Antitrust Developments in the Food Sector in the EU

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1. Political context

In 2007 and 2008, agricultural commodity prices and consumer prices for food were exceptionally unstable, thus raising concerns from consumers, consumer and food industry associations and politicians. In response to these concerns, the European Commission launched several initiatives in order to better understand the functioning of the food supply chain. In May 2008, the Commission published the communication "Tackling the Challenge of Rising Food Prices"[1] which analysed the multiple causes of increased food prices. The Commission's interim-report on "Food Prices in Europe" followed in December 2008 suggesting improvements of the food supply chain in order to promote

> "fair earnings of agricultural procedures, competitive prices and improved competitiveness of the food processing industry as well as greater choice, better affordability and higher quality of food products for European consumers".[2]

The regulator also promoted better regulation and "vigorous and coherent enforcement of competition".[3]

The former Commissioner for Enterprise and Industry set up a High Level Group on the Agro-Food Industry between 2008 and 2010, tasked with formulating recommendations to policy makers on how to improve the functioning of the agro-food industry whose competitiveness had been questioned. Participants in the group were Commission's services, representatives of Member States and key stakeholders, including farmers, processors, manufacturers, retailers and consumers.

On the basis of the High Level Group's findings, in October 2009 the Commission's Directorate for Enterprise and Industry published the Communication "A Better Functioning Food Supply Chain in Europe",[4] and the Directorate for Competition (DG COMP) issued its accompanying "Staff Working Document on Competition in the Food Supply Chain".[5] In preparation of that document, in 2009 DG Comp held a series of informal discussions with a selection of representative associations of food processors, manufacturers, traders, wholesalers and retailers. The document proposed the promotion of "sustainable and market-based relationships between stakeholders in the food supply chain" and increased transparency on the market. As a result, in 2010 the High Level Forum for a Better Functioning Food Supply Chain (the Forum) was formed, tasked with the responsibility to advice the Commission on the implementation of the relevant initiatives. While initially the term of the Forum was set until the end of 2012, the Forum's mandate has now been extended by another two years.[6]

Within this Forum, a "Business to Business Platform" was organised to draft proposals of good and fair contractual practices for business-to-business relationships in the whole food supply chain. The primary focus of attention concerns on the one hand the identification of unfair trading practices and on the other hand the promotion and dissemination of best practices. The core of the discussion has centred around the asymmetry between and possible misuses of bargaining power by actors operating in the food chain. Examples identified by the Forum concern, inter alia, unjustified sanctions, unilateral termination of an agreement or tying. Such practices may have an antitrust aspect in certain circumstances if they amounted to an abuse of a dominance.[7]

The stakeholders in the Forum have not reached yet a consensus on the best way to implement principles of good contractual practices. However, a roadmap and a framework for the implementation and enforcement of the principles had been issued in December 2012, pointing towards a voluntary system of good practices where companies from all levels of the supply chain could sign up to.[8] The Commission appears to express a preference for a voluntary approach over legislation while at the same time it has drafted a "Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe", which was presented at the end of January 2013. In that paper, unfair trading practices are defined as "practices that grossly deviate from good

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[1] Commission Communication on "Tackling the challenge of rising food prices — Directions for EU action", COM (2008) 321, May 20, 2008.
[2] Commission Communication on "Food Prices in Europe", COM (2008) 821, December 9, 2008, p.9.
[3] Commission Communication on "Food Prices in Europe", COM (2008) 821, December 9, 2008, p.10.
[4] Commission Communication "A better functioning food supply chain in Europe", COM(2009) 591, October 28, 2009.
[5] Commission Staff Working Document, "Competition in the food supply chain", accompanying document to the Communication "A better functioning food supply chain in Europe", October 28, 2009.
[6] Commission Decision of December 19, 2012 amending the Decision of July 30, 2010 as regards its applicability and the composition of the High Level Forum for a Better Functioning Food Supply Chain, [2012] OJ C396/17.
[7] Core Members of B2B Platform: Vertical relationships in the Food Supply Chain: Principles of Good Practice, November 29, 2011.
[8] B2B Platform (industry and retailers without farmers): Framework for the implementation and enforcement of the principles of good practice in vertical relations in the food supply chain, December 3, 2012.

commercial conduct and are contrary to good faith and fair dealing.”[9] Examples given are ambiguous contract terms, retroactive contract changes, unfair transfer of commercial risk, unfair use of information, unfair termination of a commercial relationship and territorial supply constraints. The paper acknowledges the different objectives of competition law—protecting competition and addressing market power—and unfair trading rules. The Green Paper is a preliminary assessment and initiates a consultation with stakeholders whose views are requested by April 30, 2013. The Commission will also work on an impact assessment of the various options available to address unfair trading practices. The farming sector is still asking for an European ombudsman with investigation power and the competence to impose sanctions for unfair trading practices.

