



## **ECN SUBGROUP FOOD**

# **ECN ACTIVITIES IN THE FOOD SECTOR**

## **Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector**

May 2012

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# 1. EXECUTIVE SUMMARY

## I. Introduction

1. After mid-2007, food prices in the EU increased significantly at all levels of the supply chain. Since this time, volatility of prices, notably of producer prices for food commodities, has also increased. In this context of **rising food prices, volatile commodity markets** and **perceived concerns about the functioning of the overall food supply chain**, the actions of the European competition authorities in the food sector are of the utmost importance to ensure well-functioning competition at all levels of the food chain to the ultimate benefit of European **consumers**, who spend a significant part of their budget on food.
2. In Europe, the National Competition Authorities ("NCAs") and the European Commission ("Commission") have responded to these challenges by actively enforcing competition rules in the food sector and by closely monitoring the structures and functioning of food markets. By doing so, they have also responded to the Commission's Communication of October 2009 on "*A better functioning food supply chain in Europe*", which called for a strengthening of the application of competition rules in food markets through a coordinated approach within the European Competition Network ("ECN"), i.e. the network of European NCAs and the Commission.
3. This Report has been prepared within the ECN and provides a comprehensive overview of the most significant enforcement, advocacy and monitoring actions undertaken by the NCAs and the Commission from 2004 to 2011. It demonstrates the significant contribution of European competition authorities to the well-functioning of the food supply chain. They have investigated and imposed sanctions in respect of a large number of competition infringements in numerous markets and at all levels of the food supply chain and have ensured that mergers and acquisitions have not significantly impeded effective competition. In addition, they have used a large variety of market monitoring tools, such as sector inquiries, to analyse and report on the possible malfunctioning of food markets. In total, they have undertaken more than **180 antitrust investigations**, close to **1300 merger control proceedings** and more than **100 market monitoring actions** since 2004.

## II. Enforcement actions (antitrust cases)

4. Since 2004, European competition authorities have concluded about 120 investigations with a finding of an infringement and are still investigating about 60 cases, which leads to a total of more than **180 antitrust cases** in the food sector. This does not take into account all the investigations opened to address potential problems in the food supply chain since 2004, but which were subsequently closed without finding an infringement for various reasons (e.g. preliminary investigations did not find sufficient evidence or internal decisions to focus resources on other investigations).

### *Main markets scrutinised*

5. The more than 180 antitrust cases pursued by the European competition authorities cover a **wide range of food markets**, with particular emphasis on multi-products (21%), cereals and cereal-based products (18% of all cases), milk and dairy (12%), followed by fruit and vegetables (10%), and meat,

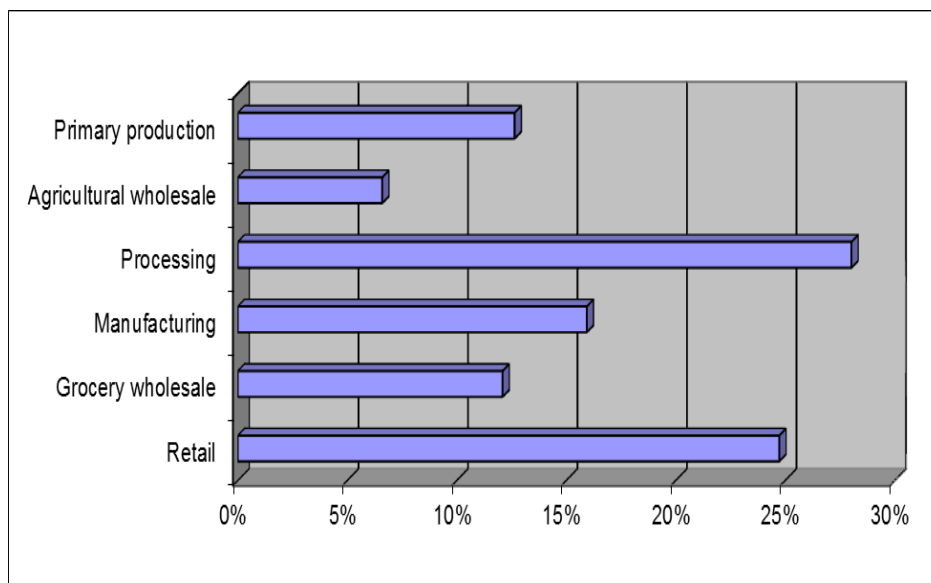
poultry and eggs (9%). Other markets in which competition authorities have intervened include alcoholic drinks, coffee, soft drinks, sugar and confectionery, and fish and seafood.

6. These cases **indicate the sectors where competition problems have been found** or are being investigated by the authorities. However, one should not automatically jump to the conclusion that some markets, where only a limited number of cases or no cases were pursued, do not face any competition problems. Many factors play a role in why certain markets receive more scrutiny than others, the most important one being the awareness of competition authorities, which can be raised through complaints, leniency applications, monitoring actions, etc.

#### *Levels of the food supply chain investigated*

7. The European competition authorities have scrutinised **all levels** of the supply chain, with the largest number of cases regarding the **processing** level (28%), followed by retail (25%) and manufacturing (16%). Interestingly, **the transformative part** of the supply chain (processing and manufacturing) accounts for about 44%, thus **close to half, of all cases**.

**Figure 1**  
**Antitrust cases by level of the supply chain**

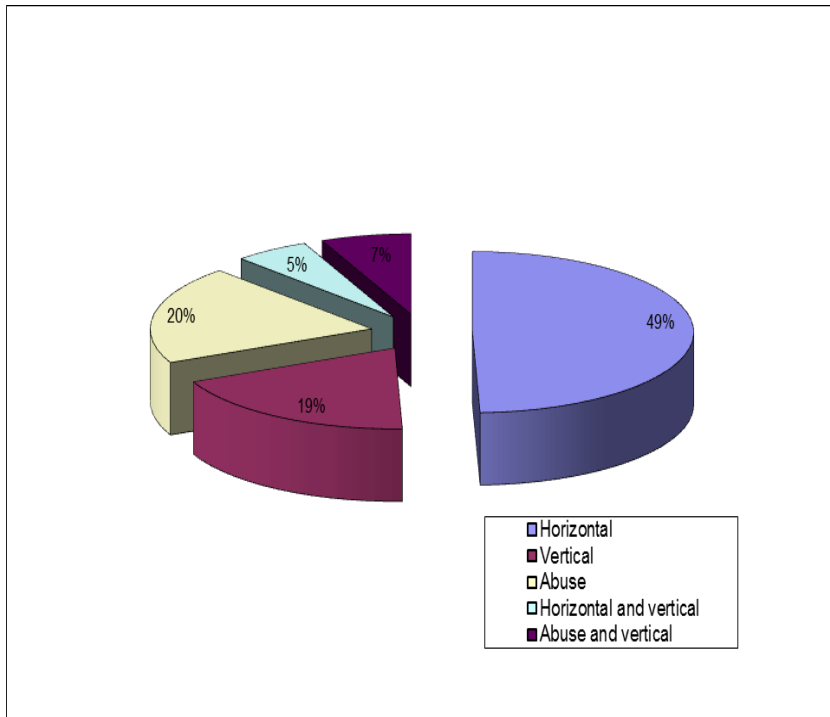


#### *Types of infringements*

8. In terms of types of infringements, competition authorities have focused on horizontal agreements among competitors, which account for **about half of all cases** investigated (49%). Competition authorities have detected horizontal infringements in the form of price fixing, market and customer sharing and exchanges of confidential information at most levels and for most products investigated, in particular in cereals (processing and manufacturing) and meat, poultry and eggs (primary production). In practice, this means that authorities

have imposed sanctions in respect of more than 50 cartels in the food industry and are investigating more than 30 further potential cartels.

**Figure 2**  
**Antitrust cases by type of infringement investigated**



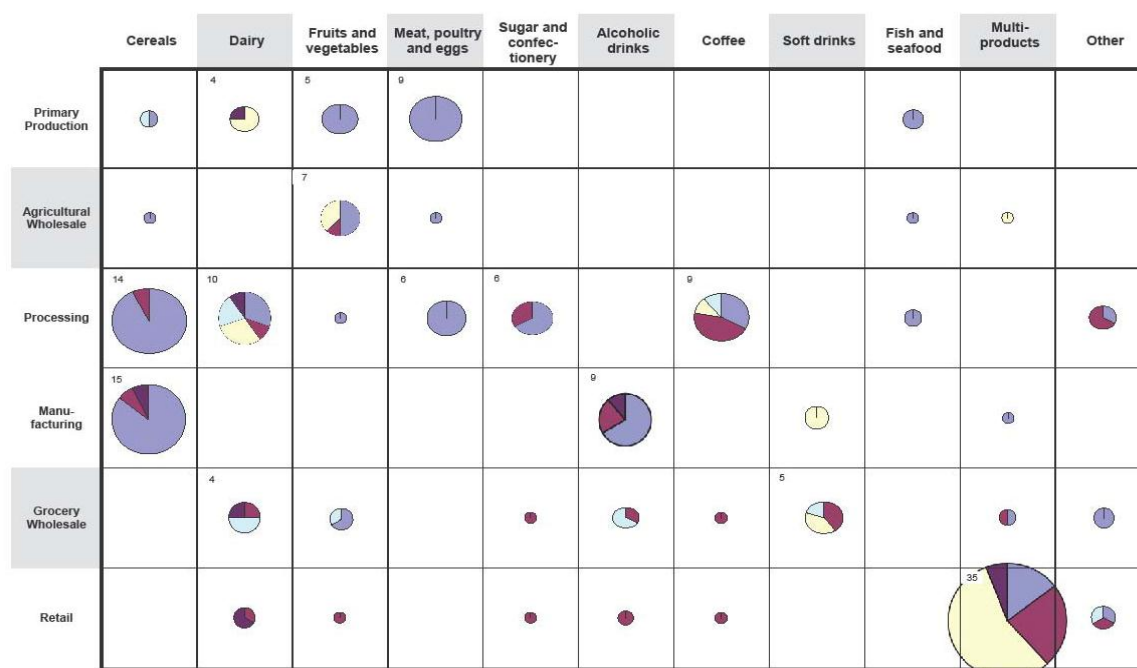
9. The European competition authorities have also investigated a number of cases dealing with **vertical anti-competitive agreements** (19% of all cases). Prominent examples are price-related anti-competitive agreements, in particular resale price maintenance (whereby a manufacturer sets the minimum price at which a retailer has to sell its products), and exclusive purchasing agreements that restrict the freedom of the immediate customer to deal with other suppliers. Competition authorities found vertical restraints mainly in coffee, sugar and multi-products markets.
  
10. Finally, the European competition authorities have further investigated cases which involved **abusive conduct by dominant operators** (20% of all cases). These abuses mainly involved strategies to foreclose competitors, such as exclusivity obligations, minimum purchasing obligations, tying and refusals to supply, but also some exploitative abuses, such as unjustified contractual obligations. The large majority of these cases related to abusive conduct subject to Article 102 TFEU or equivalent national rules. However, a few NCAs pursued a number of cases which involved the application of stricter national rules that go beyond the scope of Article 102 TFEU, such as abuses of economic dependency. Sectors with the most abuse cases were multi-products, followed by dairy and soft drinks.

### Analysis across sectors, level of the chain and types of infringements

11. The figure below provides an overview of all antitrust investigations by sector, level of the chain and type of infringement. A detailed analysis of this overview can be found in the Report.<sup>1</sup> Enforcement activity took place mostly in the retail distribution of multi-products, the processing of cereals (e.g. milling), the manufacturing of cereal-based products (e.g. bread) and the processing of milk. These four areas together represent almost 40% of all cases covered by this Report.

**Figure 3**  
**Cases by sector, level of chain and type of infringement**

Matrix – Overview of Cases in Various Food Sectors



Legend
Horizontal
Vertical
Abuse
Horizontal and vertical
Abuse and vertical

### III. Enforcement actions (merger control cases)

12. Together with antitrust enforcement, merger control plays a significant role in ensuring that competitive markets work to the benefit of consumers. The European competition authorities have analysed close to **1300 mergers** in the food sector since 2004.
13. Out of these close to 1300 mergers, **83 mergers raised concerns**. These concerns materialised in particular in the retail sector, which represented 33%

<sup>1</sup> See paragraphs 65 to 69 in the main text below.

of all mergers and 30% of all mergers raising concerns. Other problematic sectors include the dairy and meat sectors, which represented 9% and 10% respectively of all mergers and 17% and 12% of all mergers raising concerns. The competition authorities have ultimately cleared most of the 83 mergers which raised concerns, but only subject to commitments from the merging parties. The competition authorities have also prohibited 8 mergers raising serious concerns in the sectors of pastry products, cheese, meat, beverages and confectionery products. This merger enforcement record shows that in some Member States, some markets have reached such a level of concentration that further increases would risk effective competition in these markets being significantly impeded.

## IV. Market monitoring actions

### *Scope and purpose of market monitoring actions in the food sector*

14. Market monitoring actions are another set of tools which competition authorities often use to improve their knowledge of sectors and to ensure that markets remain competitive. That has also been the case in the food sector in recent years. Depending on the tools that the NCAs have to investigate and monitor markets under the legal systems of the Member States, these actions have included **sector inquiries** pursuant to which the NCAs use extensive investigative tools (e.g. requests for information to companies, inspections, etc.), or other **market studies, reports, or surveys** carried out on specific food issues or topics. Some NCAs have also been requested on a regular basis to issue consultative opinions on draft regulatory proposals and laws which may have an impact on the food sector.
15. Sector inquiries and market monitoring actions are therefore generally not used by the NCAs for concrete enforcement purposes to find and punish infringements of competition rules by individual undertakings, but rather to better understand how markets work. Against the repeated calls and allegations raised over the last years claiming that the food supply chain does not work properly, the NCAs have carried out numerous market monitoring investigations to **better understand food markets**. Some of the investigations came to the conclusion that competition was working, while others have **identified potential structural problems**, which may negatively affect the well-functioning of the food supply chain. When such problems have been identified, many NCAs have provided public authorities and stakeholders with guidance and policy recommendations on the best solutions or instruments to tackle them. In certain cases, national sector inquiries have also revealed anti-competitive practices, which have led to the opening of infringement proceedings against individual companies.

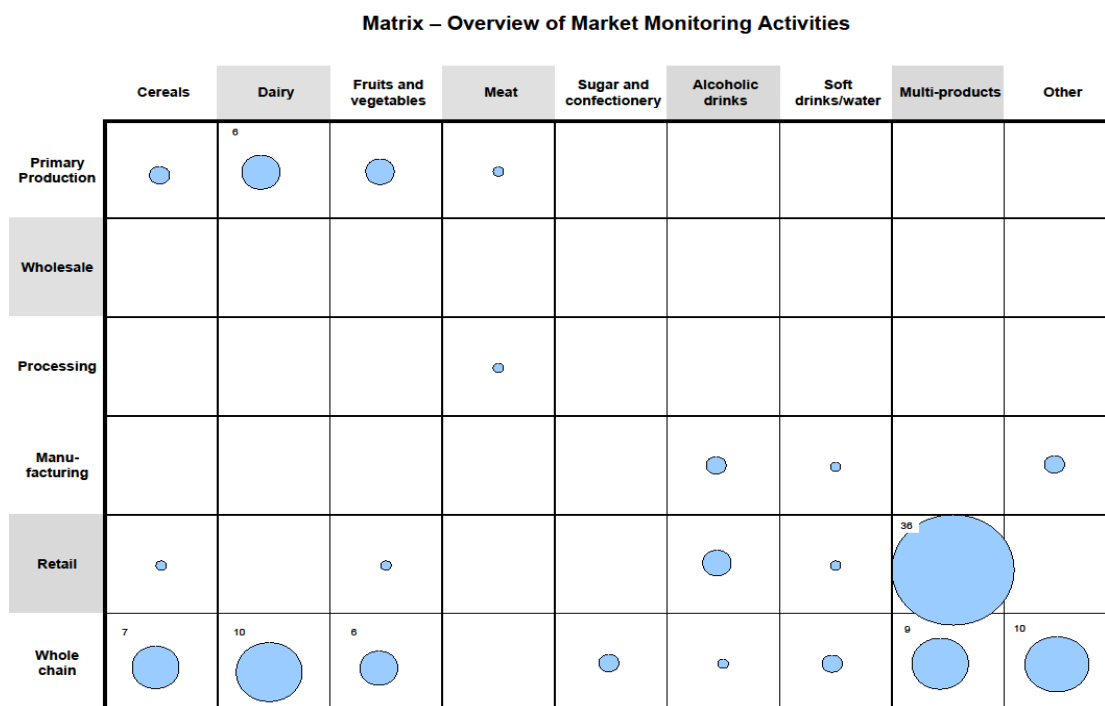
### *Sectors subject to monitoring investigations*

16. The high priority given to the food sector by the NCAs over recent years is reflected in the number of market monitoring actions. In particular, since 2004 **25 NCAs** have carried out **103 market monitoring actions, of which 10 are on-going, on food-related issues**. The scope and focus of these monitoring investigations vary. For instance, of the 103 market monitoring actions, **9** have looked at the **food supply chain and agro-food sector as a whole**. Others have focused on specific products, in particular **milk and dairy** (which



accounted for **16** monitoring actions), **fruit and vegetables** (10 actions) and **cereals/cereal-based products** (9 actions). 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.

**Figure 4**  
**Monitoring actions by sector and level**



*Analysis of price formation and price transmission along the supply chain*

17. Despite the diversity and high number of monitoring investigations undertaken by the NCAs, the issues and main aspects on which the NCAs have concentrated their efforts present significant similarities. For instance, many NCAs have focused to a large extent on the analysis of **price formation and price transmission** along the different levels of the supply chain (producers, processors/manufacturers, wholesalers, retailers), whether for one specific product or for multi-products. This has allowed them to have a better understanding of the different factors that influence price adjustments along the supply chain and to detect price asymmetries which may be indicative of potential competition problems.
18. These monitoring investigations 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**. These factors include, among others, 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 degree of complexity of the supply chain, differences in bargaining power among market players, etc. It is also interesting to note that, as a rule, the vast majority of the NCAs' monitoring investigations that have analysed price formation in the food sector have been national in scope. However, a few investigations have also compared prices between Member States and identified significant price differences between neighbouring countries.

19. Some NCAs have also focused in many cases on the **analysis of the costs, prices and margins** of the different players in production, processing/manufacturing and distribution of food products in order to identify potential **price asymmetries** that may be indicative of a potential malfunctioning at any of these stages. The findings of these NCAs have come to different conclusions which depend on particular market structures and the added-value that each of these players brings to the supply chain.

*Need to overcome inefficient market structures by pro-competitive means*

20. Through their market monitoring investigations, many NCAs have identified **structural shortcomings which may have a negative effect on the functioning of food markets** and have proposed policy recommendations and guidance (in most cases beyond the remit of competition law) on **how to tackle these shortcomings**.
21. Among these structural problems, some NCAs have identified in particular the highly **atomistic structures of agriculture primary production** in combination with the small-scale of farmers in their Member States as factors which can hamper the overall competitiveness of the sector and the market position of agricultural producers. These NCAs have called for the restructuring and consolidation of the agricultural sector and have recommended **market-oriented and pro-competitive mechanisms** to achieve this goal, such as the promotion and creation of cooperatives and other efficiency-enhancing forms of cooperation among producers as a means of becoming more competitive and reinforcing their bargaining position in the chain.
22. Some NCAs have also advocated the **rationalisation of the chain** (in particular at its **intermediary stages**) as a means of improving its functioning and efficiency. That has been the case in particular where distributors have to rely on intermediaries for their supplies, as a consequence of the atomistic and poorly organised structure of agriculture primary production, which is, in turn, a result of the small-scale size of farmers. These structures give rise to higher end consumer prices as a result of the length and number of intermediary stages in the supply chain. A few NCAs have proposed that these intermediate activities should be concentrated in a single stage (for instance, wholesale markets), so as to increase efficiency and added-value in terms of aggregation of services for both agriculture producers and distributors.

### *Problems arising from entry barriers to retail markets*

23. The retail sector has been the subject of almost one third of all market monitoring actions by the NCAs since 2004. The NCAs have usually concluded their monitoring actions by making policy recommendations to improve competitive conditions in the retail sectors.
24. Many NCAs concur that the retail sector has modernised and consolidated over recent years, which has led to **high concentration** of the sector in many Member States. Some NCAs have raised concerns where these highly concentrated retail markets are coupled with structural factors that may limit or prevent competition in these markets. One such structural factor is the presence of **regulatory entry barriers**, stemming from planning or zoning laws or other administrative constraints (e.g. administrative authorisations required for the opening or extension of retail outlets), which limit the entry of new retailers. The relevant NCAs have advocated the removal of such regulatory barriers, so as to facilitate the entry of new players and improve competition (in particular in highly-concentrated local retail markets).
25. **Contractual constraints** which hamper the exit of independent retailers or switching retail networks have also been identified as problematic by a few NCAs. These constraints include 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 which have addressed these issues have recommended modifications to such contracts and agreements to facilitate the entry of new players.

### *Using the appropriate instruments for certain trading practices*

26. In their monitoring investigations a large number of NCAs have also identified as an issue the existence of certain **practices linked to imbalances of bargaining power** between market players that are deemed unfair by many stakeholders. Although this is an issue which has been identified regardless of the level of the chain, particular focus has been devoted to this type of practice in the context of the commercial relations between suppliers and retailers. However, the NCAs have found that most of these practices do not fall within the scope of competition rules at the EU level or in most of the Member States. Consequently, a few NCAs have proposed alternative solutions to tackle them, 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. A few NCAs have also expressed concerns about the **potential anti-competitive effects** that certain of these practices may have in the long term, should they ultimately negatively affect the competitive process in the supply chain or consumer welfare by reducing investment and innovation or limiting consumer choice.

### *Guidance on the application of competition rules in agro-food markets*

27. By means of their market monitoring actions some NCAs have also provided **guidance on the general application of competition rules** in the food sector overall and in agriculture markets in particular. That has allowed market players to increase their knowledge of the practices and agreements which may

be allowed or prohibited under competition rules. Some NCAs have also been active in providing advice and guidance to regulators, so as to promote better regulation and ensure that the level playing field in the food supply chain is not undermined by regulatory or legislative measures. In order to ensure that the level playing field is not distorted, some NCAs have also **cautioned against the risks resulting from the introduction of exceptions to competition rules** as an apparent solution to tackling the structural problems of the European agro-food sector.

## V. Conclusion

28. The European competition authorities, and in particular the NCAs, have actively applied competition law in the food sector in recent years. They have stepped up their efforts in the context of the recent crises concerning food prices. They investigated and imposed sanctions for serious infringements of competition rules in food markets in more than **110 antitrust cases** and reviewed close to **1300 merger cases** with a view to ensuring that markets remain competitive. They are currently **investigating about 60 further antitrust** cases and stand ready to take up any further cases.
29. In addition, the NCAs have also undertaken more than **100 monitoring actions** to improve knowledge and to identify possible malfunctioning of the food markets. These actions have shed light on structural and cyclical factors which constrain price formation and have revealed that certain food markets may face structural problems which can only be tackled by regulatory instruments other than the competition rules.
30. The many monitoring actions and the remarkable enforcement record show that the food sector has been a **high priority for competition authorities**. Against this backdrop, the Commission and the NCAs have cooperated on food issues within the framework of the ECN. As food prices are expected to continue to rise in the near future, the Commission and the NCAs will continue to act to ensure that food markets remain competitive to the benefit of European consumers.

## 2. INTRODUCTION

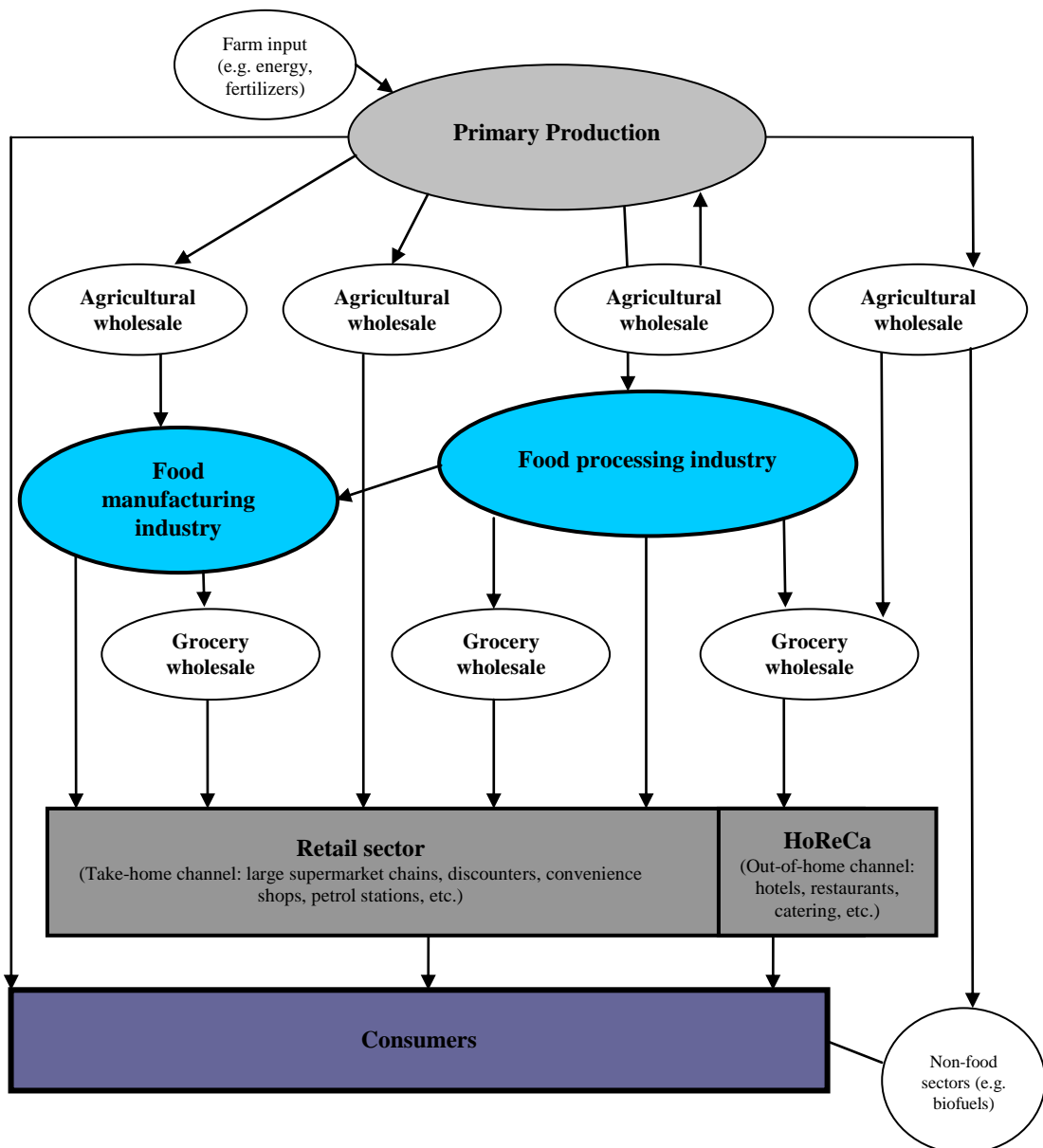
1. The food supply chain connects three important sectors of the economy: (1) agricultural production, (2) food processing, and (3) distribution (wholesale and retail). These sectors have many interactions with other sectors of the economy and play a significant role in Europe's economic, social, and political life. Among other things, they are considerable contributors to EU added value, trade and employment (especially in rural areas).<sup>2</sup>
2. The exact configuration of the food supply chain changes almost from product to product and often also from Member State to Member State. The agricultural producers may sell the produced crop or raised livestock to agricultural wholesalers, food processors, other agricultural producers (e.g. as feedstuff) or exceptionally directly to retailers or other consumer outlets, such as farmers' markets. Food processing is equally varied and includes the processing of agricultural products (e.g. by milling or slaughtering) and the ensuing manufacturing of consumable and less perishable food products (e.g. by baking or cooking). Distribution includes the marketing of food products through supermarkets and other food retailers. It also often links the two other sectors together in the form of wholesale. Apart through retailers, food is also sold to consumers via hotels, restaurants and catering ("HoReCa", also called "out-of-home" or "on-trade" market).
3. Consumer food prices are affected by the prices of agricultural products to which value is added along the supply chain. In developed countries, the initial agricultural commodities only account for 15-30% or even less of the price of the final food product.<sup>3</sup> In general, the biggest cost elements of final food prices are energy and in particular labour, which, on average, accounts for 70-75% of consumer food pricing in developed economies.

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<sup>2</sup> For an overview, see the Report on the Competitiveness of the European Agro-Food Industry of 17 March 2009 ("Competitiveness Report"), page 59, available at [http://ec.europa.eu/enterprise/sectors/food/files/high\\_level\\_group\\_2008/documents\\_hlg/final\\_report\\_hlg\\_17\\_03\\_09\\_en.pdf](http://ec.europa.eu/enterprise/sectors/food/files/high_level_group_2008/documents_hlg/final_report_hlg_17_03_09_en.pdf).

<sup>3</sup> See e.g. Gianluigi Ferrucci, Rebeca Jiménez-Rodríguez and Luca Ornante, "Food Price Pass-Through in the Euro Area – The Role of Asymmetries and Non-Linearities", ECB Working Paper Series No 1168 (April 2010), [www.ecb.int/pub/pdf/scpwps/ecbwp1168.pdf](http://www.ecb.int/pub/pdf/scpwps/ecbwp1168.pdf).

**Figure 1**  
**Simplified scheme of the food supply chain<sup>4</sup>**



## 2.1. The concerns about the functioning of the food supply chain

4. Consumers spend a significant part of their budget on food, which in 2011 accounted on average for about 14.1% of total household expenditure in the EU.<sup>5</sup> Moreover, rising food prices have been an important contributor to overall

<sup>4</sup> Adapted from Lina Bukeviciute, Adriaan Dierx and Fabienne Ilzkovitz, "The functioning of the food supply chain and its effect on food prices in the European Union", European Economy Occasional Papers, No. 47 (May 2009).

<sup>5</sup> See DG Agriculture, June 2011 update on recent agricultural commodity and food price developments in the EU, [http://ec.europa.eu/agriculture/analysis/markets/foodprices/food06\\_2011\\_en.pdf](http://ec.europa.eu/agriculture/analysis/markets/foodprices/food06_2011_en.pdf).

consumer price inflation, although the degree of such contribution varies from Member State to Member State. Higher food prices affect more severely lower-income households, who spend a higher percentage of their income on food products.<sup>6</sup> This may be aggravated in the future if current forecasts about high food prices for the next years are confirmed.<sup>7</sup>

5. Food prices have gone through significant developments in the EU since 2007 as shown in Figure 2 below.<sup>8</sup> At the beginning of 2007, the increase of food consumer prices was still below the overall inflation rate in Europe. Then, in the second half of 2007, agricultural commodity prices soared, followed – in each case with a little delay and lower magnitude – by food producer prices and food consumer prices. After their peak around 2008, agricultural commodity prices decreased in 2009 to levels below those of the beginning of 2007, only to rise again to levels above 2008 levels in 2011. Food producer prices, by contrast, appear to have followed this downward trend only to a much lesser degree (even if they reached levels below those of the overall inflation rate between end-2009 to mid-2010). While producer prices also increased more substantially than food consumer prices from 2007 until about the end of 2008, they subsequently remained below the latter until the end of 2010. Consumer food prices never really came down from the high levels reached in 2009, but rather have restarted to climb after a minimal decrease in the second half of 2009.

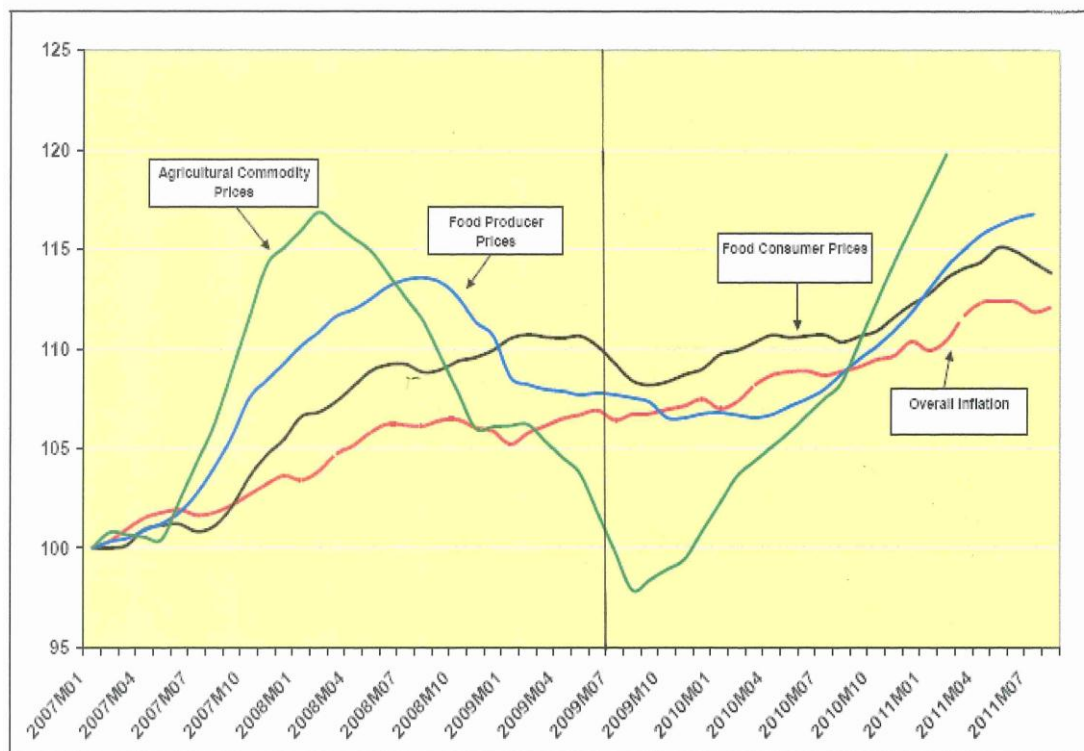
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<sup>6</sup> This is also true not only within but also across Member States, see DG Agriculture's June 2011 update above in footnote 5: Within the European Union, the share of food in the total expenditure varies between 9% in Luxembourg and 33% in Romania.

<sup>7</sup> See e.g. OECD-FAO "Agricultural Outlook 2011-2020" (2011): Higher agriculture commodity prices here to stay, [http://www.oecd.org/pages/0,3417,en\\_36774715\\_36775671\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/pages/0,3417,en_36774715_36775671_1_1_1_1_1,00.html).

<sup>8</sup> Food prices can develop quite differently from Member State to Member State, see e.g. DG Agriculture, November 2011 update on recent agricultural commodity and food price developments in the EU, [http://ec.europa.eu/agriculture/analysis/markets/foodprices/food11\\_2011\\_en.pdf](http://ec.europa.eu/agriculture/analysis/markets/foodprices/food11_2011_en.pdf).

**Figure 2**  
**Food prices and inflation in the EU**



Source: Eurostat (Theme "Economy and finance", Food Supply Chain Monitor) and Agriview

6. Rising food prices and highly volatile prices of agricultural commodities have increased the importance of a well-functioning food supply chain.<sup>9</sup> In order to develop a thorough response to concerns about a possible malfunctioning of the food sector at EU-level, the European Commission ("Commission") laid down a wide range of policy initiatives in its Communication on "A better functioning food supply chain in Europe" of October 2009.<sup>10</sup> Among other things, this Communication called for a strengthening of the application of competition rules in food markets through a coordinated approach within the European Competition Network ("ECN"). To follow-up on the initiatives in the Communication, the Commission set up a High Level Forum for a Better Functioning Food Supply Chain in 2010.<sup>11</sup>

<sup>9</sup> See Communication on "Food Prices in Europe" COM(2008) 821, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0821:FIN:EN:PDF> and Communication on "Tackling the challenge of rising food prices – Directions for EU action" COM(2008)321, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0321:FIN:EN:PDF>.

<sup>10</sup> COM (2009) 591, [http://ec.europa.eu/economy\\_finance/publications/publication16061\\_en.pdf](http://ec.europa.eu/economy_finance/publications/publication16061_en.pdf).

<sup>11</sup> Commission Decision of 30 July 2010, OJ C 210/4, 03.08.2010. The Forum has a mandate until December 2012 and is chaired by Commissioners Tajani, Ciolos, Dalli and Barnier. Its members include Member States and stakeholders' representatives of all actors in the food sector (farmers, food industry, wholesalers/traders, retailers, consumers and other interest groups). It implemented expert platforms through which it focuses on business-to-business contractual relations, a food prices monitoring tool, and competitiveness in the agro-food industry, see [http://ec.europa.eu/enterprise/sectors/food/competitiveness/forum\\_food/index\\_en.htm](http://ec.europa.eu/enterprise/sectors/food/competitiveness/forum_food/index_en.htm).



7. It appears that increasing and volatile input costs for agriculture production, as well as global developments of worldwide supply and demand of agricultural products, have been among the most important factors for price increases and volatility on world food markets.<sup>12</sup> The rise of input costs has been in particular linked to the developments of oil prices. Demand of agricultural products was (and is) fuelled by a growing and richer world population and by the use of agricultural products for other purposes than food, notably biofuels. Supply of agricultural products has been hit by weather-induced supply shocks in times of low food reserves and a slow-down in agricultural productivity growth.<sup>13</sup>
8. The link between world market commodity prices and EU food prices is not a simple one. This may be due to asymmetries and non-linearities in the price transmission mechanism in Europe.<sup>14</sup> The pass-through rates of agricultural commodity prices to final consumer prices have varied significantly between EU Member States.<sup>15</sup>
9. While it is recognised that rising input costs are one of the key drivers of recent price developments, other factors along the food supply chain may also affect price formation in the food sector.<sup>16</sup> Some stakeholders have alleged that the following factors also contribute to higher prices:
  - (i) Commodity traders and speculators would drive the increase of prices and volatility; and
  - (ii) Some actors of the chain, notably big food manufacturers and large retailers with strong bargaining power, would carry out anti-

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<sup>12</sup> See, e.g. FAO, "The State of Agricultural Commodity Markets – High food prices and the food crisis – experiences and lessons learned" (2009), <http://www.fao.org/docrep/012/i0854e/i0854e00.htm>; FAO, IFAD, IMF, OECD, UNCTAD, WFP, World Bank and WTO, "Price Volatility in Food and Agricultural Markets: Policy Responses" (June 2011), <http://www.oecd.org/dataoecd/40/34/48152638.pdf>; DG Agriculture and Rural Development, Agricultural Markets Brief No 1, "High commodity prices and volatility... what lies behind the roller coaster ride?" (June 2011), [http://ec.europa.eu/agriculture/analysis/tradepol/commodityprices/market-briefs/01\\_en.pdf](http://ec.europa.eu/agriculture/analysis/tradepol/commodityprices/market-briefs/01_en.pdf); Gerdien Meijerink, et al., "Price and prejudice: Why are food prices so high?" (2011), <http://www.lei.dlo.nl/publicaties/PDF/2011/2011-035.pdf>.

<sup>13</sup> See Commission Communication on "Food Prices in Europe" COM(2008) 821.

<sup>14</sup> For instance, see the discussion of the literature in Gianluigi Ferrucci, Rebeca Jiménez-Rodríguez and Luca Ornante, "Food Price Pass-Through in the Euro Area – The Role of Asymmetries and Non-Linearities," ECB Working Paper Series No 1168 (April 2010), [www.ecb.int/pub/pdf/scpwps/ecbwp1168.pdf](http://www.ecb.int/pub/pdf/scpwps/ecbwp1168.pdf).

<sup>15</sup> With respect to the latter, see, e.g. Lina Bukeviciute, Adriaan Dierx and Fabienne Ilzkovitz, "The functioning of the food supply chain and its effect on food prices in the European Union", European Economy Occasional Papers, No. 47, (May 2009), pages 13-18.

<sup>16</sup> See, e.g. Parliament resolution of 7 September 2010 on fair revenues for farmers: A better functioning food supply chain in Europe (2009/2237(INI)), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0302&language=EN&ring=A7-2010-0225>; Commission Communication "A better functioning food supply chain in Europe" COM (2009) 591.

competitive and/or unfair business practices.<sup>17</sup> Some stakeholders argue that this may contribute to an uneven distribution of profits and price risks along the chain and a decrease of the farmers' share of the final consumer price.

10. All competition authorities within the ECN agree that in times of rising prices and high price volatility it is of particular importance to ensure well-functioning competition at all levels of the food chain. They take the recurring questions about the functioning of the food supply chain very seriously.
11. European competition authorities have the tools to tackle anti-competitive behaviour in the food supply chain, and this Report demonstrates how they are making extensive use of these tools. They have investigated and sanctioned a large number of competition infringements at all levels of the food supply chain and ensured that mergers and acquisitions have not significantly impeded effective competition. Moreover, this Report shows that nearly all National Competition Authorities ("NCAs") are using a large variety of other investigative and monitoring tools, such as sector inquiries and other market monitoring investigations, to analyse the functioning of food markets in ways that go beyond the remit of competition law. In conclusion, European competition authorities have thoroughly answered the call for a strict and robust application of competition law – and continue to do so going forward.
12. Compared to other sectors, the use of the competition tools in the food sector faces certain particularities. When the Common Agricultural Policy ("CAP") was introduced in the Treaty of Rome, it was considered necessary to introduce certain derogations to the competition rules. These derogations have remained in place even if the original CAP has undergone major reform and moved towards a more market-based approach.
13. Before describing the extensive enforcement and monitoring work of the NCAs in the food sector in more detail, this Report will briefly explain (1) the legal framework for the application of competition rules in the ECN, in particular the allocation of competences and the existing derogations for the agriculture sector, and (2) the scope and structure of this Report.

## **2.2. The legal framework for the application of the competition rules in the EU food sector**

14. The two main pillars of the legal framework for the application of competition rules in the EU food sector are (i) the general rules concerning the allocation of competences between the NCAs and the Commission and (ii) the special rules for the application of competition law in the agriculture food sector.

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<sup>17</sup> It is important to note that unequal bargaining power and resulting contractual imbalances are not necessarily a competition law issue. In most cases this problem is rather addressed by other policy tools, such as contract or unfair commercial practices law. See also below, at para 73.

### 2.2.1. The allocation of competences between the NCAs and the Commission

15. The allocation of competences between the NCAs and the Commission may, at first glance, appear complicated. Yet the general principles are relatively straightforward: In the field of antitrust enforcement, the NCAs and the Commission have a parallel competence to apply (substantive) EU competition law, and the authority will investigate that is best placed to do so. As a general rule, EU competition law applies if the anti-competitive behaviour investigated affects trade between Member States. If it does not affect cross-border trade, the NCAs only apply their national competition laws. For merger control, the Commission and the NCAs have exclusive competencies. If a transaction falls under the European Merger Control Regulation,<sup>18</sup> it is generally reviewed only by the Commission; otherwise, the review is done by those NCAs whose national merger control thresholds have been triggered. As regards monitoring activities and broader enforcement tools, such as sector inquiries, each authority simply applies its own rules. The following paragraphs provide more details about the allocation rules and the applicable legislation.
16. **Parallel competences in antitrust enforcement.** For practices which may affect trade between Member States, the Commission and the NCAs have parallel competences to apply the substantive legal basis for EU antitrust law, namely Article 101 TFEU, which prohibits restrictive agreements, decisions by associations of undertakings and concerted practices entered into by undertakings, and Article 102 TFEU, which prohibits undertakings with a dominant position from abusing the latter.
17. If a NCA applies its national competition law to such agreements, decisions and practices or abuses that may affect trade between Member States, it must also apply the EU antitrust rules (Article 3 of Regulation (EC) No 1/2003).<sup>19</sup> In order to ensure the uniform application of the EU antitrust rules in such a system of parallel competences, Regulation (EC) No 1/2003 further provides that a NCA applying national law to agreements, decisions or concerted practices cannot come to a result that contradicts Article 101 TFEU. As a result, the substantive rules for the prohibition of such kind of anti-competitive practices are *de facto* fully harmonised throughout the EU.<sup>20</sup>
18. With respect to abuses of dominance, however, Regulation (EC) No 1/2003 allows the adoption and application of national competition laws that are stricter than Article 102 TFEU and which exist in some of the Member States. Regulation (EC) No 1/2003 also allows the application of national laws that

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<sup>18</sup> Council Regulation (EC) No 139/2004, of 20.01.2004, on the control of concentrations between undertakings, OJ L 24/1, 29.01.2004.

<sup>19</sup> Council Regulation (EC) No 1/2003, of 16.12.2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1, 4.1.2003.

<sup>20</sup> The procedural rules, which are often rooted in the national administrative or criminal law, are not harmonised. However, under general principles of EU law, Member States are under an obligation to set up a sanctioning system providing for sanctions which are effective, proportionate and dissuasive for infringements of EU law. The enforcement systems of Member States differ but they have recognised the standards of each other's systems as a basis for cooperation.

predominantly pursue an objective different from that of the EU antitrust rules, such as the national laws on unfair or deceptive commercial practices.<sup>21</sup> This possibility for national law to go beyond the scope of Article 102 and EU competition law is of particular relevance in the food sector.

