

# LEVELLING THE PLAYING FIELD

## *COMPETITION POLICY TO ENABLE INDEPENDENT RETAILER GROUPS TO BE EFFICIENT AND COMPETITIVE*

(January 2007)

### **Executive Summary and Report Overview**

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**Prepared on behalf of UGAL a.i.s.b.l.**

*– Union of Groups of Independent Retailers  
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The **Union of Groups of Independent Retailers of Europe – UGAL** – was created in 1963 to represent the interests of independent retail groups in the food and non-food sectors gathering together more than 323.000 independent retailers who manage over 456.000 sales outlets and employ close to 3.5 million people.

Formed at the wholesale level by independent retailers and craftsmen, the groups draw upon common resources to provide their retailers with a palette of services including central purchasing, logistics, point of sale and warehouse management support, training and financing. Often they comprise small and medium-sized companies working together under one common brand name.

Through this performance-oriented approach, the groups drive the development of modern and competitive retail enterprise, at both local and international levels. UGAL's raison d'être is the active representation of the interests of independent retailers. Its actions are in keeping with the long tradition of the independence of the commerce in Europe, of which UGAL is proud, and which must continue playing a crucial role for the future of commerce, at a time when large multiple conglomerates are growing their influence in markets across the EU.

**UGAL** supports its member groups' common objectives while respecting their many differences caused by varied market and economic conditions, country-specific legal and political frameworks.

UGAL's main objective in Brussels is to ensure that European decision-makers take into account the economic, political and legal interests of independent retailers and recognise their right to choose freely the most appropriate structure and management method allowing their groups to operate competitively in Europe.

In order to achieve this, UGAL carries out a wide range of activities, such as :

- ***INTELLIGENCE*** – UGAL researches, collects and circulates information among its members to ensure that they are always up-to-date on latest developments of direct relevance to their businesses.
- ***REPRESENTATION*** – UGAL its member groups' interests vis-à-vis all European institutions.
- ***SHARED BEST PRACTICE*** – UGAL stimulates and contributes to the exchange of experience and best practice between members.

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## EXECUTIVE SUMMARY

**Independent retailers** face a challenging competitive environment, not least because of the growing presence and market power of integrated chain-store retailers. By being members of a group, though, they can pool resources and in principle benefit from economies of scale and scope sufficient to allow them to be efficient and effective competitors. However, this ability is presently restricted: not so much by their own ability or desires, but by legal impediments.

Specifically, **national and EU competition policy and law currently restricts the behaviour and relations between members within such groups in ways that are FUNDAMENTALLY DISCRIMINATORY** compared to the freedom enjoyed by wholly integrated retailers. Independent retailer groups are, for example, limited in the control they can exercise over retail prices and promotions, store-level stocking/range decisions, and purchasing requirements of members, thereby affecting group efficiency and the consistency of retail image/offer presented to consumers. They are also subject to stringent market share thresholds, resulting in further restrictions on their behaviour and greater legal uncertainty over their agreements as they grow in size. These restrictions do not apply to fully integrated retailer groups that have been, with few exceptions, freely allowed to grow and increasingly dominate markets, often at the expense of independent retailers.

**Independent retailers by their nature may suffer disadvantages** over fully integrated store chains. However, at issue is **public policy and law that can exacerbate these disadvantages** – merely because of the form of association and agreements they use as a means of working together for a common good. **Such policy discrimination if not appropriately addressed, may** adversely impact retail markets and **harm consumers’ interests by reducing diversity and**

**plurality in the retail sector**, which has for so long been the mainstay and source of retail innovation, entrepreneurship and general competitive drive.

→ **This report** examines the extent of the problems and restrictions facing groups of independent retailers in relation to current competition policy and law through an economic study of the subject covering both empirical and analytical aspects.

