013, mettant en cause la première chaîne de supermarchés (AEON) qui a acquis des participations majoritaires dans la quatrième chaîne de distribution (Daiei). La définition du marché s'est, comme d'habitude, avérée un exercice délicat, d'abord pour déterminer quels types de magasins devaient être inclus sur le même marché et ensuite pour définir le marché géographique.

Aucune donnée précise sur les prix et les volumes de chaque magasin, qui aurait pu permettre d'évaluer la fonction de la demande et l'élasticité-prix croisée, n'était disponible. Un sondage a donc été mené auprès des consommateurs, sous la forme d'un questionnaire remis en magasin. Dans ces questionnaires, il leur était par exemple demandé s'ils iraient faire leurs courses dans un autre magasin si les prix étaient majorés d'un certain pourcentage. Selon les résultats du sondage, le marché concerné devait inclure les magasins de marchandises diverses et les grandes surfaces alimentaires, et le marché géographique du magasin était défini dans un rayon d'environ 0,5 à 3 kilomètres. Cette méthode a permis de recenser 260 cas de chevauchement de magasins AEON et de magasins Daiei, qui n'ont toutefois pas empêché l'existence de concurrents efficaces ni la très haute probabilité de nouveaux entrants, raison pour laquelle la concentration a été acceptée sans mesure corrective.

## 4. Les problèmes liés à la puissance d'achat et les moyens d'y remédier

Le Président présente ensuite un nouveau thème : celui des problèmes liés à la puissance d'achat.

Le délégué de l'Autriche évoque une enquête menée en 2007 sur la puissance d'achat des chaînes de supermarchés à l'égard de leurs fournisseurs. L'enquête a permis de recueillir des preuves de l'existence de cette puissance d'achat mais elle a aussi constaté que la plupart des plaintes touchant cette question étaient anonymes et qu'il a été très difficile d'obtenir des informations de la part des entreprises, qui s'obstinaient à les considérer comme confidentielles. L'autorité de la concurrence a finalement pu obtenir les données, mais celles-ci n'ont pas permis de prouver qu'il était fait un usage abusif de la puissance d'achat dans les grandes surfaces alimentaires.

Par la suite, en 2011, l'autorité de la concurrence a reçu la réclamation d'une plaignante qui rapportait la preuve de prix imposés illégaux sur le marché de la distribution alimentaire. Cette information a permis d'organiser des perquisitions surprises dans 25 à 30 entreprises. Il a alors été découvert que c'était généralement les producteurs qui demandaient, par exemple, une hausse des prix, et que les distributeurs l'acceptaient s'ils pouvaient augmenter les prix pour le consommateur final et si le producteur s'assurait que les autres concurrents augmentaient eux aussi leurs prix au consommateur final, ce qui témoigne

clairement de l'existence d'une entente structurée en étoile. Cela a aussi mis en évidence que l'existence d'une puissance d'achat rendait plus facile la mise en œuvre d'un réseau en étoile.

Le Président relève que les prix imposés ou les accords en étoile n'impliquent pas nécessairement l'existence d'une puissance d'achat et que les autorités de la concurrence sont habituées à gérer ce type plus classique d'abus.

Le délégué de la Turquie indique que son pays a conduit une enquête de marché dans le secteur de la distribution en 2012, suite à plusieurs plaintes de fournisseurs à propos de problèmes liés au pouvoir de l'acheteur et aux pratiques commerciales déloyales de grands distributeurs. Les principaux types de problèmes identifiés ont été l'application unilatérale de conditions contractuelles par les distributeurs – telles que les escomptes et autres pratiques apparentées qui réduisent le prix versé aux fournisseurs – et les pénalités en cas de retard de paiement.

Cela étant, l'enquête a permis de constaté que malgré la puissance d'achat accrue des distributeurs, le taux de concentration sur le marché restait faible, les marges bénéficiaires des fournisseurs n'avaient globalement pas baissé et les fournisseurs n'étaient pas économiquement dépendants des grands distributeurs. Il a donc été conclu que la puissance d'achat des grands distributeurs n'était pas à même de fausser la concurrence sur le marché. L'autorité de la concurrence a alors opté pour une surveillance du marché, sans intervention à ce stade.

Le Président demande ensuite au délégué du Japon de définir ce qui serait considéré dans son pays comme l'usage abusif d'un pouvoir de négociation supérieur.

Le délégué du Japon explique qu'il existe dans son pays une réglementation contre l'usage abusif d'un pouvoir de négociation supérieur. Celui-ci se définit comme le recours à des pratiques commerciales injustes en tirant parti de sa position de négociation dominante vis-à-vis de l'autre partie. Cet usage abusif est interdit par la Loi antimonopole. Il diffère de l'abus de position dominante en ce qu'il n'est pas nécessaire qu'une partie occupe une position dominante ; il suffit qu'elle occupe une position de négociation relativement supérieure par rapport à l'autre partie engagée dans l'opération.

