

# Retail Alliances – harmful for competition?

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Retail alliances like Coopernic (including, e.g. Ahold Delhaize), AgeCore (with Colruyt, Intermarché and Edeka) or Eurelec (E. Leclerc and Rewe) have been around for a long time. They gained new attention in the past decade because of the sheer, increased number of alliances and because some open trade conflicts. Concerns on restrictions of competition and higher consumer prices were also raised in this context as well as more general negative effects, such as upsetting the balance of power, preventing farmers from getting fair prices for their products while (brand) manufacturers would suffer from heavy bargaining pressure.

Last week, the European Commission published a comprehensive report at the request of the European Parliament about the effects of buying groups and other alliances on supply chains across Europe with the aim of clarifying whether retail alliances are permitted under antitrust law or not.

## **Advantages of Retail Alliances**

Retail alliances are horizontal alliances of retailers, retail chains or entire retailer groups that cooperate in pooling some of their resources and activities, most importantly relating to sourcing supplies.

- From the retailers' perspective, their aim is to gain supply chain efficiencies, e.g. by saving transaction costs or sharing knowledge and best practices. Such alliances can also lead to better purchasing conditions because they improve the retailers' bargaining position.
- Suppliers may benefit from efficiencies, too, because of combined negotiations and decreased costs as a result of larger, harmonized orders. Moreover, suppliers cannot discriminate between retailers with different price offerings when they appear as one single unit (so-called non-discrimination effect).
- Finally, retail alliances can have positive effects for consumers who benefit from lower prices.

## Competitive Concerns

While acknowledging all these benefits, especially for retailers (increased competitiveness in a consolidating and internationalising market), the European Commission considered three main competition concerns that may arise in relation to retail alliances:

- First, there may be concerns on less vigorous competition among retailers (foreclosure of competitors and growing concentration), with possibly negative implications for suppliers or consumers. This *horizontal concern* is targeted by Article 101 TFEU and considers competition restrictions ‘by object’ and ‘by effect’.
- A second concern relates to the possible exploitation of trading partners in the presence of a dominant position, notably by means of practices such as delisting, retroactive requests, no pay for performance, and a shift of business risk, which are addressed by Article 102 TFEU as well as national laws on stricter *unilateral conduct or unfair trading practices*. However for most retail alliances, these concerns are rather unlikely to apply.
- Thirdly, retail alliances may have an impact on the *internal market*. However, rather than posing a concern, aiming for a unified EU sourcing market for food and grocery products and overturning territorial supply restraints imposed by suppliers may be regarded positively.

Overall, the European Commission takes the view that a balanced view is necessary, which acknowledges the diversity of the forms and activities of retail alliances. Another factor to be taken into account is that benefits generated by retail alliances are more likely to be passed on to consumers as long as there is sufficient downstream competition.

## Horizontal concerns under Art. 101 TFEU

In relation to possible horizontal concerns, the European Commission considered that due to the close contact between actual or potential competitors, there might be increased transparency, potential for price-fixing, coordination extending beyond the legitimate scope of the alliance, and information exchange. Furthermore, market allocation agreements, limiting the expansion of shop networks or coordinating output restrictions were viewed as potential risks.

Given that the relevant markets include both purchasing and selling markets, unlawful cooperation can have negative effects both for suppliers and consumers. In addition, competition authorities might also consider the so-called waterbed effect to the detriment of smaller retailers, i.e. whether lower prices for strong buyers lead to higher prices for weaker retailers, thus endangering smaller retailers’ ability to compete.

Moreover, the Commission examined the risk of spiral effects for alliance members given that lower purchasing prices can lead to greater market shares downstream, which in turn drives buyer power and, in turn, higher downstream shares.

## **Exemptions**

Horizontal cooperation agreements may be exempted from Art. 101(1) TFEU under specific conditions and when a fair share of the benefits generated by horizontal cooperation are passed to consumers (Art. 101(3) TFEU). In their Horizontal Guidelines, the Commission explicitly allows a “safe harbour” for alliances among competitors with a combined market at/below 15%. Above this thresholds, a case-by-case analysis is necessary. The Commission generally assumes that the higher the combined market shares, the lower the likelihood that efficiencies are passed on to the consumer.

## **Outlook and significance for other sectors?**

The report of the European Commission contains insightful analysis of retail alliances in the food sector and points out a number of positive effects, which is encouraging for retailers entering into cooperation agreements: There is no general prohibition of such alliances as long as they do not lead to increased consolidation or anticompetitive coordination. Of course, these pitfalls of competition law must be diligently avoided. Before entering into some form of collaboration retailers must assess the very effects of the alliance at hand very carefully.

The report published by the European Commission contains helpful insights and economic analyses, which may be helpful beyond the food and agriculture sector. The analyses may also be transferrable to other industries, in which similar alliances often come up (e.g. pharmaceuticals). Buying groups and other alliances can generate great benefits as long as competition remains vigorous upstream and downstream and the positive effects are passed on to the consumer.

The full report is available [here](#). BLOMSTEIN will monitor further developments in this regard. If you have any questions about the report or on buying alliances in general, Anna Huttenlauch will be happy to answer them.