International Report

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1.1 Introduction

This contribution synthesizes the eighteen national reports answering the questionnaire on the grocery retail sector.[1]

At the outset a caveat is necessary. A large proportion of respondents to this survey come from countries that are Member States of the European Union and share the same (European) legal system. At the same time, and even though non-European countries such as the United States, Japan or Australia responded to the questionnaire, some major countries with a long experience in competition law and competition policy are outside the scope of this report.[2] It should thus be clear that, to a certain extent, the observations and conclusions in this report are influenced by the particular set of countries that have responded to the LIDC questionnaire. We are, however, confident that the examination of the 18 countries that have contributed allows us to come to some robust conclusions.

Before starting our analysis with an examination of the structure of the grocery retail sector, five general observations are in order.

First, laws that apply to the grocery retail sector are to a large extent the same laws that apply to the retail sector in general. Those laws are partly laws that apply to all economic sectors (such as competition law), partly laws that are specific to the

[1] The eighteen reports surveyed are the reports from: Australia, Austria, Belgium, Brazil, Bulgaria, Czech Republic, Estonia, Finland, France, Germany, Hungary, Japan, Italy, Netherlands, Romania, Sweden, Switzerland, Ukraine, United Kingdom, United States of America.

[2] The reports are provided by national groups of the LIDC only.

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retail sector (such as the laws establishing the conditions under which a large-scale retail store can be opened) and, more rarely, certain laws or regulations that are specific to the grocery retail sector (such as some consumer protection laws applying to the sale of fresh products). Whenever possible, we have tried to identify where laws are specific to the grocery retail sector or where general principles or laws applicable to the whole retail sector have been applied specifically in the grocery retail sector.

Second, while most countries that provided a report are countries that have a civil or continental system of law, this is not the case for Australia and the United Kingdom. As we shall see, the style of competition law enforcement for the grocery retail sector in those countries is markedly different from what it is in other countries (in particular, they rely more on self-regulation than the other countries in the sample).

Third, a study of competition issues in the grocery retail sector requires consideration of the relationship between retailers and their suppliers, whether they are manufacturers of prepared food or intermediaries trading in agricultural products. As we shall see, the relationship between the intermediaries and the suppliers is also of interest to understand their downward relationship with grocery retailers. Thus, most of the contributions extensively analyze the vertical chain that starts with farmers and ends with the retailers, and we will report on the sometimes complex relationships between the upstream level and the downstream level along the vertical chain to shape competition on the final market for grocery goods.

Fourth, the term "grocery" may be imprecise since, particularly in the modern retail sector, grocery stores have diversified their offerings and sell a wide variety of fresh or transformed products, some of which are food products and others are nonfood products. Most of the contributions focus on the offering of products derived from agriculture, whether transformed or not, in retail groceries. Indeed, it seems that it is in this part of the market that the competition problems are the most complex. This report also focuses on the foodstuff part of the grocery retail sector.

Fifth, the countries that are being investigated have different histories, different levels of economic developments, different cultures and different legal systems. A number of the observations that one can make when comparing the situation of competition and competition law enforcement in the grocery retail markets of these countries are grounded in those differences.

1.1.1 Economic Background

In our sample of countries, the concentration of the grocery retail sector varies widely from one country to the next. One can distinguish three groups of countries.

First are countries where the retail grocery sector is very highly concentrated: this group includes Australia ($CR_2 = 80$ %), the Netherlands ($CR_2 = 55$ %), Austria ($CR_3 = 87$ %), Finland ($CR_2 = 80$ %) and Belgium ($CR_3 = 75$ %). The Australian report suggests that large retailers have buying power over food processors but that their buying power over farmers is less certain because farmers have an alternative

in export markets. Thus, it appears that the idea according to which more concentration usually means less intense competition may not always hold in the grocery retail sector.

A second group of countries exhibit medium to low concentration in the grocery retail sector. In this group, one finds Germany ($CR_4 = 85$ %), Sweden ($CR_4 = 80$ %), Estonia ($CR_3 = 60$ %), France ($CR_6 = 80$ %), the United Kingdom ($CR_8 = 85$ % and $CR_4 = 66$ %) and Italy, where the modern distribution model accounted for about 70–72 % of food product sales in recent years. In other words, the "natural" shift in food product sales from small traditional shops and other market entities to large-scale retail outlets seems to have stopped at the levels noted above. The Swedish report suggests that because food processors in Sweden are fairly concentrated, the buying power of retailers and the selling power of food processors are fairly balanced. Finally, the report concerning the United Kingdom suggests that farmers' unions are able to exert industrial and political pressure on processors and retailers (thus limiting their buying power).

In a third group of countries, concentration of the retail sector appears to be low or very low. This group includes the United States, where the top 20 retailers account for 63.7 % of the market and the top four retailers hold 37 % of the market. This group of countries with low concentration in the grocery retail sector also includes Hungary ($CR_3 = 40$ %), Bulgaria, Romania and Ukraine. In these countries, particularly in the latter three, the development of modern retail is relatively recent since this form of retail appeared only after the countries moved to a market economy in the 1990s and a strong attachment to traditional forms of small-scale retail still seems to exist in at least some of these countries. For example, in Romania, 60 % of Romanians prefer to buy their groceries from a traditional trade unit (corner or neighborhood shop) and in Bulgaria, in 2010, about 60–70 % of all grocery sales were channeled through traditional retail establishments.

It is more difficult to categorize intermediaries and food processors. Not only does the situation vary from one country to another, but also the situation varies from one grocery product to another within the same country. Furthermore, not all reports provide details about the intermediaries or the processors of food products.

If one moves now from processing to agricultural production, the situation can again be divided into three types of situations. In countries such as Bulgaria, Austria, Italy, Romania and Finland, the agricultural sector is extremely fragmented. It is interesting to note that two of these five countries—Austria and Finland—are countries where the level of grocery retail concentration is high. As we saw previously, there is some concentration at the food processing level in Finland and Italy, but this does not seem to be the case in Austria, where grocery retail chains are likely to have unchallenged buying power.

In countries such as the United Kingdom, the Netherlands or Sweden, even though agricultural production is atomistic, farmers sell through associations or cooperatives and thus have some market power. The United Kingdom report describes a situation where farmers are able to exert considerable political and business pressure on the downstream food processors, wholesalers and the retail sector.

Finally, the situation in Germany seems to be in a state of flux with a steady decline of the total number of agricultural production entities and a growing number of large entities in primary production.

The economic assessment of the structure of grocery retail, food processors and agricultural production suggests that different competition problems will be prevalent in different countries. In some countries, buyer power will be confronted with seller power and there will be a balanced confrontation between the two, sometimes in spite of a high level of grocery retail concentration (for example, in Sweden, the United Kingdom and Australia). In other countries (for example, Germany), buyer power will prevail and public policy will be focused on ensuring that this power is not used unfairly or anticompetitively. In a third type of country (such as Bulgaria, Romania and Ukraine), both retailers and suppliers will have an atomistic structure, at least at the general level, and the main issue will be the abuse of dominance of those few retailers having a large market share at the local level.

But in order to better understand the competition law issues in the grocery retail sector, one must have a close look at the legal and regulatory environments of retail grocery.

1.1.2 Legal Background

In many countries, a large number of laws and regulations apply to the retail sector. The goals of those laws are to promote competition or to ensure fairness in exchanges or to regulate certain aspects of the retail trade for sociopolitical reasons. Whereas those goals might seem at first sight to be complementary, they are often contradictory. The situation in the United States, however, is in sharp contrast with that of the other respondents. The United States has both less competition-specific regulation and less overall regulation when compared with many European countries.

1.1.2.1 Competition Law

In most countries, there is no specific competition regulation that applies to the grocery retail sector, which is subject to the general provisions of competition law. For example, in the United States, the grocery sector is covered by the Sherman Antitrust Act, the Federal Trade Commission Act and the Clayton Antitrust Act. The industry is also subject to the Robinson–Patman Act, which was an amendment to the Clayton Act, though federal enforcement under the act is largely dormant and private enforcement is dwindling. There are no sector-specific competition laws or exemptions for the grocery retail market in the United States.

In some countries,[3] national competition law includes not only a prohibition of anticompetitive practices or transactions, which might lead to the elimination,

[3] For example, Austria, Bulgaria, Estonia, Hungary and Ukraine.

prevention, limitation or restriction of competition, but also a ban on unfair competition.

In most other countries, national competition law and the law against unfair trade practices are separate laws that both apply to the grocery retail sector. This is, for example, the case in most Member States of the European Union where national competition laws are usually modeled on EU competition law and apply concurrently with it.

Typically, national competition laws will prohibit horizontal and vertical agreements and concerted practices that have as their object or effect the restriction of competition (such as cartels or exclusive dealing), the abuse of a dominant position or the misuse of market power (such as exclusionary practices whereby a firm with market power or a dominant situation eliminates competition) and anticompetitive mergers.

Several forms of conduct particularly relevant to the grocery sector such as cartels (price fixing, market and customer allocation), primary boycotts, third line forcing or minimum resale price maintenance are in certain countries subject to *per se* prohibitions.

In a few cases, the national competition law includes provisions that are specific to the retail sector. This is, for example, the case in Germany. The German Act against Restraints of Competition[4] explicitly prohibits undertakings with superior market power to abuse their market position by selling goods or services below cost price without an objective justification. However, the prohibition to sell below cost price is widely seen as of very limited scope.

Occasionally, competition laws have been amended to better deal with concerns raised primarily in the grocery sector. Thus, for example, in 2007 Australia introduced into its competition law a specific prohibition against predatory pricing, which applies when a company with substantial market share supplies, or offers to supply, goods or services for a sustained period at a below-cost price for a prohibited purpose. The adoption of this provision was driven largely by concerns about low-cost pricing in the grocery market destroying small business.

In some countries, even though there are no provisions specific to the retail sector in the competition law, the government is considering the introduction of such a provision. For example, in Finland, a recently adopted section of the Competition Act stipulates that an undertaking, whose market share is 30 % or more of the daily consumer goods retail market, is considered to hold a dominant market position. When calculating the market share of the grocery retailer, the total retail operations of all the undertakings belonging to a certain retailer group would be taken into account.

1.1.2.2 Exemptions from Competition Law Prohibitions

Different types of exemptions from competition laws can be found for the retail sector or some parts of the grocery business. First, in a number of countries

[4] Section 20 (4) of the German Act against Restraints of Competition.