The European Parliament, already dealing with the reform of the Common Agricultural Policy (CAP), has supported the closer look at the food supply chain, and passed seven resolutions between 2009 and 2012 calling for stronger antitrust enforcement, the latest being the Resolution of January 19, 2012 on “The Imbalances in the Food Supply Chain”.[10] In this resolution, the Parliament urged the Commission to propose “robust EU legislation” and to tackle abusive and unfair trading practices. While the Parliament’s resolutions have no binding effect, they express the political expectation that the Commission will propose adequate legislative and implement executive measures.

In addition, there is intense debate as to whether within the agricultural sector, there should be to some extent an “exception to competition law, which has to reflect the need to concentrate supply and strengthen the power that farmers can wield on the market”.[11] However, the Heads of the European Competition Network (ECN) stated in the resolution from December 21, 2012 that a solution would not lie in large-scale exclusion of the application of competition rules. The ECN rather encourages farmers to form entities or organisations to create efficiencies (what could been done already under the current legislation) in order to respond to market challenges in a pro-competitive way.[12]

2. Antitrust-related activities of the European Commission

Against this backdrop, in January 2012 the DG COMP created its own “Task Force Food”. The task force is organisationally located in department “COMP.E — Markets and cases IV: Basic industries, Manufacturing and Agriculture”, and is composed of six case handlers (including the head of the task force), who seek to gain wide input from stakeholders as far as the antitrust aspects of the food supply chain are concerned. It scrutinises the food market and will determine which (if any) investigations are to be undertaken at the EU level.

In response to calls by stakeholders, in December 2012 the Commission called for a study, which shall assess whether the increased concentration on the retail level and the use of private labels have hampered choice and innovation in the European food industry. The study aims at measuring the variety of products available to consumers in supermarkets, and the offer of entirely new products.[13] The results of the study are expected by the end of 2013. It is worth mentioning that this is the first study that puts the interests of consumers in the centre of the debate on the functioning of the food supply chain.

The creation of the food task force has prompted speculation in the antitrust community as to whether the Commission will launch a food sector inquiry. The Commission may undertake a sector inquiry if it concludes that “rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market” (art.17(1) of Regulation 1/2003[14]). Previous sector inquiries concerned beer distribution, business insurance, energy, margarine, new media, pharmaceuticals, retail banking and telecommunications. Statements from the Commission’s services and the Commissioner are vague but at this stage suggest a tendency to not open an inquiry.

Unequal bargaining power is not necessarily a competition law issue, and similarly, unfair trading practices outlined above do not amount per se to competition issues. In this respect, the head of the food task force stated that

> “the complaints come usually about problems of unbalanced bargaining positions […]. This is not a concept that we usually use in competition law enforcement. What we use is buyer power, where an operator has the power to impose conditions.”[15]

Commissioner Joaquín Almunia said:

> “The result of this task force may be suggestions to strengthen our work as competition authorities, and it might also lead to a European-level investigation being opened […]. I could not deny that there may be a need for an EU-wide case; so far [the services had not] found such a case.”[16]

[9] *Commission Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe*, COM(2013)37/2, January 31, 2013, p.3.
[10] European Parliament, 2011/2904 (RSP), January 19, 2012.
[11] European Parliament, *Draft Report on the proposal for a regulation of the European Parliament and of the Council establishing a common organisation of the markets in agricultural products (Single CMO Regulation)*, 2011/0281(COD), June 5, 2012—also called Dantin Report. The Report will be adopted soon.
[12] Heads of the European Competition Authorities, Resolution, *The Reform of the Common Agricultural Policy*, December 21, 2012.
[13] COMP/2012/015 study on “The economic impact of modern retail on choice and innovation in the EU food sector”, December 11, 2012. The results of the study are expected by the end of 2013.
[14] Council Regulation (EC) No 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty, [2003] OJ L1/1, January 4, 2003.
[15] Chauve, October 17, 2012, quoted according to MLex.
[16] Almunia, October 8, 2012, quoted according to MLex; similar remarks of Almunia quoted by PaRR Global, *Policy and Regulatory Report*, June 8, 2012.

