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Position Paper

2019 Evaluation of the 1217/2010 Research & Development and 1218/2010 Specialisation Block Exemption Regulations and the Commission Guidelines on horizontal cooperation agreements (“HGL”)

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1. Introduction: Setting the scene for a future-facing revision

1.1. AIM, the European Brands Association, welcomes the opportunity to provide comments on the consultation of the European Commission on the Horizontal Guidelines.

1.2. The Horizontal Guidelines have provided a good level of legal certainty, help to disseminate good market practice and have empowered manufacturers and brands generally to better assess the potential competition implications of their horizontal agreements of a horizontal nature. Both contribute to good market practice and enhanced legal certainty. The HBERs and HGLs should therefore be renewed.

1.3. That said, due to the changed retail landscape, we submit that a review of certain elements would help better address competition concerns and improve the legal certainty for businesses. This paper complements AIM's submission to the Open Consultation by detailing its position specifically with regard to the horizontal agreements in relation to retail alliances. We will focus our analysis by analysing the grocery retail sector, as an illustration of potential future challenges for all suppliers in all retail sectors.

1.4. We would also note though, another major change in the landscape since the previous review 10 years ago is the challenge we face, as a society, in addressing the issue of sustainability and the 'climate emergency'. We believe that European competition law can be a positive catalyst to help us address this societal threat. The major challenges in this area will not be resolved by one business, organization or indeed government on its own, as many multilateral framework agreements such as the Paris Agreement demonstrates. In order to ensure effective and efficient mechanisms of cooperation to meet these challenges, we request clear guidelines for sustainability cooperation between competing companies. Today's competition law rules can be read as allowing horizontal restrictions to competition insofar as (amongst others) consumer benefits are economically quantifiable. However, we must go beyond this to meet the ambitious plans launched by the European Commission with the Green Deal. Horizontal agreements aimed at reducing the ecological footprint (carbon emissions, recyclability and recycling, reduction of plastics and composting projects) to gain efficiencies and share infrastructure and costs, as well as agree certain standards to reduce the environmental impact and to increase the viability of environmental projects, should be considered procompetitive.

1.5. Therefore, within this context, and the necessity to act now and in the immediate, we would urge the Commission in this review to take into account other considerations for 'consumer welfare', which includes improvements in sustainability, infrastructure, standards, innovation and other factors. This is not about changing the rules: an anticompetitive cartel shall continue to be prohibited and not justified. But there is scope for the Commission to reframe the interpretation of Art 101(3). The need for action is embedded in the Commission Green Deal which promises to "protect human life, animals and plants, by cutting pollution" and to "support industry to innovate and become global leaders in the green economy". Such horizontal agreements which focus on sustainability solutions would benefit from a specific section in the guidelines.

1.6. To this end, we would recommend consideration be given to complementary assessment tools for measuring consumer impact – traditional economic analysis focusing on pricing is no longer sufficient.

1.7. Coherence of interpretation of rules by national competition authorities is another key factor for legal certainty in operating in Europe. The Commission should address the challenges linked to fragmented interpretation of the rules by national competition authorities.
This paper complements AIM's submission to the Open Consultation by detailing its position specifically with regard to the horizontal agreements in relation to retail alliances. We will focus our analysis by analysing the grocery retail sector, as an illustration of potential future challenges for all suppliers in all retail sectors.

Grocery Landscape Review

A. Retailers as market gatekeepers

1.8. The Commission has itself already recognised the role of the retailers as market gatekeepers during its review of *the Kesko/Tuko merge (COMP IV/M.784)* over 10 years ago, just as numerous other stakeholders be they NCA or academics. The retail gatekeeper role is at the origin of retail buyer power towards suppliers. It is important for the Commission to recognise that retail buyer power has substantially increased in the last 10 years. Aside from the obvious growth in ecommerce and increasing influence of digital platforms for a set of product categories, traditional retailing has witnessed significant concentration and increased vertical integration across many European markets. This materially constrains brand owners' ability to access the markets and find their presence in stores, reaching European consumers or businesses. In the following section we provide an overview of the developments which form essential context to AIM's submission regarding retail alliances and specific aspects of the HGLs we would like to consider for review.

B. Buyer power and market concentration paradigm

1.9. The growth of grocery retail market concentration is a reality acknowledged by all. As Eurostat has reported, the grocery market is dominated by a few players "*European food and beverage retailing has in recent decades been characterised by consolidation, with the emergence of a limited number of national and international players. The grocery retailers account for 88.1% of all food and beverages retail sales*"[1]

1.10. Retail market concentration and buyer power is further reinforced by the internationalisation of retailing, reducing the number of independent customers for suppliers. European retailers, operating across several markets, have taken over independent national retailers (see Annexes). European retailers have become global players.

Schwarz, Aldi and Carrefour are amongst the top 10 Global retailers, all channels considered[2]. They achieved retail sales in 2019 ranging from 86 to 111 billion Euro, more than 50% of which was generated outside their "home" national markets. Four other European grocery retailers are within the top 20 global retailers (Tesco, Ahold Delhaize, Auchan and Edeka) with retail sales in 2019 ranging from 58 to 77 billion Euro. The German grocery leader, Edeka, is active in only one market but is nevertheless ranked 19th at global retail level.

The multinational European grocery retailers are typically among the top 5 retailers in each national market where present. For example, Carrefour is n°1 in France, n°2 in Spain, n°3 in Belgium, n°5 in Italy;Rewe is n°1 in Austria, n°2 in Czeck Republic,n°3 in Germany etc...[3]

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1 Eurostat, From Farm to Fork, 2011,p.117
2 Kantar's 2019 Top 50 Global Retailers (EUR) see Annexes.
3 See Annexes

Multi-national grocery retailers also generate more retail revenues and account for a higher proportion of market share that most of the leading digital platforms.

1.11. Retail market concentration and buyer power is further reinforced by national alliances creation. National grocery retail alliances have also grown in size through the development of their membership. National grocery retail alliances have proliferated in Europe since the last revision of the HGLs, significantly increasing market concentration. Such concentration may give rise to concerns as evidenced by some national competition authorities in recent years.[4]

1.12. Retail buyer power is further reinforced by European retail alliances. In the last 10 years, a set of retail alliances in the grocery sector have been created at European level. European retail alliances between major international retailers, who are global retail leaders, have proliferated.

Through their combined turnover(see Annexes), the members of grocery retail alliances achieve as much as 190 billion €[5] and 186 billion € of retail sales [6], placing theses European alliances ahead of Amazon, just 2nd to Walmart in the ranking of global retailers. It places these retail buying group retail revenues at level higher than the retail revenues generated by platforms such as Amazon or Alibaba.

Retail alliances now operate as gatekeepers for a large portion of grocery purchases and sales in European countries**.** They are also expanding into other retail channels or sector[7]. The number of alternative channels for FMCG suppliers is hence further reducing.

C. Buyer power - retail network concentration

1.13. Retail concentration and buyer power, reduction of alternative channels for suppliers, is reinforced by the development of modern retailing, the "one-stop-shop" selling thousands of products[8] (i.e. supermarkets) which has led to a gradual, multi-layer process of concentration, by the reduction in number and in independence of a set of supply chain actors :"*mid-sized general merchandise retailers are squeezed out by big-box retailers and small speciality stores or hard-discount chains ... As a result, big-box retailers often dominate the local retail market, in which they mainly compete with much smaller stores*)[9]"(see Annexes)**.**

As early as 2000[10], the UK Competition authority noted that the development of modern grocery towards "one-stop shopping", was leading consumers to concentrate spending with large multi store retail format at the expense of "specialist stores".

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4 2014 Centrale italiana case:I768 CENTRALE D'ACQUISTO PER LA GRANDE DISTRIBUZIONE ORGANIZZATA , *Provvedimento n. 24649 https://www.agcm.it/*; Bundeskartellamt Food Sector Enquiry 2014; France Competition authority Avis n° 15-A-06 du 31 mars 2015

5 Carrefour Tesco Systeme U.With Cora group, Carrefour World Trade represents 190 billion € of retail sales. European buying group created in 2018 between respectively the n°9, 12, 49 global retailers

6 www.emd-ag.com/facts-and-figures/emd-in-figures.html, see Annex

7 e.g.: Les Mousquetaires, French leading retailer is member of Agecore, a European retail alliance whose some of its members are both active in grocery and foodservice; it is also member of Arena, a European buying group active in Do It Yourself products, home decoration goods, building materials, gardening products which would represent 11 billion Euro turnover with 9 retailers active in Germany, Austria, Belgium, China, France, India, Italy, Luxemburg, Poland, Portugal, Romania, Russia, Switzerland, Thailand, Vietnam. (LSA 30/01/2020). Carrefour has a buying group in France with Fnac Darty, both representing 6 billion € turnover in electronics (LSA 12/12/2017) in France only, while Carrefour is in the grocery buying group with Cora (groupe Louis Delhaize) and Systeme U in France and internationally. (LSA 12/12/2017); Auchan, member of European Grocery alliance Horizon in in a buying group in parapharmcy with Parashop

8 Eurostat, From Farm to Fork, 2011,p.116

9 Caprice, S., and Shekkar, S., (2017), *On the Countervailing power of large retailers when shopping costs matter*, Toulouse School of Economic Working paper, No 17-771

10 U.K. Competition Commission, 2000, .Supermarkets: A Report on the Supply of Groceries from Multiple Stores in the United Kingdom "*Seven [respondents] in ten regarded it as an important factor and it was considered the primary*

1.14. The reduction of competition downstream takes place as most of the downstream stores are either owned or under a retailer franchised networks. Not only are modern retail shops replacing specialised stores (i.e. bakery, butcher...) but they are also replacing the independent stores (" mom-and-pop shops/ corner shops") through the mixed development of modern retailer owning stores (affiliate) or through franchised stores carrying the retailer names. It is the retail group owner which decides on assortment, not the stores, whatever their legal relationship with the retail group.

This in turn reinforces the growing buying power retailers hold over their suppliers, reducing the suppliers alternatives to access the market. As consumers concentrate spending in particular groups of stores, gaining access to those stores becomes disproportionately important if a brand owner is to maintain scale of distribution. In other words, relying on alternatives to the large grocery multiples is no longer an option for most suppliers. The so called "independent" stores cannot be alternative for suppliers as the purchase agreement is centralised at the retailer group level.[11]

Retail group buyer power applies to both upstream suppliers and downstream store owners.

1.15. Downstream market partitioning and/or reduction of competition has been acknowledged by some national competition authorities either in the framework of investigation[12], recent merger review (eg Sainsbury Asda) or franchised stores contracts. The retail franchise association [13] in its submission to the Vertical Block Exemption regulation consultation last year raises a set of competition issues. It highlights that entering on new market is difficult for any retailer as big international retailers make it impossible for franchisees to move to new market entrant. The retail franchise association raises a set of competition issues It highlights that entering on new market is difficult for any retailer as big international retailers make it impossible for franchisees to move to new market entrant. The international retailers are thereby setting territorials restraints on the European market.

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reason of store choice by more than twice the proportion of any other factor. respondents spend 85.3 percent of their overall expenditures on groceries at major supermarket chains" quoted by Baye, Irina and Schlippenbach, Vanessa von and Wey, Christian, *One-Stop Shopping Behavior, Buyer Power and Upstream Merger Incentives.* The Journal of Industrial Economics, Vol. 66, Issue 1, pp. 66-94, 2018

11 *The downstream shopkeepers, small retailers, are also under strong commercial pressure, confronted by retailer groups which - as per recent Benelux study - " **impose** « their law » (minimum sales volume, **obligation to purchase** secondary products even when the shops owners don't want to, retail forced range agreements*)": Restrictions territoriales dans le commerce de détail, p.5. 2018 , Secretariat General Benelux

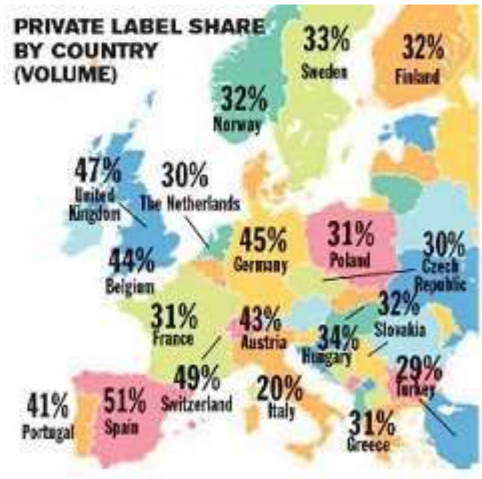
12 **Spain competition authority ruling against retailer forcing exclusive supply through their central purchase office**, fixing consumer prices leading to losses of franchisees margins CNMC Expediente S/DC/0508/14). Case I768, *Centrale Italiana*, Decision n.24649 of the Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato) of December 4, 2013. In certain regions **70% to over 90% of the stores were owned by one retailer or retail buying group (retail alliance)**.

13 See VBER F463369-2019-05-5_ECEvaluationVerticalBlockExemptionRegulation, submission of Buurtsuper Belgian organisation for independent supermarkets franchisees "*Through mergers and takeovers the degree of concentration and market dominance of a number of large international retailers has increased enormously. This also means a higher risk of international market players misusing their dominance vis-à-vis SMEs... Buurtsuper.be also wants to point out that this abuse of power is becoming more and more noticeable as well in the relationship between large international franchisors and small, local and family franchisees. .. practical evidence show that in the supermarket sector there are anti-competitive effects created by parallel networks of vertical agreements which have similar anti-competitive effects and which cover more than 50 % of a given market.*

1.16. The association challenges retail use of the VBER Excluded restrictions' (cf. non-compete principle after the end of the contract) which blocks competition between retail networks. It is also a conclusion made by France Competition authority (Opinion 10-A-26) which raised a set of competition issues in relation to **"**independent retailers", franchisees, affiliation agreements. The authority points out issues with the agreements terms to leave networks, post-contractual non-re-affiliation and non-competition clauses, all clauses at the origin of the observed high degree of market concentration in catchment areas.

