

**Opinion of the European Economic and Social Committee on ‘The current state of commercial relations between food suppliers and the large retail sector’ (own-initiative opinion)**

(2013/C 133/03)

Rapporteur: **Mr ŠARMÍR**

On 12 July 2012, the European Economic and Social Committee, acting under Rule 29A of the Implementing Provisions of its Rules of Procedure, decided to draw up an own-initiative opinion on

*The current state of commercial relations between food suppliers and the large retail sector.*

The Section for Agriculture, Rural Development and the Environment, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 9 January 2013.

At its 487th plenary session, held on 13 and 14 February 2013 (meeting of 13 February 2013), the European Economic and Social Committee adopted the following opinion by 79 votes to 6 with 2 abstentions.

## 1. Conclusions and recommendations

1.1 The EESC notes that large retailers constitute an oligopoly in every country. According to statistics on market share, a handful of retailers control most of the market everywhere. The EESC believes that this oligopolistic position gives its member companies an enormous amount of bargaining power over their suppliers. As a result, they are able to impose trading terms on their suppliers which are far from balanced.

1.2 The EESC points out that the companies that form this oligopoly are only in competition with one another in relation to their customers. They compete with one another to win over new customers yet competition with regard to their suppliers is scarcely apparent. Competition between large retailers over customers, however, focuses primarily on retail prices and does not take sufficient account of the various social and environmental aspects comprised by all-round quality<sup>(1)</sup>.

1.3 The EESC notes that there is much obscurity regarding price formation and the profit margins of the various market players. The supplier rebates used by the large retail sector mean that the purchase price paid to suppliers does not reflect the actual revenues they receive for their products.

1.4 The EESC is convinced that if a contractual party can impose its own terms on its business partners there is no contractual freedom. The abusive and anti-competition practices which large retailers apply towards their food suppliers demonstrate a lack of any real contractual freedom. Abusive practices inflict damage not only on producers but on consumers too (especially over the long term). The extent of

abusive practice is currently such that it is damaging to the public interest in general and to the economic interests of the Member States in particular.

1.5 According to the EESC, particularly worrying abusive practices only occur in relations between large retailers and their food suppliers. They are not applied by the food industry towards farmers or by the large retail sector towards suppliers of non-food products.

1.6 The EESC notes that the efforts of farmers and processing companies in certain Member States to set up groups of producers have been penalised by national competition authorities who have assessed the importance of these groups based on national production alone.

1.7 The EESC notes the failure of the market as the situation continues to deteriorate in a system that is insufficiently regulated.

1.8 In the EESC’s opinion, self-regulation does not provide a sufficient antidote to the distortions observed. ‘Codes of practice’ will not re-introduce any balance into the commercial relations in question. The very nature of such abusive practices both requires and justifies a law to prohibit them.

1.9 The EESC calls on the European Commission to begin addressing the issue of oligopolies, to examine their real power and influence, identify to what extent their impact is comparable to that of monopolies and, consequently, modify the principles underlying the rules on competition appropriately.

<sup>(1)</sup> EESC opinion: *The Community agricultural model: production quality and communication with consumers as factors of competitiveness*. OJ C 18, 19.1.2011, pp. 5–10.

1.10 The EESC calls on the European Commission to join in recognising the lack of contractual freedom in relations between the large retail sector and food suppliers.

1.11 The EESC calls on the European Commission to put forward solutions to make the system more transparent. Ideally, this would involve placing the 'supplier rebates' applied by the large retail sector 'upstream' – i.e. forcing large retailers to include the cost of the various services invoiced to suppliers in the final price of the product. This would make it possible to see how much suppliers actually receive for their products.

1.12 The EESC calls on the European Commission to provide national competition authorities with clear instructions to ensure that they take full account of the relevant market when assessing the negotiating power of groups of producers. This should cover all food products from the same category which are available on the market of the country in question not only those food products that are manufactured in the given Member State.

1.13 The EESC urges the European Commission to abandon the principle of self-regulation and to propose a binding legal text to improve the situation in the agro-food chain by encouraging undistorted competition. The concept of regulation should not be based on the protection of competition but should allow the State whose economic interest is at stake to intervene as a plaintiff during administrative and legal proceedings.

