

Competition Law and the New Slavery

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“People around the world should know that there are people working as slaves in Costa Rica”. Pineapple worker, in Pina Fruit, supplier of pineapples to several EU supermarkets, October 2006.

“95% of workers are debtors living just in single rooms and they still can’t afford to pay the rent. The money they earn doesn’t meet even basic needs. Workers should get enough money to live on. The way we live is real modern slavery”. Banana worker in Tiko Plantation, Cameroon, supplier to several EU supermarkets, September 2010.

1. Author’s Introduction

After some years of being commissioned by Banana Link to investigate conditions in banana and pineapple plantations in Central and South America and in West Africa, I have been left with two overriding memories: the memory of men bristling with rage as they described their ‘lives of slavery’ and the memory of women weeping as they told stories of bleak injustice.

There were the three women pineapple workers I met in San José, Costa Rica who told us that their supervisors on the packing lines could have any woman they wanted, because no-one could afford to lose their job by refusing sexual favours. When the inspectors from Europe came to visit the plantation (one which had all the usual certifications for compliance with international standards) the managers put up posters in the plant, stating their commitment to the protection of women’s rights and encouraging workers to report misdemeanours.

The posters came down as soon as the inspectors had left. Plantation staff had been warned before the inspectors arrived that if they said the wrong thing, the plantation would lose its contracts with its buyers and everyone would lose their jobs. In fact the women did complain to the senior management about the supervisors (but not when the inspectors were around), misled by the invitation on the posters. The supervisors were not dismissed or disciplined; the abuse went on and the women, one of them pregnant, lost their jobs. So they were now unemployed, quite probably black-listed and drifting around the capital with no money. No wonder they sobbed as they told their story.

Then there were the tears of two women who were dying in the settlement of El Cairo, poisoned by the chemicals used in the adjoining plantations. These chemicals had seeped slowly over the years into the aquifers which were their only source of drinking water. It was not until the people of El Cairo and its neighbouring settlements had repeatedly blocked the main arterial road linking San José with the port of Puerto Limon, that the authorities reluctantly sent in tankers to deliver drinking water to the affected communities. These women did not weep as they explained why they were dying. They wept when they reported that they had been accused of being 'communist troublemakers' after blocking the main road, when all they wanted was safe drinking water for themselves and their children. It seemed to be the injustice of it all, rather than their imminent deaths, which made them weep.

I met Pablo (quoted above) and his work team in a huge field of pineapples under a remorseless midday tropical sun. They were taking their half hour lunch break. There was no shade and no water and they had been working since soon after dawn. Some of the team were lying on their bellies beneath a heavy trailer. The small space between the ground and the trailer's axles was scarcely any cooler than anywhere else but at least for a short time they were out of the direct rays of the sun. Pablo was an intelligent, articulate young man and, like so many others who work on the plantations in Costa Rica, a migrant from neighbouring Nicaragua. He showed little anger about the 12 hour days of hard labour, whether in the blistering heat or the lashing rain of tropical storms (for the work seldom stops, regardless of conditions), for derisory wages which barely covered his and his work-mates' basic subsistence needs. His manner was calm and his gaze steady as he spoke quietly for his team and asked us to tell the world that they lived as slaves, with no hope of ever escaping.

It was my first research on plantations and the first time I had heard a worker use the "slave" word. It was a claim I was to hear again and again as I travelled from country to country visiting the plantations which churn out fruit for the supermarkets of Europe and North America.

The word was also used during my most recent field visit, this time to Cameroon and, more typically, on that occasion there was no shortage of anger. So much so, in fact, that there was even a moment when I almost feared for my safety. I had visited a banana plantation near Limbé in the hopes of talking directly to workers but a team of managers was sticking to me like glue. The workers all looked worn and weary, in unusually bad condition, and yet everyone I questioned assured me that life was good on the plantation. They were, they avowed, well treated and well paid.

While their words said one thing, their demeanour suggested otherwise. Their delivery was lifeless, as if they were reciting a catechism learned by rote. As one worker spoke, the others stood silently, staring into my eyes with a strange intensity.

After I had been in the plantation for some time, questioning workers under the watchful gaze of the managers, there was an incident and for a moment the management team's attention was occupied elsewhere. I slipped behind some agricultural machinery and was hardly surprised to find that one of those workmen who had been staring so intensely, had joined me there. "No-one can talk here," he said. "We have to meet outside...tonight."

That night my colleague and I met a group of some dozen workers from the plantation, in a low dark building with the sounds of the tropical night humming through its thin wooden walls. We talked late into the night. Apparently the plantation had been cleared up especially for our visit and the people had been told what to say. The reality was completely different and a picture emerged which was already familiar to me from stories I had heard all over the tropics - stories of 12 to 15 hour days, wages which barely allowed workers to stay alive, absence of proper protective clothing and the slapdash use of dangerous agro-chemicals.

We sat in a circle and everyone had a chance to speak and to respond to my and my French colleague's questions. However at times the workers were difficult to control, with everyone trying to speak at once, everyone wanting to tell his or her bit of the story, so seldom it seemed did they have a chance to tell anyone of their plight. Suddenly one of the men leapt across the space of the circle and towered over me. He stood inches away, shouting in my face and quivering with rage. It was as if, as he ranted about slavery and poverty and injustice, he was seeing me as a symbol of his oppression, a figurehead for the rich world which demanded so much of him and gave him back so little in return. For a moment, I feared he would lose all control but after a while he calmed down and a couple of his work-mates steered him back to his chair.

So, is all this misery a feature of the banana and pineapple worlds alone? Sadly not! Look at the reports emanating from Oxfam, Action Aid, War on Want, Labour behind the Label and a host of other NGOs and you will find that everywhere the same story is being told. Wherever you look in the world, the people who make, grow or harvest the things that we need or want, whether they be fruit and vegetables, clothes or electronic goods, are living in conditions which seem little better than slavery – indeed they may even be worse. Any slave owner with economic sense knows that he needs to maintain his slaves, just as he needs to maintain his draft animals and his machinery. The new slaves, who have no owner but also no choice and no escape, can be worked until they

drop and are discarded, for the benefit of the consumer who, as we all know, is now “king”. No-one is responsible for them; the new slaves must work like this or die. Unlike the slaves of yesteryear, the new slaves have no capital value in today’s brutal globalised economies.

2. Competition Law and Our Right to Own Slaves

Competition Law protects the consumer’s right to be serviced by slaves. Of course, we do not own slaves in the traditional fashion. The new slavery is altogether more modern. Just as many aspiring families who want a second home in the sun, whether on the Mediterranean coast or in Florida, no longer think of outright ownership of a property but choose instead to share ownership with other families, today’s consumers are able to benefit from the convenience of “time share slavery”, mediated by their local supermarket, fashionable clothes retailer or electronic equipment supplier.

Nor did Competition Law set out to underpin the new arrangement. On the contrary, Competition Law set out with the best and most honourable of intentions, but what happened was that the world changed and the Law didn’t. It failed to adapt to the new globalised economies and it failed to adapt to the growth of giant retailing. With the Law set in aspic, while the world changed around it, unexpected consequences began to emerge.

Giant retailers, like Tesco and Walmart, and giant producers like Dole and Chiquita who were increasingly coming to understand that something needed to be done to reduce the exploitation of workers and the collective despoiling of environments found that Competition Law was blocking their path. Even as consumers, everyday more aware of the dangers implicit in the “race to the bottom”, demanded better social and environmental standards, Competition Law insisted that price and price alone was the only legitimate value. Like it or not, the consumer must consume faster, quicker, cheaper, even if the price is destruction of the social fabrics and ecologies of producing countries and ultimately perhaps the destabilisation of the entire already fragile global economic order.

So what is Competition Law, how did it come about, where did it go wrong and is there anything we can do about it?

3. Competition Law and the Protection of the Little People

The term Competition Law refers to attempts by governments (and now also intergovernmental bodies) to regulate competitive markets for goods and services, in

such a way as to stop ruthless traders or other actors from controlling or distorting markets in order to make unfair profits.

The history of Competition Law can be traced back as far as 50 BC when the Roman Lex Julia de Annona was enacted in order to protect the corn trade. Fines were imposed on anyone who attempted to raise prices by blocking the arrival of grain supply ships, which would have had the effect of creating artificial shortages. A series of other laws were introduced during Roman times which were also aimed at protecting the general population against such extortionate practices.

Concern about unfair practices continued throughout the Middle Ages and into the Renaissance. Although some of the many laws passed in different European countries related to other products (such as King Wenceslas II of Bohemia's *constitutiones juris metallici* which between 1283 and 1305 legislated against "combinations" of ore traders, who conspired to artificially raise metal ore prices) a great many of the laws were concerned with food supplies, particularly grain.

As legislation introduced in King Henry VIII's England in 1553 put it: "prices of such victuals be many times enhanced and raised by the Greedy Covetousness and Appetites of the Owners of such Victuals, by occasion of ingrossing and regrating the same, more than upon any reasonable or just ground or cause, to the great damage and impoverishing of the King's subjects".¹

The kings of Europe may have been happy to exploit the peasantry themselves, but they did not want to see their subjects driven into penury by traders.

Modern Competition law has its roots in English Common Law. Although different European and non-European countries have had their own distinct histories (a Bohemian example has already been mentioned, but there were also provisions relating to fair competition in the Napoleonic Code² and, of course in other national legal systems), there has been a move towards harmonisation in recent times.

It is generally acknowledged that modern Competition Law began with the development of the USA's "anti-trust laws". These emerged with the enactment of the Sherman Act in 1890 and the Clayton Act in 1914, Acts which incorporated elements of 16th century

¹ 25 Hen 8, c.2

² Article 1382 of the French commercial code which is based on the Code Napoleon still deals with practices that harm others

English Common Law, such as the statutes on “engrossing”.³ The term “trust” may be slightly confusing to many. The US Acts were formulated in response to an immediate threat. Towards the end of the 19th century huge Corporations were emerging in the US for the delivery of such increasingly essential products and services as oil, steel and railways. Corporations often operating in different states formed supra-corporate Trusts in which they made secret agreements to share out markets and harmonise prices across states. Through such agreements they were able to avoid competition with each other and impose higher prices on consumers than they would have been likely to obtain had they had to battle for consumers in competitive markets. Anti-trust law therefore aimed at breaking up the federal monopolies which were beginning to emerge through the establishment of Trusts and by this means set out to protect consumers and citizens.

While European and other national competition laws continued to evolve in their own way (although there were already between the two World Wars some moves in the direction of the US model, for example in France and Canada), the end of the Second World War and the emergence of the US as the principal power broker in the capitalist world, saw a dramatic shift towards harmonisation between US and emerging European law (and later other jurisdictions).

It was commonly believed in the US that the existence of major monopolies in Germany and in Japan between the two world wars had made it easy for the Nazis in Germany and the government in Japan to rapidly gain control over the industrial systems of the two countries and to harness them for aggressive, military ends. The US therefore imposed on these two countries systems which directly replicated the US Anti-trust laws.

By the time that the first six Western European countries met to sign the Treaty of Rome in 1957 therefore (thus laying the first foundations for today’s European Union), the two most powerful countries involved, Germany and France, already had in place Competition Laws which were to a large extent modelled on the US Anti-Trust Laws (France having supplemented its 1810 Code Napoleon with new provisions modelled on the US approach in 1926 and Germany having had US law imposed upon it, as part of the post-war settlement).⁴

³ E.g. Chief Justice white in *Standard Oil of New Jersey v. United States* cites 5 & 6 Edward 6, c. 14 of 1552

⁴ In fact the European Coal and Steel Treaty of 1951 already contained competition provisions.

The articles of the Treaty of Rome (or the Treaty of the European Community) relating to Competition (notably Articles 81 and 82) are very similar to the provisions of US Anti-Trust legislation. However in its early stages EC Competition Law had a strong focus on breaking down national barriers to free trade within the European Economic Community, an emphasis which continues to influence contemporary thinking. Today Articles 81 and 82 have become Articles 101 and 102 of the Treaty of Lisbon.

Although US and therefore EU laws ultimately had their roots in English Common Law, UK Competition Law diverged on a number of important points from US and EU law in the post-war period until as late as 2002 when the UK's Enterprise Act brought UK Competition Law into harmony with EU law. A number of Commonwealth countries, including Australia, which had tended to develop along similar lines to the UK also moved closer to US and EU law in recent times.

Although there is an informal body known as the International Competition Network, it has no power. Nevertheless, it has helped to stimulate moves in all legal jurisdictions towards the increasingly dominant US/EU approaches, a trend which is likely to continue into the future. Other international institutions like UNCTAD, the OECD and even the WTO are all helping to move the world's legal systems towards a shared approach to Competition Law.

Since its inception, Competition Law has had as its principal objective to protect the essentially weak and powerless individual consumer and/or citizen against unfair exploitative practices on the part of large and powerful business interests. It aims to stop suppliers of goods and services from gaining control over markets and from using this control to extort undue payments from its customers. The motivation for the development of Competition Law has been the very honourable urge to defend public interest. The defence of public interest has traditionally focused both on the protection of weak against the strong and also on the protection of the entire economic system. Where monopolies develop, monopolists face the temptation of charging unreasonable prices, of offering shoddy goods (if, for example, there is only one car available on the market and people need cars to get to work, then consumers will buy it even if it uses enormous amounts of fuel and doesn't work particularly well!) and of abandoning innovation (why waste money on improving fuel efficiency, if people will have to buy your car anyway?)

The defence of public interest in this area is not a luxury activity; it can, literally be a matter of life or death. As mentioned above, the early roots of Competition Law had a strong focus on the manipulation of markets in essential basic foods. Where traders were able to hoard stocks and hike prices, this had the potential to cause malnutrition

and death amongst those who could not afford the artificially high prices. Failure to control such practices not only potentially opened the door to famine but also set the stage for bread riots, social disruption and chaos.

In many of its earlier manifestations, the defence of public interest was something which was openly acknowledged by legislators. Typically legislation included a range of possible exceptions which would allow public interest considerations to be taken into account (as was the case for example for much of the UK legislation until recently). In its modern forms however, public interest considerations (such as the consideration of social or economic impacts) have been largely marginalised (even though clearly the underlying motive for the legislation remains the protection of public interest) and the focus has moved towards maintenance of an efficient economic system, in which it is assumed that competition will automatically lead to the best outcomes.

This has made it particularly difficult for Competition Law to respond to the emergence of new unforeseen factors, most notably the development not of new monopolies or oligopolies but rather the development of what are called monopsonies or oligopsonies (terms which even today are so little known that Microsoft Word's spell-checker still underlines them in red, whenever they are written in its documents!)

Whereas a monopoly means that there is only one producer selling into a market, a monopsony means that there is only one buyer. Oligopoly means that there are only a small number of sellers, while oligopsony means that there are only a few buyers.

4. The Unforeseen and Inexorable Rise of the Supermarkets

It is perhaps one of life's paradoxes that just when the law appears to have finally become honed to perfection, it suddenly becomes evident that the world has changed and that the law is no longer addressing the real problem which needs to be addressed.