En 2011, la Commission japonaise de la concurrence a poursuivi en justice le supermarché Sanyo-Marunaka pour usage abusif de son pouvoir de négociation supérieur. La Commission japonaise de la concurrence a estimé que Sanyo-Marunaka avait illégalement exigé le transfert de salariés, des contributions monétaires, des retours de produits et des réductions de prix. Suite à son enquête, la Commission japonaise de la concurrence a émis une ordonnance de cessation et d'abstention et ordonné le paiement d'une amende en juin 2011.

Le délégué fait également mention de trois rapports publiés par la Commission japonaise de la concurrence au cours des trois dernières années : un rapport sur les échanges entre les fabricants de produits alimentaires et les grossistes, un rapport sur les échanges entre distributeurs et fournisseurs dans la grande distribution et autre, et un rapport sur les échanges réalisés par le biais des centres de distribution. S'agissant du rapport sur les échanges entre les fabricants de produits alimentaires et les grossistes, la Commission a relevé des éléments indiquant l'usage abusif par les grossistes de leur pouvoir de négociation supérieur à l'égard des fabricants de produits alimentaires sous la forme de retours injustifiés de produits, d'achats inutiles de biens et services etc., mais elle a également constaté que les grossistes se livraient à de tels actes non seulement pour consolider leurs propres bénéfices mais pour répondre aux demandes de leurs propres distributeurs.

Le Président demande ensuite aux États-Unis d'indiquer s'ils sont également concernés par de telles pratiques de la part des grands distributeurs dans leur pays (comme Wal-Mart).

Le délégué des États-Unis répond que ces pratiques ne peuvent pas donner lieu à une action au titre du droit américain de la concurrence au motif que, même s'il contient des dispositions sur l'abus de position dominante, l'autorité de la concurrence n'a ni les moyens ni la volonté d'examiner un cas de position dominante concernant un seul fournisseur particulier.

Le délégué du BIAC indique que le Comité souhaite se concentrer sur la question du moment où les autorités de la concurrence devraient s'inquiéter de la puissance d'achat des entreprises.

Selon le BIAC, la puissance d'achat n'est un sujet de préoccupation que lorsqu'elle est utilisée ou susceptible de l'être, soit unilatéralement soit en situation d'oligopsone, dans l'intention d'agir sur les conditions de concurrence, causant par là même du tort aux fournisseurs et aux concurrents sur un marché donné. Une analogie pourrait être faite entre la puissance d'achat et la position dominante à cet égard. Ce n'est pas la position dominante en soi qui devrait soulever des problèmes au titre du droit de la concurrence, mais bien plutôt le comportement qui révèle un abus de cette position dominante et qui produit des effets importants sur le marché donné.

Il en va de même (à savoir que la puissance d'achat ne pose problème que si l'on en fait un usage abusif) pour les affaires de concentration et d'entente, à une différence fondamentale près : l'objectif et l'effet anticoncurrentiels probables de la puissance d'achat sont souvent beaucoup plus difficiles à mettre en évidence dans les affaires de concentration que dans les affaires de comportement telles que les affaires de position dominante ou d'entente au motif que, dans ces dernières, les bilans de l'entreprise sont disponibles, le comportement de celle-ci est avéré, et qu'il n'est pas nécessaire d'établir de projections pour l'avenir comme dans les affaires de concentration.

Le Président relève que plusieurs pays s'alignent sur la position du BIAC, parmi lesquels le Royaume-Uni. Il demande donc au Royaume-Uni d'expliquer les raisons qui le font penser que le cadre normal du droit de la concurrence est approprié pour traiter les problèmes liés à la puissance d'achat.

Le délégué du Royaume-Uni fait remarquer que la question de savoir si les dispositions du droit classique de la concurrence sont suffisantes reste probablement ouverte. Cela étant, il pense que les outils classiques permettent assurément d'aborder certains problèmes touchant à la puissance d'achat.

Par exemple, les effets de la puissance d'achat sont pris en considération dans la manière dont le droit de la concurrence de l'Union européenne est défini, à l'instar de la manière dont la Commission a formulé les exemptions par catégories de l'accord vertical, qui exige désormais que les acheteurs aussi bien que les vendeurs ne dépassent pas le seuil de 30 % de parts de marché pour bénéficier des exemptions par catégorie. De la même façon, même si l'article 101 ne porte pas expressément sur la question de la puissance d'achat, l'article 102 et son équivalent dans la législation du Royaume-Uni, en revanche, la couvrent expressément dans le cadre de l'imposition abusive de prix non équitables ou d'autres conditions de transaction non équitables. Cela montre que les auteurs du traité ont considéré l'usage abusif de la puissance d'achat par les entreprises dominantes comme un élément potentiel important de l'interdiction, de sorte que ces abus pourraient, en principe, inclure les obligations d'achat exclusif, les achats en quantités excessives à des conditions abusives, l'augmentation des frais des concurrents à travers des achats en quantités excessives et le refus d'achat de la part d'un acheteur verticalement intégré.

Il observe qu'au Royaume-Uni, les dispositions équivalentes des articles 101 et 102 n'ont jamais été utilisées pour résoudre des problèmes liés à la puissance d'achat.