The Commission's reservation is reflected in the limited number of investigations that it has initiated in the last years. The authority has only pursued six major cases since 2004, namely in the markets for beer, bananas and soft drinks. However, this does not imply antitrust under-enforcement in the industry, as the large numbers of investigations by the national competition authorities (NCA) show.

3. Antitrust-related activities of Member States

The focus on antitrust issues in the food sector is considerably stronger in Member States where the NCA investigate either individual companies or conduct sector inquiries. The local scope of many food and retail markets and other structural features explain why the NCA are often better positioned to enforce competition law. The Report of the European Competition Network on *"Competition Law Enforcement and Market Monitoring Activities by European Competition Authorities in the Food Sector"* of May 2012[17] evidences the high level of enforcement activities. The report summarises the key enforcement and monitoring actions undertaken by the NCA and the Commission from 2004 to 2011.

During the eight years ending 2011, the NCA combined have conducted 182 antitrust investigations, 50 of which were cartel cases and 60 of which are ongoing. That represents an average of over one case each month during this period, or one cartel every three months.

Of all the cases, 49 per cent related to horizontal agreements, 19 per cent to vertical agreements, and 20 per cent to abusive conduct by dominant operators. By food market, the cases concern in particular multi-products (21 per cent of all cases), cereals and cereal-based products (18 per cent), milk and dairy (12 per cent), followed by fruit and vegetables (10 per cent), and meat, poultry and eggs (9 per cent). Looking at the level of the supply chain, the highest number of cases relate to the processing industry (28 per cent of all cases) followed by retail (25 per cent) and manufacturing (16 per cent). The transformative part of the supply chain (i.e. processing and manufacturing) accounts for about 44 per cent of all cases.

By country, the scrutiny is particularly intense in France, Germany, Greece, Hungary, Latvia, Portugal, Romania and Spain; the NCA in these countries combined have pursued 60 per cent of all cases investigated by NCA in the European Union (for 2004 to 2011).

Twenty-five NCA 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 largest number of monitoring investigations has focused on the retail sector (with a total of 36 market monitoring investigations). Other sectors (e.g. alcoholic drinks, sugar, meat) and food-related issues accounted for 28 monitoring investigations.

4. Selective legal issues relevant in the context of such activities and investigations

In the following, commonly investigated issues concerning resale price maintenance (RPM) (4.1) and buying power (4.2) shall be further explained, but also most-favoured-nation clauses (MFN clauses) (4.3) and hub & spoke cartels (4.4) which have received attention from the authorities:

4.1 Resale Price Maintenance

Under art.101(1) TFEU, agreements and concerted practices that may affect trade between Member States and that have as their object or effect the prevention, restriction or distortion of competition within the internal market are prohibited, "in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions". Pursuant to art.101(2) TFEU, such agreements are automatically void, unless justifications pursuant to art.101(3) TFEU apply. The Commission has set out a safe harbour for such justifications in a block exemption regulation concerning vertical agreements[18] (VBR) for parties of a vertical agreement whose respective market shares are below 30 per cent. From the outset, the VBR does not provide an exemption for RPM which are considered as "hardcore restrictions" of competition.[19]

Article 4 (a) VBR states:

> "The exemption [from prohibition] shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object: (a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties; […]".

If the agreement contains provisions that establish the resale price, the restriction is clear-cut. However, RPM can also be achieved through indirect means.[20] The Commission provides the following examples[21]: (i) fixing

[17] European Competition Network, *Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector*, (ECN Report), May 24, 2012.
[18] Commission Regulation 330/2010 of April 20, 2010 on the application of article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, [2010] OJ L102/1.
[19] In the case of agency agreements, the principal normally establishes the sales price vis-à-vis the agent, but RPM issues do not arise as agency agreements normally do not fall under the ambit of art.101(1) TFEU.
[20] See also Zevgolis, "Resale price maintenance (RPM) in European competition law: legal certainty versus economic theory?" [2013] E.C.L.R. 25.
[21] Commission Guidelines on Vertical Restraints, [2010] OJ C130/01, May 19, 2010, para.48.

the distribution margin, (ii) fixing the maximum level of discount the distributor can grant from a prescribed price level, (iii) making the grant of rebates or reimbursement of promotional costs by the manufacturer subject to the observance of a given price level, (iv) linking the prescribed resale price to the resale prices of competitors, (v) threats, intimidation, warnings, penalties, (vi) delay or suspension of deliveries or (vii) contract terminations in relation to observance of a given price level.

