




**Opinion No 10-A-25 of 7 December 2010
on "category management" agreements between retail grocery
operators and some of the suppliers thereof**

English version 

of the Avis n° 10-A-25 du 7 décembre 2010 relatif aux contrats de « management catégoriel » entre les opérateurs de la grande distribution à dominante alimentaire et certains de leurs fournisseurs

The *Autorité de la concurrence* (section III),

Considering the decision no. 10-SOA-02 of 19 March 2010 relating to "category management" agreements between large volume retail grocery operators and some of the suppliers thereof, registered under number 10/0030 A;

Considering Articles 101 and 102 of the Treaty on the Functioning of the European Union;

Considering Book IV of the Commercial Code;

Considering the other documents of the file;

The Case Officer, the Deputy General Rapporteur and the Government Commissioner heard during the session held on 9 November 2010;

The representatives of Casino, Carrefour, Procter & Gamble and Scotts Company heard on the grounds of the provisions set forth in Article L. 463-7 of the Commercial Code;

Hereby adopts the following opinion:

Disclaimer

The *Autorité de la concurrence* provides the present translation into English of its *Avis n° 10-A-25 du 7 décembre 2010 relatif aux contrats de « management catégoriel » entre les opérateurs de la grande distribution à dominante alimentaire et certains de leurs fournisseurs* to enhance public access to information about its advisory and decision-making practices.

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I. Introduction

1. Article L. 462-4 of the Commercial Code provides as follows: "*The Autorité de la Concurrence may take the initiative of issuing an opinion on any question relating to competition. The said opinion is made public. It may also recommend that the Minister in charge of the economy and the Minister in charge of the relevant sector implement the required measures to improve markets' competitive operating.*"
2. On the grounds of the said Article and further to its decision no. 10-SOA-02 of 19 March 2010, the *Autorité de la Concurrence* started at its own initiative an inquiry into "category management" agreements between retail grocery operators and some of the suppliers thereof.
3. In the said decision, the *Autorité* in particular specified the objectives of assessing the frequency and scope of "*category management agreements*", identifying upstream and downstream operators' reasons for using this type of delegation and appreciating the influence of "*category captains*" on the distributor that selects the latter. It also set the objective of appreciating the risks that such agreements may entail for competition and assessing the effects of implementing this type of commercial cooperation between industrialists and distributors on the end market.
4. On a preliminary basis, the *Autorité de la Concurrence* reiterates that, in the framework of an inquiry started at its own initiative, it is not entitled to classify a conduct on a market according to Articles 101 and 102 of the TFEU and Articles L. 420-1 and L. 420-2 of the Commercial Code. Only the implementation of a fully adversarial procedure, as provided for in Article L. 463-1 of the Commercial Code, would allow the *Autorité* to make such an appreciation.
5. This opinion is structured as follows: further to reiterating the theoretical and legal definition of category management in Part I, Part II of this opinion presents the main implementation terms thereof, ascertained during the various hearings held in the framework of the investigation, and through an analysis of data communicated by operators. Subsequently and in view of the said findings, the various competition risks resulting from such category management activities are presented in Part III of this opinion.

II. Practices identified

6. This part presents the concrete terms of category management implementation, ascertained further to the various hearings of suppliers, distributors and retail of daily consumer goods specialists, including data communicated by operators. This opinion starts with a presentation of the definitions and main fields of application of category management (A). It then considers partnerships between suppliers and distributors,

instigated in the scope of category management (B), the operators' respective motives (C), and the recorded impacts of category management (D).

A. DEFINITIONS AND CATEGORY MANAGEMENT FIELDS OF APPLICATION

Category management is a marketing practice implemented in supermarkets and hypermarkets, most often via the intermediary or in association with one or more suppliers (1) and which has several fields of application (2).

1. CATEGORY MANAGEMENT: A MARKETING PRACTICE OFTEN IMPLEMENTED IN ASSOCIATION WITH ONE OR MORE SUPPLIERS

7. According to the most general definition of category management, this consists in organising and managing the distribution of a category of products as a strategic analysis unit. A "category" of products is therefore defined as being a series of similar, complementary or substitute products which comply with the same consumption logic. A common example is the "breakfast" category which may include, depending on distributors, coffees, teas, drinking chocolates, cereals, rusks, pastries, fruit juices, freshly baked sweet breads and buns, etc. In this case, category management is said to mainly consist in organising presentation of the product category as a consistent whole, rather than a juxtaposition of decisions on each product within the category. The presence of a "category captain" within distribution groups (and the employees thereof) complies with this objective.
8. As a marketing method, category management may therefore be implemented by distributors without involving their various suppliers. Nevertheless, suppliers and distributors very often work together for the purpose of an improved understanding of final consumers' expectations. In France, and according to the proponents who were heard, category management practice is said to mainly consist in the supplier's communication of *recommendations*, mostly as PowerPoint slides and possibly by e-mail when the said recommendations are very frequent. Therefore, the supplier-partner has no decision-making power as regards the distributor's marketing policy.

2. CATEGORY MANAGEMENT FIELDS OF APPLICATION

9. Recommendations communicated by the supplier-partner mainly relate to the product mix (a), merchandising (b) and the retail brand's promotional policy (c). They never, or only very rarely, concern pricing policy (d), at least not the policy for competitor suppliers' products, even if exceptions can be found in some suppliers-partners' presentations. Lastly, the fact that private labels are taken into account in suppliers' recommendations varies depending on the case (e).

a) Recommendations relating to the product mix

10. A product mix specifies the list of products offered for sale by a store. To define this, a distributor may wish to receive recommendations from one or more suppliers, who are probably better informed of the relevant products' market trend than the said distributor. The said superior knowledge of a market is based on quantitative data such as IRI or Nielsen, which reflect sales progress per type of products for the relevant distributor or the latter's competitors and to which distributors generally also have access. It is also based on consumer surveys which assess consumers' expectations and modifications in their needs, in particular for the purpose of understanding which new products may attract them.
11. Product mix recommendations may therefore differ, according to distributors and suppliers. More often than not, these concern the "*taille de boîte*" (i.e. the number of references that can be presented at the sales outlet) and above all the choice of references or types of products which must be presented in the display spaces. In some cases, these recommendations are frequently updated in order to take account of seasonal variations in demand, or the success or failure of certain products. In other cases, they result from a distributor's deteriorated performance for a specific product category.
12. According to operators, the methodologies implemented to draw up product mix recommendations are objective and can easily be reproduced using panel survey firm's data, to which all distributors have access. Furthermore, according to several distributors, product mix recommendations are made by most major suppliers, in such a manner that the distributor, by simple comparison, can identify the irrelevant recommendations. This explains the fact that suppliers also recommend that some of their products should be delisted. However, product mix recommendations are more difficult to comprehend when this must include innovations, which, by definition, have not yet undergone panel surveys. In such a case, consumer surveys and more generally, the supplier's more or less subjective analysis of future category evolutions take precedence.

b) Recommendations relating to merchandising

13. Recommendations from suppliers-partners also and almost systematically concern distributors' merchandising. In particular, this includes products' positioning on shelves, the share of display space taken up by each product, aisle end displays, visual shelf signing or the location of the spaces or products in the store.
14. In concrete terms, recommendations on merchandising often take place in two stages. To begin with the supplier draws up the "layout plan" for the display space on the basis of a product mix for the category (laid down by the distributor or drawn up jointly). The said layout plan allocates product segments in the spaces, without specifying product brands and according to the major product categories identified for the category. Subsequently, once the layout plan has been finalised, the supplier proposes a more specific approach to space organisation: the "*planogramme*". This presents the visual location of all product references finally selected for the space, in accordance with the main line segmentations finalised in the layout plan.

15. Apparently, merchandising is essentially the selection of an "*entrance key*" for the space, followed by a distinction between a horizontal or vertical type of segmentation. Accordingly, for certain product categories, the consumer supposedly first decides on which brand he/she wants to buy, followed by the type of product (format, etc.). In this case, space segmentation per brand is favoured. These various arbitrations are settled on the basis of "shopper" surveys which analyse a buyer's behaviour in a store and are generally ordered by suppliers-partners from panel survey or third party consulting firms. In some cases, the data used may also be based on stores' loyalty cards, which make it possible to follow the same consumer's purchases over time much more precisely than the consumer panels proposed by IRI or Nielsen. These surveys therefore make it possible to define the consumer's "*decision tree*" when present in the display space and in particular, identify his/her "*entrance keys*" such as the product brand, segment or price. These criteria's hierarchy will then be decisive for merchandising.
16. Suppliers and distributors indicate that the conclusions of such surveys may differ from one supplier to another. Nevertheless, tests can be carried out to ascertain the impact of a change in merchandising and in particular the impact on turnover of a space's modification, as well as consumers' reactions to such modifications.

c) Recommendations relating to promotional policies

17. Less frequently, but nevertheless relatively often, the supplier-partner may propose promotional policy recommendations: which segment(s) of the product category must be represented, in particular according to demand sensitivity to promotions, what type of promotion appears best adapted to the category (buy one, get one free, 3 products if you buy 2, etc.), when is the most profitable period, etc. Recommendations do not simply indicate promotion efficiency according to the product type: the supplier-partner may also provide data and conclusions on both its own and its competitors' products.

d) Recommendations relating to resale prices

18. The fourth lever referred to for category management is the product's resale price. However, most of the suppliers who were questioned stated that they never drew up recommendations on prices for category products, nor on any other price-related elements such as price discrepancies to be complied with or profitability targets for example. On the other hand, survey results on demand price-elasticity for different references or for the entire category are communicated to distributors more often.