Dans le domaine des concentrations, en revanche, son pays enregistre une plus grande expérience de l'utilisation des outils classiques pour traiter la puissance d'achat. Par exemple, dans une affaire concernant

une fusion dans l'industrie des œufs, l'autorité de la concurrence a craint que la fusion entre deux producteurs d'œufs ne confère à la nouvelle entité une forte puissance d'achat dans la fourniture des œufs.

Le Président se tourne alors vers l'Allemagne et lui demande si les dispositions sur l'abus de position dominante figurant dans sa loi sont suffisantes pour sanctionner certaines des pratiques examinées ici ou si un type particulier de réglementation est nécessaire.

Le délégué de l'Allemagne estime que les dispositions classiques de la loi relatives à l'abus de position dominante sont à même de couvrir non seulement l'abus de position dominante du côté de l'offre, mais aussi du côté de la demande, à savoir le pouvoir de l'acheteur.

Toutefois, lorsque les réglementations sur l'abus de position dominante ne suffisent pas à maîtriser l'abus de puissance commerciale en deçà du niveau de la position dominante, l'Allemagne se trouve dans la situation particulière de devoir appliquer des réglementations complémentaires en deçà du niveau de position dominante. En Allemagne, les entreprises n'ont pas le droit de gêner, d'utiliser à leur avantage ou de défavoriser les fournisseurs et les acheteurs lorsque ceux-ci sont des PME qui dépendent de leurs ventes ou de leurs fournitures. Les entreprises n'ont pas non plus le droit de gêner les concurrents de petites et moyenne taille de manière inéquitable et, quelle que soit leur position sur le marché, il est interdit aux entreprises dans certaines conditions d'inciter les autres entreprises à adopter des comportements anticoncurrentiels.

L'autorité de la concurrence peut appliquer ces dispositions dans le cadre du droit européen de la concurrence. Elle gère des affaires de comportement anticoncurrentiel unilatéral, à l'exemple de la communication des griefs publiée en juillet 2013 à l'encontre du plus grand distributeur allemand EDEKA. EDEKA, après sa prise de contrôle d'un autre grand distributeur, Plus, avait exigé que les conditions particulières d'achat antérieurement accordées par près de 500 fournisseurs aux magasins de Plus (dont le volume d'affaires était beaucoup plus petit) soient désormais également proposées à EDEKA, rétroactivement et sans compensation.

L'autorité de la concurrence a considéré que de telles exigences pouvaient également servir à renforcer la puissance commerciale d'EDEKA au détriment de distributeurs plus petits. La concurrence pouvait donc être entravée par le fait que ces exigences incitaient les fournisseurs à s'abstenir d'offrir de meilleures conditions aux petites entreprises dans le sens où ils auraient toujours la crainte que les grands distributeurs prennent le contrôle des plus petites chaînes de distribution et qu'ils leur soient alors fait la même demande à très grande échelle pour la totalité de leur volume, avec effet rétroactif sur une longue période.

Le Président fait remarquer que le droit national d'un certain nombre de pays prévoit des dispositions spécifiques permettant de résoudre certains des problèmes abordés dans le cadre des débats.

Le délégué de la Finlande explique que suite à une enquête sectorielle qui avait conclu que certains problèmes touchant à la puissance d'achat pouvaient susciter des préoccupations concurrentielles, le gouvernement a décidé de rédiger un projet de loi, qui entrera en vigueur au début de 2014.

Le premier problème identifié concerne les quotas de commercialisation que les producteurs utilisent pour mettre un produit en rayon, ou encore les paiements de commercialisation directs qui peuvent être proposés à cet effet. Le deuxième problème concerne le déplacement du risque, observé en particulier dans le secteur de la boulangerie : les boulangers devaient racheter tous leurs invendus. Ces préoccupations ont conduit à l'adoption de la nouvelle loi, aux termes de laquelle les chaînes de distribution dont les parts de marché sont supérieures à 30 % sont d'office considérées comme occupant une position dominante. Cela

étant, l'autorité doit ensuite utiliser les règles de base pour examiner s'il y a bien eu abus de cette position dominante et pour mettre en œuvre l'article 102.

Le Président observe non seulement que le droit de la Hongrie contient des dispositions à l'encontre des entreprises qui ont une puissance commerciale significative en termes de pouvoir de l'acheteur, mais que le pays dispose aussi d'une nouvelle législation pour lutter contre les pratiques de négociation déloyales dans la chaîne d'approvisionnement.

Le délégué de la Hongrie explique que la Loi hongroise sur la concurrence n'aborde pas du tout le pouvoir de l'acheteur. Elle interdit l'abus de position dominante mais à l'époque où elle est entrée en vigueur, aucune des grandes chaînes de distribution n'occupait une position dominante sur les marchés concernés. En 2005, le législateur est arrivé à la conclusion que la concentration des grandes chaînes de distribution et leur fort pouvoir de négociation vis-à-vis des fournisseurs posaient un problème que seule une nouvelle législation pouvait résoudre. En conséquence, la Loi sur le commerce a été modifiée par l'inclusion d'une clause générale prévoyant l'interdiction de tout usage abusif d'une puissance commerciale significative vis-à-vis des fournisseurs. L'autorité hongroise de la concurrence s'est vue confier la tâche de faire appliquer ces dispositions à l'aide des mêmes règles de procédure que dans les affaires relatives à l'abus de position dominante. La Loi sur le commerce pose en principe que les distributeurs dont le chiffre d'affaires net dépasse 300 millions d'euros ont une puissance commerciale significative.

