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AIM’s Response to DG GROW’s Consultation on the EU’s retail ecosystem

26 September 2023

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Introduction

The overall business environment in the EU is not as attractive as in the Americas or Asia, particularly in the fast-moving consumer goods (FMCG) retail markets, which tend to be highly concentrated, and where **supplier-distributor relationships are too often conflictual**. In this response, AIM will set out the main issues relating to the retail markets for FMCG.

These markets will never be truly resilient until this perpetual state of conflict is addressed through regulatory intervention, which can only be successful if it is based on a **thorough examination and better understanding of both the inner workings of the supply chain "from farm to fork"** and the **colossal bargaining power of leading retailers, as well as their dual role as customers and competitors of manufacturers**, which results in **self-preferencing and other unfair practices**.

In particular, **an approach based on concrete facts and figures is essential to properly understand how a given retail price is formed**. Blaming wholesale price differentials for retail price differentials is short-sighted, as evidenced by the sometimes large price differences between shops/regions within the same country and between countries for private label products produced in the same factory and sold under the same retailer's banner.

The likely negative effects of imposing new rules outside existing competition law principles under the guise of "addressing TSCs" go beyond the immediate concerns. These effects include **potential job losses that would affect both suppliers and retailers**, potentially leading to **economic instability**, **reduced competitiveness of small and medium-sized enterprises** (SMEs), which play a vital role in the European market, **disrupted price dynamics**, and an **undermined race to sustainability** for many companies.

Attempting to achieve greater competitiveness, resilience, digitalisation and sustainability at the EU level necessarily implies **the absence of unlawful trading practices**, be they anticompetitive, abusive or unfair, **better enforcement and stronger rules applicable to all market players** to ensure **greater legal certainty and fairness for all**, and **more cooperation and collaboration** between market players overseen by public authorities as part of a **coherent industrial strategy**.

More sustainable production, distribution, consumption and recycling can only be achieved by **investing in research and development for innovation**. The European Commission should seriously consider incentivising innovation for the development of more sustainable products by **providing appropriate investment funds and tax benefits to innovators**.

In addition, the European Commission should **encourage responsible consumption** by informing EU consumers about the environmental costs of "buying cheap" and by ensuring that all B2C transactions comply with new mandatory measures taken to promote the consumption of sustainable products.

1. A Fair and competitive retail ecosystem

Energy prices and supply chain disruptions have pushed inflation in the EU to a 40-year high, and the impact is particularly pronounced in the FMCG sector. Protecting consumer purchasing power in this challenging economic environment requires more than increased fiscal spending and short-term stimulus packages: **fair and functioning competition is a crucial prerequisite for resilient, sustainable, and efficient supply chains that benefit consumers**.

1.1. Highly concentrated EU FMCG retail markets

While competitiveness depends on competition, this is challenged in the EU by the **high levels of concentration in retail markets**, as shown by the HHIs and market shares in the table below.

12 most concentrated FMCG retail markets in the European Union

Country	HHI	Top 3 Retailers' Market Shares	Top 5 Retailers' Market Shares
Finland	3898	96.68%	98.52%
Sweden	3024	85.24%	94.29%
Austria	2512	83.24%	94.02%
Bulgaria	2281	63.40%	74.41%
Slovakia	2274	76.42%	89.27%
Denmark	2211	75.72%	85.82%
Lithuania	2023	65.08%	84.12%
Latvia	1962	68.11%	80.52%
Czechia	1951	67.29%	85.90%
Romania	1924	65.20%	82.53%
Germany	1822	68.35%	85.53%
Belgium	1808	68.42%	87.29%

Source: 2021 Euromonitor's Passport database

Also based on Euromonitor's data, **the cumulative country share of the top five retailers in the EU gradually increased from 73% in 2010 to 79% in 2021**.

Such levels of concentration make it difficult to envisage new market entry, whether by existing retailers or new players, given the **bargaining power and strong position of the incumbents**. As the many investigations launched by national competition authorities in the retail and food sectors show, **resilience is best ensured when alternatives can be easily found**, which concentration prevents. The increasing concentration of the retail sector in Europe is a **major obstacle** to the Single Market.

The economic dependence of suppliers on retailers for access to consumer markets has long been recognised, particularly in Member States' surveys of the retail and food sectors. **Typically, a supplier represents less than 1% of a retailer's business, while a retailer represents on average at least 20% of a supplier's business**.

Concentration in the retail sector should be addressed, in particular by ensuring that cooperative arrangements between buyers do not lead to a harmful increase in market power, which is subject to scrutiny under Article 101 TFEU.

It should also be addressed by reviewing the rules on franchise networks. Some national authorities have called for an investigation into the **franchise and cooperative agreements that retail stores are forced to sign in order to be under the banner of a retail group**. The non-compete clause has been recognised by many stakeholders as a way for powerful retail groups to limit the creation of new stores. If a franchisee wants to leave the franchise agreement, for example because it imposes too many financial constraints, the franchisee is often forced to pay compensation to the retail group or to leave the geographical area, leading to higher concentration. And **the higher the level of retail concentration, the higher the consumer prices**, irrespective of the prices of suppliers and wholesalers.

Whether at the producer or retailer level, **SMEs are under considerable pressure from retail groups**. The recent strike in Belgium by Ahold Delhaize retail stores to oppose management's plans to franchise Delhaize's 128 integrated stores highlights a lack of cohesion even within the retail sector. Both suppliers and shopkeepers raise **issues of buying power and concentration of retail groups that need to be addressed**.

High levels of concentration in a market typically lead to **artificially high prices and limited product choice for consumers** due to the reduced level of competition in that market. The **widespread price-centricity of retailers' business models** has a negative impact on consumers' perception of the cost of (and willingness to consume) more sustainable products.

1.2. Other key challenges for EU FMCG retail markets

The **lack of harmonisation of rules** across Member States, **excessive red tape**, and some **unnecessary trade restrictions** are key barriers to the Single Market. Inconsistent national legal and regulatory frameworks should be harmonised as far as possible, whether on **packaging**, **labelling**, **environmental standards**, **transport standards**, **tax rates and systems**, **energy prices**, **e-commerce rules**, and other key standards and practices across EU countries (such as **health, safety, and environmental protection requirements**). The more the different national rules are harmonised, the more complete the Single Market will be, and the more wholesale and retail prices will naturally converge over time.

To ensure an optimal level of competition in EU retail markets, it is also essential to **protect the freedom of all market players to compete, contract and sell** according to their respective business strategies, market developments, consumer needs and economic and environmental imperatives (*e.g.*, the implementation of efficient, resilient, and sustainable production and distribution systems).

EU retail markets should function in a way that delivers optimal benefits to consumers, particularly in terms of **price, variety**, **respect for local traditions**, **sustainability**, and **consumer empowerment**. Brand owners can only do so much upstream in the supply chain: **retailers are fully responsible for their sourcing, logistics, marketing, and pricing decisions downstream in the chain**, which have a direct impact on consumer welfare and the sustainability of the products that they offer, including how they are transported, stored, promoted, displayed, and sold.

A resilient and efficient supply chain is an absolute priority to meet **consumer expectations**. To ensure they provide the best possible service to everyone in the chain, **brand owners and manufacturers work closely with their partners throughout the value chain**, including primary producers or SMEs involved in complex manufacturing processes, or logistics and transport partners responsible for delivering goods to retailers.

To facilitate the development of more sustainable products and practices, there is a **natural incentive for retailers and their suppliers to work together**, as this tends to be more efficient. Unfortunately, in recent years, many leading grocery retailers have continued to hinder fair competition and have in many ways worsened the already poor quality of their relationships with their suppliers, to the ultimate detriment of consumers.

1.3. Three key issues standing in the way of competitive EU FMCG retail markets

Three specific issues deserve particular attention and additional discussion:

(1) the advantageous position of large retailers due to their **ability to join forces with retailer peers within gatekeeper retail alliances**, which greatly strengthens their initial standard bargaining power and reduces the chances of entry in the market(s) where they operate, **and to exploit their dual role as customers and competitors of brand owners**,

(2) the **false allegations that manufacturers deliberately restrict their supply on a territorial basis** to the detriment of parallel trade, and

(3) the imperative need to **combat and prohibit all forms of unfair trading practices**, if only because they ultimately affect the price and choice of products that are readily available to consumers.

Increasing competition in EU retail markets requires both **stronger enforcement of existing rules by EU and national authorities** and further legislative intervention to **create a more harmonised overall regulatory framework.**

Fairness in the supply chain has been recognised as a powerful enabler, as **greater respect between supply chain actors promotes efficiency and the collaborative projects needed to drive sustainability**. The full implementation and extension of the European directive for fighting unfair trading practices in the food supply chain should be supported by authorities so that the entire retail ecosystem is guaranteed a trading environment that is free from abusive behaviour, unilaterally imposed changes, self-interest, pressure tactics, threats and other forms of retaliation and/or abuse. **Fairness is a powerful enabler of a sustainable and resilient retail ecosystem**.

