

Your World First

C/M/S/
Law . Tax



European Retail Alliances – consumer benefits or competitive harm?

12th annual symposium on competition amongst retailers and suppliers
Institute of European and Comparative Law, University of Oxford

Dr Michael Bauer
10 June 2016

Overview

- The European Retail Alliances ("ERAs") landscape
- Key characteristics of ERAs
- EU legal environment
- Adverse effects on competition

The ERA landscape



- Swiss corporation: AgeCore Ltd.
- Domicile: Geneva
- Combined turnover: **EUR 140 bn**
- Members: EDEKA, Colruyt Group, Conad, Coop Schweiz, ITM Entreprises and Grupo Eroski



- Dutch corporation: AMS Sourcing B.V. (Ltd.)
- Domicile: Amsterdam
- Combined turnover: **EUR 84 bn**
- Members: Ahold (Delhaize), Dansk Supermarked, Migros, Jerónimo Martins, Morrisons, Booker etc.



- Belgian corporation: Coopernic scrl (Sociétés coopératives à responsabilité limitée)
- Domicile: Brussels, Belgium
- Combined turnover: **EUR 81.5 bn**
- Members: Rewe, E.Leclerc, Coop Italia and Delhaize



- French corporation: Société par actions simplifiée
- Domicile: VILLENEUVE D'ASCQ, France
- Combined turnover: **EUR 70 bn**
- Members: Auchan, Système U, Metro etc.

ICDC Services

- Joint Venture by DIA and Casino Groups
- Start negotiations in 2016



- Swiss corporation: EMD Ltd
- Domicile: Pfäffikon SZ, Switzerland
- Combined turnover: **EUR 117 bn**
- Members: Asda, Superunie, Markant, Euromadi etc.

Key characteristics of ERAs

ERAs concentrate **large part of demand** in areas covered, but target only **50 to 100 top suppliers**

Unstable memberships → frequent switching → information drain → **high transparency**

Agreements foresee payment of bonus for **conditional** and **non-conditional** services

"Gatekeeper" function

Sale of **framework**

- Agreements with ERA require execution at national level

Sale of **access**

- No agreement at national level until agreement with ERA achieved

"Toll collector" function

- Non-conditional part:
Bonus without measurable counterpart
- Conditional part:
Bonus without adequate counterpart

Members usually belong to **national champions**

- Often high market shares in particular at local level
- Usually no overlaps in national retail markets
- If (in exceptional cases) competitors, aggregated market shares are limited

EU legal environment

Stricter rules on national level:

- Concept of dependency
- Unfair trading practices

— Abuse of market power

Prohibition of abuse of **dominance** (Art. 102 TFEU)

Rule of thumb: aggregated market share > **40%**

ERA members do usually not have market shares of more than 40% on the retail and/or purchasing markets

— EU Merger Control

ERA are often not lasting independent corporate structures

+ Anti-competitive coordination

Prohibition of anti-competitive agreements or information exchange (Art. 101 TFEU)

Horizontal effects:

- No horizontal block exemption for joint buying/selling groups
- Horizontal Guidelines define safe harbor for joint buying/selling (15% MS)

Vertical effects:

- Vertical Block Exemption Regulation: creates safe harbor (30% MS)
- Vertical Guidelines address foreclosure effects of slotting allowances

Horizontal effects | joint selling

Restraint of competition (Art. 101 para. 1)

Horizontal Guidelines para. 234f

- Joint selling that involves **price coordination** (joint selling in the narrow sense) is likely to restrict competition by **object**

Guidelines on Art 81 para. 3 para. 46

- Restrictions by **object**
 - No evaluation of effects necessary
 - Usually not exemptable

Individual exemption (Art. 101 para. 3)

Horizontal Guidelines para. 240

- Commercialization agreements between competitors can only have restrictive **effects** on competition if the parties have some degree of **market power**
- If the parties' combined market share does not exceed **15 %** it is likely that the conditions of Article 101(3) are fulfilled.
- Above 15% effects based assessment necessary

First key question

Are ERA members competitors on an international market for selling services to suppliers



Horizontal effects | joint buying

Restraint of competition

(Art. 101 para. 1)

Horizontal Guidelines para. 212

- Restraint of competition **unlikely** if competing purchasers are **not active on same relevant selling market**, ...
- ... **unless** the parties have a position in purchasing markets that is likely to be used to harm the competitive position of other **retailers** in the selling (retail) markets.

Second key question

Is joint buying likely to harm the competitive position of other retailers in the retail markets



Individual exemption

(Art. 101 para. 3)

Horizontal Guidelines para. 219

- Cost savings need to be **passed on** to consumers, e.g. lower prices on the selling markets.
- Lower purchasing prices are not likely to be passed on to consumers if the purchasers have **market power on the selling markets**.

Third key question

Are cost savings from joint buying passed on to consumers



Negative effects on other retailers ?

Foreclosure effect

re access to promotional budgets

- Suppliers have limited budgets for buying promotions
- Suppliers are forced by ERA to shift part of budget to ERA members
- Suppliers have less budget left for buying promotions from other retailers

Waterbed effect

re purchasing conditions

- Suppliers have business plans and margin targets
- Suppliers are forced by ERA to pay bonus without (measurable/adequate) counterpart
- Suppliers seek compensation from smaller retailers

Valetti / Inderst:

Waterbed effect in particular likely if suppliers have scope to price discriminate

"Suppliers may have incentives to recoup the losses they incur by the payments made to the alliance and therefore increase the price of their products." COM Competition in the food supply chain (2009)

Spiral effect

- Concentration outside M&A: no merger control
- Risk of reaching tipping point
- Similar to other types of abuse of buyer power (UTP)

- Increasing spread re conditions for smaller retailers compared to larger retailers
- Peculiarities of food retail market: Key success factors are (i) purchasing conditions (70% of total cost) and (ii) promotions
- Increasing concentration, risk of market exits

Not just a theory

E.g.

