

# **LEVELLING THE PLAYING FIELD 2.0**

## **FAIRNESS IN COMPETITION POLICY AND MEETING CONSUMER DEMAND IN THE NEW RETAIL ERA**

**Professor Paul Dobson**

***Final Report***

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**Prepared on behalf of Independent Retail Europe**

## About the author

### **Professor Paul Dobson**

Paul Dobson is Professor of Business Strategy and Public Policy at the University of East Anglia (UEA) in the UK. He has held academic positions previously at Loughborough University, the University of Nottingham, and the University of St Andrews. His research expertise is in the areas of competitive strategy and competition policy, with publications focusing on retail competition, brand and private label competition, supply-chain relations, pricing policies and market power. He also has extensive consulting and advisory experience. He has produced commissioned reports and acted as an adviser for numerous competition authorities, international organisations, industry associations and companies on a wide range of antitrust and competition issues, including mergers, market investigations, vertical relations, and cooperative agreements. He is a member of the Centre for Competition Policy at UEA and an advisory board member of the American Antitrust Institute based in Washington DC.

(<https://www.uea.ac.uk/norwich-business-school/people/profile/p-dobson>)

### **Contact details:**

Professor Paul Dobson  
Norwich Business School  
University of East Anglia  
Norwich NR4 7TJ  
United Kingdom  
Tel: + 44 7951 540059  
E-mail: [p.w.dobson@gmail.com](mailto:p.w.dobson@gmail.com)

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# EXECUTIVE SUMMARY

## *The tilted playing field undermining retail competition*

- 0.1 This report, prepared at the request of Independent Retail Europe (IRE),<sup>1</sup> details the findings of an economic study undertaken to examine the market and policy developments impacting the competitiveness of independent retailer organisations in view of the rapid changes taking place in European retailing driven by retail technology and multichannel retailing with accompanying structural changes to retail markets.
- 0.2 European retail markets are in a delicate position where the advancing use of retail technology and the increasing reliance by consumers on online retailing pose a significant risk to the structure and competitiveness of markets that could quickly tip towards being highly concentrated and dominated by technology giants and very large retail players with strong omnichannel retail capabilities. This tippy market challenge is new to retailing, where traditionally market structures change slowly depending on the flow of store openings and closures. However, in this New Retail era, retail growth or demise can be sudden and depend fundamentally on the appeal of online operations.
- 0.3 In such circumstances, small differences in competitive positions can be magnified and there has never been a greater need to ensure a level playing field where all retailers are able to compete on even terms and are not competitively disadvantaged by the way that competition policy operates. Unfortunately, current EU competition policy does not allow for such a level playing field because of the way it risks curtailing the competitive behaviour of independent retailer groups, which are an important economic force across European retail markets helping to ensure that consumers are well served and benefit from effective competition.
- 0.4 In the new retail era independent retailer groups will need to operate more as cohesive retail organisations and unified systems when competing directly with fully (vertically and horizontally) integrated retailers. However, EU competition policy treats independent retailer groups - unless they constitute economic units - differently because the individual retail outlet operations belonging to the relevant groups are owned and controlled by independent SME retail entrepreneurs rather than being centrally owned and managed. The result is unfair and discriminatory policy treatment that tilts the playing field in favour of integrated retailers and retail technology giants. The effects of the difference in treatment are amplified in the New Retail era where online and omnichannel retailing have come to the fore.

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<sup>1</sup> Established in 1963, Independent Retail Europe (IRE) (formerly UGAL – the Union of Groups of Independent Retailers of Europe) is the European trade association that acts as an umbrella organisation for independent retailer groups in all food and non-food sectors. Currently, IRE represents 23 groups and associations of groups in Europe which in turn represent over 373,000 independent retailers with a combined retail turnover of more than €977 billion and more than 594,000 points of sale, which in total employ over 6.34 million people and generate a wholesale turnover of more than €287 billion. (Source: <http://www.independentretailleurope.eu/about-us.html>).

- 0.5 This report demonstrates the ways in which current EU competition policy is undermining the ability of independent retailer groups to respond to the market changes taking place. There is an urgent need to modify the policy approach to create a level playing field. A level playing field is necessary to avoid consumers suffering from diminished choice, service and value and to ensure the long-term health and vibrancy of effective and fair retail competition across the EU for the economic and social good.
- 0.6 Fair competition requires a level playing field. Ensuring that independent retailer groups have the freedom to act as effective competitors in the new retail era is not about protecting competitors, but rather about protecting competition by ensuring a more even playing field that provides greater opportunity for competition to operate in a manner that can best ensure that consumers are well served by retail markets.
- 0.7 Action is required now to establish a level playing field as the developing technological revolution unfolds in retailing before competition is irrevocably weakened to the detriment of consumers.

***The competitive role of independent retailer groups***

- 0.8 Independent retailer groups are diverse retail organisations characterised by the provision of a support network to independent SME retail entrepreneurs along with joint purchasing of goods and services to attain efficiencies and economies of scale. They function as unified or cohesive systems in retail chains where the significant point of difference from integrated chains is that the individual retail outlet operations are owned and controlled by separate entrepreneur members making decisions at the store level rather than under central management. Additionally, membership may be voluntary, where members can opt to leave. It is this ownership/control/membership difference that lies at the heart of the discrepancy in competition law treatment as compared with vertically integrated groups.
- 0.9 Independent retailer groups can avoid discriminatory treatment and the problems set out in this report when their competent national competition authority recognises them as constituting as a single economic entity (“economic unit”), which applies to some groups, but this perspective varies across EU Member States and has not been resolved in respect of EU policy. Thus different independent retailer groups can receive different treatment depending not just on how they are organised but where they operate in the EU.
- 0.10 These policy issues are not new, but independent retailer groups have existed and been a key part of the fabric of European retail markets much longer than the current EU competition policy framework. Many of these independent retailer groups have existed for nearly a century or more. Their common and unifying feature is that retail entrepreneurs rather than retail managers lead and run the individual store operations and that the stores in the group tend to be independently rather than centrally owned.
- 0.11 Despite policy restrictions, independent retailer groups have survived and prospered by virtue of their special business model which promotes an attractive retail proposition to consumers through innovating by encouraging SME entrepreneurship, placing an emphasis on local sourcing, and tailoring their operations to their served local markets with a strong consumer focus. The business model works well because it provides strong incentives for

stores to perform well – where the business risks and rewards lie with the entrepreneur with local control rather than a salaried manager directed by central control – and an organisational structure that provides cost savings and revenue synergies through joint purchasing, joint marketing, joint branding and other sharable benefits.

- 0.12 Importantly, the independent retailer organisations provide a cohesive system to support their members, both to increase the value of their business and to improve the economic performance of their shops, as well as actively involving them in the development of the group. While the independent retailers may use common branding and the same retail insignia, they are not mere franchising or dealer networks. The groups respect the independent character of their members whilst ensuring, in various ways, the participation of their members in the direction and management of the group in building and maintaining a cohesive system. Additionally, they provide independent retailers with technical and material resources, including all the services and the human capacity required to guarantee the continuance and development of flourishing retail businesses: joint purchasing, logistics and IT, training, financial services, consultancy, marketing, shop-fitting and advice on trends, *inter alia*.
- 0.13 As this report details, the size of these groups can vary from representing a small handful of independent retailers operating on a regional basis through to major retail organisations operating as very familiar retail brands with several thousand retail members spanning multiple countries. Regardless of their size, the groups have in common the intention to provide their independent SME retailer members with the ability and wherewithal to compete effectively with large integrated retail chains, serve consumers well through the retail service they provide, and, in the process, ensure that retail markets remain competitive and functioning well to the greater economic and social good.

#### ***Competition policy impeding independent retailer groups***

- 0.14 To ensure effective retail competition, it is vitally important that competition policy does not impede the efficiency and competitiveness of independent retailer groups as otherwise competition in retail markets where these groups operate will suffer. Unfortunately, though, competition policy is impeding such groups when they are not viewed as constituting single economic units because it is restricting how these groups organise their internal relationships to coordinate their operations in a way that makes optimal use of their sharable benefits, notably by creating uncertainty as to the legality of their cooperation in key areas such as joint purchasing, joint marketing, common pricing, and store chain planning and coordination.
- 0.15 The problem lies with EU competition policy failing to make an appropriate distinction between *inter-* and *intra-* group relationships. Regrettably, the latter are simply treated the same as the former in being viewed as merely contracting relationships between separate legal parties, when in fact they are about operations in a unified and cohesive system that are integral to the organisation. The overlooked point is that independent retailer groups are *organisations*, where the parties involved in the unified/cohesive system work to the same overall ends, having the same values, and wanting the same success for their brand. This does not make them integrated single firms (like a corporate retail chain) but still means

that the parties in the group function within a broad *hybrid* organisational structure that is fundamentally different as to how “external” trade works, between completely separate organisations.

- 0.16 Central to the success and ongoing operation of independent retailer groups is that they develop group unity and identity. In particular, to function effectively as an organisation embodying a unified system, the different members and central functions of the group work together to support uniformity and harmony. The group achieves this through a combination of (i) *centralised* (top-down) processes (as a combination of contracts, incentives and persuasion), (ii) *plural* (mixed direction) processes (involving solidarity, mimesis, and enculturation), and (iii) *decentralised* (bottom-up or across) processes (relating to trust, organisational commitment, and informal control). These processes are the source of the efficiency in how these groups function by cementing collaboration and cohesion while respecting members’ independence and entrepreneurship in operational decision-making.
- 0.17 The deficiency of EU competition policy and the EC policy guidance is that it does not give due recognition to independent retailer groups as organisations embodying a cohesive system and instead views them as merely “associations”. Thus, the starting principle in policy assessment is that these groups operate with a set of horizontal and/or vertical agreements that – depending on content and context – have the ability to restrict and thwart competition (as evident from the wording in Article 101(1) TFEU). Thus, EU competition policy does not have a sufficiently clear “third way” between vertically integrated entities (as single economic entities) and cooperation between totally autonomous entities. This fact is at the root of the unfair and discriminatory policy treatment that independent retailer groups risk receiving.
- 0.18 The unfortunate result is a blanket policy treatment that, instead of seeing the groups as organisations, wrongly views them as mere market exchange relationships to be governed by vertical and horizontal agreements policy. Thus, their “internal” relationships are treated as being akin to separate “external” firms trading with other in a supply chain relationship or collaborating with each for the purposes of some joint initiative, all of which could be quite temporary and certainly not purposefully designed to last indefinitely.
- 0.19 The upshot is that independent retailer groups are regulated in their internal relations while integrated retailers are free from such regulation in how they organise and coordinate their store-chain operations, with the result that EU competition policy gifts integrated retailers a competitive advantage. Thus far, independent retailer groups have managed to cope with the resulting disadvantage by relying on the strength of their business model. However, in the New Retail era, any competitive disadvantage is greatly magnified and so restrictions arising from present EU competition policy that impede efficiency and competitiveness will inevitably exacerbate harm to competition and result in consumer detriment.

### ***Tippy markets in the New Retail era***

- 0.20 To appreciate why retail markets are becoming so tippy, it is important to understand how technological developments are rapidly changing retailing and the shopping experience for consumers. This transformation, in what is termed the New Retail era, is characterised by

the move to omnichannel retailing and the promise of full channel management through the integration of online, offline, logistics and data across a single value-chain. These developments are set to advance further as technology becomes completely integral to modern retailing, including greater use of Big Data analytics and artificial intelligence (AI) with applications such as smart shelves interacting with shoppers and augmented reality displays to enhance the shopping experience and propel sales.

0.21 These technological advances and changing consumer shopping habits are driving key changes in Europe's retail sector, with distinct consequences for the market structure as different forms and formats of retailing become more or less popular. In particular, six market features stand out as indicative of the major structural changes taking place:

- *Growth in online retailing* – rapid for many non-food products and developing for internet grocery retailing
- *Growth in multichannel retailing* – successful integrated retailers exploiting omnichannel presence
- *Growth in European-wide retailing* – especially with the growing international spread of discounters with strong pan-European brand identity
- *Decline of high streets and city centres across Europe* - being undermined by the prolonged effects of the economic crisis and a shift to online shopping and discount retailing with resulting closure and bankruptcy of an array of long-standing retailers
- *Declining need for very large format stores* – being undermined by a shift to online shopping and discount retailing
- *New technological era* – with an arms race in utilising data analytics and artificial intelligence to enhance the in-store shopper experience and allow real-time adjustments to the retail offer, including dynamic pricing, to drive retail sales

0.22 The New Retail era poses a substantial competitive challenge to specialist physical store retailers because the New Retail model promotes omnichannel retailing to provide greater all-round convenience along with an enhanced shopping experience through applying technology and data analytics on customer preferences, shopping habits and buying needs. These developments make flexibility and agility the strategic imperative for retailers to compete, survive and prosper. In this respect, retailers emphasising online sales operations have a major advantage in that they are significantly less encumbered by the heavy regulatory burden facing offline retailers operating physical stores.

0.23 On a global scale, the major retail tech giants, like Amazon, Alibaba, Tencent-JD.com, lead the way in this retail revolution, and the major integrated chain-store retailers, like Walmart, are striking key partnerships to make sure they have both a strong and coordinated physical store network and online presence supported by accessible shopping technology. Meanwhile, other physical store retailers are seeking to develop online operations so that they can provide more convenient services to consumers through 24/7 shopping, home delivery, 'click and collect', and product information supplied via mobile devices and social media.

0.24 In the traditional local retail markets where competition took place only between different physical store operations, independent retailer groups have been able to compete



effectively based on their ability to adapt quickly to differences in local competition and demand. Even though they have been constrained by EU competition law as compared to competing integrated chain-store retailers, the disadvantages have not been impossible to overcome. Effective business models have been possible to implement notwithstanding EU law precluding independent retailer groups from using practices such as common pricing (insofar as a group has more than one member competing in a local retail market) or resale price maintenance (RPM), across their retail members to the benefit of the consumers.

- 0.25 However, in the new market environment, the competition policy restrictions within the EU threaten the independent retailer groups' ability and agility to extend their physical store operations to an effective and fully coordinated omnichannel system. As a consequence, they are lagging behind the technology giants and major integrated retailers in this technological race with implications for the future competitive structure of retailing which is likely to become increasingly concentrated in a winner-takes-all tippy market situation where network effects and scale efficiencies dominate.

***Policy obstacles restricting independent retailer groups developing efficient omnichannel operations***

- 0.26 Independent retailer groups seeking to develop a competitive presence in the online market face legal obstacles because of how competition authorities interpret their ownership structure in the context of the prohibition against anticompetitive agreements in the EC vertical guidelines and horizontal guidelines. Principally, as interpreted in the EC guidelines, Article 101 (1) TFEU prevents independent retailer groups from using common pricing and other coordination practices open to integrated retailers online. In the New Retail era, these legal obstacles serve to distort, restrict and prevent competition in favour of integrated retailers and retail tech giants to a much higher degree than before because they are essential to an efficient, fully coordinated, data analytic driven multichannel retail system.
- 0.27 In the absence of being able to develop fully coordinated and integrated multichannel systems, independent retailer groups face choosing between the less efficient options for developing online sales through either a *centralised* or *decentralised* model. Both models are limited in respect of coordination across the store network and the need for membership support while also abiding by existing competition laws restricting horizontal and vertical agreements.
- 0.28 With a *centralised model*, where all e-commerce is centrally controlled, the group acts as the seller in direct contact with the customer. It executes all functions associated with selling (taking orders, billing, receiving payment, delivery, after-sales, etc.), and determines the price and receives all payments, regardless of the customer's location. The central operation is thereby separate and distinct from individual stores, so online and offline prices, ranges and services can differ, which can undermine the group's brand reputation for consistency and cause consumer confusion while raising consumers' search costs to obtain best value for money.
- 0.29 With a *decentralised model*, each shop acts as a seller for its own website or web page, setting and amending prices as it sees fit. Online customers choose their delivery location before examining the offer and placing the order directly with the distributor. Accordingly,

there is no single online price, which again can undermine the group's brand reputation for consistency and cause consumer confusion while raising consumers' search costs. In addition, the consumer faces a less convenient online service, involving more choices, more clicks and more time (because the choice of local retailer has to be selected first before choosing and ordering goods), compared to the faster and smoother online service offered by integrated retailers.

- 0.30 In respect of both models, the critical restriction is the inability to coordinate fully the retail price offer as a consistent and clear proposition to consumers. Specifically, in comparing offers across different retailers, consumers want to be able to search easily for the best price and value, so having a consistent and clear price is critical to aiding the consumer search process. Helping clarify to the consumer a single price on offer helps the retailer secure sales while also allowing for rapidly adapting the price to cater for changing competitive circumstance and promoting a consistent price image for the group. For practical purposes, having a common price also helps the group to appear in online search price rankings while ensuring that store prices match consumers' expectations based on the online information, again facilitating the consumer's search process. Price consistency is especially important for known-value, highly promoted, and big selling items that heavily influence the group's overall price image.
- 0.31 While both types of business model might be workable (at least as long as online and offline sales are deemed to take place on different relevant markets), they are unlikely to be as coordinated, integrated, efficient, responsive and competitive as that which can be delivered by integrated retailers. Permitting independent retailer groups to set common uniform prices for online (and, where necessary, offline) sales would help improve brand consistency and give consumers the assurance of obtaining the best price from the store network. Similarly, allowing independent retailer groups to share information on sales and prescribe product ranges would help improve the efficiency of logistics, stock replenishment and supply operations along with assuring local product availability for the benefit of consumers.

### ***Need for a level playing field (2.0)***

- 0.32 Even if unintended by policymakers, the competition policy restrictions affecting independent retailer groups are impeding their ability to compete effectively with integrated retailers and retail tech giants.
- 0.33 In contrast to the restrictions on independent retailer groups, integrated retailers and retail tech giants are free to set prices, product ranges, service levels, and share information across their entire retail operations in whatever manner they choose to maximise their efficiency and competitiveness. Instead, an independent retailer group is restricted in these aspects even if the group serves as a single coordinated organisation or unified system because of the separate legal ownership of the stores or the businesses run from the individual stores. The result is unfair and discriminatory policy treatment in respect of how EC competition law rules are applied to these independent retailer groups vis-à-vis the liberal approach afforded to integrated retailers and retail tech giants.
- 0.34 Echoing my 2007 report on behalf of Independent Retail Europe (then called UGAL) with the same finding, but now with greater urgency in view of the advancing New Retail revolution,

there is a pressing policy need to allow independent retailer groups to have similar freedom, flexibility and control as afforded to integrated retailers and retail tech giants. This will allow these groups to compete on the same competitive footing as integrated retailers to the considerable benefit of consumers who may otherwise suffer from a poorer retail offer, weakened competition, and ultimately diminished retail service and product choice.

0.35 In this situation, there are four stand-out points about removing unfair and discriminatory policy treatment to promote efficiency and competitiveness along with accepting the necessity of less regulation and reduced legal uncertainty:

- Independent retailer groups do not require special treatment and unduly favourable policies – they just need equality
- Groups just need a level legal playing field to allow them to compete on effective terms with other forms of retailers
- Consumers stand to benefit by establishing a level playing field that helps promote and sustain effective competition
- Action and clarity are required now to ensure consumers benefit from retail choice, variety, efficiency and fair competition in the New Retail era

### ***Conclusions and policy recommendations***

0.36 This report stresses the policy need for a level playing field for different retail business forms to support effective competition and efficiency in the New Retail era governed by a technology arms race currently skewed in favour of integrated retailers and retail tech giants because of the unfair and discriminatory policy treatment hampering independent retailer groups.

0.37 Creating a level playing field will help ensure that independent retailer groups receive a more appropriate legal treatment compared to the current unfair and discriminatory policy treatment they receive which is impeding their efficiency and competitiveness to the detriment of the consumers.

0.38 Specific policy measures need to be considered which account for the rapid developments happening in retailing and the need to maintain and promote effective competition through policy that supports rather than inhibits the efficiency of independent retailer groups.

0.39 As a starting point, EC competition policy rules and guidance on horizontal and vertical agreements needs to make an appropriate and clear distinction between inter- and intra-organisational relationships and identify appropriate treatment and clarity on the competition rules for independent retailer groups.

0.40 There are five longstanding issues over EC competition rules and guidance that need reviewing and amending to avoid undermining the efficiency and competitiveness of independent retailer groups:

- i. Discriminatory legal treatment in regard to permitted vertical and horizontal control
- ii. Duration and percentage share limits to pro-competitive agreements on joint purchasing and joint marketing
- iii. Legal uncertainty hanging over existing trading, supply and distribution arrangements

- iv. Arbitrary market share thresholds used in European Commission (EC) rules and guidance on vertical and horizontal agreements
- v. Continuing scepticism and distrust towards common pricing and resale price maintenance (RPM) despite clear economic benefits in the context of use within independent retailer groups

0.41 The emergence of the New Retail era has highlighted three urgent matters where independent retailer groups now need clear policy guidance and support:

- I. Allowing independent retailer groups the freedom to develop centralised online and coordinated multichannel retail operations so they can compete more effectively with integrated retailers and retail tech giants, which would be aided by allowing:
  - (i) Joint commercialisation and information sharing for efficient and effective pricing and promotion
  - (ii) Maximum resale price maintenance to guarantee fairness to consumers through capped prices
  - (iii) Common prices where necessary to ensure clarity, consistency and fairness in the retail offer to consumers
- II. Clarifying rules surrounding selective distribution to ensure that physical stores remain competitive with online stores and that competition is fair.
- III. Clarifying the treatment of contractual relationships for independent retailer groups to ensure that wholesaler-retailer franchise relationships (as in symbol groups) are not subject to franchising rules designed to regulate business-format franchises and manufacturer-dealer franchises.

0.42 The New Retail era promises the consumer the ultimate convenience of shopping flexibility to buy *anything, anywhere, anytime*. To deliver on this promise requires very substantial investment by retailer organisations, ideally supported by an assurance that policymakers will regulate the playing field to allow them to compete fairly with each other.

0.43 From a competition policy perspective applicable to European retailing, there has never been a more important time to establish a level playing field between different retail business forms as the retail technology revolution unfolds. Unless policy action is taken soon to level the playing field then competition will be further distorted in favour of the leading integrated retailers and the retail tech giants, inevitably concentrating retail markets and reducing consumer choice with independent retailer groups hindered by outmoded and flawed policy rules.

# 1. INTRODUCTION AND OVERVIEW

*This section sets out the background to the present economic study, explaining the context of the rapid changes taking place in European retailing. The nature and purpose of the report is to assess the current situation facing independent retailer groups in terms of how EU and national policy is affecting their performance and operations, while considering the ways in which policy changes might be economically beneficial in increasing efficiency and promoting competition to the benefit of consumers. This introductory section outlines how the report is organised and structured, the source material used for the empirical findings, and the main areas of focus in the report.*

## 1.A Background

- 1.1 This report, prepared at the request of Independent Retail Europe (IRE),<sup>2</sup> details the findings of an economic study undertaken to examine the market and policy developments impacting the competitiveness of independent retailer groups in view of the rapid changes taking place in European retailing in respect of retail technology and multichannel retailing, with accompanying structural changes to retail markets. Maintaining the competitiveness of independent retailer groups is vital for ensuring that consumers continue to benefit from shopping choices, variety and innovation that can sustain good service, products, prices and value for money as the coming technological revolution unfolds.
- 1.2 Independent retailer groups are retail organisations characterised by the provision of a support network to independent SME retail entrepreneurs along with joint purchasing of goods and services to attain efficiencies and economies of scale.<sup>3</sup> They function as unified or cohesive systems in retail chains where the crucial point of difference from integrated chains is that the individual retail outlet operations are owned and controlled by separate entrepreneur members rather than under central management, with membership, in some cases, being voluntary. It is this ownership/control/membership difference that lies at the

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<sup>2</sup> Established in 1963, Independent Retail Europe (IRE) (formerly UGAL – the Union of Groups of Independent Retailers of Europe) is the European trade association that acts as an umbrella organisation for independent retailer groups in all food and non-food sectors. Currently, IRE represents 23 groups and associations of groups in Europe which in turn represent over 373,000 independent retailers with a combined retail turnover of more than €977 billion and more than 594,000 points of sale, which in total employ over 6.34 million people and generate a wholesale turnover of more than €287 billion. (Source: <http://www.independentretaleurope.eu/about-us.html>).

<sup>3</sup> For a range of examples, boxed illustration C.1 in Appendix C provides summary details of 13 leading independent retailer groups operating in different countries and different sectors within the EU.

heart of the discriminatory and restricting policy treatment that independent retailer groups face, where the new retail era and technology revolution is magnifying disparities and impeding effective competition in favour of integrated retailers.

- 1.3 The independent retailer organisations provide a cohesive system to support their members, both to increase the value of their business and to improve the economic performance of their shops, as well as actively involving them in the development of the group. The groups respect the independent character of their members whilst ensuring, in various ways, the participation of their members in the direction and management of the group in building and maintaining a cohesive system. Additionally, they provide independent retailers with technical and material resources, including all the services and the human capacity required to guarantee the development of flourishing retail businesses: joint purchasing, logistics and IT, training, financial services, consultancy, marketing, shop-fitting and advice on trends, *inter alia*.
- 1.4 As this report shows, the size of these groups can vary from representing a small handful of independent retailers operating on a regional basis through to major retail organisations with several thousand retail members spanning multiple countries. Regardless of their size, the groups have in common the intention to provide their independent SME retailer members with the ability and wherewithal to compete effectively with large integrated retail chains, serve consumers well through the retail service they provide, and, in the process, ensure that retail markets remain competitive and functioning well to the greater economic and social good.
- 1.5 The market is changing. Technological developments are altering the nature of retailing and impacting all types of retailer organisations – whether independent retailer groups, integrated retailers, franchise systems, hybrid organisations (including joint ventures and mixed organisations) or standalone independent retailers. These changes are occurring in what is now termed the New Retail era, characterised by the move to omnichannel retailing and the promise of full channel management through the integration of online, offline, logistics and data across a single value-chain. This move is set to advance further as technology becomes completely integral to modern retailing, including greater use of Big Data analytics and artificial intelligence (AI) with applications such as smart shelves

interacting with shoppers and augmented reality displays to enhance the shopping experience and propel sales.<sup>4</sup>

1.6 These technological developments and changing consumer shopping habits are driving key changes in Europe's retail sector, with distinct consequences for market structure as different forms and formats of retailing become more or less popular. In particular, six market features stand out as indicative of the major structural changes taking place:

- *Growth in online retailing* – rapid for many non-food products and developing for internet grocery retailing
- *Growth in multichannel retailing* – successful integrated retailers exploiting omnichannel presence
- *Growth in European-wide retailing* – especially with the growing international spread of discounters with strong pan-European brand identity
- *Decline of high streets and city centres across Europe* - being undermined by the prolonged effects of the economic crisis and a shift to online shopping and discount retailing
- *Declining need for very large format stores* – being undermined by a shift to online shopping and discount retailing
- *New technological era* – with an arms race in utilising data analytics and artificial intelligence to enhance the in-store shopper experience and allow real-time adjustments to the retail offer, including dynamic pricing, to drive retail sales

1.7 These rapidly evolving market features mean that independent retailer groups need to respond decisively to remain efficient and competitive while enhancing their retail proposition to consumers. Rival organisations are already positioning themselves to take advantage of these market changes and so posing an increasing competitive threat to independent retailer groups. In particular, integrated retail chains are moving quickly towards omnichannel retailing to continue their market dominance. At the same time, especially in the grocery sector, the international expansion of hard discounters is driving increased price competition and a greater need for cost efficiency while competing on service and product quality. A further threat to losing sales is through the growing influence of specialist (“pure play”) online retailers (whether selling through their own websites or

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<sup>4</sup> For a range of examples, see Associated Press, “The future of shopping”, *Daily Mail*, 3/1/2017 (<http://www.dailymail.co.uk/sciencetech/article-4084612/Here-come-smart-stores-robots-interactive-shelves.html>); and Ben Sullivan, “From AR to robots, we're finally getting the store of the future,” *WIRED*, 14/9/2017 (<https://www.wired.co.uk/article/future-of-shopping-predictions>).

using third-party online platforms) and the prospect of manufacturers selling directly to consumers, so bypassing the need to go through retailers. The scene is set for a very intense competitive battle in European retail markets in the coming years, but at the risk that markets become tippy and rapidly concentrate in winner-takes-all scenarios that ultimately leads to harmful monopolisation.

- 1.8 While wanting to be part of the New Retail era revolution and improve their retail proposition to benefit consumers, independent retailer groups face key obstacles that are impeding their ability to compete on effective and fair terms due to existing EU competition policy and other regulatory restrictions that discriminate against them and work in favour of integrated retailers. In particular, because the ties between such groups and their individual retail outlets are contractual with separate ownership/control rather than integrated by common ownership/control then EU competition law does not recognise and treat such groups as single organisations or unified systems. As a consequence, these groups are treated as a nexus of market contracts to be governed by EC guidance on vertical and horizontal agreements, which to some extent prevents or limits them using practices for which integrated retailers are free to use. This notably applies to the ability to set common prices and common assortments, share data and information (e.g. on sales and demand) across the store network, and undertake joint purchasing and joint marketing.
- 1.9 In particular, existing restrictions and legal uncertainty over permissible practices are holding back independent retailer groups in developing online retailing to complement their physical store operations and establish an effective and fully coordinated omnichannel system.
- 1.10 Three current policy aspects are giving particular cause for concern to independent retailer groups in impeding their operating efficiency, undermining their flexibility and agility to move quickly in response to competition, and hindering their investment planning:
  - First, E-commerce and the challenge facing independent retailer groups to become a visible, competitive presence in the online market when they face legal obstacles (because of how competition authorities interpret their ownership and control structure in the context of the EC vertical guidelines and horizontal guidelines) against using common pricing, if necessarily supported by resale price maintenance, and where these legal obstacles serve to distort, restrict and prevent competition in favour of integrated retailers;



- Second, the need for selective distribution to remain a viable business tool for independent retailers in the age of the internet platform to provide efficiency benefits and help promote and support effective competition;
- Third, franchising rules in the contractual arrangements between the independent retailer and the central office of the group of independent retailers being developed or considered at the EU level which could undermine efficiency and detract from the pro-competitive benefits from existing franchising rules and guidance that are relevant to independent retailer groups.

1.11 In addition, there are other longstanding issues over policy restrictions and rules that are impeding independent retailer groups and are now having a greater bearing in view of the changing retail landscape. In particular, there is an urgent need for policymakers to address how the following policy aspects are adversely impacting independent retailer groups and so undermining effective and fair retail competition:

- i. Discriminatory legal treatment in regard to permitted vertical and horizontal control
- ii. Limits to pro-competitive agreements on joint purchasing and joint marketing
- iii. Legal uncertainty hanging over existing trading, supply and distribution arrangements
- iv. Arbitrary market share thresholds used in European Commission (EC) rules and guidance on vertical and horizontal agreements
- v. Continuing scepticism and distrust towards common pricing and resale price maintenance (RPM) despite clear economic benefits in the context of use within independent retailer groups

1.12 This report will explain further the economic harm that is resulting from discriminatory policy treatment and legal uncertainty and how this is affecting operational and investment decisions for independent retailer groups.

1.13 The European Commission has recently issued a communication on policy measures and a desire to see deregulation that will help to establish “a European retail sector fit for the 21st century”.<sup>5</sup> The Commission berates national authorities for creating restrictive regulations that lead to less dynamic retail markets and uses a Retail Restrictiveness Indicator (RRI) as a means to “name and shame” different EU member states. However, in no place in the Communication is there any consideration as to how the EC’s own policy measures and

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<sup>5</sup> European Commission, “A European retail sector fit for the 21st century,” Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, SWD(2018) 236 final, 19/4/2018.

guidance are distorting retail competition because of the way they discriminate against different retail business forms. Indeed, the survey of retail organisations reported in this present study points to EC policy and less so national policy as the main source of restrictive regulations that are holding back effective competition in retailing by creating an uneven playing field that distorts competition in favour of integrated retailers and retail tech giants and works against other retail organisation forms.

- 1.14 Given this context and the economic importance of the retail sector to the EU economy, there is a very pressing need to review EC competition guidance and rules to ensure that they are appropriate and fit for purpose. In particular, it is vital that EC policy provides a level playing field for all retail organisations to compete on fair terms for the greater benefit of consumers. Existing EU competition policy fails to do this because it does not adequately distinguish between *inter-organisational* relationships and *intra-organisational* contracting and control mechanisms, so automatically applies competition rules designed for the former to the latter.
- 1.15 The consequence of failing to draw adequate and appropriate distinctions is that EC rules discriminate against independent retailer groups, which are denied the same liberal policy treatment afforded to integrated retailers and instead are subjected to rules that severely inhibit their business operations and deny them vital efficiency and competitiveness. Such discriminatory treatment creates a tilted playing field and so serves to distort rather enhance competition in favour of integrated retailers and retail tech giants.
- 1.16 In terms of the policy recommendations that emerge from the findings in this report, there are four key points to stress:
  - i. Independent retailer groups do not require special treatment and unduly favourable policies – they just need equality
  - ii. These groups just need a level legal playing field to allow them to compete on effective terms with other forms of retailers
  - iii. Economic welfare benefits from ensuring effective retail competition to the advantage of consumers
  - iv. Action and clarity is required now to ensure consumers benefit from retail choice, variety, efficiency and fair competition in the emerging new retail era

## 1.B Objectives of the present study

- 1.17 The purpose of this economic study is to examine market and policy developments that are currently impacting or set to impact the competitiveness of independent retailer groups in view of the rapid changes taking place in the retail sector across the different member states of the European Union.
- 1.18 The economic study covers both analytical and empirical perspectives while building on and extending the analysis of my previous report undertaken at the request of Independent Retail Europe (then called UGAL) titled “Levelling the Playing Field: Competition policy to enable independent retailer groups to be efficient and competitive” released in January 2007. This new study takes account of the very considerable market and policy developments that have taken place over the last decade and the new ones emerging in the new era of retailing, principally in respect of the rapid growth of online retailing and the substantial structural changes taking place in retailing across the European Union.
- 1.19 The new retail era offers the promises of a seamless omnichannel shopping experience but, as this study shows in Section 2, independent retailer groups will struggle because of competition policy to provide an efficient and integrated service desired by consumers. This study discusses the different strategic options available to independent retailer groups to develop online retailing to complement and fit with their physical store network operations.
- 1.20 In terms of the analytical aspects of the study, the report discusses in Section 3 the nature and characteristics of different retail business forms, to help clarify the similarities and differences between independent retailer groups, integrated retailers and other forms like franchise systems. The discussion stresses why independent retailer groups should be viewed as cohesive organisations or unified systems rather than a merely a nexus of market contractual relationships involving restrictive agreements between separate business entities.
- 1.21 The empirical part of the study gathers information across a wide array of independent retailer groups in order to determine the nature of existing activities and agreements for these groups as well as the economic context in which they are applied. To this end, a questionnaire study was used to gather primary-sourced data from a survey of independent retailer groups and related organisations along with additional interviews with these organisations. The details of the nature of the questionnaire and the results are summarised

in the main report, in section 4, along with full details and analysis of the findings contained in Appendices A and B at the end of report.

## 1.C Outline and structure of the report

- 1.22 Following this section, the rest of the report contains four main sections and three appendices.
- 1.23 Section 2 explains the context of the rapid changes taking place in European retailing and what is meant by the term “New Retail”. Using a case study for illustration, the section shows how and why existing competition policy rules are retarding innovation and impeding the development of improved shopping services for the benefit of consumers by preventing independent retailers groups establishing efficient and competitive online retailing to complement and coordinate with existing offline (physical store) retailing operations.
- 1.24 Section 3 considers the special characteristics and policy needs for independent retailer groups, examining why EU competition policy has flawed principles in terms of its failure to distinguish between *inter-organisational* and *intra-organisational* relationships in terms of how it applies an assessment of horizontal and vertical agreements. As background, the section explains the defining and special features of independent retailer groups that distinguish this organisational form from integrated retailers and franchise systems. The section also explains how independent retailer groups promote unity and a common identity. The section explores the policy obstacles to cooperation for independent retailer groups and outlines the critical areas where policy review is urgently needed.
- 1.25 Section 4 examines the nature and economic role of independent retailer groups, setting out some examples of different groups as a prelude to the details and findings of the questionnaire survey information gathered from a wide range of different independent retailer groups. The section draws on this survey information to identify the main types of organisational structures and composition of the groups studied, and how they use contractual agreements and arrangements within the groups. The section details the key challenges identified by the surveyed independent retailer groups and their concerns about national and EU policy affecting their businesses impeding their ability to operate efficiently and compete effectively to the detriment of consumers.
- 1.26 Section 5 draws conclusions from the study and makes policy recommendations, stressing the needs for a level playing field for retail forms to support effective competition and

efficiency. The section also outlines specific measures, taking account of the rapid developments happening in retailing and the need to maintain and promote effective competition through policy that supports rather than inhibits the efficiency of independent retailer groups.

1.27 In addition, there are four appendices to the report:

- 1) Appendix A shows the 40-question questionnaire used in the survey of independent retailer groups.
- 2) Appendix B provides a full and comprehensive analysis of the findings from the questionnaire study, tabulating and summarising the responses to all forty questions for all the participating groups, for which Section 4 of the report provides a summary.
- 3) Appendix C gives examples of the development and national policy treatment of independent retailer groups, drawing particularly on the experience and legal support afforded to retailer cooperatives in France in illustrating helpful policy practice with lessons that could be applied and relevant to other jurisdictions in the EU
- 4) Appendix D examines current policy towards independent retailer groups, considering the EC's policy approach towards mixed structures of agreements as well as relevant market definition and critical market shares used in assessing competition. The appendix explores in more detail how policy assessment on joint purchasing and non-compete obligations relate to independent retailer groups. The appendix concludes with consideration of how policy towards joint commercialisation and retail pricing requirements restricts independent retailer groups in the new retail era to a much higher degree than before and can inhibit competition to the detriment of consumers.



## 2. CHALLENGES FOR INDEPENDENT RETAILER GROUPS IN THE NEW RETAIL ERA

*This section explains the context of the rapid changes taking place in European retailing, led by technology in what is called the New Retail Era. These changes pose a significant competitive challenge for independent retailer groups to develop their retail operations to provide an omnichannel service for the greater convenience of consumers. However, EU competition policy is hampering the ability of independent retailer groups to compete effectively with integrated retailers and other retail forms which are permitted full or at least greater control in how online selling and delivery is integrated with offline selling through store networks. Using a case study for illustration, this section shows how and why existing competition policy rules are retarding innovation and impeding the development of improved shopping services for the benefit of consumers by preventing independent retailers groups establishing efficient and competitive online retailing to complement and coordinate with existing offline (physical store) retailing.*

### 2.A The New Retail Era

*“Tomorrow’s business model will not involve a choice between physical and digital commerce. Its aim will be to ensure that customers can move fluidly between different product categories and sales channels. Today, we describe this as omnichannel commerce. But soon it will just be called retail, which will have been reinvented once again.”*

Dominique Schelcher, Système U, President<sup>6</sup>

- 2.1 Retailing across the globe is going through considerable changes presently. These changes are ushering in a new epoch in retailing, called the New Retail era, driven by new technology pushing forwards online retailing, multichannel retailing, increased use of Big Data, and the emergence of artificial intelligence and the application of algorithms and machine learning in selling services and providing customer information. The new retail era promises *omnichannel* retailing, providing consumers with a seamless shopping experience whether

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<sup>6</sup> Source: as quoted in “Retail’s Revolution: How Retail and Consumer Goods Companies Can Adapt,” Oliver Wyman, 2018, p. 73 (<http://www.oliverwyman.com/content/dam/oliverwyman/v2/publications/2018/april/Retails-Revolution-onscreen-version.pdf>).

the customer is shopping online from a desktop or mobile device, by telephone or in a physical (bricks and mortar) store.<sup>7</sup>

- 2.2 These technology-driven developments are changing consumer behaviour and spending patterns, which in turn are shaping the structure and development of retailing. This is most evident in respect of the growth of online retailing, which has been rapid for non-food sales but is now developing for grocery sales.<sup>8</sup> At the same time, successful large retailers are growing multichannel retail operations with a view to providing the consumer with all-round convenience and an enhanced and integrated shopping experience.<sup>9</sup>
- 2.3 The success of online retailing is having considerable knock-on consequences for sales through physical stores. Small stores lacking scale advantages, unless offering a distinctive service, are vulnerable to a loss of trade. However, the effect may also be felt on big stores. In particular, as consumers switch to buying online, then there is a declining need for large format specialist (“big box”) superstores selling commodity goods which can be conveniently purchased online.<sup>10</sup> Now this effect is being felt too by hypermarkets in the grocery sector

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<sup>7</sup> For a detailed review of the academic literature on omnichannel retailing and how it requires close integration of all sales and logistics functions to ensure a smooth, seamless operation, see Erdem Galipoglu, Herbert Kotzab, Christoph Teller, Isik Özge Yumurtaci Hüseyinoglu, Jens Pöppelbuß, (2018) "Omni-channel retailing research – state of the art and intellectual foundation", *International Journal of Physical Distribution & Logistics Management*, Vol. 48 Issue: 4, pp.365-390, <https://doi.org/10.1108/IJPDLM-10-2016-0292>.