D. Buyer power by retail upstream integration: retailer brands

1.17. Retail buyer power is also increasing through the constant upstream integration of retailing which has also grown significantly in Europe. In the grocery sector, in 17 markets, retailer brands represent between 30% and 50% of the products sold in stores in 2019[14].



1.18. Retailer and manufacturer brands compete head to head as recognised by the Commission, case law**[15]**, economist researches**[16]**.

The interchangeability, the substitutability, between retailer and manufacturer brands is demonstrated by shopper baskets analysis which shows that shoppers purchase alternatively competing manufacturer and retailer brands in the same categories. It is evidenced by the fact that many retailers marketing campaigns and promotions are expressly designed to highlight, to consumers, the substitutability of retailer brands with manufacturer brands in terms of price and quality."[17]

[14] Source of graphic PLMA , Private labels association https://www.plmainternational.com/ Nielsen Data PLMA's 2019 International Private Label Yearbook

[15] European Commission's *Case No COMP/M.4533*, recent presentation of DG COMP at DG Agri workshop on November 5, 2019, the General Court's view Case T-290/94. p. 176. *"..the retailers sell those products under their own-labels in order to compete with the products sold under the manufacturers´ brands..."*

[16] Paul W. Dobson and Ratula Chakraborty,*How Do National Brands And Store Brands Compete*? ESRC Centre for Competition Policy, University of East Anglia, *CCP Working Paper 14-7*, August 2014; Chambolle, C and Villas-Boas (2015) "*Buyer power through the differentiation of suppliers,* International Journal of Industrial Organization, 43, 56-65

[17] e.g.Comparison either by categories https://www.aldi.be/fr/produits/battles.html Aldi aussi bon que les grandes marques; comparison by full basket, e.g https://www.aldi.co.uk/SUBSPRS1810

1.19. The development of retailer brands in categories with manufacturers brands has been demonstrated as increasing buyer power.[18] Dobson and Chakraborty (ECLR 2015), referred to "*the reality of modern mass retailing, where large retailers wield enormous power and influence over supply chains and are very strategic in nature, including controlling the development and positioning of private labels*.... *producers ...are wrongly deemed to be holding and exploiting dominant positions*».
Likewise, the French Competition report also acknowledges an imbalance of power due to the retailer development of its own retailer brands[19]: "*Retailers can …encourage consumers to switch to competing products..., while suppliers can hardly incentivize consumers to change retail banners".*

The Commission already acknowledged such strategy in its review of Rewe Meinl merge (§111 cc) "*Rewe/Billa is using own brands strategically to reduce further* <u>*its already limited dependence on suppliers*</u>*".*

This feature of the current retail landscape is not adequately reflected in the current HGLs, as further detailed in this paper.

E. Buyer power - Supplier dependency

1.20. The specificities of the grocery retail market mean that buyer power can occur at lower market share levels, and buyer power can arise more frequently than in other markets as for example defined by Commission decisions in *Kesko/Tuko and Rewe/Meinl.* This issue is of particular relevance for the retail sector in general, and grocery more specifically considering the multiplication and size of retailer buyer groups among multinational, global, retailers in Europe.

1.21. National authorities have recognized the potential for retailers to generate considerable buyer power notwithstanding their downstream market shares. For example, in *Metro-Allkauf* case, the Bundeskartellamt found that if a supplier achieved more than 7.5% of its turnover with a retailer, it was economically dependent on that retailer. The UK Competition Commission report on Supermarkets recommended that retailers with more than an 8% market share should be required to abide by a code of practice on dealings with suppliers, the exercise of market power above that threshold having been demonstrated –a recommendation subsequently adopted and implemented by the UK government.

1.22. At minima, a supplier's dependency on a retailer is equivalent to that retailer's share of the downstream product market. In practice, most large retailers will represent a disproportionately important route to market for brand manufacturers given that a subset of grocery retailers, such as limited assortment discounters, tend only to stock their retailer brands. A contrario, an individual brand manufacturer will typically represent a very small proportion of a retailer's revenues and product portfolio, even for the largest and best-known brands.[20]

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[18] Chambolle, C and Villas-Boas (2015) "*Buyer power through the differentiation of suppliers,* International Journal of Industrial Organization, 43, 56-65 *"the retail sector in western countries has undergone several major changes that have* ***shifted power from manufacturers toward retailers****... In addition, retailers have allocated and increasing amount of shelf space to their private labels, resulting in an impressive increase in the market shares of these private labels, which has strengthened retailers vis-à-vis manufacturers".* The authors analyse the entering into retailer brands as a mean to increase buyer power. , at the expense of product quality, hence consumer welfare; Paul W. Dobson and Ratula Chakraborty "*Assessing Brand and Private Label Competition*", European Competition Law Review, February 2015, p.76

[19] France Competition authority Avis n° 15-A-06 du 31 mars 2015 §264

[20] e.g. **France** Competition authority Avis n° 15-A-06 du 31 mars 2015, "§253- *The data collected.. are indicative of an* ***imbalance in the forces in this sector: the share of the main retailers, or retail alliances,*** *in the turnover of the suppliers interviewed would be on average in the order of 20*%..."§254- *In comparison, in several product markets* ***even the most important suppliers represent only a small share of the overall turnover of retailers"****.* **Bundeskartellamt,** Sector inquiry "Buyer power in the food retail sector" 24.09.2014 p.13 English Summary *In negotiations with the food industry the* ***leading retailers are largely able to use their strong market positions to their advantage****. As a consequence they are in a stronger bargaining position than the manufacturers . The large retail companies Edeka, Rewe and the*

The French Competition authority (§242, Avis 2015) reminds that *"to assess the purchasing power of a buyer vis-à-vis one or more suppliers, the main criterion to take into account is the proportion of sales of the supplier that this buyer represents, that we can then compare to the proportion of the buyer's sales represented by the supplier".*
The French Competition authority (§244) as did the Bundeskartellamt defines that the analysis of power between supplier and retailer needs also to consider each other alternative to business with the other party "*the respective bargaining powers of suppliers and distributors largely depend of the alternatives to which they could resort in the event of a failure of their negotiations ..The analysis must therefore also take into account the respective "exit options" of the operators".*

Case law also confirms authorities' view: "*even if certain suppliers have important market share which provide them a power in the negotiation, **all are dependant of the retail order to sell their production** and few can allow to be delisted by a big retailer or to engage into a court case: this asymetric relationship may lead certain suppliers to be forced to accept certain contract terms which are unfair, not in favour of their business*»[21]

1.23. This view is uncontroversial. Retailers have acknowledged that "*supermarkets generally do not compete with individual products but with their full product portfolio*". [22] This explains the very limited leverage individual brand owners are likely to have over retailers. The Bundeskartellamt, as did the French authority, also noted that "*no food manufacturer or supplier offers a product range which comprises all or a substantial part of the articles required by the food retail trade"* [23]

F. Buyer Power – Negative impact on economy

1.24. There is a body of economic researches suggesting that an increase of buyer power may negatively impact the economy or the market competitiveness in various ways [24]

1.25. There is a growing body of economic research suggesting that excessive buyer power and formation of retail buying group, alliance, at national or international level, may reduce innovation, product variety and/or quality, resulting not only in lower consumer but also lower economy surpluses[25].

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*Schwarz Group **have a structural advantage** at the horizontal level (over their competitors) and at the vertical level (over their suppliers).p.*14 "***Even strong manufacturers with high turnover shares in the food retail sector can be faced with strong bargaining power from their customers,** if they have even fewer outside options than their customers*". *p.8***.** "***Shifting sales to another distribution channel is either regarded as not economically viable or doubt is cast on the "absorptive capacity" of alternative distribution channels**. Even companies already using other distribution channels envisage no further absorptive capacity in this respect. In view of the very low share of overall turnover which alternative distribution channels account for compared with the food retail sector, this assumption is probably correct.".*

[21] Appeal Court (Paris) 01.10.2014 13/16336, p.13 against leading retailer, confirming initial court decision (RG2009F00729)

[22] Ahold, leading Dutch retailer, (N°14 global retailer in 2019) 28.09.2009, letter, HT.1171 stakeholder input, comments regarding review block exemption regulations and guidelines on vertical restraints, P. Rey article..

[23] 2014 Food Sector Enquiry p.6, English summary

[24] e.g. *Toulouse School of Economic Working paper, No 17-771* Caprice, S., and Shekkar, S., (2017), On the Countervailing power of large retailers when shopping costs matter,p.30 " *When retailers enhance their buying power, suppliers adjust their investments according to the new bargaining position of their buyers* countervailing power ... *industry surplus and social welfare fall, when the large retailer possesses countervailing power*

[25] *INTERNATIONAL CONFERENCE ON COMPETITION AND REGULATION,* 5th July – 7th July 2019Marie-Laure Allain, Rémi Avignon , Claire Chambolle "Buying Groups and Product Variety" paper presented at 14th, analysis of panel data in France: ,"*It shows that retailers may enhance their buyer power by jointly committing to a common listing strategy. As a result, buying groups reduce the overall product variety. This results in lower overall consumer surpl*us; see empirical demonstration on bottle water category at European Commission Workshop on retail alliances 4.11.2019

1.26. It is worth noting that the grocery retail alliances arguments – be they national or European - that they limit the scope of their activities to a set of large suppliers which could afford the financial losses is negated by the economist and empirical researches which show that even suppliers which are not selected as suppliers by the grocery buying group are nevertheless impacted[26]. The whole market dynamics are negatively affected by the grocery retail alliances.[27] Investigations by the Italian competition authority also attest of such reality as we will review in a later section.

2. Horizontal Guidelines – Retail alliances

2.1. Section 5 of the Horizon Guidelines addresses an important area for the application of Article 101 TFEU—joint purchasing agreements.

A. The retail landscape: grocery retail alliances and competition concerns

2.2. Section 5 of the Guidelines provides a useful starting point for the analysis of buyer cooperation. The Guidelines present a classic model of buyer cooperation where companies integrate their buying activities by jointly purchasing products and negotiating prices in the form of buying groups or cooperatives. By combining their purchase volumes, such buying groups can offer buyers the benefits to secure better terms.

2.3. In theory, as described in the current HGL, suppliers and retailers can benefit from greater purchase volumes and associated scale economies, one-stop-shop negotiations, reduction in transaction costs, increased distribution efficiencies, if the buyer group handles logistics for its members. It is assumed, in turn, that these benefits will be passed on, at least in part, to consumers, provided there is sufficient competition downstream. AIM agrees with the Guidelines that joint-purchasing agreements may, in the right circumstances, generate procompetitive efficiencies.

2.4. At the same time, the Guidelines correctly note that buyer cooperation can raise a number of concerns, including both in the upstream market where suppliers compete and in the downstream market where buyers compete. The concerns that the Guidelines identify include the impairment of suppliers' ability to compete and to innovate, the facilitation of collusion among cooperating buyers, and foreclosure of independent buyers.

2.5. Since 2010 the retail landscape has changed considerably. New forms of buyer cooperation have proliferated, which do not involve genuine integration of buyer activities, but operate as naked mechanisms for the aggregation and exploitation of market power. These arrangements cause serious competitive distortions and significant harm through the extraction of fees and collective delistings.

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26 see Claire Chambolle, *The impact of retail alliances on prices and product variety*,p.10 *Limiting the scope of buying groups does not prevent full exclusion of small suppliers*¸ Workshop on retail alliances 4.11.2019, see Hugo Molina,*)* "*Buyer Alliances in Vertically Related Markets*", French National Institute for Agricultural Research (INRA) October 2019: ***the negotiated wholesale price not only transfers surplus between firms but also affects the pie to be divided****".*

27 Ibid Hugo Molina, "*Using private labels only as control group, I find a more important retail price effect from buyer alliances (−7.32%) as well as a decrease in the retail prices of national brands sold by retailers 7 and 8 (−5.80%). This shows that strategic* ***reactions of retailers remaining outside the scope of the alliances are likely to be at play****"*

2.6. AIM submits that it is important to take proper account of these forms of buyer cooperation and to distinguish such mechanisms from genuine joint purchasing. Separate consideration and rules for each type of arrangement are needed in the revised HGLs. The Guidelines need to provide a more differentiated and in-depth treatment of different forms of buyer cooperation. They need to identify more clearly possible harmful effects from non-meritorious practices such as collective fee extraction mechanisms and collective delistings, address also the issue of buyer cooperation and market partitioning.

B. Retail alliances and market partitioning

2.7. The Guidelines acknowledge possible collusion through market partitioning agreements (§205) yet overlook the fact that the Guidelines themselves may generate a chilling effect on incentives for retailers to expand into other national territories, a reality the Italian competition authority raised in the context of its grocery retail alliances investigation in 2014.[28]

2.8. The Guidelines encourage buying groups to exclude potential members that will be present on the same markets. This may discourage retailers hoping to enter an alliance from entering other alliance members' territories, and similarly discourage existing alliance members from territorial expansion. During the 2019 French Parliament on the grocery sector, some retailers declare they consider it unfeasible to be a member in an alliance with a direct competitor. Some moved from one national alliance with a national competitor to a European alliance with non-competitors[29]. When announcing their European retail alliance in 2018, Carrefour and Tesco declared in their press release that the only market where they are both present, Poland, will be excluded, from the retail alliance activities. Such territorial restraint is – for example - set out in the bylaws of one European alliance.[30] Looking at retail pulling out of some national markets in the last ten years, then joining European retail alliances, some would argue there would be ground for review.