Toutes les chaînes de distribution en Hongrie dépassent ce seuil, et on estime par conséquent qu'elles disposent toutes d'une puissance commerciale significative vis-à-vis des fournisseurs. Après 2005, l'autorité de la concurrence a lancé quelques enquêtes qui portaient principalement sur les frais que les fournisseurs devaient payer pour que les chaînes de distribution vendent leurs produits, tels que les frais de mise en rayon ou les frais de commercialisation. Toutes ces enquêtes ont été clôturées puisque les parties ont proposé des engagements que l'autorité a jugé suffisants pour maintenir le niveau de concurrence nécessaire sur ces marchés.

En revanche, le gouvernement hongrois a décidé que les fournisseurs de produits alimentaires avaient besoin d'une protection étendue contre les grandes chaînes de distribution, et a donc adopté une nouvelle loi, la Loi sur les pratiques de distribution déloyales, qui diffère de la Loi sur le commerce en ce qu'elle n'est applicable qu'à la chaîne d'approvisionnement et uniquement en ce qui concerne les distributeurs et les fournisseurs de produits alimentaires. La mise en œuvre de cette nouvelle législation est confiée à un autre organisme public que l'autorité de la concurrence. Cela étant, l'autorité de la concurrence garde compétence pour traiter les affaires d'abus de position dominante même s'il est peu probable que cela se produise puisque les chaînes de distribution ne semblent pas occuper une position dominante sur le marché. De la même façon, l'autorité de la concurrence conserve malgré tout certaines compétences en matière de puissance commerciale ou de pouvoir de négociation en relation avec les fournisseurs de produits non alimentaires.

Le délégué de l'Italie fait remarquer que la situation est la même en Italie. L'autorité italienne de la concurrence a conduit deux grandes enquêtes au sein du secteur de l'alimentation et a émis quelques doutes sur le point de savoir si les outils classiques suffiraient à lutter contre le problème du pouvoir de l'acheteur. Une loi accorde aujourd'hui à l'autorité de la concurrence de nouveaux pouvoirs qui lui permettent d'examiner les contrats caractérisés par un grave déséquilibre des forces contractuelles conclus dans le secteur de l'alimentation. Un certain nombre de comportements sont interdits, comme l'imposition de prix non équitables ou l'application de conditions objectivement différentes à des transactions équivalentes.

L'autorité de la concurrence propose d'appliquer cette loi sur la base de certains critères de manière à veiller à ce que son intervention aille dans le sens de l'application du droit de la concurrence. Elle souhaite intervenir en priorité en cas de graves restrictions à la concurrence et préfère ne pas avoir à connaître de litiges contractuels individuels. La loi est entrée en vigueur en mars 2012 et l'autorité de la concurrence ne l'a toujours pas appliquée.

Le Président observe que le « Livre vert de la Commission européenne sur les pratiques commerciales déloyales dans la chaîne d'approvisionnement alimentaire et non alimentaire interentreprises en Europe » mentionne deux raisons principales qui pourraient justifier de prendre des mesures à l'encontre des pratiques commerciales déloyales. La première est que ces pratiques pourraient empêcher l'innovation et la seconde qu'elles pourraient soulever des inquiétudes pour le marché intérieur. Il demande à la Commission européenne d'expliquer les raisons pour lesquelles l'UE envisage la possibilité d'engager des actions contre certaines de ces pratiques et quelles pratiques sont concernées.

La déléguée de la Commission européenne explique d'abord qu'il convient de faire une distinction entre le traitement de « l'usage abusif de la puissance d'achat », qui est une notion relevant du droit de la concurrence, et le traitement de « l'usage abusif de pouvoir de négociation dans les relations bilatérales », qui pourrait conduire à des pratiques commerciales déloyales entre entreprises. Du point de vue du droit de la concurrence, la puissance d'achat n'est pas une mauvaise chose en soi – du moins à court terme – lorsqu'il existe suffisamment de concurrence sur le marché en aval et que les entreprises en aval répercutent au consommateur final les conditions/prix favorables qu'elles ont obtenus de leurs fournisseurs en amont. À long terme cependant, on peut craindre que la puissance d'achat – en comprimant les marges des fabricants/fournisseurs en amont – n'entraîne une réduction des investissements dans l'innovation, laquelle aura des répercussions sur la variété des produits disponibles et sur l'éventail de produits innovants proposés au consommateur final. Il n'existe encore aucune preuve objective de cet effet à long terme de la puissance d'achat, mais le groupe d'étude de la direction générale de la concurrence sur les produits alimentaires mène actuellement une étude sur le secteur de la distribution moderne pour analyser la façon dont le choix et l'innovation dans le secteur de l'alimentation ont évolué ces dernières années et examiner si la concentration des distributeurs et des fournisseurs et/ou le déséquilibre entre la concentration des distributeurs et des fournisseurs (utilisé comme variable pour mesurer l'étendue du pouvoir de l'acheteur et de la puissance commerciale) auraient des répercussions importantes sur cette évolution.