<sup>8</sup> The value of online sales in the EU practically doubled between 2012 and 2017 from €121bn to €224bn. Products most commonly sold on-line include clothes and sports goods (purchased by 64% of e-buyers in 2017), household goods (46%), books, magazines and e-learning material (36%) and electronic equipment (25%). In the ten years from 2006 to 2016, the share of online sales quadrupled from 2% to 8% of all EU retail sales. *Source:* European Commission, “A European retail sector fit for the 21st century,” Commission Staff Working Document, COM(2018) 219 final, 19/4/2018.

<sup>9</sup> Some 22% of EU retailers sold online in 2016, up from 13% in 2011, while 44% of online sales were carried out by physical retailers operating outside of online platforms. Brick-and-mortar retailers that sell on online platforms or online marketplaces account for a large share of such sales (36% in 2015). Yet, sales through online-only retailers account for over half of all EU online sales (56% of all internet sales of goods in 2017, up from 50% in 2011). However, these online-only retailers are increasingly opening up physical shops to cater to consumers that wish to handle products or ask for advice before buying, or obtain their product immediately. In the 2015 European Commission e-commerce sector inquiry ([http://ec.europa.eu/competition/antitrust/sector\\_inquiries\\_e\\_commerce.html](http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html)) some 8% of respondents to a survey of online-only retailers reported that they planned to open a brick-and-mortar shop within the next two years. *Source: ibid.*

<sup>10</sup> The decline of big box retailing has been especially evident in the United States where online retailing has grown very rapidly resulting in many large-format retailers closing stores (e.g. “The decline of established American retailing threatens jobs,” *The Economist*, 13/5/2017) or filing for bankruptcy in what has been termed the “Retail Apocalypse” (see



that have lost non-food sales and are now beginning to be challenged by online grocery sales. At the same time, discount retailing has become more popular, operating through mid-size store formats with the dual appeal of shopping convenience and low prices.<sup>11</sup> This has facilitated the international spread of limited-assortment discounters, which in turn has led to established mainstream retailers re-assessing and adjusting their market positions, leading to turbulence through mergers and acquisitions, along with divestments and store closures.<sup>12</sup>

- 2.4 For independent retailer groups, this new era brings new competitive challenges. These groups are seeing the major integrated chains moving quickly towards omnichannel retailing to continue their market dominance. At the same time, the international expansion of hard discounters is driving increased price competition and a greater need for cost efficiency while competing on service and product quality. Additionally, there is an increasing threat to losing sales through the growing influence of specialist online retailers and the prospect of direct supply by manufacturers straight to consumers, so bypassing the need to go through retailers.
- 2.5 However, it is technology and the approach of the New Retail model that poses an existential threat since its purpose is to integrate online, offline, logistics and data across a single value-chain. In this respect the major retail tech giants and platform-based online retailers, like Amazon, Alibaba, Xiaomi and Tencent-JD.com lead the way as they extend

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[https://en.wikipedia.org/wiki/Retail\\_apocalypse](https://en.wikipedia.org/wiki/Retail_apocalypse)). Store closures on this scale have yet to be seen in Europe but the risk increases as online retailing grows. For instance, the UK saw a net closure of 1,700 stores in 2017 with a further 650 in early 2018 (Sarah Butler, “6,000 shops close in tough year for UK’s high streets,” *The Guardian*, 11/4/2018 (<https://www.theguardian.com/business/2018/apr/11/tough-year-high-street-internet-shopping-weak-pound>); James Graham, “High Street crisis forces hundreds of store closures,” *BBC News*, 24/4/2018 (<http://www.bbc.co.uk/news/business-43871596>).

<sup>11</sup> For evidence of the slowdown in the growth of grocery superstores in favour of mid-size discount stores across Europe, see Paul W. Dobson, “Grocery Retailing Concentration and Competition in the European Union,” Competition in the Food Retail Sector Workshop, European Parliament, 2/5/2017 ([http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578981/IPOL\\_STU\(2016\)578981\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578981/IPOL_STU(2016)578981_EN.pdf)).

<sup>12</sup> For instance, industry observers point to the increasing market share of discounters as a motivating factor behind the recently proposed merger of Asda and Sainsbury’s in the UK – e.g. David Dawkins, “Sainsbury’s - Asda merge to fend off Germany’s £26bn supermarket superpower,” *The Express*, 4/5/2018 - <https://www.express.co.uk/finance/city/955307/Sainsburys-Asda-middle-class-merger-Lidl-Aldi-Uk-supermarkets-shop-retail>).

their reach into owning physical stores.<sup>13</sup> As an example, Exhibit 2.1 illustrates the consumer appeal and business logic of the New Retail model as being currently advanced by Alibaba Group. The world's leading integrated chains will be intent to follow. The considerable efficiency, synergies and economies of scale provided by a seamless integration of operations into a single value-chain with mass consumer appeal will inevitably place all retailers unable to match these capabilities at a huge competitive disadvantage.

### Exhibit 2.1 – The “New Retail” Model

The term “New Retail” is the name that Alibaba Group, the Chinese e-commerce giant and one of the world's most highly valued corporations with \$40bn turnover and \$10bn net income in 2018, uses to describe its business model in combining online and offline retailing with leading-edge shopping technology to achieve full channel management:

*“Pure e-commerce will be reduced to a traditional business and replaced by the concept of New Retail – the integration of online, offline, logistics and data across a single value-chain.”*

Jack Ma, Chairman, Alibaba Group (October 2016)<sup>14</sup>

*“We are driving the age of ‘New Retail’, which leverages Big Data and innovation to provide a seamless online and offline experience for nearly half a billion mobile monthly active users. This retail transformation will make it even easier and more efficient for brands and retailers to engage with these consumers anywhere, anytime.”*

Daniel Zhang, CEO Alibaba (January 2017)<sup>15</sup>

<sup>13</sup> For example, Amazon moved to buy the grocery chain Whole Foods Market in 2017 and launched Amazon Go as a check-out free grocery store in 2018 (source: *BBC News*, “Amazon opens a supermarket with no checkouts,” 22/1/2018, <http://www.bbc.co.uk/news/business-42769096>). Xiaomi, the Chinese tech giant and online retailer, opened more than 200 stores across China and another 130 official Xiaomi stores abroad in 2017, while Alibaba has built up a large ownership stake in the Intime store chain and has been experimenting with an unmanned supermarket called Tao Café, and similarly JD.com, China's second largest e-commerce company, launched its first offline high-tech supermarket in Beijing, 7Fresh, in 2018, while tech giant Tencent invested in a number of supermarket ventures across China and opened its first unmanned shop, We Life, in 2018 (source: Michael Wade and Jialu Shan, “How China is rebooting retail,” *The Conversation*, 15/3/2018 (<http://theconversation.com/how-china-is-rebooting-retail-92982>)).

<sup>14</sup> Source: as quoted by Deborah Weinswig, “Alibaba's New Retail Integrates E-Commerce, Stores, & Logistics: Is This The Next Gen Of Retail?” *Forbes*, 14/4/2017 (<https://www.forbes.com/sites/deborahweinswig/2017/04/14/alibabas-new-retail-integrates-e-commerce-stores-logistics-is-this-the-next-gen-of-retail/#664656b4767c>).

<sup>15</sup> Source: as quoted by Business Wire, “Alibaba Group Announces December Quarter 2016 Results,” 24/1/2017 (<https://www.businesswire.com/news/home/20170124005719/en/Alibaba-Group-Announces-December-Quarter-2016-Results>).

The “new” element of New Retail is in combining elements of offline and online retail to make them an integrated whole. This entails a fully coordinated systems approach to e-commerce, physical retail, and logistics in order to improve the efficiency of selling and buying, as well as improve the shopping experience.

Utilising ‘Big Data’ is at the core of New Retail. Detailed data on consumers’ preferences, shopping habits, and purchasing history allows the retailer to provide consumers with ready access to tailored product information to drive sales, while enabling efficient delivery and effective inventory management.

The integration of online, offline and logistics provides consumers with a highly convenient, flexible and attractive omnichannel shopping experience, so expanding the consumer base and increasing sales, while setting new industry standards for other retailers to try and match or indeed exceed for competitive advantage.<sup>16</sup>

- 2.7 The combination of these structural market features and technological developments mean that there is an urgent need for independent retailer groups to respond to the changing retail environment. However, legal uncertainty and restrictions impeding independent retailer groups hold back making key decisions and investments, which impacts these retail organisations but also consumers if competition suffers as a consequence. In particular, because such groups are not fully integrated by single ownership, there is considerable legal uncertainty as the extent to which the different parties within the group can legally share and exchange information and coordinate a contractual trading system that will allow for optimising efficiency. In contrast, integrated retailer groups, with single ownership and integrated control of their retail distribution systems, do not face any such legal restrictions, and are entirely free to organise information flows and trading arrangements as they desire within their own organisations.

## 2.B Challenges in developing omnichannel retailing

- 2.8 The New Retail era focusing on omnichannel retailing poses a substantial competitive challenge to both physical store retailers and pure online retailers because the New Retail model utilises both retail modes along with mobile commerce to provide greater all-round

<sup>16</sup> For examples of how other retailers are also applying the same disruptive business model, see “Retail’s Revolution: How Retail and Consumer Goods Companies Can Adapt,” Oliver Wyman, 2018, p. 73 (<http://www.oliverwyman.com/content/dam/oliver-wyman/v2/publications/2018/april/Retails-Revolution-onscreen-version.pdf>).

convenience combined with an enhanced shopping experience through applying technology and data analytics on customer preferences, shopping habits and buying needs.

- 2.9 On a global scale, the major retail tech giants, like Amazon, Alibaba, Tencent-JD.com, lead the way in this retail revolution, but the major integrated chain-store retailers, like Walmart, are striking key partnerships to make sure they have both a strong and coordinated physical store network and online presence supported by accessible shopping technology.<sup>17</sup> Meanwhile, other physical store retailers are seeking to develop online operations so that they can provide more convenient services to consumers through 24/7 shopping, home delivery, 'click and collect', and product information supplied via mobile devices and social media.
- 2.10 Independent retailer groups would like to be part of this revolution as well. However, in the EU they face competition policy restrictions that hamper their ability and agility to extend their physical store operations to an effective and fully coordinated omnichannel system. Consequently, they are lagging behind the major integrated retailers in this technological race, with implications for the future competitive structure of retailing which is likely to become increasingly concentrated in a winner-takes-all tippy market situation where network effects and scale efficiencies dominate.
- 2.11 In particular, independent retailer groups seeking to develop a competitive presence in the online market face legal obstacles because of how competition authorities interpret their ownership structure in the context of the EC vertical guidelines and horizontal guidelines. Principally, EC guidelines prevent independent retailer groups using common pricing, if necessarily supported by resale price maintenance (RPM), across their independent retail members as well as sharing their sales information and prescribing product ranges, all of which are essential to a fully coordinated, data-analytic-driven multichannel retail system. As such, these legal obstacles serve to distort, restrict and prevent competition in favour of integrated retailers and retail tech companies.
- 2.12 In the absence of being able to develop fully coordinated and integrated multichannel systems, independent retailer groups face choosing between the less efficient options for developing online sales through either a centralised or decentralised model. Both models are limited in respect of coordination across the store network and the need for

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<sup>17</sup> *Ibid.*

membership support while also abiding by existing competition laws restricting horizontal and vertical agreements.

- 2.13 With a centralised model, where all e-commerce is centrally controlled, the group acts as the seller in direct contact with the customer. It executes all functions associated with selling (taking orders, billing, receiving payment, delivery, after-sales), determines the price and receives all payments, regardless of the customer's location. The central operation is thereby separate and distinct from individual stores, so online and offline prices, ranges and services can differ in the absence of integrated control, which can undermine brand reputation for consistency and cause consumer confusion while raising consumers' search costs to obtain best value for money.
- 2.14 With a decentralised model, each shop acts as a seller for its own website or web page, setting and amending prices as it sees fit. Online customers choose their delivery location before examining the offer and placing the order directly with the distributor. Accordingly, there is no single online price, which again can undermine brand reputation for consistency and cause consumer confusion while raising consumers' search costs. In addition, the consumer faces a less convenient online service, involving more choices, more clicks and more time (because the choice of local retailer has to be selected first before choosing and ordering goods), compared to the faster and smoother online service offered by integrated retailers.
- 2.15 While both types of business model might be workable, they are unlikely to be as coordinated, integrated, efficient, responsive and competitive as that which integrated retailers or franchise systems can deliver with strong vertical control in offering a seamless, unified and consistent buying and deliver service. Allowing independent retailer groups to set common uniform prices for online (and, where necessary, offline) sales would help improve brand consistency and give consumers the assurance of obtaining the best price from the store network. Similarly, allowing independent retailer groups to share information on sales and prescribe product ranges would help improve the efficiency of logistics, stock replenishment and supply operations along with assuring local product availability for the benefit of consumers.

## **2.C Case Study: Decentralised Online Model**

- 2.16 As a means to illustrate the challenges and obstacles that independent retailer groups face in developing efficient multichannel retailing, it might be instructive to consider a case in more detail. For this purpose, let us consider the situation of an independent retailer group seeking to develop a decentralised online model intended to complement and utilise a physical store network of independent grocery retailers while necessarily being compliant with the current restrictions of EU competition law and EC policy guidelines. This illustrative case, based on the experiences of a prominent independent retailer group, is useful since it highlights the challenges in providing additional services on a competitive basis to customers to improve their shopping experience and for their greater convenience. This is extremely important in economic terms since an efficient and effective service will help to raise consumer welfare while an innovative service supports dynamic competition and economic progress, which competition policymakers should welcome and support.

***The process from purchase intent to delivery in detail***

- 2.17 The online consumer's purchasing experience begins at the web page or the corresponding mobile app, where the consumer selects the online shopping option. The first choice the consumer needs to make is to choose from which store to shop among the available stores in the independent retailer group. Potential stores that offer online shopping are identified by the consumer entering his/her zip code to their home or delivery address and selecting the store from a list of stores. After making that choice, the consumer must specify whether s/he wants home delivery or to pick up the goods in the store. In some cases, the chosen store only offers one of those delivery options, meaning that the consumer may have to choose another store. The next time a consumer enters the web page or the app then by default they are directed to the independent retailer they chose last time.
- 2.18 After the selection of the store, the consumer will click his/her way to the specific store's website on the independent retailer group platform. The consumer can then choose from the assortment from the store of his/her choice. Except for a comparatively small number of stores that are signed up to a newly opened dark store with a common and larger number of product articles, the assortment of any particular store contains a unique assortment for that store. That is, assortments and prices differ between the online stores in the same way as they differ between the physical stores. When the consumer has finished his/her buying process, the checkout will begin with three steps:
- (i) An article summary with the total price and fees must be approved by the consumer to proceed.

- (ii) The consumer chooses which day and time s/he either wants to get access to the goods through home delivery or collect in store. Available time slots are displayed.
- (iii) When the consumer has chosen delivery or time for collection, s/he will continue to click to reach payment display. Here the consumer can choose to pay by card or by issue of invoice.

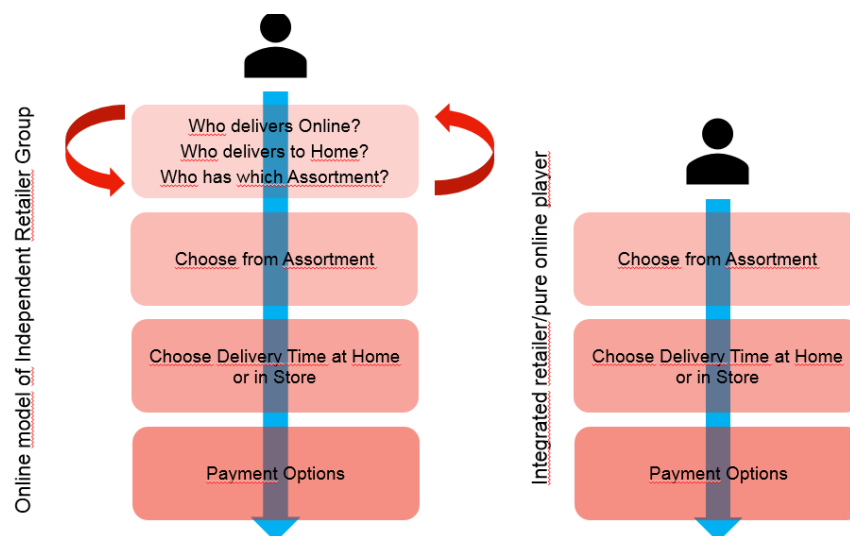
2.19 Compared with integrated chains or pure online players, the purchase process is substantially extended because of the business model of the independent retailer group. Specifically, the consumer must make more choices (clicks) before s/he can start adding products to the virtual customer basket. Indeed, internal studies have shown that the average consumer experience includes nine additional steps (clicks) compared to competitors. This is mainly explained by the business model where the independent retailer group members are formally required by competition law to compete, i.e. a requirement for *intra-organisational* competition, so that the group is prevented from using common uniform pricing even though it might be advantageous to the consumer by signalling a clear and consistent offer and so help stimulate *inter-organisational* competition with rival retail organisations.

***Technical challenges in the decentralised online model of the independent retailer group***

- 2.20 The group model is based on the principle that consumers choose which store to purchase from online. Each store has its own assortment range, pricing and delivery options. This means, in effect, that the digital purchasing process will be longer and more complex for the consumer compared to the digital offer of integrated chains or pure online players, because it entails multiple decisions, choices and clicks on the website, through different webpages, or in the app.
- 2.21 Figure 2.1 illustrates the difference in the consumer's online buying process between the decentralised online model for an independent retailer group compared to the experience of using an integrated chain or pure online player. When using the online service of the independent retailer group, the consumer must decide and click through at least three decisions which s/he does not have to make in the online model of an integrated chain or a pure online player. The consumer must find a store which offers online purchases, s/he must find a store which delivers home, and s/he must decide if the chosen store has an assortment and a price range of interest. In the online model of an integrated chain the

consumer can go directly to the choice of products from the assortment of the integrated chain.

**Figure 2.1 – The consumer online buying process: decentralised online model vs integrated chains/pure online players**



2.22 Since the independent retailers in the group are legally required to be in competition on their retail offer (including competing on prices and product assortments), the online platform must be built to accommodate the possibility for every single store to sell online. The digital solutions are therefore less commonplace and necessarily more technically complex than an online solution of a typical integrated chain or pure online player, which makes IT investments considerably larger. Due to the harsh competition on the retail market, the higher costs associated with these investments cannot be pushed forward to consumers through higher charges or prices.

2.23 The independent retailers finance their operations themselves, which in practice means that their financing of online investments specifically connected to the store, such as the storing area for the grocery bags or new parking areas for customers collecting their purchases, is bound by the size of the individual store owners' premises. This is especially the case for the owners of small format stores.



***Customer communication challenges of the online model of the independent retailer group***

- 2.24 As the importance of digital channels for market communication and customer data gathering increase, the competitive advantage of the fully integrated chains or pure online players is strengthened.
- 2.25 There are three key reasons why independent retailer groups are disadvantaged compared to centralised/ integrated chains or pure online players which enjoy the following advantages:
- 1) Digitalisation makes it possible to collect highly detailed customer data from the individual consumer, which within the fully integrated chains or pure online players provides the basis for a centralised process with optimised pricing and selection of assortments. Considering developments in Big Data, artificial intelligence and data power advances, individualised customer data create greater opportunities for a central office to set a profit-maximising price and competitive product range on the online market.
  - 2) Centrally set pricing and assortment of goods can be constantly communicated on digital platforms, through the combination of websites, apps and digital direct mail, as a continuous marketing campaign. Due to the increasing trend of online sales, integrated chains or pure online players have a great comparative advantage because their customer offer can be continuously updated and communicated on an individual consumer level. Market communication across digital channels costs much less than communication in physical channels and can therefore happen more often (in practice continuously) which gives competitive advantages for shared pricing. Integrated chains and pure online players can communicate common prices frequently on both a general and an individual level. Independent retailer organisations with a decentralized customer base cannot do this, which means they face a major competitive disadvantage especially on the online market.
  - 3) Business models with independent retailers are based on local pricing and local assortment adapted to local demand. Due to technological opportunities that emerge through digitalisation, the market players who communicate common prices have an increasing competitive advantage in terms of a transparent offer and a unified communication to the consumer. In the long run, the business models of independent retailers are at risk. Not because the competitiveness of the decentralised models

would be weaker, but because legislation gives the centralised retail model a technological advantage in the increasingly digital environment of retailing.

- 2.26 This latter aspect is highly important because today's consumers are reached by both physical and digital market communications. The integrated chains or pure online players have a major and growing competitive advantage over decentralised retail models, notably independent retailer groups, due to centrally placed brand-building market communication in the digital world. This arises because of two increasingly important factors in an omnichannel context. Online and mobile device communication, interaction and social media are pervasive and consistency in the retail offer is vital.
- 2.27 First, it is fundamentally more difficult to get through to the consumer and be perceived as relevant when communicating the retail offer if you are permanently prohibited to communicate common prices. It is evident that the retail offer becomes vaguer and less relevant if marketing and communication cannot include what price the consumer will face when purchasing goods, especially when this concerns goods marketed under one and the same brand – regardless if this concerns a so-called A-brand or a private label. This is especially so in the context of online retailing where consumers can be highly price sensitive and wish to search actively for the best prices in determining where to make their purchases.
- 2.28 Second, brand communication has a direct effect on the consumer and is also filtered through influencers, social media and public relations (PR). Very often influencers post comments on social media questioning retail brands not using common prices, which has a negative impact on business models of independent retailers.

## **2.D Lessons and insights**

- 2.29 The difficulties in establishing an efficient, competitive and cost-effective multichannel operation utilising a decentralised online model highlight broader challenges facing independent retailer groups in the New Retail era in respect of how they are handicapped by existing competition policy. The decentralised online model ensures that every individual store in its network is openly competing with each other, and yet as an overarching organisation it is hampered in how effectively it can compete with rival retail organisations because current competition policy does not adequately distinguish between *intra*- and *inter*- organisational competition.

- 2.30 In particular, current competition policy does not give enough due regard to how requiring intra-organisational competition can actually be harmful to inter-organisational competition. Specifically, competition law that obliges independent retail members in the same organisation to compete on prices and product assortments can damage the overall price and assortment perception of the organisation in how it competes at a higher level with rival retail organisations. This might not matter so much when competition is all about sales through physical stores, where competition is highly localised, but certainly would when competition increasingly is about online sales where the market is considerably broader and where inconsistencies in the retail proposition across the store network are more evident and pertinent to consumers.
- 2.31 For independent retailer groups, the decentralised online model might be the only realistic option available if it is down to stores to undertake order fulfilment and provide the delivery or pickup service for customers. However, if the online market becomes sufficiently large then it might be possible to adopt a centralised online model (e.g. using “dark stores” for the picking and packing and centralised distribution direct to customers). Even so, this will still likely mean that online and offline prices and assortments will differ, so risk undermining consistency of the retail proposition represented by the retail organisation overall. It could also create tensions in the organisation if individual retail members sense they are losing out or are inadequately compensated for reduced income. Thus, neither the decentralised nor the centralised online model is ideal so long as competition law requires independent retailers to compete with each other on all aspects within the same system even if to the detriment of overall competition with rival organisations.
- 2.32 A further reason why independent retailer groups might prefer to involve their retail members in a jointly operated online model is to avoid them breaking away with their own completely separate online operations which would risk the group’s brand image as well as lose scale economies from the joint online operations. Nonetheless, there are likely to be circumstances where these groups would still allow their members to develop their own separate online sales through third-party internet platform providers. This is especially so in situations where the group is more like a purchasing group rather than a retail chain (so the independent retailer has its own fascia name rather than part of a uniquely branded retail chain).

- 2.33 Nevertheless, if there is such a possibility, it is important that manufacturers and independent retailer groups maintain their rights to operate selective distribution that can restrict retailer members from using third-party internet platforms if they consider this undermines a cohesive brand image or allows for free-riding on store network investments, reputation and physical store on pre- and post-sales service.
- 2.34 This is an important issue because with the move to multichannel retailing, independent retailer groups rely on their retailer members maintaining their physical store sales even if they allow their members to develop their own separate online sales through third-party internet platform providers. This maintains access for consumers, supports common branding, and prevents free riding on the investments in the brand and store network that have been made through physical stores developed by independent retailers offline.
- 2.35 More generally, it should be borne in mind that selective distribution offers consumer benefits in protecting sales services and brand reputation while promoting effective competition when based on objective criteria. For example, this applies in circumstances where the objective criteria are of a qualitative nature, laid down uniformly for all potential resellers, not applied in a discriminatory manner, and for products as necessary to preserve their quality and image and attain proper use and sales support. As such, it is important that competition policy continues to allow for selective distribution based on objective criteria which can support retail and product diversity while protecting brand investments to the benefit of consumers, especially in an era when multichannel retailing is growing and is popular with consumers.<sup>18</sup>
- 2.36 While this section has focused on the challenges of developing multichannel retailing, it is important to bear in mind the broader context of competition policy when it operates to impede and discriminate against independent retailer groups in a manner that can undermine competition with other retail business forms, principally with integrated retailers. The next section of the report sets out this broader context and clarifies the differences and similarities between different retail business forms, including the types of independent retailer groups.

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<sup>18</sup> The European Court of Justice (ECJ) judgment on 7/12/2017 in respect of *Coty Germany GmbH v Parfümerie Akzente GmbH* (Case C-230/16) provides clear recognition of the importance and relevance of selective distribution based on objective criteria, specifically recognising that luxury goods manufacturers can employ selective distribution systems to preserve the luxury image of their products and can prohibit their authorised distributors from utilising third-party online sales platforms.



### 3. SPECIAL CHARACTERISTICS OF INDEPENDENT RETAILER GROUPS

*EU competition policy treats independent retailer groups differently from integrated retailers because retail stores are independently owned rather than centrally owned and controlled. Consequently independent retailer groups do not have the same freedoms in how they conduct their business as enjoyed by integrated retailers in running store networks. This policy treatment means that independent retailer groups are not viewed as single organisations but instead a nexus of markets contracts to be regulated with policies developed for inter-organisational vertical and horizontal agreements. Despite, policy restrictions, independent retailer groups have managed to compete effectively in local retail markets with physical stores based on their ability to adapt quickly to differences in local competition and demand. However, uncertainty over what practices are or not permissible restricts the ability and agility of independent retailer groups to respond effectively to the new competitive challenges posed in the new retail era as omnichannel retailing comes to the fore in European retail markets where tight coordination between online and offline retail operations are essential.*

#### 3.A EU Competition Policy Principles

- 3.1 Retail chains pervade and dominate the retail scene in Europe, with well-recognised banners and trade names that have spread beyond their original local and regional basis to become national and international branded retail chains. However, to the outside eye, their brand consistency may give the perception of a single integrated organisation. While this might evidently be the case with fully integrated multiple retailers, they are not the only organisational forms operating retail store networks. The stores could be run by independent retailers, as part of a voluntary or cooperative group, or by franchised outlets through a business-format franchise system or manufacturer-led dealership network.
- 3.2 Understanding the differences between these organisational forms is important because it helps appreciate their different operational goals and functions, as well as their roles in creating economic and social value. Moreover, understanding the purpose, nature and operation of the internal functioning of the chains is fundamental to understanding how these groups work and operate in markets, why they have become established, and how they can continue to thrive and prosper if given appropriate legal and regulatory treatment.
- 3.3 The defining and distinguishing feature of independent retailer groups is their use and reliance on vertical and/or horizontal arrangements between legally separate entities but

serving as integrated parts in a unified or cohesive system. The fundamental difference between integrated retailers and independent retailer groups is down to ownership/control – the former is under single integrated ownership/control and the latter is under separable ownership/control of the individual outlets in the store network from the central organisation. However, in terms of economic functions, they perform in the same way as in purchasing goods for resale to consumers, i.e. as retail distributors. Yet, EU competition policy treatment focuses entirely on the separable ownership/control aspect of independent retailer groups and so does not recognise them in terms of being a unified or cohesive system, but instead as a nexus of market contracts amongst legally separate parties. The consequence is that EU competition policy applies rules about horizontal and vertical agreements to these unified or cohesive systems as if the different parts are simply operating as transactional relationships. For example, insofar as independent retailer groups have more than one member active in the same geographical retail market, EU competition policy restricts their freedom to apply practices open to integrated retailers.

- 3.4 In contrast, national policy and the treatment by national competition authorities often gives specific recognition and understanding of the economic, social and cultural importance of independent retailer groups as a dynamic and pro-competitive force, which promote and support entrepreneurship and advance efficiency through cooperation, collective responsibility and mutual support. The national policy approaches have scope to be more nuanced in understanding and appreciating the historical development of such organisations and how they serve as a competitive force to suit consumers' needs in their country context. In different instances, national law and national policy decisions give special consideration to independent retailer groups, taking account of their market position and what they provide consumers, while applying regulation in a way that safeguards competition to the benefit of consumers yet providing independent groups necessary freedom and flexibility in coordinating and controlling their internal relations.
- 3.5 Whereas national policy might recognise the special hybrid character of independent retailer groups, EU competition policy seems to treat ownership/control purely in black and white terms, viewing business relationships in dichotomous terms of either ownership/control (so integrated) or non-ownership/control (so contractual). However, such a dichotomy does not take due account of the practicality of how partnership systems work and create economic and social value – whether under single ownership/control or multiple ownership/control.

- 3.6 Accordingly, at the core of EU competition policy is a focus on ownership/control that does not recognise that in the case of many independent retailer groups it is relationships that bind organisations and which are fundamental to the success of connecting different parts of business operations.
- 3.7 However, the distinctions drawn between ownership/control and cooperation have another consequence and that is a perception that cooperation between parties in the same trade is more often than not about collusion for an anticompetitive purpose. This view has a long history in economics and can even be traced back to the writings of Adam Smith in *The Wealth of Nations* (1776) with his much quoted saying that “people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices”.<sup>19</sup>
- 3.8 Unfortunately, when translated into policy sentiment, what the collusion perspective overlooks is the far more important statements from Smith about how wealth is created through cooperation and the division of labour in driving economic progress: “The greatest improvement in the productive powers of labour, and the greatest part of skill, dexterity, and judgment with which it is any where directed, or applied, seem to have been the effects of the division of labour”.<sup>20</sup> This is precisely how cooperatives and voluntary membership groups work, and indeed how all modern business organisations function, because it is through specialisation and the division of responsibilities in how efficiency and value creation is derived. To be clear, this has nothing to do with common and single ownership/control, only in how business functions are connected and interrelate.
- 3.9 Accordingly, there is at the heart of EU competition policy a problem in the application of Article 101(1) of TFEU in viewing all restrictive agreements between parts of business operations not under common ownership and control as first and foremost anti-competitive irrespective of their context. Even the term “restrictive agreement” is pejorative in this context because it implies the intention to deny or limit the freedom of actions, whereas for business operations this is about organisation and management of relationships. This might have been less evidently a problem in the previous policy regime of a form-based approach to competition policy, which had the flexibility to recognise special cases of different

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<sup>19</sup> Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Book I, Ch. 10, ¶ 82), 1776.

<sup>20</sup> *Id.*, Chapter I, p. 7.



business forms in different industry contexts (i.e. under the previous block exemption system). However, the shift to an effects-based assessment exposes flawed thinking if the view is that all restrictive agreements except between common owned and controlled business operations are inherently anti-competitive, unless proven otherwise. This is especially so in respect of all vertical relations analysis where the entire economic theory on the subject is built on producer-retailer relationships with little or no economic analysis on horizontal and vertical relations *inside* retail organisations.<sup>21</sup>

- 3.10 At issue is the application of EU competition policy in failing to make an appropriate distinction between *inter*- and *intra*- organisational relationships. Regrettably, the latter are simply treated the same as the former in being viewed as merely contracting relationships between separate legal parties, when in fact they are about operations in a unified and cohesive system that are integral to the organisation. The overlooked point is that independent retailer groups are organisations, where the parties involved in the unified/cohesive system work to the same ends, having the same values, and wanting the same success for their brand.<sup>22</sup> This does not make them integrated single firms but still means that the parties in the group function within a broad hybrid organisational structure that is fundamentally different as to how “external” trade works, between fundamentally separate organisations, and for which EU competition policy is designed.
- 3.11 In this regard, the “effects-based” approach in EU competition policy is fundamentally centred on the principles of *industrial organisation* economics, in assessing competition in inter-organisational contracting and trading relationships, but is designed without sufficient consideration of *internal organisation* economics, so does not adequately appreciate intra-

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<sup>21</sup> For a comprehensive review of this economic theory on vertical agreements, highlighting that the entire focus of this literature is on the contracting between entirely separate producer and retailer businesses, see Patrick Rey and Thibaud Verge, “Economics of Vertical Restraints”, in Paulo Buccirossi, *Handbook of Antitrust Economics*, MIT Press, Chapter 9, pp. 353-390, 2008.

<sup>22</sup> The focus in this report is on independent retailer groups as unified/cohesive systems which can include their function as “buying groups”, in representing independent retailers, but these are different to “buying alliances”, which might involve different national integrated retailers pooling their purchases together to generate cost savings through EU-wide negotiations. On how the latter work and perform, see the empirical analysis undertaken by I. Geyskens, K. Gielens and S. Wuyts, “United we stand: The impact of buying groups on retailer productivity,” *Journal of Marketing*, Vol. 79 (4), 2015, pp. 16-33.

organisational relationships that are relevant to hybrid types of organisations like independent retailers groups.<sup>23</sup>

3.12 The consequence is that the application of EU competition policy does not give due recognition to the fact that independent retailer groups can be retailer organisations that operate as single unified/cohesive systems based on ongoing relationships which are integral to the organisation and not mere contracting relations between independent parties. Yet, the policy treatment is that their intra-organisational relationships are equivalent to inter-organisational contracting and control mechanisms, which they are not.<sup>24</sup> Instead, policy should recognise the intrinsic need for independent retailer groups to act as unified/cohesive systems and not treat their internal operations and coordination on the same basis as market exchanges.

3.13 Thus, the deficiency of the current EU policy approach has been not to draw a careful distinction between inter-organisational relationships and intra-organisational relationships. The upshot is that existing EU policy discriminates against independent retailer groups. These groups are denied the same liberal policy treatment afforded to integrated retailers, which are free (unless they are deemed to be in a dominant position) to operate their stores exactly how they like. In contrast, independent retailer groups have to be more careful when grouping their activities if their market share exceeds 15% when deemed as representing a horizontal agreement or 30% when viewed as a vertical agreement. Insofar as they have more than one member operating in the same geographical retail market, they are also prevented from using the same marketing practices that integrated retailers are freely allowed to use, like common prices and joint marketing. Such unfair and discriminatory treatment certainly does not allow for a level playing field and so serves to distort rather enhance competition. Although, seldom applied in practice, the perceived EU competition policy approach creates uncertainty as to the boundaries of permissible co-operation for independent retailer groups.

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<sup>23</sup> For extensive details of the literature and scope of internal organisation economics, see Robert Gibbons and John Roberts, *The Handbook of Organizational Economics*. Princeton University Press, 2013 (noting that Chapter 23 specifically covers hybrid modes of organisation that fall neither under pure market relationships nor within hierarchical “firm boundaries”).

<sup>24</sup> On these difference, see, for example, C. Mena, A. Humphries and R. Wilding, “A Comparison of Inter- and Intra-organizational Relationships,” *International Journal of Physical Distribution and Logistics Management*, Vol. 39 (9), 2009, pp. 762–784.

- 3.14 In contrast to the EU approach, which fails to make appropriate distinctions, national policy may give recognition to the reason why independent retailer groups emerged and forged relationships as single unified/cohesive systems by the need for efficiencies to spur value creation and in response to the pressure of stiffening competition. In particular, there can be national law recognition that such groups provide their member traders with joint buying, logistics and marketing benefits, whether through membership in buying groups, voluntary associations, symbol groups, retail cooperatives, or vertical chains, with the common element that their relationship is contractual and consensual in lieu of single ownership/control. For example, this recognition is provided in France through its Commercial Code – see boxed Exhibits C.3 and C.4 in Appendix C.
- 3.15 This more favourable national policy treatment rests on seeing such group organisation as not about collusion and conspiracy to raise prices, deny consumers good value for money, and provide a poor service, but fundamentally about seeking the exact opposite through efficiencies to lower prices, increase value for money, and provide a better quality of service and improved choice. Nonetheless, the concern is the primacy of EU policy over national policy and how national policy is expected to follow and adopt EU policy, and so the risk that the special recognition afforded to independent retailer groups will be lost.

### **3.B Different organisational forms of retail chains in Europe**

- 3.16 To be clear about the types of organisations under discussion in this report, it might be helpful to draw out the key features of the different organisational forms of retail store networks presently operating in Europe.
- 3.17 A simple classification based on ownership, governance and control differences suggests four broad organisational forms of store chain networks: integrated retailers; independent retailer groups; franchise systems; and hybrid groups. The boxed Exhibit 3.1 below provides a summary of each of these four different forms, of which there are three main variants of independent retailer groups as voluntary associations or symbol groups, retailer cooperatives, and vertical chain networks.

#### **Exhibit 3.1 – Different retail organisational forms by ownership and control**

Four main types of retail chains are evident in Europe, characterised by different ownership, governance and operational control structures: (1) integrated retailers; (2) independent retailer groups; (3) franchise systems; and (4) hybrid groups (such as joint

ventures, alliances, cross-shareholdings, or a mix of organisational types).

**1. Integrated retailers** – otherwise known as multiple retailers or capital chains - are integrated chain-store networks under single ownership/control. They are fully integrated in both a horizontal sense (across different retail outlets) and a vertical sense (from wholesale supply to the stores). Individual outlets have store managers rather than independent store owners. Ownership/control of the integrated retailer can be through private or public companies, state control (e.g. for liquor stores), consumers cooperatives (i.e. owned by member customers), workers cooperatives (i.e. owned by the employed workers as partners), or hybrid worker-consumer cooperatives (like Eroski in Spain). Integrated retailers represent the dominant form of retailing in Europe, with international corporate retailers like Carrefour, Tesco, Aldi, Schwartz/Lidl, Wal-Mart, Amazon, and Metro, and consumer cooperatives like Migros, Co-operative Group (UK), S-Group (Finland), and Coop Italia.

**2. Independent retailer groups** – generally take one of three main forms:

- i. **Voluntary associations and symbol groups** (Einkaufsring - buying group; Einkaufsgemeinschaft - voluntary association) – are often wholesaler-led associations whereby independent retailers become voluntary members (not tied by ownership links, long-term franchises or other long-term contractual relations). These groups might provide different functions to different members, serving foremost as buying groups but also in promoting a common banner and brand name (symbol). Independent retail members buy supplies through a specific wholesaler, who in return for the buying and marketing benefits pays a monthly/annual fee and/or a percentage of takings to the symbol group. Such groups exist in a wide range of retail sectors including grocery (e.g. SPAR), sports goods (e.g. INTERSPORT), florists (e.g. Interflora), toys (e.g. Toymaster), and electrical goods (e.g. Euronics).
- ii. **Retailer cooperatives** (Les sociétés coopératives de commerçants – traders' cooperative; einkaufskooperation – buying cooperative; einkaufsgenossenschaft – cooperative retailer organisation) - relate to cooperatives where retail operations are separately owned by members but they coordinate their buying to seek discounts from bulk buying and additionally may adopt common retail branding. The common element is that members have a dual role as both customers of the cooperative (in buying goods) as well as co-owners (through share ownership). Such groups are important in France (e.g. E. Leclerc, ITM Intermarche, and Système U) and in Germany (e.g. EDEKA and REWE Group). This retail chain form is different and not to be confused with other co-operative forms in retailing which act as integrated chains like a (non-for-profit) consumer-owned cooperative societies or worker-owned cooperatives.
- iii. **Vertical chain networks** - where the wholesale operation owns the stores operated by independent retail entrepreneurs as with Kesko in Finland, or where there is partial integration through co-ownership as with ICA in Sweden (such that new stores are owned by the company but the retailer can later buy and own the retail business once the initial investment is paid off). In these networks, the central unit

vertically manages, through vertical chain agreements, the chain operations and the store site network, develops retail concepts and provides centralised services (such as sourcing and digital retail services) to the retail entrepreneurs, who in turn implement the chain concept and are responsible for store management, customer satisfaction, personnel and business profitability. The retail entrepreneurs tailor their stores to meet the needs of local customers. Management boards represent the entrepreneurs' interests and retailer associations help promote cooperation amongst the retailers.

**3. Retail franchises and dealerships** - normally refer to “business format franchises” (as opposed to a “wholesaler-retailer franchise”, as might be used to describe a symbol group like SPAR) or manufacturer/brand “dealerships”. The latter is common, for example, in the car sector where specific competition policy and block exemption rules apply to selective and exclusive distribution arrangements involved in car supply and distribution in the EU. More generally for franchising arrangements, the franchisor grants permission for the franchisee (the independent retailer) to sell its products or services as a means of selective distribution. The franchisor also provides a proven method of trading, plus support and advice in setting up and operating the business (e.g. Benetton, Body Shop, Mango, and Swarovski). The contractual arrangement allows the franchisor to obtain distribution at the retail level through its dealers while maintaining vertical control in how the retail service and its goods are merchandised. Even so, franchisors may be limited in the extent to which they can exercise complete control over franchisees. Thus, while a franchisor may be able to impose certain restrictions on a franchisee to protect property rights and ensure necessary investments are made, it cannot legally tie the purchase of inputs to use of the franchise. Equally, while the franchisor may specify the quality of inputs to be used, a franchisee must be free to buy from a third party that can meet the specific standards of the inputs. Also, a franchisor cannot legally determine the prices set by the franchisee, nor impose territorial restrictions that would have the effect of segmenting the EU into isolated national or regional markets.