19. In addition to the parallel competence to apply EU competition law, the NCAs have the sole competence to apply their national competition law, which comes into play for agreements and conduct that do not appreciably affect trade between Member States.<sup>22</sup> There is a (rebuttable) presumption that a case will not have significant effects on inter-state trade if the parties concerned respectively have a market share below 5% and a turnover not exceeding Euro 40 million.
20. It follows from a system of parallel competences that the members of the ECN are responsible for an efficient division of work, in particular to decide whether a case should be dealt with by a single NCA (possibly with the assistance of other NCAs), several NCAs acting in parallel or the Commission. In most instances the authority that opens a case will remain in charge, unless it considers itself not to be well placed or other authorities also consider themselves as well placed. One of the main criteria for deciding whether a NCA is well placed is whether the agreements, decisions, concerted practices or abuses substantially affect competition mainly within the NCA's territory.<sup>23</sup>
21. **Exclusive competences in merger control.** Merger control in the European Union is based on a system of exclusive competences at EU and national levels. As a general rule, the turnover of the merging parties decides whether the Commission or the NCAs are competent to review a proposed transaction. If the transaction triggers the national merger control thresholds, the parties must notify the transaction for review to the competent NCA (or several NCAs), unless the EU thresholds are also triggered. In that case, the review falls under the Commission's exclusive jurisdiction.<sup>24</sup> This general rule is complemented by rules for referring a case either to the Commission or to a NCA under certain conditions.<sup>25</sup> Unlike in the field of antitrust, the NCAs do not apply EU law but only their national laws in terms of substance and procedure. Several NCAs can review the same transaction at the same time – albeit only with a view of the effect on competition in their respective jurisdictions.

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<sup>21</sup> Some NCAs have the explicit mandate to also enforce other laws than competition law, such as consumer protection laws.

<sup>22</sup> See the Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101/81, 27.04.2004.

<sup>23</sup> For more details, see the Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101/43, 27.04.2004.

<sup>24</sup> See Recital 8 of Council Regulation (EC) No 139/2004, of 20.01.2004, on the control of concentrations between undertakings, OJ L 24/1, 29.01.2004.

<sup>25</sup> See Articles 9 and 22 of Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 24/1, 29.01.2004; Commission Notice on case referral in respect of concentrations with EEA relevance, OJ C 56/2, 05.03.2005; as well as Communication from the Commission: Report from the Commission to the Council on the operation of Regulation No 39/2004, of 18.06.2009 (COM(2009) 281 final).

**Table 1**  
**Overview of the allocation of competences between**  
**the NCAs and the European Commission**

Investigated behaviour	Possible effect on inter-state trade/ EU dimension	Applicable substantive law*	Investigating entity
Agreements, decisions, concerted practices	Yes	EU and national law (cannot deviate in outcome)	NCAs or Commission (depending on who is well placed)
	No	National law	NCAs
Abuse of a dominant position	Yes	EU and national law (national law can be stricter)	NCAs or Commission (depending on who is well placed/or if stricter law exists)
	No	National law	NCAs
Concentration (merger or acquisition)	Yes	EU law	Commission**
	No	National law	NCAs**
Other behaviour, e.g. unfair or deceptive practices	N/A	National law	NCAs or other national entity

\* In terms of procedural law, each authority applies its own procedural rules.

\*\* But referral possible and thus change of investigating authority and applicable law.

22. **Practical consequences for the application of competition law in the food sector.** In light of this allocation of competences 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.
23. Despite an increasing global pressure for consolidation, the food supply chain – and consequently also the different markets that it connects – often displays a complex and varying picture, with different intermediate levels. Its structure can differ fundamentally depending on the product or the national/regional/local market in question. Although certain players in the food supply chain are active in many Member States, there are often still many different features specific to the national food production structures, consumer demand and the distribution and retailing of food products in a given Member State.
24. Accordingly, the competition conditions on many food markets are not sufficiently homogenous across the EU from a competition law point of view to conclude in general terms that a relevant market is EU-wide. In certain markets, notably retail, the scope of the relevant markets is often even smaller than national. The assessment of the competition conditions of a particular market will have to be carried out taking into account the geographic scope of such market.
25. Even if a market is national, however, this does not mean that only national competition law applies. EU competition law applies in parallel if the behaviour,

agreement or practice subject to scrutiny affects trade between Member States to a significant extent. The criterion of effect on trade between Member States, which triggers the application of EU antitrust law, is separate from the definition of the relevant geographic market. According to established case-law, trade between Member States may also be affected in cases where the relevant market is national or sub-national.<sup>26</sup> In fact, it is sufficient for triggering the application of EU competition law that an appreciable change is capable of being caused in the pattern of trade between Member States.

26. Nevertheless, both the geographic scope and the specific structural features of many food markets often bring with them that NCAs are well placed to apply EU competition law, as this Report extensively demonstrates. The strong enforcement record by the NCAs has as a consequence that the number of cases pursued by the Commission on these markets is proportionally less than in other sectors. In total, the Commission has pursued six major cases since 2004, namely in the markets for beer, bananas and soft drinks.<sup>27</sup>

### *2.2.2. The application of the competition rules in the agricultural sector*

27. While, as a basic principle, the competition rules apply to the agriculture sector in its entirety, certain limited exceptions exist for the sector by virtue of Article 42(1) TFEU. This provision stipulates that the competition rules shall

"apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council within the framework of Article 43(2) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39."

28. The currently existing production and trade rules specific to the agricultural sector pursuant to Article 42(1) TFEU can be found in (i) Regulation (EC) No 1234/2007,<sup>28</sup> known as the "Single Common Market Organisation (CMO) Regulation", which establishes a common organisation of the markets for certain agricultural products included in Annex I to the TFEU, and (ii) Regulation (EC) No 1184/2006,<sup>29</sup> which applies to products listed in Annex I to the TFEU not covered by the Single CMO Regulation.

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<sup>26</sup> See the Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101/81, 27.04.2004, in particular paras 77-99.

<sup>27</sup> The Commission has also investigated cases in other agricultural sectors, such as the tobacco sector.

<sup>28</sup> Council Regulation (EC) No 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), OJ L 299/1, 16.11.2007.

<sup>29</sup> Council Regulation (EC) 1184/2006 applying certain rules of competition to the production of, and trade in, agricultural products, OJ L 214/7, 4.8.2006. This Regulation codifies the amended version of Council Regulation No 26/62 applying certain rules of competition to production of and trade in agricultural products, OJ L 30/993, 20.04.1962.

29. **The general rules on the relationship between EU competition policy and the Common Agriculture Policy.**<sup>30</sup> At the outset, it is important to note that both above agricultural regulations expressly state that the competition rules in Articles 101 to 106 TFEU do apply to all agreements, decisions and practices which relate to the production of, or trade in, of agricultural products, unless it is provided for differently in these regulations.<sup>31</sup> This includes secondary legislation enacted on the basis of these Treaty provisions, such as the European Merger Control Regulation, which is applicable in the field of agriculture.
30. *Limited general exceptions.* Article 102 TFEU, which prohibits abuses of dominance, applies in its entirety to the agriculture sector. The specific agriculture legislation allows however for certain exceptions to the application of Article 101(1) TFEU, which prohibits agreements, decisions and concerted practices restrictive of competition, in the agriculture sector. In particular, Article 176(1) of the Single CMO Regulation and Article 2(1) of Regulation 1184/2006 provide for three exceptions to Article 101(1) TFEU. As all exceptions to a rule, the European Courts have interpreted these derogations restrictively.<sup>32</sup> The three exceptions, which have played a very limited role in practice, are the following:
- (i) Agreements relating to national marketing organisations. This exception has become obsolete following the progressive introduction of common market organisations at EU level for agricultural products (currently regulated under the Single CMO Regulation).
  - (ii) Agreements necessary for achieving the objectives of Article 39 TFEU. The case-law of the European Courts requires that in order to benefit from this exception, agreements need to fulfil all of the objectives of Article 39 cumulatively.<sup>33</sup> These objectives are (a) efficiency of production, (b) a fair standard of living for the agricultural community, (c) stabilising markets, (d) assuring supply, and (e) ensuring supplies to consumers at reasonable prices. Against this backdrop, an agreement by which farmers would simply fix prices to increase their standard of living would fall short

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<sup>30</sup> A more thorough treatment of the relationship between EU competition policy and the Common Agricultural Policy can be found in the DG COMP Working Paper, "The interface between EU competition policy and the Common Agriculture Policy (CAP): competition rules applicable to cooperation agreements between farmers in the dairy sector" (2010), available at [http://ec.europa.eu/competition/sectors/agriculture/working\\_paper\\_dairy.pdf](http://ec.europa.eu/competition/sectors/agriculture/working_paper_dairy.pdf).

<sup>31</sup> See Article 175 of the Single CMO Regulation and Article 1 of Regulation (EC) No 1184/2006. According to established case-law, farmers constitute undertakings within the meaning of Articles 101/102 TFEU, which engage in an economic activity, see Case C-55/96 *Job Centre* [1997] ECR I-7119, para 21; Case T-513/93 *Consiglio Nazionale degli Spezionieri Doganali v Commission* [2000] II-1807, para 36.

<sup>32</sup> See e.g. Case C-399/93 *Oude Luttikhuis and Others* [1995] ECR I-4515, para 23; Joined Cases T-217/03 and 245/03 *FNCBV and Others v Commission* [2006] ECR II-4987, para 199.

<sup>33</sup> See Joined Cases T-70/92 and T-71/92 *Florimex BV and Vereniging van Groothandelaren in Bloemkwekerijprodukten v. Commission* [1997] ECR II-693, para 153.

of the other requirements of Article 39 TFEU.<sup>34</sup> Also, in light of the fact that regulations establishing a common market organisation will – explicitly or implicitly – take the objectives of Article 39 TFEU into account, the field of application for this exemption is rather narrow.

(iii) Agreements between farmers, farmers' associations and associations of farmers' associations belonging to a single Member State. This third exception requires three cumulative conditions:

- (a) It must be an agreement between farmers, farmers' associations and associations of farmers' associations belonging to a single Member State.
- (b) The agreement must relate to the production or sale of agricultural products or the use of joint facilities for the storage and cannot include the obligation to charge identical prices.
- (c) The agreement cannot exclude competition or jeopardise the objectives of the CAP.

31. It follows from the above that agreements which include non-farmers/farmers' associations, such as processors, or agreements which cover prices cannot benefit from this exception.<sup>35</sup>
32. In light of the strict interpretation of these exceptions by the European Courts, the vast majority of agreements and decisions of farmers and their associations are unlikely to fulfil the conditions for such exceptions to apply. Therefore, these agreements will have to be analysed under the general competition rules that exist in particular for joint production, joint commercialisation, and cooperation agreements involving both.<sup>36</sup>
33. The issue is of particular relevance when assessing the compatibility of the activities of producer organisations ("POs") with competition rules. As laid down in Article 122 of the Single CMO Regulation, POs are organisations constituted by agricultural producers which can pursue specific objectives, notably planning

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<sup>34</sup> Also "crisis cartel" measures, such as the agreement on minimum purchase prices and the suspension of imports following the "mad-cow" disease in the *FNCBV* case, were not found to fulfil the requirements, see Joined Cases T-217/03 and 245/03 *FNCBV and Others v Commission* [2006] ECR II-4987, paras 201-206.

<sup>35</sup> In terms of procedure, the Commission has the sole power to determine, by published decision, which agreements, decisions and practices fulfil these exceptions (Article 176(2) of the Single CMO Regulation and Article 2(2) of Regulation 1184/2006). This clearance procedure stems from the framework existing before Regulation (EC) No 1/2003 whereby agreements, decisions and practices in all sectors had to be notified to and cleared by the Commission.

<sup>36</sup> This is explained in detail in the 2010 DG COMP Working Paper on the interface between EU competition policy and CAP, referred to above in note 30, pages 14-21.



production, concentrating supply, placing on the market of the products of members and stabilising producer prices.<sup>37</sup>

34. As the members of POs are independent agricultural producers and their production can be integrated to varying degrees in the POs, it is essential to ensure that the latter function in a pro-competitive way. Therefore, unless they benefit from one of the three exceptions, the activities that POs carry out will have to be assessed under the general EU competition rules. Even if a PO benefits from an exception, it cannot exclude competition by engaging in hard core cartel activities, such as price-fixing, price coordination, or market sharing among their members.
35. *Special rules for recognised inter-branch organisations.*<sup>38</sup> Inter-branch organisations ("IBOs") are organisations that are made up of representatives of economic activities linked to the production of, trade in, and/or processing of products in a few sectors (Article 123 of the Single CMO Regulation). Their members must therefore include farmers, distributors and/or processors/manufacturers of a particular economic sector. Common rules for the recognition and functioning of IBOs in the sectors of fruit and vegetables, tobacco, wine, olives/olive oil and cotton currently exist at EU level.<sup>39</sup> According to the Single CMO Regulation IBOs can be constituted to pursue specific aims which relate to the sector in which they operate. For instance, in the sectors of fruits and vegetables and wine IBOs can carry out activities which include, among others, improving knowledge and transparency of the market; helping to coordinate better the way the products are placed on the market, in particular by means of research and market studies; drawing up standard forms of contracts compatible with EU rules; or developing methods and instruments for improving product quality at all stages of production and marketing.
36. The competition rules are fully applicable to IBOs under the Single CMO Regulation. However, this Regulation allows for certain limited exceptions to the application of Article 101(1) TFEU in relation to agreements, decisions and concerted practices which have as object the above activities that IBOs can carry out under the Single CMO Regulation. Still, hard core restrictions excluding competition, such as price fixing, output restrictions and market partitioning are in any event not permitted, [whether or not they are linked to any of the above activities](#).<sup>40</sup>
37. **CAP reform.** On 12 October 2011, the Commission presented a set of legal proposals designed to make the CAP a more effective policy for a more

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<sup>37</sup> Similar rules on POs also exist for fish and aquaculture products, see Council Regulation (EC) No 104/2000, of 17.12.1999, on the common organisation of the markets in fishery and aquaculture products, OJ L 335/3, 28.11.2006.

<sup>38</sup> This is explained in detail in the 2010 DG COMP Working Paper on the interface between EU competition policy and CAP, referred to above in note 30, pages 24-27.

<sup>39</sup> IBOs in other agriculture sectors can also be recognised on the basis of national law.

<sup>40</sup> See Article 176a(4) (for fruit and vegetables) and Article 177(2) (for tobacco) of the Single CMO Regulation.

competitive and sustainable agriculture and vibrant rural areas.<sup>41</sup> Key aims of this reform are:

- to ensure that the competitiveness of all European farming safeguards Europe's food security;
  - to lay down the foundations for long-term competitiveness that is both environmentally and economically sustainable;
  - to ensure that agriculture flourishes throughout Europe;
  - and finally, a spearhead objective: to simplify the CAP.
38. From a competition policy perspective, the objective to improve the competitiveness of the agricultural sector and to enhance its value share in the food chain is of particular importance. Many stakeholders have stressed that farmers share of value added is diminishing because the agricultural sector is highly fragmented compared to other sectors of the food chain which are better organised and have therefore a stronger bargaining power. This view is also prominent in recent EP resolutions and reports on the prospects of the CAP reform.<sup>42</sup>
39. The Commission's proposal for a new Single CMO Regulation addresses the issue of fragmentation in the agriculture sector in particular by proposing the recognition by Member States of POs in all sectors of agricultural production.
40. The proposal also confirms the above-mentioned principle that Articles 101 and 102 TFEU apply to agricultural production subject to certain limited derogations which are based on the existing ones. Furthermore, the Member State may not, as a rule, recognise POs that have a dominant position in the relevant market.<sup>43</sup>
41. Finally, in addition to the CAP reform, specific rules for the milk sector have also been recently introduced at EU level in March 2012 by Regulation (EU) No 261/2012. In particular, this Regulation, adopted by the Parliament and the Council on the basis of a Commission proposal of December 2010, amends the Single CMO Regulation as regards contractual relations in the milk and milk products sector. On the basis of Article 42 TFEU, the amendments introduced by Regulation (EU) No 261/2012 set up certain limited and temporary exceptions to the application of competition rules in the milk sector, which allow milk farmers under very specific conditions to engage in collective

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<sup>41</sup> See the documents under [http://ec.europa.eu/agriculture/cap-post-2013/legal-proposals/index\\_en.htm](http://ec.europa.eu/agriculture/cap-post-2013/legal-proposals/index_en.htm).

<sup>42</sup> See, e.g., Parliament resolution of 7 September 2010 on fair revenues for farmers: A better functioning food supply chain in Europe (2009/2237(INI)), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0302&language=EN&ring=A7-2010-0225>; "The CAP towards 2020: meeting the food, natural resources and territorial challenges of the future" (2011/2051(INI)), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2011-0202+0+DOC+XML+V0//EN>.

<sup>43</sup> The proposal includes an exception to this general rule, according to which Member States may recognise POs that have a dominant position if it is necessary for the attainment of the objectives of Article 39 TFEU.

bargaining negotiations and agree on common prices for the deliveries of raw milk. The Regulation also introduces specific safeguards which empower the NCAs and the Commission to intervene if these agreements have a negative impact on competition or SMEs in the dairy sector. The adoption of Regulation (EU) No 261/2012 responds to very specific circumstances and is based on the recommendations issued by the High Level Group on Milk. This Group was set up by the Commission in October 2009 to analyse medium-term and long-term solutions for the milk sector in the context of the exceptional crisis of 2008-2009 which significantly affected this sector and the upcoming phasing-out of the milk quotas by 2015. Without prejudice to the temporary exceptions introduced by this Regulation, competition legislation continues to rule in the milk sector.

42. **The relationship between national competition law and the CAP.** National competition law can also apply to agreements that concern a market regulated at EU level by a CMO. This is of particular importance if EU competition law does not apply because of a lack of effect on trade between Member States.<sup>44</sup> The application of national competition law is not – as such – necessarily in conflict with Article 39 TFEU and the Single CMO Regulation. However, in accordance with the general principles of EU law, the NCAs are under an obligation to refrain from adopting any measure which might undermine or create exceptions to that common organisation.<sup>45</sup>

### 2.3. Scope and structure of this Report

43. This Report has been prepared within the ECN, which is a platform of cooperation between the Commission and the NCAs with the aim to exchange information, efficiently allocate tasks, coordinate investigations as well as to discuss issues of common interest. In particular, the ECN aims at ensuring uniform application of EU competition rules by the NCAs, thereby guaranteeing that such rules are effectively and consistently applied throughout the EU.<sup>46</sup>
44. Within the ECN, the Commission and the NCAs are working closely together on food issues in the *ECN Food Subgroup*. This Report is based on information provided by the NCAs within the context of the work of this group.
45. This Report provides a comprehensive overview of the most significant enforcement, advocacy and monitoring investigations undertaken by the European competition authorities during the last years.<sup>47</sup> It also demonstrates

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<sup>44</sup> See above paras 16-20.

<sup>45</sup> See Case C-505/07 *Compañía Española de Comercialización de Aceite* [2009] ECR I-8963, paras 50-58.

<sup>46</sup> See the Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101/43, 27.04.2004 and the Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, [http://ec.europa.eu/competition/ecn/joint\\_statement\\_en.pdf](http://ec.europa.eu/competition/ecn/joint_statement_en.pdf).

<sup>47</sup> The Report includes information on the activities of the Commission and the NCAs of the 27 EU Member States. Information on the activities of certain EFTA competition authorities, such as the Norwegian NCA, is also provided.

the important contribution of competition authorities to the good functioning of the food supply chain in Europe. Going forward, the Report will help to develop a common approach to competition issues in the food sector within the ECN.

46. This Report is divided into two main parts. In the first part, it describes the case-related enforcement activities of the NCAs and the Commission from January 2004 until November 2011.<sup>48</sup> This part includes cases which have been investigated by NCAs on the basis of European and national competition law as well as cases pursued by the Commission on the basis of European competition law during the same period: this part reports on all cases in which the authorities found an infringement or which are still being investigated. In addition, the first part also reports on merger control decisions by NCAs and the Commission in food markets.<sup>49</sup> The second part of this Report provides an overview of the market monitoring activities by the NCAs in the form of sector inquiries or other market monitoring investigations undertaken from January 2004 until November 2011. Information on the findings of sector inquiries and other market monitoring actions which were on-going in November 2011 but have been concluded prior to February 2012 is also provided. The data also includes consultative opinions and reports on specific food-related issues published by the NCAs.

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<sup>48</sup> To the extent more recent information on the status of a case was available after the cut-off date of the Report (November 2011), it has been added in footnotes.

<sup>49</sup> Although the ECN has been set up in the context of antitrust enforcement under Regulation (EC) No 1/2003 and does not deal with merger control, information on merger control has also been gathered in order to provide a comprehensive overview of the activities of the NCAs in the food sector.

### 3. ENFORCEMENT ACTIONS (ANTITRUST AND MERGER CONTROL CASES)

47. This Section describes the enforcement activities of the NCAs and the European Commission in antitrust and merger control from 2004 until 2011.
48. In particular, Section 3.1 provides an overview of (1) the number of antitrust cases in the different jurisdictions, (2) the markets subject to scrutiny, (3) the main levels of the supply chain that were investigated, (4) the main types of infringements found, (5) an analysis across sectors, levels and infringements, as well as (6) the legislation applied. An overview of the merger cases reviewed by European competition authorities concludes this Section (7). In Section 3.2, the antitrust and merger cases are discussed in more detail, presented according to the main food product groups.

#### 3.1. Overview of cases

##### *3.1.1. More than 180 antitrust cases*

49. Since 2004, European competition authorities have concluded about 120 investigations with a finding of infringement and are still investigating about 60 cases,<sup>50</sup> leading to a total of **182 antitrust cases** in the food sector. This already impressive number does not take into account all the investigations opened to address potential problems in the food supply chain since 2004, but which were subsequently closed without finding an infringement for various reasons. Indeed, competition authorities receive many complaints that are closed if a preliminary investigation does not find sufficient evidence of the alleged infringement. Also, investigations may not be pursued further due to administrative priorities in the light of limited resources available or due to the disproportionate efforts needed to meet the requisite burden of proof. Investigations that were closed on these grounds are not included in this Report.

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<sup>50</sup> Confidentiality issues limit the extent to which some of the pending proceedings can be explained in detail in the Report. If it was possible to provide at least some information, it is presented with confidential information in square brackets.

**Table 2**  
**Enforcement actions by NCAs in the period 2004-2011**  
**(Decisions finding an infringement and pending proceedings)**

Authority	Number of cases	Authority	Number of cases
Austria	4	Latvia	10
Belgium	4	Lithuania	2
Bulgaria	6	Malta	3
Cyprus	4	Netherlands	5
Czech Rep.	9	Poland	4
Denmark	4	Portugal	13
Estonia	3	Romania	10
Finland	4	Slovakia	4
France	12	Slovenia	2
Germany	14	Spain	18
Greece	18	Sweden	2
Hungary	11	UK	1
Ireland	2	Norway	3
Italy	4	Commission	6
<b>TOTAL</b>		<b>182</b>	

50. The overall high number of cases illustrates the importance that the European competition authorities have given to the food sector. In line with their mandates, they have been vigilant to safeguard consumer interests in the competitive process on every level of the food supply chain.
51. The enforcement record in the food sector has always been remarkable, even prior to the beginning of the food price crisis in 2007. With the 2007 crisis, however, competition authorities stepped up their activity by increasing their investigation efforts. In the period from 2004-2007, the competition authorities opened on average 19 cases per year. From 2007-2011,<sup>51</sup> the average number of opened cases rose up to 25 per year. As shown later in this Report, many broader investigations into the sector were also initiated after 2007 (see Section 3).

### *3.1.2. Main markets scrutinised*

52. The investigations undertaken by competition authorities are not only remarkable in terms of numbers but also in terms of scope. They have covered a **wide range of food markets** (see Table 3 below). This Report seeks to classify the cases according to the main agricultural product markets concerned. Yet, if one moves down the food supply chain to the distribution of food products, such a classification becomes less clear, as the same anti-competitive practices may cover not only one but a number of products. Hence, the Report also shows figures for a category of multi-products, which includes cases in which the authorities investigated products falling under more than

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<sup>51</sup> The second period includes proceedings opened in 2007.

one sector. This category mainly concerns the retail sale of daily consumer goods and groceries.<sup>52</sup>

**Table 3**  
**Main markets subject to scrutiny in antitrust actions in the period 2004-2011**

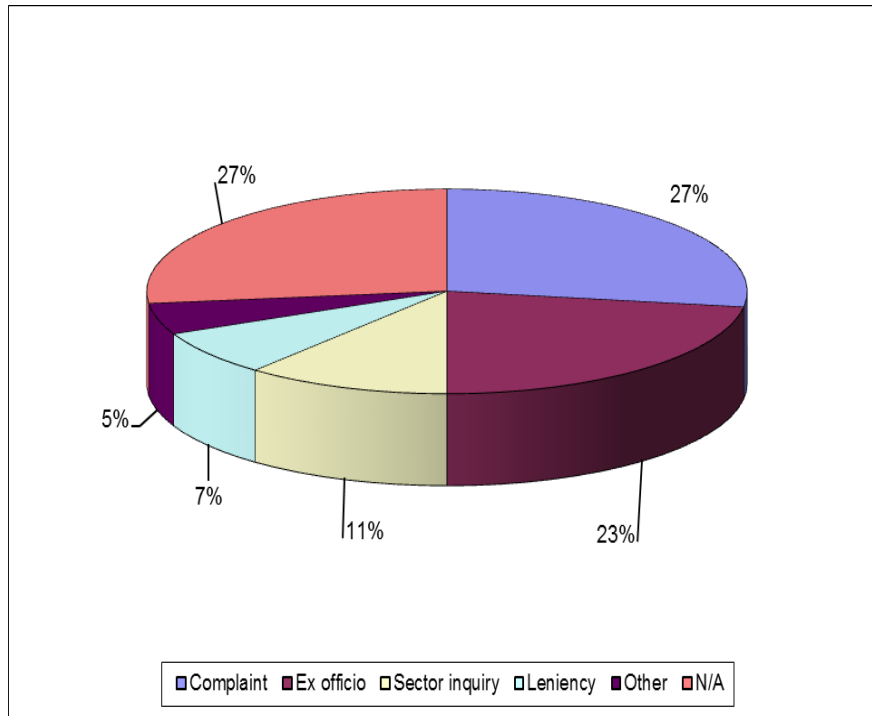
Main food sectors	Number of cases
<b>Multi-products</b>	38
<b>Cereals and cereal products</b>	32
<b>Milk and dairy</b>	21
<b>Fruits and vegetables</b>	18
<b>Meat, poultry and eggs</b>	16
<b>Alcoholic drinks</b>	15
<b>Coffee</b>	11
<b>Soft drinks and water</b>	8
<b>Sugar and confectionery</b>	8
<b>Fish and sea food</b>	6
<b>Others</b>	9

53. As shown by the table above, the food sectors that were more investigated by competition authorities are multi-products and cereals, followed by milk and dairy. A significant number of enforcement actions also took place in the fruits and vegetables sector as well as in meat, poultry and eggs.
54. The number of cases **illustrates sectors where competition problems have been found or are being investigated** by the authorities. However, one should not automatically draw the conclusion that some markets, where only a limited number or no cases were pursued, do not face any competition problems. Many factors play a role as to why certain markets receive more scrutiny than others, the most important one being the awareness of competition authorities. Potential anti-competitive practices can come to the attention of competition authorities through many means. They receive complaints by market participants and consumer organisations; they gather information through sector inquiries or other market monitoring investigations. They might also find indications of antitrust problems in merger investigations. Finally, cartel cases are often initiated after the leniency application by one (or several) of the participants to the cartel.
55. The table below shows the origins of the antitrust cases covered by this Report. Most cases were opened following complaints (from competitors or customers). A significant number of proceedings were further opened "ex officio", that is, the competition authorities opened the proceedings on their own initiative after having become aware of potential anti-competitive practices through various ways, such as the press or by evidence gathered when investigating other cases. Significantly fewer cases were opened following sector inquiries and other market monitoring actions or following leniency applications.

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<sup>52</sup> When considering the numbers for multi-products, it should be borne in mind that they are not directly comparable to the numbers for specific agricultural products.

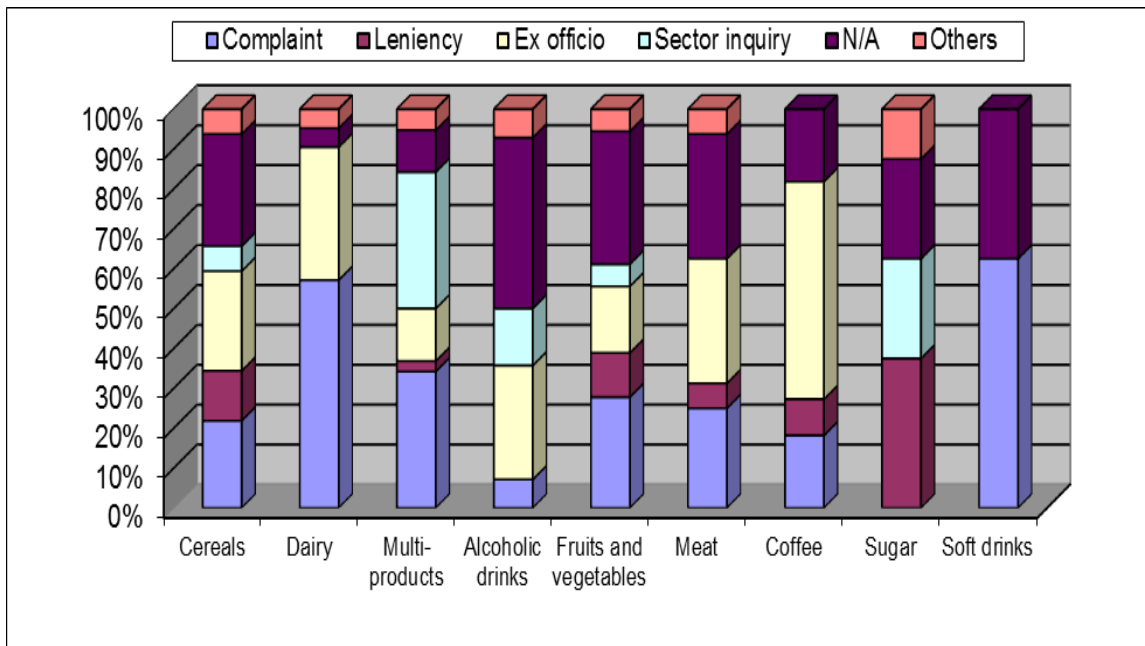
**Figure 3**  
**Reasons for opening antitrust proceedings in the period 2004-2011**



56. The reasons for initiating proceedings vary from sector to sector, as illustrated by the table below. For example, complaints have accounted for more than half of the cases opened in the dairy market (57%) and for soft drinks (63%). Complaints have also been the basis for opening a significant number of cases in the multi-products (34%) and fruits and vegetables sectors (28%). Complaints and press information triggering ex-officio investigations together have accounted for almost half of the cases initiated in meat and cereals (47% and 56% respectively). Information found in market monitoring investigations was particularly important in the multi-products where 34% of the cases were initiated following sector inquiries. Information gathered through other enforcement activities (cases) led to the opening of 54% of the cases in the coffee sector. Leniency applications accounted for 38% of the cases opened in the sugar sector.



**Figure 4**  
**Reasons for opening proceedings by sector in the period 2004-2011**



### 3.1.3. Levels of the food supply chain investigated

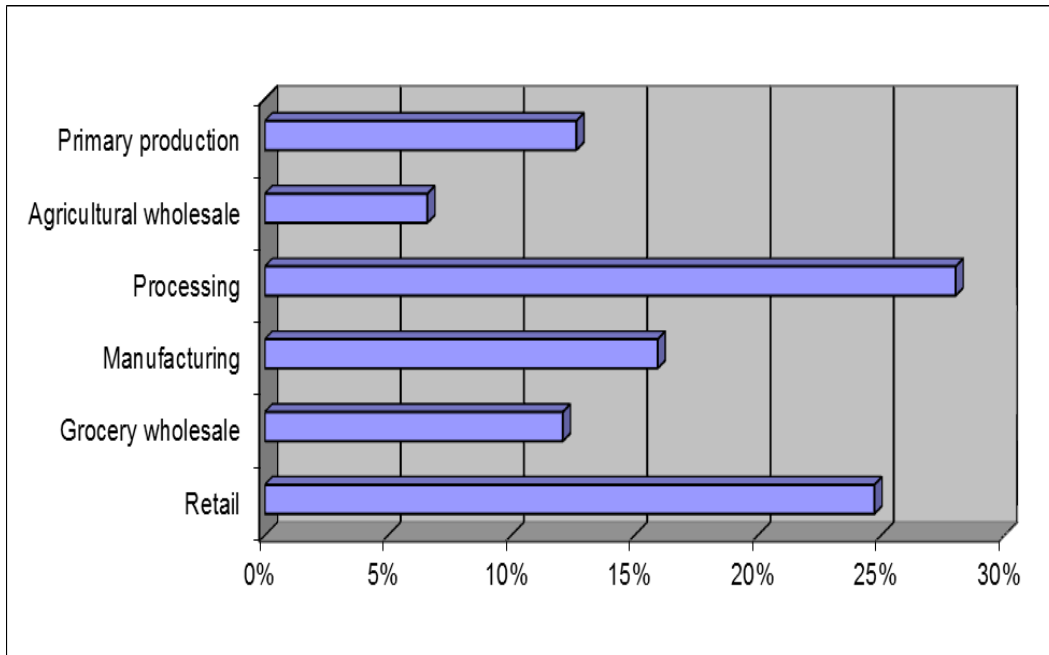
57. The competition authorities have investigated **all levels of the supply chain**, from primary production over agricultural wholesale, processing, manufacturing and groceries wholesale down to the retail level (including HoReCa).<sup>53</sup>
58. As illustrated by the table below, **processing** was the most investigated level of the chain (accounting for 28% of all cases) followed by retail and manufacturing. If one looks at the **transformative part** of the supply chain by adding the manufacturing level to the one of processing,<sup>54</sup> the share amounts to about 44%, thus **close to half, of all cases**.
59. Other levels of the chain showed much lower enforcement figures, such as the wholesale level (in particular agricultural wholesale). *Prima facie* this appears to suggest that competition would seem to work in these areas. However, it is important to keep in mind the caveat made earlier that one should not draw the

<sup>53</sup> For an overview of the chain, see Figure 1, above on page 5. The definitions used for the different levels of the production chain are determined by the entity that commits the infringement. For example, the respective levels of the chain for wheat would be (1) primary production (e.g. wheat farmer), (2) agricultural wholesale (e.g. wheat trader/wholesaler), (3) processing (e.g. flour miller), (4) manufacturing (e.g. bakery), (5) grocery wholesale (e.g. bread wholesaler), and (6) retail (e.g. supermarket). It is also important to note that some cases affect more than one level of the chain.

<sup>54</sup> The line between the processing and manufacturing is also not always too easy to draw, in particular if the processed product is sold directly to retailers or grocery wholesalers.

automatic conclusion that a limited number of cases for a certain level of the chain means such level may not face competition problems.<sup>55</sup>

**Figure 5**  
**Main levels of the supply chain investigated in the period 2004-2011**



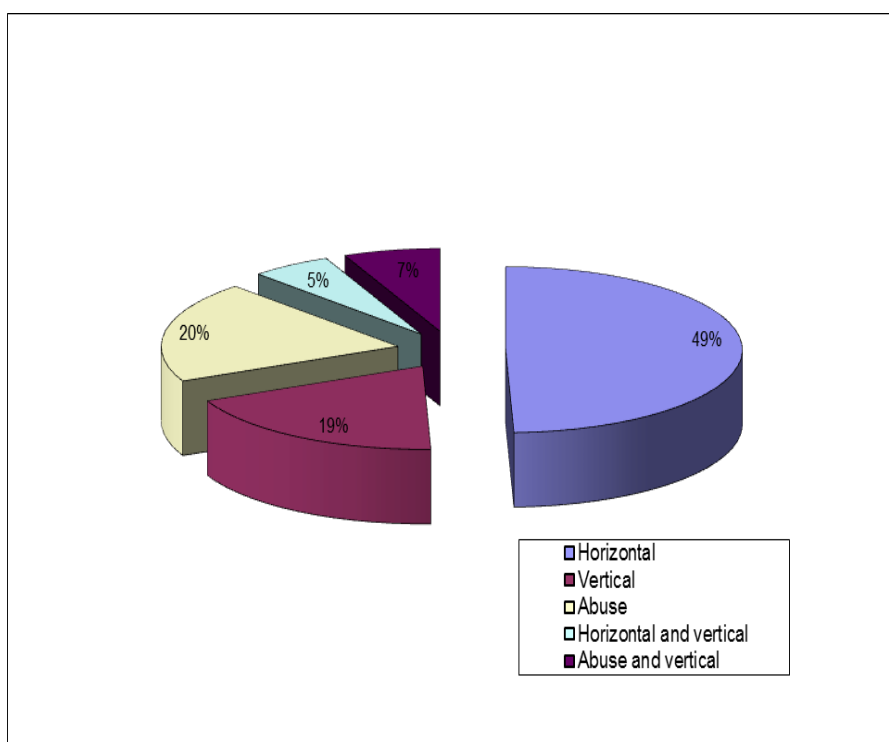
#### 3.1.4. Types of infringements

60. **About half of the cases involved horizontal competition infringements** (49% of all cases, as shown by the table below), including price fixing, market and customer sharing and exchanges of confidential information. This is not as such surprising. It indicates that priority was given to investigating collusion between competitors, which is the most serious type of competition infringement. A high number of horizontal infringements may also reflect the characteristics of the industry. For instance, in certain upstream agricultural markets as well as on certain agricultural wholesale and processing levels, the products are rather homogenous, which facilitates collusion between competitors.

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<sup>55</sup> Another factor that may explain a lower number of cases is that for certain products some levels are not part of the chain. For instance, the alcoholic and soft drink sectors do not have an agricultural primary production level – the underlying agricultural input for these products, such as wheat, potatoes or sugar beets, would be however accounted for in other sectors. In other words, quantitative differences might also add to differences between the levels.

**Figure 6**  
**Main types of infringements investigated in the period 2004-2011**  
**(decided and pending cases)**

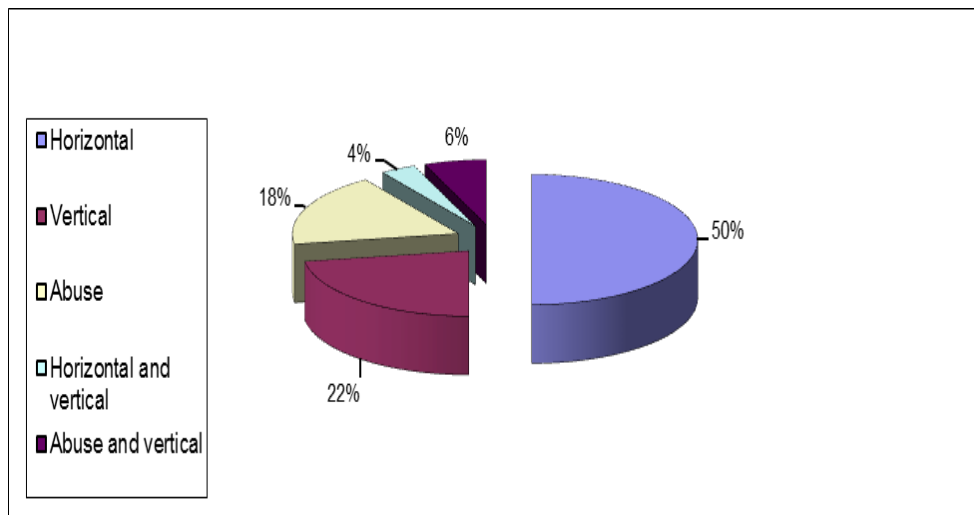


61. The competition authorities have also investigated a number of cases dealing with anti-competitive agreements between companies active at different levels of the supply chain (so-called **vertical restraints**, accounting for 19% of all cases). Prominent examples are price-related anti-competitive agreements, in particular resale price maintenance, and exclusive purchasing agreements restricting the freedom of the immediate customer to deal with other suppliers.
  
62. The competition authorities have further investigated cases which involved **abusive conducts by dominant operators** (which accounted for 20% of all cases). These abuses included mainly strategies to foreclose competitors, such as exclusivity obligations, minimum purchasing obligations, tying and refusals to supply, but also some exploitative abuses, such as unjustified contractual obligations. There were 36 cases which were classified as abuses: 2 were investigated only under EU law, 8 under both EU and national law and 26 only under national law. Out of the abuse cases pursued under national law, 16 cases involved national law abuses that are stricter than the scope of Article 102 TFEU, such as abuses of economic dependency.<sup>56</sup> This means that the majority of the abuse cases pursued by competition authorities related to abusive conduct under Article 102 TFEU or an equivalent national provision.

<sup>56</sup> The NCAs applied national laws stricter than Article 102 TFEU to unilateral conduct in Cyprus, Czech Republic, Germany, Hungary and Latvia. See para 72 below.

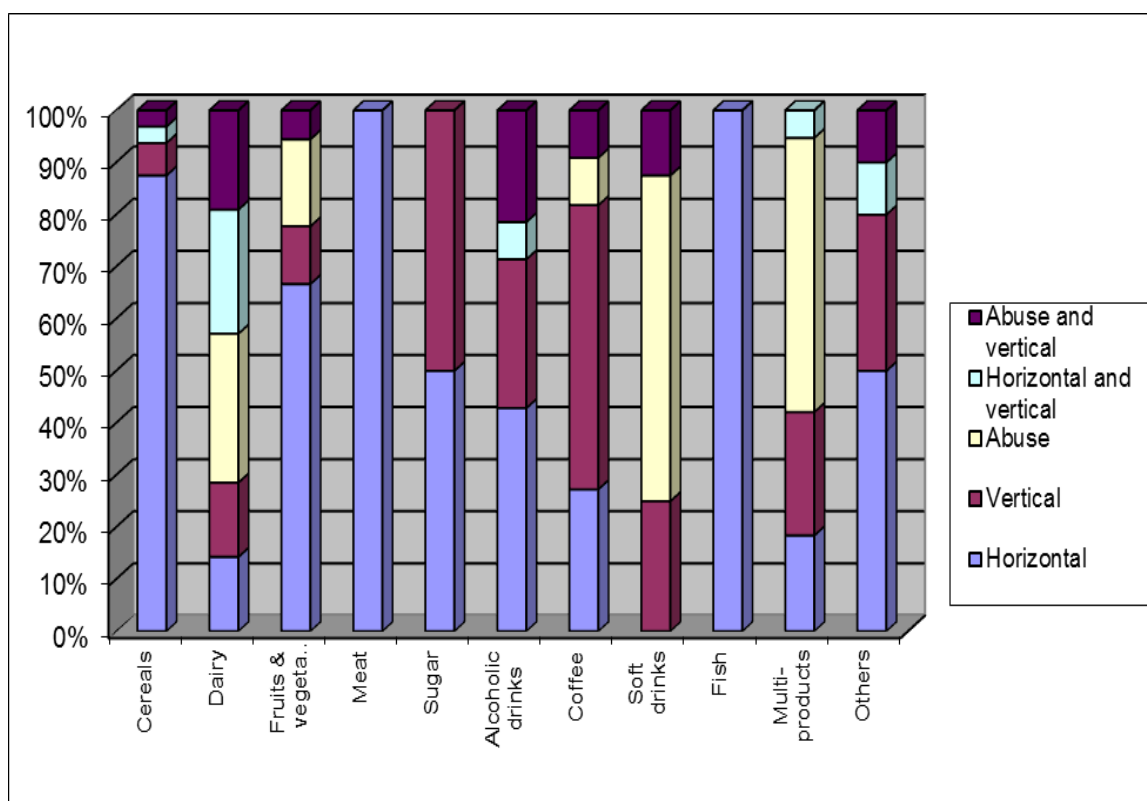
63. If one excludes the pending cases and only looks at the cases that ended with an infringement decision, the above distribution of types of infringements does not change. Horizontal infringements still account for about half of all cases, followed by verticals (22%) and abuses (18%).

**Figure 7**  
**Type of infringements investigated in the period 2004-2011**  
**(only decided cases)**



64. Not surprisingly, the different types of infringements investigated vary according to the sector at stake. The competition authorities investigated mainly horizontal infringements in the sectors of meat, poultry and eggs and fish and sea food and, to a lesser extent, in the sectors of cereals, fruits and vegetable and sugar. They investigated principally vertical restrictions in the sectors of coffee and sugar and for multi-products. Finally, they investigated abuses of dominance to a much higher degree in the sector of soft drinks and also, albeit lesser, for multi-products.