19. When a recommendation concerns resale prices, it supposedly specifically relates to the products of the supplier who draws up the recommendation, in particular the latter's innovations: according to operators, the lack of previous sales on which a consistent price strategy can be based results in such recommendations being more legitimate and necessary.

e) The position of private labels in category management partnerships

20. When a supplier works in association with a distributor to define the latter's product mix, merchandising or promotional policy, such association may or may not include private labels. In some cases, distributors do not want their brands to be treated in a specific manner, and therefore a supplier may suggest recommendations as regards the product mix, positioning and promotion thereof. Other distributors prefer explicitly imposing constraints as regards their products' treatment, for example by specifying from the start that certain spaces will be reserved for such products.

B. COOPERATION TERMS BETWEEN SUPPLIERS AND DISTRIBUTORS

21. The association relationship between suppliers and distributors, resulting from category management, is the main subject of all competition law debates on such activities¹. European Commission guidelines on vertical restraints accordingly define category management agreements as "*agreements whereby, in the framework of a distribution agreement, the distributor entrusts the supplier ("category captain") with marketing a category of products which generally includes not only the supplier's products, but also its competitors' products*" (§209). Therefore, the "*category captain may [...] influence, for example, the selection, positioning and promotion of products sold in the store*" (§209).
22. Other surveys and reports offer a more flexible definition, whereby the category captain may, depending on the relevant distributor, either assume a genuine decision-making power instead of the distributor, or restrict itself to simply providing advice and recommendations thereto². The *Autorité's* decision starting a sector inquiry at its own initiative (*Décision de saisine d'office pour avis*) accordingly emphasises: "*The category captain's level of influence also supposedly differs, according to operators: although in some relationships with distributors, the category captain is said to simply issue recommendations, which are occasionally verified by an independent firm or a second category captain, in other cases his influence is said to be more*

¹ See in particular, *Report on the Federal Trade Commission Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry*, Federal Trade Commission, 2001. *Antitrust and Category Captains Roundtable Discussion*, American Antitrust Institute, 2003.

² For illustration purposes see Desrochers D., Gundlach G., and A. Foer (2003), "Analysis of antitrust challenges to category captain arrangements": "A particular form of CM involves "category captain" arrangements, in which a supplier, often the category leader, takes on a significant role in the retail management of the category, including the brands of competing suppliers." (*Journal of Public Policy and Marketing*, vol. 22 (2), p. 201). Also see, *Report on the Federal Trade Commission Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry*, op. cit.

significant, thereby providing the latter, at least in the short-term, with a real decision-making power over the distributor's product mix" (§1).

23. The category management implementation terms in the French sector of retail grocery operators, as understood on the basis of operators' and certain specialists' statements in this sector, can be divided into two categories, depending on whether these concern the relationship itself (1), or the partner selection method (2).

1. ON THE MANAGEMENT OF THE RELATIONSHIP BETWEEN THE DISTRIBUTOR AND THE SUPPLIER-PARTNER

24. Three aspects of the collaboration between distributors and suppliers relating to category management require further developments: the supplier-partner's decision-making power (a), the presence of the said supplier-partner in the store (b) and the information exchanged between the two partners (c).

a) On suppliers-partners' decision-making power

25. Although the effective implementation terms of category management differ according to the operators, the most frequently encountered case is that of a supplier who issues *recommendations* as regards one or more distributors, at their request or otherwise. The word "recommendations" is knowingly employed by operators, who therefore wish to emphasise that, as regards France, there is no delegation of a distributor's decision-making power to one of its suppliers.
26. This is an established fact which has indeed been expressed on numerous occasions and the factual elements that may dispute this situation are relatively flimsy. Accordingly, operators opposed the French category management model with a more Anglo-Saxon practice where this type of delegation may indeed occasionally take place. They explained in several ways that it would neither be in their interest, nor part of their culture, to delegate any decision-making power whatsoever to suppliers³. Firstly, if a decision-making power was delegated to a supplier, the risk that the "category captain" would abuse this position to exclude certain competitors or set up less attractive pricing policies would be too high. Secondly, such a delegation would require a high level of confidence between operators whereas their objectives, in the French sector, would continue to be far too antagonistic. Lastly and above all, "category captains'" fields of intervention (product mix, merchandising and promotional policy) take part in the retail-brand image, which the distributor wishes to maintain command of.

³ Several explanations are offered to justify this difference between the French and Anglo-Saxon markets, such as the conflictual French context of negotiations between suppliers and distributors, the important role of backward margins in distributors' profitability, and the relative backwardness of French operators in the use of marketing data.

b) On the in-store role of category captains

27. Accordingly, nearly all operators specified that the category captain's role is limited to providing advice to distributors who alone decide on the product mix, merchandising and store promotion policies. Such advice is provided at "*centrale*" level, i.e. departments in charge of managing the different types of stores. Decisions taken by such "*centrale*" are then communicated to stores.
28. In some cases, this dialogue with the "*centrale*" is nevertheless implemented at a lower hierarchical level. Some suppliers of national brands accordingly state that they are led to making recommendations at store level, to take account of the specificities of the customer catchment area in which they are located, or store "*strata*" (main store categories, generally according to the sales surface thereof). Moreover, this type of variation bears witness to the specific "partner" or "captain" status obtained by a supplier.
29. Some suppliers also state that they continue a category management partnership at the level of distributors' sales outlets via the intermediary of their sales teams. In particular, one supplier stated that, in stores, category management partners enjoyed a special status which allowed them to master shelf-filling for their own and also their competitors' products. Accordingly, the "category captain" can use his special status to modify merchandising to the latter's advantage, moving away from the product mix and planogram agreed to with the "*centrale*". Such interventions by the category captain are said to take place with the department manager's approval, or without his knowledge, by insisting on local demand specificity for example.
30. Although they concede that their suppliers are present in their stores' departments on various occasions⁴, the distributors did however deny both the existence and impact of such practices by category captains. To avoid a modification of planograms each time the numerous suppliers' sales teams visit a sales outlet and subsequently, that planograms decided at "*centrale*" level are not complied with in stores, some distributors have set up a charter that all suppliers of a category sign and undertake to comply with.

c) On information exchanged between distributors and suppliers-partners

31. For a supplier, category management therefore consists in making recommendations to a distributor-partner. The said recommendations are based on a significant volume of information, either quantitative (past and current information on sales and prices,

⁴ In particular, suppliers take part in store installation operations which consist, once or twice a year, in setting up display spaces according to a pre-established planogram. According to certain players, this theoretical planogram is generally complied with by more or less 10%. Discrepancies recorded as compared to the theoretical planogram are said to mainly result from premises' incompatibility (columns in the middle of shelves for example), regional specificities (with an over- or under-referencing for certain products), or also the actions by the various suppliers present in display spaces during such operations. Suppliers' sales teams are also responsible for monitoring implementation of the planogram decided by the "*centrale*" and, in particular, for checking that their products are present in the display spaces. Lastly, according to certain distributors, special suppliers (and not necessarily category captains) may be induced to take charge of products' shelf filling, but under the responsibility of sales outlet managers.

frequently obtained via the intermediary of panel survey firms - IRI, Nielsen, GfK - , directly from distributors or companies that manage data resulting from loyalty card systems), or qualitative and potential (on consumers' expectations, expected evolution of the category or distributors' marketing strategy). Lastly, some associations also provide for the exclusive transfer from the distributor to its supplier-partner of detailed data on resale prices, quantities sold and stock in stores, per product reference and at least on a weekly basis. Therefore, this flow of information includes providing the supplier-partner with data on its competitors' sales, without the latter being informed of such transfer.

32. Both distributors and suppliers stated that they never transmitted information on their respective competitors' strategies. Accordingly, a supplier-partner of several distribution groups supposedly does not inform its partners of competitor distributors' attitudes towards the recommendations expressed thereby. However, being a distributor's partner is said to help the supplier better anticipate the distributor's marketing strategy.
33. According to most operators, suppliers-partners supposedly have very little influence, to their advantage, on the distributor's product mix strategy. As their recommendations are often based on public data, this can easily be checked or even reproduced by the distributor, who is also said to have the human resources required to carry out such verifications. Furthermore, the store performance follow-up undertaken by the distributor also deters the supplier-partner from expressing recommendations, which, if followed, would go against stores' performance and may result in terminating such association.
34. However, some players state that the results of qualitative surveys are more open to interpretation and that therefore they may more easily be the subject matter of recommendations which favour a specific supplier. In particular, this is the case for merchandising recommendations, which are based on specific behavioural surveys for suppliers, or those which concern a category's overall evolution. In the same way, survey results which analyse products' price elasticity are complex and the methodology thereof is open to interpretation. Lastly, it often appeared that databases used to undertake such surveys were not always communicated to distributors, nor requested thereby.

2. ON THE APPOINTMENT OF "CATEGORY CAPTAINS"

35. The process for appointing a supplier-partner is informal and lacks transparency to such an extent that operators express diverging opinions as regards the existence of a partnership between them, or otherwise (a). Nevertheless, suppliers-partners do meet certain well-identified criteria (b).

a) An informal process marked by a significant lack of transparency

36. According to some operators, in particular some distributors, the French category management practice differs from definitions provided by academic literature, European Commission guidelines on vertical restraints or the *Autorité de la Concurrence's* decision starting a sector inquiry at its own initiative, due to the frequent lack of a "captain" appointed by distributors for the purpose of making recommendations. In numerous cases, all distributors' major suppliers are said to accordingly make recommendations to distributors who may ascertain the well-founded nature thereof by comparison with others. In particular, these exchanges take place during annual "market reviews" where suppliers describe main market trends to distributors and present their innovations.
37. In practice, it nevertheless appeared on several occasions that some suppliers had indeed been appointed as "captains". Although this does not result in the latter holding a decision-making power as regards the distributor's marketing policy, such appointment entails attending meetings to which competitor suppliers are not invited, the exclusive transfer of information, either quantitative or qualitative, and lastly a more in-depth cooperation relationship⁵, which is said to be significantly developed by suppliers. This supposedly does not prevent other suppliers from transmitting recommendations, but these are said to still be based on lower quality information and do not necessarily meet distributors' demands as regards specific aspects of their marketing policy; the impact thereof is therefore said to naturally be less important. Furthermore, several operators stated that due to the market structure for some products, there may be only one supplier liable to advise distributors on the entire product category.
38. In all events, the appointment of a category captain is usually private information. Firstly and in general, distributors are not aware of their suppliers' category management activities with other distributors. Secondly, suppliers-partners' competitors are not directly informed of the "status" of their partner. In practice, suppliers believe that they occasionally recognise their competitors' operations with distributors in view of their commercial negotiation results, the implemented merchandising, or "field" data - so many elements which accordingly emphasise the influence a supplier-partner may have.