**4. Hybrid arrangements** – which can take a combination of hybrid forms, for example

- a) retail joint ventures (where there is co-ownership from two or more retail groups for a retail chain);
- b) alliances (such as cross-border buying groups like AMS and EMD where several retail groups pool their purchasing volumes in negotiating with international suppliers);
- c) multiple cross-shareholding arrangements (e.g. NorgesGruppen);
- d) a mix of organisational types (e.g. Booker as a UK cash & carry chain and wholesaler supplying independent retailers buying the Londis and Budgens retail chains from Musgrave in 2015, but now itself merged with the integrated retailer Tesco; or the Co-operative Group's takeover of the independent retailer group Nisa in the UK).

3.18 The examples of independent retailer groups identified in Exhibit 3.1 are at the end of the co-operative spectrum where they tend to operate as branded retail chains but with somewhat different forms of ownership and control.<sup>25</sup> However, these do not describe all independent retailer groups. In particular, there can be different types and levels of retail co-operation, which can adapt and evolve over time. For example, the origins of many branded independent retailer groups may well have started (and perhaps even remain today) as a buying group, then developing into a co-operative business form as co-operation on the range of services beyond joint purchasing increased over time, and ending up as a co-operative retail chain with a shared brand name. In this evolutionary process, which not all groups and associations of independent retailers have necessarily followed, the levels of vertical, horizontal, internal and strategic integration tend to increase through each stage. For illustration, Table 3.1 draws on Kennedy (2016), who provides an extensive review of the different types of retail co-operatives and their identifying characteristics, to summarise the differences for each of the three main types or stages of retail co-operation.

**Table 3.1. Types of retail co-operation**

<b>Dimensions</b>	<b>Retailers' buying group</b>	<b>Retailers' co-operative</b>	<b>Retailers' co-operative retail chain</b>
<b>Objectives</b>	Cost advantages	Cost and differentiation advantages	Cost and differentiation advantages
<b>Activities</b>	Purchasing	Purchasing and services	Purchasing and services
<b>Formality</b>	Low	Medium	High
<b>Enforcement</b>	None, social or contractual	Social or contractual	Contractual and social
<b>Vertical, horizontal, internal and strategic integration</b> <sup>26</sup>	Low	Medium	High

Source: Kennedy (2016).<sup>27</sup>

<sup>25</sup> For further summary details on these and other leading independent retailer groups, see boxed Exhibit C.1 in Appendix C.

<sup>26</sup> In this specific context, "vertical integration" refers to the integration of the supply chain of a retailer, while "horizontal integration" refers to the adoption of a shared identity between the retailers culminating in a shared brand of stores. "Internal integration" regards the level of shared decision-making where more internal integration would show in more centralised decision-making, while "strategic integration" refers to the amount that a retailer considers the other retailers in their strategy formation.

- 3.19 In practice, the emergence and development of independent retail groups has varied quite noticeably across different EU countries and across different retail sectors. The organisational form, structure and purpose of these independent retailer groups often comes down to their historical development, the needs of the market being served, the nature of competition, and the extent of opportunities for collaboration, as well as national level laws and policy.
- 3.20 In historical terms, independent retailer groups have been a key feature of most European retail markets for well over a century.<sup>28</sup> They have witnessed and been part of the history of these markets and have themselves evolved and adapted to changing market circumstances. These groups have been intrinsic to the development of these markets and have helped ensure that competition has prevailed over time. Their presence has ensured that consumers have genuine retail choice in local markets and, even in the remotest rural areas, continue to be served well across whole countries. The challenge now facing these groups is to move with and adapt to new retail developments, particularly for online retailing where centralisation and coordination is essential, but where legal restrictions discriminate against independent retailer groups simply because of their ownership structure, with their store network contractually linked rather than ownership linked as with integrated retailers.<sup>29</sup>

### 3.C Group unity and identity

- 3.21 The key distinguishing feature between an integrated retailer and a retailer group is about who owns, runs and controls the stores. In an integrated retailer, store managers follow, often with little discretion of their own, the (top-down) management instructions coming from central office on all elements of the in-store marketing mix, i.e. covering products, prices, promotion and placement. In an independent retailer group, it is the store owner or retail entrepreneur operating the store (if the store is centrally owned) who makes most of

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<sup>27</sup> Ann-Marie Kennedy, "Re-imagining retailers' co-operatives, *International Review of Retail, Distribution and Consumer Research*, Vol. 26 (3), 2016, pp. 304-322.

<sup>28</sup> For a global perspective and academic literature review on independent retailer groups in food retailing, see Flavia Angeli Ghisi Nielsen, Marcos Roberto Luppe and José Augusto Giesbrecht da Silveira (2014), "Horizontal Alliances among Independents and Non-integrated Food Retailers: A Worldwide Analysis," *International Journal of Business and Commerce*, Vol. 3, No.10, pp. 21-50 (<https://www.ijbcnet.com/3-10/IJBC-14-3907.pdf>).

<sup>29</sup> As an illustration of how independent retailer groups have evolved over time as the national retail environment has changed, see boxed Exhibit C.2 in Appendix C which considers the development of such groups in France over the past century and more.

the retail offer decisions, guided by suggestions and recommendations from the central office on the marketing mix, but expected to follow the group's approach to ensure consistency and equality across the store network to promote a common identity. Thus while the internal relationships may be different, what they have in common is that they are integral and internal to the same unified/cohesive system.

- 3.22 With this organisational perspective in mind, and to help clarify the nature of objectives, ownership and control of these different business forms, Table 3.2 draws on the classification analysis by Kennedy (2016) to illustrate the organisational differences between independent retailer groups (represented by a retailers' cooperative) and integrated retailers, whether the latter are in the form of a consumer co-operative (i.e. an integrated retailer owned by consumers) or a corporate retail chain (i.e. an integrated retailer owned by shareholder investors). In the practice, the lines may be more blurred when the independent retailer group has a combination of ownership by retail members and external investors (such as when the group has a stock market listing), but the key differentiating factor will still be the independence of retail members in making key operational decisions for their own stores.

**Table 3.2. Organisational differences between independent retailer groups and integrated retail chains**

Type of retail chain	Independent retailer group	Integrated retail chain	
<b>Specific form</b>	Retailers' cooperative	Consumer cooperative	Corporate retail chain
<b>Members</b>	Retailers – defined membership	Consumers – open membership	N/A
<b>Purpose</b>	Group buying through to cooperative retail chain	Community retailing and social movement	Corporate retail chain
<b>Objectives</b>	Competitive cost advantage through to competitive differentiation for profit maximisation	Maximise customer service and contribute to the community	Maximise shareholder returns
<b>Ownership</b>	Member owned	Member owner	Investor owned
<b>Control</b>	Democratic - by member vote	Democratic - by member vote	Hired board of directors and shareholders, based on their investment level
<b>Funding</b>	Equity of members	Equity of members	Capital markets
<b>Returns</b>	Reinvest or shared between members	Reinvest or shared between members	To shareholders



Source: Adapted from Kennedy (2016).<sup>30</sup>

- 3.23 In contrast, the comparison between independent retailer groups with franchising systems is somewhat different. Here, the stores may be independently owned but the relationship and control is different. There are four key differences between the two retail forms. Firstly, while an independent retailer group is fundamentally an organisation with power-sharing mechanisms, franchising is more about a system of vertical control where the franchisor determines the terms of the relationship to its franchisees. Thus, while power in the former may be balanced, the latter is usually asymmetric.<sup>31</sup> Secondly, retailers in the independent retailer group are members of the group, so hold dual roles as both customers of the central function and co-owners with a strong voice. In contrast, franchisees typically are just customers of the franchisor with no ownership and so have relatively a weak voice. Thirdly, the nature of the independent retailer group is about an ongoing and indefinite relationship with no fixed end date, whereas franchise relationships are generally time-limited contracts with break clauses and formal processes for contractual renewal. Fourthly, membership of an independent retailer group is often voluntary, so the member can freely leave, whereas in a franchise relationship the franchisee is always contractually bound by the franchise contract so generally does not have this freedom.
- 3.24 The differences between independent retailer groups and franchise systems, though, might run deeper in relation to the business culture, where the former can be quite democratic in its process and decision-making, and mixed with heterarchical (unranked horizontal power), hierarchical (top-down vertical power), as well as bottom-up processes, while the latter might be predominantly hierarchical and more silo-based (i.e. little interaction across the system with other franchisees). These differences are summed up by Cassou et al. (2017) drawing the following distinctions between a retail cooperative and a franchise system:<sup>32</sup>

*“A retail cooperative consists of an assembly of retailers who decide together to develop a retail business under the same banner and to organize together their procurement*

<sup>30</sup> Ann-Marie Kennedy, “Re-imagining retailers’ co-operatives, *International Review of Retail, Distribution and Consumer Research*, Vol. 26 (3), 2016, pp. 304-322.

<sup>31</sup> The consequences of the asymmetry in franchising systems is explored in the report *Franchising*, Policy Department A, Directorate for Internal Policies, European Parliament, IP/A/IMCO/2015-05, April 2015.

<sup>32</sup> Fabrice Cassou, Gérard Cliquet and Rozenn Perrigot, “Uniformity in Collective Entrepreneurship: The Case of Food Retail Cooperatives in France”, in *Management and Governance of Networks: Franchising, Cooperatives, and Strategic Alliances*, edited by G.W.J. Hendrikse, G. Cliquet, T. Ehrmann, and J. Windsperger, pp.193-211, 2017, Springer International Publishing.

*system and many other activities in the course of the growth of the organization. Even though it is difficult for a customer to distinguish between retail cooperative banners and franchise ones, these two systems, franchising and retail cooperatives, are totally different. A franchised system relies on the initial enterprise of a franchisor who attracts franchisees to implement the new concept. In such an arrangement, the franchisor is the owner, even though she/he should be able to convince franchisees to follow chain policies when changes occur. A retail cooperative is an entrepreneurial democratic system owned by an association of members..., where every decision is made in a democratic way under a basic principle: one person, one vote. The main difference between a retail cooperative and a franchise chain stems in the power-sharing system.”*

- 3.25 These characterisations of the differences between independent retailer groups and franchise systems may be overstated or unduly simplified, but they point to a generally closer integration in independent retailer groups as hybrid organisations where ownership may be more diffuse but control is less hierarchical than in franchise systems.<sup>33</sup> Nevertheless, both types of retail systems face the challenge of different legal and policy treatment compared to integrated retailers and thus both business form can be put at a potential competitive disadvantage relative to the favourable policy treatment given to integrated retailers. Moreover, independent retailer groups may themselves use or be involved in franchise systems for some of their operations (e.g. operating car dealerships or running international retail chain operations on a franchise basis rather than an independent retail member model).

### 3.D Processes to maintain network uniformity

- 3.26 The development and existence of independent retailer groups, as with any network of retail stores, depends fundamentally on maintaining uniformity to promote and preserve brand integrity and values. Respecting the core components of the concept is essential to

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<sup>33</sup> There is no common European definition of franchising and franchising agreements differ from one business to another. However, a key feature of such relationships is a contractual partnership concluded on a voluntary basis between entrepreneurs or natural or legal persons that are legally and financially independent of each other, whereby one party (the franchisor) grants to the other party (the franchisee) the right to operate his franchising formula, name, and trademarks, and shares know-how, drawing on the franchisor's technical and organisational expertise and assistance for the duration of the agreement, where customers rely upon the unity of the franchising system, the intention of both the franchisor and the franchisee being to allow for the rapid acquisition of new markets with limited investment and an increased chance of success. For further details, see the discussion in the European Parliament on the function of franchising in the retail sector (2016/2244(INI) (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2017-0199+0+DOC+XML+V0//EN>).

maintaining uniformity so that the consumer can find a common image, design, and service experience in any store under the same brand. The brand image then has to be consistent all over the brand's properties, whether they are independently or centrally owned.

- 3.27 Even in stable markets, maintaining uniformity can be a major business challenge. However, in dynamic and turbulent markets, this is both more challenging and more important for the sake of customer retention and ensuring customer satisfaction. In an integrated retail business, top-down management instruction can completely control how individual stores in the network operate. However, in independent retailer groups, such top-down control is not feasible given that the stores are run by independent retailers. Contracts between members and the central organisation may go some way towards ensuring compliance in behaviour, but the individuality and freedom enjoyed by independent retail entrepreneurs means that there needs to be other mechanisms in place to ensure group coherence, uniformity, effort and shared belief.
- 3.28 Independent retailer groups strengthen their interdependency through the formalisation of shared procedures for the monitoring, control, and harmonisation of their business practices. Outwardly, such as to the consumer, this means that the group's operations may be difficult to distinguish from integrated retailers (i.e. hierarchical organisations with managed stores controlled by a central headquarters). Yet internally, cooperation, rather than just management, is critical.
- 3.29 Horizontal cooperation may have been the origin of the group's common centralised structures (covering purchasing, marketing, communication, funding, logistics, and information systems as common policies). However, coordination between these common centralised structures and each retail store relies on a vertical form of cooperation. Thus a dual approach, both horizontal and vertical, may be in place to support cooperation, which is especially evident in retailer cooperatives. In practice, top-down centralised processes are present, but the voice and influence of the independent retailers also comes bottom-up or across as decentralised processes, and additionally there can be a mix of centralised and decentralised processes. Cassou et al. (2017) assign three specific forms to each of these three types of processes, so nine in total, as shown in Table 3.3.<sup>34</sup> They argue that this set of

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<sup>34</sup> Fabrice Cassou, Gérard Cliquet and Rozenn Perrigot, "Uniformity in Collective Entrepreneurship: The Case of Food Retail Cooperatives in France", in *Management and Governance of Networks: Franchising, Cooperatives, and Strategic Alliances*, edited by G.W.J. Hendrikse, G. Cliquet, T. Ehrmann, and J. Windsperger, pp.193-211, 2017, Springer International Publishing.

nine processes are especially evident in independent retailer groups like retailer cooperatives where the members have a clear dual status as both customers and co-owners of the central organisation.

**Table 3.3. Managing uniformity within retail cooperatives and independent store networks**

Centralised processes (top-down)	Plural processes (mixed direction)	Decentralised processes (bottom-up or across)
Contracts	Solidarity	Trust
Incentives	Mimesis	Organisational commitment
Persuasion	Enculturation	Informal control

Source: Cassou et al. (2017).

3.30 The processes involved in each of these nine types can be summarised as follows:

- i. The contracts process involves the formalisation of explicit rules and procedures to supervise and control the behaviour of members in the group. This is to strengthen the organisation's consistency without necessarily supervising all the practices and behaviours of its members. The contracts enable a formal framework to organize relations between network members, where there is typically a wide range of legal documents governing the rights and responsibilities of network members.
- ii. Incentives may play an important central process role, such as using a system of discounts or an annual bonus based on the store's maintained appearance, price policy, product availability, and employee training in reflecting concept uniformity.
- iii. Persuasion processes may arise with upstream use where the members keep an eye on projects and store planning or downstream use where individual stores are monitored by field audits, mystery shoppers, and automated management information systems to identify any deviation from the concept.
- iv. Trust strengthens cohesion, cements the union of individuals, and means members can rely on each other. Inter-organisational trust is the trust in the group itself by its own members, where each places itself in a position of vulnerability by becoming dependent on the group for its supplies and livelihood. Interpersonal trust is the trust placed by individuals upon other individuals and, in this context, between peer members in the group.

- v. Organisational commitment processes can relate to affective commitment, where there is emotional commitment to and identification with the organisation, so that members remain within the network because they want to. Continuance commitment can arise through the costs that a departure from the organization could create for the individual, based on the investments made, so members remain within the network because they feel they would lose too much if they left it. Normative commitment relates to the sense of loyalty and moral obligation to remain a member of the network as a duty, recognising if members leave then it weakens the group so remaining members suffer.
- vi. Informal control differs from formal control. It consists of relational governance through consensus and actions of social control, following the principle of “one member, one vote.” The organisation applies pressure to reduce differences between members and to reach consensus and support cohesion amongst members.
- vii. Solidarity relates to duties and mutual responsibility, recognising shared interests, defending each other’s interests, emphasising team work and team spirit, and seeing each other as equals (despite size or other differences). For retailer cooperatives, members might spend around a third their time working for the cooperative in technical functions, such as for merchandising, purchasing, marketing, logistics, and information systems, where this act of solidarity reminds individual members that they belong to a network and that they each need to give some of their time to the functioning of the network.
- viii. Mimesis corresponds to processes that help to drive consistency through commonality, imitation and herd behaviour amongst members so they are aligned in their direction and intent. For example, benchmarking analysis can help standardise the practices of stores in the same network and share best practice to generate a strong emulation. Members can use social interactions with each other as part of their learning process by identifying and comparing themselves with each other.
- ix. Enculturation processes help establish a common culture to reduce conflict and signal the kinds of members suited to the organisation, which in turn help recruit compatible individuals to become new members, such as store managers or family members who are already familiar and in tune with the principles and goals of the organisation.

3.31 These processes work in tandem to bind the group together in the absence of central ownership control (as with an integrated retailer) or direct control through contracts (as in a

franchising system). Ultimately, though, as membership is voluntary, members can opt to leave. This poses a problem about continuity and also makes the independent retailer groups fragile, as compared to the ownership and contractual binding that holds integrated retailers and franchise systems together.

- 3.32 In these circumstances, it is helpful if there are mechanisms available that provide for a smooth entry and exit process for members joining and leaving groups. In particular, because membership is intended as an ongoing basis, unlike franchise contracts which might be for a fixed period (with or without the possibility of renewal), legal recognition of the indefinite nature of these groups is important. Crucially, they are not simply about formal horizontal and vertical agreements in the way that competition policy tends to portray retailer networks and associations, but instead constitute a deeper relationship.

### **3.E Policy obstacles to cooperation for independent retailer groups**

- 3.33 Pooling resources in independent retailer groups helps generate scale economies in marketing, procurement, and central services such as training, store planning and visual merchandising, which allow retail members to operate more efficiently on an individual level. This in turn allows the retailers to compete more effectively in their respective local markets, with competition ensuring that consumers benefit through lower prices, better services, and more choice.
- 3.34 However, the extent to which groups can undertake activities on behalf of members is far from clear in most jurisdictions. Apart from EU competition law, normally only national case law provides guidance on what practices independent retailer groups can undertake and how they should be organised. This can be particular problem when there is no established case law when retail markets are changing rapidly. A key issue relates to online selling, where the options for independent retailer groups are between having a centralised online sales service, with supplies handled by local stores, as opposed to a decentralised system whereby individual stores operate their own websites. The former has the benefit of group cohesion and consistency in representation to the consumer (e.g. in providing a single price for a good), while the latter can prove to be a confusing picture where there might be multiple prices for the same good. As a good model for other national authorities to follow, the French authorities have amended the commercial code to allow centralised online retailing through developing an online sales platform for the permitted activities of retailer

cooperatives in France – see boxed Exhibit C.4 at point 6 in Appendix C for details. It would be helpful if there was clarification in other EU member states as to what practices are permitted or not permitted for independent retailer groups because uncertainty will delay necessary investments and consumers may suffer as consequence from ineffective and inefficient services.

### ***Vertical control in retail groups***

- 3.35 Fully integrated chains by their very nature already enjoy such scale benefits as well as complete control over their operations at chain-level and individual store-level. This means that an integrated chain can arrange and link up in a highly efficient manner all the business functions from procurement, logistics, marketing, merchandising, and store operations right through to sales to end consumers. Integrated chains thus have complete control over all aspects of the retail proposition both centrally (such as marketing, product range choice, and store design to reflect the overall retail image) and locally at the individual store-level (to tailor decisions such as prices, category depth, and service levels to cater for local market conditions). Crucially integrated retailers can set up, adjust and experiment with online and multichannel operations exactly how they like.
- 3.36 In contrast, independent retailer groups are limited in the extent of their control. Independent retailers, by their description and character, will desire a degree of autonomy in making decisions that apply to the operation of their own stores – the very reason they are independent rather than fully integrated. However, for certain aspects, independent retailers may like to give up some element of their freedom as they recognise that centrally-taken decisions can benefit them and their customers. For instance, centrally-taken decisions might enhance the consistency of the retail offer, provide greater assurance on service reliability to consumers, and thereby increase consumer satisfaction with the shopping experience. Nevertheless, even if the retail members might desire such centralised decision-making, competition law and policy rules can limit the nature and extent of any centrally administered control on individual members.

### ***Legal treatment of vertical agreements for independent retailer groups***

- 3.37 In some respects, competition law can be sufficiently flexible and amenable that it does not hinder independent retailer groups to any significant extent, such as over format design and visual merchandising. However, in regard to other aspects, competition law does restrict the extent to which a group can make and implement centrally-determined decisions. This

is most apparent with pricing and joint commercialisation. For instance, a group's central office (i.e. central administrative function) or wholesale arm cannot dictate the retail price at which goods must be sold, or the minimum price that they can be sold for. Such resale price maintenance arrangements are contractually unenforceable under present EU competition law and are viewed as illegal vertical price fixing (and, if used, could result in a substantial fine in most EU member states). Even imposing "retail price ceilings" on members, i.e. dictating the maximum resale price, may not be deemed to be an acceptable practice if the group possesses a high market share (specifically, 30% or more), even when the intention is to ensure that members keep prices low to raise sales levels and benefit final consumers in the process. However, national authorities may have the good sense to recognise this can be pro-competitive in restricting high prices and curbing individual retailers exploiting local market power.

- 3.38 The same reasoning applies to necessary information exchanges between the members of the group and the group's central office or among the members for the benefit of the whole group. These can aid efficient and work to the advantage of consumers by helping to identify and use best practices on data sharing, such as for coordinating marketing activities or supporting group members in all respective manners to help them reduce bureaucracy and administrative costs.
- 3.39 These restrictions on a group's pricing control, even when this is clearly intended to aid competitive positioning and benefit consumers (e.g. in respect of preventing high prices and promoting brand consistency), are in stark contrast with the extent of allowable vertical control and market behaviour exercised by integrated chains. Here competition law freely allows integrated chains to centrally determine and administer all prices in all stores within the chain regardless of whether this is to the benefit of consumers (again in respect of preventing high prices and promoting brand consistency) or to the detriment of consumers (such as raising prices to consumers in those areas where the chain's outlets face little local competition). This applies so long as pricing is neither deliberately predatory nor exceptionally exploitative in nature.
- 3.40 A similar concern relates to the treatment of purchasing obligations. An integrated chain can centrally determine and administer all stocking requirements for all stores in the chain, i.e. dictating product availability and amount supplied at each individual store. In contrast, a central office at the wholesale level for a group of independent retailers is restricted in the



range and extent of purchasing obligations that can be applied to retail members and has little or no control over which products and in what amounts the individual retailer ultimately chooses to stock from the range on offer. Typically, the allowable maximum limits for purchasing obligations extend to 80% of goods purchased and for a duration limit of up to 5 years. This creates two obvious problems. First, free-riding activity cannot be controlled so effectively (e.g. retailers refusing to stock special promotional products or obtaining delisted products from other wholesale operations, thereby undermining the bargaining position of the group as a whole, or retailers stock products without quality control or questionable quality and thus endangering the group's reputation). Second, independent retailer groups are deliberately established as an ongoing relationship for the benefit of members and consumers (not least in respect of ensuring consistency of brand image and member participation), so a duration limit undermines retailers' commitments to a particular group and complicates administration and contracting arrangements (thereby raising costs and serving as a business distraction).

- 3.41 On both accounts, the limitations on vertical control (i.e. on retail pricing and purchasing obligations) restrict the efficiency at which independent retailer groups can operate, weakening the ability of independent retailers to act as a critical competitive force and as a counterbalance to the market power of integrated chains. As a result, these limitations work against the interests of consumers in ensuring low prices, wide choice and service variety.
- 3.42 A compounding effect can arise from the way that competition policy rules or lack of clear policy guidance can mean that independent retailer groups may be prevented or unclear about whether different parties within the group can share particular forms of information, notably in respect of sales, pricing and marketing. Such information exchange could be vital, such as the central office needing to use independent retailer sales to improve its own operations as well the services it provides to retailer members.
- 3.43 The need for efficient and effect information exchanges becomes especially apparent in coordinating multichannel retailing. Here there is a need to exchange sales information to across the group along with information on pricing and adherence to joint marketing and prescribed product ranges to facilitate joint commercialisation. This information exchange is crucial for the efficiency of logistics, stock replenishment and supply operations along with assuring local product availability for the benefit of consumers. This information exchange is

also vital in enabling the group to respond quickly to changing market circumstances and competitive moves by rival retail organisations to initiate price changes and other marketing responses to ensure competitiveness.

***Legal treatment of mixed arrangement structures***

- 3.44 However, it is not just simply in relation to vertical agreement regulations that independent retailer groups are hampered and effectively discriminated against compared to the favourable legal treatment offered to integrated chains. The nature of independent retailer groups co-ordinated by a central office or wholesale operation can entail that within the group relations can have both a vertical element (i.e. central office to retailer) as well as a horizontal element (i.e. retailer to retailer in respect of shared benefits). Unfortunately, this has given rise to some competition authorities viewing such arrangements as first and foremost as being horizontal (i.e. co-operative) in nature but controlled by a vertical relationship (with the central office as the essential facilitator and co-ordinator). Given the much tighter rules and regulations that generally apply to horizontal co-operative agreements between competitors with concerns over cartelisation and competition avoidance, this has meant that some independent retailer groups have been subject to considerably more stringent limits on their size (in respect of allowable market share) and activities (in respect of operational control) than they would be if treated as simple vertical agreements.
- 3.45 Thus, for instance, a group of independent retailers that have members operating in the same geographical market may be allowed to operate relatively unimpeded only if such members' (collective) market share is no greater than 15% (as a horizontal agreement between competitors), even though its very nature is about promoting efficiency amongst independent retailers to allow them to be more effective competitors – both against integrated chains and amongst themselves. Yet this market share threshold may be perceived as a bar to the level of efficiency that the group can attain – for example in the extent to which it can negotiate discounts from suppliers that can then be passed on to consumers in the form of lower retail prices. In contrast, integrated chains may face no restriction in how much they are allowed to grow, at least through organic growth. Only in respect of mergers and acquisitions might restrictions be imposed, and even here the allowable threshold before being prohibited might be as high as a 40% share (i.e. the level at which EU case law has tended to view a firm as holding a dominant position in a market).

- 3.46 A market share threshold set at 15% (or indeed 10% or 20% as may apply in some jurisdictions) is both arbitrary and considerably below the level at which anti-competitive concerns are normally raised in relation to vertical restraints (i.e. generally taken as 30% in the context of the European Commission's guidelines on vertical restraints). The market context should take precedence. In situations where integrated chains have significantly higher shares than this threshold, then the competitive ability of the group will be stifled by this restriction (as it will be at a competitive disadvantage compared to these rival groups in respect of negotiating with suppliers and drawing on scale economies). Even when an independent retailer group represents the largest collective body in the market, consideration should be given to the basis on which the group has developed – primarily as a means to secure improved terms with suppliers and as a means of operating with a consistent marketing image. Such means offer direct benefits to consumers when lower purchase costs are translated into lower retail prices and when consistency in marketing provides greater assurance on service reliability and thereby increases consumer satisfaction and overall demand.
- 3.47 More fundamentally, a mixed arrangement of vertical and horizontal relationships should be seen and assessed exactly as that – i.e. a mixed arrangement on which the net economic effect of the combination should be the prime consideration for assessment. Specifically, horizontal elements should neither be viewed in isolation nor taking precedence over vertical elements. Rather, they should be viewed together as an intrinsic package in the makeup of independent retailer groups. In this respect, it needs to be understood that specific vertical agreements may mitigate any horizontal cooperation concerns, and vice versa.
- 3.48 A prime example is the role of maximum resale prices, which prevents individual retail members from exploiting any local monopoly power they may jointly hold when rivals (e.g. integrated chains) are absent from certain locations in which they operate (e.g. remote rural locations). It needs to be borne in mind that these are normally about vertical control (to prevent overpricing and thereby underselling), and not about horizontal agreements with the intention of co-ordinating to raise prices (as they might be classified by some competition authorities) where two or more members of a group of independent retailers are active in the same geographical retail market.

- 3.49 Equally, though, fixed common retail prices required for retail members may have an important role to play in joint commercialisation processes and the development of a brand image among retail members. In particular, this can build trust and assurance in the mind of consumers in support of value-for-money propositions, facilitating more informed decisions for consumers and generally encouraging demand (and therefore offering significant consumer benefits). Such benefits may be recognised in relation to an assessment as a horizontal agreement (when consumer benefits flow from joint commercialisation activity). But when assessed as a vertical agreement, this behaviour would be seen as an example of fixed resale price maintenance and therefore prohibited under EU regulations, regardless of the market share controlled by the parties (even if this were below the normal *de-minimis* level) and regardless of whether this practice would be indispensable for the purpose of securing joint commercialisation benefits.
- 3.50 The point is that labelling or typecasting independent retailer groups as merely instruments for horizontal agreements misses their real economic value when they offer efficiency benefits in respect of vertical relations – generating lower prices and better terms from suppliers that can be passed on to consumers and improving the quality and consistency of the retail offer to the benefit of consumers. Equally, perceiving independent retailer groups that may seek to operate common retail prices as merely using vertical agreements for the sake of eliminating intra-group competition and dampening inter-group competition through fixed resale price maintenance (which is treated as a hardcore restraint and normally prohibited under EU law), misses the real economic value of such behaviour when it offers efficiency benefits in respect of joint commercialisation processes through horizontal agreements.

***The economic and social role performed by independent retailers***

- 3.51 EU competition policy is in certain aspects proving to be an obstacle more than an assistance in promoting effective competition. Competition law in some instances unduly discriminates against such groups compared to the freedom that fully integrated chains enjoy in respect of vertical and horizontal control by a central organisation over individual stores in a chain for no reason beyond one organisation form is managed by relationships and the other is managed by ownership.
- 3.52 In facing such unduly unfair and discriminatory treatment, it may seem reasonable to ask the question why should the independent retailers not simply accept this legal position and

instead integrate to become fully integrated chains themselves? The question, though, misses the point about the important economic and social roles played by independent retailers, in particular their contribution to entrepreneurship, organisational diversity, experimentation and innovation. In addition, independent retailers have a vital role to play in ensuring that consumers continue to be well served and enjoy variety and choice while at the same time ensuring that integrated chains are kept keen – particularly as retail markets consolidate.

- 3.53 First, establishing an independent retail operation is often the way that many entrepreneurs begin in business. Particularly if they are members of a group of independent retailers, these entrepreneurs can design and experiment with different retail concepts and different product mixes, working with different business models to see which prove successful. Such experimentation can promote new methods of operation and new services to target existing consumer demand more effectively, as well as open up the prospects for new, latent demand to be served with the arrival of new services or new product mixes.
- 3.54 Second, independent retailers may go where integrated chains avoid, such as serving rural and socially deprived urban areas. In such instances, independent retailers may be more prepared because of their community conscience to accept the associated low returns and greater business risks than would integrated chains. For consumers in these areas, an independent retailer may be their only effective source serving their retail needs. Yet, even in areas where choice exists, independent retailers may provide local consumers with something different and thus of value to the offering by outlets of integrated chains. For example, independent retailers typically have greater flexibility to adapt their retail offer to cater for specific customer needs in a given community (such as stocking locally produced goods, providing credit to regular shoppers, offering additional services like home delivery, and adjusting opening hours to suit local needs).<sup>35</sup>
- 3.55 Third, the presence of a vibrant independent retail sector serves as a competitive force to ensure that integrated chains must compete intensely for the custom of shoppers, encouraging them to innovate and generally improve their offer. This is particularly important as retail markets consolidate, with integrated chains becoming both larger and

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<sup>35</sup> Independent retailers may also bring more to a community than a chain outlet in other ways, such as through paying local taxes, using local service providers, and sponsoring local clubs and community social initiatives.

fewer in number (as mergers and acquisitions continue) and where otherwise competitive intensity might be lessened.

- 3.56 With a rich and diverse retail sector, consumers are offered greater choice and a range of different value-for-money retail service propositions. Equally, though, suppliers are offered a variety of routes to markets, which may take on considerable economic importance when it opens up greater possibilities for new suppliers, with perhaps new products, to emerge and compete with existing suppliers. Accordingly, the substantial presence of independent retailers, and a lack of dominance by any single (integrated) group, may hold the key to ensuring that both demand and supply opportunities are fully realised to the economic good.
- 3.57 Thus, ensuring the efficiency, competitive resilience and ongoing development of independent retailers should be seen as an integral part of the good functioning of retail markets and benefitting consumers, and certainly not as some anachronism that has no role to play in modern retailing.
- 3.58 Building on this section of the report, Appendix D at the end of this report provides a more detailed analysis of how existing competition policy in the EU applies to independent retailer groups. The analysis highlights the deficiencies in current competition policy and the clear need for greater appreciation and understanding of the role, purpose and organisation of such groups as a pro-competitive force rather than being treated as simply a set of inherently anti-competitive horizontal and vertical agreements and so subjected to inappropriate blanket rules which are harmful to competition and serve against the interests of consumers. The Appendix identifies the specific policy areas, rules and guidance which policymakers urgently need to address.

## 4. CHALLENGES AND POLICY CONCERNS FOR INDEPENDENT RETAILER GROUPS

*Evidence gathered from a detailed questionnaire survey of independent retailer groups shows how much they vary in terms of their organisational and ownership forms, displaying a rich variety of retail models applied to different retail markets in different EU member states. While differences exist, the survey shows the extent of their common features as well. The purpose of this section is draw on this survey evidence to consider the nature of independent retailer groups, looking at their presence in the European context, how the groups are organised and structured, their economic role, and the competitive challenges and legal obstacles that they face. In particular, it is evident that independent retailer groups have multiple roles to offer for the benefit of consumers: they can be forces that support and promote efficiency, innovation, competition and diversity. However, it is also clear that certain aspects of current competition policy and law are preventing groups from fully developing these roles and thus restricting the benefits that they can offer consumers, especially in view of the increasing importance of e-commerce and rapid technological developments taking place in retail markets that are reshaping competition in the sector.*

### 4.A Independent retailer groups in Europe

- 4.1 A range of industry studies have examined the nature, structure and changes that have taken place in retailing over recent years, but most attention focuses on the development of integrated chains, especially their international spread and increasing market domination in many sectors.<sup>36</sup> Researchers have given much less attention to the role of independent retailer groups and their impact on, and equally how they have been impacted by, developments in retailing. This is most apparent regarding European developments in

<sup>36</sup> For an historical perspective, see Paul Ellickson, “The Evolution of the Supermarket Industry: From A&P to Wal-Mart” in Emek Basker (ed.) *the Handbook on the Economics of Retailing and Distribution*, Chapter 15, pp. 368-391, 2016; Andrew Seth and Geoffrey Randall, *The Grocers: The Rise and Rise of Supermarket Chains* (Kogan Page), Third Edition, 2011. On the impact of online retailing on physical store retailing, see Rajiv Lal, Jose Alvarez, and Dan Greenberg, *Retail Revolution: Will Your Brick & Mortar Store Survive?* (Rajiv Lal), 2014. On the rise of discount retailers, see Rune Jacobsen, Gavin Parker, Thomas Jensen, Jeroen Magnus, Holger Gottstein, Markus Hepp, and Bill Urda, “How Discounters Are Remaking the Grocery Industry” (Boston Consulting Group), April 2017. On competition policy treatment, see Pierre Kobel, Pranvera Këllezi and Bruce Kilpatrick (eds.), *Antitrust in the Groceries Sector & Liability Issues in Relation to Corporate Social Responsibility* (LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition), 2016.

general, beyond national level studies.<sup>37</sup> The result is a lack of empirically gathered information and analysis on the role of independent retailers groups, the different forms that they take, the nature of their arrangements, and the impact of competition policy and legal restrictions facing these groups across Europe as a whole.

- 4.2 To provide informed insights on the actual nature and role of independent retailer groups, while building on the retail organisation classifications and conceptual perspectives provided in the previous section, this section sets out the information gathered through a survey of a wide array of such groups, operating in different markets, and in different countries. The source of the information is from a questionnaire study of members of Independent Retail Europe (IRE), as the pan-European association that acts as an umbrella association for the main independent retailer groups in the food and non-food sectors. The questionnaire and full details of the analysis of responses are respectively contained in Appendices A and B at the end of this report. This section of the report draws on the findings of the questionnaire study, along with interviews conducted with individual groups, to provide insights on the organisational structure and composition of groups, behaviour and practices used by the groups, and the key issues and challenges facing groups.

## **4.B Questionnaire study information**

- 4.3 The questionnaire study serves as the key means in gathering primary-sourced data from a wide selection of retailer groups, both large and small. The resulting information is important to the overall economic study because it provides direct evidence from a broad spectrum of different independent retailer groups for their views and information on the central aspects of developments in retail markets, the competitive context in which their organisations operate, and the legal and policy challenges that their groups and members face in striving to be competitive and efficient. In total, thirty-six organisations agreed to participate in the survey and duly provided completed responses to the questionnaire.
- 4.4 The questionnaire employed for the study has forty questions divided into four parts with the intention to build up a fully representative picture of how independent retailer groups

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<sup>37</sup> For example, see EY, *The economic impact of modern retail on choice and innovation in the EU food sector* (European Commission), 2014, which provides a very detailed analysis of the EU grocery sector but does not assess or comment on the role and contribution of independent retailer groups.



function, the market circumstances they face, how they have been performing, the kinds of contractual agreements and arrangements they employ or would like to employ, and how regulations, public policy and legal restrictions affect their groups and membership in terms of impacting efficiency and competitiveness and what the groups would like and need to see changed. (See Appendix A for the full questionnaire).

- 4.5 With thirty-six respondent organisations participating in the survey and potentially providing information on all forty questions then there are potentially 1,440 responses to analyse across these different subjects and issues.
- 4.6 The first part of the questionnaire covers background information about the respondent's organisation and relationship with retail members, to help understand the diversity of different groups in respect of their history, purpose, primary roles, their direct or indirect representation of independent retailers, how their organisation is governed, owned and managed, and how the group and its relationship with retail members is distinguished from an integrated retailer organisation or franchising organisation.
- 4.7 The second part of the questionnaire covers details about independent retailer membership and performance, including how retailer members are represented and their combined turnover, the process by which retailers become members and the scale and frequency of gaining or losing members, the proportion of retail members operating single outlets, the types of goods sold, how internet sales are managed, the performance over the last decade on combined retailer sales turnover, profit and market share and key drivers of change, and how recent business developments and regulatory/legal requirements could affect the ability to compete on effective terms.
- 4.8 The third part of the questionnaire asks respondents about contractual agreements and arrangements used by groups, including obligations placed on independent retailer members, the services and terms of trade that groups are unable to provide because of the organisation's structure and legal impediments, the additional costs and loss of benefits for members if they were not part of the group, and the advantages that other retail organisational forms have over independent retailer groups.
- 4.9 The fourth and final part of the questionnaire concerns policy, regulation and legal developments and is split into two sections, with the first about national policy issue and the second about EU-level policy matters, covering the ways in which groups and their members

are impacted by current policy and what they would like to see changed to improve efficiency and competitiveness for their groups as well provide benefits to their membership and end-consumers.

- 4.10 Appendix B attached to this report provides a full and comprehensive review and analysis of the responses to the questionnaire study. The questions focus on gathering qualitative information but there are some questions that provide quantitative information. For those questions relating to quantitative information, mostly about the background to the organisations, then this information has been used to draw comparisons and highlight the spectrum and broad cross-section of the different organisations that have participated in the questionnaire survey. The responses to the questions providing qualitative information are summarised, categorised and tabulated to provide succinct summaries. In reporting the findings, tables are used to summarise the information in a condensed form for each element of the questionnaire, along with providing brief commentaries on each accompanying table.
- 4.11 The sample of firms surveyed was a suitably broad, with some groups established for more than a hundred years and others more recently formed. There was also a mix of small and large organisations in terms of membership numbers and sales turnover. In addition, there was a mix of types of organisation and with different core business purposes relating to their primary functions and roles and different ownership, decision-making and governance structures. There was also a broad span of food and non-food retail and related sectors covered.
- 4.12 This section of the report provides an overview of the findings from the survey on the nature, structure, ownership and organisational relationships of the groups, along with their market position, competitiveness, and the key issues they face in respect of national and EU policy.

#### **4.C Organizational structure and composition of groups**

- 4.13 The structure, functioning and organisation of the groups surveyed varied according to their history, market and legal context, and purpose.
- 4.14 In terms of ownership, most groups are owned by their members or by associates. For example, independent retailer members might own their central organisation (i.e. the

central office function) or at least act as direct majority shareholders and members of the organisation. At a different vertical level, though, it could be wholesale cooperatives owning their central organisation. Additionally, the groups surveyed covered other ownership arrangements including stock corporations, trade associations with no commercial links between members, and vertical chain operating systems. In general, most groups displayed elements of a mixed structure of horizontal and vertical arrangements and agreements.