**It considers objectively and critically the types of behaviour that should be allowed to groups of independent retailers in order for them to be efficient and be competitive and so best serve the interests of consumers.**

Attention is focused on four key areas:

- The treatment of horizontal (retailer to retailer) and vertical (central office to retail member) agreements when they jointly occur in mixed agreement structures
- Defining relevant economic markets and guidelines on what behaviours and agreements are acceptable if market shares exceed 30%
- The percentage and time limit on purchasing obligations when used in the specific context of independent retailer groups
- Fixing or limiting retail prices and the use of common prices for promotional purposes as part of joint commercialisation processes

**We find that independent retail groups do not require special treatment and unduly favourable policies. They just need a level playing field**, with requisite legal certainty over their arrangements, to allow them to achieve sufficient efficiency benefits and consistency in their marketing image **to enable them to compete on effective terms**. If they can obtain this, then there is a much greater prospect that procurement and retail markets across Europe will remain competitive to the definite and continuing advantage of consumers.

In order to allow independent retailer groups to compete on a (more) level playing field, our analysis leads us to make policy recommendations in the four key areas:

- The set of agreements used by independent retailer groups should be assessed on their collective and overall net economic effect (rather than assessed individually and in isolation from one another) and without regard to the specific legal form (e.g. horizontal or vertical) that specific agreements take
- Retail, procurement and wholesale markets should be appropriately defined in respect of their geographic and product/service scope, but even when critical market thresholds are exceeded, agreements (e.g. on maximum or recommended retail prices) should be allowed when they offer clear consumers benefits and provide independent retailers with pro-competitive and pro-efficiency benefits
- Joint purchasing arrangements (as horizontal agreements) and purchasing obligations (as vertical agreements) should be assessed on their merits and with regard to the nature and strength of the benefits offered, being allowed, even in an unrestricted form without percentage and time limits, where they do not distort or restrict competition to the ultimate detriment of consumers
- Allowing fixed retail prices as either vertical or horizontal agreements in independent retailer groups should be considered for short-term promotional purposes when they are indispensable in providing consumer benefits from advancing inter-group competition, ensuring consistent value-for-money propositions being offered, promoting efficiencies in respect of joint purchasing and joint commercialisation, and where there is no prospect of this engendering collusion to raise prices.

## REPORT OVERVIEW

### 1. Background to the Study

The position facing independent retailers in Europe has perhaps never been more challenging than at present. Right across Europe, independent retailers face intense competition from integrated chain-store retailers that are increasingly able to exert both considerable buying and selling power, and in the process consolidate their positions at the expense of independent retailers.

Yet, the difficult competitive environment facing independent retailers is not their only challenge. Public policy and recent legal decisions have undermined or at least not assisted the competitive position of independent retailers. Specifically, national and EU competition policy and law often discriminates against independent retailers because of their organisational and ownership form rather than anything fundamentally related to their competitive behaviour or the structure of the markets in which they operate.

This is particularly apparent in regard to the extent to which **independent retailer groups are restricted in their behaviour and relations compared to the freedom enjoyed by wholly integrated retailers**. Such groups form so that independent retailer members can take advantage of pooling resources and gaining economies of scale to make themselves more efficient and more effective as competitors. Yet, these groups of independent retailers are largely prevented from using common prices as a promotional tool (on the grounds that it amounts to fixed resale price maintenance – currently prohibited *per se* in the EU). They are also restricted and prohibited in the range and extent of the exclusive purchasing obligations that they can impose

on their members (typically corresponding to no more than 80% and/or limited to 5 years).

In addition, there are specific national-level legal and policy aspects that pose a threat and further add to the general air of uncertainty facing independent retailers and their associations. These include the treatment of mixed horizontal/vertical agreements, possible restrictions on agreements when certain market share thresholds are exceeded, and future uncertainty over currently allowed arrangements.

**These legal and political issues** are all of considerable economic concern because they are serving to **undermine the efficiency and competitive ability of independent retailers** and thereby impede the competitive process. More broadly, at stake is a societal concern that such policy discrimination, if not appropriately addressed, **may ultimately reduce diversity and plurality in the retail sector**, which has for so long been the mainstay and source of retail innovation, entrepreneurship and general competitive drive – and the loss of which would clearly be to the detriment of consumers.

Independent retailers by their nature may suffer disadvantages over fully integrated store chains. However, at issue is public policy and law that can exacerbate these disadvantages – merely because of the form of association and agreements they use as a means of working together for a common good.