Competition lawyers, authorities and legislators could be forgiven for congratulating themselves for their achievement in moving steadily towards a single global system and for their success in moving away from difficult public interest considerations (such as the potential social and economic impacts of individual legal decisions) and towards a purer focus on competition at all costs, regardless of its implications.

However, the elephant in the room is that there is a new threat to economic freedom. Although the need to defend consumers against monopolies has not gone away, in today's world producers also need protection against massive retailers, who act as

gatekeepers, potentially granting or denying producers' access to thousands and sometimes millions of consumers. So what has changed?

A mere 50 years ago, in the 1960s, supermarkets were a new and, for many, an exciting new phenomenon. Particularly in Europe, they seemed to be a glamorous entrée into a new modern, technological world, emerging from the ashes, privations and austerity of the Second World War and its immediate aftermath. They were big, light, airy, spacious, clean, filled with an enormous variety of goods. You didn't have to deal with capricious shopkeepers who might always give the best cuts of meat to your neighbour and the worst to you, because of some ongoing local feud or favouritism. You could buy everything in a single shop, instead of dragging your unwilling children from one shop to the next down endless high streets. If you were lucky enough to have a car, you could park on the premises....and, as if this wasn't enough, they offered the same quality or even better at lower prices (or so they claimed). What is more, there they were on your new black and white TV, in your living room urging you every evening to participate in the new, fashionable, glossy lifestyles of the future!

Today in the national markets of North-West Europe over 70% of all groceries are purchased in 5 or fewer big supermarket chains. In Sweden, Ireland and Denmark the figure is higher at over 80% (according to Global Retail Concentration, e-Intelligence on Global Retailing, Sept 2006; ways of estimating the figure vary and some other estimates are even higher). Eastern Europe lags behind North-West Europe with estimates now of around 50 or 60 percent. Southern Europe is further behind still with figures of around 30 or 40% (although Spain was already at 65.2% in 2006). Whatever the current figure, the trend is still upward. In every country in Europe the trend is towards a handful of big chains selling most daily goods (and moving increasingly into a range of other products, such as electronic goods, clothes, pharmaceutical products, toys, books, banking, financial services, insurance and even housing).

While fewer and fewer big chains are strengthening their hold on the grocery sector, their diversification into other goods and services mean that they are increasingly taking over people's lives. By using devices like loyalty cards and store-based credit cards, they are able to offer increasingly attractive and intelligently targeted offers, whereby if a customer buys food, banks, is housed and is even finally buried by the same supermarket, multiple mutually-reinforcing discounts are available. For hard-pressed EU citizens, near-bankrupted by the follies, greed and recklessness of their financial and political elites, one route to survival is to hand over their whole lives to their local hard discounting supermarket.

As long as you can keep up the minimum payments on your store credit card, you can have all the necessities of life....but think twice before you give up your “citizenship” of Tesco, Walmart, Carrefour or Ahold. There may be penalties in the small print of all the agreements you had to enter into as you handed your life over to a single store!

How, then, are the big retailing chains able to provide such persuasive discounts to customers? Undoubtedly they are able to keep costs down partly through economies of scale and technical innovation. In a traditional, old-fashioned shop, someone has to scan the shelves, note on a piece of paper, “We need four jars of honey, 12 pots of yoghurt, etc.....” and ring through to a supplier or visit a wholesaler, in order to replenish stocks. Multiply this process across hundreds of thousands of shops across a country and it is clear that hours of labour are involved, for which ultimately the consumer has to pay. In modern supermarkets, bar codes and computer networks mean that daily orders go straight to central depots every day automatically and thousands of person hours of work are saved. What is more, supermarket chains have honed their systems so that they hardly need to keep any stocks anymore (again reducing costs on space for warehousing, etc.). Daily demands for tomorrow’s food can be sent automatically directly to farmers and the exact amounts can be dispatched within hours. Fresh produce is flown into airports from around the world and is on the supermarket shelves within a 24 or 48 hour period, even when it is produced on the other side of the planet. (Today, of course, small shops, particularly when they are involved in a national or international network like Spar, adopt many of the new techniques themselves; nevertheless the big supermarket chains are generally in the best position to innovate and to find new ways of making efficiency savings.)

However the big chains also keep costs down in other more troubling ways. In countries where the vast majority of food is purchased in as few as 3 major supermarket chains (as in Sweden for example), these chains gain an enormous amount of power over their suppliers. A supplier who wants to sell his products has little choice other than to sell through one of the three chains and the three chains are typically involved in fairly ruthless struggles to offer consumers lower prices than their rivals. Whereas in years gone by supermarket chains would often buy goods on wholesale markets, today they increasingly source their goods direct from suppliers, often through informal agreements. Whereas the supermarkets can source their goods from anywhere in the world, a supplier who wants to sell in Sweden, the UK or Germany will have to sell through a supermarket chain which has physical stores in Sweden, the UK or Germany. Increasingly throughout the world, suppliers can only reach the consumer by going through one of three, four or five dominant supermarket groups (which may be different groups in different countries), almost all of which adopt similar approaches.

This means that supermarkets are in a position to ask for very favourable terms. They can ask for the lowest possible prices. They can insist that the supplier pays for any wastage (traditionally a small shop which failed to sell 20 kilos of apples would have to bear the loss itself; the small shop cannot go back to the farmer or wholesaler and demand a refund; supermarkets however now do this routinely; if they fail to sell a few tonnes of apples, they simply don't pay for them). They can charge suppliers for access to shelves (with higher prices for ends of aisles or "gondolas" and other desirable positions). They can unilaterally decide to offer special deals (two for one; special low cost promotions etc.), for which the suppliers have to pay. They can insist that suppliers adopt new styles of packaging or undertake other innovations which cost the supplier significant amounts of money and then unilaterally decide to drop them, in some cases ruining supplier businesses in the process. Supermarkets can (or could until recently) unilaterally decide not to pay in 30 days but rather to pay 90 days after delivery (thus effectively providing themselves with interest-free loans from the suppliers). Activities like this are often known as "abusive practices" and successive enquiries by different Competition Authorities have revealed over the years that such practices are widespread.

The fact that supermarkets increasingly control access to consumers and that they are able to use their resulting power to insist on terms which are hugely financially advantageous to themselves, makes it virtually impossible for independent retailers to compete on price.

Consumers may have to pay an additional penalty if they want to be free of the grip of the ubiquitous supermarket as a result of what has come to be known as "the waterbed effect". If a heavy person stands in the middle of a waterbed, the level of the bed around the edges goes up as the water in the bed is displaced. In an analogous way, if suppliers are forced to accept very low prices from a large supermarket chain, they may try to recoup their losses by charging smaller buyers disproportionately high prices. Suppliers say privately that they do this and have to do this in order to survive financially. In some cases they supply the larger supermarkets actually at a loss and cover these losses by charging their smaller buyers at a higher rate than they would have done if they had been the only buyers. They may be unable to stop supplying the major supermarket as this would mean that packaging plants or other facilities would lie idle and therefore cost them even more. It may be cheaper to continue to sell at a loss (and recoup some losses from smaller clients) than it is to shut down a large-scale operation.⁵

⁵ It should be noted that in the case of the UK, the Competition Commission reported that it had found no evidence of a waterbed effect.

5. Growing Concern about Supermarkets Worldwide

While the growth of supermarkets was mostly greeted with enthusiasm by consumers and even communities at the outset, as supermarkets became more widespread and as they finally started to dominate national grocery markets, concerns about them also began to grow. Vague unease turned into organised opposition in the late 1990s and this became more tightly focussed in lobbying campaigns and community resistance movements in the first decade of the new millennium.

Unease about the influence of supermarkets focussed on a number of areas:

5.1 Small shops find it very difficult to survive when supermarkets become established. Town centres may become “ghost towns” as local people shop cheaply in the big chains on the edge of town. This in turn leads to a break down in human face-to-face relations and a general decline in “community”. Profit and wealth are taken out of the hands of local traders who might have supported local initiatives (Christmas lights in the high street for example) and are transferred into the pockets of distant (possibly foreign) shareholders, who ultimately own most of the supermarket chains. Recent developments in technology (self-service checkouts, hand-held devices, internet ordering) mean that a shopper can now do his or her weekly shop without saying a word to any other human being. Not only do shops close in town centres but they also close in residential areas and villages.

5.2 Significant sections of the population face difficulties gaining access to essential supplies. Those without cars, the poor, many single parents, many old people and people with certain disabilities find it difficult or even impossible to get to a supermarket. They may have to depend on what is left of the local shops, often paying inflated prices (due to the waterbed effect, due to the disappearance of wholesale markets or simply due to the loss of turnover in the local shop, which means prices have to be pitched relatively high to cover fixed costs), often being offered a very restricted range of products (again with less footfall, the surviving local shops often cannot carry the variety of stock they used to), and often facing a complete absence of fresh products (again low turnover means shopkeepers may have to rely on more and more long-life products, like tins and packets). The relatively new phenomenon of internet ordering and home delivery may not present a solution for marginalised groups, in particular because free delivery is available only for those who spend more than a certain threshold (one which is usually not high for a family but is prohibitive for anyone living alone). Marginalised groups may in any case have problems with gaining internet access and may not have access to a debit or credit card to pay on-line.

5.3 Specialist shops also tend to disappear, not only as supermarkets develop their own in store “bakers” and “butchers” but also as they diversify into other products like books or CD/DVDs. In the case of specialist grocery suppliers, supermarkets often offer an ersatz version of original specialisms (large scale industrial baking becomes the norm, and artisanal skills and products are lost). In the case of non-grocery products, supermarkets are able to offer massive discounts on a very limited range of books for example (as in the case of Harry Potter books which sold in the UK at around half their normal price in the main supermarket chains). Traditional bookshops thus lose the most popular product lines and have to rely on more obscure and much less profitable literary works, making survival difficult or impossible. Bookshops disappear from high streets, except for one or two national chains and an increasingly sparse set of specialists. Changes in the physical system for distribution of goods thus inadvertently create a pressure on consumers to consume more populist works rather than “high culture”.

5.4 At the same time, as supermarket chains have grown in size, they have developed global supply chains, severing traditional links with seasonal foods and local food suppliers. This in turn affects environmental footprints and food security. The provision of a stable range of goods all the year round, regardless of natural agricultural and seasonal cycles is clearly attractive to consumers; however it is accompanied with a very considerable rise in so-called “food miles” (the distance food travels from farm to plate). A preference for buying food from the cheapest supplier located anywhere in the world may mean that local suppliers, unable to find a market, go out of business adding to the long-term danger of global food shortages. Any disruption in lengthy transport supply lines can lead to food shortages, as supermarkets have reduced stocks to a minimum, relying instead on Point of Sale Ordering systems (where the bar-code scanned at the check-out triggers an order automatically) and next day delivery by air, rail or road freight.

5.5 The central buying desks of large supermarket chains do not want to have to deal with hundreds of thousands of small suppliers. They want to deal with small numbers of suppliers who are sufficiently large to be able to provide goods for a substantial part or even the whole of their retail networks. This means that agricultural practices have to change to suit the supermarkets’ requirements. Small farms go out of business and their land is bought up by ever larger food conglomerates, which are able to install the appropriate technologies to meet the service delivery requirements of the supermarkets. Bigger and bigger farm units specialise in single crops or animal products, making farms ever more like factory units and less like agro-ecological systems, at the very time when awareness is growing of the environmental necessity of having mixed farms, a diversity of crops etc. Specialisation is only possible with increasing levels of chemical intervention as risks to plants and animals greatly increase in less diverse

systems. Supermarkets' insistence on completely unblemished fresh produce and on products which look good on the supermarket shelf also increases the pressure on farmers to use high levels of agrochemicals. The distribution systems developed by supermarkets have also been associated with an enormous increase in the use of packaging materials, particularly plastics, which reduce damage during transport and shelf-stacking. The growth of supermarkets has thus inadvertently led to an increased pressure to use more energy, to pollute more, to disregard soil and water quality etc., just when we all know we need to use more sustainable approaches!

5.6 Supermarkets are also accused of encouraging unhealthy diets by promoting in their advertising campaigns pre-prepared foods with high levels of fat, salt and sugar. Some commentators believe that the emphasis on the superficial appearance of particularly fresh produce leads to a decline in intrinsic food value (when agronomists focus on developing uniform crops in which all the fruit or vegetables are identical in size and shape, the issues of taste and nutrition may take second place or be disregarded).

5.7 Supermarkets develop their own-brand versions of many products which are either the traditional products of agricultural regions or which are products developed by a particular brand. Own-brand versions are sometimes produced in the very same factories which produce the branded products, following nearly or actually identical recipes but sold at very much lower prices than the branded version. This reduces the incentive for producers to innovate as their products will rapidly be copied and sold, without their developers receiving any financial reward.

5.8 Although supermarkets try to develop distinct identities in order to encourage footfall and on-going customer loyalty, and although some deliberately emphasise quality or ethics, for most supermarkets the most crucial area of competition lies in price. When supermarkets compete primarily on price and when they control access to very substantial percentages of the consumers in a market, they are able to exert very strong pressure on producer/suppliers to keep costs down. While this may encourage efficiency savings, the pressure to be the cheapest never diminishes even when all possible efficiency savings have been made. When producers are under pressure to lower prices even further in order to ensure their access to the shelves of giant supermarkets like Wal-mart, Carrefour or Tesco (the three biggest global retailers), they are under pressure to do whatever they can to reduce spending on environmental protection (by disregarding or circumventing expensive environmental controls) and in particular to reduce spending on wages to an absolute minimum. Many of the products purchased by supermarkets from developing countries are produced in contexts where labour laws are poorly enforced and labour inspectorates underfunded. In many countries tribunals are influenced by powerful employer interests. In circumstances like

this, where workers have poor social protection, it is often the workers who bear the cost of price cuts. Much permanent labour has been replaced by casual work, work is often overseen by contractors (who unlike plantation owners can simply disappear and reform under another name if they are accused of labour rights violations), and most work is paid for under piece-work systems (obscuring the fact that national minimum wages, where they exist, are being disregarded). Under a piece-rate system, employers can continue to appear to respect national minimum wage legislation (where it exists), by paying the minimum wage for work which, because piece-rates are unrealistic, require 100 hours per week labour instead of the legal expectation of (often) 48 hours per week. Pressure from supermarkets to keep costs down leads employers to impose conditions on workers which the latter themselves often describe as “slavery”.

5.9 Small and medium scale farmers who have little choice other than to supply one of the large supermarket chains typically find themselves in a position analogous to the workers in large plantations. Relentless pressure to reduce prices often leaves them with no profit, struggling to service bank debts and working long hours for barely enough money to survive. Some agricultural industries, such as the dairy sector, has proved particularly vulnerable to the price pressures imposed by supermarkets (who themselves almost always manage to remain profitable) and a great many dairy farmers have been driven into bankruptcy. Small, traditional farms, relying mostly on natural pasture, have been driven out of business as prices paid by supermarkets fail to cover production costs and dairy production has increasingly moved to large units, employing an absolute minimum of labour, in which cows are often kept inside and fed on imported feed like soya bean/cereal mixes. Their waste collects in huge lagoons adjacent to the production unit.