1.14 Lastly, the EESC believes that there is a need to legislate towards a societal choice that looks beyond market forces, in order to curb the tendency for concentration within an increasingly powerful large retail sector and promote other forms of commerce such as small independent shops, local markets and direct sales from producer to consumer. In this context, the EESC calls on the Commission to place a particular emphasis on shorter supply chains in the documents under preparation on the fight against food waste.

## 2. Background

### 2.1 Changing perceptions of the large retail sector

The commercial relations between large retailers and the suppliers of food products is a subject that is generating an increasing amount of interest not to mention concern. However, 10 years ago, it was a taboo not only for the EU authorities and institutions but for most journalists as well <sup>(2)</sup>.

<sup>(2)</sup> One of the few experts at the time who dared to decry the abuses of the large retail sector was Christian Jacquiau, author of the book *Les coulisses de la grande distribution* and an article, published in *Le Monde diplomatique* (December 2002), under the headline 'Racket dans la grande distribution à la française'.

This was the case despite the fact that the first attempts at legislation in this field in France date back to 1992 and that, as long ago as 1999 and 2000, the United Kingdom's Competition Commission carried out an investigation into the abuses of large retailers towards their food suppliers, which concluded that supermarkets were guilty of abusing their buyer power (this term essentially refers to the ability of a buyer to secure more favourable buying terms than would be possible in a fully competitive market <sup>(3)</sup>). In general, the large retail sector was considered to provide a useful public service that benefited everybody and whose development was a measure of a country's economic health. The authorities and the media drew attention mainly to its unquestionable advantages, especially the fact that it allowed consumers to buy practically everything under one roof – and at competitive prices to boot – and to the facilities available (e.g. a sufficient number of parking spaces) and the services on offer. The situation has changed dramatically over the last five years or so and the European institutions have published numerous documents criticising this state of affairs.

### 2.2 The oligopolistic position of the large retail sector

2.2.1 The large retail sector began rapidly developing some 30 years ago and this evolution has been closely linked to the globalisation process. Indeed, the vast majority of the large retailers that currently control the retail market are multinational corporations. They are much better placed than SMEs to reap the benefits of the conditions afforded by globalisation.

2.2.2 The rapid growth of multinationals (including large retailers) often takes place at the expense of SMEs. In many sectors, the lion's share of any given market is controlled by just a handful of large multinational firms. Along with the large retail chains, this also applies to the pharmaceutical and food industries, seed companies <sup>(4)</sup>, oil refining companies, the banking sector and so on. These multinational corporations are not monopolies; in most cases, they face competition from other multinationals, or even SMEs, on the same market and are not therefore considered to have a dominant position <sup>(5)</sup>.

2.2.3 Europe's large retail companies are actively involved in conquering the global market. The British company Tesco, French retailers Auchan and Carrefour, German and Austrian multinationals such as Kaufland, Lidl, Metro or Billa, and the Dutch company Ahold, have all gained a foothold in numerous countries.

<sup>(3)</sup> Consumers International, 'The relationship between supermarkets and suppliers: What are the implications for consumers?', 2012, p. 2.

<sup>(4)</sup> In 2009, 80 % of the world's seed market was controlled by just 10 or so companies while 25 years previously, hundreds of companies were involved in selecting and selling seeds. The same is true for agro-chemical companies.

<sup>(5)</sup> British Institute of International and Comparative Law, 'Models of Enforcement in Europe for Relations in the Food Supply Chain', 23 April 2012, p. 4.

2.2.4 The result of all this is that a handful of large retail companies have firm control over the retail food markets in a variety of countries. In Germany, for example, four companies control 85 % of the market; similarly, four large retailers control 76 % of the UK market. In Austria, three retailers control 82 % of the market, while in both France and the Netherlands 65 % of the market is controlled by five companies and so on<sup>(6)</sup>. This reflects the fact that while no single retailer may officially be defined as having a dominant position, the lion's share of the market is controlled by three to five companies that represent an oligopoly.