- 4.15 For most cases, the central organisation is managed by an executive board or management aided by an advisory council. Some groups have a permanent secretary, while others have decisions taken in working groups. Most groups have permanent staff or management staff dealing with the day-to-day operations of the organisation, generally indicative of the independent retailer group taking on more roles than joint purchasing. For example, these roles may cover joint marketing activities, management of logistics and providing other services to members, including brand representation of retail outlets (such as sharing a common fascia as a standard trading name).

#### **4.D Contractual agreements and arrangements used by groups**

- 4.16 The questionnaire survey reveals that coordination between the groups and individual retailer members represented takes place in various ways besides explicit contractual agreements, as explained in the previous section. These include voluntary service offers and informal agreements based on trust. The service offers extend beyond trading goods to include the transfer of know-how, information services, lobbying, training and other business support.
- 4.17 For groups that use contractual arrangements between themselves and their independent retailer members, the nature and content of the contracts vary, ranging from supply and price negotiation agreements to various branding, marketing and store layout agreements. Arrangements also cover joint purchasing requirements (for efficiencies), retaining control rights over store location (to manage future store network planning), and brand licensing agreements (for a common image and protecting intellectual property).
- 4.18 Groups use price recommendations, but these can entail suggested schedules and menus of price points rather than a single specific suggested price for a specific product. Nearly all price recommendations relate to suggested prices or maximum resale prices. Some groups limit price agreements or recommendations only to certain brands (e.g. private label or

exclusively supplied branded goods) or promotion goods (where some control is needed to ensure a consistent retail image across the group and ensure that consumers obtain the advantages of low prices for key products), or only applied to selected retailers (for the purpose of common retail branding). However, groups were frustrated that they could not require uniform retail prices across the store network in the form of fixed prices, particularly for price promoted goods where the groups felt that the assurance of consistency and clarity of the price offer across stores would help with advertising and benefit consumers. Similarly, there was frustration that joint advertising could not be required to support common marketing and price positioning for a consistent retail brand image beyond specific short-term promotions.

- 4.19 The majority of contracts appear to be mainly vertical in nature, between a central office function and independent retailer members, and not between individual retailer members (as a horizontal arrangement). However, retailer cooperatives through their nature tend to be member controlled, so the horizontal nature of agreements takes on greater significance than in wholesaler-led vertical chains, where vertical agreements are central to the group arrangements.
- 4.20 For most groups surveyed, it is not a condition of membership that all independent retailers have to adhere to all agreements. In practice, agreements appear to be a mix of voluntary agreements and binding contracts. Among the mandatory agreements, the most common appear to relate to promotions and advertising, followed by store operations (including store layout, staff training, and branding), and then exclusive purchasing and minimum purchasing (non-compete) obligations, along with instances of exclusive and selective distribution.
- 4.21 The purpose of the agreements mostly relate to securing cost savings that help support the competitiveness of the business. The cost savings result from economics of scale in purchasing, logistics and marketing, which are then passed on to the consumer in the form of lower prices and a larger choice of products. The agreements, and the cost savings they create, are considered to be necessary for independent retailers to compete against the often much larger integrated chains and other organisational forms they face in their retail sectors, including franchise operations and consumer cooperatives. The agreements allow independent retailers to survive and prosper, thereby contributing to sustaining competition in markets and offering retail choice to consumers. In addition to cost savings, other

benefits from the agreements achieving a well-recognised retail brand and unified store image through joint marketing and branding requirements and maintaining a strong price image when retailers adopt common pricing and dissuaded or prevented from setting unduly high prices.

- 4.22 Obligations to purchase jointly provide a means to ensure that the groups receive the lowest prices from suppliers, so viewed as indispensable to ensure efficiency and competitiveness whereby independent retailers can pool their resources and bargaining power in order to be able to compete effectively against integrated chains. Similarly, agreements over store fascia and retail branding under a common logo were deemed necessary for the existence of same-branded retail operations and maintaining a consistent and clear retail image for the benefit of consumers.
- 4.23 Without the agreements, groups foresaw that their retail members would suffer from increased costs and higher purchase prices. The estimates of these higher costs broadly ranged from 5% to 20% extra depending on the organisation, relating primarily to higher purchase prices, fixed costs of negotiation, lower economies of scale, inefficient logistics, additional warehousing costs, reduced product range, higher marketing costs, additional administration costs, loss of central invoicing, and loss of efficiency in developing an online presence.
- 4.24 In the absence of an independent retailer group to provide these benefits to retailers, the expected impact of consumers would be reduced choice of products and higher prices, along with a long-term decline in the number of independent retailers, all to the detriment of consumers. Any exit of retail outlets would be likely to harm particular communities badly, especially in rural areas where retail choice is already limited.

#### **4.E Key challenges facing groups**

- 4.25 Independent retailer groups compete on service, product choice and prices. Competitors are other retailers in general, but most significantly integrated retailers, whether joint stock companies or consumer cooperatives, or franchise systems. Survey respondents indicated that their independent retailer members are at a competitive disadvantage because of perceived restrictions on contractual arrangements within the groups that inhibit their ability to compete effectively in terms of the economies of scale, coordination and marketing consistency enjoyed by other retail organisations.

- 4.26 The respondents report a mixed performance over the last decade with some growing, some declining, some fluctuating, and yet others stable. However, the perception is that their competitive disadvantage in the new retail environment is restricting their performance and ability to respond rapidly in changing competitive situations. In particular, the groups feel that they have less control than integrated groups on product assortment, pricing and advertising, all of which are vital in highly competitive environments. In addition, they feel they suffer cost inefficiency compared to integrated chains, especially in purchasing but also in higher personnel costs with less ability to balance staff requirements.
- 4.27 Concern about competitive disadvantage is felt most strongly in relation to online retailing, where independent retailer groups consider that legal impediments to using consistent pricing and marketing and their inability to coordinate fully internet sales through a single centralised online operation is a serious competitive impediment. Instead, independent retailer groups are often using less efficient decentralised internet sales arrangements, which suffer from a lack of coordination, a lack of consistency in branding, and inefficiency in terms of supply arrangements for consumers. In contrast, without the same contractual and legal impediments, integrated retailers have been able to adopt more efficient centralised online retailing and greater coordination for developing strong multichannel retail operations.

#### **4.F National and EU policy issues**

- 4.28 Respondents identified several practices which are currently prohibited but which should, in their view, be allowed to enhance their competitiveness. These prohibited practices along with other restrictions were attributed to national policy and EU policy.
- 4.29 In regard to national policy, the key impediments are viewed as undue bureaucracy (e.g. labour laws, price controls, waste controls, and recycling requirements), planning policy (for new stores or extensions), restrictions on opening hours (which limited trade), and energy policy (including renewable energy levies driving up retailer costs and waste disposal regulations creating unfair advantages to online retailers who avoid such requirements). The main competition policy restrictions concern prohibiting or limiting common prices, resale price maintenance, joint marketing, joint supply obligations, selective distribution and exclusive distribution.

- 4.30 National decisions relevant to retailing include the restrictive policy treatment towards horizontal and vertical restraints, market definition, cooperatives, and planning.
- 4.31 At the EU level, policy concerns relate to vertical restraints policy, EU policy dictating national policy, bureaucracy (excessive regulations and legal requirements), the internal market (labelling requirement differences still persisting across the EU and inability to promote nationality), and tax policy (allowing the migration of companies to tax havens and using transfer pricing to move profits out of the EU).
- 4.32 The most desired EU policy changes are to allow common pricing and resale price maintenance for promotion goods (and so allow them to compete on the same footing as integrated chains), have equal treatment in law for independent retailer groups and integrated chains, harmonise taxes across the EU, support cross-border trade, avoid regulating distribution, and to uphold contract freedom.
- 4.33 The respondents' views on what constitutes the necessary minimum (i.e. least restrictive) arrangements to ensure that independent retailer groups are treated fairly and equitably in EU law to support their competitiveness are to allow common prices and maximum resale price maintenance, curtail bureaucracy, allow exclusive purchasing obligations and support equality of treatment for their organisations compared to other retail forms.
- 4.34 Respondents are concerned about possible future challenges in respect of the groups using exclusive purchasing, maximum resale price maintenance, price standardisation, joint marketing, and sourcing cooperation.
- 4.35 Looking forwards in time, respondents see a particular need for EU policy to (i) address the unequal treatment of physical and online retailers, (ii) recognise the growing threat from large-scale online food retailers undermining viability of rural retailers and reducing the efficiency of urban retailers, (iii) tackle food chain policy and the crisis in farming with support for the Supply Chain Initiative,<sup>38</sup> (iv) deal with the legal uncertainty over maximum retail prices, (v) permit consistent pricing and promotions across channels, (vi) ensure appropriate regulation of payment terms, (vi) ensure that market definition and share

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<sup>38</sup> The Supply Chain Initiative (SCI) is a joint initiative launched by several EU level associations to promote fair business practices in the food supply chain as a basis for commercial dealings and intended to benefit all players in the food supply chain. See <http://www.supplychaininitiative.eu/>.

thresholds are not arbitrary but relevant to the market context, and (vii) consider the need for a law against unfair trading practices.

- 4.36 More generally, respondents take the view that present regulations and policy guidance do not give sufficient weight to the economic reality facing independent retailers, appearing to hamper rather than assist their ability to compete on effective terms with integrated retailers. Independent retailers and their groups appear to be discriminated against because of their organisational and ownership form, and not because of their competitive behaviour and their impact on the markets that they serve.
- 4.37 As a consequence of present regulations, restrictions and prohibitions, groups note that there are a range of services that they are unable to offer their members and so detrimentally affect their members (and consumers as well) in particular ways. Three are most commonly cited. First, there is a need to allow independent retailer groups to offer common prices to consumers (which otherwise may harm the consistency of the retail offer and make it more difficult for independent retailers to compete with integrated chains, to the detriment of consumers). Second, there is a need to allow for purchase obligations (and so be able to negotiate the best possible terms with suppliers for the benefit of retail members and consumers). Third, there is a need to allow retailer groups to strengthen joint online presence either by group members conducting sales directly and jointly or via an online platform set by the central office with fulfilment handled by group members.

#### **4.G Costs and benefits of retailer independence**

- 4.38 Given the challenging market and legal and regulatory restrictions facing independent retailers groups, favouring integrated retailers and business format franchising, it is reasonable to ask why independent retailer members wish to remain as independents. The most frequently listed reasons by respondents are independence, freedom, entrepreneurship drive, individuality, autonomy and supporting tradition. In essence, independence is seen as a value in itself. Reasons relating to tradition as well as cultural and community drivers are also seen as important.
- 4.39 By contrast, respondents view the advantages of other retail forms, notably integrated retailers, through the freedom and absence of legal restrictions they enjoy in respect of being able more easily and freely to control promotions, brand image, pricing, internal integration, product quality, financing, and supply efficiencies.



- 4.40 Despite the advantages listed above, most independent retailer groups indicate the greatest problem they face is not in terms of single-owned integrated chains being inherently more efficient (as they could achieve the same benefits if permitted the same legal freedom), rather it is restrictions and regulations that hamper their own efficiency and competitive ability. If permitted greater freedom and flexibility in the services and agreements they could operate then respondents feel that they would be more efficient operators and be better able to compete with and challenge the positions of integrated retailers and other retail forms, and so serve consumers better through improved service quality, greater choice and lower prices.
- 4.41 In the absence of a policy change, respondents are concerned about the ability to continue to compete so effectively, especially as retailing shifts towards online buying and the greater use and integration of technology in retailing operations and its influence over consumer purchasing and spending decisions.

## 5. CONCLUSIONS AND POLICY RECOMMENDATIONS

*This section draws conclusions from the study and makes policy recommendations, stressing the need for a level playing field for different retail business forms to support effective competition and efficiency in the new retail era. This will help ensure that independent retailer groups receive a more appropriate legal treatment compared to the current treatment, which is impeding their efficiency and competitiveness, especially in respect of online retailing. The section outlines specific policy recommendations, taking account of the rapid developments happening in retailing and the need to maintain and promote effective competition through policy that supports rather than inhibits the efficiency of independent retailer groups.*

### 5.A Need for a level playing field

- 5.1 Retailing in the European Union is currently going through significant changes driven by new technology and changing shopping patterns. These changes are happening on a global scale, so not limited to the EU, in what is termed the New Retail era. This new era offers consumers the promise of omnichannel retailing with a seamless shopping experience whether shopping online from a desktop or mobile device, by telephone, or in a physical (bricks and mortar) store. These developments are driven by new technology pushing forwards online retailing, multichannel retailing, increased use of Big Data, and the emergence of artificial intelligence and machine learning in selling services and providing customer information.
- 5.2 Competing in this new retail era requires making substantial investments in these technological developments and organising retail operations so they provide a seamless shopping experience for consumers. There is the opportunity for all different types and forms of retail organisations to participate in this retailing revolution. However, existing competition policy rules and guidance are deterring independent retailer groups from making the necessary investments to extend their retail operations particularly in respect of developing online and mobile device retailing.
- 5.3 In particular, independent retailer groups face considerable legal uncertainty in the extent to which they can undertake practices through close collaboration, communication, joint commercialisation and control across their store networks linking in with online retail operations to provide the necessary seamless shopping experience for the benefit of

consumers. Integrated retailers do not face these legal issues because their store network is under single ownership rather than retail member owned.

- 5.4 At the heart of the problem is the failure of EC competition policy rules and guidance to recognise that independent retailer groups are unified/cohesive systems tied by relationships instead of common ownership and are not merely as “associations” operating as some nexus of restrictive agreements that are inherently anti-competitive until can be proven otherwise.
- 5.5 Specifically, EC competition policy rules and guidance fail to distinguish adequately between intra-organisational competition and inter-organisational competition. Consequently, there is a failure to give due recognition to the intrinsic nature of “co-opetition” in the former (i.e. relationships that involve a combination of cooperation and competition but where there is a single overarching organisational purpose and direction), while seeing the difference with intrinsic direct competition in the latter when different organisations having opposing purposes and conflicting intents. Ultimately, the competitiveness of markets depends on inter-organisational competition but to achieve this then there needs to be acceptance about the benefits of coordination and unity within unified/cohesive systems to help advance competitiveness and so stimulate greater competition between rival organisations.
- 5.6 In other words, a competition policy that primarily focuses on protecting competition between members of independent retailer groups (where active in the same relevant retail market) risks precluding such groups from business practices necessary to remain competitive in the new retail era when the greater issue is *inter-group* competition in retail markets.
- 5.7 If policymakers and regulators wish to see effective competition prevail in retail markets then they need to understand better how different types of retail organisations work and operate so policy can be designed and implemented to ensure that different business forms are not subject to discriminatory and unfair policy treatment.
- 5.8 Fair competition requires a level playing field. With fair competition and respect for the benefits that come from having business form diversity then there is every opportunity to ensure that the future of European retailing will be competitive, dynamic and progressive for the greater good of European consumers.

- 5.9 Unfortunately, the interpretation and application of existing EU competition law is hindering the organisational effectiveness of independent retailer groups – either directly by limiting the extent of arrangements or indirectly by causing legal uncertainty as to whether related practices will or will not be allowed. The current framework of legal treatment for independent retailer groups according to their horizontal (i.e. co-operative) and vertical (i.e. trading) nature is therefore retarding the efficiency and competitive ability of independent retailers, and thereby hindering the competitive process as a whole.
- 5.10 Importantly, this report's call for ending or at least limiting such policy discrimination is not about protecting competitors, but rather about protecting competition by ensuring a more even playing field that provides greater opportunity for competition to operate in a manner that can best ensure that consumers are well served by retail markets.
- 5.11 What is required is a suitable change in policy treatment based on recognition of the ways in which current policy application is acting to discriminate against such organisations and undermine their competitive ability. To be clear, this does not entail action intended to provide independent retailers with undue favourable treatment, allowing them to gain an unfair advantage over integrated chains. Rather, it is concerned with redressing the current imbalance in respective treatment and allowable practices by integrated chains compared to independent retailers operating as members of a buying, marketing or retail chain group.

## **5.B Specific policy measures**

- 5.12 The evidence and analysis gathered in this report shows key areas requiring areas requiring policy attention. This is in both the respect of ending policy discrimination (vis-à-vis the freedom enjoyed by integrated retailers) that serves against consumers by preventing behaviour and agreements that if permitted would be in their interests, and in clarifying the market circumstances and conditions where practices (and their precise form) should be allowed (given the present legal uncertainty facing most independent retailer groups).
- 5.13 As a starting point, EC competition policy rules and guidance on horizontal and vertical agreements need to make an appropriate and clear distinction between *inter-* and *intra-*organisational relationships. Existing EC policy is geared towards considering anti-competitive agreements between different organisations, but without distinction applies the same reasoning and analysis to agreements inside those organisations where the parts are

not integrated by common ownership. This has a particular bearing on independent retailer groups because their operations are treated as merely contracting relationships between separate legal parties, when in fact they are about operations in a unified and cohesive system that are integral to the organisation. The overlooked point is that independent retailer groups are organisations, not “associations”, where the parties involved in the unified/cohesive system work to the same ends, projecting the same goals, having the same values, and wanting the same successes. This does not make them integrated single firms (like a corporate retail chain) but still means that the parties in the group function within a broad hybrid organisational structure that is fundamentally different as to how “external” trade works, between completely separate organisations.

- 5.14 The consequence of not making an adequate distinction between inter- and intra-organisational relationships is that there are longstanding issues arising from the interpretation and policy guidance affecting independent retailer group which typically entail a mixed structure of vertical and horizontal relationships. The next review of EC competition policy rules and guidance on vertical and horizontal agreements needs to address the distinction between inter- and intra- organisational relationships, and identity appropriate treatment and clarity on the competition rules for independent retailer groups and other hybrid types of organisations caught in the same situation.
- 5.15 As highlighted in Sections 1 and 4, and detailed in Appendix D, there are a series of longstanding issues over policy restrictions and rules that are impeding independent retailer groups and undermining effective and fair retail competition. In particular, European competition policy rules and guidance need reviewing and amending in respect of the following five key aspects impeding the efficiency and competitiveness of independent retailer groups:
- i. Discriminatory legal treatment in regard to permitted vertical and horizontal control (which favour integrated retailer chains over independent retailer chains)
  - ii. Duration and percentage share limits to pro-competitive agreements on joint purchasing and joint marketing
  - iii. Legal uncertainty hanging over existing trading, supply and distribution arrangements
  - iv. Arbitrary market share thresholds used in European Commission (EC) rules and guidance on vertical and horizontal agreements

- v. Continuing scepticism and distrust towards common pricing and resale price maintenance (RPM) despite clear economic benefits in the context of use within independent retailer groups

5.16 The chief focus of this report, though, is on competition policy shortcomings that have come to the fore more recently, and especially with the emergence on the New Retail era. Specifically, the rapid changes currently taking place in the retailer sector mean that there are three urgent matters where independent retailer groups now need clear policy guidance and support:

- I. Coordinated multichannel retailing: With the rapid growth of online retailing, and especially as online grocery sales take off, competition rules need to allow independent retailer groups the freedom to develop centralised online and coordinated multichannel retail operations. Competition rules should allow independent retailer groups to have the facility to centralise pricing and sales data handling to ensure that the multichannel (online) system is suitably coordinated to support a smooth and seamless retail operation for consumers. The alternative of an uncoordinated decentralised online operation entails considerable inefficiencies and represents a poor substitute to the coordinated online operations of integrated retailers and retail tech giants.
- II. Selective distribution: With the rapid growth of multichannel retailing (online and in store) there is now a greater need for clarifying rules surrounding selective distribution to ensure that physical stores remain competitive with online stores and that competition is fair.<sup>39</sup>
- III. Franchising rules: With the uncertainty over franchising rules, clarification is needed for independent retailer groups' contractual relationships to ensure that wholesaler-retailer franchise relationships (like in symbol groups) are not subject to franchising rules designed to regulate business-format franchises and manufacturer-dealer franchises.<sup>40</sup>

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<sup>39</sup> See Section 2D on the need for clarification on the rules for selective distribution in this context.

<sup>40</sup> See Section 3C on the differences between independent retailer groups and franchise systems, where both entail a coherent and unified organisation system but are fundamentally different in the manner of their control, how membership/contracts work, and the alignment of interests.

- 5.17 The first of these three matters is the most pressing and the most substantial concern, as articulated throughout this report because it is intrinsic to omnichannel retailing in the New Retail era. If not quickly addressed then the result could be fundamental harm to the competitiveness of retail markets. Specifically, competition policy needs to allow, rather than prevent and deny, independent retailer groups the opportunity to develop efficient and competitive online and omnichannel retail systems which can compete effectively with integrated retailers and retail tech giants, and so help avoid the risk of monopolisation in tippy retail markets.
- 5.18 To move forward with confidence in making appropriate investments in online and omnichannel retail operations, independent retailer groups urgently need clarity over EC competition policy rules and guidance in relation to online sales and multichannel retailing and consider legislating if/where the existing rules are deemed insufficient to address the concerns identified in this report. In doing so, there should be consideration of existing national legislation that provides such clarity for independent retail groups – for example, the French Commercial Code on retailer cooperatives’ permitted activities illustrated in Appendix C.
- 5.19 For independent retailer groups, the greatest urgency for clarity on competition rules that would better support competition in multichannel retailing concerns how these groups are allowed to market and price their goods and services to consumers in respect of the needed use of three practices:
- (1) Joint commercialisation and information sharing for efficient and effective pricing and promotion
  - (2) Maximum resale price maintenance (maximum RPM) to guarantee fairness to consumers through capped prices
  - (3) Common prices online and generally where necessary to ensure clarity, consistency and fairness in the retail offer to consumers
- (1) Joint commercialisation and information sharing for efficiency and effectiveness***
- 5.20 Having a clear and consistent pricing and promotion strategy is the single most important element in the means by which retailers compete against each other for the patronage of consumers. This is particularly so if they are selling generally the same goods and offering comparable retail services, especially when selling online where consumers actively search for the best prices. In these circumstances, it is crucial for a group of retailers to be

competitive on prices that are indicative of the overall value-for-money offer being presented to consumers. This is most apparent in respect of prices in the following three respects:

- prices used in advertising campaigns (which reflect the overall group image)
- prices on products in the stores' basic assortment (like "known value items" which often drive stores' footfall by influencing which stores shoppers will choose to visit)
- prices for private labels (as these directly relate to the group's image, brand positioning and point of distinction from the products offered by rival groups)

5.21 In regard to setting prices in these three respects, there is a compelling case that independent retailer groups should be allowed to exercise suitable control over retail pricing if they are to be truly effective retail operators and provide consumers with the maximum level of benefits that can be achieved. In particular, allowing central control of pricing in such specific instances is justifiable for the sake of delivering a clear, consistent and unified offer to consumers that will be beneficial to shoppers and pro-competitive. Furthermore, by controlling prices only for these specific circumstances then there will still be sufficient freedom for independent retailer members to set their own prices elsewhere, so safeguarding intra-group and intra-brand competition if this is otherwise a competition concern.

5.22 Central to the need by an independent retailer group in coordinating online and offline retail operations, there necessarily has to be an efficient and effective exchange of sales information across the group along with information on pricing and adherence to joint marketing and prescribed product ranges to facilitate joint commercialisation. This information exchange is crucial for the efficiency of logistics, stock replenishment and supply operations along with assuring local product availability for the benefit of consumers. This information exchange is also vital in enabling the group to respond quickly to changing market circumstances and competitive moves by rival retail organisations to initiate price changes and other marketing responses to ensure competitiveness.

5.23 Accordingly, it is essential that independent retailer groups have clear competition policy guidance on permissible forms of information exchange that recognise and support joint commercialisation activities that promote efficiency and competitiveness and so help maintain competitive retail markets and work to the advantage of consumers.

***(2) Maximum RPM to guarantee fairness to consumers through capped prices***



- 5.24 The ability of independent retailer groups to require retail members to adhere to maximum resale prices can benefit consumers and be pro-competitive when they serve to suppress prices and ensure that any localised market power is not abused which otherwise would hurt the organisation overall by reducing sales. This comes down to identifying the true purpose of setting maximum resale prices when it helps promote competition. This is most evidently the case when applied to specific types of products and specific circumstances, notably advertised items, price promotions, loss-leaders, basis assortment goods, and private label goods. In these cases, restrictions on raising prices through maximum RPM have the most direct and beneficial effect for the group in promoting its competitive position with rival retail groups for the greater benefit of consumers.
- 5.25 If it is clear that the purpose of price ceilings is to limit prices, and not as a means to coordinate high prices by the notified levels acting as focal prices, then it seems reasonable to allow maximum resale price obligations.
- 5.26 There is good reason that this should apply even in situations where the market share is significantly in excess of the arbitrary 30% market share threshold specified in the EC's guidance on vertical agreements. Indeed, in cases where there are very high market share levels in retail markets, the practice may be a very useful way of preventing individual retailer members from exploiting local market power. For example, maximum RPM can be a very effective and direct tool to ensure fair pricing when local competition is absent or weak (e.g. in remote rural areas or socially deprived urban areas, especially as low-income consumers in these areas may be particularly harmed by high prices).
- 5.27 Accordingly, there is a clear need for competition policy guidance that recognises the benefits of intra-group RPM that creates price ceilings suiting the retail image of the independent retail group yet still gives local retail entrepreneur members flexibility to discount prices as they consider appropriate for their own local circumstances.

***(3) Common prices to ensure clarity, consistency and fairness in the retail offer to consumers***

- 5.28 While maximum RPM has general merit for independent retailer groups, independent retailer groups may also have a need for common fixed prices. In this regard, there is a need for competition policy to make a sensible judgement over situations where common fixed prices (whether set horizontally as common prices across retail members or operated through vertically-controlled RPM) are just a promotional tool as opposed to an anti-

competitive collusive arrangement. The former is much more likely to take precedence over worries about the latter in the following five circumstances:

- (i) the products with common fixed prices are limited in number
- (ii) the duration of the agreement is short term (e.g. a two-week promotion)
- (iii) the fixed prices relate a manufacturer sponsored price promotion (such as a discount on a newly introduced or amended product to encourage consumer trial)
- (iv) the fixed prices apply to a price promotion helping to develop the price image of the group and intended to build consumer demand
- (v) the group faces effective competition from rival retail groups

5.29 In particular, it would be helpful if competition policy guidance gave clear recognition that the emergence of multichannel retailing has brought the need for common prices across retail modes to the fore. With consumers no longer limited to shopping at specific stores in a given locality, but able to buy goods nationally or even internationally, then the need for joint commercialisation becomes ever more essential for effective multichannel retail operations. In particular, common prices can be required to sustain new modes of retailing and service provision that have clear consumer benefits.

5.30 Whether independent retailer groups choose to develop online operations to complement their physical store network through a centralised or decentralised online operation then they benefit from having a clear and consistent retail offer that matches up across their online operations. This clarity and consistency helps the consumer make effective purchasing choices and helps promote competition across retail organisations by making prices transparent to facilitate consumer search and assist consumers in making purchases that offer the best value for money to suit their needs and convenience. Competition policy guidance needs to recognise and support the benefits of common prices in these circumstances.

### ***Consumer welfare***

5.31 The New Retail era promises the consumer the ultimate convenience of shopping flexibility to buy *anything, anywhere, anytime*. To deliver on this promise requires very substantial investment by retailer organisations, ideally supported by an assurance that policymakers will regulate the playing field to allow them to compete fairly with each other and not be disadvantaged by policy rules that unreasonably discriminate against some retail chains merely because of their ownership and control structure.

5.32 From a competition policy perspective applicable to European retailing, there has never been a more important time to establish a level playing field between different retail business forms as the retail technology revolution unfolds. Unless policy action is taken soon to level the playing field then competition will be distorted in favour of the leading integrated retailers and the retail technology giants, inevitably concentrating retail markets and reducing consumer choice with independent retailer groups hindered by outmoded and flawed policy rules. Instead, if permitted greater flexibility in how they conduct their retail business operations then independent retailer groups would be better able to take advantage of new retail technology to compete on more equal terms, and so stimulate greater competition and provide more choice and value for consumers.

# **APPENDICES**

## APPENDIX A

### Questionnaire on behalf of Independent Retail Europe for study by Professor Paul Dobson

#### **Contact details**

Organisation name:

Your name (and position):

Address:

Email:

Telephone number:

#### **1 Background information about your organisation and relationships with retail members**

1.1 In what year was your organisation with its present name and structure formed?

1.2 Can your organisation be traced back to an earlier start date with a different name or structure? If so, what was the year when the earliest form of the organisation was created?

1.3 What term or phrase best describes the nature of your organisation (e.g. independent retailer group, voluntary membership group, retail cooperative, franchise association, etc)?

1.4 What is the purpose of your organisation?

1.5 What are the primary roles that your organisation undertakes? Please list your five most important functions.

1.6 Does your organisation directly represent independent retailer members or indirectly through other intermediary associations? If the latter, how are these member associations organised (e.g. geographically or by retailer type)?

1.7 How is your organisation governed in respect of its relationships with intermediary association members (if you have any) through to individual retailer members?

1.8 Who owns your organisation e.g. a co-operative, holding agency, owned by individual retailer members, wholesaler, etc?

1.9 How is the central office managed and how are decisions taken by your organisation?

1.10 What distinguishes your organisation and its relationship with retail members from (i) an (horizontally and vertically) integrated retailer organisation or (ii) franchising organisation?

#### **2. Independent retailer membership and performance**

2.1 How many independent retailer members does your organisation directly or indirectly represent and what is their combined turnover (i.e. total sales revenue)?

2.2 Do you ever gain or lose retail members from or to a rival organisation? If so, on what scale and frequency?

2.3 How does your organisation or member organisations define “independent retailer”?

2.4 What is the process by which independent retailers can become members? What, if any, are the fees or costs for membership (e.g. a joining fee, annual membership fee, individual service fees) and do the fees vary according to services provided or volume of trade?

2.5 What proportion (%) of your retail members operate single outlets (as opposed to multiple outlets)?

2.6 What types of goods do your independent retail members sell (e.g. grocery, sports, electronics, white goods, etc) and, if multiple product types, in what proportion?

2.7 How are Internet sales managed by the organisation and its membership (e.g. centralised or left to individual retail members to create and run their own websites)?

2.8 Over the last decade has the combined turnover, profit and market share of your retail members increased or decreased (and by how much)? What has been the key driver of this change in combined turnover, profit and market share (e.g. change in membership, change in strength of existing competitors, or emergence of new competition)?

2.9 In what ways, if any, are your retail members impeded by regulatory or legal requirements in competing on effective terms with other forms of retailers (e.g. integrated retailers or franchised retailers)? Are these impediments avoidable (e.g. with a different organisational structure)?

2.10 How have recent business developments such as the growth of online platforms (eBay/Amazon etc.) and regulatory concerns over selective distribution affected your ability to compete?

### 3. Contractual agreements and arrangements

3.1 In respect of the following contractual obligations on independent retailer members, which ones do your organisation/associations use, to what extent are they used, what product coverage applies, and for what reason are they used (i.e. intended benefits to the organisation, retailer members and final consumers):

Retail member obligations	Usage (always, sometimes or never?)	Coverage (all/some/n o products?)	Reason for use
Exclusive purchasing			
Minimum proportion purchasing			
Exclusive territories			
Selective distribution			
Fixed retail prices			

Minimum retail prices			
Maximum retail prices			
Prices set within suggested range			
Common prices for price promotions			
Common prices for Internet retailing			
Promotion and advertising requirements			
Non-compete with centralised Internet sales			
Required purchasing of set product lines			
Full-line forcing (i.e. have to sell all products)			
Use specified logistics provider			
Use specified store service provider (e.g. for maintenance, cleaning, storage servicing)			
Use specified staff training			
Store name and store branding requirements			
Store layout and planogram requirements			
Others (please specify)			

3.2 To what extent are these obligations necessary for the sake of conducting business on an efficient basis? Are there less restrictive alternatives available (please specify)?

3.3 What services or terms of trade are you unable to provide to your independent retailer members because of (a) the organisation's present structure and remit, and (b) legal impediments or regulations?

3.4 What additional costs (and on what scale) would be incurred by independent retailer members if they were not members of your organisation? (For example, fixed costs of negotiation, higher purchase prices, or lower economies of scale. Please indicate the percentage increase in costs that independent retailer members would typically face if they stopped being members of your organisation for given alternatives).

3.5 Why do your independent retailer members wish to remain as independent and not be part of a (horizontally and vertically) integrated retail organisation or franchise organisation?

3.6 What advantages do integrated firms, franchise system or other retail organisational structures have that your members do not have? Why is this the case?

## 4 Policy issues

### **National policy**

4.1 In what demonstrable ways does national or federal/regional competition policy impact and impede your organisation and independent retailer members?

4.2 Have there been any national decisions (directly or indirectly) relevant to the retailing sector served by your members in respect of market definition, permitted/prohibited practices, and/or mergers that are influencing the business practices and contractual arrangements for your organisation and membership?

4.3 What aspects of current national competition authority policy are giving your organisation and membership most concern? (For example, market definition, restrictive

practices, horizontal agreements, and vertical agreements such as franchising or selective distribution rules).

4.4 Are there any specific restrictions set out by your national (or regional) competition authority or other national regulator regarding co-operative agreements / buying organisations / associations of independent companies? (For example, market share limits, legislative restrictions or regulations)

4.5 What elements of national policy impede your organisation and members with respect to their ability to compete on effective terms and so could be detrimental to supporting effective competition and harmful to consumers?

4.6 What, if any, horizontal and vertical relationships in your organisation have been reviewed, investigated or commented on by the national competition authority or a court of law? Under what terms have these been permitted, limited or prohibited?

4.7 What, if any, policy/regulation benefits are available in other EU Member States to equivalent organisations and members that your own organisation and members are unable to enjoy because of present national policy/regulations?

4.8 Are you aware of any imminent policy changes, industry reviews, or relevant company/merger investigations? If so please provide details.

#### **European policy**

4.9 In what ways does current European (EU) competition policy impact your organisation and independent retailer members?

4.10 What would you like changed and why? (Please provided a rank order and say how these changes would benefit or hinder your organisation, independent retailer members, and end-customers?)

4.11 What alternative options would you wish to put forward for policy change that could be justified as being the least restrictive to achieve the required benefits?

4.12 Are there dissenting views amongst your independent retailer members on the most urgently required policy changes? If so, please provide details.

4.13 What aspects of your organisation do you consider may face possible challenges by competition authorities in the future? What would happen if you were no longer able to use these arrangements? How would these changes benefit or hinder your organisation, independent retailer members, and end-customers?

4.14 What emerging or future features of competition are likely to put your organisation and membership at a (further) competitive disadvantage if changes to policy are not forthcoming?



## **APPENDIX B**

### **RESULTS AND FINDINGS FROM THE QUESTIONNAIRE STUDY**

#### **B1 Background and Summary**

##### ***B1.1 General information on the questionnaire***

To gather primary-sourced information and data, a questionnaire study was undertaken at the start of 2017 with the aim of gaining information and insights on the economic, political and legal context in which independent retailer groups operate and the factor influencing their ability to be competitive and efficient. A key objective of the questionnaire study was to elicit information from a perspective as wide as possible in relation to (a) geographic coverage (with responses sought from organisations in as many EU member states as possible), (b) product coverage (with responses sought from organisations representing members in the food and a range of non-food sectors), (c) organisational coverage (representing the different of organisational structures that independent retailer associations might take), and (d) representative coverage (with responses sought from different sized organisations, in different market and competitive positions).

Given that responding to the questionnaire requires time and effort on behalf of respondents, considerable care was taken over the design of the questionnaire to focus on information pertinent to the organisation and its performance and for which direct information was required in a consistent manner across surveyed independent retailer groups. To keep the questionnaire as short and focused as possible, consultations were held with Independent Retail Europe (hereafter “IRE”) (as the key pan-European body representing most associations and independent retailer groups operating in the European Union) to help ensure that the questions were well-defined and that the information requested would feed into the relevant economic and policy analysis. To make the process of completing the questionnaires as convenient as possible, the questionnaire was made available in the three working languages used by Independent Retail Europe (and therefore by member associations/independent retailer groups targeted with the questionnaire), namely English, French and German. Responses were returned by email, and then all

responses were translated into English to facilitate generating the results and findings reported here.

Due to the confidential nature of some of the responses, information cannot be revealed on an individual basis but rather information is used to present an aggregate picture of the role and concerns of independent retailer groups in Europe as well as using anonymised quotations to illustrate and explain more involved or nuanced points and arguments.

### ***B1.2 Questionnaire design and structure***

The full questionnaire (English version) used in the study is reproduced in Appendix A. The questionnaire is divided into four sections. In total, the questionnaire asks for information in respect of forty questions, with the intention of soliciting mainly qualitative information from respondents, along with some quantitative information.

The first section covers general background information relating to the representative group. For example, it covers the organisation's age, general aims, role and purpose, ownership, governance and management structure, and distinctiveness from other forms of retailer.

The second section seeks background information on independent retailer members. The questions concern the number of retailers represented and their combined turnover, whether members are ever gained from or lost to a rival organisation, the definition applied to the term "independent retailer", the process by which retailers can become members, the balance of single outlet versus multiple outlet members, what types of goods members sell, how internet sales are organised, how turnover, profit and market share of the group has changed over the last decade, whether regulation or legal requirements have impeded competitiveness, and the effects of recent business developments (such as online platforms and how selective distribution might have changed).

The third section requests information on contractual agreements and arrangements, such as vertical and horizontal agreements with association and/or retail members, the benefits of such agreements, the economic necessity of arrangements, the services and terms of trade that cannot be provided, costs of alternative arrangements, and advantages of integrated firms or franchise systems over independent retailer groups.

The fourth section looks at public policy issues at national and European levels, including impacts arising from relevant competition policy decisions or imminent developments (e.g. regarding market definition, mergers, and vertical and horizontal agreements), and consideration of desirable alternative policies, especially in view of emerging or future features that could put independent retailer groups at a (further) competitive disadvantage if changes to policy are not forthcoming.

The Appendix is structured in a manner that presents and discusses the questionnaire survey findings on each of these aspects separately in successive sections (sections 2-5 below).

### ***B1.3 Questionnaire responses and sample size and characteristics***

The questionnaire was originally sent out in December 2016 to each of the 23 direct member groups and associations of Independent Retail Europe and with some associations then forwarding the questionnaire to groups within their association, identified to us as representing or explicitly serving independent retailers (and in some cases covering other providers and artisans directly supplying consumers).

Independent Retail Europe direct member associations are a mix of apex organisations acting as (national) associations representing the interests of a range of different independent retailer groups (e.g. ZGV, FCA and SECOF), trade associations supporting small and independent retailers specific to a sector (e.g. ACTO, ACS and RGDATA for convenience stores), international groups with national organisation strictures (e.g. Euronics and Expert in electronics/electrical goods and INTERSPORT and Sport 2000 in sporting and leisure goods), individual organisations (nationally or internationally operating) for specific sectors (e.g. Kesko, ICA, SPAR, EDEKA and REWE Group predominantly operating in the grocery sector, 3e in tools and hardware), national cooperative associations (e.g. CONAD), and intermediaries facilitating trade across multiple countries (e.g. Markant). Some of the individual groups may be members directly of Independent Retail Europe as well as indirectly through a broad association (e.g. EDEKA and Système U as direct Independent Retail Europe members, as well as indirect representation through respectively ZGV and FCA).

In order to obtain information and views at different organisational and association levels, all Independent Retail Europe direct members were contacted and asked to complete the questionnaire. Of the 23 direct members, 13 responded by returning completed questionnaires (i.e. a response rate of 57%). Additionally, one pan-European direct member requested two national associations to complete the survey, in order to provide more direct information on independent retailer members. Moreover, ZGV (as a representative organisation for a wide range of individual independent retailer groups) asked the groups it represented to complete the questionnaire, of which 21 ZGV members duly responded.

In total, 36 organisations completed and returned the questionnaire by April 2017. These respondent organisations represented 11 different countries in terms of the location of their headquarters and with a mix of national associations and associations covering multiple EU countries. However, the degree to which respondents provided full answers to all questions varied widely. Most respondents did not provide answers to all of the questions. Furthermore, different interpretations to required data in some instances also restricted the comparability of responses to some questions across the organisations. Accordingly, the sample of organisations considered in the analysis varies for each question. The descriptions and discussion of the results given in this Appendix are based on only those answers that could be clearly interpreted.

#### ***B1.4 Key findings***

As a summary, and to provide some direction to the more detailed analysis of the responses discussed below, the key findings of the questionnaire study were found to be as follows:

##### *Characteristics of responding organisations and independent retailer groups*

The information provided by respondents to the questionnaire shows that the structure, functioning and roles differ widely among the surveyed organisations. The purpose and primary roles of the organisations varied by their type, their membership representation, and the sectors in which they operate. In respect of functioning, decision-making and ownership, again there is a wide diversity demonstrated across respondents, where many had a central office organised by an executive board and with management aided by an advisory council or direct representation or shareholding through members, while other respondents have a permanent secretary and yet others managed by working groups. The heterogeneity in the organisation of respondents demonstrates the wide range of

characteristics of independent retailer groups, typically shaped according to the market, legal and historical context in which they operate.