**Figure 8**  
**Type of infringements investigated in the period 2004-2011**  
**(split by level of the chain and product)**



### 3.1.5. Analysis across sectors, levels of the chain and types of infringement

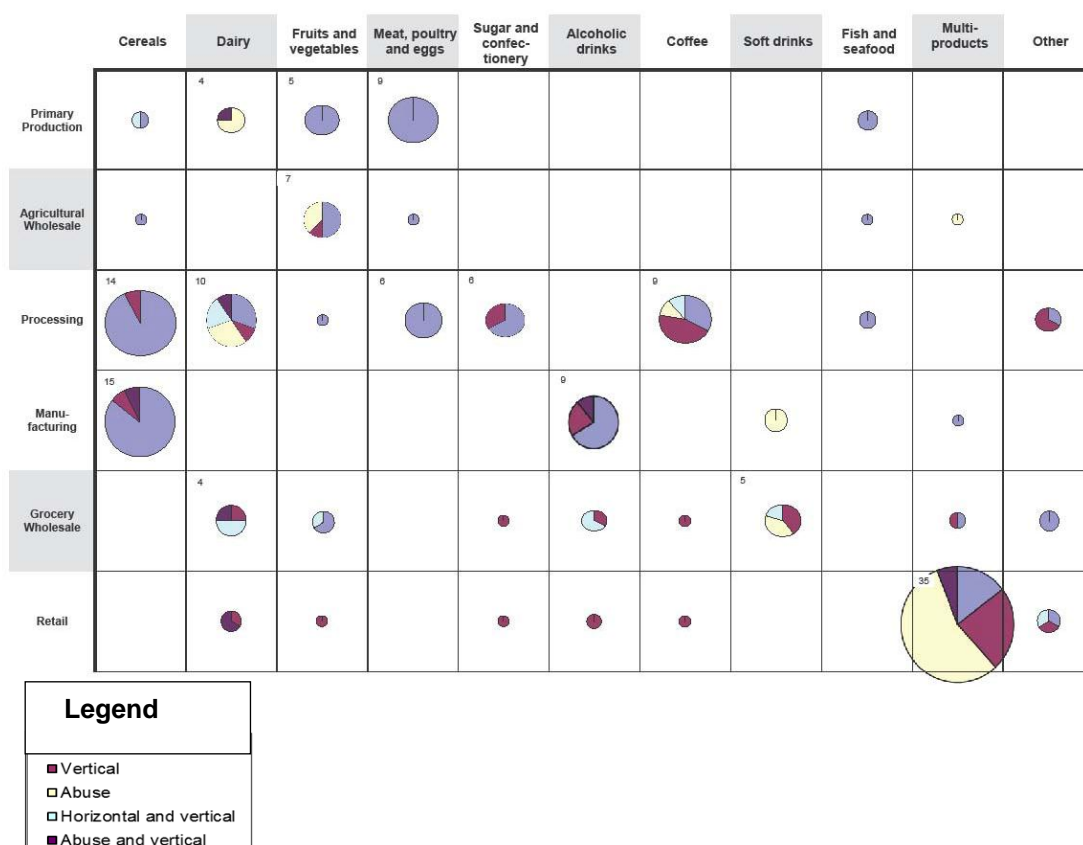
65. The figure below provides an overview of all antitrust investigations by sector, level of the chain and type of infringements. Before looking more closely at each of the sectors by level of the supply chain and type of infringement, three general observations can be made:
66. First, **each sector has a rather unique pattern of infringements** and there is no evident resemblance between any two sectors.<sup>57</sup> In fact, the patterns become even less similar if one also takes the type of infringement into consideration. That being said, even if the characteristics of the various markets differ (between, and at times even within, Member States), the type of infringements often seem to **reflect the different structures** of the sector, or rather the relevant level of the sector. The most obvious example is the abuse cases, which can only occur in markets that have a level of concentration allowing for a dominant player. This is also confirmed by the merger statistics. The sectors with the most abuse cases – multi-products (groceries) and dairy – are also the ones with the highest number of problematic merger cases which required commitments by the parties.

<sup>57</sup> The sectors that still show the most resemblance with each other in terms of enforcement record appear to be meat and fish.

67. Second, the areas with the highest enforcement activity appear to be at two places: (a) the cluster of three big bubbles in **cereals/processing (e.g. milling) cereals/manufacturing (e.g. baking), and dairy/processing**, and (b) the biggest bubble in **multi-products/retail**. Together they represent almost 40% of the 182 cases covered by this Report, and they are also the reason why the respective sectors are the ones with the most cases (cereals 18%, dairy 12%, and multi-products 21%).<sup>58</sup>

**Figure 9**  
**Cases by sector, level of chain and type of infringement**

Matrix – Overview of Cases in Various Food Sectors



68. Third, when looking at the specifics of infringements per level of the chain, two further observations are worth pointing out: (i) the transformative part of the supply chain (processing and manufacturing) displays a **significantly higher percentage of horizontal infringements (66%)** than the average for all

<sup>58</sup> When looking at the number of cases per sector, one should also keep in mind that the sectors also have different sizes. Everything else equal, a larger sector should be prone to exhibit a higher number of cases. If one takes consumer spending as a yardstick, however, it appears that the number of cases in cereals (18%) and dairy (12%) correspond by and large to the percentage in consumer spending (18% and 13%, respectively). For all other sectors, the number of cases is far below the number of consumer spending, e.g. meat (9% vs. 25%) or fruits and vegetables (10% vs. 20%). Given that the case figures include the multi-products category as a sector – accounting for 1/5 of all cases –, whereas the consumer spending figures do not have this category, the comparability of the figures is also somewhat distorted.

cases (49%);<sup>59</sup> (ii) compared to the average, the **retail level in the multi-products** category shows a relatively high number of abuse and vertical cases (accounting for 53% and 24%, respectively of all cases for those two types of infringements).

69. Turning from the overall picture to the respective sectors, the following picture emerges:

- (i) Most investigated infringements in **cereals** concerned the **processing and manufacturing levels** and were of a **horizontal** nature.
- (ii) As to **dairy**, the most investigated level was **processing**, accounting for more than half of all dairy cases. Infringements at this level were mainly of a horizontal and abuse nature.
- (iii) Enforcement activities in **fruits and vegetables** showed, differently from the two sectors above, that the emphasis of the investigations was on the **agricultural wholesale** level, followed by the primary production level. These cases consisted mostly of **horizontal** infringements as well as some abuse cases.
- (iv) As to **meat, poultry and eggs**, most infringements affected the **primary production** level, accounting for more than half the cases. These cases were all **horizontal** infringements.
- (v) In the few cases in the sector for **sugar and confectionery**, the large majority was investigated at the **processing** level and included mainly **horizontal** infringements.
- (vi) In the sector for **alcoholic drinks**, the large majority of the few cases reported, related to the **manufacturing** level and mainly concerned **horizontal** infringement cases.
- (vii) In the few cases in the sector for **coffee**, almost all were found at the **processing** level. They consisted mainly in **vertical** cases as well as horizontal cases.
- (viii) The limited number of **soft drinks** and water cases related mainly to **groceries wholesales**. The infringements were split between **vertical** cases and **abuse** cases.
- (ix) The very few **fish and sea food** cases related mainly to **horizontal** infringements at the **primary production** level.
- (x) As to the **multi-products** category, the by far largest number of investigations was clearly at the **retail** level. The cases at this level are mainly comprised of **abuse** cases, followed by vertical and horizontal cases.

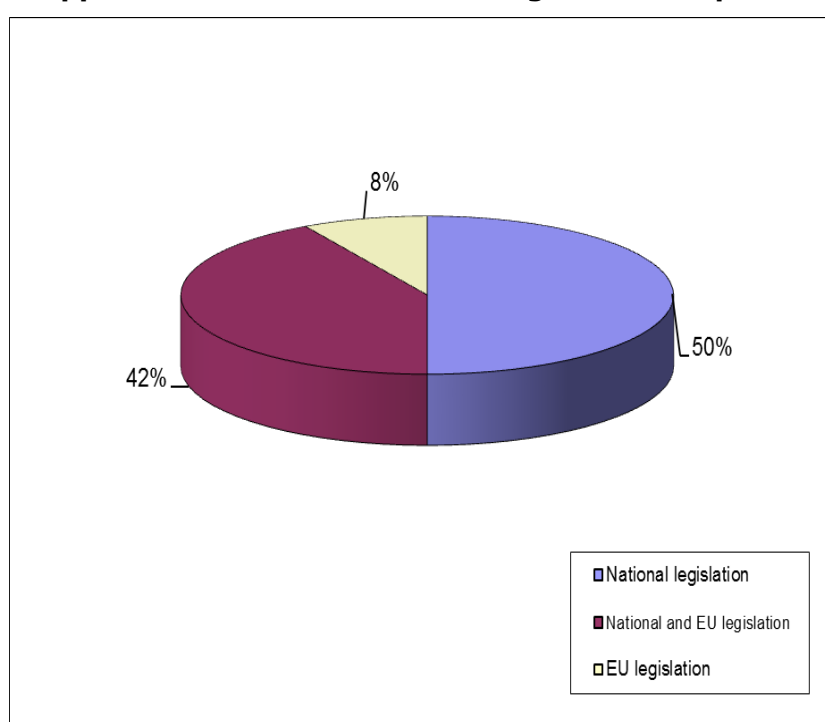
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<sup>59</sup> The largest contributing groups are collusive practices by millers and bakeries; see in more detail in Section 3.2.1.1 below.

### 3.1.6. Legislation applied

70. When looking at the type of legislation applied, one important finding is that the **NCAs have applied national legislation in nearly half** of the cases covered by this Report. Several of the NCAs explained that the main reason for applying national law was the local scope of the competition infringements, which lacked an appreciable effect on trade between Member States.<sup>60</sup>
71. In almost half of the cases, the NCAs have applied both national and EU competition law. The NCAs regularly applied both legislations when the infringements had an appreciable effect on trade between EU Member States. By contrast, the NCAs relied only on EU law in very few cases.<sup>61</sup>

**Figure 10**  
**Legislation applied in antitrust cases investigated in the period 2004-2011**



72. If one takes a closer look at the cases in which the NCAs applied only national competition law, one comes across a group of cases in which the NCAs applied stricter national rules that target abusive conduct by undertakings which goes beyond Article 102 TFEU.<sup>62</sup> This has been the case in 16 investigations<sup>63</sup> and

<sup>60</sup> As explained above at Section 2.2.1, the NCAs must also apply EU competition law in cases in which they apply national competition law to anti-competitive agreements, decisions, practices or abuses of dominance which have an effect on trade between Member States. However, given that some food markets are regional, or even local in scope, the practices investigated may often not have an effect on trade.

<sup>61</sup> The 9% in Figure 10 below, corresponding to cases in which only EU law has been applied, also includes the 6 Commission cases.

<sup>62</sup> See above para 62.



probably also explains why the NCAs have applied national law in a slightly higher number of abuse cases than they have done for all types of infringements together.

73. Some of the above-mentioned abuse cases tackled the issue of structural imbalances. In this context it is important to note the distinction between buyer power and unequal bargaining power.<sup>64</sup> Unequal bargaining power exists whenever one party to a proposed contract, be it either the supplier or the buyer, can "drive a hard bargain"; that is, can impose upon the other contracting party terms and conditions that are deemed unfavourable by that other party. Unequal 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. Buyer power, by contrast, exists if a market is concentrated to such an extent that a particular buyer has not only power over a particular supplier but over suppliers in general. From the perspective of EU competition law,<sup>65</sup> the power of a buyer over its suppliers can constitute a problem, for instance, if this position is used to foreclose (potential) rivals to the detriment of consumers. However, buyer power can also be to the benefit of consumers, for instance, by acting as a countervailing power that exerts competitive constraints on a powerful supplier or by creating purchase efficiencies that are passed on to consumers.

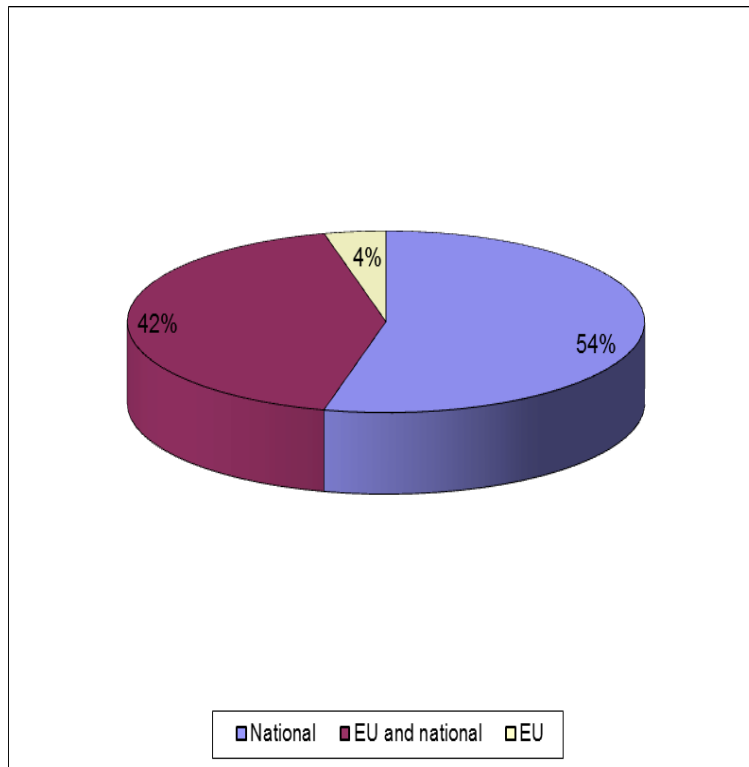
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<sup>63</sup> As previously mentioned (see footnote 56 above), this was the case for the NCAs in Cyprus, Czech Republic, Germany, Hungary and Latvia.

<sup>64</sup> For a more detailed explanation of the differences between buyer power and bargaining power, see Commission Staff Working Document, "Competition in the food supply chain", accompanying document to the Communication "A better functioning food supply chain in Europe" (2009), pages 17-18, [http://ec.europa.eu/economy\\_finance/publications/publication16065\\_en.pdf](http://ec.europa.eu/economy_finance/publications/publication16065_en.pdf).

<sup>65</sup> National rules may have a different perspective. For an overview of the various different approaches that exist, see e.g., International Competition Network, "Report on Abuse of Superior Bargaining Position" (2008), <http://www.internationalcompetitionnetwork.org/uploads/library/doc386.pdf>.

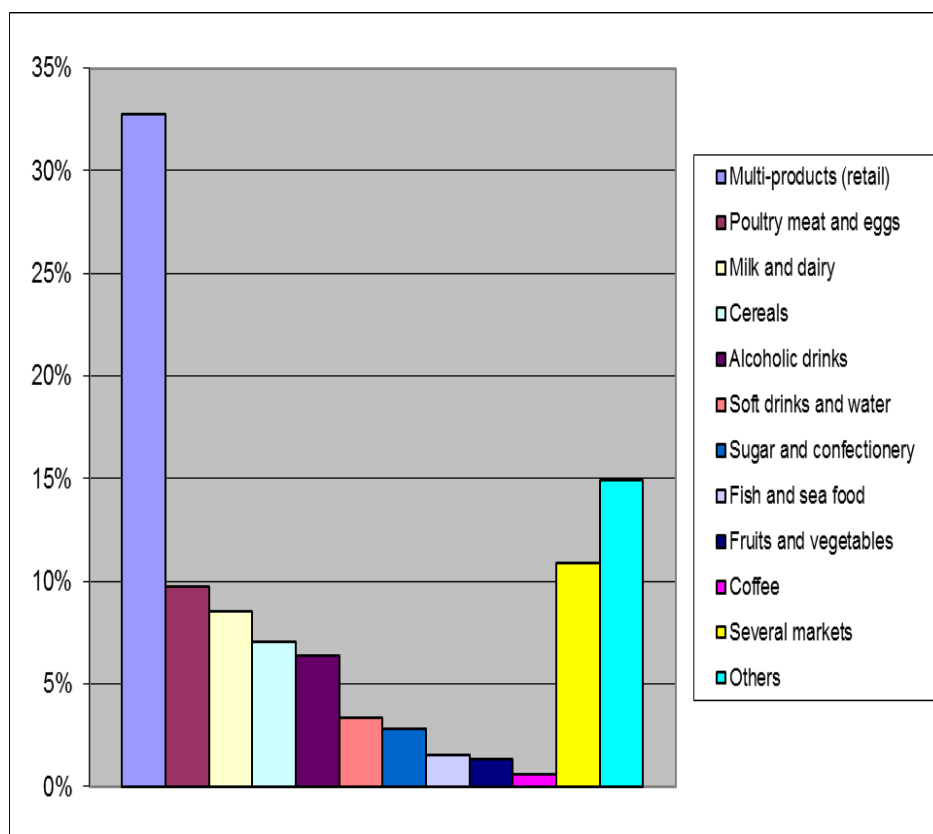
**Figure 11**  
**Legislation applied in abuse of dominance cases**  
**(including cases reported as "abuse and vertical infringement")**



### 3.1.7. Overview of merger control cases

74. Together with antitrust enforcement, merger control plays a significant role in ensuring that competitive markets work to the benefit of consumers. Combining their different activities may allow companies, for example, to develop new products more efficiently or to reduce production or distribution costs. Through their increased efficiency, the market becomes more competitive and consumers benefit from higher-quality goods at fairer prices. However, some mergers may reduce competition in a market, usually by creating or strengthening a dominant player, leading to consumer harm in form of higher prices, reduced choice or less innovation.
  
75. The number of reviewed mergers in the food sector is remarkable both in terms of numbers of cases and variety of markets covered. The European competition authorities have reported 1289 mergers in the food sector since 2004. In order to ensure comparability, merger cases have been classified following the same criteria as antitrust cases. As shown by the table below, the category of multi-products (products falling under several product groups, mainly concerning the retail sale of daily consumer goods and groceries) had the highest number of mergers, followed by meat, poultry and eggs and milk and dairy. Given that many mergers involve companies producing several products (without necessarily involving the retail level of the value chain), an additional category of "several markets" was created, which non-surprisingly shows a high number of mergers.

**Figure 12**  
**Total mergers divided by sectors**

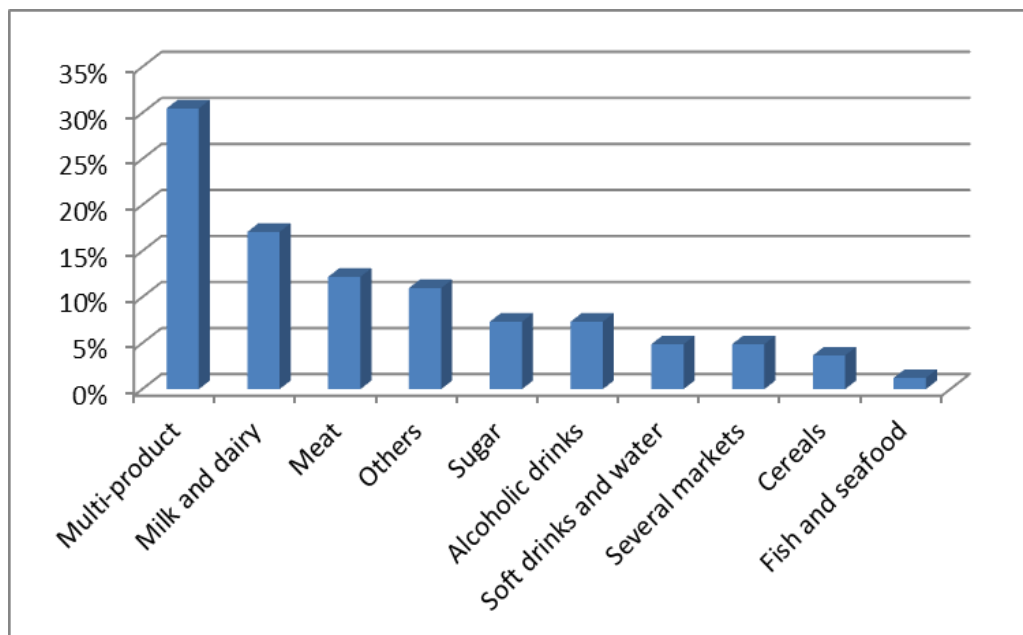


76. It is important to keep in mind that the number of mergers in a certain industry does not yet say anything about the existence of competition problems. As explained above,<sup>66</sup> if a transaction triggers the merger control thresholds at EU or national level, it needs to be notified to the competent competition authority. This obligation normally exists regardless of whether the transaction raises any competition problems or not. A high number of mergers in an industry rather reflects the consolidation process in the particular industry, which, once it reaches a certain level, can give rise to competition concerns.
77. As mentioned, while mergers can be pro-competitive by expanding markets, creating efficiencies and bringing benefits to the economy, some may also reduce competition in a market. In order to get a better overview of the relevant competition problems in merger cases, this Report refers only to those mergers where the competition authorities raised competition concerns. However, even if a competition authority finds that a proposed merger could distort competition, the parties may commit to taking action that remedies this likely effect. They may commit, for example, to sell a part of the combined business or to engage in or refrain from certain behaviour, such as continuing to supply downstream competitors or not to enter into exclusivity contracts. If the competition authority is satisfied that the commitments would solve the competition problem identified in the market, thereby protecting consumer interests, it gives conditional clearance for the merger to go ahead.

<sup>66</sup> See para 21 above.

78. Out of the above total of 1289 mergers analysed, there were **83 mergers**, in which the competition authorities expressed some concerns and either cleared the transaction with **commitments** by the parties or **prohibited** it.
79. As shown by Figure 13 below, most mergers cleared with commitments or prohibited by competition authorities fell into the category of multi-products. In milk and dairy markets as well as meat markets competition concerns were identified in a significant number of cases. Only a limited number of merger cases raising concerns was reported in the markets for alcoholic and non-alcoholic drinks. Cereals and cereal-based markets were subject to only two merger decisions with commitments.

**Figure 13**  
**Main markets subject to commitments or prohibition merger decisions**



80. Out of the above 83 mergers which raised concerns since 2004, the NCAs have cleared **70 mergers with commitments** and have **prohibited 8** mergers, namely in the markets for pastry, cheese, meat, beverages and confectionery products. The Commission has approved the other **5** mergers raising concerns subject to commitments in the markets for dairy products, spirits, retail, baker's yeast and sunflower seed.

**Table 4**  
**Commitments and prohibition merger decisions by sector**

COMMITMENT DECISIONS		PROHIBITION DECISIONS	
<b>Multi-products</b>	25	<b>Milk and dairy</b>	1
<b>Milk and dairy</b>	13	<b>Meat, poultry and eggs</b>	2
<b>Meat, poultry and eggs</b>	8	<b>Sugar and confectionery</b>	1
<b>Sugar and confectionery</b>	5	<b>Alcoholic drinks</b>	1
<b>Alcoholic drinks</b>	5	<b>Cereals and cereal products</b>	1
<b>Cereals and cereal products</b>	3	<b>Several markets</b>	1
<b>Soft drinks and water</b>	4	<b>Others</b>	1
<b>Several markets</b>	3		
<b>Fish and seafood</b>	1		
<b>Others</b>	8		
<b>TOTAL</b>	<b>75</b>	<b>TOTAL</b>	<b>8</b>

## 3.2. Enforcement in specific markets

### 3.2.1. Cereals and cereal-based products

81. Cereals account for over half of the agricultural crop production in the EU in terms of volume.<sup>67</sup> Cereals and bread - as the most important downstream cereal product - together represent 18% of the average consumer's food basket expenditure.<sup>68</sup> In addition, cereals prices also play a non-negligible indirect role for the consumer budget because they are an essential input for animal feed and bio-fuel production.
82. Cereals were very much part of the extraordinary increases and volatility of agricultural commodity prices that could be observed from 2007 on, not only in Europe but worldwide.<sup>69</sup> In fact, cereals are even more linked to international markets than most other agricultural products because of their distinct commodity nature and relatively easy storability. Unlike some other food products, cereals do not exhibit a lot of product differentiation. The main characteristic determining their economic value are the protein percentage, specific weight and impurities, apart maybe from the overall cultivation method (conventional vs. organic).
83. With the integration of cereals into the Single CMO Regulation, the scope for public intervention in cereals markets has been reduced significantly. However, some intervention instruments are still in place, such as automatic intervention for common wheat and special market measures for any cereal if the market situation makes it necessary.<sup>70</sup> In addition, there are still various measures in

<sup>67</sup> See Eurostat figures for 2010 under, [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Agricultural\\_products](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Agricultural_products).

<sup>68</sup> See the figure for 2011 in DG Agriculture, June 2011 update on recent agricultural commodity and food price developments in the EU, Graph 4, [http://ec.europa.eu/agriculture/analysis/markets/foodprices/food06\\_2011\\_en.pdf](http://ec.europa.eu/agriculture/analysis/markets/foodprices/food06_2011_en.pdf).

<sup>69</sup> Cf. above paras 4 to 8.

<sup>70</sup> For details, see DG Agriculture, "The EU cereals regime" (October 2011), pages 2-5, [http://ec.europa.eu/agriculture/cereals/factsheet-cereals\\_en.pdf](http://ec.europa.eu/agriculture/cereals/factsheet-cereals_en.pdf).

place that restrict imports (and exports) of cereals, notably variable import duties and quotas.<sup>71</sup>

84. Turning to the industry structure, the production level is very varied, ranging from larger, specialised and efficient farms to small, diversified subsistence holdings. On the agricultural wholesale level, cooperatives play an important role in some Member States. For instance, in France they account for almost 75% of sales.<sup>72</sup> Often, locally operating cooperatives with grain warehousing capacity collect the harvest, which is then marketed by large central cooperatives. Some cooperatives are also active across borders, but the international trade of cereals is dominated by large companies, such as ADM, Bunge, Cargill, ConAgra and Louis Dreyfus. The processing level is mainly characterised by private milling companies, even if some of the larger cooperatives have also invested in processing capabilities. Finally, the food manufacturing level is again very diverse, ranging from a few very big players, such as Kraft, Nestlé and Unilever, over some medium sized companies, such as regional bakery chains, to very small players, such as local crafts bakeries. The importance of certain products and players differs from Member State to Member State.

#### 3.2.1.1. Antitrust cases

85. With a total of **32** cases (almost 20% of all antitrust cases), the cereals sector has seen the highest number of cases pursued by competition authorities.

**Table 5**  
**Investigations in cereals and cereal-based products**

Authority	Infringement	Status	Product
<b>Austria</b>	Vertical, abuse	Decided	Corn
<b>Belgium</b>	Horizontal	Pending	[ ]
	Horizontal	Decided	Bread
<b>Bulgaria</b>	Horizontal	Decided	Bread
<b>Czech Rep.</b>	Horizontal	Decided	Pastry, bread
<b>Estonia</b>	Horizontal	Pending	Flour
	Horizontal	Pending	Bread
<b>Finland</b>	Horizontal	Decided	Barley
<b>France</b>	Horizontal	Decided	Bread
	Horizontal	Pending <sup>73</sup>	Flour
	Horizontal	Decided	Cereals
<b>Germany</b>	Horizontal	Pending	Flour

<sup>71</sup> See the DG Agriculture document mentioned in the previous footnote, pages 5-11.

<sup>72</sup> See Rainer Kühl, "Support for farmers' cooperatives in the cereals sector" (2011), pages 13-25, <http://www.lei.dlo.nl/wever.internet/applications/leirapporten/images/spr/SFC%20Cereals%20Final%20rev%20draft.pdf>. Large cooperatives with turnover in excess of EUR 1 billion can also be found in the Scandinavian countries, Germany and The Netherlands.

<sup>73</sup> The investigation resulted in a fines decision issued on 13 March 2012. Given that this decision was adopted after the cut-off date of the Report (November 2011), the case appears as pending in its statistics.

	Horizontal	Pending	Flour
<b>Greece</b>	Horizontal	Pending	[ ]
	Horizontal	Decided	Cereals
<b>Hungary</b>	Horizontal	Decided	Wheat
	Horizontal	Pending	Grain
<b>Italy</b>	Horizontal	Decided	Pasta
	Horizontal	Decided	Bread
<b>Latvia</b>	Horizontal	Pending	Flour
	Vertical	Decided	Bread
<b>Netherlands</b>	Horizontal	Decided	Flour
<b>Portugal</b>	Horizontal	Pending	Flour
	Horizontal	Decided	Bread
<b>Romania</b>	Vertical	Pending	Pastry and bakery
	Horizontal	Decided	Wheat
	Horizontal	Decided	Bread
	Horizontal	Decided	Bread
<b>Slovakia</b>	Horizontal, Vertical	Decided	Bakery
<b>Spain</b> <sup>74</sup>	Horizontal	Decided	Bread, pastry and pasta
	Horizontal	Decided	Bread
	Horizontal	Decided	Bread

86. NCAs have uncovered **collusive practices** between competitors notably on two levels of the supply chain: between flour producers (millers) on the processing level and between bakers on the manufacturing level. These antitrust cases show that collusive behaviour can also be found between small regional players, which play an important role in supplying bread to consumers in these markets. Collusion was in many instances organised within the framework of industry associations.

#### **Agreements between flour producers (millers)**

In October 2010 the **Hungarian** NCA imposed a fine on 16 millers active in the **flour industry** for participating in a cartel violating Article 101 TFEU and national law. The companies had - from February 2005 to April 2008 - entered into an **agreement on prices of whole-grain, flour and bran**, which provided for price increases following a defined method and timing. The investigation also revealed market allocation practices, further to which the millers involved had refrained from entering into each other's markets and approaching each other's customers.<sup>75</sup>

After carrying out an investigation in the milling sector, the **Portuguese** NCA imposed a fine on 12 cereal millers. The authority found that the millers had entered into an agreement to raise flour prices, which had led to an increase of approximately 30% in the price of bread.<sup>76</sup>

<sup>74</sup> The Spanish NCA has reported an additional pending case initiated in January 2012 regarding a horizontal agreement in the bread sector. Given that these proceedings were initiated after the cut-off date of the Report (November 2011), they are not taken into account in its statistics.

<sup>75</sup> This decision is under appeal.

<sup>76</sup> This case is still pending before the Portuguese NCA on procedural grounds.

In 2010, the **Dutch NCA** imposed a fine amounting to EUR 81.6 million on 15 **Dutch, Belgian and German flour producers** for participating in a cartel involving several agreements that infringed both Article 101 TFEU and national legislation. This participation was considered a single and continuous infringement with the objective of stabilising the market positions of the flour producers, which held an aggregated market share of almost 90%. The agreements involved customer allocation (comprising industrial bakeries, artisanal bakeries and the food industry) among the producers with the aim to prevent shifts of volumes among the mills and the implementation of certain business strategies targeted at restraining competition from competitors outside the cartel. For example, one potential competitor outside the cartel was bought by members of the cartel and subsequently taken off the market. Another competitor was compensated for revenue losses on the condition that it would not interfere with the cartel activities.

There are also a number of on-going investigations in several Member States (**France**,<sup>77</sup> **Germany**, and **Latvia**) in the flour production and milling sector, which concern alleged price-fixing agreements and other practices, such as market sharing or quota allocation among producers and exchange of sensitive business information. Some of these practices potentially have a cross-border dimension and entail cooperation among different NCAs.

Foreclosure practices are also being investigated by the **Estonian NCA** in a case where a large producer of flour is alleged to have engaged in exclusionary practices vis-à-vis its only (and smaller) competitor. Both allegedly entered into an agreement by which the small producer undertook to exit the market and to hand over its customers and suppliers to the larger producer.

87. Horizontal collusion between grain storage companies was fined in 2009 by the **Romanian NCA** in the market for wheat. The Association of Grain Storage Merchants in Romania conveyed information and set the price levels that its members should apply to their clients (farmers, processors, etc.). This was found to cause the undertakings involved to align their own trade policies, regardless of the costs incurred by each of them. Consequently the NCA found the behaviour to restrict competition on the market in question.

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<sup>77</sup> The investigation resulted in a decision on 13 March 2012 imposing fines amounting to EUR 242.4 million in total for anticompetitive agreements fixing prices, limiting output and customer sharing for packaged flour marketed to French supermarkets and hypermarkets as well as hard-discount retailers.



### **Anti-competitive practices by bakers' associations**

In **Belgium**, the national association of bakers was fined in 2008 for having published a price index and cost schedule from 2004 to 2007. Based on the cost figures of a certain number of bakeries, it had calculated the average rise in costs and it made these public by publishing an index on its monthly magazine.<sup>78</sup>

In **Bulgaria**, three associations of bread and pastry producers were fined in July 2008 for coordinating the pricing policies of their members from 2002 to 2007. In addition to price fixing, the practices involved the exchange of sensitive business information, namely the collection of data on retail prices, which were disseminated among their members with instructions on their respective pricing policies.<sup>79</sup>

In **France**, a local federation of bakers ("Fédération départementale de la Boulangerie et Boulangerie Pâtisserie de la Marne"), together with 26 independent bakers, were fined in March 2004. They were found guilty of taking part in an agreement intended to raise the price of bread during the period immediately preceding the adoption of the Euro.

In **Italy**, the bakers' association of Rome was fined in 2008 for setting up and circulating fixed price lists for all types of bread products from 2003 to 2007. The decisions taken during meetings on price recommendations restricted the bakers' choice to set their own prices. Many bakers had participated in this infringement – the associations had 215 direct and 200 indirect members –, which therefore had wide-ranging effects.

The **Spanish** NCA found in 2006 and in 2009 that price recommendations between bakers' associations at local and regional level infringed national competition law.

In **Slovakia**, the NCA sanctioned in 2007 a national bakers' association for having issued price recommendations for two years, which had led to indirect price fixing among bakers in April 2007.

In **Portugal**, the bakers' association of Lisbon was found to have implemented a system for exchanging information on bread retail prices among its members from 2002 to 2005, which ultimately led to fixed retail prices. According to investigations carried out in this case, the price of bread in the period of the agreement was found to have significantly contributed to the rise of inflation. A fine of EUR 1.17 million was imposed in 2008.<sup>80</sup>

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<sup>78</sup> The decision is under appeal at the Brussels Court of Appeal.

<sup>79</sup> The decision was judicially appealed and partially upheld.

<sup>80</sup> An appeal was lodged at the Lisbon Court of Appeal.

The **Romanian** NCA fined in 2009 two cartels between bakeries involving a substantial number of participants. One agreement to fix prices was reached between 17 bakeries and the other involved 31 bakeries. The NCA found that an association transmitted tariff levels, which in practice would lead the bakeries involved to align their own trade policies. These practices had the effect of increasing the price of bread by 70%.

In 2010, the **Estonian** NCA initiated an investigation into an alleged exchange of information on bread prices between bakers which took place in the framework of an association.

88. Anti-competitive practices between producers have also been investigated in other cereals and cereal-based product markets (such as barley, corn, or pasta). For instance, the **Austrian** NCA investigated a case relating to the purchasing, storage and drying services of organic corn. The trading association Österreichische Agentur für Biogetreide GmbH, which had producers, processors and traders as members, was accused of foreclosure practices. It had entered into exclusivity contracts with local storage and drying facilities for organic corn. Since farmers have a limited radius within which they can deliver their harvest, they need to bring the organic corn to a nearby drying and storing facility. The exclusivity contracts were therefore found to foreclose the purchasing of organic corn in certain regions in Austria. This case was closed with commitments that eliminated the exclusivity.

#### **Pasta producers**

In 2009, the **Italian NCA** concluded – on the basis of Article 101 TFEU – that the main **pasta manufacturers** in Italy (27 out of a total 29, accounting for approximately 90% of the national production) and their industry association had entered into an **anti-competitive agreement to coordinate price increases**. This co-ordination on prices took place through an association of pasta manufacturers (UNIFI), which facilitated contacts and exchanges of information between manufacturers, and lasted from at least 2006 until 2009. As a consequence of this collusive behaviour, the price that retailers paid for pasta underwent an average increase of 51.8 %. Most of this was passed on to consumers, as the retail price increased by 36 % over the same period. In addition, the Italian NCA found that such price fixing agreements were likely by their nature to favour the partitioning of national markets and hamper economic integration. Therefore, it imposed fines totalling approximately EUR 12.5 million, which were confirmed on appeal.

89. Compared to the number of investigations on horizontal agreements, the number of enforcement actions regarding **vertical agreements** in the cereals sector was limited. In most of these cases only national competition rules were applied. For example, the **Latvian NCA** reported a case concerning resale price maintenance imposed on retailers by a bread manufacturer.

### 3.2.1.2. Merger control

90. In contrast to the antitrust enforcement in the cereal sector, the intensity of merger control was much lower in this sector, accounting only for less than 4% of all cases. Also, not many decisions found serious competition concerns. However, the **Czech** NCA prohibited one merger and two mergers were authorised only after commitments were offered to the **Portuguese** and **Spanish** NCAs respectively.

#### **Prohibition decision – ensuring access to supplies**

The **Czech** NCA prohibited a merger that would have led to a combination of the two biggest bakeries, which were the only sources of supply to retailers within the whole Czech Republic. The NCA considered that the merged entity would be the strongest competitor on the markets for mill products, thereby making other competitors on the bakery markets dependent on it.

91. A merger in the market for manufacturing of biscuits was cleared with commitments by the **Portuguese** NCA. It found the merger was liable to increase significantly the merged entity's market power by making it a brand leader. Commitments included the obligation by the merged entity to inform the NCA of the agreements signed with its six principal clients, including its price-lists, sales conditions and discounts applied. The **Spanish** NCA also cleared in September 2011 a merger in the rice sector subject to the commitments by the buyer to divest several brands.

### 3.2.2. Milk and dairy

92. Milk and dairy products represent slightly less than 16% of the consumer's food basket expenditure.<sup>81</sup> Milk is produced in every Member State and it is one of the core goods in daily consumer baskets across the EU. Accordingly, the milk supply chain represents an important part of the agricultural turnover of the EU. In the chain, farmers are followed by dairy processors, which process the raw milk partly into milk and other dairy products for end-consumption.<sup>82</sup> A sizeable part of the processed milk goes into the food manufacturing industry in the form of milk powder or bulk butter. In varying degrees, one can also find intermediary operators such as independent collectors, traders or wholesalers. Apart from its economic importance, the milk and dairy production also has non-economic dimensions: It is an important part of the diversity of the European food heritage and milk farmers shape large territories and the environment in Europe.

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<sup>81</sup> See the figure for 2011 in DG Agriculture, June 2011 update on recent agricultural commodity and food price developments in the EU, Graph 4, [http://ec.europa.eu/agriculture/analysis/markets/foodprices/food06\\_2011\\_en.pdf](http://ec.europa.eu/agriculture/analysis/markets/foodprices/food06_2011_en.pdf). Apart from milk and dairy products, this figure also includes eggs, which have been allocated to the meat and poultry sector for the purpose of this Report.

<sup>82</sup> In the dairy sector, the distinction between processors and manufacturers is rather difficult to draw. Many dairies do not only process the raw milk but also manufacture dairy products, such as yoghurt, butter or cheese.

93. The milk sector has many specific features, such as the continuing daily production and high perishability of unprocessed milk, which require well-functioning transport logistics. Together with the relatively high weight of milk as a commodity, this limits economical transport distances and the possibilities for farmers to switch between buyers. Therefore, markets are often national or regional in scope and NCAs are often well placed to address potential anti-competitive practices.<sup>83</sup>
94. The special features of the milk sector are also one of the main reasons for a rather high cooperative organisation of milk farmers in the EU.<sup>84</sup> Farmers benefit from common investments in transport, processing and quality control. Moreover, cooperatives are also a possibility to create countervailing power on the side of farmers to counter the continuing consolidation process on the downstream levels of the supply chain, that is food processors, manufacturers, and retail. The percentage of milk sold by cooperatives varies from Member State to Member State but lies at approximately 57% on average in the EU-27. Under cooperative agreements, the farmer is often obliged to deliver all his milk production to the cooperative whilst at the same time the latter promises to purchase the entire output.
95. The milk sector has recently suffered from the high volatility of prices on international markets. After prices had increased until they peaked in 2008, they fell even more, while input costs (in particular feed and energy) continued to increase.<sup>85</sup> This so-called "milk crisis" triggered discussions at EU level and put the existing CAP milk regime back into focus. As a result, the Single CMO Regulation has recently been amended by Regulation (EU) No 261/2012 to allow farmers, subject to very specific conditions, to engage in collective bargaining negotiations and agree on common prices for the deliveries of raw milk (see para 41 above).

#### 3.2.2.1. Antitrust cases

96. The dairy sector has been subject to an important number of antitrust investigations by the NCAs, especially in the aftermath of the "milk crisis".<sup>86</sup> In total, there were **21** cases.

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<sup>83</sup> As to the allocation of competences between Commission and NCAs, see above at paras 15 to 26.

<sup>84</sup> For a thorough overview of the role of cooperatives in the dairy sector, see e.g. Markus Hanisch, Malte Müller & Jens Rommel, "Support for farmers' cooperatives in the dairy sector" (2011), <http://www.lei.dlo.nl/wever.internet/applications/leirapporten/images/spr/SFC%20Dairy%20Final%20rev%20draft.pdf>.

<sup>85</sup> See "Report of the High Level Group on Milk" (June 2010) [http://ec.europa.eu/agriculture/markets/milk/hlg/report\\_150610\\_en.pdf](http://ec.europa.eu/agriculture/markets/milk/hlg/report_150610_en.pdf).

<sup>86</sup> The "milk crisis" did also have significant effects on the producer and consumers prices in the downstream markets for dairy products, see DG Agriculture, November 2011 update on recent agricultural commodity and food price developments in the EU, Graph A4, [http://ec.europa.eu/agriculture/analysis/markets/foodprices/food11\\_2011\\_en.pdf](http://ec.europa.eu/agriculture/analysis/markets/foodprices/food11_2011_en.pdf).

**Table 6**  
**Investigations in the milk and dairy sector**

<b>Authority</b>	<b>Infringement</b>	<b>Status</b>	<b>Product</b>
<b>Bulgaria</b>	Horizontal	Decided	Cheese, raw milk
<b>Cyprus</b>	Horizontal, vertical	Pending	Raw milk
	Abuse	Decided	Raw milk
	Abuse	Pending	Raw milk
<b>Denmark</b>	Abuse	Decided	Raw milk
<b>Estonia</b>	Horizontal, vertical	Pending	Milk
<b>Finland</b>	Abuse	Pending	Milk
<b>Germany</b>	Boycott	Decided	Raw milk
<b>Greece</b>	Horizontal	Decided	Raw milk
	Vertical	Decided	Dairy products and yogurt
	Horizontal, vertical	Pending	[ ]
	Vertical, abuse	Pending	[ ]
<b>Ireland</b>	Horizontal, vertical	Pending	Milk
<b>Lithuania</b>	Horizontal	Decided	Milk
	Horizontal, vertical	Pending	[ ]
<b>Poland</b>	Vertical	Decided	Ice cream
<b>Portugal</b>	Abuse, vertical	Decided	Ice cream
	Vertical	Pending	[ ]
<b>Sweden</b>	Abuse	Decided	Raw milk
<b>UK</b>	Horizontal, vertical	Decided	Milk and cheese <sup>87</sup>
<b>Norway</b>	Abuse, vertical	Decided	Cheese

97. Competition authorities have paid particular attention to raw milk procurement markets, thus at the level of milk **processing**. Several of the investigations in the sector concerned **buyer cartels** for purchases of raw milk. The behaviour of cooperatives vis-à-vis their members and their customers have also been investigated.

#### **Raw milk procurement – collusion between buyers**

In **Greece**, the members of a buyer cartel involving raw milk were fined on the basis of Article 101 TFEU and national law in 2007. The anti-competitive conduct took place from 2003 to 2006 and buyers were found to have fixed purchasing prices, allocated sources of supply and exchanged price information. The Greek NCA established that the undertakings involved had met to exchange price lists and coordinate their discount policy.<sup>88</sup>

Similarly, in **Bulgaria**, the members of a buyer cartel of dairy processors were fined on the basis of national legislation in 2008. In the context of this cartel, lasting between 2002 and 2007, associations of processors had agreed on purchasing prices for raw milk and exchanged information thereupon. The anti-competitive conduct also encompassed the setting of minimum prices for white cheese and the exchange of sensitive business information within the associations.

**Lithuania** reported a case where milk processors were fined in 2011 for having exchanged information on a regular basis for a period of eight years on

<sup>87</sup> This case is currently under appeal to the Competition Appeal Tribunal.

the quantities of raw milk purchased.<sup>89</sup> The investigation concerned the exchange of confidential information between the undertakings active in the milk purchasing and processing business and their association. The information exchanged included quantities of raw milk purchased and of individual milk products produced and marketed. The possession of such information was found to have influenced the final decisions of the undertakings in the relevant markets.

98. As explained above, one of the main purposes for farmers to join cooperatives is the opportunity to create a counterweight to other market players with stronger bargaining power. But the **relationship between farmers and cooperatives** can also raise issues under competition laws.
99. For instance, the **Cypriote** NCA investigated an **abuse of economic dependency** under national law of a dairy farmer by a dairy cooperative. It found that the cooperative, which delivered and sold milk, had illegally terminated its trading relationship with a dairy farmer who produced yoghurt. The termination of the contractual relationship lasted for a period of two months. The NCA took into account that the production of yoghurt was the only economic activity of the dairy farmer, who faced serious difficulties obtaining milk for producing yoghurt elsewhere. The termination of the trading relationship thus completely prevented the farmer from pursuing his activities. The Cypriote NCA has further reported a similar pending case which concerns an abusive behaviour in the raw milk sector.<sup>90</sup> The **Swedish** NCA has also undertaken a preliminary assessment under both EU competition rules and national law concerning an alleged abuse of dominant position through **exclusive supply obligation**. The statutes of the dairy cooperative Arla required its members to deliver to it at least 80 % of the milk that they produced. This case was finally closed with commitments, whereby a clarification was added to the statutes, stipulating that the Swedish farmers only had to deliver 50 % of their milk supplies to the cooperative.<sup>91</sup>
100. The **German NCA** also prohibited a **boycott** of raw milk sales to processors in 2008. In this case, a German milk farmers' association had requested farmers not to sell milk to all major dairies in Germany, with the aim of achieving a uniform price for milk in Germany. The boycott was accompanied by a physical blockade of the dairies that still received large quantities of raw milk from various sources. The boycott was called out in order to force the dairies to agree on a uniform price demand in their contractual negotiations with the retailers and to force the retailers to raise the price that end consumers would have to pay for milk above a certain level. The German NCA found that this

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<sup>88</sup> Although the decision of the Greek NCA was largely upheld on the first appeal, it is still pending at the Supreme Court of Greece.