(in particular, European countries and Australia), there is an exemption for anticompetitive practices—for example, anticompetitive agreements—that contribute to economic progress or have public benefits. Such exemptions are sparingly given, however. Second, in other countries where there are no formal exemption, groupings of small suppliers will get an exemption from competition law for otherwise prohibited practice on public interest grounds. Third, some countries (again, certain European countries) have a *de minimis* exemption either resulting from EU competition law or unrelated, in which case they only apply to domestic practices that have no effect on interstate trade. Fourth, a number of countries exempt, in part or in whole, agricultural producers' groupings from competition law (for example, cooperatives in Japan). Fifth, a smaller number of countries have (or had) block exemptions for voluntary chains of small retailers.

Exemptions from Competition Law for Agricultural Groupings

In several countries, specific anticompetitive practices may be exempted on the basis of their contribution to economic progress or on public interest grounds.[5]

Aside from the individual exemptions previously mentioned, farmers' groupings or associations are also frequently exempted from competition law either because the *de minimis* rules apply to them or because they benefit from a specific group exemption if they meet certain criteria.[6]

In France, there is no formal exemption from competition law for the agricultural sector. However, the French Competition Authority (hereafter "FCA") considers that groupings of producers of agricultural products can be exempted from competition rules because of their contribution to economic progress for the commercialization of products, provided that their practices remain proportionate to the objective. Furthermore, the French Rural Code[7] exempts from competition law agreements concluded within officially recognized interprofessional organizations aimed at (1) adapting supply to demand through a forecast of demand and a coordination or planning of production, (2) planning and restricting production to improve the quality of products, (3) limiting production capacity, (4) temporary restriction of the entry of new firms based on objective criteria and implemented in a nondiscriminatory manner or (5) fixing sales price by producers or the price at which they will buy back their production. No party to such an agreement should have a dominant position on the relevant product market, and those agreements have to be notified, after their conclusion and before they are enforced, to the Minister of Agriculture, to the Minister in charge of the Economy and to the FCA. In the dairy sector, the French Rural Code[8] allows interprofessional organizations to develop and issue information on product prices, without these practices being subject to the prohibition of anticompetitive practices.

[5] E.g., United States, Australia, or France.

[6] See, e.g., the reports of Austria, the Netherlands, Hungary, Finland, Romania and Germany.

[7] See Article L 632-2 II of the French Rural Code.

[8] See Article L 632-14 of the French Rural Code.

Exemptions from Competition Law for Groupings of Small Retailers

Just as farmers' groupings are exempted from competition law to allow them to withstand the pressure of large-scale retailers, small retailers in voluntary chains are also exempted from competition law in some countries to allow them to better compete with large-scale retailers.[9]

1.1.2.3 Laws Against Unfair Trade Practices

Unfairness Vis-à-Vis Other Firms

In most countries, the laws prohibiting unfair trade practices also apply to the retail sector and the grocery retail subsector. The content of laws against unfair trade practices varies from one country to the next but may prohibit a large number of practices. Some trade practices of large-scale retailers may be prohibited because they are considered to be unfair to suppliers (for example, suppliers of agricultural products); others may be prohibited because they are seen as unfair to competitors (for example, small grocery stores); finally, some practices are prohibited because they are considered to be unfair to final consumers.

When applied to the grocery retail sector, laws against unfair trade practices are often used to curb the negotiating power of large-scale retailers.

Some of those prohibitions tend to prevent retailers from abusing their buyer power by requesting or gaining "unjust economic benefits," "unjust price reduction," "unjust consignment sales contract" or "unjust assignment of work to employees of suppliers,"[10] "contributions from the suppliers related to the retailer's price reductions,"[11] "payment of fees or tariffs related to the expansion of the retailer's network, the development of its sale space or the operations and events for promoting the retailer's activity and brand image" or "payment for services that are not directly linked to the sale operation",[12] "retroactive benefit of rebates, discounts or commercial cooperation agreements".[13] In France, the submission of a partner to obviously abusive payment conditions[14] or to obligations creating a significant imbalance is also prohibited.[15] The retailers are prohibited from requesting payment for a supplier to be referenced before any order is made.[16]

The general prohibition against unjustified or abusive requests by retailers can lead to the prohibition of particular forms of business behavior of the retailers. The prohibited practices vary from country to country, reflecting the specificities of the tensions between retailers and their suppliers in each country.

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[9] See, e.g., Sweden, the Netherlands and Ukraine.

[10] See Japan.

[11] See Hungary.

[12] See Romania.

[13] See Article L 442-6, II, a) of the French Commercial Code.

[14] Article L 442-6, I, 7° of the French Commercial Code.

[15] Article L 442-6, I, 2° of the French Commercial Code.

[16] See, e.g., France.

Some countries restrict the ability of retailers to delay payment of their suppliers in general or for specific products.[17]

In spite of the wide scope of laws against unfair trade practices, in a number of countries there is a debate as to whether general laws prohibiting unfair trade practices are sufficient to prevent the negotiating abuses of large retail chains vis-à-vis their suppliers. Although competition authorities have in several countries concluded that a specific legislation or regulation to curb the buying power excesses of large retail chains was unnecessary, a number of governments under pressure due to a large number of complaints by farmers or food processors have nevertheless adopted such laws or regulations.[18]

It is interesting to note that if slotting fees are considered to be unfair in some countries (such as in Italy), they are not necessarily always considered to be anticompetitive. In 2001 and 2003, the US Federal Trade Commission (the "FTC") published a staff report on slotting fees, also known as "pay-to-stay" fees paid by manufacturers. The reports resulted in theories for how such arrangements, where manufacturers pay retailers for premium shelf space, would be anticompetitive. However, the 2003 report was not able to find data and economic models that conclusively determined antitrust harm or injury resulting from slotting fees.

Unfairness Vis-à-Vis Consumers

In Australia, unfair terms in consumer contracts are also prohibited, and these prohibitions apply to the grocery sector. In Estonia, the Consumer Protection Act imposes certain information and transparency requirements on retailers and prohibits a range of unfair commercial practices. In the United Kingdom, the Consumer Protection from Unfair Trading Regulations 2008 sets out a broad prohibition on unfair commercial practices, which include both misleading actions and misleading omissions.

Enforcement of Unfair Trading Laws

While unfair trading laws are usually enforced through the courts rather than by competition authorities, there are some exceptions to this principle. For example, in Romania, the law on unfair competition[19] provides a general prohibition of unfair competition and applies to the grocery sector. This law was traditionally enforced by domestic courts, but the Romanian Competition Council took over the enforcement of this law and initiated a legislative process for the review of the law and the enactment of secondary legislation.

[17] See Hungary, Romania and France.

[18] See Bulgaria and Italy.

[19] Law no. 11/1991 on the fight against unfair competition.

1.1.2.4 Other Laws and Regulations Applying to the Retail and Grocery Sector

Besides competition law and laws against unfair trading practices, a number of other laws and regulations on retail distribution (such as zoning laws, laws on the opening hours of stores or price regulations, unit pricing laws) apply to the grocery retail sector or are sometimes specific to the grocery retail sector. A number of those laws and regulation have the object of protecting small retailers and the effect of restricting the strategic freedom of large-scale retailers, whether by making it difficult for them to open or enlarge their stores or by limiting the number of hours during which they can stay open.[20] In rare cases, some of those laws are designed to protect or promote competition in the grocery retail sector.

As a contrast to the situation in previously mentioned countries, in the United States, nonrestrictive local zoning and relatively little land use restrictions have allowed niche providers like green grocers, gourmet food stores and organic markets to enter urban and high-income areas in proliferation. At the same time, Wal-Mart has grown quickly in rural areas to openly compete with local and regional chains that previously faced little competition. Equally, while Sunday shopping laws that have a secular purpose are constitutional in the US, between 1966 and today many states and municipalities have repealed those laws or had them overturned for a variety of issues related to the Establishment Clause of the first Amendment to the US Constitution,[21] which prohibits any government interference with or support for any religion or creed, job creation, consumer preference, retail sales lobbying. Further, in 1964, the Supreme Court sustained, against an antitrust claim, a collective bargaining agreement that prevented a supermarket chain from selling meat on Sundays. Such clauses no longer exist in grocery market where unionized stores face vigorous competition from nonunionized ones.

1.1.2.5 Pricing Regulations

Pricing regulations in the grocery sector have a wide range of objectives. Some aim at eliminating predatory pricing[22] by large retailers[23]; others aim at allowing suppliers to impose a maximum resale price for grocery products or at controlling the resale price of goods sold through retailers.[24] Occasionally, such provisions

[20] See, e.g., in Japan, the Act on the Measures by Large-Scale Retail Stores for Preservation of Living Environment (Act No. 91 of June 3, 1998); in Belgium, the Act on the Authorization of trade Establishment of 2004; in Hungary, the Act No. LXXVIII of 1997 on the Formation and Protection of Built Environment; in Finland, the Land Use and Building Act 132/1999; in the Netherlands, the Opening Hours Act (Winkeltijdenwet) or the Commercial Code in France.

[21] See the U.S. Bill of Rights.

[22] Or reselling at a loss.

[23] See, e.g., Government Ordinance no. 99/2000 in Romania, the French Commercial Code or the Presidential Decree no. 218/2001 in Italy.

[24] See the Price Regulation Act (SFS 1989:978) in Sweden or Article 3 of the Law on State Support of the Agriculture in Ukraine.

impose a minimum resale price for products considered to be dangerous to the health of consumers.[25]

The United States has largely moved away from price controls and other efforts to ensure farm gate prices and has developed less anticompetitive means of supporting a critical sector of the economy—such as producer subsidies—rather than involving itself in the question of pricing or relative bargaining power throughout the supply chain. However, notable exceptions do exist. Domestic producers of some agricultural products—such as sugar—have been able by political means to obtain price controls or other barriers to lower-cost production from abroad, and the federal Robinson–Patman Act, dealing with price discrimination, was vigorously enforced by the Federal Trade Commission until the 1960s then was increasingly criticized by the DOJ, economists and others in the 1970s. Since the 1980s, the Robinson–Patman Act, while still on the books, has ceased to be enforced and therefore ceases to be a significant restraint on efficient markets in grocery products.

1.1.2.6 Laws Designed to Empower Consumers to Make Competition Work Better Among Retailers

Australia has adopted unit pricing laws specifically targeting supermarkets to promote competition in the grocery sector by ensuring that consumers are able to make informed choices. The unit pricing laws take the form of a mandatory industry code that applies to grocery retailers. This Code applies to grocery retailers with more than 1,000 m^2 of floor space and that sell a minimum range of food-based groceries. The Code also applies to online grocers. Once a retailer falls under the Code, all grocery items must have a unit price displayed unless the item is exempt (*e.g.*, bundled items). The unit price must be prominent, close to the selling price, legible and unambiguous and must be displayed in dollars and cents.