⁵ A supplier defines the role of a "category captain" as follows: "*This is a supplier with whom distributors undertake more in-depth exchanges and pay more attention to proposals there from. They are also distributors with whom [the supplier] completes the category management course of action, i.e. who works and makes proposals for the three mainstays (merchandising, product mix, logistics). [The supplier] considers that being a partner involves the supplier's responsibility towards the distributor and reciprocally, as the relationship requires regular assessments which do not exist otherwise. From approximately 169 category/client couples, [the supplier] is a supplier-partner in 30*" (quote 18625). In the same way, another supplier states that "*the [relationship with a category captain] is defined as a relationship which has progressed further between a distributor and a specific supplier, with more or less regular exchanges and resources committed to the relationship, the provision of data... in the end, this more advanced relationship gives rise to recommendations from the supplier to the distributor, which are either accepted and implemented by the distributor or not.*"

39. Lastly, it should be emphasised that services provided by the supplier-partner are rarely specified in an agreement, and therefore rarely paid. Operators also stated that no interdependence exists between the results of commercial negotiations and category management services: therefore, a supplier supposedly does not benefit from higher purchase prices due to category management services provided to the distributor. Conversely, no supplier-partner pays to obtain such status as supplier-partner, on the basis of a commercial cooperation for example. None of the operators questioned stated being aware of any payment made by a category captain in exchange for enjoying such status. However, some suppliers did state that, in the past, certain distributors had unsuccessfully attempted to receive payment for this position.

b) On the selection terms of category captains

40. Distributors are said to select captains or suppliers-partners on the basis of several criteria such as the position of market leader or quasi-leader, presented as guaranteeing a sufficient level of expertise, the supplier's presence on all or a majority of the segments for the studied category, the availability and provision of resources dedicated to category management for the considered distributor, the purchase of statistical data deemed necessary by the distributor to perform the position of category captain.
41. In many cases, selection of a supplier-partner is not the result of a formal process, but is based on the quality of surveys contributed by suppliers even prior to the selection thereof as partners. With this understanding, all major suppliers communicate recommendations and survey results to distributors; when the latter wish for more in-depth recommendations or want to modernise their retail display space for a given category of products, they select the partner who, in view of the latter's previous presentations, appears to be the most convincing. Conversely, suppliers are said to tend to consider themselves as "category captains" once they have the possibility of exchanging regularly with distributors on the management of their category.

C. OPERATORS' MOTIVATIONS

42. The recent nature of partnerships noted between suppliers and distributors evidences certain joint motivations for the two types of operators (1). More specific motivations also exist beyond the aforementioned for distributors (2) and suppliers (3).

1. REASONS FOR THE DEVELOPMENT OF CATEGORY MANAGEMENT

43. Operators appear to agree that category management emerged (as a marketing method) on the French market at the turn of the century, and possibly in the mid 90s for certain categories. However, category management did not develop as fast or significantly as in Anglo-Saxon countries, apparently due to the very strained relationships between suppliers and distributors on the French market. However, the last few years appear to mark a real development of such activities as several operators have recently initiated, formalised or systematized this type of cooperation.
44. Category management development over the last few years results from the conjunction of several distinct factors. Firstly, its development from the turn of the century matches the activity increase in statistical data provided by operators' information systems: the growing sophistication of such data is indeed said to result in increasingly detailed analyses but which also require additional expertise that distributors have found with their suppliers. More recently, the development of data resulting from loyalty cards also encourages distributors to rely on the expertise of some of their suppliers.
45. Secondly, the mature nature of some markets may have led operators to research new growth vectors and to start associations between suppliers and distributors for the purpose of identifying such channels or their deployment in stores. Conversely, sudden changes in certain categories of products (the boom in organic and "natural" products, changes in product formats - *pods*, *sticks*, product systems, etc.), have required greater reactivity from distributors who therefore relied on their suppliers more frequently so as to appropriately adapt to the said changes.
46. Lastly, the economic crisis and also the reform in relationships between suppliers and distributors are said, over the last few years, to have led to a more frequent use of category management cooperation. Suppliers and distributors are both interested in maintaining sales values to consumers who are increasingly price-sensitive. By enabling genuine price negotiations, the "*loi de modernisation de l'économie*" (law on the modernisation of the economy) has also allowed distributors to rethink their role: although over recent years, this consisted in finding legal means of reducing prices or increasing their backward margins, it is now said to consist in optimising product resale efforts in a more competitive context between distributors. In particular, certain distributors state that they are not in a position to deploy such a strong competitiveness on prices as some of their competitors and favour display space attractiveness to establish clientele loyalty and encourage customers to increase their purchases.
47. Yet, in spite of this development, use of category management is variable according to operators. Although the majority of major players (distributors and main suppliers) in the retail of daily consumer goods sector, have adopted an in-company organisation that includes a category management unit and which is generally independent of "purchasing" and "commercial negotiation" units, the overall number of employees and the level of resources allocated to category management vary, not only according to the companies' size, but also to the level of priority that they attribute to its development.

48. In particular, integrated distributors use such partnerships more often than cooperative groups insofar as the selected recommendations can indeed be spread over and imposed on all of their stores. Some groups are also exclusively concerned by the price aspect of their product mix and are said to pay scant attention to recommendations from industrialists. Discounters supposedly do not use these practices, insofar as neither the size of their product mix, nor their merchandising is said to be sufficiently sophisticated to require assistance from suppliers. However, large specialised retailers are said to increasingly use methods developed in daily consumer goods distribution.
49. As regards suppliers, small and medium-sized companies do not appear to be aware of this practice and, in all events, hardly capable of implementing this in view of their limited financial and human resources. Major manufacturers deploy variable resources in the category management field; some have only allocated two full-time employees, whereas others have teams of approximately fifteen people.

2. DISTRIBUTORS' MOTIVATIONS

50. Distributors argue of suppliers' expertise in their product categories to justify their use of outsourced associations for category management (a). Cost reasons also play a part in the said outsourcing (b).

a) Suppliers' expertise

51. According to distributors, the use of suppliers' recommendations can be explained by their more extensive expertise in the category, in particular via their studies of consumer habits in a store, category and demand evolution, market trends (innovating lines, growth rates...) and their knowledge of product marketing techniques used by all distributors. Such information is supposedly lacking for distributors, in particular due to the large number of products and categories available in the store. It is true that almost all partnership relationships between suppliers and distributors start with a presentation of the principal quantitative market evolutions and main data on consumers' behaviour. These are general descriptions and data; they do not refer to a competitor supplier nor a retail-brand.
52. Furthermore, beyond "major evolutions" of products and demand, *a priori* the supplier is also the party who has the best knowledge of each product's specificities such as for example, the effects of seasonality on sales volumes, the most effective form of promotion for each type of product, etc.
53. Lastly, on some markets where retailers of daily consumer goods are hardly present, statistics available from panel survey firms are said to be relatively limited. In this case, a partnership with a supplier provides a better understanding of the specific demands of customers in other stores, and different sale formats, and enables this information to be taken into account when creating the product mix for the distributor's retail display spaces.

b) Outsourcing - a source of savings for distributors

54. Distributors' lack of expertise could possibly be overcome internally. In actual fact, all distributors have teams who are specialised in category management, in particular responsible for assessing suppliers' recommendations. Furthermore, some data on which category management relies is available either from panel survey firms, or from their own statistics departments (such as data from consumers' loyalty cards); therefore, distributors could undertake their own internal surveys.
55. However, apart from access to suppliers' supposed higher level of expertise, outsourcing such tasks allows distributors to make real savings as the category management consulting services provided by food retail suppliers to the former are supposedly never invoiced, either directly within the framework of the category management relationship, or indirectly in the framework of purchasing agreements. Moreover, a supplier appears preferable to an outsourced consultant as, on the one hand, no consultant will ever be as expert in the category as a manufacturer who has effectively been present in the said category for several years, and on the other hand, the said suppliers have a direct economic interest in the fact that their recommendations lead to an increase in the distributor's sales. Lastly, use of suppliers' resources in category management is said to be all the more justified insofar as there are more and more databases which are increasingly well-informed: accordingly, the exploitation thereof requires significant resources.
56. In addition to the said savings comes the sale of certain detailed statistics, stemming from loyalty cards: in some partnerships, suppliers-partners are indeed required to acquire the retail-brand's loyalty card data, at a price which reaches several thousands of Euros.

