



EUROPEAN RETAIL ACTION PLAN

– UGAL COMMENTS –

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The Union of Groups of Independent Retailers of Europe

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EXECUTIVE SUMMARY

The retail sector is not homogenous. What is in the interests of certain large chains is not necessarily in the interests of the groups of independent retailers, who promote SME retail, and are represented by UGAL.

UGAL urges the European Commission to use the European Retail Action Plan (ERAP) to propose concrete actions to boost growth in the entire retail sector. The European Commission should acknowledge, and promote, the diversity of the retail sector when formulating these concrete actions. This will ensure that the full range of retail companies can take equal benefit from the ERAP.

By including the five priority actions described in this document, in the ERAP, the European Commission will better take into account the needs of groups of independent retailers in Europe. This will contribute to the retail sector reaching its full potential in providing growth, innovation and jobs as part of the EU 2020 strategy.

Five priority actions to facilitate growth in the retail sector

1. Formally recognise the diversity of the retail sector in the upcoming ERAP Communication by acknowledging the important role that groups of independent retailers play in the market. Without such formal recognition of this alternative yet successful business model, it is unlikely that regulatory efforts will be made to take into account its specificities.
2. Where a group of independent retailers is only structured vertically, it should only be assessed in a vertical context (i.e. with reference to the Guidelines on Vertical Restraints and attendant Regulation).

A horizontal check is only required if a group of independent retailers is i) horizontally structured or ii) when a double assessment is required, due to the specific structure of the group of independent retailers concerned. This test should take into account the full efficiency/economic benefits of the entire group structure.
3. Improve access to finance for independent retailers belonging to a group, through a clarification of paragraph 147 of the Guidelines on Vertical Restraints and article 5 of Regulation 330/2010. At a time when entrepreneurs struggle to access finance from bank loans, the easy use of alternative methods of financing are essential to encourage entrepreneurship and growth in the retail sector.
4. Include a clause on “isolated cases” in the new General Product Safety Directive (GPSD 2). The relevant clause already exists in the guidelines (1) to the existing General Product Safety Directive (GPSD 1).

(1) *Guidelines for the Notification of Dangerous Products to the Competent Authorities of the Member States by producers and distributors in accordance with Article 5(3) of Directive 2001/95/EC*, chapter 4.1

5. Set up, on the basis of EU and national legislation, a dedicated EU database containing European and national food labelling rules, at the disposal of producers, consumers, national authorities and distributors.

Groups of independent retailers make a diverse and competitive retail sector possible

The ERAP's main stakeholders are the four main EU retail associations. Each of these associations represents a different part of the European retail landscape. UGAL, as one of these four organisations, represents an important part of this landscape.

The UGAL membership statistically is very significant. This is exemplified by the UGAL membership standing for over 300,000 independent retailers with over 540,000 points of sale, directly creating over 5 million jobs. Added to this is a retail turnover of more than 623 billion euros and a wholesale turnover of more than 260 billion euros.

→ Statistically, UGAL members contribute more to the EU economy than the 13 largest integrated retailers in Europe combined.

Despite this fact, the needs of SME/independent retailers, and their groups, are often overlooked from a policy perspective. It is in the interests of the European Commission to help these retailers to reach their full potential. Indeed, the horizontal legislation that covers retail activities rarely takes into account the specific challenges faced by the groups of independent retailers represented by UGAL.

Fulfilling their potential

One way in which SME retailers can reach their full potential is by joining a group of independent retailers. This "group" business model allows SME retailers to compete with large integrated chains. Indeed, joining a group allows SME retailers to achieve economies of scale in purchasing consumer goods. It also gives economies of scale in purchasing *inter alia* energy, telecoms, training, advertising and financial services.

This sustainable business model has allowed independent retailers/SMEs to not only thrive but also to promote long term growth by helping group members to i) increase the value of their own business and ii) improve the economic performance of their shops. Moreover, members are actively involved in the working of the group itself.

Such positive actions ensure that a member independent retailer can sustainably contribute to the local economy over the long term, thereby promoting wider economic stability. Being part of a larger group structure ensures a long-term contribution to the wider European economy through *inter alia* utilising the wholesale function of that group.

Ultimately, the group structure benefits consumers by ensuring a more diverse, sustainable and competitive marketplace. The consumer is the ultimate beneficiary as a more diverse, sustainable and competitive marketplace facilitates consumer choice, responds to consumer expectations and leads to lower consumer prices.

In addition to the consumer benefit, groups of independent retailers promote entrepreneurship. As it is entrepreneur retailers who make up a group, levels of customer service at the point of sale are extremely high. This is due to an independent retailer always wanting the best for his/her business.