1.1.2.7 Laws Deregulating the Retail Sector

In all of the contributions except one, there is very little said about attempts to deregulate, partially or totally, the retail sector in general and the grocery sector in particular. Quite the contrary, as we just saw, there has been and there is still a tendency on the part of governments to constantly increase the regulatory burden in the grocery sector in an attempt to better monitor the tense relationships between large-scale retailers and other operators. One exception worth mentioning is Italy, where there has been a real effort at deregulation of the retail sector since the beginning of the 2000s.

The "Bersani Decree"[26] reformed the commercial sector and was a significant step towards the deregulation of the market and the simplification of bureaucratic and administrative procedures. The law establishes general principles and puts Regions in charge of planning commercial development and establishing urban

[25] See, e.g., the Alcohol Minimum Pricing Act 2012 of Scotland.

[26] Legislative Decree no. 114 of 31 March 1998.

planning measures. This Decree makes a distinction between "food" and "non-food" distribution, and this simple distinction replaces 14 goods categories previously used. It also distinguishes retail outlets in the following categories: neighborhood outlets, medium-sized sales structures, large sales structures and shopping centers. The law[27] implementing the EU directive on internal market services[28] provides that the access to and exercise of services may not be subject to unjustified or discriminatory limitations. A subsequent regulation[29] guarantees the principles of free enterprise and competition. Under this Decree, the provisions governing access to and exercise of economic activity must not contain restrictions unless in the public interest and must not discriminate, directly or indirectly, on the basis of the nationality and registered office of the enterprise.

Another piece of legislation[30] gave businesses the option of not complying with set opening and closing times, the obligation to close on Sundays and holidays and to close for a half-day during the week, on an experimental basis, and only for those businesses located in municipalities that are on regional tourist location lists or art cities. Subsequently, the "Save Italy Decree"[31] introduced further deregulations regarding both the management and opening of new sales outlets with the aim of relaunching the Italian economy. It extended the deregulation provisions to the opening days and times referred to under Law Decree no. 98/2011 to all commercial businesses and not just those located in tourist locations or cities of art. Starting from 1 January 2012, commercial enterprises[32] and businesses that provide food and drink in Italy can carry out their activities without any restrictions on opening times and without the obligation to close on Sundays or holidays.

1.1.3 Market Studies

As is clear from the developments above, the relationship between large-scale retailers, small-scale retailers and small-scale suppliers is a highly sensitive issue, and in most countries there is an elaborate, and sometimes quite complex, array of regulations to monitor the relationships between the various players.

The issues raised by the functioning of the grocery retail market are even more sensitive politically since, above and beyond the issues previously mentioned, the objective pursued by many governments is to keep the price of food as low as

[27] Legislative Decree no. 59 of 26 March 2010.

[28] Directive 2006/123 of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006, L 376, p. 36.

[29] Law Decree no. 138 of 13 August 2011, converted into Law no. 148 of 14 September 2011.

[30] Law Decree no. 98 of 6 July 2011, converted with amendments by Law no. 111 of 15 July 2011.

[31] Law Decree no. 20 of 16 December 2011 was enacted, converted with amendments by Law no. 214 of 22 December 2011.

[32] Pursuant to Legislative Decree 114/1998.

possible for consumers and the price of agricultural products sufficiently high for farmers to enable them to make a living.

The press is quick to suspect that lack of competition among intermediaries—such as wholesalers—or retailers is the source of the perceived high prices of food and that abuses of buying power is the source of the low level of prices paid to farmers for agricultural products.

With the exception of Estonia, where the competition authority has not done any market study on the grocery sector, the competition authorities of all the other countries that participated in the survey have undertaken one or several sector inquiries in the recent years. The scope and focus of those inquiries vary.

Some of these studies are general studies of the grocery retail sector either at the national level or in a given geographical area: the United States, Sweden (2002, 2004 and 2005), Nordic countries (2009 and 2011), Australia (1999), Austria (2007), the United Kingdom (2008), Romania (2009), food retail sector in France (2012) and Italy (2007, and a study started in 2010 and ended in 2013).

A second set of inquiries or market studies is focused on retail and/or supermarket prices and whether those prices are competitive: Australia (2008), Belgium (2012), Netherlands (2009) and Finland (2010).

A third set of market studies focused on the exploration of buyer power by retail chains and its implications for the upstream suppliers in general and the farmers: Netherlands (2004), Finland (2012), Japan (2011 and 2012) and Hungary (2007 and 2009).

A fourth set of market studies analyzed specific product markets of basic staples such as fish (Netherlands 2011), wheat, bread, dairy products, cooking oil (Bulgaria), milk (Germany 2012), eggs (Ukraine 2012), sugar, sunflower (Ukraine 2011) or dry pasta (Italy 2011).

Finally, a last set of market study analyzed specific issues related to the distribution of foodstuff such as the affiliation contracts of independent stores to retail chains and the conditions of purchasing commercial real estate in the food retail sector (France 2010) or category management agreements in the retail sector (France 2010).

As this list suggests, the grocery retail sector is probably one of the most frequently studied sectors.

1.1.3.1 Reasons for Conducting Market Studies

The reasons for undertaking those market studies are varied.

High Prices

A first set of market studies was undertaken to investigate high prices. In a substantial number of countries,[33] the concern that food prices are high or higher than in neighboring countries or rising rapidly has been one of the important reasons for which national competition authorities have undertaken a market

[33] Sweden, Belgium, Bulgaria, United Kingdom, Finland and Ukraine.

investigation of the grocery market. One can suspect that in some cases, public authorities or the media put pressure on the Competition Authority to do something about the high price of foodstuffs for consumers. If they lacked evidence of clear-cut anticompetitive practices to be investigated or sanctioned, the Competition Authority could respond to this pressure by launching a general investigation of price formation in the sector. The publication of reports following these market investigations could help the Competition Authority explain why it did not have any reason to use its sanctioning powers and simultaneously suggest to public authorities measures that could alleviate the perceived pricing problem.

For example, grocery market investigations were launched because of concerns that food prices were higher in Sweden in comparison to the EU average, because of concern in Belgium that grocery prices were higher and increasing more rapidly than in neighboring countries, because of concerns that there were sharp increases in retail prices of the most important staple foods (such as bread, milk, and cooking oil) in Bulgaria, because there were concern in the United Kingdom in the 1990s that prices and profits were high in the grocery sector as well as concerns that prices were higher there than in continental Europe, because of concerns about the difference in food product price trends in Finland and in other European countries, because there were concerns in some regions of France about the increase in price levels, because there were concerns about the price differential between different types of stores in Ukraine.

In Italy, a survey on agro-food distribution was carried out partly because of the widespread perception that fruit and vegetable prices increased with the changeover from the Italian lira to euro on January 2002. Another study on the "Price transmission mechanisms along the agro-food chain: an analysis of dry pasta supply chain" was carried out as part of a project by the Authority to monitor food product prices, with specific reference to the ways in which raw material fluctuations were transferred downstream by the operators at the various stages of the production and distribution chain.

High Concentration Levels

In some countries, the concerns that led to the launching of a market investigation were the high concentration level in the grocery retail sector (*e.g.*, Sweden) or the concentrated nature of the sector and the relatively homogenous nature of the products that created the risk of collusion (*e.g.*, Netherlands) or the fact that the emergence of large-scale retail chains led to a higher concentration of the food retail sector (*e.g.*, Hungary) or the perceived high level of market concentration at the retail level (*e.g.*, Austria or France).

Allegation of Abuse of Buyer Power

In a third set of cases, market investigations were launched because of allegations of abuse of buyer power by supermarkets (*e.g.*, Netherlands), because of concerns about the clauses of supplier contracts—applied by the retailers (*e.g.*, Hungary), because of complaints about buyer power and substantial pressure put on suppliers by large retailers (*e.g.*, Austria and Finland), because of persistent tensions between

the retailers and suppliers (*e.g.*, Romania) or because of allegations of unfair trade practices by large-scale retailers to the detriment of suppliers (*e.g.*, Japan).

Low Purchase Prices, Anticompetitive Practices or Importance of the Sector for Consumers

In a fourth set of cases, market investigations were launched because of complaints about the low price paid by retail chains to producers of sour cherries, melons, apples or milk (*e.g.*, Hungary and Germany).

In a fifth set of cases, market investigations were launched because there was a suspicion of possible anticompetitive practices (*e.g.*, Germany and France).

In a last set of cases, market investigations in the food retail sector seem to have been launched because of the importance of the sector for consumers (*e.g.*, Netherlands and Ukraine).

1.1.3.2 Outcome of Market Studies

Turning now to the results of these market investigations of the grocery retail sector, three main observations can be made.

First, in most countries, competition authorities did not find that there was a major competition problem in the grocery retail sector even when concentration was high or increasing. Thus, most competition authorities responded to the concern about the high or rising prices of grocery retail products by saying that other factors besides the lack of competition were responsible for the high level of prices.

In contrast to previously mentioned studies, the French Competition Authority found that a lack of competition was an important cause of high prices in French overseas "departments" and made different proposals in order to revitalize competition on such local markets. First, it initiated investigations in order to sanction some of the anticompetitive practices that had been identified in the course of the market investigation (such as imposed sale prices, horizontal anticompetitive practices, or clientele exclusivity agreements and restrictions on parallel trade). Second, it proposed legislative modifications designed to eliminate unnecessary regulatory entry barriers and to improve consumer information. Third, it suggested that in each overseas territory, local and regional authorities and state authorities should set up study missions with the objective of defining the conditions under which procurement and storage centers could be created and operated. But the French Competition Authority took a strong stand against the temptation to reinstate price controls in the overseas territories in response to discontent about the high level of prices.

One should also mention that the Ukrainian market investigation resulted in a finding that prices were unjustifiably high for some grocery products (such as sugar or sunflower), and the competition authority took action on prices and to improve the retail market of some products and initiated proceedings against economic operators.

Second, for the most part, competition authorities recognized that there was an imbalance in the negotiating powers of retailers and their suppliers, particularly when suppliers were agricultural producers. But, in most cases, the competition

authorities did not recommend the imposition of behavioral constraints on the negotiating practices of retailers. The dominant feeling expressed by competition authorities was that buying power was only occasionally a competition problem and that, when that occurred, competition law instruments were adequate to deal with the problem.

The Japanese competition authority was clearly more concerned about what it calls the abuses of superior bargaining power of large-scale retailers, and it requested that trade associations of wholesalers and larger retailers make their umbrella organizations thoroughly understand the contents of the "Guidelines Concerning Abuses of Superior Bargaining Position under the Antimonopoly Act" published by the JFTC. It also indicated that it would act against illegal abuses of superior bargaining position.