The supermarkets themselves are involved in what looks like a “virtuous circle” of development and expansion. A large supermarket can push for low supplier costs and thus becomes more attractive to consumers as it passes on some of the lower prices. As more consumers shops in the supermarket, it grows further, enabling it to demand still better deals from its suppliers. This allows it to buy and sell even cheaper which means that even more consumers are attracted into its stores. This allows it to insist on even cheaper deals from its suppliers and so on, in an apparently unstoppable cycle, which leaves grocery markets (and increasingly others) in the hands of just three or four giant retailers.

While this apparently virtuous circle of “concentration of the retail market” is going on, other changes occur around the supermarket, as a direct result of this concentration. City centres, residential areas, and villages lose their commercial life. People no longer interact with other people as a part of their basic economic lives. Social isolation

increases. Supply routes lengthen for all foods and become more dependent on oil and political stability (or social order provided by repressive regimes) in far off countries. Small enterprises are driven out of business and are replaced by fewer and fewer giant enterprises (which have no human but only commercial loyalties). Agricultural workers become unemployed, wages are driven down and work is increasingly casualised. Farming and food transformation become more industrialised and less adapted to local environmental conditions. Massive industrial farms start to threaten the water supplies, soil and biodiversity of already hard pressed ecologies. Use of plastics for packaging increases.

As the profits of giant retailers continued to grow, outside these new centres of corporate power the circle of development looked very far from virtuous. On the contrary, suppliers, shop-keepers, citizens and increasingly governments began to realise that the changes generated by the growth of monopsony or oligopsony (the domination of the retail market by a handful of players) might be far from desirable.

In the late 1990s, some EU governments, like those of France, Germany and the UK introduced laws or set up enquiries which attempted to limit some of the negative consequences of the growth of supermarket power (particularly the adverse impacts on suppliers, especially agricultural suppliers). By the beginning of the new millennium, the urge to find solutions spread to other countries like Austria, Slovakia, Czech Republic, Ireland and Spain. Meanwhile, in the US, campaigns against Wal-mart and “Big box” retailing (the US descriptive term for the featureless warehouse premises of many out of town stores) also gathered pace.

In the last couple of years, concerns about the impacts of supermarkets has gone global, with campaigns and legal initiatives unfolding in Australia, S. Korea, S. Africa, India and many other countries.

The concerns, campaigns and legal initiatives in different countries are not the same in every country. In the US, for example, anti-Walmart campaigns have tended to focus on alleged abuse of worker’s rights by the supermarket chain. In India, the immediate fear is that supermarkets will replace the huge informal street trading sector which provides a meagre living for millions of people. (While classic economic theory would see the reduction of such inefficient employment as a positive development, the roots of the theory grew in a very different world in which the industrial world was expanding; as workers were thrown out of one sector, they could move into another sector; the western world is no longer involved in such limitless horizons of growth; the whole world is now part of a single interconnected global economy and this economy is now coming up against the limits set by the ecological carrying capacity of the globe; when

workers are thrown out of one occupation, there is not necessarily anywhere new for them to go to find employment.) In the EU, much of the concern is focussed on the future viability of EU farming.

6. An EU Response

While various EU nations had responded to some of the various difficulties outlined above and had instituted enquiries, in some cases followed by legislation, none of this legislation appeared to have been very effective in dealing with the problems associated with supermarkets' abuse of power. NGOs received numerous reports from producers and suppliers, complaining that they were struggling to survive in the face of the impossible terms and conditions imposed on them by increasingly powerful and often arrogant supermarkets. Furthermore, while all of the attempts to deal with the problem had been national, it seemed clear that supermarkets themselves were becoming increasingly pan-European. In some cases large supermarkets, like Carrefour (French) and Tesco (British) were buying up chains in other EU countries or building new super- or hyper-markets themselves (particularly in the newly acceded EU countries of Eastern and Central Europe); in other cases, groups of supermarkets were forming cross-border buying alliances, which meant that, in terms of relations with suppliers, they had effectively become single massive EU wide buyers. Legislation in the different EU countries was, meanwhile, completely uncoordinated.

Two of the countries which arguably had taken the biggest steps in the direction of trying to control the problem of abuse of buyer power were France and the UK. France had introduced its Loi Galland and Loi Raffarin, attempting to limit the size of supermarket floor space and to stop below cost selling. The UK had set up a voluntary code of practice for the 4 biggest UK supermarkets and set up a procedure for suppliers to take complaints to the Office of Fair Trading when they believed that the terms of the code were being violated. Neither of these sets of legislation proved to be particularly effective. The French rules on below cost selling could be circumnavigated by setting up buying desks in other European countries outside France (or by moving discounts off invoice so that they became payments for "services") and there were almost no complaints to the OFT in the UK, because suppliers (or so they said off the record) were afraid that if they made a complaint (which was not anonymous) they would lose their contracts with supermarkets and possibly be black-listed with all of the big 4.

In the light of the failure of legislation and in the light of the uncoordinated national legal initiatives within the EU Single Market, a group of NGOs, meeting in the EU parliament in Brussels in Jan 2004 (under the loose collective banner of the Agribusiness Accountability Initiative) decided to try to push for a coordinated response on the part

of the EU to deal with “abusive practices” by supermarket buyers (a Competition Commission Report in the UK in 2000 had identified 52 such practices).

After investigating the various legal instruments available within the EU and following discussions with the UK Green MEP, Caroline Lucas, the AAI group decided to support the deposition of a “Written Declaration” at the European Parliament. A Written Declaration, to be successful, has to be sponsored by a small group of at least 5 MEPs and subsequently signed by a majority of all MEPs. If this happens the European Commission cannot ignore it but is bound to respond to its demands.

A Written Declaration was drafted (by the author of this paper) and sponsored by a group of MEPs, led by Caroline Lucas and deposited in Brussels and Strasbourg, according to the guidelines. The Written Declaration appears as an Appendix to this paper. Its key demands were as follows:

- “1. [The European Parliament through this Written Declaration] Calls upon DG Competition to investigate the impacts that concentration of the EU supermarket sector is having on small businesses, suppliers, workers and consumers and, in particular, to assess any abuses of buying power which may follow from such concentration;
2. Requests the Commission to propose appropriate measures, including regulation, to protect consumers, workers and producers from any abuse of dominant position or negative impacts identified in the course of this investigation;”

Written Declaration 088/2007 was supported by a healthy majority of MEPs, with cross party support and was formally adopted on Feb 19th 2008. It should be noted that a very large number of Written Declarations are submitted every year and that these are extremely rarely successful. The fact that this particular WD received widespread and cross-party support is therefore in itself evidence of the extent of concern which existed by 2008 regarding the growth of supermarket power, the abuse of this power and its impacts on supplier businesses (and therefore on workers’ employment conditions and environmental impacts).

What could not have been foreseen at the time was that the entire world economy would be plunged into acute disorder by the end of the year and that an ongoing banking, fiscal and economic crisis would mean that the EU’s focus would move to emergency damage limitation, potentially paralysing efforts to effect regulatory change in the retail sector. Nevertheless, the issue did not and has not gone away.

DJ Competition's response to the first demand (see Appendix 2) was to say that :

"The primary objective of EC competition policy is to make markets work better to the benefit of consumers within the EU. The Commission therefore tackles buyer power to the extent that it harms, or could potentially harm consumers".

DG Competition then praises the low costs achieved by supermarkets:

"According to OECD figures⁶, during the last 20 years earnings and consumer prices for all items have increased to a much greater extent than food prices in all European countries where data were available. Moreover, some of the most retail-concentrated countries show the lowest increase in food prices."

The Commission, far from worrying about the impact of low prices, caused by buying power, worried instead that food prices had recently risen (not, it should be noted, as a result of higher prices being paid to producers, but rather because of speculation on agricultural commodity markets):

"However, recent developments have shown significant price increases in agricultural products and ingredients for the food industry, as well as an increase in retail prices of some basic food goods in some national markets. This is a cause of concern for both the consumers and the industry. Further analysis of the competitive structure of the food supply chain, including concentration and market segmentation of the retail and distribution sectors, and monitoring of developments in food consumer prices at product level in each Member State would allow to better assess the situation. The Commission will continue to further evaluate the potential link between recent retail concentration and consumer prices."

The Commission goes on to emphasize further the beneficial effects of buying power on consumer prices:

"Buyer power itself may have either beneficial or adverse effects on consumers and suppliers. With sufficient competition downstream, lower prices upstream can be passed on to consumers, which will be beneficial to consumers. When supermarkets use their buying power, suppliers, such as the agricultural sector, are put under pressure to sell at low prices. Commission figures⁷ on producer prices show that the agricultural

⁶ Source: *OECD. Stat* website (<http://stats.oecd.org/wbos/Default.aspx>).

⁷ Source: EUROSTAT EC index of producer prices of agricultural products (website: http://epp.eurostat.ec.europa.eu/extraction/retrieve/en/theme5/apri/apri_pi95_proda?OutputDir=EJOutputDir_132&user=unknown&clientsessionid=EC27DD8478E0EDCC5B702FA892EF85BC.extraction-worker-

sector has contributed substantially to the low consumer prices. In the 8-year period 1995 – 2003 real producer prices in the EU-15 have declined by 18%.”

During this 8 year period many farmers saw their profits eroded to nothing and plantation workers saw the real value of their wages declining to well below local minimal costs of living. Meanwhile retailers continued to go from financial strength to strength. Apparently, the bigger picture beyond immediate low prices was a matter of unconcern to the DG Competition. If supermarkets can use their buyer power to drive down prices further and if this leads to plantations imposing slave-like conditions on their workers or small farmers being driven into bankruptcy, what is the problem? If food is cheap for consumers, DG Competition is happy. If there are problems as regards impacts on employment or the environment, these should be the concerns of other legal instruments, not apparently Competition Law:

“In terms of effects on employment or the environment, competition between undertakings is positive for long term employment opportunities and for creating a competitive economy able to face the environmental challenges. Competition law is not the appropriate instrument however to tackle certain employment or environmental concerns. These are better dealt with by *inter alia* labour and environment regulations which should address any legitimate concerns of society and EU citizens as a whole.”

This response might be appropriate for production within the EU market, where there are regulations and, hopefully an adequate infrastructure and a will to reinforce them. In the case of EU production of bananas for example, primarily in the Canary Islands and the French Antilles, however much buyer power is applied, prices paid have to internalize the costs of producers’ paying minimum wages and respecting environmental controls. The question here is not whether Competition Laws are inadvertently driving down basic standards; rather the question is how EU producers are supposed to co-exist and survive in an internal market in which they are the only producers which are required to meet such standards, with all the costs that such compliance implies.

When it comes to a great many overseas suppliers, it requires a considerable leap of faith to believe that living wages are being paid to plantation workers or that the carrying capacities of banana producing lands are being respected, when supermarket buyers are able to demand prices which are no higher than they were in the 1970s. All the evidence suggests that, in most producer countries, wages do not even begin to

1&OutputFile=apri_pi95_proda.htm&OutputMode=U&NumberOfCells=51&Language=en&OutputMime=text%2Fhtml&).

approximate “living wages” and that there are serious environmental problems in almost every producing region in the tropics.

There are few reliable mechanisms in producing countries for ensuring that national standards are respected. Supermarkets effectively acknowledge that the existing mechanisms are inadequate when they adopt their own private standards. However adopting private standards is not a panacea. In most cases the means of enforcement, primarily auditing with a threat of de-listing if producers do not comply (a threat which is very seldom carried through), are ineffective.

The European Parliament went to DG Competition, looking for some kind of response to the new problem of monopsony (or more correctly oligopsony). DG Competition’s response suggests that it has no real strategy for effectively dealing with monopsony. Even if formally monopsony/oligopsony should fall within its remit, their effects are interpreted as either someone else’s problem – or as not being a problem at all.⁸

When it comes to that other group which is adversely affected by retail concentration, the small EU farmer or supplier (who as proprietor does not have the guarantee of a minimum wage) but who also presumably must have taken the hit for the 18% reduction in consumer prices, DG Competition suggests that s/he should combine with others to form bigger units, so that the supermarkets’ buying power could be matched by the combined selling power of several producers.

“It is important to note that building up a strong market position achieved through growth in a competitive environment is not necessarily problematic and may lead to efficiencies that benefit to consumers and businesses. On the supplier side, for example in the agricultural sector, the Commission recognises the important role producer organisations can play to help farmers working together to achieve various efficiencies. Based on the existing single market and competition rules, those organisations also play an intermediary role between individual farmers and retailers and thus enhance their bargaining position. The Commission is looking at this issue in the framework of the CAP Health Check.”

⁸ Looking at DG Competition’s powers in formal terms, they have some capacity to act if there is an explicit cartel between competitors. In the absence of this then the only way for them to tackle monopsony or oligopsony is under, what is now, Article 102 and this would require: a. definition of the appropriate market – is it all grocery procurement, only particular product categories, either of these by region or in specific local areas, etc.?; b. proof that one company is dominant in that product category and/or area; c. or proof that two or more retailers are behaving in such a way as to amount to collective dominance, for which the legal test is notoriously difficult; d. then proof that it or they have abused their dominance – and if so, how?

The ratchetting up of scale of buyer and seller appears not to be at all problematic for the Commission, in spite of its frequent references in other contexts to the importance of Small and Medium Enterprises as forming the backbone of the European economy and society.

The Commission's response to the second demand from the European Parliament is perhaps a little more encouraging:

"The Commission and NCAs are vigilant to any infringement of EC competition law by supermarkets. The Commission takes specific care to ensure that concentrations of a Community dimension between supermarkets will not significantly impede effective competition to the detriment of consumers and businesses. It will further investigate the particular issue of buying power issue in collaboration with NCAs in the context of the ECN."

In fact at the beginning of its response, the Commission already implies that NCAs or National Competition Authorities might be better placed to deal with the problems raised than is DG Comp itself. The acronym ECN refers to the European Competition Network, which brings together the NCAs and DG Comp.

"If the exercise of buyer power is found to lead to a lower profitability for suppliers, this may in specific circumstances induce suppliers to invest less in new products and therefore lead to a loss in product diversity and quality for consumers. This aspect is taken into account by EC competition policy when assessing the impact of the exercise of buyer power on consumers: consumer welfare includes not only prices but also diversity and quality."

This was the clinching issue for the UK's second round of investigations into the Grocery Retail Market, of which more later. The Competition authorities in general feel unable to respond to a broader concept of consumer welfare. Consumers are not also citizens and workers; they can be considered only as consumers *qua* consumers in conceptual isolation. This means that the only argument which allows the Competition authorities to take any action is the one which points out that suppliers might fail to invest in the future if buyer power squeezes them to the point where all they can do is survive from day to day.

