

## JRC SCIENCE FOR POLICY REPORT

# Retail alliances in the agricultural and food supply chain

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## Abstract

Retail alliances (RAs) are not a new phenomenon, but the increasing number of alliances of large retail chains over the past decade and their international dimension, have generated renewed attention. This report looks into the potential impact of RAs on the agricultural and food supply chain. It summarises the insights and views presented at a workshop that was held in Brussels on 4-5 November 2019. The workshop gathered economic and legal scholars, experts from European and national competition authorities, as well as technical experts from the retail, food manufacturing and farming sectors.

RAs are horizontal alliances of retailers, retail chains or retail groups that cooperate in pooling some of their resources and activities, most importantly relating to sourcing supplies. RAs are diverse, and may group different types of retailers and engage in different activities. These differences are important to consider, as they lead to different economic impacts and different legal assessments. RAs can be classified into three main types: (1) groups of independent retailers, (2) national alliances, and (3) European alliances, although substantial differences may exist even within these types. While the members of groups of independent retailers and national RAs are active in the same national market, members of European RAs are active in different national markets.

The main activities performed by RAs relate to the pooling of bargaining power in the sourcing of supplies. Groups of independent retailers typically buy both branded and private label products jointly. European RAs and most national RAs do not buy jointly, but engage in the formulation of joint tenders for private label products and/or in so-called 'on-top agreements' with large A-brand suppliers. These agreements are 'on top' of the contracts between suppliers and individual retailers over the purchase of products, and cover the provision of a range of services offered by the RA to suppliers (e.g. related to promotional activities, growth plans or internationalisation). RAs may also be active in supporting smaller suppliers in developing their (international) network and some RAs engage in the joint procurement of not-for-sale products such as in-store equipment, or data sharing services. By pooling these activities at the level of the alliance, RAs aim to increase their efficiency and by situating these 'on-top agreements' at the level of the alliance, they help to improve the bargaining position of their members with respect to large suppliers. In this way, RAs play an important role in ensuring the competitive position of retailers in a highly competitive, consolidating and increasingly international market.

The formation of RAs also may have effects for consumers and upstream actors in the agricultural and food supply chain. RAs may create potential benefits for consumers. By generating efficiencies and providing a countervailing force against large brand manufacturers, RAs may lead to lower consumer prices. Nevertheless, the degree to which this countervailing force benefits consumers, depends on the specificities of the contract between retailers and suppliers, as well as on the degree of downstream competition in the selling market. RAs may also have an effect on the product variety offered to consumers. In the longer term, the degree of retail competition may be affected by RAs, with possible effects for consumers and suppliers. For suppliers, RAs may generate efficiencies and facilitate market expansion, but at the same time, suppliers will face stronger buyer power, likely leading to a lowering of their margins. However, evidence on how this affects innovation and competition among suppliers is ambiguous. There is little evidence on the possible impact of RAs yet further up the agricultural and food supply chain, that is to say on farmers. While some groups of independent retailers may be involved in the sourcing of fresh products from wholesalers or farmer cooperatives, national and especially European RAs only deal with packaged food products. Any possible impact of (European) RAs on farmers is thus indirect at best.

The report also discusses the legal framework applicable to RAs and provides relevant examples of decisional practice of the European Commission and national competition authorities. At the EU level, Articles 101 and 102 TFEU (EU competition law) apply to the conduct of undertakings on the market. In the context of Article 101 TFEU, the Horizontal Cooperation Guidelines provide an analytical framework for the assessment of horizontal

agreements. The decisional practice of national competition authorities under EU competition law is considered, providing examples of issues that may arise in the context of RAs. Directive (EU) 2019/633, which addresses unfair trading practices specifically in the agricultural and food supply chain, is also relevant for assessing the conduct of groups of buyers, as long as they and their suppliers fall within the scope of the Directive.

EU competition law considers two main competition concerns that may be relevant in the case of RAs, while it also accounts for the possible benefits that RA may generate. First, there may be concerns on RAs leading to less vigorous competition among retailers (foreclosure), with possibly negative implications for suppliers or consumers. This concern is targeted by Article 101 TFEU and considers competition restrictions 'by object' (which are assumed to be restrictive), and others 'by effect' (for which a detailed assessment of effects, both upstream and downstream, is required). Under specific conditions and when a fair share of the benefits generated by horizontal cooperation are passed to consumers, an exemption (Article 101(3) TFEU) may be granted though. A second concern relates to the possible exploitation of trading partners in the presence of a dominant position. This concern is addressed by Article 102 TFEU. Yet, for most RAs, the concern about a dominant position is unlikely to apply, and although the legal tools are available, case law suggests that the agency of competition law concerning possible harm on suppliers from RAs, has been limited. Finally, the Directive (EU) 2019/633 on Unfair Trading Practices aims to protect weaker players against unfair trading practices. In most cases, and especially for European RAs, the Directive would not apply, as RAs only deal with large suppliers that tend to largely exceed the turnover thresholds of the Directive. The legal assessment concludes with examples from the German and Italian competition authorities to illustrate how the EU competition law toolbox, possibly in combination with national legislation, can be used to address possible concerns related to RAs.

Overall, a balanced view is necessary when considering RAs. The diversity of the forms and activities of RAs requires a case-to-case assessment and makes it hard to derive general conclusions. Overall, the experts and participants in the workshop agreed that RAs are able to generate benefits for retailers that increase their competitiveness in a competitive, consolidating and internationalising market. They also agreed that – as long as there is sufficient downstream competition – at least some of the benefits that RAs generate are likely passed on to consumers. Nevertheless, there is the possibility of increased retail consolidation and of anti-competitive practices. Under certain circumstances, the possible benefits that RAs can provide to consumers might be off-set by the possible harm inflicted on upstream actors. In such cases, a closer investigation of RAs and their behaviour may be warranted. As regards the potential harm to upstream suppliers, the case law is limited and increased attention and orientation in guidelines by competition authorities may well be desirable. The general assessment of the existing EU and national competition law, the legislation on unfair practices, and the presented case law suggest that the current legal framework provides tools to address potential concerns and to protect both consumers and upstream actors.

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# 1 Introduction

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The retail sector has undergone a significant transformation over recent decades and keeps adapting and evolving quickly. Food retailing in Europe has been characterised by increased levels of concentration through mergers, increased vertical integration of supply chains, and increased internationalisation of retail operations with several companies being active in several EU member states. Moreover, the international expansion of discount stores<sup>1</sup> and online retailing is driving up competition in an already highly competitive industry.

While cooperatives of smaller retailers exist for many decades, a recent transformation in the retail sector consists of the increasing number of retail alliances (RAs)<sup>2</sup> formed between large retail groups or retail chains within a country, from different countries in Europe, or even involving non-European partners. The main function of RAs is to bundle procurement to generate efficiencies and to improve the bargaining position of their members with respect to upstream operators, in particular large brand manufacturers. Retailers argue that such horizontal cooperation between retailers is needed for retailers to remain competitive and to face the highly concentrated food manufacturing sector. At the same time, suppliers and policymakers are concerned about the concentration of buying power in the retail sector and the consequences for the agricultural and food supply chain.

RAs exist for many decades in Europe, the first ones being set up in the 1930s. Most of the earlier alliances consisted of cooperation between a large number of small independent retailers active in the same country (Ghisi et al., 2014). In the 1980s and 1990s, such alliances became more widespread and also the first international alliances were established. In the early 2000s, a number of two-party alliances were established by two (usually larger) retail companies, some of them expanding later on into larger or international RAs (Dawson and Mukoyama, 2006). Horizontal cooperation agreements between retailers are thus not new. Still, over the past five to ten years, an acceleration in their formation, reorganisation and international expansion can be observed and has created renewed attention.

The precise activities covered by RAs, their functioning, and the opportunities and challenges they pose for the agricultural and food supply chain, are not yet researched very extensively and they need to be better understood by policymakers. Therefore, members of the European Parliament and other policymakers have highlighted the need for a deeper insight into what RAs are, how they function and what implications they might have for retailers, consumers, but also for upstream actors in the agricultural and food supply chain.

Given the dynamics in the organisation and internationalisation of the retail sector, and linked to the draft directive on Unfair Trading Practices (UTPs)<sup>3</sup>, the European Parliament called on the Commission to launch an analysis on the extent and effects of national and

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<sup>1</sup> Hard discount stores refer to a retail format focused on high volume sales of a very limited assortment of products of daily need, a very high share of private label products offered at low prices, no or very limited number of manufacturer brands, and a focus on simplification and efficiency. Soft discounters offer a broader product portfolio including also more manufacturer brands compared to hard discounters, though still much more limited compared to full-line assortment supermarkets. ALDI is a hard discounter, LIDL is typically considered a soft discounter (Sachon, 2010).

<sup>2</sup> With retail alliances (RA) we refer to horizontal alliances of retailers, retail chains or groups that cooperate in pooling some of their resources and activities, most importantly relating to sourcing supplies. For a definition and classification of types of retail alliances, refer to section 2.1.

<sup>3</sup> Unfair Trading Practices (UTPs) refer to practices that deviate from good commercial conduct and are contrary to good faith and fair dealing. They usually are unilaterally imposed, by one trading partner on another. [https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/market-measures/agri-food-supply-chain/unfair-trading-practices\\_en](https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/market-measures/agri-food-supply-chain/unfair-trading-practices_en)

international buying alliances on the economic functioning of the agricultural and food supply chain<sup>4</sup>.

It is in response to this call that the European Commission decided to bring together in a workshop all relevant actors to help better understand the nature and functioning of such alliances, as well as their implication on the agricultural and food supply chain. The workshop was organised by the European Commission (DG AGRI and JRC) in Brussels on 4 and 5 November 2019, gathering economic and legal scholars, experts from European and national competition authorities, as well as technical experts from the retail, food manufacturing and agricultural sectors. The workshop agenda is included in Annex 1 to this report. The expert talks and debates aimed to shed light on the following issues:

- The functioning of national and international RAs
- The economic efficiency of such alliances in the agricultural and food supply chain
- The impacts of RAs on consumers as well as upstream operators in agricultural and food supply chains
- The legal context and policy implications of RAs

This report describes the principal insights and discussions that were put forward by the speakers and participants at the workshop. This report has been produced under the responsibility of the JRC and is based on the contributions of two academic experts: Zohra Bouamra-Mechemache, Toulouse School of Economics and INRA (Section 3) and Victoria Daskalova, University of Twente (Section 4), who have acted as rapporteurs on, respectively, the economic and legal sessions of the workshop. This report does not pretend to represent a thorough and comprehensive review of scientific literature on the topic concerned, but aims to bring together the different arguments and views that were presented at the workshop. This report does not imply a policy position of the European Commission.

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<sup>4</sup> Annex: Statement by the European Parliament on buying alliances, European Parliament legislative resolution of 12 March 2019 on the proposal for a directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain, [http://www.europarl.europa.eu/doceo/document/TA-8-2019-0152\\_EN.html](http://www.europarl.europa.eu/doceo/document/TA-8-2019-0152_EN.html)

## 2 National and European retail alliances

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### 2.1 What are retail alliances?

Based on the concepts and descriptions presented at the workshop, RAs can be defined as horizontal alliances<sup>5</sup> of retailers, retail chains or retailer groups that cooperate in pooling some of their resources and activities, most importantly relating to sourcing supplies (Dobson, 2019)<sup>6</sup>. These groups may also be referred to as central purchase organisations or buying groups, but the term RAs is a more general term, and captures better the variety of forms and activities they may encompass.

Horizontal retailer cooperation can take different forms along a continuum, ranging from infrequent arm's length transactions, to closer long-term relationships, to fully integrated relationships with mergers and acquisitions as the most extreme form (Stafford, 1994). This results in a continuum in the degree of commitment, the range of activities covered, the existence of organisational infrastructures that bind the partners, and the existence of exit barriers (Bailey et al., 1995). RAs can be situated in the middle of this continuum: cooperation is usually institutionalised in the form of a central secretariat, which generates a mutual benefit for the different partners. Members delegate part of their activities, mainly related to buying, to the central organisation. Yet, the main activities of partners remain independent. This means that the presence of RAs changes the buying structure in the intermediary goods markets ('business-to-business'), but does not directly impact the structure of the consumer market, nor does it directly affect the market of primary agricultural goods<sup>7</sup>.

### 2.2 Competition, consolidation and internationalisation in the retail sector

The increased horizontal cooperation of retailers in the EU and its increasingly international dimension should be seen within the context of a strongly competitive and rapidly changing retail sector. The number of independent retail outlets has been declining in the EU, while discount stores<sup>8</sup> have been expanding rapidly and the introduction of new retail formats in the form of self-scanning and online retailing is on the rise (Dobson et al., 2001; OECD, 2013). The retail sector is characterised by increasing consolidation and internationalisation of retail operations with several companies being active in several EU member states (Dobson et al., 2001; Dawson, 2006). Concentration ratios in both EU retailing and food manufacturing are high and have been increasing over the past decades. In 2016, the CR5 (concentration ratio measured as the joint market share of the five largest firms) for retailing ranged from 35% in Greece to 90% in Finland (McCorriston,

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<sup>5</sup> The term 'alliance' is applied to independent organisations, which are cooperating and forming partnerships and coalitions based on mutual needs (Bailey et al. 1995).

<sup>6</sup> Other definitions describe retail alliances as a cooperation between two or more retail companies whereby each partner seeks to add to its competencies by combining some resources with those of its partners (Dawson and Shaw, 1992).

<sup>7</sup> As will be discussed in detail in section 3.2 and section 3.3, RAs may have indirect implications for the retail competition in the consumer market and may impact prices and variety at the consumer end of the chain. RAs also do not directly affect the market of primary agricultural goods, since they do not deal directly with farmers, but might impact them indirectly, as discussed in section 3.4.

<sup>8</sup> See footnote 1.

2019). There is also increased upstream control by retailers, in the form of the rise of private labels<sup>9</sup>, successfully competing with A-brands<sup>10</sup> (Nielsen, 2005).

At the same time, the European retail sector has been characterised by an important wave of internationalisation. The international expansion of retailers is reflected in the high number of foreign mergers and acquisitions in the retail sector, as well as in the expansion of discount stores across borders (EC, 2014). Also, the increasing number of international RAs, joining members from different countries, can be seen as part of this internationalisation wave.

It is in this context of high competitive pressure, consolidation and internationalisation, that RAs are argued to be vital for retailers to remain competitive, to enhance supply chain efficiency, and to counter supplier power. The way in which RAs do so, are only briefly described here<sup>11</sup>. A detailed discussion of the economic mechanisms behind these arguments and the evidence will follow in section 3.

By pooling resources, RAs can generate scale efficiencies, for example related to transaction or negotiation costs, or the coordination of promotion activities. Some alliances also offer expertise and promoting technology developments (e.g. e-commerce, click & collect<sup>12</sup>) to their members, to support them in their response to competitive pressures from new forms of commercialisation (e.g. digital platforms such as Amazon and Alibaba, or home delivery services).

By improving the bargaining position of retailers, RAs can typically secure better purchase conditions from suppliers. In this way, smaller retailers can improve their competitive position with respect to large retail chains. Similarly, retailers from different countries may form European alliances to respond better to the strong price competition, the increasing consolidation of the retail sector, and the rapid international expansion of discounters, which may engage in central product sourcing at European level<sup>13</sup>. The acceleration in the set-up of national alliances in the French retailing sector in the course of the year 2014, for example, cannot be seen in isolation from the price war in France that had started in the beginning of 2013 (IRI, 2015)<sup>14</sup>.

Finally, RAs are set up to form a counterweight against the high selling power of major FMCG (Fast-Moving Consumer Goods)<sup>15</sup> players, supplying strong brands. European alliances facilitate cross-border procurement from both private label producers and premium FMCG companies. Retailers argue that in this way, RAs help them to fight the use of territorial supply constraints that may be imposed by multinational suppliers and to challenge seemingly excessive differences in prices charged across countries (Bouchut, 2019).

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<sup>9</sup> A private label product is a product that is produced by a manufacturer under a contract, specifying detailed product and packaging requirements, for a retailer or a group of retailers. The product is sold under the retailer's brand name, or under a specific name, label and logo developed for this purpose. Such products are also referred to as store brands, retailer brands, or own brands.

<sup>10</sup> An A-brand products is a product that is distributed under a well-known brand name owned by a food manufacturer. They are also referred to as manufacturer brands, national brand products, or branded products.

<sup>11</sup> The remainder of this section is largely based on the contributions by Prof. Dobson, Mr. Essmann and Mr. Bouchut.

<sup>12</sup> E-commerce refers to the online purchasing of products. Purchased products can be delivered to the consumer at home, at a specific location, or the online purchased items can be picked up in-store (referred to as click-and-collect).

<sup>13</sup> <https://www.handelszeitung.at/handelszeitung/hofer-schafft-60-arbeitsplaetze-salzburg-182237>

<sup>14</sup> In course of 2014 the number of purchasing organisations in France faced by multinational FMCG manufacturers, reduced from seven to four, jointly representing almost 90% of French distribution.

<sup>15</sup> Fast-Moving Consumer Goods refer to products that sell quickly, i.e. moving fast over retailer shelves. It typically concerns products that are relatively cheap and frequently purchased (packaged goods, beverages, toiletries, etc.).

## 2.3 Typology of retail alliances<sup>16</sup>

RAs exist in many forms and do not all share the same functioning and activities. They are diverse in geographical coverage, types of members, number of members, and activities they perform (Bouchut, 2019). The most important activities are discussed in more detail in the next section.

Based on the information presented at the workshop, RAs can be classified into three main types: (1) groups of independent retailers, (2) national RAs, and (3) European RAs<sup>17</sup>. The main characteristics of each type are illustrated in Table 1. While this typology may not cover exactly all existing alliances and important differences are present also within these types, this classification helps to distinguish across a number of dimensions that are linked to the economic and legal arguments around RAs that are presented later.

### Groups of independent retailers

Groups of independent retailers<sup>18</sup> refer to groups of – mostly smaller – independently operating retailers. Members of these groups are retail outlets that are owned and independently controlled by individual entrepreneurs, investing at their own risk and taking responsibility for the management of the stores. As member-shareholders, members of such groups of independent retailers participate in the central strategy and decision-making of the group. They tend to have a strong connection to the central organisation and there is a strong alignment between the cooperative members. These groups typically offer a wide set of functions to its members, including joint buying. The larger part of the buying activity, both for A-brands and private label sourcing, is handed over to the group (based on the purchase volumes decided by members individually). Members do engage in individual purchase contracts with smaller or regional suppliers, for example, concerning local products. Groups of independent retailers often also develop a common label and logo to market their own private label products under a common name<sup>19</sup>. Besides, they usually offer a wide set of other functions to their members, including quality control services, IT infrastructure and administrative services. Several also engage in marketing activities, provide support for supply chain organisation or optimisation, may have central warehousing, and provide financing assistance for its members (Dobson, 2019; Essman, 2019).

Groups of independent retailers are mostly active in one Member State only. Members tend to operate in the same national retail market, and these alliances may therefore be referred to as 'national cooperative buying groups' or 'national buying clubs' as well (Bailey et al., 1995; Essmann, 2019). That means that members are active in the same national market, although the degree to which they are effectively competing downstream will depend on their presence in the same local consumer market. The individual market share of each member is typically small. Yet, the joint market share in the consumer market varies and some groups of independent retailers are major players in their national retail markets (e.g. EDEKA and REWE Group in Germany, E. Leclerc, Intermarché and Système U in France, CONAD in Italy, ICA in Sweden and KESKO in Finland).

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<sup>16</sup> This typology and classification is based on the presentations by Mr. Essman who presented at the workshop the functioning of EDEKA (a large German cooperative buying group that joins approximately 3,700 independent retailers and a major retail player in Germany), by Mr. Bouchut, former retail executive, and on contributions by Prof. Wey, Prof. Caprice and Prof. Dobson.

<sup>17</sup> Besides, there are groups of groups, contract specific consortia, franchise systems, voluntary associations and symbol groups, which all have their specificities in terms of organisational structure but are not further discussed here (Wey, 2019; Dobson, 2019).

<sup>18</sup> Groups of independent retailers can take different forms, including voluntary associations or symbol groups, retailer cooperatives, or vertical chain networks (Dobson, 2019).

<sup>19</sup> Like several large retail chains, groups of independent retailers also develop private label brands, often including several lines. For example, REWE Group has a value line at low prices, an 'organic' brand, and a 'premium' line of private label products. More details on the purchasing activities of RAs can be found in section 2.4.

## National retail alliances

With 'national RAs' we refer to horizontal agreements between retail chains or retailer groups that are active in the same national retail market. Members are typically much larger compared to those of groups of independent retailers. In contrast to the groups of independent retailers, national RAs usually consist of a small central structure that is mandated to develop a more limited set of services related to the sourcing of products<sup>20</sup>.

While the exact range of activities varies across alliances, most national RAs do not engage in joint buying, but negotiate 'on-top agreements'<sup>21</sup> with A-brand suppliers, in which purchasing terms ('on-top' of those purchasing terms negotiated with members individually) are specified in relation to the services offered by the alliance. Some national RAs also engage in the preparation of joint tenders for the procurement of private label products for those categories where the members do not have a sufficient sales volume to develop one individually. Some national alliances may engage in joint buying as well (e.g. Superunie).

The group of national RAs is rather heterogeneous and a number of 'sub-types' may be identified. Some national RAs represent multiple smaller retailers or chains (e.g. Superunie in the Netherlands, Euromadi and Grupo IFA in Spain, Retail Trade Group in Germany and Provera in Belgium) (Dobson, 2019; Engelsing, 2019). Several of these national alliances exist for several decades. Other alliances consist of so-called 'satellite constellations' (Engelsing, 2019) with a number of smaller members around a larger central actor (e.g. Centrale Italiana). While such a setting allows smaller retailers to obtain better purchasing terms, these alliances may end up in a merger or acquisition by the larger partner. For instance, Feneberg and Coop entered into an alliance with respectively EDEKA and Rewe, before being acquired by respectively EDEKA Cooperative and REWE Cooperative in 2016 (Engelsing, 2019). Finally, some more recently formed national alliances consist of a small number of larger retail groups or chains. In Italy, several national alliances were formed by 2006 (Clementi, 2019) and in France, three bilateral alliance agreements were signed between six of the main French retail groups in the course of 2014 (Système U/Auchan; Intermarché /Casino; and Carrefour/Cora), although they were reorganised or turned into European alliances soon after.

## European retail alliances

The members of 'European RAs' are usually larger retailers, retail chains or groups of independent retailers from different countries. Such alliances are currently composed of 2 to 14 members, covering retail outlets in 4 to 22 countries (Table 2). An important characteristic is that the alliances are usually composed of only one member active in each national market. Therefore, their members do not have overlapping markets and are not direct competitors on the consumer market. Most of the international alliances in Europe consist of European members only, although some of them also include partnerships with non-European players (e.g. EMD).

Some of these alliances tend to focus on premium manufacturing brands supplied by large FMCG players, while others focus primarily on the procurement of private label products. They typically do not engage in the joint buying of product, but close 'on-top agreements' with large A-brand manufacturers or formulate tenders for private label products. The purchasing decisions for products and quantities, and the actual contracts on the delivery of products remain with each individual member. Some European alliances also offer international marketing support and network development of smaller suppliers. Over time, several European alliances have gradually expanded their activities and may offer also

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<sup>20</sup> Distinctions between types of RAs are not always straightforward. Superunie, for example, is classified among the national alliances, even though it is a buying group with a cooperative structure (as many groups of independent retailers). Its members are small retail chains as well as groups of independent retailers ([www.superunie.nl](http://www.superunie.nl)).

<sup>21</sup> 'On-top agreements' refer to service contracts negotiated by the alliance over the services provided by the RA in return for discounts, rebates and fees. The contracts are negotiated by the alliance, 'on top' of the terms negotiated in contracts with members individually. For more details, see section 2.4.

data sharing, quality control services or support in digitalisation. AMS and EMD were set up in 1988 and 1989 and join a large number of retailers from different countries. They have a primary focus on private labels, although EMD expanded its activities to include A-brands. More recently, several European alliances were formed with a primary focus on branded products. For example, in 2002, Alidis was formed among six major EU retailers, and Coopernic was formed in 2005, joining 5 European retailers. After several shifts in membership, they were reorganised into the alliances AgeCore (since 2005), a reorganised Coopernic (since 2015) and Horizon International Services (since 2019).

A more recent form of international cooperation between retailers entails a more integrated form of pooling buyer power: the German retailer REWE and French E. Leclerc formed a buying joint venture in 2016, where the central organisation negotiates and purchases goods from a selected list of large brand manufacturers. To date, this is the only European RA that engages in joint buying, and thus replaces its members in the purchasing of certain branded products.

### **Overlapping alliances, and alliances of alliances.**

These three types of alliances should not be seen as mutually exclusive. Retailers may, and often do, pursue multiple alliances strategies at the same time, and groups of independent retailers are themselves often members of national or European RAs. For example, the members of the European alliance are themselves mostly groups of independent retailers or national alliances. The German group of independent retailers EDEKA, is a member of the European alliance AgeCore. And after the Belgian-Dutch merger of Delhaize Albert Hein, Ahold-Delhaize remained a member of two European alliances, one for private label products (AMS) and one for branded products (Coopernic). Also Carrefour has formed several alliances at different levels, including national (e.g. Carrefour Belgium with purchase alliance Provera, Carrefour France with Cora and Système U) and European alliances (with Tesco). REWE and Leclerc remain members of Coopernic, while they have jointly set up the buying venture Eurelec.

### **Organisational structure and governance**

RAs most often have a central secretariat and have their own legal and commercial identity, separate from their members. Some groups of independent retailers have the legal form of cooperative. Their size depends on the range of activities they provide to members. National and European alliances tend to be small companies with limited capital requirements and employ up to 20 persons for the larger ones<sup>22</sup> (Wey, 2019). The life span of a RA is usually open-ended, and members are free to leave the alliance, at least in the medium term (Dobson, 2019).