3. SUPPLIERS' MOTIVATIONS

57. Although not paid for, suppliers' category management services are nevertheless costly. The budget allocated thereto differs from one distributor to another, but, for each large volume distributor, this activity often mobilises between four to ten people, for the sole French sector of daily consumer goods retailers. Committed amounts are also large enough that no SME, with the possible exception of certain renowned food industry manufacturers, offers this type of service.
58. The reasons for this investment are supposedly twofold. Firstly, it is said to be a question of promoting the entire category by specifying the main growth lines for the category and encouraging an improved adaptation of offer to demand (a). Secondly, the partner relationship created with the distributor is said to allow the acquisition of a competitive advantage for the supplier, who is in the best position to anticipate the distributor's marketing strategies (b).

a) Promoting growth for the entire category

59. The main motivation expressed by suppliers who cooperate with distributors is their will to increase sales of their product categories. As hypermarkets and supermarkets do not have expandable sales surfaces, distributors are said to constantly arbitrate between the various product categories for allocation of their marketing space. Therefore, by allowing an improved adaptation of distributors' retail display surfaces to consumers' demand and evolution, category management facilitates a growth in sales for the entire category and maintains its position in the distributor's stores.
60. Generally speaking, a product's sale to a consumer generates profits for both the distributor and its supplier: if the distributor alone invests to improve sales of its products, the latter's investment effort does not take account of the resulting gains for the manufacturer and is therefore insufficient. Accordingly, the supplier attempts to overcome this lack of incentive by taking charge of part of the costs for promoting products and taking part in the distributor's decisions.

b) The search for an information and commercial advantage

61. Being a supplier-partner is also said to be a source of additional information. Firstly, several months or even years in advance, the supplier-partner is informed of the distributor's intentions as regards marketing policy (product mix, merchandising, promotional policy). Although it was stated that manufacturers' category management departments were quite separate from commercial negotiation units, it cannot be excluded that within a same group, information obtained by a team is provided to another so that it can increase its performance. Secondly, the supplier-partner may also and exclusively have access to more detailed quantitative data than that provided by panel survey firms. This therefore entails that the latter has an improved overview of its products' performance with the distributor, but also for competitor products, and is better informed of such distributor's clientele characteristics.
62. From the suppliers' point of view, this information advantage, and the partnership relationship assumed due to category management, is said to allow suppliers to have an improved outlook on commercial negotiations and, in particular, to avoid negotiations which solely concern the purchase price: accordingly, establishing a category management relationship supposedly makes it possible to depart from a purely conflictual commercial negotiation focused on the distributor's purchase price and surplus sharing, and contributes to the emergence of a more cooperative logic, focused on increasing added value rather than solely on sharing. Nevertheless, this is said to still be the subject of lively conflicts; this was confirmed by all suppliers-partners of distributors. However, from the distributors' point of view, this is said to be simply an illusion, as the "commercial negotiation" departments are never in contact with "category management" departments: moreover, certain distributors denied that some suppliers who present themselves as partners or referents actually have this status.

D. THE EFFECTS OF CATEGORY MANAGEMENT

63. To appreciate the effects of category management, the *Autorité de la Concurrence* used both quantitative data provided by operators and a questionnaire initiated for the attention of small and medium-sized companies, which supply large food retailers. The said quantitative data does not evidence any modification in the category of products that is frequent enough to be described as significant (1). This measuring exercise does however have significant limits in view of the wealth of data required for it to be sound (2). Replies to the *Autorité de la Concurrence's* questionnaire are analysed in a third section (3).

1. FINDINGS RESULTING FROM THE ANALYSIS OF DATA COMMUNICATED BY OPERATORS

64. The operators who were heard and who stated that they used category management partnerships, communicated data that describes the evolution of the relevant categories before and after setting up such associations. The said data was compiled and then subjected to an econometric analysis; this allowed a comparison of category evolution between, firstly, the periods which preceded partnership implementation and subsequent periods and, secondly, between distributors with whom a partnership had been set up by a supplier and those with whom the latter had no partnership.
65. Analysis of this data evidences that in general the effects of category management are of little significance, whatever the dependent variable used (number of references, prices, volumes sold, category turnover, market shares for the various operators in the category, etc.). Accordingly, although it can be noted that a distributor's appointment of a supplier-partner may result in increasing or reducing the analysed and dependent variable, the same type of evolution can be noted for other retail-brands, where the relevant supplier is not a partner, sufficiently often to indicate that the appointment of a captain does not have a significant effect.
66. In particular, it does not seem that appointing a captain results in efficiency gains thereby reflecting an increase in quantities sold or, in a more ambiguous manner, a growth in category turnover. In the same way, neither the descriptive nor the regression analyses undertaken evidence that the category captain systematically increases the latter's prices or market share, or that prices increase for the whole category further to appointing a category captain. In the end, it therefore appears that category management associations do not seem to result, on average, in significant modifications for the product category concerned by the cooperation. Neither the category's total sales, nor the category captain's market share are, on average, significantly impacted by the appointment of a category captain.

2. THE PRACTICAL LIMITS TO THIS EXERCISE IN THIS SPECIFIC CASE

67. In practice, the scope of this type of analysis is, however, limited. Firstly, in view of the very recent nature of partnerships declared by operators, the database used only offers a few years subsequent to the appointment of a category captain. Secondly, the analysis representativeness requirement, essential to draw up an opinion with an overall significance, contradicts the wealth of data required for the soundness thereof. In particular, this includes data that is confidential for each supplier-distributor team, such as the products' net purchasing price, which could not be collected for all of the categories concerned by such practices. Lastly, the hearings did not make it possible to register all partnerships which may have been set up in the categories, firstly because all operators could not be heard and secondly, because the crossed hearings with suppliers and distributors evidenced that some operators are not inclined to disclose partnerships or, if these were declared by an operator, considered them as null and void.
68. Accordingly the analyses presented here above cannot be considered as an exhaustive description of the full extent of category management effects. They are simply an indication of the way in which this may (or may not) modify a category's market structure and cannot therefore substitute a case by case analysis, which the *Autorité de la Concurrence* would carry out if it was referred to for such types of practices in a litigation framework.

3. REPLIES TO THE AUTORITE DE LA CONCURRENCE QUESTIONNAIRE

69. To complete this statistical analysis, a questionnaire was also sent to 77 suppliers of retail grocery operators, of which a large majority are small and medium-sized companies. The questionnaire successively studies the replying companies' relationships with major food distribution retail-brands, category management activities set up by the same companies, category management activities implemented by competitor companies of the replying companies, the difficulties which may result there from and, lastly, replying companies' use of panel survey or loyalty card data.
70. Only 17 of the 77 suppliers addressed replied to the questionnaire. Most of the said suppliers do not have a category management partnership with distributors, either because their activity is focused on private labels, or because they do not have the required in-company resources. Accordingly, the majority of these operators decide, for example, not to call on panel survey firms due to the high cost of such services. As regards their competitors' category management activities, some replying companies declare that these activities secure an advantage for category leaders. Yet such remarks appear to be in the minority: most often, the replying companies declare that they are not informed of their larger competitors' activities or special relationships with distributors. In the same way, the no-reply rate may result either from the lack of any negative impact of category management on competitors, or from the lack of information available on this practice for the companies which answered.

E. CONCLUSION ON RECORDED CATEGORY MANAGEMENT PRACTICES

71. In its decision no. 10-SOA-02 starting a sector inquiry at its own initiative, the *Autorité de la Concurrence* in particular specified the objective of assessing the frequency and scope of "category management agreements", identifying operators' upstream and downstream reasons for using this type of delegation and appreciating the influencing power of "category captains" on the distributor that selected them.
72. The investigation firstly made it possible to establish that "category captains" mainly act as major distributors' consultants but are not decision-makers as regards distributors' commercial policy, nor for their own products or, *a fortiori*, those of their competitors. Although the frequency of such partnerships varies greatly from one operator to another, it is nevertheless highly significant for certain suppliers, who may then be partners with several competitor retail-brands. Furthermore, most of the said partnerships were only set up recently, mainly over the last four years. Lastly, according to operators' statements, their motivations supposedly and mainly concern the specific expertise enjoyed by suppliers, which expertise they wish to communicate to distributors for the purpose of increasing the product category that they manufacture.
73. Yet some characteristics of such partnerships, according to the implementation terms thereof, may raise concerns as regards competition. Accordingly, the associations disclosed during investigations lead to the belief that a same supplier may be the partner of several distributors, for identical product categories. As regards its competitors, the category captain also supposedly enjoys certain advantages: in some cases, the latter indeed has access to exclusive databases; in others the captain also has a favoured access to retail display spaces in partner stores. Lastly, the actual motivation of category management is based on outsourcing retail display spaces' analysis. Distributors, who do not necessarily demand access to data communicated by suppliers, are not always able to undertake a detailed analysis of the recommendations provided thereto.

III. Competitive analysis

74. While emphasising efficiency gains liable to result from category management, the European Commission guidelines on vertical restraints identify two types of competitive risks relating to category management implementation.
75. Firstly, the risk of excluding category captains' competitors: *"While in most cases category management agreements will not be problematic, they may sometimes distort competition between suppliers, and finally result in anticompetitive foreclosure of other suppliers, where the category captain is able, due to its influence over the marketing decisions of the distributor, to limit or disadvantage the distribution of products of competing suppliers. While in most cases the distributor may not have an interest in limiting its choice of products, when the distributor also*

sells competing products under its own brand (private labels), the distributor may also have incentives to exclude certain suppliers, in particular intermediate range products. The assessment of such upstream foreclosure effect is made by analogy to the assessment of single branding obligations (in particular paragraphs (132) to (141)) by addressing issues like the market coverage of these agreements, the market position of competing suppliers and the possible cumulative use of such agreements.” (§ 210).

76. Then the risk of collusion, between distributors on the one hand and between suppliers on the other hand, is analysed: *"In addition, category management agreements may facilitate collusion between distributors when the same supplier serves as a category captain for all or most of the competing distributors on a market and provides these distributors with a common point of reference for their marketing decisions. Category management may also facilitate collusion between suppliers through increased opportunities to exchange via retailers sensitive market information, such as for instance information related to future pricing, promotional plans or advertising campaigns.” (§ 211-212).*
77. Points A and B of this part now consider these two types of competition risks in view of the factual circumstances of category management implementation in the French retail grocery sector. On a preliminary basis, it could be emphasised that operators involved in such associations are aware of the possible impact thereof on competition, with several of them accompanying such implementation with training, confidentiality clauses and regulatory reminders for the relevant personnel.