"Other aspects of the functioning of the retail sector may be better addressed, if it found required [sic], by other policy tools, such as consumer policy, employment policy tools and rules governing unfair trading."

DG Competition agreed to meet the MEPs who had sponsored the WD and representatives of the AAI on a number of occasions. However its position while overtly friendly and cooperative was in reality fairly unhelpful. It would need to have concrete evidence of abuse of dominant positions before it could justify launching an enquiry, as had been requested, even though one of the purposes of such an enquiry would have been precisely that of gathering evidence regarding the extent of the abuse of power.

Interestingly enough, those who were pushing for a similar enquiry in the UK a couple of years earlier had faced exactly the same argument from the Office of Fair Trading. The OFT did not want to waste its time investigating whether or not there was evidence of abuse until it had evidence of abuse. This presented real difficulties for campaigners. There already had been evidence of abuse reported in the 2000 Competition Commission Report (when legal powers had been used to solicit evidence) and since that report suppliers had continued to make complaints off the record. For the OFT this was not enough. There had been no complaints made under the terms of the UK's voluntary Supermarket Code of Practice (except one), meaning presumably that everything had been fine. Why then should another enquiry be launched?

The answer to the OFT's question was that suppliers were scared to speak out and to make complaints under the terms of the voluntary Code. They would only tell their stories if they were required to by law (an Enquiry could invoke legal powers to force suppliers to give evidence) and if they could remain anonymous. When finally the OFT agreed to proceed, as a result of prolonged pressure and lobbying⁹, and when legal powers were invoked, it was indeed confirmed that there was plenty of evidence that the voluntary code had been ineffectual and that abuse of dominant positions by supermarkets had continued without interruption and with all the negative consequences for suppliers that have been mentioned above.

It has been shown again and again that suppliers are not prepared to challenge supermarkets openly, for fear of losing contracts and being driven into bankruptcy. When they are forced to speak and are given anonymity however, they are only too happy to provide evidence. DG Competition through its contacts with NCAs and the ECN must have been aware of the UK experience. It must have been fully aware that it is not realistic to ask voluntary groups like the AAI to do DG Comp's job of collecting evidence, given that no-one will speak out publicly without legal protection. Did DG Competition's refusal to proceed with the European Parliament's demands, by requiring the AAI to do its work for it, indicate naivety or stupidity on the part of the Competition or was it a deliberate (and in fact fairly successful) attempt to evade its own responsibilities?

⁹ Particularly from Action Aid and the Association of Convenience Stores

Or is there something still more serious at stake? Is DG Competition driven by an ideology of “big is beautiful” in which big supermarkets and big suppliers are seen as the only way forward for a competitive EU? Is big business the only show in DG Competition’s town, while EU citizens and their parliament are required to put up with whatever the Commission decides behind closed doors? Does democracy have any meaning in today’s EU or are we, the EU citizens, supposed to merely accept the decisions of our political masters as they protect the interests of big banks, big finance and big business, in the best interests of the citizens who presumably they assume are not capable of either understanding their own best interests nor of making their own choices?

While DG Competition saw its role as being confined to ensuring compliance with Articles 81 and 82 of the EC Treaty, there was scope for the issue of abuse of market power to be considered by other DGs or institutions, it suggested. For example:

“The Commission will touch upon the issue of the market power of distribution in the framework of a High Level Group on the Competitiveness of the Agro-Food Industry. This initiative will be launched by the Commission in order to analyze the food industry which in the recent years has faced new risks and challenges which questioned the sector's competitiveness.

And again:

“The Commission's Single Market Review has identified retail trade as one of the sectors that warrants in-depth market monitoring given its key role for consumer and supplier markets and its current level of fragmentation. A monitoring report will be prepared for 2009 to analyse the reasons for malfunctioning of retail services seen from both consumers' and suppliers' perspectives.”

With DG Competition presenting itself as an inappropriate agency to tackle the overall problem of buyer power, the attention of campaigners turned to participation in or support for various initiatives by other EU institutions, such as:

1. A European Economic and Social Committee (EESC) Report, “Retail industry: Developments and Impact”
2. An “Own Initiative Report” of the Agriculture and Rural Development Committee, led by Katrina Batzeli, “On the Gap between Producer Prices and the Prices paid by consumers”.
3. The High Level Group on the Competitiveness of the Agro-Food Industry

4. A DG Internal Market survey on the retail market
5. Another “Own Initiative Report” of the Agriculture and Rural Development Committee, led this time by José Bové, “Fair Prices for farmers: a better functioning food supply chain in Europe”
6. An Agriculture Committee Hearing: “Who calls the shots in Europe’s food supply chain”
7. Late Payment Directive

6.1 EESC hearing: “Retail industry: Developments and Impact” 24 September 2008

The Economic and Social Committee presented its report in December 2008 of a hearing it had organised in September and the subsequent parliamentary seminar it had staged in October. It recommended the establishment of a voluntary supermarket code of practice and “at national level the appointment of a mediator to arbitrate on disputes, evaluate and monitor the implementation of the Code, with the power to gather information from all stakeholders and proactively investigate breaches of the Code”. While there were strong voices in favour of a legally binding code, these were firmly resisted by European retailers who were able to make presentations at the seminar.

6.2 “Own Initiative Report” of the Agriculture and Rural Development Committee, led by Katrina Batzeli

The Batzeli report, which was adopted by the Parliament on the 26th March 2009, stated clearly its concern about the gap between farm gate and consumer prices and linked the size of the gap to retail concentration.¹⁰

“One constant factor in the rapporteur's investigation of the matter has been the degree of concentration of food marketing and distribution. Numerous studies show that in those Member States where market concentration has been found highest, there is a wider gap between producer and consumer prices. In the last decade, large retailers have come to dominate the European food markets. For instance, across the EU 15, the degree of concentration has grown from an average 21.7% in 1993 to more than 70% at present. Evidence suggests big supermarkets are abusing their buying power to force down prices paid to suppliers (based both within the EU and overseas) to unsustainable levels and

¹⁰ The extracts quoted in this section come from the Explanatory Statement of the draft report which was adopted 26/03/2009: PE413.955v01-00 PR\74430EN.doc

impose unfair conditions upon them. Large retailers across Europe are steadily becoming 'gatekeepers', controlling farmers' and other suppliers' access to EU consumers.

"At the same time, the final consumer price in Europe is in the range of one to five times that at the farm gate. Farmers in Europe received approximately half of the retail price of food fifty years ago. Today that proportion has dropped to much lower percentages, such as 7% in the UK and 18% in France on average. In the case of bread, the farm-gate retail spread can be as high as 30 times the farm gate price, with farmers receiving in general around 8% of the final retail price."

It noted the range of abusive practices employed by large retailers, called for "specific counteracting measures" and noted that there was a danger of small enterprises being driven out of business.

"The rapporteur identified a series of common marketing practices that distort free competition in the food sector and contribute to a widening gap between retailers' and farmers' earnings. Instances such as under the cost [*sic: normally "below cost"*] selling, threats of delisting, special supermarket taxes for putting certain brands of food on the shelves, listing charges, slotting allowances, retroactive discounts on goods already sold or unjustified high contributions to retailer promotion expenses or insistence on exclusive supply are all addressed in the report. For each of these practices, the rapporteur demands coordinated European and national action and specific counteracting measures.

"Furthermore, the report underlines the effects concentration and price wars among big retailers have on employment in the agricultural and producer sectors, through severe cost cutting competition and reductions in labour costs or deregulation of opening hours or weekend work. Aggressive price competition has also been found to have lead to poorer product quality, with a lesser nutritional value of products, as well as to a disruption in the production of seasonal fruit and vegetables.

"While admittedly market concentration can lead to lower price levels for food, this can also bear negative effects on the medium and long term, by damaging free competition and driving small businesses as well as direct producers out of the market. Therefore, the rapporteur stresses the fact that many SMEs in the food sector are extremely vulnerable especially if they are largely dependent on a large retail store. This is because retailers often employ race to the bottom price competitions between several small suppliers, who in order to stay in business need to cut costs and profit margins."

The Batzeli report called for the establishment of an EU wide data base giving complete transparency on prices, for a food price observatory to be set up at the FAO to give such

transparency a global dimension and for a Green Paper to be launched on the issue of the buying power of large retailers.

6.3 The High Level Group on the Competitiveness of the Agro-Food Industry

It was already noted above that the Commission's response to the WD included a reference to a "High level Group". This was not set up in response to the WD but was part of on-going work already envisaged.

"Additionally, the Commission will touch upon the issue of the market power of distribution in the framework of a High Level Group on the Competitiveness of the Agro-Food Industry. This initiative will be launched by the Commission in order to analyze the food industry which in the recent years has faced new risks and challenges which questioned the sector's competitiveness."¹¹

The High Level Group on the Competitiveness of the Agro-Food Industry was launched on 12 June 2008 by DG Enterprise. It involved key Commissioners, Ministers and various other stakeholders, and aimed at ensuring a comprehensive approach towards improving the framework in which the food and drink industry operates. The group's output was accordingly wide-ranging and only a few of its recommendations had a particular bearing on the abusive use of power by retailers.

The HLG produced a road map with 30 recommendations. These included general recommendations to adopt more holistic approaches, recommendations aimed at improving energy use in the sector, recommendations to streamline the process of authorizing new GMOs (so as to emulate the decisions of other regions where GMOs are more tolerated) and so on. There were recommendations to reduce and simplify legislation and to improve rapid response systems. There were recommendations on finance and improving SMEs access to global markets.

Among these recommendations were a few which are pertinent to the current paper.

Recommendation 14, for example, again counseled SMEs to develop ways of building up their own negotiating power through the establishment of marketing organizations or cooperatives.¹²

¹¹ From the Commission's Response to the WD, see Appendix 2

¹² The quotes which follow in this section are quoted from the table in 06/07/2009 HLG.008 Road Map of Key Initiatives, drawn up by the High Level Group on the Competitiveness of the Agro-Food Industry

“Recommendation no14: Support the effective integration of agro-food SMEs in the food chain. Farmers and agro-food SMEs in the upstream markets should integrate effectively in the food chain in order to reinforce their bargaining power and secure fair returns on their products.

To this effect, improving the understanding and knowledge of price transmission as well as of contractual arrangements along the food supply chain is of crucial importance and should be a priority action of existing national “Markets and Price Observatories”. The outcome of these actions would contribute to improving the effectiveness of market positioning strategies by agricultural producers through the setting up of producer groups and agro-food cooperatives.”

Recommendation 15[1] set out to ensure the proper and optimal functioning of the entire food chain by addressing the relationships among the food chain players

“The European Commission in collaboration with the Members States and stakeholders should establish a European forum that will address the relationships among the players in the food chain, and in particular between producers/processors/distributors and will identify various parameters of importance for the good functioning of the food chain with the aim to adopt an EU wide Code of Conduct.”

Recommendation 16 focused on private labels.

“Recommendation no16: Study the effect of private labels on the competitiveness of the European agro-food industry The European Commission should study the effect of private labels on the competitiveness of the agro-food industry, in particular on SMEs, and examine ways to reduce if appropriate, the imbalances of power in the food supply chain.”

The road map goes on to recommend making a career in the food industry more attractive, improving research and investment in research, improving WTO agreements and other matters.

DG Enterprise is responsible for overseeing the implementation of the roadmap. As part of this implementation it replaced the HLG with a new “Forum on the efficiency of the food supply chain”, which met for the first time on 16th November 2010.

At least four new Platforms (effectively working groups) were agreed which would report to the Forum. Two of the new platforms were on “Contractual Relationships” and “Industrial Competitiveness”.

Although the Road Map referred to adopting an “EU wide Code of Conduct”, this was included only after considerable lobbying pressure and there was no mention of a legally enforced code, implying that unless the Platform on Contractual Relationships decides otherwise any such code would remain voluntary.

6.4 DG Internal Market Report

In June 2009, DG Internal Market sent out questionnaires to member state governments, focusing on the functioning of retail markets in the EU. Five supply chains were being investigated: groceries, pharmaceutical products, textiles, electronic goods and recreational goods. The expectation was that the governments would fill these questionnaires out themselves and also forward them to “stakeholders” so that the latter could also help to build up a “snapshot” of the state of the retail market.

The context given in the introduction to these questionnaires was that the EU was facing a severe recession, that the retail sector could potentially help the EU to move out of recession and that this sector relied mostly on unskilled workforces making it therefore particularly important in contributing towards a solution to the economic crisis. The way in which the questionnaires were presented was very much in terms of asking what the regulatory blocks were to expansion of the retail sector. Although suppliers were potentially “stakeholders”, the questionnaire seemed to be inviting people to point out how existing regulations were holding back expansion of the retail sector, rather than inviting them to comment on how regulation might be expanded and strengthened to, for example, stop supplier businesses being destroyed by abusive practices. In spite of this emphasis, DG Competition had pointed to this market survey as being relevant to a potential solution to the problems raised by the European Parliament in its Written Declaration. Thus, as already quoted above:

“the Commission's Single Market Review has identified retail trade as one of the sectors that warrants in-depth market monitoring given its key role for consumer and supplier markets and its current level of fragmentation. A monitoring report will be prepared for 2009 to analyse the reasons for malfunctioning of retail services seen from both consumers' and suppliers' perspectives.”

The planned Retail Monitoring Report was also seen as being an important component of the Road Map to be adopted by DG Enterprises High Level Group.

On July 5th 2010, the Commission adopted a report which (according to the Commission’s own press release):

“identifies key issues potentially hampering more efficient and fairer retail services within the Internal Market and is now launching a public consultation on the report to determine future policy priorities in this domain. Reduced accessibility to basic retail services, scarce information on retail offers beyond local markets, slow growth of e-commerce, potentially abusive contractual practices throughout the retail supply chain, lack of transparency on quality labels, unsatisfactory functioning of the retail service labour markets as well as very different approaches to environmentally friendly retail services across the EU have been identified as key issues potentially hampering the retail sector. The deadline for consultation responses is 10 September 2010. The responses will feed into measures that the Commission will propose in the autumn as part of the Single Market Act.

“The Commissioner for Internal Market and Services Michel Barnier said: "Retail services employ nearly 18 million people in the European economy. We can create more economic growth by taking away difficulties that retail services face. That's why I am now consulting widely on this report, and on that basis, I will bring forward concrete proposals in the autumn."¹³

Clearly and unsurprisingly the primary concern of DG Internal Market was with economic growth and not, for example, with the EU citizens' increasing dependence on slavery to obtain cheap goods and the collusion of the economic system and regulations in guaranteeing such dependence.

While one of the 5 issues listed was the: “Risk of unfair commercial practices between different actors along the supply chain,” the concern about such unfair practices arose because: “the differing responses to these practices can undermine profits and innovation, particularly for SMEs.”¹⁴

When IMCO adopted its final report in June 2011, the importance of “Addressing contractual and commercial practices in business-to-business relations” was one of the issues recognised. However, the emphasis was on businesses resolving their difficulties without resort to regulation and there was no mention of the impacts on supplier businesses from outside the Internal Market, nor of the knock on effects of the abuse of power on employment conditions and the environment beyond the EU's shores. There was a mention in paragraph 39 of the possibility of setting up an anonymous complaints procedure and an ombudsman should all else fail, but the clear preference was to avoid such a step unless it should prove unavoidable.