2.9. In *Toshiba*, the General Court explained that an "*unwritten understanding*" [31]to avoid entering a market would amount to an anticompetitive market-partitioning agreement. The Commission also identified an unlawful implicit territorial partitioning in the *CISAC* decision.[32] Even if market partitioning was not the parties' intent, the agreement may violate Article 101(1) TFEU[33].

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[28] 2014 Centrale italiana case, I768 CENTRALE D'ACQUISTO PER LA GRANDE DISTRIBUZIONE ORGANIZZATA , *Provvedimento n. 24649, §30 "The competitive dynamics of the sector is also strongly affected by the nature of such buying group, .. disincentive to carry out competition...decision to enter local market only through swap of stores between retailers members of alliance ...to avoid "costly" confrontation* "

[29] Stéphane Prunelé link parliamentary hearing on 11.7.2019 (Leclerc now in European retail alliance) explained: *"Leclerc firstly created a retail alliance with System U "Lucie". To come together around a table,to negotiate with suppliers or to build commercial strategies But Leclerc soon realized that partnerships between retailers competing downstream were harmful .." Michel Biero* (Lidl*): "it is nonsense: we cannot ally with our worst competitors on one side and on the other side compete downstream."*

[30] Coopernic (European retail alliance) bylaws on BCE, 13.09.2016, article 16, exclusion of a retail alliance member if it purchases a "*significant competitor on a downstream national marke*t", competitor to one of the retail alliance members ("*concurrent significatif sur une part substantielle d'un marché national de détail*")

[31] Case T-113-07, *Toshiba v Commission*, para 123

[32] Case COMP/C2/38.698, *CISAC*, Commission decision of July 16, 2008

[33] Guidelines on Article 101(3), §22 :"*Evidence of subjective intent on the part of the parties to restrict competition is a relevant factor but not a necessary condition*."

C. Retail alliances as naked mechanisms for the aggregation and exploitation of market power

2.10. As identified already by the Czech Competition authority[34], some retail buyer cooperation in the retail do not involve genuine integration of buyer activities, but operate as naked mechanisms for the aggregation and exploitation of market power. These groups do not to buy together nor set up common logistics solutions. No efficiencies are achieved; on the contrary, such complex buying arrangement with multi-tier negotiation reduces efficiencies as identified by Italian Competition authority[35].

2.11. These retail alliance arrangements at European level are characterized by three key elements:

- They operate as gatekeepers to national retailers;
- They exploit this gatekeeper position by extracting access fees from suppliers; and
- They coerce suppliers through collective de-listings.

2.12. Such arrangements represent naked mechanisms for the aggregation and exploitation of buyer power, and cause serious competitive distortions and significant competitive harm through the extraction of fees [36]and collective delistings (removal of suppliers products from stores as an exercise of buyer power). As such they have a negative impact on the European economy.

2.13. In more detail, a set of European grocery retail alliances typically operate as follows:

- Suppliers that wish to do business with national retailers, members of alliance, must first pay a fee to the alliance as a condition for access to members, national retailers. The fee is typically calculated as a percentage of the cumulative revenues that a supplier generates with retail alliance members in all European markets where present. Alliance members therefore agree to turn the alliance into a gatekeeper for access to their members and to levy jointly set fees as a condition for such access.
- Suppliers that do not agree to the access fees are made subject to collective delisting (removal of suppliers products from stores by the national retailers members of grocery retail alliances). These collective delistings are tightly coordinated by the European alliance and its members across number of European countries, including as to timing and severity. Typically 20% to 30% of the suppliers' business with retailers is affected.
- While retail alliances, in some cases, would argue they offer services in return for access fees, such fees do not bear a genuine relation to the offered services . Services may not necessarily be provided at all.[37]The fee therefore in effect operates as a form of tax or toll for suppliers. This is evidenced by the fact that a supplier declining to pay the fees does not simply lose the service but is penalized with delisting.

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[34] Billa-Meinl retail alliance. 17. 5. 2012 Supreme Court confirmed the cartel decision of the Competition authority: "*the purpose of the cooperation was to ...maximise profit...requested from the suppliers the alliance bonus, for which there was no justification. In addition, should the suppliers have refused to accept the conditions, they would have risked Billa or Julius Meinl terminating their cooperation with them* ", see https://www.uohs.cz/

[35] I768 - CENTRALE D'ACQUISTO PER LA GRANDE DISTRIBUZIONE ORGANIZZATA *Provvedimento n. 24649 §37* "*the investigation hearings made clear that the exercise of buyer power by retail chains may lead for the weaker producers,* ***not just to a squeeze of profit margins, but also to a more general difficulty in organizing effectively their production activities.*** *Study of the framework of these contractual relations showed the presence of long- and complex agreements, which, in many cases: i) are not defined before the time of supply; ii) are supplemented by subsequent requests on the part of retail chains,by unilateral and retroactive changes to the terms negotiated iii) do not allow, especially for enterprises with less bargaining power, the easy evaluation and comparison of economic conditions negotiated.*"

[36] Chris Doyle & Martijn Han; *Cartelization Through Buyer Groups*, Review of Industrial Organization, 2014, vol. 44, issue 3, 255-275 2014 (Collusion through slotting allowances): "*Retailers may enjoy stable cartel rents in their output market through the formation of a buyer group in their input market*"

[37] It has also been evidenced in French Parliament hearings of retail alliances see http://www.assemblee-nationale.fr/15/rap-enq/r2268.asp

- The level of the access fee is negotiated for a one- or- two year period. For each subsequent period, a new access fee needs to be negotiated and the level of the fee generally increases from period to period as part of an automatic indexation not linked to economic or commercial realities.
- Access fee negotiations are staggered and carefully orchestrated by alliances, such that the alliance will not negotiate simultaneously with multiple competing suppliers in same categories. In this way when an alliance decides collectively to delist a supplier, the alliance is able to hurt the supplier (who will see sales divert to its competitors who remain on the shelf) without harming the retailers[38] (as customers are very unlikely to switch to a different retailer in search of the delisted product as evidenced[39]). As a result, a supplier facing collective delisting will be hit with even greater force since consumers will switch to rival products in response to the disappearance of the supplier's products from retailer shelfs. The retailers have also the ability to encourage consumers to purchase their retailer brands during these delistings, they can then not only balance their sales and profit, but also gain in category share.[40]

Collective de-listings (sudden removal of suppliers products from store to force a fee payment) by retail alliances have considerable adverse consequences for competition and suppliers.

D. Cumulative access fees – a competition concern

2.14. Once the access fee is agreed, suppliers must still negotiate prices and additional fees with each individual alliance member at national level or with overlapping national alliances. The access fee negotiations and payments to European alliances therefore come on top of national level negotiations. The total amount of access fees to reach the European market has become excessive for most suppliers with the multiplication of national and European grocery retail alliances in the last decade, reducing for suppliers the ability to benefit from the Single Market by entering new markets when not present. The Guidelines on Vertical restraints already acknowledged this issue in terms (VGL §204 – 205 *"Upfront access payments may sometimes result in anticompetitive foreclosure").*

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38 A.Iozzi &T.Valletti, "*Vertical bargaining and countervailing power*", London Imperial College, *Discussion paper 2010/10*:*"the breakdown of the negotiation between a retailer and the input supplier is observed by the rival downstream firms; they react and make, in the downstream market, optimal choices which take into account that* ***there is now one less competing firm***"

39 . France Competition authority Avis n° 15-A-06 du 31 mars 2015 §264 « *a supplier runs the risk of losing almost all of its turnover with the customers without the possibility of compensation, while a retailer who would suffer a supply disruption would only decrease possibly its margin on certain products, without .. impacting the loyalty of its consumers...§265 recent delistings by retailers of a set of brands, some considered as leaders... These episodes of dereferencing would have led to very limited or even zero reports of consumers to other stores. By comparison, only rare cases of interruption of trade relations at the initiative of suppliers and for very limited periods of time have been reported"* Note that authority challenged the retail argument of must-stock brands, arguing that if there must stock they would not delist them while brands leaders are regularly delisted by retail to exercise commercial pressure.

40 France Competition authority Avis n° 15-A-06 du 31 mars 2015 §267

2.15. The accumulation of fees and their negative economic impact, especially for smaller companies has also been identified by the Italian Competition authority in the Centrale Italiana case[41]. Economists have documented the anti-competitive effects of slotting allowances as well as their harm to the economy at large as they reduce efficiencies.[42] One could argue that a UK[43] case supports such conclusions.

2.16. The access fees that these retail alliances extract act as a toll that significantly increases the cost for suppliers of doing business in Europe. The costs of the toll diminish the funds that suppliers have available to compete by promoting their products and investing in product development and innovation. They therefore diminish competition.

Changes are needed to ensure that competition in the European retail sector continues to thrive

2.17. The discussion of buyer power cooperation in the Guidelines must take into account these developments. The growth in the power of retail alliances, the relentless increase in access fees, and the serious disruption caused by collective delistings calls for a more differentiated and sophisticated analysis of buyer cooperation under Article 101 TFEU.

2.18. AIM submits that the revision of the Guidelines should, in particular, recognize and expand on the following points:

- Buyer power can be accumulated and exploited, regardless of whether participants are competitors.
- It is necessary to distinguish between genuine integration of buyer activities and naked mechanisms for buyer power aggregation.
- Buyer power aggregation and exploitation can have harmful effects on upstream competition among suppliers.
- Collective extraction of fees that are decoupled from price negotiations can raise competitive concern.
- Collective delistings can raise competitive concerns.

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41 I768 -CENTRALE D'ACQUISTO PER LA GRANDE DISTRIBUZIONE ORGANIZZATA *Provvedimento n. 24649 §38 : « **A specific area of concern from a competition point of view on the procurement market**, associated with the achievement of greater purchasing power on the part of retail chains, derives from the i**ncreased** diffusion and the increased importance of the phenomenon of **trade spending** – that is the **fees paid by suppliers to the retail chains for services performed – in general for listing, distribution and promotion.** With regard these components of the negotiation with suppliers, in fact, **retailers** against a weaker party, may adopt behaviors such as: **i) condition the purchase of products to the retail sale of a package of services; ii) impose sales prices not related to the characteristics of the services and to the actual benefit that derives from them for the suppliers; iii) to provide services not adequate to the price paid, resulting. The verification of such adequacy is not always easy for smaller producers."***

42 *Cesifo working paper n°1800*, Do **Slotting allowance harm retail competition**? + *Review of Industrial Organization, May 2014, Volume 44, Issue 3*, Cartelization Through Buyer Groups *seep.263 " Since the slotting allowance is a fixed fee, it is a contractual sunk cost for the suppliers and a contractual sunk income for the retailers; thus, its size is independent of the number of inputs that are sourced and does not affect the retailers' behavior. Therefore, this mechanism allows retailers jointly to expropriate monopoly profits by coordinating through a buyer group in the input market without engaging in per se illegal collusioning the output market"*. Ibid Caprice, S., and Shekkar, S., (2017), On the Countervailing power of large retailers when shopping costs matter, *"the supplier pays a slotting fee (negative fixed fee) to the large retailer. In the end, high wholesale prices appear as a surplus extraction device rather than joint profits maximization. Industry surplus falls, as does consumer surplus, which results in a lower social welfare profits maximization"*. *See also note 24*

43 Relying on such fees collection not only addresses business management but it is at the origin of a set of investigations and fines when a leading grocery retailer had to send profit warnings and its stocks collapsed when it appeared its revenues forecast were built not on its retail sales but on suppliers fee collections, which at end couldn't be met.

AIM discusses each of these points in more detail in the sections below. To illustrate its proposals, AIM provides suggestions for specific amendments to the current Guidelines in relation to the section 5.

E. Proposed changes to the guidelines

i. Buyer Power can be accumulated and exploited, regardless of whether participants are competitors

2.19. The analytical framework for the assessment of buyer cooperating under the current Guidelines draws a distinction based on whether participators are competitors. The majority of the Guidelines' discussion of possible restrictive effects covers cooperation among competing buyers (Guidelines, ¶¶208–211 and 213–216). The Guidelines dedicate only one sentence to cooperation among non-competing buyers (Guidelines, ¶212).

2.20. In that passage, the Guidelines suggest that cooperation among buyers that do not compete in the same downstream market is unlikely to raise concerns. But the Guidelines go on to note that concerns may arise if the cooperating buyers have "a position in the purchasing markets that is likely to be used to harm the competitive position of other players in their respective selling markets" (Guidelines, ¶212).

2.21. As set out in §10 of the HGLs, competitor definition "includes both actual and potential competitors". Given the vital importance of furthering integration of the Single Market, greater acknowledgement of the scope for multinational retailers to be potential competitors is needed. In that context, buyer cooperation can therefore create significant harm even if cooperating buyers do not currently compete directly on the same national market downstream.

2.22. In AIM's submission, the distinction based on whether cooperating buyers compete downstream is not a useful starting point for the assessment of buyer cooperation. Nor is the Guideline's treatment of cooperation among non-competitors satisfactory. While the Guidelines ultimately recognize the possibility of concerns in the case of buyer cooperation among non-competitors, the Guidelines' discussion on this point is not sufficient to address competition concerns and markets competitiveness.

2.23. The competitive relation among cooperating buyers matters only for one particular concern, namely whether cooperation may foster collusion among participating buyers in the downstream market. It is not determinative for other types of concerns associate with buyer cooperation.

2.24. The primary and fundamental concern arising from buyer cooperation is the creation and reinforcement of buyer power that can then be used to distort competition either in the upstream or downstream market. Yet **buyers can increase market power by aggregating their demand**, regardless of whether the cooperating buyers are competitors. The increase in market power arises from the accumulated demand that a supplier loses if it declines to accede to the demands of a buyer group. There is therefore no need for a competitive relation between buyers for the creation and reinforcement of market power through buyer cooperation.