2.2.5 There is no doubt that the members of these oligopolies compete with one another but only over their customers. Competition with regard to suppliers is scarcely apparent, especially where SMEs are concerned. Unlike their suppliers, who are far greater in number, the buyers (retailers) are spoiled for choice. In other words, the suppliers must make a huge effort and accept many concessions if they wish to deliver their products; the buyers, meanwhile select those suppliers who are the most 'flexible' about their terms and conditions.

2.2.5.1 Nonetheless, while producers are right to expect a faire share of the sales margin as part of a loyal and healthy commercial relationship with their distributors they must also be attentive to the signals they receive from them about the requirements of consumers. Producers who are able to innovate and adapt the preparation and presentation of their products to meet demand will have greater bargaining power.

### 2.3 Abusive practices

2.3.1 Thanks to their buyer power, large retailers are therefore able to impose their own terms, which are such that they often represent an abuse of buyer power. These contractual terms are also referred to as 'abusive practices' or 'unfair practices' and non-exhaustive lists of such practices have been drawn up on numerous occasions. As well as generating constant (downward) pressure on retail prices, late payments or excessively long payment deadlines, the use of such abusive practices by large multiples has completely changed the classic model of cooperation between suppliers and buyers. In simple terms, traditionally, the parties involved agreed on the volume and price of the goods to be delivered, and on other necessary terms and conditions, after which the supplier delivered the goods which were then paid for by the buyer. This model has been turned completely upside down with the advent of the large retailers. Today, suppliers – who receive less and less money for their products – are forced to pay more and more or to agree to other forms of compensation in return for access to the buyer's services. This means that those who should be receiving money are actually receiving invoices instead. It is

<sup>(6)</sup> Consumers International, 'The relationship between supermarkets and suppliers: What are the implications for consumers?', 2012, p. 5.

worth noting that the large retailers have successfully managed to impose this new model; it is now generally accepted and something that surprises nobody, least of all the competent authorities.

2.3.2 In general, the most common forms of abusive practice involve two aspects of buyer-supplier relations<sup>(7)</sup>. The first involves the transfer – from the buyer to the supplier – of commercial costs, namely: promotional and marketing costs, store equipment costs, distribution and the management of individual stores. Retailers achieve this by imposing a variety of different payments on their suppliers such as listing fees or by charging for promotional leaflets. The second form of abusive practice involves large retailers passing on the cost of their business risk to their suppliers, which in practice means making retrospective changes to the agreed price based on how well the product in question sold to the customer. In this way, any differences compared with sales forecasts are borne by the supplier. This second objective is achieved thanks to a complicated system for establishing the final net price (various types of return bonus). These two mechanisms distort the simple business formula by which production costs are borne by the producer while the commercial costs are borne by the seller.

2.3.3 This new model for retailer-supplier relations was introduced on the pretext that there was a need for closer commercial cooperation in view of the increasingly tough competition in the retail sector. The large multiples' reasoning is as follows: it should be in the suppliers' interest to increase sales of their products and, for this very reason, it is absolutely right that they should participate financially in the commercial costs. Although this is by no means a vision that is shared by everybody, the suppliers are forced to accept these terms. However, the large retailers do not stop there and this form of wider commercial cooperation is subject to even more shocking forms of abuses. Either suppliers are overtly overcharged for services actually provided or the buyers invoice their suppliers for services that are purely fictitious. This last practice is referred to as 'unjustified invoicing or billing' as there is nothing in return. To take but a few examples, such invoices simply mention 'payment for stable cooperation', 'payment for issuing invoice', 'payment for settling invoice', or even 'contribution to the costs of the company party'. Incredible though it may sound, retailing multiples are known to have issued their food suppliers with invoices containing all of these headings and more.

2.3.3.1 Members of France's National Assembly have identified more than 500 reasons used by central purchasing departments to extract such additional benefits from their suppliers<sup>(8)</sup>.

<sup>(7)</sup> British Institute of International and Comparative Law, 'Models of Enforcement in Europe for Relations in the Food Supply Chain', 23 April 2012, p. 4.

<sup>(8)</sup> Christian Jacquiau, *Racket dans la grande distribution à la française* in *Le Monde diplomatique*, December 2002, pp. 4 and 5.