The governance of alliances tends to differ by type of alliance and depends on its composition (Wey, 2019). Groups of independent retailers are typically governed by democratic decision-making among a large number of small independent retailers, with limited control of the central management (Wey, 2019). Alliances that are built around a large founder and smaller members tend to be governed by the larger partner, with the smaller member paying membership fees (e.g. Centrale Italiana). Several national and European RAs are governed in the form of a central secretariat. This would be the case for most of the European RAs as well as for the national alliances with members of similar size, such as Grupo IFA, EuroMadi, Superunie. This central secretariat acts as a service provider, offering services to its members, as well as selling services to suppliers. The budget for the functioning of the organisation consists of membership fees, with each members' fee, corresponding to its share in the commonly negotiated turnover. Finally, the alliance can take the form of a buying joint venture, such as Eurelec.

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<sup>22</sup> European Marketing Distribution, [www.emd-ag.com](http://www.emd-ag.com).

**Table 1 Typology of retail alliances(\*)**

<b>TYPE</b>	<b>MEMBERS</b>	<b>GEOGRAPHICAL SCOPE</b>	<b>PRODUCT SCOPE</b>	<b>BRANDED PRODUCTS</b>	<b>PRIVATE LABELS</b>	<b>OTHER ACTIVITIES</b>	<b>EXAMPLES OF ACTUAL/FORMER ALLIANCES</b>
<b>GROUPS OF INDEPENDENT RETAILERS</b>	Small independent retailers	National	Usually both A-brands products and private labels	Joint buying Providing services to suppliers	Joint buying Market development, SME networking	IT and administrative support, quality control services Possibly common marketing activities, supply chain coordination, support to financing and investment	e.g. EDEKA, Système U, CONAD, ICA
<b>NATIONAL RETAIL ALLIANCES</b>	Small or large retail chains	National	Focused on A-brands or private labels, sometimes both	On-top agreements(**) Providing services to suppliers	Joint tenders	Market development, SME networking Possibly IT support, not-for-sale products	e.g. Superunie, Grupo IFA, Centrale Italiana, Système U/Auchan
<b>EUROPEAN RETAIL ALLIANCES</b>	Retail chains or groups of independent retailers	EU (or global)	Focused on A-brands or private labels, sometimes both	On-top agreements Providing services to suppliers	Joint tenders	Market development, SME networking Possibly IT support, not-for-sale products	e.g. EMD, AMS, Eurelec, Agecore, Horizon International Services

(\*) This table only presents the most typical activities for each type of alliance. For example, some national alliances may engage in joint buying as well, though this is not the most frequent case. Not all RAs engage in all the activities mentioned.

(\*\*) On-top agreements: this refers to service contracts negotiated by the alliance over the services provided by the RA in return for discounts, rebates and fees. The contracts are negotiated by the alliance, 'on top' of the terms negotiated in contracts with members individually.

**Table 2 Overview of main European retail alliances\***

<b>NAME</b>	<b>SINCE</b>	<b>MEMBERSHIP IN 2018/19** (COUNTRY***)</b>	<b>PRIMARY FOCUS</b>
<b>AMS</b>	1988	10 members, active in 18 European countries Shareholders: Ahold-Delhaize (BE-NL), ICA (SE), Salling Group (DK), Morrisons (UK), Migros (CH), JMR (Pingo Doce) (PT), Kesko (FI) Cooperation agreement with: Booker (UK), Hagar (IS), Musgrave (IE)	Private label products only
<b>EMD</b>	1989	14 members, active in 20 countries of which 16 are European Shareholders: Dagab (SE), Dagrofa (DK), ESD (IT), Euromadi (ES), EuromadiPort (PT), Lenta (RU), Markant AG (CH), Markant Austria (AT), Markant Syntrade (CH), Superunie (NL), Unil/Norgegruppen (NO) Associated Members: Woolworths (AU), Progressive Entreprises (NZ), Homeplus (KR)	Private label products; A-brands, marketing support for suppliers
<b>COOPERNIC</b>	2006	4 members covering 22 European countries Coop (IT), Ahold Delhaize (BE-NL), Leclerc (FR), REWE (DE)	A-brands; private label products; goods not for resale
<b>AGECORE</b>	2015	6 members covering 9 countries Colruyt (BE), EDEKA (DE), Intermarché (FR), Conad (IT), COOP (CH), EROSKI (ES)	A-brands; private label products
<b>EURELEC</b>	2016	2 members covering 4 countries (FR, PT, DE, AT) Leclerc (FR), REWE (DE)	A-brands
<b>HORIZON INT. SERVICES (HIS)</b>	2019	4 members covering 16 countries in the EU and 21 outside the EU Auchan (FR), Casino (FR), Metro (DE), Dia (ES)	A-brands, support for national suppliers in their international development
<b>ALLIANCE CARREFOUR TESCO</b>	2018	2 members, active in 16 countries (10 in the EU and 6 outside the EU) Carrefour (FR), Tesco (UK)	A-brands; Private labels products; Goods not for resale
<b>BIGS</b>	1991	SPAR franchise holders in 13 member states	Private label products only

\*This table is produced based on input provided by EuroCommerce.

\*\*2018 for all alliances, except Horizon International which is active since 2019 only. It resulted from joining Auchan-Metro Cooperation (since 2014) and ICDC (Casino and Dia, since 2015).

\*\*\*For each retailer, only the main countries of operation are indicated between brackets.

All RAs emphasise that they have strong governance and compliance rules to make sure national and EU competition rules are respected. These include confidentiality agreements and internal codes of conduct. European RAs use compliance officers and external legal counsels to ensure compliance and share aggregated figures only. Nevertheless, suppliers stated they are concerned about business information being passed on among retailers, and some possible concerns about the sharing of information that can possibly distort markets are discussed in section 3.3 and section 4.2.

## 2.4 Activities<sup>23</sup>

Activities vary across RAs, but they typically engage in one or several of the following main activities: (1) joint buying from, or on-top agreements with A-brand manufacturers; (2) the joint sourcing of private label products; and (3) market development and networking for suppliers. These activities are therefore explained in more detail below. RAs may engage in all three main activities, or may focus specifically on one of them.

Besides, a number of additional activities may be developed. The activities a RA engages in are directly linked to the types of products covered (A-brands, private label products, small brands) and the type of suppliers they deal with (large food manufacturers, private label producers, small and medium suppliers).

### Joint buying or on-top agreements<sup>24</sup> with A-brand manufacturers

Groups of independent retailers typically engage in the joint buying of products from A-brand manufacturers. Most national and European RAs do not buy jointly. Those RAs do not engage in purchasing agreements with A-brand manufacturers, but only in so-called 'on-top agreements'.

#### *Joint buying*

For RAs that engage in joint buying from brand manufacturers (which applies mostly to groups of independent retailers), the alliance replaces its members in the negotiation of purchase conditions with suppliers. This means that the alliance itself signs a contract with the supplier on the delivery of goods. Negotiations over A-branded products between retailers and suppliers take place annually or a few times per year. Although the exact components in the negotiation may vary, negotiations typically start from a list price given by the supplier. Starting from this list price, additional discounts (e.g. volume discounts, end-of-year rebates<sup>25</sup>) and fees (e.g. slotting fees<sup>26</sup>) are negotiated against the provision of services by the retailer to the supplier<sup>27</sup> (e.g. commercial activities, shelf placement, promotions, product launches, growth plans).

When the RA engages in joint buying, it is thus the alliance that negotiates and fulfils the complete contract related to the purchase and delivery of products, including also the discounts and fees related to services provided by the RA and by its members. Additional contract clauses related to, for example, logistic specificities may still be negotiated by the alliance members individually. Groups of independent retailers typically engage in the joint buying of a large part of products sold by the members. Where national and international

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<sup>23</sup> The description of the activities is based on the presentations by the stakeholders from the retail and food manufacturing sectors (Essmann 2019, Bouchut 2019, Larracochea, 2019), the presentation by Prof. Dobson (2019), and personal communication with Mr. Phillippe Gruyters, EMD (May, 2020).

<sup>24</sup> See footnote 21.

<sup>25</sup> End-of-year rebates refer to an amount of money the supplier will pay to the buyer (in the form of a rebate on the invoice at the end of year) when a number of conditions are met. These conditions typically refer to a certain volume being reached by the retailer.

<sup>26</sup> Slotting fees or slotting allowances are fees associated with the listing of a given product. Suppliers pay such fees to retailers in order to compensate the retailer for the shelf space provided and possibly also for additional services associated with the listing of their product by the retailer.

<sup>27</sup> The fees (e.g. slotting allowances, promotional fees) paid by the supplier to the retailer, are often referred to as 'trading costs'. It has been argued that trading costs are increasing for manufacturers, but at the same time some manufacturers increase list prices to retailers, then subsequently providing discounts (e.g. in the form of promotional fees) on these artificially inflated prices (Corstjens and Steele, 2008). These practices are very common within the industry, with a wide variation in possible discounts, fees, year-end-rebates etc.

RA engage in the actual buying (which is not the most frequent case) they typically take over the buying for specific branded products offered by the largest A-brand manufacturers only. The buying of products from smaller national or local suppliers is dealt with by the individual retailers.

### *On-top agreements*

Most national RAs and virtually all<sup>28</sup> European RA alliances focusing on branded products do not buy jointly but engage in service contracts, often referred to as 'on-top agreements', with large A-brand suppliers. The negotiations over these agreements do not replace negotiations at the level of individual retail chains, but instead add an agreement with suppliers 'on-top', relating to the services offered by the alliance.

By bringing together various retailers, RAs can deliver services to suppliers in a more efficient way, or can offer a set of new services (e.g. at international level) to suppliers. These services may relate to commercial activities in the stores (e.g. related to the placement of products on shelves, promotional displays, extra presentation), joint business plans and growth initiatives, sustainability campaigns, strategic cooperation with suppliers, the sequencing of promotional programmes across countries, support for multi-country product launches and innovation, support for internationalisation etc. Also data sharing with a high degree of detail on sales performance is an important service offered by several RAs. As an alliance, they can offer these services at a larger scale and can coordinate them and generate synergies across members. European RAs can add an international dimension to the services as well. Depending on the alliance, only a few or several of these services may be offered.

The services offered by the RA are delivered against a payment by the suppliers. The price of these services is negotiated between the RA and the supplier and is linked to the performance of the alliance and its members in fulfilling these services (e.g. volumes sold, promotions put in place by the alliance members, joint business plans being designed) (Bouchut, 2019). The specificities of the 'on-top agreements' are communicated to the members of the alliance to ensure their execution, and their execution is followed up regularly in joint business reviews between representatives of the retailers and the supplier. Based on an evaluation of these performances, a payment is made by the supplier to the alliance at the end of the year. These agreements do not replace the bilateral negotiations between the alliance members and suppliers over the actual delivery of the product<sup>29</sup>.

The price (expressed in the form of fees or discounts) of the services offered by the RA is usually expressed as a percentage of the sales volume realised by the RA members. The RA will offer a mix of services, depending on the needs and interest of the supplier. According to EMD, the price of each individual service offered by European RAs may typically be in the range of 0.05 to 0.5% of the sales volume made by RA members. The total price related to the full mix of services offered by the European alliance may reach 1 to 2% of the total sales volume<sup>30</sup>, though this number may vary across alliances and the size of the supplier dealt with. At the end of year, the performance is assessed, and corresponding payments are paid to the RA, which forwards these payments to its members.

Suppliers and some experts at the workshop questioned to what extent the price of these services reflect their realistic value to suppliers (Larracochea, 2019, Engelsing, 2019). RA members may use the larger bargaining power of the alliance to negotiate discounts and fees on the list price, which they would not be able to obtain individually. If this is the case, the value of discounts and fees in 'on-top agreements' may well go beyond the actual value

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<sup>28</sup> There are exceptions though. Eurelec for example, the alliance formed between French E. Leclerc and German REWE in 2016, is a joint venture that buys products for both groups. It is currently the only European RA engaging in joint buying of products.

<sup>29</sup> Note that also the bilateral negotiations between individual retailers or retail chains over the delivery of the product, with include discounts and fees related to sales volumes and services (e.g. promotions, product launches) performed by the individual retailer, in addition to those services offered by the alliance.

<sup>30</sup> Personal communication with Mr. Phillippe Gruyters, EMD (May, 2020).

of the services. Besides, suppliers may risk to pay twice for the same service, once to the RA and once to the individual retailers (Dobson, 2019), and not all these services may be genuinely desired by suppliers (Bauer, 2019; Larracochea, 2019).

For the negotiation of these 'on-top agreements', European RAs typically deal with the international offices of the large A-brand manufacturers. Some alliances may move to bundle the annual supplier negotiations of alliance members with larger suppliers into a single process and engage in further coordination of services and corresponding purchasing terms. Suppliers at the workshop reported that on some occasions, the 'on-top agreement' at the level of the European alliance, acts as an 'entry fee' to enter into negotiations with the alliance members at national level. Negotiations with the alliance and its different members may also be held in parallel and be made mutually dependent. Food manufacturers have also argued that the different levels of negotiations lead to additional complexity in the price setting process (Larracochea, 2019).

Among the services offered, RAs also mention their mediating role between their members and A-brand suppliers in case of conflicts. Suppliers on the other hand, question the mediating role, and rather point to the fact that, on some occasions – which are more likely to occur if both parties have considerable market power – negotiations may become confrontational. Retailers can possibly include (threats of) delisting and manufacturers may use the non-supply of crucial A-brands as a way to increase pressure in negotiations. When a conflict with an individual retailer escalates, it may be brought to the alliance level. The RA may help to mediate, but they may also allow alliance members to coordinate their actions and make use of the large joint sales volumes of the RA (e.g. in the form of collective delisting) to increase pressure on the supplier. This practice has been described by suppliers at the workshop, though retailers argue this occurs only very exceptionally and certainly not by all RAs.

### **Joint sourcing of private label products**

The sourcing of private label products follows a different procedure than the sourcing of branded products. In the case of private labels, it is not the supplier, but the retailer that owns the private label brand. Retailers or RAs launch a tender for a specific product in which they specify, in detail, the requirements in terms of quality, volumes, quality control, etc. This tender is sent to a list of possible private label suppliers. The offers submitted by private label suppliers are analysed and retailers or RAs set up a contract with the preferred supplier on the delivery of the product.

Several RAs enter in the joint sourcing of private label products. When the RA does not engage itself in the joint buying of the products (which is the case for most national and European RAs), the RA limits its activities to negotiating a 'framework contract' with the supplier. The RA members interested in the sourcing of a private label product in a specific product category, agree on a common list of specifications and launch a joint tender to suppliers. The RA selects the suppliers and negotiates the contract terms with the private label supplier. Alliance members can then place their individual orders under the conditions of this framework contract.

Other RAs (groups of independent retailers and some national RAs) also engage in the actual purchasing of the private label product. They collect the order from the alliance members, and place common orders.

By pooling volumes, private labels can be offered to independent retailers in a more efficient way, or for product categories in which retailers individually do not reach sufficient volume. Alliance members can share contacts, expertise and best practices on product and market trends, and they agree on the quality terms, homogenised packaging, etc. to benefit from volume leveraging. Several RAs also engage in the development of a common 'private label', which comes with its own quality control system, category development and design. Most groups of independent retailers have developed at least one line of private label products, and several offer several quality tiers of private label products. Also some national RAs (Grupo IFA, Superunie) and the European alliances AMS and EMD offer a

range of private label brands to their members. EMD offers the Eurolabel brands, which is designed and coordinated by the alliance, and AMS has developed the EuroShopper brand.

## **Market development and networking**

Several RAs also engage actively in the promotion of small brand manufacturers within their retail network, and in promoting smaller private label suppliers to join tenders so they can gain access to new markets. For some alliances with international reach, this may include the promotion of local small- or medium-sized brand manufacturers to retailers active in other countries, including in some cases even non-European retailers (Bouchut, 2019).

## **Other activities**

RAs have expanded their activities over time. Several RAs also include the sourcing of goods-not-for-resale (e.g. store furniture & equipment, info-systems), sharing of aggregate sales data across countries, processing data regarding promotion effects, and category development reports. For example, the group of independent retailers EDEKA was initiated as a central buying entity, but then gradually, other activities were added to its portfolio, including data processing, strategy development, and even finance provision (Essmann, 2019).

## **2.5 Product scope and type of suppliers<sup>31</sup>**

Retailers purchase food products from a highly heterogeneous manufacturing sector, ranging from very small local SMEs producing a specific product, to large global players active across various product segments. The majority of manufacturing firms in the European food and drink sector are SMEs. SMEs account for 99% of businesses but only for 50% of turnover, which reflects the importance of large companies and the high concentration in food manufacturing (McCorriston, 2019), several of them being active in many countries around the world.

RAs do not deal with all types of suppliers that retailers deal with. First of all, RAs typically focus on packaged food products and do not deal with fresh food products<sup>32</sup>. Groups of independent retailers and some of the national alliances may exceptionally engage in the sourcing of some fresh food products and interact more closely with fresh food wholesales or farmer cooperatives. Yet, most RAs, and especially the European ones, deal only with processed food products, RAs do not engage directly with farmers or small producer organisations. The potential indirect link between RAs and farmers will be discussed in more detail in section 3.4.

Packaged food includes branded food products, as well as 'private labels' (also referred to as 'retailers brands') that are produced by manufacturers on behalf of retailers<sup>33</sup>. Groups of independent retailers and national RAs of smaller retail chains (e.g. Superunie, Grupo IFA, Euromadi) usually deal with both private label products and branded food products. Several larger national RAs and most European RAs primarily focus on either private label products or branded products, and the activities they perform will also differ in that respect. The first European alliances (AMS and EMD) dealt initially with private label products only. Most other European alliances have focused, in the first place, on the sourcing of A-brands. Yet, several RAs have been expanding their activities and product scope over the past

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<sup>31</sup> The description of the activities is based on the presentations by the stakeholders from the retail and food manufacturing sectors (Essmann 2019, Bouchut 2019, Larracochea, 2019), the presentation by Prof. Dobson (2019), and personal communication with Mr. Phillippe Gruyters, EMD (May, 2020).

<sup>32</sup> With fresh products we refer to fresh fruits and vegetables, fresh meat, and fish. It does not include dairy products.

<sup>33</sup> The share of private labels now represents a large share of the European food market. In 2015, the average market share of private labels for food products ranged from 17.6% in Italy, to 34.5% in Germany, to 44.5% in Switzerland (Olbrich et al., 2017) and this share is especially high for specific food groups. For example, private labels account for 60% of the sales of cheese, and 74% of the sales of milk in Germany (Anton, 2019).

years. For example, while EMD has traditionally focused on private labels, it now also offers business development services for A-brands and engages in the negotiation with A-brand manufacturers for a subset of its members. Similarly, AgeCore focuses mainly on A-brand products, but also offers a limited number of private label products to its members.

For the sourcing of private label products, RAs may deal with medium to large manufacturers of private label products. Very exceptionally, there may be farmer cooperatives or smaller companies among the private label suppliers that RAs deal with<sup>34</sup>. Especially for RAs that reach large combined volumes, only large suppliers may be able to deal with the required volumes.

With respect to branded food products, it was emphasised by various workshop participants that the joint buying or the engagement in 'on-top agreements' of RAs, focus on a limited set of leading A-brand products that are produced by the large food manufacturers. RAs tend to deal with industry partners within the top-75 to top-100 largest food and beverage manufacturers only. European RAs stressed that they focus on the largest multinational FMCG companies only, and do not intend to expand their activities to smaller partners. This may include large multinational farmer cooperatives (e.g. Arla Foods, Royal Friesland/Campina), which belong to the top FMCG companies, but not smaller cooperatives.

Relations with smaller national producers, regional or local manufacturers usually do not take place at the level of the alliance. These are typically organised at a lower level by national retail chains, or local store owners. RAs may engage with smaller, national producers or local A-brands in limited cases and at supplier request only. This is the case for those RAs that offer market development and networking support to smaller producers, in order to support them to expand their market and develop their international sales.

## 2.6 Evolution and size of retail alliances

### Evolution of retail alliances in Europe

Horizontal cooperation between retailers is not a new phenomenon. The first RAs date back several decades and consisted of cooperations of smaller independent retailers or retail chains active in the same country (Clarke-Hill et al., 1998)<sup>35</sup>, often emerging in response to the appearance of chain stores (Ghisi et al., 2014). By the 1980s and 1990s, such groups of independent retailers and national alliances of smaller retail chains had become more widespread. In the late 1990s, early 2000s, several national alliances between two retail chains were established (Dawson and Mukoyama, 2006)<sup>36</sup>.

The first international sourcing in European grocery retailing by alliances started in the 1980s, when a number of groups with a focus on international trade were set up in Europe (Bailey et al., 1995). Some of these initiatives failed, while others (e.g. EMD and AMS)<sup>37</sup> developed into well-established European alliances (Dawson and Mukoyama, 2006). In the late 1990s, early 2000s, some national RAs teamed up with foreign partners, forming European alliances. For example, Alidis was established in 2002 as an agreement between Intermarché (FR) and Eroski (ES). Later German EDEKA also stepped in (Dawson and Mukoyama, 2006).

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<sup>34</sup> Personal communication with Mr. Phillippe Gruyters, EMD (May, 2020).

<sup>35</sup> E.g. Groups of independent retailers: EDEKA (1989), Intermarché (1967). National alliances: Superunie (1965), Grupo IFA (1967)

<sup>36</sup> In 1998, the French Intermarché established the entity Agenor as an agreement between Intermarché and Spar. In 2002, Casino-Auchan created IRTS (International Retail and Trade Services), which focused on international negotiations and agreements with multinational suppliers, while the two partners continued purchasing separately (Dawson and Mukoyama, 2006). Also in 2002, Intermarché (FR) created Alidis, jointly with the Spanish retail cooperative Eroski, and later German EDEKA also stepped in (Dawson and Mukoyama, 2006). In 2015 another three European retailers joined, forming AgeCore.

<sup>37</sup> EMD was established in 1989. EMD members are typically nationally based buying groups of small retailers, thus giving even smaller retailers an element of internationalisation. AMS was founded in 1988 and had several changes of membership, but in general it limits membership to one per European country.

Especially during the past five to ten years, national and European RAs have become increasingly more dynamic in their formation and reorganisation: new alliances have been formed and several retailers have shifted from one alliance to another (Chauve, 2019; Larracochea, 2019; Clementi, 2019). In 2015, three European retailers from different countries joined Alidis, leaving their former alliance CORE, and formed AgeCore. In Italy, there were frequent changes and movements between alliances, facilitated by short-term contracts of the alliances (Clementi, 2009). In France, several pairs of retail chains have set up a national alliance in 2014, with some changes in constellations shortly after. By 2018, a new wave led to a reorganisation of alliances in France, some of national scope (Envergure: Carrefour/ Système U) and others including also international partners (Horizon International: Auchan/Casino and three (later two) international partners; and Carrefour/Tesco) (Caprice, 2019). These changes in membership and composition of several national and European RAs may be due to diverging member interests, new alliance opportunities, or international expansion (Dobson, 2019). Such fluctuating membership points to instability in the alliance landscape, and it is unclear how they will evolve further. It was argued during the workshop that some alliances might, in the longer term, lead to further consolidation in the form of mergers or acquisitions (Engelsing, 2019).

### **Size of retail alliances**

In order to assess the possible impact of RAs on the functioning of the agricultural and food supply chain, it is useful to get an idea of their size. The joint market share of RA members on the purchasing market and consumer market varies considerably, and the relevance of considering these joint market shares largely depends on whether or not RA members act jointly in those markets. Moreover, the aggregate turnover of alliance members provides little information on the size of the alliance and of its activities itself. The essence of RAs consists in their cooperation on the purchasing market, and not on the consumer market. It would therefore be more insightful to look at the sales volume that is subject to joint buying or to 'on-top agreements'. In the absence of such data, it can be nevertheless useful to look at some figures that can give an idea of the magnitude of the phenomenon and of how large the members are that are represented by the different RAs.

Where RAs bring together independent stores or small retail chains, their joint market share also tends to be limited. Groups of independent retailers in the EU therefore usually do not have a joint turnover going beyond 10% of the national consumer market (Larracochea, 2019). A few of them are larger national players. For example, EDEKA and REWE are good for, respectively, 21.5 % and 14.7 % of the German retail market in 2018 (Engelsing, 2019).

For some of the national RAs, the aggregate market share is higher. The German Retail Trade Group has a joint national market share of less than 15%, even though its market share is substantially higher in some regional markets (Engelsing, 2019). The French national alliances that were formed in 2014 reached larger aggregate market shares, reaching joint market shares between 21.6% and 25.9%. Together, the three alliances and E. Leclerc were good for 90% of the French retail market in 2014 (Dobson, 2019).

Non-surprisingly, European RAs typically have a large aggregate turnover. The EU-wide sum of consumer turnover of all shareholders<sup>38</sup> of EMD was EUR 140 billion in 2018. This corresponds to EMD members having an aggregate market share of 13% of the EU consumer market. The total consumer turnover in the EU market of the members of European alliances Agecore and Horizontal International is estimated to be of similar size (IGD, 2016; SOMO, 2017).

This figure provides little information though, about the buying volume that relates to the activities of these RAs. European RAs typically deal only with a limited range of products sold by their members, focusing only at the largest brand manufacturers and/or dealing only with specific private label products. For example, up to 14% of the total buying volume

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<sup>38</sup> This refers to the sum of consumer turnover of all retailers or members of EMD (several EMD shareholders are themselves national alliances of smaller retailers).

of individual EMD-members with the largest A-brand suppliers, can be affected by the activities of the alliance<sup>39</sup>. For AgeCore, the buying volume affected by the RA was reported to amount to approximately 15% of the total buying volume of the individual members (Essmann, 2019). Regarding the sourcing of private-label products, the total contractual volume of private-label sourcing by European RAs is estimated at about 2.5% of the total EU private label buying volume<sup>40</sup>.