As groups of independent retailers and their members believe in having a “local touch”, the well-being of the group, and its members, can promote local/regional development. This can be through developing close relationships with local or regional producers, ensuring that the local/regional economy benefits.

→ Priority action 1

UGAL urges the European Commission to formally recognise the diversity of the retail sector **in the upcoming ERAP Communication** by acknowledging the important role that groups of independent retailers play in the market. Without such formal recognition of this alternative yet successful business model, it is unlikely that future regulatory efforts will be made to take into account its specificities.

Despite the success story that groups of independent retailers represent, the UGAL constituents have identified one clear challenge to their business. That is the competition test that certain agreements must pass in order to comply with competition law.

It has been reported to UGAL that certain agreements between the central office of a group of independent retailers and its members must often pass a two-stage competition law assessment, when it is not necessary to do so.

The first stage of this double assessment is that an agreement must not contravene the horizontal competition guidelines. If this test is passed, the agreement must be tested for its compliance under the vertical competition law rules. In its current form, this two-stage test is not strictly necessary for many groups of independent retailers. The competition law assessment should be adapted to the structure of the group of independent retailers concerned.

→ Priority action 2

Where a group of independent retailers is only structured vertically, it should only be assessed in a vertical context (i.e. with reference to the Guidelines on Vertical Restraints and attendant Regulation).

A horizontal check is only required if a group of independent retailers is i) horizontally structured or ii) when a double assessment is required, due to the specific structure of the group of independent retailers concerned. This test should take into account the full efficiency/economic benefits of the entire group structure.

UGAL stresses that the European Commission should further recognize the validity of the way groups of independent retailers are structured and supports better recognition of such group structures in future competition law developments.

Loans to undertakings

A further challenge to the business model of groups of independent retailers concerns the rules on “loans to undertakings” set down in paragraph 147 of the vertical guidelines (2).

The central office of a group of independent retailers often facilitates access to finance for an independent retailer who is a member of that group. This usually is done in the form of a loan.

The vertical guidelines state that such loans should be provided in the least restrictive way. Considering that in such cases, the group is playing a similar role to a bank, the group should be free to use the loan conditions comparable to normal market rates.

Indeed, granting credit carries a substantial risk. Creditors should be able to mitigate that risk as they see fit. This is often done through financial means such as interest rates by many commercial banks providing industrial credit.

In the context of groups of independent retailers, financial risk should be allowed to be mitigated through non-compete or purchasing obligations. This avoids the need for an independent retailer having to use up its scarce capital through the payment of interest rates yet, using an overall economic analysis, it means that the loan terms are still comparable to market rates.

→ Priority action 3

Improve access to finance for independent retailers belonging to a group, through a clarification of paragraph 147 of the Guidelines on Vertical Restraints and article 5 of Regulation 330/2010. At a time when entrepreneurs struggle to access finance from bank loans, the easy use of alternative methods of financing are essential to encourage entrepreneurship and growth in the retail sector.

Harmonising retention of title rules

Many businesses supply goods on credit subject to 'retention of title' provisions in their sales agreements.

Rules on retention of title vary throughout the EU. For example, in certain Member States, if a product stored on a retailer's property causes environmental damage, the retailer is liable for that damage. In other Member States, if a product stored on a retailer's property causes environmental damage then the supplier (who remains the owner of the product i.e. retains the title) is liable. Different insurances are needed to cover these different scenarios.

(2) *Guidelines on vertical restraints*, OJ C 130 of 19.05.2010, page 1

This means that a company cannot take advantage of economies of scale in taking out a single insurance product to cover potential liabilities. Instead, they must take out a variety of insurance products to cover the different applicable national rules to retention of title and their consequences. This is not cost efficient.

→ To improve the situation, the European Commission should develop a harmonised retention of title regime across the EU. This could be done by drafting a relevant clause in the Common European Sales Law.

Reducing administrative burden by ensuring clear responsibilities in the supply chain and simple but effective product safety rules for “isolated cases”

The GPSD 1 is currently under review. This review will result in a GPSD 2. The GPSD 2 should be used as an opportunity to reduce certain administrative burdens that have come to light due to the uncertainty of specific rules set down by the GPSD 1.

UGAL members are committed to playing their part in ensuring effective and efficient product safety regulation and consumer protection. In order to successfully fulfill this role, the precise responsibilities of retailers should be sufficiently clear in the relevant legislation.

Clear responsibilities for producers and distributors in the supply chain

The template of responsibilities created by Framework Decision 768/2008 (3) and sectoral product safety legislation (4) clearly sets down the obligations of producers and distributors in the supply chain. This enumerated approach to determining the obligations of producers and distributors is the best way to ensure that retailers play their part in ensuring a safe supply chain. In this way, subjectivity and uncertainty about how risks are best managed by retailers is considerably reduced.