A. THE RISK OF EXCLUDING CATEGORY CAPTAINS' COMPETITORS

78. The analysis of the practices described in part II of this opinion leads to the consideration of three possible vectors for a potential exclusionary conduct by category captains, according to whether this is based on the influence of a supplier-partner in the store (1), on denigrating competitor product performance and manufacturers (2), or on the exclusive information obtained by an operator due to its position as supplier-partner (3)⁶. Lastly, the lack of transparency should be emphasised with which companies liable to have suffered from exclusionary conduct are confronted with, and the search for the means to reduce this (4).

⁶ An economic analysis of practices which, for a category captain, consist in supplanting competitor products from retail display spaces is presented by Dhar, S., J. Raju, U. Subramanian & Y. Wang (publication pending), "The competitive consequences of using a category captain", *Management Science*. The intuition of their analysis is to evidence that such exclusionary conduct lead competitor manufacturers to reduce the prices of their products, thereby mitigating the scope of denigration. This contribution also highlights the preventive role of competition between category captains, which is said to prevent the selected supplier-partner from making recommendations which are too much in its favour.

1. THE RISK OF EXCLUSIONARY CONDUCT RESULTING FROM THE CATEGORY CAPTAIN'S POSSIBLE INFLUENCE IN STORES

79. According to some operators or specialists in the retail sector of daily consumer goods, the category captain is in a position whereby the latter can significantly influence product mix and merchandising actually inside stores and procure an advantage for its own products to the detriment of its competitors' products (see §27 to 30 above). In practice, the real scope of this risk is very uncertain. Both distributors and their manufacturers-partners denied this possibility, but they also admitted that suppliers do indeed take part, to varying degrees, in product installation operations in stores.
80. As soon as their purpose and possible effects impact competition intensity, such behaviour may be sanctioned under competition law. In accordance with the logic introduced by the European Commission's guidelines on vertical restraints, such practices, if they take place further to agreement by the relevant distributor(s), may be assimilated with the vertical restraint which is prohibited under paragraph 1 of Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Article 420-1 of the Commercial Code. However, they are presumed to be legal and exempted from application of the aforementioned provisions if the relevant operators hold less than a 30% market share, on the wholesale market of products' sales and where such products are purchased. If this is not the case, they are assessed in view of the market share covered by such agreements, the position of competitor suppliers and the possible cumulated use of similar agreements as regards the effects thereof. On this subject, two specificities of category management agreements should be emphasised as compared to traditional exclusivity agreements. Firstly, the supplier-partner present in the retail display space is not simply in a position to increase his share in the said space: he can also target the competitor references which he would like to see withdrawn from such spaces. Secondly, a category management partner may have access to precise data on his competitors' behaviour, in particular as regards prices.
81. If this takes place without the relevant distributor's explicit or implicit consent, such behaviour, if proven, could obviously be considered from the point of view of unfair competition. It may also be classified, as understood by Article L. 420-2 of the Commercial Code and possibly 102 of the Treaty on the Functioning of the European Union (TFEU) if the manufacturer involved holds a dominant position. In which case it is indeed far from probable that competitor manufacturers have the capacity to foil the manufacturer's plans, either with the distributor where such conduct takes place, or with its competitors.
82. On this matter, it should be remembered that in 2003, the Company *US Tobacco* was ordered to pay a fine amounting to over one billion dollars by American Courts on the grounds that, in its capacity as category captain in a dominant position on the chew tobacco market, firstly it had damaged the store visibility and presence of the competitor company's *Conwood* products by its in-store operations, and secondly, by

denigrating presentations of competitor products' performance⁷. Although the severe nature of the sanction contrasted with the plaintiff's growth in market shares and the seemingly sporadic nature of the relevant practices, the United States' Supreme Court emphasised that it was not necessary to evidence the harm actually caused to consumers, as this could be directly deduced from the nature of the practice. On this matter, the European Commission's communication providing guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings also specifies that: "*There may be circumstances where it is not necessary for the Commission to carry out a detailed assessment before concluding that the conduct in question is likely to result in consumer harm. If it appears that the conduct can only raise obstacles to competition and that it creates no efficiencies, its anti-competitive effect may be inferred. This could be the case, for instance, if the dominant undertaking prevents its customers from testing the products of competitors or provides financial incentives to its customers on condition that they do not test such products, or pays a distributor or a customer to delay the introduction of a competitor's product.*" (§ 22). Lastly, in its decision no. [04-D-13](#) on practices implemented by the *Société des Caves et des Producteurs Réunis de Roquefort* in the blue-veined cheese sector, the *Conseil de la Concurrence* pointed out that "*supermarkets' retail display spaces constitute a rare resource to which access is strongly competed for between producers. Any practice which illegally restricts competition in the said retail display spaces deprives the final consumer from the possibility of accessing products which have not found their place therein.*" (§ 55).

83. In practice, the efficiency gains associated with delegation to a category captain for filling spaces with products appear to be relatively limited. Firstly, although it is true that distributors' commitments relating to the positioning of their suppliers' products in spaces cannot necessarily be fully specified in contracts, the resulting lack of potential incentive may be corrected by simply controlling suppliers and not by a delegation for actually filling the shelves. Furthermore, all operators stated that positioning products in retail display spaces is not the subject matter of an agreement or commitment from distributors, which would require control by suppliers. Secondly, the possibility for suppliers, whether partners or otherwise, of positioning their products in spaces and, at the same time, moving or failing to restock competitors' products, generates inefficient competition between suppliers as each one will mobilise resources to ensure that their products do not undergo unfavourable treatment. This process pointlessly penalises companies which have the lowest level of human resources. Thirdly, suppliers' argument of improved productivity in this type of task appears to be all the less credible insofar as the latter must frequently call on third party services to undertake such assignments.
84. Without being able to fully assess the frequency, scope and nature of category captains' operations in stores, the *Autorité de la Concurrence* can therefore only reiterate that if the proven implementation of such practices concerns operators who enjoy a significant market authority, this would be considered with all the attention merited by behaviour that may damage the level of competition between suppliers and that does not appear to be compensated by any efficiency gain.

⁷ *Conwood Co. vs. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002), 123 S. Ct. 876 (2003).

2. THE RISK OF EXCLUSIONARY CONDUCT RESULTING FROM POSSIBLE DISPARAGEMENT OF COMPETITORS BY CATEGORY CAPTAINS

85. Both operators' hearings and communicated presentation mediums tend to indicate that, as compared to a traditional marketing operation, the specific nature of category management is the frequent use of product comparisons. This is naturally the case when this concerns recommendations on distributors-partners' product mix. This is also true for recommendations on merchandising and promotions, where the relative performances of competitor products as regards promotion and positioning can be analysed.
86. During these presentations, a supplier can therefore choose to voluntarily devalue the performance of competitor products by presenting inaccurate data or by distorting the interpretation of accurate data. Recommendations on products' performances according to the positioning or type of promotion thereof is particularly open to such treatment due to the relatively subjective nature of the data used and the impossibility of confronting this with data available from panel survey firms. The same applies to product mix recommendations for competitor products that are new on the market, where objective data used as a basis for a recommendation may be very slight and subject to significant variations. Lastly, the fact that the data used as a basis by suppliers to draw up their recommendations is not systematically communicated to distributors (see § 33 and 34 here above) also increases this risk.
87. As reiterated by the *Autorité de la Concurrence*⁸, "*disparagement practices consist in publicly discrediting an identified person, product or service. They differ from simple criticism in that disparagement comes from an economic player who is hoping to profit from a competitive advantage by penalising his competitor. Although such actions may commit the liability of the company which holds a dominant position on the grounds of unfair competition, they do not necessarily constitute abuse of a dominant position as understood by Article L. 420-2 of the Commercial Code. For disparagement to be classified as abuse of a dominant position, a connection must be established between the company's dominant position and the disparagement practice (09-D-14; 09-D-21).*"
88. Once again, there is no precedent as regards disparagement implemented in the retail grocery sector, except for the American *Conwood* case already referred to. However, the actual terms of category management implementation lead to the belief that practices intended to undermine the performance of competitor products in the framework of a category management relationship may, as applicable, be assimilated with disparagement and sanctioned by the *Autorité de la Concurrence*.
89. In particular, the publication of false or truncated statistical data or surveys, for the purpose of depreciating competitor products, may be identified as cases of disparagement which have already been sanctioned by the *Autorité de la Concurrence*⁹. Moreover, the position of category captain held by a company in a dominant position would enable a connection between this position and the possible practice of disparagement to be established¹⁰: in point of fact, the operators heard

⁸ *Autorité de la Concurrence* 2009 Annual Report.

⁹ As examples, see decisions [07-D-33](#) (France Télécom), [07-MC-06](#) (Arrow Génériques), [08-D-21](#) (France Télécom), [09-D-14](#) (electricity supplies), [09-D-28](#), [10-D-16](#).

¹⁰ In previous decisions, the *Conseil* and the *Autorité de la Concurrence* have had the opportunity of establishing this connection on the basis of the company's incumbent operator position practicing the alleged

emphasised several times the trustworthy relationship which may exist between a category captain and the distributor-partner. Even if this does not prevent the distributor from frequently putting a certain distance between itself and the proffered advice, the referent supplier therefore finds itself in a specific position which may, depending on the case, establish the connection between its dominant position and such disparagement. The effect of such practices is said to be all the more significant insofar as firstly, they aim at products that have been newly released on the market, for which it is difficult to assess performance and that must overcome numerous other obstacles when marketed and, secondly, at distributors who hold a significant share of retail markets. Lastly, the argument whereby distributors have no interest in letting themselves be abused by distorted or inaccurate information communicated by their partners is not sufficient to avoid a risk of disparagement. In point of fact, when disparaged products only represent a small market share, for example due to the recent release thereof, the disparagement impact is not so much suffered by the distributors, whose sales are not necessarily affected as the consumer turns to another variety of product, but by consumers who must turn to products other than those they would have wished to purchase if these had been available or appropriately positioned on the shelves.

