

Unclassified

DAF/COMP/GF/WD(2012)45



Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

30-Jan-2012

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

**DAF/COMP/GF/WD(2012)45
Unclassified**

Global Forum on Competition

COMPETITION AND COMMODITY PRICE VOLATILITY

Contribution from the European Union

-- Session I --

This contribution is submitted by the European Union under Session I of the Global Forum on Competition to be held on 16 and 17 February 2012.

JT03315042

Document complet disponible sur OLIS dans son format d'origine
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-- European Union --

1. Introduction

1. Over the past couple of years, prices for commodities have globally fluctuated widely. This is an issue the European Commission (EC) has been actively working on for the last few years. To illustrate the EC's activities, this paper will focus on the food supply chain and highlight in particular the competition related aspects.

2. The food industry sector is one of the largest and most important manufacturing sectors in Europe. It is the second largest (after metal) in the manufacturing industry, with 14.5% of total manufacturing turnover (€917bn for the EU-27). The employment in the food industry represents about 14% of the total manufacturing sector. However, the food industry is characterised by fragmentation. There are few European multinational companies competing worldwide with a wide variety of products, but 99% of all enterprises in the food sector are small and medium sized enterprises (SME's). As a matter of fact, Europe's food market is made up of about 310.000 companies, and 4.8 million employees. With an annual turnover in excess of €900 billion, this diverse sector is a strong exporter and is responsible for countless end products in extremely competitive domestic and international markets

3. From mid-2007 to mid-2008, agricultural commodity prices rose sharply, which resulted in increased consumer food prices and higher inflation levels overall. Since then, prices of many commodities have come down to levels comparable to, or even lower than those reached before the start of the price surge. However, consumer food prices continued to increase and only started declining in May 2009, raising concerns about the functioning of the food supply chain. These changes have caused considerable hardship for agricultural producers and imply that consumers are not getting a fair deal.

4. The food supply chain connects three important sectors of the European economy – agriculture, the food processing industry and the distribution sectors – that together make more than 5% of European value-added and 7% of employment. Moreover, its performance has direct consequences for all European citizens, since food represents 16% of European households' expenditures.

5. The functioning of the food supply chain takes on increased importance in the path towards recovery from the current economic and financial crisis. High food consumer prices are a source of concern because they put pressure on household incomes in particular now at a time when an increase in consumption is needed. They are particularly hard on the most vulnerable households who spend a considerably greater proportion of their income on food. In the longer run, a better functioning food supply chain is crucial for consumers and for ensuring a sustainable distribution of value added along the chain, thus contributing towards raising its overall competitiveness. Improvements are needed urgently to avoid an escalation of consumer food prices as the recovery sets in.

6. The EC has been following developments in food prices as part of a market monitoring exercise launched within the context of the November 2007 Single Market Review which aims to provide policy

remedies to identified causes of malfunctioning. In December 2008, the EU published an interim report on "Food prices in Europe" and set out a roadmap identifying the key directions for policy actions.

7. In October 2009 the EU issued a Staff Working Document focussing in particular on competition issues in the food chain. This document will be discussed in more detail in the next section, complemented by a section on recent efforts of the EC in sanctioning cartels in the Food sector.

8. The Staff Working Document accompanies the EC Communication of 2009 on "a better functioning food supply chain in Europe". The EC Communication of 2009 contains a number of policy initiatives to improve the functioning of the food supply chain which are currently being discussed in the framework of the High Level Forum for a Better Functioning Food Supply Chain, set up by the Commission in July 2010.

2. Competition in the food supply chain

9. Competition policy plays a key role in maintaining a level playing field in the food supply chain. Ensuring that competition is not distorted in the food sector by any market player operating within the chain, i.e. producers, processors, traders, wholesalers and retailers is therefore of the utmost importance. For this reason, the roadmap set out in the EC Communication on "Food Prices in Europe" of December 2008 called for a pro-active monitoring of the food supply chain and, where necessary, for a vigorous and coherent enforcement of competition rules in food markets by the EC and National Competition Authorities.

10. As a follow-up to this Communication, and in order to implement its roadmap, the EC launched a fact-finding exercise involving stakeholders and National Competition Authorities (NCA's) with a view to better understand the competitive structure, interplay of actors and degree of competition in food markets. Firstly, the EC held meetings with relevant European associations of producers, processors, traders, wholesalers and retailers representing several food sub-sectors, so as to obtain insights into recent economic developments and specific factors influencing competition within different food supply chains, including cereals and breakfast cereals, milk and dairy, livestock and meat processing, pasta, confectionery, branded foodstuffs and beverages, fruit and vegetables, oils and oilseeds, sugar, poultry and eggs.