→ **This report** sets out to examine the extent of the problems and restrictions facing groups of independent retailers in relation to current competition policy and law through an economic study of the subject covering both empirical and analytical aspects. The intention of the present report is to consider objectively and critically the types of behaviour that should be allowed to groups of independent retailers in order for them to be efficient and be competitive and so best serve the interests of consumers.

## 2. Economic Importance of Independent Retailer Groups

Independent retailer groups vary considerably in their size from one country to another, and from one retail sector to another. In some countries, they represent a very significant competitive force (e.g. *ICA* in Sweden, *Kesko* in Finland, and *Edeka* in Germany) by virtue of their relative and/or absolute size. In other countries, they represent less substantial, though nevertheless still economically important, forces.

Yet in all cases, the important economic role played by independent retailer groups is very apparent in several critical respects. Specifically, independent retailer groups and their members collectively support and promote the following economically desirable features:

- **Efficiency** – in the provision of retail services and in co-ordinating the supply chain to meet consumer demand and expectations via scale economies from pooling resources
- **Innovation** – via experimentation and entrepreneurship with retail and support services
- **Diffusion** – as a channel for spreading new products for the benefit of consumers and as adopters of best-practice techniques and services in retailing and supply chain organisation
- **Competition** – as a challenge to the increasing dominance of integrated chains, uniquely offering inter-group competition (i.e. amongst competing supply systems) and a degree of intra-group competition (e.g. amongst members competing in the same local retail market)
- **Diversity** – as organisational forms uniquely adaptive to the needs of different communities and localities rather following a rigid national model such as that of a fully integrated chain-

-store operator, while allowing independent retail entrepreneurs to thrive through access to an efficient supply and retail support system where otherwise as unaffiliated independents they would less certain to survive

- Consumer choice – by being flexible to local needs and serving locations where other retail forms might avoid (such as remote rural areas and socially deprived urban areas)

**By their very nature and reason for formation, groups of independent retailers are intended to be pro-efficiency and pro-competitive forces.** They involve independent retailers using their collective resources and market presence to build scale economies (e.g. in marketing, procurement, and central services such as training, store planning and visual merchandising) that allow them to operate more efficiently on an individual level. By being more efficient on an individual level, then the independent retailers are better able to compete with other players in their respective local markets. This helps ensure that all retailers (whether independents or integrated chains) are forced to pass on their efficiency benefits to consumers in the form of lower prices and better service levels, and that consumers continue to enjoy choice and diversity from a range of outlet types and the different retail propositions that they have to offer.

Accordingly, the economic well-being and competitive ability of such groups and their individual members take on both considerable economic and social importance.

### 3. Competitive Challenge Facing Independent Retailer Groups

**Independent retailer groups** have no scope for complacency in today's rapidly evolving retail environment. They **are driven by competitive pressures to improve efficiency and the attractiveness of their retail offer to consumers**. This is a challenge that they are generally well placed to meet, so long as they are not handicapped in their ability to compete on like-for-like terms.

However, such groups face an ever-increasing threat from the growing dominance of fully integrated chains in the markets in which they operate. This increasing dominance, and thus major competitive challenge for independent retailers, can be attributed to a number of factors. Central to these are the benefits derived from the complete vertical and horizontal control that are afforded to fully integrated retailers.

It is this aspect, for example, which allows **integrated retailers** to take full advantage of available **economies of scale at store and group level** to reduce costs, obtain more favourable terms from buyers, and increase throughput and efficiency within their supply systems. It also key to their marketing advantages, by allowing them to develop and promote a common retail brand, providing consumers reassurance about the consistency of the offer being made such as through common promotional prices, common products and common service levels adopted throughout the store chain.

Taken together, the scale economies and retail brand advantages that integrated retailers enjoy allow them increasingly to take advantage of a **“virtuous circle” of growth**, where such advantages allow for increased income generation (from increased profitability), that in turn allows for more growth-enhancing investments (such as improving the store portfolio, developing new product lines, increasing marketing effort, and acquiring rival chains), serving to

increase market share, feeding through to improved terms with suppliers (vis-à-vis other retailers), allowing for lower costs and greater income generation (from higher margins), and so on.