Elle souligne que, selon la Commission européenne, les instruments actuels de la politique de la concurrence de l'UE suffisent à résoudre le problème de l'usage abusif de la puissance d'achat et qu'il n'y a aucune raison d'adopter des dispositions particulières en matière de concurrence.

Cela dit, s'agissant du niveau agricole de la chaîne d'approvisionnement alimentaire, le manque de pouvoir de négociation des producteurs vis-à-vis de leurs acheteurs, a été au cœur des débats sur la récente réforme de la politique agricole commune. Le Parlement européen a tout d'abord proposé d'assouplir les règles de concurrence pour l'ensemble du secteur agricole avant qu'un compromis soit trouvé, prévoyant de modifier les règles de concurrence dans certains secteurs (cultures arables, huile d'olive et bœuf) et d'autoriser les producteurs à centraliser leurs ventes (y compris fixer leur prix), de manière à accroître effectivement leur pouvoir de négociation. Cela n'est possible que dans certaines conditions, la première étant de générer des gains d'efficience importants autrement que par la vente centralisée (par exemple, grâce à la mise en commun du stockage, de la distribution et des achats) et la deuxième de ne pas dépasser certains seuils de parts de marché.

En revanche, la question de savoir dans quelle mesure l'exploitation abusive du pouvoir de négociation dans les relations contractuelles bilatérales par le recours à des pratiques commerciales déloyales devrait être réglementée ne relève pas des règles de concurrence de l'UE. Le droit de la

concurrence de l'UE s'applique lorsque le comportement discutable d'une entreprise a des répercussions sur l'ensemble du marché et lorsqu'il porte atteinte au bien-être des consommateurs. Ces conditions ne sont pas nécessairement réunies en cas de pratiques commerciales déloyales constatées dans le cadre de relations bilatérales. L'expérience de certaines autorités nationales de la concurrence, tirée de leur exercice de surveillance du marché, tend également à montrer que les règles de concurrence ne sont généralement pas le meilleur instrument pour lutter contre les pratiques commerciales déloyales, dans la mesure où il est difficile de rapporter la preuve des atteintes au bien-être des consommateurs, de sorte que leur action s'en trouve limitée.

Néanmoins, outre les préoccupations concurrentielles, plusieurs raisons peuvent justifier d'agir contre les pratiques commerciales déloyales, comme l'équité ou la protection des petites entreprises. Il est alors préférable de traiter les pratiques commerciales déloyales sur la base du droit des contrats ou de lois sur la concurrence déloyale ou d'envisager l'instauration de codes de bonnes pratiques. Certains États membres de l'UE l'ont déjà fait par le passé.

La déléguée de la Commission européenne souligne par ailleurs qu'avant de décider d'intervenir dans une relation contractuelle bilatérale ou de prendre des mesures réglementaires à l'encontre de pratiques commerciales déloyales, il est important d'évaluer les effets potentiellement négatifs de ces interventions et de réunir des éléments de preuve des coûts induits par la mise en place de ces réglementations. Elle cite l'exemple de la France où l'introduction de la « Loi Galland » a entraîné une hausse de l'inflation, montrant par là même que la réglementation peut avoir un coût.

Ensuite, sur invitation du Président, Fabien Bergès présente les aspects économiques des marques de distributeurs. Il commence par faire observer que les marques de distributeurs ne sont pas une catégorie homogène. La plupart des distributeurs proposent des marques de distributeurs de premier prix qui concurrencent le hard discount, mais ils proposent aussi des marques de milieu de gamme qui concurrencent les marques nationales bien implantées et enfin, ils proposent en outre des marques de distributeurs de haute qualité, considérées comme des produits de niche. Toutes ces marques de distributeurs ayant pour but de distinguer les produits en magasin, elles offrent une plus grande variété aux consommateurs et une plus grande concurrence en magasin.

En tout état de cause, les marques de distributeurs représentent une alternative crédible aux marques nationales qui place le distributeur négociant avec un fabricant de produits de marque dans une meilleure position de négociation. Un autre intérêt particulier des marques de distributeurs tient à ce qu'elles renforcent également la fidélisation des consommateurs au magasin. Des études économétriques montrent que plus on consomme les marques d'un distributeur, plus on devient fidèle à ce distributeur, et donc plus captif.

Les marques de distributeurs peuvent avoir un impact sur l'innovation : si un fabricant de marques de distributeurs introduit un élément nouveau dans une marque, cette innovation peut alors être étendue aux marques d'autres distributeurs concurrents, sachant qu'elles seront sans doute fabriquées par ce même fabricant. De la même façon, lorsqu'une grande marque innove, le fabricant des produits portant la marque en informe le distributeur, en tant que maillon indispensable à la vente de la marque. Il s'ensuit que les marques du distributeur finiront vraisemblablement par copier l'innovation après un certain temps. Ainsi, l'existence de marques de distributeurs peut réduire la période de retombée de l'innovation, et avoir un effet négatif sur celle-ci.