11. Secondly, given the national or regional scope of food retail markets, the EC strengthened its dialogue with NCA's on food related issues in the framework of the European Competition Network (ECN). In particular, ECN members exchanged information on recent enforcement, monitoring and advocacy initiatives undertaken at national and EU level, as well as on policy issues raised by recurrent commercial practices which may affect the functioning of food supply chains.

12. As evidenced by the significant efforts deployed over the last years by competition authorities, ECN members have granted due priority to case by case investigations, as well as to broader inquiries regarding food markets, which has led to the finding of an appreciable number of serious infringements, such as cartels and resale price maintenance cases. These infringements were swiftly remedied through cease-and-desist orders, accompanied where appropriate by substantial fines. Such cases spanned a variety of product markets, such as the dairy, milk, flour, bakery, pasta, eggs, poultry, beef, vegetables, fruit, olive oil, chocolate and herbs markets. A number of abuses of dominance cases targeted at the food industry have also been assessed in different Member States but remained limited in scope. Where NCA's applied EC competition law, the EC ensured a consistent and coherent application of the rules. Over the last years NCA's have also undertaken a significant number of sector inquiries and other market monitoring actions in the food sector which have provided detailed insights as to how food markets work.

13. Moreover, the information shared with the EC by stakeholders and NCA's confirms the view that, depending on the type of products involved, food supply chains are characterized by a high degree of complexity and diversity in terms of market structures, number of intermediaries operating at different stages within each chain, size and market power of incumbent producers and retailers, degree of concentration, entry barriers and other factors liable to affect competition in the relevant markets. Such product-specific structural differences are further amplified by diverse market conditions prevailing across Member States. To reflect such diversities, an important distinction should be made between supply chains for non-processed food (agricultural produce, perishable) and processed food (stockable).

14. Overall, supply chains for non-processed food are generally characterized by atomized suppliers and stronger buyers who are in most cases intermediary operators, and more rarely retailers. Such buyers are often unavoidable trading partners for the weakest producers. Given farmers' difficulties in aggregating their output with complementary products so as to supply retailers directly with the required product ranges, such an aggregation function is still largely being performed by intermediaries who, however, operate mostly at local level and sometimes at sub-optimal scale. Where it still exists, such an overlap of several layers of wholesaling may result in structural inefficiencies which, in turn, may influence negatively price transmission to end consumers.

15. By contrast, within supply chains for processed food, negotiations generally take place directly between producers and large retailers. While suppliers of leading brands tend to hold a relatively strong bargaining position vis-à-vis retailers, a significant number of SME's active in agro-food industries also enter into direct supply relationships with retailers, which adds to the complexity of the competitive interactions between producers and retailers within supply chains for processed food. These transactions may entail restrictions of competition depending on the nature of the agreements concluded between the parties and on whether the supplier, or the buyer, has sufficient market power to maintain prices at a supra-competitive level to the detriment of consumers.

16. As regards the retail sector, it is generally characterised by strong concentration ratios in many Member States even though different market structures and business models (hypermarkets, supermarkets, hard-discounters, networks of independent retailers, etc.) also prevail at national level. The existence of entry barriers stemming from regulatory constraints, such as zoning or planning laws, has been generally identified as a factor having an impact on competition in retail local markets.

17. Against this backdrop, it appears that the ability of suppliers and/or buyers to exercise their market power in a manner that would distort competition to the detriment of consumers depends, primarily, on the type of supply chain and on local market conditions which, in turn, are the result of structural factors and regulatory barriers specific to each Member State. NCA's are therefore well placed to tackle possible restrictions of competition which could affect the functioning of certain food supply chains.

18. In accordance with its Communication of 2009, the EC has also examined the relevance of certain commercial practices both in terms of their likelihood to arise and their ability to raise competition concerns within the relevant food supply chains. In addition to classic cartels and resale price maintenance, other practices were quoted by certain stakeholders as deserving special attention by Competition Authorities in appropriate cases, and requiring a careful balancing of efficiency enhancing and potentially anti-competitive effects. Such practices include joint commercialization agreements, tying and bundling, joint purchasing agreements (buying alliances) and the increasing use of private labels. NCA's converge in recognizing that a case-by-case analysis is required for such practices, based on the specificities of local market conditions.

19. In supply chains for non-processed food, joint commercialisation or joint selling agreements occur with relative frequency in the context of producer organisations. Such agreements may raise

concerns for competition when they lead to price fixing. However, when they entail an integration of complementary assets, they may help the supply of agricultural produce to become more efficient by cutting some of the intermediary stages that lengthen the supply chain and drive prices upwards. Competition Authorities can therefore assess such agreements in a way that can help farmers to grasp the efficiencies of their cooperation, whilst ensuring that benefits are passed onto end consumers.