2.3.3.2 According to the Confederation of the Food and Drink Industries of the EU (FoodDrinkEurope) and the European Brands Association (AIM), 84 % of European suppliers to the large retail sector were victims of breach of contract in 2009; 77 % were threatened with product delisting unless they gave the supermarkets unjustified benefits; 63 % saw a reduction in their invoice price for no valid commercial reason; 60 % were forced to make payments for which there was nothing in return.

2.3.4 The 'supplier rebates' for which the large retail sector invoices its suppliers have made the pricing system completely unfathomable. Neither suppliers nor external observers are capable of identifying the actual purchase price. Business practices based on the 'double profit margin' technique are causing serious problems for both consumers and suppliers<sup>(9)</sup>. A more transparent system should be imposed.

#### 2.4 Absence of genuine contractual freedom

2.4.1 The suppliers accept this particularly harmful system because they have no other choice. They cannot bypass the large retail sector if they wish to sell their products and, for this very reason, they continue to sign sales contracts so long as such cooperation provides at least a minimal profit margin. In reality, the abusive practices employed by the various large multiple retailers are practically identical; it is therefore impossible to determine whether it is more profitable to cooperate with one supermarket chain over another. A climate of fear – the fear of product delisting – pervades commercial relations, a fact that has even been recognised in official documents<sup>(10)</sup>.

2.4.2 The use of abusive contractual conditions is generally considered to be unethical. However, in the light of the practices outlined above, this term is clearly inadequate. In cases where the terms of business are dictated by one party that is strong and another that is unable to refuse them in practice, it is more appropriate to use the terms blackmail or extortion instead. Furthermore, given these circumstances it is also inappropriate to talk about contractual freedom, a concept that the retailers and competent authorities refer to so readily. Just as contractual freedom cannot be assumed to exist in relations between natural monopolies (electricity or gas suppliers) and the final customers, it would be equally misleading to describe the relations between the large retail sector and food suppliers in this manner.

<sup>(9)</sup> EESC opinion *A better functioning food supply chain in Europe*, OJ C 48, 15.2.2011, pp. 145–149.

<sup>(10)</sup> For example, the Commission report COM(2010) 355 final, *Towards more efficient and fairer retail services in the internal market for 2020*, p. 8; British Institute of International and Comparative Law, 'Models of Enforcement in Europe for Relations in the Food Supply Chain', 23 April 2012, p. 3.

#### 2.5 Impact of abusive practices and victim identification

2.5.1 The use of abusive practices by large retailers is not only damaging for suppliers but for consumers as well. It can often put suppliers, especially small and medium-sized producers, in very difficult situations financially, which can lead to companies closing, something which occurs from time to time. The large food companies usually cope much better with this situation as they can offset the lower revenue on their products by delivering in huge volumes. Furthermore, these multinational food companies also enjoy substantial negotiating power: large retailers cannot survive without their products and, consequently, they cannot treat them in the same way as they treat SMEs. As a result, in France, for example, a group of 20 or so multinationals accounts for between 70 and 80 % of the turnover of large retailers<sup>(11)</sup>.

2.5.2 For consumers – the main beneficiaries of the system according to the authorities – the reality is much less rosy than we are made to believe. Several factors suggest that the use of abusive practices towards suppliers can also have a negative impact on consumers. On the one hand, consumers do not always benefit from the low purchase price<sup>(12)</sup> and, on the other, choice is becoming increasingly limited, there are fewer innovations, the quality of a large number of food products is falling due to the constant downward pressure on purchase prices and, last, retail prices are also on the rise<sup>(13)</sup>.

2.5.2.1 Large retailers have also had quite an important social impact, as the way in which they operate has shattered a number of taboos. For example, Sundays are no longer as sacred as they once were, as hypermarkets and supermarkets are now open seven days a week or even 24 hours a day, with all the effects on working conditions that this entails.

2.5.3 The phenomenon of large retailers affects many other suppliers outside the food sector. Nonetheless, it is primarily food producers who are the victims of abusive practices.