#### *Independent retailer membership and performance*

The respondent organisations demonstrated a variety of processes by which membership takes place, but often through formal process with different fees attached for membership or services provided. Membership was also seen to be broadly stable for most organisations, but in some instances there had been a loss of membership due to business closures. There was a broad spread in terms of the proportion of members that operate single outlets, ranging from 0% through to 99%. Also, the types of goods sold by the different respondents was varied, and while grocery/food retailing was predominant there was a wide range of other retail sectors covered. Online retailing, though, was still relatively underdeveloped for many but not all organisations, with a mix of business models for developing online retailing, ranging from centralised selling (from the central office) to decentralised selling (where members operate their own online retail services and internet sites). Also, performance was variable for the respondents in terms of sales, profitability and market share witnessed over the past decade, with some organisations growing but others declining in the face of strengthening and new competition, especially from discounters and specialist online retailers. In terms of business development impact future performance, the growth of online retailers and platforms was seen as the most concerning feature, but also there was concern expressed about the restrictiveness and cost-increasing aspects of regulation and legal requirements.

#### *Contractual agreements and arrangements*

The respondents were provided with a list of 19 specific potential obligations, as a mix of horizontal and vertical agreements, and asked which of these were used with their members. The responses were varied, but in most cases the organisation eschewed from using pricing restraints and only a limited amount of joint advertising and service obligation restraints, but more widely required members to adhere to store name and store branding requirements. The reasons for their use and the benefits provided were also given. It was clear that many organisations were reluctant to use a range of potential efficiency-enhancing obligations on their members, which became more apparent when respondents were asked about what services and terms of trade they were unable to provide independent retailer members because of legal impediments and regulations. The respondents also provided information on the nature and scale of costs that retailer

members would incur if they were not part of the organisation, as well detailing the advantages in terms of superior negotiating position and consistent branding and image with consumers favouring integrated retailers and franchise systems.

#### *National policy issues*

Respondents were asked about the ways in which national policy impacted their organisation and their independent retailer members. The respondents provided a wide range of different examples of how regulations, bureaucracy and restrictions impeded their organisation and membership, ranging from competition policy assessments limiting their use of purchasing obligations, price fixing, resale price maintenance (RPM), selective distribution, joint marketing and common price promotions and advertising campaigns, along with local restrictions through planning policy, environment and energy policy, and transport policy. The regulations and restrictions giving respondents most concern were those which other retail organisations did not face, such as online retailers not facing the same taxation, planning, and recycling policies, or integrated retailers being able to fix store prices, run national campaigns, use common branding and have full control over their stores enabling them to increase their negotiating power with suppliers and producers alongside presenting a unified brand image to consumers. In addition, a number of respondents pointed to the problems of self-assessments required by their national competition authorities which provided them with considerable legal uncertainty which in turn inhibited them making important business investments, notably over the difficulty of establishing integrated online retailing services when they cannot control store prices and product availability. This legal uncertainty also carried over to the treatment of agreements which could serve the same purpose and outcome but would be legally viewed differently depending on their treatment as horizontal or vertical agreements. Respondents also pointed to perceived inconsistency and unequal treatment of independent retailer groups across different EU countries.

#### *European policy issues*

When asked about what EU policy aspects they would like changed and why, respondents cited that the greatest hindrance to their organisations came from the treatment of vertical restraints and cooperative agreements, particularly in respect of pricing restrictions where RPM was prevented and there remained legal uncertainty over using price caps (as with maximum RPM) and common prices for promotions even though their purpose, intent and outcome was to keep prices down for the benefit of consumers. In addition, concerns were

expressed about restrictions on exclusive purchasing obligations and assortment selections undermining efficiency and weakening negotiating positions with suppliers. Central offices and members were also viewed as sharing the same desired policy changes. For future competition, the greatest policy need was to permit practices that would enable efficient online retail systems to be created.

## B2. Background information on the membership organisation

In the first part of the survey, respondents were asked to give background information about their organisation. The responses show the different nature of independent retailer groups in terms of their history, development, membership size and sales turnover, roles, services, organisational type, ownership structure, membership representation, and the wide range of retail sectors and services covered.

### *B2.1 Respondents' organisation age, size and retail membership*

As a starting point to illustrate the breadth of organisations covered in the survey, Table B1 summarises the quantitative data from responses to questions Q1.1, Q1.2, Q2.1 and Q2.5 on the age of the organisation, the number of members represented and their sales turnover (in €bn), and the proportion (%) of the organisation's retail members which operate single outlets (as opposed to multiple outlets).

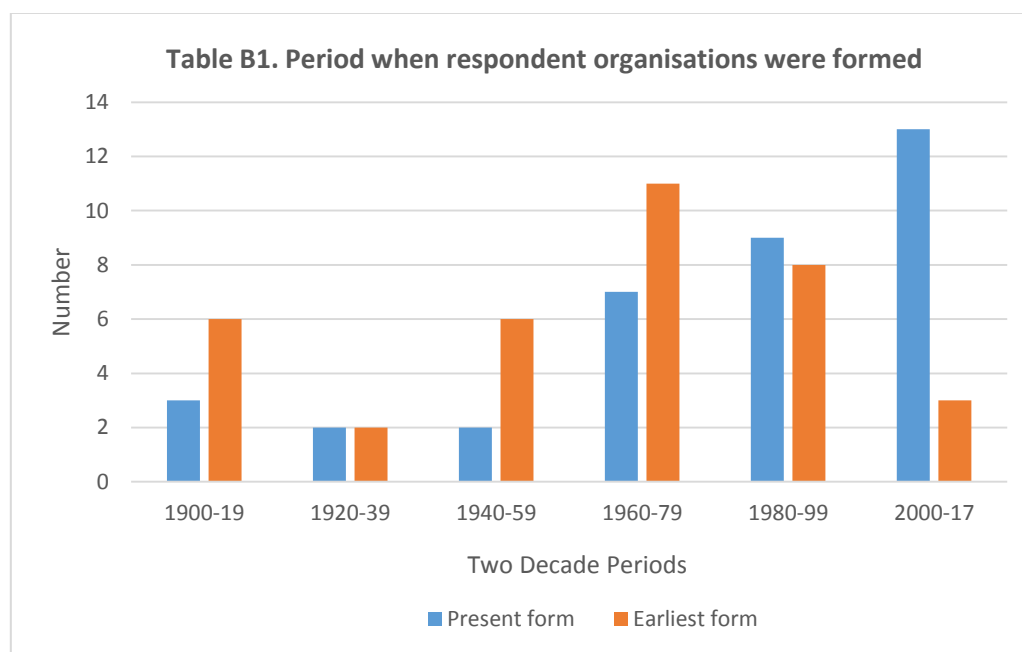
**Table B1. Summary Statistics on Respondents**

Measure	Mean Average	Median	Standard Deviation	Minimum	Maximum	Range	Sample size
Year when current organisation formed	1980	1989	31	1906	2015	109	36
Year when original organisation formed	1962	1965	31	1906	2014	108	36
Number of retailer members represented	3,674	1,090	8,335	10	36,000	35,990	31
Retailer members' total turnover in €bn	12.77	2.2	31.74	0.03	147	146.97	30
Proportion of members which are single outlet	65	77	30	0	99	99	29



Source: Analysis of responses to questions Q1.1, Q1.2, Q2.1 and Q2.5

As Table B1 shows, the organisations span more than 100 years in terms of their age, with the earliest dating back to 1906 through to the latest formed with its current name and structure in 2015. To provide further illustration of the pattern and spread of organisations by their age, Figure B1 shows the number of respondents falling into two-decade periods for their current structure and their earliest date of origin. While most of the organisations in their current structure have been formed in the past 30 years, the majority can point back to over 50 years to their earliest inception date in their original form where 17 of the 36 respondents (i.e. 47%) stated that their organisations could be traced back to an earlier state date with a different name or structure.

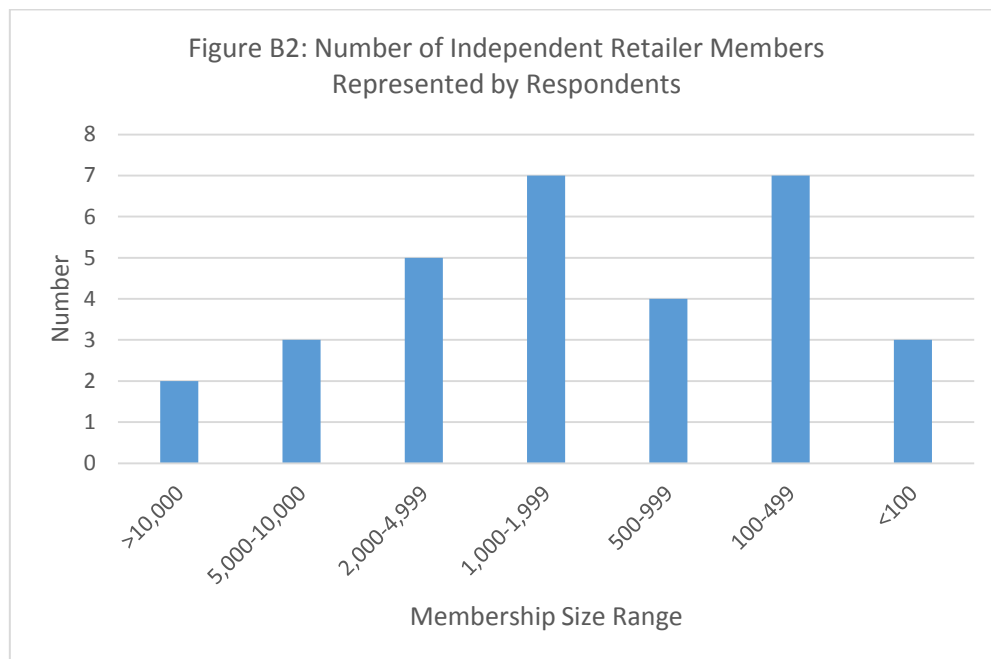


Source: Analysis of responses to questions Q1.1 and Q1.2

In respect of the organisation's size, the median membership was just over 1,000 retailers but the range was from the very small with 10 members for a specialist cooperative through to two umbrella organisations with each representing over 30,000 independent retailers. Figure B2 shows the number of respondents in terms of different size ranges, where

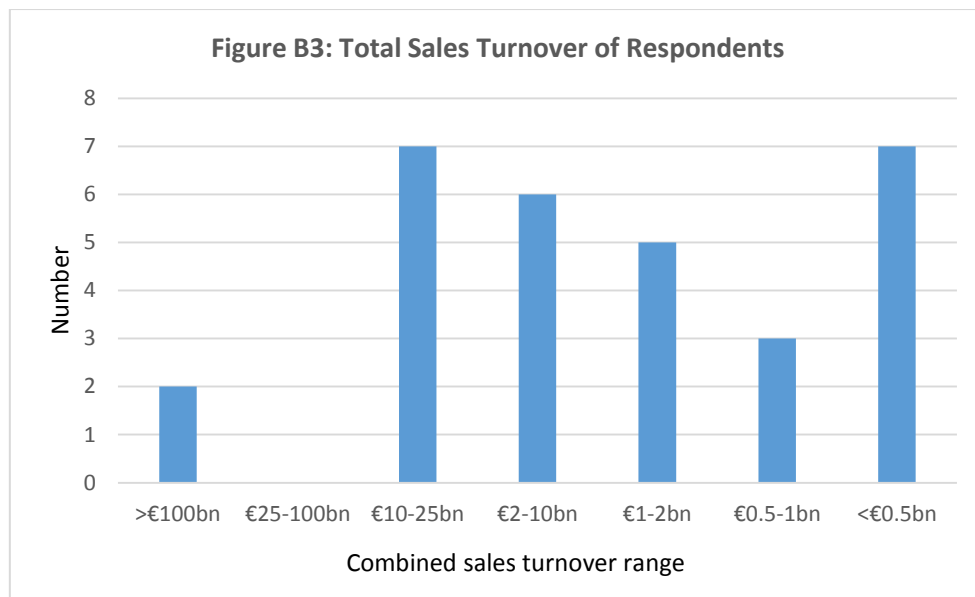


between one and two thousand members represents the most common size band, closely following by one hundred to five hundred members.



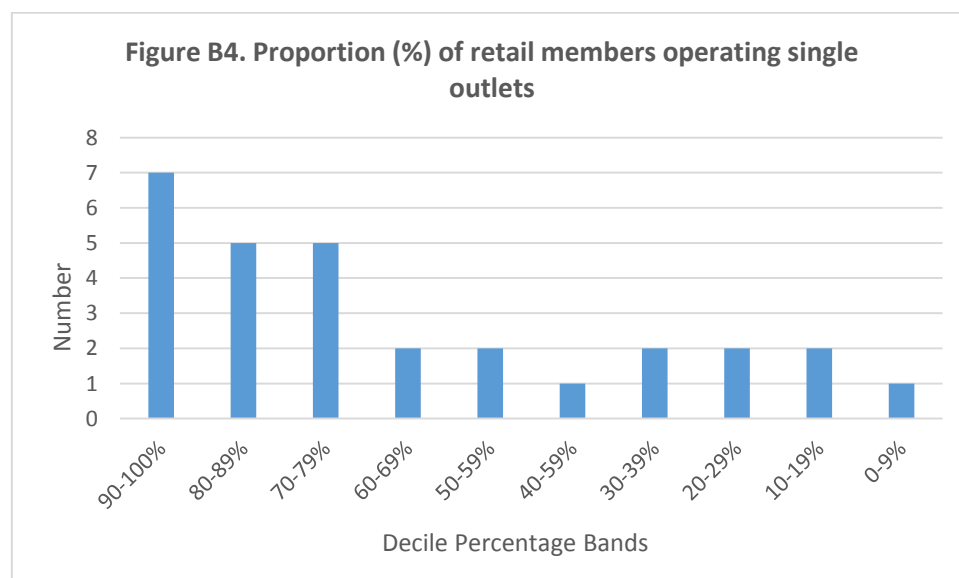
Source: Analysis of responses to question Q2.1

Similarly, in terms of the combined retail turnover of members, the median level was €2.2bn but the range covered smaller organisations (from €0.03bn upwards) through to €147bn, of which 9 respondents had combined sales in excess of €10bn and equally 9 respondents had combined sales less than €1bn, with the rest in between these levels. Figure B3 shows the number of respondents falling into different sales turnover size ranges.



Source: Analysis of responses to question Q2.1

In respect of the proportion of retailer members of the organisation which operate single as opposed to multiple outlets, the range of responses spanned from 0% (in the case of service intermediary) through to 99% (for a cooperative). However, with the median value at 77%, most of the respondents indicated that more than 50% of their members operated as single outlets, as shown in Figure B4 by the distribution of respondents across the different percentages ranges



Source: Analysis of responses to question Q2.5

## **B2.2 Respondents' organisation nature, purpose and role**

In terms of how the respondents describe and define their type of organisations, the term or phrase that they used as best describing the nature of their organisation are summarised in Table B2. One third (12/36) describe their organisation simply as a group of independent retailers, while others emphasise the voluntary membership nature of the group (4/36), the vertical structure of the retail organisation (1/36) or as a retailers' cooperative (1/36) (i.e. as a cooperative of retailers as independent owners as opposed to a consumer-owned retail cooperative society, company or corporation). Others have broader representation, either as trade associations (3/36) or operating as a group of retailers' cooperatives (3/36). The organisations covered in this survey extend their interests beyond retailing goods, to cover particular specialist services, certain professions, wholesaling, purchasing, and manufacturing. However, the core focus of the sample of respondents relates to retailing goods as sold by independent retailer members.

**Table B2. Term or Phrase Best Describing Nature of Organisation**

<b>Nature of Organisation</b>	<b>Number of Respondents</b>
Group of independent retailers	12
Voluntary membership group of independent retailers	4
Wholesale cooperative	4
Group of retailers' cooperatives	3
Trade association for independent retailers	3
Retailers' cooperative	1
Retailing and wholesale cooperative	1
Vertically structured retailer with retail entrepreneurs	1
Voluntary membership group	1
Purchasing group	1
Service cooperation interfacing between industry and commerce	1
Manufacturer cooperative	1
Coalition of medical aid professionals	1
Group of independent IT entrepreneurs	1
Systems service provider group	1

Source: Analysis of responses to question Q1.3

While Table B2 indicates that different phrases and expressions are used to define the groups, their expressed organisational purpose is very similar, as summarised by Table B3. Nearly half (17/36) of the organisations describe their purpose in terms of providing business support, but others are more specific in terms what benefits they provide stressing

the efficiencies to which they bring their membership in respect of scale economies (6/26), buying economies (3/36), scale efficiency to support retail entrepreneurs (4/36), or value chain optimisation (1/36), while the remaining respondents (5/36) emphasise their representation role.

**Table B3. Purpose of Organisation**

Organisation purpose	Number of Respondents
Provide business support	17
Scale economies for independent retailers	6
Represent independent retailers	5
Optimising scale efficiency to support retailer entrepreneurs	4
Buying economies for independent retailers	3
Value chain optimisation	1

Source: Analysis of responses to question Q1.4

In addition, the survey participants were asked about their primary roles undertaken by their organisation and to list their five most important functions. In total 118 functions were mentioned by respondents, averaging 3.28 per respondent. Table B4 summarises the responses and shows that the most frequently mentioned roles were joint purchasing, support services, joint marketing, public relations, knowledge transfer, training and lobbying. The roles span various aspects of supporting independent retailer members in terms of purchasing, advertising, branding, data management, financing, invoicing, logistics, product sourcing, property letting, store network development and trade mark protection.

**Table B4. Primary roles undertaken by respondents**

Primary roles and functions	Frequency
Joint purchasing	27
Support services	24
Joint marketing	17
Public relations	7
Knowledge transfer	5
Training	5
Lobbying	4
Brand management	3
Business support services	3
Financial services	3
Representation	3
Branding	2

Data management	2
Warehousing	2
Central invoicing	1
Certification	1
Financing	1
Logistics	1
Negotiation	1
Own brand development	1
Product sourcing	1
Research	1
Retail property letting	1
Store network development	1
Trademark protection	1
TOTAL	118
average per respondent	3.28

Source: Analysis of responses to question Q1.5

### **B2.3 Respondents' organisation ownership and management structure**

In addition to the roles and functions of the organisation, respondents also supplied information about who owns their organisation. As Table B5 shows, half of the responding organisations are owned directly by the cooperative members (9/36) or retailer members (9/36), with the remainder a mix of being owned by multiple cooperatives, member shareholders, national representative organisations, or holding a structure supported by association status, a cooperative subsidiary, a combination of public shareholders and retail members, a foundation, or as a European group of economic interests (GEIE).

**Table B5. Organisation Ownership**

Owner of the organisation	Number
Cooperative members	9
Retail members	9
Multiple cooperatives	4
Member shareholders	3
Partnership shares	3
Member companies	2
Association status	1
Cooperative subsidiary	1
GEIE - European group of economic interests	1
Foundation	1
National representative organisations	1

Public shareholders and retail members	1
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Source: Analysis of responses to question Q1.8

A common theme across the responses to ownership is the role played by members. This is also the case in respect of how the responding organisations tend to be governed with a board or a council, where there is typically retail member representation but with overall management led by a chief executive officer (CEO), managing director (MD), director general (DG), president or secretary. Table B6 summarises the situation for the respondents which shows that the most common way that the central office is managed and how decisions are taken by the organisation as being through a board and MD or a board and CEO, but with variants across the respondents.

**Table B6. Central Office Management and Organisation Decision Making**

Central office control and decision making	Frequency
Board and MD	14
Board and CEO	6
Central office and membership assembly	3
Board and membership assembly	2
Board and central office	1
Board and DG	1
Board and general assembly	1
Board and President	1
Board and Secretary General/President	1
Central Office	1
Central office and MD	1
Central office and retail council	1
Committees and MD	1
Council and MD	1

Source: Analysis of responses to question Q1.9

#### ***B2.4 Respondents' retail sector coverage and distinguishing character***

The organisations were asked about the type of goods and services sold or provided by independent retail members to indicate the range of sectors of retailing in which they were involved (Q2.5). Some 34 respondents identified a total of 84 types covering 43 categories. Of the respondents, 11 identified one category, 14 identified two categories, 4 listed three

categories, 2 listed four categories, and then 1 respondent each for respectively identifying five, eight and thirteen categories.

The most common mentioned categories of goods and services revolved around the grocery sector broadly defined, with respondents specifying Food (7 responses), FMCG (5), and Grocery (2). However, beyond this, the mix of sectors covered was extremely diverse: Sporting & leisure goods (5); Consumer electronics (4); DIY (4); Domestic appliances (4); Household goods (4); Tools & machines (4); Footwear (3); Furniture (3); Baked goods (2); Clothing (2); Hearing aids (2); Kitchens (2); OTC medicines (2); Vehicles (2); Accessories (1); Agricultural machinery (1); Alcohol (1); Beauty (1); Beverages (1); Building goods (1); Confectionery (1); Garden Tools (1); Hardware (1); Healthcare products (1); Home & Garden (1); Home furnishing (1); Homewares (1); ICT products (1); Jewellery (1); Leather goods (1); Newspapers & magazines (1); Optical aids (1); Orthopaedic aids (1); Photo Services (1); Photography goods (1); Promotional items (1); Stationery (1); Tobacco products (1); Tourism (1); and Toys (1). Accordingly, the respondent organisations represent a wide range of retail sectors from which to provide views about the effects of changes in competition and developments taking place in their respective sectors.

Respondents were asked about what distinguished their organisation and its relationship with retail members from an integrated retailer or franchising organisation, as the two other major organisational forms that they typically might face as competitors in retail markets. Table B7 summarises the responses. Of the 26 responses, 10 pointed to the independence of their members, 7 explicitly focused on the aspect of independent retailers, 3 on the organisation as a cooperative, 2 on the voluntary (rather than integrated or contractually tied) nature of membership, and 1 each for collective decision-making (rather than top down decision-making or vertical control via a franchising relationship), serving as a democratic organisation, acting as a non-profit service for members, and retail members as entrepreneurs.

**Table B7. Distinguishing feature from integrated retailer or franchising organisations**

Distinction from other organisational forms	Frequency
Independent members	10
Independent retailers	7
Cooperative	3
Voluntary membership	2
Collective decision making	1

Democratic organisation	1
Non-profit service for members	1
Retail entrepreneurs	1

Source: Analysis of responses to question Q1.10

### **B2.5 Respondents' membership process**

Given that the very essence and key point of distinction for independent retailer groups are centred on the collection, alliance and collaboration of individual members with common interests, the questionnaire also asked respondents about the process by which independent retailers can become members of the organisation, and what, if any, are the fees or costs for membership (Q2.4). This is important to understand how the groups evolve, change in terms of their composition and how well they can adapt to changing market circumstances. All 35 organisations that had independent retailer members answered the question. The most common response (11/35) was to specify that membership was through a cooperative share subscription (notably for ZGV members). Additionally, a smaller number of organisations (5) stressed the formal admissions procedure and approval process, often involving credit checks, a joining fee and services charges. In respect of membership fees, there was a mix of organisations specifically mentioning they charged no fees (2), monthly fees (2), annual fees (3), or without specifying the frequency of when fees were paid (8), with the fees covering a mix of entry fees and license fees, as well as service charges.

Competition may also exist between independent retailer groups, and so respondents were asked whether they ever gain or lose retail members from or to a rival organisation, and if so on what scale. Of the 33 responses, 8 said they did not gain or lose members, 7 said they faced little change, 7 said a rarely did members join or leave, while 6 pointed to a slight gain in membership in recent years and 3 to a slight loss (of which 2 specified this was because of business closures). Two organisations responded with a more precise figure for the extent of membership churn, with 1 organisation pointing to a 2% gain in membership each year, and 1 organisation pointing a 2% loss in membership each year. Based on these responses, most organisations have broadly stable membership, with only small gains and losses each year, even if competition is causing some business closures in certain retail contexts.

## **B3. Market Position and Developments Impacting Competitiveness**



### **B3.1 Respondents' market position over the last decade**

To ascertain more information about how independent retailers had been performing, we asked respondents to answer whether over the last decade their membership had seen an increase or decrease in combined turnover, profit and market share (Q2.8). Of the 32 responses, 13 indicated that their membership had seen a decrease, slowing or stagnation on these measures, with nearly all (12/13) pointing to a decline specifically due to increased competition, particularly around online competition with the extension of pure play online retailers but also the rise of discount retailers and increased growth of established integrated retailers. However, 11 respondents indicated that their organisations had seen growth over this period from the market as a whole growing (6/11), service improvements and member professionalism increasing (3/11), or membership growth (2/11). In addition, 5 respondents reported varied performance, with some indicating that members with larger stores had performed better than members with smaller stores, with this trend exacerbated with a move to greater online consumer purchases impacting the viability of small stores. Finally, 3 respondents indicated a broadly stable or static trend over this period. Accordingly, taken collectively, the groups have seen quite mixed performance, some suffering from increased competition, especially from online retailers, and others managing to grow in favourable market growth conditions, with yet others in a broadly similar position over the last decade.

### **B3.2 Impact of recent business developments**

In respect to ongoing and future aspects that might affect the ability of independent retailer groups to competitive effectively, respondents were asked about how have recent business developments, such as the growth of online platforms (eBay, Amazon, etc.), and regulatory concerns, such over selective distribution, were affecting their ability to compete (Q2.10). There were 22 detailed responses provided. These are summarised in Table B8 and grouped together (shown in different colour bands) according to the respondent's type of organisation.

**Table B8. Recent business developments impacting ability to compete effectively**

<b>Business developments identified as impacting ability to compete effectively</b>	<b>Organisation type</b>
Increasing price transparency and price pressure due to online sales but not competing on equal terms due to higher operating costs	Retailer group
Aggressive competition from pure online players operating without the same overhead expenses as physical retailers	Retailer group
Risk of e-commerce making physical stores unprofitable	Retailer group

Online food retailing still in its infancy but growing with big investments by Amazon and other operators	Retailer group
Online retailers benefit by not having the same recycling obligations	Retailer group
Online retailers free ride on retailers' advice service	Retailer group
Legal uncertainty over the new block exemption regulation for vehicles	Retailer group
Online platforms used extensively for price dumping	Retailer group
Smaller retailers being undermined by selective distribution system requirements and legal uncertainties	Retailer group
Combination of selective distribution by suppliers, rise in manufacturer-owned shops and online shops exacerbate the competitive pressure on affiliated independent retailers	Retailer group
Price dumping via online channels resulting in reduced retailer sales	Retailer group
Focus on price leads to neglect of service aspects and reducing SME competitiveness	Retailer group
No means to enforce members to keep to brand owner set end prices	Voluntary membership group
Tightening requirements for legally compliant selective distribution agreements impacting independent retailers	Voluntary membership group
Manufacturer own e-commerce undermines store-based retailers	Voluntary membership group
Shift to online sales putting pressure on store-based retailers	Group of professionals
Online product sales have driven shift towards services and consultancy	Group of professionals
Selective distribution can be a means to improve quality and quantity of online retail and allow independent retailer groups to compete	Retailers' cooperative
Online retailers free ride on the service provided by specialist retailers and sell below their cost	Retailers' cooperative
Countering the growth of online sales to focus more on applications requiring consultancy from trained sales force	Manufacturer cooperative
Need to have ability to deny members using third-party platforms to support a common strategy for the group	Trade association
Shifting sales towards online	Wholesale cooperative

Source: Analysis of responses to questions Q2.10 and Q1.3

As evident from the responses listed in Table B8, online developments are having an especially distinct and important impact on the respondent organisations and their membership. In particular, pure online players are seen as utilising to their advantage being able to avoid the same overhead expenses as physical store (bricks-and-mortar) retailers as well as free-riding on the sales service provided by physical stores (which consumers might visit first but then make purchase online afterwards). Online retailing is also seen as a problematic source of price dumping, which some retailers might use as a channel to sell products at or below cost and so undermine regular competition, even to the extent of such action being predatory in nature or intent.

Also, moving forwards in time, it is very clear that respondents are concerned about the scale of investments that Amazon and other online players are making with future competition in mind as online sales become larger and perhaps even dominant in some retail sectors. On top of this, respondents as independent retailer groups and cooperatives also feel that they will not be able to compete on effective terms with these online players, exacerbated by the way that producers might use or not use selective distribution which might discriminate against their membership or put them in a disadvantageous market position, especially when there is legal uncertainty about the legitimacy of using or supporting selective distribution that could help ensure the viability of physical stores. Additionally, there is concern that if groups cannot for legal or contractual reasons manage effectively their own online presence then individual members might turn to using third-party online platforms and leave the group exposed to harmful intra-brand competition that damages the group's overall brand image and reputation for consistency with consumers, especially if it means that service quality suffers.

One particular aspect of online retailing that concerns independent retailer groups in respect of their ability to compete effectively going forwards is the effect of specialist online operators cherry-picking sales on certain products, like best-selling lines, or to certain customer bases, like only in large cities. This cherry-picking behaviour by online specialists can have the effect of undermining the overall efficiency of physical store retailers if they cannot maintain sales or establish their own internet operations to offer a more comprehensive service to benefit consumers more generally rather than online specialists only favouring a minority of consumers, albeit the most lucrative part but to the detriment of other consumers. As an illustration of how this works in a market context, one respondent (a large grocery retail organisation) sums up the situation by how online specialists are using cherry picking and cross-subsidisation (from non-food sales) in the grocery sector as the importance of online retailing increases in the following terms (in anonymised form):

*"Internet retailing poses a special challenge... Over the last few years, there has been a large number of new market players with online specialist retailers cherry picking appealing product ranges with strong margins. Online retail allows these new players easy customer access via the Internet. Very often, these companies are able to fall back on experience and/or systems from online retail of non-food product ranges. Expansion is further favoured by easy access to risk capital and advertising inventory (known as 'advertising for equity' deals). This further increases the intense competition of these important add-on product ranges for food retailing.*

*In terms of full product range, online retailing is still in its infancy. Demand continues to be weak. In terms of supply, nearly all large food retailers have launched their own projects. DHL has already entered the full-range food retail market based on its existing non-food oriented platform. Amazon has been offering a dry food range on its own platform (Amazon Marketplace) for a long time and has supplemented this offer in 2015 with its Prime Pantry range. Amazon has been actively operating Prime Now in key cities since June 2016 as an online retailer with a core product range of 4,700 items, including fresh, same-day delivery. Considering Amazon's ambitious goals for growth, it is only a matter of time before Prime Fresh will launch a broad and specialised product range with its own delivery service across the country.*

*The competitiveness of traditional food retailers is being threatened by market entrants insofar as these companies use online food retail for generating site visits and are able to fund it through profits from their non-food business. For independent retailer groups and cooperatives, and as internet sales increase then these organisations could increasingly find themselves at a competitive disadvantage compared to other retail organisation forms, especially if regulatory and legal restrictions pose an additional burden and act in a discriminatory fashion."*

### **B3.3 Management and development of internet sales**

The responses discussed above and listed in Table B8 illustrate the range of concerns that groups have about the shift in favour of internet sales and how retailers geared towards online retailing have advantages over retailers reliant on physical stores, which could be especially exacerbated for independent retailer groups. The obvious response from independent retailer groups might then be to respond by developing their own online retailing facility. However, there are practical and legal issues (as indicated in the above statement) to overcome in developing such a facility when the retail members are independent and there is a need for coordination to create a single, integrated facility. This presents both a coordination and a contractual challenge and the respondents were asked how internet sales are being managed by their organisation and its membership, and specifically whether it was being centralised or left to individual retail members to create and run their own websites (Q2.7). Some 32 organisations responded with information to the question, with responses categorised by the frequency of their type as shown in Table B9.

**Table B9. Internet sales management by the organisation and its membership**

Mode of Internet Sales	Frequency
Members manage their own internet sales	16
No internet sales	4
Not involved	2

Central online shop with individual retailer offerings	2
Centralised platform with individual members managing their own online store	2
National organisation manages online sales	2
Centralised online shop	1
Centrally operated online shop plus individual retailer websites	1
Members manage their own internet sales using common platform	1
Under development	1

Source: Analysis of responses to question Q2.7

From Table B9, half the responses (16/32) point to the organisation's members managing their own internet sales, while seven stated that they had no internet sales, were not involved in internet sales or this was still under development by the organisation. Of the remaining nine organisations, only one pointed to a single centralised online shop, with all the others have a mix of central and devolved arrangements involving retailer members or national organisations (of international groups) using a central online shop or centralised platform.

The detailed responses to the question about how internet sales are organised reveals the difficulties that independent retailer groups have faced and the slow speed at which they have typically been able to respond in developing online retailing, compared to the much swifter development from integrated retailers or pure online retailers. As one trade association neatly summarises in the following words there are two main business models, either pursuing a centralised or decentralised model, by which independent retailer groups and cooperatives have been able to develop internet sales, but both have their limitations because of the coordination and contractual challenge and the need for membership support while also abiding by existing competition laws restricting horizontal and vertical agreements:

*"The retailer groups do not always pursue the same online sales strategies; they vary according to their history, business sector and strategic choices. There are two main discernible online sales models:*

- A centralised model, where the head of the network consolidates all e-commerce activity either directly, or via an intermediary branch under its control and/or a contractor. The group acts as the seller in direct contact with the end-user. It executes all functions associated with selling (taking orders, billing, receiving payment, delivery, after-sales). It determines the price and receives all payments, regardless of the web user's place of residence.*
- A decentralised model, where the potential role of the group is restricted to making a web tool with seamless functionalities available, but without providing input regarding*

*content. Each shop acts as seller for his own website or web page. He sets and amends prices as he sees fit. Web users choose their delivery location before examining the offer and placing the order directly with the distributor. With this set-up, each retailer resorts to the website for selling his products and services. There is no exclusive Internet offer.”*

While both types of business model might be workable, they are unlikely to be as coordinated, integrated, efficient, responsive and competitive as that which can be delivered by horizontally and vertically integrated retailers, franchise operations with strong direct vertical control from franchisors, or directly from manufacturers or delivery companies (as new intermediaries) with strong brands, strong identification with consumers and considerable financial resources to undertake the necessary technical and marketing investments to establish a seamless, unified and consistent buying and deliver service. The phrase that appears apt for many respondents as independent retailer groups struggling with the development and coordination of their own online retailing operations is “disjointed”. This applies even for the very largest respondent organisations with deep resources but unable to provide a single, integrated, seamless service. One respondent representing a very large grocery retail organisation consisting of several cooperatives discussing the development of online grocery operations summarises its own situation with the piecemeal fashion in which it has had to develop online retailing in the following terms (in anonymised form):

*“In addition to store-based food retail, distance selling also exists within the group. As of 30 June 2016, 1,460 stores operated their own delivery service. Ordering typically takes place by phone, fax or email. Around 50 of these stores dispose of their own online shop. The group itself does not operate a central online shop. However, in one city, a subsidiary of the group operates an online food shop, offering a basic range of non-perishable and easy to move foods (dry food range) for delivery, as well as wine, spirits and coffee and a drive-in collection service with online ordering facility. The regional group organisations in two regions support interested retailers with shop systems they developed themselves, which can be adapted by individual retailers to suit the respective market conditions. In addition, individual independent retailers operate online shops under their own steam, delivering to customers in nearby areas. Finally, a discounter subsidiary also runs an online shop offering almost exclusively non-food items as well as wines.*

*Overall, online selling within the group is **disjointed**, which may have a detrimental effect on the development potential of this area for the group.”*

### **B3.4 Impediments arising from regulatory and legal requirements**

The responses to questions Q2.7, Q2.8 and Q2.10 discussed above, respectively about how internet sales are managed, how members have been performing over the last decade, and the effect of recent business developments, frequently made references to impediments due to regulatory or legal requirements. Question Q2.9 addresses this issue more directly in asking respondents specifically which regulatory or legal ways independent retailer groups are impeded that might not apply to other organisational forms or structures. There were 25 responses identifying specific aspects, which can be grouped into six categories as summarised in Table B10.

**Table B10. Regulations and legal restrictions impeding independent retailer groups**

Regulatory and legal impediments facing retail members	Restrictions Category
Competition law preventing fixing prices	Consistent pricing
Restrictions preventing consistent pricing	Consistent pricing
Restrictions preventing standard pricing for own-brand products	Consistent pricing
Competition law preventing consistent pricing and promotions across channels	Consistent pricing (+ advertising)
Competition law preventing joint marketing with standardised pricing	Consistent pricing (+ advertising)
Restrictions on national advertising campaigns and standard prices	Consistent pricing (+ advertising)
Restrictions preventing consistent prices and advertising	Consistent pricing (+ advertising)
Restrictions preventing joint advertising promotions at a single price point	Consistent pricing (+ advertising)
Restrictions preventing standardised pricing and advertising	Consistent pricing (+ advertising)
Regulations restricting standard pricing policy across the entire network and especially problematic with multi-channel sales	Consistent pricing (+ online)
Restricting on price preventing the operation of a joint online shop	Consistent pricing (+ online)
Restrictions on opening hours	Opening hours
Restrictions on opening hours compared to online	Opening hours
Legal requirements preventing joint nationwide marketing activities	Joint marketing
Restrictions preventing consistent advertising	Joint marketing
Competition laws preventing independent retailers using the same commercial policies as integrated retailers	General commercial policy
Disadvantages arising from antitrust laws, fragmented buyer power and inefficiencies resulting from a multi-level business model	General commercial policy
Discriminatory regulations allowing cooperatives but not independent retailer groups to offer a consistent and efficient common brand policy	General commercial policy
Restrictions on the contractual relationship between manufacturer and retailer	General commercial policy
Competition law preventing a joint online operation	Online operations
Competition law preventing retailer obligations to use centralised online sales	Online operations
Competition law preventing retailer obligations to use centralised online sales	Online operations
Discriminatory regulations preventing independent retailer groups being unable to produce a single unified online offer with coordinated logistics	Online operations
Discriminatory waste disposal regulations favouring online retailers	Discriminatory regulations
Online providers not subject to the same licensing and qualification criteria	Discriminatory regulations

Source: Analysis of responses to question Q2.9

The largest number of responses summarised in Table B10 were about restrictions that prevent independent retailer groups using consistent or standardised prices applicable for the organisation as a whole, which was cited by 11 of the 25 responses, but particularly in respect of using consistent pricing in the context of advertising campaigns and promotions (6/11) or in respect of online retailing (2/11). The other restrictions identified by respondents concerned restrictions on opening hours (2), joint marketing (2), or general commercial policy for independent retailer groups (4), along with the set of restrictions working together to inhibit the group developing internet operations (4), or regulations that face physical stores but can be avoided by online retailers so work in a discriminatory manner (2).

Clearly, the legal restrictions relating to whether consistent pricing can be used by independent retailer groups is the aspect that most groups surveyed feel strongest about in terms of legal impediments inhibiting their ability to compete effectively. This does not necessarily mean that groups will entirely avoid or be unable to use consistent prices in specific instances, only that legal uncertainty overhangs the practice for independent retailer groups in a way that it does not for integrated retailer groups, which instead benefit from legal certainty because of their ownership structure. One respondent organisation (a ZGV member) highlights the legal uncertainty issue for independent retailer groups in the following terms:
































































*“The consumer expects a clear pricing structure. The affiliated companies are partially impeded by German and European competition law in having a joint external presence. This concerns in particular consistent pricing, for instance in the form of promotional measures across different channels, where the group’s central office creates brochures etc. containing specific items and prices. The voluntary participation of affiliated companies in such promotions naturally results in the same price being advertised for the same product in the context of such centralised advertising activities. This is currently something of a grey area for retail groups. Legal clarification regarding the legality of such promotions would be helpful as a loss compensation measure compared to branch and franchise systems.”*

More generally, we can observe from Table B10 that it is often a combination of legal restrictions and specific circumstances or needs that work against the interests of independent retailer groups. In providing evidence of how this combination works in practice and what it means for the extent to which an organisation can control critical elements of decision making, one respondent providing a detailed diagram contrasting the extent to which an integrated retailer can control decision making compared to an



independent retailer group even if it has strong vertical ties. This diagram has been anonymised and is shown in Figure B1, where for visual clarity a traffic light colouring system is used, ranging from bright green for “completely” through to deep red for “none” in terms of the extent to which the organisation has control over key decisions, with intermediate degrees of “significantly”, “partly” and “slightly” shown respectively as muted green, yellow and muted red. Here the contrast between the greater control of the integrated retailer (shown on the left hand side) is very clear compared to the considerably weaker control of the independent retailer group (shown on the right hand side) over the nine separate decision aspects as well as overall ability to direct retail trade (shown in the bottom row). The diagram highlights the cumulative effect of where weak or limited control across several decisions combines together to undermine overall control to direct retail trade and leave independent retailer groups disadvantaged.

