

**DO EUROPEAN GROUPS ACTIVE IN FOOD AND NON-FOOD WHOLESALE  
AND RETAIL ABUSE THEIR DOMINANT POSITION?**

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## DO EUROPEAN GROUPS ACTIVE IN FOOD AND NON-FOOD WHOLESAL AND RETAIL ABUSE THEIR DOMINANT POSITION?

### I. INTRODUCTION

My aim is to stress the truly European dimension of issues concerning the retail sector. It is a sea change.

Until now, except for mergers with Community dimension, competition issues in that sector were usually dealt with at a national level as the market concerned is mainly national not to say local. However, there is - at present - a trend to consider that those issues might be more consistently dealt with at EU level.

Several reasons may explain such a trend:

- The loss of consumers' purchasing power throughout Europe and the related increase of retail prices (+3,8% at EU level between march 2007 and march 2008, + 6,9% in the food sector and almost 40% regarding main distributors' own trademarks) is a major European concern;
- A recent European Parliament's written declaration "on investigating and remedying the abuse of power by large supermarkets operating in the EU" strongly reflects this concern and asks the Commission to tackle the issue instead of National Competition Authorities;
- The "Services" Directive - whose four main objectives are to ease freedom of establishment and of provision of services in the EU; to strengthen rights of recipients of services as users of the latter; to promote quality of services and to establish effective administrative cooperation among Member States (MS), is amongst other things aimed at opening barriers to entry on the distribution market.

Let me briefly go back to these three points:

#### 1. The loss of consumers' purchasing power

It is no secret that one of the principle current concerns of all European governments is the loss of consumers' purchasing power, especially in respect to food. Inflation is back for several reasons:

- The rise of Chinese and Indian consumers' needs results in a considerable increase of the price of commodities and food;

- The present financial crisis makes banks reducing risky positions and thus places downward pressure on economic growth;
  - The third reason put forward to explain inflation is related to alleged abuses of dominant position, as defined by the EC Treaty (ECT) Article 82, by European groups active in food and non-food wholesale and retail.
2. **The European Parliament written declaration on investigating and remedying the abuse of power by large supermarkets operating in the EU**

It is a first: **the written declaration approved on February 18 by 439 MEPs** clearly encourages the Commission not only to investigate the sector but also to propose appropriate measures, including regulation, to protect consumers, workers and producers from any abuse of the supermarkets' dominant position. Retailers are accused of "*abusively controlling access farmers and other suppliers to EU shoppers in forcing down prices to unsustainable levels and in imposing unfair conditions.*" According to the European deputies, if "*some EU countries have introduced national legislation attempting to limit such abuse, yet large supermarkets increasingly operate across national boundaries, making harmonized EU legislation desirable*"

Even if politically oriented, this Declaration has to be taken seriously. It is in line with public opinion's feeling that retailers' margins are too high. In his last TV interview, President **Nicolas Sarkozy** referred to it in stressing the necessity to establish sound and equitable relationships between main retailers and suppliers.

Another example of this growing concern is the UK, where a **Competition Commission investigation** is ongoing into the food retail industry on the dominant positions built up in some local areas by supermarket chains (e.g. Tesco<sup>1</sup>). Although it has failed so far to uncover any widespread problems in the supply chain, the UK Competition Commission has carried out an **exhaustive inquiry into all aspects of groceries retailing**, collecting a data set of 14,000 grocery stores. Its final report which will be issued on **May 8, 2008**<sup>2</sup> will be of great interest since it may incite the EU Commission to sooner or later launch a similar enquiry.

### 3. **The Services Directive's impact on the distribution sector**

Although not yet transposed by all MS, this Directive has already produced some effects in the distribution sector notably in France. Because of the EU Commission's formal notice stating that the French legislation on economic authorization for supermarkets and hypermarkets is incompatible with freedom of establishment and of provisions of supply,

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<sup>1</sup> See : Press article entitled « *Commission puts Tesco in the spotlight* » by Fiona Walsh, extract from the guardian.co.uk.

<sup>2</sup> The Competition Commission's provisional findings report entitled "*The supply of groceries in the UK market investigation*" dated 31.10.2007.

the French government will change the legislation in question (see below “le projet de loi de modernization de l’économie”).)