Third, several business practices by large-scale retailers were found to be problematic for competition.[34]

1.1.4 Codes of Conduct

In two of the countries surveyed, the United Kingdom and Australia, market investigations found that competition was working well in the grocery retail markets but that there were nevertheless problems between retailers and their suppliers. Neither recommended the adoption of new legislation to solve these problems—among other reasons because legislation could have unintended negative consequences—but suggested the adoption of codes of conduct. The experience of these two countries shows that such codes might be more appropriate ways to solve the problems raised by buyer power than legislation but that to be effective the codes need to be legally enforceable and to include a dispute resolution mechanism.

In the United Kingdom, in a report published in 2000, the Monopolies and Mergers Commission identified a number of competition concerns, falling into two broad categories: (1) concerns about grocery retailers' pricing strategies, in particular below-cost pricing and "price flexing," whereby higher prices were charged in some stores than others, and (2) concerns about grocery retailers' conduct towards their suppliers. It decided not to recommend any action in relation to the pricing concerns, however, because it considered that the potential remedies, such as a prohibition on below-cost selling or on price variations across stores, would either have too many unintended consequences—such as prohibiting desirable price cutting or differential pricing that reflects regional cost differences—or be too difficult to implement. In relation to concerns about supplier practices, the MMC recommended the adoption of a Supermarkets Code of Practice (the "SCOP") for all grocery retailers with a national market share in excess of 8 %.

[34] See, *e.g.*, in Finland, the Netherlands, Austria, the United Kingdom and France.

Such a code was drawn up and adopted by the four largest grocery retailers at the time.

On August 2005, the OFT (UK) concluded that the SCOP and competition in general were both working well. That decision, however, was challenged by the Association of Convenience Stores (the "ACS"), and in May 2006, its challenge led to a second reference of the grocery retail sector to the Competition Commission. Although the Competition Commission investigated a number of the concerns raised by the ACS, in each case the Competition Commission concluded that there was no restriction of competition. However, the Competition Commission recognized that the large retailers had buyer power and that some exercise of this buyer power could be problematic. In particular, the Competition Commission considered that the use of buyer power to "transfer excessive risks or unexpected costs to their suppliers through practices involving retrospective adjustments to supply agreements or giving rise to moral hazard on the part of the grocery retailer" "is likely to lessen suppliers' incentives to invest in new capacity, products and production processes ... [and] will be detrimental to the interests of consumers." Particular examples of retrospective conduct that the Competition Commission identified included imposing price changes on suppliers after goods had been ordered or delivered or requiring them to contribute to the costs of promotions that had not been agreed in advance. Examples of excessive risk transfer giving rise to moral hazard included the practice of making suppliers liable for losses arising from goods being lost or stolen in store.

One of the remedies imposed by the Competition Commission in this second investigation was the establishment of the Groceries Supply Code of Practice ("GSCOP"), based on the existing SCOP, but amended to include a general requirement of fair dealing and specific prohibitions of the retrospective and excessive risk transferring forms of conduct considered above, together with a requirement that retailers should enter into binding arbitration to resolve any disputes arising under the GSCOP. Parliament then decided to legislate for a new role of Groceries Code Adjudicator to act as an enforcer for GSCOP.

In Australia, since December 2007, industry participants have had the option to follow a voluntary code of conduct, the Produce and Grocery Industry Code of Conduct, which was introduced in 2007 as part of the Australian Government's response to the Parliamentary report, Report of the Joint Select Committee on the Retailing Sector: Fair Market or Market Failure. This Code sets as its objectives "fair and equitable trading practices among industry participants" and "fair play and open communication between industry participants." Nevertheless, the Code failed to fulfill these objectives because of a lack of enforcement and "contractual obligation," which are key elements of a voluntary code of conduct. Furthermore, the provisions of the Code did not ensure well-balanced and fair negotiation of contracts and their subsequent application.

This code of conduct will be replaced by a new code of conduct. Although the government supports the adoption of a voluntary code of conduct, other parties involved in the negotiation prefer a mandatory code. The new code will be proposed by the competition authority (the ACCC) and a supermarket and grocery industry

working group, including the major supermarket chains. It will set rules for conduct, such as unilateral changes of concluded supply agreements, payments and the determination of prices. This code will, for the first time, regulate delisting of products from supermarket shelves and will set arrangements for effective and accessible, low-cost dispute resolution. The new code of conduct may follow the UK trend of a mandatory code of conduct and could include a supermarket ombudsman.

The ACCC is in favor of a legally enforceable code of conduct as it recognizes that the existing code has failed to fulfill its objectives. In particular, it failed to ensure the enforcement of contracts and effective dispute resolution. Furthermore, the ACCC's inclination towards the enforceable code of conduct is based on its investigation of the industry, finding that the major supermarket chains do not always honor their contracts with suppliers. Often they demand additional payments and one-way penalties, which are not part of the original contract, as well as discriminating and failing to pay agreed prices. The suppliers comply with such practices, refusing to officially complain to the ACCC, for fear of the consequences on their supply to the supermarket chains.

If the code is legally enforceable, the ACCC will have the power to issue public notices, apply to the court to make orders to redress loss or damage suffered by other parties of a contract or arrangement in question and investigate its application and enforcement.

First, under s 51, the ACCC can advise the public by issuing a written notice if conduct by a corporation or a person contravenes the code of conduct. Second, under s 51 ADB, the ACCC may apply on behalf of a class of persons who suffered or could suffer loss or damage caused by a person contravening the code of conduct for orders to the court with jurisdiction in this matter. The court can make orders that will redress fully or partially the damage or loss suffered or prevent or reduce the loss or damages suffered. In particular, the court can make orders declaring the contract or arrangement in question (or its part) void or varying such a contract or arrangement, or it can enforce any of the provisions of the contract or arrangement in question. It can order the respondent to refund money or return property or provide parts, repair goods or supply specified services. Third, the ACCC has also investigation power under Division 5 of the CCA, meaning it can give written notice to a corporation asking for information or for a specific document.

Although the enforcement power of the ACCC can be assumed with certainty for the new code of conduct because it will be established under Part IV B of the CCA, the ACCC and/or other bodies could also be provided with additional powers under the code of conduct. For instance, it can be expected that the new code of conduct will include the institution of an ombudsman.

1.2 Competition Law Enforcement

As mentioned previously, some of the market investigations undertaken by competition authorities were based on suspicions of horizontal or vertical anticompetitive practices. Competition authorities have not limited themselves to market investigations and have, in a number of cases, used their enforcement powers against anticompetitive practices.

1.2.1 Competition Law Enforcement Against Anticompetitive Horizontal and Vertical Agreements

Several observations derived from national reports on horizontal and vertical anticompetitive practices and abuses of dominance in the grocery retail sector can be made.

First, the market for groceries can be affected by horizontal collusion either at the level of suppliers or at the level of retailers. However, the cases of collusion among suppliers of grocery products are much more frequent than the cases of collusion among retailers (even if collusion among retailers is not unknown).

1.2.1.1 Collusion Among Suppliers of Grocery Products

A large number of cases of supplier cartels in the grocery sector have been reported. Most of these cartels concern producers of agricultural products. But some of the collusion cases concern a combination of horizontal and vertical collusion between transformers or wholesalers of food products and retail distributors (of the "hub and spoke" variety). As farmers push for higher farm gate prices—sometimes through illegal collusion, sometimes through more violent expression of discontent—and put pressure on the downstream levels, there is a tendency for firms operating at the intermediate level, such as transformers or wholesalers, to push retailers to lower the intensity of competition among them through price monitoring so as to allow both the intermediaries and the retailers to absorb price increases called for by their supplies. For example, there have been cases in France of millers supporting, or even organizing, collusion among bakers so as to be able to increase the price of flour in response to demands by farmers for a higher price for wheat.

A number of country reports mention the existence of standard horizontal cartels among suppliers of foodstuffs that have the object or the effect of either increasing price or excluding competitors, *e.g.*, the United States, Austria (organic corn), the Netherlands (shrimp, silver skin onions, first-year onions, pork slaughterhouses, greenhouse grown vegetables), Hungary (bakery products, flour mill companies, eggs, Hungarian watermelons), Italy (Grana Padano cheese) or France (endives, flour, pork slaughterhouses).

If we now move to more complex hub and spoke agreements, several investigations of such agreements have been initiated in the United Kingdom, but the competition authority has not always been successful.

1.2.1.2 Collusion Among Grocery Retailers

As we saw in the previous section, in the hub and spoke type of collusion retailers and suppliers through a complex combination of vertical agreement and horizontal practices, try to reduce the intensity of price competition at the retail level. However, very few cases of pure horizontal collusion among retailers were reported.

On the contrary, in some countries such as the Netherlands, the competition authority considers that there is very active price competition among large-scale retailers and that consumers benefit from this active competition. The report concerning the United States similarly states that for at least 30 years, cartel enforcement in the domestic food sector has no longer been necessary as there do not seem to have been any prosecutions against groceries for cartel activity, since 1972, when the US DOJ prosecuted a group of small, independent grocers that organized to compete against larger chains.

One exception is Finland, where certain grocery retail operators belonging to the same retail group were sanctioned for prohibited horizontal price fixing. In France, the Paris Court of Appeals (CA Paris) has in two different instances sanctioned franchisors for anticompetitive horizontal clauses in franchise agreements that limited or made it impossible for a former franchisee of a retail chain to become a franchisee of a competing chain at the end of its first contract. In the US, in 1972, the Supreme Court struck down as *per se* illegal under Section 1 of the Sherman Act a territorial restriction in a joint venture agreement among small to medium-size supermarkets. The stores had created a national private label brand called "Topco" for use on standard grocery products, and each joint venture member was given an exclusive license to sell Topco-branded products in a defined service territory. At the time, decisions such as this one were important rules and occupied a significant amount of time and attention among grocery and other retailers and their counsel, as well as enforcement agencies. Today, they no longer matter in practical terms, which illustrates how United States antitrust law can evolve without old statutes being repealed or old court decisions being explicitly overruled by courts or repealed by Congress. In Bulgaria, a cartel among food suppliers seems to have resulted from a government initiative. Finally, in Ukraine, there were investigations on a number of cases in which increases in the price of food products within a retail chain or across retail chains were considered to be unjustified and potential violations of the competition law (*e.g.*, milk products, sour cream, butter and hard cheese, noodles, sunflower oil, cereals, meat and fish, garlic, poultry meat, lemon and onions).

1.2.1.3 Cooperation Within Franchise Networks

The horizontal relationship among members of a franchise network of agreements is sometimes examined to assess their compatibility with competition law provisions that prohibit horizontal restrictions to competition. In Estonia, the competition authority considered that cooperation among the members of a cooperative was not illegal because it allowed them to compete with major retail chains and therefore fostered competition on the retail grocery market. The competition

authority considered the cooperative to be a single undertaking for the purposes of applying competition law but added that even if the members of the cooperative had been considered as separate undertakings, their cooperation practices would have been exempted under the national equivalent of Article 101(3) TFEU.