Of course, it may be possible for **independent retailer groups** themselves to enter a virtuous circle of growth, so long as they are sufficiently large and have enough scale in the first place. In which case, the prospective benefit for consumers is not only of efficiency benefits entailing lower costs for retail members (e.g. in purchasing products from suppliers) being passed on to them in the form of lower retail prices when *inter*-group competition prevails, but also these benefits are more likely to be secured because general competition will be often augmented by a degree of *intra*-group competition (i.e. where affiliated members compete amongst themselves at the retail level) in a way that would be wholly absent if only integrated chains were present.

Nevertheless, it is **integrated chains** that are more often in a better position to take advantage of the virtuous circle **because of the manner in which they are allowed to co-ordinate their activities** in regard to joint procurement and common marketing across their entire chain, **compared to the legal restrictions imposed on independent retailer groups limiting this ability**. This, together with the generally favourable competition policy towards retail mergers and internationalisation of fully integrated groups, has allowed them to gain a critical advantage over independent retailer groups in many retail markets.

## 4. Legal hurdles and discriminatory policy treatment

Unlike integrated chains that are completely free to co-ordinate all their activities within their store groups, **independent retailer groups are held back by a number of legal restraints and policies in several critical regards**. Specifically, **because they are members of a group that are linked together by agreements** (either explicitly or implicitly), **rather than by common ownership** as with an integrated chain, they are treated differently under competition law and presently they are subject to rules that limit the nature and extent of any centrally administered control on individual members. Fundamentally, this is about **discrimination based on organisational form rather than an economic basis about effects on the market**, which serves against groups of retailers that for historical, cultural and commercial reasons work together by means of agreements rather than by direct, single ownership.

The discriminatory legal treatment in regard to permitted vertical and horizontal control is most apparent with regard to limits on essentially pro-competitive agreements on joint marketing and joint purchasing, but more broadly about the legal treatment given to organisations based on a mixture of horizontal and vertical agreements.

Thus, unlike a wholly integrated retailer under single ownership, an independent retailer group's central office (i.e. central administrative function) or wholesale arm cannot dictate the exact or minimum retail price at which goods must be sold throughout the group's stores. Such arrangements are viewed as (fixed or minimum) resale price maintenance and contractually unenforceable under present EU competition law and are viewed as illegal vertical price fixing (and, if used, could result in a substantial fine in most EU member states). Even imposing "retail price ceilings" on members, i.e. dictating the

maximum resale price, may not be acceptable practice if the group possesses a high market share (specifically, 30% or more), even when the intention is to ensure that members keep prices low to raise sales levels and benefit final consumers in the process. **In such cases, independent retailer groups can be hampered in building consistent retail brands of value to consumers.**

Similarly, in regard to joint purchasing, whereas an integrated chain can centrally determine and administer all stocking requirements for all stores in the chain, a central office or wholesale operation for a group of independent retailers is generally restricted and prohibited in the range and extent of purchasing obligations that can be applied to members.

It also has little or no control over which products and in what amounts the individual retailer ultimately chooses to stock from the range on offer. Typically, the allowable limits for purchasing obligations only extend to 80% of goods purchased and for a duration limit of up to 5 years. Such restrictions can result in a loss of efficiency, undermine scale economies in purchasing, and unnecessarily complicate administration and contracting arrangements (thereby raising costs while serving as a business distraction).

On both accounts, the **limitations on vertical control** (i.e. on retail pricing and purchasing obligations) **restrict the efficiency at which independent retailer groups can operate**, weakening the ability of independent retailers to act as a critical competitive force and as a counterbalance to the market power of integrated chains, **and as a result work against the interests of consumers in ensuring low prices, wide choice and service variety.**

However, it is not just simply in relation to vertical agreement regulations that independent retailer groups are hampered and effectively discriminated against compared to the favourable legal treatment offered to integrated chains. The very nature of **retailer**