**II. IS IT TRUE THAT INFLATION, AT LEAST PARTIALLY, IS DUE TO ABUSES OF DOMINANT POSITION IN THE RETAIL SECTOR?**

Article 82 of the EC Treaty has its equivalent in all national legislation, and is also directly enforced by national courts. It does not prohibit dominant positions as such, merely the abuse of such a position in a specific market when it is likely to affect trade between Member States.

Since the relevant market in the distribution sector is national (from the supplier point of view) if not local (from a consumer point of view), most decisions grounded on abuse of dominant position are made by national competition authorities or courts. But in case of a specific European legislation concerning the distribution sector, the ECJ will have more and more say on the practices concerned.

The concept of dominant position was defined by the European Court of Justice in the United Brands case (27/76 of February 1978) as "*a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers*".

**1. Several factors may lead to abuse of dominant position**

**1.1. Concentration and market power**

You are better placed than I am to measure the retailers’ market power country by country. It is well-known that major retail groups or joint central buying offices totalize a large majority of the market shares in Europe, much larger than in most of the other sectors.

[In France, the French Competition Council indicates in its “opinion of 11 October, 2007, relative to the legislation on commercial activities” that “*the major four distribution groups totalize 66% of market shares and that two central buying offices supply 52.1% of total hypermarkets sale area.*” The percentage may be similar in most of the other MS.]

**1.2. Regulatory barriers to entry**

*1.2.1. Requirement of an administrative authorization for the opening of a new sale area*

According to the French Competition Council in its above-mentioned opinion, the French legislation which submits the opening or the extension projects of sale areas to an economic authorization has “*created and strengthened barriers to entry on distribution markets, protecting current operators from competition...this infringement to the free entry*”

*on the market encouraged mergers in the sector, contributed to strengthen the retailers' position in the relations with their suppliers and to price increases..”*

It is all the more regrettable that *“in the light of a [recent] study, an increase of 1% of authorized sale areas rate leads to a significant increase of the sector's employment (0.1%), which means that the opening of hypermarkets creates more jobs than it destroys them.”*

*“...In Europe, diverse systems regulate commercial facilities and it is possible to group, on the one hand, the Northern European countries (Germany, Austria, Denmark, Finland, Ireland, Netherlands, Norway and Sweden) where the assessment of the commercial establishment occurs during the examination of the building permit and, on the other hand, the Southern European countries, where it is necessary to obtain a license prior to the obtainment building permit in order to undertake commercial activity.”*

Whatever the system concerned, the barriers to entry issue remains the same.

### *1.2.2. Prohibition of sale at a loss*

Member States have particular legislation prohibiting sales below some cost floor, generally without reference to market power or to any real effect on competition. These sale-at-a-loss prohibitions are described even though they might not normally be considered to be predation rules. They could, nonetheless, operate in the same fashion as a cost-based anti-predation rule.

## **2. Abusive practices may concern the retail sector**

### **2.1. French Competition Council's Decisions**

- **Practices implemented by retailers which may raise competition issues**
- **Coordination agreed between members of a buying group in order to impose unfair conditions to suppliers– Horizontal cartel.** E.g. practices consisting of forcing the suppliers to renegotiate the commercial terms of the contracts on a more advantageous basis without objective justification by using the threat of the withdrawal of their products from the list or to obtain rebates from the suppliers by threatening to withdraw from the list their products (sometimes no infringement, no grounds to condemn).
- **Use of buyer power – Abuse of a dominant position *stricto sensu*.** Same practices implemented by a dominant operator or an operator whose suppliers are dependent on it, if they restrict suppliers' access to consumers or distort competition on retail.

- **Practices identified in the supply chain**
- **Exclusivity agreements negotiated with major retail companies with the aim of evicting competitors from the market – Abuse of a dominant position.** e.g. condemnation of a French leading producer of cheese for concluding commercial agreements with the main distributors and purchasing centers aiming at obtaining or strengthening exclusive supply.
- **Retail price fixing practices between suppliers and retailers – Vertical cartels.** Condemnation of a vertical agreement between two large retailers and a wholesale aimed at fixing the retail price of video cassettes at an artificially high level.