## Relative position vis-à-vis suppliers

At the workshop, several figures were presented regarding the bargaining position of individual retailers and RAs vis-à-vis large A-brand food manufacturers. The figures put forward by large retailers and manufacturers illustrate the complexity of assessing the distribution of power in negotiations between these two groups of major actors in the food supply chain. Given the very different business structures of both sectors, identifying the relevant indicators and scale of comparison is not obvious, and many of the statistics put forward may be illustrative, but present each only a partial view. An economic analysis of how RAs affect the bargaining position of retailers is discussed in detail in section 3.1. In this section, we briefly discuss some of the figures regarding turnover and market concentration presented at the workshop, and put them in perspective.

Suppliers argue that retailers act as 'gatekeepers'<sup>41</sup> towards consumers. They point to the increasing proportion of private labels in total turnover, successfully competing against premium brands, and the increased bargaining power of retailers through the increased consolidation and cooperation of retailers, including in the form of (European) RAs. Food industry representatives provide figures of sales turnover of EU 10 leading retailers, far exceeding the FMCG turnover of the EU 10 leading manufacturers (Larracochea, 2019). Retailers, on the other side, argue that the relevant scale of comparison for retailers are national, or even regional markets, while many of the large FMCG firms operate at EU or even global level (Bouchut, 2019). Moreover, retailer turnover is by definition much larger since one manufacturer never supplies the full product range that retailers must have on offer (Dobson, 1999). Retailers point to profit margins as an illustration of power imbalance. They argue that the strong price competition between retailers results in small margins of 2-3%, compared to the double-digit margins of some large FMCG players (Bouchut, 2019). Suppliers, to the contrary, illustrate that when using the concept of return on capital employed as a profitability indicator instead, profitability of large companies is largely very similar in retail and food manufacturing.

When alliances bring together a large number of small independent retailers, the aggregate turnover and subsequent weight in negotiations of the alliance can be several hundred times larger than that of the independent stores (example provided by Essmann, 2019). In some cases, the aggregate volume negotiated by the alliances may reach a substantial share of the national turnover of a manufacturer. For example, the set-up of RAs in Italy meant that although there was no concentration downstream (with 21 retail chains active on the retail market), upstream concentration was considered high. At the same time, the buying volume affected by the international activities of European RAs might still correspond to only a small percentage of the total sales of large FMCG manufacturers, which tend to be present in multiple European and often global markets<sup>42</sup>. Still, some of

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<sup>39</sup> The total buying volume of all EMD members with the top 50 largest A-brand manufacturers is estimated to be about EUR 145 billion. Only 7 EMD-members (corresponding to about half of the buying volume of the total EMD group) participate in the on-top agreements with large A-brand manufacturers. Total buying volume with A-brand manufacturers that could be affected by the activities of EMD is about EUR 10 billion. Personal communication with Mr. Philippe Gruyters, May 2020.

<sup>40</sup> Personal communication with Mr. Philippe Gruyters, May 2020.

<sup>41</sup> The term 'gatekeepers' refers to the role of retailers in allowing food manufacturers to reach the consumer. If retailers have a powerful position, they may control manufacturers' access to reach certain parts of the consumer market.

<sup>42</sup> As an example, Dr. Essmann (2019) mentioned that the turnover of Heinz affected by the activities of AgeCore corresponds to 0.4% of the total global revenue of Heinz. According to Mr. Gruyters (Personal communication, May 2020) the buying volume of EMD from the top 50 largest A-brand manufacturers corresponds to about 2 % of the total turnover of these top 50 manufacturers.

the large national or European alliances may reach a substantial share of the relevant turnover of some multinational food manufacturers<sup>43</sup>.

Overall, these figures thus do not provide many insights into the relative bargaining position of retailers versus branded food product suppliers in bilateral negotiations and illustrate merely the very different business models of both sectors. Both retail 'gatekeepers' and 'must-have'<sup>44</sup> brand owners have a strong bargaining stick, and their relative position may vary across product categories and consumer markets.

Private label suppliers tend to have lower bargaining power compared to A-brand suppliers, since they do not sell specific 'must-have' brands, but instead adjust their supply to the specifications and quality characteristics requested by retailers, which own the private label brands. The sourcing of private label products and the typical form of contracting and negotiations of RAs with private label producers are therefore very different from the sourcing of branded food products, and private label suppliers participate in a competitive tendering process (Anton, 2019; Bouchut, 2019). Some private label suppliers may have a long record in producing quality products for retailers, though, which may put these suppliers in a stronger position. But generally, the sector of private label suppliers can be considered to be competitive and bargaining power is likely on the side of retailers. This difference in market structure and bargaining positions for A-branded and private label products are relevant to take into account when assessing the impact of RAs on the agricultural and food supply chain, as will be done in the next section.

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<sup>43</sup> Larrachoechea (2019) refers to the French retail alliances enquiry, stating that "the share of the main retailers or retail alliances in the turnover of the suppliers interviewed would be on average in the order of 20%", although it is not clear whether the latter considers the suppliers' turnover in the French market only, or also includes presence in other markets. Grupo IFA reports a joint market share of 14.1% in the total value of manufacturers brand in the supermarket channel in Spain in 2018 (<http://www.grupoifa.com/en/figures.html>).

<sup>44</sup> A 'must-have' brand refers to a brand that retailers cannot afford not to offer on their shelves because of its importance to consumers. Consumers may choose their shop based on the presence of such 'must-have' brands.

### **3 Economic analysis of retail alliances**

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This section summarises the economic role and impact of RAs in the agricultural and food supply chain. It presents the economic arguments behind the potential positive and/or adverse effects of RAs, as identified by experts at the workshop. Section 3.1 starts by providing an overview of the potential benefits that RA can create for their members, in terms of efficiency gains and increased bargaining power. Section 3.2 assesses the extent to which the benefits that retailers can obtain from joining a RA can be passed on to consumers through lower final consumer prices and access to a wider variety of products. Negotiations between suppliers and retailers, and the implications of RAs for consumer prices, innovation and product variety are complex to analyse, both theoretically and empirically, and were thus widely discussed during the workshop. Section 3.3 discusses the implications of RAs on non-member retailers and retail competition. Section 3.4 studies the impact on upstream supply chain actors, including food manufacturers and farmers. The final section concludes.

#### **3.1 Efficiency gains and bargaining position of retail alliances**

The main objective of RAs is to achieve greater supply chain efficiencies and to benefit from an improved bargaining position through collaboration between retailers. By joining sourcing activities and pooling volumes, RAs can achieve cost efficiencies. At the same time, negotiation on larger volumes can improve the bargaining position of retailers and help to get better purchasing terms from suppliers. Through these improved bargaining positions, RA can contribute to more efficient contracts and RA may contribute to a single EU procurement market for food products through their potential to break territorial supply constraints.

##### **Efficiency gains**

Cost reduction through scale economies has been emphasised by experts and stakeholders at the workshop as a main argument in favour of RAs (Wey, 2019; Dobson, 2019; Essmann, 2019; Bouchut, 2019). Depending on which activities are performed jointly, different types of cost reductions from pooling volumes can be achieved by forming a RA. By engaging in joint buying or in the joint provision of services and negotiations (in the form of 'on-top agreements'), a RA can generate savings on transaction and contracting costs. By pooling volumes into a RA, the minimum scale for private label production can be reached, or private label development can be expanded to a larger range of product categories. Also, the costs of searching or switching suppliers can be reduced by operating at a larger scale.

For groups of independent retailers, which engage in distribution activities as well, efficiency gains in logistics can be generated, for example in the form of central warehousing and distribution centres and avoiding the duplication of delivery costs (Essmann, 2019). Groups of independent retailers may also develop joint marketing campaigns, invest in quality control services and competitive IT-structures, or engage in other strategic investments that are too expensive for individual retailers (Essmann, 2019).

RA members can benefit from sharing best practices, market knowledge on private label products and market trends, and from sharing knowledge on digital technologies or e-commerce development (Dobson, 2019). Better coordination also makes possible the expansion of the network of suppliers favouring the introduction of new products on the market. This is particularly the case for European RAs, where members can share experiences and networks from different countries and utilise the single market of the EU to source efficiently across Member States (Dobson, 2019).

RAs can also generate efficiencies for suppliers. Coordinated promotion programmes, pooled negotiation and distribution, and larger and harmonised orders for private label products may also lead to reduced costs for suppliers, as discussed in more detail in section 3.4. And reduced costs for suppliers may, in turn, lead to lower purchasing prices for retailers<sup>45</sup>.

There was broad agreement among experts and stakeholders at the workshop on the efficiency gains that RAs can create. Empirical findings, even if scarce, confirm this (Dobson, 2019). A study by Geyskens et al. (2015) investigates the efficiencies generated by RAs using the membership of 24 European RAs over a 15-year period. They find that scale advantages result in increased members' productivity and sales and decreased cost. However, the productivity gains for retailers are found to depend on the characteristics of the RA. Retailers benefit less from alliance scale when membership is heterogeneous in terms of member size and when it extends its scope across too many geographic markets. In addition, members do not benefit equally: smaller members are found to benefit less, especially when overlapping with fellow members in served markets (Geyskens et al., 2015).

### **Improved bargaining position**

Besides efficiencies, RAs also generate benefits for their members by improving their bargaining position and leading to better purchasing terms. When food products are provided in a perfectly competitive setting, prices at the supply stage (i.e. wholesale prices) reflect marginal costs of supply. This competitive setting applies better to private labels since market power of private label suppliers is limited<sup>46</sup>. Private label sourcing by retailers takes the form of a tendering process, usually without engaging in extensive bilateral negotiations. Such a competitive setting is less relevant for branded products. Branded food products are provided by (large) food manufacturers that have (some or high) market power, and retailers and suppliers bargain over purchasing terms<sup>47</sup>. The impact of RAs on the bargaining position of retailers is therefore probably most relevant in the sourcing of branded food products, and consequently we focus primarily on impact of RAs on bargaining with branded food manufacturers.

From Wey (2019) and Chambolle (2019), two main economic mechanisms can be identified through which RAs affect retailers' ability to obtain better deals from branded food suppliers than they would individually<sup>48</sup>: increased *bargaining ability* and increased *bargaining leverage*. However, for RAs engaging in the negotiation of common purchasing terms and with members competing on the consumer market, the positive impact of RAs on purchasing terms may be reduced through a *non-discrimination effect*. Each of these mechanisms and the theoretical arguments behind are explained in detail below.

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<sup>45</sup> If pooling volumes into a RA lead to lower average costs to powerful suppliers, this may allow the RA to capture part of that benefit through negotiations (Wey, 2019). When the supplier's unit costs are increasing, a smaller retailer gets marginalised while larger buyers get better deals because of the lower average costs the supplier has to incur to serve larger volumes (i.e. the marginalisation effect defined in Chippy and Snyder, 1999 and Inderst and Wey, 2003). By pooling volume into a RA, small retailers can avoid this effect and obtain better purchasing terms than when they negotiate separately.

<sup>46</sup> It should be mentioned, however, that the procurement of PLs through calls of tenders or contracting has not been much discussed during the workshop. The general view is that private labels are bought at the marginal cost of production for those products (see Mills, 1995 for instance) and that these low wholesale prices are passed through to consumers. However, the economic incidences of private label strategies by retailers are much more complex, as long term relationships and reputation of private label products may generate mutual dependencies. It should also be noticed that private label products can be supplied by "small" firms or by large companies that also offer their own national brand products, which does not rise the same issues on food markets. The understanding of the implication of private label procurement on the vertical chain was not discussed at the workshop and is not covered in this report.

<sup>47</sup> Note that also small suppliers may sometimes have considerable market power vis-à-vis retailers (Noton and Elberg, 2018), for example when they own highly valued brands in regional markets.

<sup>48</sup> The literature on vertical contracting does not directly deal with RAs but analyses more generally larger buyers (a merger for instance). In terms of the impact on bargaining, it can however be applied to the case of RAs, as RAs confer similar behaviour with respect to upstream firms by pooling the volumes of the members for (at least certain elements of) the procurement process.

### *Bargaining ability*

The bargaining ability is a broad concept that reflects bargaining skills, patience and risk tolerance. If a RA improves a retailers' bargaining ability, for example by offering the services of highly experienced staff and knowledge, then the negotiation outcome will be shifted in favour of the retailer.

### *Bargaining leverage*

The bargaining leverage is the power a firm has in the negotiation over an agreement. A retailer can be more powerful if it is less dependent on the outcome of the negotiation with a supplier. This dependency relates to the status quo or the alternatives (outside options) the retailer has in case no agreement with that supplier is reached. The better the alternative options available, the more credible is the threat to terminate negotiations in case no better deal is offered. Retailers can increase their bargaining leverage by affecting their own outside option and/or that of suppliers.

RAs can favour retailers' own outside option by favouring access to alternative suppliers. Dealing with larger volumes typically makes it easier to substitute between products or suppliers<sup>49</sup>, and RAs may facilitate switching suppliers or integrate vertically (Katz, 1987; Inderst and Wey, 2011) and create their own private label<sup>50</sup>. At the same time, the outside option for the supplier is reduced through the formation of the RA, because a lower number of retailers remain outside the RA. Suppliers have worse outside options when facing large volume buyers, such as a RA, because it becomes more difficult to re-allocate such large volumes (Inderst and Wey, 2007).

A RA can improve its bargaining position through different degrees of engagement in the negotiation process. Some RAs purchase jointly and thus negotiate common purchasing terms. Other RAs only negotiate on-top agreements related to the specific services they provide. In addition, through the possible common selection (or delisting) of a supplier or a part of its product range, RAs can also affect the bargaining position of its members in their individual negotiations with suppliers. Caprice and Rey (2015) model such a RA that does not engage in common purchasing terms. Instead, the RA generates bargaining leverage only by transforming the individual threat of leaving the negotiation table and finding another supplier (theoretically modelled as a 'delisting' threat<sup>51</sup>) into a common threat that binds all alliance members. Such a common threat is more harmful to the supplier than an individual threat, as it affects negotiations over a larger volume of sales and thus reduces the supplier's outside options. At the same time, such a threat is less harmful for the alliance members, since other group members will also have to deal with an alternative supplier if no agreement is found, reducing the search and switching costs.

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<sup>49</sup> The size effect of the formation of a RA may not always lead to improved terms of trade for retailers. Taking into account the existence of multiple sellers and adjustments in trade, the dependency of suppliers on large retailers increases, which tends to improve retailers' terms of trade but on the other hand it also increases retailers' dependency on those suppliers since it might be difficult for retailers to find alternative suppliers being able to fulfil the high demand (Inderst and Montez, 2019). This may worsen retailers' terms of trade. Inderst and Montez (2019) show that the retailers' dependency effect may vary with bilateral bargaining power and technological specificities of the industry.

<sup>50</sup> Wey (2019) mentions that it is not necessarily the case that larger buyers can get discounts with larger volume. The reason is that when a retailer becomes essential to a suppliers' survival, then the retailers' leverage may actually reduce. Then, becoming large may also backfire. This is the pivotal buyer argument showed by Raskovich (2003), although this effect typically applies in markets with high fixed costs.

<sup>51</sup> In theoretical models, the complex bargaining between a retailer and A-brand supplier over a product range is presented in a simplified way. An individual retailer can threaten to delist the product (i.e. take it from the shelves) and offer only products from competing suppliers instead, while suppliers can threaten not to supply a 'must-have' brand. Such delisting threats do not materialise frequently and are usually short in time, but illustrate the option of both parties to threaten a (partial) breakdown of negotiations. Similarly, a 'common delisting' threat in theoretical models corresponds to a common threat of the RA of stepping away from the negotiation table, having implications for the deals with all members of the alliance. Dobson (2019) referred to such 'all deal or no deal' threats as coordinated bargaining stances. The model of Caprice and Rey (2015) models a RA that does only engage in common delisting, without negotiating purchasing terms. In reality, (European) RAs typically do negotiate jointly on the terms of 'on-top agreements', but their model illustrates that the impact on bargaining may go much beyond the negotiated terms in the service contract of the RA. Through common delisting threats, RAs may also improve the bargaining position of alliance members in the negotiation of purchasing terms of contracts between individual retailers and the supplier.

In this way, the RA will allow its members to obtain better purchasing terms, without the RA itself engaging in the negotiation of these terms.

There is no empirical investigation on the bargaining leverage effect of RAs, although there is some evidence on the role of size and volumes in bargaining. A recent study by Noton and Elberg (2018) considers the relation between market size, bargaining leverage and purchasing terms in the market for coffee in the UK using actual wholesale price data. The study finds that suppliers earn a sizable fraction of the industry surplus (i.e. the joint surplus of retailers and suppliers), and that suppliers' market size matters for the outcome of the negotiations. While they find that the largest supplier obtains a large share of the surplus, smaller suppliers are not necessarily squeezed by retailers and are able to obtain a considerable share of the industry surplus. Although this study is applied to a very specific sector and not dealing directly with RAs, it sheds some light on the issue of bargaining leverage between a highly concentrated retailing sector and suppliers of different sizes.

#### *Non-discrimination effect*

When RA members are competing in the consumer market, the impact of the RA on bargaining leverage may be attenuated through what has been identified in the literature as the *non-discrimination effect* (O'Brien, 2014; Caprice and Rey, 2015). When purchasing terms are (fully or partially) centrally negotiated by the RA instead of being negotiated individually, the possibility of the supplier to discriminate between retailers by offering them different wholesale prices might be reduced (Chambolle, 2019). The larger the share of purchasing terms being negotiated jointly, the more uniform contracts will be among members, and the more they become aware of the contract terms available to the other retailers. When alliance members are competitors on the downstream market, this can result in reduced competitive pressure in the consumer market. Retailers may, therefore, be less eager to negotiate better terms, and a RA could then even lead to a higher wholesale price. This non-discrimination effect may counteract the bargaining ability and bargaining leverage effect of the RA.

Note that this effect only applies to RAs engaging in the central negotiation of purchasing, and with members competing in the same market and reaching a significant joint market share. It remains difficult to say to what extent this theoretical possibility applies in reality. Still, in any case, it seems not to apply to groups of independent retailers, nor to alliances with members that do not compete on the consumer market, like most European RAs. Moreover, even within national alliances with significant joint market shares and common negotiation of purchasing terms, stakeholders have stressed during the workshop that RAs do not negotiate product prices, but only a very limited set of fees and discounts. They put into question whether this effectively widens the information on other members' contract terms sufficiently as to lower competitive pressure.

### **Additional benefits from improved bargaining**

In addition to providing better bargaining terms to members, improved bargaining power may also serve to generate additional efficiencies. By providing additional negotiation abilities and a stronger bargaining position, RAs may put in place more sophisticated types of contracts and pricing schemes that may lead to more efficient outcomes. Moreover, by improving retailers' bargaining position vis-à-vis large, often multinational, food manufacturers, RAs may succeed in breaking vertical contract restrictions (including territorial supply constraints) imposed by suppliers.

#### *Efficient contracting*

When both food manufacturing and retailing are concentrated sectors and companies have non-negligible market power, simple contracting over linear wholesale prices<sup>52</sup> leads to double mark-up inefficiencies (see Box 1). Suppliers may more easily agree to include non-

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<sup>52</sup> Linear wholesale prices refer to a pricing scheme which only includes a price per unit, without additional components not depending on quantity. Non-linear pricing schemes includes fixed price components, not depending on quantity (e.g. slotting allowances, additional volumes discount when specific sales targets are reached, etc.). See also Box 1.

linear price components such as slotting allowances or other fixed fees in the pricing scheme in negotiations with more powerful buyers, resulting in more efficient contracts. As a consequence, larger retailers can take advantage of discounts not available to smaller retailers. Wey (2019) therefore highlighted that RAs may also generate benefits by allowing for more sophisticated, efficient contracts. However, to the extent that such efficient contracts are effectively used, Caprice (2019) questions whether RAs can effectively lead to further efficiencies, given the already sophisticated pricing schemes in the contracts with individual retailers<sup>53</sup>.

### **Box 1. Double marginalisation and linear vs. non-linear contracts**

The economic impact of RAs may depend on the type of contract or pricing scheme concluded between suppliers and retailers. Theoretical economic models provide a conceptualised framework, that takes into account the main characteristics of typical retailer-supplier contracts, to study how outcomes may depend on the specificity of contracting.

Suppliers and retailers may engage in simple *linear or non-efficient contracts*. These are called *linear* since the contract only specifies a fixed price per unit, such that the total price paid is a linear function of the number of units purchased. They will enter a bargaining process to decide on the final negotiated wholesale price paid by the retailer to the supplier, which will depend on the relative bargaining strength of the retailer and supplier. When both the supplier and the retailer enjoy non-negligible market power, both will maximise their individual surplus. They do so by setting the price above their marginal cost, i.e. both will add a mark-up or a margin, leading to a 'double margin'. This leads to excessive prices compared to the competitive situation since prices are set above marginal costs (Rey and Vergé, 2008). This creates *double-marginalisation (or double mark-up) inefficiencies* and ends up in a reduction of the total output and welfare at any stage of the vertical chain (Tirole, 1988).

By using more sophisticated, *non-linear or efficient contracts* (Belleflamme and Peitz, 2015; Marvel and Yang, 2008), the retailers' and suppliers' decisions can be coordinated such that they maximise their joint surplus (instead of their individual surplus) and then bargain over the distribution of this surplus. In this way, the double marginalisation is avoided, and welfare increases for both trading partners and consumers<sup>54</sup>. A typical way to model such contracts theoretically is in the form of a non-linear, two-part tariff, which consists of a fixed part (a lump sum) and a varying unit price. The unit price is then set to the marginal costs (no upstream margins). Negotiations over the fixed fee decide on how the joint industry surplus is distributed between the retailers and suppliers and will depend on the relative bargaining power of both actors. Several theoretical analyses have modelled the typical price negotiations between large FMCG suppliers and retailers (list prices, volume or loyalty discounts, conditional rebates, slotting fees, etc.) as such non-linear contracts (e.g. Caprice and Rey, 2015; Inderst and Shaffer, 2007), where at least part of the price reflects marginal costs and thus ensure an efficient outcome avoiding double mark-ups.

This conceptual difference is less clear-cut in reality. Typically, negotiations involve a wide range of possible discounts, slotting fees and year-end rebates can be part of the negotiations. While they appear lump sum, the anticipation of year-end rebates or other retrospective performance-based discounts translates them at least partially into discounts 'at the margin'<sup>55</sup>, and should affect a retailer's optimal pricing policy (Dobson and Inderst, 2007). Also, practitioners argue that at least part of the pricing scheme reflects the retailers' marginal costs. The degree to which this is the case will be important to assess

<sup>53</sup> When also individual retailers can engage in more sophisticated contracts, the variable part of the pricing scheme is already set at the marginal cost level (which is the lowest level possible) in the contracts of individual retailers. The increased bargaining power through RAs may then only affect the fixed fee in the contracting scheme, without affecting the unit price.

<sup>54</sup> Note that total and consumer welfare remain inferior compared to the perfectly competitive outcome.

<sup>55</sup> An investigation in the UK's retail grocery market strongly supports this picture, that (at least for this sector and the UK), discounts are given 'at the margin' (Competition Commission, 2008).

the role of RAs in providing more efficient contracts, and in creating lower prices for consumers (see section 3.2).

### *Breaking vertical contract restrictions*

Some suppliers may use their supplier power to impose competition restrictions in their agreements with retailers, relating to the resale of their products. The economic experts at the workshop have identified two main potential vertical contract restrictions that can be broken by the formation of RAs.

First, by buying at the European level, European RAs can contribute to the creation of a European single market for sourcing products, including A-brands and private labels. RAs facilitate access to an expanded network of suppliers across Europe and they can help to avoid territorial supply constraints<sup>56</sup> by multinational suppliers (Caprice, 2019; Dobson, 2019; Wey, 2019). Bouchut (2019) stresses that while large branded food manufacturing firms sell their products in the entire EU market, they tend to fragment the EU market by imposing territorial supply constraints, which prevent retailers from sourcing from an EU-wide market. By joining purchases across borders, RAs can overcome territorial supply constraints. This could potentially increase efficiency by allowing to source from the most efficient production site. It should be noticed that territorial supply constraints can also be beneficial when they are used to adjust the product characteristics to consumers' preferences that might differ from one country to the other.

Second, through their increased bargaining leverage, RAs can help to reduce the bundling of products or tying practices that can possibly be used by multi-product suppliers. Bundling and tying practices can be used to force retailers to buy a wider range or even the whole range ('full line forcing') of products from the supplier in addition to the products retailers want to buy, or to make the sale of a 'must-have' brand conditional on certain terms relating to other products being accepted. A RA can help to reduce such practices, to negotiate products separately and get better contract terms (Caprice, 2019)<sup>57</sup>.

### **Summary**

Summarising, a retailer can benefit from joining a RA through efficiency gains, improved bargaining and/or by avoiding vertical restraints imposed by suppliers.

The efficiencies generated from forming an alliance depend on the types of activities that RAs engage in. Groups of independent retailers typically engage in a large range of activities, including warehousing, joint buying, and several services. Other alliances may only engage in 'on-top agreements', and generate less efficiencies. European alliances may provide efficiencies in the cross-national sharing of expertise and supplier networks, which might be especially valuable in private label sourcing. Moreover, RAs may allow for more sophisticated non-linear pricing schemes and thereby increase contracting efficiency (at least if alliance members did not already use non-linear pricing strategies individually before joining the RA).

The impact of RAs on bargaining power will also depend on the characteristics of the alliance. A RA may provide better purchasing terms (1) because the RA may have better negotiation abilities; and (2) because pooling retail volumes increases the retailers' outside option and reduces the outside option of suppliers and thus increases bargaining leverage.

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<sup>56</sup> Territorial supply constraints allow multinational suppliers to maximise profits by charging different prices to retailers in different countries (third degree price discrimination). A higher price is set in a country with low upstream competition and price-insensitive demand, while a lower price is set in countries with more intense competition and more price-sensitive demand (Wey, 2019). Price discrimination across countries may also relate to the relative bargaining strength (i.e. outside options) of retailers in different countries (Katz, 1987), resulting in different prices being charged to retailers operating in different countries, depending on their outside option. By joining forces, this heterogeneity in bargaining power could disappear and more homogeneous prices obtained.