<sup>89</sup> The decision has been appealed.

<sup>90</sup> Both Cypriote cases correspond to abuses of economic dependency pursued under stricter national law, which goes beyond the scope of Article 102 TFEU.

<sup>91</sup> This case was closed with commitments and no final legal assessments thus were made regarding dominant position or abuse.

behaviour infringed the specific German national competition rules on boycott cases. The decision was upheld on appeal.

101. In another case in the **UK** the NCA imposed fines in August 2011 on the members of a cartel in the processing and retail sector for cheese and fresh milk. The NCA found that some dairy processors and four large supermarkets had infringed national competition rules by coordinating increases in the prices consumers paid for certain dairy products in 2002 and 2003. This co-ordination was achieved by supermarkets indirectly exchanging retail pricing intentions with each other via the dairy processors.
102. The NCAs found also other competition problems further down the chain. However, in comparison to the cereal sector, investigations in the dairy sector have not focused so much on horizontal restraints but rather on **vertical relationships** in the chain. These cases include strategies to exclude upstream competitors or attempts to control prices downstream.

#### **Exclusion of competitors by dairies**

The **Danish** NCA fined the dairy cooperative Arla in 2006 for abusing its dominant position in the dairy market. Arla had paid a marketing contribution to one of its customer, the wholesaler Metro, to put an end to the newly-started cooperation with one of Arla's competitors.

The **Portuguese** NCA imposed commitments on contracts between the dominant company in the dairy market and its retailers. The dairy was found to abuse its dominant position by imposing on its retailers the obligation to use its freezers only to store that company's ice cream.

Similarly, the **Norwegian NCA** imposed a fine in 2007 on the largest dairy processor in Norway for imposing on a retailer an agreement under which it was to be the latter's sole supplier of cheese, thereby excluding its competitors.<sup>92</sup>

103. Some cases reported involved restrictive **vertical agreements that set minimum resale prices** and other price-related infringements.
104. The **Greek** NCA has reported two cases. In the first case some dairy processing companies were fined for fixing minimum resale prices and restricting passive sales between 2001 and 2006. The decision of the NCA, based on both Article 101 TFEU and national law, was largely upheld upon first appeal, but is still pending at the Supreme Court of Greece. The second Greek case relates to minimum retail price fixing between dairy producers and supermarkets.
105. The **Polish** NCA investigated an agreement between one of the largest ice-cream manufacturers in Poland and a large retailer involving the fixing of

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<sup>92</sup> The decision was reversed by the Supreme Court in June 2011.

minimum resale prices. As a result of the agreement, the retail prices of the ice-cream were higher than it would have been if market mechanisms had been at work.

106. The **Irish** NCA is also currently investigating a case in relation to possible price-fixing in the liquid milk market.

#### 3.2.2.2. *Merger control*

107. Out of the **110** mergers notified in this sector, **13** mergers were cleared with commitments by the **Austrian, Cypriote, Finnish, French, Greek, Italian, Lithuanian** and **Portuguese** NCAs as well as by the **Commission**.

108. In addition, one merger was prohibited in the dairy sector by the **German** NCA.

#### **Prohibiting the creation of a dominant position in cheese manufacturing**

Following a Phase II in-depth investigation, the **German** NCA prohibited a merger in the market for curdled milk cheese. The NCA considered that the merger would have led to a dominant position of the Theo Müller group on the market for the manufacturing of this cheese in Germany. The takeover would have increased the market share of Müller from approximately 50% to over 70%.

109. Similar to what could be observed in the above antitrust cases, milk procurement markets were subject to competition concerns. In addition to the probability of post-merger price increases, the NCAs had concerns about the **access to raw material** by competitors after the mergers. These concerns were addressed in cases dealt with by the **Austrian, Finnish, Cypriote and Greek** NCAs as well as the **Commission**.

#### **Ensuring access to raw milk**

In December 2008, the **European Commission** cleared a merger in the milk and dairy markets following a Phase II investigation. Merging companies were Campina and Friesland Foods, both dairy cooperatives active in the Netherlands and other EU Member States. Their activities involved several markets along the dairy food supply chain. The Commission was concerned that the transaction would have significantly impeded competition in the Dutch markets for the procurement of raw milk and in a number of other dairy markets, in particular in the markets for fresh dairy products and cheese. The Commission was further concerned by the fact that Campina and Friesland Foods were each other's closest competitors in a number of other markets, such as in desserts, flavoured drinks and cream. In these markets the merger would have created a market leader and removed a strong alternative supplier.

To address these concerns, Campina and Friesland Foods offered to divest Friesland's fresh dairy product business, a part of Campina's cheese business and Campina's brands for dairy drinks. In addition, the parties committed to



ensure access to raw milk for the to-be-divested fresh dairy and cheese businesses as well as for their other competitors in the Netherlands.

In **Finland**, a producer of raw milk and a cheese processor were authorised to merge on the condition to ensure that the average price of raw milk sold to competitors would be the same as the purchase price paid by the new entity resulting from the merger.

In a horizontal merger between two dairies in **Cyprus**, the parties committed to refrain from increasing the wholesale price of milk for three years.

Similarly, the **Austrian** NCA accepted commitments to ensure access to milk procurement markets in a merger affecting dairy products markets. To address the NCA's concerns, the parties offered to introduce an additional distribution channel for raw milk by committing to procure milk from non-member farmers at the generally available index price for milk exports. Consequently, farmers who were not members of an association and whose contracts of sale to other dairies were discontinued were offered access to the market at market price.

110. A high market concentration, symmetry in prices, high barriers to entry and lack of countervailing constraints led the **Greek** NCA to conclude that a merger in the ice-cream market would create a collective dominant position between the merged entity and a third party. Under the commitments, the parties agreed inter alia to delete the exclusivity clauses in existing cooperation and distribution contracts and to reduce the duration of the transaction non-compete clause.

### *3.2.3. Meat, poultry and eggs*

111. Meat is the most important product group in the consumer food basket, representing about 25% of total household expenditures on food (which amounts approximately to 4 % of the total household budget).<sup>93</sup> Accounting for fresh meat and processed products, pork is the most consumed meat in the EU followed by chicken and beef. On average, fresh meat and processed meat products are consumed in EU households every other day, although the rate of meat consumption varies considerably from one Member State to another. Even if there are important national differences also in the meat production and processing, it is possible to identify certain overall tendencies in the EU meat and poultry sector.
112. The farm production of meat is characterised by the distinction between the farms that breed the animals and the ones that fatten them for slaughter. This specialisation by farms has created a separate market for live animals or eggs for hatching with important intra-EU trade. There is a tendency to consolidation in both types of farming, but especially in the fattening sector. However, compared to other main meat producing countries such the US, Brazil or Argentina the breeding farms are small in most Member States.

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<sup>93</sup> See the figure for 2011 in DG Agriculture, June 2011 update on recent agricultural commodity and food price developments in the EU, Graph 4, [http://ec.europa.eu/agriculture/analysis/markets/foodprices/food06\\_2011\\_en.pdf](http://ec.europa.eu/agriculture/analysis/markets/foodprices/food06_2011_en.pdf).

113. **Pig meat** is the most cyclical meat product, which regularly faces significant ups and downs of producer prices and supply adjustments.<sup>94</sup> The breeding in the pig sector is atomised, but the rearing before slaughter in the EU is mainly done by a few large undertakings.
114. The **beef** sector suffered in particular from the abrupt fall in demand and prices during the BSE crisis in 2001, which resulted in a significant overcapacity. The farm-gate prices for beef and demand recovered only towards 2005. The NCAs and the Commission responded to the situation by investigating a number of collusion cases in beef farming and processing. Since 2005 the EU beef price has been rising and there is in general more demand than supply at the EU level. Therefore overproduction in one Member State can usually be marketed to other Member States.
115. **Poultry and egg** production has experienced significant concentration at the farm level. The increased consumption of poultry has improved farm-gate prices and balanced the supply and demand in the poultry sector. Nevertheless, the profitability of poultry farming has been under pressure due to high feed prices, energy costs and regulatory changes to improve hygiene and animal welfare. In the egg production, overcapacities remain and the prices have started to recover only after 2010. Against this backdrop it is understandable that the NCAs have been investigating the poultry and eggs sector and in particular collusion at the farm level.
116. As for **processing**, the first processing stage (slaughtering and cutting) shows a different development than further processing stages (the manufacturing of prepared meat products). On the one hand, the EU slaughterhouse and meat-cutting sector has undergone a major restructuring mainly due to overcapacities in beef and pork processing. As a result, the market share of large multinational processing companies has increased, in particular in slaughtering and first-stage processing. The tightening of animal welfare and hygiene demands in meat processing, especially in the wake of the BSE and other animal disease crises have contributed to this tendency. By contrast, the subsequent manufacturing stage that caters to retail customers has been able to diversify. A large number of SMEs operate in the market, competing on price and variety of products rather than on brand names as their big competitors.

#### 3.2.3.1. Antitrust cases

117. The sectors for meat, poultry and eggs have been subject to **16** investigations undertaken by the NCAs and the Commission.

**Table 7**  
**Investigation in the meat, poultry and eggs sector**

Authority	Infringement	Status	Product
Bulgaria	Horizontal	Decided	Poultry, eggs

<sup>94</sup> See the developments during the last decade in DG Agriculture, November 2011 update on recent agricultural commodity and food price developments in the EU, Graph A3, [http://ec.europa.eu/agriculture/analysis/markets/foodprices/food11\\_2011\\_en.pdf](http://ec.europa.eu/agriculture/analysis/markets/foodprices/food11_2011_en.pdf).

<b>Czech Rep.</b>	Horizontal	Decided	Poultry
<b>France</b>	Horizontal	Decided	Beef
	Horizontal	Pending	[ ]
<b>Germany</b>	Horizontal	Pending	Meat products
<b>Greece</b>	Horizontal	Pending	[ ]
<b>Hungary</b>	Horizontal	Decided	Eggs
<b>Ireland</b>	Horizontal	Decided	Meat
<b>Latvia</b>	Horizontal	Decided	Eggs
	Horizontal	Decided	Eggs
<b>Malta</b>	Horizontal	Decided	Poultry
<b>Spain</b>	Horizontal	Decided	Poultry
	Horizontal	Decided	Eggs
	Horizontal	Pending	Meat
<b>Slovakia</b>	Horizontal	Decided	Fat hogs
<b>Norway</b>	Horizontal	Pending	Poultry
<b>Commission</b>	Horizontal	Decided	Meat

118. All cases investigated by competition authorities in this sector related to **horizontal collusion**.

*Meat markets (beef and pig meat)*

119. On the beef and pig meat **primary production level**, a few cases of **collusion by farmers** were investigated, in particular regarding price fixing. For instance, the **Slovakian** NCA investigated a case in which 47 fat hogs' breeders (including farmers and associations of farmers) **fixed prices** to slaughterhouses.

120. **Horizontal collusion** cases, in particular in the form of price fixing, exchange of information and output restrictions, were much more prevalent on the **processing level**.

### **Horizontal collusion between meat processors**

In 2003, the **Irish NCA** opened a case under Article 101 TFEU concerning a **rationalisation plan adopted by the Beef Industry Development Society (BIDS)**. The plan aimed at removing excess capacity from the Irish beef processing industry to ensure the continuing viability of processors that remained in the market. Under the plan, some processors (about 25 % of the total capacity) would leave the market, their plants would be decommissioned and their equipment sold to processors staying in the business. The processors signing up to the plan would agree on a two-year non-compete clause in relation to the processing of cattle on the entire island of Ireland. These "goers" would be compensated by processors staying in the market, which would obtain financing by a voluntary levy paid by the processors. The Irish NCA concluded that the BIDS arrangement was an agreement to **limit output** and thus a restriction of competition by object. The Irish Supreme Court referred the matter to the Court of Justice of the European Union ("CJ") for a preliminary ruling (Case C-209/07), and in 2008 the CJ agreed with the assessment of the Irish NCA that the BIDS arrangements had as their objective the restriction of competition within the meaning of Article 101 TFEU. In January 2011, the BIDS abandoned the restructuration plan.

In 2004 the **French NCA** imposed a fine on shareholders and users of slaughterhouses. They were found to have taken part in a horizontal collusion which resulted in the **setting of discriminatory tariffs and conditions of access** to slaughterhouses.

The **German NCA** is currently investigating an alleged cartel which **may entail price fixing and information exchanges** between manufacturers of sausages and other meat products. The authority searched the premises of 26 companies.

### *Poultry and eggs markets*

121. Regarding the **poultry** market, the NCAs reported a relatively high number of horizontal collusion, in particular **price fixing** at the **farmers'** level.

### **Horizontal collusion between poultry farmers**

The **Bulgarian NCA** investigated a case which included agreements entered into by the Union of Poultry Breeders which provided for **minimum prices** in the markets for poultry and eggs. The agreements were also found to limit production by setting production quotas. The parties were further sanctioned for sharing sensitive information on the produced quantities of chicken, poultry meat and eggs in order to monitor compliance with the adopted agreements. The decision was upheld on appeal.

The **Czech NCA** fined poultry farmers for **price fixing** in 2011. It found that growers agreed on the prices imposed to their main (and common) customer.

An example of the type of restrictive practices which are not allowed under the framework of sectorial IBOs is found in a case of the **Spanish NCA** of 2009, in which the competition authority fined the nation-wide IBO active in the poultry sector for having adopted collective price recommendations addressed to its members. In particular, the representatives of this IBO, which included the

vast majority of Spanish poultry producers and processors, had published a press release and made public declarations announcing an upcoming price increase of the poultry meat in Spain.

122. The **Maltese** NCA investigated a case regarding a tripartite agreement between a hatchery, a broiler breeder and a slaughter house which included single branding and exclusive supply obligations. The NCA found that the exclusivity clause imposed on the broiler breeder by its very nature impeded the latter's freedom to contract with the hatchery's competitors. Furthermore, the agreements contained a penalty clause for the broiler breeder which created an exit barrier and further compounded the restriction of the breeder' freedom (and thus access for competing hatcheries).<sup>95</sup>
123. **Eggs** are mostly sold to final consumers in an unprocessed state. In such a supply chain the procurement and wholesale level of the chain plays a central role. The NCAs dealt with several cases of horizontal collusions that were set up via associations of **egg producers**.

#### **Horizontal collusion between associations of egg producers**

The **Latvian** NCA investigated two infringements by egg producers. In 2004, it found that all Latvian egg producers had engaged in **price fixing and exchanges of information** through their association, aiming at increasing the sales price of eggs. In 2009, it sanctioned three major egg producers for information exchanges on hen egg prices and marketing rules, production and sales volumes.<sup>96</sup>

In **Hungary**, the NCA applied Article 101 TFEU to fine egg producers and an egg producer association for having agreed on **recommended prices** and **exchanged** sensitive business **information** from 2002 to 2005. The fine also covered other anti-competitive practices including **import control** and the reduction of laying capacity. The decision of the Hungarian NCA was appealed and upheld at first instance.

Similarly to the above case concerning the IBO of the poultry sector in Spain, the **Spanish** NCA also fined the IBO active in the egg sector in Spain for having adopted a collective price recommendation addressed to its members in 2009. That recommendation had taken place by two press releases which provided guidance to its members on the need to pass the increases of production costs on the prices applied to its customers.

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<sup>95</sup> On appeal, the Commission for Fair Trading (the review tribunal) disagreed with the NCA's decision.

<sup>96</sup> These decisions were appealed.

### 3.2.3.2. Merger control

124. Out of the **125** notified mergers regarding meat markets, there were **8** mergers cleared with commitments in **Denmark, France, Germany, Hungary** and **Latvia**. In addition, **Norway** reported **2** prohibition decisions.

#### *Meat markets*

125. Mergers subject to commitments were analysed by the **French, Latvian** and **German** NCAs. The main concerns were increased market concentration and the need to ensure access of competitors to inputs at non-discriminatory terms. An example of these concerns was a merger analysed by the **German** NCA in 2010, which affected the markets for the sale of veal to wholesalers, industrial processors and the HoReCa sector. In that case, the parties offered divestiture commitments.<sup>97</sup>

#### *Poultry and eggs markets*

126. The **Danish, French, Hungarian** and **Norwegian** NCAs analysed mergers which raised competition concerns in the markets for poultry and eggs.

#### **Ensuring access to inputs**

The **Danish** NCA analysed the acquisition of the company Spira by the cooperative Svenska Lantmännen in which it found that the latter could possibly leverage its strong position on the market for breeding and selling broilers to the market for poultry. The NCA considered that the merged entity would have the possibility to put pressure on competitors on the market for the purchase of broilers from breeders and possibly also on the market for the supply of chicken products to retail and catering. Therefore, Svenska Lantmännen undertook to deliver broilers to all Danish chicken brooding houses on non-discriminatory terms.

The **French** NCA reviewed a merger in the poultry sector which also raised concerns of input access because the merged entity would have strengthened its presence in the markets for production and marketing of poultry. The parties undertook to divest certain assets in the upstream slaughterhouse market as well as downstream regarding sales to butchers and supermarkets. In addition, the parties committed not to grant discounts for bundles consisting of several types of products.

127. The **Hungarian** NCA cleared a merger between a poultry producer and distributor and a poultry processor after the parties offered commitments remedying effects stemming from interlocking directorates. The merging parties

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<sup>97</sup> On 17 November 2011 the German NCA also prohibited the intended acquisition of slaughterhouse operator Tummel by Tönnies, which holds a dominant position in the procurement of cull sows and distribution of sow meat to meat processors in Germany. Given that this merger case is beyond the cut-off date of the Report, it is not included in its statistics.

had to resign their membership in the supervisory board of a third-party competitor and refrain from buying its shares.

128. In **Norway**, a merger was prohibited between the largest poultry grower and processor and the largest meat processor. It was considered that the merger would eliminate a potential competitor in the market for poultry and therefore lead to a further weakening of competition in the market for poultry products.<sup>98</sup>
129. The **Norwegian** NCA further reported a prohibition decision in the market for eggs. The prohibited merger would have strengthened the position of the acquiring party, which had already a 60% market share prior to the merger. In addition, it would have acquired one of its largest competitors in the market for processing and sale of egg products.<sup>99</sup>

### *3.2.4. Fruits and vegetables*

130. Fruits and vegetables together represent the second largest food group in the average EU consumer's food basket expenditure (accounting for 20%).<sup>100</sup> About a million farms are specialised in fruits and vegetables production, creating more than a sixth of the total value of agricultural production in the EU.<sup>101</sup>
131. Fruits and vegetables are a very heterogeneous group including various different crops and a large number of differentiated varieties. Still, as products, they are characterized to a very large extent by their perishability and seasonability, which often leads to price volatility.<sup>102</sup> The perishability is also a key driver for the organisation of the supply chain, which is often characterised by a complex organisational structure with a lot of intermittent levels in which some players are active on several levels of the chain.
132. The processing level for fruits and vegetables is characterised by significant economies of scale. However, the extent of processing varies from Member State to Member State. Despite competition from outside of the EU, the

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<sup>98</sup> The NCA decision was overruled by the Norwegian Government, which cleared the merger.

<sup>99</sup> The NCA decision was also overruled by the Government, which cleared the merger with commitments.

<sup>100</sup> See the figure for 2011 in DG Agriculture, June 2011 update on recent agricultural commodity and food price developments in the EU, Graph 4, [http://ec.europa.eu/agriculture/analysis/markets/foodprices/food06\\_2011\\_en.pdf](http://ec.europa.eu/agriculture/analysis/markets/foodprices/food06_2011_en.pdf).

<sup>101</sup> See DG "Agriculture in the EU – Statistical and Economic Information Report 2010", table 3.1.1, "Share of products in agricultural production", [http://ec.europa.eu/agriculture/agrista/2010/table\\_en/2010enfinal.pdf](http://ec.europa.eu/agriculture/agrista/2010/table_en/2010enfinal.pdf).

<sup>102</sup> The most perishable fruits and vegetables are leafy vegetables, soft fruits and some subtropical fruits, which have to be consumed or rather quickly processed after harvesting. Other products can be stored for months without much effort, such as apples, carrots, onions, and potatoes.

processing and preserving industry grew relatively strongly and steadily from 2000 at least until the beginning of the food price crisis in 2007.<sup>103</sup>

133. In many cases farmers organise themselves together or engage in more vertically coordinated supply chain partnerships that can also include downstream levels, such as processing. Consequently, organisations such as **POs** and **IBOs** play an important role in this sector.<sup>104</sup>

#### 3.2.4.1. Antitrust cases

134. Fruits and vegetables accounted for **18** enforcement actions undertaken by the NCAs and the Commission.

**Table 8**  
**Investigations in the fruit and vegetables sector**

Authority	Infringement	Status	Product
<b>Belgium</b>	Horizontal	Pending	Fruits and vegetables
<b>Cyprus</b>	Abuse	Decided	Potatoes
<b>France</b>	Horizontal	Pending <sup>105</sup>	Chicory
	Horizontal	Decided	Cauliflower
<b>Greece</b>	Abuse	Decided	Vegetables
	Horizontal	Decided	Canned peaches
	Vertical, abuse	Decided	Frozen vegetables
<b>Malta</b>	Abuse	Pending	[ ]
<b>Netherlands</b>	Horizontal	Pending	[ ]
	Horizontal	Pending	Bell peppers
	Horizontal	Pending	[ ]
<b>Portugal</b>	Abuse	Decided	Tomatoes and tomato seeds
<b>Romania</b>	Vertical	Decided	Fruits and vegetables
<b>Spain</b>	Horizontal	Pending <sup>106</sup>	Vegetables
	Vertical	Pending	Fruits
<b>Poland</b>	Horizontal	Decided	Preserved vegetables
<b>Commission</b>	Horizontal	Decided	Bananas
	Horizontal	Decided	Exotic fruits/bananas

<sup>103</sup> See Eurostat data, which suggests that the production grew on average by 3.4% from 2000 to 2007, [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Fruit,\\_vegetable,\\_oil\\_and\\_grain\\_processing\\_statistics](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Fruit,_vegetable,_oil_and_grain_processing_statistics).

<sup>104</sup> See, e.g. Jos Bijman "Support for farmers' cooperatives in the fruit & vegetables sector" (2011), pages 12-27, <http://www.lei.dlo.nl/wever.internet/applications/leirapporten/images/spr/SFC%20Fruit%20%20Veg%20Final%20rev%20draft.pdf>.

<sup>105</sup> The investigation resulted in a fining decision in March 2012. Given that this decision was adopted after the cut-off date of the Report (November 2011), the case appears as pending in its statistics.

<sup>106</sup> The investigation resulted in a fining decision in December 2011. Given that this decision was adopted after the cut-off date of the Report (November 2011), the case appears as pending in its statistics.



135. **Most investigations** concerned the markets for **vegetables**, including potatoes, onions, tomatoes and tomato seeds, endives, cauliflower and bell peppers. Fruit markets were investigated to a lesser extent.
136. On the **primary production** level, investigations focused mainly on collusive behaviour, which often involved POs.

#### **Cartels in vegetables production**

The **French** NCA fined three **POs** and a regional organisation, the Economic Committee for Fruits and Vegetables, in 2005. In Brittany, producers of cauliflowers sell through auctions, which are an important distribution channel in this sector. The NCA found that certain cauliflower POs had controlled the access to auctions in Brittany and obliged customers to purchase exclusively from auction markets controlled by the POs. Moreover, the NCA found that one of the producer associations had fixed prices and quantities for sales of cauliflowers in auctions.

The **French** NCA investigated whether associations of producers and **POs** took part in minimum price agreements in the market for chicory.<sup>107</sup> The investigation also included the coordination of promotional offers and exchanged confidential information on prices by POs.

The **Spanish** NCA investigated two producer associations and a trade association for a minimum price fixing agreement on several products such as peppers, aubergines or courgettes.<sup>108</sup>

The **Dutch** NCA is also currently investigating several potential cartels in the vegetables sector, one of which involves the sale of bell peppers. In this case, the NCA is examining allegations of collusion on daily and weekly prices, customer sharing and exchange of sensitive business information.

137. As indicated above, the perishability of most fruits and vegetables renders the rapid and efficient downstream distribution particularly important. Against this background, it is also not surprising that the European competition authorities looked in particular into allegations of infringements in agricultural wholesaling. Some of these investigations are still pending, but the infringements on this level of the chain mainly consist in horizontal collusion and abuses.

#### **Cartels and abuses on the wholesale level**

The **Commission** fined banana importers in **two cases** for having participated in a **price fixing**. In the first decision, the Commission found that the importers set their quotation prices for **bananas** in eight Member States by

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<sup>107</sup> As mentioned, in March 2012 the investigation led to a fining decision. However, the French NCA imposed moderate fines taking into account the limited damage caused to the economy and the producers' limited funds.

<sup>108</sup> As mentioned, the investigation resulted in a fining decision in December 2011.

agreeing on a reference price over a three-year period. Following this decision, the Commission further investigated the market for exotic fruits leading to a second Commission decision in October 2011. In this second decision, the Commission fined a cartel operated by Chiquita and Pacific Fruit, both major importers and sellers of bananas in the EU. 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.<sup>109</sup>

The **Cypriote** NCA analysed a case where the Cyprus Potatoes Trading Board imposed a conditional exclusivity clause on producers. The association, active in the wholesale of potatoes, **refused to buy** potatoes from producers who did not deliver their entire production.

The **Greek** NCA reported an atypical case concerning the **abuse** of the organiser of central vegetables markets for **charging excessive fees for market services**. According to Greek law, the merchants of the central markets were obliged to use the services of the organiser of the markets, such as unloading, and were charged according to a price list. As the actions of the organiser in question were partly a result of this legal framework, the NCA did not impose a fine, but rather foresaw an amendment of the provisions not compatible with competition principles.

138. On the **processing level**, only one horizontal infringement case was found. In **Greece** the members of the Association of Manufacturers of Canned Agricultural Products of Greece were fined in 2006 on the basis of both Article 101 TFEU and national law for having engaged in a cartel regarding the processing of fruit. Producers of canned peaches had agreed on prices between 2001 and 2005. **Vertical restrictions** were also found at the processing level. The **Portuguese** NCA found vertical restrictions in the area of tomato seeds and tomato processing. The food processor Sugalidal had used contractual clauses which made the purchase of tomatoes conditional upon the seller buying tomato seeds from Sugalidal's subsidiary. The case was closed with commitments which included amendments to these contractual clauses.
139. In markets further downstream, the NCAs also reported only few cases. The **Greek** NCA dealt with a case in which a company involved in the wholesale of frozen vegetables for domestic use fixed retail prices and restricted passive sales between 2002 and 2006. Finally, **Romania** reported a vertical case in the fruits and vegetable **retail** trade. A supplier and a retailer agreed to fix the retail prices and established a commission for each of the parties.

#### 3.2.4.2. *Merger control*

140. In this sector, the European competition authorities did not report any merger control notification that raised competition concerns.

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<sup>109</sup> The second cartel case has been challenged in January 2012 before the EU General Court.

### 3.2.5. Sugar and confectionery

141. Sugar and confectionery account for less than 8% of the average EU consumer's food basket expenditure.<sup>110</sup> Sugar is mainly consumed in the form of further processed products.<sup>111</sup> It is produced either from sugar beets (which are grown in Europe and elsewhere and processed into sugar locally) or from sugar cane (which is grown in more tropical climates).<sup>112</sup> Sugar production from beets accounts for about 90% and from imported cane raws for about 10% of total EU sugar production.
142. Processing sugar beet requires large capital investments. In order to reach economies of scale, also in anticipation of a further opening of European markets to large non-EU competitors, the industry has seen a consolidation process over recent years. As a result, the sugar industry is highly concentrated with only a few players in most Member States.
143. The sugar market has various unique features linked to the regulatory framework set by the CMO in agricultural products. This framework includes a quota system for beet sugar production allocated to Member States, which in turn allocate the quota to sugar beet processors. In addition, the framework sets a minimum beet sales price and a reference price for the sale of standard quality white sugar.<sup>113</sup> Competition from outside the EU is prevented to a large extent by import tariffs.
144. Driven in particular by external trade developments, the CMO for sugar was reformed in 2006, including a phasing-out of the price and quota mechanisms until 2015.<sup>114</sup> Further changes are being discussed within the current CAP reform. Still, competition in the EU sugar industry is very much influenced by the CMO framework.

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<sup>110</sup> The 8% figure in DG Agriculture, June 2011 update on recent agricultural commodity and food price developments in the EU, Graph 4, [http://ec.europa.eu/agriculture/analysis/markets/foodprices/food06\\_2011\\_en.pdf](http://ec.europa.eu/agriculture/analysis/markets/foodprices/food06_2011_en.pdf), includes not only sugar and confectionery but also jam, honey, and chocolate.

<sup>111</sup> These processed products do not only include confectionery, but also other products, such as soft drinks and juices, bakery and ice cream.

<sup>112</sup> In addition, there are also other products that can be used as sweeteners, such as corn syrup (which is much less used in Europe than in the US and not a substitutable input for the production of certain downstream food products) or artificial sweeteners, such as aspartame and saccharin.

<sup>113</sup> See the overview of the framework in Case No COMP/M.5449 - ABF/ Azucarera, paras 9-15. For more detail, see Rudolf Mögele and Friedrich Erlbacher (eds.), "Single Common Market Organisation – Article-by-Article Commentary of the Legal Framework for Agricultural Markets in the European Union" (2011), Articles 49-53.

<sup>114</sup> See Mögele and Erlbacher, cited in note 113, pre-Arts 49-53. In fact, one goal of the sugar reform was to reduce overcapacity, which had the effect that sugar production is now concentrated in six Member States (France, Germany, Poland, United Kingdom, Netherlands and Belgium) to which approximately 75% of the quota is allocated. From a major (heavily subsidised) exporter, the EU has become a net importer of sugar.

### 3.2.5.1. Antitrust cases

145. In total, NCAs have reported **8** cases in this sector, most of them still pending. These include investigations of anti-competitive practices by sugar processors but also by manufactures of confectionery. Cases focused on sugar as well as sugar-based products, such as confectionery including chocolate, candies and chewing gum.

**Table 9**  
**Investigations in the sugar and confectionary sector**

Authority	Infringement	Status	Product
<b>Austria</b>	Horizontal	Pending	Sugar
<b>France</b>	Vertical	Decided	Chocolate
<b>Germany</b>	Horizontal	Pending	Sugar
	Horizontal	Pending	Chocolate, confectionery
	Vertical	Pending	Candies
<b>Hungary</b>	Horizontal	Pending	Sugar
<b>Latvia</b>	Vertical	Decided	Sugar
<b>Romania</b>	Vertical	Decided	Chewing gum, sugar-based products

146. On the processing level (i.e. production of sugar) the investigated cases included **horizontal collusion**.

#### **Price fixing and market allocation by sugar producers**

The **Austrian** NCA has brought a case to court accusing two sugar producers of market-sharing practices which affected the German and Austrian sugar markets. The case is still pending. The undertakings involved are accused of having agreed to respect each other's strongholds in the respective domestic markets.

The **German** NCA is currently investigating allegations of market-sharing and price fixing agreements between sugar producers. This investigation involves cooperation with other NCAs.

147. The **Latvian** NCA reported a case where sugar producers were fined for engaging in vertical restrictions towards their distributors. In particular, the NCA fined sugar producers for imposing **resale price maintenance** on its distributors, thereby limiting the distributors' freedom to set their prices.

148. Further downstream on the manufacturing level, the **German** NCA is currently investigating allegations that several manufacturers of chocolate bars have coordinated price increases and exchanged commercially sensitive information in 2007 and 2008. The **Romanian** NCA fined fifteen **groceries wholesalers** of chewing gum and other sugar-based products which had engaged in vertical agreements with distributors, by fixing the selling price through applying discounts, sharing markets and allocating customers. Finally, the **German** NCA

has further opened investigations into **resale price maintenance** by candy manufacturers and retailers.

#### 3.2.5.2. *Merger control*

149. Out of the **36** mergers notified in the sugar and confectionery sector, there were **5** mergers cleared with commitments in **France, Germany, Poland** and **Romania**. The **Polish** NCA also prohibited a merger in this market.

##### **Prohibition decision in markets for cake ingredients**

The **Polish** NCA prohibited a merger which it found to significantly restrict competition on markets related in particular to the manufacturing of cakes and related products, such as the national marketing of powdered whipped cream, powdered cakes, coatings to desserts, baking powder, vanilla sugar, baking soda and flavours for cakes.

150. Some of the NCAs addressed concerns related to the increasing concentration of national sugar processing markets.

##### **Remedies addressing concentration on the sugar producing and marketing level**

The **German** NCA found in the context of Nordzucker's acquisition of its Danish competitor Danisco that the market for industrial sugar in Germany was characterised by an uncompetitive duopoly between the producers Nordzucker and Südzucker, and that the acquisition would have further expanded their joint dominant position. To avoid the negative effects from the adding of production capacities and the elimination of a powerful competitor by the merger, the parties offered the up-front divestiture of a production plant in the north of Germany.

The **French** NCA found that a merger in sugar production and marketing could result in an increase of sugar prices for consumers in the Reunion Island. The NCA authorised the transaction subject to structural and behavioural commitments intended to maintain two independent sugar wholesale distributors on this island. In particular, the acquiring party committed to divest to an independent third party assets of the acquired party regarding the marketing of sugar (including its brand) as well as a storage and packaging unit. Should the buyer not wish to acquire this unit, the acquiring company further undertook, inter alia, to supply the new independent distributor with minimum quantities of sugar at agreed sale prices for a period of 20 years.

151. The **Romanian** NCA reviewed a merger in the confectionery products market. It found that the transaction would have resulted in an important market share for the acquiring company (Kandia), which would have likely prevented the entry of potential competitors. Therefore, the merger was cleared subject to remedies that, inter alia, eliminated certain exclusivity clauses in downstream distribution contracts.

### 3.2.6. Coffee

152. Coffee is a tropical commodity produced in countries outside of the EU,<sup>115</sup> but widely consumed in EU countries. As a consequence, the supply chain in the EU does not start at the primary production but at the processing level. A further particularity of the coffee markets is that coffee is to a large extent distributed through the HoReCa channel, such as in restaurants, hotel, cafes and bars.

#### 3.2.6.1. Antitrust cases

153. Coffee and coffee-based products account for **11** antitrust cases, most of them investigated in Germany and Portugal. The majority of the cases related to standard coffee. Other products analysed to a lesser extent include instant coffee, coffee pads, and instant cappuccino.

**Table 10**  
**Investigations in the coffee sector**

Authority	Infringement	Status	Product
<b>Germany</b>	Horizontal	Decided	"Away-from-home coffee", filter coffee, coffee beans, espresso and coffee pads by coffee roasters
	Horizontal	Decided	Coffee
	Horizontal	Decided	Cappuccino
	Vertical	Pending	Coffee products, cappuccino
<b>Greece</b>	Abuse, vertical	Decided	Instant coffee
<b>Hungary</b>	Vertical	Decided	Coffee
<b>Portugal</b>	Vertical	Decided	Coffee
	Vertical	Decided	Coffee
	Vertical	Decided	Coffee
	Vertical	Decided	Coffee

154. The vast majority of the cases concerned **processors** of coffee and related coffee products (coffee roasters).<sup>116</sup> They were sanctioned for having engaged in collusion, in particular price fixing (notably in Germany). Other cases concerned vertical restrictions and abuse of dominance.

<sup>115</sup> Interestingly, tropical commodities were far less subject to the significant price movements during the food price crisis in 2008, see FAO, "The State of Agricultural Commodity Markets – High food prices and the food crisis – experiences and lessons learned" (2009), page 10, <http://www.fao.org/docrep/012/i0854e/i0854e00.htm>.

<sup>116</sup> Given that coffee beans are roasted (and often also subsequently ground) prior to being sold as a final branded product, the distinction between "processing" and "manufacturing" is not relevant in this sector.

### **Collusion by coffee roasters**

During 2008, the **German** NCA opened a series of investigations under Article 101 TFEU and national legislation on **cartels** by **coffee roasters** and **manufactures of instant cappuccino**. The first case triggered evidence for opening the remaining proceedings.

In 2009 the German NCA imposed fines on a **cartel** of **coffee roasters** which had engaged in **price fixing and information exchange** for eight years. The aim of the cartel had been to maintain the traditional price structure of the members' core products in the consumer coffee market. The four coffee roasters exchanged information concerning, among other things, raw coffee market developments, retail demand and the effects of price reductions.

In 2010 German NCA fined coffee roasters for engaging in a cartel in the market for **away-from-home coffee**, which included products such as filter coffee, coffee beans, espresso and coffee pads. The coffee roasters were fined, inter alia, for having **exchanged information and coordinated price** increases. The NCA imposed fines on nine processors, while seven processors opted for a settlement.

Finally, the German NCA also investigated a horizontal infringement which involved **price coordination** between **manufacturers in the instant cappuccino market**.

### **Non-horizontal anti-competitive practices by coffee roasters**

The **Portuguese** NCA investigated supply contracts between coffee roasters and distributors accounting for about 70% of the HoReCa channel. The contracts concluded with HoReCa customers since 1999 included restrictive clauses, such as non-competition clauses with a duration exceeding five years, the obligation to purchase minimum quantities, and penalties for non-compliance. The investigations involved four companies and were all closed with commitments.

The **Greek** NCA found an **abuse of dominance combined with vertical restrictions** imposed by the market leader in the instant coffee market (Nestlé), which had a market share of about 85%. The company was fined EUR 22.34 million for abusing its dominant position and EUR 7.45 million for entering into illicit vertical agreements. In its trading relations with supermarket chains, the company had granted target and fidelity rebates, impeded parallel imports, and prohibited any marketing activity of competing products alongside its own products. In the instant coffee market in the HoReCa sector, the company had also imposed exclusive supply and bundled contractual arrangements as well as granted fidelity rebates aimed at inducing customer loyalty. In addition, the company had imposed non-compete obligations and restricted parallel imports by specific supermarket chains.<sup>117</sup>

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<sup>117</sup> The decision was upheld on appeal. However, it found that the NCA should not have imposed separate fines per relevant market but rather per legal provision. Therefore, the NCA re-imposed the same fine per legal provision. This decision was appealed again and is currently pending.

155. Vertical restrictions were also found at the **groceries wholesale** level. The **Hungarian** NCA investigated vertical agreements between Sara Lee and eight of its HoReCa distributors for coffee (and also tea). These agreements influenced prices by setting a minimum price level and a general obligation for distributors to consult Sara Lee on the prices to apply. The agreements also included an exclusivity clause which prevented distributors from selling products of competing brands. The **German** NCA is currently investigating a case concerning the **retail** of coffee products and cappuccino. The allegations include vertical agreements on minimum resale prices undertaken between coffee roasters and retail traders, as well as the indirect horizontal coordination of resale prices between retail traders via coffee roasters.

#### 3.2.6.2. Merger control cases

156. In this sector, the European competition authorities did not report any merger control notification that raised competition concerns.

#### 3.2.7. Fish and seafood

157. Fish and seafood represent 6% of the average EU consumer's food basket.<sup>118</sup> However, general consumption trends in the EU show an increase in consumption of seafood products.<sup>119</sup> On the production side, past overfishing and pollution of waters in Europe and the world have put a particular strain on satisfying the increasing demand. Even if aquaculture, the "farming" of fish, has also increased in the past,<sup>120</sup> these developments have contributed to overall price increases. The Commission has responded to these developments, inter alia, by putting forward recently a reform of the Common Fisheries Policy setting out a fundamentally changed approach to fisheries management in Europe, which aims at bringing stocks back to sustainable levels.<sup>121</sup>

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<sup>118</sup> See the figure for 2011 in DG Agriculture, June 2011 update on recent agricultural commodity and food price developments in the EU, Graph 4, [http://ec.europa.eu/agriculture/analysis/markets/foodprices/food06\\_2011\\_en.pdf](http://ec.europa.eu/agriculture/analysis/markets/foodprices/food06_2011_en.pdf).

<sup>119</sup> This increase is in particular due to a rise in consumption of prepared frozen meals and the rising share of supermarkets in the retail of seafood products. In addition, healthy eating is another factor contributing to the increase in seafood consumption. See, e.g. Pierre Failler, "Future Prospects for Fish and Fishery Products", FAO Fisheries Circular No. 972/4 (2007), chapter 4: Fish consumption in the European Union in 2015 and 2030, <http://www.fao.org/docrep/010/ah947e/ah947e00.htm>.

<sup>120</sup> Aquaculture accounts for about 20% of the total volume of EU fisheries production, see DG Mare, "Facts and figures on the Common Fishery Policy" (2010), page 22, [http://ec.europa.eu/fisheries/documentation/publications/pcp\\_en.pdf](http://ec.europa.eu/fisheries/documentation/publications/pcp_en.pdf). Increasing prices for wild fish increase the viability of fish farming, which also faces various constraints in terms of environment, health, and feed supply (mainly fishmeal and oil).

<sup>121</sup> See the presentation of the proposed reform of the Common Fisheries Policy under [http://ec.europa.eu/fisheries/reform/index\\_en.htm](http://ec.europa.eu/fisheries/reform/index_en.htm). The reform also includes other points, such as fostering the role of fishermen's organisations in steering market supply and increasing fishermen's profit.



### 3.2.7.1. Antitrust cases

158. There were **6** cases investigated by NCAs and the Commission on fisheries, involving in particular gilthead sea bream in **Greece**, shrimps in the **Netherlands** and mussels and canned fish in **Spain**.

**Table 11**  
**Investigations in the fish and seafood sector**

Authority	Infringement	Status	Product
<b>Greece</b>	Horizontal	Decided	Fish
<b>Netherlands</b>	Horizontal	Decided	Shrimp
<b>Spain</b>	Horizontal	Decided	Mussels
	Horizontal	Decided	Canned fish
	Horizontal	Pending	Canned fish
<b>Commission</b>	Horizontal	Pending	Shrimp

159. The cases rather took place on the **upstream** levels of the supply chain (in particular production) and all cases concerned **horizontal agreements** between competitors.

#### **Collusive agreements in the shrimp sector**

The **Dutch** NCA found in 2003 that fishermen's organisations had concluded agreements on the maximum amount of shrimps that each cutter could land each week to reduce overcapacity and thereby to keep prices artificially high. In the agreements, fishermen and traders had also given each other minimum price guarantees. Fines in excess of EUR 4.4 million were imposed on traders as well as on POs representing Dutch, German and Danish shrimp fishermen for engaging in cartel activity between 1998 and 2000. The largest fines, which together represented more than EUR 3 million, were imposed on the two wholesalers involved in the cartel.

The **Commission** is currently investigating allegations of a cartel between companies active in the trading of North Sea shrimps and related products in several Member States.

160. Fines were imposed by the **Greek** NCA upon a cartel between fishers of fresh gilthead sea bream for price fixing and output-limiting agreements.<sup>122</sup> The **Spanish** NCA also imposed fines on **mussel producers** for market sharing and fixing the quantities, qualities and prices of mussels as well as on the main fish processors' association in Spain for a collective recommendation to pass on to consumers certain cost increases. The NCA is furthermore currently investigating allegations of a horizontal collusion also between **processors of canned fish**.

<sup>122</sup> This case is under appeal.

### 3.2.7.2. Merger control

161. The French NCA cleared the acquisition of Pan Fish by Marine Harvest only after the parties agreed to divest Pan Fish Scotland. The divestiture addressed in particular the concern that the merged entity could reduce its production in Scotland with the aim to increase prices.

### 3.2.8. Alcoholic drinks

162. Alcoholic drinks are generally divided in the following categories: beer, wine, fermented beverages other than beer or wine (e.g. cider), intermediate products (e.g. sherry) and spirits. The industry structure in each of these categories differs quite markedly (and often from Member State to Member State), as also emanates from the cases below. For instance, even if strong local preferences persist, the beer market is relatively concentrated in many Member States with only a handful of groups holding various brands. The European wine industry,<sup>123</sup> by contrast, is much more fragmented, with wine manufacturers who often also produce their own grapes. However, in wine markets as well, brands gain more and more importance beyond purely upscale products. The markets for spirits are again generally more concentrated with strong (often also international) brands.
163. Globally, the European alcoholic drinks industry plays a remarkable role: it holds the world's most important beer production and accounts for about half of the world's wine and a quarter of the world's alcohol production. Consequently, alcoholic drinks are very successful export products: about 70% of all alcohol exports in the world come from Europe.<sup>124</sup>
164. One distinctive feature of the alcoholic drinks sector in Europe is that an important share of product distribution takes place through the HoReCa channel (also referred to as the "on-trade" segment, i.e. consumption is on the premises). Many small enterprises, such as local bars, restaurants, hotels or cafes get their supplies from a few, often very large, multinational breweries or other alcoholic drinks producers or their distributors. In addition, selling draught beer requires the installation of equipment, which often serves as an entry point for a brewer to bind the HoReCa outlet to its brands.