1.3.1. Retailers' bargaining power, European retail alliances and retailers' dual role

1.3.1.1. Retailers' bargaining power

What matters most in determining the outcome of negotiations is not so much market power as bargaining power, which is related but quite different.

Market power measures a company's ability to act independently of competitive forces in a given market. The main relevant indicators are: market shares, market concentration (HHI index), barriers to entry, vertical integration. On the other hand, **bargaining power refers to a company's ability to influence its trading partners or to negotiate favourable terms**. The main relevant indicators are: dependence (relative share of sales generated through the other party), availability of alternatives (and switching costs), information asymmetry, and differentiation / uniqueness of the offer.

The key question to analyse (and even anticipate) the outcome of commercial negotiations is: "**Which party needs the other the most?**" The criterion of **dependence** is key in this respect and is best measured by analysing the relative share of sales generated through the other party in the relevant market(s), but also the availability of alternatives or substitutes (consumers tend to have both, retailers too, but suppliers hardly do in such concentrated retail markets).

The market reality is that, while there are alternatives (other branded products) and substitutes (private label products) to SKUs, there are no alternatives and no substitutes to the shelves of major retailers. Retailers often talk about "must-have-products", but the reality is that retailers have such high market shares that their supermarkets have **"must-have shelves" that manufacturers cannot afford to miss**. For guidance only, the German Federal Cartel Office found in the *Metro-Allkauf* case that a supplier is economically dependent on a retailer if it generates more than 7.5% of its turnover with that retailer.[1]

1.3.1.2. European retail alliances

Although the extraordinary buying power of Europe's leading supermarkets was already sufficient to keep even their largest suppliers in a state of **economic dependence** (since they ***must*** have their products on the shelves of these supermarkets, or risk losing immense business), more and more of them have joined retail alliances to pool and further increase their initial bargaining power the need for manufacturers to deal with them.

Now organised in retail alliances and/or buying groups, some of Europe's most powerful retailers have reached a point where they can afford to impose their terms on even the largest suppliers, who are left with little room for negotiation and "take it or leave it" choices. The price-driven nature of retailers' demands leads to less competition based on real product value and appeal, and ultimately to **artificially high prices and less choice and quality in the range of products offered to European consumers on supermarket shelves**.

Although retailers claim that they need to organise at European level to counter the market power of their suppliers, retail price records show that **European consumers have not reaped the benefits that retailers have been able to extract from manufacturers in recent years** thanks to their increased bargaining power. As part of the debate on fair competition and efficient, resilient supply chains, the role of retail alliances and their perceived benefits for consumers need to be addressed.

While genuine purchasing groups that purchase and/or negotiate discounts on behalf of their members can be beneficial to the wider community if these benefits are shared with consumers, **the benefits of collective arrangements within the supply chain must always be of fair value to all parties involved**. Such benefits should be passed down the supply chain to consumers while ensuring a healthy and fair business environment for all.

1.3.1.2.1. Gatekeeper retail alliances

Some retail alliances act as **gatekeeper alliances, foreclosing markets through collective tying and boycotts**. While traditional joint purchasing is about aggregating volumes and negotiating a lower overall price; new forms of joint purchasing are limited to aggregating threats to extract fees without commitments as to what those fees will be used for. Such threats are effective and sufficient because **the retailers have the upper hand in the negotiation and can damage the suppliers' sales**, not only by delisting their products but also by "playing" with their prices at will.

The European Commission should ensure that supply chains are efficient and free from artificial barriers such as those **alliances that coerce** manufacturers into signing service agreements and paying **significant market access fees**, threatening to remove their products from the shelves of all alliance members within a similar timeframe if they refuse to pay these fees. Their sole objective *raison d'être* is to **act as a bottleneck access point to national markets** through which suppliers can pass if they agree to pay.

[1] Bundeskartellamt, WuW/E DE-V 94, Metro MGE Einkaufs GmbH.

Given the market power of the members of gatekeeper alliances operating in Europe and the severe commercial consequences of delistings for manufacturers, **the coordinated threat of delisting alone is increasingly sufficient to compel manufacturers to pay these access fees**.

These gatekeeper alliances serve as a **collective boycott mechanism**, reinforced by the fact that their members always include supermarkets with **strong bargaining power** in their home countries and whose shelves are "**must-haves**" for the manufacturers that supply them. This mechanism unduly increases the cost of supplying products, to the ultimate detriment of consumers, who are left with limited choice on the shelves and artificially high prices.

If a manufacturer refuses to pay the market access fee of a gatekeeper alliance, the alliance will **instruct** its members to **remove the manufacturer's products from their shelves**. Such **coercive collective boycotts** to force manufacturers to sign up to "international" service agreements and pay access fees are **disproportionate and very harmful** not only to them, but also to consumers who miss out on their favourite products.

Gatekeeper alliances keep prices artificially high for consumers and prevent them from benefiting from manufacturers' investment or innovation. These fees add to manufacturers' costs and prevent them from using this money for other activities, such as local promotions, innovation development, branding/marketing, improving production or raw material purchasing efficiency, etc.

Ultimately, gatekeeper alliances seriously harm European consumers through reduced competition, less innovation, and higher retail prices. A recent economic study conducted by CompassLexecon demonstrates the inaccuracy of retailers' claims that gatekeeper alliances lead to lower prices for consumers, suggesting instead that they are **a source of unnecessary cost increases and inefficiencies**.[2]

While innovation is an important parameter of upstream competition among FMCG manufacturers, as widely recognised in industry reports,[3] access fees reduce the funds available to manufacturers for investment in marketing and innovation. As far as SMEs are concerned, European retail alliances increase the power of the leading supermarkets, making it difficult, if not impossible, for smaller retailers to compete on a level playing field.

Agreements with gatekeeper alliances typically include recommended marketing services or promotions. In reality, however, these are **notional services** because they are not binding on alliance member retailers in their bilateral negotiations with manufacturers. The access fees do not include any

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[2] Compass Lexecon, 20 September 2022, Corstjens's Report on the Price Effects of International Retail Alliances – A review. See also AIM, 26 October 2022, Retail data reveals higher consumer prices for products purchased through international retail alliance AgeCore

[3] See, for example, Linney, Innovation: keeping FMCG brands relevant: "*innovation is everything in this [FMCG] industry. It's the key to growth as well as to keeping brands relevant. In fact, brands that rest on their laurels and don't drive for innovation won't last long in this crowded marketplace*". StartUs Insights, Top 10 FMCG Industry Trends & Innovations in 2022: "*to meet consumer demand, more and more FMCG companies offer compostable, recyclable, and reusable packaging. Additionally, cruelty-free, vegan ingredients are on the rise*". Shopmium, NPD: Why FMCG Brands Must Innovate to Grow: "*IGD's ShopperVista research on innovation carried out in January 2019 shows that UK shoppers have a strong appetite for innovation*". RetailDetail, Why do major FMCG manufacturers spend more in innovation: "*major brand manufacturers are feeling the heat from innovative start-ups and want to speed up*".

obligation on the part of the alliances or their members to invest in innovation or to improve the efficiency and sustainability of the supply chain for the benefit of consumers.

The coercive nature of gatekeeper alliances – and, in the worst case, their foreclosing effect when manufacturers refuse to pay access fees – is reinforced by their proliferation. Dealing with each of them has become unavoidable for brand owners because their respective members include most of the largest retailers in Europe. This means that **the more gatekeepers there are, the more frozen and less transparent the EU retail markets become**.

1.3.1.2.2. Consumers' fair share

The benefits of collective bargaining must provide fair value to all parties in the supply chain, cascade down to consumers, and ensure a fair and healthy trading environment for all. Gatekeeper alliances do **not** achieve these goals.

Brand manufacturers now have to pay market access fees to gain access to most EU retail markets, for which they tend to receive **little value in return**, and which reduce their incentives to innovate and introduce new or improved products, while **it is unclear to what extent these fees are passed on to consumers**.

As stated in DG COMP's press release announcing its decision to close its antitrust investigations into retail alliances AgeCore and Coopernic, **member retailers are free to use these fees as they wish**, as long as they contribute to their "*overall pricing strategies allowing them to reduce retail prices to match or undercut competitors' pricing*" and pass on only part of them depending "*notably on the degree of competition existing in the relevant downstream retail markets*".[4]

While it may not be anticompetitive for a retailer to use the fees paid by brand owner A to fund promotions on products of competing brand owner B's products or to develop its own private label products, this is **in direct contradiction to the letter and spirit of the Unfair Trading Practices ("UTP") Directive**, which only applies to suppliers whose EU turnover does not exceed €350 million or where Member States have sought to protect all food suppliers and have not retained the recommended €350 million threshold in their national legislation.