In Finland, prior to the abolishment of the possibility to apply for individual exemption in 2004, the competition authority granted an individual exemption to the S Group, concerning horizontal cooperation regarding pricing, procurement and marketing of daily consumer goods. The conditions imposed by the competition authority for the benefit of the exemption were that each grocery retailer within the group had to remain free to lower its prices from the agreed prices and had to advertise independently; that the commonly agreed prices concerning foodstuffs could only be in force for 3-month periods except for industrial foodstuffs, for which prices could be in force for 4 months; that the central organization could define at maximum 60 % of the individual retailers' product mix calculated on the basis of their sales value; and that the individual retailers had to remain free to procure products from sources other than the central purchasing organization.

Another network, the K Group, also benefited from an individual exemption from the resale price maintenance ban. The exemption concerned the imposition of maximum sales prices for 35 % of the products belonging to the mix of products that each K Group retailer had to stock, as well as the maximum pricing of the group's private label products.

The Finnish competition authority has also granted exemption decisions concerning the procurement cooperation between the procurement organizations of certain Finnish grocery retail groups.

1.2.1.4 Anticompetitive Horizontal Agreements Among Grocery Retailers at the Local Level

It is possible that some horizontal price fixing among retailers happens at the local level rather than at the national level since consumers are typically unable to move easily from one region to another and since it seems that retail chains adjust their prices to local conditions.

A number of countries are not well equipped to deal with such local horizontal anticompetitive practices either because they have *de minimis* rules that prevent them from intervening if the turnover of the firms investigated is below a threshold level or because the *de minimis* exemption is expressed in terms of a percentage of the national market. In addition, even when *de minimis* rules do not apply, competition authorities show a reluctance to pursue purely local practices because they are concerned with their own efficiency and prefer to focus on cases that they see as bringing the best impact/cost ratio. In such cases, competition enforcement is limited to civil actions.

For example, the Swedish report states that the companies with a turnover of less than SEK 30 million in the previous fiscal year can jointly hold a maximum market share of 15 % without being subject to the application of rules against anticompetitive agreements, but this rule does not apply to hard-core cartel violations. As in Sweden, in Finland, competition restrictions among competitors are considered to

be of minor importance and are exempted from the prohibitions of the competition law if the market share of participants does not exceed 10 % on the relevant market; for vertical restrictions, a market share threshold of 15 % applies. However, hard-core competition restrictions such as price-fixing cartels, market sharing, resale price maintenance or granting of absolute territorial protection do not fall under the *de minimis* rule.

In the United States, the US DOJ and FTC rarely are involved in local antitrust enforcement outside of market remedies for larger mergers that affect small markets. Policing anticompetitive practices can happen through the State Attorneys General, through state or applied federal law or through private cases, though the latter are rare. Enforcement by the State Attorneys General varies greatly across the states.

As a contrast, in the Netherlands, the statutory *de minimis* exemption in the domestic competition law exempts even hard-core restrictions. Furthermore, the competition authority may decide not to investigate violations that have only a small economic effect, even if they do not fall within the scope of the *de minimis* exemption, because of its priority policy.

The legal situation in Hungary is similar to that in Sweden. Under the *de minimis* rule, agreements of minor importance are not subject to the general prohibition against anticompetitive practices. An agreement is of minor importance if the parties' joint market share does not exceed 10 % in the market concerned by the agreement. However, this exemption does not apply to agreements that are aimed at price fixing or market sharing so that local cartels can be pursued by the competition authority. Nevertheless, the Hungarian competition authority has not investigated such micro-violations in the food sector, possibly because of a lack of resources and the fact that it was not aware of possible local infringements because it has no local offices across the country.

In Austria, until 2012, even hard-core cartels were exempted from legal cartel prohibition if the members of the cartel had a joint market share of less than 5 % of the national market and less than 25 % of a regional market. However, in 2012, an amendment to the Austrian Cartel Act made the law consistent with the *de minimis* concept of the European Commission and hard-core infringements—irrespective of the market shares of the undertakings involved—are no longer exempted from the application of the cartel prohibition as stated in Section 1 Austrian Cartel Act.

In contrast to Austria, in Germany, anticompetitive practices at the local level are not exempted from the general cartel prohibition clause in the competition law. However, competition authorities are not subject to any obligation to take action against possible violations of the German antitrust regime. The decision of whether they start formal proceedings is subject to their own discretion.

In Bulgaria, the competition authority has not investigated any local anticompetitive behavior among retailers even though they have dealt with local anticompetitive agreements notably in the transportation sector (*e.g.*, buses and taxis).

In Estonia, the competition authority is unlikely to investigate local cases. However, due to the fact that horizontal hard-core cartels are criminal violations,

the competition authority would be expected to investigate a local cartel if it becomes aware of the existence of such practices.

Unlike previously mentioned countries, Romania actively pursues antitrust violations at the local level.

In Italy, the competition authority deals with all "the understandings between companies that intend to or result in consistently preventing, restricting or distorting competition within the domestic market or a significant part thereof." The "significant part" of the domestic market referred to in the law must be considered in relation to the significance of the local market for the consumer and the reasonable alternatives available to the consumer. In 2008, the Italian competition authority found that the Bread-Making Association Union of Rome and the Province of Rome had violated the competition law, on September 2007, when it gave indications regarding the sales prices for the two main types of bread sold in the Province of Rome and "recommended" increases for all other types of bread. The Bread-Making Association was also considered to have violated the law by preparing and disseminating cost analyses of the main types of bread, aimed at calculating the relative end prices. The competition authority considered that by indicating minimum prices, the Bread-Making Association encouraged the bakers to align their prices at higher levels than the level that would have been reached in an ordinary competition environment.

The competition authority of Ukraine controls adherence to the competition law at both national and local levels. Local anticompetitive practices are handled by regional departments of the national competition authority of Ukraine and are authorized to impose fines for infringements in amounts not exceeding UAH 68,000 (approximately USD 8,500 or EUR 6,538). In 2011, the competition authority investigated abuse of the monopoly (dominant) position on the grocery market for bread and flour, eggs, milk and butter. Over 50 infringements were detected and sanctioned in a large number of cities.

In France, since 2008, the competition division of the Ministry of Foreign Affairs (and not the Competition Authority) has the power to make injunctions and to conclude financial transactions for local anticompetitive practices involving undertakings with limited turnovers. The anticompetitive practices at stake are those (1) that concern markets of local dimension, (2) that do not affect intracommunity trade and (3) that relate to undertakings whose individual turnover is below EUR 50 million and aggregated below EUR 100 million.

Finally, in the United Kingdom, the Competition Commission identified four features of the relevant markets that distort competition, three of which are relevant for local markets: (1) high levels of concentration in some local markets, (2) the planning system, (3) retailers' landholdings and (4) supply chain practices. In each case, the Competition Commission found that the features gave rise to detrimental effects on consumers, and accordingly the Competition Commission had a statutory duty to impose remedies.

1.2.1.5 Hub and Spoke Agreements

Second, if competition authorities have little evidence of horizontal cartels at the retail level, they are highly suspicious of the relationship between retailers and their suppliers or their service providers, and in the last 5 years competition authorities initiated a large number of investigations based on the idea that the close relationship between retailers and suppliers contributes to the increase in transparency at the horizontal retailer level and contributes to a weakening of competition among retailers.

For example, the competition authority of Belgium brought a case alleging an exchange of sensitive information among retailers through a supplier and coordinated price increases between retailers, but the case was dismissed on procedural grounds, the competition authority of Estonia is investigating two cases of interrelated vertical and horizontal collusive practices. In Bulgaria, the competition authority brought a case of price coordination against six modern retail chains. The competition authority alleged that the implementation of various clauses in supply agreements (such as most-favored-customer clauses, product promotion exclusivity clauses or clauses obliging suppliers to report to the retailer a lower net supply price granted to another retailer) led to a "network effect" that increased transparency on the supply market, thus allowing retailers to obtain current information about the supply costs and planned promotional activities of their competitors. In Germany, in 2010, the competition authority began an investigation into the vertical and horizontal relations between the agro-food industry and retailers, alleging price fixing of confectionery, coffee and pet food between the retailers and their suppliers. The competition authority of Austria also brought two "hub and spoke" cases respectively in the beer and dairy markets. In a case that involved the relationship between the retailers and a market research firm in Finland, the competition authority held that the information exchange between three major grocery retail groups through the research company AC Nielsen, which provided weekly detailed sales statistics to the participating grocery retail groups, had restricted competition contrary to the Finnish Competition Act and EU competition law.

1.2.1.6 Resale Price Maintenance and Recommended Resale Prices

Resale price maintenance is prohibited in most countries and is considered to be a hard-core violation in some countries, even though all competition authorities are not convinced of the fact that resale price maintenance should be considered a major competition law violation.

In most countries, it is possible for a supplier to recommend a sale price, provided that these recommendations are not combined with incentives for or pressure on retailers to apply the recommended prices. For example, the Italian report states: "The practice of recommending a resale price to a reseller or asking a reseller to abide by maximum resale prices may benefit from an exemption in accordance with the exemption rule by category when the market share of each of the parties to the agreement does not exceed a 30 % threshold on condition that this does not establish a minimum sales price or a price fixed in accordance with the

pressure exercised or the incentives offered by any of the parties. The market position of the supplier is the most important factor in deciding whether there are any anti-competition effects due to the maximum prices or recommended prices. The stronger the market position of the supplier, the greater the risk that a maximum price or a recommended resale price will be applied as the resale price by most or all of the retailers."

Competition authorities have spent a lot of energy trying to distinguish between truly recommended prices and resale price maintenance masquerading as recommended pricing.

There are two ways in which resale price maintenance can be implemented. The first one is the diffusion of recommended prices combined with various incentives or threats to ensure that the retailers will effectively enforce the resale price. The second method is the hub and spoke method (a combination of vertical and horizontal collusion, which we commented on previously and which is not dealt with in this section).

In Japan, recommended resale prices in the retail grocery sector can be considered a violation of AMA under the condition that such recommended prices are binding the retailers.

In Sweden, Belgium, Estonia, the Netherlands, Finland and Romania, rules on resale price maintenance (RPMs) in vertical agreements are in essence the same as EU rules.

In Austria, recommended prices are treated as (bilateral) cartels if they have as their object or effect the restriction of competition, but they are exempted from the cartel prohibition if the nonbinding nature of the recommendation is "explicitly" mentioned and if there is no pressure to implement the price recommendation.

In Germany, according to the decision-making practice of the competition authority and the court, the pure dissemination of resale price recommendations does not violate German antitrust law even if the retailers follow these recommendations. But the competition authority and the court have adopted a restrictive interpretation of this exemption. If manufacturers do anything more than the pure dissemination of price lists with the aim to bring retailers to follow these recommendations (e.g., contacting the retailer to address the difference between the recommended resale price and the actual resale price), the competition authority and the courts consider this as a violation of the German cartel prohibition clause.