#### 3.2.8.1. Antitrust cases

165. The alcoholic drinks sector accounted for **15** enforcement actions undertaken by the NCAs and the European Commission. The majority of cases involved the **distribution of beer**.

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<sup>123</sup> Wine also falls under the Single CMO Regulation, see in particular Articles 85a-x. The restrictions on planting vines in these provisions have been put in place after overproduction but are planned to expire after 2015.

<sup>124</sup> See e.g. Peter Anderson and Ben Baumberg, "Alcohol in Europe – A Public Health Perspective – A report for the European Commission" (2006), pages 47-52, [http://ec.europa.eu/health-eu/news\\_alcoholineurope\\_en.htm](http://ec.europa.eu/health-eu/news_alcoholineurope_en.htm).

**Table 12**  
**Investigations in the alcoholic drinks sector**

Authority	Infringement	Status	Product
<b>Austria</b>	Horizontal, vertical	Pending <sup>125</sup>	Beer
<b>Denmark</b>	Vertical, abuse	Decided	Beer
	Vertical, abuse	Decided	Beer
<b>Germany</b>	Vertical	Pending	Beer
<b>Greece</b>	Vertical, abuse	Pending	[ ]
<b>Hungary</b>	Vertical	Decided	Beer
<b>Latvia</b>	Vertical	Decided	Alcohol
<b>Spain</b>	Horizontal	Decided	Wine
	Horizontal	Decided	Wine
	Horizontal	Decided	Wine
	Horizontal	Pending	Wine
<b>Slovakia</b>	Vertical	Decided	Beer
	Vertical	Decided	Beer
<b>Commission</b>	Horizontal	Decided	Beer
	Horizontal	Decided	Beer

*Beer*

166. As mentioned above, the distribution system in the beer sector is very important. Against this backdrop, the NCAs' activities have focused on several **vertical restrictions**, sometimes in combination with **abuses of dominance** by **beer manufacturers**. The investigations in the relationships surrounding the **HoReCa** channel included **exclusivity obligations, installation agreements, minimum purchasing requirements** and **abusive termination clauses**.

**Distribution agreements between breweries and the HoReCa channel**

The **Danish** NCA considered in a preliminary assessment certain exclusivity business practices of the brewery Carlsberg in the supply of beer in the HoReCa channel to be of concern under Articles 101/102 TFEU and equivalent national provisions. In response to the assessment Carlsberg offered a set of commitments designed to remedy such concerns, which were rendered legally binding by a decision of the Danish NCA of October 2005.

The concerns of the Danish NCA referred in particular to the provisions on equipment exclusivity and outlet exclusivity in Carlsberg's agreements with the HoReCa channel. The Danish NCA's investigation showed that the sale of draught beer was of great importance in the HoReCa-sector. In outlets with a draught beer installation the sale of draught beer constitutes up to 80 % of the total beer sales. Moreover, the Danish NCA found that it was unlikely that an outlet operator who had an installation agreement with Carlsberg would replace or supplement such installation – supplied free of charge – with a beer installation owned by the outlet operator himself or by a third party. According to the Danish NCA, the installation agreements would often amount to a de facto outlet exclusivity, which unduly hindered these outlets from turning to

<sup>125</sup> In February 2012, the Austrian Cartel Court imposed fines on the companies under investigation. Given that this decision was taken after the cut-off date of the Report (November 2011), the case appears as pending in its statistics.

Carlsberg's competitors and, thus, reduced the competitive pressure on this company.

Even though it was not part of the final decision, the Danish NCA also gathered evidence which showed that the size of marketing support offered by Carlsberg to an outlet rose according to the volume of Carlsberg beer sold by the outlet. Therefore, the marketing support may contribute to the foreclosure effect stemming from Carlsberg's installation agreements. The Danish NCA also found that the exclusive purchase agreements were part of (and enforced) a parallel network of agreements between Carlsberg (and Royal Unibrew) and the outlets, which led to the foreclosure of Carlsberg's competitors.

The **Slovak** NCA investigated two cases of vertical restrictions in the HoReCa sector. Agreements between Heineken and HoReCa distributors entailed **exclusivity, non-compete and minimum consumption clauses**. Given that competition between beer suppliers occurs predominantly in acquiring new HoReCa facilities, Heineken's supply conditions were also found to have potential negative effects.

The **Hungarian** NCA found in 2008 that vertical agreements between the brewery Borsodi and retailers in the HoReCa channel were anti-competitive. The agreements contained **minimum purchasing requirements** and also abusive clauses concerning the termination of agreements which ensured **brand exclusivity**. In fact, Borsodi was allowed to terminate agreements with immediate effects if a HoReCa retailer sold products of competitors.

167. The **Commission's** investigation of a horizontal agreement between two French brewery groups, Groupe Danone/Brasseries Kronenbourg S.A. and Heineken N.V./Heineken France S.A., also concerned the relation with the HoReCa sector. The breweries had allocated HoReCa customers amongst themselves and also agreed to fix the total volume of beer and to refrain from acquiring wholesalers that were not on an agreed list. In another case concerning the manufacturing level, the Commission fined Dutch brewers Heineken, Grolsch<sup>126</sup> and Bavaria for a total of EUR 273.8 million for operating a price-fixing cartel in the Dutch beer market.
168. The **Austrian** NCA brought a case to the Austrian Cartel Court concerning **restrictions imposed** by breweries on another outlet than HoReCa, namely **cash and carry**. Through an agreement within a trade association in the beer sector, Austrian breweries allegedly refused to supply beer to cash and carry companies and rather distribute themselves or via small local beverage distributors. As a consequence, cash and carry operators were not to be able to enter the market for draught beer.
169. The **Latvian** NCA investigated vertical agreements between **wholesalers** and retail outlets, which included **resale price maintenance**. The agreements

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<sup>126</sup> The EU General Court has annulled the fine imposed on Dutch brewer Koninklijke Grolsch ruling that the Commission had failed to explain its reasons for attributing to this company the conduct of its subsidiary. This failure denied the parent company any opportunity to reverse the presumption of liability and to challenge it before the courts; see the judgment of 15 September 2011 in Case T-234/07 Koninklijke Grolsch NV [not yet reported in ECR].

involved the possibility of refusing to supply retailers if they lowered the price beyond what had been agreed. The agreements were found to have infringed national competition law.

#### *Wine*

170. In the wine sector, the NCAs reported **collusive agreements** between **producers** of wine.

#### **Agreements between wine producers (output restrictions, market sharing and price fixing)**

The **Spanish** NCA has concluded **three investigations** imposing fines on wine producers for having engaged in horizontal agreements and is currently investigating a fourth case in this sector.

The first investigation found collusion within the Regulatory Council of certain wines that have a protected designation of origin (the Council is a public organisation which represents the interests of producers and wineries). The collusion consisted in establishing a restrictive and discriminatory **quota allocation** of such wines based on past sales among the members of the Council.

The second case involved an agreement between several wineries and the same Regulatory Council which included **output restrictions, market sharing, minimum price fixing and exchange of information** in relation to the production and distribution of a quality wine which was exported to Germany, The Netherlands and UK.

The third case related to **price fixing** of grape and grape juice undertaken by certain associations (winery associations and producer associations) and the Regulatory Council. A fourth case is still pending in Spain, also related to horizontal agreements on the grape price.

#### *3.2.8.2. Merger control*

171. Out of the **83** mergers notified in this sector, there were **5** merger clearance decisions with remedies and one prohibition decision. The merger cases illustrate the importance of **distribution** in the alcoholic drinks markets. One of the main concerns of the NCAs in this respect was to avoid anti-competitive effects arising from vertical integration through the acquisition of distributors by manufacturers.

#### **Prohibition decision – market concentration in distribution**

The **Polish** NCA prohibited a merger which affected the markets for the sale of vodka and wholesale distribution of spirits. Since the parties to the merger were the largest producer and the largest distributor of alcoholic drinks the NCA was concerned that third parties would no longer have access to some of

the best-selling vodka brands in Poland. The latter would have significantly restricted competition in the national wholesale distribution of spirits.

172. The **Latvian** NCA reviewed two problematic mergers regarding the distribution of alcoholic drinks. In one of the cases, the largest producer of alcoholic drinks in the Baltics acquired a wholesale trading company. The parties committed to apply the same terms to all business partners and to ensure that any retail and wholesale company would be able to purchase the desired amount and assortment of products.
173. The **Polish** NCA investigated a merger between two of the three largest producers of spirits in Poland, which at the same time also distributed very well-known brands. The NCA considered that the merger would have restricted the access of other distributors to these products. Accordingly, it only cleared the proposed transaction with commitments, in particular limitation of sales.
174. The **French** NCA ordered divestments following the proposed acquisitions by brewers Kronenbourg-Scottish & Newcastle and Sogebra-Heineken of several warehouses. The French NCA considered that the acquisitions significantly foreclosed the market for the production and distribution of beer in France. Foreclosure effects were aggravated by the fact that pubs and cafés are usually tied to a specific brewer and warehouse by an exclusive purchasing obligation.
175. Finally, the **Commission** cleared the proposed acquisition of the Swedish state-owned company V&S Vin & Sprit (V&S) by Pernod Ricard of France in 2008. However, the Commission's decision was conditional upon the sale of a number of brands in markets where it had identified competition concerns. These included flavoured spirits in Finland, gin in Poland, vodka in Greece and cognac, port, Canadian whisky and gin in Sweden.

### 3.2.9. *Soft drinks and water*

176. The major players in the soft drink industry are producers and bottlers. The two are greatly interdependent and often share costs in procurement, production, and marketing. The biggest source of added value in the chain comes from unique formulas and branding.<sup>127</sup> Brand loyalty, regularly fostered by extensive marketing campaigns, is particularly strong for carbonated soft drinks ("CSDs"). This industry segment is generally also the most profitable.<sup>128</sup>
177. Strong brands – together with established distribution channels and high capital investment – have long been regarded as major barriers to entry for

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<sup>127</sup> For an overview of the industry, see e.g. Meghan Deichert et al. "Industry Analysis: Soft Drinks" (2006), [http://www.csbsju.edu/Documents/libraries/zeigler\\_paper.pdf](http://www.csbsju.edu/Documents/libraries/zeigler_paper.pdf).

<sup>128</sup> Other industry segments are bottled water, fruit and vegetables juices, concentrates, sports and energy drinks, ready-to-drink (iced) coffee and tea as well as other soft drinks, such as Asian speciality drinks.

newcomers trying to enter the industry.<sup>129</sup> However, the recent consumer trend towards healthier drink options than carbonated drinks has somewhat lowered barriers to entry. Incumbents have reacted to this trend by developing their own new products or by acquiring producers of those products.

178. Main outlets for soft drink are supermarkets, convenience stores and petrol stations, vending machines and fast food chains. A few of the CSDs brands have become must-stock items and thus their supply can become a very important feature for competition at the distribution level. At the same time, access to and control of distribution is also often decisive for the success of branded CSDs.

### 3.2.9.1. Antitrust cases

179. The sector for soft drinks and water accounted for **8** cases, the majority of which relate to CSDs.

**Table 13**  
**Investigations in the soft drinks sector**

Authority	Infringement	Status	Product
<b>Austria</b>	Abuse	Pending	[ ]
<b>Belgium</b>	Abuse	Decided	Soft drinks and flavoured waters
<b>Bulgaria</b>	Abuse	Decided	CSDs
<b>Czech Republic</b>	Vertical	Decided	Non-flavoured waters, CSDs and non-CSDs
	Vertical	Decided	Soft drinks
<b>Greece</b>	Abuse	Decided	CSDs
<b>Portugal</b>	Abuse, vertical	Pending	[ ]
<b>Commission</b>	Abuse	Decided	CSDs

180. Reflecting the importance of distribution for the industry, all cases had a distribution component, mostly on the wholesale level. The investigated behaviour concerned attempts – generally by the local brand leader – either to foreclose access to distribution outlets by competitors and/or to control prices in (national) distribution networks.

#### **Foreclosure of access to distribution outlets**

In **Greece** Coca-Cola was fined in 2002 for abusing its dominant position by granting target discounts and fidelity rebates to wholesale dealers and retail outlets. It used discriminatory methods in favour of its exclusive dealers and retailers against dealers/retailers who also traded competitive products. It furthermore induced retailers to take free-on-loan freezer cabinets, in which only its own soft drinks, and not those of its competitors, could be stored.

<sup>129</sup> The consumption of soft drinks and the development of the industry can be quite different from Member State to Member State, see e.g. "Overview of the Soft Drinks & Juices Market in Europe" (2010), <http://foodmarkets.wordpress.com/2010/10/26/soft-drinks-market-europe/>.

The **Commission** also investigated Coca-Cola for an abuse of dominant position in the carbonated soft drinks market by pursuing certain practices in the distribution channels. In 2005, the Commission made Coca-Cola's EU-wide commitments legally binding, which included the removal of exclusivity clauses, target or growth rebates and of tying clauses. Coca-Cola also offered commitments regarding the use of coolers supplied by Coca-Cola, in particular by agreeing that 20% of the space could be used for other products.

### **Price control within the distribution network**

The **Czech NCA** investigated a vertical case **on resale price maintenance** by Kofola, a producer of soft drinks. Kofola had the intention to maintain prices for its products on the on-trade soft drinks market at a certain price level and therefore set the price level in its contracts with **wholesalers**. The NCA found that the prohibited agreements had a negative impact on competition, which was increased by the active enforcement of the agreements by the Kofola group.

The **Bulgarian NCA** sanctioned Coca-Cola for abusing its dominant position by imposing **restrictions on resale**. Coca-Cola had obliged its wholesalers to resell only to customers, which were specified by Coca-Cola in an annex to the wholesale contracts. Wholesalers were also obliged to supply retailers at **fixed wholesale prices** thereby ensuring that wholesalers would not engage in cross-supplies of Coca-Cola products among them and that Coca-Cola retained control over the supply of its products within the distribution system.

The **Belgian NCA** found that Coca Cola had abused its dominant position by applying discriminatory conditions to a certain category of clients. After one of the Belgian wholesalers had expanded its activities into the French market, Coca-Cola announced that a new **"export" price** would be applied to its products. In addition, Coca-Cola imposed on this wholesaler the obligation to order stocks six weeks in advance. Coca-Cola undertook commitments, in particular to apply the same conditions to all its customers who are in a similar situation as well as to strengthen its transparency and communication vis-à-vis their clients (classification of clients, level of discounts and promotions, communicate its price list to each client within a certain category, notification of changes at least six weeks in advance). It also undertook to only refuse orders under exceptional circumstances.

The **Czech NCA** investigated a vertical case involving an **export prohibition** in the market for natural waters, CSDs and non-CSDs. This prohibition had been imposed by the largest producer and bottler of mineral and spring waters in the Czech Republic, which exported to approximately twenty countries. The producer had prohibited wholesalers to sell outside their territories in order to control exports and to protect its brand image. The NCA concluded that the export prohibition could have a potential negative effect on competition.



### 3.2.9.2. Merger control

181. Out of the 82 mergers that were notified in the soft drinks and water markets during the reporting period, **4** were cleared with commitments, in **Austria**, the **Czech Republic** and **Portugal**.
182. The main competition concerns in these decisions referred to the main assets of soft drink and bottled water producers, namely unique formulas and brands. The parties had to offer divestitures or third-party access commitments to ensure that the combination of the market positions linked to these assets would not impede effective competition in the markets concerned.

#### **Brands and formulas as barriers to entry**

An example for the above-mentioned competition problems and commitments related to brands and formulas is a merger decision by the **Portuguese** NCA concerning the market for production and HoReCa distribution of soft drinks and juices. The merged entity's products were well-known brands with high market shares, which prompted the NCA to express competition concerns with regard to the existence of strong barriers to entry and expansion of competitors.

The parties undertook to sell one of the juice brands and the formulas used therein for Portugal and Spain. In addition, they committed to suspend the marketing of certain brands of juice for three years in Portugal. Finally, they offered to provide filling services for juices and nectars, in line with market conditions, to any manufacturing brand and to eliminate exclusivity clauses in contracts for the distribution of the products.

183. The **Austrian** NCA cleared two mergers in this sector after the parties offered commitments that alleviated competition concerns. One of the cases concerned a merger between Coca-Cola and Römerquelle, which was presumed to have a dominant position in the market for mineral waters characterised by long-term contracts and rigid structures. The NCA feared in particular that Coca-Cola would strengthen Römerquelle's position by virtue of its financial power and its know-how as bottler and distributor. Another concern was that Coca-Cola would add a small, but significant brand to Römerquelle's already very strong brand portfolio in the market for functional drinks. The parties offered commitments, which included (i) ceasing the production of the Coca-Cola functional drinks brand, (ii) the obligation to distribute competing mineral waters at non-discriminatory prices, and (iii) refraining from linking the delivery (including rebates and other contract conditions) of Coca-Cola products to those of Römerquelle in the distribution to the catering industry.
184. The **Czech** NCA analysed a problematic merger in the market for bottled natural water. Commitments offered by the parties included the obligation to maintain the existing separate trademarks and prices of products of the acquired party and ensure that the latter would have a separate distribution system, independent from the acquiring party.

### 3.2.10. Multi-products (groceries and daily products)

185. The NCAs have also investigated numerous cases classified under the multi-products category. This category includes cases that concerned products from more than one sector and mainly concern the sales of groceries and daily consumer goods. These products are typically sold through retailers (supermarkets and other retail stores), which are the main interface between manufacturers of food products and consumers.
186. The selling of daily consumer goods and groceries can be done in a wide variety of forms (shops, open markets, electronic commerce, etc.), legal structures (independent stores, franchises, integrated groups, etc.), locations (urban/rural, city centre/suburbs, etc.) and formats (from small convenience shops to hypermarkets).<sup>130</sup> Accordingly, competition takes place on various levels even if the players in the market will not necessarily always compete for the same customer group or in the same segment. Traditional supermarkets are still the most important retail outlet, accounting for over 33% of grocery sales in the euro area. But their importance differs significantly across the EU. For instance, in Germany discounters have displaced supermarkets from the top spot, while in Cyprus smaller, traditional smaller shops still account for a relatively large proportion of sales.<sup>131</sup> Apart from the rise of discounters, other developments continue to shape the industry, such as the increased use of private labels and of information and communication technology (even if e-commerce still only amounts for an almost negligible part of grocery sales).<sup>132</sup>
187. For consumers, competition remains local because they will generally not travel very far for their daily groceries. That being said, the actual distance will probably depend on factors, such as whether the consumer is doing a comprehensive "one-stop shopping" or only needs to buy a few fresh items. Despite the generally local nature of competition, local retailers will generally also be constrained to a certain extent by competition on the national level. Certain features of the industry, such as the growth of international buying alliances, even point to a level of competition beyond national border (at least on the procurement side). However, the analysis of sales prices across Member States suggests that, despite some evidence of price convergence within the EU, there is still a relevant "border effect", i.e. the price dispersion is larger across countries than within countries.<sup>133</sup> The reasons for this fragmentation are manifold and include not only differences in living standards, but also the regulatory framework (which spans from land-use planning over price control to VAT), commercial practices and possibly also levels of concentration. Against this background, the NCAs are particularly well placed to deal with cases affecting these markets.

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<sup>130</sup> See e.g. the Commission's Retail Market Monitoring Report, "Towards more efficient and fair retail services in the internal market for 2020", COM(2010)355 final, [http://ec.europa.eu/internal\\_market/retail/docs/monitoring\\_report\\_en.pdf](http://ec.europa.eu/internal_market/retail/docs/monitoring_report_en.pdf).

<sup>131</sup> European Central Bank, "Structural Features of Distributive Trades and Their Impact on Prices in the Euro Area" (September 2011), page 18 (figures for 2009), [www.ecb.int/pub/pdf/scpops/ecbocp128.pdf](http://www.ecb.int/pub/pdf/scpops/ecbocp128.pdf).

<sup>132</sup> See the Commission's Retail Market Monitoring Report, cited above.

<sup>133</sup> See the ECB Structural Issues Report, cited above, pages 65-67.

188. The procurement side is often complex with goods arriving from all levels of the grocery supply chain, manufacturers, wholesalers (including importers), and sometimes primary agricultural producers. Many retailing activities are characterised by economies of scope and efficiencies from the vertical integration of the wholesale and retail level. Accordingly, the food retail sectors in the Member States have often seen an increasing level of concentration – in some Member States significantly higher than in others – sometimes leading to the presence of only a few large players.<sup>134</sup> As explained above,<sup>135</sup> this can lead to imbalances in bargaining power – not so much in relation to large multinational food manufacturers of must-stock products, but rather to smaller suppliers of commodity products or products without a known brand. As also explained above, such an imbalance does not necessarily lead to a competition problem under Article 102 TFEU but may reflect other concerns associated to the imposition of trading practices deemed as unfair by many stakeholders.

### 3.2.10.1. Antitrust cases

189. Overall, the NCAs reported **38** cases in this category. Almost all cases concerned the retail level of the supply chain. Most cases involved the relations between retailers and their suppliers. In terms of infringements, the most investigated cases were abuse cases (more than 50%) followed by vertical infringements (slightly, more than 20%). Horizontal agreements accounted for only slightly more than 25% of the overall enforcement activities.

**Table 14**  
**Investigations of multi-product markets**

Authority	Infringement	Status	Category
<b>Bulgaria</b>	Horizontal	Pending	Retail
<b>Czech Republic</b>	Abuse	Decided	Retail
	Abuse	Decided	Retail
	Abuse	Pending	Retail
	Abuse	Pending	Retail
	Abuse	Pending	Retail
<b>Denmark</b>	Vertical	Decided	Groceries
<b>France</b>	Abuse	Pending	[ ]
	Abuse	Pending	[ ]
	Abuse	Pending	[ ]
<b>Finland</b>	Horizontal, vertical	Decided	Food retail
	Horizontal	Decided	Daily goods
<b>Germany</b>	Vertical	Pending	Food retailers
	Horizontal	Pending <sup>136</sup>	Branded goods
<b>Greece</b>	Vertical	Decided	Daily goods
	Vertical	Decided	Daily goods
	Horizontal	Decided	Daily goods
<b>Hungary</b>	Abuse	Decided	Food retail

<sup>134</sup> See the merger decisions reported below.

<sup>135</sup> See para 73 above.

<sup>136</sup> The case was closed in 2011 but it is still pending against one undertaking.

	Abuse	Decided	Food retail
	Abuse	Decided	Food retail
	Abuse	Decided	Food retail
	Abuse	Pending	Food retail
<b>Italy</b>	Abuse	Pending	Food retail
	Abuse	Pending	Food retail
<b>Latvia</b>	Abuse	Decided	Daily goods
	Abuse	Decided	Daily goods
	Vertical	Decided	Retail space
	Abuse	Pending	Daily consumer goods
<b>Malta</b>	Horizontal	Decided	Consumer goods
<b>Poland</b>	Abuse	Decided	Provision of market space for agricultural products
<b>Romania</b>	Vertical	Pending	Food retail
	Vertical	Pending	Food retail
	Vertical	Pending	Food retail
	Vertical	Pending	Food retail
<b>Slovenia</b>	Abuse	Decided	Procurement market for daily goods
	Horizontal, vertical	Decided	Procurement market for daily goods
<b>Sweden</b>	Vertical	Decided	Convenience stores
<b>Norway</b>	Horizontal	Decided	Groceries

190. A closer look at the abuse cases reveals that only less than half of them were abuses pursued under Article 102 TFEU or national equivalent provisions. The other half of the cases concerned abusive behaviour pursued under national laws which prohibit unilateral conduct of undertakings on a stricter basis than Article 102 TFEU.<sup>137</sup> Among others, these national laws address the aforementioned situations of asymmetric bargaining power. Consequently, some NCAs reported cases in which they had investigated allegations under national law that retailers abused their bargaining power by imposing **clauses in supply contracts**, such as unfair risk-sharing terms, fees, unilateral changing of contracts and other unfair contractual terms.

**Abusive terms in contracts between retailers and suppliers under national competition law<sup>138</sup>**

The **Hungarian** NCA reported **five** investigations in which large retailers imposed restrictions in the contracts with their suppliers. One case concerned contracts in which a retailer had imposed clauses on its suppliers, such as unfair risk-sharing terms, retro-active changing of contracts or the abusive charging of certain fees. Other cases (three closed proceedings) involved clauses imposed by large supermarkets in their supply contracts, including exclusive promotion campaigns, the supermarket's right to return goods to the suppliers without time or quantity limits, and the obligation for the supplier to reimburse discount losses. The Hungarian NCA is currently investigating a case in which contracts allegedly include, inter alia, an unfair bonus schemes and the imposition of unjustified fees.

<sup>137</sup> They concern mainly abuse cases investigated in the Czech Republic, Latvia and Hungary. Other Member States also have laws that tackle abuse cases that go beyond the scope of Article 102 TFEU.

<sup>138</sup> The scope of these abuse cases pursued under national law is stricter than Article 102 TFEU.

The **Latvian** NCA has reported **two** cases involving abusive contractual restrictions in the food retail sector. The first case concerns the application of unfair payment terms by a retailer in relation to one of its small suppliers. The second involved the charging of unfair fees to suppliers for the placement of products in its discount outlets. In both of these cases, the NCA imposed fines and obliged the retailers to terminate the agreements.

The **Czech NCA** has also reported **five** investigations related to allegations of abusive commercial practices by retailers in their commercial relationships with suppliers. These cases were initiated as a result of the sector inquiry on the retail sector launched by the Czech NCA in 2010.<sup>139</sup>

191. As explained above, due to the distance consumers are willing to travel, competition in retail is primarily local. In order to prevent local market entry by competitors, some **locally dominant retail companies** were alleged to engage in abusive foreclosure strategies that made use of the local regulatory framework.

#### **Foreclosure of local markets**

The **Italian** NCA is currently analysing two cases involving allegations of market foreclosure by dominant retailers. In both cases retailers had allegedly impeded new competitors to enter the market by **preventing** them from **access to the land** or physical space necessary to open new retail outlets. In particular, the retailers appear to have used land-use legislation to prevent the successful completion of the administrative authorisation process that is required to gain control over land. For example, in one of the cases, the retailer had allegedly acquired the part of the land to then exercise its veto rights on decisions concerning its further use, thereby prohibiting the opening of a competing retail outlet.

The **Polish** NCA investigated a **refusal to grant access** to space in a wholesale market place. The undertaking organising the market place had prohibited the sale of agricultural and food products by competitors that would sell from their vehicles. The latter were only allowed to sell agricultural products with a low degree of processing, such as national fruits and vegetables. The NCA found that this conduct infringed the national provisions prohibiting the abuse of dominant positions.

In a **Latvian** case, retailers entered into an agreement with a lessor of retail space in shopping malls under which the latter was prohibited to rent spaces to competitors of the retailers without permission, thereby preventing entry of new competitors. In 2011 the NCA found the agreement to be anti-competitive, fined the parties and obliged them to terminate the infringement.

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<sup>139</sup> One of these cases is currently under appeal.

192. Another group of cases dealt with **vertical restrictions** and in particular **resale price maintenance** that **large supermarket chains** imposed in their distribution/franchise networks.

#### **Resale price maintenance**

In 2008, the **Greek** NCA fined the major supermarket chain operator Dia HELLAS for setting retail prices within its franchise network from 2001 to 2006. Moreover, the supermarket operator Carrefour was fined in 2010 for imposing retail prices as well as for restricting cross-supplies by prohibiting the members of its franchise network from selling to other franchisees of the network or to other authorised distributors of the Carrefour Group in Greece.

Similarly, the **Swedish** NCA investigated an infringement involving resale price maintenance in a franchise network of convenience stores. The franchisor had discouraged franchisees from setting their own prices or selling below the franchisor's set price. In practice, franchisees were hindered from changing the prices due to a cash computer system put in place by the franchisor and due to shelf price labels that automatically indicated the present prices. In addition, the franchise fee was calculated from the prices in the system. This case was closed with voluntary commitments by the franchisor.

In 2005, the **Finnish** NCA imposed fines for setting up a resale price maintenance mechanism within the retailer Kesko's network. The case involved horizontal cooperation between the retail members of its chain, which fixed prices. The controlling company, Kesko, enforced the horizontally fixed prices by distributing price lists to these members or by feeding the prices directly to the cash register systems of each retail outlet.

The **Romanian** NCA opened four ex-officio investigations in September 2009 with respect to four vertical agreements allegedly setting the prices between suppliers and retailers of food products.

193. The product range for groceries is generally rather wide and generally includes many differentiated products, which makes coordination and thus the implementation of cartels rather difficult. Nevertheless, the NCAs have also found **horizontal agreements** between **supermarkets**. These agreements included the fixing of prices and discounts as well as the exchange of sensitive information.

#### **Horizontal collusion and exchange of information by retailers**

In 2004, the **Maltese** NCA found that a cartel of supermarkets infringed national competition law. The anti-competitive conduct consisted in fixing prices and agreeing on discounts. In particular, supermarkets joined forces and offered discounted prices on a number of consumer goods during the same period of time. The discounts offered were intended to counteract a similar leaflet sent by another company that marketed discounted consumer goods.

The **Greek** NCA fined an association of supermarkets and several of its members for having participated in a cartel. The association had set the level of discounts that the suppliers could apply, which prevented retailers from

freely negotiating any rebates with the suppliers and to set prices on the basis of their own operating costs, profits or any other parameters of their capital structure. Additionally, the association asked its members not to accept any invoices from suppliers that failed to apply the fixed discount. Furthermore, in this context, seven of the biggest Greek supermarkets participated in meetings with large suppliers in which they were asked not to supply certain competitors. The retailers also threatened to exclude from their shelves any supplier who would not co-operate.

In a 2008 decision, the **Finnish** authority found an information exchange agreement between supermarkets to be anti-competitive. In particular, the detailed, timely and sensitive information exchanged was considered to create artificial transparency and facilitate collusion between the retail groups. The information exchange enabled the formation of focal points, efficient monitoring and targeting of possible retaliatory measures.

The **Slovenian** NCA closed a price fixing and information exchange case with commitments in 2009 involving an information exchange system on the procurement market of daily consumer goods. Under the system each retailer would require its suppliers to inform it about prices and price changes of the other retailers. The same case further involved the fixing of purchase prices by three large retailers which had agreed that none of them would get a better purchase price from the suppliers.

The **Norwegian** NCA reported a case of weekly information exchange of prices and turnover between four large grocery chains. Potential effects on the information exchange were increased transparency and the risk for tacit collusion in the market.

### 3.2.10.2. Merger control

194. Since 2004, there were **25** mergers regarding supermarkets, daily consumer goods and groceries that were cleared with commitments, namely in **Austria, Finland, France, Germany, Ireland, Latvia, Lithuania, Malta, Netherlands, Poland, Portugal, Slovenia, Spain, Norway, UK** and by the **European Commission**.
195. As mentioned above, the competition between grocery retailers has a strong local component because of the limited distance that consumers are generally willing to drive for their groceries. Accordingly, the vast majority of problematic merger cases grappled with situations where the proposed transaction would have resulted in a significant impediment to competition in one or several local areas. In most cases, this problem could be remedied by the divestiture of shops or retail outlets in a local area, but in some other cases (additional) remedies, such as the commitment not to increase sales space, to shorten the duration of non-compete clauses or lease contracts, or not to apply for new licenses, etc. were submitted.

#### **Addressing significant impediments to competition at the local level**

In the **UK**, the NCA reviewed Asda's acquisition of Netto's 194 grocery stores in early 2011. With respect to the product market definition, the NCA established that Asda operated mostly in a market of large supermarket stores

(or one-stop stores – with a surface in excess of 1000 m<sup>2</sup>), while Netto was rather active in the limited assortment discounter segment (with a surface in excess of 280 m<sup>2</sup> but below 1400 m<sup>2</sup>). Still, the NCA found evidence that Asda's shops were able to exert a competitive constraint on Netto's shops on a local level. With respect to the geographical market definition, the NCA applied, inter alia, a five (urban area) to ten minute (rural area) driving time isochrone. The merger did not raise any competition concerns at a national level; the NCA rather found evidence suggesting some efficiency gains. However, the merger threatened to eliminate the competitive restraint from Asda on Netto in 47 local areas and it was only cleared after Asda committed to divest stores in these areas.

In the **Netherlands**, the NCA found that two mergers between retailers exploiting supermarkets and shops specialising in food and beverages would have restricted competition on regional or local markets given that the combination would lead to local market shares of 60-70%. Therefore, the NCA accepted the transaction on the condition that a group of supermarkets was sold to an independent third party in all of these markets.

The **Polish NCA** only cleared a merger between Carrefour and Ahold after the parties committed to divest nine shops in several urban areas. In another case, the parties committed not only to divest 38 stores but also agreed to reduce sales space.

The **European Commission** approved the takeover of ADEG by the REWE Group only after the parties proposed to divest 24 outlets in regions with respect to which the Commission had concerns that the strength of the merged entity could lead to higher prices for daily consumer goods in Austria.<sup>140</sup>

The **German NCA** analysed a merger in the market for the sale of beverages to end consumers. The acquiring party undertook to divest about 30 beverages stores in ten different markets as well as the beverage logistics provider, which was held by the acquired party.

The **Austrian NCA** dealt with a local merger in the cash and carry segment. It established that the geographical market (i) for the pick-up cash and carry market was a maximum of 30 km from the business premises and (ii) for the delivery market it was 100 km from the business premises. As the divestiture of a particular location was not possible because the former also contained another business that was part of the transaction, the parties submitted alternative remedies. The NCA cleared the transaction on the condition that the parties guaranteed that, first, prices in that location were pegged to the prices in the competitive Vienna region and, second, that the parties did not to acquire any other competitors in that region.

196. Finally, several mergers also created problems that went beyond "merely" local competition problems. For instance, the **German NCA** dealt with the acquisition of the fifth largest grocery sales group by the market leader EDEKA. This transaction concerned several segments of the retail spectrum and in particular

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<sup>140</sup> The clearance decision has been appealed by SPAR, a competing retailer, and is currently pending before the General Court.



discounting and it would not only have led to market shares addition in certain limited local areas but also created or strengthened entire clusters of markets with a high degree of concentration. In addition, the transaction threatened to eliminate one of EDEKA's closest competitors across the entire country and also strengthened EDEKA's already pre-eminent access to the procurement market. The German NCA only cleared the transaction after EDEKA committed, *inter alia*, to divest shops in almost 400 locations.

### 3.2.10.3. Several markets affected

197. This category refers to merger cases which concern more than one of the food sectors mentioned in the above Sections. They include only merger cases in which the parties involved in the transaction were active in several of these food sectors. In particular, **3** mergers cleared with commitments were reported in the **Czech Republic** and **Lithuania**. The **Irish** NCA also prohibited a merger.

#### **Prohibition decision**

The **Irish** NCA prohibited the proposed acquisition by Kerry Group plc (through Rye Investments Limited) of the entire ordinary issued share capital of Breeo Foods Limited and Breeo Brands Limited. The NCA considered that the transaction would have substantially lessened competition in the markets for the production, supply and distribution of rashers, non-poultry cooked meats and processed cheese.<sup>141</sup>

198. In two mergers regarding the retail sales of fertilisers, compound feed and the purchase of cereals, concerns by the **Czech** NCA about the creation of a dominant position in several regional markets resulted in divestiture commitments.
199. Finally, the **Lithuanian** NCA accepted structural and behavioural commitments in a merger affecting the markets for production and distribution of alcoholic drinks and juices. The NCA found that without the commitments the parties would have attained a position in the market that would have significantly lessened the pro-competitive pressure that grocery chains and wholesalers of alcoholic drinks were currently exerting prior to the merger.

### 3.2.11. Others

200. NCAs have also analysed some other cases covering a wide variety of products that do not fit in any of the above categories.

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<sup>141</sup> The decision to prohibit the merger was overturned by the High Court. This decision is currently under appeal to the Supreme Court by the Irish Competition Authority.

### 3.2.11.1. Antitrust cases

**Table 15**  
**Investigations in other food sectors**

Authority	Infringement	Status	Product
<b>Bulgaria</b>	Horizontal	Decided	Sunflower seed and oil
<b>Greece</b>	Abuse, vertical	Decided	Snacks
<b>Portugal</b>	Horizontal	Decided	Salt
	Horizontal	Pending	[ ]
	Horizontal	Pending	[ ]
<b>Spain</b>	Vertical	Decided	Sunflower seeds
	Horizontal	Decided	Food and beverages
	Horizontal, Vertical	Decided	Oil
<b>Poland</b>	Vertical	Decided	Yeast

201. Two cases related to **sunflower seeds and oil**. The **Bulgarian** NCA fined a cartel for price agreements in the sectors of production and distribution of sunflower seeds, processing of seeds, and production and trade of sunflower oil. Moreover, the **Spanish** NCA closed a case on sunflower seeds with commitments. The restrictive practice investigated referred in particular to the obligation imposed on farmers to acquire sunflower seeds from the companies to whom they sold the final sunflower production. By means of the commitments the parties modified the agreements concluded with farmers in order to eliminate this type of contractual conditions.

202. One case reported concerned the commodity product **salt** in Portugal. In particular, the **Portuguese** NCA fined in 2006 a cartel in the sector of refined salt wholesale which took place between 1997 and 2005. The anti-competitive practices involved hard-core restrictions, such as market allocation, fixing of market shares, price fixing and customer sharing.

203. Another case concerned salty snacks in **Greece**. The Greek NCA fined in 2011 the company Tasty Food, Greek subsidiary of Pepsico and leading player in the production and distribution of salty snacks in the Greek market, for abuse of dominance and implementation of restrictive agreements between 2000 and at least 2008. The abusive practices carried out by Tasty Foods included exclusivity agreements and target rebates at wholesale and retail level. They also included rebates conditional upon the commitment of all available shelf/store space for the company's products, intended to exclude competitors from smaller retail outlets (notably kiosks, grocery stores, traditional food stores and mini-markets) and to limit their growth possibilities.

### 3.2.11.2. Merger control

204. Since 2004 there were **8** merger cases cleared with commitments or prohibited by the **Commission** and the **Romanian, Danish, and Norwegian** NCAs, which related to markets such as oil, seeds, yeast, farming inputs and catering.

205. The **Danish** NCA cleared a merger in the market for **farming input** (such as animal feed, fertilizers and pesticides) subject to the selling of a production facility. It concluded that the transaction would increase the risk of coordinated

effects between the company Danish Agro and the only other large player in the market, DLG.

206. The **Romanian** NCA found competition concerns as a result of a merger in the **edible oil market**. It found that the post-merger position of the acquiring company would create possible barriers to entry. Therefore the parties agreed to sell two brands and modified a non-compete clause.
207. The **Commission** cleared the acquisition of the global **sunflower seed** business of the US company Monsanto by the Swiss company Syngenta. The notified transaction, which was referred to the Commission by the Spanish NCA under Article 22 of Regulation (EC) No 139/2004, combined two leading sunflower seed suppliers in Europe, with significant breeding activities. The Commission found that the transaction would have removed a considerable competitor in the market for the commercialisation of sunflower seeds in Spain and Hungary. The transaction also raised concerns with regard to the exchange and licensing of sunflower varieties, insofar as the merging parties would be in a position to restrict the access of competitors to input necessary for the commercialisation of sunflower seeds. To address these concerns, Monsanto agreed to divest its sunflower hybrids as well as the parental lines used in the creation of those hybrids or currently under development for the creation of hybrids for Spain and Hungary.
208. In September 2008, the **Commission** also cleared one merger with commitments in markets for compressed baker's **yeast**. Following an in-depth market investigation, the Commission accepted the offer by Associated British Foods to divest GBI's businesses in Spain and Portugal and to ensure that the divested businesses would be linked to a sufficient production capacity.

## 4. MARKET MONITORING ACTIONS

### 4.1. Introduction

209. This Section provides an overview of the market monitoring actions undertaken by competition authorities in the food sector in Europe since 2004. Sector inquiries and other market monitoring investigations can be carried out either at EU level by the Commission or at national level by NCAs.
210. The Commission has the powers to conduct sector inquiries when "the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market".<sup>142</sup> When undertaking such inquiries the Commission has the powers to request information from companies and to carry out inspections for giving effect to the enforcement of Articles 101 and 102 TFEU. In recent years the Commission has conducted inquiries in the energy, financial services and pharmaceutical sectors.
211. Many NCAs have similar powers to the Commission when it comes to undertaking inquiries into a sector of the economy. Some also have more general responsibilities to monitor and report on market functioning. In that context, they may carry out market studies, reports or other types of surveys.<sup>143</sup>
212. As part of their consultative role, NCAs may also conduct market monitoring investigations to enable them to provide opinions on legislative projects or other regulatory measures which may have an impact on competition conditions on markets.
213. The reasons for conducting sector inquiries or market studies by NCAs differ and may respond to different purposes. NCAs may decide *ex officio* to open an inquiry when they want to improve their knowledge about a sector and in view of better identifying obstacles to competition. In such cases, NCAs may have concerns that competition may not be working as it should be, but the reasons for that are not clear. In other cases, under their general market monitoring obligations, NCAs may want to monitor markets so as to have a better understanding of recent trends and developments. NCAs may also be expressly requested to conduct a sector inquiry or market study by other public authorities or stakeholders.
214. Over the last years NCAs have actively used these market monitoring tools with respect to the food sector. Against repeated calls for market monitoring and allegations claiming that the food supply chain does not work properly, NCAs have carried out numerous market monitoring investigations to better

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<sup>142</sup> Art. 17 of Council Regulation (EC) No 1/2003, of 16.12.2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1, of 4.1.2003.

<sup>143</sup> Market studies, reports and other surveys can be carried out by NCAs directly or in cooperation with external third parties (consultancy firms, universities, research centres, etc.).

understand food markets and identify the potential structural problems which may negatively affect the well-functioning of the food supply chain. When they have identified such problems, NCAs have provided guidance and policy recommendations on suitable regulatory tools to tackle them. This confirms that sector inquiries and market studies are not necessarily conducted by NCAs with express enforcement purposes (so as to find and sanction infringements of competition rules by individual undertakings). This notwithstanding, in certain cases national sector inquiries have also revealed anti-competitive practices, which have led to the opening of infringement proceedings against companies.

#### 4.1.1. More than 100 market monitoring actions

215. Since 2004 **25 NCAs** have carried out **103 market monitoring actions**, out of which **10 are currently on-going, on food-related issues**.<sup>144</sup> The large number of monitoring actions related to the food sector shows that this sector is a high priority for NCAs. There is no other sector which has been the subject of more monitoring investigations by NCAs in recent years.

**Table 16**  
**Market monitoring actions by NCAs**

<b>Austria</b>	<b>1</b>	<b>Latvia</b>	<b>7</b>
<b>Belgium</b>	<b>1</b>	<b>Lithuania</b>	<b>6</b>
<b>Bulgaria</b>	<b>8</b>	<b>Netherlands</b>	<b>3</b>
<b>Czech Rep.</b>	<b>2</b>	<b>Poland</b>	<b>13</b>
<b>Denmark</b>	<b>4*</b>	<b>Portugal</b>	<b>3</b>
<b>Estonia</b>	<b>2</b>	<b>Romania</b>	<b>3</b>
<b>Finland</b>	<b>2*</b>	<b>Slovakia</b>	<b>3</b>
<b>France</b>	<b>16</b>	<b>Slovenia</b>	<b>1</b>
<b>Germany</b>	<b>2</b>	<b>Spain</b>	<b>11</b>
<b>Greece</b>	<b>2</b>	<b>Sweden</b>	<b>3*</b>
<b>Hungary</b>	<b>1</b>	<b>UK</b>	<b>2</b>
<b>Ireland</b>	<b>4</b>	<b>Norway</b>	<b>2*</b>
<b>Italy</b>	<b>3</b>	<b>TOTAL</b>	<b>103</b>
* Figures include a joint market study carried out by the Danish, Swedish and Finnish NCAs, together with the Norwegian NCA and other Nordic Competition Authorities. This study is counted only once in the final total figure.			

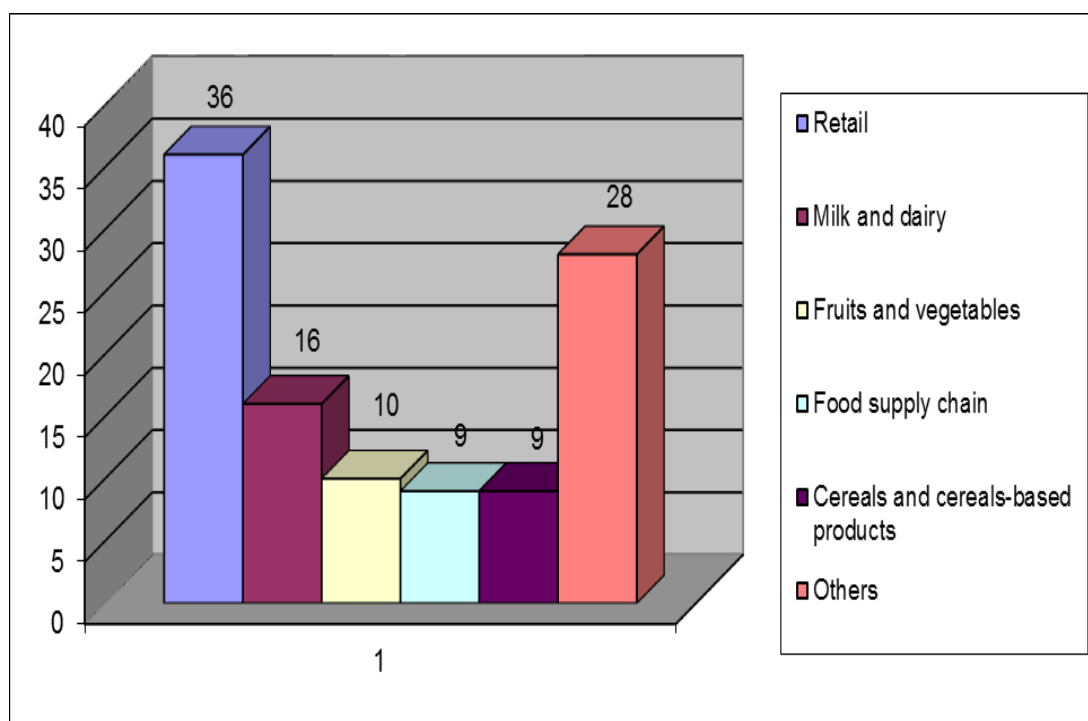
216. These figures are representative of the wide range of competencies that NCAs have in order to investigate and monitor markets under the legal systems of Member States. They include sector inquiries under which NCAs use extensive investigative tools (for instance, requests for information to companies, inspections, etc.), market studies, surveys and reports carried out on specific issues or topics as well as consultative opinions provided upon the request of national governments, national parliaments or stakeholders. Such opinions may not require extensive gathering of new information.