The sharing of benefits received by retailers from their suppliers should be accounted for, transparent and verifiable. Also, fair payment terms should imply a **linearity** in the distribution of benefits, with fees paid by a particular brand manufacturer being used to promote its products on the retailer's shelves.

1.3.1.3. Retailers' dual role

The **parallel rise in inflation and the consumption of low-cost products** (typically lower quality, less sustainable products) **is exacerbated by the dual role of FMCG retailers** as customers and competitors of manufacturers.

Retailers' dual role (reinforced when they are also part of a retail alliance) allows them to influence consumers' purchasing decisions as they wish, since **they have full control over the pricing, assortment, and**

[4] European Commission, 13 July 2023, Antitrust: Commission closes antitrust investigations into AgeCore and Coopernic

presentation of the products offered in their stores. This allows them, for example, to resell branded products at very low prices in order to attract new customers who end up buying other products in their stores, or at very high prices in order to indirectly promote the sale of other products, in particular their own private label products.

But **with great power comes great responsibility**. In particular, the responsibility of FMCG retailers to develop a model for the distribution of the products they offer to consumers that is exemplary, green and sustainable is enormous. If supermarkets, especially the market leaders, continue to focus solely on achieving the lowest possible prices for manufacturers' products, the availability, diversity and sustainability of the products in their stores will be compromised. **Given the diversity of consumer needs and expectations in different countries, retailers should balance their desire for cost savings with a genuine commitment to truly serving these local needs.**

"***Aliquis non debet esse judex in propria causa, quia non potest esse judex et pars***"

In fact, the position of retailers in the supply chain is intrinsically conducive to their engaging in unfair trading practices with their suppliers because ***one cannot be fair when one's own interests are at stake***. Indeed, **retailers are both judge and party** when it comes to product selection, pricing, presentation and beyond: they are free to price and promote (their own) or demote (their suppliers') products on their shelves as they see fit, in line with and as part of their respective commercial strategies. This has a **negative impact on innovation and sustainability** because cheaper private label products tend to be much less innovative and sustainable than branded products, while retailers have a natural incentive to sell more of their own private label products and resell less of their independent suppliers' branded products.

The private label market model for distributors has proliferated over the past decade, both online and offline, with some private label distributors capturing **up to 50% of the market by volume**.[5] As a result, branded products now compete in retail spaces that are fully controlled by distributors developing private label brands. Private label products, which unlike branded products are not subject to gatekeeping retail alliance access fees, have now reached **40% market share in several European countries**, enabling leading retailers to further increase their vertical integration.

In the FMCG sector, retailers have access to commercially sensitive information from innovative brands and are in a position to misuse it for their own benefit. Whether this can have an impact on consumer welfare in terms of consumer choice is debatable. In general, the perception of the relationship between consumer choice and innovation is positive, as innovation creates consumer welfare by bringing a wider, more diverse and innovative range of products to the market. Consequently, **a negative impact on innovation will lead to a negative impact on consumer choice**. The EC's own study "*The Economic Impact of Modern Retail on Choice and innovation in the EU Food Sector*"[6] found a statistically and economically significant, progressive correlation between the growth of private labels and a decline in brand innovation.

[5] Per PLMA/Nielsen, "Private Label Today", private label market shares in Europe went from a mean average of 33.4% in 2012 to 37% in 2022 in a group of 17 EU countries.

[6] European Commission, 1 February 2016, "The economic impact of moder retail on choice and innovation in the EU food sector (Final report)"

Kantar World Panel's research into the Spanish market confirmed the existence of a risk threshold or tipping point above which private label market share in a product category limits innovation. Based on the benchmark analysis of 104 categories over the period 2011-2013, Kantar concluded that **a private label market share above 35% leads to less innovation and growth in the market**.

The EC has focused too much on promoting intra-brand competition, which may have had a negative impact on innovation. § 21 of the 2022 Guidelines on Vertical Restraints recognises that inter-brand competition is more important from a consumer welfare perspective than intra-brand competition. Promoting intra-brand competition may undermine a brand's competitiveness (*e.g.*, its ability to innovate) and thus inter-brand competition. This is particularly the case as brands compete with both retailers and marketplaces selling their own private label brands.

The Guidelines on Vertical Restraints specifically address two buyer-driven practices (category management and upfront access fees), but on the flawed assumption that these practices, designed to exclude smaller independent brands, are only used by leading independent brands and not by retailers. In the light of market developments over the last decade, the European Commission should recognise that **a retailer's dual role gives it a unique competitive position, whether online or offline**.

The dual role of retailers has antitrust implications in terms of the potential for abuse of dominance given the asymmetry of information and the access that these retailers have to prices, capacity/output and other commercially sensitive information in both upstream and downstream retail activities.

The European Commission should take into account that **branded goods manufacturers face fierce inter-brand competition downstream at the retail level from private label goods** in situations where these retailers are in a "***judge and party***" position and can freely determine the conditions under which they will sell branded goods, which may lead to free-riding problems.

1.3.2. "Territorial supply constraints"

Despite the fact that most leading EU retailers are now organised at European level to buy together or to charge high fees for the right to negotiate national supply agreements, **cross-border price differences are not reported to have decreased**, despite retailers' repeated claims that this is the *raison d'être* of European joint purchasing groups.

Looking at cross-border price differentials for identical private label products is quite indicative of the market reality: **retailers adapt consumer prices to each local market**, which is why the price of the same product will vary across countries, regions, cities and even within cities, from one shop to another, regardless of whether the product is branded or private label.

1.3.2.1. Retailers are responsible for setting consumer prices

Indeed, **retailers set the prices on their shelves independently.** Legally, a manufacturer is not allowed to ask them to resell its products at a certain price. As retailers are responsible for setting all prices in their stores, **local price differences for fast moving consumer goods cannot be attributed to manufacturers.**

Retailers typically negotiate a **single national price from brand manufacturers** and then resell the same branded products at different prices in their stores within the country. In addition, **retailers adapt their private label product ranges and prices locally and sell the same private label product at different prices in different regions and cities**.

With **full control over the pricing and placement of products on their shelves**, and a **comfortable dual role vis-à-vis manufacturers**, acting both as customers reselling their branded products and as competitors selling competing private label products, **retail chains are free to price and place all these products strategically to increase their profitability**. As a result, **even stores within the same chain can have very different prices and assortments**, depending on the retailer's strategy.[7] In addition, prices can vary not only from store to store, but also from week to week. Some retailers even adjust their prices according to the day of the week or to the prices of nearby competitors.[8]

In short, **retailers are fully responsible for price differences between their stores in the same country**, not manufacturers. The role of retailers in setting consumer prices is all the more important as European retail markets tend to be concentrated, with many countries dominated by a few strong players.

1.3.2.2. Many factors influence pricing in national markets at wholesale and retail level

Markets are local and vary between countries due to **historical, cultural and socio-economic differences**: to compete effectively, both manufacturers and retailers need to **adapt their offerings and prices to these differences** in each geographic market, tailoring their respective products to consumers' **preferences, expectations and habits**, as well as to **seasons, traditions and events**. The popularity of a brand in turn influences consumer **choice, loyalty and preferences**, so that the prices at which FMCG products are sold in each market are influenced by the relative **strength and reputation** of the brand.

Other differentiating factors outside the control of manufacturers and retailers can affect their prices, including **logistics, labour and transport costs, tax and VAT regimes, and sector-specific national regulations**, for example on labelling, packaging, recycling or composition, which vary greatly from a European country to another. The increasing number of different national environmental regulations, particularly on packaging, plays an important role in that regard.

Finally, other important factors such as **commercial agreements on promotions and distribution networks can have a significant impact on price differences between EU countries**. As retailers provide various in-store promotional and marketing services funded almost entirely by manufacturers, these can have an impact on the availability and cost of goods, and therefore on retailers' pricing strategies and consumer prices in local markets. In addition, retail groups impose real constraints on their suppliers, such as exclusivity in terms of product retail listing in all markets, which has a restrictive effect on independent stores.

Based on their case practice, **competition authorities recognise that markets are local**, as do the European and national central banks. It is also worth noting that promotional arrangements vary widely from

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[7] See AIM, Insights on Assortments and Price Differences in Europe.

[8] For insights into the dispersion of grocery prices, see Berardi, Sevestre & Thébault, June 2017, The Determinants of Consumer Price Dispersion: Evidence from French Supermarkets, Banque de France Working Paper #632

country to country, and that the diversity of the legal frameworks in the different countries is such that **local negotiations cannot be replicated across Europe**.