<sup>(11)</sup> Sgheri Marie-Sandrine, *La machine à broyer des PME* in *Le Point*, Paris, No 1957 of 18 March 2010, pp. 88–89.

<sup>(12)</sup> For example, during the milk crisis in 2009, supermarkets continued to sell milk to their customers at the same price as before the crisis despite the significant fall in the purchase price paid to producers.

<sup>(13)</sup> Consumers International, *The relationship between supermarkets and suppliers: What are the implications for consumers?*, 2012, p. 12, but also EESC opinion, OJ C 225 of 14.10.2005, p. 48.

There are undoubtedly many reasons for this. One is certainly the fact that there is a wider range of outlets for manufacturers of non-food products. Alongside large retail stores, producers of clothing, household appliances, books or sports equipment are all catered to by chains of specialist shops. There is therefore good reason to focus specifically on relations between large multiple retailers and food suppliers.

2.5.4 These abusive practices are also much less evident in relations between farmers and the food industry even though companies from this sector also have major 'buyer power'. While price negotiations can often be very tough, food companies do not usually ask their suppliers to contribute for instance to the purchase of a new bottling line, unlike large retailers, who systematically demand that their suppliers make payments relating to the modernisation of their stores or the opening of new ones.

2.5.5 In short, most of the above abusive practices exist only in relations between supermarkets and food suppliers. However, given the impact of these practices and the extent to which they are being applied, they are also creating a third victim: the economic interest of the State. The inability of certain suppliers to meet the requirements of large retailers and the resulting economic difficulties are contributing to the decline of the agro-food sector in several countries. Certain Member States, which were once self-sufficient in terms of foodstuffs, have lost their food security in this manner, which represents a particularly dangerous situation today.

## 2.6 Possible solutions

2.6.1 For some time now, the abusive practices employed by large retailers towards their suppliers have received an increasing amount of criticism from the authorities of both individual Member States and the EU institutions. The first such highly critical document was adopted by the European Economic and Social Committee in 2005<sup>(14)</sup>. Yet it was above all a Written Declaration from the Members of the European Parliament<sup>(15)</sup>, signed by a majority of MEPs in January 2008, that launched a real debate on this matter. The declaration was followed up by numerous documents and studies published by the Commission, the Parliament and the EESC<sup>(16)</sup>.

<sup>(14)</sup> EESC opinion *The large retail sector – trends and impacts on farmers and consumers*, OJ C 255, 14.10.2005, pp. 44–49.

<sup>(15)</sup> Written Declaration No 0088/2007 on investigating and remedying the abuse of power by large supermarkets operating in the European Union.

<sup>(16)</sup> EESC opinion *A better functioning food supply chain in Europe*, OJ C 48, 15.2.2011, pp. 145–149.

2.6.1.1 The European Competition Network (ECN), which groups together the European Commission and the national competition authorities of the 27 Member States, published a report which follows up the Commission's Communication on *A better functioning food supply chain in Europe*. The communication called for a common approach among competition authorities within the European Competition Network to improve the detection of endemic problems specific to food markets and to swiftly coordinate future action. The Commission has set up the High Level Forum for a Better Functioning Food Supply Chain, which relies on the work of several platforms of experts, including one on business to business contractual practices, which is tasked with identifying the most appropriate method of avoiding disloyal practices. Once all the stakeholders in the agri-food chain had agreed on the basic principles, the platform was given a mandate to find a consensus on their implementation. The stakeholders have not yet managed to reach a satisfactory compromise in the form of a voluntary code.

2.6.2 The situation has become politically sensitive and the authorities are being urged to respond. Regulation by market forces alone, however, has failed and is today rarely seen as an ideal solution as, over recent decades, marked by a system of non-regulated commercial relations, the problems has continued to get worse. Among the possible solutions, calls are being made for regulation, self-regulation or the formation of groups of producers and processing companies whose combined strength can counterbalance the buyer power of large retail networks.