2.25. What matters for **buyer power aggregation is not whether cooperating buyers compete in the same downstream market, but whether they buy the same product**. If they do, then by linking their demand they can increase their market power. The starting point for the analysis of buyer cooperation must therefore be a recognition that buyer cooperation can raise concerns because of the accumulation of buyer power, regardless of whether participants compete.

2.26. AIM would emphasise that whether or not alliance members are actual or potential competitors should not ultimately be determinative as to whether the practices of a given retail buying group/alliance may be anti-competitive. **It is the accumulation of buyer power that is the source of distortive competition effects on the upstream market**, which is not contingent on the alliance members being competitors .

ii. It is necessary to distinguish between genuine integration of buyer activities and naked buyer power aggregation mechanisms

2.27. The current Guidelines focus on classic models of "*joint purchase of products*" (Guidelines, ¶194). Buyer cooperation, however, can take also other forms that do not involve joint purchasing. This includes arrangements that have the sole or primary purpose of accumulating and exploiting of buyer power without genuine integration of buying activities, as described earlier. Such naked mechanisms for the aggregation of market power cannot be assessed in the same way as joint purchasing arrangements that integrate participants buying activities.

2.28. It is well recognized that buyer power can be harmful to competition. The Commission's Horizontal Merger Guidelines note, for example, that "*a merger that creates or strengthens the market power of a buyer may significantly impede effective competition.*"[44] Likewise, cooperative arrangements among buyers may result in a harmful increase in market power that is subject to review under Article 101 TFEU.

2.29. Aggregation of buyer power cannot be considered efficiency-enhancing in itself. It is insufficient for the arrangement to simply enrich participating buyers at the expense of suppliers. In *MasterCard*, the Commission made clear that "*any transfer which results from a restriction of competition must be more than compensated by benefits for somebody else other than the undertakings participating in the restrictive agreement*."[45]

2.30. In its Staff Working Paper on Competition in the Food Supply Chain, the Commission noted that the creation of market power through buyer cooperation "*may be outweighed by economies of scale provided the parties actually bundle volume*."[46] Yet, naked mechanisms for aggregating market power do not generate economies of scale because they do not combine purchase volumes. Nor do they provide a one-stop-shop opportunity for suppliers or other obvious benefits. Instead – unlike genuine buyer integration – they operate as one-sided instruments for coercing suppliers and achieving outcomes that are different from the free interplay of supply and demand in an undistorted market. It is difficult to see how such arrangement can be reconciled with Article 101 TFEU.

2.31. The Guidelines should therefore provide for a more differential treatment of different forms of buyer cooperation. In particular, **the Guidelines should distinguish between genuine integration of buyer activities and naked mechanisms for the aggregation and exploitation of buyer power**. The Guidelines should recognize that arrangement that are limited to the aggregation of market power are restricting competition within the meaning of Article 101(1) TFEU. They are not likely to be exempted under Article 101(3) TFEU.

2.32. As HGL §205, clearly states "*joint purchasing arrangements* ***restrict competition*** *by object* ***if they do not truly concern joint purchasing,"*** With this in mind, we would propose the following amendments to the current guidelines:

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[44] Horizontal Merger Guidelines, §61.

[45] Case COMP/34.579, *Mastercard*, Commission decision of December 19, 2007.

[46] Commission Staff Working Document, Competition in the Food Supply Chain, available at: https://ec.europa.eu/economy_finance/publications/pages/publication16065_en.pdf

§205. Add (**in bold)-:"** *Joint purchasing arrangements restrict competition by object if they do not truly concern joint purchasing, but serve as a tool to engage in a disguised cartel, that is to say, otherwise prohibited price fixing, output limitation or market allocation* ***or are a naked mecanism of buyer power aggregation".***

iii. Buyer power aggregation and exploitation can have harmful effects on the upstream competition among suppliers

2.33. In Section 5.3.1, the Guidelines identify as one of the main concerns of buyer cooperation, the possibility of adverse effects in the upstream market for competition among suppliers, including reduction in quality, lessening of innovation[47], and suboptimal supply (Guidelines, ¶202). Yet this concern is not further developed in the Guidelines .

2.34. Buyer cooperation – in particular in the form of naked mechanisms for market power aggregation – can have considerable adverse consequences for competition among suppliers. Indeed, suppliers are the direct counterparty to the cooperating buyers and mechanisms for aggregation of buyer power are typically designed to exercise and exploit market power *vis-à-vis* suppliers.[48]

2.35. Buyer power aggregation mechanisms can harm competition among suppliers in multiple ways. They increase the cost of suppliers of doing business in Europe. They create additional friction and hurdles for suppliers to access European markets. They create serious disruptions and distortions through collective delistings.

2.36. Thus, in *Centrale Italiana*, the Italian competition authority identified possible restrictive effects on upstream supply markets from a retail alliance. The authority found that the alliance had created strong buyer power and that such power could lead to a reduction in the ability to compete of producers. This, in turn, could have adverse consequences over time on the variety and quality of products.[49]

2.37. Similarly, an investigation by the French competition authority found that retail alliance arrangements added complexity to the process of suppliers' negotiations with retailers.[50] Such arrangements create a bottleneck for negotiating and implementing effective counter-services that would stimulate inter-brand competition.

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47 A reality demonstrated by economist researches earlier mentioned, see also e.g.P.Rey & S. Caprice, *Buyer power from joint listing decision,* Toulouse School of Economic Working Paper, n° 12-294, avril 2012, révision juillet 2014 *"when a buyer group..., increasing its size further tends to ...reduce investment incentives.... suppliers respond to the exercise of buyer power by under-investing in innovation and production",*

48 Ibid, "*Size may not only increase the value of a downstream firm's alternatives but also reduce the suppliers' alternatives* " Dana, J. (2012), "*Buyer Groups as Strategic Commitments*,", Games and Economic Behavior, 74(2):470-485 : a large buyer group is an opportunity to reduce the number of suppliers which it deals with.

49 Case I768, *Centrale Italiana*, Decision n.24649 of the Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato) of December 4, 2013. E.g. §7 describing the retail alliance as a "*negotiation platform*";§37"*exercise of buyer power lead ..also to a more general difficulty in organizing effectively their production activities.* "

50 *See* Avis n° 15-A-06 du 31 mars 2015 , April 1 press release : *the agreements which are the subject of this notice add to this complexity by distinguishing between several categories of suppliers, multiplying the negotiation strata, and operating new segmentations between different aspects of the negotiation for some of them.*

iv. Collective extraction of fees that are decoupled from price negotiations can raise competitive concern

2.38. The current Guidelines do not discuss buyer arrangements that involve the extraction of access fees that are disconnected from actual price and volume negotiations. As noted earlier, such access fees act essentially as a toll: suppliers that wish to do business with national alliance members must first pay a fee to the alliance as a condition for access to member at national level. As just quoted, authorities raise also the issue of complexity and additional of negotiation layers, hence cumulative access fees.

2.39. Such arrangements are likely to restrict competition, in violation of Article 101(1) TFEU. The costs of the fees must be compensated through cuts in budgets of affected suppliers for individual products and markets. These fees therefore diminish the funds that suppliers have available to compete by promoting their products and investing in product development and innovation.[51] As a consequence, collective access fees reduce brands competition. The Czech competition authority in a recent decision condemned such access fees[52].

2.40. Indeed, the collective demand of access fees is difficult to distinguish from buyer cartels that have been condemned in recent cases. For example, in *Car Battery Recycling*, the Commission (upheld by the General Court) found that recyclers' coordination of fixed-amount discounts applied to suppliers' prices constituted a restriction by object.[53] Similarly, in *Raw Tobacco Italy*, the Commission considered that coordination on purchase prices constituted a by object restriction.[54]

2.41. Collective extraction of access fees is also unlikely to qualify for an exemption under Article 101(3) TFEU. While retail alliances argue that these access fees are passed on to consumer in the forms of costs savings, such a pass on cannot be presumed. Retail alliances and their members bear the burden of proving any alleged pass on[55].

2.42. There are good reasons to be sceptical about pass-on claims.[56] Access fees are less likely to be passed on to consumers because of their particular structure. They are not negotiated as part of a price and they are paid *ex post* after sales are made[57] as the Italian Competition authority also observed (§38,42-43).

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51 See earlier notes on economist researches on retail alliance negative impact on economy surplus

52 *e.g. Case 18/053/VTS001-S0139/2017, Decision of the Czech Competition Authority of September 6, 2018 where the* agency condemned a retailer's requirement that its suppliers pays a fee to its buying group, Markant, in order to be allowed to enter a negotiation of purchase with the retailer, Kaufland.

53 Case AT.40018, *Car battery recycling*, Commission decision of February 8, 2017.

54 Case COMP/C.38.281/B.2, *Raw Tobacco Italy*, Commission decision of October 20, 2005.

55. Regulation 1/2003, article 2 ("*The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled*.")

56 Bundeskartellamt, German Competition Authority, Summary of the Final Report of the Sector Inquiry into the food retail sector, 31.12.2014, p.5. *From the perspective of the smaller partners, a purchasing cooperation with one of the leading competitors has ambivalent implications for another reason….there are increasing indications that the* ***conditions attained are not always passed on in full to the smaller partners****. The results of the sector inquiry confirm this estimation. Apart from the loss of independence, this can also lead to direct disadvantages for the smaller cooperation partners*";

Ezrachi, Ariel**.** 2012. *Journal of Competition Law and Economics*, January 2012 "*Buying Alliances and Input Price Fixing: In Search of a European Enforcement Standard*» argues and analyses that passing-on depends on the firms' lack of downstream market power, reduction in rivalry increases risk of price collusion downstream. One would assume that when the market leaders are in a national or international alliances, it illustrates a "lack of rivalry, downstream competition" *(Centre for Competition Law and Policy, Oxford University 15 May 2012)*

57 E.g.: Carrefour registration document,section 5, p.257 :"*receivables, still to be paid at end year, "correspond for the most part to rebates and commercial income receivable from suppliers* , 1.1 bion € in 2018, 1.3 bion € in 2017 http://www.carrefour.com/sites/default/files/ddr_2018_version_anglaise_vdef_100519.pdf" .

The Commission's staff paper on competition in the food supply chain observed that these kind of payments have "*no direct relationship*" with product prices and "*a retailer may therefore be reluctant to reduce consumer prices*" based on such payments.[58]

2.43. Alleged sharing of spoils derived from the raw exercise of collective market power provides no valid basis for an exemption under Article101(3)TFEU. Thus, in *T-Mobile*, the Court condemned coordination among telecoms providers on commission fees paid to agents, noting that it did not matter whether reductions in commission fees were passed on to consumers.[59]

2.44. Retail alliances, at times, also argue that collective access fees are compensated by counter-services. Yet , as noted, these counter-services do not bear a genuine relation to the access fees. Suppliers that disagree with the access fees do not merely lose the counter-service but are made subject to delisting, their products removed from store. This fact demonstrates that the fees are not paid for counter-services but operate as a toll to pass the bottleneck created by the alliance.

v. Collective delistings can raise competitive concerns

2.45. Suppliers that fail to agree to the fees demanded by an alliance are subject to collective delisting (sudden removal of supplier products from store) by alliance members. Collective delistings therefore operate as an instrument to coerce suppliers into paying access fees. Typically, the alliance will set a share of the supplier's sales with members that each member must cut off. This cut-off share can reach as much as 20–30% of a supplier's sales with members. The members will then select SKUs for delisting up to the predetermined sales share.

2.46. Such agreements on collective delisting (suppliers products removal from stores) restrict competition both by object and effect.

2.47. The sole purpose of collective delisting is to exercise market power and coerce counter-parties. It is in the very nature of a collective delisting that the affected supplier will be excluded from at least for a portion of affected national markets, which necessarily impedes its ability to compete. Collective delistings are in their essence a form of coordinated boycott, whether between retailers in different markets but also between retailers and independent, franchisees stores owners.

2.48. Collective delistings are, moreover, likely to inflict significant harm on suppliers[60] and distort competition among suppliers[61]:

- A delisting can last for a considerable period of time and can cover a substantial portion of the products of the affected supplier. The delisting therefore leads to noticeable loss of competition and choice for consumers within the retailers that participate in the collective delisting.
- Because consumers tend to "stick" with their preferred retailer and will not switch to alternative retailers if a particular product is not on offer, delisting causes severe losses for suppliers that they cannot recoup elsewhere.

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[58] see Competition in the Food Supply Chain (2009), section 4.2.1 I, supported by Caprice, S., and Shekkar, S., (2017) demonstrating it p.3 "*the supplier.. slotting fee (negative fixed fee).. are not passed on to consumers*"

[59] Case C-8/08, *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, ECLI:EU:C:2009:343, 36–39, "*Anti competitive object even though there is no direct connection between that practice and consumer prices*"

[60] Avis n° 15-A-06 du 31 mars 2015 §264 « *a supplier runs the risk of losing almost all of its turnover with the customers without the possibility of compensation"*

[61] See notes 35,36 ,e.g ,A.Iozzi &T.Valletti "*the breakdown of the ...there is now one less competing firm"*

- The German Bundesgerichtshof, for example, found in the *Wedding Rebates* case that a delisted supplier will likely lose sales, while the delisting supermarket is likely to lose little or no sales because consumers will not switch retailers.[62] Therefore, the delisting eliminates or at least severely reduces the ability of the affected supplier to compete for the share of the market affected by the delisting.
- Delisting also has more long-term debilitating effects on competition because a supplier may not be able to recover fully its lost market share following the end of the delisting or may require significant time and effort to do so.