The Commission notes that direct or indirect means of RPM can be made more effective when combined with measures to identify price-cutting distributors, such as the implementation of a price monitoring system, or the obligation on retailers to report other members of the distribution network that deviate from the standard price level. Similarly, according to the Commission, direct or indirect price fixing can be made more effective when combined with measures that may reduce the distributor's incentive to lower the resale price, such as the manufacturer printing a "recommended resale price" on the product or the manufacturer obliging the distributor to apply a most favoured nation clause. The same indirect means and the same "supportive" measures can be used to make maximum or recommended prices work as RPM. However, the use of a particular supportive measure or the provision of a list of recommended prices or maximum prices by the manufacturer to the distributor is not considered in itself as giving rise to RPM.

In the food context, investigations in Member States will have to analyse very cautiously RPM, and in particular, the existence of "indirect means to achieve RPM". It is worth mentioning that in Germany precedents exist according to which the Federal Cartel Office has taken a very restrictive approach, in particular as to the question what a legitimate recommended price practice is and, hence, created great uncertainty amongst manufactures and retailers. To give an example, the authority considers it problematic, if the sale price or the promotional price is the subject of repeated discussions between the manufacturer and the retailer.[22] However, in purchase price discussions with manufacturers, a retailer needs to estimate a prospective resale price, and for that calculation a retailer inevitably needs to understand the validity of a recommended sale price. Food manufacturers and retailers use a multitude of arguments, criteria and calculations in their bilateral negotiations, and the intensity of these negotiations reflects the fierce competition both sides are facing.[23] Antitrust enforcement should not wrongfully interpret recommended prices in an overly restrictive way, which would impede business practices that are essential to achieve such intense competition.

In the Commission's view, there is a presumption that hardcore restrictions such as RPM impede competition. However, companies can rebut such presumption in individual cases, if they can prove that pro-competitive benefits for consumers outweigh the negative competitive effects. It is not unlikely that the Commission will apply high standards for a successful justification defense; its Guidelines on Vertical Restraints mention the following non-exhaustive list of scenarios[24]:

- RPM may be used for a period of two years in order to promote the sale of a new product. In relation to the criterion of "new", the Commission is unlikely to accept modifications of an existing product; in many presentations, representatives of the Commission referred to the Segway as an example of a new product.
- Similarly, fixed resale prices may be necessary to organise in a franchise or similar system, applying to a uniform distribution format a co-ordinated short-term low price campaign (two to six weeks in most cases).
- RPM may also help to prevent free-riding at the distribution level. RPM may allow retailers to provide (additional) pre-sales services, in particular in terms of experience or in case of complex products. If enough customers take advantage of such services to make their choice but then purchase at a lower price with retailers that do not provide such services (and hence do not incur these costs), high-service retailers may reduce or eliminate these services that enhance the demand for the manufacturer's product.

4.2 Buying power

The increasing concentration of retailers observed in many Member States, unstable or higher retail prices in some countries, and the (often political) debate on the alleged exercise of market power by retailers to sustain higher retail prices have put the question of buying power of retailers on the agenda. Other factors, such as entry barriers to retail markets, co-operative alliances among retailers, international buying alliances or the use of private-label products, have also been raised in this debate.

From an EU law perspective, buying power may give rise to concerns if it is used to foreclose competing buyers to the detriment of customers. In general, however, it is recognised that buying power is less likely to raise antitrust concerns where the parties face competition on

[22] Bundeskartellamt, *Vorsitzendenschreiben*, April 13, 2010, pp.3–5 (paper prepared by the director of the competent decision department of the Bundeskartellamt). Also Bundeskartellamt, B3-123/08, September 25, 2009, CIBA Vision.
[23] As the Commission Staff Working Document "Competition in the food supply chain" notes, p.9: "One of the key findings of the current exercise is that competition at retail level is fierce, both between retailers themselves and increasingly between different retail formats".
[24] Commission Guidelines on Vertical Restraints, [2010] OJ C130/01, May 19, 2010, para.225.

the selling markets.[25] Hence, from an antitrust and economic perspective, buying power is not per se a problem.