In Hungary, recommended resale prices are violations of the competition law if they are combined with means to make them mandatory or if there is a risk that they are a focal point for resellers and are followed by most or all of them or if they soften competition or facilitate collusion among suppliers. The 10 % *de minimis* exception applies to resale price maintenance.

In Bulgaria, setting minimum resale prices is considered a hard-core restriction that is *per se* illegal. The setting of maximum prices is not always regarded as anticompetitive and is subject to a case-by-case analysis. Price recommendations are permissible, as long as additional factors, such as penalties for noncompliance or incentives for compliance, do not alter their voluntary nature.

Under French law, distribution of recommended prices or the setting of a maximum price is lawful, provided that this does not dissimulate an imposed price. Recommended resale prices can be found illegal if three conditions are met: the recommended resale prices are known by the retailer, prices are monitored, and the prices chosen by the supplier are applied by a significant number of distributors.

In a number of countries,[35] there have not been any recent cases of resale price maintenance in the retail grocery sector. Several cases of alleged resale price maintenance are under investigation in Germany.

The competition authority of Bulgaria has dealt with several instances of resale price maintenance. In one instance, it considered that a yogurt manufacturer had abused its dominant position on the market of unflavored yoghurt for having entered into distribution agreements with its retailers that required them, inter alia, to resell the yoghurt at prices not higher than the retail prices it recommended and not to sell the yoghurt at prices lower than the prices indicated as list prices. An aggravating factor was the fact that the distribution agreements also included performance- and volume-based rebate incentive schemes. The competition authority of Bulgaria is also investigating allegations of resale price maintenance and territorial allocation against several manufacturers of sunflower oil and their distributors.

With respect to resale price maintenance, the situation in the United States has evolved recently. In 2005, the US Supreme Court repealed the 94-year-old *per se* prohibition on vertical pricing agreements. However, resale price maintenance was never an important factor in food distribution in the United States (unlike in distribution of pharmaceutical products), and the de facto absence of an RPM prohibition does not seem to be a significant barrier to consumers getting competitive prices in the retail grocery field. The US national reports state: "Part of the United States legacy may be that for many years the United States enforced RPM to protect smaller service-oriented retailers and image-creating manufacturers against free-riding services. Since RPM was never particularly important in grocery retailing, it is not clear whether removing effective RPM prohibitions has been pro-competitive or commercially irrelevant in this sector. Either way, there is little evidence that it has been anti-competitive in the main."

1.2.2 Abuse of Dominance

Except for the case of Ukraine and the United States, there are no reports of abusively high prices by the retailers of grocery products.

In the United States, abusively high consumer prices that could be linked to monopolization of a market would be evidence of monopoly under United States antitrust law. There are no major cases in the grocery retail market except the

[35] Japan, Belgium, Netherlands, Hungary, Austria, Romania or Estonia.

California ex. rel. Lockyer v. The Vons Companies case,[36] which involved retail grocery monopolization of a small California town. The plaintiff state, California, was able to demonstrate across-the-board price increases following monopoly control.

One reason might be that, in most countries, no grocery retailer has a market share sufficiently large to be recognized as having a dominant position on the relevant market.[37]

In other countries, provisions of the competition law define thresholds of dominance in the retail sector.[38]

One of the practices that is frequently mentioned as a possible abuse of dominant position by retailers in the grocery market is reselling below cost. In some countries, reselling below cost can be sanctioned only if it is considered to be predatory (Sweden, Belgium, Bulgaria, Finland and Germany). In other countries, reselling below cost is considered an abuse of dominance even if it is not predatory (for example, the Austrian competition law explicitly states that reselling of products (not services) below the purchase price is an abuse of dominance if not objectively justified). Finally, in a last group of countries, reselling below cost is *per se* prohibited irrespective of whether the retailer has a dominant position.[39]

There are relatively few cases of successful prosecution of resale below cost.

In Austria, a retailer with a market share of about 5 % failed to prove that Austria's biggest grocery retailer was abusing its dominance by reselling products below 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).

In Japan, three wholesalers of alcoholic liquors sold beer below cost to some retailers. It was considered that they were creating difficulties for the business activities of other retailers of alcoholic liquors, and the Japanese competition authority warned them to stop the practice.

In the Netherlands, a supplier of a well-known brand of gingerbread discontinued selling to a retail chain that sold its product below the purchase price. The discontinued retailer sued the supplier and argued that any attempt on the part of the supplier to force an increase in the resale price of the gingerbread would amount to resale price maintenance. The competition authority published a press release stating that resale price maintenance was prohibited but did not take any enforcement action.

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[36] *California ex. rel. Lockyer v. The Vons Companies, Inc.* (C.D. Cal CV 05-8972 DSF January 03, 2006).

[37] See, for example, the United Kingdom and Estonia.

[38] E.g., Finland.

[39] For example, in Hungary, the Unfair Distributional Practices Act prohibits resale below cost, irrespective of the market power of the retailer, if the practice affects agricultural or food products; in Romania, reselling below costs is prohibited regardless of whether the company is dominant or not; in France, Article L 442-2 of the Commercial Code prohibits resale below purchase price.

However, in 2007, the German competition authority imposed a fine on the drugstore chain for having sold several products below cost. Indeed, in Germany, undertakings with a superior market position are prohibited from selling articles regularly below cost price without a reasonable justification. However, the decision of the competition authority was overturned on appeal.

Besides reselling below cost, there are also reports of other exclusionary practices by dominant firms. For example, in Italy, the competition authority dealt with a case where it found that a retail distributor, Coop Estense, systematically interfered with the attempts of the competitor to start up new food sales outlets, in potentially suitable areas and shopping centers and which were available to it, and also intervened in the administrative procedures that had been initiated by a competitor to obtain the necessary authorizations. The Italian competition authority stated that this strategy was carried out in a market environment that was already characterized by low availability of suitable areas and shopping centers and significant administrative barriers blocking entrance to the market. According to the ICA, this behavior allowed Coop Estense to maintain—and actually strengthen—its dominant position in the markets in question, gaining increasing market share over time. In addition, by blocking an "efficient" competitor from accessing the market, Coop Estense damaged consumers in terms of higher prices and/or lower choice.

1.2.3 Abuse of Buying Power

In most countries, abuse of buying power is considered to be a serious problem. In the group of surveyed countries, several questions arise: is such an abuse covered by the provision of a competition law prohibiting anticompetitive abuse of dominance? Or is there a specific provision in the competition law? How is dependency defined? What constitutes an abuse of dependency?

1.2.3.1 Legal Provisions Regarding Abuses of Buying Power

In a first group of countries,[40] abuse of buyer power or dependency is considered to be part of a wider category of abuses of dominant position. In these countries, the concept of dominance is applied both on the seller's side and on the buyer's side. Thus, to establish that a grocery retailer has buying power, it must account for a substantial part of the procurement of groceries or of a particular grocery product. This may in fact make it very difficult or impossible to bring abuse of buying power cases.

In a second group of countries,[41] it is easier to control the buying behavior of firms either because the concept of dominance is fairly wide or because the

[40] United Kingdom, Belgium, Sweden, Netherlands, Finland and Romania.

[41] Australia, Germany, Austria and Bulgaria.

competition law allows the control of the behavior of firms that have a strong (although not dominant) position.

In a final group of countries,[42] there are specific provisions concerning the abuse of buying power. In these countries, it is thus not necessary to show that a firm has a dominant position to be able to control its behavior on the buying side. As a result, the prohibition of buying power is different in nature from what it is in the previous groups of countries because it is clearly aimed at restoring fairness in vertical transactions rather than achieving competitive equilibrium of the market.

1.2.3.2 Definition of Buyer Power

Except for the Netherlands and Bulgaria, which define buying power as the ability of a firm to distort competition on the upstream market, buying power on the part of the seller is defined in most other countries as either a situation where the suppliers of the firm having buyer power have no economic alternative but to deal with the buyer or a situation where a buyer could disproportionately hurt its suppliers if it stopped dealing with them.

1.2.3.3 Is Abuse of Buyer Power a *Per Se* Offense?

In nearly all of the countries for which information has been gathered, irrespective of whether or not they have a specific provision regarding abuse of buying power, such abuses are not treated *per se* and the competition authority has to show that there was a restriction of competition on the market. There seem to be only two exceptions to this principle. In Romania, there is consensus between the competition authority and the courts that all abuses of dominance (including abuse of buying power) are *per se* violations of the national competition law. In Germany, abuses of a dominant market position, active and passive discrimination and unfair impediment of dependent undertakings are prohibited *per se*. Furthermore, there are two countries where it is unclear whether abuse of buying power is considered to be a *per se* violation of the competition law. In Estonia, the competition authority has traditionally considered the anticompetitive effects of abusive conduct, but the Supreme Court held in 2007 that the Competition Act does not require showing the anticompetitive effects in abuse of dominance cases. In Austria, the Austrian Cartel Courts focus on the "suitability" of the behavior of a dominant undertaking to create "negative effects concerning the market situation and the competitive relationship." Therefore, the approach in Austria concerning prohibited abuse seems to be between a *per se* prohibition and a factual restriction of competition.

1.2.3.4 What Constitutes an Abuse of Buyer Power?

In most countries, and in particular in EU Member States (such as Sweden or Belgium, Estonia, the Netherlands, Bulgaria, Austria, Romania) where abuse of buying power is a subset of abuse of dominance, there is no statutory definition of what constitutes an abuse of buying power.

[42] France and Japan.

This lack of statutory definition of what constitutes an abuse of buying power leaves competition authorities with the difficult task of finding a test. As the contribution from the Netherlands mentions, there is no clear distinction between fierce competition and abuse of buying power and the test applied by competition authorities can be rather vague.

The view expressed by the contribution of the Netherlands that it is difficult from a competition law standpoint to define an abuse of buying power is shared by the United Kingdom Competition Commission. The Competition Commission found that the largest retailers have buying power but that this is not in itself problematic from a competition perspective because the lower supply prices that their buyer power makes possible are passed on to consumers. In particular, the Competition Commission rejected the suggestion that retailers exercised their buyer power by withholding demand, which, if it had been established, would have had adverse effects on consumers. However, the Competition Commission drew a distinction between the normal exercise of buyer power to obtain better trading terms and the use of buyer power to "transfer excessive risks or unexpected costs to their suppliers through practices involving retrospective adjustments to supply agreements or giving rise to moral hazard on the part of the grocery retailer." According to the Competition Commission, such conduct "is likely to lessen suppliers' incentives to invest in new capacity, products and production processes ... [and] will be detrimental to the interests of consumers." Particular examples of retrospective conduct that the Competition Commission identified included imposing price changes on suppliers after goods had been ordered or delivered or requiring them to contribute to the costs of promotions that had not been agreed in advance. Examples of excessive risk transfer giving rise to moral hazard included the practice of making suppliers liable for losses arising from goods being lost or stolen in store.