<sup>144</sup> The Report does not include market monitoring actions on food which have been undertaken by public bodies or other public authorities different from competition authorities, such as Price Monitoring Observatories, Ministries for Agriculture, etc.

217. The scope and focus of the monitoring investigations conducted by NCAs in the food sector vary. Some have looked at the food supply chain as a whole, while others have focused on specific agricultural products, such as milk and dairy, fruits and vegetables and cereals/cereal based products. A very significant number of monitoring investigations have looked at the functioning of grocery markets/retail.

218. The following table provides an overview of the market monitoring actions undertaken by NCAs in the food sector over the last years. It includes in separate categories market monitoring actions which have focused on the supply chain of food products in general or on specific food products (e.g. milk and dairy, fruits and vegetables and cereals/cereal based products). It also includes in a separate category (given their importance) the market monitoring actions which have looked at the retail distribution of food multi-products.

**Figure 14**  
**Main sectors subject to market monitoring actions**

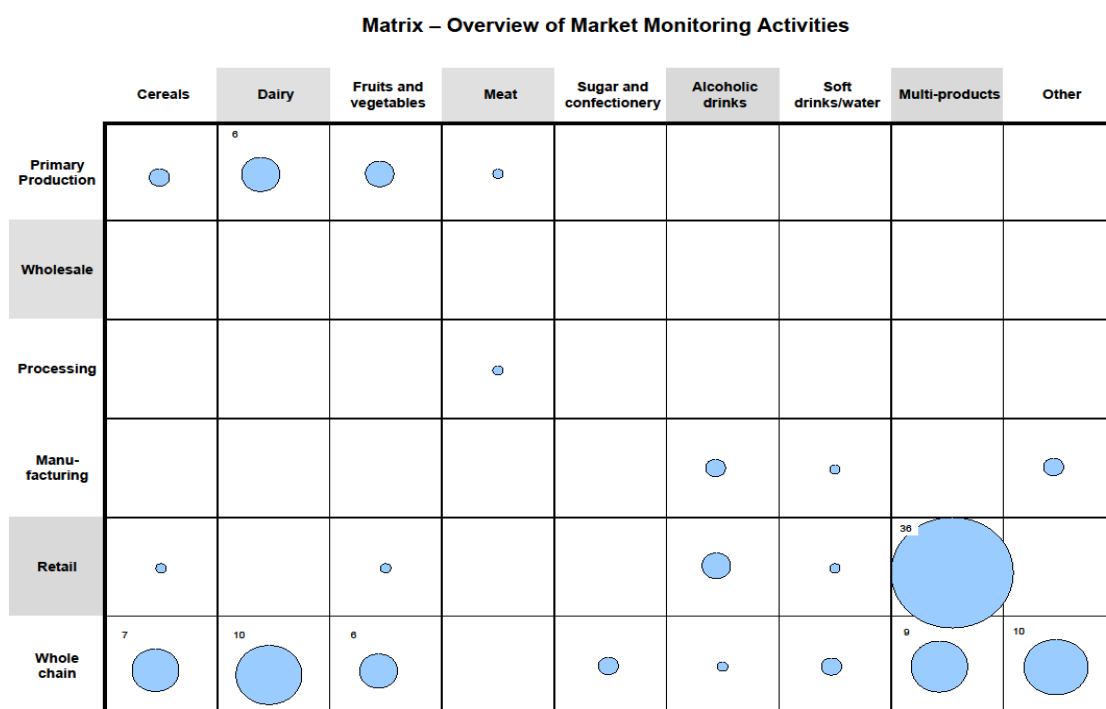


219. Similarly to the record of enforcement actions, the market monitoring activities undertaken by NCAs also significantly increased after the 2007 crisis, which shows how NCAs have stepped up their activities to monitor food markets and identify potential problems which may affect their functioning. Indeed, out of the 103 market monitoring actions reported since 2004, 88 actions (86% of all the actions) were initiated as from 2007.

#### 4.1.2. Common trends

220. The following matrix presents a more detailed overview of the sectors and levels of the chain on which NCAs have focussed when undertaking a market monitoring action.

**Figure 15**  
**Market monitoring actions by sector, level of chain and type of infringement**



221. Competition authorities have shown common trends and similarities in their market monitoring actions in the food sector. Indeed, it appears that most actions have been concentrated on: (i) the **retails sales of multi-products (daily consumer goods)** by far, and (ii) the **supply chain of food products in general or of certain specific food products** (in particular, **dairy**, followed by **cereals** and **fruits and vegetables**). Further the **primary production level of the milk supply chain** (milk farmers) has also been subject to a higher number of monitoring actions as compared with other sectors or levels. This shows the active reaction of NCAs to the milk crisis of 2008, which particularly hit milk farmers in certain EU Member States.

222. The remaining monitoring actions have focused on the analysis of the whole supply chain of other food products (e.g. sugar, alcoholic drinks, soft drinks) or of specific levels of the chain for these or other products (e.g. primary production of cereals and fruits and vegetables; processing of meat; manufacturing and retail of alcoholic drinks, or retail of soft drinks).

#### 4.1.3. Main issues addressed

223. The analysis carried out by many NCAs in their market monitoring actions has often focused on price formation and price transmission. This in turn has allowed NCAs to have a better understanding of the different factors that influence price adjustments along the supply chain and to detect price asymmetries which may be indicative of potential competition problems. NCAs' monitoring investigations have revealed that price developments along the supply chain are influenced by many factors and in many cases are not strictly linked to anti-competitive behaviour. As a rule, NCAs' inquiries have been

national in scope, although a few monitoring investigations have also compared prices between Member States.

224. Particular attention has also been devoted to the analysis of structural features of the food supply chain. In this context, some NCAs have detected that certain markets present inefficient structures. One example is the primary agricultural production, which is characterised by fragmented and atomistic supply structures in many Member States. NCAs have proposed remedies to overcome these situations, including reinforcing the position of agricultural producers by allowing them to make full use of the market-based forms of co-operation allowed under competition rules. The rationalisation of the chain in particular at its intermediary stages has also been advocated by NCAs as a means to improve its functioning and efficiency.
225. As mentioned, retail markets have also been subject to close scrutiny, which has allowed some NCAs to detect structural factors which may limit or prevent competition in these markets. These factors include in particular entry barriers resulting from regulatory frameworks, such as planning or zoning laws or other administrative rules, which limit the entry of new retailers in a particular market. Contractual constraints which limit the possibilities of independent retailers to exit or switch retail networks have also been identified as problematic. Some NCAs have advocated the removal of such barriers and constraints in order to enhance competition in retail markets.
226. In their monitoring investigations many NCAs have also identified as an issue the existence of commercial practices linked to imbalances of bargaining power between market players which are deemed to be unfair by stakeholders. Since most of these practices do not fall under EU and most of the national competition rules of Member States, NCAs have proposed other suitable solutions to tackle them, such as for instance the application of national laws against unfair trading practices or the adoption of codes of conduct also with effective enforcement mechanisms. Certain NCAs however have also alerted against the potential anti-competitive effects that certain practices may have in the long term if they ultimately negatively affect the competitive process of the supply chain or affect consumer welfare by reducing investments on innovation and decreasing consumer choice.
227. By means of their market monitoring actions some NCAs have also provided guidance on the application of competition rules in the overall food sector and in agriculture markets in particular. That has allowed market players to have a better knowledge of the practices and agreements which may be allowed or prohibited under competition rules. Certain NCAs have also been active in providing advice and guidance to regulators, so as to promote better regulation and ensure that the level playing field in the food supply chain is not undermined by regulatory or legislative measures. In order to ensure that such level playing field is not distorted, NCAs have alerted against the risks resulting from the introduction of exceptions to competition rules as an alleged solution to tackle the structural problems of the European agro-food sector.
228. The following Sections, which will explain these findings in more detail, include a classification of the market monitoring actions undertaken by NCAs based into six categories: (i) the overall food supply chain and agro-food sector, (ii)



milk and dairy, (iii) fruits and vegetables, (iv) cereals and cereal-based products, (v) retail, and (vi) other sectors and food-related issues.

## 4.2. Food supply chain and agro-food sector

229. Against the background of the numerous concerns voiced about perceived malfunctioning of the food supply chain, some NCAs have undertaken several inquiries that have looked at the overall value chain and at the functioning of the agro-food sector in general. In particular, **9 monitoring actions** of this type have been undertaken in **Greece, Lithuania** (3 market studies), **Netherlands, Slovakia, Spain** and **Sweden**. A joint market study also referred to **Sweden, Denmark, Finland** and other EFTA countries: **Iceland** and **Norway**.

**Table 17**  
**Market monitoring of the food supply chain and agro-food sector**

NCAs	Name	Publication date
<b>Greece</b>	Public consultation on food prices	May 2011
<b>Lithuania</b>	Market study on food product prices	2004
	Market study on food product prices	2007
	Market study on food product prices	November 2010
<b>Netherlands</b>	Study on pricing in the agro-food sector	December 2009
<b>Slovakia</b>	Sector inquiry on food, agriculture and trade	September 2006
<b>Spain</b>	Report on the application of competition rules in the agro-food sector	June 2010
<b>Sweden</b>	Market study on the food supply chain	April 2011
<b>Sweden, Denmark, Finland, other EFTA countries</b>	Market study on Nordic Food Markets	November 2005

230. The main purpose of these inquiries and studies was to investigate the **causes underlying the rise in food prices over the past few years**. Some also sought to obtain a more detailed knowledge of how prices were transmitted along the different stages of the food supply chain (farmers, processors, wholesalers, retailers and consumers), so as to identify anomalies in **price adjustments** at any of these stages. Some NCAs have also looked at how prices, costs and margins are distributed among the undertakings active along the value chain.
231. NCAs have pointed to a number of economic factors that explain food price increases and different price transmission patterns. National monitoring investigations and studies have also analysed the structure and competition conditions of the food supply chain.

### Market monitoring of food prices

In its study on pricing in the agro-food supply chain, of December 2009, the **Dutch NCA** investigated the pricing of eight basic food products along the food supply chain (potatoes, apples, bread, eggs, cucumbers, bell peppers, onions,

and sliced onions) in the Netherlands. The investigation examined selling prices, costs and margins at different stages of the chain. It found that prices at retail level were influenced to a larger extent by costs incurred by wholesalers rather than by costs of retailers themselves. It also found that the retailers were unable to improve their margins permanently by increasing their prices in respect of most products. The study also noted that retailers had the highest margins in absolute terms in the chain. However, in relative terms, when comparing margins to the turnover of the undertakings at different levels, retailers enjoyed higher margins than primary producers and wholesalers only for certain products (cucumbers, bell peppers and onions). For the majority of products examined, it was producers that obtained the highest relative margins. The study also concluded that the increased concentration at retail level had a limited effect on the purchasing and selling prices of retailers.

In two market studies on food product prices of 2004 and 2007 the **Lithuanian NCA** found that food prices increases were caused by several objective economic factors, such as increases of purchasing prices of raw materials and fuel, increases of demand, export volumes, labour costs, and stricter quality standards. The study of 2007 analysed the effect of these factors on the retail price and found a diversified pattern for certain products (flour, bread and bakery products, meat, poultry and dairy). In particular, it revealed that in most of the cases retailers increased their prices following the increases of producer prices. However, in other individual instances it was observed that the retail price varied differently from input increases and in some cases retail prices remained unchanged.

In a more recent market study conducted in 2010, the **Lithuanian NCA** pointed to the impact on price developments of factors such as the number of intermediaries operating in the food chain, its competitive structure, and the differences in the negotiation power of the parties. It was stressed that asymmetrical adjustments between production prices and retail prices were not necessarily indicative of the existence of anti-competitive practices. However, the study observed that changes in producers' prices for some food products (dairy and grains) did not fully explain the changes downstream at wholesale and retail level. It therefore concluded that the recent increase of food prices in Lithuania may not be fully explained by objective economic reasons but may be also caused by weakened competition. The findings of this study led to the opening of an investigation concerning potential restrictive horizontal agreements between undertakings operating in the production and retail distribution of food products as well as possible anticompetitive vertical agreements in Lithuania.

The **Swedish NCA** in its report of April 2011 found that margins in the Swedish food supply chain were no higher than in other Member States. Nor had these margins increased over the past decade. The report found certain price asymmetries in price transmission since consumer prices were more prone to rise with higher input costs than to decline with lower input costs. The reasons for this asymmetry were not fully explained, although one of several conceivable explanations could be the use of market power by undertakings in the chain. The report also analysed the effects of the exercise of buyer power by retailers in the value chain. It concluded that there was no empirical evidence as to whether it had an impact on innovation and on the range of products offered by food producers. The overall conclusion was that competition was essentially functioning efficiently in the food supply chain in Sweden.

Some issues addressed in the recent Swedish report were already highlighted in a prior report on "**Nordic Food Markets**", of November 2005, jointly carried

out by the **Danish, Finnish and Swedish NCAs**, together with other Nordic Competition Authorities (**Iceland, Norway**). This study was undertaken against the background that food prices tended to be higher in Nordic countries than in other European countries. Account was also taken of the fact that the range of food products in Nordic countries appeared to be narrower than in other countries. The report concluded that numerous factors specific to national markets had an influence on food prices and ranges, including tax and VAT differences, national price promotional campaigns, tariffs and customs duties, the high degree of concentration of both the food processing and retail sectors, and the different market structures in Nordic countries.

The **Slovakian NCA** also looked at the functioning of the food supply chain in its sector inquiry conducted between June 2005 and September 2006. It looked at the levels of primary production, processing, wholesaling, retail and consumers for a group of products (milk and dairy, bakery products, beer, soft drinks, fruits and vegetables and meat). The inquiry revealed that the transition from the local currency to the Euro had had an impact on food prices. Even though it did not identify substantial issues, the Slovakian NCA concluded that a close monitoring of the relevant markets was further necessary to identify potential competition problems.

The **Greek NCA** carried out a public consultation on the sales of basic nutritional products and products for daily consumption in Greece between December 2010 and May 2011. This consultation was launched further to indications of a gap between primary producer prices and consumer prices, and aimed at identifying competition problems which may arise from potential anti-competitive practices occurring along the chain. It focused on a wide range of products, including fruits and vegetables, dairy products, meat and fish, oils and butter, pulses, rice and pasta, flour and pastries, juices and beverages, and frozen foods. As a result of this consultation, the Greek NCA launched in December 2011 a sector inquiry into the production, distribution and retail sales of fruits and vegetables (see Section 4.4 below).

232. NCAs have also provided guidance on the application of general competition principles and on the need to ensure that competition rules are preserved in agro-food markets. That has been the case in particular in relation to the calls made in the public debate to introduce exceptions to such rules as a manner to tackle the structure problems which may undermine the well-functioning of the food supply chain at any of its stages. NCAs have proposed policy recommendations to tackle these concerns and make food markets more competitive. As detailed in the Sections below, these same or similar recommendations have been proposed by NCAs in the context of market monitoring actions focused on particular food sectors.

#### **Policy recommendations for improving the functioning of the food supply chain and the overall agro-food sector**

The report of the **Spanish NCA** on the application of competition rules to the agro-food sector, of June 2010, analysed in detail the interface between EU and domestic competition rules and agriculture rules. It recalled that competition rules are fully applicable to the agricultural primary production sector (except

for the limited exceptions contained in EU agriculture legislation).<sup>145</sup> It also recalled that the involvement of public authorities in restrictive practices do not exempt the undertakings concerned from the obligation to comply with competition rules. The report observed that the introduction of any exceptions to the application of competition rules to allow price-fixing agreements among agricultural producers as a way to reinforce their bargaining power vis-à-vis other market players would not be justified, since this would discriminate against players in other economic fields and would not solve the sector's problems.

The report provided an overview of the wide range of instruments available to both public authorities and private operators to overcome the problems of agricultural producers in full compliance with competition rules. These instruments included the development of cooperatives as a pro-competitive form of organisation among farmers or the use of written contracts between producers and processors to ensure legal certainty in the framework of their commercial relations. The adoption of a voluntary code of conduct (but with effective and compulsory enforcement mechanisms) and a more effective enforcement of the laws against unfair trading practices were also proposed in the report. Other recommendations included a better use of quality standards by farmers and the adoption of price transparency-enhancing measures through mechanisms in compliance with competition rules (such as the setting up of price observatories which process and publish data on an aggregated basis).

The report of the **Swedish NCA** on the food supply chain, of April 2011, also included a number of recommendations to further improve competition in a number of areas. These recommendations included the need to reinforce the market-oriented approach of the EU CAP and avoid the formulation of regulatory measures which distort competition in the markets for agricultural products (border protectionism for agricultural products or an excessive support for producer organisations (POs) or other trade associations among farmers). The report also valued positively the role of cooperatives as a form of cooperation among farmers but noted that these organisations may have excessive market power capable of distorting competition. For this reason, the report proposed the review of a current exception applicable to cooperatives under Swedish domestic competition rules. In order to tackle the high concentration of local retail markets in Sweden, the report also recommended the removal of entry barriers to these markets resulting from planning laws and proposed changes on the implementation of the Swedish Planning and Building Act by local municipalities, so as to make the entry of new operators more transparent and effective.

Similar recommendations were included in the report on "**Nordic Food Markets**" of November 2005. The report proposed in particular to facilitate the access for new entrants to new retail sites by planning authorities as well as a close monitoring of agreements between suppliers and retailers that may result in foreclosure or other anti-competitive effects. Given the highly concentrated structures of the food processing and retail industries, it was also proposed to carefully assess mergers between companies in these sectors. The report also recommended increasing consumer information on food prices, quality and safety (through for instance national consumer agencies) and a better

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<sup>145</sup> As indicated in Section 2.2.2 above, EU CAP rules, in particular the Single CMO Regulation, sets down certain limited exceptions to the application of competition rules in the agriculture sector in relation to certain specific types of agreements concluded by farmers' associations and IBOs.

harmonisation of food regulation to prevent hindrances to trade resulting from country-specific food rules.

### 4.3. Milk and dairy

233. Milk market developments in 2008-2009 were characterised by a sharp drop in dairy commodity prices, whilst consumer prices for dairy products remained relatively high. Therefore, it is not surprising that the milk and dairy sector has been looked at in depth by a number of NCAs as a response to calls by different institutions and stakeholders. Particular attention has been devoted to issues such as price transmission and price transparency along the supply chain. Another area of focus has been the analysis of the structure of the milk supply chain, so as to have a better knowledge of how each stage (dairy farmers, collectors, processors, wholesalers/traders, retailers) functions. Many NCAs have also played an advisory role to other governmental bodies in their decisions regarding the milk sector.
234. In overall terms NCAs have carried out **16 monitoring actions** in relation to this sector in **Bulgaria, Denmark (2), Estonia, France (2), Germany, Hungary, Latvia (3), Poland, Romania, Slovakia, and Spain (2)**.

**Table 18**  
**Market monitoring in the milk and dairy sector**

NCAs	Name	Publication date
<b>Bulgaria</b>	Sector inquiry on the competitive environment in the sector of production, purchasing and processing of raw milk and distribution of dairy products	December 2010
<b>Denmark</b>	Sector inquiry on food prices*	October 2008
	Sector inquiry on milk, butter and bread price developments*	June 2009
<b>Estonia</b>	Opinion on the amendment of Regulation 1234/2007 as regards contractual relations in the milk and milk product sector	January 2011
<b>France</b>	Opinion 09-A-48 on the operation of the dairy sector	October 2009
	Opinion 10-A-28 on two decree proposals imposing written contracts in two agriculture sectors**	December 2010
<b>Germany</b>	Sector inquiry on the milk sector	January 2012
<b>Hungary</b>	Study on the buying processes of basic agricultural products**	2009
<b>Latvia</b>	Sector inquiry on the dairy sector	2006
	Sector inquiry on the milk and cottage cheese processing and retail market	2008
	Sector inquiry on sales of milk and bread products in large retail chains*	January 2011
<b>Poland</b>	Study on the local market of milk production in the regions of Lubelskie and Podlaskie Voivodships (NUTS 2 regions)	December 2009

<b>Romania</b>	Sector inquiry on the raw cow milk market in the producer-processor economic stage	September 2010
<b>Slovakia</b>	Sector inquiry on the dairy sector	September 2009
<b>Spain</b>	Report on the "Milk Agreement"	July 2009
	Report on the draft Royal Decree regulating the recognition of producers' organizations and inter-branch organizations in the milk sector and establishing conditions for contracts in the milk sector	February 2011

\* Monitoring action also mentioned in Section 4.5 below.

\*\* Monitoring actions also mentioned in Section 4.4 below.

235. The national monitoring investigations of these NCAs show that milk and dairy markets have national characteristics. The milk production level differs per Member States, ranging from fragmented and atomistic structures in terms of number of operators to much more concentrated markets. The dairy processing industry is overall characterised by higher ratios of concentration at national level and by the presence of large operators (either acting as independent companies or in the form of vertically integrated producers' cooperatives) in some Member States. Retail normally presents high degrees of concentration in most Member States.
236. As mentioned, many of the monitoring investigations undertaken at national level have focused on the analysis of **price formation** in order to have a better understanding of how prices are transmitted along the milk supply chain. They have also focused on examining all levels of the supply chain (production, processing, wholesaling/trading, retailing) in order to identify potential **price asymmetry**, in which consumer prices for end products have in certain cases not responded to reductions in upstream dairy commodity prices.
237. These monitoring investigations have revealed that price formation in the milk supply chain follows a complex pattern influenced by many factors. Elements singled out by some NCAs as having an influence on milk price setting mechanisms include external developments (such as high volatility of prices in dairy commodity markets at worldwide level), internal features of domestic markets (such as atomistic production structures and imbalances of bargaining power between farmers and processors/collectors in some Member States, varying competitive structures, developments in energy and labour costs), or different cost structures of companies. In certain cases monitoring investigations at national level have also identified the stages of the supply chain where possible price stickiness occurred.

#### **Market monitoring of milk prices**

For instance, the **Latvian NCA** found price asymmetry and differences in price adjustments along the milk supply chain in three different sector inquiries carried out in 2006, 2008 and 2011. The NCA concluded that this asymmetry was due to a number of different factors, including insufficient competition at the processing and retail levels, energy and labour costs and high production costs. As a result of the investigation of 2011, two infringement proceedings for abuse of dominant position in retail markets were initiated.

In the report of its sector inquiry on the production, procurement and processing of raw milk and distribution of milk products of December 2010, the **Bulgarian NCA** detected price stickiness at the milk processing level as well as an unequal distribution of rents in favour of processors in Bulgaria. Similar conclusions were reached by the **Slovakian NCA** in the report on its sector inquiry of the dairy sector of September 2009, where it found that the highest margins along the chain were captured by processors and also retailers.

The **Danish NCA** carried out a market monitoring investigation to analyse the rise of milk and butter consumer prices between August 2007 and February 2008 in Denmark. Such increase was higher than in neighbouring countries. The final report, of October 2008, concluded that the sharp increase of commodity prices in the autumn of 2007 could not fully explain the rise of consumer prices. It found that both dairy processing companies and retailers had increased their prices in addition to the increase of commodity prices. This investigation was followed by another survey carried out in 2009 to analyse why the drop of commodity prices in 2009 (basically to the same levels before the boom in commodity prices in 2007) did not lead to a similar decrease of consumer prices. It found that predominantly dairy companies but to some extent also retailers had contributed to different extents to the maintenance of higher consumer prices.<sup>146</sup>

The sector inquiry on the milk sector of the **German NCA** (which published an interim report in December 2010 and the final report in January 2012) revealed how excessive price transparency in the market can influence price formation of milk and dairy products and lead to potential distortive effects. In particular, the inquiry found the existence of market information systems which provided up-to-date data on the prices of raw milk paid by each dairy company to producers. These systems allowed private dairies to know the prices paid by neighbouring dairy cooperatives, which were then used as benchmark for the prices paid to their own suppliers. It was found that these mechanisms facilitated the standardisation of prices and led to a reduction of competition among dairy companies with regard to the acquisition of raw milk. Measures have been taken by the German NCA to change these systems. The potential anti-competitive effects of the widespread combination of long-term supply agreements with the duty of farmers to deliver all their supplies of raw milk to only one dairy either under contract or under a cooperative statute were also addressed.

The German NCA also found in its sector inquiry that price movements along the milk supply chain seemed to be margin-neutral for retailers (retailers' margins had not changed regardless of price developments in other upstream stages of the supply chain). In this context, the report highlighted the limitations of comparing the end prices paid by consumers for dairy products against the prices paid to primary producers by dairy companies for raw milk. Raw milk is processed in a wide range of products by dairy companies with different cost structures. Although the price of raw milk was the main cost, many other factors influenced the prices paid by consumers. The German NCA concluded that it would be more appropriate to compare the purchasing prices paid by retailers to dairy companies with the selling prices applied by these retailers to consumers.

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<sup>146</sup> These investigations of the Danish NCA also referred to bread and flour (see Section 4.5 below).

238. The NCAs have also actively contributed to the discussions held at EU level on solutions for the milk and dairy sector in the context of the 2008-2009 milk crisis. As mentioned in Section 2.2.2, these discussions ultimately led to the adoption of Regulation (EU) No 261/2012, which has introduced certain limited and temporary exceptions to the application of competition rules in the milk sector. The Regulation allows milk farmers to engage in collective negotiations and agree on common prices for the deliveries of raw milk under certain conditions and subject to the close scrutiny of competition authorities. Regulation (EU) No 261/2012 responds to very specific circumstances and is based on the recommendations issued by the High Level Group on Milk set up by the Commission in October 2009 to analyse medium-term and long-term solutions for the milk sector, in particular, in the light of the exceptional crisis affecting the sector in 2008-2009 and the phasing-out of milk quotas by 2015.
239. Much of that debate focussed on how to reinforce the bargaining power of dairy producers vis-à-vis their buyers (processors/collectors) where there were commercial or contractual imbalances between both parties. In this context, the European competition authorities have provided guidance on the role that competition rules could play for reinforcing the bargaining power of milk farmers beyond the possibilities for cooperation allowed by proposal, whilst ensuring a level playing field in dairy markets.
240. An ad hoc **ECN Joint Working Team on Milk** was set up in 2009 which submitted to the High Level Group on Milk a "*Synopsis of Member States' National Competition Authorities contributions on the Milk Supply Chain*".<sup>147</sup> This paper provided information gathered among NCAs on issues such as the structure of milk markets at national level, price formation and price transmission in the milk supply chain and the actions that NCAs had undertaken in recent years on milk markets. DG COMP, in cooperation with NCAs, also published an explanatory brochure entitled "*How EU competition policy helps dairy farmers in Europe*", and a Working Paper entitled "*The interface between EU competition policy and the CAP: competition rules applicable to cooperation agreements between farmers in the dairy sector*".<sup>148</sup> These papers provided an overview of the various forms of co-operation that milk farmers can develop in order to adopt more market-oriented business models and, in parallel, strengthen their bargaining position vis-à-vis their buyers without infringing EU competition law. The Heads of all of the European competition authorities adopted a **Joint Resolution on 17 November 2010**, in which they highlighted the risks and negative effects resulting from the introduction of exceptions to competition rules as a means of reinforcing the bargaining power of dairy producers, and expressed their serious concerns in relation to such exceptions.
241. At domestic level some NCAs have also played an advisory role regarding public legislative and regulatory measures envisaged by national regulators to tackle some of the problems affecting the sector. These NCAs have in particular provided **guidance and recommendations on how to formulate such legislative or regulatory measures in compliance with competition principles**. In line with the ECN joint initiatives taken at EU level, NCAs have

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<sup>147</sup> See [http://ec.europa.eu/agriculture/markets/milk/hlg/com4\\_milk\\_supply\\_chain\\_en.pdf](http://ec.europa.eu/agriculture/markets/milk/hlg/com4_milk_supply_chain_en.pdf).

<sup>148</sup> See [http://ec.europa.eu/competition/sectors/agriculture/documents\\_en.html](http://ec.europa.eu/competition/sectors/agriculture/documents_en.html).



also provided at domestic level guidance to market operators and stakeholders active in the dairy sector on the types of co-operation agreements which they may enter into without infringing competition rules. Such advocacy work has focused in particular on clarifying how milk farmers can reinforce their bargaining position in the value chain in a pro-competitive manner by making full use of the opportunities for co-operation allowed under competition rules or by other means compatible with these rules (such as the use of voluntary written contracts between farmers and processors).

### **Recommendations and opinions on milk market measures**

In the report of December 2010 on its sector inquiry on milk, the **Bulgarian NCA** recommended implementing the existing CAP legal instruments as well as EU and national competition rules in order to resolve structural problems resulting from imbalances in the bargaining power between producers and processors.

These were also the conclusions of the **Romanian NCA** in its September 2010 report on its sector inquiry on the production and processing of cows' milk. In this report, it proposed to effectively support the association of operators in the milk sector in compliance with national competition rules. It also proposed to reduce the asymmetry of bargaining power by means of a contract framework, and encouraged the association of producers into regional cooperatives with the support of EU structural tools.

Similar measures were recommended by the **Hungarian NCA** which, in a study on the buying processes of basic agricultural products (namely milk and certain fruits and vegetables) of 2009, proposed a number of recommendations to tackle the structural problems of the food supply chain in Hungary, characterised by a primary production sector much less concentrated than other levels of the chain. The proposed measures included the need to accelerate the adaptation of producers to market requirements, so that they could improve their economies of scale, production know-how and technical expertise. The Hungarian NCA also recalled the tools compatible with competition law which are available to help to this adaptation, such as mergers or horizontal or vertical cooperation agreements among undertakings with minor market power. In view of the Hungarian NCA, the introduction of exceptions to competition rules in the agriculture and food sector was not an appropriate solution to address these problems to the extent that this type of measure would contribute to preserve the poor performance and development lag of the sector.

In its opinion 09-A-48 on the functioning of the French dairy sector of October 2009, the **French NCA** pointed out that certain aspects of the legal sectorial agriculture framework applicable in France to the dairy sector until 2008 were not compatible with competition rules. This included for example the fact that IBOs were allowed to issue price recommendations. The opinion also recalled that even though the new regulatory system in force in France as from 2009, which allowed for the publication of price indexes and target prices by the national dairy IBO (CNIEL), benefited from a legal exception under national competition rules, was nonetheless subject to EU competition rules.

Against the main two structural problems that affected the functioning of the dairy sector (the high volatility of prices and the imbalances of bargaining power between farmers and collectors/processors), the French NCA proposed alternative solutions different from the above system based on price recommendations and price indexes. These solutions included the use of written

contracts between producers and collectors/processors to ensure stability and legal certainty in the commercial relations between both parties, and the reinforcement of cooperatives active in the production of added value quality dairy products. Other proposed measures included the development of futures markets to fight against price volatility, and the adoption for the dairy sector of rules governing the creation of POs similar to those applicable to the fruit and vegetables sector under the EU CAP legal framework.

In the subsequent opinion 10-A-28 of December 2010 on two proposals for a decree imposing written contracts in the agriculture sector,<sup>149</sup> the **French NCA** stressed that any obligation to use written contracts between farmers and processors/collectors in the milk sector should not lead to a standardisation of their content, nor bind individual negotiations, in particular, on prices and volumes. It also proposed a number of recommendations in order to ensure the freedom of negotiation between parties and to avoid foreclosure effects, other discrimination or a protectionist outcome. It also recalled the risks resulting from using as price references in the contracts between the parties the price or trend indicators on dairy market forecasts that IBOs may publish.

The report of **Spanish NCA** of July 2009 illustrates the risks that can result from the use of price indexes. This report focused on the analysis of a framework agreement signed by the Government and the main associations of milk farmers, processors and retailers to promote the use of written contracts between dairy farmers and processors. According to this framework agreement, the prices under the proposed written contracts would be established on the basis of an index system. The Spanish NCA found that the proposed system could lead to anti-competitive practices, such as the indirect fixing of minimum prices, and that it was doubtful that it complied with the conditions of any of the limited EU exceptions to competition rules in the agriculture sector.<sup>150</sup>

Objections were also raised by the Spanish NCA in another report of February 2011 against the anticipated implementation at national level of the initial Commission proposal for Regulation (EU) 261/2012 on contractual relations in the milk sector, which the NCA found would create a situation of legal uncertainty before the final legislative text was adopted. In this same context, objections were also raised by the **Estonian NCA**, in an opinion of January 2011 on that same legislative proposal. The Estonian NCA concluded that even if the possibility for allowing price fixing among dairy farmers under the proposal may in the short term and to a certain extent improve the producers position vis-à-vis processors, it would not solve in the long term the problems of the sector linked to fluctuations of world milk prices or supply/demand dynamics. It also concluded that the mere fact that the bargaining power of the parties in the dairy supply chain was imbalanced did not mean that problems accrued from competition-related issues. Similar objections have been raised by the **German NCA** in its sector inquiry on the milk sector of January 2012 where it alerted against the risks for the liberalisation of milk markets resulting from the extension of the exceptions to competition rules in this sector.

In certain cases the sector inquiries carried out by NCAs in the milk sector have resulted in legislative changes going beyond that sector. For instance, the sector inquiry on the milk sector carried out by the **Latvian NCA** in 2006 was

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<sup>149</sup> This opinion also referred to the fruit and vegetables sector (see Section 4.4 below).

<sup>150</sup> See Section 2.2.2 above.

one of the elements which led to the introduction in March 2008 of a national rule stricter than Article 102 TFEU prohibiting the exploitative abuse of a dominant position in retail trade in the domestic competition law.

#### 4.4. Fruits and vegetables

242. The fruit and vegetables sector has also been subject to close scrutiny in many Member States. In particular, NCAs have undertaken **10 monitoring actions** regarding this sector in **France (3), Greece, Hungary, Italy, Latvia, Netherlands, Poland, and Spain.**

**Table 19**  
**Market monitoring actions in the fruit and vegetables sector**

NCAs	Name	Publication date
France	Opinion 08-A-07 on the economic organisation of the fruit and vegetables processing industry	May 2008
	Opinion 10-A-28 on two decree proposals imposing written contracts in two agriculture sectors	December 2010
	Opinion on a Decree proposal related to the content of agreements of moderations of retail margins in the fruit and vegetables sector	February 2011
Greece	Sector inquiry in the fruit and vegetables sector	On-going
Hungary	Study on the buying processes of basic agricultural products	September 2009
Italy	Investigation on agro-food distribution – IC 28	June 2007
Latvia	Sector inquiry on the fruit and vegetables wholesale and retail market	2010
Netherlands	Market study on the tomato market structure	April 2010
Poland	Study on the purchasing market of certain fruits	October 2004
Spain	Report on the supply chain of certain fruits and vegetables	January 2004

243. Most of the monitoring investigations in the fruit and vegetables sector focussed on **price formation for certain fresh products.**<sup>151</sup> Many of these investigations also included an analysis of price transmission and margins along the whole supply chain and identified several factors having an influence on price formation for fruits and vegetables. They include the length and complexity of the chain, the seasonal nature of production, demand increases, imports, or different competition conditions and specific structural features prevailing at national levels. Some NCAs have also looked at **market structures** of certain fresh products.

<sup>151</sup> For instance, cauliflower, romaine lettuce, zucchini greenhouse, red oranges and golden apples in Italy; strawberries, blackcurrants, cherries and raspberries in Poland; tomatoes in The Netherlands; tomatoes, lettuce, peppers, green beans, pears and apples in Spain, or sour-cherry, apples and melon in Hungary.

## Market monitoring of fruit and vegetables prices and market structures

The **Spanish NCA** found in its report on the supply chain for fruits and vegetables of January 2004 that there was parallelism in fluctuations of prices of these products between Spain and other Member States. It also noted that the margins fluctuated in parallel along the chain, although for certain products and periods, prices at wholesale level were somewhat rigid to production price decreases. Likewise, it also observed that aggregated average margins in the first level of the chain (producers-wholesale central markets) ranged from 40% to 90% (and even 100% for some products), whilst margins in the second part of the chain (wholesale central markets-consumers) ranged from 40% to 70% and seemed more stable over time. The report revealed certain structural problems in the sector, which included the high number of intermediaries and the small-scale size of the agents. The report also highlighted the existence of entry barriers in the retail distribution resulting from the obligation to have a second commercial license at regional level.<sup>152</sup>

Similarly, the inquiry on food distribution carried out by the **Italian NCA** in June 2007 also concluded that the supply chain of fruits and vegetables in Italy was characterised by a complex structure stemming from factors such as the different typology of products, the different number and features of the agents active in each stage of the chain, or the different variety, origin and destination of the products. It also found a number of factors having a negative effect on the efficiency of the sector, such as the highly atomistic and fragmented structure of primary production and the excessive length and complexity of the chain. For instance, it noted that distributors had to rely on intermediaries, in particular, in cases in which the agriculture primary production was fragmented or poorly organised. That had an impact on prices. The more intermediaries were involved, the higher end consumer prices were. Indeed, the increase of average prices (mark ups and production costs) could range from 77% to 300% (as compared with producer prices) as a result of the length and number of intermediary stages in the supply chain.

In its study on the tomato market structure in The Netherlands, of April 2010,<sup>153</sup> the **Dutch NCA** analysed the tomato sector in The Netherlands, identifying key elements, such as production levels and surfaces, domestic sales, trade flows, and types of market agents, which included different operators such as producers, producer organisations (POs), marketing organisations, wholesalers and middlemen, and retailers. The study found that the chain in The Netherlands presented a high degree of concentration at retail level but also at production level, given that the major POs, sales organisations and exporters in the Netherlands had a substantial market share (the largest four operators had more than 50%).

The study on the procurement market for certain fruits undertaken by the **Polish NCA** in October 2004 examined price formation at the production, wholesaling and processing stages of the supply chain. It found that prices were influenced by factors such as the seasonal supply of fruits, prices offered by competing companies, end product prices and the quality of raw materials. The **Latvian NCA** conducted a sector inquiry on the fruit and vegetables sector

<sup>152</sup> This recommendation has been subsequently addressed by the Spanish NCA on its report on the commercial relations between suppliers and retailers in the food sector of October 2011.

<sup>153</sup> This study is an addendum to the study on pricing in the agro-food sector, of December 2009 (see Section 4.2 above).

in Latvia in 2010 with the purpose of having an overview of the different stages that intervene in the supply chain (farmers' cooperatives, importers, wholesalers and retailers). Even though it found that competition at the wholesaling level was quite intense, the Authority also observed that retailers had started to purchase directly from producers.

244. Some NCAs have also adopted guidance and recommendations intended to stimulate competition in the fruit and vegetables sector and to help overcome some of the structural problems in its supply chain, characterised in certain Member States, as indicated above, by an atomistic production structure and many intermediaries. A few NCAs have also provided consultative opinions on regulatory measures applicable to the sector.

### **Recommendations and opinions in the fruit and vegetables sector**

In the above sector inquiry on food distribution of June 2007, the **Italian NCA** included a set of recommendations intended to increase the efficiency and competition in the supply chain of fruits and vegetables in Italy, which referred to all stages of the chain. They included in particular a better organisation of the primary production sector by promoting a pro-competitive concentration of that sector through POs under the applicable CAP rules. The setting-up of POs should not be limited to merely concentrate the supply of the existing producers but as a means to foster the selection and concentration of the producers more efficient. The report also proposed to rationalise the supply chain by reducing the number of intermediary stages. Intermediary activities between producers and distributors should concentrate in a single stage (for instance, wholesale markets), so as to increase efficiency and added-value in terms of aggregation of services for both agriculture producers (selection, packaging, processing, etc.) and distributors (quality, labelling, logistics, etc.). Competition among the players active in this intermediary stage should also be stimulated. The final report also proposed to increase competition in the retail sector by removing the different entry barriers resulting from a variety of regional laws which implemented national laws on the opening and extension of new outlets.

Similar recommendations based on the development of pro-competitive solutions to tackle the structural problems of the fruit and vegetables sector are also found in the study on the **Hungarian NCA** on the buying processes of basic agricultural products (see Section 4.3 above).

In its opinion 08-A-07, of May 2008, on the organisation of the fruit and vegetables processing industry in France, the **French NCA** recalled that price-fixing agreements among associations of POs were not allowed. The French NCA considered other solutions more appropriate to reduce the uncertainty in production (linked to factors such as weather conditions, inelasticity of the supply or high volatility of prices) and its impact on producers' revenues. These included the formalisation of contracts between producers and distributors and insurance-revenue mechanisms. In its opinion 10-A-28 on two proposals for a decree imposing contracts in the agriculture sector of December 2010, the French NCA also favoured the use of written contracts between primary producers and their buyers, provided that certain safeguards were respected to ensure the freedom of negotiation between the parties (see Section 4.3 above).

Also the **French NCA** was consulted to give its opinion in relation to a regulatory proposal intended to moderate retailers' margins in the selling of

fruits and vegetables in cases of significant decrease of the supply prices of these products (opinion 11-A-04, of February 2011). The regulatory proposal provided in particular for the obligation on retailers to pay a specific tax unless they concluded with their suppliers voluntary agreements including a moderation of their margins. The French NCA considered that this type of arrangements, initially conceived as a measure to limit the effects of situations of high volatility of prices, could be accepted provided that they did not have an impact on supply upstream prices, did not restrict trade between Member States and guaranteed a fair remuneration for retailers. However, the French NCA also highlighted the risks which may result from the potential strategies that retailers may implement to circumvent them in order to limit a reduction of their margins (such as the non-selling of certain fruits and vegetables or the increase of the prices of food products not targeted by the measure).

## 4.5. Cereals and cereal-based products

245. Cereals and cereal-based products have been subject to a high volatility of prices in recent years as a result of developments in worldwide commodity markets, which has also been reflected in rises of end-consumer prices. Against this backdrop, some NCAs have devoted particular attention to this sector. Their activities include **9 monitoring actions**, one of them on-going. These actions took place in **Bulgaria** (3), **Denmark** (2), **Italy**, **Latvia** (2) and **Romania**.<sup>154</sup> **Wheat, flour and bread** were the products mostly subject to scrutiny.

**Table 20**  
**Market monitoring in the cereals and cereal-based products**

NCAs	Name	Publication date
<b>Bulgaria</b>	Sector inquiry on the markets for production and trade of common wheat, flour and bread	June 2005
	Opinion on the proposed adoption of a legislative act envisaging the implementation of a minimum level of retail prices of bread	May 2010
	Sector inquiry on the competitive environment of the food markets for common wheat, flour and bread	On-going
<b>Denmark</b>	Sector inquiry of food prices	October 2008
	Sector inquiry on milk, butter and bread price developments	June 2009
<b>Italy</b>	Mechanisms of price transmission along the agro-food chain: an analysis of the dry pasta chain	August 2011
<b>Latvia</b>	Sector inquiry on bread processing and retail markets	2009
	Sector inquiry on sales of milk and bread products in large retail chains	January 2011

<sup>154</sup> Bread has also been analysed by other NCAs in other market studies on basic food products already cited in this report, such as the study on pricing in the agro-food sector, of December 2009, of the Dutch NCA.

<b>Romania</b>	Sector inquiry on the market for bread grains (production, trade and storage of bakery wheat)	October 2009
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246. These inquiries and monitoring investigations on cereals and cereal-based products have focused on the analysis of **price formation and price transmission** along the supply chain. They have identified several factors having an influence on price-setting mechanisms in this sector, such as fluctuations on worldwide commodity markets, availability of stocks, different market structures, and commercial behaviours by companies.

### **Market monitoring of cereals prices**

In its sector inquiry on the markets of production and trade of common wheat, flour and wheat bread of May 2005, the **Bulgarian NCA** analysed average producer costs and selling prices along the chain and did not find any gaps in price transmission between primary producers, milling undertakings, bakeries and consumers. Prices broadly followed upward and downward trends depending on seasonal variations, on the availability of stocks, and on wheat prices on world commodity markets. For instance, the analysis carried out established a seasonal variation in the average margins of wheat farmers (between 0% and 20%) which depended on the seasonal variation of wheat market prices and the ability of farmers to store wheat after harvest campaigns. The average margin of flour milling undertakings was established at around 8-9%.