90. In the end and to avoid any risk of legal proceedings or financial penalties under competition law, it appears worthwhile that operators, who have significant market powers, base their recommendations on objective and verifiable data, communicated to distributors-partners in easily usable formats, and that important precautions are implemented when comparisons are made between their products and those of their competitors which are not in a position to assert their point of view with the distributors.

3. THE RISK OF EXCLUSIONARY CONDUCT CONNECTED TO EXCLUSIVE TRANSFERS OF INFORMATION

91. Category management associations between suppliers and distributors are an opportunity to exchange various types of information. Firstly, suppliers-partners may draw up their recommendations on the basis of quantitative information communicated by the distributor and for which they are the sole recipients. In some cases, these exchanges appear to be highly detailed and concern data on sales, prices and stocks, broken down per store and product reference and undertaken on a daily or weekly basis (see § 31 above). This data then relates to all products of a category and therefore includes information on the supplier-partner's competitors' products, and may be even more detailed and recent than data possibly available from panel survey firms. Secondly, suppliers-partners indicated several times that one of their motivations in becoming a supplier-partner was to acquire, before competitors, information on the marketing strategy that the distributor intends to implement (see § 61 and 62 above).

disparagement (decision [07-D-33](#) on practices implemented by the Company France Télécom in the high bandwidth internet access sector), or its renown and the trustworthy relationship that it had established with its customers (decision [09-D-14](#) on practices implemented in the electricity supply sector).

92. The risks of exclusionary conduct connected to exclusive information exchanges are traditionally analysed with respect to abuse of dominant position, held by the operator who has the strategic information. In its thematic study on information exchanges¹¹, the *Autorité de la Concurrence* accordingly emphasises that it pays "special attention to risks of competition distortion due to exclusive access, by a company connected to an incumbent or dominant operator, to information on consumers, held by the latter due to its preferential situation (...). In point of fact, access to exclusive information on consumers, which its competitors cannot obtain, may confer an unfair advantage on a company (...). Another risk (...) is to enable a company to access sensitive and confidential information on its competitors." (p. 114).
93. Accordingly, several decisions have sanctioned the transfer of information from a company that holds a dominant position to a subsidiary which competes on a related market. The information exchanged by these operators in particular concerns consumers' states of mind when calling on competition¹² or purchasing certain equipments¹³. More specifically, in its decision no. [08-D-34](#) relating to practices implemented by the municipal funeral services in Marseille, the *Conseil de la Concurrence* found that the latter's use of statistics from the City Hall of Marseille, to which its competitors did not have access, and that detailed market shares and competitors' commercial activity for each care or stay institution, may distort competition¹⁴.
94. In the said decisions, the *Conseil* and subsequently the *Autorité de la Concurrence* found that competition, between operators to whom such information was communicated and their competitors, was distorted insofar as this may procure a significant and undue advantage to the recipients thereof and where competitors were not able to reproduce the database constituted by the company which held a dominant position, nor have access thereto under transparent and undiscriminating price conditions.
95. By analogy, exchanges of information undertaken in the framework of category management shall be classified as anti-competitive if they conferred an advantage on the supplier-partner, if the said advantage was unjustified and if the supplier-partner's competitors were not in a position to obtain information having a similar scope. In view of the efforts made by manufacturers to become partners in the category, the

¹¹ *Autorité de la Concurrence 2009 Annual Report*.

¹² Decisions [09-D-24](#) on practices implemented by France Télécom in the various landline electronic communication services markets in French overseas departments and [07-D-33](#) on practices implemented by the Company France Télécom in the high bandwidth internet access sector.

¹³ Decision [09-MC-01](#) related to a request for urgent interim measures submitted by the Company Solaire Direct.

¹⁴ In this case, the *Conseil de la Concurrence* obtained structural commitments from the parties intended to ensure a separation between the municipal funeral services and the bureau of regulations which compiles these statistics, for the purpose of municipal funeral services no longer having access to preferential information on their competitors.

lack of any direct remuneration of their services and the type of information exchanged, which may describe either the distributor's future intentions, or, in a very detailed and up-to-date manner, competitors' past behaviour, the advantage resulting from information exchanged may appear substantial upon first analysis, especially if the distributor-partners' share of the market on which such products are purchased is significant.

96. The advantage may also be considered as unjustified if the information exchanged was not required for the services provided by the category captain or if this was obtained due to the manufacturer's position on its market rather than due to the quality of the latter's category management services. Although this last element is tricky to settle, certain aspects of the level of detail in statistical information exchanges undertaken between certain distributors and the suppliers thereof indeed appears to be exaggerated as compared to the pursued objectives. According to operators, in point of fact the issue of the said exchanges is to define the optimal product mix for the selling space. However, the definition of the optimal product mix for a given distributor does not necessarily entail knowledge of the said distributor's product mix in stores: indeed the supplier may recommend a product mix on the basis of information on the entire market, in which case the distributor is then responsible for comparing such recommendations with its own product mix and sales statistics. In the same way, the definition of the optimal merchandising for a store or promotional policy does not require an exchange of data which is as recent as that actually exchanged in the framework of some category management partnerships.
97. In addition, the potentially anti-competitive nature of an exclusive exchange of information also depends on the possibility, for the supplier-partner's competitors, of obtaining the same type of information, either from other distributors or by in turn becoming partners of the said distributor. This possibility appears to be limited if other manufacturers compete with an operator who holds a dominant position or if their size is small as compared to an operator that holds a significant market share. In this context, it is more than likely that the same company will become the supplier-partner of each distributor who wishes to use category management. Furthermore, the generalisation of such detailed information exchanges, presenting price and stock data per store and per reference on a weekly basis, does not appear as beneficial from a competitive point of view due to the risk of collusion which may result there from (see below).
98. In the end, it therefore appears that operators which take part in category management associations must monitor that the purpose of information exchanges undertaken on such occasions are not intended to or result in a distortion of competition, in particular when the supplier selected as partner already holds a strong position on the relevant market and that the distributor represents a significant share of the manufacturers' sales for this category of products. On this matter, the European Commission Regulation on vertical agreements' exemption and the European Commission Guidelines on vertical restraints offer a highly relevant safeguard. When the related 30% thresholds are exceeded, the information that a distributor may disclose as regards its future commercial strategy, or the behaviour of competitor manufacturers, must not confer a significant competitive advantage on the

beneficiary thereof, which may involve restricting the level of precision and up to date nature thereof. Furthermore, these precautions comply with those required to forewarn any risk of collusion between suppliers or between distributors, as presented in point B here under.

4. TO MITIGATE THESE RISKS OF EXCLUSIONARY CONDUCT, CATEGORY MANAGEMENT RELATIONSHIPS SHOULD ALSO BECOME MORE TRANSPARENT

99. Although the risk of a crowding-out effect for category captain's competitors is theoretically significant, it can only be found that relatively few criticisms have been expressed against this practice by competitors of category captain companies. This relative indifference may be based on efficiency gains indeed generated for the entire category or most major suppliers' possibility of becoming a supplier-partner. It may also result from operators' ignorance, especially small ones, of the existence of such practices in their sector. In point of fact, appointment of a category captain, including when this results in a quite formal association as regards the regular nature of meetings between the distributor and its partner, the commitment term and growth objectives, is never made public (see §38 here above). Therefore, competitors which may, as applicable, be harmed by the implementation of such a partnership are never, in actual fact, directly informed of its existence and are not therefore in a position where they can make a malevolent category captain responsible for the unexplained deterioration of their share of the retail display space or the visibility of their products in stores.
100. The fact of making a supplier-partner's appointment public would probably mitigate the risk that the association will result in prejudicial effects for competition. Admittedly, this lack of transparency prevents the category captain from becoming a joint reference liable to facilitate the implementation of anticompetitive arrangements between both distributors and also suppliers (see below). In practice, it is however quite easy for a supplier to disclose the latter's special status with a distributor to its competitors.
101. Above all, the lack of transparency noted in category management prevents competitor suppliers from defending themselves against possible denigration practices or crowding-out from retail display spaces. As they are not informed of a category captain's appointment and are not in a position where they can assess most of the parameters which guide distributors' product mix decisions (triple net purchase price for competitor products in particular), competitors cannot make the connection between a possible reduction in their display space with a distributor and the presence of a category captain with the same distributor. Neither are they in a position where they can fully compete with the said captain by the quality of their own recommendations and therefore mitigate the risk that the supplier-partner diverts the category management association to the detriment thereof.
102. To remedy this lack of transparency, yet without producing a transparency such that the presence of a category captain results in coming to anticompetitive arrangements, distributors should firstly announce their intention of benefiting from assistance by the category captain, for example via a call for applications, without necessarily specifying the identity of the supplier actually selected, and secondly should draw up and have signed a business agreement or contract which enables identification, with further details and certainty, of the role that a supplier plays with a distributor.

B. THE RISKS OF HORIZONTAL CONCERTED PRACTICES CONNECTED TO CATEGORY MANAGEMENT RELATIONSHIPS

103. Paragraph 3 of the decision by the *Autorité de la Concurrence* starting a sector inquiry at its own initiative (*Décision de saisine d'office pour avis*), and paragraphs 211 and 212 of the European Commission's new guidelines on vertical restraints, identify two risks of horizontal concerted practices connected to category management agreements: one concerns distributors (1), the other concerns suppliers (2). The said risks are now assessed in view of the actual terms of category management implementation recorded for the French retail sector of daily consumer goods.
104. First, it can be emphasised that such risks of concerted practices are naturally higher when the category captain holds a significant decision-making power over product mix, merchandising, promotions and prices practiced by its distributors-partners. At least in the short-term, the captain can reduce competition between suppliers within retail display spaces for a same distributor when the former is the partner of a single distributor. He can also reduce competition both between suppliers and between distributors, even more significantly insofar as he is category captain for several distributors simultaneously. Hearings of the relevant parties did not however make it possible to evidence such a delegation of decision-making authority between distributors and suppliers. At this stage the *Autorité de la Concurrence* can therefore only state that it believes that such a delegation is a cause for great concern in view of the possible resulting risks for competition, both between distributors and between suppliers.