**Figure B1. Comparison of business models for integrated vs. independent retailer groups**

Central unit's ability to decide	Retailer being single economic entity			Retailer group with independent retail members			
	Chain selection (> 90 % of sales)	Other products (< 10% of sales)	TOTAL (100% of sales)	Group selection (≥ 65 % of sales)	Other products (≥ 25 % of sales)	Retailers' own sourcing (≥ 10 % of sales)	TOTAL (100 % of sales)
decide range of goods	completely 	slightly 	significantly 	slightly 	none 	none 	partly 
decide general planograms	completely 	significantly 	significantly 	significantly 	none 	none 	partly 
special events and product placement	completely 	partly 	significantly 	slightly 	none 	none 	slightly 
retail price or maximum retail price	completely 	partly 	significantly 	significantly 	none 	none 	partly 
campaigns (products, prices, advertising)	completely 	completely 	completely 	significantly 	none 	none 	partly 
place of purchase (where the store buys products)	completely 	significantly 	significantly 	slightly 	slightly 	none 	slightly 
whether to allow suppliers' representatives to visit in stores	completely 	significantly 	significantly 	none 	none 	none 	none 
to exclude certain product(s) from range of goods in retail stores	completely 	completely 	completely 	none 	none 	none 	none 
to what extent there a competing products (and their roles) in	completely 	completely 	completely 	slightly 	none 	none 	slightly 

retail stores							
Overall ability to direct retail trade	completely 	significantly 	significantly 	partly 	slightly 	none 	slightly 

Source: Anonymised diagram from a respondent's submission in response to question Q2.9

## B4. Contractual agreements and arrangements

### *B4.1 Types of contractual obligations on independent retailer members*

To gather information on the types of contractual obligations applied to independent retailer members, respondents were given a list of 19 different possible obligations they might use with their retailer members, which could represent either horizontal or vertical agreements depending on the structure and nature of the responding organisation. For each of the 19 possible obligations, respondents were asked whether their organisation used the obligation and if so to what extent it was used in respect of its product coverage. Specifically, respondents were asked to say whether the usage was always, sometimes or never, and if used whether the product coverage was for all products or just some products. Additionally, the respondents were asked for the reason why an obligation was used, such as the intended benefits to the organisation, retailer members and final consumers. In respect of the responses, not all 36 survey respondents provided information on the listed obligations and there was variation in the number of responses to each listed obligation, ranging from 16/36 to 25/36, but in all but one case the response rate was over 50%. The results are summarised in Table B11.

As can be seen in Table B11, there is significant variation in terms of usage of the different possible obligations. The most extensively used relate store name and store branding requirements, promotion and advertising requirements, and common prices for price promotions, but even for these obligations there was a high proportion of respondents who did not use these obligations. In contrast, the respondent organisations did not impose fixed prices on retailer members (with one exception from a respondent allowed to do this in the very specific context of regulated tobacco prices), but other price restrictions were also hardly used, notably in setting minimum retail prices but also even in setting maximum retail prices or suggested price ranges. In addition, other kinds of restraints on members were not extensively used including exclusive or minimum proportion purchasing obligations, full-line forcing, exclusive territories, selective distribution, and requirements to use certain central services like training and service providers. Also, in regard to internet sales, respondents indicated that they mostly did not use non-compete obligations to favour

centralised internet sales and nor did they extensively use obligations for common prices with internet retailing. The lack of use and coverage of these potential obligations comes despite the significant benefits that could be available, as identified by those groups using the obligations and seeing benefits for their group, members and consumers, with examples listed in the last column.

**Table B11. Regulations and legal restrictions impeding independent retailer groups**

Retail member obligations	Usage			Coverage		Reasons for use
	Always	Some-times	Never	All	Some	
Exclusive purchasing (25/36 = 69% response rate)	1	8	16	0	8	<ul style="list-style-type: none"> <li>Strengthen buying position</li> <li>Network efficiencies</li> <li>Supporting own brands</li> </ul>
Minimum proportion purchasing (24/36 = 67% response rate)	2	11	11	3	6	<ul style="list-style-type: none"> <li>Strengthen buying position</li> <li>Purchasing efficiency</li> <li>Logistical efficiency</li> </ul>
Exclusive territories (21/36 = 58% response rate)	3	2	16	3	1	<ul style="list-style-type: none"> <li>Encourage retailer investment</li> <li>Site protection</li> <li>Partial franchise system</li> </ul>
Selective distribution (21/36 = 58% response rate)	2	6	13	2	5	<ul style="list-style-type: none"> <li>Support supplier demands</li> <li>Support brand image</li> <li>Retailer investments in service</li> </ul>
Fixed retail prices (20/36 = 56% response rate)	0	1	19	0	1	<ul style="list-style-type: none"> <li>Tobacco tax law</li> </ul>
Minimum retail prices (22/36 = 61% response rate)	0	3	19	0	1	<ul style="list-style-type: none"> <li>Supporting common brands</li> <li>Retailer investments in service</li> <li>Own brand image consistency</li> </ul>
Maximum retail prices (22/36 = 61% response rate)	2	3	17	2	1	<ul style="list-style-type: none"> <li>Facilitate promotion campaigns</li> <li>Own brand development</li> <li>Consistency of retail offer</li> </ul>
Prices set within suggested range (19/36 = 53% response rate)	1	5	13	1	3	<ul style="list-style-type: none"> <li>Commercial policy</li> <li>Recommended prices</li> </ul>
Common prices for price promotions (21/36 = 56% response rate)	5	6	12	1	7	<ul style="list-style-type: none"> <li>Support competitiveness</li> <li>Support national advertising</li> <li>Holding down prices with max RPM</li> </ul>
Common prices for Internet retailing (22/36 = 61% response rate)	3	2	17	1	1	<ul style="list-style-type: none"> <li>Commercial policy</li> <li>Hold down prices with max RPM</li> <li>Legislative demands</li> </ul>
Promotion and advertising requirements (19/36 = 53% response rate)	6	6	7	3	3	<ul style="list-style-type: none"> <li>Supporting international campaigns</li> <li>Consistency for consumers</li> <li>Store and brand image</li> </ul>
Non-compete with centralised Internet sales (16/36 = 44% response rate)	1	1	14	1	1	<ul style="list-style-type: none"> <li>Distribution economies of scale</li> <li>Service and technology investment</li> <li>Common platform establishment</li> </ul>
Required purchasing of set product lines (21/36 = 58% response rate)	3	8	10	1	5	<ul style="list-style-type: none"> <li>Enhance negotiating power</li> <li>Consistency for consumers</li> <li>Product availability to consumers</li> </ul>
Full-line forcing (i.e. have to sell all products) (21/36 = 58% response rate)	0	2	19	0	1	<ul style="list-style-type: none"> <li>Enhance negotiating power</li> <li>Consistency for consumers</li> </ul>
Use specified logistics provider (21/36 = 58% response rate)	4	3	14	2	1	<ul style="list-style-type: none"> <li>Network and logistical efficiencies</li> <li>Supply assurance</li> </ul>
Use specified store service provider (21/36 = 58% response rate)	2	6	15	0	1	<ul style="list-style-type: none"> <li>Consistency in service quality</li> <li>Network efficiencies and cost savings</li> </ul>

Use specified staff training (24/36 = 67% response rate)	3	8	13	3	1	<ul style="list-style-type: none"> <li>• Service quality</li> <li>• Food safety and hygiene</li> <li>• Common identity and branding</li> </ul>
Store name and store branding requirements (21/36 = 58% response rate)	9	4	8	8	2	<ul style="list-style-type: none"> <li>• Common branding and image</li> <li>• Supporting retail brand identity</li> <li>• Consistency for consumer benefits</li> </ul>
Store layout and planogram requirements (25/36 = 69% response rate)	3	9	13	2	2	<ul style="list-style-type: none"> <li>• Store image and consistency</li> <li>• Common brand identity</li> <li>• Network efficiencies</li> </ul>

Source: Analysis of responses to question Q3.1

In addition to the 19 listed potential obligations, a few respondents mentioned other obligations applied to their retail members for the sake of ensuring efficiency, promoting a common brand image and ensuring a consistent mode of operation. The additional obligations cited include making retail price recommendations rather than formal requirements on price setting as well as obligations to accept purchasing terms and conditions, follow charter and membership agreements, comply with store lease and store policy terms, and adopt central settlement (over invoices) when required.

From the set of responses, it was not clear on the extent to which the listed restrictions in Table B11 were treated as formal obligations as opposed to expectations, or how indeed any obligations would be enforced. Indeed, some respondents specially indicated the use of the term “recommended”, indicating that retailer members may have had greater freedom or flexibility than a hard-and-fast obligation enforced by contract. This recommended aspect was predominantly indicated by respondents in respect of pricing or promotional aspects.

#### ***B4.2 Extent to which obligations are necessary for efficient business conduct***

To ascertain the extent to which independent retailer groups feel that obligations on members are essential to the efficiency and competitiveness of their organisations, respondents were asked to what extent are the obligations used necessary for the sake of conducting business on an efficient basis and whether are there less restrictive alternative available (Q3.2). There were 19 responses which provided clear indication as to the extent to which obligations on retail members might be necessary or desirable for the sake of business efficiency. These responses are summarised in Table B12 according to the type of organisation, where almost half (9/19) were from independent retailer groups, and the remainder comprising three each from retailers’ cooperatives and voluntary membership groups, and one each from a group of professionals, a trade association, a manufacturer cooperative and a wholesale cooperative.

The responses summarised in Table B12 highlight the essential nature for obligations to help the group continue to operate and its members survive in the market, but in particular responses stress the importance of supporting the group's brand concept, public image and overall commercial policy, as well as specifically the benefits flowing from strengthening the group's negotiating position with suppliers and supporting marketing and promotional effort.

**Table B12. Necessity of obligations for efficient business conduct**

Business necessity of retail member obligations	Organisation type
Retailers taking part in national campaigns must abide by the specified maximum prices for consistency	Retailer group
Necessary for an umbrella brand concept	Retailer group
Needed as a minimum to run a national retail group with a common image and commercial policy for the consumer's benefit	Retailer group
Needed for consistent brand image and planning security for total purchases	Retailer group
Extremely important for the retail stage, since this stage could end up disappearing in the long run otherwise	Retailer group
Participating in central settlement is essential for funding the central office with surplus distributed directly to members, with affiliated retailers benefiting from better purchasing terms and reduced workload	Retailer group
Obligations are partially necessary in order to achieve price benefits from suppliers and service providers based on guaranteed purchase volumes	Retailer group
The current contractual obligations are crucial for the group's business operations	Retailer group
Chain selections are indispensable to maximum retail price maintenance, improving purchasing terms, and better operative efficiency	Retailer group
Practically no obligations are imposed	Retailers' cooperative
Central settlement conditions ensure efficient business operations but the majority of services offered are not mandatory	Retailers' cooperative
Needed to advertise standard pricing to support marketing efforts	Retailers' cooperative
In order to enable our (mainly small) retailers to survive in the market	Voluntary membership group
Obligations when legally permitted can help support a positive public image	Voluntary membership group
There is no alternative to a liberalisation of the competition law framework in order to be able to compete against integrated retail chains.	Voluntary membership group
Members have relatively few obligations and the central body provides effective sales and marketing measures as support	Group of professionals
Justified by economic rationale to reduce costs, increase negotiating power, and establish common branding	Trade association
Needed for a strong negotiating position and public image	Manufacturer cooperative
Staff training obligations are required for meeting trading requirements	Wholesale cooperative

Source: Analysis of responses to question Q3.2

One respondent (a trade association) summarises the use the objective justification for the use of these obligations as necessary to constitute a group pooling resources rather just individual operators in competing with integrated retailers in the following terms:

*“All of the obligations mentioned above can be justified objectively – there is an economic rationale connected to a common business policy, a common brand policy and a common goal of pooling resources in order to reduce costs or increase negotiating power. This is the very nature of a distribution network made up of independent operators.*

*In the case of a distribution network structured as a group of independents, the group is a resource-sharing entity pooling purchases and services. The independent members sharing control of this group put together a business policy which may result in a common brand concept. A distribution network set up by independents is thus granted the same means of action as any integrated network.”*

However, it is clear from the detailed responses provided that it is the set or combination of obligations used rather than just individual obligations which is vital to the efficiency of the organisation. In demonstrating how the intertwined nature of obligations on retail members work in tandem, one retail group seeking to use vertical influence for the benefit of the organisation as a whole to be as efficient and competitive as possible, so benefitting consumers as well, argues how centrally determined assortment selections as a purchasing obligation works together with maximum retail prices (as price caps) in the following terms (in anonymised form):<sup>41</sup>

*“The group has in its self-assessments concluded that assortment selections are indispensable to (maximum) retail price maintenance and better operative efficiency. Assortment selections enable the group to have better purchasing terms with suppliers. Assortment selections create also a solid base for efficient product management and logistics. These are obvious sources of cost efficiencies. Furthermore, (maximum) retail price maintenance is necessary to pass on these benefits (in form of lower prices) to the consumers. Based on our own assessment, recommended product ranges and/or recommended retail prices have not led to as positive results as with assortment selections and (maximum) retail price maintenance.*

*Having said that, the group’s buying power is substantially undermined by several facts. First, retailers do not have any definitive obligation to buy goods from through the central organisation. While the group may exploit its buyer power regarding assortment*

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<sup>41</sup> This same retail group also separately provided details of empirical analysis they had undertaken which corroborates their arguments here. Their analysis shows that a high share of mandatory assortment is correlated with a low total price level for a store and that products with maximum retail price (MRP) set by the central organisation were significantly cheaper than products without with MRP so acting as a driver for competitiveness. The analysis also showed that high usage of recommended retail prices (RRP) correlates with local total prices level of a store as the stores strive for efficiency.

*selection to some extent, retailers may contact suppliers directly and even use competing sources of supplies when purchasing goods belonging to assortment selections. Furthermore, retailers may always purchase and sell other goods that are not in assortment selections. This diminishes the group's bargaining power resulting in weaker purchasing terms and, consequently, consumer benefits. At the same time, the group's main competitors may fully exploit their bargaining power in sourcing. Therefore, it would be important to the group to be able to (i) impose exclusive purchasing obligation on its retailers.*

*Furthermore, the group's right to set maximum prices are limited compared to its main competitors... Maximum priced selections cover approximately 65% of sales in each retail chain. Retailers may set prices quite freely on the rest of the selections. Even if the group has given price recommendations to its retailers, retailers can then exceed these recommendations. This, on the other hand, damages the group's price image and leads to worse purchasing terms. Suppliers do not give best terms to the group if the group cannot assure its suppliers that such benefits shall be passed on to the final consumers. Finally, the group's main competitors are free to set retail prices as they see fit. Therefore, it would important to the group to be able to (ii) set maximum retail prices on all products that are being sold from the group's retailer stores; or (iii) at least create positive incentive schemes to its retailers not to beyond price level the centre has recommended."*

### **B4.3 Services and terms of trade not offered to members**

In addition to responses to questions Q3.1 and Q3.2 providing information about which obligations organisations use in respect of their retailer members and the extent to which these are necessary for efficiency and competitiveness purposes, respondents were also asked about the services and terms of trade that their organisations are unable to provide to their independent retailer members because of the organisation's structure and remit and/or legal impediments and regulations. Some 14 organisations responded with specific information on the services and trade that they could not offer members but would like to be in a position to do so if regulations and competition law permitted them to do so and also if members were willing to accept their use. The information from the responses by the type of organisation responding is summarised in Table B13, where restrictions on the ability to undertaking joint advertising, consistent pricing and online retailing again come to the fore.

**Table B13. Services and terms of trade that cannot be offered to members**

<b>Services and terms of trade not currently available to retailer members</b>	<b>Organisation type</b>
No common e-commerce platform providing a common assortment with the same prices	Retailer group
No online retail	Retailer group

Restricted online development requiring high investment effort with high risks	Retailer group
No unified payment and financial services	Retailer group
No joint sale promotions, no key product data with sale price, and no margin advice	Retailer group
No joint advertising due to inconsistency in brand images and variations in product range, no consistent advertising, and no central merchandising management	Retailer group
No nationwide marketing activities	Retailer group
No joint advertising with standardised pricing	Retailers' cooperative
Restricted development of own brands and exclusive products and no proactive pricing policy	Retailers' cooperative
National restrictions (e.g. market power regulations in the Czech Republic)	Service intermediary
No price fixing or use of minimum resale price maintenance	Trade association
No common prices	Voluntary membership group
No recommended pricing and joint price advertising (e.g. special offers)	Group of professionals

Source: Analysis of responses to question Q3.3

#### ***B4.4 Additional costs incurred by members if not part of the group***

In respect of the benefits that go with membership of independent retailer groups, respondent were asked about how independent retailer members would fare, and specifically what additional costs and they would face, on what scale, if they were not members of the organisation (Q3.4). Some 22 respondents addressed this question, summarised in Table B14 according to the organisational type, with the table split between those providing general detail shown in the top part of the table and those giving more specific attributable figures on the extent or impact of additional costs or lost benefits shown in the bottom part of the table.

**Table B14. Services and terms of trade not offered by independent retailer groups**

<b>Additional costs incurred if not members in group</b>	<b>Organisation type</b>
<b><i>I. General losses and implications</i></b>	
Additional warehousing costs, reduced product range and additional administration costs	Voluntary membership group
Higher fixed costs for negotiating	Wholesale cooperative
Higher process-related costs	Service intermediary
Higher purchase prices	Retailer group
Higher purchase prices and inefficient logistics	Retailer group
Higher purchase prices and lower economies of scale	Retailers' cooperative
Higher purchase prices, higher negotiating costs and higher marketing costs	Group of professionals
Higher purchasing costs and loss of economies of scale	Retailer group
Loss of competitive sourcing, logistics and IT support	Retailer group
Loss of efficiency in developing online presence, negotiating with suppliers, and loss of central invoicing	Retailer group
Unable to survive	Trade association



Unable to survive	Voluntary membership group
Unable to survive with drop in margins resulting in running a loss-making business	Retailer group
<b>II. Quantified losses and implications</b>	
Additional 1-5%	Voluntary membership group
Additional 3%	Retailers' cooperative
Approximately €100,000 per member per year	Retailer group
Extra 2-15% purchasing costs, extra 20% marketing costs and extra 2-5% financing costs	Retailer group
Higher purchase prices, advertising costs and IT services resulting in 20% additional costs	Retailer group
Impossible to compete effectively with 10% higher costs	Retailer group
Loss of 4% bonuses from group buying and higher operating and financing costs	Voluntary membership group
Loss of benefits amounting to 5-7% of realised turnover	Retailer group
95% would be unable to survive due to their small size	Retailer group

Source: Analysis of responses to question Q3.4

The set of 13 responses in the top part of the table identify a wide range of additional costs that independent retailers would incur in the absence of membership to the organisation, including higher fixed costs of negotiation, higher purchase prices, inefficient logistics, additional warehousing costs, reduced product range, lower economies of scale, higher marketing costs, additional administration costs, loss of central invoicing, loss of efficiency in developing an online presence. Three of these respondents conclude bluntly that these members would be unable to survive outside the organisation in the absence of any equivalent organisation for independent retailer groups.

In addition, respondents were also asked to indicate the percentage increase in costs that independent retailer members would typically face if they stopped being members of their organisation for given alternatives. A number of respondents said that they were unable to quantify the percentage or monetary amount facing individual members, in part because of differences in retailer sizes and circumstances they face, but mostly because it was not clear that there was a ready alternative. However, 9 respondents did provide figures, as shown in the bottom part of Table B14. The percentage increases in costs range from an additional 1% to an extra 20%, with the lower values tending to be for overall costs and the higher values for specific service costs. Also, beyond percentage levels, one independent retailer group (involved in automotive retailing) put a value (at approximately €100,000 per member per year) on the loss for not being a member of the group.

Taken across the set of respondents, it is evident that many retailer groups feel that retail members would struggle to survive and prosper if they were outside of the organisation given the benefits and protection that group membership can afford and the lack of alternatives in view of the considerable efficiencies and market advantages that integrated retailers and franchise systems hold in most retail markets.

#### ***B4.5 Reasons why members wish to remain independent***

In addition to asking about the consequences for members losing their membership and not being part of the organisation, respondents were also asked why their independent retailer members wish to remain as independent and not instead be part of an integrated retail organisation or franchise organisation (Q3.5). The 27 responses to this question are listed (alphabetically) in Table B15. The key aspects that most organisations point to is that their members want to retain their independence because this way they are entrepreneurs rather than employees or store managers, they have greater say in decision making as co-owners of the organisation, it meets their needs for being self-sufficient and having business freedom and able to express their individuality, it provides continuity as a family business and supporting tradition, and serves them in wanting to remain independent but also benefiting from cost savings and business support within a membership organisation, with ultimately control of their lives and reward for their own efforts while bearing the financial risk of owning and running an independent business.

**Table B15. Reasons for why group members wish to retain their independence**

<b>Reasons cited for members wishing to remain as independent</b>
As entrepreneurs owning their own stores and with internal pressures ensuring group competitiveness
Being an entrepreneur not employee or store manager
Continuity as family-run businesses rooted in their locality
Control of their lives and reward for their own efforts
Co-owners making joint decisions providing power beyond own retail outlet
Desire to be completely independent and self-sufficient
Ensuring individuality and diversity of services
Entrepreneurial freedom steering their businesses independently
Entrepreneurs and companies grown over generations appreciate independence and decision-making freedom with established strong brands in their respective region
Entrepreneurs and family-run companies bearing financial risk but with maximum influence on their business
Family-run business put their heart and soul into their companies

Free and independent entrepreneurs established over generations in their local market
Freedom of entrepreneurship rather than being an employee
Freedom of independent entrepreneur to act and make decisions
High levels of freedom within an organisation structure
Independence supporting tradition
Independence, self-rule, entrepreneurial freedom, free to choose central services provided, and no restrict requirements or documentation obligations
Independent decision-making to autonomously further their business development
Independent decision-making, investments and risk involvement with better local and customer knowledge and more personalised product range
Independent entrepreneurship
Maintaining independence
Maximum entrepreneurial independence
Nothing better than freedom
Supporting an independent mind-set making their own decisions
Want to be independent but franchising could offer advantages
Want to remain business owners
Want to remain legally independent and act autonomously while achieving cost savings and process support

Source: Analysis of responses to question Q3.5

#### ***B4.6 Advantages of other retailer organisational structures***

Given the contractual restrictions, regulations and other limitations that independent retailer groups face, respondents were asked what specific advantages do integrated firms, franchise system or other retail organisational structures have that their members do not have and why do these arise. Twenty four respondents provided details on 61 advantages (i.e. an average of a little over 2.5 examples per respondent) arising from nature, structure and/or ownership pattern of these alternative retail organisational types. These advantages are categorised and listed in Table B16 in rank order according to the number of examples cited for each of the 12 categories used.

**Table B16. Advantages of other retailer organisational structures**

Category	Frequency	Identified advantage for integrated retailers and other organisations forms
Promotion	14	Ability to undertake nationwide promotions (x 2); Active, aggressive and nationwide communication; Advertising economies of scale; Consistent advertising; Consistent customer communication; Consistent marketing across all channels; Fewer restrictions on marketing Joint advertising (x 2); Promotional economies of scale; Standardised advertising (x 2); Uniform marketing behaviour
Brand image	13	Clear image to consumers; Consistent appearance; Consistent approach and communication; Consistent brand image of shops/products/staff; Consistent brand policy; Consistent image to consumers; Higher consumer recognition; Same name and corporate identity; Strong consumer brands; Strong retail brands; Uniform brand image with standard prices; Uniform brand image with standard prices and special offers; Uniform public image
Pricing	9	Consistent pricing (x 2); Consistent retail prices; Franchising systems also unable to

		set standardised prices in the manner of integrated retailers; Freedom to set same prices; Pricing policy control; Standard pricing structure; Standardised pricing; Standardised pricing and service offer
Internal integration	8	Absence of intra-brand competition; Efficiencies from integrated business model; More simplified management and policy decision making; Quicker decision-making without need for agreeing decisions with a large number of players; Seamless communication within organisation; Standardised purchase processes; Systematic training of staff; Uniform management system
Negotiating power	5	Better discounts from suppliers; Better negotiating position; Better purchasing conditions through bulk purchasing; Consolidated rather than fragmented buyer power; Possibility to negotiate with suppliers based on guaranteed assortment in all stores
Product control	3	Ability to delist products in absence of favourable terms; Consistent product range/portfolio; Strict policy in terms of product range and sales/distribution
Financing	2	Credit and investment advantages; Investment power
Supply efficiencies	2	Lower logistic costs; Purchasing economies of scale
Legal freedom	1	Absence of antitrust law restrictions inhibiting efficiency
Market power	1	Market power
Overheads	1	Lower overhead expenses; additional synergies
None	1	None

Source: Analysis of responses to question Q3.6

As shown in Table B16, there was one instance where a respondent stated “none” to indicate that these other organisations forms had no apparent advantages over its own group. In all other cases, though, the respondents identified an array of different advantages available to integrated retailers and franchise systems, especially in respect of promotion, brand image, pricing, internal integration, negotiating power, and product control, along with instances related to financing, supply efficiencies, legal freedom, market power, and overhead cost savings and cost synergies.

As discussed above, often effects can work in tandem, and this certainly seems to be the case with the benefits enjoyed by integrated retailers over independent retailer groups when the lack of the ability to control all business aspects puts these groups at a disadvantage. For example, the lack of control of independent retailer members can provide a means for powerful suppliers to exploit this lack of control to their advantage in a way that is not possible with integrated retailers. To illustrate how this works in relation to the greater negotiating power of an integrated retailer, one large independent retailer group operating with different retail chains contrasted its vulnerable negotiating position and inability to control costs as effectively as it would like in the following terms (in anonymised form):

*“One of the key advantages is a generally better negotiating position when it comes to purchasing. Although our group can achieve significant economies of scale thanks to its purchasing volume, integrated organisations are able to, for instance, simply discontinue certain products from suppliers if no agreement can be reached. Because of its*

*cooperative philosophy, our group is under obligation to procure the items considered necessary by its members, even if this means purchasing them at less favourable costs than the competition might be able to achieve. Due to the sheer number of independent retailers, there is a significant number of retailers who wish to stock certain items, some of which may even be at the disposal of the buyers themselves. This results in retailers being able to influence purchasing organisations via their cooperatives. Suppliers can use this effect to their advantage by actively promoting their products with the retailers, putting pressure on the purchasing organisations.*

*The aforementioned integrated organisations are also able to run a leaner operation and generate efficiencies – although perhaps to the detriment of variety – thanks to stricter regulations in terms of shop furnishings, distribution and advertising of products.”*

## B5. National policy issues

The questionnaire asked respondents a series of questions about how policies, regulations and laws are impacting their organisations and membership, in respect of the ways in which they might be impeded, restricted or discriminated against, and also what the organisations would want to see changed in order to improve their situation in aiding their efficiency and competitiveness. This section details the responses in regard of local, federal and national policy matters, while Section 6 below covers EU-wide policy issues.

### ***B5.1 Impact of national or federal competition policy and regulations***

As an opening question on policy matters, the respondents were asked in what demonstrable ways does national or federal/regional competition policy impact or impede their organisation and their independent retailer members (Q4.1). In total, 24 respondents provided defined answers, of which four respondents said there was no specific impact, but the other twenty respondents gave a total of 32 examples, which for convenience are organised into general categories and listed by their rank order of the frequency for the category and summarised in Table B17.

**Table B17. Impediments due to national/regional regulations and competition policy**

Category	Number	Impact and impediments from national/regional regulations and policy
Bureaucracy	7	Administration burden and costs arising if food inspections and wastage control systems are introduced; Administrative burden for completing statistics reports and documentation; Bureaucracy and administration burden associated with following labour laws; Bureaucracy and compliance driving up costs; Bureaucracy and intrusion from price control authorities; Disproportionate bureaucracy and strain on independent retailers; National-level bureaucracy exacerbated by European regulation
Planning policy	5	Competition authority views planning policy restrictions as creating barriers to competition in retail trade; Planning and construction laws inhibiting the development of new stores; Planning policy and over-supply of retail space resulting in desolation of city centres; Planning policy for stores; Varying local

		regulations
Opening hours	4	Loss of turnover due to restricted Sunday opening hours; Opening hour restrictions (x 2); Opening hour restrictions but not applicable
Vertical restraints	4	Competition authority refuses to accept any exclusive purchasing obligations on independent retailers and doubtful on maximum retail price maintenance; Competition authority requirements to adjust pricing services provided to individual retailers; Controversial draft bills ultimately not adopted due to different distribution models not sufficiently taken into consideration; Competition authority encouragement to adopt voluntary governance mechanisms to tackle unfair trading practices
Transport policy	2	Traffic and parking management affecting trade; Transportation policy restricting sales force operations
Advertising ban	1	Tobacco advertising ban restricting retailer's communication with the consumer
Below cost selling	1	Abolition of the ban on selling at cost price would be desirable, since it has not worked in practice
Public procurement	1	Competitive tendering requirements favouring large specialised companies
Energy levy	1	Renewable energy levy driving up retailer costs
Cooperatives	1	Inconsistent legal treatment of cooperatives in being able to set common sale prices in some countries but not others
Market definition	1	Competition authority views dominant position at 30%+ national market share
Pricing promotion	1	Prohibition on joint advertising with standard pricing
Collaboration	1	Small retailers prevented from acting together
Tax policy	1	Large corporations such as Amazon do not pay trade taxes but use the infrastructure paid for by the tax payers
Wage legislation	1	Minimum wage legislation

Source: Analysis of responses to question Q4.1

As the table shows, the most frequency cited examples related to bureaucracy and the associated administrative burden, planning policy (in respect of opening new stores and the regulation of stores and retail centres), opening hours (which appear particularly restrictive in some EU member states), and policy towards vertical restraints and distribution agreements (including restrictions on exclusive purchasing obligations and the use of resale price maintenance as well as policy towards unfair trading practices). In addition, there were individual examples from a string of other categories as diverse as traffic and parking policy, tobacco advertising ban, below cost selling law, competitive tendering requirements, renewable energy levy, inconsistent legal treatment of cooperatives, market definition and the treatment of a dominant position if holding above 30% market share, prohibition on joint advertising for price promotions, small retailers being prevented from collaborating, discriminatory tax policy (being advantageous to pure online retailing organisations), and minimum wage legislation.

### **B5.2 National decisions relevant to retailing sectors**

Building on this general information, respondents were asked a more specific question in respect of whether they have there been any national decisions (directly or indirectly)

relevant to the retailing sector served by their members in respect of market definition, permitted/prohibited practices, and/or mergers that are influencing the business practices and contractual arrangements for their organisation and membership (Q4.2). Of the twenty respondents, nine said there were none. From the eleven other respondents, they identified 15 specific decisions which have been summarised in category ranks in Table B18.

The list of specific decisions covered in Table B18 includes national competition authority decisions based on investigations, notably regarding vertical restraints and market definition issues, including matters relating to exclusive purchasing obligations, (maximum) resale price maintenance, and defining dominant positions with 30% national share as well as policy on delineating local retail markets. In addition, the list includes specific court decisions which relate to the legal treatment of cooperatives and over geographic restrictions on pharmacy licenses. There are also cited examples where no action was taken by the authorities, including in respect of below-cost selling and price dumping, removing import restrictions, and no planning restrictions on logistics centres for online retailers (unlike the tight planning restrictions on retail stores).

**Table B18. National decisions relevant to retail sectors**

Category	Number	Specific decisions relevant to retail sectors covered
Vertical restraints	4	<ul style="list-style-type: none"> <li>• Competition authority decision not to accept any exclusive purchasing obligations on independent retailers and doubtful on maximum retail price maintenance</li> <li>• Requirement for not conducting joint concerted marketing activities with consistent pricing</li> <li>• Restrictions on marketing and price controls</li> <li>• Competition authority investigation advising brand suppliers not to ban sales via online platforms</li> </ul>
Market definition	3	<ul style="list-style-type: none"> <li>• Competition authority determining market definition at the local level</li> <li>• Competition authority adopting unduly narrow product and geographical market definitions</li> <li>• Competition authority decision that dominant position exists with 30% national market share</li> </ul>
Cooperatives	3	<ul style="list-style-type: none"> <li>• The European Court of Justice's ruling on <i>Paint Graphos</i> (8/9/2011, C78/08 to C80/08)</li> <li>• European Parliament resolution on Social Economy (19/2/2009, no. 2008/2250, para 4).</li> <li>• French Public Notice (no. 10-A-26, 7/12/2010) regarding membership contracts for independent shops and the conditions for purchasing commercial property in the food distribution sector</li> </ul>
Planning/licensing restrictions	2	<ul style="list-style-type: none"> <li>• Planning decisions allowing construction of logistics centres for online retailers</li> <li>• Confirmed legality of geographical restrictions on setting up pharmacies (ECJ joined cases C-159/12 to C-161/12 <i>Venturini e. a. / ASL Varese e. a.</i>)</li> </ul>
Advertising ban	1	<ul style="list-style-type: none"> <li>• Tobacco advertising ban and restrictions</li> </ul>
Dumping	1	<ul style="list-style-type: none"> <li>• Authority failure to prevent below-cost selling and price dumping</li> </ul>
Imports	1	<ul style="list-style-type: none"> <li>• Abolition of import restrictions from the Far East</li> </ul>

Source: Analysis of responses to question Q4.2

### **B5.3 Aspects of current policy giving cause for concern**

In addition to asking about decisions relating to retail sectors, the respondents were also asked about what aspects of current national competition authority policy are giving their organisation and membership most concern (Q4.3). Four respondents answered that there were none, but other respondents identified 17 aspects of concern to their organisation and membership. The 17 aspects are categorised and as summarised by their category rank in Table B19. The majority of these relate to concerns about vertical restraints policy and the legal uncertainty as to practices that may or may not be allowed, particularly in respect of resale price maintenance, selective distribution, and the perception that manufacturers are favoured over retailers in applications of the vertical agreements block exemption regulation. In addition, concerns were also raised about national authorities doing nothing about unfair competition from large online providers, especially when paying little or no tax. Further aspects cited were about state interference in business decision making and also a specific case about competitive tendering requirements in regulated markets for medical goods. Furthermore, concern about legal uncertainty was also raised in respect to how competition authorities would physical store retailers cooperating over developing online sales.

**Table B19. Aspects of national policy giving independent retailer groups most concern**

Category	Number	Aspects of national policy giving concern
Vertical restraints	9	<ul style="list-style-type: none"> <li>• Attitude against maximum retail price maintenance</li> <li>• Block exemption regulation favouring manufacturers over retailers</li> <li>• Brand providers allowed to impede online distribution of their products</li> <li>• Legal uncertainty over vertical price fixing requiring new guidelines</li> <li>• Regulations restricting selective distribution (x 3)</li> <li>• Requirements to remove any obstacles to inter-brand mobility</li> <li>• Restrictive practices</li> </ul>
Unfair competition	4	<ul style="list-style-type: none"> <li>• Continuing to allow tax benefits for foreign online providers</li> <li>• Continuing to allow unfair competition from large online providers who pay little or no tax</li> <li>• Continuing to allow unfair competition from online retailing</li> <li>• Lack of support to independent retailers</li> </ul>
Regulation	2	<ul style="list-style-type: none"> <li>• Administrative interference by the state in corporate decision-making without considering the actual impact of laws and obligations</li> <li>• Competitive tendering favouring large specialist organisations</li> </ul>
Market definition	1	<ul style="list-style-type: none"> <li>• Market definition uncertainty over online sales and legal risk if brick and mortar retailers cooperate</li> </ul>
Environment policy	1	<ul style="list-style-type: none"> <li>• Risk of environmental decisions devaluing the market</li> </ul>

Source: Analysis of responses to question Q4.3

### **B5.4 Restrictions on cooperative and association agreements**



To gather information more specifically on whether and how national policy might impact the operations and membership of the organisations responding to the survey, the respondents were asked if there were any specific restrictions set out by their national (or regional) competition authority or other national regulator regarding co-operative agreements, buying organisations, and associations of independent companies, such as market share limits, legislative restrictions or regulations (Q4.4). For this question, seven respondents answered “none”. Of the remaining responses, 18 examples of specific restrictions or regulations were cited, as summarised by their category rank in Table B20. The majority of these relate to vertical restraints policy and treatment, such as the need for selective distribution to ensure product diversity as well as about the legal uncertainty over vertical price fixing and use of maximum retail price maintenance, market share restrictions in the vertical group exemption, not allowing fully exclusive purchasing obligations, and standardised pricing restrictions. In addition, there restrictions were cited in regard to how competition authorities determined dominant positions with market power, deemed to exist with 30% national market share, as well as market share limits that could restrict the growth prospects or merger opportunities for independent retailer groups, not least because market definition could be determined on a very narrow product or geographic basis. Furthermore, respondents cited how opening hour restrictions limited their ability to compete effectively (especially with online retailers), how the absence of legislation against below-cost pricing was resulting in price dumping and predatory behaviour, and the risk that cooperatives could be subject to time limits on cooperative membership (in view of a 2015 draft bill in France, which was later abandoned, intending to set a contract limit to 9 years without the possibility of tacit renewal).

**Table B20. Restrictions and regulations affecting cooperative and association agreements**

Category	Number	National or regional restrictions and regulations affecting cooperation
Vertical restraints	12	<ul style="list-style-type: none"> <li>• Competition law on selective distribution needs to ensure product diversity</li> <li>• Competition law restrictions on agreements with members (x 3)</li> <li>• Legal uncertainty over vertical price fixing</li> <li>• Market share restrictions in the vertical group exemption</li> <li>• Not allowing exclusive purchasing obligations</li> <li>• Restrictions by national competition Act (x 2)</li> <li>• Standardised pricing restrictions</li> <li>• Uncertainty over permitting use of maximum retail price maintenance</li> <li>• Vertical group exemption regulation and competition restrictions</li> </ul>
Market power	2	<ul style="list-style-type: none"> <li>• Determining dominant position exists with 30% national market share</li> <li>• Market share limits</li> </ul>
Below cost selling	1	<ul style="list-style-type: none"> <li>• Absence of legislation against below-cost pricing</li> </ul>
Cooperatives	1	<ul style="list-style-type: none"> <li>• Draft bill (later abandoned) to limit cooperative membership contracts to nine years</li> </ul>

Market definition	1	<ul style="list-style-type: none"> <li>Narrow market definition</li> </ul>
Opening hours	1	<ul style="list-style-type: none"> <li>Regulation of opening times</li> </ul>

Source: Analysis of responses to question Q4.4

### ***B5.5 National policy impeding competitiveness***

To assess the different ways in which national policy might hold back or undermine the competitiveness of independent retailer groups, respondents were asked what elements of national policy impede their organisation and members with respect to their ability to compete on effective terms and so could be detrimental to supporting effective competition and harmful to consumers (Q4.5). Three respondents answered none. Of the, 21 ways were cited, which have been categorised and summarised according to their category rank order in Table B21. The table shows a broad spread, with five categories having three examples each, and a further five categories having one or two examples each. In particular, bureaucracy was seen as undermining competitiveness by raising costs associated with administration and compliance, planning policy was constraining store development and store network expansion, so affecting efficiency, and similarly pricing restrictions for independent retailer groups and cooperatives was affecting competitiveness, especially in regard to running promotions and ensuring that low prices were being maintained across the retail membership network. Retailer costs were also be driven up by renewable energy levies and waste disposal/recycling costs, which online retailers might be able to avoid.

**Table B21. National policy affecting competitiveness**

Category	Number	Aspects of national policy affecting ability to compete effectively
Bureaucracy	3	<ul style="list-style-type: none"> <li>Administration burden and costs arising if food inspections and wastage control systems are introduced</li> <li>Bureaucracy and administration burden associated with following labour laws</li> <li>Bureaucracy and intrusion from price control authorities</li> </ul>
Cooperatives	3	<ul style="list-style-type: none"> <li>Cooperatives prevented from adopting uniform pricing</li> <li>Extend provisions consistently across all countries to allow for cooperatives to set common promoted prices for members</li> <li>Extensive restrictions in terms of mutual exchanges</li> </ul>
Planning policy	3	<ul style="list-style-type: none"> <li>Planning and construction laws inhibiting the development of new stores</li> <li>Planning policy constrains opening, expanding or renovating a retail business</li> <li>Planning policy restraints</li> </ul>
Pricing	3	<ul style="list-style-type: none"> <li>Legal uncertainty over permitting use of maximum retail price maintenance</li> <li>Promotional price recommendations from suppliers should be allowed to be binding to avoid excessive and unprofessional price dumping</li> <li>Restrictions for group members in terms of determining standardised pricing</li> </ul>
Vertical restraints	3	<ul style="list-style-type: none"> <li>Competition law on selective distribution needs to ensure product diversity</li> <li>Not allowing exclusive purchasing obligations</li> <li>Vehicles block exemption regulation</li> </ul>
Energy policy	2	<ul style="list-style-type: none"> <li>Renewable energy levy driving up retailer costs</li> <li>Waste disposal regulations create unfair advantage to online retailers</li> </ul>
Below cost selling	1	<ul style="list-style-type: none"> <li>Abolition of the ban on selling at cost price would be desirable, since it has not</li> </ul>

		worked in practice
Market definition	1	<ul style="list-style-type: none"> <li>• Legal uncertainty when holding a high market share</li> </ul>
Marketing	1	<ul style="list-style-type: none"> <li>• Banning of concerted marketing activities</li> </ul>
Public procurement	1	<ul style="list-style-type: none"> <li>• Public procurement requirements</li> </ul>

Source: Analysis of responses to question Q4.5

### ***B5.6 Horizontal and vertical relationship investigations and decisions***

To ascertain whether there had been specific investigations or decisions regarding the contractual relations between members and the central organisation, the respondents were asked what, if any, horizontal and vertical relationships in their organisation have been reviewed, investigated or commented on by the national competition authority or a court of law and under what terms have these been permitted, limited or prohibited (Q4.6). Fifteen respondents answered none. Of the remaining responses, 9 specific restrictions were cited, as summarised by their category rank in Table B22. All but one relates to restrictions arising from what are categorised as vertical restraints policy, but for retailers' cooperatives they could in some instances instead be construed as horizontal agreements (e.g. over pricing agreements). The cited examples mostly relate to large retail organisation where authorities might consider the groups hold market power, in which case there might be assessment of concept agreements as part of merger control and consideration of a breach of restrictions of for national competition act. In addition, though, there are quite specific limitations and constraints imposed on vertical agreements, such as assortment selections for retail chains accepted if not exceeding 80% of stores sales or maximum retail prices allowed on own and exclusive products if not exceeding 75% of category sales. However, there were blanket bans like the decision not to accept any exclusive purchasing obligations for one large retail group,

As well as requiring self-assessment on other vertical restraints. In addition, other respondents mentioned competition authority reviews in regard to national campaigns if not all retailers follow the recommended prices advertised and price profiles with the intention to limit their influence. Aside from vertical restraints, the only other mentioned example is about involvement with a review of online sales, which resulted in no objections.