2.49. Consistent with these considerations, the investigation of retailer alliances by the French competition authority found that delistings could have a negative impact on competition in the form of long-run reduction of volumes, foreclosure of suppliers from the market in addition to removal of competing products to the retailer brands, long-run reduction of volumes, and a reduction in the incentive for suppliers to invest.[63]

2.50. It is also difficult to see how collective delistings could have any redeeming benefits that would justify an exemption under Article 101(3) TFEU. Collective delistings go beyond what is necessary to achieve any conceivable benefit because the alliance could leave each member the freedom to decide for itself what action it takes if a supplier does not accede to alliance demands. Moreover, collective delisting is disproportionate because it operates as a mere instrument to coerce suppliers into acceding to monetary demands

2.51. The revised version of the Guidelines should therefore recognize the harmful and anticompetitive nature of collective delistings.

vi. “ Services” and buyer cooperation: competitition concern

2.52. The Guidelines analytical framework set out in Section 5 or Section 6 do not adequately reflect buyer cooperation which have emerged and proliferated in Europe in the last 10 years, whether at national level where such buyer cooperation mixes both horizontal purchasing agreements and horizontal commercialisation agreements, sell of services. or at European level.

2.53. AIM suggests the Commission to take these developments into account in the revision of its Guidelines, in order to provide an adequate framework for the assessment of such arrangements. Both suppliers and buyers would benefit from more clarity provided on the legality of such arrangements.

2.54. If services are actually sold and performed, the French parliamentary commission has recommended the establishment of a transparent services price list to avoid the collective extraction of “access to market” fees.

2.55. Retail alliances and their members would bear the burden of proving such price adequacy with the mandatory tax arm’s length principle. Clear service definition should ensure that the suppliers do not pay twice for the same services both at national and international level. Otherwise, the service price should be considered as anti-competitive, a mere mechanism of buyer power aggregation.

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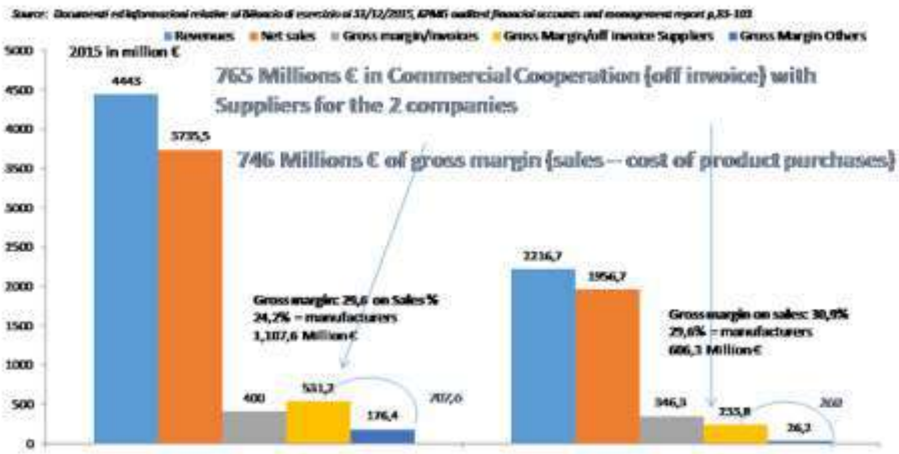
62 Bundesgerichtshof, *Hochzeitsrabatte*, KVR 3/17.

63 *See* Avis n° 15-A-06 du 31 mars 2015 relatif au rapprochement des centrales d’achat et de référencement dans le secteur de la grande distribution, Press release. See note 24.

2.56. To address the concerns of the Italian authority as well the French Parliamentary commission, the Guidelines should specify that if retail alliances provide joint services they must ensure that the services are clearly defined, that a clear procedure is set to ensure their delivery, that the delivery respect the price paid, so that, as in any other commercial transaction, the invoice matches the order and service specifications. Suppliers should have direct recourse in the event of no respect of the joint service agreement.

2.57. However, we need to note that the Italian Competition authority[64] has observed that the services by retail alliance may raise competition concerns. The authority considered possible risk of downstream collusion. These services appeared as an alignment of commercial strategies and activities. The fact that the retail alliance is negotiating a same service price for all retail members of the buyer cooperation leads to "*a similar level of counter performance... which reduces in this way the degree of autonomy of the parties in the management of their promotional and display policies".*

The difficulty in reconciling the services with its price lead the services to appear as "masked" discounts. The creation of a "service contract" was viewed by the Italian authority as a potential means of facilitating the coordination of downstream prices, maintained at a level artificially high as the "discounts" (service price) was not appearing on the invoice when purchasing products. Hence it was not deducted from the nominal cost of purchase (see graph below).



2.58. Likewise, if to avoid such competition concerns, the suppliers are still to negotiate individually the services with each national retail member, if the services are delivered on the local markets, one may question the efficiency and legality of an European alliance requirement for a payment. There is not as foreseen by the Guidelines a "one-stop" negotiation benefit bringing efficiencies and justifying such horizontal agreements.

vii. Buyer Cooperation – exchange of information (Section 2 of the HGLs, Section 5 §214-215)

2.59. The Guidelines provide an important analytical framework for the assessment under Article 101 TFEU of information exchanges among competitors. The investigations[65] of retail grocery buying group, retail alliances, by competition authorities since the last review of the HGLs underscore the importance of Section 2 of the Guidelines and potentially merit further clarifications for the application of Article 101 TFEU to retailers and retail buying groups, retail alliances.

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64 Case I768, *Centrale Italiana*, Decision n.24649,see earlier note (38),§38,42-43

65 Italian authority in *Centrale Italiana (2014)*; Czech competition authority in *Billa/Meinl*,(2012) *Kaufland/Markant (2018).* Belgian (Carrefour/Provera) and French Competition authorities (Carrefour-Systeme U; Auchan Casino Metro) in 2019 and 2018.

2.60. **Firstly, individual retailers risk to pass-on competitively sensitive information between alliances and their members.** Buyer alliances, including high transit and overlapping memberships, have increased in recent years[66].

It is not uncommon for one retailer to be a member of multiple buying groups or alliances – whether at national and/or European level. This can lead to a flow of sensitive information, and potential alignment, between retailers and alliances. In fact, the lack of alliances' structures or mandates increases this risk even more (*e.g.*, one retailer negotiates on behalf of others, employees of different retailers attend other retailers' negotiations with suppliers, and lack of safeguards such as "Chinese walls").

2.61. **Second, information exchanges should be assessed in accordance with the type of alliance or buying group.** The type of information that retailers or alliances are allowed to exchange remains unclear. To a significant extent, this will depend on the specific set of functions an alliance or group carries out. Buyer alliances vary from handling the entire process of supply contract negotiations and purchasing to those merely coordinating joint product listing decisions. New forms of retail alliances in the grocery space have developed at the European level that do not involve genuine integration of purchase operations. For such alliances, it is difficult to argue that they can exchange certain types of information, such as purchasing terms. In this given situation, such exchange would infringe Article 101(1), or would not benefit from exemption under Article 101(3).

2.62. **Third, through alliances retailers can pressure suppliers into providing sensitive information.** By aggregating their demand, alliances may be able to increase their market power and thus their bargaining position. This allows them to pressure suppliers to provide competitively sensitive information, under the threat of collective delisting or foreclosure of national markets. This is particularly harmful in buyer cooperation arrangements where retailers can use suppliers' commercial information for the marketing of their own (competing) retailer brands.

2.63. AIM suggests the Commission to take consideration of the particularities of information exchange in the context of retail buying groups and retail alliances for the revision of its Guidelines. They should be revised to acknowledge the increased risks associated with information exchange within and between alliances and provide more detailed guidance on the types of information that may be exchanged and appropriate mitigations that should be put in place.

viii. Addressing "Dual Role", Horizontal and Vertical relationship combined

2.64. In reviewing the Guidelines, the Commission should take into account the effect that the growing retailer brands sales have on the retail industry. Retailers are increasingly active in the sale of their own retailer brands and, therefore, act as both customers and competitors of branded goods manufacturers.

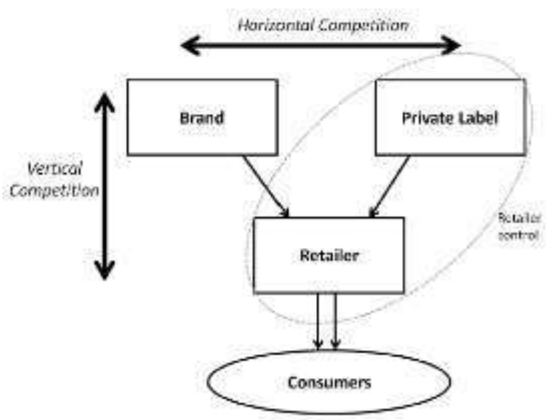

Figure 1 — Brand and Private Label Competition

[66] See Annexes

2.65. As pointed out by research, the "dual aspect to brand/private label competition needs careful consideration when undertaking competitive assessments about behaviour and outcomes in FMCG markets."[67]. As such, "their relationship entails elements of both vertical competition (in the battle for profit share between successive stages of the supply chain) and horizontal competition (in the battle for market share at the product level)[68].

2.66. The Commission is currently investigating similar issues in the Amazon investigation under both Article 101 and 102 TFEU, where the Commission has recognized that "*Amazon has a dual role as a platform: (i) it sells products on its website as a retailer; and (ii) it provides a marketplace where independent sellers can sell products directly to consumers*."[69] This dual role may raise a conflict of interest that threatens the competitive process in consumer goods markets when the same company acts as both player and referee.[70] One could also raise a 3rd issue in the current review, the dual role of Amazon as a retailer selling products of brands or resellers and also selling its own Amazon[71] brands in a set of categories.

2.67. The Guidelines currently do not discuss issues that can arise from retailers' holding such a dual role. In particular, the HGL should recognize that a retailer's sales of its own retailer brands provides it with "considerable *power over a national brand producer when it holds both a gatekeeper position as an essential route for the producer to go through to reach final consumers and as the controller of the selling environment in which products are retailed to consumers*."[72]

2.68. Moreover, retailers' dual role may allow them to exploit the information and data that they obtain from distributing third-party products to gain a competitive advantage for their own competing products.

2.69. First, retailers active in retailer brands sales may demand excessive amounts of commercially sensitive information suppliers and use that information to their advantage. This may include both appropriating suppliers' know how and other innovations, or it may include the supplier's forward-looking business strategy, which the retailer uses to adjust its marketing of its own retailer brands. Retailers occasionally refuse to sign confidentiality agreements that would prevent the misuse of the suppliers' sensitive commercial information.

2.70. Second, retailers engage in discriminatory treatment of branded goods compared to retailer brands products. For example, retailers may favor their retailer brands products through pricing, by increasing

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67 Paul W. Dobson & Ratula Chakraborty, *Assessing Brand and Private Label Competition*, European Competition Law Review, 76 (2015).

68 European Competition Law Review, February 2015,76 "*Assessing Brand and Private Label Competition*" Paul W. Dobson & Ratula Chakraborty; illustration taken from article. Also Global Antitrust Review 2012**,** *Buyer Power in the Context of Private Label in the EU,* Sera Erzene **"***the introduction of those private labels has added a horizontal dimension to the relationship between retailers and branded-product suppliers This two-dimensional relationship makes it difficult to adopt a competition law approach to the exercise of buyer power by retailers"*

69 https://ec.europa.eu/commission/presscorner/detail/en/ip_19_4291

70 Commissioner Vestager, "New technology as a disruptive global force", *Youth and Leaders Summit, Paris, 21 January 2019.*The competitive threat of grocery retailers' dual role has also been recognized by the Commission in the past. *See, e.g.*, José Manuel Barroso, *Energising Europe: a real market with secure supply,* September 19, 2007 ("*It's a bit like a supermarket that has its own brands but does not want to make shelf space available for other brands, let alone build new shelves, or open up new branches.*").

71 https://www.vox.com/2018/4/7/17208804/amazon-private-label-brands-list, Apr 7, 2018

72 Paul W. Dobson and Ratula Chakraborty, *How Do National Brands And Store Brands Compete*?, ESRC Centre for Competition Policy, University of East Anglia, CCP Working Paper 14-7,August 2014.

the price gap between manufacturer brands and retailer brands equivalents.[73] This conduct leads to both (i) consumer price increases, and (ii) foreclosure of branded goods manufacturers. In fact, the Guidelines on Vertical Restraints (para. 201) already recognize the risk of horizontal foreclosure of unaffiliated brands raised by retailers' discriminatory category management practices that favour their own brands.[74] The revision of the HGL offers a unique opportunity to address coherently and generally the legal framework of cooperation agreements with vertically integrated intermediaries.

2.71. Third, the Commission should consider the restriction of competition in the context of tie-in of services. This practice is being investigated in the online sector (e.g., Amazon tie in of its logistic services to the marketplace use). This practice is pervasive in the FMCG sector: retailers and their alliances are increasingly tying their purchase of suppliers goods to suppliers payments for so called retail services that are either (i) not required by the suppliers, or (ii) could be procured from third-party providers at lower prices. This ultimately raises suppliers' costs and consumer prices.

2.72. These practices may restrict competition by compromising innovation, quality, and variety or products available to consumers.

ix. Proposed amendments to Section 5 of the Horizontal Guidelines

§202 Add **(in bold)**-:".If the parties have a significant degree of market power on the purchasing market (buying power) there is a risk that **they may exercise their buyer power in manners that reduce competition among** which may bring about restrictive effects on competition such as reduced choice, quality reductions, lessening of innovation efforts, or ultimately sub-optimal supply.