<sup>57</sup> See also the Decision adopted by the European Commission, 2005, addressed to the Coca-Cola Company, "Coca-Cola: Europe-wide remedies in fuzzy drinks", [https://ec.europa.eu/competition/publications/cpn/2005\\_3\\_60.pdf](https://ec.europa.eu/competition/publications/cpn/2005_3_60.pdf)

The impact on purchasing terms may be limited (or absent), though, (3) when RA members are competitors on the downstream market reaching a significant joint market share, and when a substantial share of purchasing terms is negotiated centrally by the alliance. In such cases, the non-discrimination effect can reduce competitive pressure among retailers and limit the possibility of the RA to improve the terms of contract. This non-discrimination effect is less likely to apply to European RAs whose members are typically not competing in the same national market, or to groups of independent retailers, which tend to have a low joint market share.

Depending on the type of contract (efficient/non-linear or non-efficient/linear), the bargaining leverage from a RA may help to obtain lower unit prices, or only affect the fixed fee such that a larger share of the joint surplus will be captured by retailers. As explained in detail in the next section, this distinction in which purchasing terms are affected (unit price or fixed, non-linear part) will be relevant in assessing what this means for consumer prices.

## **3.2 Impact of retail alliances on consumers**

### **Impact on consumer prices**

The efficiencies and bargaining leverage effects generated by RAs can possibly be passed on to consumers in the form of lower prices on the consumer market. The degree to which consumers share in these benefits will depend on contracting schemes and retail competition in the downstream market, and are likely different for branded food products and private label products. While the workshop mostly focused on branded products, we briefly discuss what may be expected for private label products as well.

The benefits of RAs in dealing with private label products are mainly related to cost efficiencies and much less to improved bargaining power or different contracting strategies. By pooling volumes, retailers might be able to source private label products at lower unit prices when they join a RA. With sufficient competition among retailers in the consumer market, such a reduction in input costs can be expected to be passed on to consumers. For private labels, the general view is, therefore, that the cost efficiencies that might be created through a RA would benefit consumers.

Also, RAs dealing with branded food products can generate lower input costs through scale economies or other efficiencies, resulting in lower marginal costs. With sufficient competition, also these efficiencies are expected to translate into lower consumer prices. However, for branded food products, the “countervailing power” has been discussed extensively at the workshop and is described in detail below. The countervailing power refers to the possibility that retailers can reduce consumer prices thanks to an improved bargaining position vis-à-vis powerful food suppliers.

#### *Countervailing power*

In the negotiation over branded food products, retailers often deal with large, powerful suppliers. By increasing buying power, RAs can then help retailers to obtain better bargaining terms, which can potentially result in lower consumer prices (RBB Economics, 2007). The *countervailing power effect* is the notion that buying power can act as a counterweight to upstream market power, and as such, benefit consumers in the form of lower consumer prices (Galbraith, 1952). It is one of the main arguments raised in favour of RAs, as identified by both economic experts and representatives of national and European RAs at the workshop (see for instance Chambolle, 2019, Dobson, 2019; Wey, 2019; Bouchut, 2019). While this mechanism of countervailing power has been widely acknowledged, the question remains under which circumstances it applies and how important its impact is on consumer prices.

Caprice (2019) and Chambolle (2019) illustrated theoretically how the pass-through of benefits to final consumer prices does not show up in all vertical chain configurations (see also Allain et al., 2016). This will depend on the (1) type of contract (as anticipated in section 3.1) and (2) the degree of competition in the consumer market.

First, the benefits provided by the RA are only expected to be (partially) passed on to consumers, when they reduce the retailer's marginal costs (including unit prices). Conceptually, this would be the case of simple, non-efficient (linear) contracts. When RAs lead to a lower linear unit price being negotiated, this will directly reduce the marginal costs of retailers, and can be passed on to consumers in the form of lower consumer prices. In the theoretical situation of more complex, fully efficient (non-linear) contracts, the improved bargaining position created by the RA does not affect the unit price (which in theory should already equal the marginal cost). It will only increase the fixed part of the pricing scheme (i.e. the share of the joint industry surplus that accrues to the retailers). Since this does not affect the retailers' marginal costs, it is not expected to affect the retailers optimal decisions. In the short run<sup>58</sup>, no pass-through to consumers in the form of lower consumer prices is, therefore, theoretically expected (Caprice, 2019). While these conceptual differences shed light on which factors play a role in the countervailing power effect, they are less clear-cut in reality. Common contract negotiation between RAs and powerful suppliers typically consists of fees, conditional discounts and year-end rebates, indicating a non-linear pricing scheme. However, as argued at the bottom of Box 1, these terms usually reflect at least some marginal discount. When a RA helps in reducing these, and in a competitive setting at least some of it is expected to be passed on to consumers.

Second, the degree of competition in the final goods market will determine whether and in how far possible reductions in input prices are transmitted to consumers. When alliance members are competing in the same market, as may be the case for some national RAs, the incentive for retailers to obtain better purchasing terms (non-discrimination effect discussed above) is limited in the first place, as is the incentive to pass them on to consumers. In this case, the potential countervailing power effect may be very limited, and in specific circumstances, consumer prices may even increase<sup>59</sup>. But when alliance members are not competing in the same market (as is usually the case for European RAs) or when their joint market share is low (as is usually the case of groups of independent retailers), it can be expected that at least some of their reduced costs are passed on to consumers in the form of lower prices. The higher retail competition in the consumer market, the larger the countervailing effect and the more consumers may share in the benefits. When assessing the impact of the countervailing effect, it is thus also relevant to take into account how RAs may affect retail competition in the longer run, either positively (e.g. by strengthening smaller retailers or facilitating entry in new markets) or negatively (e.g. through the waterbed effect) (Dobson and Inderst, 2007). The impact of RAs on retail competition is discussed in section 3.3.

### *Empirical evidence*

The empirical evidence on the presence of the countervailing power effect is very limited<sup>60</sup>. Both the studies by Ciapanna and Rondinelli (2012) and Molina (2019) find support for the hypothesis that RAs can lead to lower consumer prices. A study by Rickert et al. (2019) studies the effect of a merger on prices in the consumer market<sup>61</sup>. This study finds that,

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<sup>58</sup> In the long run, other mechanisms may play a role as well. Increased profits (even may be for example be invested in new private label development, entry into new markets or new retail formats, which may enhance competition in the final market.

<sup>59</sup> The non-discrimination effect might limit the incentive to obtain better purchasing terms. Note again that this effect is only of concern if retailer alliance members (1) can observe (partially) the variable input prices of other RA members (2) are competitors in the final good market with a considerable aggregate market share, which is not the case for most cross-border alliances, nor for groups of independent retailers. When moreover contracts are fully efficient (non-linear), the increased bargaining power through the RA is only affecting the non-linear part of the pricing scheme and no reduction in variable input prices is expected. When only the non-discrimination effect prevails, this may result in variable input prices, and lead instead to higher consumer prices.

<sup>60</sup> An emerging applied literature is devoted to countervailing power and more generally on the sharing of the total industry surplus in some industries—such as cable television, medical device, hospital and health insurance. It has been reviewed for instance in Collar-Wexler et al. (2019).

<sup>61</sup> Even though Rickert et al. (2019) studies a merger, and not a retail alliance, this study is worth to be mentioned because it is one of the few empirical studies that has information on the negotiated outcome between retailers and suppliers (the retailers' input costs) and assesses how this is transmitted to consumers. In case of a merger, downstream competition between the merging parties completely disappears. The impact of a

on average, cost reductions are not passed through. Ciappana and Rondinelli (2012) and Rickert et al. (2019) show that the degree to which prices are passed on to consumers depends on the degree of retail competition in the consumer market. The three studies are discussed in detail in Box 2.

The few existing studies suggest that an increase in buying power indeed translates into lower consumer prices. Yet, these results relate to specific types of alliances, product groups (e.g. bottled water) and market structure, and the question remains to what extent these findings apply more widely.

### **Box 2: Empirical evidence of countervailing power**

Ciapanna and Rondinelli, 2014: relationship between retail market structure and consumer prices

This ECB working paper investigates the empirical relationships between regional market concentration and retail prices in nine countries of the euro area (Belgium, Germany, Spain, France, Greece, Italy, the Netherlands, Austria and Portugal). The study covers a wide range of food products (45 products in 13 food categories) in 2010. They found empirical evidence of higher consumer prices where retail market concentration is higher (in terms of aggregated sales area) for most of the product categories. However, they also find that final consumer prices are lower when concentration in the intermediary purchasing market is higher. They explain that a higher concentration in the purchasing market (e.g. through the formation of national RAs) benefits consumers because it rebalances bargaining power between dominant producers and retailers. All members of the RA benefit from better purchasing terms, resulting in lower consumer prices (countervailing power effect). This study is the first evidence in favour of the countervailing power argument presented above. However, it does not directly estimate the causal impact of RAs on prices.

Rickert et al., 2019: merger between a supermarket chain and a soft discounter in Germany

This study estimates the impact of a merger between a German supermarket chain and a soft discounter on consumer prices. The study finds cost reduction of the merger on the wholesale market, resulting from synergy gains between retailers or from higher retailers' bargaining power (lower input price). In this particular merger setting, this cost reduction is — on average — not transmitted to consumers. In addition, the pass-through of efficiency gains is lower for higher levels of concentration on local retail markets. However, it should be highlighted that this work does not consider a RA but a merger case. Only RAs with specific characteristics (members are competitors with considerable concentration in consumer markets and fully or substantially uniform wholesale prices) could potentially be similar to the setting of the merger case studied here, and is in line with the theoretical prediction of no or small declines in consumer prices in such situation. Nevertheless, for the large majority of RAs and especially European RAs, this scenario would be unlikely to apply.

Molina, 2019: Impact of national RA on prices in the French bottled-water market

This study is a first attempt to assess the effect of RAs on price formation along the agricultural and food supply chain. It focused on the wave of national RAs that occurred in France in 2014. During that year, three buyer alliances have been formed by retailers to engage in common negotiations with suppliers: Système U/Auchan, Intermarché /Casino and Carrefour/Cora. The three RAs focused on A-brand suppliers. The wave of RAs resulted in the three alliances plus retailer E. Leclerc having 90% of the national market. The study is applied to the bottled-water market, characterised by a concentrated manufacturing industry with three large manufacturers (namely, Nestlé, Danone, and Groupe Alma).

Molina (2019) estimates the effect of the RA wave by comparing how the difference in consumer prices for branded and non-branded formation of RA led to a drop in consumer

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RA (even if downstream competition is limited) can thus in any case be expected to be more beneficial to consumers compared to a merger.

prices from 5.40% to 7.3% (when private label products only are used for the comparison). His results thus confirm the potential countervailing power effect mentioned above. He then estimates an economic model of bargaining between bottled-water manufacturers and retailers in the pre-and post-alliance periods, assuming that they negotiate bilaterally over linear wholesale prices (so a linear, non-efficient contract). The results of this model confirm the findings of the previous analysis: RA causes an average retail price decrease by 7.1%. Both retailers and consumers benefit from this countervailing buyer power effect to the detriment of manufacturers.

### *Summary*

Cost efficiencies and improved purchasing terms resulting from RAs may be passed on to consumers in the form of lower prices. It seems likely that – in most circumstances and as long as there is sufficient competition in the retail market – the formation of RAs will benefit consumers in the form of lower consumer prices, at least in the short run. Yet, the degree to which reduced input prices obtained through a RA will be passed on to consumers will depend on various factors. First, the nature of the contract matters. The more the formation of a RA will reduce the costs of retailers ‘at the margin’, the more likely these benefits are passed on to consumers. This is more likely when negotiation with suppliers is over linear prices. Yet, also seemingly non-linear price components such as fees and year-end rebates are usually somehow linked to performance, affecting retailers’ marginal cost. If so, retailers may also pass on some of the obtained benefits to consumers, even though probably less than in the case of linear pricing schemes.

Second, competition in the downstream market determines to what extent consumers will benefit from lower prices. The larger competition in the retail market, the more consumers will share in the benefits. In the case of RAs that join a number of large retail chains that are active in the same market, the impact on consumer prices may be limited, and under certain circumstances even positive. This might apply to national alliances of a few large retail chains, but would typically not be the case for groups of independent retailers, nor European RAs, nor national alliances joining smaller members. Yet, for all types of alliances, the longer-run impact of RAs on competition in the downstream market matters to assess the impact on consumer prices.

### **Impact on variety and innovation**

In addition to the impact on consumer prices, RAs can also impact consumers through the quality and variety of the products available on retailers’ shelves. Different arguments and mechanisms related to the impact of RAs on innovation and variety were presented at the workshop.

#### *Impact on innovation*

By increasing the buying power of their members, RAs lead to lower supplier surplus and may, therefore, lower supplier investments in innovation. To the contrary, it is argued that RAs can also foster suppliers’ investment (Wey, 2019). Inderst and Wey (2011) show that powerful buyers may incentivise suppliers to overinvest in innovation to make sure they can remain competitive in terms of price and quality of their offer, relative to the buyer’s alternative options. In this way, the suppliers make it more costly for retailers to switch to other suppliers (by reducing the retailer’s outside option value), which increases the supplier’s bargaining leverage and allows him to obtain a bigger share of the industry profit. Caprice (2019) argues that this effect only holds when retail buyer power is not too big. As stressed by Caprice (2019), when the size of a RA is very large, retailers’ outside options are much less affected by the supplier’s investments in productivity or innovation. Overall, this would reduce the supplier’s investment incentives instead of increasing it.

#### *Impact on variety offered to consumers*

Also, the impact of RAs on product variety is ambiguous. On the one hand, when retailers from different countries join a RA, this may force retailers to select the same supplier or products, while the retailers each used to select a different supplier or different products.

This would reduce product variety and consumers may receive a less preferred product. Two theoretical studies (Inderst and Shaffer, 2007 and Allain et al., 2019) provide insights into how an increase in buyer power through European RAs affects product variety. Box 3 summarises the main findings of these studies. Wey (2019) argues that these models fail to account for longer term-effects. In particular, retailers might not want to exclude some suppliers to ensure a sufficient level of supplier competition in the future. Moreover, consumers may decide to switch to competing retailers if the choice of products is limited or if they cannot find their preferred product. Finally, Chambolle (2019) also mentions that RAs may favour large suppliers and possibly lead to the exclusion of small suppliers, which would contribute to reduced product variety.

On the other hand, size advantages of RAs may allow smaller retailers to develop private labels for product categories for which they do not reach critical volumes individually, also contributing to an expansion of product variety. As highlighted by Bouchut (2019) and discussed in section 2.4, European RAs provide retailers with access to new networks of private label suppliers or small local brand producers in different countries<sup>62</sup>. When local suppliers with a good track record with one of the retailers find their way to stores in other countries, the product variety that is offered to consumers also increases.

There is hardly any empirical evidence on the relation between RAs, innovation and product variety, and the empirical evidence on the general relation between competition and innovation is inconclusive (De Bondt and Vandekerckhove, 2012). A report on choice and innovation in the EU food sector (European Commission, 2014) does not deal directly with RAs, but some results may apply and highlight the potential effects of RAs. First, they find that the product choice offered to consumers in shops seems to be largely driven by factors other than competition. Second, product innovation seems to be significantly affected by competition and relative bargaining power. Higher supplier concentration is linked to less innovation. That negative effect might be compensated, however, when suppliers face higher retailer concentration.<sup>63</sup> At the workshop, Chauve (2019) argued that further evidence is needed on variety and innovation issues raised by the development of both national and European RAs (Chauve, 2019).

### **Box 3: European retail alliances and impact on variety**

Inderst and Shaffer (2007) provide a theoretical model assessing the case of one supply firm operating per country and two retailers operating in an independent market. Under some assumptions on consumer preferences and capacity constraints<sup>64</sup>, the retailers face the following trade-off when deciding on the (joint) selection of suppliers, and thus the listing of their products. On the one hand, by pooling purchase volumes and buying the total volume from only one of the suppliers, a European RA may benefit from increased bargaining leverage. The non-selected supplier then serves as an outside option in case no agreement is reached with the selected supplier, and generating bargaining leverage. Members of the RA can thus benefit from better contract terms from the supplier, which they will most likely pass on (partially) to consumers in the form of lower prices. On the other hand, if consumer preferences are different in different countries, relying on a single supplier reduces the total profit of the industry as the product does not fit all consumer preferences.

<sup>62</sup> This may also be the case for national RA although to a smaller extent.

<sup>63</sup> The effects of increased concentration of retailers on the wholesale market (as buying entities) were however measured on markets with an HHI of buying retail entities up to 2000 and not on markets with higher levels of retail concentration. At the local level, the association of higher retail concentration on most innovation measures was found to negative, but only statistically significant for specific indicators and time periods. Higher shares of private labels were found to be associated with less innovation (European Commission,, 2014).

<sup>64</sup> The model relies on two main assumptions. First, consumer tastes differ among countries. Second, retailers can only carry a limited number of products in their stores (capacity constraints). This implies that consumer preferences can be ranked: the good produced in the national market leads to higher profits in the national markets while the foreign good leads to higher profits in the foreign market. The difference in preferences between the national and the foreign products is assumed not too large, such that consumers will still buy the foreign good if they cannot buy the national one.

Retailers will decide to pool volumes and source from a single supplier when the benefit from pooling the volume in terms of improved bargaining leverage, is larger than the loss from not serving consumers their preferred product. This explains how the formation of European RAs can lead to a reduction of product variety, and harm consumers who prefer the product of the supplier that is not selected. The overall impact on consumers would depend on the trade-off between lower consumer prices (if countervailing power results in lower prices) and reduced variety.

Allain et al. (2019) extend the analysis of Inderst and Shaffer (2007) to investigate what would be the impact of buying groups on product variety when introducing both a multinational supplier of a branded product that is active in both countries and a local private label supplier in each country<sup>65</sup>. The study confirms the Inderst and Shaffer (2007) result that committing to a joint listing strategy might be profitable for the retailers through an increase in bargaining power. Moreover, it shows that, unlike in Inderst and Shaffer (2007), the reduction in variety can now lead to a loss in the total profit of the industry and harm consumers in both markets. Their study also differentiates between the impact of a 'partial RA' only targeting the branded products and a 'full coverage RA' more generally targeting all products (both branded and private label products). They show that even when RAs are only targeting branded products, the creation of such alliance may still lead to the exclusion of small local suppliers. Their results thus illustrate that products that are not under the scope of RAs may be indirectly affected by their creation.

These two studies consider international RAs with members operating in different countries. It could apply to national RAs only when they operate in different regional markets, and do not offer the same product varieties already before joining the RA. It should be noted also that results may differ when taking into account the role of variety strategy in non-price competition between retailers.

### 3.3 Impact on retailer competition

The main advantage of RAs is to create size advantages and improve bargaining power to enhance the competitiveness of their members. RAs may help to strengthen the competitiveness of (small) retailers in a consolidating retail market and avoid that large integrated retail chains force smaller players out of the market through their access to better purchasing terms<sup>66</sup> (Wey, 2019). In this way, RAs can make retail markets more dynamic and competitive, which will benefit consumers at the end of the agricultural and food supply chain (Dobson, 2019). This is another important argument in favour of RAs.

However, in some circumstances, the benefits for members of RAs can be such that it leads to negative outcomes for other retailers that are not members of RA, with negative implications for downstream competition. During the workshop, a number of mechanisms through which RA can negatively affect other retailers or competition on the consumer market, and in turn, also consumer welfare, have been discussed<sup>67</sup>.

#### Waterbed and spiral effect

By pooling volumes, retailers who are members of an alliance can improve their bargaining position to obtain better terms of trade from a supplier. Yet, the improved purchasing terms relating to size may negatively affect other, smaller retailers through the *waterbed effect* (e.g. Inderst and Valetti, 2011; OECD, 2008). The improved purchasing terms allow

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<sup>65</sup> In their framework a multinational brand supplier offers two products in the two markets and competes with two small PL suppliers, each active only in its local market. Preferences are ranked such that one brand is preferred in one country while the other is preferred in the other one. The preference for the national private labels is lower than for the preferred "national" branded product. Their study also assumes capacity constraints for retailers: only two of the three available products can be listed.

<sup>66</sup> Also the rise of vertically integrated retail chains may induce a 'waterbed effect', leading to rising cost to smaller (non-integrated) retailers in the market (see also Ordovery et al., 1990). A RA may ensure smaller players have access to similar purchasing terms and counteract this 'waterbed effect' (Wey, 2019). The fact the RAs themselves may create a 'waterbed effect' is discussed below.

<sup>67</sup> For further development on the effect of buyer power and competition in food retailing, refer to Clarke (2002).

alliance members to reduce retail prices<sup>68</sup>, thereby expanding their business. Some of this expansion will occur at the expense of other, less powerful buyers. When these other retailers have lower sales volumes, also their purchase volume will be lower, which will worsen the purchasing terms they can obtain from suppliers. This is the (static) *waterbed effect* (e.g. Inderst and Valetti, 2011). Whether consumers benefit from the waterbed effect or are harmed is ambiguous. Smaller buyers may on the one hand want to charge higher retail prices to compensate for their higher purchasing costs. On the other hand, they may face even more aggressive price competition now that the terms of alliance members have improved. If the latter effect dominates, all consumers will benefit from lower prices. But when the waterbed effect is strong, consumer prices may increase on average (Wey, 2019; Inderst and Valetti, 2011).

Note that a waterbed effect can also occur through restructuring in the upstream market. When more powerful retailers squeeze margins for suppliers, some suppliers may not remain profitable and exit, or new entry may be deterred. If this leads to increased supplier concentration, then this leads to worse outside options for all retailers and may reduce their purchasing terms. When weaker retailers are disproportionately affected, this may lead to a waterbed effect as well (Dobson and Inderst, 2007).

The waterbed effect can have a longer term effect, referred to as the *spiral effect* (Dobson and Inderst, 2007). When smaller retailers cannot offer the same low prices because they cannot access the same purchasing terms, this may reduce their market share and, in turn, they may obtain even worse terms of trade. The opposite happens to RA members, which gain market share and obtain even better terms. In this way, large buyers end up in a virtual circle and grow at the expense of rival retailers, while small rival retailers are caught in a vicious circle: their businesses shrink, the wholesale prices they pay increase, and their margins erode. The spiral effect can thus eventually have a detrimental effect on smaller retailers, which may end up with the exit of firms from the market, and may increase market power of RA members. When this leads to a substantial reduction in retail competition, this can result in higher consumer prices (Dobson and Inderst, 2007).

The literature also shows that the strength of the waterbed effect depends on the existing heterogeneity in bargaining power. The larger the existing differences, the larger the effect will be. Furthermore, this waterbed effect also depends on the supplier's market power. The larger its market power, the more it is able to exploit, to a large extent, any deterioration in a retailer's position due to a loss in volume (see Dobson and Inderst, 2007).

Moreover, the waterbed effect can only occur when the supplier finds it optimal to charge a higher price to rival retailers, which are then disadvantaged in the final product market. In the long term, this could lead to increased retail concentration, which may not be seen as desirable by the supplier (Wey, 2019).

However, there is no empirical evidence about the presence of such waterbed and spiral effects in reality. As noticed by Chauve (2019), these effects are difficult to demonstrate and existing legal assessments of these effects are related to merger cases and not to RAs.

## **Tacit collusion**

Although RAs repeatedly state they have developed strict codes of conduct and are very cautious about any inappropriate exchange of information (Bouchut 2019), both economic experts and legal experts from the competition authorities raised the risk of anti-competitive behaviour during the workshop (e.g. Dobson, 2019; Caprice, 2019; Chauve, 2019; Clementi, 2019). RAs can facilitate information exchange and collusion among members and reduce their incentive to compete, as mentioned by Dobson (2019) and Caprice (2019). This concern applies especially for alliances with members competing in overlapping consumer markets.

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<sup>68</sup> The economic mechanism behind the waterbed effect assumes that improved bargaining results in discounts 'at the margin', and not only through fixed fees, such that at least some of the better terms of supply are passed on to consumers (see section 3.2).

Norman et al. (2015) analyse theoretically how tacit collusion between competitors can be facilitated when it takes place within a RA (with members being downstream competitors). When members of an alliance decide not to abide by a collusive agreement, they may also lose the benefits in terms of efficiencies or better purchasing terms that they derive from the RA. Depending on the rules of the RA, a break-down of the collusive agreement would lead to a more severe punishment for retailers since it can (1) also lead to abandoning the RA altogether, or (2) the alliance can exclude a single retailer that deviates from the collusive behaviour. An experiment conducted by Norman et al. (2015) found that the second one (exclusion of individual retailers) might indeed facilitate collusion.<sup>69</sup> The governance of an RA is thus important to take into account when evaluating the potential risk of collusion of RAs.

Finally, even if no explicit collusive agreements are made, participation of competing retailers in a RA can lead to restricted competition. The idea is that when retailers join a RA and benefit from centrally negotiated purchasing terms, the RA enhances the symmetry among retailers, which may facilitate tacit collusion in the consumer market (Motta, 2004).<sup>70</sup>

Yet, also in the case of European RAs – where members are typically not competitors in the consumer market – there is still the risk that anti-competitive agreements or mutual forbearance<sup>71</sup> may deter retailers from entering each other's markets (Dobson, 2019; Bauer, 2019). Moreover, frequent changes in the composition of RAs with members leaving one RA to join another one have been observed (Dobson, 2019), and some experts raised the concern that these frequent moves can result in an exchange of information not only within, but also between the different RAs (Caprice, 2019; Clementi, 2019).

### **3.4 Possible impacts of RAs on upstream supply chain actors**

RAs can generate benefits for other players in the agricultural and food supply chain, including for suppliers (Larracochea, 2019). But they can also negatively affect them. We summarise in this section all the potential impacts on upstream agricultural and food supply chain actors, based on the inputs from speakers and participants at the workshop.

#### **Impact on suppliers**

The buying power role of RAs on negotiations has been addressed in section 3.1 and 3.2. RAs may allow for extraction of surplus from suppliers in favour of retailers and/or consumers. If retailers gain in the bargaining process (more than the potential efficiency gains generated through the RA) then suppliers must lose profits. However, RAs can also benefit suppliers in different ways. For the possible impact of RAs on supplier investments and innovation, we refer to section 3.2, but from the contributions at the workshop, RAs may create the following efficiencies for suppliers.