**associations** with co-ordination through a central office or wholesale operation implies that within group relations **could have both a vertical element** (i.e. central office to retailer) **as well as a horizontal element** (i.e. retailer to retailer in respect of shared benefits). Unfortunately, **rather than assessing such arrangements as a whole package**, there has been a tendency for competition authorities to view such arrangements as first and foremost **as being horizontal** (i.e. co-operative) in nature **but controlled by a vertical relationship** (with the central office as the essential facilitator and co-ordinator). Given the much tighter rules and regulations that generally apply to horizontal co-operative agreements, with concerns over cartelisation and competition avoidance, this has meant that **independent retailer groups have been subject to considerably more stringent limits** on their size (in respect of allowable market share) and activities (in respect of vertical control) than they would be as simple vertical agreements.

Thus, for instance, a group of independent retailers may be allowed to operate relatively unimpeded only if its (collective) market share is no greater than 15% (as a horizontal agreement), even though its very nature is about promoting efficiency amongst independent retailers to allow them to be more effective competitors – against integrated chains, other retail forms, and amongst themselves. Yet this market share threshold may act as a bar to the level of efficiency that the group can attain – for example in the extent to which it can negotiate discounts from suppliers that can then be passed on to consumers in the form of lower retail prices. In contrast, **integrated chains may face no restriction in how much they are allowed to grow**, at least through organic growth. Only in respect of mergers and acquisitions might restrictions be imposed, and even here the allowable threshold before being prohibited might be as high as a 40% share (i.e. the level at which EU case law has tended to view a firm as holding a dominant position in a market).

A market share threshold set at 15% (or indeed 10% or 20% as may apply in some jurisdictions) is both arbitrary and considerably below the level at which anti-competitive concerns are normally raised in relation to vertical restraints (i.e. generally taken as 30% in the context of the European Commission’s guidelines on vertical restraints). The market context should take precedence. In situations where integrated chains have significantly higher shares than this threshold, then the competitive ability of the group will be stifled by this restriction (as it will be at a competitive disadvantage compared to these rival groups in respect of negotiating with suppliers and drawing on scale economies). Even when an **independent retailer group represents** the largest collective body in the market, consideration should be given to the basis on which the group has developed – primarily as **a means to secure improved terms with suppliers and as a means of operating with a consistent marketing image. Such means offer direct benefits to consumers when lower purchase costs are translated into lower retail prices and when consistency in marketing provides greater assurance on service reliability and thereby increases consumer satisfaction and overall demand.**

More fundamentally, a mixed arrangement of vertical and horizontal relationships should be seen and assessed exactly as that – i.e. a mixed **arrangement on which the net economic effect** of the combination **should be the prime consideration for assessment.** Specifically, **horizontal elements should neither be viewed in isolation nor taking precedence over vertical elements.** Rather, they should be viewed together as an intrinsic package in the makeup of independent retailer groups. In this respect, it needs to be understood that specific vertical agreements may allay any horizontal cooperation concerns, and vice versa, to provide overall pro-competitive outcomes through improving efficiency and competitive positioning.

## 5. Need for a Level Playing Field

**Providing appropriate and clear policies** that support or at least do not hinder arrangements for independent retailer groups should not be seen as merely ensuring that diversity or variety of organisational forms is maintained but, much more crucially, that **the long-term health and vitality of retail competition is preserved and preferably enhanced.**

Unfortunately, as existing competition law hinders such arrangements – either directly by limiting the extent of arrangements or indirectly by causing legal uncertainty as to whether related practices will or will not be allowed.

**The current framework of legal treatment for independent retailer groups** according to their horizontal (i.e. co-operative) and vertical (i.e. trading) nature **is therefore** (perhaps unwittingly) **retarding the efficiency and competitive ability of independent retailers and thereby the competitive process** as a whole. This is made all the more problematic by the need for self-assessment by groups in the absence of clear rules and guidelines, providing considerable legal uncertainty over what are usually a complex set of agreements in complicated market settings (often requiring markets to be defined on retailing, procurement and wholesaling bases).