Le délégué de la Belgique indique que les observations recueillies dans son pays montrent que l'inflation des prix des produits alimentaires est beaucoup moins marquée pour les marques de distributeurs que pour d'autres marques (mais plus que pour le « premier prix »). La discipline créée par les marques de distributeurs est donc très appréciée, ne fût-ce que parce que les tests réalisés par les

associations de consommateurs ne laissent apparaître aucune différence notable dans la qualité des produits entre les marques de distributeurs et les marques de producteurs. Le délégué belge reconnaît que les marques de distributeurs constituent un groupe très hétérogène, et que la décision d'en vendre ou non et la façon de les positionner dépendent du modèle économique de la chaîne de distribution. Il pense cependant que les marques de distributeurs sont dans l'intérêt des consommateurs.

Du côté des fournisseurs, il évoque deux aspects liés aux marques de distributeurs. D'un côté, les marques de distributeurs sont souvent fournies par des PME, ce qui leur donne ainsi l'opportunité de travailler du côté de la production, ce qui est certainement appréciable. D'un autre côté, les PME sont par nature beaucoup plus petites que les distributeurs, ce qui peut poser un problème de puissance d'achat. Cela étant, l'autorité belge de la concurrence n'a recensé aucune affaire de puissance d'achat susceptible de constituer une violation aux règles de la concurrence.

Le délégué de l'Australie explique que les marques de distributeurs sont un phénomène relativement nouveau en Australie. Elles ont connu une croissance rapide ces dix dernières années, les statistiques faisant apparaître une hausse de 15 à 25 % entre 2003 et 2010. Cette augmentation est en partie due à l'arrivée de la chaîne Aldi sur le marché australien, qui fonctionne entièrement avec des marques de distributeurs. De même, les deux chaînes de supermarchés dominantes (représentant un total de 70 à 80 % de parts de marché) ont également de plus en plus recours aux marques de distributeurs.

D'un côté, l'entrée d'Aldi sur le marché et son expansion ont un effet stimulant sur la concurrence, puisque la chaîne propose aux consommateurs des prix bas et une grande variété de produits. D'un autre côté, l'inquiétude suscitée par les deux chaînes de supermarchés dominantes tient à ce qu'elles pourraient profiter de leur puissance commerciale au niveau du détail pour restreindre l'accès aux linéaires et fausser le jeu de la concurrence entre elles et les fournisseurs des produits de marque, ce qui, à long terme, pourrait nuire aux incitations à l'investissement et à l'innovation.

C'est pourquoi l'ACCC conduit actuellement une enquête de marché qui étudie les marques de distributeurs mais aussi le comportement dominant des chaînes de supermarchés du point de vue de leurs relations avec les fournisseurs.

Fabian Bergès indique qu'une étude a été menée en France sur 3 080 produits de base pour voir si le développement des marques de distributeurs empêchait le développement des marques secondaires (c'est-à-dire les marques de second plan et non les marques principales bien reconnues). Les résultats de cette étude ont montré que même si le taux de développement des marques de distributeurs était bon, le nombre de produits de marque secondaire en rayon n'avait pas diminué.

Le Président oriente alors les débats sur la question de la définition des codes de conduite pour remédier aux problèmes touchant à la puissance d'achat. Le délégué de la Belgique explique que les associations de producteurs semblent croire en l'efficacité des codes de conduite. La Belgique en a adopté un pour protéger les producteurs dans des circonstances très particulières. Ce code est très minimaliste et ne va pas vraiment au-delà de ce que les règles pertinentes de l'UE considèrent comme des clauses abusives. Proposé par les associations de producteurs et accepté par l'autorité de la concurrence, il est aujourd'hui en vigueur depuis environ trois ans et n'a encore fait l'objet d'aucune plainte pour non respect. Ce code de conduite est très similaire au texte examiné ultérieurement au niveau de l'UE.

Le délégué du Royaume-Uni indique que son pays applique un code de conduite depuis plus de 10 ans. Une enquête de la Commission de la concurrence avait établi qu'un code de conduite serait un bon moyen d'aborder les questions liées à la puissance d'achat. Adopté en 2002, il s'agit d'un code volontaire – puisqu'il n'a pas été établi par voie réglementaire – qui témoigne des engagements volontaires des très grands distributeurs (les quatre ou cinq plus grands) disposant de parts de marché importantes. L'Office of

Fair Trading était chargé de prendre des mesures en cas de non respect du code. Il s'avère que très peu de plaintes sur le contenu du code ont été déposées, sans doute par crainte des représailles envers les petits fournisseurs.