20. For processed food, tying and bundling, often involving branded goods marketed by major industrial suppliers, are quoted by certain stakeholders as potential sources of concern. In certain situations, such practices may lead to anticompetitive foreclosure effects in the tied market, the tying market, or both at the same time, and may also lead to higher prices for consumers. In addition, foreclosure of competing suppliers may have a knock-on effect on the revenues of upstream producers of agricultural products by strengthening the market power of their industrial customers and, as a result, by weakening their capacity to negotiate prices with the latter. At the same time, however, tying obligations may help to produce efficiencies arising from joint production or joint distribution, and may also help to ensure a certain uniformity and quality standardisation. In absence of market power, such efficiency gains could be passed on to consumers in the form of lower prices or better products.

21. Additionally, certain stakeholders also refer to the development of transnational buying alliances, pointing out that, in certain circumstances, such forms of cooperation between large retailers may reduce the participants' incentives to expand into each other's domestic markets or may contribute to a standardisation of their purchasing policies, which could have a negative longer term impact on product variety and/or the ability of food suppliers to innovate. While joint purchasing agreements may give rise to important efficiencies, the extent to which such benefits are passed on to consumers depends on the specificities of each market, as well as on the scope and type of cooperation that takes place within each buying alliance.

22. Lastly, another concern raised by some stakeholders is the increased use of private labels enabling retailers to compete with established brands. In principle, private labels provide retailers with a way to satisfy consumer demand for cost-efficient alternatives to branded products, while ensuring value for money and quality products. Also, they are the expression of a competitive dynamic which may contribute to rationalizing the food supply chain by allowing retailers to enter into direct procurement and purchasing negotiations with their suppliers and participate in the productive process. However, when the extensive use of private labels leads a retailer and its competing leading brand supplier to coordinate their respective pricing and assortment strategies, in-store competition between brands may be restricted and, absent a sufficient competitive pressure from other retailers, consumers may suffer from higher prices or reduced choice for the relevant products.

23. It stems from the above that, as regards these practices, no sweeping generalisation can be made and a case by case analysis is necessary in order to establish the existence of a possible competitive harm. Competition Authorities will continue to ensure a rigorous enforcement of the rules in all cases where, after a careful balancing of efficiency enhancing and potentially anti-competitive effects, it appears that a significant harm for European consumers could result from these practices, be it at Community or national level.

24. For this purpose, and as explained above, NCA's play a key role in ensuring the application of competition rules to anti-competitive practices affecting both non-processed and processed food markets. Given the national or regional scope of such markets, the EC considers that the ECN is the appropriate forum to further develop an efficient and coherent policy to ensure sound competition in food markets throughout the EU. Therefore, further improvements in the cooperation between Member States and the EC within the ECN will facilitate the development of a common approach to relevant competition issues,

the swift identification of problematic cases and an efficient allocation of tasks amongst the ECN members.

25. In order to make the best use of the resources and competition expertise of the ECN, the EC has invited NCA's to consider the possibility of creating where appropriate joint working teams dedicated to the analysis of specific practices and markets which may be critical for the functioning of the food supply chain. Going beyond the mere exchange of information, this approach would encompass monitoring, advocacy and enforcement actions geared towards specific product markets and coordinated by the EC with a view to steering the collection of relevant information, identifying best practices for the prosecution of possible infringements. Through these comprehensive efforts, the EC and NCA's should be able to better detect endemic problems specific to food markets and promptly coordinate future actions, so as to improve the functioning of the food supply chain to the benefit of European consumers. In this context, over the last years the EC and NCAs have strengthened their close cooperation on competition issues in the food sector in the framework of the ECN Food Subgroup.

3. Recent Efforts in sanctioning cartels in the Food sector

26. The EC's own enforcement practice in the food sector has primarily focused on tackling hard core cartels. In the context of the economic crisis and rising food prices, detecting and sanctioning collusive behaviour in the food supply chain has indeed become more important than ever. In 2011, the EC concluded its investigation into the price fixing practices in the EU –wide marketing of, and trade in, bananas. In 2011 the EU Courts also rendered decisions on appeals in cartel cases in the agriculture sector previously decided by the EC.

3.1 *Banana cartels*

27. Bananas are bought all year around by a large proportion of EU consumers, and the EU is the largest consumer and importer of bananas in the world. According to EUROSTAT in 2010 the EU consumption of bananas was approximately 5 million tonnes, of which 12 % were of domestic production.