¹³ Commission Press Release, July 5th 2010

¹⁴ *ibid*

The mention of a possible ombudsman unsurprisingly tends to give hope to those who believe that competition policy in its current form is inadequate and that some additional measures are needed to deal with the abuses of power which can come specifically from concentration of the retail sector. When such calls come from a number of different directions within the EU political structure, it adds to the impression that change may be in the air.

However, the absence of any reference to overseas suppliers, the preference for voluntary arrangements and the emphasis on economic efficiency in DG Internal Market's deliberations all suggest that many of the real issues at stake in an increasingly monopsonist/oligopsonist market are unlikely to be resolved, particularly as regards its impact on workers who and environments which feed the already extremely powerful and concentrated EU retail sector.

6.5 “Own Initiative Report” of the Agriculture and Rural Development Committee, led by José Bové, “Fair Prices for farmers: a better functioning food supply chain in Europe”

The report of this Committee was published on the 6th July 2010. Its starting point, as the title suggests, was prices, the gap between farm gate and consumer prices and the decline of farm gate prices in real terms and the consequent decline of farmers' incomes. The focus of the report was on the EU itself although the interconnectedness of EU and other region's agricultures was acknowledged. For example, in the preamble the report notes:

“whereas the European Union is the world's largest agricultural importer and exporter, with the EU's agricultural imports rising in 2008 by some 10% to EUR 98 600 million and agricultural exports rising by nearly 11% to EUR 75 200 million....”¹⁵

Later the report:

“Urges the Commission, in its activities, to be particularly attentive to the situation in developing countries and not to jeopardise the self-supply of food in these third countries”.

The emphasis here is on not threatening food security in vulnerable regions, rather than on extending the same kind of protection to overseas suppliers as to EU farmers. Apart from these two references, there is hardly any mention of overseas interests, suppliers, employment conditions or environmental impacts.

¹⁵ Quotes in this section are from the final Report, published 6th July 2010, “On fair revenues for farmers: A better functioning food supply chain in Europe”, A7-0225/2010

When it comes to farming within the EU, the report returns to the kind of clarity and directness of the Written Declaration. The report:

“Urges the Commission to initiate a full sector inquiry along the food supply chain to determine the level of buyer power abuses in the sector”.

It suggests that current assessments of anticompetitive practice are not fit for purpose in the context of the growth of large-scale retailing and it therefore:

“Urges the Commission to revise the criteria currently used to assess anticompetitive behaviour (Herfindahl Index); this index, which is useful for assessing the risks of monopoly, is unable to get the true measure of anticompetitive practices of a collusive or oligopolistic nature, as is apparently occurring, at least in part, in large-scale retailing;

It continues to recommend that more fundamental changes should be made to thinking relating to Competition Policy when it:

“Calls on the Commission to ensure a more targeted application of competition rules in the food chain and to consider legislative proposals to Parliament and Council in this regard, so as to effectively limit the development of dominant market positions within the input sectors, the food processing industry and the retail sector and to strengthen farmers’ bargaining power, enabling them to take coordinated action against dominant actors through efficient producer organisations, sectoral organisations and SMEs”.

In paragraph 31 it comes back to the spirit of the Written Declaration when it:

“Urges the Commission to propose an expansion of European competition law beyond its current narrow focus on consumer welfare and concerns for low food prices”.

The report deplored the fact that the President of the Council’s earlier communication of 11 Feb 2010 to the Special Committee on Agriculture had called merely for self-regulation and dialogue.

6.6 Late Payment Directive

Concerns about late payments preceded the Written Declaration and a political process was already underway when the WD was adopted¹⁶. Late payments themselves constitute a single example of an abusive practice routinely adopted by buyers who are

¹⁶ Indeed at the time of the WD there was already an existing late payments directive which laid down suggested but not mandatory payment periods. As non-compliance was widespread it clearly needed strengthening however

in a dominant position (not only by supermarkets but also by public authorities and other institutions).

While dealing with late payments does not in itself solve the general problem of distortion of markets caused by monopsony, putting a stop to them does at least remove one of the many symptoms of the underlying problem (at least 52 according to the UK's Competition Commission).

The EU Competitiveness Council agreed the draft of a directive on late payments on 11 Oct 2010. This would need to be converted into national law by the 27 member states within a two year period and would require payments to be made within a maximum of 60 days (or 30 days for public sector clients.) Although this is a step forward, as an EU-wide survey by Graydon's in the third quarter of 2010 showed that as many as 10% of invoices had remained unpaid even after 90 days, it is nevertheless not particularly stringent. Under the new directive supermarkets will still be able to effectively obtain 60 day loans from Small and Medium Enterprises, while the SMEs themselves usually have to pay for their own inputs within 30 days.

7. Overview of EU Institutional Responses

It is clear that there is significant concern amongst European parliamentarians as regards the growing power of supermarkets and the widespread abuse of that power. The concern comes from a number of different directions. Some MEPs may be worried about the effect of retail concentration on small shops and high streets. Others may be concerned about declining quality of life as cheap, uniform food cultures take over from Europe's rich heritage of local traditions. Others still are concerned about the economic impacts on farming, particularly European farming. While undoubtedly some are also concerned about the impacts on suppliers overseas and about the knock on effects which squeezing developing country suppliers inevitably has on environments and employment conditions in countries which export to the EU, developing country issues generally receive very little attention in the various reports and initiatives undertaken by the different EU institutions.

DG Competition's position is fairly clear. In its response to the Written Declaration, it expressed some concern but concentrated on praising big retail for its ability to use buyer power to keep down prices for the consumer. While others, such as the authors of successive reports by the Agriculture and Rural Development Committees deplored the drop in farm gate prices, DG Competition actually rejoiced in an 18% drop in consumer prices over an 8 year period, apparently unconcerned that such a drop might be attributable not to efficiency gains but rather to supermarkets' squeezing all the profit out of small independent businesses.

It would perhaps be unfair to expect DG Competition to know what has been going on in the world outside the confines of Brussels' economic and political elite. Indeed if DG Competition were aware of pressures caused by supermarkets on businesses and on ordinary people's working lives, then its rather indifferent response would have to be read as a tacit endorsement of, for example, the waves of suicides among small farmers, unable to make a living as supermarkets demand pig meat, dairy and other products at prices which do not even cover the costs of production or as an endorsement of slavery in developing countries, forced to accept prices for products which are lower than they were even as far back as the 1970s.

For those who adhere to a fundamentalist ideology of competition at all costs, it may indeed be desirable for the weak and powerless (whether small EU farmer or third-world slave) to be sacrificed for the benefit of collective economic efficiency.

DG Competition does however note that there may be alternative ways forward. It is beyond the scope of the Competition Authorities themselves to consider the effects of the domination of capitalist markets by a few giant retailers or to come up with ways of limiting any resultant abuses of dominant positions¹⁷. Nevertheless, problems arising from such abuse can potentially be dealt with by other agencies within the EU political structure, whether by DG Enterprise, DG Internal Market, DG Agriculture or others. The monopsony/oligopsony buck can indeed be passed.

However, as has been seen above, with the exception of DG Agriculture, other agencies have tended to share with DG Competition an overriding concern for Europe's competitiveness regardless of its consequences. There is much talk of removing the regulatory blocks to economic activity, of achieving economies of scale, even of smoothing the way for a more widespread acceptance of the still highly unpopular GMOs. Certainly amongst all this talk, concern about abuse of power is mentioned but only as a small part of a much bigger picture and the bigger picture appears to be overwhelmingly sympathetic to the growth of corporate power whether on the retailer or the supplier side. Notions of social justice, fair treatment of workers, protection of the environment, sustainability and quality of life always seem to be well in the background of the EU's high level groups and market enquiries.

Such matters are of course the rightful domain of particular branches of the law (such as employment or environmental legislation). Reliance on such other branches may be justifiable where law itself is both reliable and enforced but for a vast tranche of EU

¹⁷ Or at least so they appear to argue. Nevertheless in past years they did take initiatives with telecoms and later energy. It may be that there is simply not the political will to take such initiatives in the case of either banking or retailing

imports which go directly onto supermarket shelves, there is no such law and supermarkets' leverage of lower prices from overseas suppliers translates directly into poverty, environmental destruction and ultimately slavery. What is more, that other strong right arm of Competition Policy, the WTO enshrines in its rules the fundamental principle that overseas products cannot be discriminated against simply because workers are not paid enough to live. Although formal slavery may be banned, paying wages which do not allow workers to feed themselves and their families is absolutely fine, even laudable. Competition Law in the EU, the US and Internationally has muscle and clout. The countervailing legal structures which protect the people and the planet are by contrast weak and flabby, often "enforced" (or rather unenforced) by corrupt and underfunded low-status bureaucratic structures without power or influence.

Back in the EU, only the Agriculture Committees seem to speak for a Europe of citizens and of small enterprises. It is also the Agriculture Committees which recall most vividly Europe's social and economic rather than merely financial and competitive relationships with the rest of the world. The Agriculture Committees alone call for fundamental reviews of Competition Policy – could this be because Agriculture Committees are dominated by people with muck under their finger nails, who deal with everyday tangible realities and with real people, while the scions of Competition Law are more comfortable with the bankers, financial advisors and speculators whose mathematical algorithms based on idealized visions of abstract economic behaviour seem to have led the average citizen (but curiously not themselves) towards debt and ruin?

Amongst the various reports, there seems to be only one concrete proposal for action on abuse of supermarket power. This is the proposal for an EU wide code of Conduct. Many, particularly, of course, the retail industry but also the High Level Group, DG Internal Market and others favour a voluntary solution. Regulation is always seen as bad for business. Indeed much of the current effort of the High Level Group is directed precisely at reducing or removing regulation. Big retail and indeed business in general should regulate themselves, there should be more opportunities to talk, more forums etc., so the representatives of big business argue.

For others, notably and almost exclusively the Agriculture Committees, voluntary arrangements are not enough. They demand a legally enforceable code of conduct, which would actually make abusive practices by dominant retailers illegal and they call for an independent ombudsman, to whom anonymous complaints could be taken. Even for those who argue in favour of this regulatory route, there is almost no mention of nor indeed much acknowledgement of the plight of overseas suppliers in the discussions. With the main lobbying effort coming from either EU based farming interests or from EU based brands or food manufacturers, will any proposed mechanism really make provision for protecting overseas suppliers? To answer this question, we shall have to

look at the UK experience, which appears *faute de mieux* to be providing the only realistic model for EU efforts to control oligopsony.

8. The UK Experience

France and Germany do not have specific policies on supplier/retailer relations in the food industry. However they do have policies aimed at preventing firms exploiting dependency relations. Latvia has explicit penalties for abuse of a dominant position under its competition law. The Nordic Countries are keeping abusive practices under review and Ireland, following the example of the UK introduced a grocery code of practice in January 2010 which is due to become statutory (legally binding) in the future.

Apart arguably from Latvia, the UK appears to be ahead of the field as regards its efforts to control giant retailers¹⁸.

The UK's Competition Commission launched an enquiry into the operation of the Grocery Retail Market at the end of the last century. This reported back in 2000. The enquiry found 52 kinds of abusive practices (listing fees, late payments, demands for payments for new store openings, etc.) and recommended that a voluntary Code of Practice should be agreed in which the 4 largest supermarkets would agree to desist from such practices. There was a complaints procedure which would allow suppliers go to the Office of Fair Trading if they found that they were still being subjected to such abuses and there was a disputes resolution procedure to resolve problems.

Suppliers who did experience problems did not however take advantage of the complaints procedure which had been set up. Instead, they continued to complain off the record to their trade associations, to interested NGOs and to MPs and others. When asked why they did not use the complaints procedure, they said that they feared that if they made complaints, they would be delisted by the supermarkets and might even be black-listed as troublemakers by the others. As they were completely dependent on access to supermarket shelves for their financial survival, it was simply not worth risking the future of their businesses.

The widespread dissatisfaction with the code amongst suppliers to supermarkets in the UK led a number of trade associations and NGOs (including Banana Link) to make their own investigations. For anyone who was involved in such efforts to gather information, the experience was fairly disturbing. A great many suppliers seemed to regard the big supermarkets in much the same way as many citizens in Eastern Europe had once

¹⁸ Although it should be remembered that France in particular has had a series of laws which specifically attempted to target the grocery supply chain e.g. the Loi Galland, Loi Raffarin etc.

regarded secret police organizations like the Stasi, before the Iron Curtain was pulled down, with something approaching terror. It was possible to find people who would speak in private but only a tiny minority would speak out in public.

One producer of fresh produce, for example, claimed in private that he had been bankrupted as a result of the completely unreasonable demands made on his business by a supermarket buyer. He had an interesting and convincing story to tell and he was actively involved in lobbying the government and the Competition Commission to launch a new enquiry. However he would not tell his own story to the Competition Commission nor the Office of Fair Trading because he did not believe that they could guarantee him anonymity. His brother still had a business and was supplying the supermarket in question. The bankrupted producer believed that if he went public, his brother would be punished for his crimes by being de-listed. He no longer had anything to fear himself but he still feared for his family. Of course, his fears may have been unfounded but the case illustrates the extent of distrust of the big supermarkets felt by many suppliers.

As an alliance of interested parties continued gathering information and presenting what they could to the relevant authorities, the latter continued to resist demands to reinvestigate the Grocery Market. Finally with great reluctance, the Competition Commission had to accept instructions to launch a second enquiry. This reported back in 2008. As the Competition Commission was able to invoke legal powers it could force suppliers to give information and it could also ensure anonymity where necessary. This changed the atmosphere and made suppliers more prepared to speak out. The Commission found that many of the 52 abuses continued to go on and that the Voluntary Code had been ineffective. Its assessment was that at least some of these abuses distorted the market and lessened competition. In particular it was concerned that supermarkets were passing costs back to suppliers and putting them under such financial pressure that the latter could only think in terms of everyday survival. This implied that in time, suppliers would not be able to invest in the futures of their own businesses and that therefore they would be likely to go into long term declines. The financial pressures on them from low prices and high demands imposed by buyers would make it very unlikely that they would invest in innovation and this would have negative long-term consequences for consumers. As usual, the Competition Authorities could only really judge the situation in terms of the impact on consumers; other matters such as alleged impacts on employment practices etc. fell outside their perception of their own remit.

A new Groceries Supply Code of Practice (GSCOP) was introduced (in the face of vigorous lobbying and opposition from most but not all of the retailers). It would apply

to any firms with annual grocery sales of over £1 billion. An Order was made in August 2009 and came into effect in February 2010.