The sector inquiry on bread processing and retail markets undertaken by the **Latvian NCA** also examined the price gap between producers and consumers from 2006 to 2008. It found that price increases for bread products were influenced by several factors, including soaring demand for grain supplies in Asia, the increasing cost of packaging, energy and labour costs, declining bread consumption, and excessive non-utilised capacity in Latvia. The inquiry also found indications that large retailers had exercised buyer power as reflected in an obligation imposed on certain bakeries to sell bread products below or at cost to them. In order to compensate for this, these same bakeries applied higher prices for their products to smaller retailers (so-called "waterbed effect").

The **Romanian NCA** analysed the primary wheat production and the wheat storage sectors in Romania in its inquiry on the market for bread grains of October 2009. The inquiry found that price formation in this market was significantly influenced by international commodity markets. It also observed that unequal bargaining power between agriculture producers and their buyers influenced price formation. It also found that the vertical integration of activities in certain undertakings entailed significant economies of scale, which gave the firms in question important competitive advantages.

The two market monitoring investigations carried out by the **Danish NCA** concerning bread and flour in 2008 and 2009 also analysed the reasons behind the increase of consumer prices of these products in Denmark.<sup>155</sup> As regards bread, the investigation of 2008 found that the consumer price increase had

<sup>155</sup> Market investigations already referred to in Section 4.3 above in relation to milk.

been three to four times higher than the increase of farmers' prices for cereals. Bread producers and retailers both contributed substantially to such increase. Given that bread prices in Denmark were higher than in neighbouring countries, it could not be precluded that weak competition amongst bread producers contributed considerably to these high prices. The market for factory-made bread was dominated by a conglomerate of companies. High prices for bread continued in 2009, despite the decrease of cereals commodity prices. One reason which could explain that was the fact that millers had entered into long-term supply contracts beforehand. With respect to flour, the investigation of 2008 found that all food companies, millers and retailers had contributed to the price increase. It is interesting to note that the market investigation of 2008 led to the opening of infringement proceedings against a milling company for imposing resale prices to bread producers. Both the company and its CEO were sanctioned.

The **Italian NCA** carried out in August 2011 a study on the mechanisms of price transmission along the agro-food chain which focussed in particular on the dry pasta chain. The study revealed how the variations of production costs resulting from the acquisition of inputs had been passed on in the selling prices of the different operators active along the chain (durum wheat producers, milling industry, pasta industry and distributors). It pointed out that the pasta processing industry, compared to the other actors of the chain, had been the main responsible for enlarging the gap between the prices for raw materials and prices applied to end consumer and had significantly increased their margins during three consecutive years as compared to year 2006. The study pointed out that these findings were coherent with the existence of a price-fixing cartel in the Italian pasta industry during the same period, which had been uncovered by the Italian NCA.

247. A few NCAs have also addressed, by means of recommendations, how to tackle structural problems which may undermine the competitiveness of the cereal sector. They have also issued opinions on particular regulatory measures intended to regulate this sector.

#### **Recommendations and opinions in the cereals sector**

In its sector inquiry on the market for bread grains, of October 2009, the **Romanian NCA** recommended certain regulatory proposals, such as the activation by the Government of a Guarantee Fund for Warehouse Certificates. This measure would allow setting a functional system to guarantee certificates of deposit and facilitate wheat trading on the stock market. It was also proposed to implement measures intended to limit the informal market for bread wheat, as well as an amendment of the legislation on the wheat stock renewal/lending performed by the State's reserve.

NCAs have also analysed the potential impact of public measures regulating bread prices. Such was the case of the **Bulgarian NCA** which in May 2010 adopted an opinion on the proposed adoption of a legislative act envisaging the implementation of a minimum level of retail prices of mass bread. The Bulgarian NCA assessed the reasons for the introduction of this measure, such as the termination of below-cost selling, the protection of the interests of producers and consumers and the fight against the informal economy in the sector. It concluded however that these potential positive effects would not make up for the harm to competition in the sector of production and



distribution of bread and would not provide benefits to final consumers or the industry as a whole.

## 4.6. Food retail

248. Food retail has drawn particular attention by a large number of NCAs. In total, **36** market monitoring actions (out of which 3 are on-going) are reported in **Austria, Bulgaria (3), Belgium, Czech Republic, Denmark, Finland, France (5), Germany, Ireland (4), Italy, Lithuania (3), Norway, Poland (2), Portugal (3), Romania, Slovakia, Slovenia, Spain (3), Sweden and UK.**

**Table 21**  
**Market monitoring in the food retail sector**

NCAs	Name	Publication date
<b>Austria</b>	General inquiry on the Austrian groceries sector with particular emphasis on buyer power aspects	June 2007
<b>Belgium</b>	Study on the level of prices in the supermarkets	February 2012
<b>Bulgaria</b>	Opinion on the adoption of legislative acts concerning relationships between suppliers and retailers	May 2010
	Opinion on the adoption of legislative acts concerning relationships between suppliers and retailers	July 2010
	Opinion on the adoption of legislative acts concerning relationships between suppliers and retailers	March 2011
<b>Czech Rep.</b>	Sector inquiry on the sales markets for agriculture and food products with particular emphasis on relations between retailers with significant market power and their suppliers	2010
<b>Denmark</b>	Study on the retail sector	June 2011
<b>Finland</b>	Sector inquiry on the retail sector	January 2012
<b>France</b>	Opinion 04-A-18 on the state of competition in the non-specialist large-scale retail sector	October 2004
	Opinion 07-A-12 on the legislation on commercial planning law	October 2007
	Opinion 10-A-25 on category management agreements in the food retail sector	December 2010
	Opinion 10-A-26 on affiliation contracts of independent stores and purchase details of commercial estate in the food retail sector	December 2010
	Opinion 12-A-01 on the competition situation in the food retail sector in Paris	January 2012
<b>Germany</b>	Sector inquiry on the food retail sector	On-going
<b>Ireland</b>	Grocery monitor report 1	March 2008
	Grocery monitor report 2	March 2008
	Grocery monitor report 3	July 2008

	Retail-related import and distribution study	May 2009
<b>Italy</b>	Sector inquiry on large-scale retail distribution	On-going
<b>Lithuania</b>	Market study on retail	2008
	Market study on retail	2009
	Market study on retail	On-going
<b>Norway</b>	Market survey on "payment for shelf space"	2005
<b>Poland</b>	Study on the structure and distribution chain of daily consumer goods	February 2005
	Study on the definition of the retail market for daily consumer goods	August 2011
<b>Portugal</b>	Report on the food distribution sector in Portugal	April 2005
	Report on buyer power and pass-through of large retailing groups in the Portuguese food sector	October 2006
	Report on commercial relations between the large retail groups and their suppliers	October 2010
<b>Romania</b>	Sector inquiry on retail distribution of food products	September 2009
<b>Slovakia</b>	Sector inquiry on retail markets	December 2008
<b>Slovenia</b>	Survey on the relationships between producers and retailers of daily consumer goods	2008
<b>Spain</b>	Report on the draft Bill for the reform of Act 7/1996, of 15 January 1996, on the retail sector	May 2009
	Report on the Bill on distribution agreements	June 2011
	Report on relations between retailers and suppliers in the food sector	October 2011
<b>Sweden</b>	Study on the retail sector	June 2004
<b>UK</b>	The supply of groceries in the UK market investigation <sup>156</sup>	April 2008

249. These actions have looked at a number of recurrent issues in the debate concerning the structure and functioning of the retail sector. First, public authorities and stakeholders have expressed concerns in relation to the degree of consolidation in this sector over the last years and the high concentration ratios which characterise local retail markets in many Member States. Concerns have also been raised about the alleged abusive exercise of market power by large retailers.

250. By means of their monitoring investigations and market studies the NCAs have contributed to clarifying the structure and functioning of the food retail sector. Particular focus has been devoted to the analysis of **retail business models and market structures**, the **exercise of buyer power by retailers** in their commercial relationships with their suppliers, the perceived existence of **unfair trading practices** within the framework of such relations, the **effects of certain specific practices** in terms of competition, and the **barriers to entry in food retail markets**.

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<sup>156</sup> Report by the UK Competition Commission on reference by the OFT (UK NCA).

### *Retail models and market structures*

251. National monitoring investigations have revealed the complexity of the retail sector in terms of business models and market structures. They have also analysed the recent trends and developments which this sector has undergone.

#### **Retail models and market structures**

An example of inquiries on retail which illustrates the developments in this sector is the grocery monitor report 1, of April 2008, carried out by the **Irish NCA**. This report provided a detailed overview of the complexity of the modern grocery supply chain in Ireland. It analysed the interlink existing between wholesale and retail activities and the extent to which modern wholesaling was involved with developments at retail level. Different types of market players were identified: (i) vertically-integrated retailers, (ii) affiliated retailers which own and operate retail outlets under a retail brand or fascia used by other retail outlets and licensed by wholesaler-franchisors, (iii) wholesaler-franchisors, which buy goods from suppliers for resale to retailers and licence one or more retail brands or fascias to retailers, and (iv) independent wholesalers (cash and carry wholesalers). The report pointed out the emergence and development of wholesaler-franchisors in the wholesaling of grocery goods as an element which made wholesalers and retailers become more integrated, and in some aspects mimic the business models of the vertically-integrated retailers who combine wholesaling and retailing in a single business entity.

The different types of retail models existing in France were also analysed by the **French NCA** in its opinion 10-A-26, of December 2010. The opinion identified two main models. One of them was commercial cooperatives, which acted as an association of entrepreneurs legally and financially independent from each other. These groups were managed by the cooperative's member shareholders, who were also the owners of the sales outlets. Their main purpose was to pool means (purchasing pools, brands, sales, commercial policies, financial means, know-how, etc.) in order to develop tools and actions intended to ensure the competitiveness of the sales points. The other retail model included vertically-integrated retailers, which could also develop franchising networks of affiliated independent retailers.

The complexity of the structure of the retail sector is also one of the preliminary findings of the on-going inquiry on large food retail distribution currently undertaken by the **Italian NCA**. Its findings have revealed that the modernisation of the retail sector in Italy has led to a significant increase of the degree of concentration, resulting both in large retail groups (40% of the industry turnover) and other less structural forms of cooperation among retailers, such as cooperatives, associations, franchises, or buying alliances (60% of the industry turnover). At horizontal level competition has shifted from individual companies to groups of companies integrated to different extents and often linked by mere contractual relationships. Also at vertical level the inquiry has revealed the importance of large buying alliances (five of them accounting for approximately 75% of the retail procurement market), the members of which change frequently.

252. In other cases, a few NCAs have also undertaken **cross-border analysis of retail market structures**, in particular where significant price differences between countries have been identified, so as to better understand the reasons behind such divergences.

### **Cross-border analysis of retail market structures**

Such is the case of the **Irish NCA** which, in its study on retail-related import and distribution of June 2009, examined the factors that had contributed to retail price differences between the Republic of Ireland and Northern Ireland. The study revealed that differences in the cost of doing business, the scale of the firms involved, different tax regimes, consumers' incomes and tastes, as well as levels of competition and regulation, all affected the pricing practiced by suppliers and retailers.

Also the **Belgian NCA** concluded in February 2012 a market study to investigate why food retail prices in Belgium are higher than in The Netherlands. This study focused on four main issues: (i) verifying the methodology used to carry out international price comparisons; (ii) comparing the characteristics of supermarket chains in Belgium and The Netherlands and evaluate the effect of any potential differences on the costs of processed food; (iii) examining possible restrictions to competition in the retail sector in Belgium; and (iv) studying the effect of key regulations affecting competition in the distribution sector in this country. The results of the study point out to higher prices in Belgium than in The Netherlands (10.4%) and other neighbouring countries: France (7%) and Germany (10.6%). According to the study, higher consumer prices in Belgium (as compared with The Netherlands) arise as a combination of several factors, including differences on taxes and social legislation (more flexible in The Netherlands). The ban on resale-below-cost in Belgium may also have an impact since it reduces the degree of competition among supermarkets, as well as among their suppliers. Specific structural characteristics of the Belgian retail sector (such as the low profitability of one of the main market players which would prevent it to engage in aggressive pricing policies) were also identified as having a negative impact on prices. Although the study does not identify significant barriers to entry in Belgium (three supermarket chains have shown a rapid organic growth over the last two decades and are now amongst the five largest chains), it points out to important difficulties to exit and/or restructure. The findings conclude that amending some aspects of the social legislation and uniformising franchising retail contracts may help to overcome such difficulties.

#### *Analysis of buyer power in the framework of the commercial relationships between retailers and suppliers*

253. The analysis of the exercise of buyer power by retailers and its effects on competition in procurement and sales markets is also an issue which has been a priority by many NCAs in their market monitoring investigations. In general terms, these NCAs have acknowledged that large retailers have strong buyer power vis-à-vis their suppliers as a result of numerous factors such as, among others, the increasing concentration of the sector, high barriers to entry to retail markets, the existence of strong cooperative alliances among incumbent retailers or the increasing use of own-label products. Such buyer power can be however offset by the market power of the most prominent branded product manufacturers. NCAs also agree that the exercise of buyer power can bring positive effects if competition among retailers exists in downstream markets and the lower purchasing costs achieved in procurement markets are passed to consumers in terms of lower prices.

254. However, it has also been pointed out that in certain cases the imbalances of bargaining power between retailers and suppliers can lead to situations of contractual conflicts and tensions, resulting in the transfer of excessive risks or costs or the imposition of unfair trading practices to suppliers. To tackle these situations, which do not involve anti-competitive practices implying harm for consumers and, consequently, do not fall under the scope of EU and most of the national competition rules of Member States, some NCAs have proposed alternative solutions. They include for instance the adoption and effective enforcement of **national laws against unfair trading practices** or **codes of conduct** governing the commercial relations between retailers and suppliers. In this context, a few NCAs have also alerted against the risks of certain commercial practices that, even if in the short term may not entail an immediate anti-competitive effect, may however in the long term undermine the competitive process of the food supply chain or entail negative effects on consumer welfare by decreasing investment and innovation or reducing consumer choice.

### **Market power and unfair trading practices**

The report of the **Portuguese NCA** on the food distribution sector in Portugal, of April 2005, provided a general overview of the food retail and wholesale sectors in the period 1990-2004 in Portugal and concluded that the increase of buyer power among large retail groups had mainly resulted from the progressive concentration of the sector. That was in line with the progressive decline of wholesalers and traditional local retailers (small individual retail stores, such as grocers, bakeries, and local drugstores). The report further pointed out that the increasing concentration of large retail groups seemed to have intensified the conflicts with suppliers (reflected in the imposition of certain commercial practices such as larger rebates with retroactive effects or less favourable payment terms and delays). In a subsequent report of October 2006 on buyer power and pass-through, the Portuguese NCA also assessed the issue of buyer power from an econometrics standpoint. Its results revealed that purchasing pools among retailers and vertical agreements had contributed to increase the buyer power of large retail groups. That resulted in lower prices paid to suppliers which tended to be partially passed-through to final consumers in terms of lower retail prices. The report also found that large retail groups tended to increase their selling prices less than national trade, including other retailers such as traditional small businesses.

The **Finish** NCA concluded an inquiry into the grocery sector in January 2012, the main purpose of which was to investigate how the buying power of the retail sector affects competition in the food industry. Reasons which led the Finnish NCA to open this sector inquiry are the increasing concentration rates of the retail sector in Finland (with the two largest chains jointly accounting for approximately 80% of the market), the high food prices in Finland, and the public debate concerning the alleged exercise of market power by retailers to sustain such high prices. The inquiry found that retailers use their market position with respect to suppliers in several ways that may be considered questionable for sound and effective competition. They included the use of free marketing allowances and the transfer of own risks to suppliers (see below). Other practices, such as the increasing use of private labels, may also contribute to reinforcing the strong position of retailers (see further details below). The Finnish NCA concluded that these practices between suppliers and retailers lied in a grey area when it comes to the application of competition law. Even though the buying power of retailers did not in itself automatically mean a lack or distortion of competition, the nature of the detected issues and their

apparent prevalence clearly motivated further measures to be taken. Other sector inquiries which are currently on-going initiated by the **Italian NCA** (October 2010) and the **German NCA** (September 2011) focus on similar issues (see further details below).

In this context, unfair trading practices have been identified by many NCAs in their monitoring actions of the retail sector. Among others, such is the case, for instance, of the **Slovenian NCA** which undertook a survey on the relationships between producers and retailers of daily consumer goods in 2007-2008, in which it observed a number of unfair trading practices which limited the freedom of negotiation of suppliers.<sup>157</sup> Unfair trading practices between retailers and suppliers were also identified by the **Czech NCA** in its 2010 sector inquiry into the agriculture and food products market. This inquiry was carried out under the domestic Act 395/2009 on Significant Market Power in the Sale of Agriculture and Food Products and Abuse thereof, which prohibits retailers with significant market power from applying abusive unfair trading practices to suppliers.<sup>158</sup> The inquiry led to the opening of proceedings against six retailers for possible infringements of this Act. Also the **Lithuanian NCA** in two studies on the retail sector in 2008 and 2009 identified unfair trading practices in the framework of the commercial relations between retailers and their suppliers. The study of February 2005 on the structure and distribution chain of daily consumer goods of the **Polish NCA** also found out the existence of disputes between these operators as a result, in particular, of the obligation imposed on suppliers to pay certain fees to retailers.

### **Recommendations on contractual relations between retailers and suppliers**

The sector inquiry on the supply of groceries carried out by the **Competition Commission (CC)**<sup>159</sup> upon reference from the **UK NCA** particularly focussed on the relations between suppliers and retailers. The final report, published in April 2008, found that all large retailer, wholesalers and buying groups had buyer power over at least some of their suppliers but such buyer power can have positive effects in terms of lower retail prices for consumers. It also found that the financial viability of food and drink manufacturers was not under threat as a result of the exercise of buyer power by grocery retailers. However, the report also concluded that when retailers transferred excessive risks or unexpected costs to suppliers, this was likely to lessen suppliers' incentives to invest in new capacity, products and production processes.<sup>160</sup> These practices would

<sup>157</sup> For instance, obligations to have same pricelists for all customers, restrictions of sales campaigns in other retail shops, requests to apply prices simultaneously, restrictions to cooperate with discounters, restrictions to produce products under the private label of other retailers, or requests for rebates which exceeded economically justified benefits and savings.

<sup>158</sup> Unfair trading practices found included retroactive rebates, requests for fees for opening new retail stores, promotion contributions, fees for payments before expiration of payment periods, imposition of high penalties, as well as obligations to refill and clear shelves or to dispose unsold goods without compensation.

<sup>159</sup> The Competition Commission is an independent UK public body which conducts in-depth enquiries into mergers, markets and regulation of the major regulated industries with a view to ensuring healthy competition between companies in the UK. All of the Competition Commission's inquiries are initiated following reference from the OFT (i.e. the UK NCA) or one of the sectorial regulators.

<sup>160</sup> For instance, retrospective unilateral changes to contracts, requests for upfront payments or listing fees.

ultimately have a detrimental effect on consumers. As a result of the inquiry, a new Groceries Supply Code of Practices (GSCOP) came into force in February 2010. This Code introduced an overarching fair-dealing provision governing commercial relationships between suppliers and retailers and imposed a number of commercial prohibitions and obligations upon large retailers.<sup>161</sup> It also introduced an independent binding arbitration at retailers' expenses if disputes between parties cannot be resolved informally. The report also recommended the establishment of an ombudsman to oversee and enforce the GSCOP. A draft bill on the Groceries Code Adjudicator was published in May 2011 and is expected to have its first reading in the UK Parliament in May 2012. The CC also made an Order<sup>162</sup> to prevent the largest grocery retailers from using land restrictions to prevent entry by competitors.

The **Spanish NCA** in its report on the relations between manufacturers and retailers in the food sector, of October 2011, concluded that the strong bargaining power of retailers may have a positive impact on consumers' welfare in the short term if there is a sufficient level of competition among retailers in downstream markets. However, the report also highlighted that in the medium and long term it may have a negative effect on competition among manufacturers (inter-brand competition) and among retailers (intra-brand competition) and may contribute to a slowing down in the rate of innovation in the food industry. Should these effects materialise, they may outweigh the initial positive impact.

The report identified a number of factors which increased such risk of negative effects in terms of competition and welfare. These factors included in particular (i) certain commercial practices between manufacturers/suppliers and retailers, such as commercial payments imposed unilaterally by retailers and unconnected to the actual provision of any services to the suppliers; (ii) the failure to stipulate in writing the contractual terms and conditions governing the commercial relationships between the parties; (iii) unforeseen changes to those conditions with retroactive effects in many cases; (iv) obligations to provide excessive information to retailers regarding new products very well in advance to the launching of such products; (v) most favoured client clauses; (vi) and the requirement on suppliers to provide sensitive commercial information regarding their commercial relations with third-party retailers.

The report set of a number of recommendations with the aim of increasing among operators the awareness of the potential negative effects stemming from these practices. These measures included the need to have written contracts between suppliers and retailers and to set limits on the application of retroactive changes to contractual terms and conditions. The report also pointed out that commercial payments from suppliers to retailers should be applied under foreseeable, transparent and proportionate terms. Other recommendations are detailed below.

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<sup>161</sup> They include a prohibition on (i) making retrospective adjustments to terms and conditions of supply, and (ii) entering into arrangements with suppliers that result in suppliers being held liable for losses due to shrinkage, as well as limitations on the circumstances where retailers may require payments as a condition of being a supplier. The GSCOP also includes obligations upon retailers to: (i) enter into binding arbitration to resolve any dispute with a supplier arising under the Code, (ii) keep written records of all agreements with suppliers on terms and conditions of supply; and (iii) provide to the body monitoring and enforcing the GSCOP any information as it may reasonably require in pursuit of its functions.

<sup>162</sup> The Groceries Market Investigation (Controlled Land) Order 2010.

Further to its reports of 2005 and 2006 on the retail sector (mentioned above), the **Portuguese NCA** published a third report on the commercial relations between large retail groups and their suppliers in October 2010. It noted that in most cases it would be difficult to demonstrate that these relationships breached competition rules, mostly because it would be hard to demonstrate significant harm on competition. It found however that some of these practices should be tackled either under the specific Portuguese legislation on unfair commercial practices or by applying the sector's self-regulatory code of conduct on best commercial practices in relations between large retailers and their suppliers. In order to make more effective the application of these instruments, the report included a number of recommendations addressed to the Government and stakeholders, which included the granting of legal force to the existing code of conduct. It proposed to adopt new rules on unfair trading practices and further reinforce the monitoring and application of the existing national legislation on this issue.

Other recommendations included: (i) to increase transparency along the food supply chain by collecting and disseminating aggregated data on prices and quantities along the supply chain; (ii) to promote the opening of small traditional grocery stores at local level and the promotion of protected geographical indications under national law; (iii) to analyse the impact on social and consumer welfare of "look alike" and "copycat" products; (iv) to monitor more rigorously these products under the legislation on unfair trading practices or industrial property; and (v) to implement the future EU Directive on payment delays in commercial relations.

The **Romanian NCA** came to similar conclusions in its report on its inquiry on the food retail sector of September 2009. It pointed to the need to tackle unfair trading practices under commercial law rather than competition law. It considered that these issues should be resolved through negotiations, litigation or other means available in a contractual relationship.

In three separate opinions in 2010 and 2011 the **Bulgarian NCA** provided guidance the possibility to introduce a regulatory framework governing the relations between supermarket chains and suppliers in Bulgaria. On the basis of the experience in other EU Member States and the EU EC initiatives on the supply chain, the Bulgarian NCA analysed different regulatory approaches and their effects on competition. The different approaches taken into consideration included the enforcement of the existing competition rules, the introduction in the domestic competition law of a stricter rule on unilateral conducts based on the notion of "abuse of significant market power" and the adoption of a specific law on unfair trading practices exercised by retailers on suppliers. Other initiatives considered by the Bulgarian NCA were the launching of information campaigns, the adoption of a code of ethics, or the strengthening of the suppliers' bargaining power through establishing professional organisations which would protect their collective rights.

In cases in which Member States have adopted specific laws on unfair trading practices, NCAs have also undertaken monitoring actions to supervise the enforcement of such laws. This is the case for instance of the **Lithuanian NCA** which in 2010 initiated a study (currently on-going) to monitor the enforcement of the Law on the Prohibition of Unfair Commercial Activities of Retail Trade in Lithuania. This Law entered into force in April 2010 and prohibits a number of unfair trading practices between retailers and suppliers which fall outside the scope of application of competition law in Lithuania.



*Analysis of specific practices in the food retail sector*

255. Some NCAs have also devoted attention to analysing whether potential competition issues or constraints among retailers and other market players may arise, in particular, in the context of the consolidation of the retail sector that has occurred during the last years. Some NCAs have for instance assessed the competition risks resulting from new forms of cooperation among retailers at horizontal level (such as buying alliances among retailers in procurement markets). The possibility of tacit collusion among retailers has also been looked at.

**Horizontal issues**

The development of buying alliances as a specific form of cooperation among retailers in procurement markets is being subject to a close scrutiny in a number of Member States. Such is the case of the sector inquiry on food retail initiated by the **German NCA** in September 2011, in which the effects of the concentration of this sector on the competitive conditions for smaller trading companies and suppliers are being analysed. The inquiry will also focus on the examination of certain forms of organisation, such as purchasing cooperation agreements involving leading retailers, and their impact on the concentration process of the German retail sector. In a first phase of the inquiry the German NCA will investigate the structure of the procurement retail markets for large product categories and, in a sample survey, in relation to nine products (tinned vegetables, milk, butter, cold coffee beverages (with milk), ketchup, frozen pizza, roasted coffee, sparkling wine and jam). In a second phase it will analyse whether the leading food retailers enjoy purchasing advantages over their competitors. It will also be determined which effects these advantages have on competition in the downstream sales markets.

The sector inquiry initiated by the **Italian NCA** in October 2010 also focuses, among others, on the analysis of the agreements and alliances of retailers concluded to undertake joined business functions, such as purchasing, logistics, trade markets, promotions, or development strategies.

NCAs have also analysed the potential risk of tacit collusion among retailers, as the sector inquiry of the groceries retail sector in the **UK** did. The inquiry found a number of structural factors (highly concentrated) and behavioural practices in grocery retailing that may facilitate collusion in the UK. However, it noted that sustaining coordinated conduct over thousands of differentiated products or choosing a smaller group of products on which to coordinate would be sufficiently complex to prevent the emergence of tacit coordination among retailers. The report also noted that no evidence of large grocery retailers engaging in parallel behaviour with respect to the prices had been found. The report did not exclude that, given the structure of the grocery retailing market in the UK, such behaviour could occur in the future.

256. Many NCAs have also focused on vertical relations between suppliers and retailers. Practices occurring in the framework of such relationships have in many instances not been considered to raise competition problems in the short term, but rather fall under the rules applicable to unfair trading practices. However, a few NCAs have also pointed out that in the long term certain

commercial practices, if largely applied by retailers, may undermine the competitiveness of the food supply chain and have a negative impact in competition terms. In other cases, some NCAs have warned against the anti-competitive behaviours that may result from or be facilitated by certain practices and agreements in the retail sector.

257. In this context, practices such as commercial payments, category management agreements, most favourite client clauses, exchanges of sensitive commercial information, or own-label products have been subject to close consideration.

### **Vertical issues**

As regards commercial payments from suppliers to retailers, the **Norwegian NCA** assessed in its market survey "Payment for shelf space" in 2005 the types of fees and payments requested by retailers to suppliers for allocation of shelf space. It found that this type of payments can be regarded as one of the several means that retailers have to exercise buyer power. If competition between retailers is fierce in downstream sales markets, such fees may be passed on to the consumers in terms of lower prices. However in certain cases such fees, in conjunction with other arrangements, may have foreclosure effects as regards smaller competitors. The Norwegian NCA concluded that any ban on shelf fees would have limited effects on competition to the extent that retailers could achieve the same purpose through other tools (volume rebates, rebates for stocking certain products or bonuses on total sales). As a result of potential foreclosure effects, it imposed the obligation upon the four largest retailers (which account for more than 99% of the national market) to notify their agreements with approximately 20 suppliers that were also presumed to be dominant in their respective markets. That would enable it to monitor the practical application of such supply agreements.

The **Finnish NCA**, in its sector inquiry on the grocery sector, of January 2012, identified as problematic the requests by retailers for payments of free marketing allowances among suppliers, since they may induce price increases given that suppliers seek to pass on all their cost increases on purchase prices. It also found that the transfer by retailers of own risks to suppliers (such as repurchase requirements for unsold products) may lead to production cuts, pressure to increase prices and fewer incentives to innovate among suppliers. The transfer of risks may also have an impact on competition at retail level since suppliers may want to obtain better conditions when negotiating with other relatively weaker retailers (waterbed effects).

In its on-going sector inquiry on retail the **Italian NCA** is also focusing on the different commercial payments made by suppliers to retailers. The preliminary findings have revealed that suppliers generally negotiate contracts at three different levels, which include large buying alliances, retail chains and/or single distributors. At each negotiation level upfront access payments and other fees are dealt with. Such payments and fees are very numerous and have a large variety of forms (e.g. lump sum, sales percentages, based on supplier's product portfolio, etc.). According to the preliminary conclusions of the inquiry, the widespread use of upfront payments may increase barriers for new entrants. The different multi-phase negotiations of fees may also offset the market transparency on purchasing conditions applied by buying alliances.

The opinion 10-A-25 of the **French NCA** of December 2010 analysed category management agreements in the food retail sector in France. Category

management agreements are agreements by which a distributor entrusts a supplier (the "category captain") with the marketing of a category of products including in general not only the supplier's products, but also the products of its competitors. The opinion highlighted that this type of agreement led to foreclosure risks, since it provided the "category captain" with exclusive confidential information from other suppliers (such as loyalty programmes, sales, resale prices or stocks), which would enable it to anticipate in a privileged manner the retailer's commercial strategy and facilitate shelf eviction. The NCA also pointed to risks of collusion where one and the same supplier acts simultaneously as category captain for several retailers. This situation could facilitate the exchange of sensitive information among the latter since the supplier could inform its partner retailers of their respective plans and facilitate the implementation of a concerted practice, involving price increases or a reduction in the variety of marketed products.

The French NCA proposed the formulation of best practices on category management agreements. As a result of this, a code of good practices on category management was adopted by the CEPC (a body grouping suppliers, retailers and government representatives in charge of the surveillance of the relations between suppliers and retailers). The code aims at regulating the exchange of information between operators so as to reduce or eliminate the risk of anti-competitive practices, and prevent category captains from being able to take decisions regarding retailers' behaviour or to exert pressure upon shop managers in stores. It also sets out that contracts specifying these principles should be signed between the parties when the collaboration between category captains and retailers is significant.

Category management agreements and other practices were also assessed in detail in the sector inquiry on food retail of the **Romanian NCA** of September 2009. The final report concluded that the allocation of shelf space should remain under the retailer's responsibility in order to guarantee an equal treatment of all suppliers. The inquiry also analysed certain contractual clauses which are customarily applied by large retailers to their suppliers, such as "most favourite client" clauses and shelf fees.<sup>163</sup> Whereas most favourite client clauses may entail benefits for final consumers if competition among retailers exist, the report also noted that both clauses jointly applied could lead to higher consumer prices and could affect the competitiveness of traditional smaller retailers (as suppliers tended to charge the cost of shelf fees paid to large retailers in the prices applied to smaller retailers). The final report consequently proposed the elimination of most favoured customer clauses in commercial relations between suppliers and retailers given the existence of shelf fees. That would allow to protect consumer welfare and to maintain a competitive playing field between all retailers active on the market. The final report also recommended the elimination of other fees, characterised many times for a lack of transparency, where there was no connection between the fee paid by the suppliers and the value of the services provided by the retailers (such as fees required for expanding/modernising the retail chain or fees collected for covering the risk of the non-selling of certain products).<sup>164</sup>

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<sup>163</sup> A most favourite client clause was defined in the inquiry as the clause through which suppliers commit to offer to distributors/buyers the best price which they offer on the market.

<sup>164</sup> These last two recommendations have been incorporated in the provisions of the Romanian Code of Good Practices for Food Commerce, which was given legal force by Law 321/2009 on the Marketing of Food Products. It is interesting to note that this inquiry led to the opening of four infringement

Exchanges of confidential information between suppliers and retailers remain problematic from a competition standpoint. The report of the **Spanish NCA** on commercial relations between suppliers and retailers in the food sector, of October 2011, launched an overall warning against the risks in competition terms of the application of most favoured client clauses and of the exchanges of information between suppliers and retailers regarding their commercial relations with third-party retailers (hub-and-spoke cartels). In this same context, the **Slovenian NCA**, as a result of its survey on the relationships between producers and retailers of daily consumer goods between 2007-2008, opened two infringement proceedings against retailers for having implemented a system of exchange of commercially sensitive information with suppliers. The system allowed retailers to have information on prices and other contractual terms applied by suppliers to competing retailers. This case terminated with commitment decision.

The increasing use of own-label products by retailers and its impact on branded product manufacturers and consumer welfare has been or is currently being assessed in a number of market monitoring investigations. Certain authorities have noted that private labels are a factor to take into account when assessing buyer power by retailers. This was mentioned by the **Austrian NCA** in the sector inquiry on the Austrian groceries sector that it undertook between 2004 and 2007. It also concluded that private labels brought forward positive effects for consumers in terms of price competition. In the **UK** sector inquiry on the groceries sector, it was also observed at the time of publication that the sale of own-label products by retailers had not had any adverse effect on product innovation by branded product manufacturers.

In its report on the commercial relations between suppliers and retailers, of October 2011, the **Spanish NCA** also recognised the positive effects that own-label products can entail in the short term as regards consumer choice. However, it also highlighted that in the long term own-label products may ultimately bring forward anti-competitive effects by progressively eliminating secondary brands of manufactures and therefore reducing inter-brand competition. In order to limit certain specific unfair practices linked to the use of private labels (such as copycat products launched by retailers using sensitive commercial information provided in advance by suppliers), the Spanish NCA also recommended that the requests for sensitive commercial product information from retailers to their suppliers should be proportionate and within the limits of their commercial relationship. The timing of such requests should also be in accordance to such relationship.

In its sector inquiry concluded in January 2012, the **Finnish NCA** also acknowledged that private labels reinforced the strong position of retailers. It also found that retailers often priced brand products above private label products. Suppliers could respond by setting a maximum resale price, even though it was difficult to estimate the possibilities and incentives of suppliers level to include this type of conditions into their agreements with the retailers. Other NCAs (**Portugal**) have also proposed to assess these specific practices of "copycat" or "look alike products" under the national rules on unfair trading practices.

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proceedings against certain retailers and their suppliers for potential anti-competitive vertical agreements concerning resale price maintenance.

The issue of the increasing use of private labels by retailers is currently being analysed in detail by other NCAs (**Italy, Germany**) in their on-going sector inquiries on the retail sector.

258. Below-cost selling and the impact that certain regulatory measures prohibiting this type of practices can have on retail prices has also been addressed by a few NCAs.

### **Below-cost selling**

The **French NCA** analysed, in its opinion 04-A-18, of March 2004, the impact of the legislative prohibition of sales below cost on the retailers' margins. The opinion found that standard sales margins of retailers had fallen in recent years. However, their back margins (which are the rebates paid to retailers by suppliers for the provision of certain marketing services, such as shelf location or promotion material) have risen steadily even though the growth in the provision of such marketing services was not equivalent. The opinion noted that this phenomenon reflected the purchasing power that major retailers had with respect to their suppliers, due to the high degree of concentration in the retail distribution market (which had been even reinforced by a restrictive legislation on commercial planning imposing entry barriers to retail markets). It was also found that the excessive development of back margins may serve to encourage certain anti-competitive practices. This opinion led in 2008 to certain legislative changes intended to ensure the passing-on of back margins by retailers to consumers.

As a consequence of the repeal of the Groceries Order in March 2006, which banned the sales in Ireland of certain grocery goods below cost (where the cost benchmark was the net invoice price), the **Irish NCA** undertook a survey (grocery monitor report 2, of March 2008) to analyse price trends in the Irish grocery retail sector between 2001 and 2007. The repealed Order prohibited retailers from passing on to consumers substantial off invoice discounts they received from suppliers in relation to certain products (alcoholic drinks, bread and cereals, chocolate, confectionary, etc.). For grocery items not covered by the Groceries Order (typically fresh produce) retailers retained the ability to price more freely. Once the Groceries Order was removed, retailers were free to compete on the basis of price on the full set of grocery products. The report of the Irish NCA analysed how Groceries Order items and non-Groceries Order items behaved prior to the removal of the Order and following its repeal. It found that during the period immediately following the removal of the Groceries Order retailers undertook price adjustment across their range of grocery products. Once this adjustment had been achieved, the price trends for Groceries Order items and non-Groceries Order items began to behave similarly.

The **Belgian NCA**, in its market study on the level of prices in the supermarkets, of February 2012, called for a review of the national law which prohibits sales below cost in order to stimulate competition among retailers and benefit consumers which may acquire products at lower prices. Manufacturers would also benefit since retailers would sell their products applying reduced margins and under important advertising campaigns.

259. When assessing retail market structures, one aspect of common concern which has been raised by some NCAs (**Denmark, France, Ireland, Spain, UK**) is the existence of important **entry barriers to these markets** often resulting from regulatory and administrative constraints, such as **planning or zoning laws** or **ex ante administrative authorisations** required for the opening or extension of new outlets<sup>165</sup>. In general terms, these NCAs have advocated the **removal of such measures**, so as to facilitate the entry of new players and improve competition in particular in highly-concentrated local retail markets. The introduction of a **competition test** in grocery retail planning applications has also been suggested in some jurisdictions, such as the **UK**, in order to prevent strong retail incumbents from reducing competitors' incentives and ability to enter or extend in highly-concentrated local areas.

#### **Regulatory barriers to entry**

In its grocery monitor report 3 of July 2008, the **Irish NCA** found that the planning system in Ireland acted as a barrier to competition in grocery retailing by imposing restrictions on the size and the location of grocery retail outlets. The system also entailed uncertainty as regards planning permissions, which could raise costs and delay the arrival of new retail operators. To tackle these constraints, the report proposed a number of recommendations aimed at removing restrictions to entry and expansion in the retail sector. They included proposals to remove caps on grocery retail space and end the discrimination against discount retailers which were granted lower space caps. It was also recommended to introduce flexibility in the formulation by local authorities of projections of floor space requirements. An assessment of competition in health checks of local development plans should also be introduced by local authorities, as well as a change to reduce the importance that planning authorities apparently placed on trade diversion in the process of assessing an application for a new retail outlet. Consumers should also be formally surveyed regarding attitudes and preferences in relation to future floor space requirements. Further research should also be carried out to limit the grounds for appeals against planning decisions by competitors of the retail applicants. Some of these recommendations are currently considered in the on-going review of the retail planning guidelines in Ireland.

The **French NCA** – in its opinion 07-A-12 on the legislation on commercial planning of October 2007 – proposed to remove the system of authorisations based on economic criteria required for the opening or extension of commercial sites in France, insofar as it amounted to an entry barrier with negative effects on competition. The opinion led to a legislative change which removed the economic objectives as an element to be considered when authorising the opening or extension of new retail stores. This reform also lifted the requirement of prior authorisation for all establishments below 100 square metres, and revamped the composition of the committees which adjudicated on authorisations, so as to prevent applicants' competitors being involved in the final decision.

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<sup>165</sup> The existence of entry barriers to retail markets resulting from planning and zoning laws is an issue which has been raised in the framework of other market monitoring actions already mentioned.

In its report on the draft bill for the reform of the retail sector of May 2009, the **Spanish NCA** called for the abolition of the authorisation system required for the opening or extension of large stores in Spain. Alternatively, it advocated for introducing grounds of necessity and proportionality in the application of the system. A new law (Act 1/2010) abolished such regime, but maintained the possibility for regional governments to set up *ex ante* authorisations based on general interest and proportionality criteria.

In its sector inquiry on the supply of groceries, of April 2008, the **UK CC** also highlighted the planning regime as a barrier to entry or expansion in highly-concentrated retail local markets. It also proposed the introduction of a competition test within the planning system in order to assess competition in the applications for opening or extending new stores, and prevent the reinforcement of the position of retailers with already a strong presence in local areas. The Government is still considering this recommendation.

The **Danish NCA**, in its study on the retail sector of June 2011, also proposed an amendment of the Danish Planning Act. The Danish Planning Act sets limits for the size and location of retail outlets and hinders the establishment of hypermarkets. The retail sector in Denmark is characterised by the presence of smaller supermarkets with higher costs, higher retail prices and low productivity. An amendment of the Danish Planning Act could facilitate the establishment of hypermarkets by foreign retail chains, which would promote competition and productivity and hence lowering the prices, by replacing many of the smaller and medium-sized supermarkets. The impact of this proposed measure is currently under study at national level.

Barriers to entry resulting from regulatory restrictions in the retail sector were also identified by the **Spanish NCA** in its report on the commercial relations between suppliers and retailers in the food sector of October 2011. Such restrictions (which included regional authorisation regimes for opening large commercial establishments, restrictions on opening retail establishment on public holidays and outside certain trading hours and a general prohibition on below cost selling) made the entry of new operators with the ability to increase competitive pressure on incumbent retailers more difficult and restricted the development of alternative distribution models. They also contributed to strengthening the bargaining power of such retailers. In its report the Spanish NCA urged all competent public authorities to eliminate such restrictions and to implement the Services Directive correctly. In particular, it recommends removing the power of regional governments to make the opening of commercial establishments conditional upon any form of prior authorisation or permit; removing the restrictions on the freedom to set opening hours, opening on public holidays and sales periods; and repealing the general prohibition on below cost selling. The report also warned against the risk of a disruption of the internal market in Spain as a result of the proliferation of different regulations and codes of practice on commercial practices adopted by the regional governments. Since that may reduce the intensity of competition and remove efficiency and competitiveness in the Spanish food sector, the report urged public authorities to take competition criteria into account in these actions.

As regards the particular issue of the regulatory restrictions on opening hours, a few NCAs have also assessed the potential effects that an extension of these hours may have on final prices. That has been the case for instance of the **Belgian NCA** in its study on the level of prices in the supermarkets, of February 2012, in which it pointed out that it was unlikely that an extension of the opening hours of food retail outlets may contribute to a reduction of prices. To the contrary, it may probably create pressure for price increases to the

extent that the associated labour costs (higher in the evenings and weekends) would also increase.

260. A few NCAs have also identified entry barriers to retail markets resulting from specific **contracts which limit the use and availability of land suitable for retail sites** or other **contractual arrangements** (implemented by large incumbent retailer groups through different means, such as long-term affiliation or franchising contracts with independent retailers). These NCAs have recommended the introduction of modifications to such contracts and agreements to facilitate the entry of new players.

### **Contractual barriers to entry and switching**

In its inquiry on the groceries sector mentioned above, the **UK Competition Commission** raised objections against restrictive covenants and other exclusive arrangements that retailers could use to limit access by (potential and/or actual) competitors to land suitable for grocery stores in highly-concentrated local markets. Restrictive covenants are restrictions typically imposed on the sale of freehold land that limits the future use of the land. They are normally imposed on the sale of the freehold. In order to address the concerns above, the CC enacted the Controlled Land Order of August 2010 requiring retailers to release certain restrictive covenants and exclusive arrangements that restricted access by other retailers to potentially suitable land for grocery stores in areas where local competition was reduced.

In this context, it is also interesting to note that land agreements<sup>166</sup> in the UK were legally excluded from the application of domestic competition rules until early 2011. Following the recommendation of the groceries market inquiry and a consultation in January 2010, the Government decided that there was no justification for retaining a special exclusion from the UK Competition Act. Legislative changes were introduced to make this type of agreements subject to domestic competition rules as from April 2011 with no exception. The UK NCA published in March 2011 final guidance on the application of competition law to land agreements. The UK NCA noted that it expects that only a minority of land agreements will infringe domestic competition rules. Moreover, there is no presumption that a restriction in a land agreement will infringe competition law. The guidance seeks to provide greater clarity about the types of restrictions that are most likely to give rise to competition concerns.

In the opinion 10-A-26 of December 2010, the **French NCA** analysed the position of independent retailers which are members to retail co-operatives or are affiliated to an integrated retail group through a franchising agreement. It found that these retailers were often bound to retail groups by numerous agreements (such as franchising contracts, supply agreements or leasing contracts) with an excessive duration, which in certain cases may be of up to thirty years. In order to favour inter-brand mobility among such retailers, the opinion recommended certain changes to these types of contract (for instance, to limit their duration to a maximum of five years). The opinion also contained

<sup>166</sup> Land agreements are defined as agreements between businesses which create, alter, transfer or terminate an interest in land, thus including situations where two businesses enter into a lease agreement, or where one business sells property to another business. In either situation, one party may impose a restriction on the way in which land may be used, or how a right over land may be exercised.



recommendations regarding certain practices applied by large retailers which had the effect of limiting the availability of land suitable for new stores. These practices included obligations imposed by incumbent retailers on buyers of land or sites not to engage in retail activities, or options to re-acquire a land site if it was likely to be sold to another competing company. A draft bill currently under examination has incorporated certain of these recommendations with the aim of fostering more competition in the retail sector.

261. In situations of a high degree of concentration of local retail markets a few NCAs have recommended, in addition to the removal of entry barriers, **further regulatory instruments intended to modify the structure of such markets**. These instruments would include the possibility to activate structural remedies which would oblige incumbent retailers to sell part of their retail outlets to competitors.