A supplier may benefit by pooling purchasing volumes through a RA and, in that way, reduce transaction and contracting costs. RAs that also engage in joint distributional activities, may allow for more efficient logistics and reduced delivery costs for suppliers. A RA may also provide a guaranteed minimum volume and reduce uncertainty, which may induce productivity by allowing for a larger minimum efficient scale. Moreover, joint tenders for private label products likely lead to more harmonised product specifications, allowing for reduced production or packaging costs for suppliers (Wey, 2019). If efficiencies

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<sup>69</sup> They conduct a laboratory experiment where treatments are run in a three-firm Cournot framework. They use two treatment variables, buyer group and communication. Two types of buyer groups are considered: everyone can join the group, or the governance rules allow for the exclusion of single firms.

<sup>70</sup> See Motta (2004) for a review of the literature of the factors that facilitates tacit collusion in a product market.

<sup>71</sup> Mutual forbearance refers to reduced competitiveness between rival firms that meet regularly in multiple markets.

translate into lower consumer prices<sup>72</sup>, this may also increase demand and lead to an expansion of sales<sup>73</sup>.

RAs may have important network effects as well. By providing access to a multi-national network of potential buyers, smaller suppliers or private label suppliers can access an extended market that can cover many European countries and – for some RAs – even non-European countries. This way, RAs can help small suppliers to grow internationally<sup>74</sup>. By coordinating sourcing, RAs can thus sponsor the entry of new (smaller) suppliers and new private label development (Dobson, 2019). RAs may also increase efficiency in managing commercial relationships by reducing work, travel and administrative costs but also by shortening the negotiation cycles.

RAs provide access to services in addition to individually provided services (in return of a fee): they favour and coordinate product launches across retailers and multiple countries and thus provide suppliers easier access to a large set of markets for new products with a single-entry point (Bouchut, 2019 and Dobson, 2019). They provide suppliers access to (aggregate) data on retail sales across countries and can support innovation and promotion campaigns (Bouchut, 2019).

It is thus likely that both national and European RAs can be beneficial for suppliers. Representatives of suppliers acknowledge the potential mutual benefits of RA for both retailers and suppliers, but also raised how RAs can harm suppliers:

In some cases, retailers may abuse their buyer power in the negotiation with suppliers and squeeze supplier margins through the exercise of coordinated delisting threats or unfair practices (see also section 4). Food manufacturers at the workshop gave a number of examples, including unilateral demand of payments, payments requested from suppliers without adequate counterparts, misuse of confidential information and buyer retaliation (Larracochea, 2019). It was especially questioned whether all of the services offered are actually wanted by suppliers and if the corresponding fees justify the value they bring to suppliers, or are instead used to extract profits from suppliers (Larracochea, 2019; Engelsing, 2019).

Some of the possible efficiencies in negotiation and contracting have been questioned, as RAs add another layer of negotiation and may instead add complexity to the process of suppliers' negotiations with retailers or add additional costs through higher or more complex quality and product specifications. European RAs mostly do not buy jointly, and therefore the efficiencies derived from pooling volumes may not apply (Larracochea, 2019).

Concerns have been raised regarding the impact of RAs on upstream concentration in the supply chain and the exclusion of small suppliers. Arguments pointing in both directions have been presented at the workshop. Dobson (2019) mentions that RAs can favour new supplier entry and new private label development. He argues that the increased bargaining pressure of RAs may stimulate supplier competition and make supply markets more dynamic. They may also help small and medium-sized private label suppliers and smaller brand owners to expand their markets thereby enhancing competition among suppliers. On the other hand, only large suppliers may be able to deal with the large pooled volumes of private label products required by RAs (SOMO, 2017), possibly leading to an exclusion of smaller private label suppliers. Also when RAs focus on branded products, and negotiate only with large manufacturers of A-brands, as is the case for most national or European alliances focused on branded products, the impact on supplier concentration may go in both directions. Inderst and Montez (2019) show theoretically how an increase in buyer

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<sup>72</sup> See section 3.2 for conditions under which it applies.

<sup>73</sup> The market expansion effect was mentioned at the workshop with respect to the impact on farmers, and is discussed in detail below.

<sup>74</sup> Bouchut (2019) has highlighted two examples: first, frozen food product from Scandinavia are now sold in Belgium and the Netherlands. Second, a full range of 200 specialties from Italy, which found its way to Germany and Switzerland).

power through the formation of a RA can provide incentives to consolidate at the supplier level<sup>75</sup>.

## **Impact for farmers and small upstream firms**

Farmers are at the upstream end of the agricultural and food supply chain. They are typically the weaker players and confronted with increasingly concentrated downstream processing or retail sectors (McCorrison, 2019). Market power in the buying of agricultural products, unfair trading practices (UTPs)<sup>76</sup> and price transmission along the supply chain are identified as major concerns for the agricultural sector (OECD, 2013; Veerman et al., 2016), and there has recently been increased attention from policy-makers to these issues (e.g. the High Level Forum for a Better Functioning Food Supply Chain (2010); the Supply Chain Initiative (2013-2019), Agricultural Markets Task Force (2016), EU Directive on UTPS (2019)). It is in this context that policy-makers asked whether and how RAs may affect farmers and small firms upstream the agriculture and food supply chain.

In general, RAs do not deal with fresh agricultural and food products (e.g. flowers, fruits and vegetables, fresh meat, and fish)<sup>77</sup>. This section, therefore, excludes supply chains of such fresh products. But obviously farmers are also indirectly linked to retailers when agricultural products are processed into final food products<sup>78</sup>. For processed and packaged foods, farmers at the upstream level of the supply chain can thus be indirectly affected by the formation of RAs.

Because of the lack of a direct link between RAs and farmers, the benefits or harms for farmers are difficult to assess. The way they can be affected depends on the distribution chain. Different possible channels coexist. Farmers can deliver to cooperatives who process and/or sell the agricultural products. The average market share of agricultural cooperatives in selling agricultural products in the EU was 40% in 2010, with a large heterogeneity among member states and agricultural sectors (Bijman & Iliopoulos, 2014). For example, when farmers are part of a large dairy cooperative<sup>79</sup>, they can be directly affected by the formation of RAs. With respect to branded products, European RAs report to only deal with the largest A-brand manufacturers. This may also include cooperatives where they concern large international players and brand owners (e.g. Arla Foods, Royal Friesland/Campina). For private labels, RAs may also trade with large farmer cooperatives, but this is rather exceptional. In other cases, agricultural products are processed and marketed by private firms. Private firms can be small or medium-sized enterprises (SMEs) or large companies. Both cooperatives and private firms can use agricultural production to produce branded products or private label products, which implies different channels of distribution.

Based on the contributions at the workshop (McCorrison, 2019; Dobson, 2019), the following economic mechanisms are identified through which RAs may possibly affect farmers and other small upstream supply chain actors. For none of these mechanisms, there is clear evidence as to whether and how strong they apply. Further theoretical and empirical evidence is needed to clarify how RAs may possibly affect actors further upstream the agricultural and food supply chain.

### *Market expansion effects*

The workshop highlighted potential benefits for upstream firms when RAs lead to lower consumer prices and increased demand for a specific food product (Dobson, 2019). This market expansion effect may increase farmers' income. The benefits of RAs through this

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<sup>75</sup> Inderst and Montez (2019) model a setting of bilateral bargaining with mutual dependency. In their model, the formation of a larger buyer increases *mutual* dependency: sellers become more dependent on that buyer (the costs of losing that buyer is higher, and less easy to replace with other buyers) but that buyer also becomes more dependent on each individual seller.

<sup>76</sup> See footnote 3.

<sup>77</sup> Dairy products are not included in fresh products. Dairy products typically undergo at least some degree of processing and packaging before ending up on retailer shelves, and may be considered by RAs.

<sup>78</sup> As an example, the top five retailers account for 76% of the retail milk market in Germany and 79% in Belgium in 2015 (Anton, 2019).

<sup>79</sup> 50% of dairy production in EU is delivered via cooperatives.

market expansion effect for farmers thus crucially depend on the impact of RAs on consumer prices<sup>80</sup> (see section 3.2) and on how consumers will adjust their purchases to a change in price. Yet, in general, food demand is rather inelastic (a decrease in price will only cause a small increase in food purchases). For instance, it was argued that the European dairy industry seems to be a mature market with limited growth potential in particular for fresh dairy products (Anton, 2019). In such cases, the relevance of a market expansion effect can be questioned. Some examples were given at the workshop of European RAs contributing to enlarge the size of the market for European producers (and farmers), although it is not clear how important this effect is in terms of volumes. For instance, RAs can promote the European food industry's products outside Europe through their international partnerships.

#### *Increased buying power and vertical coordination*

While RAs typically are not directly connected to agriculture, RAs may impact the organisation of the upstream supply chain and thereby indirectly affect farmers. In case RAs lead indeed to more concentration in the food processing industry (as suggested by the study of Inderst and Montez, 2019), the common view is that this could lead to increased buying power with respect to the agricultural sector and therefore could harm farmers (McCorrison, 2019). A potential of price reduction for the farmers may result in the farmers having fewer incentives to invest and leaving the agricultural sector (e.g. Sexton, 2012). However, when taking a long-term perspective, Mérel and Sexton (2017) show that in the case of vertical coordination in the form of contracting with farmers, a higher concentration of the food processing sector may actually benefit farmers. In the long term, processors have no interest in paying farmers a too low price that may lead to underinvestment or exit of their suppliers, because they need viable farmers. The study explains how such possible negative long-term effects of high buyer power on primary good suppliers, may be more easily internalised when the processing sector is more concentrated. Consequently, an increase in concentration in the processing sector does not necessarily affect farmers negatively (McCorrison, 2019).

There is little evidence as to how increased consolidation at retailer and/or processor level is affecting the bargaining position of farmers and what the effects are on the agricultural sector and agricultural prices, though. At the workshop, figures were presented showing how the share of the value added in the EU agricultural and food supply chain has declined over time (McCorrison, 2019). Yet, these statistics provide little insightful information on how agricultural prices, farmers' bargaining power or welfare is affected.

#### *Unfair Trading Practices*

The workshop also briefly addressed the question whether RAs may increase the risk of farmers being confronted with UTPs (such as unfair clauses included in contract terms, unilaterally termination of a contract with no notice or unjustifiable reasons, contractual sanctions imposed with no justification, non-contractual retrospective unilateral charges, imposition of charges to fund a promotion, listing fees, etc.<sup>81</sup>). The risk that tough or possibly abusive bargaining practices imposed by RAs on food manufacturers (as argued by Larracochea, 2019) are passed-on to farmers was briefly mentioned. While large suppliers are typically not covered by the UTP directive, it was suggested at the workshop that the passing on of the consequences of such practices onto weaker upstream players, might be more likely if suppliers are large and powerful enterprises (Bauer, 2019). Yet, overall, there was little information provided at the workshop on whether and to what

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<sup>80</sup> It should be noticed that the whole society is better off with increasing volumes (or decreasing consumer prices), as consumers are also better off.

<sup>81</sup> For more information on UTPs in the food supply chain, refer to the EU Directive on UTPs in the agricultural and food supply chain ([https://ec.europa.eu/info/sites/info/files/food-farming-fisheries/key\\_policies/documents/factsheet-utp-directive\\_en.pdf](https://ec.europa.eu/info/sites/info/files/food-farming-fisheries/key_policies/documents/factsheet-utp-directive_en.pdf)) as well as Fałkowski et al. (2017). The EU Directive only applies to practices between trading partners with an imbalance in power and with a turnover below EUR 350 million (as would be the case for RAs negotiating with large private label or A-brand producers). This does not exclude that the same practices occur between trading partners that are more equal in size or that surpass the threshold, but that an additional legal protection is not necessary in these cases.

extent RAs engage in unfair practices, and if so, how harmful they are at the level of food manufacturers and how they could possibly be transmitted to upstream actors. The studies in the literature suggests that a practice in a given segment of the supply chain can possibly be passed to and impact upstream and downstream segments. Whether and to what extent such a 'pass-through' of UTPs take place will depend on the interdependence between the supply chain segments, the nature of the transaction and the type of UTP (Basic 2015; Fałkowski et al., 2017; Russo et al., 2020). Yet, the workshop did not provide evidence on whether similar concerns would or would not apply to the activities of RAs in the supply chain, particularly for packaged foods, where the intermediary actors connecting retailers to farmers, are mostly large A-brand manufacturers.

#### *Price transmission*

Finally, there are concerns about how RAs may impact price transmission in the chain. Prices are typically more volatile and variable in the agricultural sector than in the other levels of the supply chain, while they fluctuate less in the retail sector (McCorrison, 2019). The transmission of price shocks through the supply chain is typically low, but depends on the organisation of the chain, as well as on the nature of the contract and pricing scheme. McCorrison (2019) explained that the extent to which a change in agricultural prices is passed on to retail prices depends on how the margins in the food sector adjust, which depends on the nature of the contract and on how competitive the sector is. In case RAs increase concentration at the retailer or processor level, then mark-ups are expected to grow and price transmission is expected to decrease. On the other hand, RAs may promote competition at the retail and processor stage and generate efficiencies, which increase price transmission.

Representatives of the EU dairy sector argued that in the dairy sector, increased price pressure on the industry through the formation of RAs is expected to be – to a large extent – transmitted to the milk price paid to farmers because the cost of raw milk corresponds to an important share of the price of dairy products (65% of the consumer price) (Anton, 2019). Overall, the potential impact of RAs on price transmission remains ambiguous and further research would be needed.

Overall, the impact of RAs on farmers and other small players upstream the agricultural and food supply chains is not clear. RAs may increase concentration among food processors, which could possibly (though not necessarily) exacerbate existing concerns about the weakest links in the food sector. When RAs, to the contrary, promote competition at the retail and food processing stage and improve efficiency in the chain, in principle, they could create benefits for farmers.

### **3.5 Conclusions**

The main economic impacts of RAs identified during the workshop are summarised in Table 3. There are general agreements among experts on the benefits RAs can create for alliance members. Efficiencies from pooling activities, joint provision of services and negotiations, and joint sourcing of private label products and an improved bargaining position can reduce retailer costs and help them to obtain better purchasing terms from suppliers.

The implications RAs might have on retail competition or other actors in the chain are more complex, and might depend on the type of alliance concerned, the pricing scheme used in the contract, and the market structure in the retail and purchasing markets.

Experts and practitioners agreed that the improved bargaining position of RAs may generate benefits for consumers. By countervailing the impact of high market power at the level of suppliers, RAs may benefit consumers in the form of lower consumer prices. Conceptually this countervailing power effect depends though on the nature of the contract with suppliers, and on the degree of competition in the consumer market.

For private label products where suppliers typically have limited market power, it can be expected that at least part of the efficiencies generated by RAs, are passed on to consumers in the form of lower prices. In the case RAs negotiate with large brand

manufacturers, a countervailing power effect is likely leading to lower consumer prices can be expected; however, the strength of this effect will depend on the nature of the contract with suppliers and on the degree of downstream competition in the consumer market. For retailers to pass on the improved purchasing terms into lower consumer prices in the short run, the contract negotiations should affect the variable input price for retailers. This is likely to be the case for most contracts, though possibly less when most of the negotiations of RAs are over slotting allowances or other fixed fees. Besides, the lowering effect on consumer prices will be stronger when retail competition is higher. When RAs join members that are competing in the same market and reach a considerable joint market share, the benefit for consumers may, therefore, be limited, or even non-existent. Yet, in most cases, and especially for European RAs with members from different countries, RAs are likely to reduce consumer prices—at least to some extent.

Also, product variety may be affected by RAs, even though the effects are ambiguous. When RAs create possibilities to develop new private label products, product variety increases. Yet, RAs may also lead to two locally targeted product varieties being replaced by the common selection of one (other) variety instead. In that case, product variety may be reduced, although consumers may still benefit from the product being offered at a lower price. RAs may also affect product variety through the impact on supplier innovation. The few existing theoretical and empirical studies indicate the impact on innovations and product variety may be ambiguous, and so is the possible impact on consumer welfare through access to greater product varieties.

By improving the efficiency and bargaining position of retailers, RAs can help small retailers compete against larger retail chains, thereby improving retail competition. On the other hand, when larger players join RAs, they may negatively affect rival retailers and possibly reduce competition in the retail market. The risk that RAs may enhance anti-competitive behaviour was also raised by both economic and legal scholars. The risk of downstream price collusion or market allocation could increase in RAs in which members are competitors and reach a substantial market share. However, European RA members are usually not competing on the same markets and for groups of independent retailers and several national alliances of smaller retail players, joint market shares typically remain limited. Still, even for RAs with limited or no market overlap between members, risk of collusion on market allocation, or agreements not to enter each other's markets could arise. Note that these possible positive and negative implications on retail competition and competitive behaviour, may also effect consumers in the longer run and impact the degree to which benefits are translated into lower consumer prices.

RAs may also generate efficiencies for suppliers in the form of reduced costs of transaction or distribution, and more homogeneous specifications for private label products. RAs may offer smaller suppliers access to a larger (international) network, allowing them to expand their markets. On the other hand, smaller suppliers may be excluded when RAs lead to larger minimum volume requirements. Moreover, the improved bargaining position of RAs can lead to reduced margins for food manufacturers. This reduction in margins may reduce possibilities to invest and innovate, but may also stimulate supplier competition and product innovations. Theoretical and empirical studies indicate the impact on innovations and product variety, as well as the possible impact on consumer welfare through access to greater product varieties, may be ambiguous.

The impact on actors further upstream the supply chain, including farmers, is very uncertain. European RAs do not deal directly with fresh agricultural products, and the possible impact on farmers is therefore indirect. While a number of potential mechanisms were mentioned during the workshop, studies (both theoretical and empirical) on how an increase in buyer power can affect upstream actors are largely missing. When consumers obtain lower prices, this can potentially increase demand. Given low demand elasticities, the impact on demand for agricultural products can be expected to be limited though. The impact on farmers is thus largely dependent on how RAs affect the competitive structure of the food manufacturing sectors, and on whether reduced margins are passed on further upstream. Yet, even if RAs lead to increased supplier concentration, this does not necessarily lead to worse outcomes for farmers. Given that the indirect impact of RAs on

more upstream operators remains unclear, this is an area for further investigation and academic research.

Overall, this economic analysis suggests that RAs, in most cases are likely to generate efficiencies and benefits that may be passed on to consumers. RAs may support small and medium-sized retailers to remain competitive in an increasingly consolidated and internationalising retail market, and small suppliers may benefit from larger network opportunities. Under certain circumstances, however, the possible benefits to consumers may be small or inexistent (as might be the case for some national RAs of relatively large retailers competing in the same market, but generally not for European RAs or alliances of small retailers); RAs may improve bargaining positions to such extent that a serious imbalance of power may occur vis-a-vis upstream actors, or there may be a serious risk of anti-competitive effects. In those cases, the possible benefits for consumers may not compensate for the possible harm inflicted on upstream actors, and a closer investigation into the overall welfare effects of the RA may be warranted.

**Table 3. Summary of the main impacts of retail alliances on the agricultural and food supply chain**

	Potential positive effects	Potential negative effects
<b>Retailers (alliance members)</b>		
<b>Efficiencies from joint activities</b>	<ul style="list-style-type: none"> <li>- Joint negotiation, marketing, logistics, etc.</li> <li>- Development of private label products</li> </ul>	
<b>Bargaining power</b>	<ul style="list-style-type: none"> <li>- Access to price discounts by combining volumes</li> <li>- Better purchasing terms through increases bargaining leverage and bargaining ability</li> <li>- Response to the imbalance of power and vertical restraints with respect to large suppliers (national RAs but mostly European RAs)</li> </ul>	<ul style="list-style-type: none"> <li>- No (or upwards) effect on purchasing prices and consumer prices, applicable under specific circumstances (in case RA uses efficient contracts, central negotiation of purchasing terms, and RA members compete on the final good market with significant joint market share)</li> </ul>
<b>Retail competition</b>	<ul style="list-style-type: none"> <li>- Strengthen competitiveness of smaller retailers, avoiding further consolidation of the sector</li> </ul>	<ul style="list-style-type: none"> <li>- Risk of price collusion in national markets (if RA members compete in final good market with significant joint market share, which is generally not the case for European RAs and alliances of small retailers*)</li> <li>- Risk of collusion through market allocation</li> <li>- Possible waterbed and spiral effects on rival retailers, leading to increased consolidation</li> </ul>
<b>Consumers</b>		
<b>Consumer prices</b>	<ul style="list-style-type: none"> <li>- Pass-through of cost efficiencies</li> <li>- Countervailing power effect (if inefficient contracting and RA members not competing in consumer market with significant joint market share)</li> <li>- Stimulation of competition in food manufacturing and retail sector</li> </ul>	<ul style="list-style-type: none"> <li>- No pass-through of efficiencies and countervailing power if central negotiation of purchasing terms and RA members compete in final good market with significant joint market share (which is generally not the case for European RAs and alliances of small retailers*)</li> <li>- Higher consumer prices through reduced retail competition (collusion, spiral effect)</li> </ul>
<b>Variety</b>	<ul style="list-style-type: none"> <li>- Access to a larger choice of private labels</li> <li>- Increase in variety through supplier innovation</li> </ul>	<ul style="list-style-type: none"> <li>- Possible harmonisation of private label products in Europe with a possible decrease in product variety</li> <li>- Reduction of product variety if RAs reduce supplier innovation</li> </ul>
<b>Suppliers</b>		
<b>Volumes, extended markets, selling terms</b>	<ul style="list-style-type: none"> <li>- Volume guarantee</li> <li>- Access to a larger market and retail network, especially for smaller (private label) firms</li> <li>- Entry into new markets (European RAs mainly)</li> <li>- Market expansion: possibly reduced consumer prices can be translated in larger sales and income</li> </ul>	<ul style="list-style-type: none"> <li>- Delisting threats (if executed) may temporarily affect volumes</li> <li>- Reduced margins when facing stronger bargaining partner</li> <li>- Potential abuse of buyer power vis-à-vis smaller suppliers</li> </ul>
<b>Service provision</b>	<ul style="list-style-type: none"> <li>- Better knowledge of (foreign) markets</li> </ul>	<ul style="list-style-type: none"> <li>- Fee to be paid for services even if not wanted or not corresponding to added value of service</li> </ul>

	<ul style="list-style-type: none"> <li>- Access to data on retail sales across countries</li> <li>- Promotion services, harmonised demands, joint business planning, etc.</li> </ul>	
<b>Innovation</b>	- Increase in innovation (if the buying power of the RA is not too large)	- Reduction of innovation (if the buying power of the RA is large)
<b>Supplier competition</b>	- Possibly more competitive and dynamic food processing sector	- Possibly leading to increased consolidation of food processing sector
<b>Farmers (**)</b>		
<b>Volume</b>	- Possibly market expansion when consumer prices can be translated in larger sales and income (though likely limited)	
<b>Indirect effects of buying power</b>	- Possibly facing a more dynamic and competitive food processing sector	- Possibly facing increased pressure from downstream actors

(\*) With alliances of small retailers, we refer to Groups of independent retailers or National RAs of smaller retailers. The concern could thus potentially apply to national RAs of large retailers that have a considerable joint market share in the consumer market.

(\*\*) Note that the possible impact of RAs on farmers is indirect, and thus dependent on the impact on suppliers. Given that several effects of RAs on suppliers are ambiguous, so are the possible impacts onto farmers.

## 4 Legal framework for national and European retail alliances

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This section assesses the role and impact of RA from a legal point of view. It relies primarily on the contributions made by legal experts and members of the European, German and Italian competition authorities. This report will delve into aspects of competition law and unfair trading practices legislation, which were mentioned as most relevant legal frameworks by experts and stakeholders at the workshop. This naturally limits the scope of this report. Further investigation might be necessary to provide a more complete overview of other relevant areas of law at the national and possibly the EU level.

This section will proceed by discussing the relevance of the legal form of RAs and then sketching the legal framework applicable to RAs (section 4.1), before delving into the different legal instruments. Sections 4.2 and 4.3 discuss the possible issues as well as standards of assessment under EU competition law. Section 4.4 considers the applicability of Directive (EU) 2019/633 on Unfair Trading Practices in the agricultural and food supply chain. Finally, section 4.5 discusses the applicability of national competition law and national unfair trading practices legislation specifically in the cases of Germany and Italy. Section 4.6 concludes.

### 4.1 Legal framework for assessing retail alliances

#### Legal form

Section 2.2 above presented a number of possible different organisational and governance structures of RAs, but the different organisation and legal forms of different types of RAs have not been documented extensively (Wey, 2019). For EU competition law purposes, the exact organisational form is not decisive: competition law applies to all 'undertakings', a concept which is independent of formal legal categories in national law<sup>82</sup>. Insofar as they constitute agreements between independent undertakings of their members, RAs fall within the scope of Article 101 TFEU, while some RAs may also be subject to Article 102 TFEU, insofar as they are undertakings themselves (Chauve, 2019). With respect to Directive (EU) 2019/633, the legal form is also not decisive. Directive (EU) 2019/633 applies to groups of natural and legal persons, so that a RA is subject to the Unfair Trading Practices Directive when it acts as a buyer.<sup>83</sup>

#### Applicable legal framework

At the EU level, there is no legislation specifically addressed to RAs. Having said this, competition laws – rules on agreements between undertakings, rules on unilateral conduct of dominant undertakings, and merger control – at the European and at the national level generally apply to the conduct of undertakings on the market, including RAs and their members. At the EU level, these are, respectively, Articles 101 and 102 TFEU and the Merger Control Regulation. An analytical framework specifically for purchasing agreements has been elaborated by the European Commission in the context of Article 101 TFEU; this framework is to be found in the chapter on purchasing agreements in the European Commission's Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements (hereinafter: the Horizontal Cooperation Guidelines or HG).<sup>84</sup> The Horizontal Cooperation Guidelines are a form of soft law published in 2011 by the European

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<sup>82</sup> In EU competition law, the concept of 'undertaking' is a functional concept. Accordingly, courts and authorities consider whether the entity in question is engaged in an economic activity rather than the legal form under national law. See Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* ECLI:EU:C:1991:14, paragraphs 21-22.