For example, collective demands of access fees by retailer alliances as a precondition for entering into contract negotiations with individual alliance members, creates an additional hurdle for accessing national market and increases transaction costs for suppliers. Collective delistings to enforce access fee demands by retailer alliances may create disruptions for suppliers and compromise their ability to compete.

§205. Add (**in bold)-:"** *Joint purchasing arrangements restrict competition by object if they do not truly concern joint purchasing, but serve as a tool to engage in a disguised cartel, that is to say, otherwise prohibited price fixing, output limitation or market allocation* ***or are a naked mecanism of buyer power aggregation"***

Arrangements that have the sole purpose of accumulating and exploiting buyer power are by object restrictive. This includes arrangements that coordinate the collective demand of fees from suppliers and that are dissociated from the negotiation of actual prices and purchases. It also includes arrangements that involve coordination and execution of collective delistings and boycotts of suppliers"

§210. Add (**in bold)** ***:"The aggregation and exploitation of buying power*** *may, under certain circumstances, cause restrictive effects on competition* ***in either the purchasing or selling market or both****. Anti-competitive buying power is likely to arise if a buyer cooperation accounts for a sufficiently large proportion of the total volume of a purchasing market so that access to the market may be foreclosed to competing purchasers or* ***suppliers may be harmed through significant additional costs or collective***

[73] Paul W. Dobson and Ratula Chakraborty, *How Do National Brands And Store Brands Compete*?, ESRC Centre for Competition Policy, University of East Anglia, CCP Working Paper 14-*7; see also* Ratula Chakraborty, empirical shopper UK data analysis in *CCP Working Paper 18-2 16.3.2018*

[74] Guidelines on Vertical Restraints, para. 201 ("*While in most cases the distributor may not have an interest in limiting its choice of products, when the distributor also sells competing products under its own brand (private labels), the distributor may also have incentives to exclude certain suppliers, in particular intermediate range products.*")

delistings (removal of their products from stores)*. A high degree of buying power may indirectly affect the output, quality and variety of products on the selling market."*

§211. Add (**in bold** "*In the analysis of whether the parties to a buyer cooperation have buying power, the number and intensity of links (for example, other purchasing agreements) between* ***the purchasers are relevant. Buyer cooperation, such as alliances, should also to be analyzed collectively, rather than individually, to take into account the amplification effects that a network of similar arrangements might have***".

§212. Add (**in bold**)"*Buyer cooperation may give rise to buyer power and possible anticompetitive effects* ***even if the cooperating parties operate in geographically separate purchasing markets (e.g., if purchasing markets are defined as nation-wide and each of the parties operate in different Member States). This, for example, may be the case where the parties establish an alliance to coordinate joint listing decisions, which in turn enhances their joint bargaining power vis-à-vis suppliers*.**"**

§214 Add (**in bold**) ***"A buyer cooperation may lead to collusive effects even if the parties do not presently compete in the same market. For example, members of international retail alliances may be reluctant to enter into each other's territory. In such circumstances, an alliance may have either the object or effect of a non-competition agreement and restrain competition in the internal market***"

§217. Add (**in bold**)" ***Aggregation of buyer power in itself is not an efficiency****. That said Joint purchasing arrangements can give rise to significant efficiency gains. In particular, they can lead to cost savings such as lower purchase prices or reduced transaction, transportation and storage costs, thereby facilitating economies of scale. Moreover, joint purchasing arrangementsbuyer cooperation may give rise to qualitative efficiency gains by leading suppliers to innovate and introduce new or improved products on the markets****. The cooperating buyers bear the burden of proving the claimed efficiencies."***

The probability of efficiencies depends on the level of integration of buying activities and the closeness of the cooperation to the actual buying. Joint purchasing arrangement that involve genuine integration of buying activities and joint buying of volumes are likely to generate efficiencies.

Buyer cooperation that do not involve joint purchasing arrangement are not likely to result in an efficiency relevant for the Article 101(3) analysis. Such arrangements will not produce scale economies or lower transaction costs.

§218 Add (**in bold**) "***Collective delistings (suppliers products removal of stores) that are used to penalize suppliers that do not accept fee payments do not meet the critieria of Article 101(3) nor of indispensability for achieving efficiencies."***

§223 Add (**in bold**) **Example**

Situation: Six large retailers, leaders in their home market, organize in an retail alliance that does not involve joint purchasing, but instead joint negotiation of access fees

Analysis: The buyer alliance does not engage in joint purchasing, increasing transaction costs, without generating efficiencies. Consequently, the arrangement is likely to give rise to restrictions of competition by object within the meaning of Article 101(1). For similar reasons, the arrangements is unlikely to generate any efficiencies relevant for the Article 101(3) analysis. The arrangement is therefore unlikely to be compatible with Article 101.

3. ANNEXES

A. TOP 50 Global Retailers 2019
B. Top 5 Retailers in Europe per EU -28
C. Imbalance of The European Supply Chain
D. National retail alliances: example France and Italy (membership and share)
E. Buyer Power by retail upstream integration: retailer brands vs manufacturer brands
F. European Grocery Retail Alliances Membership and weight in sales revenues
G. Link of national and European retail alliances; collective delisting example
H. Switch of membership in national and international retail alliances over the 10 years
I. 50 global retailers and top 50 FMCG companies revenues 2018

A. TOP 50 Global Retailers 2019

Kantar's 2019 Top 50 Global Retailers (EUR)

KANTAR

2019E Global Rank	2024E Outlook	Retailer/Parent Company	Home Country	2019E Global Retail Sales (€MM)	2019E Global Stores	Sales CAGR ('14-'19E)	Sales CAGR ('19E-'24E)	2019E % Retail Sales Outside Home Market
1	◀▶	Walmart[1]	US	€442,389	11,576	4%	2%	25%
2	◀▶	Amazon.com[2]	US	€182,729	558	25%	14%	19%
3	▼	Costco	US	€123,348	768	8%	6%	34%
4	▼	Schwarz Group	Germany	€111,404	12,318	7%	6%	63%
5	▼	Kroger	US	€106,229	3,037	5%	3%	0%
6	▼	Walgreens Boots Alliance	US	€97,425	9,275	8%	4%	13%
7	▼	Aldi[3]	Germany	€93,589	11,922	6%	4%	70%
8	▼	Home Depot	US	€93,083	2,292	8%	2%	8%
9	▼	Carrefour	France	€86,373	12,713	0%	1%	59%
10	▲	JD.com[4]	China	€80,645	N/A	39%	16%	0%
11	◀▶	Seven & i	Japan	€79,552	17,546	5%	9%	28%
12	▼	Tesco	United Kingdom	€76,900	12,900	0%	2%	20%
13	▲	CVS	US	€76,509	10,022	8%	5%	0%
14	▼	Ahold Delhaize	Netherlands	€65,981	7,107	3%	2%	77%
15	▼	Target	US	€65,784	1,863	3%	2%	0%
16	◀▶	Aeon	Japan	€62,633	15,557	3%	3%	8%
17	▼	Lowe's	US	€60,673	2,264	6%	2%	8%
18	▼	Auchan	France	€59,180	4,347	0%	1%	65%
19	▼	Edeka	Germany	€58,014	12,533	7%	2%	0%
20	▼	Albertsons Companies	US	€51,152	2,252	28%	1%	0%
21	▲	Apple	US	€51,021	507	10%	8%	11%
22	▲	Ikea	Sweden	€45,490	464	9%	8%	96%
23	▼	Rewe Group	Germany	€45,363	11,706	3%	4%	33%
24	▲	Casino	France	€45,071	13,477	-1%	5%	51%
25	▲	Alibaba[4]	China	€42,119	244	48%	15%	0%
26	▼	Leclerc	France	€38,825	1,942	2%	1%	4%
27	▼	Intermarché	France	€38,121	3,616	1%	2%	12%
28	▼	Best Buy	US	€37,071	1,238	4%	1%	8%
29	◀▶	Woolworths Limited (Aus)	Australia	€36,376	2,980	0%	2%	12%
30	▼	Metro AG	Germany	€35,403	8,425	-3%	2%	70%
31	▲	TJX Companies	US	€35,365	4,460	10%	4%	23%
32	▼	Publix	US	€32,830	1,476	7%	4%	0%
33	▼	Sainsbury's[1]	United Kingdom	€31,383	2,009	2%	2%	0%
34	▼	FamilyMart UNY	Japan	€30,032	25,327	1%	2%	8%
35	▲	Mercadona	Spain	€27,983	1,636	9%	7%	0%
36	◀▶	Loblaw	Canada	€27,981	2,413	1%	4%	0%
37	▼	Coles[5]	Australia	€24,142	2,454	N/A	2%	0%
38	▼	H&M	Sweden	€23,646	5,062	7%	4%	97%
39	▲	Suning	China	€23,570	1,544	12%	14%	0%
40	▲	China Resources Enterprise	China	€23,082	3,833	16%	9%	0%
41	▼	X5 Retail Group	Russia	€22,336	16,308	13%	2%	0%
42	▼	H-E-B	US	€22,385	304	7%	5%	5%
43	▲	Dollar General	US	€21,982	16,088	9%	5%	0%
44	▼	Ceconomy	Germany	€21,899	1,195	1%	-1%	49%
45	▼	Macy's	US	€21,396	886	0%	1%	0%
46	◀▶	Adeo Group	France	€21,282	1,354	6%	4%	60%
47	▼	Morrisons	United Kingdom	€20,999	553	0%	4%	0%
48	◀▶	Lawson	Japan	€20,908	16,726	8%	4%	7%
49	▼	Système U	France	€20,875	1,631	0%	2%	3%
50	▲	A.S. Watson[6]	Hong Kong SAR	€20,684	15,873	11%	9%	67%

[1] The U.K. CMA ruled against the proposed merger of Asda U.K. (Walmart) and Sainsbury's. [2] Includes Whole Foods Market. [3] Combines Aldi Nord, Trader Joe's, and Aldi Süd. [4] Direct sales only, not GMV. [5] Spun off by Wesfarmers as an independent entity effective FY 2019. [6] Re-evaluated A.S. Watson retail business due to accurately accounted for subsidiaries.

All figures are estimates based on FY 2018 and/or year-to-date results (primarily reported in March/April 2019).

For more information, go to [illegible] | Contact us at [illegible]

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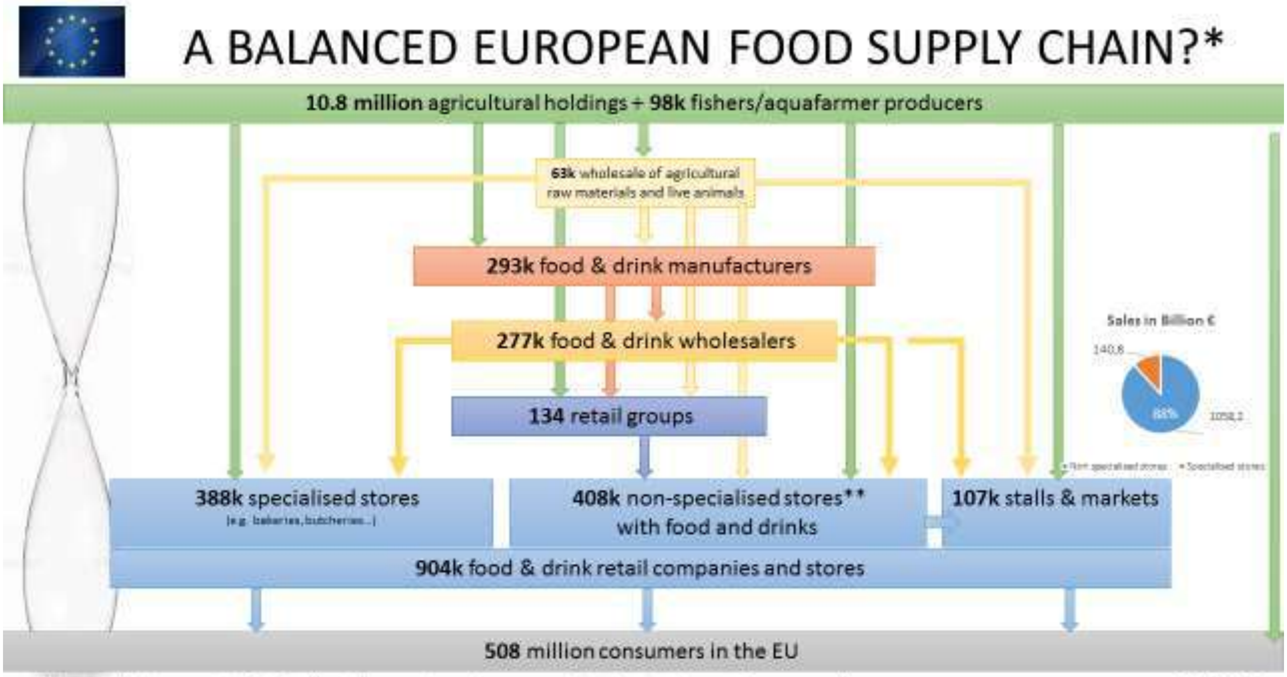
B. Top 5 Retailers in Europe per EU -28

Top 5 Retailers in the European Member States - Most are International & Global Retail Groups