The fact that it is difficult for competition authorities to define what could be an abuse of buying power is illustrated by Hungary, where the competition authority has stated in a decision that, in order to establish an abuse of buyer power under the Trade Act, it is necessary that the "supplier does not receive any benefit from the economic results of the large-scale selling." Such a criterion seems to be both vague and economically dubious.

In a few countries,[43] short of providing a test for the definition of an abuse of buying power, the competition law, or proposed amendments to the competition law, provides an exemplary list of such abuses.

1.2.3.5 Case Law on Abuse of Buying Power

The case law on abuse of buying power is relatively scarce, and very few cases involve the grocery retail market.

On this topic, we can identify three groups of countries.

First, in Austria, Sweden, Belgium, Finland, the Netherlands and Ukraine, there have been no cases (in the case of Estonia, no recent case) of abuses of buying

[43] See the Netherlands, Italy, Germany, Finland and Japan.

power examined by the competition authority during the past 5 years. In the case of France, the competition authority investigated cases but found that the practices did not amount to an abuse of buyer power.

Second, in four countries,[44] there is an abundant case law, and a wide array of practices of retailers that had buyer power were considered to be violations of the competition law because they were unfair or unjustified rather than because they restricted competition.

Third, in three countries,[45] the effect of the practices of grocery retailers on competition was examined in the course of an investigation into possible abuses of buying power, but no violations were found.

1.3 Merger Control

Competition authorities in most countries are in charge of merger control in the grocery retail sector at both the national level and the local levels. There are countries,[46] however, where the government can directly intervene to prevent a merger transaction.

In a large number of countries, there is a double threshold, one for the aggregate turnover of the parties to the merger and a second, which may be a threshold for the acquired firm or a threshold for at least two of the undertakings party to the merger. When one looks at the thresholds for merger control in the countries covered by this survey, one sees a striking difference between eastern European countries and the other countries. First, the thresholds for the aggregate turnover of the parties to the merger tend to be a great deal lower in a number of eastern European countries. For example, in Ukraine, the threshold for the aggregate turnover of the parties to the transaction is EUR 12 million worldwide, but there is also a domestic market share threshold of 35 %. In Romania, the threshold is EUR 10 million worldwide. In Bulgaria, the domestic threshold is EUR 12.78 million.

In comparison, aggregate thresholds tend to be much larger in other countries (EUR 115 million domestic in Sweden, EUR 100 million domestic in Belgium, EUR 113,450,000 worldwide in the Netherlands, EUR 350 million worldwide in Finland, EUR 482 million domestic in Italy, EUR 500 million worldwide in Germany). The same observation applies to the threshold for the turnover of two of the undertakings that are party to a merger transaction. This threshold is set at EUR 1 million worldwide in Ukraine, EUR 4 million domestic in Romania, EUR 1,530,000 domestic in Bulgaria, whereas the equivalent threshold is set at EUR 23 million domestic in Sweden, EUR 48 million domestic in Italy, EUR 40 million domestic in Belgium, EUR 30 million domestic in the Netherlands, EUR 20 million domestic in Finland, etc. Even though part of the difference in thresholds is justified

[44] See Japan, Germany, Hungary and Bulgaria.

[45] Australia, United States and France.

[46] See Romania, the United Kingdom and Germany.

by the difference in the size of the respective economies, it still seems that merger controls in Eastern Europe tend to be applied to many transactions that would not be controlled in developed economies.

In most jurisdictions, there are no special thresholds for the control of mergers in the grocery retail sector, and the general thresholds for merger control are applied. There is only one major exception and one minor exception.

In France, for retail trade, which includes retail grocery, the law of modernization of the Economy[47] has lowered the notification thresholds for mergers.[48] For overseas departments and territories, the Commercial Code sets even lower thresholds.[49]

In Germany, the thresholds that apply to merger control also apply to mergers in the retail (and thus the grocery retail) sector, but according to Section 38(2) ARC only three-quarters of the turnover generated through trade in goods (i.e., buying and reselling of goods) have to be taken into account, possibly to reflect the fact that the ratio of sales to value added is notoriously higher in the retail sector than in manufacturing, which means that turnover thresholds do not have the same meaning.

However, there may be occasional attempts by politicians to limit the concentration of large retailers in the grocery market. For example, in Australia, this has led some politicians to call for limits on the extent to which the major grocery chains should be permitted to merge, beyond the existing competition test in the CCA. To date, however, no such modifications to the merger laws have been made.

In most countries, there is a double threshold in turnover for the aggregate firm and the acquired company. In many cases, the acquisition by one retail chain of a retail outlet would not be caught by the merger regulation because the turnover of the acquired retail outlet would not reach the threshold for the acquired firm. However, in countries where merger notification thresholds are low or where there is no threshold on the turnover of the acquired company—mostly eastern European countries—even minor acquisitions of retail spaces have to be notified. This was the case in Bulgaria, where before 2008 every transaction involving change of control had to be notified if the joint turnover of the undertakings concerned exceeded BGN 15 million (EUR 7,670,000 million).

In the United States, the enforcement system makes it substantially less likely that the FTC, or the Justice Department, would seek to shape or prohibit a grocery merger than what seems to be true under the administrative enforcement systems that prevails in Europe. The numbers bear this out. Between 2004 and 2011, the NCAs conducted over 400 grocery retail merger inquiries, and 25 or so were required commitments from the parties. In that same period, the US FTC required divestment in only four mergers.

[47] LME no 2008-776 of 4 August 2008.

[48] See Article L 430-2 of the Commercial Code, paragraph 2.

[49] See Article L 430-2-III of the Commercial Code.

1.3.1 Market Definition in the Grocery Retail Sector

None of the countries under review has a statutory definition of relevant markets. Competition authorities define relevant products or service markets by examining substitutability for consumers (and using the SSNIP test) and occasionally by considering substitutability on the supply side. Most European countries follow closely the principles included in the European Commission notice on the definition of the relevant market. Australia also assesses the substitutability of product/services for consumers. But the entry of new actors such as Amazon in the grocery retail chain, in the United States, may lead to a profound change in the way the competition authorities of this country will define grocery markets.

Competition authorities in and outside of Europe claim to use the SSNIP test to try to assess the substitutability between products and services. However, due to the onerous data requirements required for the hypothetical monopoly test, some competition authorities take shortcuts. For example, the Australian competition authority notes that this test is "rarely strictly applied to factual circumstances" and that it generally takes "a qualitative approach to market definition," using the HMT as an "intellectual aid to focus the exercise."

In their decisions when competition authorities assess product market definition for retail groceries, they consider a number of features of retail stores, such as their size or their format or whether or not they belong to vertically integrated groups.

If we look first at the question of whether grocery retail stores of different sizes are on the same market, one gets not only results varying across countries (which may reflect different consumer habits across countries) but also different results within the same country (which may reflect a difference between competition authorities and the courts when it comes to employing the tools of economic analysis) and, sometimes, different results across time (which may reflect either increased knowledge of the grocery retail sector or an evolution in the buying habits of consumers). The overall picture, however, points to a certain level of *ad hoc* decisions and fuzziness in methodology used.

The formats of the stores are also often considered to assess whether they belong to the same markets. In many countries, stores of different formats are considered to belong to different markets. But there are exceptions. In Bulgaria, the competition authority has concluded that small-size convenience shops should be regarded as competitors to large supermarkets. Interestingly enough, the Bulgarian competition authority also considers that cash & carry stores are a type of "hypermarket" and included in the retail market. This is justified by the fact that although access to cash & carry outlets in Bulgaria requires registration, many final consumers acquire customer cards and purchase goods for personal consumption in cash & carry stores. The French competition authority takes into account the asymmetric substitutability among the different sizes of general food retailers. It considers that for some consumers, a hypermarket might be a local substitute for a supermarket, and so the former will be included in the relevant market of the latter. By contrast, it considers that the converse is rarely verified: supermarkets are not part of the relevant market of hypermarkets. Under the same logic, the competition authority

stated that "small retail stores and supermarkets were competing with each other" and, following this, that "they both face competitive pressures of large supermarkets (sales space of over 1,000 m^2) and hypermarkets."[50] The competition authority also considers competitive pressures of discounters towards other general food retailers, leading to the conclusion that discounters should be included in the same relevant market. On the flip side, the French competition authority considers that the competitive pressure of specialist stores and street markets on other types of food retailers is too limited for them to be included in the relevant market of general food stores. Thus, it excludes specialist stores (such as bakeries, butcher shops, fishmongers, cheese boutiques, fruit and vegetable merchants) from the relevant market of general food stores. In one recent case in the United States, the market was defined as the market for a specific set of premium products sold in supermarkets. In the 2007 case, *FTC v. Whole Foods*, the US FTC considered that the merging parties, Whole Foods and Wild Oats, were "premium natural and organic supermarkets."[51] As the US FTC indicated, "The operation of premium and natural organic supermarkets is a distinct "line of commerce" within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18." While ultimately the US FTC's theory that the market was distinct prevailed, the United States has not yet seen an attempt to use the inverse market definition of discount groceries used in an antitrust enforcement setting.

The fact that a retail chain may be vertically integrated is occasionally a source of difficulty in market definition of retail grocery. For example, the Australian report indicates that at times markets have been confined to a single functional level and at other times the court has taken a broader view and considered both wholesale and retail activity to be in the same market because of the extent to which one constrains the other where there is extensive vertical integration. The report observes that experts can themselves be divided on the issue of whether and when wholesale and retail groceries should be considered to belong to the same market.

To finish this review of grocery product market definitions, it is worth noting that the United States report commenting on the recent developments in grocery retail in this country suggests that the criteria traditionally used by competition authorities to define markets may be about to change due to the entry of new actors in the grocery retail chain and the profound transformation of the sector. The entrance of Amazon into grocery retailing is seen as completing the already underway international transformation of grocery retailing to general retailing. As a consequence, unnecessary middlemen like wholesalers, and possibly shipping companies, may exit entirely. The end result may be that the major market segmentation for retail will shift dramatically from the way that antitrust agencies in the United States typically see them (as product and geographic markets) to being primarily

[50] FCA, Opinion no 12-A-01 of 11 January 2012 relating to the competitive situation in the food distribution sector in Paris, paragraph 81.