<sup>83</sup> Article 2(2) of Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain OJ L 111/59.

<sup>84</sup> Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/01.

Commission. They provide an analytical framework for the assessment of the most common types of horizontal agreements. As a form of soft law, the Guidelines are binding on the European Commission itself; however, they are not binding on national courts and authorities.

The decisional practice of the European Commission, for instance in *National Sulfuric Acid Association*,<sup>85</sup> and the case law of the Court of Justice of the European Union, notably in *Gøttrup-Klim* judgment,<sup>86</sup> are also relevant for the legal framework. Beyond this, as will be discussed further in this report, the decisional practice of national authorities under EU competition law is also helpful in providing examples of issues which might arise in the context of RAs. Directive (EU) 2019/633, which addresses unfair trading practices specifically in the agricultural and food supply chain is also relevant for assessing the conduct of groups of buyers so long as they fall within the scope of the Directive.<sup>87</sup>

At the Member State level, various pieces of legislation may be relevant. A number of Member States have laws and regulations specifically for the agricultural and food supply chain or operators in the retail sector. Additionally, Member States may have own competition law provisions going beyond the scope of Article 102 TFEU<sup>88</sup> such as provisions on economic dependency or relative market power. Additionally, some Member States have laws specifically addressing unfair trading practices or buying behaviour as such.

Finally, there has been self-regulation in this sector, notably the Supply Chain Initiative<sup>89</sup>. However, it was noted that few European RAs were members of the Supply Chain Initiative (Bauer, 2019). In the meantime, the Supply Chain Initiative has ended.

The question was raised as to what extent the rules on merger control apply (Bauer, 2019). According to Article 3(4) of the EU Merger Control Regulation,<sup>90</sup> a joint venture which performs 'on a lasting basis all the functions of an autonomous economic entity' would fall within the scope of the merger control rules. Thus, whether an assessment under the merger control regulation is necessary depends on the nature of the particular RA in question. As mentioned in the Introduction, RAs typically perform some, but not all retail activities. The members of groups of independent retailers and purchasing joint ventures continue to operate independently on the consumer market. Section 2.3 describes how some cooperations of independent retailers in the context of an alliance may lead to a merger or acquisition. In this case, the merging entity would have to comply with the notification requirements and will be subjected to review under the rules on merger control, which were not further discussed at the workshop.

## **Retail alliances: assessment under the EU competition law framework**

EU competition law doctrine distinguishes several types of primary competition concerns. Firstly, there are concerns with exclusion of competitors and limitation of competition, for example through anti-competitive practices including collusion. Secondly, there are concerns about exploitation of business partners (suppliers, customers, and ultimately consumers); this is mostly associated with the unilateral exercise of market power. Thirdly, there are concerns with market integration and the possibility to trade freely within the EU internal market. Depending on the type of concern present, competition authorities apply different tests, which may also take into account possible efficiencies (e.g. lower prices for consumers, improved quality or choice) that the alliance might generate.

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<sup>85</sup> Commission Decision of 9 June 1989 relating to a proceeding under Article 85 of the EEC Treaty (IV/27.958 - National Sulphuric Acid Association).

<sup>86</sup> Case C-250/92 *Gøttrup-Klim e.a. Grovwareforeninger v Dansk Landbrugs Grovvareselskab AmbA* ECLI:EU:C:1994:413.

<sup>87</sup> Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain OJ L 111/59.

<sup>88</sup> The application of Article 101 TFEU must be harmonised; however, pursuant to Article 3 (2) of Regulation 1/2003 Member States may adopt stricter rules on unilateral conduct.

<sup>89</sup> See <https://www.supplychaininitiative.eu/about-initiative>.

<sup>90</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

We find these three concerns embedded in Articles 101 and 102 TFEU and the EU Merger Control Regulation<sup>91</sup>. Article 101 TFEU targets primarily collective action<sup>92</sup> – agreements of undertakings or decisions associations of undertakings – which have the object or effect of restricting competition on the internal market. Under specific conditions, the possible efficiencies related to a collective agreement may be considered and an exemption (Article 101(3)) may be granted. Article 102 TFEU applies to the unilateral conduct of undertakings in a dominant position: an undertaking is in breach of this provision when it abuses its dominance in order to exclude its competitors or when it abuses its dominance towards its trading partners (customers, suppliers and final consumers). In addition to Article 101, and depending on the nature of the RA, also Article 102 TFEU may be relevant for the assessment.

Three broad types of competition concerns may be considered in the case of RAs.

Firstly, being a form of cooperation between actual or potential competitors, RAs should be scrutinised for their impact on competition, notably whether their activities might lead to less vigorous competition among retailers on the markets on which these retailers compete. Experts at the workshop mentioned concerns 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 (Bauer, 2019; Chauve, 2019; Clementi, 2019 and Engelsing, 2019). Given that the relevant markets include both purchasing and selling markets, unlawful cooperation can have negative effects both for suppliers and consumers. One also needs to examine whether the alliance could lead to the foreclosure of competitors and might lead to a growing concentration on these relevant markets, with possibly negatively implications for suppliers or consumers. Authorities might consider the waterbed effect, i.e. whether lower prices for strong buyers lead to higher prices for weaker retailers, thereby endangering smaller retailers' ability to compete (Bauer, 2019; Engelsing, 2019). Moreover, a RA may engender a virtuous cycle for alliance members (spiral effects) in which lower purchasing prices lead to greater market shares downstream, thereby driving buyer power and, in turn – higher downstream shares. The economic mechanisms behind both effects were explained in detail in section 3.3.

Secondly, authorities may consider issues related to possible exploitation of trading partners in the presence of dominance, notably by means of practices such as delisting, retroactive requests, no pay for performance, and a shift of business risk (Bauer, 2019). Here the prohibition on abuse of dominance under Article 102 TFEU may be relevant, as well as national laws on stricter unilateral conduct or unfair trading practices (Bauer, 2019).

Thirdly, participants also mentioned the impact of alliances on the internal market. Rather than posing a concern, some stakeholders have pointed out that RAs favour EU market integration, as they help achieve a unified EU sourcing market for food and grocery products and help overturn territorial supply restraints imposed by suppliers (Bouchut, 2019).

The above are issues mentioned by stakeholders and experts in the context of the workshop but should not be taken to constitute a general judgment on RAs. Where there is suspicion that one of the above concerns is present, the conduct of the RA(s) in question would have to be assessed on its own merits, also with a view to the exemptions – e.g. under Article 101 (3) TFEU or objective justifications under Article 102 TFEU – which the conduct might benefit from. The sections below demonstrate, on the basis of doctrine, as well as the experience of national and European competition authorities, how such an assessment might be carried out and what relevant factors are taken into account by authorities.

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<sup>91</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

<sup>92</sup> A unilateral decision by an association of undertakings also falls within the scope of Article 101 TFEU.

## Relevant product and geographic markets

For the purpose of competition law analysis, it is essential to establish the relevant market or markets affected by the conduct being analysed. According to the Horizontal Cooperation Guidelines, there are two markets which may be affected by joint purchasing as an activity: firstly, the relevant purchasing market or markets; and, secondly, the relevant selling markets or markets, i.e. the markets on which the parties are active as sellers (HG, 197). It is important to note that the concept of relevant market includes a product dimension and a geographic dimension.<sup>93</sup> These two dimensions need to be considered both for the relevant purchasing and for the relevant selling markets.

We also refer to the purchasing markets as upstream markets, as they relate to purchases from actors upstream the supply chain. The selling market is also referred to as the downstream market, as it regards selling to consumers downstream the supply chain.

### *Purchasing markets*<sup>94</sup>

On the basis of the information provided by stakeholders regarding the activities carried out by alliances, the following upstream product markets may be distinguished: the market for purchase of branded food products, the market for purchase of private label products, and the market for purchase of not-for-sale goods (e.g. information systems, store furniture, and equipment).

With respect to the **product dimension of purchasing markets**, a distinction can be made on the basis of product categories and sub-categories. The main distinction, however, is between purchasing markets for branded food products and purchasing markets for private labels. These are generally regarded as distinct product purchasing markets due to the significant differences in the process of buying: in the case of branded products, retailers regularly negotiate supply contracts with brand owners, often jointly over a whole range of products. RAs tend to negotiate on-top-agreements on a set of fees, rebates or volume discounts related to the services offered by the alliances. In the case of private labels, retailers or RAs carry out procurement tenders and select suppliers, usually for several years (section 2.6).

Alliance members are also active on purchasing markets for not-for-sale goods; however, this is a more recent development and little information was provided during the workshop on this matter.

With respect to the **geographic dimension**, purchasing markets are generally considered national, with some exceptions (Chauve, 2019). For instance, the German competition authority (Bundeskartellamt) generally considers purchasing to be national in scope; however, the purchasing markets may also be international, as decided by the Swiss Competition Authority in the Coop/Migros case (Engelsing, 2019).

### *Selling markets*

**The market for final sales to consumers** is generally considered local in terms of geographic scope (Chauve, 2019; Clementi, 2019; Engelsing, 2019). For instance, the Italian Antitrust Authority separates the market for final sales to consumers into '20-minute drive' catchment areas (*isochrones*) (Clementi, 2019). The reason is that consumers generally do not make long trips for the purpose of their shopping, and select shops based on the basket of products offered, rather than on the availability of price of an individual product. E-commerce does not change this as it remains very limited (Chauve, 2019). Importantly, unlike in the case of purchasing markets, there is rarely a distinction between private labels and brands, as both are offered on the same shelves and consumers largely see them as substitutes (Chauve, 2019).

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<sup>93</sup> Commission Notice on the definition of a relevant market for the purpose of Community competition law [1997] OJ C 372/03.

<sup>94</sup> Purchasing markets and procurement markets are used interchangeably in this report.

Regarding the **provision of services by RAs to suppliers**, it is unclear to what extent this may be considered a separate market.

When discussing relevant markets in the context of the operation of RAs, the assessment by competition authorities might be highly complex. Upstream, RAs concern the purchase of hundreds of thousands of goods in many different markets; downstream, on markets for final sales to consumers, there are even more markets due to the local nature of the markets (Chauve, 2019). This complexity also means that it is difficult to make a precise estimate of all the consequences of a given conduct (Chauve, 2019).

In the next section, the assessment of RAs under the relevant law is discussed in more detail, starting with an assessment under competition law (Articles 101 and 102 TFEU), Directive (EU) 2019/633 and national laws. The sections build on the applicable legal doctrine and soft law, as well as the descriptions and examples provided by the workshop participants.

## **4.2 Article 101 TFEU: agreements by undertakings and decisions of associations of undertakings**

Article 101 TFEU prohibits agreements, decisions and concerted practices of undertakings which have as their object or effect the restriction of competition. The doctrine of Article 101 TFEU distinguishes between practices which are restrictive to competition by 'object' and others which are restrictive 'by effect'.

Restrictions by object are *assumed* to have a detrimental effect on competition. Therefore, in order to demonstrate breach of Article 101 (1), an authority (or plaintiff) need not prove the effect. By contrast, if it cannot be determined that a restriction is 'by object', an authority (or plaintiff) needs to demonstrate that the restriction has an anticompetitive effect. This distinction 'by object' and 'by effect' is relevant for both horizontal and vertical restraints assessed under Article 101 TFEU. This is an important distinction because it implies a different level of scrutiny and evidentiary burden. However, it should be noted that all restrictions, regardless of whether they are by object or by effect, can benefit from the exemption under Article 101 (3) TFEU provided that they meet the four cumulative criteria set therein: namely the need to generate benefits such as improving production or distribution; passing a fair share of the benefits to consumers; making sure the restrictions imposed do not go beyond what is necessary to achieve the benefits and that they do not eliminate competition for a substantial part of the products or services concerned. This assessment is discussed separately in section 4.2.3.

Which restrictions are by object? There is no exhaustive list; however, practices such as price-fixing, market allocation, and exchanges of sensitive information have been considered restrictions by object.<sup>95</sup> It should be noted that these practices may affect both downstream and upstream markets, thereby inflicting harm on suppliers or consumers. The guiding principle is that these are restrictions whose anticompetitive nature should be obvious once a preliminary examination of the nature of the restraint in its legal and economic context is carried out. In the words of the Court *'in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' within the meaning of Article 81(1) EC,*<sup>96</sup> regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.'<sup>97</sup> If, upon such an examination, a

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<sup>95</sup> Indications of which restrictions are considered by object can be found in Commission guidelines, block exemptions and communications. For a recent overview, see European Commission, Commission Staff Working Document, *Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice* SWD(2014) 198 final (Revised Version of 03/06/2015).

<sup>96</sup> Currently, this is Article 101 TFEU.

<sup>97</sup> Case C-67/13 P *Groupement des cartes bancaires (CB)* ECLI:EU:C:2014:2204, paragraph 53.

restriction is not obviously anticompetitive, a further analysis of the possible anticompetitive effects is necessary.

It should be noted that the prohibition in Article 101 TFEU applies not only to horizontal agreements (that is, agreements between undertakings active on the same level in the supply chain) but also to vertical agreements (that is, agreements between undertakings active on different levels in the supply chain). For horizontal agreements, the Horizontal Cooperation Guidelines distinguishes between actual or potential competitors, while clarifying that it applies also to non-competitors<sup>98</sup>. When purchasers are not active on the same relevant selling market (the case of non-competitors), the Guidelines note that horizontal agreements are unlikely to have restrictive effects. However, this is not the case where the parties 'have a position in the purchasing market that is likely to be used to harm the competitive position of other players in their respective selling markets (HG, 212). The notion of 'other players' is not entirely clear in the Guidelines as it could refer to the position of rival retailers or possibly suppliers or other undertakings. As a matter of doctrine, however, this distinction is not relevant. The prohibition in Article 101 (1) TFEU applies to all undertakings who are party to an agreement in restriction of competition, regardless of whether they are actual or potential competitors on a given market.<sup>99</sup>

Insofar as horizontal aspects of RA conduct are concerned, the primary source of guidance are the Horizontal Cooperation Guidelines (i.e. the European Commission's Communication providing guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements). Insofar as vertical relations are concerned, e.g. between RA members and suppliers, the relevant block exemption regulation on vertical restraints<sup>100</sup> and the corresponding guidelines<sup>101</sup> would be applicable. The latter instruments were not discussed at the workshop so they are also not reflected further in this report.

The Horizontal Cooperation Guidelines do not focus on RAs as such; the guidance is meant broadly for joint purchasing collaborations. The scope of configurations falling in the category of 'joint purchasing' is broad. For instance, the Guidelines cover purchasing carried out by a jointly controlled company, by a company in which other companies hold non-controlling stakes, and purchasing in the context of a contractual arrangement or even looser forms of co-operation (HG, 194).

The Horizontal Cooperation Guidelines recognise that joint purchasing may produce substantial efficiencies, and that certain configurations (e.g. members having a low joint market share, or not being competitors on the downstream market) are less likely to lead to anti-competitive effects, as discussed in more detail in the analysis of the restrictions 'by effects'. Moreover, Article 101 (3) TFEU takes into account the potential positive effects that may result from joint purchasing agreements, and foresees an exemption under a combination of specific conditions, described in detail below.

## **Restrictions 'by object'**

The Horizontal Cooperation Guidelines note that while joint purchasing arrangements may lead to important efficiencies, they might also lead to a collusive outcome<sup>102</sup> if they facilitate the coordination of the parties' behaviour on the selling market (HG, 213).

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<sup>98</sup>According to the Horizontal Cooperation Guidelines, actual competitors are those active on the same relevant market. Potential competitors are those which are likely, within a short period of time, to enter another's relevant market (HG, 10). The guidelines also cover cooperation agreements between non-competitors, e.g. two companies active in the same product market, but in different geographic markets without being potential competitors (HG, 1).

<sup>99</sup> Case C-194/14 P *AC-Treuhand AG v European Commission* [2015] ECLI:EU:C:2015:717, paragraphs 33-36.

<sup>100</sup> Commission Regulation 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 OJ L 102/1.

<sup>101</sup> Commission Notice, Guidelines on Vertical Restraints OJ C 130/1.

<sup>102</sup> Collusion broadly refers to secretive anticompetitive agreements made by market participants. However, there need not be an explicit agreement in order to reach a collusive outcome. The collusive outcome can be the result of tacit coordination – a situation in which the mere following of market signals, without any agreement, may result in an outcome identical to the outcome which would have arisen in the case of an actual collusive agreement.

Experts from authorities expressed concern that RAs may be explicitly used as a vehicle for exchanges of sensitive information and coordination of behaviour among competing undertakings with the goal of restricting competition (Chauve, 2019; Clementi, 2019). According to the case law of the Court of Justice of the European Union, agreements involving the fixing of purchasing prices (be it directly or indirectly) can be considered restrictions by object.<sup>103</sup> Under the Horizontal Guidelines, the approach is that agreements on purchasing prices are to be considered as a restriction by effect when these prices are agreed in the context of a joint purchasing arrangement (HG, 206). There may be instances, however, where alliances are a disguise for collusion going beyond the procurement of products itself - for instance, with respect to the development of shops or aligning the prices to the final consumers on retail markets (Bauer, 2019; Chauve, 2019), which are considered to restrict competition 'by object' (HG, 205) .

A concern mentioned by workshop participants was the frequent shifting of members between different alliances - over the past years (see section 2.6 on the evolution and dynamics of RAs)- in the words of the Italian Antitrust Authority, 'alliance waltzes' (Clementi, 2019), which might increase transparency among the industry members, and possibly also among the alliances themselves. Even if members within European alliances are not direct competitors in local markets, information may indirectly be obtained through rotating memberships and employee rotation, resulting in information being shared among a larger number of retail chains and alliances, including direct competitors active in other (e.g. formerly overlapping) alliances (Chauve, 2019; Dobson, 2019). On the other hand, retail representatives emphasised that European RAs have governance and strong compliance rules put in place to ensure compliance with national and EU competition rules. They enforce strict compliance programs specifically in order to limit the flow of sensitive information (Bouchut, 2019). This is something that authorities are vigilant about, as evidenced by the Commission's investigation into the activities of Casino and Intermarché (see Box 4 below).

The following sections discuss some restrictions of object, which may arise in the context of alliances – for example, market allocation, output restrictions, exchanges of information, and price collusion. As explained above, these practices may inflict harm upstream to suppliers or downstream to consumers. It is not to be assumed that these restrictions are a general feature of RAs. However, these are theories of anticompetitive harm mentioned by experts and authorities as relevant when scrutinising the behaviour of RAs.

- Market allocation

The concern with **market allocation** is that retailers might use their collaboration in a RA in order to allocate markets. Most European alliances do not have more than one affiliate from the same Member State, which may be seen as a deliberate strategy in order to comply with the criteria laid down in the Horizontal Cooperation Guidelines or to avoid entering into partnerships with competitors for strategic reasons. On the other hand, it was questioned whether this may also be an outcome of market allocation practices (Bauer, 2019). The recent investigation by the European Commission is an example of a situation in which RAs may have provided a setting in which retailers engage in anticompetitive collaboration in order to limit expansion of their shop networks or align the prices they charge to consumers (Box 4).

**Box 4. The European Commission's investigation into possible collusion by two French retailers in a purchasing alliance**

When actual or potential competitors avoid entering into each other's markets, they avoid competition among themselves. The ongoing Commission investigation, announced on November 4<sup>th</sup> 2019, into a possible collusion among retail chains Casino and Intermarché exemplifies this concern. The two retail chains had set up the joint venture 'Inca-achats' for the purchasing of branded products in November 2014. The buying joint venture was

<sup>103</sup> Joined Cases T-217/03 and T-245/03 *FNCBV and Others v Commission (French Beef)* [2006], ECLI:EU:T:2006:391, paragraph 83 and Case C-8/08 *T-Mobile Netherlands* [2009] ECLI:EU:C:2009:343, paragraph 37.

dissolved in 2018. According to the press release: *'The Commission is concerned that Casino and Intermarché went beyond the purpose of their alliance and engaged in an anticompetitive conduct. In particular, the Commission will investigate whether Casino and Intermarché coordinated their activities on the development of their shop networks and their pricing policy towards consumers.'*<sup>104</sup>

- Output restriction

Another restriction by object which might be alleged, is the issue of **coordinated output restriction** by means of joint delisting. According to stakeholders' comments at the workshop, coordinated delisting occurs when suppliers fail to reach an agreement with (a member of) the RA. In this case, the relevant products are taken off the shelves by all affiliates of the RA (Larracochea, 2019; Bauer, 2019). The argument was made that the practice is reminiscent of an output restriction because products are taken off the shelves (Bauer, 2019); of course, it remains to be seen to what extent this argument will be accepted by the authorities and the courts. The issue of coordinated delisting might also be discussed under unfair trading practices legislation (such as Directive (EU) 2019/633 or national legislation, such as the Anzapverbot in Germany)<sup>105</sup>, which will be addressed separately in Sections 4.4 and 4.5 below.

- Information exchange

**Information exchange** has been cited as one of the competition concerns associated with alliance members, the suspicion being that information exchanged for the purpose of carrying out the RA activities might be used by parties for other purposes, such as coordinating market behaviour. Here it is relevant to distinguish between deliberate exchanges of sensitive information among alliance members in the context of a given alliance, and general transparency on the market as a result of dynamics in RA membership. An example of how exchange of sensitive information may happen in the context of an alliance can be found in Box 5 below.

As regards the legal assessment of information exchange between competitors, there is a separate chapter in the Horizontal Cooperation Guidelines dedicated to this topic. Specifically with respect to joint purchasing agreements, the Guidelines note that the exchange of information will not be assessed separately but in the light of the overall effects of the agreement (HG, 216). However, one must note that there have been some developments with respect to how exchange of information is treated: notably, some types of information exchange have been declared by the Court of Justice of the European Union to be restrictions of competition 'by object'. The Court of Justice has held that *'an exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anticompetitive object'*,<sup>106</sup> and this is so *'even if that there is no direct connection between that practice and consumer prices'*<sup>107</sup>. This case law, which is more recent than the Horizontal Cooperation Guidelines of 2011, would be relevant to the assessment of information exchange taking place in the context of an alliance.

**Box 5. Information exchange via partnership fees: the case of Centrale Italiana**<sup>108</sup>

Affiliates of the RA Centrale Italiana had to pay participation fees to the alliance. The fees were calculated in proportion to the respective participation in the share capital. There was an additional annual fee paid to Coop Italia in order to compensate it for providing the know-how, internal structures and human resources for the operation of the RA. This

<sup>104</sup> European Commission Press Release, 'Antitrust: Commission opens investigation into possible collusion by two French retailers in a purchasing alliance' (4.11.2019) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_6216](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6216)>

<sup>105</sup> The *Anzapverbot* is a provision of German Competition law which prohibits the abuse of economic dependence by undertakings with relative or superior market power.

<sup>106</sup> Case C-286/13 P Dole Food Company v European Commission ECLI:EU:C:2015:184, paragraph 122

<sup>107</sup> Case C-286/13 P Dole Food Company v European Commission ECLI:EU:C:2015:184, paragraphs 123

<sup>108</sup> Based on the contribution by Mr. Clementi of the Italian Antitrust Authority. A detailed summary of the *Centrale Italiana* case is available in Annex 2.

annual fee was equal to a percentage of the volume of the affiliate's own turnover made through negotiation by Centrale Italiana. Thus, affiliates had to reveal the turnover made through Centrale Italiana in order to justify the amount of additional fee. The result was a flow of data to the RA, which essentially revealed how much turnover the affiliate had made through joint activities.

The information exchanged thus concerned not only costs and conditions of purchase, but also invoices of purchases made and various product sales. Centrale Italiana knew how much turnover each affiliate had made on given purchases.

The RA and its affiliates were barred from disclosing to third parties confidential information about the contracts they had; they were obliged to adopt adequate protection systems for sensitive data and contractual information.

The Italian Antitrust Authority suspected that the parties had used Centrale Italiana as a vehicle in order to achieve further forms of collaboration and started an investigation in 2013, and indeed considered the RA agreement was likely to produce anticompetitive effects both on the upstream and downstream markets. Centrale Italiana was dissolved in 2015.

- Price collusion

The theoretical economic literature points to the possibility that RAs may seek to achieve collusion through a combination of high input prices and slotting allowances<sup>109</sup> (see section 3.3 and Foros and Kind, 2008; Doyle and Han, 2014). Such a strategy would not only make the collusion more difficult to discover but might also take away the possible benefit of the RA for consumers when the collusive effect outweighs the pass-through of slotting allowances to consumers (Doyle and Han, 2014). For an example of the issue of pass-through of slotting allowances, see Box 8.

With respect to discussions on collusion, it should be noted that a collusive outcome can also arise without an explicit agreement to harm competition. A collusive outcome without active collusion may be the result of the joint procurement *itself*. In its Guidelines, the Commission suggests that an assessment should be made of whether a collusive outcome is possible. In this assessment, it is relevant whether the parties have market power and whether the characteristics of the market are such so as to be conducive to collusion (HG, 213). Restrictive effects are considered more likely if the parties purchase a significant part of their products together, and have a significant degree of market power (HG, 201), and if the joint procurement results in a high degree of communality of costs, i.e. when parties to the RA have '*a significant proportion of their variable costs in the relevant downstream market in common*' (HG, 214) such that the operators may become so aligned that they lose the ability and the incentive to distinguish themselves and compete (Chauve, 2019)

### **Analysis of restrictions 'by effect'**<sup>110</sup>

In the absence of 'by object' restrictions of competition, the assessment of Article 101 TFEU consists of an investigation of potential restrictions of competition 'by effect'. Insofar as they are collaborations between actual or potential competitors, RAs can be assessed under the rules applicable to cooperation between competitors (the Horizontal Cooperation Guidelines).<sup>111</sup> However, as already noted, insofar as alliances engage in contracts with suppliers (vertical restraints), their activities might also need to be assessed by reference

<sup>109</sup> Doyle and Han (2014) discuss how a buyer group allows retailers to commit credibly to increased input prices, which serve to reduce combined final output to the monopoly level; increased input costs are then refunded from suppliers to retailers through slotting allowances (see footnote 26) or rebates.