The report acknowledged that the GSCOP on its own would be unlikely to be any more successful than its predecessor (the SCOP) if an effective compliance system was not introduced. The report recommended that an Ombudsman should be established which would have powers to arbitrate in disputes, pro-actively monitor GSCOP compliance, receive anonymous complaints from organizations within the supply chain and gather information from retailers. Key to the way its role was conceived was that it should be able to protect complainants from possible retaliation by preserving their anonymity.

Having the power to pro-actively initiate enquiries (whether or not this power was ever invoked) would give the most complete assurance of anonymity for complainants, since a supermarket would never know whether the Ombudsman was actually responding to a complaint or was simply undertaking a routine enquiry. Crucially other organizations along the supply chain, including trade associations, would be allowed to make complaints, as suppliers were often afraid of doing so themselves (also third parties could sometimes see patterns emerging which would not be evident to a single isolated supplier).

At the time of writing, the precise form which the enforcement procedure will take has not been agreed. The UK's Department of Business Innovation and Skills has the responsibility of drafting the bill which defines the *modus operandi* of the Groceries Code Adjudicator (not, it turns out, an Ombudsman after all.) The current thinking is that complaints will be accepted from primary producers which might not be the direct suppliers of supermarkets (and also from other agencies like Trade Associations), even though the dispute will ultimately be between the direct supplier and the supermarket. The idea of the Adjudicator pro-actively undertaking enquiries appears unlikely to be endorsed.

Where will this leave overseas suppliers? The GSCOP covers only the direct suppliers to the supermarkets and this means that many overseas suppliers, whose products are bought by traders or importers who then sell on to the supermarket, will not be directly covered by the legislation. (Nor will many national producers, in fact.) Nevertheless overseas suppliers will be able to make anonymous complaints to the Adjudicator (it is widely acknowledged that when suppliers are put under acute financial or other pressures by the supermarkets, they frequently pass these pressures on in turn to the primary producers who supply them) and if the Adjudicator receives a certain number (to be decided) of complaints of a similar nature this could trigger an enquiry.

But will overseas suppliers take advantage of this opportunity? No-one can be sure but informal talks with a number of suppliers in the tropical fruit sector suggest that they are extremely unlikely to complain. To understand why not, we need to look at how business works in practice in international supply chains.

For a producer of tropical produce, by far the biggest headache is getting a market. Other problems, whether agronomic, environmental or labour problems, can usually be dealt with through his or her own efforts somehow or other. Natural disasters like hurricanes are beyond anyone's control and simply have to be endured (or the business will finally have to go under). However the future of the business is completely dependent on access to a reliable buyer and that buyer will inevitably be remote (in the case of tropical fruit, mostly on another continent). If a plantation has a client, he will do his best to keep him at all costs. He certainly won't want to complain through any official channel. If there is a difficulty he may be prepared to discuss it directly with the buyer and see if they can come to some accommodation. If the buyer is obdurate, then the plantation owner will have to do what he or she can to survive.

When buyers demand prices which are unrealistically low or other terms and conditions which are unreasonable, then in the absence of less demanding buyers, the supplier will somehow have to meet these demands. At the same time as the buyer wants the produce at low cost, s/he (almost invariably "he" in the tropical fruit sector; let's drop the political correctness and face reality!) also wants certain standards to be met. These include quality standards (these are sacrosanct; if the fruit doesn't look good, it will not be accepted and the supplier will not be paid), environmental standards and social standards.

In recent years retailers' demands that suppliers should use more environmentally sound methods have increased, as consumer awareness of environmental issues has grown. Unfortunately better environmental standards frequently add to production costs (the good old days are over when plantations could throw straight into the river the discarded chemically-impregnated plastic bags which they had used to protect the growing fruit! – disposing of these safely now costs money.) Some environmental practices can be easily checked and auditors sent by the supermarkets do this periodically. However, savings can be made by appearing to do things but not doing them in practice. From the point of view of a supplier it may be more workable to agree to something with the buyer but then to do something quite different once his back is turned than it is to comply (knowing that the chances of being rumbled are fairly slim).

In the case of social standards, this is particularly true. A classic case is that of wages. Most supermarkets insist that suppliers pay decent wages but the idea of a decent wage is typically tied to national minimum wages. In most tropical countries the agricultural

minimum wages are set way too low. Employers don't want them to rise to reasonable levels and nor do governments, as both parties fear loss of competitiveness on the world economic stage. Trade unions on the other hand usually do want minimum wages to rise but they are generally ignored or have no power and in some countries the more difficult and militant trade union leaders are simply assassinated. This is however not the end of the story. In most plantation agriculture the old idea of a wage or salary has been replaced with productivity deals. Almost everyone is paid according to how much work they do and in many cases plantation owners don't pay workers directly; instead the workers are often employed by contractors. The piece-rates are incredibly complicated and it is not unusual to talk to workers who have absolutely no idea why they are being paid what they are being paid. What they do know is that they have had to work for 12 hours instead of the legal 8 hour requirement to earn even the minimum wage which is not in itself enough to pay for accommodation and for food for their families. This whole area of workers' pay but also of general terms and conditions is one where it is almost impossible for a supermarket auditor to see what is really going on. Actual pay for a day's work will depend on how an individual supervisor has assessed a job (the supervisor may say "This is an easy field to work, therefore you have to harvest a lot of fruit to get the agreed payment", for example; the workers may disagree with the supervisor's assessment but they have no rights to challenge him). The arrangement might look reasonable when an auditor looks at the formal rates and tariffs in the farm office, but when these are applied in practice by the supervisor or foreman in the field the real levels of pay may be completely unreasonable.

Putting two and two together therefore, how is a supplier likely to respond to difficult demands from a remote supermarket buyer who might visit his plantation once a year...and perhaps not even that often, for a single day or even half a day? Will he make a complaint against his precious client at some unknown legal authority on another continent (knowing full well that in his own country such legal authorities are usually, shall we say, "heavily influenced" by the richest and most powerful people in the land)? Or, will he, if he finds his business is being impossibly squeezed, simply pass the pressure on by cutting back on those environmental protection practices which no-one is going to notice (for most tropical countries don't have adequately funded Environmental Protection Agencies) and by squeezing yet more work for even less money from his already hard-pressed workforce (or contractors)?

The overseas supplier has easier ways of surviving than by seeking justice in a remote court. He or she is unlikely to complain. The people who are most likely to want to complain are not the suppliers but the communities who live surrounded by pollution and the workers who are being slowly killed by over-work and inadequate pay and the only people who are likely to act on their behalf are NGOs or International Trade Union

Organisations. However will NGOs or Trade Unions be regarded as appropriate bodies to take complaints to the Adjudicator? This remains to be seen. In the UK process the idea of allowing third parties to make complaints has been controversial and has been vigorously opposed by the retailers. They argue that under the terms of the GSCOP, any potential dispute would be between a supplier and the retailer. Only the supplier should be able to make a complaint therefore (and the retailer should, as a matter of natural justice know who the complainant is – thus effectively ensuring that anonymity would not be possible.)

The Department for Environment, Farming and Rural Affairs disagrees. It wrote to the Department of Business Innovation and Skills recommending that third party complaints should be allowed. Its recommendation followed discussions with trade associations such as the National Farmers' Union and the Processed Vegetable Growers' Association. While it comes out in favour of third parties, it also points out that there will need to be provisions to ensure that such third parties are "appropriate".

"We consider that enabling appropriate third parties to make complaints to the Adjudicator is necessary. We therefore urge the Business, Innovation and Skills Committee to recommend that the legislation be amended to provide for third parties to make complaints to the Adjudicator on behalf of direct or indirect suppliers. **The Government will need to set out provisions that ensure such third parties are appropriate bodies to take on this role and that make clear the mechanism and evidential requirements of such a complaint.**" [My emphasis; in fact the first part is in bold in the original letter]¹⁹

Whether in the UK or more widely in the EU, the Code of Conduct combined with an Ombudsman or Adjudicator appears to be the only show in town. As so often, the devil is in the detail. To be effective, the Ombudsman needs to be able to act proactively and needs also to be able to impose financial or other penalties which are as serious as those imposed by the Competition Authorities in cases of collusion and price fixing. Third parties also need to be able to tip off the Ombudsman anonymously and when enough such tips are received the Ombudsman needs to be able to launch a sector-wide enquiry using his/her own discretion. Third parties should not be confined to Trade Associations. They need, in the case at least of overseas supply chains, to include NGOs and Trade Unions (whether these are based in the supplying countries, the EU or internationally). If all these conditions are met, then it might be possible to reduce supermarkets' powers to employ (indirectly) quasi-slave labour and to (indirectly)

¹⁹ Letter dated July 2011 from DEFRA to BIS

despoil global environments in their relentless efforts to win the never-ending price wars which are a feature of almost every EU national grocery market.

There are a lot of “ifs” in all this. What is still needed more than ever is not simply the development of systems of control to deal with the *symptoms* of what has become a crisis in the dynamics of global supply chains. What is really needed is for the EU (and indeed international) Competition Authorities and for the entire professional and academic world associated with Competition theory and practice to stop ignoring reality and to look for new approaches which do not fuel the “race to the bottom” referred to by Batzelli, Bové and others in their Agriculture Committee reports to the Commission. What is needed is a fundamental change in the way that we think about Competition which takes into account the new realities of monopsonist or oligopsonist power and its ability to destroy people and places.

9. Competition Law Requires Retailers to Use Slaves

At first sight, this appears to be an absolutely outrageous claim. Can it really be true that Competition Law actually requires retailers to use slave labour? Surely, this cannot be possible.

And yet remarkably and shockingly, it appears to be the case.

To see how this works, we will have to reluctantly and briefly leave the exotic world of tropical agriculture and slip seamlessly into another of the great profitable domains of giant retailing, the garment industry, specifically the garment industry of Bangladesh. We will also need to peer behind the hallowed oak portals of the famous legal “Chambers” of Gray’s Inn Road, London and seek advice from some of the UK’s leading Barristers or “Queens Counsel” ...but first let us remind ourselves quickly of the dynamics of the retail markets in both groceries and increasingly clothes (and indeed many other sectors).

For groceries and for the giant supermarket chains which now dominate the grocery market (and increasingly the garment market as well), the greatest driver is price. While it is true that some of the smaller supermarkets emphasise quality, ethics or other values, the real giants almost always compete primarily on price. “Everyday Low Prices”, “Good Food Costs Less at...”, “Every little helps” – these are the slogans that appear on the chains’ delivery trucks and shop fronts, on the plastic carrier bags and on adverts on billboards, in newspapers and on the TV. In some countries, like the UK for example, the big chains show not only their own prices on the products displayed on their shelves but also those of their competitors. For some sensitive products (like bananas) all the big retailers sell at precisely the same price. If one cuts its prices, all the others follow

immediately, usually within a matter of one or two hours. The supermarkets are locked in a permanent price war.

Prices for bananas are lower than they were ten or twenty years ago and yet supermarket profits have never been better. How is this trick achieved? Certainly, as already intimated there have been some efficiency gains but almost all such gains were made some time ago. More recently, low prices have been obtained by squeezing the supplier and the supplier can only survive if he or she squeezes someone else and that someone else is almost bound to be the weakest person in the supply chain, the worker who gets out in the field and actually grows and harvests the fruit. Real wages have declined since the 1970s. Permanent jobs have been increasingly replaced by short term, contract work and piece work. Workers' rights have been eroded. Plantation housing is disappearing or crumbling away. Sick pay, maternity leave, compensation for injury, unemployment benefits, health care, other social benefits...all these have been steadily eroded as the emphasis has moved towards cheap, short-term labour. Plantations like to employ young, fit men and as few women as possible and to discard them when they have been worked into the ground. And all this has been made inevitable by the ruthless purchasing policies of the big supermarkets.

It has also generated a new kind of problem for the supermarkets however. On the one hand, they have to ruthlessly push for the lowest prices and the most favourable terms and conditions if they are to stay ahead in the frankly unwinnable supermarket price war. As their buyers pursue their objectives of "everyday low prices", the inevitable impacts on the people and communities which supply supermarkets with products become more shocking and more visible. Reports appear in the press, documentaries appear on the TV and consumers feel uneasy as they see what supermarket chains are doing on their behalf.

The problem for the supermarkets is that they don't really know how to stop fuelling this "race to the bottom" (a race of declining environmental and social standards as suppliers are pushed to produce at ever lower prices). They have to squeeze their suppliers to keep ahead of their own competitors and to make sure that consumers will continue to visit their stores (the famous "footfall" of which retailers like to speak). The problem is that there are no mechanisms to stop them squeezing too hard until all the juice is gone, until the environments on which production depends are ruined and the people exhausted and starving. There should be mechanisms which place a limit on the buyer's ability to squeeze. There should be a point at which all suppliers agree "Sorry, we just can't sell any cheaper than this; it can't be done".

In fact, at least theoretically, there are mechanisms. There are national labour laws and environmental laws in the producing countries but as absolutely everyone knows from

the humblest worker, through the plantation owner, through the national politicians, through the exporters and importers and right on to the supermarkets, the mechanisms are all broken. They have been broken for years. The World Bank and the IMF and all the other proponents of ultra-capitalism and “efficiency” have been saying for years that the bureaucracies which ensure social and environmental standards are just too expensive and need to be cut, so that producing countries can be lean and fit and competitive.

Faced with this absence of controls and with potentially ruinous attacks from the media and NGOs on the reputations of their corporate brands, the supermarkets have been forced to set up their own standards and mechanisms. One such initiative has been the UK’s Ethical Trading Initiative (ETI), in which retailers have got together with NGOs and trade unions to try to establish minimum standards, below which suppliers cannot sink. The theory is that if all suppliers respect these standards, then the retailers can continue their brutal price wars but they will never be able to push suppliers beyond a certain point (the point at which suppliers fulfill all the requirements of the standards and make an adequate profit for themselves.)

Accordingly the ETI has agreed its own set of standards, referred to as the ETI Base Code, one element of which is that all suppliers are required to pay their workers a “living wage”. This leads us to the case of Bangladesh and the garment trade.

In the first decade of this century, many of the big names in UK clothes retailing, including three of the big 4 UK supermarket chains, were increasingly sourcing their clothes from Bangladesh. They did this for a very good reason, which was that labour was (and still is) dirt cheap there. In fact, some of the more prestigious and “up market” brands really didn’t want to be there but even they had had to cave in and take advantage of the cheap labour if they were to survive in a very price competitive retail market.

Immediately, in looking at this story, we come up against the central paradox of today’s market. Everyone has to go where the labour is shockingly cheap but actually they don’t want to accept that they are relying on what amounts to slave-like conditions. It doesn’t look good for the retail brand. No-one can leave because to do so would be financially ruinous but no-one wants to rely on labour which is being slowly starved and worked to death.

Bangladesh has a national minimum wage. In 2008, this was set at 1600 Taka but assessments of what was really needed for survival generally agree that a “living wage” would be somewhere between 3000 and 4000 Taka, at least twice and possibly three times the current level.