The present discrimination operating against independent retailer groups, compared to the freedom enjoyed by integrated chains, represents **a perverse handicap system**, whereby **those players already at a competitive disadvantage because of their organisational form are handicapped in a way that limits their ability to compete with integrated chains and even stay in business.**

Here, it is important to observe that a call for ending or at least limiting such policy discrimination is not about protecting competitors, but rather about protecting competition by ensuring a more even playing field that provides greater opportunity for competition to operate in a manner that can best ensure that consumers are well served by retail markets.

What is required is a suitable change in policy treatment based on recognition of the ways in which current policy is acting to discriminate against such organizations and undermine their efficiency and competitive ability. This does not entail action that is intended to provide independent retailers with undue favourable treatment, allowing them to gain an unfair advantage over integrated chains and other retail forms. Rather, it is concerned with **redressing the current imbalance in respective treatment** and allowable practices by integrated chains and other forms (notably franchise systems) compared to independent retailers operating as members of a (vertically and/or horizontally controlled) buying and/or marketing group.

## 6. Specific policy concerns

The report concludes with suggestions for specific policy consideration in four critical areas to allow independent retailer groups to compete on a (more) level playing field with wholly integrated chains and other retail organizations that are not subject to the same binding restrictions on their horizontal and vertical arrangements. In each of these areas, the consideration is with regard to the context in which the arrangements operate, the efficiency and pro-competitive benefits that can be realised, and the resulting consumer benefits:

### A. The treatment of mixed agreement structures

Some groups of independent retailers operate with what can be called a “**mixed structure**” of agreements, involving elements which are both horizontal (retailer to retailer) and vertical (central office to retail member) in nature. In this situation there is the strong possibility that competition authorities might adopt different interpretations into the nature of these agreements without taking full consideration of their purpose and economic effects. Thus, it is entirely **possible that pro-competitive vertical arrangements might be misinterpreted as anti-competitive horizontal agreements, and equally pro-competitive horizontal agreements might be misinterpreted as anti-competitive vertical agreements.** This creates the distinct possibility that pro-competitive agreements could be prohibited or that, with legal uncertainty hanging over the arrangements, groups could be deterred from using them.

Consequently, it is important that such uncertainties in legal interpretations, which may seriously handicap groups of independent retailers, are eliminated or least curbed. More specifically, it is necessary to ensure that:

- The purpose and economic role of agreements takes precedence over their legal form in respect of how they are viewed and treated;
- The “double-hurdle” sequential analysis advanced under EU policy and guidelines, in considering first horizontal and then second vertical agreements, should not be used as means to lessen the possibility of groups being allowed to use pro-competitive agreements when these are directed primarily at controlling co-ordination problem undermining group efficiency or competitive positioning;
- In regard to using market share threshold tests, an examination of the horizontal aspects of agreements should not

automatically lead to a ban on behaviour that is allowed in the context of vertical agreements (e.g. where market share thresholds are exceeded in a horizontal assessment but not in a vertical assessment);

- Behaviour that is consistent with the improved functioning and efficiency of a group should be assessed on its merits rather than on an assumption that because of its form it is necessarily anti-competitive (e.g. exchanges of information between members to improve the responsiveness of retailers in response to inter-group competition may not amount to anti-competitive horizontal behaviour when inter-group competition takes on greater significance than intra-group competition in ensuring that consumers benefit from effective competition);
- Authorities should, where possible, assess mixed agreement structures on a full effects basis (rather than the present sequential dual-effects basis) to examine whether the associated cooperative agreements offer efficiency benefits to group members while not distorting, restricting, or preventing supplier and retailer competition to the detriment of consumers – taking the view that if there is no net detrimental effect on either side of the market then all horizontal and vertical control agreements should be allowable (i.e. using as a benchmark the practices that would be used by a single-owned vertical-integrated business undertaking in the same market circumstances).