In this context, a distinction must be made between anti-competitive buying power on the one hand and unequal bargaining power on the other hand which is a feature of any industry. The latter may be deemed to be unfair for the contract party but not necessarily negatively affect consumers' interests. Further, antitrust legislation is not aimed at preserving certain supply and demand structures. The ECN report as well as the Commission Staff Working Document on "Competition in the Food Supply Chain" consequently state that

> "[u]nequal bargaining power and resulting contractual imbalances do not necessarily imply a competition infringement in most cases. Such issues may be, where appropriate, addressed by other policy tools, such as contract and unfair commercial practices law."[26]

In addition, anti-competitive buying power does not necessarily have to meet the standard of art.102 TFEU, which prohibits the abuse of a dominant market position. National antitrust laws of many Member States provide stricter laws to unilateral conduct than art.102 TFEU (e.g. Cyprus, Czech Republic, France and Germany), including the abuse of economic dependency.

The analysis of buying power, including the economic concepts (such as spiral and waterbed effects), is not clear-cut; the sheer size of a retailer does not necessarily translate into buying power if there is a countervailing position on the side of the manufacturer. Buying power itself does not necessarily impede competition, if competition downstream is intense and the buying power creates efficiencies that are passed on to consumers.[27] In Germany, for instance, the national Monopoly Commission has just recently found that competition on the retail markets has not decreased.[28] Many NCA have realised the complexity of price formation and price setting in the food supply chain. In this respect, sector inquiries may provide new information, which should facilitate reaching sound conclusions, and which may demonstrate the Commission that there are no reasons to overly regulate the business relationships in the food supply chain.

4.3. Most favoured nation clauses

MFN clauses typically require one party (usually the manufacturer) not to offer to others than the contract party better prices/conditions, or to always offer the lowest price/best conditions to the contract party.

The VBR and the Guidelines on Vertical Restraints are silent about MFN clauses. From public sources, it seems that the Commission has not investigated any cases, and the European Courts have not decided upon the legality of MFN clauses. A recent exception concerns the Commission's investigation into e-books, although it has to be noted that in this case the Commission seems to have suspected concerted practice aimed at raising retail prices for e-books. There is no published decision available that sets out the Commission's thinking in full, as the case was settled. However, some guidance is available from the commitments accepted by the Commission, according to which neither the publishers nor Apple can conclude agreements for e-books with retail-price MFN clauses for a period of five years.[29]

In addition, it is understood that many NCA have taken a critical attitude toward MFN clauses. A clear example is given by the German Federal Cartel Office, which has explicitly expressed its reservations about MFN clauses in a paper prepared in the context of the food antitrust investigation.[30] The authority has taken the view that MFN clauses or similar oral or written agreements that aim at establishing homogeneous prices on wholesale or retail levels are generally not permissible if they have as their object or effect the (indirect) agreement on prices or other competitive parameters between wholesalers/retailers.

4.4 Hub & Spoke cartels

Hub & Spoke cartels present one of the most interesting legal and factual challenges in competition law.[31] Conceptually, these cartels concern the situation where an exchange of information does not occur directly between competitors but indirectly through a third party. The Commission briefly observes in its Horizontal Guidelines that information can be shared indirectly through a common agency (for example, a trade association) or a third party such as a market research organisation or through the companies' manufacturers or retailers,[32] but it does not offer further guidance as to how in practice an infringement of art.101 TFEU can be established.

The NCA seem interested in testing such concepts, in particular in the retail area. A prominent example is the UK case *Argos Ltd and another v Office of Fair Trading*, *JJB Sports Plc v Office of Fair Trading* (OFT), in which following decisions by the OFT, the Court of Appeal considered the existence of an unlawful horizontal agreement

> "(i) [where] retailer A discloses to supplier B its future pricing intentions in circumstances where A may be taken to

[25] Commission Guidelines on Horizontal Co-operation Agreements, [2011] OJ C11/1, January 14, 2011, para.203.
[26] *ECN Report*, para.76. Similar wording Commission Staff Working Document, "Competition in the food supply chain", accompanying document to the Communication "A better functioning food supply chain in Europe", October 28, 2009, p.18.
[27] *ECN Report*, para.73.
[28] Monopolkommission (Monopoly Commission), *Drucksache 17/10365*, July 20, 2012, p.363.
[29] Almunia, *Statement on commitments from Apple and four publishing groups for sale of e-books*, December 13, 2012.
[30] Bundeskartellamt, *Vorsitzendenschreiben*, April 13, 2010, p.9.
[31] See also Odudu, "Indirect information exchange: the constituent elements of hub and spoke collusion" (2011) 7(2) *European Competition Journal* 205.
[32] Commission Guidelines on Horizontal Co-operation Agreements, [2011] OJ C11/1, January 14, 2011, para.55.

intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is or may be one),

(ii) B does in fact, pass that information to C in circumstances where C may be taken to know the circumstances in which the information was disclosed by A to B and

(iii) C does, in fact, use the information in determining its own future pricing intentions, then A, B and C are all to be regarded as parties to a concerted practice having as its object the restriction or distortion of competition."[33]

In late 2011, the Competition Appeal Tribunal (CAT) quashed the tobacco cartel decision of the OFT which had imposed record fines against ten retailers and two manufacturers. The CAT held that the OFT failed to provide reliable evidence concerning the intention of the retailer that the information that it passed to the manufacturer will be passed on to competing retailers.[34] The OFT had found an infringement of the prohibition to conclude anti-competitive agreements in that each manufacturer sought to achieve, through a series of bilateral agreements with the different retailers, retail prices for the manufacturer's brands which were set either at parity with or at a differential to competing linked brands.[35] The case has elements of MFN issues (see above), but is also interesting because the OFT originally investigated an alleged hub & spoke cartel. However, this element was not further pursued by the OFT. According to the OFT, the closure of the investigation should not imply that it "would not prioritise suspected A-B-C information exchanges in the future".[36]

In the context of the food antitrust investigation in Germany, the authority issued an informal communication identifying practices that per se amount to an infringement of antitrust law, and other practices that would indicate an infringement. The objective of the communication was to provide guidance to companies co-operating with the authority on how to avoid illegal practices within the co-operation. The communication does not fully spell out the legal assessment of the authority. The Federal Cartel Office takes the position that RPM may result in a horizontal agreement between retailers if the retailers' information exchanges with the manufacturers have as an (indirect) object or effect a horizontal agreement on prices and other competition parameters between retailers.[37] The Federal Cartel Office considers that the following practices normally constitute per se an infringement if they have as their (indirect) object or effect the agreement on prices or other competitive parameters between wholesalers/retailers (but does not explain further when the object or effect would occur)[38]: (i) manufacturer discloses to retailer conditions and contracts agreed upon with competing retailers; (ii) MFN clauses (see above); (iii) manufacturer discloses upon request of retailer price-related information concerning competing retailers; (iv) retailer agrees with manufacturer assortment, sales strategy, advertisement or promotions/timing if such agreements aim to achieve a coordination with competing retailers; (v) retailer announces advantages or disadvantages for observance of recommended sales price by competing retailers.

In addition, the Federal Cartel Office identifies other practices that suggest an infringement of antitrust law if other circumstances exist, such as: (i) retailers exchange sales prices of competing retailers with manufacturers or complain about such prices; (ii) manufacturers engage retailers to monitor sales prices and vice versa.

It remains to be seen whether the Federal Cartel Office will follow the strict approach introduced in the communication. However, as with RPM, authorities should not establish an overly restrictive standard for antitrust-compliant negotiations. As a matter of fact, manufacturers as well as retailers must take account of competitor's prices, as the retail price is not necessarily based on the cost (i.e. purchase price) plus margin, but might be set with reference to the lowest price offered by a competing retailer. In the negotiations, manufacturers and retailers need to be able to discuss recommended sales prices and market prices without breaching antitrust laws.

5. Conclusion

The food sector will continue to be scrutinised by the Commission and NCA. In light of the activities of NCA, a sector inquiry of the Commission does not seem necessary, although it cannot be excluded. Given the intense competition in the food retail markets, antitrust authorities should exercise caution with respect to the assessment of negotiation power and certain contract clauses unless a clear-cut theory of harm can be established.

[33] Court of Appeal, *Argos Ltd v Office of Fair Trading*, [2006] EWCA Civ 1318; [2006] U.K.C.L.R. 1135; (2006) 103(42) L.S.G. 32.
[34] CAT, *Imperial Tobacco Group Plc v Office of Fair Trading* [2011] CAT 41.
[35] OFT, case CE/2596-03, 7.32.
[36] OFT, *Closure of investigation into suspected price coordination involving a number of retailers and suppliers in the UK Grocery sector*, para.7, November 2010.
[37] Bundeskartellamt, *Vorsitzendenschreiben*, April 13, 2010, p.8. See also Röhling and Haus, *Hub and Spoke — Kartelle im Handel*, KSzW 2011, 32; Stöcker, *Abstimmung über Dritte*, WuW 2012, 935.
[38] Bundeskartellamt, *Vorsitzendenschreiben*, April 13, 2010, p.10.