1. THE RISK OF HORIZONTAL CONCERTED PRACTICES BETWEEN DISTRIBUTORS

105. In the European Commission Guidelines on vertical restraints, it states that category management may encourage horizontal concerted practices between distributors. More precisely, "*category management agreements may facilitate collusion between distributors when the same supplier serves as a category captain for all or most of the competing distributors in a market and provides these distributors with a common point of reference for their marketing decisions.*" (§ 211). In the same way, the *Autorité de la Concurrence's* decision starting a sector inquiry at its own initiative notes that "*a supplier may be simultaneous category captain for several distributors and therefore serve as the information hub for each of the latter. [...] Downstream, a category captain who works for several distributors may encourage the latter to implement identical strategies.*" (§ 3). In practice, it has indeed been found that some manufacturers describe themselves as partners of several major distributors for a same category of products (see § 72-73 above).
106. Of course, the fact that the distributor alone continues to be responsible for its commercial policy is the first means of mitigating this risk of collusion. Nevertheless, recommendations from the supplier-partner may serve as basis for coordination between the distributors with which he has a relationship. As an example, let us therefore consider a supplier who recommends to several distributors

that the latter reduce their product mix¹⁵. Nevertheless, as they continue to be the sole decision-makers in this matter, they are therefore confronted with the following arbitration: a reduction of their product mix will allow them to reduce their logistic costs and increase margins due to obtaining lower purchase prices, but this may entail consumers' loss of interest who will no longer find the varied selection that they wish for with the said distributor. As a result, distributors will find that it is profitable to implement the supplier-partner's recommendations if they consider, with a reasonable degree of certainty, that their direct competitors will act in the same way.

107. Exchanges undertaken in the scope of category management relationships may precisely serve as a medium for communications which make it possible to reduce each distributor's uncertainty as regards competitors' behaviour. In point of fact, a supplier-partner may inform its distributors-partners of their respective intentions and therefore enable the implementation of a "three-party concerted practice"¹⁶, consisting for example in a price increase and/or a reduction in the variety of products offered for sale. This reduction in competition at retail level allows an increase in sale prices, which subsequently authorises an increase in wholesale prices. This is in accordance with the *Autorité de la Concurrence's* summary of the thematic survey on exchanges of information, "*a distributor's communication of its pricing intentions to its supplier, when the former intends such information to in turn be communicated to a competitor distributor and that the latter correctly identifies the source of such information, may constitute a three-party concerted practice of an anti-competitive nature, as it allows a coordination between distributors.*" (p. 114)¹⁷. The reciprocal nature of such exchanges, although this constitutes an aggravation of the practice, is not however required to evidence this. In the same way, the European Commission emphasised that a concerted practice may be established on the sole basis of a unilateral disclosure of strategic information for market structuring insofar as the party to whom such information has been communicated accepts this or fails to express any reserves or objections¹⁸. Furthermore, and according to European case law, exchanges of information between competitors concerning their future intentions, which are particularly relevant for inducing a coordination in companies' conduct, have been classified as infringements "by object" on several occasions (in particular in the *Bananes*¹⁹ and the *T-Mobile* decisions²⁰).

¹⁵ An identical reasoning can be presented relating to other types of recommendations connected to category management, such as products' positioning or the retail-brand's promotional strategy.

¹⁶ See *Autorité de la Concurrence* 2009 Annual Report, p. 136.

¹⁷ On this matter, the *Autorité de la Concurrence* refers to two similar decisions by the British Office of Fair Trading (OFT), confirmed by the British Court of Appeal. In a first case, known as *Replica Kit*, on the sale and resale market for football accessories (t-shirts, shorts, etc.) a distributor (*JJB*) declared to a supplier that it would comply with the recommended prices if a competitor distributor (*Sport Soccer*), traditionally more aggressive, did the same, while aware that this information would be communicated to this competitor distributor - which was indeed the case. *Sports Soccer* then accepted to increase its prices and this information was once again communicated to *JJB*. A second and similar case, in the toys sector, was analysed identically by both the OFT and the British Court of Appeal.

¹⁸ See cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle plc v Commission* and case T-25/95 *Cimenteries CBR SA v Commission* [2000].

¹⁹ Commission decision of 15 October 2008, COMP/39188, *Bananes*.

²⁰ European Court of Justice, 4 June 2009, *T-Mobile Netherlands e.a.* C-8/08.

108. As regards category management agreements, operators stated that recommendations expressed by suppliers-partners never concerned distributors' resale prices (see § 18 above). However, although it is true that competition authorities pay special attention to exchanges of information on future prices, this does not necessarily incur that exchanges on other aspects of competition between distributors and/or between suppliers are less restrictive for competition: indeed the simple fact that such exchanges may have an impact on competition by reducing the uncertainty to which any competing operator is normally submitted, is sufficient for them to be considered as anti-competitive²¹.
109. On this subject, the specificity of category management, as compared to exchanges which may take place during commercial negotiations, is twofold. Firstly, the subjects that may be discussed are much wider than in commercial negotiations where the main stake continues to be the purchase price and possibly, commercial cooperation services invoiced by the distributor to its supplier. Secondly, the supplier-partner's role is to express recommendations which do not simply concern its own products, but also those of its competitors: therefore, recommendations, and the anti-competitive effects which may result there from when these are used as a base for exchanges of information between competitors, have a wider scope as, if applicable, they not only make it possible to directly reduce intra-brand competition, but also impact inter-brand competition. Therefore, it cannot be presumed that, insofar as they do not concern resale prices, such exchanges have no effect on competition.
110. The suppliers who were questioned also stated that exchanges with distributors were covered by confidentiality clauses specified either in internal codes of ethics or in the employment contracts of employees involved in category management. Yet, a same employee may be charged with expressing recommendations for competitor distributors, in particular when the category management department is quite small or is specialised per product category rather than per distributor. Furthermore, when the supplier-partner specialises its employees per distributor, these inevitably continue to be part of the same team, at the same place of work. It therefore appears difficult to admit that information communicated by a distributor to the supplier's employee, responsible for category management for this retail-brand, cannot be communicated to another employee, with the risk that such information is subsequently communicated to another distributor.
111. Lastly, it should be noted that this risk of an indirect concerted practice exists, including when category management partnerships are not exclusive, i.e. when distributors simultaneously call on several suppliers-partners. Therefore, it is not the exclusive nature of the relationship with the distributor that entails a concern for competition, but the fact that a supplier discusses commercial strategies with several distributors simultaneously, and which may be followed for all products in a

²¹ Accordingly, the decision by the Court of First Instance of the European Communities in case T-25/95 *Cimenteries CBR SA v Commission* [2000] specifies that to prove the existence of a concerted practice, it is not necessary to evidence "*that the competitors agreed to their future conduct on the market [...]. It is sufficient that, by a declaration of intent, the competitor has eliminated or at the least, substantially reduced, the uncertainty as regards other parties' expected conduct on the market*" (§ 1852).

category, without being able to guarantee a lack of information communication between distributors. In the same way, it is not the level of accuracy of the information communicated that creates a concern as regards competition: on the contrary, the higher the level of confidence enjoyed by a distributor's category captain, due to the relevance of information communicated, the more the latter will be in a position to set up a coordination between distributors.

112. Although the competition risks discussed in paragraphs 78 to 98 may be avoided due to rules of conduct for suppliers, those which concern the risk of an indirect concerted practice between distributors require a modification in the latter's behaviour, who must refrain from communicating any information relating to the implementation of recommendations communicated thereto and all statistical data which makes it possible to assess such level of implementation fairly quickly.

2. THE RISK OF CONCERTED PRACTICE BETWEEN SUPPLIERS

113. The guidelines on vertical restraints identify a second risk of collusion resulting from category management: *"Category management may also facilitate collusion between suppliers through increased opportunities to exchange via retailers sensitive market information, such as for instance information related to future pricing, promotional plans or advertising campaigns."* (§ 212). In the same way, the *Autorité de la Concurrence's* decision starting a sector inquiry at its own initiative specifies that *"delegation of retail display space requires numerous exchanges of information between a distributor and the latter's category captain which may in particular relate to strategies considered by competitor producers. [...] Upstream, separate category captains, in lesser numbers than manufacturers and who have a genuine sanctioning power, may implement a concerted practice more easily than manufacturers themselves."* (§ 3).
114. According to operators, the decision-making powers held by category captains are more often than not inexistent or very restricted; distributors alone are still the only decision-makers for their marketing strategy: accordingly, even if a supplier expresses recommendations which relate to both its own and its competitors' products, and can therefore attempt to mitigate possibly existing competition in its partner's display spaces between such products, the distributor, who is subject to competitive pressure from other large supermarkets, remains free to follow such recommendations or not. In the same way, it does not seem that meetings with distributors held in the framework of category management are simultaneously attended by several suppliers, except for the notable case of distributors' brand managers (see below). Neither has category management appeared as favouring exchanges of information between suppliers via the intermediary of distributors, as each distributor frequently only calls on the services of a single supplier-partner and therefore only exchanges data with the latter. More generally, the fact that distributors are not generally interested in the possibility that their suppliers may engage themselves in concerted practices regarding commercial policies, also constitutes an obstacle to the use of category management for the purpose of implementing concerted practices between manufacturers.

