

***THE FOOD DISTRIBUTION MARKET:
IS ANTITRUST EFFICIENTLY HANDLING THIS MARKET?”
(MERGER, RESTRICTIVE PRACTICES, ABUSE OF DOMINANT POSITION)***

RESOLUTIONS¹

The League considers:

- 1) There are only a few “pure” competition law issues in the grocery retail market and antitrust law seems to be able to satisfactorily handle most of the competition problems raise
The LIDC underlines the importance of applying the same competition law principles consistently across sectors. The application of a general competition law framework to grocery retail in no way prevents taking into consideration specific characteristics of the sector in the analysis such as the limited geographic scope of retail markets for groceries or the importance of grocery retail networks.
- 2) There are serious difficulties in the way antitrust laws are applied to the grocery retail sector in a number of countries. Such difficulties are due to the existence of conflicting public policy goals.
Such conflicts can arise when public policy makers want simultaneously to achieve low and stable retail prices for food products, to ensure that agricultural firms and suppliers of food products are sufficiently profitable, and to preserve small scale retailers.
In order to achieve such contradictory goals, a number of countries have included in their competition law or in their law against unfair trade practices a large number of prohibitions against various business behaviours of either suppliers or large scale retailers. This inclusion of numerous per se prohibitions against the business strategies of economic operators in the grocery retail sector has many undesired effects and may often restrict competition beyond what would be strictly necessary to achieve the socio-political goals pursued by governments. In addition, the enforcement of these prohibitions often appears ineffective to solve the tensions between large scale retailers and other operators in the grocery retail sector.
- 3) Issues concerning abuse of bargaining power in the business to business relationship mainly pertain to the distribution of the surplus along the vertical chain in the food retail sector and not always to competition or efficiency.
Competition authorities, when they are assigned the task of enforcing the provisions against abuses of bargaining power in the business to business relationships, have some

¹ The resolutions were adopted at the LIDC General Assembly, held in Kiev on 21 September 2013. International Rapporteur was Prof. Frédéric Jenny (France)

difficulty defining what bargaining power is and establishing a link between the alleged abuses and anti-competitive effects.

Establishing a list of all the “unfair” demands by co-contractors which are considered to be abuses of their bargaining power, as is done in some countries, may prevent pro-efficient business behaviours and unduly restrict commercial freedom. Furthermore, one can doubt the effectiveness of laws prohibiting abuses of bargaining power in the business to business relationship since in most cases the victims of the alleged abuses are not in a position to bring cases against the authors of the alleged “unfair” behaviour since the economic survival of the victims depends on the continuation of their commercial relationship with the perpetrators.

In the light of the above, the League recommends that:

- 1) More attention should be given to the fact that the multiplication of specific provisions to deal with the perceived competition problems in the grocery retail sector runs the risk of inconsistencies, overly restrictive regulations and lack of effectiveness. Generally, the enforcement of general competition law provisions is sufficient to deal with all the competition difficulties in this sector.
However, further thinking should be developed on the criteria to be used to decide if or when individual members of a grocery retail network should be treated as independent units or as part of an aggregated undertaking.
Given the limited size of the geographic retail markets for groceries, it appears that in some countries there should be more concern about competition in the grocery retail sector at the local level. Where National Competition Authorities do not have the resources to pursue local anticompetitive practices, their powers could be delegated to bodies acting locally under their supervision.
- 2) Competition law should not be diverted from what its role should be, i.e. the protection of competition and should not be used to protect competitors. There is a need for a systematic competition assessment of the legal provisions applicable to the grocery retail sector in order to amend those that are unnecessarily restrictive of competition and to eliminate those that are ineffective to achieve the socio-economic goals that they are supposed to promote. Such a competition assessment should also be taken into consideration by local authorities when enforcing zoning and land use planning laws so as not to unnecessarily restrict entry into the grocery retail sector.
- 3) The issue of abuses of bargaining power in the business to business relationships should be revisited in order to find complements to the use of competition law or unfair trade law, which could both be more effective and entail fewer undesirable effects. A possible alternative could be the adoption of enforceable codes of conduct, including an effective dispute settlement mechanism. The victims’ reluctance to complain should be taken into consideration when designing and enforcing alternative dispute resolution mechanisms.