

Kluwer Competition Law Blog

Continuing close scrutiny of the EU food sector – ECN report

Peter Citron (Editor) (White & Case, Belgium) · Tuesday, May 29th, 2012

At the end of last week, the European Competition Network (“ECN”) published a report on the competition law enforcement and market monitoring activities by the European competition authorities in the food sector.

The report is an important reminder of the fact that at both the European and national level the EU food sector has been and will continue to be under close scrutiny from the antitrust perspective and more broadly.

What is the report?

The European Commission has been under considerable pressure to respond to concerns regarding the rising cost of food in the EU. In 2011, the European Parliament requested closer cooperation between the Commission and the national competition authorities so as to ensure effective competition within the food sector, and also urged the Commission to conduct a sector-specific inquiry into the food supply chain in the EU. This report aims to respond to these concerns.

The report was prepared within the ECN, and consists of a compilation of contributions from EU national competition authorities (“NCAs”) and the European Commission (DG COMP). It contains a comprehensive summary of the key enforcement and monitoring actions undertaken by NCAs and the European Commission in the period 2004 to 2011.

Key findings

The report includes the following key findings.

Antitrust enforcement actions. The report notes that since 2004 the European competition authorities have dealt with more than 180 antitrust cases in the food sector – about 120 investigations have led to a finding of infringement and 60 cases are still on-going. The cases have covered a wide range of food markets, with particular emphasis on multi-products (21%), cereals and cereal-based products (18%), milk and dairy (12%) fruit and vegetables (10%), and meat, poultry and eggs (9%). 44% of the cases have related to the transformative part of the supply chain (processing and manufacturing). 49% of cases related to horizontal agreements, 19% to vertical agreements, and 20% to abusive conduct by dominant operators.

Monitoring actions. 25 NCAs have carried out 103 market monitoring actions, of which 10 are on-going, on food-related issues. These actions include sector inquiries, market studies, reports or

surveys. The report concludes that these monitoring actions have revealed that *“price developments along the supply chain are influenced by many factors, which in many cases are not strictly linked to anti-competitive conduct but which are rather of a structural or cyclical nature”*. Examples include *“fluctuations on worldwide commodity markets, increases in input costs for agricultural products, global supply and demand developments, availability of stocks, energy and labour costs, seasonal production of certain food products, length and complexity of the supply chain, differences in bargaining power among market players etc”*.

Mergers. Since 2004, 83 mergers in the food sector have raised competition concerns. The concerns have in particular materialised in the retail sector. The report states that *“some markets have reached such a level of concentration that further increases would risk effective competition in these markets being significantly impeded”*.

Structural problems. NCAs have identified highly atomistic structures of agricultural primary production as a structural problem, and have called for the restructuring and consolidation of the agricultural sector, for example through the promotion and creation of co-operatives. Some NCAs have also recommended the rationalisation of the chain in particular at its intermediate stages.

Entry barriers to retail markets. Some NCAs have raised concerns regarding the high concentration of the retail sector coupled with regulatory entry barriers, stemming from planning or zoning laws. They have called for the removal of such regulatory barriers to facilitate the entry of new players and to improve competition.

Contractual constraints. A few NCAs have noted that contractual constraints hinder the exit of independent retailers or switching retail networks. This includes contracts which limit the use and availability of land suitable for retail sites or *“other contractual arrangements implemented by large incumbent retailer groups (such as long-term affiliation or franchising contracts with independent retailers)”*. The NCAs have recommended modifications to contracts to facilitate market entry.

Codes of conduct. To deal with the existence of certain practices linked to imbalances of bargaining power a few NCAs have proposed solutions, which are not competition–law based, such as the application of national laws against unfair trading practices or the adoption of codes of conduct or good practices with effective enforcement mechanisms.

Role of NCAs. The report states that because of the allocation of competences between the NCAs and the European Commission as well as the many specific features of national food markets, *“the NCAs play a key role in the enforcement of competition law in the food sector”*.

Agricultural sector. The report emphasises that the competition rules do apply to the agricultural sector and only subject to limited exceptions.

Report conclusion

The report notes that the European competition authorities have made a significant contribution to the well-functioning of the food supply chain. The work is not yet over. Critically the report notes that *“the Commission and the NCAs will continue to act to ensure that food markets remain competitive to the benefit of European consumers”*.

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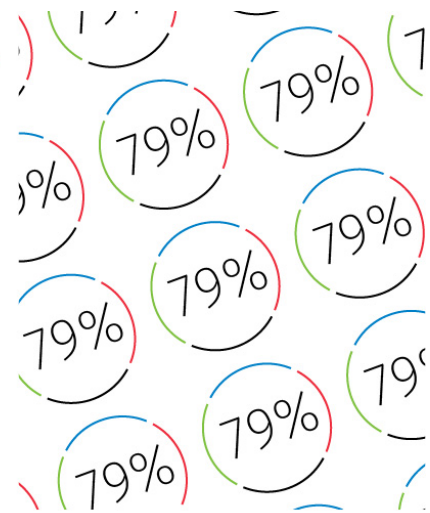
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