<sup>110</sup> Article 101 TFEU prohibits all agreements between undertakings, decisions between associations of undertakings, or concerted practices 'which have as their object or effect' the restraint of competition. As noted above, the Court of Justice of the European Union has established a different standard of assessment for restrictions by object and restrictions by effect. In the case of the former, authorities or plaintiffs need not prove that the restriction has a negative effect on competition. In the case of the latter, authorities or plaintiffs need to delve into the economic impact of a restraint.

<sup>111</sup> As stated before, insofar as alliances engage in contracts with suppliers (vertical restraints), their activities might also need to be assessed by reference to the Block Exemption Regulation on Vertical Restraints, and – if not covered by the block exemption – individually under Article 101 TFEU (HG, 195 -196).

to the Block Exemption Regulation on Vertical Restraints, and – if not covered by the block exemption – individually under Article 101 TFEU (HG, 195 -196).

The Guidelines set out the Commission’s approach to joint purchasing arrangements which do not involve restrictions of competition by object, thus providing an analytical framework for assessing ‘restrictions by effect’ in the context of joint purchasing. As to restrictions by object, these are not subject to the same analysis and do not benefit from the safe harbours mentioned below. Restrictions by object – once identified – are considered prohibited; however, they may still benefit from an exemption under Article 101(3) TFEU.

The Horizontal Cooperation Guidelines recognise that joint purchasing may produce substantial efficiencies. This is in line with the pronouncements of the Court in the *Gøttrup-Klim* case, where the Court of Justice of the European Union observed in relation to the assessment of a purchasing cooperative of farmers that: *‘in a market where product prices vary according to the volume of orders, the activities of cooperative purchasing associations may, depending on the size of their membership, constitute a significant counterweight to the contractual power of large producers and make way for more effective competition.’*<sup>112</sup>

According to the Horizontal Cooperation Guidelines, RAs are not likely to lead to anticompetitive effects when the parties to the collaboration have a combined market share not exceeding 15% (referred to as the ‘safe harbour’) on either the upstream or on the downstream markets (HG, 208).<sup>113</sup> This means that the potential for the creation of power or limitation of competition must be considered both upstream (e.g. towards suppliers) as well as downstream (e.g. towards consumers). The Commission notes that the 15 % threshold is to be considered rigorously and requires high quality data (Chauve, 2019). Often the data available is aggregate, e.g. for the national level; while at the local level the concentration may be much higher than suggested by aggregate national market shares. For instance, it was reported that there are six major retailers in the French market, but reports suggest that in the majority of urban areas there are no more than four players competing (Chauve, 2019).

Another situation which is not deemed to be problematic under the Guidelines, is when the members of a purchasing collaboration are not competitors on the same relevant selling market (HG, 212), as is the case in most of the European RAs (Bauer, 2019). This possibility to escape the prohibition in Article 101 (1) TFEU, however, ceases to apply if *‘the parties have a position in the purchasing markets that is likely to be used to harm the competitive position of other players in their respective selling markets.’* (HG, 212). This suggests that alliances consisting of entities which are not direct competitors on the downstream market, may nonetheless be subject to further scrutiny in order to ensure that there are no adverse effects on competition in the different national markets.

For purchasing arrangements which cannot benefit from the above-mentioned safe harbour and cannot be exempt on grounds that they are not competitors downstream, a detailed assessment of effects on the market is needed (HG, 209). Such an assessment takes into account factors such as market concentration and the possible countervailing power vis-a-vis strong suppliers (HG, 209). The assessment involves verifying effects such as likelihood of quality reductions, lessening of innovation and sub-optimal supply as a result of increased buyer power (HG, 202). The analysis should consider possible negative effects both on the purchasing and on the selling markets (HG, 207). The efficiencies generated by the collaboration are weighed against possible anticompetitive effects. On the basis of this analysis, the authority may decide that the agreement is not in breach of Article 101 (1) TFEU in the first place because its effect is insufficient to constitute a restriction of competition. If that is the case, there is no need to consider the exemption criteria under Article 101 (3) TFEU. If, however, on the basis of the analysis the authority decides that the collaboration is in breach of Article 101 (1) TFEU, the parties to the collaboration may invoke the exemption under Article 101 (3) TFEU.

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<sup>112</sup> Case C-250/92 *Gøttrup-Klim e.a. Grovwareforeninger v Dansk Landbrugs Grovvareselskab AmbA* ECLI:EU:C:1994:413, paragraph 32.

<sup>113</sup> That is, unless the restriction is ‘by object’. On restrictions by object see section 4.2.

Two examples of how authorities may approach the assessment of a RA while taking account of the relevant economic context and the impact on consumer and suppliers is presented below. Box 6 describes the assessment of the *Retail Trade Group* case by the German Competition Authority, which was concluded in favour of the alliance, which was believed to benefit both consumers and suppliers by preserving competition in both retail and procurement markets. Box 7 describes parts of the assessment of the *Centrale Italiana* case by the Italian Antitrust Authority, which led to the conclusion that the RA agreement was likely to produce anticompetitive effects both on the upstream and downstream markets and thereby violating Art. 101 of TFUE.

**Box 6 Assessing a RA under the Horizontal Cooperation Guidelines – the case of *Retail Trade Group (RTG)* in Germany<sup>114</sup>**

There are eight supermarket chains outside the top four in Germany and seven of them, except Globus, decided to form the national RA Retail Trade Group.<sup>115</sup> Most of these chains are family businesses so the possibility of a merger was not attractive. Retail Trade Group was founded in April 2017 as a joint venture providing services to the parties in the areas of purchasing, e-commerce, logistics and administration. The parties continued to operate independent distribution channels on the sales markets.

On the procurement side, the joint shares of the alliance were less than the 15 % threshold set in the European Commission’s Horizontal Cooperation Guidelines of 2011. On the sales side, the parties were active mainly in different regional areas but there were also overlaps, e.g. with two members of the RTG active in the same area. In a couple of local markets they had high joint market shares on the sales side, surpassing the 15% threshold.

Nevertheless, the German Competition Authority had no objections to the formation of the alliance. In fact, it considered that there was a significant positive effect. The four major food retailers, i.e. EDEKA, REWE, the Schwarz group and Aldi, dominated more than 85% of the market. This competitive situation ensured that the scope of action of RTG would remain sufficiently controlled. The German Competition Authority considered that the alliance would boost the competitiveness of the smaller retailers vis-à-vis the big four players while allowing them to retain their independence.

The collaboration was also considered important for suppliers as it would preserve a competitive alternative distribution channel for suppliers. Following the assessment, the German Competition Authority considered that the RTG alliance is a positive development on the market – both for consumers and for suppliers.

**Box 7 Assessing a RA under the Horizontal Cooperation Guidelines – the case of *Centrale Italiana (Italy)*<sup>116</sup>**

In the case of *Centrale Italiana*, a national RA of competing chains in the large-scale retail sector in Italy, the Italian Antitrust Authority assessed the possible restrictive effects on both the supply markets (upstream) and the consumer market (downstream).

Restrictions in the upstream market were deriving from the possession of strong purchasing power. The combined market share of the alliance members was on average 23% of the procurement markets: a figure that indicated a high market power towards the producers (with respect to competing RAs), reinforced by the territorial distribution of the affiliates' sales quotas, far exceeding 40 percent in many local markets. It was considered that such power could lead to a reduction in the ability to compete of contractually weaker producers, with negative consequences, in the medium term, on the variety and quality of the products (depletion of supply).

<sup>114</sup> Based on the contribution of Dr. Engelsing by the German Competition Authority (Bundeskartellamt).

<sup>115</sup> According to information provided by LZ Retailytics and presented by Dr. Engelsing of the German Competition Authority, the top four retailers in Germany are, EDEKA, REWE Group, Schwarz Gruppe, and Aldi.

<sup>116</sup> Based on the contribution by Mr. Clementi of the Italian Antitrust Authority. A detailed summary of the *Centrale Italiana* case is available in Annex 2.

On the local distribution markets (downstream), the agreement in question was deemed likely to produce negative effects in terms of coordination of sales policies or, at least, of strong reduction of incentives for reciprocal competition between member companies and / or members of Centrale Italiana.

The Italian Antitrust Authority assessed that the RA agreement was likely to produce anticompetitive effects both on the upstream and downstream markets and were leading to a violation of Art. 101 of TFEU.

### *Theories of harm*

An 'effects analysis' requires considering how the collaboration affects the level of competition on the market. One of the worries of competition law is that agreements between companies may lead to the exclusion of some competitors, thereby leading to increasing concentration and limited competition. Such concerns are termed 'foreclosure concerns'. The possible negative effect of increased buyer power on innovation by suppliers, and thus therefore on product variety for consumers can be assessed under competition law, as for example in the case of *Centrale Italiana* (see Box 7 above). As it is not obvious that collaboration between companies necessarily leads to lower competition or reduced upstream innovation, authorities will need to expound a credible theory of harm – that is, an explanation of the mechanism whereby the conduct assessed will harm competition in the present or in the near future. A theory, however, is not sufficient to find that a certain kind of collaboration is has anticompetitive effects. Theories of harm need to be substantiated by evidence. Participants in the workshop identified two main theories of harm with respect to foreclosure of competitors, which may be relevant for the assessment of RAs – the waterbed effect and spiral effect. A possible theory of harm with respect to innovation by suppliers was not discussed at the workshop, and would seem more difficult to substantiate, given that the effects on innovation are ambiguous (see also section 3.2 and 3.4)<sup>117</sup>.

It should be noted that these theories of harm are not specific to Article 101 TFEU assessment; they may be analysed under Article 102 TFEU in the case of a dominant position, and under the respective rules on control of concentrations in the case of mergers and acquisitions. The Commission's approach to these theories in the context of Article 101 TFEU investigation is discussed in the Horizontal Cooperation Guidelines; this is notwithstanding the fact that concerns about foreclosure in the case of vertical relations (e.g. agreements between the RA and suppliers), would have to be analysed separately under the Block Exemption Regulation for vertical restraints and the accompanying guidelines. For an economic explanation on these effects, see section 3.3.

#### - The waterbed effect

The waterbed effect theory of harm captures the idea that lower prices for some buyers might translate into higher prices for other buyers, the assumption being that the buyers benefitting from the low price are powerful whereas the buyers faced with a higher price are weak. This inequality in terms of purchasing prices might cause a detrimental effect for the smaller buyer thereby creating foreclosure on the retail market. This theory of harm is recognised in the Horizontal Cooperation Guidelines, which note that joint purchasing may raise concerns about foreclosure of competing purchasers by 'limiting their access to efficient suppliers' (HG, 203).

The contributions at the workshop indicate that authorities are familiar with the waterbed effect theory of harm and prepared to investigate it. The waterbed effect has been considered in the context of merger control cases (Bauer, 2019; Chauve, 2019). The German Competition Authority investigated the waterbed effect in its assessment of the *EDEKA/Plus* (2008) and *EDEKA/Trinkgut* (2010) mergers. The UK Competition and Markets Authority also discussed it in the *Sainsbury/Asda* (2019) merger review. The European Commission also does not ignore the waterbed effect; however, it was noted that it is

<sup>117</sup> Denicolò and Polo (2018) provide an appraisal of the 'innovation theory of harm' in the context of horizontal mergers, but conclude that there is no strong general theory is harm, as the effect may go both ways and a case needs to be built on facts on a case by case basis.

difficult to substantiate the waterbed theory of harm (Chauve, 2019). Although the effect has been considered in merger investigations, there are no examples of antitrust case involving the waterbed effect. This should not be taken to mean this theory of harm does not materialise but indicates that this is an area in which more research is needed (Chauve, 2019).

- Spiral effects

Another theory of harm is the so called 'spiral effect'. If a retailer obtains lower purchasing prices through the alliance, this is expected to translate into lower selling prices, which result in more customers for the retailer; this in turn generates higher volumes for the retailer in question, thereby creating higher buying power, which once again leads to lower purchase prices.

The spiral effects theory has been considered by authorities, especially in the context of merger control. Examples have been provided of both Commission decisions and national decisions. For instance, the spiral effects theory was discussed in the Commission's merger cases *REWE/Billa* (1996) and *REWE/Meinl* (1999) (Bauer, 2019).<sup>118</sup> At the national level, the German Competition Authority considered the spiral effects theory in its review of the merger *EDEKA/Plus* (2008); the theory was also alleged in the application to the minister in the 2015 merger case *EDEKA/KT*.

Just as with the waterbed theory of harm, the examples come from the merger practice of authorities but there is no evidence of a successful investigation related to horizontal cooperation agreements under Article 101 TFEU. The Commission takes these theories of harm seriously, but just as with the waterbed effect, they have to be substantiated with evidence (Chauve, 2019).

- Reverse waterbed effect

The EDEKA Wedding Rebates case presents an interesting example of the opposite of the waterbed effect: namely, suppliers offering lower prices to smaller buyers rather than to larger buyers. This practice may backfire for the supplier if a larger buyer discovers that a competitor has obtained better purchasing terms from the supplier in question. This was an issue which surfaced in the *EDEKA 'Wedding Rebates'* case (Engelsing, 2019). When EDEKA acquired a number of supermarkets from Plus, it discovered discrepancies between the terms offered by some suppliers to Plus and those offered to EDEKA. Generally, EDEKA enjoyed better terms of contract but there were instances in which Plus had received better conditions from some suppliers. Suppliers might have been motivated to do so in order to keep an additional distribution channel on the market and, given the lower purchasing volume of Plus, they would have been able to afford accepting a lower price (Engelsing, 2019). Upon merging with Plus, EDEKA demanded that suppliers retroactively adjust their terms to EDEKA to match the more advantageous conditions they had temporarily granted to Plus before the merger was implemented.<sup>119</sup>

The German Competition Authority considered that such a practice of *ex post* review of the terms received by a competitor might have a chilling effect on suppliers' willingness to offer discounts. If suppliers know that there is a chance that a smaller retailer would be acquired and that then they would have to offer the better conditions to the big companies as well, they might never dare to offer better terms to the smaller retailers in the first place (Engelsing, 2019). More information about the case is provided in Box 10.

This discussion gives examples of the variety of mechanisms whereby competition may be harmed in the context of collaboration between competitors. However, as the examples discussed above show, actual investigations may reveal other ways in which

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<sup>118</sup> However, the Commission did not consider that same possible effect in the *REWE/Adeg* (2008) merger even though it was on the exact same market and concerned the same buyer (Chauve, 2019).

<sup>119</sup> For more information, see Bundeskartellamt (German Competition Authority), 'Federal Court of Justice confirms key points of Bundeskartellamt's landmark decision concerning unfair trading practices' (Press Release of 29.01.2018) <[https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/29\\_01\\_2018\\_EDEKA\\_BGH\\_Entscheidung.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/29_01_2018_EDEKA_BGH_Entscheidung.html)>

anticompetitive strategies are implemented. In practice, this should not pose an issue for competition authorities due to the broad scope of Article 101(1) TFEU.

### **Exemption criteria under Article 101 (3) TFEU**

Exemption under Article 101 (3) TFEU requires that four cumulative conditions be met: (i) the agreement, decision or practice should generate efficiency gains such as lower purchasing prices or reduced transaction, transportation and storage costs, or gains thanks to economies of scale (HG, 217); (ii) the restrictions must be indispensable to achieve the claimed efficiencies and not go beyond what is necessary to achieve those efficiencies (HG, 218); (iii) these efficiency gains must be passed on to consumers *'to an extent that outweighs the restrictive effects on competition'* caused by the collaboration (HG, 219); and finally, (iv) the restrictions may not eliminate competition *'in respect of a substantial part of the products in question'* both on the purchasing and on the selling markets (HG, 220). All four conditions must be satisfied before an exemption can be granted.

RAs may generate important efficiencies both for retailers and for suppliers, as discussed in section 3. However, one of the crucial conditions under Article 101 (3) TFEU is that a 'fair share' of these efficiencies be passed on to consumers in the form of lower prices or increased product variety. The Horizontal Cooperation Guidelines note that the likelihood that retailers will pass the efficiency gains on to consumers is lower when the RA affiliates' market power on the selling market increases (HG, 219). In such cases, authorities might decide that there is insufficient pass-through to justify an exemption for a collaboration between retailers.

It was suggested that a case in which no pass-through was found likely, due to the parties' significant market power on the selling market, was in the German Competition Authority prohibition decision in the *EDEKA/KT* merger in 2015 (Bauer, 2019). The decision was however overturned by ministerial authorisation in 2016, including a commitment to safeguard jobs (Engelsing, 2019). The question of pass-through was similarly crucial in the Norwegian Competition Authority decision to prohibit the ICA-Norgesgruppen collaboration. In this case, the likelihood of pass-on to consumers was found to be limited as the parties were likely to receive the lower prices in the form of slotting allowances (lump sum payments from suppliers). The case is discussed in Box 8 below.

#### **Box 8. Slotting allowances, transparency, and pass-through: the case of ICA-Norgesgruppen (2014)<sup>120</sup>**

The Norwegian Competition Authority reviewed the collaboration between Norgesgruppen (number one retailer in terms of market share in Norway) and ICA (number four retailer at the time). The two entities represented slightly more than 50 % of the total market upstream and 50 % of the overall sales downstream on a market dominated by four main retailers. The parties were not always direct competitors in the same markets but were jointly present in a number of markets. The concern was that this joint presence would limit competition between the two parties and also that it would create transparency. The Norwegian Competition Authority considered that given their size, the two parties would jointly be the biggest buyer on the market. However, the Norwegian Competition Authority considered that they would not be likely to pass on the benefits of prices decreases, as they would capture the benefits via slotting allowances. The collaboration was prohibited.

### **4.3 Article 102 TFEU : abuse of dominant position**

Article 102 TFEU may also be relevant in assessing the conduct of RAs. Article 102 TFEU prohibits both exclusionary conduct and exploitative conduct. Exclusionary conduct refers to conduct leading to the foreclosure of competitors. Here, the foreclosure theories explored in Section 4.2.3. can also be relevant.

However, unlike Article 101 TFEU, Article 102 also prohibits exploitative conduct, that is unfair prices, terms and conditions, when it is imposed by dominant companies. The

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<sup>120</sup> This box was developed on the basis of the contribution by Mr. Chauve.

concept of 'unfair terms' is not precisely defined and there is no exhaustive list of abuses. It would be possible to consider complaints about unfair trading practices such as delisting, retroactive requests, no pay for performance, and a shift of business risks under this provision. However, the possession of a dominant position is a prerequisite for applying this provision (Bauer, 2019).

An example of applying Art. 102 TFEU to the conduct of a RA was provided by the Italian Antitrust Authority (See Box 9 below). The case concerns misuse of administrative procedures in order to prevent a competitor from entering local markets.

**Box 9. Abuse of dominant position to foreclose a competitor: *Esselunga/Coop Estense* (2012)<sup>121</sup>**

In 2012, the Italian Antitrust Authority found that Coop Estense had abused its dominant position by systematically blocking attempts by competing retailer Esselunga to open new retail shops in areas which were potentially ideal for opening such shops. The markets were characterised by limited availability of suitable spaces and high administrative barriers to entry. Coop Estense systematically intervened in the administrative procedures started by Esselunga in order to obtain the necessary permits. Coop Estense was fined by the Italian Antitrust Authority.

Because Article 102 TFEU requires plaintiffs and authorities to prove a dominant position, its scope of application is more limited than Article 101 TFEU. Proving that a RA is in a dominant position is difficult, which means Article 102 TFEU is seldom triggered in the case of RAs (Bauer, 2019).

#### **4.4 Directive (EU) 2019/633 on Unfair Trading Practices**

Directive (EU) 2019/633<sup>122</sup> was adopted in 2019 with the aim of addressing unfair trading practices in the agricultural and food supply chain. Member States have until 1<sup>st</sup> May 2021 to transpose the Directive into national law and until 1<sup>st</sup> November 2021 to start applying the implementing measures. This is obviously a process which is still ongoing in the Member States.

Directive (EU) 2019/633 applies to the conduct of a group of natural and legal persons who buy agricultural and food products,<sup>123</sup> where the buyers and the suppliers from whom they purchase fall within certain turnover thresholds, as specified in the Directive.<sup>124</sup> The Directive is meant to protect weaker suppliers from the behaviour of stronger buyers, whereby the economic strength is expressed in terms of turnover categories. However, this protection is not unlimited. The Directive does not cover relationships in which suppliers have an annual turnover exceeding EUR 350 million. Thus, it is not obvious that the Directive would apply to the activities of RAs, given that their primary focus is on goods supplied by companies exceeding the thresholds established by the Directive. As stated above, European and national alliances mainly deal with packaged goods, rarely engage in sourcing of fresh goods, and normally do not have direct contacts with farmers and smaller undertakings.

One of the legal experts raised that the limitation of EUR 350 million for supplier turnover is a limitation in the Directive when unfair practices could possibly lead to a cascading effect in the form of the passing on of price pressures upstream to farmers. Such a pass-through of negative impacts was argued to be even more likely if the supplier is a large enterprise (Bauer, 2019).

Besides the fact that the trading partners of RAs would typically not fall under the scope of the Directive because of their large size, it is not clear to what extent the issues raised by stakeholders at the workshop could be captured by the Directive. The Directive includes

<sup>121</sup> This example was provided by Mr. Clementi of the Italian Antitrust Authority and Raffaelli et al., (2015)

<sup>122</sup> Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain OJ L 111/59.

<sup>123</sup> Article 2(2) of Directive 2019/633.

<sup>124</sup> To determine the applicability of the Directive, one must determine the turnover of both the buyer and the supplier involved in the transaction, and decide whether they fall within the threshold schedule as laid out in Article 1 of Directive 2019/633.

a black list of practices which are *per se* prohibited and a grey list of practices which are prohibited unless they have been agreed in advance in clear and unambiguous terms.

One of the issues mentioned is a so called '6+1' practice: the requirement that a supplier must reach an agreement with all members of a RA and the alliance itself within a certain deadline; failure to do so would result in a delisting of the products concerned by all members of the alliance, including by those with whom an agreement had been reached (Larracochea, 2019, Bauer, 2019).<sup>125</sup> Other issues mentioned were concerns about forced or fictitious services (Bauer, 2019), the realistic value of those services relative to the fees (Engelsing, 2019), and potential double charges for the same service, e.g. a listing fee at the European level and a listing fee at the national level (Larracochea, 2019; Dobson, 2019). It is not clear to what extent these practices would be prohibited under the Directive. Notably, with respect to the grey list of practices, these are prohibited only insofar as they have not been agreed in clear and unambiguous terms in advance<sup>126</sup>. This has raised the criticism that agreements might be misused to include abusive terms, thereby undermining the purpose of the legislation (Bauer, 2019).

Directive (EU) 2019/633 provides a minimum set of prohibited practices that all EU Member States must implement. Member States can go beyond these minimum requirements and implement legislation with stricter provisions than those laid down by the Directive, both in terms of the list of practices covered, and as regards the scope of companies and relations considered. As discussed in the next section, quite a number of Member States already have a regulation on unfair trading practices in place, as illustrated in the next section.

#### **4.5 Member State Legislation: unilateral conduct and unfair trading practices**

Various pieces of legislation under public or private law might be relevant to the operation of RAs at the Member State level. The focus in this section is on national competition law provisions and legislation on unfair trading practices. The former is important because competition rules are not fully harmonised in the European Union. Whereas the application of Article 101 TFEU is harmonised within the EU, there is room for divergence at the national level with respect to rules on unilateral conduct. Pursuant to Regulation 1/2003, Article 3(2), Member States may adopt stricter rules on unilateral conduct than those provided in Article 102 TFEU. Similarly, under Article 9(1) of Directive (EU) 2019/633, Member States may maintain or introduce stricter rules on unfair trading practices. Some Member States already have provisions which provide a stricter regime for unilateral conduct than Article 102 TFEU. These provisions sometimes prohibit specific unfair trading practices, which is why they are also relevant in view of the implementation of Directive (EU) 2019/633. The experiences of Germany and Italy which have unilateral conduct provisions stricter than Article 102 TFEU will be discussed below.

##### **Germany: economic dependency and unfair practices under the Anzapfverbot<sup>127</sup>**

German competition law has a general prohibition of unfair trading practices in Section § 19(2) no. 5 of the Act against Restraints of Competition (GWB).<sup>128</sup> This prohibition, known as *Anzapfverbot*, is applicable to companies with relative or superior market power, not just to companies in a dominant position. Companies with relative or superior market power may not request other undertakings to grant them advantages without any objective

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<sup>125</sup> According to Mr. Larracochea, a supplier must reach agreement in six countries with the members plus an agreement internationally within a deadline of 45 days. If an agreement with just one member is not reached, there is no deal in any country despite the fact that agreements with five other members have been reached.

<sup>126</sup> Article 3(2) of Directive 2019/633.

<sup>127</sup> This subsection and the example developed in Box 10 is based on the contribution to the workshop of Dr. Engelsing (German Competition Authority) (Engelsing, 2019).

<sup>128</sup> For an English language version of the legislation, see [http://www.gesetze-im-internet.de/englisch\\_gwb/englisch\\_gwb.html#p0057](http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0057)

justification; in this regard particular account is taken of whether the other undertaking has been given plausible reasons for the request and whether the advantage requested is proportionate to the grounds for the request. Section § 20(2) of the GWB clarifies that this prohibition also applies in cases of economic dependency, that is to undertakings and associations of undertakings in relation to the undertakings which depend on them. To assess dependency and relative market power, one needs to assess whether there is an imbalance of power by examining the respective outside options of the parties<sup>129</sup>. An example of how the *Anzapfverbot* can be used in cases involving unfair trading practices in the retail sector is the *EDEKA Wedding Rebates* case (see Box 10 below).

Importantly, under German law, one has to consider whether there is an objective justification for the contractual terms. Requests for advantages from a company in a dominant position or a position of relative market power to a dependent company are prohibited when there is no objective justification. Particular account must be taken as to whether the undertaking has been given plausible reasons for the request and whether the advantage requested is proportionate to the grounds for the request.

