

HOUTHOFF BURUMA

Does Competition Law help Producers against Retailers' Buying Power

30 September 2014

TODAY'S SUBJECT



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BUYING POWER

- o 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
- o 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
- o Results in short term
 - Pressure on profit margins
 - Bankruptcy of suppliers
- o Results in long term
 - Less innovation
 - Worsening labour conditions
 - Less attention for environment

SUMMARY

- O Attack the retailer?
 - Merger control
 - Abuse of dominance
 - Abuse of economic dependency
 - Cartel prohibition
- Strengthen the supplier
 - De Minimis
 - Single Common Market Organisation
 - o Producers Organisation/Union of Producers Organisations
 - o Branch Organisation
 - Cooperative
- Other Legal Instruments?
 - Supply Chain Initiative
 - Refusal to supply
 - o 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?



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ATTACK THE RETAILER

Merger control

- Remedies downstream
- o But no solution upstream

Abuse of dominance

- o Little use due to absence of dominant position
- o Locked in?

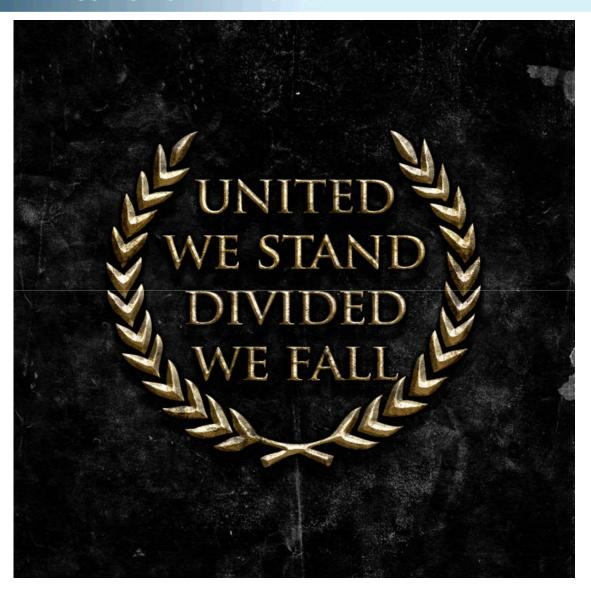
Abuse of dependent position

- o Germany: dominance assumption -> investigation Edeka Anzapfverbot
- Austria: UTPs + discrimination against A-brands by Spar

Cartel prohibition

- o 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

o **De Minimis**

o If a practice is effective enough to help against retailers it won't often be de minimis...

o Sinlge Common Market Organisation

- Producer Organisations/Unions of Producer Organisations
- Branche Organisations

Cooperatives

- Oude Luttikhuis (C-399/93), Gøttrup-Klim (C-250/92)
- o Restriction proportionate to goal, but
- High market share allowed

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

- o 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)
- o Role PO
 - Agent
 - o marketing products on behalf of members
 - o no transfer of ownership products
 - o Control by PO over members
- 'Safe harbour' competition law
- Dairy sector

COOPERATION IN THE CHAIN (QUALITY, CERTIFICATION SYSTEMS)







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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

- o 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
- o (...)

OTHER LEGAL INSTRUMENTS



Together for good trading practices

OTHER LEGAL INSTRUMENTS – 1

- Codes of Conduct
 - o EU Code 2010
 - Green Paper 2013
 - No binding instruments
 - Communication 2014
 - o Appeal to introduce effective enforcement
 - Dutch Code
 - Follow EU Codes
 - o Pilot since 16 September 2013
 - UK Code: SCOP 2006, Code 2010
 - Formal interdictions
 - Obligatory dispute resolution
 - o Belgium
 - Monitoring
 - o France
 - Monitor standard agreements
 - Powers Minister of Economic Affairs
 - Germany
 - Abuse of relative position of dominance

OTHER LEGAL INSTRUMENTS – 2

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

CONCLUSION – BEST OPTIONS?

- Attack the Retailer
 - o Figure of position of dependency is accepted
 - Chinese Wall re new products
- o Strengthen the Supplier
 - o POs
 - Cooperatives
 - Quality Schemes/Branche Organisations

THANK YOU

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