



HOUTHOFF BURUMA

Does Competition Law help Producers
against Retailers' Buying Power

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TODAY'S SUBJECT



BUYING POWER

- **Competition Definition: When the buyer has to power to**
 - Lower price below normal prices of other suppliers
 - Exact better conditions compares to normal seller/buyer relationships
- **Issues (also according the EC Green Paper 2013)**
 - One-sided change of contract
 - No written contract
 - De-listing
 - Use private label
 - Payment terms
 - Enforcing retroactive discounts
- **Results in short term**
 - Pressure on profit margins
 - Bankruptcy of suppliers
- **Results in long term**
 - Less innovation
 - Worsening labour conditions
 - Less attention for environment

SUMMARY

- **Attack the retailer?**
 - Merger control
 - Abuse of dominance
 - Abuse of economic dependency
 - Cartel prohibition
- **Strengthen the supplier**
 - De Minimis
 - Single Common Market Organisation
 - Producers Organisation/Union of Producers Organisations
 - Branch Organisation
 - Cooperative
- **Other Legal Instruments?**
 - Supply Chain Initiative
 - Refusal to supply
 - Tort
 - Payment terms
 - Market Practices Directive
 - Unfair Contract Terms B2C
 - Directive on Trade Secrets
 - Common European Sales Law

ATTACK THE RETAILER?



CHINESE WALLS REGARDING NEW PRODUCTS?



ATTACK THE RETAILER

- **Merger control**
 - Remedies downstream
 - But no solution upstream
- **Abuse of dominance**
 - Little use due to absence of dominant position
 - Locked in?
- **Abuse of dependent position**
 - Germany: dominance assumption -> investigation Edeka Anzapfverbot
 - Austria: UTPs + discrimination against A-brands by Spar
- **Cartel prohibition**
 - Information regarding new products necessary for retail function?
 - But not for the Home Brand production
 - Information exchange dampens competition
 - Insist on Chinese Wall re IPR/knowhow

STRENGTHEN THE POSITION OF THE PRODUCER



STRENGTHEN THE POSITION OF THE SUPPLIER

- **De Minimis**
 - If a practice is effective enough to help against retailers it won't often be *de minimis*...
- **Single Common Market Organisation**
 - Producer Organisations/Unions of Producer Organisations
 - Branche Organisations
- **Cooperatives**
 - Oude Luttikhuis (C-399/93), Gøttrup-Klim (C-250/92)
 - Restriction proportionate to goal, but
 - High market share allowed

PRODUCER ORGANISATIONS (PO'S) AND UNIONS OF PO'S (UPO'S)

- **By and on initiative of producers**
- **Obligatory objectives**
 - Ensuring planning production and adjustment to demand
 - Concentration of supply and the placing on the market of the products
 - Optimising production costs and stabilising producer prices
- **Other objectives:** crisis management (withdrawal products)
- **Role PO**
 - Agent
 - marketing products on behalf of members
 - no transfer of ownership products
 - Control by PO over members
- **'Safe harbour' competition law**
- **Dairy sector**

COOPERATION IN THE CHAIN (QUALITY, CERTIFICATION SYSTEMS)



COOPERATION IN THE CHAIN

- **Inter Branch Organisations (BOs)**
 - Representatives of economic activities linked to the production of, trade in, and/or processing of products in one or more sectors
 - Formed on the initiative of all or some of the **organisations** or **associations**
 - **Safe harbour conditions**
 - No partitioning of markets
 - Not affecting the sound operation of the Common Market Organisation
 - No distortion or elimination competition
 - No fixing of prices, or creating discrimination

- **Specific aims**
 - Improving knowledge and the transparency of production and the market
 - Improving coordination of placing the products on the market
 - Drawing up standard forms of contract
 - Exploiting to a fuller extent the potential of the products
 - Providing the information and carrying out the research
 - (...)



- **Codes of Conduct**
 - EU Code 2010
 - Green Paper 2013
 - No binding instruments
 - Communication 2014
 - Appeal to introduce effective enforcement

- Dutch Code
 - Follow EU Codes
 - Pilot since 16 September 2013
- UK Code: SCOP 2006, Code 2010
 - Formal interdictions
 - Obligatory dispute resolution
- Belgium
 - Monitoring
- France
 - Monitor standard agreements
 - Powers Minister of Economic Affairs
- Germany
 - Abuse of relative position of dominance

- **Payment terms**
 - EU Guideline of payment terms implemented since 18 December 2012
 - 30 days if no written agreement
 - 60 days
 - But longer is possible if explicit and not unfair vis-à-vis supplier
- **Refusal to supply**
 - Risky from competition law perspective
 - You need some market power
- **Tort**
 - Doesn't help due to fear factor
- **Framework on market practices Directive 2006/114**
 - misleading advertising
- **Unfair contract terms (Directive 2005/29/EC)**
 - B2C
 - Not often applied to B2B
- **Proposed Directive on Trade Secrets (COM (2013) 813)**
 - To be seen
- **Regulation on Common European Sales Law (2011 COM (2011) 635)**
 - But this will be a voluntary instrument

CONCLUSION – BEST OPTIONS?

- **Attack the Retailer**
 - Figure of position of dependency is accepted
 - Chinese Wall re new products

- **Strengthen the Supplier**
 - POs
 - Cooperatives
 - Quality Schemes/Branche Organisations

THANK YOU

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