In fact, price differentiation is a ubiquitous phenomenon that occurs in countless markets, including highly competitive ones, and cross-border price differentials reflect the efficient functioning of these markets, in line with their inevitable and sometimes substantial differences. Sellers have the **right to respond to the different economic conditions in different countries by charging different prices in those countries**, taking into account factors relating to demand, supply and the local regulatory environment, in addition, of course, to variations in costs. As many of these factors vary considerably from one country to another, it is natural that price levels will vary accordingly.

1.3.2.3. Double standards and the pitfalls of focusing only on low prices

Retailers want to purchase products at a single (lowest possible) price, but they do not want to resell them at a single price. All market players naturally adapt to market conditions, and yet retailers accuse manufacturers of illegitimately adjusting their prices in each country while they themselves do just the same with consumer prices.

In fact, **retailers typically apply different retail prices wherever they operate**, including for their own private label products. Price differences for private label products across countries, regions, cities, and stores within a city show that **retailers use pricing, assortment, and differentiation strategies to adapt to the competitive environment** (such as the number, positioning, formats, and relative strength of players),[9] hence the price differences for private label products between countries, regions, cities, and stores within a city.[10]

Although retailers typically tailor consumer prices to local preferences and market conditions, their insistence on a **one-price-fits-all model** when negotiating with manufacturers is **misguided and detrimental to consumers**. By focusing solely on achieving the lowest possible prices for manufacturers' products, retailers affect the **availability and diversity of products** in their stores. Retailers who adopt an aggressive negotiating stance and **remove manufacturers' products from their shelves** or force them to **rationalise their portfolios** ultimately leave consumers to bear the brunt of their actions. Given the **diversity of consumer needs and expectations** in different geographic markets, retailers should balance their desire for cost savings with a genuine commitment to truly **serving these local needs**.

1.3.2.4. The Study on TSCs was inconclusive at best

[9] See AIM, Insights on Assortments and Price Differences in Europe.

[10] For examples of retailers setting different retail prices for the same product in two neighbouring countries in order to respond to the local economic environment, see De Tijd, 13 February 2022, Hoe Albert Heijn het potje Nutella uit het Colruyt-rek nam, Le Soir, 5 September 2022, Supermarchés: l'infographie qui montre le grand écart des prix entre la Belgique et la France, and RTL Nieuws, 9 September 2023, Dit is waarom bloemkool en shampoo bij Jumbo en Albert Heijn in België goedkoper zijn

The study on TSCs commissioned by DG GROW and carried out by Valdani Vicari & Associati and London Economics, published on 19 November 2020 ("the Study"),[11] was in fact inconclusive, finding "***no hard or documentary evidence***" of such behaviour and acknowledging both that enforcement action already addresses any problems and that "***retailers engage in some of the related practices that they accuse manufacturers of engaging in***" by applying the same differentiation rules to their own private label brands, which do not carry multi-lingual labels and have different packaging at different prices depending on the market, even though they are perfectly identical because they are manufactured in the same factory.

Published on 9 December 2022,[12] NERA's critical review of the Study concluded the following about it:

- The Study "*suffers from fundamental flaws in its information basis (starting with the definition of TSCs) and in its analysis of the prevalence and the impact of TSCs on consumers*".
- The Study excludes from its analysis "*manufacturers' benign commercial practices that may have a valid justification as a response to various factors falling outside their control, such as heterogeneous consumer preferences, manufacturing and trade costs, and national labelling, packaging and recycling regulations.*"
- The Study relies on evidence that "*is not representative of the EU retail sector as a whole and focuses instead – by design or non-response – on countries, product categories and customers that overstate exposure to alleged TSCs.*"
- "*The Study's analysis of the impact of TSCs on prices and consumer expenditures is equally undermined by* ***data problems, as well as conceptual and methodological flaws****.*"
- Even the Study's analysis of "*the extent to which wholesale prices are passed on into retail prices (…) is unsatisfactory, as it is marred by an* ***array of serious data and methodological problems****.*"
- "*The Study's estimates of the impact of TSCs on retail prices are* ***arbitrary*** *and cannot be used to derive the impact of TSCs on consumer expenditures.*"
- **The claim that €14 billion would be saved for consumers "*as a result of eliminating TSCs*" in 16 countries has no realistic basis and is not supported by any evidence.** The estimate of €14.1bn "*must be dismissed in any event because to derive it: (i) the Study erroneously assumes that, after the removal of TSCs, wholesale prices would collapse to the level of the Member State exhibiting the lowest wholesale price; (ii) it then takes this erroneous estimate of counterfactual wholesale prices and multiplies it with an erroneously estimated pass-on elasticity, leading to an erroneous estimate of counterfactual retail prices; and (iii) it multiplies the erroneous estimate of counterfactual retail prices by total consumer spending.*" This estimate is subject to a high degree of uncertainty due to its **very wide 90% confidence interval**, which does not allow the TSC study to exclude that consumer savings could be as low as 3.5% (€0.5 billion) of the estimate.
- "*The Study's main result is therefore based entirely on a* ***combination of unrealistic assumptions and erroneous estimations.***[13] *Such an approach necessarily yields an incorrect result. For all these reasons, we conclude that the Study suffers from fundamental flaws in its conceptual design, information basis and empirical methodology to analyse the prevalence and impact of alleged TSCs.*"
- Critically, there is no evidence that a hypothetical lower wholesale price would translate into lower consumer prices, which the authors of the TSC study acknowledged by stating that there is no "*certainty*

[11] Valdani Vicari & Associati and London Economics, 19 November 2020, Study on territorial supply constraints in the EU retail sector

[12] NERA, 9 December 2022, "Study on territorial supply constraints in the EU retail sector: A critical review"

[13] For example, the TSC Study warns against using the results of the country-level analysis, stating that "*the findings cannot be interpreted as necessarily implying a causal relationship*", but nevertheless goes on to use and interpret these results in a causal manner, thereby ignoring its own warning. In fact, the said country-level analysis cannot correctly estimate the causal effect on retail prices because it wrongly assumes that changes in prices set by retailers in several countries in the European Union can be explained by looking at changes in wholesale prices paid by at most five retailers.

whether the possible benefit of a lower consumer price would indeed materialise".[14] Despite this conclusion, **the authors recklessly published a misleading and dubious figure, which has since been used indiscriminately in the public domain**.[15]

- "*The Study effectively assumes that, after the removal of TSCs, wholesale prices would collapse to the level of the Member State exhibiting the lowest wholesale prices. However, this assumption is in sharp contrast with both economic theory and common sense: **if a low-price Member State started to experience an increase in demand due to customers redirecting their purchases, prices in that Member State would increase**. This assumption is also bound to grossly exaggerate any consumer savings by overstating the savings of consumers located in high-price Member States and ignoring the higher expenditures of consumers located in low-price Member States.*"

Finally, the price data used in the study is too limited in scope, inconsistent, and imprecise to be useful in establishing a clear and meaningful causal relationship, and **manufacturers could not verify the accuracy of the data provided by retailers and wholesalers**. In addition, only 34 participating retailers reported being affected by TSCs, which is a small fraction of the approximately 5 million retailers and wholesalers in Europe.

1.3.2.5. TSCs are subject to EU competition rules

TSCs are effectively subject to the EU competition rules, which provide **a solid and coherent framework for the assessment of any unlawful territorial restrictions**, whether imposed by a supplier or by a retailer. EU competition law recognises that even restrictions on parallel trade resulting from concerted practices or abusive exclusionary conduct may be compensated or justified under certain circumstances (Art 4 VBER and §§ 202-244 VGL), as it is indeed important to balance the benefits and disadvantages of parallel trade.[16]

Manufacturers have the right, and often the obligation, to adapt their products, including their packaging and labelling, to the specific conditions in different Member States. Recently, the European Commission's ("EC's") revised Guidelines on Vertical Restraints clarified that the differentiating features of manufacturers' products, such as different labels or languages, "***are not in themselves restrictions of competition***."[17] The EC recognised that there are various reasons that may justify "*measures that allow a manufacturer to verify the destination of the supplied goods*."[18] In addition, manufacturers are legally obliged to comply with Member-State-specific regulations on labelling, packaging, recycling, sales conditions, and other issues that mandate different product characteristics and may affect cross-border trade.[19] These obligations apply equally to all manufacturers, from the largest to the smallest.

[14] Valdani Vicari & Associati and London Economics, 19 November 2020, Study on territorial supply constraints in the EU retail sector, p. 104.

[15] For example, EuroCommerce abusively states on its new website page that "*studies estimate that this is costing consumers €14 billion*", whereas only the Study produced this estimate.