## 2.2. UK Competition Commission’ inquiry in the food retail sector

The UK Competition Commission has investigated the following practices:

- **Distortions of competition between grocery retailers.**
- **Local vouchering**, i.e. “*temporary promotions on some products, including fuel, to attract consumers and increase total sales (commonly referred to as loss leading)*”.
- **Waterbed effect**, e.g. A situation where “*...an additional discount to one buyer leads to higher wholesale prices for other buyers. By exercising buyer power a firm obtains now a two-fold advantage, namely through more advantageous terms for itself and through higher purchasing costs for its rivals*”.
- **below-cost selling** (predatory strategy)

*[Please note, the preliminary findings **do not reveal any significant distortions in competition between large grocery retailers**]*

- **Tacit coordination between grocery retailers.** The Competition Commission indicates that such coordination may be facilitated by suppliers which ease the exchange of information on retail prices charged by rival retailers.

*[Please note, the preliminary finding provides **no direct evidence of tacit coordination at present, but the Competition Commission expressed its concern that, given the structure of the grocery retailing market, such behaviour could occur in the future.**]*

- **Competition issues in the grocery supply chain.** The Competition Commission assesses the possible negative impact of the grocery retailers’ buyer power on the grocery supply chain, e.g. (i) the buyer power may damage the supplier profitability and ultimately bring into question the financial viability of the entire grocery supply chain, (ii) suppliers, as a result of the exercise of the buyer power by grocery retailers, receive such low prices and margins that their willingness to invest and innovate may decline

(which would ultimately cause a reduction of quality and of the number of new products).

*[Please note, the Competition Commission expresses concerns over problems which may arise in relation with grocery retailers' buyer power in the near future unless otherwise addressed.]*

I could mention another interesting decision by the German Federal Cartel Office (FCO) or the Hungarian Competition Authority for instance, but it will be too long.

### III. TOWARDS A “EUROPEANISATION” OF ISSUES RELATED TO THE RETAIL SECTOR

Interestingly several Member States are contemplating important changes in their legislation concerning the retail sector so as to promote the achievement of the internal market in that respect.

#### 1. Case study: at National level

- **For instance in France, the “loi de modernisation de l’économie” contains provisions which are specific to the retail sector, such as:**
  - Increase of the threshold beyond which an administrative authorization is required (for opening a retail store) from 300m<sup>2</sup> to 1000m<sup>2</sup>;
  - Introduction of “free negotiability” of prices between suppliers and retailers and withdrawal of the price discrimination prohibition contained in Article L. 442-6-I of the French Commercial Code.
- **In the UK: interestingly, the Competition Commission’s has published a package of proposals for consultation**

I mention this package because the proposals it contains are in line with the Commission’s practice as a competition authority. It comprises:

- A recommendation to the relevant government departments that a **‘competition test’** should be introduced **when local planning authorities are assessing planning applications for new large grocery stores**. The OFT would act as a statutory consultee to the local planning authority to carry out the test.
- A requirement for grocery retailers to **release existing restrictive land covenants**, which have the effect of preventing that land being used for competing stores, in areas of high concentration.
- A requirement on grocery retailers to **exclude exclusivity arrangements** which may constitute a barrier to entry by a competing retailer in areas of high concentration.

- A recommendation to the Department for Business, Enterprise and Regulatory Reform (BERR) that the Land Agreements Exclusion Order be amended so that **agreements which restrict grocery retailing should no longer benefit from exclusion from the Competition Act.**
- The creation of a **new Groceries Supply Code of Practice (GSCOP)** to replace the existing Supermarkets Code of Practice (SCOP), which will be extended to include all grocery retailers with a UK turnover greater than £1 billion. The new Code, whilst including much of the existing SCOP, will **prohibit retrospective changes to agreed terms of supply** and also require retailers to make further **improvements to their dealings with suppliers** through the appointment of an **in-house code compliance officer**, keeping better records of contracts with suppliers and automatic notification to suppliers of contractual terms and their right to complain and seek arbitration of disputes.
- A recommendation to establish an **ombudsman to arbitrate on disputes under the GSCOP**, with the power to gather information following complaints from suppliers and primary producers and proactively investigate breaches of the GSCOP.

