Does Competition Law help Producers against Retailers’ Buying Power

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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
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)

Guarantees a **better deal** for Third World Producers

Beter Leven

Dieren bescherming
**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

- 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