[16] See Laurent Cenatiempo, Parallel imports (parallel trade), Global Dictionary of Competition Law, Concurrences, Art. N° 12166.

[17] European Commission, 10 May 2022 Guidelines on vertical restraints, §205.

[18] Ibid.

[19] *See also* NERA Economic Consulting, Study on territorial supply constraints in the EU retail sector: A critical review, 9 December 2022, pp. 11-18.

Manufacturers are free to decide what they sell and to whom they sell in a given country. The freedom to conduct one's business, including the freedom to choose one's trading partners, and the freedom to dispose of one's property are recognised in the EU Charter of Fundamental Rights.[20] Interference with these rights under the competition law rules is the exception, not the rule, and can only be considered if a number of proportionate and carefully justified conditions are met.[21] Accordingly, sellers have the right to decide which products to sell in a given country and which companies to trade with in that country.

Manufacturers are free to determine the quantities that they sell. The Court of Justice has recognised that even dominant companies can take "*reasonable and proportionate*" measures to protect their commercial interests, such as refusing to fill orders that are "*out of the ordinary in terms of quantity*", including unusual orders in a Member State.[22] In determining whether an order is "*out of the ordinary*," the quantities previously sold by the same companies to meet local market needs should be taken into account.[23]

Manufacturers are free to organise their logistics operations as efficiently as possible and in line with their sustainability requirements and ambitions. Manufacturers should never be obliged to deliver to a country far away from their production sites or to any country, for that matter, as long as the customer remains free to collect the goods in that country.

While many of these practices depend on different regulatory and market factors in different EU Member States and cannot be attributed to manufacturers, other practices fall within the fundamental right of manufacturers to conduct their business and adapt to local market conditions. **Manufacturers are not obliged to accommodate retailers and wholesalers in "*sourcing where they wish in the Single Market*"**, particularly if this means complying with orders that are unusual, not in line with local demand or regulations, or that disproportionately and unjustifiably interfere with the manufacturers' fundamental rights.

1.3.2.6. TSCs in DG GROW's SWD on the EU's retail ecosystem

DG GROW's recent SWD on the EU's retail ecosystem referred to TSCs as "*unjustified obstacles put in place by suppliers to block or limit retailers' access to products and services in other Member States*" in the form of "*direct restrictions (e.g. refusal to supply, destination obligations or quantitative limitations) and indirect restrictions (e.g. differentiation of products in terms of content/composition or packaging) in order to impede cross-border trade.*"

In reality, as noted above, a **holistic approach** is required to explain why prices can vary widely, including due to the constraints imposed by retailer groups on suppliers, such as exclusivity in terms of product retail listing across markets and the exclusive/restrictive effect on independent stores.

Brand owners do ***not*** deliberately restrict the way in which they distribute their products, either directly or indirectly. Instead, **they simply exercise their freedom to compete, contract and sell according**

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[20] Charter Of Fundamental Rights of The European Union, 2000/C 364/01, Articles 16 and 17.

[21] *See* Advocate General Jacobs's Opinion in Case C-7/97, *Oscar Bronner*, EU:C:1998:264, 28 May 1998, §56: "*it is apparent that the right to choose one's trading partners and freely to dispose of one's property are generally recognised principles in the laws of the Member States, in some cases with constitutional status. Incursions on those rights require careful justification.*"

[22] Joined Cases C-468/06 to C-478/06, *Sot. Lélos kai Sia*, EU:C:2008:504, 16 September 2008, §§50, 70 and 76.

[23] Joined Cases C-468/06 to C-478/06, *Sot. Lélos kai Sia*, EU:C:2008:504, 16 September 2008, §76.

to their respective business strategies, market developments, consumer needs and economic and environmental imperatives, while being **constrained by the myriad of factors** discussed above, some of which may play a decisive role.

The current framework for balancing the pros and cons of parallel trade is well established and supported by more than 50 years of European competition jurisprudence since the landmark Consten and Grundig judgment in 1966.[24] As long as it is done within the bounds of competition law, manufacturers have the right to price their branded products as they see fit and to require territorial exclusivities in order to operate an appropriate distribution network for those products.

The production of branded products is designed to ensure that they reach the markets where a suitable level of demand is expected in the most efficient way. National and pan-European investments, planning and logistics are geared towards efficiency and best value, while taking into account environmental concerns.

Logistics and transport costs can be economically significant and hinder cross-border trade, depending on their value relative to the value of the products concerned. Logistics networks tend to be organised nationally to ensure timely delivery. **Sourcing products from the other side of Europe would be detrimental to achieving high sustainability standards**.

Also, attempting to achieve the "one price for Europe" paradigm before harmonising tax rates and average purchasing power would lead to **delocalisation of certain brand manufacturing facilities** and have a **significant impact on the local farmers** on whom current production systems depend.

The likely negative effects of imposing new rules outside existing competition law principles under the guise of "addressing TSCs" go beyond the immediate concerns. These effects include **potential job losses that would affect both suppliers and retailers**, potentially leading to **economic instability**, **reduced competitiveness of small and medium-sized enterprises** (SMEs), which play a vital role in the European market, **disrupted price dynamics**, and an **undermined race to sustainability** for many companies.

While these potential impacts have not been fully assessed, there is **no clear evidence or indication to suggest that policy intervention in the pricing of FMCG products may ultimately lead to a positive final outcome for consumers**. Careful analysis and consideration of specific cases and contexts, as well as a thorough impact assessment, would be required to draw meaningful conclusions about the likely impact of policy intervention in the pricing and distribution of FMCG products before any such regulatory changes are considered.

1.3.3. Unfair trading practices

The EU retail system is characterised by an **over-concentration of retailers and international retail groups that maintain tight control not only over their suppliers but also over their network of stores**, preventing suppliers from having direct access to stores (reduced mileage distribution) or stores from freely sourcing from suppliers, whether at national or international level. EU retailers are much more confrontational and less collaborative than in Asia and the Americas, for example. This is precisely why the

[24] Joined Cases 56 and 58/64, Consten and Grundig v Commission, [1966] ECR 299, ECLI:EU:C:1966:41

Unfair Trading Practices Directive was introduced. [25]

The European legislation targeting unfair B2B practices is a **patchwork of sometimes similar, sometimes divergent rules**. Over the last five years, several important European legislative instruments have been adopted to combat unfair trading practices between businesses in the agri-food chain and the digital economy. While they are being implemented in the different EU countries, it would be appropriate to reflect on the next steps to ensure **greater coherence and convergence** between these legal instruments.

The European Commission should consider **extending their scope of application to all players and all retail products** and **codifying the rules that they lay down in a single European Code of Unfair Business-to-Business Trading Practices**. The European legislator should also promote greater fairness in commercial relations between players in the retail sector.

European legislation on unfair commercial practices between businesses is currently based on one directive and two regulations.

1.3.3.1. Directive 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain

The Directive on unfair trading practices in business-to-business relationships in the agricultural and food supply chain adopted by the European Parliament and the Council in April 2019, aims to strengthen the bargaining power of farmers and food producers vis-à-vis buyers, including large retail chains. It prohibits **sixteen trading practices** at the European level, including late payments, unilateral contractual changes and commercial retaliation.

Some of these practices are prohibited in all circumstances ("***black list***"), while others are permitted if they are the subject of a clear and unambiguous agreement between the seller and the buyer ("***grey list***"). The list of beneficiaries of this protection is limited only to suppliers and manufacturers of food and processed food whose annual turnover in the EU does not exceed €350 million, **leaving a large part of them exposed to such practices**.

To avoid the risk of commercial retaliation, the UTP Directive allows trade associations representing farmers, food suppliers and food manufacturers to take legal action on behalf of their members to obtain the cessation of any breach of these rules by the companies with which they have established commercial relations.

The UTP Directive has been applicable in the national legislation of the EU Member States since November 2021, with national authorities responsible for ensuring compliance . **Eleven EU Member States[26] have decided to extend the scope of the Directive's provisions in their national law to all food producers**, and two Member States[27] have done so to all non-food FMCGs, recognising that unfair trading practices affect all producers of consumer goods, large and small.

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[25] For recent documentaries on unfair trading practices in the mainstream media, see in particular: France TV - Complément d'enquête, 1 September 2022, Inflation : les coups bas des hypers; Arte TV, 27 September 2022, Hypermarchés : la chute de l'empire; and France TV - Complément d'enquête, 14 September 2023, Prix cassés et coups de pression : révélations sur le système Leclerc

[26] Croatia, Estonia, Finland, France, Hungary, Italy, Latvia, Spain, Portugal, Slovakia and Sweden

[27] France and Portugal

Unlike the two regulations described below, the UTP Directive applies to the commercial activities of actors in the agri-food chain, whether they take place online or offline.