Le premier code est resté en vigueur pendant six ans mais une inquiétude persistante concernant un possible usage abusif de la puissance commerciale a conduit la Commission de la concurrence à mener une nouvelle enquête. Cette enquêté s'est achevée en 2008. Elle a conclu que le premier code avait eu une certaine incidence sur les grands distributeurs, mais comme sa portée était limitée et que la structure du marché de détail avait changé depuis son instauration, il ne couvrait pas l'ensemble des principaux distributeurs. L'enquête a en outre relevé qu'il était difficile à mettre en œuvre du fait que les gens étaient réticents à porter plainte. C'est pourquoi la Commission de la concurrence a recommandé l'adoption d'un nouveau code contenant un certain nombre de modifications. En particulier, il a été adopté par décret et est donc devenu obligatoire. Elle a également recommandé que soit désigner un arbitre par loi du Parlement. Cet arbitre, qui n'est en place que depuis peu, étudie toujours le meilleur moyen de s'acquitter de ses nouvelles fonctions. Il a notamment une fonction de conseil auprès des fournisseurs et des grands distributeurs, une fonction d'arbitrage, une fonction d'enquête, une fonction d'application de la loi et il peut infliger des sanctions, notamment des amendes importantes. Il lui est également demandé de publier un rapport annuel.

Le nouveau code contient des dispositions plus générales que le premier code. Son champ d'application est également plus large puisqu'il vise les dix principaux distributeurs. Il oblige les distributeurs à prévoir une fonction de vérification de la conformité en interne et garantit l'anonymat aux plaignants. Le délégué conclut qu'il reste à voir comment le code fonctionne en pratique mais sa fonction d'arbitre et les amendes qu'il peut infliger pourraient avoir pour effet de résoudre certains des problèmes posés par la puissance d'achat.

Le délégué du Royaume-Uni ajoute que le véritable problème pour une autorité de la concurrence est de parvenir à distinguer les effets favorables à la concurrence des effets défavorables, dans un contexte extrêmement confus de marchés interdépendants où les chaînes d'approvisionnement sont à la fois complexes et diversifiées. De la même façon, nous avons assisté ces dernières années à un glissement très important du pouvoir de négociation des grands industriels vers les distributeurs. Il se peut que les plaintes aient depuis lors davantage pour objet de tenter de regagner la part du pouvoir de négociation perdu que de soulever un problème lié à la puissance d'achat. En revanche, la puissance d'achat soulève de réelles préoccupations en amont de la chaîne d'approvisionnement. Mais, on ne sait pas très bien quels sont les effets anticoncurrentiels de ces inquiétudes sur le bien-être des consommateurs en comparaison des problèmes d'équité.

Le délégué de l'Australie explique que la question du choix entre les codes volontaires et les codes obligatoires a fait débat en Australie. La différence tient au fait que, avec un code volontaire, l'entreprise qui y adhère est soumise aux dispositions de la loi qui la concernent, alors qu'avec un code obligatoire, l'entreprise peut être désignée pour y adhérer. Pour l'heure, l'idée consiste à tenter de négocier un code volontaire et de le rendre ensuite applicable aux principales chaînes de supermarchés. L'ACCC est d'avis que le code devrait être opérationnel et efficace et qu'il ne devrait pas créer une situation pire que l'absence de code.

Le délégué de l'Irlande explique que le gouvernement irlandais a pris la décision politique d'adopter un code de conduite réglementaire et obligatoire. Celui-ci entrera en vigueur au moment de la fusion de l'autorité de la concurrence avec l'agence nationale de la consommation. Il reviendra alors à l'autorité de la concurrence de faire appliquer la nouvelle législation.

La première tentative d'adoption d'un code de conduite volontaire en Irlande date de 2009. On pensait à l'époque que l'exigence de contrats et d'avenants écrits réduirait au minimum la possibilité de modifier de manière rétroactive et unilatérale les conditions contractuelles. Mais cette tentative a échoué, faute d'accord des distributeurs sur sa rédaction.

Au moment des débats, l'autorité irlandaise de la concurrence ne disposait pas du texte de la proposition d'un nouveau code de conduite réglementaire et obligatoire, mais au vu de la proposition d'un code volontaire, elle redoutait que la nouvelle législation n'augmente le coût de l'activité commerciale pour les fournisseurs et les distributeurs, ce qui aurait considérablement renforcé la rigidité du marché.

Par ailleurs, même si l'objectif politique n'est pas contestable, il a peu de chance d'être atteint, et ce pour deux raisons. Tout d'abord, le système irlandais ne connaît que les infractions pénales, à l'exclusion des amendes civiles ou administratives. Le seul moyen d'infliger une sanction à un distributeur pour manquement au code de conduite est de porter l'affaire en justice, ce qui implique que le fournisseur soit disposé à témoigner et à apporter des preuves à l'encontre de son principal distributeur devant le juge. Comme ils sont déjà très réticents à porter plainte nominativement lorsqu'il s'agit de prestations publicitaires et d'autres questions similaires, il est peu probable qu'ils seront disposés à témoigner de tels abus.

L'autre problème de la proposition de 2009 tient à ce que le code permettait pratiquement tout, dès lors que le contrat le prévoyait par écrit. La crainte était qu'il ne fasse pas disparaître le déséquilibre dans les rapports de force. Les petits fournisseurs seraient une nouvelle fois désavantagés par rapport aux grands distributeurs, qui disposent d'un service juridique et peuvent ainsi rédiger le contrat à leur avantage.