115. Nevertheless, and as often emphasised, some suppliers-partners may profit from the transfer of specific information as compared to that available from panel survey firms²². The said detailed statistical information is liable to rapidly inform the category captain of the commercial strategies implemented by competitor manufacturers. Although the retail-brand's purchase prices are not specified in such databases, these do nevertheless inform on the scope of the referenced range, stocks held in each store and the average prices for each reference. Therefore, the supplier is capable of assessing, on a store by store basis and at least every week, the presence of its competitors within the said retail-brand and can accordingly promptly retaliate against any commercial initiative, of which the latter can ascertain the results (extension of range, reduction in the resale price) even if it is not precisely informed of the reasons (supplier's resale price level, range rebates granted to the supplier). In so doing, the supplier may finally be in a position where he can discourage his competitors from implementing more aggressive commercial strategies by being able to duplicate these more or less quickly, thereby facilitating the implementation of an horizontal concerted practice. In particular, this is the case when the existence of a category captain and the data accessed thereby are known of by his competitors.
116. Exchanges of information are prejudicial for competition when these result in an artificial increase in transparency between competitors liable to enable the latter to bring their strategies into line. *Conseil and Autorité de la Concurrence* case law enable identification of several parameters, which, when combined, define the classification which may be applied to exchanges of information between a distributor and a supplier, relating to all products that compete on a market. As regards exchanges on previous information as in this specific case, the *Autorité de la Concurrence* accordingly emphasised that "*in order to assess the impact on competition (and if this is the case, the possible efficiency gains that this may produce) numerous factors should be taken into account relating to the relevant market, the information exchanged and the terms of such exchange.*" In the John Deere decision, the European Court of Justice in particular emphasised the oligopolistic structure of the market and the recent and strategic nature of information exchanged, an analytical framework referred to by the *Autorité de la Concurrence* in its decisions no. [05-D-64](#) and no. [05-D-65](#), respectively relating to practices implemented in the Paris luxury hotel market and practices noted in the mobile telephony sector. On this subject, the precise and regular nature of exchanges of information recorded in the framework of certain category management agreements between suppliers and distributors should be emphasised. According to the relevant sectors, these may also relate to oligopolistic markets characterised by a small number of operators and strong entrance barriers.

²² According to the level of detail and updating thereof, data exchanged via panel survey firms or loyalty card systems may also raise concerns as regards competition, as already emphasised in the thematic survey of information exchanges published in the *Autorité de la Concurrence's* 2009 Annual Report (p. 141). However, these were not submitted to a detailed examination for this opinion.

117. Without prejudging the possible classification that may be upheld as regards such practices, several of their more specific characteristics should be noted, which are liable to influence the competitive analysis thereof. Firstly, subject to compliance with confidentiality clauses, only the “category captain” is informed of the prices, volumes sold and product stock levels of its competitors. Secondly, the category captain only has such data for the distributors who are a partner. At this moment in time, and in most of the market situations where they were recorded, such exchanges therefore only have a fairly restricted coverage, but they may extend to other distributors and suppliers if the category management practice continues to develop. Thirdly, data exchanged does not concern prices practiced by suppliers as regards their direct customers, but products' resale prices. However, it should be remembered that exchanges of information which do not directly concern prices, but decisive elements for price fixing, have already been sanctioned. By analogy, statistics which do not allow verification of prices practiced by competitors, but a parameter which is closely connected thereto such as resale prices, may also facilitate the tacit adoption of a common course of action, or monitoring the follow-up of a joint course of action. Lastly, the exchanges of information in question are undertaken further to request from a distributor, a customer of companies liable to fall in line with a joint rule of conduct due to the said exchanges.
118. In view of these characteristics, it therefore appears that exchanges of information set up within the framework of category management relationships do indeed allow category captains to monitor their competitors' behaviour. To avoid this risk, it is once again recommended that distributors only transmit to their suppliers-partners information which does not allow the latter to assess their competitors' commercial policy, and all the more so insofar as such information does not appear necessary to express relevant product mix recommendations (see above).
119. Lastly, category management associations also give rise to concern as regards competition when the distributor operates not only due to its retailing activity, but also as a producer of private labels via subcontracting. In this case, the supplier-partner's recommendations may indeed reveal, intentionally or otherwise, information on its future conduct and therefore facilitate coordination with the manufacturer of the private labels. The same applies if the distributor reveals some of the latter's intentions concerning its private label commercial policy to the category captain. Once again, it therefore seems essential that exchanges between the supplier and its distributor, whether written or oral, cannot be classified as horizontal and that both distributors and suppliers take care that exchanged information does not make it possible to infer their future economic strategy intentions; as no obstacle to the information flow between category captains and the distributors' employees responsible for private label supplies appears to be sufficiently creditworthy to prevent a possible tacit coordination on the basis of information disclosed by either partner.

IV. Conclusion

120. This opinion is issued relatively early in the development of category management in France: indeed, although the emergence of this organisation method began in the 2000s, its real take off may actually have only taken place from 2007-2008, and most of the players who were questioned agree on the fact that it is only in the medium or long-term that the effects of this practice will really be felt.
121. Furthermore, and most probably partly due to the reason presented above, no complaint from a sector player has to date been formally introduced before the *Autorité de la Concurrence*, which has therefore only been able to ground this opinion on data and documents communicated by operators and statements collected during the investigation and hearing before the Board. Nevertheless, some conclusions can be drawn.
122. As implemented in the French retail grocery sector, category management consists in a more or less close collaboration between a supplier who is frequently, but not systematically, selected from amongst the leaders of its product category, and a distributor. The purpose of such collaboration is supposedly to enable distributors to better adapt to evolutions in demand (seasonal variability, emergence of new needs, etc.), and offer (emergence of new products) and to thereby encourage growth for an entire product category.
123. According to operators heard and documents communicated during the investigation, the supplier-partner is said to only express recommendations to the distributor relating to product mix, merchandising and promotional policy for the entire category of products concerned by the cooperation. Although in some cases, all suppliers of a category are free to express this type of recommendation, in other cases however, a preferential association may be created, most often at the distributor's request, with a supplier who then attends meetings, follows category progress in a more regular and detailed manner, in particular due to certain data transfers, and enjoys a higher level of attention from the distributor-partner.
124. In all probability, the supplier-partner supposedly does not formally have any decision-making power, although in some cases and according to some operators, the former may have easier access to the display spaces of its distributors-partners and that it is then possible to modify, at least at margin level, the product mix and organisation of such spaces to its advantage. In other cases, specific exchanges of detailed data may also be undertaken, enabling the supplier to monitor evolution of the entire category sold by the distributor.
125. The frequency of such partnerships is difficult to ascertain statistically insofar as no agreements exist which make it possible to formally identify the existence of such partnerships. Several significant suppliers did however state that they were sometimes simultaneously involved in category management partnerships with several distributors. Furthermore, relatively formal partnerships, involving the exchange of specific data and holding very regular meetings, were entered into quite recently. The increasing sophistication of data, and the revival of pricing competition in the retail grocery sector, may also encourage an increased implementation of such associations.

126. From a competition analysis point of view, the lack of any transfer of decision-making powers by distributors to suppliers mitigates the negative effect that such practices may entail for competition. In this case, it is indeed more difficult for a supplier to develop a concerted practice between several distributors or to supplant competitor products from its category; as each distributor continues to be the decision-maker for its commercial policy, it can always wish to divert from the course of action recommended by its partner.
127. Nevertheless, competition risks connected to such associations remain, whether these concern crowding out competitors from the distributor-partner's display spaces or facilitating a concerted practice, in particular between distributors. At this stage of the deployment of category management activities and in view of the elements which could be collected relating to the effects thereof, the *Autorité de la Concurrence* considers that the simple application of the provisions of the Commercial Code on abuse of a dominant position and horizontal and vertical concerted practices are sufficient to prevent identified competition risks. On this matter, the analytical framework presented in this opinion should allow operators to verify the compliance of their practices with competition law. They may also assist in drawing up a code of good practice for category management.
128. Nevertheless, in conclusion to this opinion, three points should be emphasised. Firstly, competition law efficiency closely depends on competition monitoring undertaken by operators liable to be harmed by certain practices. As regards category management, the lack of transparency for third parties of relationships between distributors and the latter's suppliers-partners is obvious. Therefore the *Autorité de la Concurrence* can but regret that the appointment of a category captain is rarely made public, for example via a call for applications which describes the means implemented, and that it is therefore difficult for competitors to ascertain the effects of such appointment on their presence in the distributor-partner's retail display spaces.
129. Secondly, a large share of the interrogations arising from category management result from the variable scope of the supplier-partner's fields of intervention. The lack of a contract or agreement which specifies the tasks effectively within the category captain's competence and those which exclusively concern the distributor-partner, and that also entails the lack of remuneration for category management services, is connected to the suspicions which weigh on this practice.
130. Thirdly, the effects of some practices implemented in the framework of category management partnerships closely depend on the market share covered by such partnership. Special attention shall therefore be paid to the future developments of category management practices, for the purpose of analysing to what extent stricter recommendations or even legislative provisions may possibly be stipulated to mitigate the risks of anti-competitive effects of such associations if these were to cover significant market shares for a high number of product categories. On this subject, the *Autorité de la Concurrence* finds that the *Commission d'examen des pratiques commerciales* (commercial practices' examination commission) could play a very useful role in expressing good practices and in exercising a certain vigilance when these associations develop between distributors and suppliers, in a framework which is still very vague and relatively impenetrable.

Deliberation on the debriefing of Miss Hélène Boisson and the speech by Mr Etienne Pfister, Deputy General Rapporteur, by Mrs Anne Perrot, Chair, Mrs Reine-Claude Mader-Saussaye and Mr Yves Brissy, Members.

The Meeting Officer

Véronique Letrado

The Vice-President

Anne Perrot

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