## 2. What about the European level?

### 2.1. Is the Commission to launch a sector investigation?

- **MEP's declaration adopted on 18.02.2008**

This written declaration, signed by 439 MEPs (that is more than half of MEPs) is based on very censorious observations, such as :

- Evidence from across the EU that big supermarkets are **abusing their buying power to force down prices paid to suppliers** (based both within the EU and overseas) to unsustainable levels and impose **unfair conditions** upon them,
- **Negative knock-on effects** of such squeezes on suppliers **on both quality of employment and environmental protection,**
- **Loss in diversity of products,** the cultural heritage and retail outlets,

One has specially to pay attention to the conclusion stating that although national legislation has been adopted to limit such abuse, yet large supermarkets increasingly **operate across national boundaries,** making harmonized EU legislation desirable.

The declaration requests the Commission to propose appropriate measures, including regulation, to protect consumers, workers and producers from any abuse of dominant position or negative impacts identified in the course of this investigation.

- Sector inquiry by the European Commission

Let's recall that the Commission may decide to start a sector inquiry when a **market does not seem to be working as well as it should**. This might be evidenced by limited trade between Member States, **lack of new entrants on the market**, the **rigidity of prices**, or **other circumstances** that suggest that competition may be restricted or distorted within the common market. The results of sector inquiries are published in a **report** and interested parties are invited to submit their comments.

In the course of the inquiry, the Commission may request that firms - undertakings or associations of undertakings - concerned **supply information** (for example, price information). This information is used to **assess whether the Commission needs to open specific investigations on possible restrictive agreements and abuse of dominant position (Articles 81 and 82 of the EC Treaty)**.

The Commission has not yet decided to make a sector inquiry in the retail sector. But it has already launched a study on the retail sector, in particular on grocery retail within the EU, in the context of general monitoring of the internal market.

**Examples of specific formal proceedings opened after a sector inquiry:** the Commission initiated formal proceedings against Electrabel and EDF for suspected foreclosure of the Belgian and French electricity markets (26.07.2007), six months after the adoption of its final report concerning the energy sector inquiry (10.01.2007).

## 2.2. What steps can be taken in order to avoid infringing competition law?

Precautionary steps to be taken in order to prevent the Commission or NCA's competition concerns (and possible sanctions, in particular fines – up to 10% of the total turnover) should be determined on a **case-by-case analysis**, given *inter alia* features of the relevant market, the operators concerned and the practices.

More and more frequently, in view of proving their good faith, companies implement compliance programs so as to ensure better compliance with EC antitrust rules.

## IV. CONCLUSION

As a way of conclusion:

1. Let me stress the necessity for retailers to take into account the fact that **consumer protection** is becoming the heart of European policy.

This is not entirely new.

- What is new is that EU Competition law will be the principle tool to enforce consumer protection, especially with regards to price.

- For instance, in the telecommunication sector, the EU Commission forced a reduction of up to 40 % of telephone communications across EU.
  - I don't mean that such a reduction will be imposed in the retail sector but one can expect that the Commission will use Competition law to force reduction of retail prices. In this respect, Community law is much more efficient than National law.
2. I would like to mention another aspect of the current trend of EU economic policy which should make us think about the relationship between the EU institutions and the retail sector. As everyone notes, EU Competition law is applied in an increasingly rigorous manner. No sector is safe from the considerable penalties imposed by the Commission and the Court. The reason is that Competition law is also supposed to be the main instrument of **EU industrial policy**. Jérôme Bédier participated in a meeting with one of the most prominent top officials of DG Comp, Emil Paulis, who clearly stated that "*Competition policy is the pure expression of modern industrial policy*". In the retail sector, this declaration can be translated into the prohibition of abuse of a dominant position in exerting excessive pressures on suppliers of the agricultural industry. This relatively strong message is not only the policy of the EU Commission, but is also increasingly the policy of National Authorities. Since 2004, these National Authorities have formed "The EU Competition Network" dedicated to the effective enforcement of EC Competition Rules.

As you can see, even if President Sarkozy has obtained the deletion in the Lisbon treaty of the word "Competition" as one of the EU values (competition rules being only tools to guarantee these values), this has not stopped competition policy from becoming the hallmark of EU economic governance.

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