### ***B. Market definition and guidelines when market shares exceed 30%***

With market shares playing a very prominent role in the assessment of horizontal and vertical agreements, market definition takes on special importance. The extent to which practices may or may not be allowed is made all the more complicated by procurement markets

differing from retail markets in both the product/service dimension and geographic dimension. Moreover, definitions may be influenced by ongoing changes in the retail environment. In particular, such developments would suggest taking into account the following policy considerations:

- In regard to defining procurement markets, consideration should be given to the extent to which procurements are becoming international rather than simply national in nature, by virtue of the amount of cross-border trade and international sourcing activity taking place;
- In regards to defining retail markets, only where there are very clear differences in market behaviour between different retailer types (e.g. in prices and product ranges) and consumer shopping patterns (e.g. bulk vs. small purchases, commercial vs. private purchases, etc.) should a narrow product/service definition be used;
- Even when critical market share thresholds are exceeded, agreements should be allowed where the benefits for consumers are clearly evident and potentially measurable (e.g. allowing maximum resale prices on advertised, staple and private label items when it is clear that this practice is being undertaken to lower retail prices and enhance the competitive position and retail image of a grouping);
- When critical market share thresholds are exceeded then rather than outright prohibiting an agreement where there may be some anti-competitive concerns, authorities should consider allowing modified agreements (with less extensive coverage or less onerous requirements) that allay anti-competitive concerns (e.g. by reducing the chance of foreclosure effects), but which still allow for significant efficiency benefits to be achieved (for example, allowing purchasing obligations to groups that exceed the 30% market share threshold so long as the total purchase requirements only reflect a foreclosure of an

equivalent share of the total market at a specific level, say a maximum of 30% of the market).

### **C. Joint purchasing and non-compete obligations**

In order to allow independent retailer groups to compete on an equal footing with integrated chains and ensure that policy is non-discriminatory and does not unduly impede efficiency, the following considerations towards joint purchasing (essentially as horizontal agreements) and non-compete obligations (essentially as vertical agreements) appear warranted:

- Independent retailer groups should be able to operate joint purchasing arrangements (as horizontal agreements) when their combined market share exceeds 15% so long as this is required in order to be competitive with other, larger groups of retailers operating in the same markets, and so long as competition in the relevant procurement and retail markets is not thereby distorted or restricted to the ultimate detriment of consumers;
- Purchasing obligations (as vertical agreements) should be seen as acceptable ancillary restraints, when they are linked to the principal objective of the commercialisation under a common brand name and/or are essential for ensuring that benefits from joint purchasing can be fully realised and when this result in consumers receiving tangible benefits (e.g. lower prices);
- The percentage and time limit on purchasing obligations (as non-compete obligations) should be removed when used in the specific context of independent retailer groups so long as this does not distort or restrict supplier competition or reduce effective competition in procurement markets to the ultimate detriment of consumers;

- For common marketing activities by the group, it should be possible to (a) oblige the retailers to order and keep in stock certain core product ranges in quantities appropriate to their regional market; and (b) to participate in advertising campaigns organised centrally by the groups, and usually to take part in campaigns that are national or international (e.g. within the “Euro zone”) with an obligation to charge a fixed common price so long as the promotions are short term (e.g. a two-week duration) and designed to provide clear consumer benefits (e.g. introducing a new or improved product or offering a low price).

### **D. Joint marketing and retail pricing requirements**

In regard to joint marketing and the setting of retail prices, the analysis suggests the following policy considerations:

- Competition authorities should consider allowing commonly set prices (i.e. fixed retail prices that apply across all or some retail members) within vertical agreements of groups of independent retailers for a limited number of short-term marketing campaigns based on a limited part of the product assortment (e.g. on private label goods, key brands, and known value items) when they are indispensable in developing and promoting a consistent group image, providing consumers with reassurance and clarity about the value-for-money proposition being offered, advancing inter-group competition while providing efficiencies (e.g. removing duplicated effort in otherwise running separate advertising/marketing campaigns for price promotions).
- Fixed prices should be allowed as indispensable in horizontal agreements when they promote efficiencies in respect of joint purchasing (by improving the bargaining position of the group when producers are desiring retail promotions that expose their

products widely to consumers) and joint commercialisation (by providing a consistent retail brand image), which cannot be achieved by maximum price obligations or other restraints alone, and when they relate to a limited number of short-term marketing campaigns, over limited product ranges, and where there is no prospect of this engendering collusion to raise prices amongst retail members or in retail markets more generally.

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