Another issue is whether individual or overall conditions should be used as a reference point. The German Competition Authority considers the contract in its entirety, instead of focusing on individual terms which might appear abusive. Thus, in the Amazon case, the German Competition Authority found that there was a bundle of various disadvantages or abusive conditions. This approach is different from the approach under Directive (EU) 2019/633, which singles out individual terms and practices.

Boycotts and other restrictive practices are discussed under Section § 21 GWB. According to Section § 21 GWB (1): '*Undertakings and associations of undertakings may not request that another undertaking or other associations of undertakings refuse to supply to or purchase from certain undertakings, with the intention of unfairly impeding these undertakings*'. This provision might be relevant when there are allegations of coordinated delisting; however, one should determine whether that is boycott or another type of restrictive practice.

The position of the German Competition Authority is that tough negotiations are the expression of the freedom of contract and therefore should be allowed. The basic question considered by the authority is whether there is market power or dependency leading to an imbalance in negotiation power. Such a claim would have to be substantiated. For example, in its 2019 case against Amazon, the German Competition Authority considered that Amazon acted as a gatekeeper vis-à-vis third party sellers on the market for online marketplace services. However, on the German food retail market, this is less of an issue as there is not one gatekeeper because there are at least four major retailers.

#### **Box 10. Requests from suppliers following a merger: applying the Anzapfverbot in Germany**

Following its acquisition of 2000 PLUS supermarkets, EDEKA made requests for contributions from its suppliers. According to internal documents, parties considered that suppliers should also pay for the merger, which is why the case is referred to as the *EDEKA Wedding Rebates* case. The German competition authority issued a prohibition decision in 2014, which was limited to requests made by EDEKA toward some suppliers of sparkling wine. The German Competition Authority found these suppliers to be dependent given the percentage of total sales going to EDEKA, the limited 'must-have' potential of the brands concerned, and the fact that private brands were an outside option for the supermarket. The prohibition was based on the *Anzapfverbot*.

The appeal Court (Oberlandesgericht Düsseldorf) in its judgement of November 2015 disagreed with the assessment. It took the view that tough negotiations are normal and there was no abuse of market power by EDEKA. However, the German Federal Court of Justice (Bundesgerichtshof) in a judgement in January 2018 confirmed the German Competition Authority in the most important issues: the relative market power of EDEKA

<sup>129</sup> Outside option refers to the possibility a dependent party may have realistic alternative trading partners, e.g. alternative suppliers or alternative distribution channels, which may allow it to avoid dependence.

and the abuse consisting in demands for retroactive alignment of conditions to the best value, adjustment of payment terms, and partnership reimbursement. The German Federal Court of Justice, just like the German Competition Authority, considered that there had been an excessive shift of entrepreneurial risk from a powerful retailer to a dependent producer.

However, such cases depend on the issue of relative market power. An example to illustrate the contrary in another product market is Hudson's Bay. When Hudson's Bay had a merger in 2012, it asked its suppliers for a 1 % retroactive rebate under the 'Fit for the Future' program. No suppliers (or almost none of the suppliers) paid this rebate. This practice could be considered as abusive because under German law the request itself may be considered an abuse; however, the German Competition Authority considered that there was no relative market power if no supplier actually complied with the request.

### **Italy: Article 62 of the *Cresci Italia* Decree<sup>130</sup>**

Italy has had its own provisions on unfair trading practices since 2012 when Article 62 of the *Cresci Italia* Decree was introduced (Decree-Law no. 1 dated 24<sup>th</sup> January 2012). Under the new law, the Italian Antitrust Authority acquired additional powers in the agri-food sector. Article 62 banned the adoption of unfair practices in the relationships between operators in the food and agriculture sector. The goal of the law was to protect suppliers and to avoid the imposition of unjustifiably burdensome conditions in commercial contracts. Article 62 introduces the concept of "significant imbalance" between bargaining parties (supplier and buyers), which is to be understood as the existence of an asymmetry between the parties due to their different bargaining power. However, the existence of significant imbalance in bargaining power is not *per se* an assumption of unfair conduct. Unfairness must be proved in assessing the specific conduct.

Article 62 also introduced specific requirements for contracts concerning the sale of agricultural and food products (the exception are contracts concluded with final consumer): the contracts must be in written form and indicate the duration, the quantity, and characteristics of the product sold, the price and the terms of delivery and payment. In the absence of these elements, the contract is considered null and void.

To exemplify the type of enforcement under Article 62 of the *Cresci Italia* Decree, one may consider the two recent investigations described in Box 11 below.

#### **Box 11. Applying unfair trading practices in the agricultural and food supply chain under Italian legislation**

Case AL14 (2016) concerned the commercial relations and contractual conditions between pear suppliers and two retailers (COOP ITALIA/Centrale Adriatica). Two retail operators abused their position of commercial strength to impose a series of excessively onerous discounts and economic contributions on the weaker parties to the contract. The Italian Competition Authority considered that the requests were disproportionate given the relationship between the parties and that they would weigh heavily on the agreed list price. The conduct of the companies was found to be contrary to the principles of transparency, correctness, proportionality and reciprocal services for payment. The retail operators have been fined.

Case AL15 (2019) concerned commercial relations and contractual conditions between bread producers (bakeries) and large retailers. The complaint was made by the National Association of Bread-makers against some retail chains about requirements related to unsold goods. The conduct consisted in imposing on suppliers of fresh bread the obligation to withdraw and dispose of the entire quantity of in-stores unsold bread products at the end of the day at the supplier's own expenses.

<sup>130</sup> This subsection and the example in Box 11 is based on the contribution to the workshop of Mr. Clementi (Italian Antitrust Authority) (Clementi, 2019).

## 4.6 Conclusions

RAs may generate important efficiencies in terms of lower prices for consumers, diversity of products, and cost savings. They help create a single European purchasing market and contest territorial supply constraints, where such constraints are imposed by suppliers on the internal market.

Nonetheless, authorities should remain vigilant in order to address possible concerns arising under EU competition law, the Unfair Trading Practices Directive, and relevant national legal provisions. The practice of national and European authorities reveals that in addition to benefits, RAs may also lead to some anticompetitive effects such as creating potential for collusion or reducing competition, which may negatively affect consumers or upstream supply chain actors. Some concerns were also mentioned with respect to possible unfair trading practices.

With respect to competition law, Article 101 TFEU applies to any horizontal agreements, and the application of Article 102 TFEU depends on whether a RA is found to hold a dominant position. Regarding unfair trading practices, there was some disagreement as to whether the scope of Directive (EU) 2019/633 is sufficient, since it only extends to transactions between buyers and suppliers falling within certain specified turnover thresholds. In the case of European RAs purchasing from major A-brand suppliers, both buyers and suppliers will likely exceed the upper thresholds, thereby falling outside the scope of protection of the Directive. In some cases, however, potentially stricter national legislation on unfair trading practices may apply.

Authorities seem well aware of these potential concerns related to RAs. The examples provided show how the EU competition law toolbox, possibly in combination with national legislation, can be used to address these concerns. Based on the workshop contributions, the competition law toolbox seems sufficient to address potential competition law concerns that might arise in the context of RAs in both selling markets (i.e. with respect to consumers) and purchasing markets (with respect to upstream suppliers); however, there was some disagreement as to whether there is sufficient enforcement, especially regarding potential upstream impacts. Experts from authorities generally acknowledge that RAs have both benefits and costs, and stated that they will continue to actively monitor the markets concerned in order to prevent or stop problematic developments.

## 5 General conclusions

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Retail alliances (RAs) are not a new phenomenon, but the growing number of new alliances being set up over the past decade and the rise of international RAs, have generated renewed attention. This report looks into the potential impact of RAs on the agricultural and food supply chain, in particular at the European level. It summarises the insights and views presented at a workshop held in Brussels on 4-5 November 2019. The workshop gathered economic and legal scholars, experts from European and national competition authorities, as well as technical experts from the retail, food manufacturing and farming sectors.

RAs are horizontal alliances of retailers, retail chains or retail groups that cooperate in pooling some of their resources and activities, most importantly relating to the sourcing of supplies. By generating efficiencies from pooling volumes, and by providing a countervailing force in relation to powerful brand manufacturers, RAs play an important role in enhancing the competitiveness of retailers in a consolidating market and in strengthening their position in the context of increased price pressure of discounters, international expansion of competitors, and the entrance of digital players.

The type of alliances and the activities they engage in are diverse, and in particular, groups of independent retailers differ in their activities from national and European RAs. While members of groups of independent retailers and national RAs are active in the same national market, members of European RAs are active in different national markets. The main activities performed by RAs relate to (1) the provision of services to suppliers and the joint negotiation of purchasing terms related to those services, focusing typically on larger A-brand manufacturers and/or (2) the joint launching of tenders for sourcing private label products. In addition, several RAs engage in data sharing initiatives or information sharing concerning technological developments. Groups of small independent retailers typically engage in further collaboration, and engage in the actual buying of product. They may provide support for investments in infrastructure, distribution and logistics to their members. While European RAs deal with the large, so-called A-brand suppliers only, groups of independent retailers and national alliances may deal with a broader scope of suppliers.

This report focuses on the joint activities that relate to the negotiation with or buying from food manufacturers. It provides an economic assessment of how these activities may impact other actors in the agricultural and food supply chain, including consumers, private label suppliers, A-brand food manufacturers, and farmers, and discusses how these potential positive and negative impacts are taken into account under the applicable legal framework.

Consumers may share in the benefits when efficiencies and lower purchasing prices for retailers are passed on to consumers in the form of lower prices. The possibility of 'countervailing power' through RAs has widely been acknowledged by economists and is explicitly considered in the legal assessment of RA under competition law. The degree to which consumers may benefit from lower prices depends on the nature of the contract between retailers and suppliers, as well as on the extent of downstream competition. As regards alliances of small national players and European alliances, whose members are typically active in different markets, at least some reduction in consumer prices can be expected due to downstream competition. The impact on the product variety offered in retail outlets is also relevant in assessing how RAs affect consumer welfare, but it is difficult to establish a priori, as the impact may go both ways.

The impact of the formation of RAs on the degree of retail competition is also relevant to consider, both regarding the impact this may have for consumers, as regarding the upstream implications. In the longer run, the impact of RAs on the degree of retail competition may increase or decrease, thereby enhancing or limiting the lowering effect on consumer prices. Besides, the degree of retail concentration will also affect the number

of alternative sales channels for suppliers. Moreover, agreements between retailers may facilitate anti-competitive behaviour. However, these concerns apply mainly to national RAs whose members are active in the same markets; it does not necessarily apply to European RAs whose members operate in different countries. Yet, some concerns – for example, regarding market allocation – may apply to RAs that have members from different geographical markets. While this cannot be assumed to be a practice - alliances have strict rules of conduct in place to avoid any such anti-competitive behaviour - national and European competition authorities are aware of this risk and any possible unlawful activities. Overall, European competition law has a well-developed set of rules to assess how horizontal alliances affect competition in the selling market, and whether the potential consumer benefit is considered sufficient to justify competition restrictions from either the existence or the behaviour of these alliances.

RAs tend to deal with private label producers or manufacturers of branded food, so these upstream actors are directly impacted by the existence of RAs. By pooling volumes, RAs may generate efficiencies and facilitate market expansion for suppliers. By the same token, suppliers will face stronger buyer power, likely leading to a lowering of their margins, and smaller players may be excluded. The impact on suppliers' investment and innovation from RAs is ambiguous, and also the overall impact on competition between retailers is not entirely clear. Mechanisms pointing in both directions may play a role; the empirical evidence is not unequivocal. Finally, some suppliers claim that in certain cases, the strong bargaining position of RAs allows retailers to charge unjustified fees, demand sensitive information concerning production or impose unwanted services. Yet, it is hard to substantiate to what extent these practices are simply part of tough bargaining - merely counterbalancing the bargaining power that brand manufacturers build up via territorial supply constraints – or are actually harmful to suppliers.

Regarding the possible implications for farmers, it is noted that RAs, and in particular European RAs, do not deal with fresh produce and do not negotiate directly with farmers, so possible impacts are indirect. The impact on farmers will thus primarily depend on whether the market structure at the level of food manufacturing is affected by the existence of RAs, and how impacts of RAs on suppliers are passed on upstream to farmers. The typically weak position of farmers in the agricultural and food supply chain has received attention in other contexts – for instance recent EU policies and legislation strengthened recognised producer organisations, banned certain unfair trading practices and improved market transparency to help farmers. In the context of RAs specifically, the workshop did not adduce concrete evidence as to how or to what extent RAs would affect farmers.

Regarding possible harmful effects on upstream actors, EU competition law addresses potential negative effects on upstream actors (normally by way of assessing exploitative practices), as well as the abuse of possibly dominant positions. Yet, for most RAs, the concern about a dominant position is unlikely to apply, and although the legal tools are available, case law suggests that the consideration of possible upstream harm on suppliers from RAs has been limited. Regarding unfair trading practices, the EU Directive on unfair trading practices would not apply as in most situations both RAs and the suppliers they deal with exceed the turnover thresholds of the Directive.

Overall, a balanced view is necessary when considering RAs. The diversity of the forms and activities of RAs requires a case-to-case assessment and makes it hard to derive general conclusions. Overall, the experts and participants in the workshop agreed that RAs are able to generate benefits for retailers that increase their competitiveness in a competitive, consolidating and internationalising market. They also agreed that – as long as there is sufficient downstream competition – at least some of the benefits that RAs generate are likely passed on to consumers. Nevertheless, there is the possibility of increased retail consolidation and of anti-competitive practices. Under certain circumstances, the possible benefits that RAs can provide to consumers might be off-set by the possible harm inflicted on upstream actors. In such cases, a closer investigation of RAs and their behaviour may be warranted. As regards the potential harm to upstream suppliers, the case law is limited and increased attention and orientation in guidelines by competition authorities may well be desirable. The general assessment of the existing EU and national competition law and

the legislation on unfair practices and the presented case law suggest that the current legal framework provides tools to address potential concerns and to protect both consumers and upstream actors.

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UK Competition and Markets Authority decision Sainsbury/Asda merger (2019)

## **List of abbreviations**

EU	European Union
FMCG	Fast-Moving Consumer Goods
HG	Horizontal Cooperation Guidelines
IT	Information Technology
JRC	Joint Research Centre
RA	Retail Alliance
SME	Small- and Medium-sized Enterprises
TFEU	Treaty on the Functioning of the European Union
UTPs	Unfair Trade Practices

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## Annexes

### Annex 1 Workshop Agenda



**Directorate-General for Agriculture and Rural Development and  
Joint Research Centre**

#### **The role of national and international retail alliances in the agricultural and food supply chain**

**Date: 4-5 November 2019**

Venue: Rue Van Maerlant 2, Brussels, Belgium  
Meeting Room: 2

In a statement linked to the draft Directive on UTPs, the European Parliament calls on the Commission to launch an analysis on the extent and effects of national and international buying alliances on the economic functioning of the agricultural and food supply chain<sup>131</sup>.

The Commission intends to kick off the analysis by bringing together in a workshop all relevant actors to help better understand the nature and functioning of such alliances, as well as their implications on the agricultural and food supply chain.

The aim of the workshop is thus to fill the current knowledge gap by structuring the debate around:

1. The functioning of national and international retail alliances
2. The economic efficiency of such alliances in the agricultural and food supply chain
3. The impacts of retail alliances on upstream operators in the food supply chains
4. The legal context and policy implications

<sup>131</sup> Statement by the European Parliament on buying alliances, European Parliament legislative resolution of 12 March 2019 on the proposal for a directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain, [http://www.europarl.europa.eu/doceo/document/TA-8-2019-0152\\_EN.html](http://www.europarl.europa.eu/doceo/document/TA-8-2019-0152_EN.html)

<b>Day 1: 04 November 2019</b>			
From 13:00		Registration	
<b>SESSION I – Introduction</b>			
13:30	13:45	Welcome and introduction	Michael Scannell - DG AGRI
13:45	14:30	What challenges do retail alliances raise and what opportunities do they offer?	Paul Dobson – University of East Anglia
<b>SESSION II – The economic efficiency of retail alliances and their impact on the agri-food supply chain</b>			
14:30	15:15	The economics of buyer power and retail alliances	Christian Wey – DICE, Heinrich-Heine University Düsseldorf
15:15	16:00	The impact of retail alliances on prices and product variety	Claire Chambolle - INRA
<b>BREAK (15 min)</b>			
16:15	17:00	A cocktail of "fresh" issues on the role of retail alliances	Stéphane Caprice – TSE, INRA
17:00	17:45	Economic impact of retail alliances on upstream operators in the food supply chain	Steve McCorriston – University of Exeter

<b>Day 2: 05 November 2019</b>			
<b>SESSION III – The functioning of retail alliances, economic and legal challenges</b> Chair: Marc Corstjens - INSEAD			
09:00	09:30	What are European retail alliances (ERAs), what do they do, and how do they function?	Pierre Bouchut - former retail executive
09:30	10:00	What are national cooperative buying groups and how do they differentiate from ERAs?	Dirk Eßmann - EDEKA
BREAK (15 min)			
10:15	10:45	A manufacturer's perspective on retail alliances	Ignacio Larracochea – Industry Expert
10:45	11:15	Retail alliances, private labels and their impact on producers – experiences from the dairy sector	Alexander Anton – European Dairy Association
11:15	12:00	Debate and reflections	Marcel Corstjens - INSEAD
BREAK (60 min)			
<b>SESSION IV – Retail alliances under EU and national law</b> Chair: Oliver Sitar - DG AGRI			
13:00	13:45	Retail alliances under EU competition law	Philippe Chauve - DG COMP
13:45	14:30	Theories of harm in assessing retail alliances	Michael Bauer - CMS Law
14:30	15:15	Retail alliances: overview of the Italian experience and case study	Lorenzo Clementi - AGCM
15:15	16:00	Competition aspects of retail alliances: experiences from Germany	Felix Engelsing - Bundeskartellamt
BREAK (15 min)			
<b>SESSION V – Retail alliances and potential responses: wrap-up</b> Chair: Bruno Buffaria - independent expert			
16:15	16:45	Implications for the agri-food supply chain and potential responses by upstream operators	Zohra Bouamra-Mechemache – TSE, INRA
16:45	17:15	Legal framework for national and international retail alliances	Victoria Daskalova - U Twente
17:15	17:30	Closing	Oliver Sitar - DG AGRI

## **Annex 2 Multiple restrictions on competition in the context of a retail alliance – Centrale Italiana**

Case I768 – “Centrale d’acquisto per la Grande Distribuzione Organizzata” (Centrale Italiana)<sup>132</sup>

In Dec 2013, the Italian Antitrust Authority (*Autorità Garante della Concorrenza e del Mercato*) opened a proceeding against Centrale Italiana (formed in 2005) for alleged violation of Art. 101 TFEU.

### *Form and activity*

Centrale Italiana was a retail alliance of competing chains in the large-scale retail sector, created with the main objective of centralising the contracting function of the participating companies in order to obtain cost savings in the purchasing of goods. The alliance was established as a company. The Parties involved were Centrale Italiana, which consisted of four large-scale distributors including: Coop Italia (owning 69% of the shares in the company), Despar Servizi (owning 25% of the shares in the company), Il Gigante (by means of its subsidiary Gartico owning 5% of the shares in the company), Discoverde (owning 1% of the shares in the company); and Sigma, which joined the RA through a contract with Coop Italia.

The purchasing potential of the parties involved in the preliminary investigation was estimated to be on average around 23% of the procurement markets: a figure that indicated a higher market power towards the producers as compared with competing retail alliances and which was reinforced by the territorial distribution of the affiliates' sales quotas, exceeding 40 % in many local (downstream) markets.

Centrale Italiana was actually an alliance of retail alliances and distributors. Each affiliate acted as a purchasing centre for its own group and for its own affiliates, while conditions were negotiated at the higher level, by Centrale Italiana. The activity consisted of the negotiation of framework agreements with suppliers containing the main purchase conditions applicable to supply contracts. The contracts were then subsequently stipulated by the individual distribution chains. The main goal was obtaining cost savings in the purchasing of goods through collective bargaining with the suppliers.

Members of Centrale Italiana paid participation fees to the retail alliance: all the associates paid fees in proportion to the respective share capital of participation in the company but given that Coop Italia was providing the know-how of the company by means of its internal structures and human resources, the associates compensated Coop Italia with an additional annual fee, equal to a percentage of the volume of the affiliate’s own turnover achieved through negotiations conducted by Centrale Italiana. Essentially, this provided a flow of data back to the retail alliance revealing how much turnover the affiliate had made through the negotiations. This was necessary in order to justify the amount of additional fee that the affiliate had to pay.

Through Framework contracts, the Centrale Italiana defined the main discounts and quantity conditional rebates, both on- and off-invoice, to be awarded either as a lump sum or as a percentage of the turnover achieved by each affiliate. In particular, Centrale Italiana was deciding on:

- a) various types of on-invoice discount;
- b) year-end discounts and payment conditions related to payment times and methods;
- c) conditional rebates related to:
  - i. the realisation of promotional activities (promotional budget),
  - ii. the maintenance of a specific assortment (assortment discount or family discount) and variety,
  - iii. the inclusion of new products,
  - iv. the implementation of co-marketing with supplier companies.

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<sup>132</sup> This annex describes the case of Centrale Italiana, as presented at the workshop by Mr. Clementi (Italian Antitrust Authority).

Suppliers were offered a large use of 'trade spending' activities, such as promotions, products' shelf expositions, distribution and sales services, all paid by producers. In the negotiation phase, additional services were contracted among suppliers and Centrale Italiana. The supplier could decide whether to renounce to the agreed services, losing the right to receive the back-payment on achievement of sales target of the specific product.

Centrale Italiana had a proper contracting team dealing with the negotiations of the Framework agreement to be proposed to suppliers. Within the Contracting Team, members of each affiliate were represented. The decision to stipulate a contract with a supplier was made within that team when two members were interested in specific products of the provider. There was a two level system negotiation.

The first level of negotiation were the Framework contracts: Centrale Italiana was contracting with suppliers and affiliates were prohibited from re-contracting the distributors already officially engaged. However, some degree of freedom was left to affiliates that could negotiate terms and conditions related to logistics and delivery and could include various types of on-invoice discount: in particular, they could put in some further conditions specific to their business relating just to logistics and delivery.

The information exchanged within Centrale Italiana in the context of the bargaining activity of the retail alliance concerned not only costs and purchase conditions, but also economic value of various products purchase and sale, through the exchange of invoices. In fact, these were some of the essential elements needed by the retail alliance in order to exert joint negotiating power. Therefore, Centrale Italiana knew how much turnover each affiliate had made on given purchases. This behaviour was considered a clear clue that the parties were using Centrale Italiana as a vehicle to achieve further forms of collaboration, such as the search for synergies of a commercial nature and the development strategies of chains.

#### *Market definition and Market Power*

Given the structure of the retail alliance, two relevant markets were to be considered.

At upstream level, Italian Antitrust Authority considered the product market consisting in the procurement market for goods. On these markets, the RA negotiated large amount of products as a single agent. The geographical scope of the market was considered to be national. As proxy of market power, the Italian Antitrust Authority considered the general value of sales at the national level. The authority concluded that Centrale Italiana and its affiliates had a combined market share of about 23% on the procurement market for goods.

At downstream level, different product and geographic markets were defined. Product markets are defined at the local level depending on the size of the shops, where different size shops are competing asymmetrically within the same relevant market. The scope of the market is local: at the time, in 2014, the Italian Antitrust Authority considered the Italian provinces as local markets<sup>133</sup>. At downstream level the parties were estimated to have a combined share of (roughly): more than 50% in 11 Italian provinces, more than 40% in 20 Italian provinces, and more than 30% in 6 Italian provinces. In the market for stores greater than 1.500 square meters, Centrale Italiana had a market share greater than 40% in 38 provinces (with market share of more than 70% in 12 of the provinces). Therefore, at local level the parties had market power much greater than the safe harbour threshold.

Further market power at local level was raising by bilateral collaboration agreements to develop synergies in specific Italian regions. For instance, Coop and Despar had an industrial partnership to improve their supply in Sicily, whereas Despar and Distribuzione Roma (company controlled by seven of the cooperatives joining Coop Italia) had an agreement on store management in Lazio. Furthermore, a Despar affiliate had an

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<sup>133</sup>Note that in the analysis of merger cases, the Italian Antitrust Authority has considered catchment areas corresponding to a 20-minute drive (isochrones) up to 2019. Currently, catchment areas' extension differs according to the size of the targeted shop (10-minute driving time for convenience shops, 15 minutes for bigger shops).

agreement to exclusively manage Sigma and Dico stores in Sardinia. The levels of collaboration and agreements in Centrale Italiana thus involved several dimensions.

#### *Outcome*

The competition concerns during the investigation were that Centrale Italiana was effectively able to facilitate collusion among affiliates due to the highly sensitive information exchanged on prices, costs, discounts and quantities purchased. Moreover, retail chains involved in Centrale Italiana had multi-market contact at downstream level. The overlaps were considered very important in this case because they meant a reduction of incentives to compete in local markets.

The Italian Antitrust Authority considered that the RA was likely to produce anticompetitive effects both on the upstream and downstream markets. The possible restrictive effects on the supply markets (upstream) derived from the possession of strong purchasing power. Such power could lead to a reduction in the ability to compete for contractually weaker producers, with negative consequences in the medium term on the variety and quality of the products. On the local product distribution markets (downstream level), the agreement was deemed likely to produce negative effects in terms of coordination of sales policies or, at least, of strong reduction of incentives for reciprocal competition between affiliates. All these conditions led to a finding of a violation of Art. 101 of TFEU.

The parties individually submitted remedies in order to remove anticompetitive concerns. The main remedy was the termination of Centrale Italiana in 2015. In addition, the parties interrupted the collaboration agreements between Despar Servizi and Gartico with all the companies belonging to Centrale Italiana, including Coop Italia. A further remedy regarded the collaboration relationships between Sigma and Coopitalia and between Discoverde and Coop Italia, with exclusive reference to the activity of purchase negotiation, that was limited to some suppliers (no private label suppliers). This specific collaboration relationship was formalised through the stipulation of negotiation mandates, signed by Sigma and Discoverde, as principals, and Coop Italia as the mandated company.

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