[51] *FTC v. Whole Foods Market, Inc.* 548 F. 3d 1028 (D.C. Cir. 2008).

customer-segmented markets. While not having a completely settled doctrine for how to approach such dramatically new and shifting market definitions, United States antitrust regulators seem to have presaged this change with the 2007 Whole Foods merger case, in which the agency vigorously defended a market definition that was limited to a small, high-end customer profile.

When it comes to the geographical definition of markets, the practices of competition authorities in different jurisdictions seem to be fairly similar even though there may be minor differences. The catchment area for large store such as a hypermarket, a supermarket or a discount store is the area comprising places that can be reached from this store by car within 15–20 min in western European countries (or within a radius of 20–30 km) and within 20–30 min in eastern European countries such as Estonia, Bulgaria or Hungary (or within a radius of 30 km). In the United States, supermarkets are considered to draw their customers from within a radius of 3 or 4 miles. However, in the Whole Foods case, the US FTC considered that premium natural and organic supermarkets tend to draw their customers from within a radius of 5 or 6 miles.

The relevant geographic market for mid-size stores (when there is no hypermarket or one-stop shop in the vicinity) tends to be limited to the area that can be reached in 5–10 min from the store. Those figures are adjusted to take into consideration local circumstances (such as whether one is dealing with a rural or an urban area, what the local habits are in terms of shopping and road transport). What is noticeable, however, is that the figures chosen for the time of travel are rarely justified by a scientific assessment of the behavior of consumers and more by the intuitive appreciation of competition authorities.

1.3.2 Procurement Markets

Finally, a number of countries define procurement markets in the retail grocery sector. They tend to follow the EU approach and consider that such markets should be defined by 'product categories' as suppliers are not able to switch production to the relevant products and market them in the short term. Both in Belgium and in the Netherlands, procurement markets are considered to be national in scope. In Belgium, these markets include sales not only to grocery retailers but also to other distributors (such as hotels, restaurants or specialized distributors). In Austria, on the contrary, the procurement for food retailers/supermarkets is considered to be a separate procurement market from procurement markets for other distribution channels such as Cash & Carry, specialized outlets, gastronomy, petrol station shops, butchers and bakeries.

1.3.3 Merger Control and the Growth of Grocery Retail Networks

The growth of grocery retail networks (such as franchises and cooperatives) is considered to be problematic in some countries. This is the case in countries where

the level of concentration in grocery retail is already high and where there is a perception that prices are higher than they are in benchmark countries.[52] In such circumstances, questions are raised about the adequacy of the merger control system to stem increases in concentration of the large network retail systems or the necessity to enact specific laws. However, in some countries where the concentration of grocery retail network is high but where the level of grocery prices is not considered to be high, or is considered to be decreasing, there is no particular concern about the concentration of grocery retail networks.

As a contrast to countries where the concentration of the networks of groceries are (or were) considered to be problematic, a number of countries have not been concerned with this issue, either because the level of retail concentration remained low or because it was considered that the competition authority had the adequate tools to fight any possible anticompetitive merger (even if it involved a small acquisition, such as a local store). This, for example, is the case of Australia, Sweden, Belgium, Estonia, Bulgaria (where small independent convenience stores remain predominant in retail sales of groceries), Romania (where, as of 2008, there were 52 retailers of grocery products) and Italy.

Finally, one should note that the way in which the franchisee members of a network are considered in the context of a merger control when a network acquires new franchisees varies from one country to another.

For example, in the Netherlands, the competition authority aggregates the turnovers of all the franchisees in the network on the relevant—national or local—market and the turnover of the new franchisee and computes the total share of the network after the acquisition of a new franchisee. If the market share of the network remains below 50 % of the relevant market, the competition authority will authorize the merger. If the aggregate market share of the relevant market exceeds 50 %, the parties have to bring forward mitigating circumstances, such as a high market share of competitor(s) on such a local market or evidence of customer movements that show that consumers do in fact visit supermarkets outside the town considered to constitute the relevant geographic market.

In contrast, so far the Hungarian competition authority considers that the individual members of a franchise network should be regarded as competitors since they are invested with independent decision-making competence, most importantly with respect to pricing methods and to determining the variety of goods they offer. Therefore, if new members join a franchise network, such a "change in membership" does not qualify as a concentration within the meaning of merger control law.

[52] See Finland, France and Germany.

1.3.4 Countervailing Buyer Power as a Mitigating Factor for the Concentration of Suppliers

In some countries, the concentration of the grocery retail sector has been offered as a motive for mergers among their suppliers, and this argument has been taken into consideration by the competition authority in a few cases.[53]

In two recent cases involving concentrations between Dutch suppliers of snacks, the suppliers put forward the existence of buyer power at the retail level as a justification for the large market shares that would be created as a result of the concentrations. However, in both cases, the competition authority rejected the argument and ruled that it was unlikely that retailers disposed of sufficient countervailing buyer power to justify the increase of market share of the producers on the production/sales markets.

The French competition authority has publicly stated that, in medium term, the weakening of the upstream sector through the market power close to an oligopsony in the downstream market is likely to drive a reduction of the supply or its diversity that might be detrimental to social welfare. It has called on the government to intervene. The competition authority looks at the countervailing power of large retailers when assessing mergers between suppliers but does not always consider this defense sufficient to allow anticompetitive mergers by suppliers.

1.3.5 Merger Remedies

When it comes to merger control among retail chains, competition authorities usually assess the extent to which competition is going to be restricted on local markets, and if local restrictions to competition are likely to result from the transaction, the competition authority accepts divestment commitments or impose divestiture of supermarkets, whether owned or franchised in the affected local markets.[54]

In a few cases, competition authorities have imposed behavioral commitments alongside divestiture requirements. For example, in the Netherlands, in two cases the purchaser agreed to refrain from (re)gaining economic influence on the divested supermarkets for a period of 10 years. In Austria, the competition authority cleared Pfeiffer's acquisition of three branches of Nussbaumer, on the condition that the parties guarantee that, first, prices in the respective location would be pegged to the prices in the competitive Vienna region and, second, that the parties would not acquire any other competitors in that region.

[53] See Sweden, Belgium, Finland, Italy, the United Kingdom and the United States.

[54] See, for example, Sweden, Finland, Germany, France and the United States.

1.4 Conclusion

From this review of the 18 national contributions, 3 conclusions can be drawn.

First, there are few "pure" competition law issues in the grocery retail market, and competition laws seem to be able to satisfactorily handle most of the competition problems raised. Merger control can be applied (and is applied) to the grocery retail sector and is quite extensive in some countries. The traditional abuses of dominant position provisions (such as provisions against abusively high prices or exclusionary practices such as predatory pricing) and the provisions prohibiting anticompetitive agreements can also be applied (and are applied) extensively to the grocery retail sector. Overall, competition in the grocery retail sector works well.

This is confirmed by the large number of reports that conclude that there is no need for legislative changes concerning the state of competition in their country.[55]

Further thinking should be, however, developed on the criteria to be used to decide whether or when individual members of a grocery retail network (for example, franchisees) should be treated as independent units or as part of aggregated undertakings, including the franchisor and the franchisees.

It would also be worth asking whether more enforcement of competition law in the grocery retail sector at the local level should be undertaken (and if so, by whom), given the limited size of the geographic retail markets for groceries.

However, there are serious difficulties in the use of competition law in the grocery retails sector due to conflicting public policy goals. Public policy goals are contradictory in the sense that public policy makers in many countries want to simultaneously achieve low and stable retail prices for food products (which leads them to promote competition and the emergence of modern forms of retailing, to prohibit resale price maintenance and sometimes to regulate the resale price of grocery products) while at the same time maintaining sufficiently remunerative prices for agricultural firms and suppliers of food products (which leads them to condone some blatantly anticompetitive agreements among farmers or intermediaries and to limit in many different ways the ability of large-scale retailers to make use of their buying power) and, in some countries, while also preserving small-scale retailers (which leads them to prevent large-scale retailers from engaging in some commercially aggressive tactics that would work to the detriment of their small-scale competitors).

The difficulties come from the fact that in order to achieve such contradictory goals a number of countries have included in their competition law or their law against unfair trade practices a large number of *per se* prohibitions against various business behaviors of either suppliers or large-scale retailers.

In this context, there is a serious risk that competition law is diverted from what its role should be, i.e. the protection of competition, to what its role should not be, i.e. the protection of competitors, whether small-scale retailers or small-scale agricultural firms. Furthermore, the inclusion of numerous *per se* prohibitions

[55] See Australia, Austria, Estonia, Germany, the United Kingdom and Sweden.

against the business strategies of economic operators in the grocery retail sector—whether in the competition law or in sector-specific laws—restricts competition beyond what would be strictly necessary to achieve the sociopolitical goals pursued by governments, and the enforcement of these prohibitions is ineffective to solve the tensions between large-scale retailers and other operators in the grocery retail sector.

Thus, several national reports call for a regulatory reform of the various provisions affecting competition in the grocery retail sector with the aim of either making the various applicable laws more consistent or streamlining the prohibitions to keep only those that are strictly necessary.[56] Several reports also call for a review of the restrictive rules that apply to commercial planning and of the role of local authorities who are in charge of granting authorizations for new stores.[57] From that last standpoint, it would be worth reflecting on the past experience of Italy.

In particular, the issue of abuses of buying power is worth revisiting. The questions raised by allegations of abuse of buying power are to a large extent related to the distribution of the surplus along the vertical chain in the food retail sector and not, contrary to what competition authorities occasionally pretend to believe, to issues of competition or efficiency.

It is doubtful whether any type of law against "abuses of dependency" or "abuse of superior market positions" could be fully effective, and it is clear that competition authorities, when they are assigned the task of enforcing the provisions against abuses of buying power, have some difficulty defining what buying power is and establishing a link between the alleged abuses of buying power and a restriction of competition. One of the alternatives to a full-fledged case-by-case analysis of the economic effects of alleged abuses of buying power is for the competition authority, or the law, to establish a list of all the "unfair" demands by buyers that are considered to be abuses of buying power. But even in countries where such a list exists, it is questionable whether the victims of abuses of economic dependency are in a position to make complaints about them.

In order to deal with the issues related to abuse of buying power, an alternative to the use of competition law or unfair trade law, which could both be more effective and entail fewer undesirable effects, could be the adoption of enforceable codes of conduct, including an effective dispute settlement mechanism.

While the report from Ukraine suggests that additional regulations should be adopted in order to solve some of the issues arising out of the imbalance in bargaining power between operators in the grocery retail sector, several country reports suggest that the adoption of mandatory codes of conducts and effective dispute settlement mechanisms is a more appropriate way forward.[58]

From that standpoint, the past experiences of the United Kingdom and Australia deserve to be studied carefully.

[56] See, for example, Hungary, Finland and Belgium.

[57] See, for example, France, Finland, Italy and Sweden.

[58] See Australia, the Netherlands, and the United Kingdom.