2.6.3 Codes of practice are a so-called 'soft' solution. They involve a voluntary commitment to refrain from using the practices in question. Self-regulation has been adopted in the UK, Spain and Belgium and the results have been neither satisfying nor particularly convincing. Not only are self-regulation success stories lacking, codes of practice also raise a number of philosophical questions e.g. what 'ethics' are at play in the case of a multinational company – those of the managers, the shareholders or perhaps those of society itself? The real masters of the multinationals are the shareholders, who are often anonymous, and for whom the ownership of shares is often a purely financial investment. They can hardly be said to bear any personal responsibility for the behaviour of a business or the use of abusive practices. It is therefore difficult to consider ethics as an apt reference point for large retailers.

2.6.4 Along with other authorities, the European Commission strongly recommends that farmers and small and medium-sized enterprises group together to increase their negotiating power during business meetings with buyers from large retail networks. However, these types of initiatives have been penalised by the national competition authorities of

a number of Member States where businesses have joined forces in this way on the pretext that such groupings constitute 'cartel agreements'. According to the local authorities, the market share controlled by these groups of producers was too large; nonetheless, they took only national production into account in their calculations to the exclusion of products sourced from other countries. For reasons that are hard to understand, the authorities in question do not usually take into account all products available on the national market when establishing the share of the market dominated by a given operator.

2.6.5 A number of Member States have made attempts at regulation, some bolder than others. Certain countries have prohibited the use of set practices (e.g. half of all EU Member States ban below-cost selling (dumping)); others have adopted sector-specific legislation, as in the case of Hungary, Italy, the Czech Republic, Romania, Slovakia and Poland, or have adapted their standards, as in Latvia and France. In recent years, several countries have adopted laws suppressing the use of abusive practices by the large retail sector, in particular the former communist countries of Central and Eastern Europe. This is most probably due to the fact that the situation in this region is particularly worrying. Unlike Western Europe, the large retail sector of these countries is largely in the hands of foreign companies who have special contacts with suppliers in their own countries or in countries where they have been in business for longer. The result is the decline of the agro-food sectors of the countries in question.

2.6.6 It is true that it is far from simple to enforce these laws, especially as those suppliers who are victims of such abuse fear for their very existence if they do complain. In spite of this, such laws provide a more appropriate response than codes of practice. First, this is because such abusive practices are not only unethical but are also completely at odds with the fundamental principles of justice. Leaving aside the problem of enforcement, this argument alone is sufficient for prohibiting them by law. Second, this is because the legislative system has already yielded positive results in France<sup>(17)</sup>.

2.6.7 The Commission recognises the existence of these problems but for the time being prefers self-regulation and criticises the fragmented nature of the European Judicial Area.

In reality, there is little compatibility between the laws adopted by individual Member States. Yet the only way of overcoming this fragmentation and this incompatibility is to adopt binding European rules. The EESC strongly recommends that the European Commission take the necessary steps in this direction. For practical reasons, it would seem appropriate not to base any possible European rules on the principle of protecting competition, as suppliers would consequently be required – in their capacity as victims – to confront large retailers in the courts. Following the French example, it is the State, whose economic interest is also at stake, which should act as plaintiff. This would make it possible to avoid the well-known problem whereby suppliers are afraid to press charges.

2.6.7.1 These rules should make it compulsory to draw up written contracts which stipulate the duration, quantity and nature of the product sold along with the price and terms and conditions for delivery and payment, failing which they will be considered null and void. Payment should be made within a legal deadline of 30 days for perishable goods and 60 days for all other goods, failing which a fine will be imposed. Most importantly, the following should be prohibited:

- the direct or indirect imposition of terms of purchase, sale or any other form of binding contractual terms, as well as extra-contractual and retroactive terms or conditions;
- the application of different conditions for equivalent services;
- situations where the conclusion or performance of contracts as well as the continuity and regular nature of business relations is subject to the performance of obligations that have no connection with the subject of the contract or the business relation in question;
- undue extraction of unilateral benefits that are unjustified in relation to the nature or scope of the business relations;
- any other form of unfair conduct with respect to the business relationship as a whole.

Brussels, 13 February 2013.

*The President*  
of the European Economic and Social Committee  
Staffan NILSSON

<sup>(17)</sup> According to France's General Directorate for Competition Policy, Consumer Affairs and Fraud Control, the off-invoice discounts used by large retailers have fallen to a reasonable level.