1.3.3.2. Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services

The Regulation on relations between platforms and businesses ("P2B Regulation"), adopted in June 2019, two months after the adoption of the UTP Directive, aims to promote fairness and transparency in the commercial practices of digital platforms towards their professional users and to combat certain abusive practices of the former vis-à-vis the latter.

The P2B Regulation applies to all digital platforms operating in the EU, without exception. It prohibits certain practices that are considered unfair, such as the **sudden and unexplained suspension or closure of an account** or, like the UTP Directive, **unilateral contractual modifications**. Digital platforms that act as both marketplaces and online retailers are also required to disclose the advantages that they give to their own products over those of third-party sellers. Like the UTP Directive, the P2B Regulation empowers trade associations to take legal action on behalf of their members against digital platforms that do not comply with their obligations.

1.3.3.3. Regulation 2022/1925 on contestable and fair markets in the digital sector

The Digital Markets Regulation ("DMA") of September 2022 aims to ensure the openness of digital markets, by regulating or prohibiting certain practices of the largest digital platforms, which have become essential for companies wishing to offer goods for sale or online services. Indeed, these platforms are likely to create bottlenecks in the digital economy; they are referred to in the text as "gatekeepers" that require special regulatory treatment and particular obligations.

Unlike the P2B regulation, the DMA regulation only applies to essential services provided by large digital platforms that meet several cumulative quantitative criteria (linked to their annual turnover or market capitalisation and the number of European users) or qualitative criteria (such as belonging to a conglomerate). These criteria allow the European Commission to designate them as "gatekeepers" from this year onwards and to subject them to the prohibitions and obligations laid down in the Regulation.

The DMA Regulation distinguishes between commercial practices that are prohibited with immediate effect ("black list") and those that can be specified by the European Commission ("grey list"). It prohibits a "digital gatekeeper" from favouring its own products or services to the detriment of those offered for sale or made available by third parties through its essential digital services. The DMA regulation thus prohibits a practice that is *a priori* unfair under internal market law, without the need to prove an abuse of a dominant position under competition law, as was previously the case.

1.3.3.4. Enforcing, expanding and codifying EU rules on unfair trading practices

The UTP Directive, the P2B Regulation and the DMA Regulation form a set of rules against unfair commercial practices between businesses that is so fragmented and piecemeal that **it is difficult for FMCG manufacturers to use it in their commercial relations with retail brands** and large digital platforms: these rules are complex, sometimes overlapping, sometimes diverging. It would therefore be helpful for the European value chain and consumers to launch a debate during the next European legislative term (2024-2029) with a view to simplifying these rules and ensuring greater consistency.

One of the first desirable measures would be to extend to all FMCG manufacturers the protection against unfair trading practices by large retail brands, which the UTP Directive currently offers only to suppliers whose annual EU turnover does not exceed €350 million. Eleven EU countries have already taken this step in their national legislation, and it would be welcome if the others followed suit in order to create more uniform rules in the Single Market. It would also be appropriate to consider the interest of extending this protection to all FMCG manufacturers, as there is **no good justification for restricting these rules to the agri-food sector**, since the same type of commercial practices exist in non-food categories.

The European Commission would also be well advised to consider whether it would be appropriate to include in the UTP Directive, when it is revised, **the prohibition on a reseller favouring its own products or services to the detriment of those of its competitors**, which is included in the DMA Regulation. Indeed, private label products are often better displayed on the shelves of large retailers than branded products.

The scope of the DMA Regulation should also be extended to all digital platforms, as even if they do not meet the criteria to be designated as “digital gatekeepers”, their commercial users are subject to the same unfair trading practices. In general, **the size of a business or the category of products or services it offers should not be relevant in determining whether it should be subject to the rules on unfair commercial practices**: only the nature of its activities should be relevant.

Finally, the codification of these rules in a single European Code of unfair business-to-business trading practices is an area to be explored in order to **ensure greater coherence and convergence** between these rules, in the light of recent experiments with codification at European level, notably in the field of electronic communications.[28]

These codification efforts could lead to a comprehensive UTP regulation applicable to all market players in all sectors, ending the inconsistent treatment of online and offline self-preferencing by preventing self-preferencing practices by offline gatekeepers as well. Where a major retailer offers its own private label products that compete with branded products on the same shelves, that retailer should be treated as an **offline gatekeeper playing a hybrid role that deserves a regulatory framework similar to that established by the DMA for digital gatekeepers**.

Such codification would bring more consistency and provide an opportunity to develop specific measures and to extend the list of black and grey practices currently contained in the UTP Directive. For example, **tying services to the purchase of goods should become a grey, if not black, practice**. It would also be important to **make it compulsory for retailers to indicate which entity funds all active promotions in their shops and supermarkets** to avoid the widespread misconception that they fund all such promotions, when in fact brand owners fund 90% of them.

Beyond the possibility of legislative action, **strong enforcement of existing national UTP laws** (such as in France, Italy and Croatia) is in order. More national authorities should investigate the details of retailers’ contracts and impose higher fines to truly deter and prohibit unfair trading practices against the other actors in the retail supply chain, be they farmers or manufacturers.

1.3.3.5. Extra-territoriality of unfair trading practices legislation

A very important aspect of sound enforcement is the necessary extraterritorial effect that UTP laws should have in order to prevent circumvention – for example, by the mere fact of operating from another Member State or even outside the European Union, as is currently the case for a number of retail alliances whose members operate mainly in the EU.

The French legal framework is the most advanced in terms of preventing and sanctioning unfair trading practices and was recently updated by the ***Loi Descrozaille*** to explicitly clarify that French UTP laws have

[28] See the EU Electronic Communications Code, which codified four directives relating to electronic communications networks and services.

extraterritorial effect, as recommended in the preamble of the UTP Directive itself and i**n line with the extraterritoriality of European and national competition laws**.

Ensuring the extraterritoriality of UTP laws is all the more necessary as retailers increasingly join international retail alliances and source at a European level. Ideally, **all Member States should have a Loi Descrozaille in place to ensure that their national measures implementing the UTP Directive are properly enforced** and are not perceived as being open to circumvention simply because of geographical considerations. Indeed, **Article 1 of the *Loi Descrozaille* is entirely consistent with Recital 12 of the UTP Directive**:

> "*Suppliers in the Union should be protected not only against unfair trading practices by buyers that are established in the same Member State as the supplier or in a different Member State than the supplier, but also against unfair trading practices by buyers established outside the Union. Such protection would avoid possible unintended consequences, such as choosing the place of establishment on the basis of applicable rules.*"

This Article concerns the contractual relations between suppliers and distributors, not the characteristics of the products traded, applies to all operators operating on French territory, and affects the marketing of domestic products and products from other Member States in the same way. Its purpose and effect are not to restrict the ability of economic operators to establish themselves on the territory of another Member State, but merely to **regulate contractual relations between suppliers and distributors having an impact on the French market and ultimately on the French consumer**, which may result from activities carried out in France or abroad.

This new legal provision cannot be reasonably considered as restricting the freedom to provide services within the Union since its only purpose is to **ensure the applicability of the French UTP rules to commercial relations between suppliers and distributors affecting the marketing of products in France**.

Not only is it perfectly reasonable to prohibit unfair commercial practices across the board and wherever they originate, as this approach is fully justified in itself, but it is also justified by overriding reasons relating to the French public interest, as **the measure is appropriate to ensure the attainment of the legitimate objective pursued and does not go beyond what is necessary to attain that objective**, while no other less restrictive measure would allow it to be attained as effectively.

1.3.3.6. Trust and fairness between the actors in the retail ecosystem

EU case law has long recognised that **the protection of fairness in commercial transactions and the fight against unfair competition are among the grounds that may justify restrictions on the freedom to provide services**, provided that they are necessary and proportionate.[29]

It is particularly important that SMEs are protected from unfair trading practices by retailers, in particular late payments. Public authorities should investigate retailer behaviour to address SMEs' fear of retaliation (such as de-listing (removing) the product from the shelves), which is why they are so reluctant to

[29] See judgments of 2 March 1982 in Case C-6/81, Industrie Diensten Groep (§7), of 12 October 2004 in Case C-60/03, Wolff & Müller (§41), and of 19 December 2012 in Case C-577/10, Commission v Belgium (§45).

complain to their retail customers. **Most SMEs are economically dependent on their retail customers.** A supplier represents less than 1% of a retailer's business, while on average a retailer represents at least 20% of a supplier's business, but in the case of some SMEs, this is much, much more. SMEs have fewer resources to expand their customer base and find alternative channels (shelves) to sell their products.