In 2008, ETI members decided that they would like to put in place a pilot project. The purpose of this project would be to try to get Bangladeshi suppliers to pay “living wages” rather than the shockingly low wages which were then extant (in fact most suppliers didn’t even pay the national minimum wage, let alone the proposed “living wage”).

However, the retailers faced a real problem. Some of the big supermarkets had already been in trouble with the Competition Authorities for trying to raise the retail price of milk. The punishments for collusion can be severe, with hefty fines payable and the possibility that Directors will be imprisoned! Some of the defendants who were accused of colluding to raise retail prices claimed that they had been trying to ensure that farmers would receive fair prices (dairy farmers were being increasingly bankrupted by the unsustainably low prices paid by supermarkets for their milk, prices which were sometimes actually below the costs of production). To do this they had had to collude in agreeing to raise the retail prices on the supermarket shelves. Whether these defenses were sound or not need not concern us here. The salient point is that the big retailers were afraid that a concerted effort to stop slave wages being paid in Bangladesh would lead to them being prosecuted by the Competition Authorities for collusion or price fixing. To guard against this the ETI sought legal advice from a reputable legal firm in Gray’s Inn. An examination of their advice is most instructive.

Realising that they could be at risk, the ETI set up a defensive structure which was referred to as “the Scheme”. The retailers faced a problem in influencing their suppliers. This was that individually they purchased only a percentage of their suppliers’ outputs. An individual retailer might try to insist that living wages should be paid. However producers who supplied other buyers would be unlikely to comply if compliance would raise their costs (which would clearly be the case) and if this meant that they would have to charge other buyers more for their products (which would also be fairly inevitable). If several UK retailers could work together however to insist on living wages, then suppliers would be much more likely to comply (particularly if several UK retailers together accounted for a majority of their sales!) At the same time, the suppliers would feel able to demand that buyers should pay higher prices and these would be likely to be accepted by the retailers (and almost certainly passed on to the UK consumers). There was however a problem.

Sharing information about suppliers, applying coordinated pressure on them and passing on costs to consumers could be construed as collusion by the Competition Authorities. The “Scheme” tried to get round this by getting retailers to provide a neutral third party (a group of independent consultants employed by the ETI) with a list of their suppliers. The independent consultants could then identify suppliers who were supplying several retailers with a critical mass of products and these suppliers would

then be chosen for the pilot. Retailers would be given a list of which of their own suppliers they should try to influence but they would not know which other retailers were also sourcing their garments from the same supplier. Each retailer would conduct its own independent negotiations as regards higher prices to compensate for the payment of living wages. The whole situation would be “anonymised” and therefore collusion would be avoided.

The legal advice offered was positive. The QC’s believed that the retailers could get away with “the Scheme”, without running the risk of prosecution. However even with the safeguards proposed, they were cautious. They provided 30 pages of arguments to justify their cautious acceptance of the proposal. What was particularly revealing were the arguments which they considered to be crucial in justifying their judgment.

Crucially, they felt that the scheme could work precisely because only a small proportion of all the garments sold by the retailers in the UK would be sourced from suppliers who paid the agreed Living Wages. This would mean that consumers would still have plenty of opportunity to buy garments which were produced by suppliers who did not pay living wages. It is worth quoting in full this remarkable (but undoubtedly technically correct) judgment:

“33.....Insofar as increased costs are passed on by some retailers, consumers will not be required to pay those prices, but may instead choose to purchase goods which have not been sourced under the Scheme (which goods will, for the foreseeable future, continue to constitute the vast majority of goods sold even by the participating retailers). In other words, the Scheme is unlikely to result in any significant rise in retail prices even of the goods that are sourced under the Scheme; and, if there were such a rise, consumers would have no difficulty in avoiding it by buying goods not sourced under the Scheme.

34. For these reasons, we do not consider there to be any realistic risk of the Scheme infringing the Chapter 1 prohibition (or, therefore, Article 81 of the EC Treaty) in the immediately foreseeable future.”²⁰

It is necessary to dwell for a moment on this remarkable exposure of the underlying logic of Competition Law as embodied in Articles 81 and 82 of the EC Treaty.

Provided that consumers are enabled to buy goods which are produced by workers who were not paid enough money to live on (in other words, these goods were pretty much produced by slave labour) then there will have been no infringement of Chapter 1

²⁰ Quotes come from the legal advice given. As this advice was not published and is therefore generally not in the public domain a reference is not provided here

prohibition (as enshrined in Article 81 of the EC Treaty). EU Competition Law has not been infringed because consumers' rights to buy products produced by quasi-slave labour have not been violated.

The legal advice goes on to state that there might have been a possibility of gaining an "Exception under Section 9"²¹ but that fortunately this should not be necessary, in the light of the above considerations. Section 9 is untested, there are few legal precedents and a judgment could go either way. A Section 9 exemption is allowable if it can be shown that an infringement is necessary to achieve "economic progress", not it should be noted in the producing but rather in the consuming country. The retailers would have to show that UK consumers (as the pilot scheme on this occasion was confined to the UK) would receive a "fair share" of any economic progress. The only such share which could be argued would be a sense of moral satisfaction that goods had been ethically sourced. It was possible that a tribunal would not view such satisfaction as evidence of economic progress (social progress would not be an allowable consideration). Certainly, the legal team noted, such an argument had never been successfully used so far.

In showing why in this case the Scheme was workable, the legal team inevitably revealed the obverse side i.e. what would not be workable or what is not allowable under Competition Law. What they showed is that consumers have the right to expect to be able to purchase the products of quasi-slave labour (i.e. for the purposes of this paper, labour which is not rewarded with sufficient payment to allow the labourer to survive). However they do not have the right to expect that the products they purchase are produced without the use of such quasi-slave labour; nor do they have the right to demand or expect that the retailers who provide them with products take any steps to ensure that the products on sale in their shops are not produced in slave-like conditions.

Competition Law protects the right of consumers effectively to own slaves via their retailers. It forbids collective efforts to avoid reliance on slavery (except in the most formal sense of slavery as actual legal ownership of another person).

Indeed, it could be said that in the light of the above two statements, Competition Law effectively imposes a duty on consumers to purchase products produced in slave-like conditions. Consumers can avoid this duty but only by paying a punitive additional tariff (by for example purchasing "Fairtrade" products) if they insist on avoiding such products of quasi-slavery. (This will place them at a competitive disadvantage in life *vis-à-vis* other consumers, as such choices will leave them with less disposable income to be deployed in, for example, competitive markets like the crucial housing market;

²¹ Of the Competition Act 1998

effectively therefore consumers who hold ethical beliefs and who act in ethical ways are actively punished.)

While Competition Law prevents collusion amongst retailers to guarantee minimum standards such as living wages, it acts in synergy with WTO rules which at the level of nation states, similarly prevents nations from imposing tariff barriers against goods which are produced using processes which do not conform to minimum standards (e.g. the avoidance of environmental pollution; the payment of living wages, etc.)

These two powerful legal tools, both of which are supported by significant legal sanctions, protect the consumer against any attempt by any party to ensure that the goods they buy are produced in socially or environmentally sustainable ways. They enshrine as a matter of legal necessity the requirement that consumers in the course of consumption contribute to the destruction of social and environmental fabrics without regard to any considerations other than short term material satisfaction, unless, that is, they themselves undertake extraordinary efforts to avoid such destruction (by, for example, researching and choosing fair trade, organic or other options, which they may deem to be less harmful).²²

10. Where do we go from here?

Given the logics of the current economic system and given the current global financial crisis, it is not immediately clear what can be done to change direction.

For the last twenty or thirty years, there has been a relentless ideological push towards ever more laissez-faire systems. After the collapse of the soviet bloc, there was a tendency to believe that capitalism had triumphed and that all that was needed was more, faster and better capitalism. Markets were increasingly liberalized. States were encouraged to abandon nationalized enterprises and to privatize everything. Productive enterprises of all kinds left the developed world and sought low wages and easy terms in the cheapest parts of the “developing world”, including China, the new “workshop of the world”. Financial speculation in every kind of market, even markets for basic essential commodities was endorsed and a speculative bubble developed and finally collapsed. Financiers and bankers were bailed out by governments and then continued with their speculative ways, awarding themselves extraordinary bonuses, rewarding

²² The OFT has recently introduced the “Short Form Opinion” which could potentially enable parties to potentially difficult agreements to obtain an opinion from the OFT which effectively blesses it. It may be that the ETI could have used this mechanism had it been faced with this particular dilemma more recently. This particular mechanism would only be usable in the UK clearly, where the OFT has its jurisdiction. It is not only the ETI’s scheme which potentially faced such difficulties in the past. Unilever and Procter and Gamble faced huge fines for price fixing in the context of an environmental scheme which should, some commentators believe, have been blessed by the competition authorities in advance

themselves regardless of failure or success. The gaps between rich and poor became ever wider. Governments, having provided the capital necessary to prevent the entire banking system from collapsing, found themselves in ever deeper debt. The financial interests which had ruined the governments by their profligate practices started to downgrade the credit ratings of the countries which had saved them from ruin. Governments could not, so the credit ratings agencies believed, afford costly welfare programmes, national health systems, pensions etc., etc. All spending needed to be cut.

Overall, the developed world, including both the EU and the US, managed to throw away its legacy of development, and is in the process of plunging the global system into a state comparable to that which had existed during the earliest stages of industrialisation, when workers lived in extraordinary conditions of poverty and suffering. The entire globalisation and liberalisation project, supported by the WTO, Competition Law and the growth of giant retailing was not complemented by a comparable globalisation of standards, social protection, or effective environmental or labour law.

Laws of these kinds in the developed world were not historically given out by today's beneficence of wise legislators. They were mostly the product of widespread unrest, of blood flowing in the streets, of rioting, of passionate political debate. Every concession which allowed the humanisation of the industrial machine and the civilising of capitalism was fought for by the dispossessed and bitterly resisted by ruling classes who used police forces and armies to protect their wealth and to keep the ordinary masses of people subjugated.

The globalization of industrial exploitation makes it difficult for the severely exploited to coordinate pressure to achieve decent standards.

Certainly, there is discontent enough, but that discontent occurs in isolated pockets, whether in Iran, Syria, China, Russia or Greece and each local manifestation is different from the others, making international coordination virtually impossible. There is the so-called "arab spring"; there have been riots in parts of the EU; and in China there is a bubbling discontent against corruption and growing inequality which may not be contained for much longer. Everywhere the gap between rich and poor is growing; everywhere the poor are finding daily survival more difficult and every day the rich seem yet more entrenched, grabbing more of the world's resources for themselves, while others sink in the mire of wretchedness.

11. Consumers and Citizens

At such a time of instability and financial uncertainty, it might seem unwise to rock the boat by questioning the regulatory structures which govern our affairs.

If supermarkets can continue to provide us with cheap food and other goods, perhaps we should not look too closely at their methods or at the exploitation of workers and environments which make their “everyday low prices” possible. Certainly it would seem that, in the EU, DG Competition does not want to embark on an enquiry which could end up making goods more expensive. This reticence is very understandable.

From the point of view of the pure consumer, buying stuff cheap is always preferable to paying more, especially when the consumer is feeling poorer than s/he did before the financial crisis.

Does buying cheap really provide any kind of prospect of long term improvement however? Arguably, the “everyday low prices” so lauded by Asda/Walmart will chain the world economy to stagnation for the indefinite future. “Honest prices” on the other hand might be what lift us collectively out of a pending depression. Honest prices will not emerge from a market of consumers who don’t want to pay and who can collectively influence prices through the monopsonist services of giant retailers. Fair prices can only come if the economic model promoted by law and regulation, themselves products of collective citizen action, insists that minimum standards are respected, not just in the developed world but in all countries which participate in the global economy.

What will move economics out of stagnation is a redistribution of wealth (or more precisely a reversal of the massive redistribution of wealth towards the rich which has occurred in the last thirty years), based on the payment of living wages. If workers are paid living wages, workers’ demands for goods increase and therefore growth is stimulated. This may fuel inflation; but inflation also lessens the value of old debt and makes it repayable. The world economy can move on, instead of retrenching. (In a non-infinite world however this growth needs to be a temporary driver allowing redesign of life styles to the point where they become sustainable).

Consumers/citizens will need to decide if they want to follow the consumer vision offered by WalMart’s Sam or the citizen vision offered by Henry Ford.

12. Wal-Mart vs. Ford²³

Wal-Mart was founded on a vision, a vision which contrasts with that of another US company, Ford.

Wal-Mart's philosophy has been to sell products as cheaply as possible so that everyone, even the poorest of the poor can afford to buy them. This, in itself, appears to be a perfectly honourable aspiration and apparently many Wal-Mart managers are proud to be instrumental in helping the poor to survive. However in order to achieve this, Wal-Mart pays its own staff at low rates and its suppliers as little as it can get away with. Does this matter? According to Wal-Mart's worldview, it does not. Staff may be paid very low wages, but since everything at Wal-Mart is so cheap, staff can still afford to buy their daily groceries, providing they shop at Wal-Mart. The same applies to the suppliers and all the intermediaries. Payments may be low but Wal-Mart provides so many things in its stores that anyone involved in the Wal-Mart family can still survive. The more people work in Wal-Mart, the lower wages become and therefore the cheaper goods become, which means that more people can afford to buy goods, which means that more people can be employed by Wal-Mart and its suppliers at low wage rates, which increases the demand for cheap goods, etc.

Contrast the Wal-Mart approach with the Ford vision. Henry Ford took completely the opposite approach. When he set up his vehicle manufacturing plants, he paid his newly recruited workers handsomely, at unusually high rates for the time. His argument was that if his workers were well paid, then they would be able to afford to buy his cars and this would help to generate more demand, which would lead to more workers being paid, which would lead to more demand and so on. Interestingly enough, during the 1970s, car workers in Detroit changed their cars on average every three years.

The two US giants have both been highly successful in their time. Both models appear to work and both generate what look like virtuous circles. However, there is clearly a crucial difference between the two.

The Wal-Mart virtuous circle is one of ever lowering prices and ever expanding "making do". More and more of the world's population from China (Wal-Mart buys more from China than most nations import from that country) to Latin America is drawn into the tough ambit of cheap prices, hard bargaining and penny pinching, while high above

²³ The basic idea expressed in this section of a Wal-Mart vs. a Ford visionary model came to the current author from a forwarded e-mail some years ago. The idea is therefore not original. Sadly, it is not possible to attribute it to its original creator as the e-mail in question was stored on a now defunct old computer and is no longer retrievable. Nevertheless I would like to take the opportunity to express gratitude to the unknown author here. Thank you, whoever you are!

them float the increasingly remote “lords of creation” (as the members of some financial establishments liked to call themselves before the last great crash).

The Ford model was one of rising wages and rising prices with ordinary families sharing in prosperity, able to borrow money to buy consumer goods and able to pay off their debts as a spiral of growth reduced the values of old debts and allowed people to aspire to ever-better life styles. At the time of its greatest success, the gap between senior management and ordinary workers was very modest compared to the gaps between executives and workers today.