**Table B22. Specific national restrictions on cooperatives or groups of independents**

Category	Restrictions
Vertical restraints	Assessment of concept agreements as part of merger control and potentially a breach of restrictions of Competition Act

Vertical restraints	Assortment selections for retail chains accepted if not exceeding 80% of stores sales
Vertical restraints	Decision not to accept any exclusive purchasing obligations
Vertical restraints	Maximum retail prices allowed on own and exclusive products if not exceeding 75% of category sales
Vertical restraints	Required self-assessment
Vertical restraints	Review of national campaigns if not all retailers follow the recommended prices advertised
Vertical restraints	Review of price profiles limiting their influence
Vertical restraints	Vertical group exemption regulation
Online sales	Part of EU sector inquiry on online sales platforms but no resulting objections

Source: Analysis of responses to question Q4.6

### ***B5.7 Different regulations and policies in other EU Member States***

To understand whether the same rules and policy treatments were being applied equally across the EU, the respondents were asked what, if any, policy/regulation benefits are available in other EU Member States to equivalent organisations and members that their own organisation and members are unable to enjoy because of present national policy and regulations (Q4.7). This question yielded on a limited number of responses, of which there were eight in total and three of these said there were none. Of the remaining five respondents, two respondents focused on the benefits that cooperatives could enjoy in a different member state compared to the legal treatment in their own country, where retailers' cooperatives were allowed to cooperate with a common online platform with common pricing and given more ability to set and manage common pricing. In addition, one respondent mentioned that there were less restrictive shop opening hours in other EU countries than in their own country. Another respondent intimated that in other EU countries there is support for state subsidies for digitalisation and visiting trade shows abroad that is not supported by their own country's government or authorities. The remaining respondent focused on the need for market entry conditions and the ability to stop the expansion of "huge foreign retailers" in view of the considerable structural changes taking place in grocery retailing in the respondent's own country and the limited ability of small-store format domestic retailers to compete against larger and heavily resourced international retailers.

### ***B5.8 Imminent national policy changes***

As a final question on national policy and looking forwards in time, the respondents were asked whether they were aware of any imminent policy changes, industry reviews, or relevant company/merger investigations (Q4.8). From the 21 responses, 16 respondents said that they were not aware of any. Four responses focused on potential measures against unfair trading practices (UTPs), including a possible amendment to the national competition act prohibiting retailers from inducing suppliers to grant them benefits without any objective justification and enforcing the ban on selling food items below cost, as well as suggested national and EU level legislation on payment terms limited to 30 days, and suggested legislation on unfair trade practices applied in the food industry. In addition, another respondent commented on imminent legislation for a national strategy on the food chain in their own country, indicating that this was partly about food security but also concern the welfare of farmers and margins and terms of trade within the food sector.

## **B6. European policy**

### ***B6.1 European (EU) competition policy impact***

Moving on from questions about national policy to a series of questions about EU policy, the respondents were first asked about the ways in which current European (EU) competition policy impacts their organisation and independent retailer members (Q4.9). Of the 20 responses to the question, three said that there was no impact and one said negatively in an overall and non-specific sense. The remaining 16 responses are categorised and summarised in Table B23. The category with the highest number of cited examples is in regard to vertical restraints policy, where there are specific instances relating to the vertical agreements block exemption regulation, prohibition of resale price maintenance, and the group and vehicles block exemption regulations. The next category is about the influence of EU policy more generally in respect of dominating national policy and the failure of both EU and national policies to understand the nature of cooperative retail for consumer benefit. The third category is about bureaucracy and the administrative and compliance burden impacting small businesses and retail organisations in particular, with an example about the failure of the EU to control the existence different labelling laws in EU member states which were acting to raise costs for international retailers. The other three mentioned examples also relate to international retailing in respect of the inability to promote the nationality of

goods and services, the lack of tax harmonisation allowing for the creation and abuse of tax havens by international companies seeking to avoid paying taxes, and the impact of the tobacco products directive which is viewed as favouring large international organisations over small and medium sized enterprises (SMEs).

**Table B23. EU policy impact on independent retailer groups**

Category	Number	EU policy impacting respondent organisations
Vertical restraints	6	<ul style="list-style-type: none"> <li>• Promotion of fair business practices through participation in the Supply Chain Initiative</li> <li>• Vertical agreements block exemption regulation</li> <li>• Competition policy against resale price maintenance</li> <li>• Group exemption regulation 330/2010 excludes certain groups from competition-reducing agreements</li> <li>• Prohibition of resale price maintenance</li> <li>• Vehicles block exemption regulation</li> </ul>
Policy agenda	4	<ul style="list-style-type: none"> <li>• EU policy leads and dominates national policy</li> <li>• Failure of EU and national policies to understand the nature of cooperative retail for consumer benefit</li> <li>• National competition law more or less resembles EU competition policy</li> <li>• National policy is conditioned by EU policy</li> </ul>
Bureaucracy	3	<ul style="list-style-type: none"> <li>• Excessive regulations and legal requirements in the EU</li> <li>• Leads to excessive bureaucracy</li> <li>• Legal differences across the EU on labelling adding to costs</li> </ul>
Internal market	1	<ul style="list-style-type: none"> <li>• Prevention of promoting nationality</li> </ul>
Tax policy	1	<ul style="list-style-type: none"> <li>• Tax legislation allows migration of companies to tax havens</li> </ul>
EU directive	1	<ul style="list-style-type: none"> <li>• Tobacco Products Directive requirements favour large international organisations over SMEs</li> </ul>

Source: Analysis of responses to question Q4.9

### **B6.2 Desired changes in EU policy**

In view of the concerns that independent retailer groups might have about competition policy and EU regulations in general, respondents were asked about what they would like changed and how these changes could benefit their organisation, their members and end-consumers (Q4.10). There were 26 responses which have been categorised and summarised in Table B24. The most frequently mentioned cases relate to be allowed to use common pricing and RPM for the sake of being competitive. Also respondents wanted equality of treatment for their organisations compared to other retail forms, as well as aspects relating to tax policy, the internal market, and various marketing and agreement arrangements.

**Table B24. Desired EU policy changes**

Category	Number	Specific examples of desired EU policy changes
Pricing	6	<ul style="list-style-type: none"> <li>• Allow common pricing online on certain competitive products</li> <li>• Allow consistent pricing and advertising</li> <li>• Allow maximum retail prices on all products and appropriate incentives for retailers to comply and benefit consumers with lower prices</li> <li>• Allowing increased retailer cooperation to establish common pricing and platform online</li> <li>• Remove ban on communicating consistent pricing for independent retailer groups</li> <li>• RPM, at least for the online sales and for a certain number of not defined products during a certain period</li> </ul>
Equality	4	<ul style="list-style-type: none"> <li>• Allow networks of independent retailers access to the same competitive tools as integrated networks</li> <li>• Create the same conditions for all providers in the market</li> <li>• EU commission should abandon its anti-retail attitudes which are jeopardising independent retailing</li> <li>• Regulations to take into account the special characteristics of independent retailer groups to benefit consumers and allow adapting to changing trading conditions</li> </ul>
Tax policy	3	<ul style="list-style-type: none"> <li>• Harmonise sales and profits taxes</li> <li>• Harmonization of fiscal rules to ensure online sellers have the same costs, recycling fees and copyright fees as physical stores</li> <li>• Standard European tax for all companies on turnover or profit</li> </ul>
Internal market	2	<ul style="list-style-type: none"> <li>• Harmonization of the legislation in the EU</li> <li>• Reduce bureaucratic obstacles on cross-border trade</li> </ul>
Vertical restraints	2	<ul style="list-style-type: none"> <li>• Avoid regulation on distribution</li> <li>• Stop European legislation regulating business practices along the food supply chain which will restrict flexibility and freedom of contract to the detriment of suppliers and retailers</li> </ul>
Regulated goods	1	<ul style="list-style-type: none"> <li>• Abolish required tendering systems for regulated medical goods</li> </ul>
E-Commerce	1	<ul style="list-style-type: none"> <li>• Support the creation of e-commerce platforms for SMEs</li> </ul>
Liberalisation	1	<ul style="list-style-type: none"> <li>• More market liberalisation policies</li> </ul>
Entry restrictions	1	<ul style="list-style-type: none"> <li>• Limits on the expansion and practices of multinational retail companies</li> </ul>
Exclusive purchasing	1	<ul style="list-style-type: none"> <li>• Allow exclusive purchasing obligation on retailers to obtain better commercial terms from suppliers to benefit consumers with lower prices</li> </ul>
Unfair trading practices	1	<ul style="list-style-type: none"> <li>• Avoid regulation on unfair trading practices (uphold freedom of contract)</li> </ul>
Selective distribution	1	<ul style="list-style-type: none"> <li>• Clearly define regulations for selective distribution</li> </ul>
Marketing	1	<ul style="list-style-type: none"> <li>• Allow concerted marketing activities</li> </ul>
Review dates	1	<ul style="list-style-type: none"> <li>• Ensure EU regulations have an expiration date for continuous review</li> </ul>

Source: Analysis of responses to question Q4.10

### **B6.3 Alternative options for policy change**

Apart from their most desired policy changes as addressed by the previous question and the long list of response shown in Table B24, the respondents were also asked as to what alternative options they would wish to put forward for policy change that could be justified as being the least restrictive to achieve the required benefits (Q4.11). There were 19 responses, of which one said none and the other 18 responses are summarised in Table B25 and shown in categories by rank order. Again, pricing features as the leading category for suggested policy changes, focused on the need and advantages of common prices, price fixing on certain products, and allowing maximum retail prices on all products to benefit consumers with lower prices overall. In addition, there was a diverse range of suggestions covering other categories, including (in alphabetical order) bureaucracy, equality, exclusive purchasing, online coordination support, tax policy, environment policy, entrepreneur support, subsidiarity, and voluntary agreements.

**Table B25. Alternative least-restrictive options for policies**

Category	Number	Alternative options as least restrictive for EU policy
Pricing	4	<ul style="list-style-type: none"> <li>• Allow common regional/national level price and platform online</li> <li>• Allow maximum retail prices on all products and appropriate incentives for retailers to comply and benefit consumers with lower prices</li> <li>• Allow price fixing for certain products and services</li> <li>• Remove ban on communicating consistent pricing for independent retailer groups</li> </ul>
Bureaucracy	2	<ul style="list-style-type: none"> <li>• Curtail bureaucratic burden on national operators which favours international competitors</li> <li>• Reduce bureaucratic obstacles on cross-border trade</li> </ul>
Equality	2	<ul style="list-style-type: none"> <li>• Groups to be given more opportunities to act consistently to overcome blatant competitive disadvantage compared to large integrated chains</li> <li>• There is no alternative for the survival of the independent commerce group or franchise model.</li> </ul>
Exclusive purchasing	2	<ul style="list-style-type: none"> <li>• Allow exclusive purchasing obligation on retailers to obtain better commercial terms from suppliers to benefit consumers with lower prices</li> <li>• Return to exclusivity negotiations for supply contracts</li> </ul>
Online coordination	2	<ul style="list-style-type: none"> <li>• Allow retailer groups to strengthen joint online presence either by group members conducting sales directly and jointly or via an online platform set by the central office with fulfilment handled by group members</li> <li>• Support the creation of e-commerce platforms for SMEs</li> </ul>
Tax policy	2	<ul style="list-style-type: none"> <li>• Harmonise sales and profits taxes</li> <li>• Tax relief for SMEs</li> </ul>
Environment policy	1	<ul style="list-style-type: none"> <li>• Integrate cross border regulations on recycling costs</li> </ul>
Entrepreneur support	1	<ul style="list-style-type: none"> <li>• Recognition and support for entrepreneurship in wealth creation and social commitment</li> </ul>
Subsidiarity	1	<ul style="list-style-type: none"> <li>• Subsidiarity (i.e. policy matters should be dealt with at the most immediate and relevant level rather than unnecessarily at the EU level)</li> </ul>
Voluntary agreements	1	<ul style="list-style-type: none"> <li>• Develop Supply Chain Initiative further without legislative regulation to develop flexible solutions that protect freedom of contract and competition</li> </ul>

Source: Analysis of responses to question Q4.11

#### **B6.4 Degree of alignment between members' and organisation's policy views**



In being conscious that the person serving as the respondent would provide views that were representative of the organisation but not necessarily the entire membership, the respondents were asked explicitly whether they considered there were any dissenting views amongst their independent retailer members on the most urgently required policy changes. There were thirteen responses of which seven said “no”, three said “not known”, one said that there were differences of opinions regarding opening hours and planning policy, one said that individual retail members may want to remain free to set their prices and choose where to source products, and the last one said that possibly but that as a retailers’ association then it expresses its own views as a collective.

### ***B6.5 Possible future challenges by competition authorities***

In looking forwards in time, the respondents were asked to consider whether there were aspects of their organisation that may face possible challenges by competition authorities in the future and how then the organisation would cope if they were no longer able to use these arrangements, as well as how these changes benefit or hinder your organisation, independent retailer members, and end-customers (Q4.13). There were fourteen responses, three said none and the responses from the other eleven are summarised in categories and reported in Table B26. The leading category relate to vertical restraints were there was concern about future challenges in respect of exclusive purchasing, quantity purchasing obligations, maximum retail price maintenances, as well as tightening the price harmonisation and standardisation ban. In addition there were concerns about investigations or future decisions which would limit or further restrict joint marketing, sourcing cooperation, and treatment of agreements that could be construed as horizontal rather than vertical agreements.

**Table B26. Possible future challenges by completion authorities**

Category	Number	Areas for possible future competition authority challenges
Vertical restraints	6	<ul style="list-style-type: none"> <li>• Exclusive purchasing</li> <li>• Maximum retail price maintenance</li> <li>• Obligation to purchase a certain quota of merchandise</li> <li>• Preventing centrally driven sales support efforts to members</li> <li>• Private label</li> <li>• Tightening the price harmonisation and standardisation ban</li> </ul>
Marketing	2	<ul style="list-style-type: none"> <li>• Joint marketing</li> <li>• TV advertising</li> </ul>
Assessment	1	<ul style="list-style-type: none"> <li>• Legal exposure if view of relationships reversed from vertical to horizontal</li> </ul>
Cooperation	1	<ul style="list-style-type: none"> <li>• Sourcing cooperation (possible UTP legislation)</li> </ul>
SME support	1	<ul style="list-style-type: none"> <li>• Financial support for SMEs</li> </ul>

Source: Analysis of responses to question Q4.13

### **B6.6 Future features of competition requiring policy changes**

As the final question on the questionnaire, the respondents were asked about what emerging or future features of competition are likely to put their organisation and membership at a (further) competitive disadvantage if changes to policy are not forthcoming (Q4.14). There were seventeen responses which are categorised and summarised in Table B27. The largest and top ranked category relates to online retailing as the critical area where there is an increasing concern that retailers specialising in physical stores will be at a competitive disadvantage compared to online retailers and particularly that independent retailer groups are not well positioned because of policy restrictions in being able to develop integrated and efficient online operations of a sufficient scale and degree of competitiveness to meet the challenge of competing with specialist online retailers unless there is policy change. In addition, there are examples cited from other categories, notably around the food chain, pricing restrictions, vertical restraints policy, contract law, market definition and unfair trading practices, as well as the concerns of ever widening inequality between independent and integrated retailer groups as well as between SMEs and large corporations.

**Table B27. Future features of competition requiring policy changes**

Category	Number	Desired changes to EU policy for emerging and future competition
Online	5	<ul style="list-style-type: none"> <li>• Competitive disadvantage with online retail widening</li> <li>• Developments in e-commerce and marketplace aggregators</li> <li>• Growing threat from large-scale online food retailers undermining viability of rural retailers and reducing the efficiency of urban retailers</li> <li>• Increasing share of online sales</li> <li>• Unequal treatment of store-based and online retailer</li> </ul>
Food chain	2	<ul style="list-style-type: none"> <li>• Food chain policy and crisis in farming</li> <li>• Supply Chain Initiative</li> </ul>
Pricing	2	<ul style="list-style-type: none"> <li>• Legal uncertainty of maximum retail prices</li> <li>• Need to permit consistent pricing and promotions across channels</li> </ul>
Vertical restraints	2	<ul style="list-style-type: none"> <li>• Exclusive supply obligations</li> <li>• Regulation of payment terms</li> </ul>
Alignment	1	<ul style="list-style-type: none"> <li>• Aligning rights of independent retailer groups with integrated retailers if membership consents</li> </ul>
Contract law	1	<ul style="list-style-type: none"> <li>• Contract law reforms to strengthen protection of retailers' interests</li> </ul>
Financing	1	<ul style="list-style-type: none"> <li>• Imbalance in funding and availability of credit adversely impacting independent retailers competing with integrated chains</li> </ul>
Inequality	1	<ul style="list-style-type: none"> <li>• SME retailers will disappear if disadvantages compared to integrated chains remain</li> </ul>
Market definition	1	<ul style="list-style-type: none"> <li>• Market definition and share thresholds</li> </ul>
Unfair trading practices	1	<ul style="list-style-type: none"> <li>• Clarifying laws on unfair trading practices</li> </ul>

Source: Analysis of responses to question Q4.14

Respondents also pointed out that many of these aspects are interconnected, notably regarding online retail developments which tie together advantages relating to negotiating

power with respect to suppliers and the ability to have a consistent online retail offer and standardised prices.

As a means to conclude this review of the questionnaire responses, and as indication of future competition, we end this report with the summary view from one respondent in the context of the emerging development of online grocery retailing, which is still in its infancy in many EU countries but which looks set to grow rapidly as a form of retailing for grocery shopping in the coming years. To illustrate how the series of interconnections work, the respondent (in representing a large independent retailer group operating with different retail chains) points to the greater negotiating power of an integrated retailer in contrast to its own weaker negotiating position and inability to control purchasing costs as effectively as it would like in the following terms (in anonymised form):

*“Large-scale online food retailers entering the market will become an enormous challenge for food retailer groups. These retailers will be able to deliver a broad and specialised range of food products in urban areas. As consumer acceptance of online retail increases, this creates a strong new distribution channel which could become an existential threat for some independent food retailers. It might be possible to deal with this from a competition perspective if it were not for independent retailers (even in groups) being structurally disadvantaged in terms of the currently existing difficulties of operating their own online platform.*

*In rural areas, on the other hand, online retail might not only threaten the local food retailers’ business, but also lead to significant disadvantages for consumers:*

*The customer does not expect a full product range, even from a large-scale online provider – in other words, he does not expect that an online food retailer necessarily carries all the required items. This allows the online food retailer to focus the product range on regions that are most profitable in terms of the logistics costs which may differ greatly depending on the product range.*

*Currently, only urban conglomerations can be profitable for online food retailers and delivery services. Online food retailers are currently generally restricting the delivery of merchandise in rural areas to products that do not require refrigeration, due to the high costs of refrigerated transport. They are increasingly competing against the locally-based retailers in rural areas. What appears to be a positive factor for consumer welfare at first glance (i.e. an additional provider in a rural area), actually proves to have negative consequences on closer inspection: as even relatively small losses in turnover generally result in dramatic profit losses for store-based retailers because of their high overheads, particularly smaller independent food retailers in rural areas can find themselves under threat from a single online competitor supplying only a part of their product range (i.e. anything that does not require refrigeration). If, as a result, the store-based retailer goes out of business, his product range (now no longer available) can only be partially substituted by the online retailer (i.e. with foods that do not require refrigeration). Or, consumers with restricted mobility or who are not particularly Internet-savvy will have to*

*put up with much higher delivery charges to allow the online retailer to supply rural areas with refrigerated merchandise.”*

The respondent indicates that now is the time for policy change while there is still the opportunity for independent retailer groups to establish a competitive online presence by being allowed the same benefits and freedom to operate as integrated retailers are permitted; simply and only because of their different ownership and contractual structure as a retail group. The response suggests that if policy changes are not forthcoming then consumers will ultimately suffer from reduced competition and less choice in the future.

## APPENDIX C

### EXAMPLES OF THE DEVELOPMENT AND NATIONAL POLICY TREATMENT OF INDEPENDENT RETAILER GROUPS

- C.1 Independent retailer groups have existed in Europe for over a 100 years, often starting out as purchasing groups but then developing as branded retail organisations with integrated supply and distribution systems and yet retaining retail outlet operations as owned and controlled by independent retail entrepreneurs. The development of these groups has varied from country to country and sector to sector, with the differences influenced by the legal, cultural, economic and social situations in the countries in which they developed. Several of these groups are now some of the largest retail and trading organisations in Europe. These include large international associations acting as brand umbrella groups for sector-specialist independent retailers, like SPAR (food and convenience stores), INTERSPORT (sports goods), Euronics (electrical goods), Expert International (electrical goods), and Sport 2000 (sports goods), as well as large groupings focused predominantly on grocery retailing like EDEKA, REWE Group, E. Leclerc, Intermarche, Système U, ICA, and CONAD, or across broad range of retail sectors, like Kesko (covering grocery, automobiles, building and home improvement, machinery, electrical goods, and leisure goods). There are also smaller specialist groups, like 3e (trade tools), and a wide assortment of retailer cooperatives, especially in countries where there is a strong tradition for cooperatives across a range of economic sectors, notably in France and Germany<sup>42</sup>, but also widely across the EU for specific retail sectors (e.g. for pharmacies).
- C.2 To provide a flavour of the different character and development of independent retailer groups, boxed Exhibit C.1 gives a brief summary as an alphabetical listing of 14 leading independent retailer groups that compete in European markets and represent significant operations in their product area as a challenge to integrated retailers and other retail

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<sup>42</sup> For example, in Germany, 53 cooperatives in the food and associated retail trades generated €80bn in sales and 98 cooperatives in non-food retail trade (e.g. domestic appliances, shoes, pharmacies, chemists, textiles) generated €24bn in sales in 2014 – source: *Facts and Figures: Cooperative Banks, Commodity and Service Cooperatives* ([https://www.dgrv.de/en/cooperatives/\\$file/Facts\\_and\\_Figures.pdf](https://www.dgrv.de/en/cooperatives/$file/Facts_and_Figures.pdf)).

organisational forms. Many of these organisations have a long history with a common starting point as a joint buying organisation, seeking to obtain better prices from suppliers, which could then allow the independent retailers to offer consumers lower retail prices, which in turn increased their sales and fed a virtuous circle of growth, where larger orders from suppliers enabled retailers to obtain further discounts, and so on. Today, the onus is also on promoting a recognisable brand name and a consistent retail proposition, so interdependence has become ever more important for independent retailers.

### **Exhibit C.1 – Examples of leading independent retailer groups (alphabetical)**

**3e** – is an association of specialist dealers in the hardware industry based in Austria. Formed in 1989 from the merger of three hardware associations, it bundles the purchasing activities for 250 companies and provides joint market concepts. Group member sales were €568 million in 2017, of which €416 million were in Austria.

**CONAD** (Consorzio Nazionale Dettaglianti) – operates one of the largest supermarket chains in Italy. Created in 1962, Conad is a cooperative system of entrepreneurs, dealing in large-scale distribution. It is structured on three levels: entrepreneur members (owners of retail outlets), cooperatives (large shopping and distribution centres), and the national consortium (a service and market-oriented body for member companies). CONAD achieved €13bn sales in 2017, through 3,198 outlets and with around 52,000 employees.

**EDEKA** – is a German cooperative group established in 1898 as the E.d.K. (Einkaufsgenossenschaft der Kolonialwarenhändler im Halleschen Torbezirk zu Berlin, “Purchasing Cooperative of Colonial Goods Retailers in the Hallesches Tor district of Berlin”), and renamed EDEKA in 1913. EDEKA generated €49.6bn sales in 2016 through its 11,200 stores, with over 4,000 self-employed retailers and over 351,500 employees.

**E.Leclerc** – is a French cooperative group and hypermarket chain, established in 1948. Members commit to sell at discount prices, distribute 25% of store profits to the employees, work part-time in the Group’s operational and commercial functions (purchasing and sourcing), and sponsor store employees to become independent storeowners. Sales were €46bn in 2017 through 2000 stores.

**Euronics** – formed in 1968 and based in Amsterdam, it functions as a leading international electrical retail group on behalf of its members as an international association with a GEIE (“Groupement européen d'intérêt économique”) structure made up of 29 national retail associations serving 5,500 retail entrepreneurs with 8,800 stores in 36 countries with total sales of €19bn in 2016.

**Expert International** – a Swiss-based consumer electronics purchasing and retail group formed originally in 1967 with its current name from 1971. National retail organisations coordinate the buying for independent retailers, covering more than 3,600 stores in 21 countries, with total retail sales of €13bn in 2017.

**ICA** – traces its origins in Sweden to Hakonbolaget started in 1917 and formed as ICA in 1938, developing with individual retailers owning their own stores and joining forces so

that through coordinated purchasing and other forms of collaboration, they could achieve the same economies of scale as chain enterprises, while combining collaboration with local adaptation. ICA Gruppen achieved sales of SEK 104bn in 2016 through 2,103 stores and pharmacies.

**INTERSPORT** – established in 1968 from 10 national buying organisations, is an international sporting goods purchasing group and retail brand based in Switzerland, with more than 5600 outlets as licensees across 45 countries generating global sales of €11.5bn in 2017.

**ITM** (Intermarché) – is a network of independent supermarket store owners ITM Entreprises owning the majority stake in Intermarché, part of the large French retail group 'Les Mousquetaires' started in 1969 under the name EX Offices de distribution, renamed Intermarché in 1972. Each of the 3,000 members run their store as well as contribute two days a week to the management of the group's central operations, helping to promote interdependence and solidarity. Grocery retail sales were €25.8bn (excluding fuel) in 2016.

**Kesko** – operates in the grocery trade, the building and technical trade and the car trade, with its divisions and chains acting in close cooperation with retailer entrepreneurs and other partners. Formed in Finland through the merger of four regional wholesalers founded by retailers in 1940, supplying K-retailers as retail entrepreneurs, Kesko moved to a chain operation in 1990 and then internationalisation. It now has over 2000 stores with sales of €13.2 billion in 2016.

**REWE Group** – is a German diversified retail and tourism cooperative group, initiated in 1927. Its name is derived from “Revisionsverband der Westkauf-Genossenschaften” (meaning “Auditing Association of Western Purchasing Co-operatives”). The basis of the cooperative trade group consists of a network of independent retailers. REWE Group turnover was €57.8bn in 2017 through more than 15,000 stores across 21 European countries with 350,000 employees.

**SPAR International** – formed in 1932 with its headquarters in Amsterdam, operates with independent retailers and wholesalers who work together in partnership under the SPAR Brand, and represents the world's largest voluntary food retail chain, with 12,545 stores, as SPAR Partners, in 44 countries and a global turnover of €33.1bn in 2016.

**Sport 2000** – founded in 1966 in France, has expanded internationally to become one of the world's largest purchasing cooperatives of independent sports retailers, representing 3,855 stores (with 1,157 branded stores) in 24 countries, achieving €6.4bn sales (2014) and with 35,000 employees.

**Système U** – is a French retailers' cooperative, with a history going back to 1894, comprising about independent hypermarkets, supermarkets and convenience stores, where the independent grocery retailers (adhérents/members) own the majority stake in Système U. Sales were €20bn in 2016 made through 1550 stores.

*Source:* author's analysis based on corporate websites and Planet Retail

- C.3 Over time, independent retailer groups have evolved to fit with the political, legal, economic, social and technological environmental forces shaping retailing. As a representation of the evolutionary process in one country, the boxed Exhibit C.2 provides the example of France where independent retailer groups, especially in the form of membership cooperatives, have played an instrumental part in the historical and current development of retail competition in that country over the past century and more.<sup>43</sup>

**Exhibit C.2 - The history and evolution of cooperatives and independent retailer groups in France**

- 1885 to 1914: Independent grocers facing the growing competitive challenge from new commercial enterprises such as chain stores decide to group together to become more competitive. The first procurement group, “Le Pain Quotidien” (the daily bread), was founded in Nantes in 1894. The phenomenon of uniting in groups subsequently spread to other regions as retail competition intensified, with procurement societies founded in Agen in 1908 and Bordeaux in 1913. Non-food retailers did not experience the same level of risk from competition but there were some attempts to set up groups in the pharmacy, ironmongery and general merchandise, haberdashery and hosiery sectors. At the same time, not as a response to a competitive risk but rather for promotional purposes, watchmakers and jewellers united within a syndicate which filed a brand – ‘Paris-Province’ – the precursor to the goldsmiths’ guild (now Synalia).
- 1918 to 1945: The federation of grocers’ syndicates decided to distinguish the purpose of representing its members, in its strictest sense, from that of joint procurement, which had to be carried out from within the framework of a suitable organisation, represented in the form of a joint procurement society. The number of joint procurement societies increased in several sectors in view of the increasing competitive threat presented by the new forms of trading. Examples included the founding of the Société des épiciers détaillants de la région parisienne (SED; Society of retail grocers in greater Paris) in 1919; Alliance céramique (tableware) in 1930; Centres d’études et de répartition pharmaceutiques (CERP; Centre for pharmaceutical studies and distribution), integrated with the Comptoir national de la pharmacie française (national association of pharmacies) in 1940, and the La Hutte stores (today's INTERSPORT) merging in 1924. The economic

<sup>43</sup> For more details about the development of retailer cooperatives in France, see Fabrice Cassou, Gérard Cliquet and Rozenn Perrigot, “Uniformity in Collective Entrepreneurship: The Case of Food Retail Cooperatives in France”, in *Management and Governance of Networks: Franchising, Cooperatives, and Strategic Alliances*, edited by G.W.J. Hendrikse, G. Cliquet, T. Ehrmann, and J. Windsperger, pp.193-211, 2017, Springer International Publishing. For a different country perspective, covering cooperative buying in Croatia, see Mirko Palić, Ivan Kovač, and Boris Sruk, “Cooperative buying as a source of competitive advantage on the Croatian FMCG retail market”, *Economic Integrations, Competition and Cooperation Conference Proceedings*, Vinko Kandžija and Andrej Kumar (eds), 2013. 306-313.



crisis of 1929 and the resulting fall in consumer spending power forced “new” retailers to revise their strategy. This led to the growth of department stores and the development of mail-order purchasing (La Redoute in 1922 and Les Trois Suisses in 1932) and the first indicative emergence of a proto-type franchise network by retailers marketing Roubaix wool under the brand name Pingouin-Stemm in 1928.

□ 1949 to 1963: After the Second World War, the emphasis was on a return to freedom of supply. A number of joint procurement groups were established: Copamétal (ironmongery, 1953), Société des papetiers détaillants (stationery retailers, 1953), Union des chausseurs français (shoemakers, later became Arbell, 1953), Société coopérative des libraires (booksellers, later became Majuscule, 1953), Union Franco-européenne du meuble (became Monsieur Meuble, 1953). Whilst supermarkets first appeared during 1947/8, they become gradually larger through the 1950s into the early 1960s (e.g. E. Leclerc).

□ 1963 to 1972: In 1963, the first Carrefour hypermarket-sized store opens with 2,500m<sup>2</sup> of retail space and 450 parking spaces opens. By the end of 1971, there are 2,060 supermarkets and 147 hypermarkets. But, as early as 1970, a new form of commerce arrives on the scene from the United States through the development of retail malls, with the first French shopping centre – ‘Parly II’ – opened with a retail space of 40,000m<sup>2</sup>. This ushered in new forms of commercial structures, bringing together different types of specialist retailers under one roof.

□ 1973 to 1989: Following a period of economic growth, the retail sector is affected by the economic downturn connected to the 1973 oil crisis. Moreover, the ‘Royer’ law from 27 December 1973 curtailed the development of large-scale retailing (restricting the construction of supermarkets over 1,000 m<sup>2</sup>). The combination of the two effects led the development of specialised retailing through a new practice: franchising. Retailer groups followed this evolution and offered new services, beyond joint procurement, including stock development, location searches and establishing store fascia as a common brand. Retail cooperatives also followed these developments and obtained legal recognition when the law of 11 July 1972 was passed.

□ 1990 to today: During the 1990s, the retail sector underwent changes in difficult economic circumstances. Designed to protect smaller retailers, the ‘Royer’ law ultimately contributed to the rise of discount stores. Large specialist organisations (as integrated networks) were able to strengthen their position in the non-food sector (including sports retailer Decathlon from the Auchan group and the US retailer, Toys’R’Us, in the toy market). New players have appeared on the scene with the development of e-commerce (e.g. Amazon.com, booking.com). In this context, independent retailer groups have continued to adapt by offering ever more targeted services requiring increasing investment. Centralising online sales on a platform managed by the group is just one of the many areas of progress essential to surviving in a highly competitive market.

□ Initial conclusion: This quick historical recap shows that individual independent retailers have had no choice but to form groups and continually adapt them to changing market circumstances in order to grow and succeed in a competitive market. The actions they have taken as part of a group allowed them to survive in highly competitive markets

by offering consumers similar or better services. The restrictions of intra-brand competition within a retailer group (common brand, common commercial policy, exclusivity zones, non-competition clauses, etc.) have always been essential in helping the cooperative groups to position themselves as credible competitors against integrated networks.

*Source:* Based on material supplied by the Fédération du Commerce Coopératif et Associé (FCA).

- C.4 Legal recognition and support at national level can make a considerable difference to the way that independent retailer groups can survive and prosper over time as the membership develops and changes. As an illustration, boxed Exhibit C.3 shows how legal understanding in France of the specific characteristics of groups of independent traders and retailer cooperatives helps counter the problems that arise from the structural fragility of these organisations. This legal support is an important counterweight to the simplistic treatment and characterisation that EU competition policy applies when it views retailer associations as simply a set of intrinsically anticompetitive horizontal and/or vertical agreements intended to restrict and thwart competition, which is their starting point (as evident from the wording in Article 101(1) TFEU) before consideration of their material effects, in respect of efficiency and distributional benefits set out in Article 101(3) TFEU). It would be helpful for other EU countries without such rules and legal support towards independent retail groups to follow the example in France.

**Exhibit C.3 – Legal understanding in France of the specific characteristics of groups of independent traders**

***Fragility of the groups linked to the free right of withdrawal of the shareholder trader***

Independent retailer groups are inherently fragile organisations because each shareholder trader has the free right to exit the group. In this regard, traders belonging to a group hold capital shares in the group (or social shares in the case of groupings in cooperative or mutual form). Through shareholder status (or as a cooperating partner or member), each trader benefits from the activities of the group. As the trader is independent, it is free to withdraw, to obtain the refund of its social shares or capital shares, and therefore to leave the group and its network, at any time.

Article L. 231-6 of the Commercial Code is applicable to open-ended associations and under which “*each member may withdraw from the association when it deems it appropriate unless there are agreements to the contrary*”. Consequently, the groups of traders find themselves in a situation of structural fragility since their members can leave

the network at any time and accordingly reduce the group's purchasing power. Integrated distribution networks (where all points of sale belong to the same company) are not in the same situation of fragility. Similarly, franchise-type contractual distribution networks, which are made up of independents, are also not in the same situation of fragility because the loss of shareholder/partner status breaks the contract, regardless of its duration, and the franchisor can seek to find a replacement franchisee.

### ***Validation of the mechanisms limiting the right of withdrawal***

In order to reassure their suppliers and their banks, while deploying the investment strategies necessary to remain competitive, traders within the same group generally agree to limit their own right of withdrawal by committing themselves to remain a shareholder/partner for a certain duration. When exercising their right of withdrawal before this agreed deadline, they pay compensation.

French case law validates this mechanism for limiting the right of withdrawal of the shareholder trader. The law recognises that the departure of a trader weakens the capacity of the group, and leaves to other merchant traders to cover the share of the expenses and the financing of the investments that the retiring or excluded trader will no longer assume, and from which it benefited.

It therefore appears normal and legitimate that, in order to ensure the sustainability of the group's membership, the group should set up compensatory mechanisms, namely that the trader who withdraws offsets the consequences of its premature departure and thus preserves the other traders from the consequences of this departure. This principle emerges clearly through case law (e.g. Paris, 2 October 2008, 5th Ch.B, n ° 06/15.920; Versailles, 12 June 2001, 12th Chamber Section 1, RG n ° 99/03314; Versailles, 12th Chamber 2nd Section, 27 March 1997, RG No. 5279/95; Reims, Civil Chamber, 1st Section, March 5, 2003, RG 98/1404; Versailles, 12th Chamber 2nd Section I, October 26, 1995, RG 8143/94, 8865/94, 8916 / 94).

In addition, there are other complementary mechanisms also recognised by case law, such as the right of priority of acquisition by the grouping of shares in the trader's association, which also helps provide stability and assurance of continuity for the groups.

### **Legislation recognising the specific characteristics of the group distribution model**

#### ***Example 1: Ensuring that independent trader groups are not time-limited***

In order to protect certain abuses concerning the relations between the franchisor and the franchisee in a franchise agreement, and thus fight against the practices that prevent the franchisee from leaving the network, the legislator has set a rule of common expiry of franchising contracts. According to this rule, provided for in Article L. 341-1 of the Commercial Code created by the "Macron" law n ° 2015-990 of 6 August 2015, all the contracts concluded between these two operators provide for a common duration for when they expire. This article puts an end to the practice, denounced by the French Competition Authority, for franchise contracts whose "cross-duration" prevents the termination of the relationship, with intention to promote competition and provide greater protection for franchisees, as perceived vulnerable parties.

In contrast, in the context of independent trader groups, if the traders in a group have a

contractual relationship with the group, they benefit from the group's activities only because they are shareholders or members. This feature of shareholder status is a specific characteristic of the group that, by its nature, reflects a relationship of indefinite duration. For this reason, any such contracts concluded between the group and its members are also of indefinite duration or tacitly renewed. The legislator has taken into account this specific characteristic of groups of independent traders by excluding the application of the rule of common expiry of the "contract of association and the civil, commercial or cooperative association contract" (C. com., L. 341 -1, paragraph 3).

*Example 2: Priority rights*

In order to overcome their structural fragility, the groupings generally include clauses in their statutes giving them a right of priority in the event of a plan to sell the trader's shares or business assets. The group can thus try to find another trader who will take over the point of sale under the same banner (i.e. brand name), in the same network. The legislator (law n ° 2014-856 of 31 July 2014), aware of the usefulness of such mechanisms for the durability of groups, has included one, for example, in the commercial code specifically for groups of traders who have the form of cooperative traders, which is a dominant form of grouping of independent traders in France:

**Article L. 124-4-1 of the Commercial Code:**

*"The articles of a cooperative association of traders may provide that a member which wishes to sell its business, or more than 50% of the social shares or shares comprising the capital of the association holding the funds, or the real estate in which the funds apply, must inform the cooperative. The cooperative has, from the receipt of this information, a period of three months to submit an offer of acquisition.*

*Divestment in breach of the first paragraph may be annulled by the relevant court.*

*If the divestment has not taken place within two years, the transferor shall inform the cooperative who may submit a new offer under the conditions provided for in the first paragraph.*

*The clause referred to in the first paragraph is waived in the event of succession, termination of a marriage or transfer to a spouse, an ascendant or a descendant."*

(LOI n ° 2014-856 of July 31st, 2014 - art. 40)

Source: Based on material supplied by the Fédération du Commerce Coopératif et Associé (FCA).

- C.5 The extent to which groups can undertake activities on behalf of members is far from clear in most jurisdictions within the EU. Apart from EU competition law, it is normally only national case law that provides guidance on what practices independent retailer groups can undertake and how they should be organised. This can be particular problem when there is no established case law when retail markets are changing rapidly. A key issue relates to online selling, where the options for independent retailer groups are between having a

centralised online sales service, with supplies handled by local stores, as opposed to a decentralised system whereby individual stores operate their own websites. The former has the benefit of group cohesion and consistency in representation to the consumer (e.g. in providing a single price for a good), while the latter can prove to be a confusing picture where there might be multiple prices for the same good. To pre-empt this problem, the French authorities have amended their national Commercial Code to allow centralised online retailing through developing an online sales platform. This is shown at point 6 in boxed Exhibit C.4 on the permitted activities of retailer cooperatives in France according to the Commercial Code. It would be helpful if there was clarification in other EU member states as to what practices are permitted or not permitted for independent retailer groups because uncertainty will delay necessary investments and consumers may suffer as consequence from ineffective and inefficient services.