Accordingly, UGAL supports Article 5(2) of the GPSD 1 which encapsulates the retailers' responsibility to “*act with due care to help to ensure compliance with the applicable safety requirements, in particular by not supplying products which they know or should have presumed, on the basis of the information in their possession and as professionals, do not comply with those requirements*”.

The remainder of Article 5(2) (second and third sentence) goes on to develop a narrative of the contributory and co-operative role which retailers should play with producers and competent authorities. This spirit of co-operation, which underpins the GPSD, Decision 768/2008 and Regulation 765/2008, is fully supported by UGAL.

That said, the second sentence of Article 5(2) “*monitoring the safety of products placed on the market, especially by passing on information on product risks*” introduces an element of subjectivity, **which would benefit from further clarification.**

(3) Decision 768/2008/EC, Annex I, Article R5(2)

(4) Regulation 1223/2009 on cosmetic products; Directive 2009/48/EC on the safety of toys

It fails to elaborate on who the recipient of risk information should be under the variety of different circumstances that retailers are faced with in their daily business.

Although retailers, on the front line of dealing with consumer feedback and complaints, are involved with monitoring safety issues on a daily basis, determining what is (and is not) a product risk is a task surrounded by uncertainty. Indeed this reflects the challenges of hazard analysis and risk assessment in general (5). These challenges are particularly difficult for independent retailers, and their groups, who rarely have the in-house testing facilities that integrated chains have.

Isolated cases

A particular problem experienced under the GPSD 1 is how to deal with isolated cases. The guidelines accompanying the GPSD 1 (6) illustrate that circumstances exist where, while safety issues may arise in relation to a product, they do “*not require any verification, monitoring or action by the authorities and do not provide information useful for risk assessment or consumer protection*” (7). This may be because solid evidence exists that any risk has been fully controlled, or that only a limited number of products or batches are concerned, which have been managed.

Whilst a single consumer complaint may exist which identifies a perceived risk, the reality may often be that any damage is due to the misuse of the product by the consumer, rather than any inherent dangerous defect, design or risk posed by the product. In these cases, **no** notification to competent authorities should be made.

It is important that notifications are avoided in these situations in order to avoid proliferation of notifications and to promote active risk management between supply chain partners. Crucially, **whether or not a particular identified incident represents an isolated case will not always be immediately obvious to a retailer. Producer input is required to confirm the existence, or not, of an isolated case.**

If a retailer is uncertain as to whether or not an isolated case is present, two particular scenarios can arise:

Scenario i) only very obvious public health risks will be passed on to competent authorities when identified, leaving considerable potential important risk information under the radar (the ‘tip of the iceberg’ problem).

Scenario ii) the retailer may take a highly cautious view of all feedback concerning products and may contact the competent authorities immediately, often unnecessarily. This can lead to notification overload to competent authorities.

(5) The challenges of risk assessment are reflected in the length of the guidelines for the operation of RAPEX

(6) Guidelines for the Notification of Dangerous Products to the Competent Authorities of the Member States by producers and distributors in accordance with Article 5(3) of Directive 2001/95/EC

(7) Guidelines for the Notification of Dangerous Products to the Competent Authorities of the Member States by producers and distributors in accordance with Article 5(3) of Directive 2001/95/EC, Chapter 3.3

In **Scenario ii)**, the initial processing of the notifications requires time and resources on the part of Member State competent authorities. The needless involvement of competent authorities creates considerable frustration on the part of producers, and this sentiment will often translate into badly damaged business relationships with retailers. These problems will be exacerbated where an unjustified RAPEX (8) notification is made by a competent authority on the basis of information unnecessarily passed on by retailers. Such a notification could potentially expose the retailer to large litigation costs as possible co-defendants with competent authorities, via the chain of causation in a civil case.

Isolated cases: the pragmatic legislative solution

There is one simple solution to clarifying distributor obligations in isolated cases.

→ Priority action 4

Include a clause on “isolated cases” in the GPSD 2. This could be added under the GPSD 2 provisions that best correlate to Article 5(2) of the GPSD 1.

The relevant clause already exists in the Guidelines to the GPSD 1 and states: *“distributors who have doubts about the safety of a product or whether a dangerous product represents an ‘isolated case’ must transmit to the producer the information they have. They can also contact the competent authorities for advice on how to proceed (9).*

This wording has previously been accepted by the European Commission, MEPs, Member States and other stakeholders. This should mean that it will be acceptable for future use in the GPSD 2.

The above-mentioned text clearly expresses a preference for initial action to be B2B cooperation between distributors and producers. This is a vital concept, which must be further strengthened in order to limit the negative consequences explained in scenarios i) and ii) above.