Trust and fairness between the actors in the retail ecosystem need to be improved. All actors need to take responsibility for their behaviour and focus on a long-term approach, managing change collaboratively so that all can be resilient. The retail ecosystem is interdependent on many actors: **the supply "chain" needs all actors to "link up" in a more productive, collaborative way** that provides resilience for both EU citizens and the supply chain, as many EU citizens work in this supply chain.

The promotion and implementation of the European Unfair Trading Practices Directive is crucial to ensure such resilience. It is essential that national authorities cooperate on cross-border national cases of abuse by international retailers, which the JRC survey identified as the **main actors of unfair trading practices in the food supply chain**.

Implementing and extending the protection afforded by the Unfair Trading Practices Directive to all market players would bring greater fairness to supplier-distributor relationships, which is fundamental to strengthening a resilient and sustainable retail ecosystem.

2. A digitally empowered retail ecosystem

In terms of existing digitalisation solutions, **automation of manufacturing processes is already established** and **AI will play a crucial role** in the future. It will be critical that AI is regulated through a global lens, rather than a national or regional approach, to ensure a coherent and comprehensive approach.

As part of the Retail2040 initiative, several key reports, both from academia and governments, were identified by stakeholders as critical reference points for the future ecosystem. In particular, the French government has produced a critical report on the "greenness" of digital.

Section 2.1.2 of this report points out that e-commerce contributes to the growth of the country's gas emissions. Produced as part of the Retail2040 initiative, this French scientific report focuses on the logistical aspects of e-commerce, transport and warehousing systems. In terms of delivery, the report points out that **e-commerce delivery transport is less efficient than logistics to physical stores** for a number of reasons, including the trend to reduce delivery times. This leads to less efficient truck loading, more parcel delivery (more frequent single items vs combined basket and delivery). The lower efficiency and sustainability of e-commerce is also explained by **higher rates of consumer product returns for online purchases**. For their part, manufacturers have consistently called for an approach based on scientific data. In 2021, the European Commission has promised a report that will objectively assess the risks and opportunities of the digital transition in the light of sustainability/green emissions targets.

3. A green retail ecosystem

A sustainable and competitive retail ecosystem is based on **sustainable production, distribution and consumption**, which requires collaboration between all actors in the ecosystem. However, the EU FMCG retail market is more dysfunctional than in other regions of the world. If EU-based retailers suddenly stop ordering products, their suppliers have to reorganise transport and storage accordingly, resulting in additional emissions, as **sustainable transport is not yet a reality**.

Not only do they need to reorganise transport and storage, but in some cases, due to the existing fragmentation of the labelling requirements across EU Member States, they may also need to adapt and/or redesign their packaging artwork (which takes time) to ensure that the product can be marketed in other countries.

Suppliers support and invest in a sustainable and resilient production system. In a market economy such as the EU, demand drives supply. By focusing on product price rather than product value, retailers influence consumers to constantly focus on price rather than the value of sustainability. In a highly concentrated retail market, it is easier for them to compete on price than on value. The reality is that sustainability has a cost. Investments can only be made if sufficient financial returns are ensured. In 2020, **organic products accounted for €52 billion of retail sales in Europe**,[30] just **3.5% of the €1.46 trillion in food and drink retail sales that year**.[31] This is quite a long way from ensuring a sustainable and competitive agri-food system in Europe. Convincing consumers of the value of sustainable products over cheaper products is an absolute necessity.

It is imperative for the European Commission to **focus on building demand for sustainably produced consumer goods**, which in turn will drive greater business focus on sustainable production, as return on investment is assured. **ROI is necessary to sustain any business in the long-term**. All stakeholders need to **focus on value, not just price**, as a sustainable product is currently more expensive to produce and therefore more expensive to sell. **Without a long-term approach to the value of sustainable competitiveness, the retail ecosystem will not be resilient**.

In addition to focusing on sustainably produced products, it is important to ensure that brands can communicate their efforts to meet their sustainability commitments by **providing relevant and trustworthy information at the point of purchase**.

Shorter distribution channels should be encouraged. For example, the practice of retail groups of restricting direct access of stores to suppliers is a barrier as it makes it harder for suppliers to access a market.

The recent series of crises that have hit the FMCG industry – Covid19, Brexit, the war in Ukraine, global climate change causing floods as well as droughts that affect ingredients such as raw materials – have **created massive challenges that have hampered suppliers' ability to source what is needed to sustain production** (components, raw materials, packaging, transport, labour, energy...). Almost 80% of European FMCG companies have been forced to reduce or stop production due to a lack of components. Production facilities have also been significantly affected by the need to adapt to integrate the safety measures required during the health crisis. Finding transport solutions and the impact on stocking capacity were **real-time stress tests for the supply chain**.

Manufacturing is energy intensive. Not only is it challenged by shortages or energy cost inflation, but it is also planning and investing in new sustainable energy. This requires **long-term planning and commitment**. The constant need to adapt business processes is in itself a **financial stress** for the industry, as it requires more time and resources in a system in Europe that is already tense between suppliers and retailers.

Fairer behaviour would improve relationships within the supply chain and lead to a more resilient outcome for SMEs, facilitating their ability to embrace the green and digital transition and to operate in a

[30] 15 February 2022, FIBL, Exceptional growth of the European organic market 2020 – Organic market reaches 52 billion euros and organic farmland 17 million hectares in 2020

[31] November 2022, Eurostat, Key figures on the European food chain - 2022 edition

secure commercial environment where products are not abruptly removed from shelves without regard to the impact on their business. In order to build a sustainable and competitive European retail supply chain, **collaboration between stakeholders in the retail supply chain is needed**. Retailers should avoid putting undue pressure on other actors. There are enough disruptions in the supply chain, which continue to accumulate as a result of so many crises in such a short period of time.

A sustainable retail system relies on **greater cooperation to manage the transformation** needed to maintain a competitive ecosystem in Europe. Working synergies must be found between all players in the retail ecosystem. The experience of the American and Asian markets is very different and much more positive for suppliers, as a **different mindset** prevails, with everyone working in a much more cooperative manner to drive sustainable and competitive retail systems and most importantly, **value for consumers**.

In particular, **the EU could learn a lot from the US market, where supply chain relationships are much more collaborative**. As a concrete example, written contracts between suppliers and retailers are commonplace in the US, whereas **in Europe most retailers refuse to confirm the terms of a supply agreement in writing**. This is confirmed by the results of AIM's 2023 survey of the FMCG industry, which found that no less than 27% of respondents had been confronted with a refusal to sign an agreement.[32]

Increased collaboration and partnerships allow companies to leverage each other's work, share resources, combine and integrate resources, and transform existing systems much more efficiently. **Substantive collaboration to synergise expertise adds significant value**. As the authors of a study on the impact of governance on sustainable performance put it in other words: "*Collaboration enhances sustainable benefits by creating legitimacy of sustainable technologies, reducing waste and improving environmental and social performance of firms*".[33]

As part of DG GROW's Retail2040 stakeholder consultation on the retail ecosystem, a survey of stakeholders found that the most important measure to make the EU business environment more attractive and favourable to companies was "**promoting a level playing field and fair competition between all players in the ecosystem**". "Stimulating investment" came second and "harmonising relevant EU rules" third. This focus would strengthen the EU's resilience and strategic autonomy.

Producers and manufacturers should be supported in their efforts to promote sustainability by **investing in processes that can improve the sustainability and competitiveness of the retail ecosystem**, rather than wasting time and resources dealing with unfair trading practices imposed on them. Beyond fairness, **investment is needed to create the appropriate market and regulatory conditions for FMCG businesses to become more sustainable and more competitive** and to incentivise all players in the retail ecosystem to move towards a more sustainable set-up.

The following investments should be prioritised:

- Investment in **sustainable energy** through various means (solar panels, wind, etc...).

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[32] AIM, 2023 Survey of Europe's Consumer Goods Industry (to be published in October 2023).

[33] Niesten, Eva & Jolink, Albert & Jabbour, Ana & Chappin, Maryse & Lozano, Rodrigo, December 2016, Sustainable collaboration: The impact of governance and institutions on sustainable performance, Journal of Cleaner Production. 155. 10.1016/j.jclepro.2016.12.085. See also: The Partnering Initiative, July 2018, Maximising the impact of partnerships for the SDGs – A practical guide to partnership value creation; Harvard Business Review, April 2014, The Collaboration Imperative; The SustainAbility Institute by ERM, December 2020, Leveraging the Power of Collaborations.

- Investment in **efficient recycling and waste management**, including waste collection.
- Regulatory clarity on chemical recycling to accelerate investment in **chemical (food grade) packaging circularity**.
- Investment in **efficient transport and sustainable transport infrastructure**: this is essentially the role of public authorities at all levels (local, national, international).