However, the decision to move much of US and EU manufacturing to cheap labour areas has led to a striking widening of wealth gaps between rich and poor. In the US for example, family income for the poorest fifth of families rose by 2.8% between 1974 and 2004, as large companies shifted production to China and other countries. (Meanwhile the cost of living continued to rise, meaning that a 2.8% growth translates into a shrinkage of income in real terms). Over the same period, the income of the richest fifth of US families went up by 63.6%.

In the case of the automotive industry, to choose a single example, Delphi, a US auto parts company was paying \$27 per hour (or \$65 per hour when Medicare costs were factored in) to its US based labour in 2006. Meanwhile its Chinese plant was paying a mere \$3.00. In 2005, the Company appointed a new CEO (on a massive salary) with the remit of reducing US labour by two thirds and increasing production in China. While reduction of labour costs would clearly finally impact on the price of auto parts, in fact labour represents only a modest proportion of overall costs. The reduction of costs helped to keep the Company competitive but the downside was that thousands of well-paid workers lost their jobs and incomes. The jobs created in China were not well enough paid to allow Chinese workers to buy cars. Therefore overall the shift to China reduced demand for car parts. While the effect of this would have been extremely small, such effects become massive when virtually every manufacturing sector is doing the same thing i.e. cutting well-paid work and replacing it by work which barely allows workers to cover their subsistence costs. The effect of numerous such changes occurring all over the world at the same time has been to destroy demand.

In the short term this was not entirely apparent to many commentators as demand was stimulated in the US and the EU by the extension of credit to people with little chance of ever paying back debts. Credit was extended against the security allegedly offered by a boom in housing ownership in the context of rapidly rising house prices in both economic blocks. A range of new financial instruments obscured the fact that western property markets were nothing more than speculative bubbles and that much of the new debt would never be re-paid. When the bubble burst, banks nearly crashed and

governments stepped in to stabilize the financial system. The solutions offered up until the time of writing have succeeded in averting total collapse, but the story is far from over and it is not impossible that a 1930s style depression lies just around the corner.

Seen in terms of these developments, the Wal-Mart approach of doing everything to get everyday low prices seems less attractive. While low prices are always great for the individual, if they also mean that suppliers of all goods, the employees of all such suppliers, the transporters of goods and their employees, etc. etc. all end up earning wages which allow them nothing better than mere day to day survival (and sometimes not even that, as we are told by many workers in the agricultural sector) and if this in turn means that all these entrepreneurs and workers stop buying things, then economic depression would appear to be inevitable.

The Wal-Mart model may deliver results for the poor when the poor live in the context of general affluence (as was the case when the Company started out). When this model becomes the mainstream however, ever poorer people, working ever harder for ever less, end up buying less and the entire economic system grinds to a halt.

13. Rethinking Competition Law

When significant monopsonies or oligopsonies develop, Competition Law sets a legal and financial framework in which giant retailers inevitably drive down prices below sustainable levels. In the absence of countervailing, properly enforced legal instruments employment and environmental standards inevitably decline as suppliers struggle to meet increasingly unreasonable demands for cheap goods from huge supermarket chains locked in relentless price wars.

In such conditions, slave like work conditions and gross environmental pollution events are apt to develop in ways which are reminiscent of the early stages of industrialization and mass production.

While efforts to modify the behaviour of buyers through the imposition of codes (whether voluntary or legally binding) may have some success, these are unlikely to have a major impact on the treatment of overseas suppliers. Nevertheless such attempts to limit abuse directly (as in for example the Late Payment Directive) are worth supporting and must have some impact on the atmosphere in which business is carried out.

However, deeper changes will be required if the current dynamics are to be changed. At present, retailers can be penalized for trying to insist on minimum standards, such as the payment of living wages (as competing retailers are unlikely to survive when they

source from suppliers who pay properly if their rivals all continue to source from those who don't; meaning that collusion is a prerequisite to guaranteeing proper standards).

Changes need to be made to Competition Law such that retailers are penalized not for trying to insist on minimum standards but rather for not succeeding in assuring that such standards are met by suppliers. In other words, a retailer which habitually sources goods from suppliers which fail to pay (for example) Living Wages should be condemned as guilty of unfair competition. Such retailers should be subjected to sanctions, as grave as those imposed for price fixing. Gaining an unfair advantage by failing to pay adequate wages is not only an abuse of any reasonable conception of fair competition, it also tends to withdraw purchasing power from significant numbers of potential consumers (workers employed by such suppliers) and thus tends to slow global economic growth (a classic negative effect of monopsony).

DG Competition argues that issues like employment practices are outside its frame of reference and that such issues should be dealt with by other legal instruments such as employment law. However Competition Law has teeth both within jurisdictions and internationally; neither employment laws nor a great many environmental laws have any teeth at all beyond a few, limited jurisdictions. Competition Law cannot continue to ignore practical realities; it needs to be reconceived, to rediscover its social and economic objectives and to internalize minimum standards into its everyday *modus operandi*.



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Appendix 1: The Written Declaration (WD)

EUROPEAN PARLIAMENT

2004



2009

10.10.2007

0088/2007

WRITTEN DECLARATION

pursuant to Rule 116 of the Rules of Procedure by Caroline Lucas, Gyula Hegyi, Janusz Wojciechowski, Harlem Désir, Hélène Flautre on
investigating and remedying the abuse of power by large supermarkets
operating in the European Union Lapse date: 24.1.2008

0088/2007

Written declaration on investigating and remedying the abuse of power by large supermarkets operating in the European Union

The European Parliament,

- having regard to Rule 116 of its Rules of Procedure,
- A. whereas, throughout the EU, retailing is increasingly dominated by a small number of supermarket chains,
- B. whereas these retailers are fast-becoming ‘gatekeepers’, controlling farmers’ and other suppliers’ only real access to EU consumers,
- C. whereas evidence from across the EU suggests big supermarkets are abusing their buying power to force down prices paid to suppliers (based both within the EU and overseas) to unsustainable levels and impose unfair conditions upon them,
- D. whereas such squeezes on suppliers have negative knock-on effects on both quality of employment and environmental protection,
- E. whereas consumers potentially face a loss in diversity of products, the cultural heritage and retail outlets,
- F. whereas some EU countries have introduced national legislation attempting to limit such abuse, yet large supermarkets increasingly operate across national boundaries, making harmonised EU legislation desirable,
- 1. Calls upon DG Competition to investigate the impacts that concentration of the EU supermarket sector is having on small businesses, suppliers, workers and consumers and, in particular, to assess any abuses of buying power which may follow from such concentration;
- 2. Requests the Commission to propose appropriate measures, including regulation, to protect consumers, workers and producers from any abuse of dominant position or negative impacts identified in the course of this investigation;
- 3. Instructs its President to forward this declaration, together with the names of the signatories, to the Commission, the Council and the parliaments of the Member States.

Appendix 2: The Commission's Response to the WD

European Parliament written declaration on investigating and remedying the abuse of power by large supermarkets operating in the European Union

- 1. Declaration tabled by Caroline LUCAS (Verts/ALE/UK), Gyula HEGYI (PSE/HU), Janusz WOJCIECHOWSKI (UEN/PL), Harlem DÉsir (PSE/FR) and H  l  ne FLAUTRE (Verts/ALE/FR) pursuant to Rule 116 of the European Parliament's Rules of Procedure**
- 2. EP reference number:** DCL-0088/2007 / P6-TA-PROV(2008)0054
- 3. Date of adoption of the declaration:** 19 February 2008
- 4. Subject:** investigating and remedying the abuse of power by large supermarkets operating in the European Union
- 5. Brief analysis/assessment of the declaration and requests made in it:**

The European Parliament has adopted a written declaration on "investigating and remedying the abuse of power by large supermarkets operating in the European Union" at the plenary session of 18-21 February 2008. The written declaration expresses concerns relating to competition, unfair commercial practices, consumer protection, employment and the environment. It:

- i) calls upon DG Competition to investigate the impacts that concentration of the EU supermarket sector is having on small businesses, suppliers, workers and consumers and, in particular, to assess any abuses of buying power which may follow from such concentration, and
- ii) requests the Commission to propose appropriate measures, including regulation, to protect consumers, workers and producers from any abuse of dominant position or negative impacts identified in the course of this investigation.

- 6. Response to the requests and overview of the action taken, or intended to be taken by the Commission:**

Introduction

The Commission welcomes the attention drawn by the EP to the retail sector and outcomes for consumers, producers and employees in the sector and agrees on the importance of a better understanding of how the sector is working. There is a very large

variety of situations in the different EU countries as regards concentration of retailing markets.

Concentrations are under constant control of both the Commission and National Competition Authorities (NCAs), in line with the effective EC and national merger regulations. In the antitrust context, any abuses of a dominant position are subject to Article 82 EC Treaty or its equivalent in national laws.

In respect of retail markets, which in particular tend to be national with differing legal, economic, political and cultural characteristics, NCAs are often well placed to act under the competition rules. In fact, some NCAs are investigating the issue of buyer power in the retail sector, for instance in the UK and in Austria.

Apart from EC competition rules, several other policies at Community level govern the conduct of supermarkets in particular or the functioning of the retail sector in general. These include inter alia EC internal market rules and EC consumer law.

Any national legislation should comply with relevant requirements of Community law, notably the principles governing the Internal Market.

Point 1: The Parliament calls upon DG Competition to investigate the impacts that concentration of the EU supermarket sector is having on small businesses, suppliers, workers and consumers and, in particular, to assess any abuses of buying power which may follow from such concentration.

The Commission has not in recent years received any formal complaints against big supermarkets which claimed violation of Articles 81 and 82 of the EC Treaty. The Commission considers it important to consider all relevant factors affecting these markets, and will continue to gather evidence regarding factual claims relating to retailers allegedly controlling farmers' and other suppliers' only real access to EU consumers.

The primary objective of EC competition policy is to make markets work better to the benefit of consumers within the EU. The Commission therefore tackles buyer power to the extent that it harms, or could potentially harm consumers. As highlighted above, it is important to note that alongside the Commission, national competition authorities are able to take action against anti-competitive practices that violate the EC competition rules.

According to OECD figures²⁴, during the last 20 years earnings and consumer prices for all items have increased to a much greater extent than food prices in all European countries where data were available. Moreover, some of the most retail-concentrated countries show the lowest increase in food prices. However, recent developments have shown significant price increases in agricultural products and ingredients for the food industry, as well as an increase in retail prices of some basic food goods in some national markets. This is a cause of concern for both the consumers and the industry. Further analysis of the competitive structure of the food supply chain, including concentration and market segmentation of the retail and distribution sectors, and monitoring of developments in food consumer prices at product level in each Member State would allow to better assess the situation. The Commission will continue to further evaluate the potential link between recent retail concentration and consumer prices.

Buyer power itself may have either beneficial or adverse effects on consumers and suppliers. With sufficient competition downstream, lower prices upstream can be passed on to consumers, which will be beneficial to consumers. When supermarkets use their buying power, suppliers, such as the agricultural sector, are put under pressure to sell at low prices. Commission figures²⁵ on producer prices show that the agricultural sector has contributed substantially to the low consumer prices. In the 8-year period 1995 – 2003 real producer prices in the EU-15 have declined by 18%.

It is important to note that building up a strong market position achieved through growth in a competitive environment is not necessarily problematic and may lead to efficiencies that benefit to consumers and businesses. On the supplier side, for example in the agricultural sector, the Commission recognises the important role producer organisations can play to help farmers working together to achieve various efficiencies. Based on the existing single market and competition rules, those organisations also play an intermediary role between individual farmers and retailers and thus enhance their bargaining position. The Commission is looking at this issue in the framework of the CAP Health Check.

The Commission will also gather additional evidence regarding factual claims that consumers potentially face a loss in diversity of products, cultural heritage and retail

²⁴ Source: *OECD. Stat website* (<http://stats.oecd.org/wbos/Default.aspx>).

²⁵ Source: EUROSTAT EC index of producer prices of agricultural products (website: http://epp.eurostat.ec.europa.eu/extraction/retrieve/en/theme5/apri/apri_pi95_proda?OutputDir=EJOutputDir_132&user=unknown&clientsessionid=EC27DD8478E0EDCC5B702FA892EF85BC.extraction-worker-1&OutputFile=apri_pi95_proda.htm&OutputMode=U&NumberOfCells=51&Language=en&OutputMime=text%2Fhtml&).

outlets. The evolution of retailing in the past fifty years seems to have led to a greater diversity of products and retail outlets. Additionally, there is no data as to whether or not consumers receive relatively lower quality products or have less choice in those Member States where retail concentration is the highest.

In terms of effects on employment or the environment, competition between undertakings is positive for long term employment opportunities and for creating a competitive economy able to face the environmental challenges. Competition law is not the appropriate instrument however to tackle certain employment or environmental concerns. These are better dealt with by *inter alia* labour and environment regulations which should address any legitimate concerns of society and EU citizens as a whole.

The retail sector plays an essential role in the Internal Market by allowing suppliers and consumers to access non - domestic markets and therefore benefit from the Internal Market. By facilitating cross-border selling, competition may be further strengthened and consumers may benefit from an increased choice of products and lower prices as a result.

Additionally, the Commission will touch upon the issue of the market power of distribution in the framework of a High Level Group on the Competitiveness of the Agro-Food Industry. This initiative will be launched by the Commission in order to analyze the food industry which in the recent years has faced new risks and challenges which questioned the sector's competitiveness.

Point 2: The Parliament requests the Commission to propose appropriate measures, including regulation, to protect consumers, workers and producers from any abuse of dominant position or negative impacts identified in the course of this investigation.

The Commission and NCAs are vigilant to any infringement of EC competition law by supermarkets. The Commission takes specific care to ensure that concentrations of a Community dimension between supermarkets will not significantly impede effective competition to the detriment of consumers and businesses. It will further investigate the particular issue of buying power issue in collaboration with NCAs in the context of the ECN.

If the exercise of buyer power is found to lead to a lower profitability for suppliers, this may in specific circumstances induce suppliers to invest less in new products and therefore lead to a loss in product diversity and quality for consumers. This aspect is taken into account by EC competition policy when assessing the impact of the exercise of buyer power on consumers: consumer welfare includes not only prices but also diversity and quality. (However, it is important to assess whether the claimed loss of

diversity, if at all a reality, could be attributed to the expression of consumers' preferences when they choose lower prices at the cost of a loss in diversity or a change in the retailing structure.)

Other aspects of the functioning of the retail sector may be better addressed, if it found required, by other policy tools, such as consumer policy, employment policy tools and rules governing unfair trading. At the same time, in the context of the Lisbon Strategy, the Commission supports national plans to reduce and remove unjustified regulation in the retail sector that would restrict competition to the detriment of consumers.

In addition, the Commission's Single Market Review has identified retail trade as one of the sectors that warrants in-depth market monitoring given its key role for consumer and supplier markets and its current level of fragmentation. A monitoring report will be prepared for 2009 to analyse the reasons for malfunctioning of retail services seen from both consumers' and suppliers' perspectives.