2017	Top 1	Top 2	Top 3	Top 4	Top 5
Austria	Rewe	Spar	Aldi	Schwarz/Lidl	MPreis
Belgium	Colruyt	Ahold Delhaize	Carrefour	Aldi	Schwarz/Lidl
Bulgaria	Schwarz/Lidl	Coop Euro	Rewe	Metro	Fantastiko
Croatia	Agrokor	Schwarz(Lidl)	Spar	Plodine	Rewe
Cyprus	Alpha Mega	Schwarz(Lidl)	Sklavenitis	Denbenhams	Spar
Czech Republic	Schwarz /Lidl	Rewe	Ahold Delhaize	Tesco	Coop Euro
Denmark	Coop DK	Dansk Supermarked	Dagrofa	Reitan	Schwarz/Lidl
Estonia	Coop Eesti	Kaubajama	Maxima	Ica Gruppen	Phoenix
Finland	SOK	Kesko	Alko	Schwarz/Lidl	Reitan
France	Carrefour	Leclerc	ITM	Système U	Casino
Germany	Edeka	Schwarz (Lidl/Kaufland)	Rewe	Aldi	Metro
Greece	Sklavenitis	Ahold Delhaize	Schwarz(Lidl)	Metro Gre	Masoutis
Hungary	Coop Euro	CBA	Tesco	Spar	Real Hungaria
Ireland	Musgrave	Tesco	Spar	Aldi	Schwarz(Lidl)
Italy	Coop Italia	Conad	Esselunga	Auchan	Carrefour
Latvia	Maxima	Ica Gruppen	SOK	Albe	Couche-Tard
Lithuania	Maxima	Norfa	Ica Gruppen	Aibe	Schwarz(Lidl)
Luxembourg	Cactus	Louis Delhaize(Cora)	Ahold Delhaize	Auchan	Carrefour
Malta	Schwarz(Lidl)	Debenhams			
Netherlands	Ahold Delhaize	Jumbo Supermarken	Schwarz(Lidl)	Aldi	Plus
Poland	Jeronimo Martins	Schwarz (Lidl/Kaufland)	Eurocash	Tesco	Carrefour
Portugal	Jeronimo Martins	Sonae	Schwarz(Lidl)	ITM	Auchan
Romania	Carrefour	Schwarz (Lidl/Kaufland)	Profi	Ahold Delhaize	Auchan
Slovakia	Schwarz (Lidl/Kaufland)	Coop Euro	Tesco	Rewe	CBA
Slovenia	Agrokor	Spar	TUS Trgovine	Aldi	Schwarz(Lidl)
Spain	Mercadona	Carrefour	Dia	Eroski	Auchan
Sweden	Ica Gruppen	KF Gruppen	Axel Johnson	Bergendahl	Lidl
UK	Tesco	Sainsbury	Asda	Morrisons	Aldi

(Source : Planet Retail, 2017)

C. Imbalance of The European Supply Chain



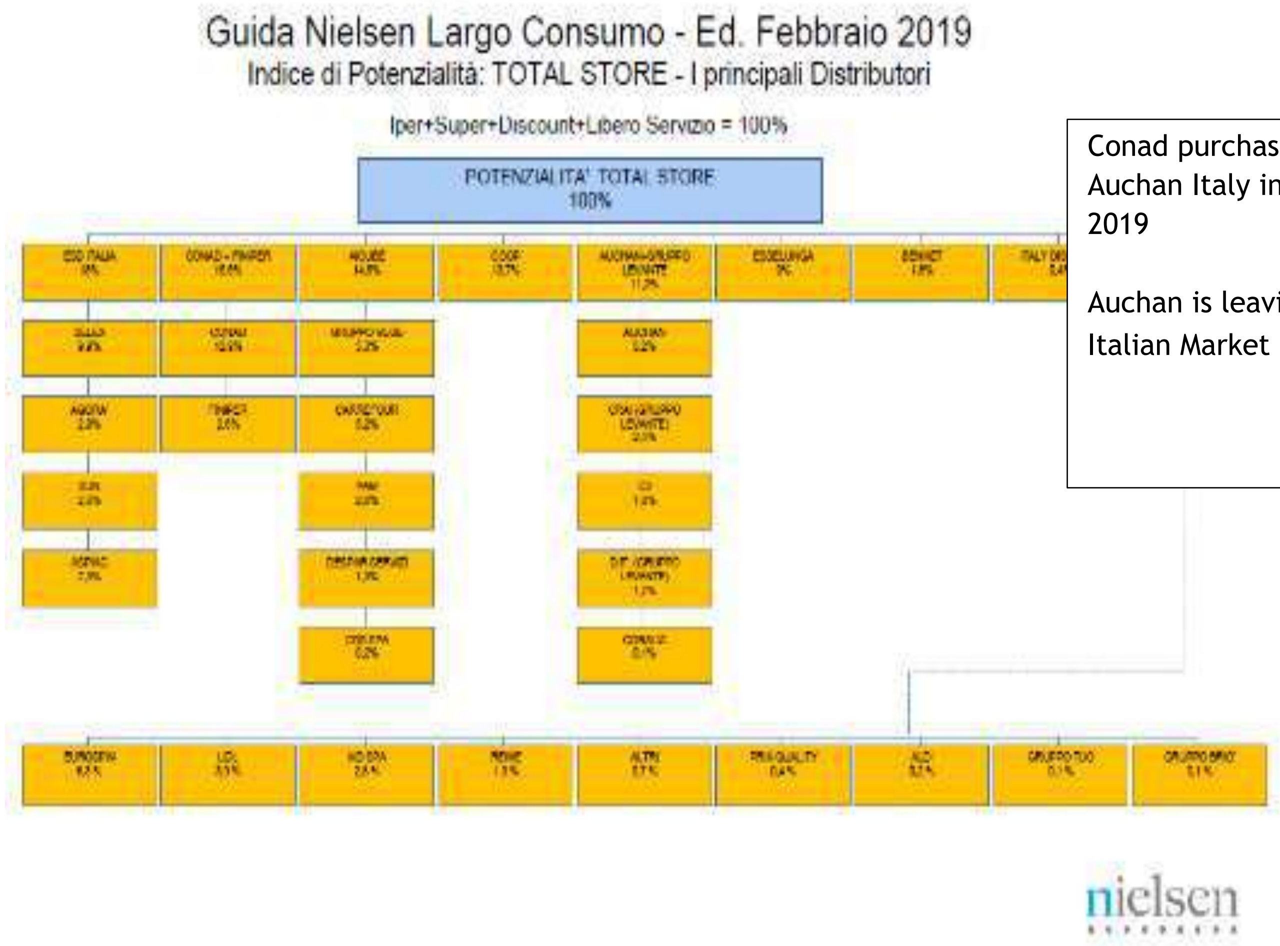
**Non specialised stores: a variety of product lines in the same store, such as supermarkets or department stores, retail groups owned or franchises or small mum-and-pop shops

* EU-28, 2015 data
Sources: Eurostat (Agriculture, National Accounts, SBS); Planet Retail

D. National retail alliances: example France and Italy (membership and share)

France and Retail alliances – Market concentration

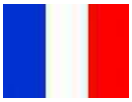
Italy: Individual retailers and Retail alliances



Conad purchased Auchan Italy in 2019

Auchan is leaving Italian Market

E. Buyer Power – Retailers brands vs Manufacturers Brands



FOOD MARKET - 2017

Top 10 Suppliers*

1, Pernod Ricard

2, Carrefour- Retailer Brands

3, Nestle

4, Leclerc- Retailer Brands

5, Heineken

6, Lactalis

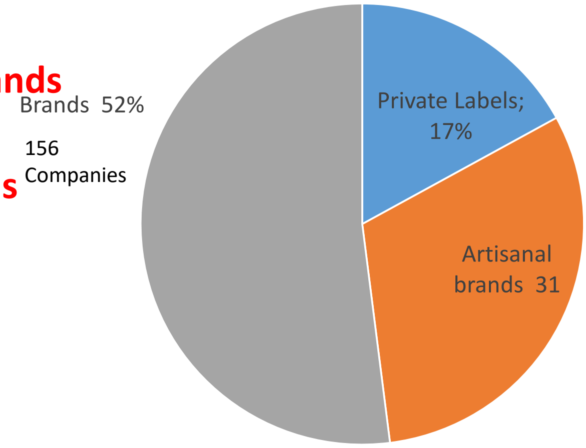
7, Carlsberg

8, La Martiniquaise

9, ITM- Retailer Brands

10, Castel

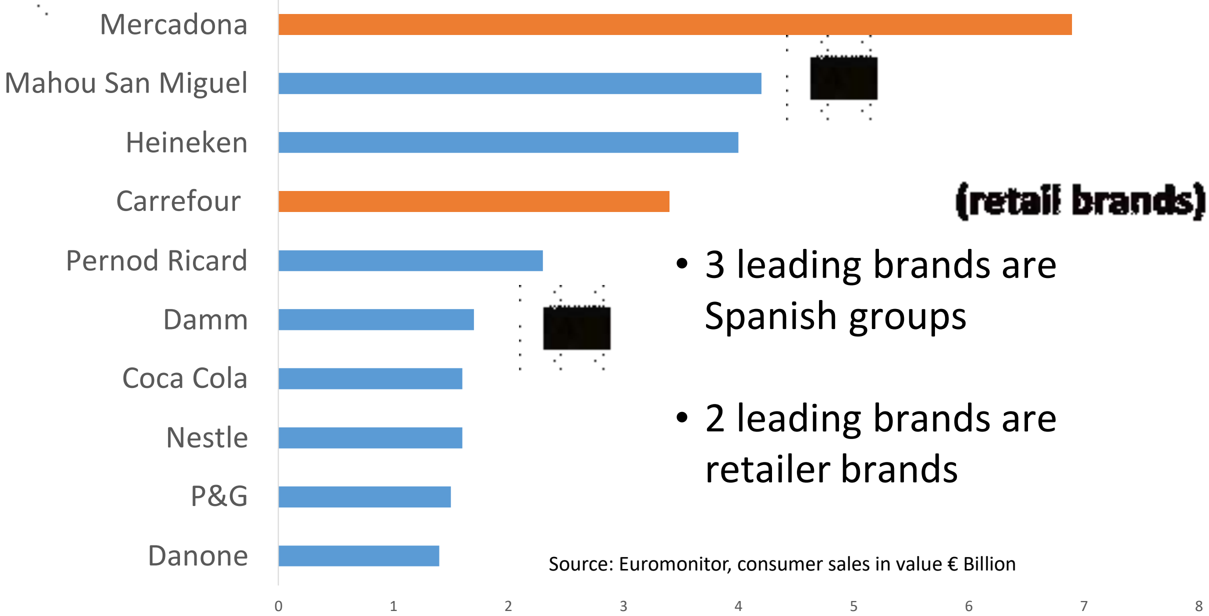
Retail sales to consumers



Artisanal + others: others <0,1% market share
Packaged Food, Soft and Hot drinks, Alcool drinks

Source: Euromonitor * % sales, database does not identify discounters in France

TOP 10 Brands purchased in 2018



(retail brands)

- 3 leading brands are Spanish groups
- 2 leading brands are retailer brands

Source: Euromonitor, consumer sales in value € Billion

F. European Grocery Retail Alliances Membership and weight in sales revenues

+ European Retail alliance: Tesco Carrefour, Systeme U, Provera (Louis Delhaize, Cora banner)+ Aicube. Carrefour WorldTrade negotiates joint international agreements for a varying mix of retailers, combined or not.

European retail alliances combined leaders on the national market

- Agecore: N°1 in Belgium, Italy, Germany, Swiss, n° 4 In Spain and France
- Coopernic: N°1 in Nl & n°2in Belgium; N°3 In Germany and France, N°4 in Italy ...

Source: Edge Ascential (Planet Retail)

G. Link of national and European retail alliances: example

European Retail Alliances : their MS in the top 4 national markets

The table below lists the main European retail alliances with their members in top EU Member States, some of these members being themselves national alliances. The cumulated market share in the country is the European retail alliance members market share in these countries.

European retail alliance members and shares in top EU countries

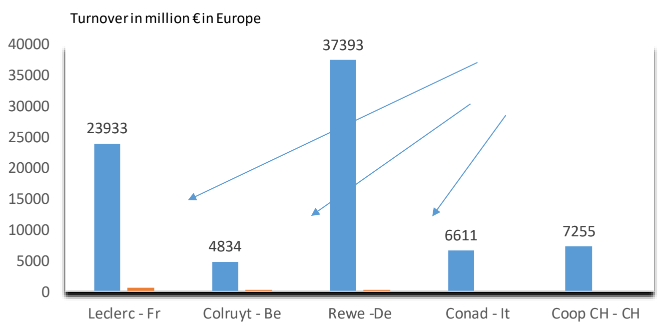
Alliance	Germany		France		Italy		Spain	
	Retailer	MS	Retailer	MS	Retailer	MS	Retailer	MS
AgeCore	EDEKA	23%	Intermarch é	14%	Conad	21%	Eroski	7%
COOPERNIC[75]	REWE	16%	E.Leclerc	20%	Coop Italia	14%		
Horizon	Metro	5%	Auchan Casino	11% 12%			DIA	12%
EMD	Markant	27%			ESD	18%	Euromadi	24%
Carrefour CWT			Carrefour Cora Système U	22% 3% % 11%	AICUBE	15%		
Total coverage	71%		92%		53%		43%	

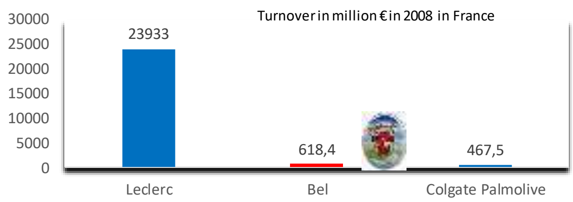
(Source: Kantarworldpanel 2015 data, Italy:2019 , IGD for Euromadi /Spain)