#### **Exhibit C.4 – French Commercial Code on retailer cooperatives’ permitted activities**

##### **CHAPTER IV: COOPERATIVE ASSOCIATIONS OF RETAILERS**

Article L. 124-1 (Law n ° 2014-856 of July 31st, 2014 - art. 36, 37)

*Through the collective efforts of their members, cooperative associations of retailers seek to improve the conditions in which they conduct their business. To that end, they may, inter alia, directly or indirectly engage in the following activities on behalf of their members:*

*1° Supplying them with some or all of the goods, commodities, services, equipment and materials they need in order to conduct their business, inter alia, by establishing and maintaining stocks of all kinds of goods, by building, purchasing, or leasing and managing private shops and warehouses, and by carrying out on their own premises or those of their members any appropriate works, conversions or refurbishments;*

*2° Bringing together on one site the businesses belonging to their members, creating and managing all services collectively needed to operate those businesses, building, purchasing or renting the buildings required for their activities or those of their members, and managing them, all as provided for in Chapter V of the present Title;*

*3° Within the framework of the legislative provisions relating to financial activities, facilitating access by the members and their clients to the various financing and credit facilities available;*

*3 ° (a) Organising financial cooperation between the members, in particular through the formation of associations, exercising under their direct or indirect control with the purpose of providing the necessary support for the purchase, creation and development of the business in accordance with the provisions of credit institutions. The capital of the associations thus constituted must be majority owned by the cooperatives and cooperative members; non-cooperative members cannot in any case hold together more than 35% of the total voting rights. When the share of capital held by non-cooperative shareholders exceeds this limit, the number of voting rights is reduced to a proportionate amount;*

*4° Carrying out activities which are complementary to those referred to above, and, inter alia, providing their members with assistance in relation to technical, financial and accounting management;*

*5° Purchasing businesses in respect of which, as an exception to Article L. 144-3, leasing-management rights are granted to a member within two months and which must be re-conveyed within a maximum period of seven years. Failure to re-convey within this period may give rise to an injunction as set out in the second paragraph of Article L. 124-15;*

*6° Drawing up and implementing a common commercial policy designed to ensure the development and activity of its members by any means, including:*

- the establishment of an appropriate legal structure;*
- the provision of trademarks or brand names which they own or have the use of;*
- the carrying out of commercial operations of an advertising or other nature which may include common pricing;*
- the development of common methods and models for purchasing, stocking and presenting products, and for the architecture and organisation of the outlets;*
- the development and management of an online sales platform;*

*7° Acquiring shareholdings, including majority interests, in directly or indirectly associated companies running retail businesses.*

## **APPENDIX D**

### **COMPETITION POLICY TOWARDS INDEPENDENT RETAILER GROUPS**

#### **D.I. Overview**

- D.1 This appendix summarises how existing competition policy in the EU applies to independent retailer groups. It considers the treatment of mixed structures involving horizontal and vertical agreements (as typically characterising independent retailer groups), and relevant market definition and critical market shares (in both procurement and retail markets). The appendix also considers in detail the fundamental aspects relating to the economic purpose of most independent retailer groups, namely joint purchasing and the role of purchase obligations, and joint commercialisation and the role of retail pricing requirements. The analysis highlights the deficiencies in current competition policy treatment towards independent retailer groups in the new retail era where online sales play an ever increasing role.

#### **D.II. Current policy and legal frameworks**

- D.2 The section begins by considering the impact of the joint presence of horizontal and vertical agreements that typically characterise independent retailer groups. With groups using arrangements that have horizontal (retailer to retailer) and vertical (central office to retail member) elements, then different assessments of EU competition law may follow since the rules and guidelines for clearing or exempting agreements differ between the two types of agreements. Vertical agreements are generally considered less harmful to competition than horizontal agreements between competitors. Accordingly, determining the appropriate interpretation and consequent treatment of agreements may be crucial in determining whether independent retailer groups can achieve appropriate efficiency benefits that serve to protect or enhance competition in the relevant markets to the ultimate benefit of consumers.
- D.3 Given the role of market shares in the economic assessment of horizontal and vertical agreements and the importance of determining whether retailers are competitors, i.e. act

on the same market(s), market definition of the relevant procurement and retail markets in which independent retailer groups operate is important. Here, both the product/service and geographic scope of these markets needs careful consideration. In general, procurement markets tend to be treated as product-category based and could be regional, national or international in scope. Thus, with international sourcing on the rise and extensive cross-border trade occurring within Europe, procurement markets might for many products be international. In regard to retail markets these are generally treated as local in nature when conducted from physical stores. However, with online sales operations, the geographic scope of supply might widen the geographical scope of the market, potentially making them national or international (e.g. possibly EU-wide), but this will depend on the market circumstances.

- D.4 Two particular aspects of existing policy that directly impinge on the efficient operation and the ability of independent retailers to compete effectively in the new retail era; namely joint marketing/commercialisation (with the need for control over retail prices for brand uniformity and consistency) and joint purchasing (and the associated use of purchasing obligations when product markets are deemed regional or national in scope). Both aspects can be fundamental to the efficient operation of independent retailer groups. However, both aspects may receive different and inconsistent treatments under horizontal and vertical agreement regulations, and there is a clear need for assessment to be fully on the economic effects of these arrangements and not simply on an interpretation of their legal form.

### **D.III. Policy approach towards mixed structures of agreements**

- D.5 As explained in Section 3, independent retailer groups by the very nature of their collaboration usually represent both horizontal and vertical agreements within an organisational context. In legal and policy terms, this means that the treatment that such groups receive is fundamentally different to integrated retailers (where all internal arrangements, functions and parts of the business are controlled by ownership as a single entity rather than contractual arrangements between separate legal entities). In the traditional local retail markets where competition took place only between different physical store operations, independent retailer groups have been able to compete effectively based on their ability to adapt quickly to differences in local competition and demand. Even though they have always been constrained by EU competition law as compared to competing



integrated chain-store retailers, the disadvantages have not been impossible to overcome. Effective business models have been possible to implement notwithstanding EU law precluding independent retailer groups from using practices such as common pricing (insofar as a group has more than one member competing in a local retail market) or resale price maintenance (RPM), across their retail members. However, in the new retail environment of multichannel retailing, the competition policy restrictions within the EU threaten the independent retailer groups ability and agility to extend their physical store operations to an effective and fully coordinated omnichannel system.

- D.6 In regard of the horizontal nature of relations with independent retailer groups, coming together to pool their purchasing, typically means that they are bound by horizontal agreements.<sup>44</sup> However, as described below, the central body responsible for purchases have in many cases developed into a separate entity with more of a vertical relationship to the retail members also as regards the supply of goods.
- D.7 Beyond pooling purchasing, and specifically in response to the emergence and growth of wholly integrated chain-store groups, independent retailer groups moved to adopt structures in which their central organisations developed to make purchases at their own risk, offer to their members concepts of common brand names involving the organization of a genuine network of sales outlets, and develop and offer products under their own brands, common marketing concepts, shared training programmes, and joint communication policies. These aspects can be viewed as joint marketing and commercialisation, so again can be viewed to have horizontal agreement nature (in applying across different retailers). However, operationally they are formalised by a set of vertical agreements entered into between retail members and central organisations, which are separate entities from their members.<sup>45</sup>
- D.8 Thus with the exception of some groups that solely relate to joint purchasing as buying alliances, most independent retailer groups are governed by and characterised by a co-existence of vertical and horizontal activities and agreements, thus have a “mixed structure”.

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<sup>44</sup> See Commission Communication: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union (TFEU) to horizontal co-operation agreements, O.J. 2011/C 11/01 (14/1/2011).

<sup>45</sup> The vertical aspect is because the agreements can operate at different stages of the distribution chain. See Article 101(1)(a) of the Block Exemption Regulation (Commission Regulation (EU) No 330/2010 of 20 April 2010).

Yet, in some cases the separation between the central entity and the horizontal activities (i.e. the interaction between the retail members) has gone so far that the relationship between the central entity and the retail members has become purely vertical.

- D.9 When faced with mixed situations, the European Commission's Guidelines on horizontal agreements and Guidelines on vertical restraints, require assessing the horizontal agreements first. If this assessment leads to the conclusion that these agreements are acceptable, a complementary evaluation must then be carried out to assess the group's vertical agreements.
- D.10 This sequence in performing this dual examination based on different legal texts derives from the fact that the Commission considers that vertical agreements are less harmful to competition than horizontal agreements, as stated in the Vertical Restraints Guidelines: *"Vertical restraints are generally less harmful than horizontal restraints and may provide substantial scope for efficiencies"* (point 6). This is also manifest by the different market share thresholds used in exempting agreements – typically 15% in the case of horizontal agreements and 30% in the case of vertical agreements.
- D.11 However, this approach can lead to problems in misinterpreting the true nature of an agreement and its effects on participants and subsequent market behaviour and outcomes.
- D.12 As a good case for illustration, consider the issue of retail prices. If retailers were to reach agreements among themselves to sell a particular product at a particular price, this practice could be considered as illegal because it results from a horizontal agreement and deemed as anticompetitive "price fixing".<sup>46</sup> In contrast, if the central organisation of the same group, in the context of the group's brand policy, for example, requests that its members charge a maximum selling price for certain products, it could be considered that such prices are legal under certain conditions. This is because they come under a vertical structure between the central organization and its members (principally when used to suppress prices and increase sales to the benefit of consumers). In practice, the outcome of such arrangements may be

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<sup>46</sup> While this is generally the case in Europe, there may be exceptions at the national level. For example, in France where Article L. 124-1 Code de Commerce provides an exception in particular circumstances to horizontal agreements to Article L. 420-1 Code de Commerce.

exactly the same – i.e. the same price level used under both arrangements by all retailer members – yet the legal treatment may be clearly very different.<sup>47</sup>

D.13 The principle and language applied by the Commission is that “price fixing” is inherently anticompetitive in horizontal agreements between competitors because its objective is to raise price and reduce value to final consumers.<sup>48</sup> In contrast, the Commission takes the view that for a vertical agreement the purpose of fixing or capping prices may be to raise or lower price. Specifically, there is recognition that setting maximum selling prices could avoid a double marginalisation problem (i.e. a succession of mark ups at the wholesale and retail level that leads to inefficiently high price that reduces sales and profits overall and harms consumers). There is also recognition that even fixing prices may be necessary in a distribution system applying a uniform distribution format to organise a coordinated short term low price campaign to benefit consumers. Nevertheless, fixed resale price maintenance (RPM) is treated as a hardcore restriction and so falls within Article 101(1), where the presumption is that it is unlikely to fulfil the conditions of Article 101(3) and so the block exemption does not apply, leaving undertakings to plead an efficiency defence under Article 101(3) in an individual case.

D.14 In the new retail era with online sales becoming an important sales channel, independent retailer groups face new challenges. While few of their members have been competitors in the local retail markets where they operate their physical stores, the situation is likely to be quite different as regards online sales. Thus, the restrictive view expressed in EC guidance

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<sup>47</sup> The point here is that while there might be a view that independent retailers may wish to collude amongst themselves in order to agree on a high price and avoid intra-group competition, this might not necessarily be the case. Just as with the justification for a vertical agreement involving maximum resale prices as being a means to support a common and consistent brand image (to reassure consumers about the value-for-money proposition offered by the group’s members), a horizontal agreement could have exactly the same intention and purpose (i.e. it does not necessarily have to serve against consumers’ interests). Indeed, this aspect lies behind the concept of “joint commercialisation”, whereby common marketing and promotion practices used within an independent retailer group may be interpreted as horizontal agreements, which may be justifiable under Article 101(3).

<sup>48</sup> For example, consider the wording in the EC Horizontal Agreement Guidelines: “Price fixing is one of the major competition concerns arising from commercialisation agreements between competitors. Agreements limited to joint selling generally have the object of coordinating the pricing policy of competing manufacturers or service providers. Such agreements may not only eliminate price competition between the parties on substitute products but may also restrict the total volume of products to be delivered by the parties within the framework of a system for allocating orders. Such agreements are therefore likely to restrict competition by object.” (point 234).

papers towards horizontal agreements between competitors becomes a more acute obstacle for the development of effective business models for independent retailer groups in the new retail era than before.

- D.15 Thus, the greatest challenge is in respect of new modes of retailing, particularly in respect of Internet retailing and omnichannel retailing. In these forms of retailing, where consumers are not limited to specific stores in a given locality, but can buy goods nationally or even internationally then the interpretation of EU competition law will determine if and to what extent independent retailer groups will be able to compete effectively with their integrated competitors. In particular, fixed prices can be required to sustain new modes of retailing and service provision that have clear consumer benefits. For example, “bricks-and-clicks” (i.e. internet-cum-store) retailing has attractions for consumers, who can search for products on-line (through a “centralised site” managed by the central office) then pay for them and pick up them up from a contracted store of their choice (typically the one closest to where they live or work). In such a setting, for the system to work effectively, contracted stores may have to give undertakings to provide consumers with the goods at their advertised prices (otherwise there would be scope for opportunistic behaviour on the part of retailers that would undermine the reputation and efficiency of the whole operation, with a resulting loss of trade).
- D.16 This problem is recognised in part by the example given in the EC Horizontal Guidelines (at point 254) regarding establishing a joint internet platform. However, the issue on online retailing has far wider ramifications for independent retailer groups, where their continuing existence may depend on how quickly and effectively they can respond to the online operations of integrated retailers and the implementation of new trading and retailing systems to respond to customers’ needs and preferences. Unfortunately, as the survey of independent retailer groups highlighted, reported in Section 4 and Appendix B, current competition policy and legal restrictions on applying fixed prices and coordinating central online sales operations through joint commercialisation are severely hampering independent retailer groups. This is a matter that policymakers urgently need to address before competition is permanently damaged.
- D.17 The question of determination of the appropriate interpretation and application of the relevant law in the new retail era is therefore clearly important.

- D.18 Moreover, uniform application throughout Europe is crucial. Today, national competition authorities or courts could, despite the European Commission definition of and guidelines on vertical and horizontal agreements, consider a central organisation of a group which has wholesale activities as not having vertical agreements with its retailer members if these members were at the same time customers and owners of the central organisation.
- D.19 Clearly, from the perspective of allowing independent retailer groups to operate efficiently in the new retail era and not be handicapped or unduly discriminated against, it is fundamentally important that those uncertainties in legal interpretations are removed. Specifically, it is necessary to ensure that
- ◆ First, it is possible to differentiate the economic effects in each analysis, and that any suspicion of an illegal agreement of the horizontal type should be ruled out when a vertical agreement would serve exactly the same pro-efficiency, pro-competitive purpose (not least as this prejudices the examination of the vertical aspects from the outset);
  - ◆ Second, an examination of the horizontal aspects does not lead to a ban on behaviour that is allowed in the context of vertical agreements;
  - ◆ Third, exchanges of information (and data sharing), for example, between members to improve the responsiveness of retailers to competition should not necessarily be considered as an anti-competitive horizontal behaviour when the primary aim of such exchanges is to enhance the overall efficiency and competitive ability of the group through improved co-ordination between the central office and individual members or amongst the members directly. Specifically, this is likely to enhance competition with other retail groups and networks, not least as this typically entails improving supply responsiveness and improved stocking and product selection for the direct benefit of consumers.

#### **D.IV. Relevant market definition and critical market shares**

- D.20 In the “economics effects” approach used in assessing horizontal and vertical agreements under Article 101, market share is used as a proxy measure of market power or its absence. Specifically, below certain critical market share levels, the presumption is that (in the absence of parallel effects) parties will possess insufficient market power for their agreements to have a material detrimental effect on market outcomes. The definition of the

relevant product and geographic markets affected by an agreement is therefore important for the assessment of the activities of any retailer grouping. However, it should be stressed that such presumption merely provides for a safe harbour for agreements concluded by undertakings with relatively low market shares. If the threshold is exceeded this does not automatically mean that there is detrimental effect on the market; it only means that the shorthand route to exclude such effects does not apply and that a qualitative analysis must be made. The market definition will also determine whether the retailers are (actual or potential) competitors on the relevant product and geographic markets, which is another important factor for the assessment under Article 101.

- D.21 Following a good number of retail sector merger cases in the past few years, some clear patterns have emerged as to how competition authorities view procurement and retail markets. Even if market definitions in merger cases are not directly transposable to Article 101 cases (given the different context in which they apply), they could still, to some extent, provide guidance on how the competition authorities would define relevant markets in Article 101 cases.

***Procurement market definition***

- D.22 At the procurement level, where retailers or groups of retailers purchase products, either directly or through a wholesale operation, competition authorities generally consider that each different kind of product or group of products constitutes a separate product market.
- D.23 Furthermore, due to the similar market coverage and reach of producers and distribution channels, as well as price negotiations with suppliers generally taking place at the national level, the geographic scope of these markets is mostly national within the EU (although regional variations may exist within individual member states). However, the European Commission has observed that where purchase conditions are centrally negotiated with suppliers across national borders, the relevant geographic market may be wider (e.g. covering a number of adjacent member states). Indeed, geographic expansion of the relevant market, even up to the level of the entire EU or European continent, is a possibility as retailing internationalises with cross-border procurement (e.g. with pan-European purchasing alliances, such as European Marketing Distribution (EMD), Associated Marketing Services (AMS), Coopernic, AgeCore, and Eurauchan).

- D.24 In summary, the market share of a purchaser group at the procurement level is the share that the combined purchases of the relevant product represent out of the total purchases of the relevant product in the relevant geographic market (i.e. whether national or multi-national depending on the extent of cross-border sourcing and distribution activity).

**Retail market definition**

- D.25 At the selling level, the European Commission and national authorities have generally distinguished between an overall retail market for “daily consumer goods” (or “groceries”) and narrower product markets where specialised retailers are concerned.
- D.26 The retail market for daily consumer goods in respect of the product dimension comprises the entire range of food and non-food products for daily consumer household needs that is normally offered at retail level (e.g. food, drink, pet food, household goods, and cleaning products) and sold through grocery stores where consumers are buying a basket of goods.<sup>49</sup>
- D.27 The European Commission has in merger situations considered breaking down this market definition by size of the sales outlet when there are different purchasing patterns by consumers in the competitor set.<sup>50</sup> However, boundaries may be blurred when consumers use a repertoire of different store sizes to make their purchases, so in effect they are all competing for a share of the consumer’s wallet/purse and thus it has become difficult to make clear-cut distinctions as to whether different sizes or types of outlets are in or outside the same close competitor set. This aspect has become more pertinent with the growth of online sales operations as competitors to physical stores and the spread of limited assortment discounter stores to compete with full-range mainstream stores, as well as the resurgence of convenience stores to compete with supermarkets (as shoppers move to make more frequent shopping trips but purchase smaller baskets).<sup>51</sup> A further complication is that there may be asymmetric substitutability by consumers shopping for their basket size

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<sup>49</sup> See cases M.784 – *Kesko / Tuko*, M.1221 *Rewe / Meini*, M.7933 – *Carrefour / Billa Romania and Billa Invest Construct*; see also case M.2951 – *A.S. Watson / Kruidvat* relating to the retail sale of health and beauty products.

<sup>50</sup> See cases M.1221 – *Rewe / Meini* and M.7345 – *Carrefour / 53 Magasins de Billa en Italie*.

<sup>51</sup> For a national perspective, see the analysis and review of UK retail merger cases by the Competition and Markets Authority (CMA), *Retail Mergers Commentary*, CMA62, 10 April 2017 ([https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/607524/retail-mergers-commentary.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/607524/retail-mergers-commentary.pdf)).

needs, so that, for example, hypermarkets might be viewed as substitutes for supermarkets, but not vice versa.<sup>52</sup>

D.28 As regards the relevant geographic market, the European Commission has considered the catchment area of a retail outlet as the critical factor, using a radius of between 10 and 30 minutes driving time to and from the outlet (depending on the context, e.g. less in densely populated urban areas, and more in less densely populated rural areas).<sup>53</sup> This suggests that the relevant geographic market is a regional or local one. In this case, it may be possible that only one retailer belonging to a given independent retailer group may be established in a relevant geographic market, so that there would be no competition between the independent retailers of the same group in respect of retail markets.

D.29 The European Commission and national competition authorities have also found in merger situations that where retailers negotiate and purchase goods in a centralised way at national level and decide on consumer prices, product promotion and advertising campaigns at national level, the relevant geographic market may have a national, rather than local, dimension.<sup>54</sup>

D.30 In the case of specialised retailers, the European Commission has established narrower product market definitions according to the products or group of products concerned.<sup>55</sup> From a geographic point of view, these product markets can be considered to be national in scope when the range of products, image, store layout, service level, marketing and prices are decided and advertised by the market players on a national level.<sup>56</sup> However, the geographic scope may be taken as local if there is evidence of local-based policies (e.g. in respect of pricing, product ranges determined according to local tastes, and extensive independent retailers). Nevertheless, the choice facing consumers of online or offline retailing significantly complicates defining the geographic scope of retail markets.

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<sup>52</sup> For example, asymmetric substitutability issues has been considered in France and the UK. See respectively FCA, Opinion no 12-A-01 of 11 January 2012 (relating to the competitive situation in the food distribution sector in Paris, para 81); and Competition Commission, *A report on the acquisition by Somerfield plc of 115 stores from Wm Morrison Supermarkets plc*, September 2005.

<sup>53</sup> See case M.1684 – *Carrefour / Promodes*.

<sup>54</sup> See cases M.1221 – *Rewe / Meinl*; M.1684 – *Carrefour / Promodes*; M.1612 – *Wal-Mart / ASDA*.

<sup>55</sup> See cases M.1221 – *Rewe/Meinl*, M.3464 – *Kesko/ICA/JV*, and M.7336 – *Carrefour France/Dia France*.

<sup>56</sup> See case M.2951 – *A.S. Watson / Kruidvat*.



**Issues arising for independent retailer groups**

- D.31 For independent retailers, and prior to the development of online and omnichannel retailing, the relevant retail market would likely have been regional or local in nature (in relation to the relevant catchment area of retail outlets). This follows in the context of physical-store retailing since, even though there might be a central office setting out marketing policy, decisions could be made in respect of the key marketing and store operation variables at the local level (such as over prices, promotions, product range, category depth, staffing, etc.). This applies to both retailers of daily consumer goods (supermarkets) and for specialised consumer goods retailers.
- D.32 In this pre-online retailing age, retail outlets located outside a given geographic area would not constitute effective alternative sources of supply for retail customers. This is because these customers would and could not, “in the short term and at a negligible cost”,<sup>57</sup> switch to outlets located elsewhere “in response to a hypothetical small (in the range 5% to 10%) but permanent relative price increase”<sup>58</sup> occurring in the retail outlets within the relevant catchment area. For the purchase of consumer goods (especially of daily household goods) and in the absence of an online retailing option with home delivery, consumers would not drive beyond a certain distance from their home even in the case of a small but permanent increase in prices at their local retail store (as economic search costs begin to outweigh any shopping-around benefit of finding lower prices). In such instances, in the event of a small but significant non-transitory price increase in a given local market, the consumer would most likely rather switch to another type and/or the same type of retail store in the same local market. Accordingly, for the purpose of the relevant product market definition, a breakdown between different types of retailers may not generally be justified, unless there is a very clear difference in respect of consumer behaviour as to where and on what basis shopping trips are undertaken.<sup>59</sup>

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<sup>57</sup> European Commission Notice on the definition of the relevant market, OJ (1997) C 372/5, point 29.

<sup>58</sup> *Id.*, at point 17.

<sup>59</sup> For example, the UK authorities have moved away from distinguishing the retail grocery market between “one-stop shopping” and “secondary shopping” on the basis that these do not separate out retailers (e.g. a large store would likely be operating in both markets if both types of shoppers visited the store), and critical store size differences may appear arbitrary when there is a spectrum of shopping habits rather than a dichotomous type of behaviour (i.e. either one-stop or secondary shopping on a specific shopping trip). Nevertheless, store size and store type differences may be important to consumers, and that is an aspect that can be examined through careful shopping pattern

D.33 Nevertheless, this is all predicated on consumers being geographically constrained in where they purchase goods, which becomes less clear in the presence of online retailing. If retail markets can be taken to be regional or local in nature, then the important implication which follows is that the retailers belonging to a given group may not be competitors on the relevant selling markets. This would have permitted a favourable assessment in respect of their joint commercialisation and other co-operative activities relevant to their association or group. However, with increasing online sales, retailers that previously were not competitors on the same local retail market, could become competitors due to the fact that the geographical market becomes wider. This raises the concern for independent retailer groups that the legal status of their existing activities could change with the emergence of online retailing, ironically because of the greater scope for competition with the perverse consequence that previously legal activities could be jeopardised by the market widening with more competitors present. In this regard, it is vital that independent retailer groups are provided with legal certainty over their joint commercialisation and cooperative arrangements to ensure that they are not dissuaded, to the detriment of consumers, from developing online retailing which risks altering market definition in a way that could undermine the assurances they have over the legality of their existing arrangements.

## **D.V. Joint purchasing and non-compete obligations**

### ***Joint purchasing arrangements as horizontal agreements***

D.34 As a starting point, joint purchasing in the context of independent retailer groups is a horizontal agreement between retail members, even though a (vertically) separate central office or wholesale arm may actually conduct negotiations and handle logistical arrangements with producers.<sup>60</sup> The economic benefits of such an arrangement for retail members in securing more favourable terms from suppliers (compared to them negotiating separately) are recognised under EU law.

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and expenditure analysis. For examples, see Competition and Markets Authority (CMA), *Retail Mergers Commentary*, CMA62, 10 April 2017.

<sup>60</sup> Even though joint buying may be viewed as first and foremost a horizontal agreement, the precise relationship may have a strong vertical element when it involves purchasing obligations – which are normally treated in the framework of vertical agreements, e.g. the treatment of non-compete obligations in the EC's regulations and guidance on vertical restraints.

- D.35 In general, as long as buyer power is not created in a way that might distort competition in procurement markets and subsequently in retail markets, and that consumer benefits (e.g. lower prices) can be expected to flow from the arrangement, then such arrangements may be looked upon favourably by competition authorities. For example, joint purchasing by small and medium size companies may be vital in allowing them to compete with larger companies on an effective basis.
- D.36 When the combined market share of the group is low then such arrangements will normally be permitted under the *de-minimis* notice (in the absence of any hardcore restrictions, like retail price fixing). More directly, the EC's Horizontal Guidelines on joint purchasing make it clear that Article 101(1) is unlikely to apply where the retailers have a combined market share of below 15% on each the relevant procurement markets and the relevant retail markets. In any event, if these market share thresholds are not exceeded, the conditions of Article 101(3) are likely to be fulfilled and the practice allowed.<sup>61</sup>
- D.37 Higher market shares may still justify an exemption. This is particularly so if the agreement does not confer significant buying power for the group relative to rival retail organisations, as then joint purchasing is unlikely to restrict competition in retail markets. However, where the parties have buying power (i.e. a significant share of the relevant purchasing market), they may be in a position to drive down purchase prices below a competitive level so that competing buyers may be foreclosed or will be charged higher purchase prices to compensate the low prices negotiated by the strong buyers. This may hamper these competitors' cost positions on the selling market and therefore restrict competition on the selling market.<sup>62</sup> The condition for a restriction of competition on the selling market through a purchasing cooperation is thus the creation of market-distorting buying power. Therefore, where joint purchasing does not create such buying power, it will not restrict competition neither on the purchasing nor retail market, and thus may fall outside Article 101(1).<sup>63</sup>

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<sup>61</sup> EC Horizontal Guidelines, point 208.

<sup>62</sup> EC Horizontal Guidelines, point 210.

<sup>63</sup> See Example 1, EC Horizontal Guidelines, point 221, which provides an illustration of a joint purchasing agreement would be permitted. However, the example does not show where the market share boundaries lie and where restrictive effects on competition within the meaning of Article 101(1) would be such that the purchasing agreement is unlikely to fulfil the criteria of Article 101(3).

D.38 In respect of justifying joint purchasing, assessment under Article 101(3) involves consideration of the four cumulative conditions in that the agreement must: (i) lead to efficiency gains; (ii) be indispensable to achieve those gains; (iii) allow consumers to receive a share of those gains; and (iv) not eliminate competition in respect of a substantial part of the products in question. In this regard, the primary justification for joint purchasing by groupings of independent retailers under Article 101(3) would normally be that the efficiencies achieved by joint purchasing (economies of scale in ordering and transportation and a stronger negotiating position through bundled purchases) are necessary in order to enable the parties to compete with the large (integrated) retail groups and thus to maintain competition on the selling market, which is clearly to the benefit of consumers.

D.39 In a similar vein, it may be argued that additional obligations are indispensable. Most notably, an obligation to buy exclusively through the cooperation can in certain cases be indispensable to achieve the necessary volume for the realisation of economies of scale.<sup>64</sup> This might, for example, apply in cases where larger (integrated) retail groups are active on the relevant markets. In these circumstances, since these groups have significantly larger purchasing shares in the relevant purchasing market than the independent retailers, a total purchasing obligation on the retailers may be viewed as indispensable in order to bundle the necessary volume and to enable the independent retailers to compete in the purchase of products. The presence of larger, more powerful retail groups on the selling market can be expected to play an important role here since they will also ensure that the retailer group pass on the economies to the consumers through lower prices in competing with the large retailers.

#### ***Non-compete obligations as vertical agreements***

D.40 Viewed in the vertical context of a central office serving retail members, purchasing obligations may clearly play a crucial role in the effectiveness of the joint purchasing function of an independent retailer group. Such obligations ensure that retail members will take the goods that the central office (or wholesale arm) manages to source from producers, which in turn provides bargaining leverage (through guaranteed access to outlets and large sales volumes) that enables favourable terms to be negotiated with producers to the collective benefit of retail members, and in turn consumers when these benefits are passed on in the form of lower retail prices and/or better products.

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<sup>64</sup> EC Horizontal Guidelines, point 218.

D.41 In this vertical context, purchasing obligations are treated as non-compete clauses in the vertical block exemption regulation. The obligation to purchase all or more than 80% of the buyer's requirements from the central office, are covered by the block exemption<sup>65</sup> for a duration of up to 5 years if no individual retailer who is member of the retailer group has a total annual turnover exceeding €50 million and the market share of the supplier (central office) does not exceed 30% of the relevant selling market.<sup>66</sup>

D.42 There are two qualifications to this general rule that may be specifically applicable to independent retailer groups:

- ◆ First, if the premises from which the retailer sells the products are owned by the supplier or leased by the supplier from third parties, the non-compete obligation can exist for as long as the buyer occupies these premises.
- ◆ Second, the EC's Guidelines on Vertical Restraints states that restrictions (such as a non-compete obligation) imposed by an association of retailers in which only a limited number of the members have a total annual turnover exceeding €50 million, and where these members together represent less than 15 % of the collective turnover of all the members combined, will in principle also be exempted under Article 101(3).<sup>67</sup>

D.43 Where the above-mentioned turnover or market share threshold is exceeded, the block exemption does not apply and the non-compete obligation has to be assessed under Article 101 in accordance with the Vertical Guidelines.

D.44 In general, a non-compete obligation is unlikely to have restrictive effects falling within the scope of Article 101(1) (or at least would be exempt under Article 101(3)) where the supplier (the central office) has an insignificant market share and where there are numerous and strong competitors. It is only likely that competing suppliers will be foreclosed if they are significantly smaller than the supplier applying the non-compete obligation.<sup>68</sup> Accordingly,

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<sup>65</sup> Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. Hereafter referred to as the Block Exemption Regulation.

<sup>66</sup> EC Guidelines on Vertical Restraints, O.J. 2010/C 130/0, points 29 and 131.

<sup>67</sup> EC Guidelines on Vertical Restraints, point 29.

<sup>68</sup> EC Guidelines on Vertical Restraints, points 134 and 141.

and in the context of independent retailer groups, if competing integrated retail groups hold strong market positions then it is unlikely that a non-compete obligation imposed by a central office on its members will foreclose these competitors' access to the distribution market.

## **D.VI. Joint commercialisation and retail pricing requirements**

- D.45 The pressures of increased competition and a recognition of the need to cater better for consumers needs have meant that many independent retailer group have moved on from simply providing their members with better purchasing conditions as a joint buying group. Today, the objective pursued by such groups is often considerably broader. They are typically designed to bring the associated retailers (and, where appropriate, craftsmen as well) the technical and material resources in the field of marketing and the know-how to contend with competition and develop efficient retail and distribution businesses. By doing so, they facilitate retail members being better able to respond effectively to the expectations of consumers by providing for a more consistent retail image and a more assured value-for-money proposition. This has become more important in the new retail era where online sales play a crucial role.
- D.46 In order to support such activity, and ensure that consumers benefit from such developments, independent retailer groups will look to using two particular practices relating to requirements on retail pricing. The first of these is the obligation on retail members not to price specified goods above a certain price level – i.e. a price cap through a maximum resale price obligation – for the purpose of ensuring that retail prices are sufficiently low to drive sales volumes for the benefit of the group (by increasing total revenues) and consumers (by ensuring that they receive low prices). The second of these is the obligation for retail members to stick to a fixed common retail price on certain promotional goods that are intrinsic to the joint marketing and overall retail image being developed by the group and which provide assurance for all consumers that they will enjoy the same value-for-money offer irrespective of their location and place of purchase (i.e. providing clarity about the offer and assisting in consumers making more informed purchasing decisions when contrasting the group's offer with that offered by other retail groups active in the same market).

- D.47 Both of these types of obligations can be seen as being pro-efficiency and pro-competitive in nature. They may also offer significant consumer protection benefits (e.g. by ensuring that advertised promotions do not mislead or falsely inform consumers as to the prices that will find on visiting stores). However, present policy regulations may restrict or even prohibit in their use depending on how competition authorities interpret these obligations, which in turn may depend on whether they are viewed as horizontal or vertical agreements.
- D.48 The importance of this matter cannot be underestimated for independent retailer groups to function well and be an effective pro-competitive force in the new retail era. Pricing strategy is perhaps the single most important element in the means by which retailers compete against each other for the patronage of consumers. It is crucial for a group of retailers to be competitive on prices that are indicative of the overall value-for-money offer being presented to consumers. This is most apparent in respect of the prices used in advertising campaigns (which reflect the overall group image), prices on products in the stores' basic assortment (which often drive stores' footfall by influencing which stores shoppers will choose to visit), and the price for private labels (as these directly relate to the group's image, brand positioning and point of distinction from the products offered by rival groups). In such areas, it may be imperative for groups to be able to exercise suitable control over retail pricing if they are to be truly effective retail operators and provide consumers with the maximum level of benefits that can be achieved through consistent low prices.

***Maximum resale price obligations***

- D.49 Trading agreements help formally separate parties avoid sub-optimal outcomes in relation to their supply and distribution arrangements. These arise from individual behaviour that, while being individually rational and profitable, is not in the joint (i.e. collective) interests of the parties. Such a problem can arise with separate decisions over pricing which result in retail prices being set "too" high from a joint perspective (i.e. the double marginalisation problem of successive mark ups). This is a problem for independent retailer groups when an individual retail member chooses to set prices higher than the group as a whole would like because this allows that retailer to capture additional profits (say, by exploiting some local market power) but as a consequence this reduces the volume of sales, which impacts detrimentally on the wholesale arm (which by implication loses income for a given wholesale price). In these circumstances, in order to prevent this individual retailer, and others like it,

from acting in this way, the group and consumers collectively benefit from the exercise of vertical control.

- D.50 This, in a nutshell, explains why independent retailer groups will seek to use maximum resale price obligations. Imposed retail price ceilings will ensure that individual members do not undermine the collective efficiency position of the group by raising their own prices but in the process leading to underselling and reduced group revenue as a consequence. This is also in the interests of consumers by ensuring that they receive low prices and are not exploited in areas where individual retailers could otherwise exploit local market power.
- D.51 In recognition of this need for vertical control, EU policy allows this practice to benefit from the Block Exemption Regulation on Vertical Agreements when it is applied to retailers (or equivalently their vertically-linked wholesale operation) whose collective market share does not exceed 30% of the relevant market being supplied, so long as this does not directly or indirectly lead to fixed or minimum resale prices.
- D.52 Usually this practice does not pose any competition law concern, even if the market share of the vertical central unit exceeds the 30% threshold, so long as the purpose is designed to prevent increases in the group's retail prices. Then, by setting maximum prices, the central unit of the group can help ensure a reasonable price level and thus benefits are transferred to consumers in the form of lower prices.
- D.53 Indeed, in cases where there are very high market share levels in retail markets, the practice may be a very useful way of preventing individual retailer members from exploiting local market power, i.e. when local competition is absent or weak (e.g. in remote rural areas or socially deprived urban areas, especially as low-income consumers in these areas may be particularly harmed by high prices).

***Common retail prices for promotional purposes***

- D.54 While retail price ceilings may prove to be an important and useful element in vertical control to ensure that efficiency benefits (arising from high sales volumes and combined revenues) are realised by the group and that these are shared with consumers (when these leads to lower retail prices), setting fixed prices may be more to do with horizontal control.



- D.55 Fixed resale price maintenance is *per se* prohibited under EU law, as a hardcore restriction, and does not benefit from an exemption at any market share level. The reason for this strict treatment is that while the practice can offer benefits (like curbing retail prices or tackling free-rider problems resulting in diminished retail service levels), it is generally not viewed as being “indispensable”. In other words, competition authorities take the view that there will be other vertical restraints available than can serve the same benefits but be less restrictive on competition. Thus, for example, competition authorities might prefer to see price ceilings used rather than fixed prices to prevent the problem of successive mark ups arising. Similarly, competition authorities may prefer to see the use of retail service obligations being used as a direct way to control free-rider problems in retail service provision rather than the more indirect way of controlling the problem with fixed resale prices.
- D.56 Nevertheless, this stance against fixed and minimum RPM has softened in recent years, as evidence from the changed wording in the latest 2010 Guidelines on Vertical Restraints compared to the previously issued Guidelines in 2000.<sup>69</sup> In particular, the 2010 Guidelines recognise that fixed resale prices, and not just maximum resale prices, may be necessary to organise in a franchise system or similar distribution system applying a uniform distribution format a coordinated short-term low price campaign (suggested as 2 to 6 weeks duration) which will also benefit the consumers. The 2010 Guidelines also recognise that the extra margin provided by RPM may allow retailers to provide (additional) pre-sales services, in particular in case of experience or complex products. The risk in these circumstances is that, in the absence of RPM, if enough customers take advantage from such services to make their choice but then purchase at a lower price with retailers that do not provide such services (and hence do not incur these costs), high-service retailers may reduce or eliminate these services that enhance the demand for the supplier's product. Here, RPM may help to prevent such free-riding at the distribution level. Nevertheless, the onus on the parties is to demonstrate convincingly that the RPM agreement can be expected not only to provide the means but also the incentive to overcome possible free riding between retailers on these services and that the pre-sales services overall benefit consumers as part of the demonstration that all the conditions of Article 101(3) are fulfilled.<sup>70</sup>

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<sup>69</sup> Commission Notice – Guidelines on Vertical Restraints, O.J. C 291, 13.10.2000.

<sup>70</sup> This softening stance in Europe, especially in recognising the freeriding problem on pre-sales services, follows in the wake of the importance case law development in the USA where in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (2007), the US Supreme Court abolished a nearly century-old *per se* rule against RPM established in *Dr. Miles Medicine Co. v. John D. Park & Sons* (1911). The consequence of this 2007 court ruling is that RPM will be judged under federal antitrust law by the

- D.57 Recognition of the economic value of common prices, as equivalent in outcome to fixed RPM, has been much longer in the context of horizontal agreements between competitors. In particular, fixed prices may be necessary in the case of a campaign for launching a product on the market or for promoting a product or a specific assortment with price positioning especially as regards internet sales. This can involve imposition of prices at the “commercialisation” level to allow the marketing of an assortment of branded articles in a reasonable price framework. The benefits of such an arrangement are most apparent when the promotional campaign is carried out with the products offered at a single price – as this enhances retail brand image and provides assurance and clarity for consumers of the value-for-money proposition being offered to them.
- D.58 EU competition policy recognises the possibility that there may be benefits from such arrangements. According to the Horizontal Guidelines (point 240), joint commercialisation agreements between competitors can benefit from exemption under Article 101(3) when the combined market share is below 15%. Furthermore, “Example 3” of the Commission’s Horizontal Guidelines (point 254), in the context of joint internet platform, shows that price fixing can be exempted under Article 101(3), when it is indispensable for the integration of other marketing functions and the attainment of economic benefits, which at the end constitute significant efficiencies that are of benefit to consumers and ensure that competition is not eliminated.
- D.59 Clearly, there is a need for competition policy to make a sensible judgement over situations where fixed prices are just a promotional tool as opposed to an anti-competitive collusive arrangement. The former is much more likely to take precedence over worries about the latter when (i) the products with fixed prices are limited in number, (ii) the duration of the agreement is short term (e.g. a two-week promotion), (iii) the promotion is at the request of (and perhaps partly sponsored) by a manufacturer, (iv) the promotion helps develop retail image of the group and build consumer demand, and (v) the group faces effective competition from rival retail groups. It would be very helpful for the EC to develop guidelines that take these features into account in developing a sensible policy towards common pricing and joint commercialisation.

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rule of reason, which is a less restrictive standard that requires courts to weigh all the relevant circumstances of a case to assess whether a practice unreasonably restrains trade.