Move from soft to hard law

Due to the “soft” nature of the GPSD 1 guidelines, there are **no legal guarantees** that their interpretation of isolated cases will always be reflected in the approach taken by Member States.

The influence of the GPSD 1 guidelines on SMEs is doubtful. Such non-binding, “soft law” guidelines, only available via an obscure hyperlink from a European Commission webpage, are unlikely to be consulted by SME retailers. Indeed there is a high probability that SME retailers will not know that such guidelines even exist.

(8) For further information see: Results of the Public Consultation on the Revision of the General Product Safety Directive

(9) Guidelines for the Notification of Dangerous Products to the Competent Authorities of the Member States by producers and distributors in accordance with Article 5(3) of Directive 2001/95/EC, chapter 4.1

That said, SME retailers, represented in groups of independent retailers, are aware of, and follow, the “hard law” as it is set down in the relevant Directive, or national implementation thereof.

Given this specificity, we are convinced that such a legal provision on isolated cases in the GPSD 2 will clarify how retailers should best deal with isolated cases. This will facilitate an effective supply chain for consumer goods, contribute to the efficient work of Member State competent authorities and ensure overall product safety in Europe.

Simplifying compliance obligations

Labelling rules for the products that retailers sell are extremely complex. Different products have different labelling rules. Many labelling rules are set down by EU legislation. These rules are often “gold plated” by a plethora of additional national labelling requirements. This results in a complex regulatory situation that retailers must adhere to in order to comply with the law.

This complex regulatory situation could be simplified by a relatively basic European intervention – the creation of an EU level database containing the labelling requirements that one must adhere to in each Member State.

As a first step, it would be useful to launch a pilot database that includes labelling rules in the food sector. This database would be an information system, accessible to all, on food labelling legislation that would bring together both EU and national labelling requirements.

Such a system would provide:

- companies, consumers and national authorities with the means to easily access all applicable labelling legislation via a one-stop-shop;
- the European Commission with a system where the content is easy to update and revise, if necessary (a “live update” system); and
- all parties with a unique, harmonised and simple way to identify concrete labelling requirements per product, using multi-criteria search functions.

→Priority action 5

UGAL would support any such proposal to set up, on the basis of EU and national legislation, a dedicated EU database containing European and national food labelling rules, at the disposal of producers, consumers, national authorities and distributors.

This database would allow inter alia companies to concretely identify the applicable European and national food labelling rules. It also follows the Better Regulation agenda, which promotes the employment of IT technologies as a means to bring legislation closer to the citizen.

The action is also a driver of innovation because the database would facilitate the commercialisation of food products. Food business operators who commercialise their products in the EU market would easily be able to identify the relevant labelling requirements. This will reduce information costs, regulatory compliance costs and time to market for food business operators, in particular for SMEs.

Improving administrative cooperation

Improving administrative cooperation between competent authorities is crucial for groups of independent retailers. Improving administrative co-operation in official controls of food and feed law is of particular importance. In this context, it is vital that the provisions of Regulation 882/2004 on official controls of food law concerning administrative co-operation between competent authorities are strengthened.

In certain Member States where products come from another Member State and breach food law or create a serious risk, responsibility for such problems is simply attached to the retailer. **This is a wholly inappropriate and disproportionate form of regulation as the retailer is not the responsible party under EU food law (Article 17, 178/2002)** – it is simply impossible for a retailer to control the business activity of the original supplier/producer.

When competent authorities attach these unrealistic responsibilities to retailers, the result is that food law breaches or food risks are not effectively controlled in the Member State where the problem originates. This means that EU consumers continue to be exposed to illegal/unsafe products.

Where competent authorities attach responsibility to retailers for products coming from another Member State, an economic disincentive is automatically created for distributors to source from other jurisdictions, thereby creating an indirect barrier to trade in the internal market.

→ To improve the situation, current obligations for Member State competent authorities to co-operate in such cases needs to be effectively reinforced in the context of the revision of Regulation 882/2004. The review will take place in 2012.

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Established in 1963, UGAL – the Union of groups of independent retailers of Europe – is the European association that acts as an umbrella organisation for the main groups of independent retailers in the food and non-food sectors.

These groups are set up like wholesale businesses by independent retailers and craftsmen. Their aim is not only to provide their members with the best purchasing conditions. What they are also seeking is to jointly contribute technical and material resources, together with all the services and the human capacity required to guarantee the operation and development of modern commercial and distribution enterprises for retailers to effectively respond to consumer expectations.

To achieve this, these groups seek economic performance through networks of points of sale – consisting of SMEs usually working under a common brand name.

UGAL represents nearly 300.000 independent retailers, who manage more than 540.000 sales outlets. This represents a total employment of more than 5.000.000 persons.

More information about UGAL under www.ugal.eu