Source: LE FIGARO

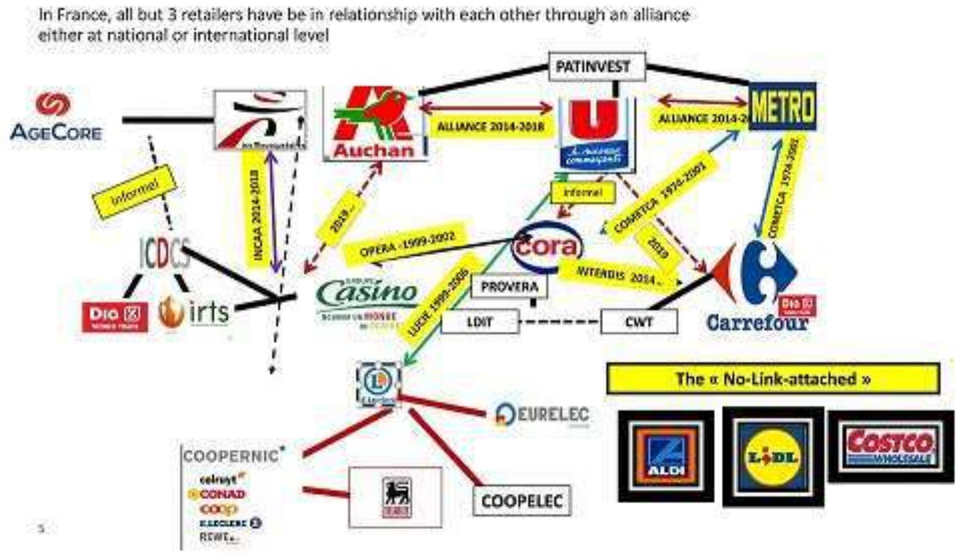
Collective Delistings - Example

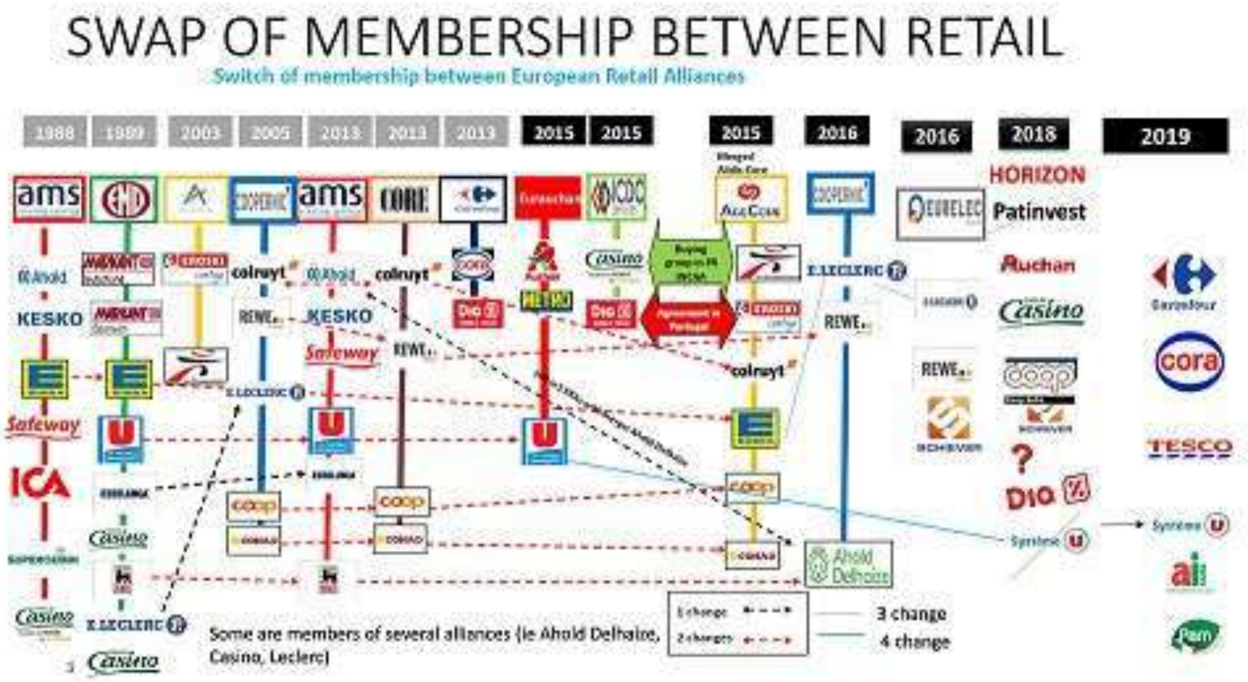
- French leading retailer announces its delisting of manufacturer brands
- Coordination of delisting across the member of the European retail alliance in a set of European Countries





H. Switch of membership in national and international retail alliances over the 10 years





I. 50 global retailers and top 50 FMCG companies revenues 2018

Kantar Consulting's 2018 Top 50 Global Retailers (USD)

KANTAR CONSULTING

2018E Global Rank	2023E Outlook	Retailer/Parent Company	Home Country	2018E Global Retail Sales ($MM)	2018E Global Stores	Sales CAGR ('13-'18E)	Sales CAGR ('18E-'23E)	2018E % Retail Sales Outside Home Market
1	◀▶	Walmart[1]	US	$526,327	11,922	2%	3%	27%
2	◀▶	Amazon.com[2]	US	$190,062	510	23%	17%	34%
3	◀▶	Costco	US	$134,651	762	5%	8%	25%
4	▼	Kroger[3]	US	$122,987	3,254	6%	3%	0%
5	◀▶	Schwarz Group	Germany	$121,794	12,046	4%	7%	64%
6	▼	Walgreens Boots Alliance[4]	US	$111,409	15,495	10%	5%	13%
7	▲	Aldi[5]	Germany	$108,299	11,615	5%	7%	71%
8	▼	Home Depot	US	$107,320	2,287	6%	5%	8%
9	▼	Carrefour	France	$104,292	12,351	-2%	3%	61%
10	▼	Tesco[6]	United Kingdom	$101,089	12,861	0%	2%	24%
11	▼	Seven & i	Japan	$89,455	36,770	1%	4%	30%
12	▼	CVS	US	$83,837	9,751	5%	5%	2%
13	▲	JD.com[7]	China	$82,707	N/A	50%	18%	0%
14	▼	Target	US	$74,741	1,836	1%	2%	0%
15	▼	Ahold Delhaize	Netherlands	$74,031	6,985	0%	3%	77%
16	▼	Auchan	France	$71,365	4,087	-2%	3%	65%
17	▲	Aeon	Japan	$69,915	13,361	0%	5%	9%
18	▼	Lowe's[8]	US	$69,263	2,256	5%	3%	8%
19	▼	Albertsons Companies[10]	US	$60,286	2,289	25%	2%	0%
20	▼	Edeka	Germany	$54,822	12,064	-1%	4%	0%
21	▲	Apple	US	$54,049	501	12%	9%	13%
22	▼	Casino[11]	France	$53,818	13,828	-3%	1%	53%
23	▲	IKEA	Sweden	$49,890	442	6%	10%	95%
24	◀▶	Rewe Group	Germany	$49,875	11,239	0%	5%	32%
25	▼	Sainsbury's	United Kingdom	$44,639	2,049	4%	4%	0%
26	▼	Intermarché	France	$43,557	3,575	-2%	3%	12%
27	▼	Best Buy	US	$42,718	1,244	0%	2%	8%
28	▼	Metro AG[12]	Germany	$42,303	8,542	-1%	3%	70%
29	▼	Woolworths	Australia	$41,927	2,948	-4%	2%	15%
30	▼	Leclerc	France	$41,845	1,876	0%	3%	4%
31	▲	Alibaba[9]	China	$40,282	N/A	41%	17%	3%
32	▲	TJX	US	$38,649	4,298	7%	5%	25%
33	▼	Publix	US	$36,776	1,420	5%	3%	0%
34	▲	A.S. Watson	Hong Kong SAR	$33,934	14,808	9%	8%	78%
35	▼	FamilyMart UNY	Japan	$33,912	24,359	-3%	4%	8%
36	▼	Loblaw	Canada	$33,180	2,452	5%	3%	0%
37	▼	Morrisons	United Kingdom	$28,677	533	1%	6%	0%
38	▼	Mercadona	Spain	$28,553	1,652	4%	7%	0%
39	▲	Adeo Group	France	$28,507	1,354	7%	16%	66%
40	▼	H&M	Sweden	$27,960	4,878	6%	6%	96%
41	▼	Coles[13]	Australia	$27,478	2,438	N/A	1%	0%
42	▲	China Resources Enterprise	China	$27,395	5,495	18%	9%	3%
43	◀▶	Dollar General	US	$27,068	15,479	9%	8%	0%
44	▲	Suning	China	$26,240	1,554	9%	14%	6%
45	▼	Ceconomy[12]	Germany	$26,078	1,075	5%	5%	52%
46	▼	Lotte Shopping	South Korea	$26,066	10,872	2%	6%	4%
47	▲	X5 Retail Group	Russia	$26,019	14,568	9%	15%	0%
48	▼	Macy's	US	$24,844	890	-2%	-1%	1%
49	▼	Coop Schweiz	Switzerland	$24,685	2,169	0%	3%	24%
50	▼	H-E-B	US	$24,557	380	4%	4%	5%

2018 RANKING OF THE GLOBAL 50 FMCG

RANK	CHANGE 2018/17		COMPANY	COUNTRY	GROCERY SALES IN MILLION US$ IN 2018[1]	GROCERY SALES % CHANGE IN LOCAL CURRENCY SALES '18 VS '17[2]
1	◆	-	Nestlé AG	Switzerland	$93,400	2.1%
2	◆	-	Procter & Gamble	US	$66,335	2.8%
3	◆	-	PepsiCo	US	$64,661	1.8%
4	◆	-	Unilever	UK/Netherlands	$60,120	-5.1%
5	◆	-	AB InBev	Belgium	$54,619	-3.2%
6	◆	-	JBS	Brazil	$49,044	12.4%
7	◆	-	Tyson Foods	US	$40,052	4.7%
8	▲	+6	British American Tobacco P.L.C	UK	$32,656	25.2%
9	▼	-1	Coca-Cola Company	US	$31,856	-10.0%
10	◆	-	L'Oréal	France	$31,766	3.5%
11	▼	-2	Philip Morris International	US	$29,625	3.1%
12	▼	-1	Danone	France	$29,070	-0.6%
13	▲	+2	Heineken Holding	Netherlands	$26,499	4.0%
14	▼	-2	Kraft Heinz	US	$26,259	0.7%
15	▼	-2	Mondelez	US	$25,938	0.2%
16	◆	-	Archer Daniels Midland	US	$24,831	10.9%
17	◆	-	WH Group	China	$21,283	-0.1%
18	▲	+1	Suntory	Japan	$20,383	4.3%
19	▼	-1	Altria Group	US	$19,513	0.5%
20	▲	+2	Japan Tobacco	Japan	$18,974	3.3%
21	◆	-	Asahi Breweries	Japan	$18,765	1.6%
22	▼	-2	Kimberly Clark	US	$18,434	0.7%
23	▲	+3	Reckitt Benckiser	UK	$16,796	10.0%
24	▲	+1	Diageo	UK	$16,148	0.9%
25	▼	-2	General Mills	US	$15,740	0.8%

2018 RANKING OF THE GLOBAL 50

RANK	CHANGE 2017/16	COMPANY	COUNTRY	GROCERY SALES IN MILLION US$ IN 2018[1]	GROCERY SALES % CHANGE IN LOCAL CURRENCY SALES '18 VS '17[2]
26	-2	Colgate Palmolive	US	$15,544	0.6%
27	+1	Grupo Bimbo	Mexico	$14,993	7.8%
28	-1	Johnson & Johnson	US	$13,853	1.8%
29	+1	Estée Lauder Companies	US	$13,616	15.8%
30	-1	Essity	Sweden	$13,614	8.4%
31	+1	LVMH	France	$13,249	5.6%
32	-1	Kellogg Company	US	$12,312	6.0%
33	-	Henkell	Germany	$12,228	-1.4%
34	+9	Yili Group	China	$11,891	17.8%
35	+1	Kirin Breweries	Japan	$11,748	5.7%
36	-2	Royal Friesland Campania	Netherlands	$11,563	-4.1%
37	+1	Nippon Meat Packers	Japan	$11,494	5.6%
38	-1	Kao	Japan	$10,824	-1.7%
39	+2	Bunge Limited	Bermuda	$10,820	12.8%
40	-5	Molson Coors Brewing Company	US	$10,770	-2.1%
41	-2	Pernod Ricard SA	France	$10,598	-0.3%
42	+4	Mengniu Dairy	China	$10,420	14.7%
43	-3	Imperial Tobacco	UK	$10,347	-0.8%
44	-2	Arla Foods A.M.B.A	Denmark	$10,301	-1.1%
45	-	Carlsberg	Denmark	$9,891	3.0%
46	+12	Kweichow Moutai	China	$9,813	25.4%
47	+2	Shiseido	Japan	$9,657	9.2%
48	-4	Hormel Foods	US	$9,546	4.1%
49	+1	Tingyi	China	$9,064	3.0%
50	-2	Yamazaki Baking	Japan	$8,973	0.9%

(Source: https://www.occstrategy.com)

About AIM

AIM is the European Brands Association representing brand manufacturers in Europe on key issues which affect their ability to design, distribute and market their brands.

AIM comprises 2500 businesses ranging from SMEs to multinationals, directly or indirectly through its corporate and national association members. Our members are united in their purpose to build strong, evocative brands, placing the consumer at the heart of everything they do.

AIM's mission is to create for brands an environment of fair and vigorous competition, fostering innovation and guaranteeing maximum value to consumers now and for generations to come. Building sustainable and trusted brands drives investment, creativity and innovation to meet and exceed consumer expectations. AIM's corporate members alone invested €14 billion in Research & Development in Europe in 2014, placing them fifth in the EU ranking of R&D investment.

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