## 5. L'efficacité des autres outils pour atténuer le déséquilibre des forces contractuelles entre les fournisseurs de produits alimentaires et les grandes surfaces alimentaires

Le Président souhaite examiner quelques-unes des solutions originales mises en œuvre pour tenter d'obtenir le même résultat que les codes de conduite. En Norvège, les quatre plus grandes chaînes d'alimentation doivent soumettre les contrats conclus avec leurs principaux fournisseurs à l'autorité de la concurrence qui peut alors décider si ces contrats sont acceptables du point de vue de la concurrence.

Le délégué de la Norvège précise que les mécanismes de suivi mentionnés visent avant tout la puissance commerciale des fournisseurs les plus importants, et non la puissance d'achat des distributeurs. L'objectif le plus important est de discipliner les fournisseurs et il n'était donc pas prévu que la surveillance donne lieu à des affaires de concurrence. Les informations sont utilisées pour mieux comprendre le marché mais ne donnent pas nécessairement lieu à des recours ou à des affaires.

Le Président fait alors savoir que la Russie procède aussi au suivi des contrats. Il demande ensuite au délégué de la France d'expliquer comment la mise en place de contrats à long terme peut atténuer certains des problèmes rencontrés dans la chaîne d'approvisionnement.

Le délégué de la France rappelle les deux thèmes qu'il convient d'examiner en cas de problème lié à la puissance d'achat : (i) la relation entre les distributeurs et les producteurs et (ii) la relation entre les entreprises agroalimentaires et les distributeurs.

S'agissant de la première relation, par deux fois le législateur a sollicité l'avis de l'autorité de la concurrence, une première fois à propos du secteur des fruits et légumes, et une deuxième fois concernant le secteur du lait. Dans les deux cas, l'autorité de la concurrence a vanté les mérites des contrats à long terme comme instrument juridique pour équilibrer la relation entre producteurs et distributeurs. Ces contrats à long terme fixent les conditions de prix, les volumes et prévoient la possibilité de réviser les prix

pendant la durée du contrat. Ces contrats peuvent assurer la sécurité à la fois aux producteurs, qui seront en mesure de planifier leurs investissements et leur production, mais aussi aux acheteurs.

Un instrument identique permet de gérer la relation entre l'industrie agroalimentaire et les distributeurs.

Ces contrats à long terme viennent compléter le droit de la concurrence, qui interdit les accords illégaux, l'abus de position dominante et qui contrôle les concentrations. Le droit de la concurrence préserve les règles de concurrence sur le marché mais ne peut pas, en tant que tel, empêcher les effets des déséquilibres structurels entre l'offre et la demande. Ces effets sont particulièrement marqués en France dans le secteur des produits alimentaires et des légumes du fait que les producteurs dans ce secteur sont toujours beaucoup plus petits que les distributeurs, même lorsqu'ils s'organisent en coopératives. Qui plus est, la nature périssable des produits en question force les producteurs à négocier avec les distributeurs dans des délais très courts.

À titre d'exemple, ces contrats contiennent quelques dispositions détaillées, comme : (i) l'obligation pour les acheteurs de payer la marchandise acquise dans un certain délai ; (ii) l'interdiction pour les acheteurs d'exiger de leurs fournisseurs des avantages qui ne correspondent à aucun service rendu ; et (iii) une disposition qui limite considérablement le comportement des acheteurs et leur interdit de bénéficier de remises et de restitutions.

Le Président ajoute que les autorités de la concurrence de deux pays au moins (Israël et la France) ont le droit de proposer la déconcentration du commerce de détail même lorsqu'il n'y a pas eu de fusion ou d'abus de position dominante.

Johan Swinnen observe que la zone géographique à prendre en considération du côté du vendeur est beaucoup plus restreinte que du côté des acheteurs, où les entreprises s'approvisionnent dans le monde entier et indubitablement à l'extérieur des frontières. C'est pourquoi il se demande s'il est souhaitable d'étudier la chaîne d'approvisionnement alimentaire d'un point de vue national.

Il note également que les problèmes abordés sont propres aux matières premières. Le modèle d'un grand distributeur et d'un petit fournisseur convient bien à certains produits de base comme les fruits et les légumes, où les distributeurs s'approvisionnent auprès des producteurs. Mais dans d'autres secteurs, les fournisseurs sont de grandes entreprises comme Nestlé, Unilever, Campina, Danone, etc. Enfin, il remarque que même en présence de grands distributeurs et de petits fournisseurs, la répartition du pouvoir n'est pas toujours ce qu'elle semble être. En fait, même les plus grands transformateurs ou les grandes entreprises peuvent être tributaires d'une offre de haute qualité sous certaines conditions, ce qui signifie que la répartition du pouvoir, et même la répartition des revenus, dans la chaîne d'approvisionnement peut être très différente de ce qu'elle semble être à première vue.

Steve McCorriston fait remarquer que la sécurité alimentaire et le fonctionnement de la chaîne d'approvisionnement alimentaire sont quelques-unes des questions importantes à traiter. Il souligne l'importance de collecter des données et mentionne les plates-formes d'experts européens sur les prix alimentaires qui ont été mises en place pour recueillir des données aux différentes étapes de la chaîne d'approvisionnement. Enfin, il évoque la nécessité de poursuivre la recherche sur ce sujet.

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