**EDEKA /
Kaiser's
Tengelmann**



Bundeskartellamt

Decision March 2015

*EDEKA's **purchasing conditions would improve** due to the merger and its effect on buying power*

*The improvement of purchasing conditions of a large retailer as EDEKA results in an even **better market position on the selling markets***

*The improvement on the selling markets are directly linked to **effects on the purchasing market** fostering market concentration on the purchasing market and, hence, buying power by the large retailers*

*Against this background **further market exits are to be expected** in particular by smaller retailers who offer a complete range of products or are active as self-service department store with high percentage of brands*

**Kaiser's Tengelmann
/ EDEKA**

Application for minister
approval April 2015

*Due to **prohibition on entering into buying group** with EDEKA, KT was faced with **structural disadvantage***

*As a consequence Kaiser's Tengelmann suffered losses, its market shares decreased and it is now **forced to exit the market***

Passing on of benefits to consumers ?

If markets reach **tipping point** consumers will suffer

- Prices
- Innovation
- Choice

Passing on of benefits or **windfall profits?**

- Retroactive payments
- No uniform price level across countries: high market shares of ERA members at least on various local markets make passing on unlikely
- Recognized by authorities: e.g. *EDEKA/Kaisers' Tengelmann*:

"The passing on of cost savings following the better purchasing conditions, ... is doubtful due to the parties' significant market power on the selling market."

Bundeskartellamt, decision 31 March 2015, par. 392

"... a direct link between (i) the initial provision of the marketing services by alliance members, (ii) the end-of-year lump sum payments made by suppliers and (iii) the end prices of the products for which the marketing services were provided in the first place is rather difficult to construe."

COM Competition in the food supply chain (2009)

Cross-subsidization
(retailers use ERA-Bonus for price wars on other products)

- Art. 81 para. 3 guidelines:
All "users of the products" covered by the agreement
- ECJ:
Not all customers must benefit in "relevant market"

If European Retail Alliances are accepted ...

... shouldn't suppliers consider teaming up as well ?



- Legally possible for all non-competitors
- Beneficial for consumers ?

Thank you!



Dr Michael Bauer

CMS Hasche Sigle / EU Law Office

T +32 2 6500 421

M +49 173 28 31 322

E michael.bauer@cms-hs.com

C/M/S/ Law-Now™

Law.Tax

Ihr kostenloser juristischer Online-Informationsdienst.

E-Mail-Abodienst für Fachartikel zu
vielfältigen juristischen Themen.

www.cms-lawnow.com

C/M/S/ e-guides

Law.Tax

Ihre juristische Online-Bibliothek.

Profunde internationale Fachrecherche
und juristisches Expertenwissen nach Maß.
e-guides.cmslegal.com

Dieses Dokument stellt keine Rechtsberatung dar und verfolgt ausschließlich den Zweck, bestimmte Themen anzusprechen. Es erhebt keinen Anspruch auf Richtigkeit oder Vollständigkeit und die in ihm enthaltenen Informationen können eine individuelle Rechtsberatung nicht ersetzen. Sollten Sie weitere Fragen bezüglich der hier angesprochenen oder hinsichtlich anderer rechtlicher Themen haben, so wenden Sie sich bitte an Ihren Ansprechpartner bei CMS Hasche Sigle.

CMS Hasche Sigle ist eine der führenden wirtschaftsberatenden Anwaltssozialitäten. Mehr als 600 Anwälte sind in acht wichtigen Wirtschaftszentren Deutschlands sowie in Brüssel, Moskau, Peking, Shanghai und Teheran für unsere Mandanten tätig. CMS Hasche Sigle ist Mitglied der CMS Legal Services EEG, einer europäischen wirtschaftlichen Interessensvereinigung zur Koordinierung von unabhängigen Anwaltssozialitäten. CMS EEG ist nicht für Mandanten tätig. Derartige Leistungen werden ausschließlich von den Mitgliedssozialitäten in den jeweiligen Ländern erbracht. CMS EEG und deren Mitgliedssozialitäten sind rechtlich eigenständige und unabhängige Einheiten. Keine dieser Einheiten ist dazu berechtigt, im Namen einer anderen Verpflichtungen einzugehen. CMS EEG und die einzelnen Mitgliedssozialitäten haften jeweils ausschließlich für eigene Handlungen und Unterlassungen. Der Markenname „CMS“ und die Bezeichnung „Sozialität“ können sich auf einzelne oder alle Mitgliedssozialitäten oder deren Büros beziehen.

www.cmslegal.com

CMS-Standorte:

Aberdeen, Alger, Amsterdam, Antwerpen, Barcelona, Belgrad, Berlin, Bratislava, Bristol, Brüssel, Budapest, Bukarest, Casablanca, Dubai, Düsseldorf, Edinburgh, Frankfurt/Main, Genf, Glasgow, Hamburg, Istanbul, Kiew, Köln, Leipzig, Lissabon, Ljubljana, London, Luxemburg, Lyon, Madrid, Mailand, Maskat, Mexiko-Stadt, Moskau, München, Paris, Peking, Podgorica, Prag, Rio de Janeiro, Rom, Sarajevo, Sevilla, Shanghai, Sofia, Straßburg, Stuttgart, Teheran, Tirana, Utrecht, Warschau, Wien, Zagreb und Zürich.

CMS Hasche Sigle Partnerschaft von Rechtsanwälten und Steuerberatern mbB, Sitz: Berlin, (AG Charlottenburg, PR 316 B), Liste der Partner: s. Website.

www.cms-hs.com