#### **Structural remedies to modify the structure of retail markets**

This was the conclusion of the **French NCA** in its Opinion 12-A-01, of January 2012, on the food retail sector in Paris. The opinion analysed the structure of the food retail market in the city of Paris and concluded that it was characterised by a significantly degree of concentration, where the leading retailer (Casino group) had a market share above 60% (in terms of sales surface). This percentage was three times higher than the market share of its main competitor (Carrefour). In terms of value, it was also found that the market share of the Casino group was between 50%-70% in Paris.

The French NCA concluded that the removal of the existing entry barriers (by repealing for instance the obligation to obtain an administrative authorisation to open retail outlets above 1000 m<sup>2</sup> and by making the franchising conditions of the independent retailers members of the Casino group more flexible to switch to other competing retail networks) were not sufficient to overcome the obstacle to competition resulting from the dominant position of this group in the food retail market in Paris. Given that the current legal system in France empowers the French NCA to impose structural remedies under very strict conditions (i.e. acknowledgement of an abuse of a dominant position or of a situation economic dependence and persistence of such abuse despite a sanctioning decision), the French NCA recommended the introduction of legal instruments which would facilitate the application of such structural remedies by imposing on dominant incumbent companies the obligation to sell part of their assets (retail outlets) to competitors. The exercise of these powers should be made in the framework of a contradictory procedure where companies would be granted legal safeguards to preserve their rights of defence.

262. A few NCAs have also pointed out the existence of **barriers to exit** as an element which may have a negative impact on competition if such barriers contribute to mainlining inefficient incumbent retailers operative in the retail sector.

#### **Barriers to exit**

The existence of barriers to exit the retail sector was pointed out by the **Belgian NCA** in its study on the level of prices in supermarkets, of February 2012. These barriers may contribute to maintaining operative or prevent the

restructuring of inefficient incumbent retailers. Given their high cost structures, these retailers cannot engage in aggressive pricing policies which may facilitate a reduction of their end-consumer prices. As a result of this, they may also have a negative effect on the commercial policies of more efficient competing retailers, which would not have an interest on lowering down significantly their own prices. The Belgian NCA identified certain elements which may render the exit or restructuring of retailers more difficult in Belgium than in other countries, such as social laws which may make the restructuring process costly. The contractual difficulties to exit a retail franchising network by independent retailers in order to switch to competing networks was also singled out as a factor to take into account.

## 4.7. Other sectors and issues subject to monitoring investigations

263. Other sectors subject to monitoring investigations by the NCAs included a wide range of agriculture and food products such as, among others, **sunflower seeds and oil, alcoholic drinks** (in particular, **beer** and **wine**), **soft drinks, sugar, fisheries, spices, baby food, and pork meat**. Specific regional or local geographic markets or particular competition issues have also been investigated by a few NCAs included in this general category. A number of **28 monitoring actions** were carried out (5 of which are on-going) in **Bulgaria, Czech Republic, Estonia, France (7), Latvia (2), Netherlands, Poland (9), Spain (5)** and **UK**.

**Table 22**  
**Market monitoring in other food sectors**

NCAs	Name	Publication date
<b>Bulgaria</b>	Sector inquiry on the production and trade of sunflower seeds and oil	On-going
<b>Czech Rep.</b>	Sector inquiry on on-trade market for soft drinks	December 2008
<b>Estonia</b>	Market study on the sugar sector	November 2011
<b>France</b>	Opinion 06-A-07 on the operating conditions of the fair trade sector in France	March 2006
	Opinion 07-A-04 on the possibility to restrict the use of certain intermediate products to producers of a quality agriculture or food chain	June 2007
	Opinion 09-A-45 on import and distribution mechanisms of daily consumer goods in the overseas departments	September 2009
	Opinion 11-A-03 on an inter-branch agreement in the ovine sector	February 2011
	Opinion 11-A-11 on the methods for negotiating contracts in the livestock sectors in the context of price volatility of agriculture raw materials	July 2011
	Opinion 11-A-12 on an inter-branch agreement in the turkey sector	July 2011
	Opinion 11-A-14 on an inter-branch agreement in the wine sector	September 2011
<b>Latvia</b>	Sector inquiry on brewing and distribution markets	2009
	Sector inquiry on the sugar distribution market	2010
<b>Netherlands</b>	Study on the Dutch fisheries sector	February 2012

<b>Poland</b>	Survey on the competition and concentration of the beer production market in the regions of Lubelskie and Podlaskie Voivodships (NUTS 2 regions)	July 2006
	Study on the Polish market for spices	October 2006
	Study on the competition and concentration of the national market for mineral water	October 2006
	Study on competition and concentration of the wine production market	November 2006
	Survey on the competition and concentration of the mineral water market in the regions of Lubelskie and Podlaskie Voivodships (NUTS 2 regions)	November 2006
	Study on the competition and concentration of the national market for ice cream	April 2007
	Study on the pork market with focus on the procurement of live pigs	November 2010
	Study on baby food market	On-going
	Study on the beer market with particular emphasis on the HoReCa distribution channel	On-going
<b>Spain</b>	Report on the certification of quality and safety standards	July 2010
	Report on the draft Bill on the quality of agro-food products	October 2010
	Report on the draft ministerial order to extend olive oil withdrawal	November 2011
	[ ]	On-going
	[ ]	On-going
<b>UK</b>	Inquiry on the supply of beer in the UK pubs	October 2010

264. In general terms, the issues mostly investigated concerned **price formation and market structures** as regards specific products.

### Prices and market structures

In its sector inquiry of 2009, on brewing and distribution markets, the **Latvian NCA** analysed the major increase in beer supply prices between January 2006 and January 2009. It found that this increase was mainly due to increases in the prices of major beer ingredients and of import prices. The **UK NCA** also carried out an inquiry on the supply of beer in the UK in 2010 further to a complaint which alleged, among other matters, foreclosure of tied outlets to suppliers unable to access them directly; excessive wholesale prices paid by tied pubs for beer and other tied drinks and excessive levels of rent paid by tied lessees, and barriers to entry at the retail level. The UK NCA concluded that the pub sector in the UK is competitive overall and did not find evidence of competition problems that were having a significant adverse impact on consumers.

The **Latvian NCA** also undertook a sector inquiry on the sugar distribution market in 2010. This market was characterised by the absence of local producers and a dependence of imports, which had led to high prices for industry and consumers in Latvia. The presence of a quota system that limited the number of producers also had an impact on the situation in Latvia, and resulted in demand being higher than local supply. A market study in the sugar sector was also published in November 2011 by the **Estonian NCA** in order to

analyse sugar price formation and the obstacles that hinder sugar supply from other countries to Estonia. The study also focused on the issue of how the specific market mechanisms (production quotas) influence the sugar price in Estonia. It concluded that such high prices, rather than resulting from potential anti-competitive agreements (a fact which was not established), were originated by the limited supplies arising from the quota system under the legal framework applicable to the sugar sector.

The sector inquiry carried out by the **Czech NCA** in December 2008 into the on-trade market for soft drinks examined the HoReCa distribution channel in order to determine whether exclusive contracts and parallel networks of similar vertical agreements resulted in foreclosure effects. No evidence of distortion of competition was found as regards these practices. However, the inquiry led to the opening of two infringement proceedings against producers and distributors of soft drinks for vertical agreements on resale price maintenance and export prohibitions.

The study of April 2007 on the market for ice cream undertaken by the **Polish NCA** also focused on the analysis of potential anti-competitive practices having a negative impact on prices of ice creams. It revealed the existence of a restrictive agreement on resale price maintenance between one of the largest manufacturers of ice creams in Poland and a retail chain. This case terminated with the imposition of fines on both companies.

265. In other cases, a few NCAs have conducted monitoring actions regarding very specific geographic markets within their territories.

#### **Specific geographic markets**

Such has been the case of the **Polish NCA** which undertook two studies in July 2006 and November 2006 on the local markets of beer and mineral water in the regions of Lubelskie and Podlaskie Voivodships (NUTS 2 regions).

Also, the **French NCA** provided the opinion 09-A-45 in September 2009 on import and distribution mechanisms of daily consumer goods in the French overseas departments. It found that the small size of the markets and their distance from the main procurement sources were natural obstacles to securing prices comparable to prices in mainland France. A special tax (i.e. dock dues) collected by the local and regional administrations on imports also increased sale prices for consumers in the overseas departments. However, the French NCA also found that these specificities were insufficient to explain the high price discrepancies for consumer goods between mainland France and the overseas departments (for certain products reaching up to 55%). The French NCA identified certain particularities of the procurement circuits of the overseas markets that allowed operators to partially avoid competition, such as the uncompetitive structure of food retail distribution sector in these markets. The sector was protected by specific entry barriers (e.g. length of the logistics circuits towards the overseas territories, scarcity and high prices of commercial real estate) and was characterised by high concentration levels. The importers-wholesalers were also protected from competition pressure to the extent that they benefited from territorial exclusivity granted by manufacturers. The French NCA proposed several recommendations to promote a more competitive structure of the markets, such as curbing anti-competitive practices which had been detected (e.g. resale price maintenance, horizontal agreements,

exclusivity arrangements and restrictions of parallel trade), removing regulatory entry barriers, improving consumer information on prices, pooling the logistics circuits with mainland France by creating regional procurement and storage centres, and reviewing the assistance measures for local companies.

266. Certain national monitoring actions have also focused on the analysis of the compatibility with competition rules or the impact on competition of specific practices or agreements, notably at the request of interested stakeholders or public authorities.

### **Specific practices or agreements**

For instance, the opinion 06-A-07, of March 2006, of the **French NCA** on the fair trade sector in France assessed the conditions under which fair trade mechanisms may or may not be compatible with competition rules. These mechanisms are based on the payment to disadvantaged foreign producers (located in developing countries) of a price high enough to improve local living and production conditions. The French NCA concluded that the existence of minimum purchase pricing grids did not create in principle any restrictions of competition prohibited under EU or French competition rules. Even though the system obliged their adherents to respect, where appropriate, standardised purchasing conditions with producers in developing countries, the French NCA found that the object and effects of these agreements, in the current state of development and organisation of the fair trade sector, were mainly applied overseas and therefore fell outside the jurisdiction of EU and French competition rules. It also pointed out that at the downstream level (transformation and marketing stages), fair trade players remained free to compete on prices, even though the costs for raw materials were approximately the same for all operators. Additionally, it noted that this cost represented a relatively small percentage of the total cost of the finished product. However, it alerted that this assessment could change if, for instance, the market share of fair trade products were to develop significantly. If such was the case, it would be necessary to examine whether the system could benefit from an exemption under EU or French competition law. The French NCA also pointed that the different fair trade certification systems should operate in a competitive way. That would ensure competition not only among the different existing fair trade agencies themselves but also downstream among retailers when selling fair trade products.

In a report on the certification of quality and safety standards, of July 2010, the **Spanish NCA** also analysed the competitive structures of the certification systems for wine designations of origin in Spain. The report found that the certification of quality and safety standards play an important role in the economy, since it provides assurance that products and services conform to certain standards and specifications. Such is the case in particular of the certification of the product specifications for wine designations of origin. These specifications are voluntary quality standards which set down the parameters that must be satisfied by a wine in order for it to qualify for a designation of origin. Among other proposals, the report recommended that the activity of certification of wine product specifications should be carried out under market-based criteria which would allow certifying agencies to compete among themselves to provide such services. The report also alerted against the risks for competition arising from the system in which the sectorial organisations

which participate in the determination of the product specifications are also entrusted with the certification functions of such specifications. In a report of November 2011 the **Spanish NCA** also analysed a draft ministerial order, driven by the IBO in the sector of olive oil in Spain, which intended to extend a mechanism to withdraw olive oil from the market until 2014. Although the purported goal was the improvement of the quality of olive oil based on CAP norms, the Spanish NCA found that the CAP does not cover these kinds of agreements whose real objective was to reduce supply in order to increase prices. The opinion of the Spanish NCA was fully considered and the draft ministerial order was set aside.

The **French NCA** analysed in its opinion 07-A-04, of June 2007 the compatibility under competition rules of the possibility to restrict the use of certain intermediate products only for producers of specific agriculture quality products. This opinion was rendered in the context of assessing under competition rules whether the quality poultry farmers of the region of Bresse (which benefited from a specific agriculture quality label) could restrict the distribution to third parties of chicks bred and selected for the production of this quality labelled poultry in order to avoid confusion with other types of poultry. The French NCA concluded that the distribution of an intermediate farm or breed product (for instance chicks) only to the producers of an agriculture product having a quality label may be compatible with competition rules, notably if the distribution to third parties would jeopardise the quality label.

267. A few NCAs have also provided guidance as to how certain measures designed by public authorities to tackle structural problems of the agro-food sector (such as the imbalances of bargaining power between market players or the high volatility of prices of agricultural products) should be implemented in accordance with competition rules and principles. In line with opinions provided in relation to other food sectors (such as milk, see Section 4.3 above), that has been the case for instance of the use of standard written contracts as a means to formalise the commercial relations between the actors of the chain. The assessment undertaken by these NCAs has taken place in cases in which the use of standard contracts has been promoted or encouraged by public authorities or by agriculture organisations empowered to draw up this type of contracts, such as IBOs.

#### **Promotion of standard written contracts**

In a report on the draft bill on the quality of agro-food products, of October 2010, the **Spanish NCA** raised objections to certain regulatory measures proposed in the draft bill, given the anti-competitive effects that they might entail. The measures in question would have allowed farmers to engage in price-fixing agreements and allow market operators to use price indexes in standard contracts. In this context, the report recalled that competition principles apply in the agro-food sector.

In an opinion 11-A-03, of February 2011, the **French NCA** assessed an agreement concluded by the French IBO active in the ovine sector. This agreement determined certain standard contractual aspects (regarding price determination, deliveries, duration, or review of contractual terms) to be incorporated in the individual supply contracts between breeding farms and their buyers. In line with prior opinions, it concluded that that any use of

standard written contracts should not lead to price recommendations in the framework of an IBO.

The need to protect the freedom of the parties to negotiate prices was also recalled in two subsequent opinions (opinions 11-A-11 and 11-A-12, both of July 2011), in which the French NCA analysed the possibility to insert price review clauses and "price smoothing" clauses in the contracts among the operators of the livestock sector (breeders, processors and distributors). These clauses were intended means to adjust prices and take account of price fluctuations in markets for agriculture raw materials in the framework of the commercial relations of the parties. The French NCA recalled that prices had to be freely agreed between the parties according to their specific costs. If such prices had to be indexed or adjusted according to this type of clauses, the parties could not make use of potential reference values which IBOs may publish, since that would be equivalent to instructions given by these organisations on the determination of one key element related to production costs. IBOs can only publish price indexes provided that they refer to past, anonymous and sufficiently aggregated data. These principles were repeated by the French NCA in two subsequent opinions of July 2011 (opinion 11-A-12 on a standard contract drawn up by an IBO in the turkey sector) and of September 2011 (opinion 11-A-14 regarding a standard contract drawn up by an IBO in the wine sector).

## 5. ANNEXES<sup>167</sup>

### 5.1. List of Cases

#### AUSTRIA

Product	Level of chain	Legal basis	Infringement	Remedies/fine	Status
Cereals (corn)	Primary production	National	Vertical, abuse	Commitments	Closed March 2008
Alcoholic drinks (beer)	Manufacturing	EU and national	Horizontal, vertical	N/A	Pending <sup>168</sup>
[ ]	Manufacturing	EU and national	Abuse	N/A	Pending
Sugar	Processing	EU and national	Horizontal	N/A	Pending

#### BELGIUM

Product	Level of chain	Legal basis	Infringement	Remedies/fine	Status
[ ]	[ ]	EU and national	Horizontal	N/A	Pending
Cereals (bread)	Manufacturing	National	Horizontal	Fines	Closed 25/01/2008 <sup>169</sup>
Fruits and vegetables (auctions)	Agricultural wholesale	EU and national	Horizontal	N/A	Pending
Carbonated soft drinks	Manufacturing	EU and national	Abuse	Commitments	Closed 30/11/2005

#### BULGARIA

Product	Level of chain	Legal basis	Infringement	Remedies/fine	Status
Cereals (bread)	Manufacturing	National	Horizontal	Fine	Closed 22/07/2008 <sup>170</sup>
Dairy (cheese)	Processing	National	Horizontal	Fines	Closed 24/07/2008

<sup>167</sup> Confidential information on pending cases and market monitoring actions has been replaced by square brackets [ ].

<sup>168</sup> In February 2012, the Austrian Cartel Court imposed fines on the companies under investigation.

<sup>169</sup> The decision is under appeal.

<sup>170</sup> The decision was appealed and partially upheld.



Poultry and eggs	Primary production	National	Horizontal	Fines	Closed 17/07/2008
Carbonated soft drinks	Groceries wholesale	National	Abuse	Fines	Closed 11/11/2008
Sunflower seed and oil	Processing	National	Horizontal	Fines	Closed 27/12/2007
Food and consumer goods retailing	Retail	National	Horizontal	N/A	Pending

## CYPRUS

Product	Level of chain	Legal basis	Infringement	Remedies/fine	Status
Raw cow milk, fresh pasteurised cow milk	Primary production	National	Horizontal, vertical	N/A	Pending
Raw milk	Primary production	National <sup>171</sup>	Abuse	None	Closed 09/12/2008
Raw milk	Primary production	National <sup>172</sup>	Abuse	N/A	Pending
Potatoes	Agricultural wholesale	National	Abuse	Fines	Closed 16/12/2004

## CZECH REPUBLIC

Product	Level of chain	Legal basis	Infringement	Remedies/fine	Status
Cereals (pastry and bread)	Manufacturing	National	Horizontal	Fines	Closed 02/02/2009
Poultry	Primary production	National	Horizontal	Fines	Closed 23/5/2011
Soft drinks and water	Groceries wholesale	EU and national law	Vertical	Commitments and fines	Closed December 2009
Soft drinks	Groceries wholesale	National	Vertical	Fines	Closed July 2008
Food retail	Retail	National (Act on Significant Market Power) <sup>173</sup>	Abuse of significant market power	Fines	Closed 2011 <sup>174</sup>

<sup>171</sup> Case decided on national law stricter than Article 102 TFEU.

<sup>172</sup> Case decided on national law stricter than Article 102 TFEU.

<sup>173</sup> All 5 cases mentioned under the Act on Significant Market Power refer to cases in which national rules stricter than Art. 102 TFEU were applied. They concern abuses of significant market power different from abuses of dominant position.

Food retail	Retail	National (Act on Significant Market Power)	Abuse of significant market power	Commitments	Closed 2011
Food retail	Retail	National (Act on Significant Market Power)	Abuse of significant market power	N/A	Pending
Food retail	Retail	National (Act on Significant Market Power)	Abuse of significant market power	N/A	Pending
Food retail	Retail	National (Act on Significant Market Power)	Abuse of significant market power	N/A	Pending

## **DENMARK**

<b>Product</b>	<b>Level of chain</b>	<b>Legal basis</b>	<b>Infringement</b>	<b>Remedies/fine</b>	<b>Status</b>
Milk	Processing	National	Abuse	Fines	Closed 10/02/2006
Food retail	Groceries wholesale	National	Vertical	Commitments	Closed 30/08/2007
Beer	Groceries wholesale	EU and national	Vertical and Abuse	Commitments	Closed 2005
Beer	Groceries wholesale	EU and national	Vertical and Abuse	Commitments	Closed 2008

## **ESTONIA**

<b>Product</b>	<b>Level of chain</b>	<b>Legal basis</b>	<b>Infringement</b>	<b>Remedies/fine</b>	<b>Status</b>
Cereals (flour)	Processing	National	Horizontal	N/A	Pending
Bread	Manufacturing	National	Horizontal	N/A	Pending
Milk	Processing	National	Horizontal and vertical	N/A	Pending

<sup>174</sup> The decision has been appealed.

## EUROPEAN COMMISSION

Product	Level of chain	Legal basis	Infringement	Remedies/fine	Status
Beer	Manufacturing	EU	Horizontal	Fines	Closed 29/09/2004
Carbonated soft drinks	Manufacturing	EU	Abuse	Commitments	Closed 22/06/2005
Beer	Manufacturing	EU	Horizontal	Fines	Closed 18/04/2007 <sup>175</sup>
Bananas	Agricultural wholesale	EU	Horizontal	Fines	Closed 15/10/2008
Exotic fruits (bananas)	Agricultural wholesale	EU	Horizontal	Fines	Closed 12/10/2011 <sup>176</sup>
Shrimps	Primary production	EU	Horizontal	N/A	Pending

## FINLAND

Product	Level of chain	Legal basis	Infringement	Remedies/fine	Status
Malting barley	Processing	National	Horizontal	N/A	Closed 2005
Milk	Processing	EU and national	Abuse	N/A	Pending
Food retail	Retail	National	Horizontal and vertical	Fines	Closed 2005
Food retail	Retail	EU and national	Horizontal	N/A	Closed 2008

## FRANCE

Product	Level of chain	Legal basis	Infringement	Remedies/fine	Status
Bread	Manufacturing	National	Horizontal	Fines	Closed 12/03/2004
Cereals	Primary production	National	Horizontal	Fines	Closed 09/05/2007
Cereals (flour)	Processing	EU and national	Horizontal	N/A	Pending <sup>177</sup>
Fruits and vegetables	Primary production	EU and national	Horizontal	N/A	Pending <sup>178</sup>

<sup>175</sup> The decision was partially annulled by the EU General Court in so far as it concerned one undertaking.

<sup>176</sup> The decision is under appeal before the EU General Court.

<sup>177</sup> The investigation resulted in a fines decision issued on 13 March 2012.

<sup>178</sup> The investigation was concluded with a fining decision in March 2012.

(chicory)					
Fruits and vegetables (cauliflower)	Groceries wholesale	EU and national	Horizontal	Fines	Closed 15/03/2005
Beef	Processing	National	Horizontal	Fines	Closed 03/08/2004
Chocolate	Processing	EU and National	Vertical	Fines	Closed 24/07/2007
[ ]	Agricultural wholesale	EU and national	Horizontal	N/A	Pending
[ ]	Retail	EU	Abuse	N/A	Pending
Food retail	Retail	National	Abuse	N/A	Pending <sup>179</sup>
[ ]	Retail	National	Abuse	N/A	Pending
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]

## GERMANY

Product	Level of chain	Legal basis	Infringement	Remedies/fine	Status
Durum wheat	Processing	EU and national	Horizontal	N/A	Pending
Flour	Processing	EU and national	Horizontal	N/A	Pending
Milk	Primary production	National	Abuse (boycott)	Prohibition decision	Closed 2008
Branded consumer goods	Manufacturing	EU and national	Horizontal	Fines	Pending for one undertaking. Otherwise, closed 2011
Meat products	Processing	EU and national	Horizontal	N/A	Pending
Coffee	Processing	EU and national	Horizontal	Fines	Closed 2010 <sup>180</sup>
Coffee	Processing	EU and national	Horizontal	Fines	Closed 2009 <sup>181</sup>
Coffee	Processing	EU and national	Horizontal	Fines	Closed 2011 <sup>182</sup>
Coffee	Retail	EU and national	Vertical	N/A	Pending
Sugar	Processing	EU and national	Horizontal	N/A	Pending
Chocolate and sugar confectionery	Processing	EU and national	Horizontal	N/A	Pending
Candies	Retail	EU and national	Vertical	N/A	Pending

<sup>179</sup> The investigation was closed with commitments in December 2011.

<sup>180</sup> 2 fining decisions were appealed in this case.

<sup>181</sup> 2 fining decisions were appealed in this case.

<sup>182</sup> One fining decision was appealed in this case.

Food retail	Retail	National	Vertical	N/A	Pending
Beer	Retail	EU and national	Vertical	N/A	Pending

## GREECE

Product	Level of chain	Legal basis	Infringement	Remedies/fine	Status
Flour	Processing	EU and national	Horizontal	Commitments	Closed 09/2010
[ ]	Processing	EU and national	Horizontal	N/A	Pending
[ ]	Processing	EU and national	Horizontal, vertical, abuse	N/A	Pending
Milk and dairy	Processing	EU and national	Horizontal	Fines	Closed 29/11/2007 <sup>183</sup>
Milk and dairy	Processing	EU and national	Vertical	Fines	Closed 19/12/2007 <sup>184</sup>
[ ]	Groceries wholesale	EU and national	Vertical, abuse	N/A	Pending
Supermarkets (Dia Hellas)	Retail	EU and national	Vertical	Fines	Closed 22/05/2008
Supermarkets (Carrefour)	Retail	EU and national	Vertical	Fines	Closed 6/7/2010
Supermarkets (Sesme)	Retail	EU and national	Horizontal	Fines	Closed 2005
Canned peaches	Processing	EU and national	Horizontal	Fines	Closed 07/07/2006
Frozen vegetables	Groceries wholesale	EU and national	Abuse, vertical	Fines	Closed 20/03/2008
Fruits & vegetables (fresh goods)	Agricultural wholesale	EU and national	Abuse	Commitments	Closed 19/03/2009
[ ]	Production	EU and national	Horizontal	N/A	Pending
Instant coffee	Processing	EU and national	Vertical, abuse	Fines	Closed 12/02/2009 <sup>185</sup>
Soft drinks	Manufacturing	EU and national	Abuse	Fines	Closed 13/06/2006
[ ]	Retail	EU and national	Vertical, abuse	N/A	Pending
Fish	Production	EU and national	Horizontal	Fines	Closed 23/06/2010 <sup>186</sup>

<sup>183</sup> The decision is under appeal.

<sup>184</sup> The decision is under appeal.

<sup>185</sup> The decision is under appeal.

<sup>186</sup> The decision is under appeal.

Savoury / Salty snacks	Retail	EU and national	Abuse, vertical	Fines	Closed 05/05/2011
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## HUNGARY

Product	Level of chain	Legal basis	Infringement	Remedies/fine	Status
Cereals (stocks of grain)	Processing	EU and national	Horizontal	N/A	Pending
Cereals (wheat mill products)	Processing	EU and national	Horizontal	Fines	Closed 28/10/2010 <sup>187</sup>
Food retail	Retail	National (National Trade Act) <sup>188</sup>	Abuse of significant market power	Commitments	Closed 12/10/2010
Food retail	Retail	National (National Trade Act)	Abuse of significant market power	Commitments	Closed 14/07/2010
Food retail	Retail	National (National Trade Act)	Abuse of significant market power	Commitments	Closed 05/07/2010
Food retail	Retail	National (National Trade Act)	Abuse of significant market power	Commitments	Closed 21/12/2008
Food retail	Retail	National (National Trade Act)	Abuse of significant market power	N/A	Pending
Alcoholic drinks (beer)	Retail	EU and national	Vertical	Commitments	Closed 16/05/2008
Coffee and tea	Groceries wholesale	EU and national	Vertical	Commitments	Closed 02/04/2007
Sugar	Processing	EU and national	Horizontal	N/A	Pending
Eggs	Primary production	EU and national	Horizontal	Fines	Closed 30/11/2006

## IRELAND

Product	Level of chain	Legal basis	Infringement	Remedies/fine	Status
Meat (Irish beef)	Processing	EU	Horizontal	N/A	Closed January 2011

<sup>187</sup> The decision is under appeal.

<sup>188</sup> All 5 cases mentioned under the National Trade Act refer to cases in which national rules stricter than Art. 102 TFEU were applied. They concern abuses of significant market power different from abuses of dominant position.

Milk	Retail	National	Vertical, horizontal	N/A	Pending
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## ITALY

Product	Level of chain	Legal basis	Infringement	Remedies/fine	Status
Pasta	Manufacturing	EU	Horizontal	Fines	Closed 2009
Bread	Manufacturing	National	Horizontal	Fines	Closed 2008
Food retail	Retail	National	Abuse	N/A	Pending
Food retail	Retail	National	Abuse	N/A	Pending

## LATVIA

Product	Level of chain	Legal basis	Infringement	Remedies/fine	Status
Flour	Processing	EU and national	Horizontal	N/A	Pending
Bread	Processing	National	Horizontal	Fines	Closed 2006
Daily consumer goods	Retail	National <sup>189</sup>	Abuse	Fines	Closed 2010
Daily consumer goods	Retail	National <sup>190</sup>	Abuse	Fines	Closed 2011
Daily consumer goods	Retail	National <sup>191</sup>	Abuse	N/A	Closed 2011
Retail space	Retail	National	Vertical	Fines	Closed 2011
Alcohol	Groceries wholesale	National	Vertical	Fines	Closed 2008
Eggs	Primary production	National	Horizontal	Fines	Closed 2004
Eggs	Primary production	National	Horizontal	Fines	Closed 2009 <sup>192</sup>
Sugar	Processing	National	Vertical	Fines	Closed 2004

<sup>189</sup> Case decided under national rules stricter than Art. 102 TFEU.

<sup>190</sup> Case decided under national rules stricter than Art. 102 TFEU.

<sup>191</sup> Case decided under national rules stricter than Art. 102 TFEU.

<sup>192</sup> The decision is under appeal.

## LITHUANIA

Product	Level of chain	Legal basis	Infringement	Remedies/fine	Status
Milk	Processing	National	Horizontal	Fines	Closed in 2008 Additional investigation closed in 2011 <sup>193</sup>
[ ]	Groceries wholesale	EU and National	Horizontal and vertical	N/A	Pending

## MALTA

Product	Level of chain	Legal basis	Infringement	Remedies/fine	Status
Poultry	Primary production	National	Horizontal	N/A	Closed 20/03/2006
Supermarkets (consumer goods)	Retail	National	Horizontal	Commitments	Closed 29/11/2004
[ ]	Groceries wholesale	National	Abuse	N/A	Pending

## NETHERLANDS

Product	Level of chain	Legal basis	Infringement	Remedies/fine	Status
Flour	Processing	EU	Horizontal	Fines	Closed 2010
Bell peppers	Agricultural wholesale	EU	Horizontal	N/A	Pending
[ ]	Primary production	EU	Horizontal	N/A	Pending
[ ]	Primary production	EU	Horizontal	N/A	Pending
North sea shrimp	Primary production	EU	Horizontal	Fines	Closed 2003

## POLAND

Product	Level of chain	Legal basis	Infringement	Remedies/fine	Status
Others (bakery yeast)	Processing	National	Vertical	Fines	Closed 29/12/2006

<sup>193</sup> The decision is under appeal.



Market space for agricultural products	Agricultural wholesale	National	Abuse	N/A	Closed 10/09/2006
Vegetables	Primary production	National	Horizontal	Fine	Closed 28/08/2009
Ice cream	Groceries wholesale	National	Vertical	Fine	Closed 31/12/2008

## **PORTUGAL**

<b>Product</b>	<b>Level of chain</b>	<b>Legal basis</b>	<b>Infringement</b>	<b>Remedies/fine</b>	<b>Status</b>
Cereals (flour)	Processing	National	Horizontal	Fines	Pending <sup>194</sup>
Cereals (bread)	Manufacturing	National	Horizontal	Fines	Closed 02/02/2008 <sup>195</sup>
[ ]	Groceries wholesale	EU and national	Horizontal	N/A	Pending
Ice cream	Groceries wholesale	National	Abuse, vertical	Commitments	Closed 07/08/2000
Fruits and vegetables (tomatoes)	Agricultural wholesale	EU and National	Abuse	Commitments	Closed 07/10/2009
Coffee	Processing	National	Vertical	Commitments	Closed 29/05/2008
Coffee	Processing	National	Vertical	Commitments	Closed 29/05/2008
Coffee	Processing	National	Vertical	Commitments	Closed 29/05/2008
Coffee	Processing	National	Vertical	Commitments	Closed 29/05/2008
[ ]	Groceries wholesale	EU and National	Vertical, abuse	N/A	Pending
Others (salt)	Groceries wholesale	EU and National	Horizontal	Fines	Closed 06/07/2006
Catering	Retail	National	Horizontal	N/A	Pending at Court
[ ]	Retail	National	Vertical	N/A	Pending

<sup>194</sup> The case is still pending on procedural grounds.

<sup>195</sup> The decision is under appeal.

## ROMANIA

Product	Level of chain	Legal basis	Infringement	Remedies/fine	Status
Cereals (wheat)	Agricultural wholesaler	National	Horizontal	Fines	Closed 12/07/2009
Chewing gum and sugar based products	Groceries wholesale	National	Vertical	Fines and commitments	Closed 19/12/2005
Fruits and vegetables	Retail	National	Vertical	Fines	Closed 05/2011
Food products (Metro Group)	Retail	EU and national	Vertical	N/A	Pending
Food products (Mega image)	Retail	EU and national	Vertical	N/A	Pending
Food products (Rewe)	Retail	EU and national	Vertical	N/A	Pending
Food products (Interex)	Retail	EU and national	Vertical	N/A	Pending
Baked goods	Manufacturing	National	Vertical	N/A	Pending
Bread	Manufacturing	National	Horizontal	Fines	Closed 12/07/2009
Bread	Manufacturing	National	Horizontal	Fines	Closed 12/07/2009

## SLOVAKIA

Product	Level of chain	Legal basis	Infringement	Remedies/fine	Status
Cereals (bakery products)	Manufacturing	National	Horizontal, vertical	Fine	Closed 27/04/2007
Fat hogs	Primary production	National	Horizontal	Fine	Closed 01/07/2005
Beer (Heineken)	Manufacturing	EU and national	Vertical	None	Closed 10/2007
Beer (Pivovary)	Manufacturing	EU and national	Vertical	None	Closed 08/2008

## SLOVENIA

Product	Level of chain	Legal basis	Infringement	Remedies/fine	Status
Supermarkets (procurement markets)	Retail	EU and national	Abuse	Commitments	Closed 26/06/2009
Supermarkets (procurement markets)	Retail	EU and national	Vertical, horizontal	Commitments	Closed 07/05/2009

## SPAIN

Product	Level of chain	Legal basis	Infringement	Remedies/ fine	Status
Cereals (bread, pastry and pasta)	Manufacturing	National	Horizontal	Fine	Closed 24/09/2009
Cereals (bread)	Manufacturing	National	Horizontal	Fine	Closed 18/07/2006
Cereals (bread)	Manufacturing	National	Horizontal	Fine	Closed 18/10/2006
Alcoholic drinks (wine)	Manufacturing	EU and national	Horizontal	Fine	Closed 04/06/2009
Alcoholic drinks (wine)	Manufacturing	EU and national	Horizontal	Fine	Closed 28/07/2010
Alcoholic drinks (wine)	Manufacturing	EU and national	Horizontal	Fine	Closed 06/10/2011
Alcoholic drinks (wine)	Manufacturing	EU and national	Horizontal	N/A	Pending
Vegetables	Primary production	EU and national	Horizontal	N/A	Pending <sup>196</sup>
Fruits	Agricultural wholesale	EU and national	Vertical	N/A	Pending
Poultry meat	Primary Production	National	Horizontal	Fine	Closed 29/09/2009
Eggs	Processing	National	Horizontal	Fine	Closed 28/09/2009
Meat	Processing	National	Horizontal	N/A	Pending
Seafood (mussels)	Primary production	EU and national	Horizontal	Fine	Closed 26/04/2011
Seafood (canned fish)	Processing	National	Horizontal	Fine	Closed 31/03/2011
Seafood (canned fish)	Processing	EU and National	Horizontal	N/A	Pending
Others (sunflower)	Processing	EU and national	Vertical	Commitments	Closed 13/09/2010

<sup>196</sup> The Spanish NCA imposed fines in a decision of 14 December 2011.

seeds)					
Others (food and beverages)	Groceries wholesale	National	Horizontal	Fine	Closed 14/10/2009
Others (oil)	Manufacturing	EU and national	Vertical, horizontal	Fine	Closed 21/06/2007

## **SWEDEN**

<b>Product</b>	<b>Level of chain</b>	<b>Legal basis</b>	<b>Infringement</b>	<b>Remedies/fine</b>	<b>Status</b>
Raw milk	Processing	National	Abuse	Voluntary change of regulation	Closed 31/03/2010
Retail/ Convenience stores	Retail	National	Vertical	Change of cash register system	Closed 26/02/2006

## **UK**

<b>Product</b>	<b>Level of chain</b>	<b>Legal basis</b>	<b>Infringement</b>	<b>Remedies/fine</b>	<b>Status</b>
Milk and cheese	Retail	National	Vertical, horizontal	Fines	Closed 10/08/2011 <sup>197</sup>

## **NORWAY**

<b>Product</b>	<b>Level of chain</b>	<b>Legal basis</b>	<b>Infringement</b>	<b>Remedies/fine</b>	<b>Status</b>
Cheese	Processing	National	Abuse and vertical	Fines	Closed 19/02/2007 <sup>198</sup>
Groceries	Groceries wholesale	National	Horizontal	Commitments	Closed 17/04/2007
Poultry	Processing	National	Horizontal	N/A	Pending

<sup>197</sup> The decision is currently on appeal.

<sup>198</sup> Decision reversed by the Norwegian Supreme Court in June 2011.

## 5.2. List of Market Monitoring Actions

This Annex contains a list of the sector inquiries, market studies and other consultative opinions reported by NCAs since 2004, including date of publication.

### **AUSTRIA**

General inquiry on the Austrian groceries sector with particular emphasis on buyer power aspects	June 2007
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### **BELGIUM**

Study on the level of prices in supermarkets	February 2012
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### **BULGARIA**

Sector inquiry on the markets for production and trade of common wheat, flour and bread	June 2005
Opinion on the proposed adoption of a legislative act envisaging the implementation of a minimum level of retail prices of bread	May 2010
Opinion on the adoption of legislative acts concerning relationships between suppliers and retailers	May 2010
Opinion on the adoption of legislative acts concerning relationships between suppliers and retailers	July 2010
Sector inquiry on the competitive environment in the sector of production, procurement and processing of raw milk and distribution of dairy products	December 2010
Opinion on the adoption of legislative acts concerning relationships between suppliers and retailers	March 2011
Sector inquiry on the competitive environment of the food markets for common wheat, flour and bread	On-going
Sector inquiry on the competitive environment of the markets for production and trade of sunflower seeds and oil	On-going

### **CZECH REPUBLIC**

Sector inquiry on on-trade market for soft drinks	December 2008
Sector inquiry on the sales markets for agriculture and food products with particular emphasis on relations between retailers with significant market power and their suppliers	2010

### **DENMARK**

Report on "Nordic Food Markets – A taste of competition"	November 2005
Sector inquiry of food prices	October 2008
Sector inquiry on milk, butter and bread price developments	June 2009
Study on the retail sector	June 2011

## **ESTONIA**

Opinion on the amendment of Regulation 1234/2007 as regards contractual relations in the milk and milk product sector	January 2011
Market study on the sugar sector	November 2011

## **FINLAND**

Report on "Nordic Food Markets – A taste of competition"	November 2005
Sector inquiry on the retail sector	On-going

## **FRANCE**

Opinion 04-A-18 on a request for opinion submitted by the consumers association "Union Fédérale des Consommateurs (UFC-Que Choisir)" on the state of competition in the non-specialist large-scale retail sector	October 2004
Opinion 06-A-07 on the examination, in terms of competition law, of the operating conditions of the fair trade sector in France	March 2006
Opinion 07-A-04 on the possibility to restrict the use of certain intermediate products to producers of a quality agriculture or food chain	June 2007
Opinion 07-A-12 on the legislation on commercial planning law	October 2007
Opinion 08-A-07 on the economic organisation of the fruit and vegetables processing industry	May 2008
Opinion 09-A-48 on the operation of the dairy sector	October 2009
Opinion 09-A-45 on import and distribution mechanisms of daily consumer goods in the overseas departments	September 2009
Opinion 10-A-25 on category management agreements in the food retail sector	December 2010
Opinion 10-A-26 on affiliation contracts of independent stores and purchase details of commercial estate in the food retail sector	December 2010
Opinion 10-A-28 on two decree proposals imposing written contracts in two agriculture sectors	December 2010

Opinion 11-A-03 on an inter-branch agreement in the ovine sector	February 2011
Opinion on a Decree proposal related to the content of agreements of moderations of retail margins pursuant to Article L 611-4-1 of the Rural Code in the sector of fruits and vegetables	February 2011
Opinion 11-A-11 on the methods for negotiating contracts in the livestock sectors in the context of price volatility of agriculture raw materials	July 2011
Opinion 11-A-12 on an inter-branch agreement in the turkey sector	July 2011
Opinion 11-A-14 on an inter-branch agreement in the wine sector	September 2011
Opinion 12-A-01 on the competition situation in the food retail sector in Paris	January 2012

### **GERMANY**

Sector inquiry on the milk sector	January 2012
Sector inquiry on the food retail sector	On-going

### **GREECE**

Public consultation on "The sales of basic nutrition and daily consumption products in the retail market"	May 2011
Sector inquiry in the fruit and vegetables sector	On-going

### **HUNGARY**

Study on the buying up processes of basic agricultural products	September 2009
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### **IRELAND**

Grocery monitor report 1 - A description of the structure and operation of grocery retailing and wholesaling in Ireland: 2001 to 2006	March 2008
Grocery monitor report 2 - Price trends in the Irish retail grocery sector: A description of the evolution of retail grocery prices between 2001 and 2007	March 2008
Grocery monitor report 3 - The retail planning system as applied to the grocery sector: 2001 to 2007	July 2008
Retail-related import and distribution study	May 2009

## **ITALY**

Investigation on agro-food distribution – IC 28	June 2007
Mechanisms of price transmission along the agro-food chain: an analysis exercise of the dry pasta chain	August 2011
Sector inquiry on large-scale retail distribution – IC 43	On-going

## **LATVIA**

Sector inquiry on the dairy sector	2006
Sector inquiry on milk and cottage cheese processing and retail market	2008
Sector inquiry on bread processing and retail markets	2008
Sector inquiry on brewing and distribution markets	2009
Sector inquiry on the sugar distribution market	2010
Sector inquiry on the fruit and vegetables wholesale and retail market	2010
Sector inquiry on sales of milk and bread products in large retail chains	January 2011

## **LITHUANIA**

Market study on food product prices	2004
Market study on food product prices	2007
Market study on retail	2008
Market study on retail	2009
Market study on food product prices	November 2010
Market study on retail	On-going

## **NETHERLANDS**

Study on pricing in the agro-food sector	December 2009
Study on the tomato market structure	April 2010
Study on the Dutch fisheries sector	February 2012

## **POLAND**



Study on the procurement market of certain fruits	October 2004
Study on the structure and distribution chain of daily consumer goods	February 2005
Survey on the competition and concentration of the beer production market in the regions of Lubelskie and Podlaskie Voivodships (NUTS 2 regions)	July 2006
Study on the Polish market for spices	October 2006
Study on the competition and concentration of the national market for mineral water	October 2006
Study on competition and concentration of the wine production market	November 2006
Survey on the competition and concentration of the mineral water market in the regions of Lubelskie and Podlaskie Voivodships (NUTS 2 regions)	November 2006
Study on the competition and concentration of the national market for ice-cream	April 2007
Study on the local market of milk production in the regions of Lubelskie and Podlaskie Voivodships (NUTS 2 regions)	December 2009
Study on the pork market with focus on the purchasing of live pigs	November 2010
Study on the definition of the retail market for daily consumer goods	August 2011
Study on baby food market	On-going
Study on the beer market with particular emphasis on the HoReCa distribution channel	On-going

## **PORTUGAL**

Report on the food distribution sector in Portugal	April 2005
Report on buyer power and pass-through of large retailing groups in the Portuguese food sector	October 2006
Report on commercial relations between the large retail groups and their suppliers	October 2010

## **ROMANIA**

Sector inquiry on retail distribution of food products	September 2009
Sector inquiry on the market for bread grains (production, trade and storage of bakery wheat)	October 2009
Sector inquiry on the raw cow milk maker in the producer-processor economic stage	September 2010

## **SLOVAKIA**

Sector inquiry on food, agriculture and trade	September 2006
Sector inquiry on retail markets	December 2008
Sector inquiry on the dairy sector	September 2009

## **SLOVENIA**

Survey on the relationships between producers and retailers of daily consumer goods	2008
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## **SPAIN**

Report on the supply chain of certain fruits and vegetables	January 2004
Report on the draft Bill for the reform of Act 7/1996, of 15 January 1996, on the retail sector and other supplementary provisions	May 2009
Report on the "Milk Agreement" of 20 July 2009	July 2009
Report on the application of competition rules to the agro-food sector	June 2010
Report on the certification of quality and safety standards	July 2010
Report on the draft Bill on the quality of agro-food products	October 2010
Report on the draft Royal Decree regulating the recognition of producers' organizations and inter-branch organizations in the milk sector and establishing conditions for contracts in the milk sector	February 2011
Report on the Bill on distribution agreements	June 2011
Report on relations between retailers and suppliers in the food sector	October 2011
Report on the draft ministerial order to extend olive oil withdrawal	November 2011
[ ]	On-going
[ ]	On-going

## **SWEDEN**

Study on the retail sector	June 2004
Report on "Nordic Food Markets – A taste of competition"	November 2005
Study on the food supply chain	April 2011

## **UK**

The supply of groceries in the UK market investigation	April 2008
Inquiry on the supply of beer in the UK pubs	October 2010

## **NORWAY**

Report on "Nordic Food Markets – A taste of competition"	November 2005
Market survey "Payment for shelf space"	2005