In order to attract investors, **companies need to show that they can generate returns, *i.e.*, sustainable profits, over the long term**. Enforcement of contracts and retailer payments is therefore a critical factor for the industry. A collaborative system is needed where all players focus on growing successful businesses rather than exploiting the business success of others in the supply chain. The constant confrontational approach of European retailers is not conducive to an investment-friendly environment. As the approach of American or Asian retailers is more respectful and collaborative, the retail supply chains in these regions are more efficient. In the current European trading environment, **it is more advantageous for European manufacturers to consider investing outside Europe than within Europe**.

The private sector has already been actively engaged in the ESG agenda for many years. This can be a competitive advantage for the retail ecosystem, as the expectations of the investment community continue to be shaped by these parameters. In this respect, **national laws setting ESG standards remain inconsistent, and the European Commission should harmonise them**.

Innovation is constant, and investment in R&D and new technologies is led by a wide range of manufacturers and entrepreneurs working with academia and university centres. The challenge of identifying technologies at a particular point in time is that they may still be evolving in their R&D phase, while they are completing market trials, or after they have been tested in just one or a few markets. What is clear is that **for technologies to have an impact at scale, they need to be deployed by companies that operate at scale** within the retail ecosystem. Their scale also gives them the ability to absorb potential financial risks associated with promising technologies and to share their learnings with SMEs, including improvements in processes and operational situations.

There is little recognition of the effort, resources and investment made. Suppliers, particularly branded consumer goods manufacturers, have been leading change through innovation for many years. It is vital that this continues, as this is the transformational approach required for a sustainable and competitive retail ecosystem. Unfortunately, **branded innovations are often copied by private label manufacturers** (who carry the retailer's brand), which also means that these innovations can reach a much broader consumer base. The cost of innovation is therefore borne by branded FMCG manufacturers, whether large European players or small disruptive brands, to drive innovation in Europe.

R&I requires a long-term commitment to investment and planning. Converting production facilities to fully renewable energy sources requires **significant planning, resources and commitment**. Those who pioneer such efforts should be **financially rewarded**. This includes timely and full payment by actors further down the supply chain who do not have the same commitment to innovation. National authorities should **ensure enforcement of appropriate legislation**, including the Unfair Trading Practices Directive, to support such commitments. In particular, the Commission should support the national authorities responsible for implementing the Unfair Trading Practices Directive by providing them with the means to carry out investigations and to ensure compliance with the national laws adopted to implement the Directive.

If retail groups honoured their supplier contracts, they would ensure that their suppliers are paid in full and on time, giving them the resources to better engage in sustainable and digital transformation. When suppliers are paid in full and on time, they don't have to waste time chasing money owed to them, but can instead use it to engage in the business changes required to drive sustainable and resilient production. International suppliers increasingly see Europe as a continent where **the "race to the bottom" mentality and concentration of retail power are becoming critical factors in global investment decisions for production sites, innovation and R&D**, with price often the only criterion cited as important, and unpredictable government intervention in pricing in market economies such as France and Italy. **Manufacturing, innovation and R&D create high quality jobs** – scientists, biochemists, nutritionists, engineers – all of which contribute positively to local economies.

Suppliers are under constant pressure from retailers to provide **more money to support retailers' margins**. This is a financial drain and encourages inefficiencies in the supply chain. In this respect, the European Commission would be well advised to **review and take into account the results of the JRC's annual survey on the food supply chain and unfair trading practices**.

As the lack of funding for start-ups and the declining R&D budgets of established brand owners indicate that it will take time for disruptive innovation to **enable the production of truly sustainable products at truly competitive prices**, public authorities should intervene to **favour innovators over followers and free riders** and **facilitate the emergence of UTP-free, competitive and resilient retail markets in the EU**.

According to current scientific knowledge, more sustainable products cannot be produced and offered at a lower unit price, but this could soon change, especially if the EC encourages and facilitates innovation (through more targeted R&D spending), educates consumers and holds market players accountable, especially **supermarkets, which should stop being price-driven and instead promote better quality, more sustainable products**.

In short, the European Commission should seek to **develop the EU's economic resilience through investments** aimed at avoiding supply chain disruptions in times of crisis and encouraging the emergence of disruptive innovations that can lead to products that are both sustainable and affordable.

4. A retail ecosystem empowered by skills

Labour availability, skills and costs continue to be a challenge. This is exacerbated by the need for **new skills to cope with the changes required to drive sustainability and digitalisation**.

The main challenges of the skills transition relate to **labour shortages and costs at all levels** of the retail ecosystem, from farming to processing to distribution. In their constant search for lower prices and higher margins, leading retail groups, often global leaders, are increasingly relying on temporary workers with fewer social benefits (the Belgian Ministry of Economy has published a report explaining price differences due to different wages and social systems across European countries). Farmers have often complained that retailers charge prices that do not cover their production costs. As a result, there is a **constant drain of workforce from the agricultural sector**, leading to lower crop yields and further price inflation.

Developing skills and reducing administrative burdens are also key to **enabling smaller companies to focus on running sustainable and competitive businesses**. It is essential that SMEs are consulted on changes and can operate in a **simple, clear and predictable regulatory environment**.

The European Commission should ensure that the retail ecosystem is based on fair behaviour by all market players. Numerous studies have been published over the years showing **the lack of attractiveness of the EU retail ecosystem**, which is subject to **constant pressure from retailers on other players, stores or suppliers**. An ecosystem that does not provide work and collaborative ethics does not attract the right skills and jobs. The aggressive behaviour of retailers, which is constantly highlighted in the media, is so endemic to the ecosystem that it is even mentioned in the preamble of the Unfair Trading Practices Directive for the food supply chain.

5. A retail ecosystem empowered by good governance

Transparency of the Commission's regulatory processes is of paramount importance. DG GROW undertook an exercise, the Retail2040 initiative, which involved participants from across the retail supply chain. However, there has been no follow-up and the whole work stream seems to have simply disappeared. Many stakeholders took time to participate and contribute to the DG GROW Retail2040 exercise throughout 2022. It appears that the expertise and recommendations provided not only by stakeholder participants, but also by the independent consultants appointed and paid by the Commission, have not been taken into account. DG GROW did not reflect the results of the survey conducted in the subsequent SWD on the retail ecosystem published in July 2023.

All relevant social partners should be invited to participate in stakeholder initiatives and their results should not be ignored. It is also important to ensure that stakeholder consultations are free from conflicts of interest.

A science-based, data-driven and transparent approach is required from the EU institutions and policy makers. A holistic approach to the issues, understanding the complexity of the business processes across the value chain, should be a priority, and due diligence should be carried out to ensure **proper and evidence-based policy making**. The Commission has not yet produced a thorough, scientifically based, objective research analysis that provides an assessment of the economic and external costs of the green and digital transition.

About AIM

AIM (Association des Industries de Marque) is the European Brands Association, which represents manufacturers of branded consumer goods in Europe on key issues that affect their ability to design, distribute and market their brands.

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

AIM's mission is to create for brands an environment of fair and vigorous competition, fostering innovation and guaranteeing maximum value to consumers now and for generations to come. Building sustainable and trusted brands drives the investment, creativity and innovation needed to meet and exceed consumer expectations.

AIM's corporate members
AB InBev • Arla Foods • Bacardi Limited • Barilla • Beiersdorf • Bel Group • BIC • Chanel • The Coca-Cola Company • Colgate-Palmolive • Coty • Danone • Diageo • Dr. Oetker • Essity • Estée Lauder • Ferrero • Freudenberg/Vileda • FrieslandCampina • General Mills • Groupe Lactalis • Haleon • Heineken • Henkel • JDE • Johnson & Johnson • Kellogg • The Kraft Heinz Company • Lavazza Group • The LEGO Group • Levi Strauss & Co. • Lindt & Sprüngli • L'Oréal • LVMH • Mars Inc. • McCormick • Mondelēz • Nestlé • Nike • Nomad Foods Europe • Orkla • PepsiCo • Perfetti Van Melle • Pernod Ricard • Philips • Procter & Gamble • Puma • Reckitt • Sanofi • Savencia Fromage & Dairy • SC Johnson • Signify • Sofidel • Unilever

AIM's national association members
Austria Markenartikelverband • Belgilux BABM • Czech Republic CSZV • Denmark MLDK • Finland FFDIF • France ILEC • Germany Markenverband • Hungary Márkás Termékeket Gyártók Magyarországi Egyesülete • Ireland Food & Drink Federation • Italy Centromarca • Netherlands FNLI • Norway DLF • Portugal Centromarca • Russia RusBrand • Spain Promarca • Slovakia SZZV • Sweden DLF • Switzerland Promarca • United Kingdom British Brands Group

EU Transparency register ID no.: 1074382679-01