28. As imports dominate the EU banana market, it is not surprising that marketing and trade are at the forefront of competition enforcement in the sector. The banana market is highly concentrated with five major multinationals (Dole, Del Monte, Chiquita, Fyffes and Noboa/Pacific Fruit/Bonita) controlling more than 80% of all internationally traded bananas, and at least 50 % in the EU fresh banana markets. Furthermore, the trade in bananas during the period of the infringements was characterised by significant trade flows between Member States. For instance, bananas imported into a few ports located along either the Northern or Southern European shipping routes could distribute throughout the region or transported elsewhere.

29. In its decision of 12 October 2011 the EC concluded an investigation into the banana market which had started in 2005 on the basis of an immunity application made by Chiquita and sanctioned a cartel operated by this company and Pacific Fruit, both major importers and sellers of bananas in the EU (case COMP/39482 - Exotic fruit). From at least July 2004 to April 2005, the companies had fixed weekly sales prices for bananas and exchanged price information in relation to their respective brands in Italy, Greece and Portugal. The EC imposed a fine of € 8, 9 million on Pacific Fruit while Chiquita, as the immunity applicant, was granted immunity from fines.

30. In October 2008, the EC also fined Dole and Weichert/Del Monte € 60 million for price fixing in Northern Europe (case COMP/39188 – Bananas). It found that in the period 2000-2002 the companies had engaged in bilateral pre-pricing communications during which they discussed banana price-setting concerning Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the Netherlands and Sweden.

3.2 *Dutch Beer cartel*

31. Beer is one of the most important beverage items in EU household expenditure and it is particularly important for HoReCa services. In 2010 approximately 343 million hectolitres of beer worth were sold in the EU. Most beer (ca 63 %) was sold in retail outlets, but about 70 % of expenditure on beer occurred in the HoReCa.

32. In its decision of 18 April 2007 (Case COMP/B/37.766 - Dutch beer market), the EC had fined Dutch brewers Heineken, Grolsch and Bavaria with a total of € 273 million for operating a price-fixing cartel in the beer market in the Netherlands. The InBev group was granted immunity under the EC's leniency programme. The four brewers coordinated prices, and price increases of beer in the Netherlands, both in the on-trade segment of the market (where consumption is on the premises) and the off-trade market segment (consumption off the premises, mainly sold through supermarkets), including private label beer. The EC also found that in both segments the brewers had coordinated commercial conditions offered to individual customers and allocated customers, while in the on-trade market segment the companies had coordinated the rebates granted to pubs and bars.

33. The companies concerned subsequently appealed the decision before the General Court, seeking annulment of the EC's decision or a reduction in their fines.

34. The General Court largely upheld the EC's fines for Bavaria and Heineken (see Judgments of the General Court of 16 June 2011 in Cases T-235/07 Bavaria NV v EC and T-240/07 Heineken Nederland BV and Heineken NV v EC (Dutch Beer Cartel)). The General Court annulled the part of the decision relating to Grolsch in full. The judgment finds that the EC did not adduce sufficient evidence to establish the direct participation of Grolsch in the cartel (see Judgment of 15 September 2011 in Case T-234/07 Koninklijke Grolsch NV).

3.3 *Tobacco cartel*

35. Italy is an important producer of raw tobacco in the EU and has significant exports to other Member States.

36. Between 1995 and 2002, the leading tobacco processors in Italy colluded on their overall purchasing strategy in the raw tobacco procurement market, agreeing between themselves purchase prices and allocating their suppliers (both growers and intermediaries). They also rigged their bids in respect of public auctions between 1995 and 1998. In 2005 the EC imposed fines totalling € 56 million on four raw tobacco processors for breach of Article 101 TFEU (EC decision of 20 October 2005 (C (2005) 4012 final, COMP/38.281 – Italian raw tobacco). Despite the conditional immunity granted to Deltafina, the EC found that the company had infringed the obligation to cooperate as applicant for immunity. Therefore the EC granted it a reduction of its fine of 50% instead of a complete reduction. The case was the first in which the EC did not grant final immunity from fines to the first undertaking that revealed the existence of a cartel.

37. The General Court upheld the EC decision entirely as far as Deltafina was concerned (see Judgment of the General Court of 9 September 2011 in Cases T-12/06 Deltafina and T-25/06 Alliance One v. EC). In its judgment of 5 October 2011 concerning the actions brought by Romana Tabacchi, Mindo and Transcatlab, the General Court reduced the fine imposed on Romana Tabacchi from € 2,5 million to € 1 million, as it considered that the EC had not sufficiently proved in part the duration of Romana Tabacchi's participation (see Judgments of the General Court in Cases T-11/06 Romana Tabacchi Srl v EC, T-19/06 Mindo Srl v EC and T-39/06 Transcatlab SpA v EC. The General Court did not adjudicate the action by Mindo and dismissed the action by Transcatlab).